



U.S. House of Representatives
Committee on Transportation and Infrastructure

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SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials
FROM: Subcommittee on Railroads, Pipelines, and Hazardous Materials Majority Staff
SUBJECT: Hearing on the Historic Preservation of Railroads and Facilities

PURPOSE OF HEARING

The Subcommittee on Railroads, Pipelines, and Hazardous Materials is scheduled to meet on Thursday, June 5, 2008, at 2:00 p.m., in 2167 Rayburn House Office Building to receive testimony on the effects of Federal historic preservation requirements on the development of rail infrastructure. The hearing will consider whether Federal requirements for preservation of historic sites are creating unnecessary delays and administrative burdens for improvements to rail infrastructure, and whether there is a need for legislation to change the historic preservation process.

BACKGROUND

Existing Federal Requirements for Historic Preservation

The basic Federal historical protection requirements are found in section 106 of the National Historic Preservation Act of 1966; 16 USC 470f.

Section 106 comes into effect when proposed action by a Federal agency (such as a grant or permit) could affect an historic property (see discussion below of what properties are covered). In these cases, the Federal agency is required to consult with the affected State Historic Preservation Office ("SHPO") and others to determine whether the proposed Federal action will adversely affect the protected property. If there is no agreement on adverse effect, a Federal agency, the Advisory Council on Historic Preservation ("ACHP"), determines whether there will be an adverse effect.

In cases where there will be an adverse effect, the law establishes a process for consultation in an effort to develop a Memorandum of Understanding between the agency and the SHPO on

whether measures will be taken to avoid, minimize or mitigate the adverse effects. There is also a process for the agency and ACHP to reach agreement, if there is no agreement with the SHPO.

Special additional requirements are imposed on projects of the Department of Transportation ("DOT") affecting historic properties. For DOT projects, 49 USC 303, and 23 USC 138 provide that the Secretary shall approve a project requiring use of land of an historic site of national, state or local significance only if the Secretary finds that there is no "prudent and feasible alternative to using that land" and "the program or project includes all possible planning to minimize harm to the . . . historic site." The law also provides an exemption for projects having a "de minimis" impact on an historic site, with detailed requirements for how a finding of "de minimis" impact shall be made.

What Historic Sites are Eligible for Federal Protection

In general, protected sites are those which are listed in the National Register of Historic Places, or sites which are eligible for listing, i.e. sites which are unlisted but meet the criteria for listing.

The National Register is maintained by the National Park Service. Ordinarily, a site must be more than 50 years old to be listed or eligible. The criteria for listing include an association with significant historical events or lives of historically significant persons, embodying "distinctive characteristics of a type, period, architectural style or method of construction, or that represent the work of a master designer, possessing high artistic values, or that representing a significant and distinguishable entity whose components may lack individual distinction". A property less than 50 years old may be listed "if it is of exceptional value or significance".

Exemption of Interstate Systems

The SAFETEA-LU bill of 2005 included special provisions governing how the Interstate Highway System would be handled under the special DOT provisions on historic preservation. 23 USC 103(c)(5) provides that except as otherwise provided in the section, "the Interstate System shall not be considered to be an historic site under section 303 of title 49 or section 138 [of title 23]". Section 103(c)(5) also gives the Secretary authority to determine that individual elements of the Interstate System possess national or exceptional historic significance and should be covered by the DOT historic preservation laws. Acting under this authority, the Secretary has compiled a list of more than 100 portions of the Interstate System that will be given historical protection. Most of the listed portions are bridges and tunnels, but there are also a number of road segments, including 150 miles of the Pennsylvania Turnpike, 60 miles of the Columbia Oregon River Highway, and 30 miles of Alligator Alley in Florida.

Current Protection of Historic Sites for Railroads

A first review of the National Register indicates that about 2,300 rail facilities are listed on the Register. There is no way to determine how many additional facilities would be protected on the basis of a finding that they are eligible for inclusion in cases which if there was a proposed Federal action affecting the facility.

According to the National Trust, the properties listed in the Register include 19 corridors or entire railroads, including tourist railroads and other scenic corridors. The Trust defends the appropriateness of listing entire corridors. They assert that corridors can have "a historical significance independent of the rail ties, structure, signage and signals that comprise it." They contend that corridors may be "historically significant as well established pathways," between cities.

Rail corridors have been afforded protection. An example is the 66 mile Enola low grade line in Lancaster County, Pennsylvania. In an abandonment proceeding before the Interstate Commerce Commission ("ICC") it was determined by the keeper of the National Register that the corridor had historic significance and was eligible for listing. The ICC required that the corridor not be dismantled and plans are being developed to connect portions of the corridor to trails.

Problems in Historic Preservation for Railroads

At the hearing, witnesses from the Alaska Railroad and the North Carolina Department of Transportation are expected to urge modification of the laws governing historic preservation for railroads. The Alaska Railroad supports the need for legislation by citing cases in which Alaska's SHPO has contended that the entire 450 mile railroad is an historic site, which has required historic protection procedures for individual facilities which do not have historic merit on their own. The railroad contends that this process for these facilities delays projects and imposes unnecessary expenses for consultant's fees.

The Alaska State Historic Preservation Office has submitted a memo on its efforts to prevent unreasonable burdens arising from the designation of the entire railroad. The SHPO asserts that they are trying to negotiate a programmatic agreement for activities that would not have an adverse effect on historic properties. For these activities, the SHPO would not require Section 106 special negotiations and agreements, but only annual reporting. Examples are siding extensions, bridge abutment repairs, construction of new tracks in existing yards, and construction of new set out tracks. They have also reached agreement with the railroad on replacement of 57 wooden bridges.

The Alaska SHPO also asserts that the railroad has not exercised its right to appeal the designation of the entire corridor to the keeper of the National Register.

The North Carolina DOT ("NCDOT") claims that the North Carolina SHPO sought to designate the entire corridor between Raleigh and the state line as a historical site, and that this required new historic protection processes for structures within the corridor which had already been evaluated. The new evaluations added 6 months and \$150,000 of added costs to the project schedule.

Legislative Issues

The National Trust for Historic Preservation argues that there are administrative remedies available to streamline processing of historically insignificant features of large historic sites, such as rail corridors. These include programmatic agreements such as the one described for Alaska SHPO above and administrative exemptions.

If a decision is made to establish a legislative exemption for railroads from historic preservation protection, similar to the exemption for the Interstate Highway System, there are important subsidiary issues of the scope of the exemption.

The highway exemption provides that "the Interstate System shall not be considered to be an historic site" but that "individual elements" of the system may be. It is not clear what a similar exemption for railroads would cover. An exact parallel would seem to be to exempt the entire national rail system. This would not exempt the entire system of any single rail carrier. With respect to parts of the system that could receive protection, the highway provision allows the Secretary to protect "individual elements" of the system. This provision has been interpreted to allow designation of highway segments up to 150 miles in length. In rail cases, entire corridors have been deemed eligible for listing on the register. If the highway model is followed, the Secretary would be allowed to decide that a rail line of 150 miles should be protected, as the Secretary decided to protect 150 miles of the Pennsylvania Turnpike.

Another issue is whether the 2,300 rail facilities already listed on the National Register, which include 19 railroads and rail corridors, would continue to be protected.

WITNESSES

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