

July 24, 2017

Michael A. Smith,
Office of the General Counsel
U.S. Department of Transportation
1200 New Jersey Ave. SE, Room W12-140
Washington, DC 20590-0001

Re: Transportation Infrastructure: Notice of Review of Policy, Guidance, and Regulation
Docket No. DOT-OST-2017-0057

Dear Mr. Smith,

Thank you for the opportunity to provide input for the U.S. Department of Transportation (DOT) review of existing policy statements, guidance documents, and regulations to identify unnecessary obstacles to transportation infrastructure projects. Together, our organizations—the National Trust for Historic Preservation, the National Conference of State Historic Preservation Officers, the National Association of Tribal Historic Preservation Officers, the American Anthropological Association, the American Cultural Resources Association, the Society for American Archaeology, and the Society for Historical Archaeology—represent the transportation policy interests of much of the historic preservation community.

Our organizations have extensive experience participating in the project review process for identifying and protecting historic resources, with particular experience with reviews required under section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108) and section 4(f) of the Department of Transportation Act (23 U.S.C. § 138(a); 49 U.S.C. § 303(c)). We have worked extensively with DOT, state transportation agencies, industry, and other stakeholders to find common-sense efficiencies in the review process, such as the section 4(f) *de minimis* approval option, and we are glad to share further insight. We support DOT's efforts to make the project approval process for transportation infrastructure projects more predictable, consistent, and efficient, while ensuring that the agency strikes an appropriate balance between development and preservation goals, in accordance with the intent Congress expressed in the NHPA and the National Environmental Policy Act (NEPA), and transportation legislation (SAFETEA-LU, MAP-21, and the FAST Act).

HOW TO IMPROVE PROJECT DELIVERY WHILE MAINTAINING PROTECTIONS FOR ENVIRONMENTAL AND HISTORIC RESOURCES

As noted in a 2014 Government Accountability Office report to Congress, the Council on Environmental Quality (CEQ) estimates that the overwhelming majority (95%) of all NEPA-required analyses are “categorically excluded” (CE) from more comprehensive review. Of the remaining five percent of projects, CEQ estimates that about four percent are subject to an Environmental Assessment, and less than one percent go through an Environmental Impact Statement, the most thorough environmental project review. The report also noted that the Federal Highway Administration (FHWA) estimates 96% of its highway projects were processed as CEs – an even higher rate than for the federal government as a whole. The vast majority of

transportation projects, therefore, move quickly and efficiently through the environmental and historic preservation review process.

The primary reasons for the small number of DOT projects that are unnecessarily delayed or prevented are not related to DOT rules or regulations. Rather, our shared experience indicates the following obstacles are more likely to cause project delay:

- Lack of adequate and predictable project funding
- Changing state and local transportation priorities
- Local community opposition and/or poor public involvement
- Poor project planning and design
- Contradictory incentives in infrastructure project development, usually resulting from inefficient contracting structures and processes

In our experience, delays, increased project costs, and poor project outcomes occur not because of legal requirements, but because of inconsistent or inappropriate implementation of DOT regulations, rules, policy statements and guidance for environmental and historic preservation reviews. Thus, improving the implementation and application of rules and regulations is the best way to ensure efficient project delivery while maintaining appropriate protections for environmental and historic resources.

Furthermore, numerous existing tools are available to DOT-funded project sponsors to streamline the review process and expedite project delivery. For example, many state departments of transportation have developed early planning tools and procedures that identify potential conflicts early in the planning process, avoiding costly delays and potential project conflicts and controversy before significant investments are made. We discuss these tools below, and recommend that their use be increased and promulgated throughout the Department of Transportation.

UNDERUTILIZED STREAMLINING TOOLS SHOULD BE SUPPORTED AND ADOPTED ACROSS THE DEPARTMENT

There are a large number of existing, effective tools for streamlining historic preservation reviews and expediting project delivery. These tools, which are often linked to overall environmental review procedures, have been developed by the Department (especially the FHWA) and many state DOTs, in partnership with State Historic Preservation Offices, the Advisory Council on Historic Preservation (ACHP), federally-recognized Tribes, and other stakeholders.

We provide links to reports and studies on these tools, along with links to state-specific programs that created and/or use these tools, which include, but are not limited to, the following:

- Cultural resources Geographic Information Systems (GIS) and associated electronic environmental and historic preservation screening tools and decision-making systems

(NCHRP 25-25, Task 90¹; FHWA Planning and Environmental Linkages for Historic Preservation²; Florida DOT's Efficient Transportation Decision Making Process³; Minnesota DOT's MnModel⁴)

- Electronic documentation and tracking of environmental and historic preservation reviews (Florida DOT StateWide Environmental Project Tracker⁵; Texas DOT's Texas Environmental Compliance Oversight System⁶)
- Programmatic agreements that delegate decision making to the state DOTs (NCHRP 25-25, Task 49⁷; FHWA Planning and Environmental Linkages for Historic Preservation)
- Programmatic agreements identifying classes of transportation projects that do not require review or are reviewed under a streamlined and expedited process (NCHRP 25-25, Task 49)
- Electronic communication and documentation of consultation with the public (Pennsylvania DOT's ProjectPath⁸)
- Guidance on the preparation of concise, legally sufficient environmental documents (AASHTO Handbook on Preparing High-Quality NEPA Documents for Transportation Projects⁹)
- Consideration of historic preservation factors during long-range planning (NCHRP 25-25, Task 87¹⁰)

As a result of the use of these and other tools, and because of the streamlining mandates in SAFETEA-LU and MAP-21, the Department and state DOTs have, over the last several years, reduced the time and costs associated with project delivery. In addition, the FAST Act includes several new streamlining measures that have yet to be fully implemented. These include, but are not limited to:

- Exempting a common class of post-1945 historic bridges from Section 4(f) review (Section 1303);¹¹
- Exempting the use of elements of railroad and rail transit lines from a Section 4(f) approval (Section 11502); and
- Exemption of railroad rights-of-way from review under Section 106 of the NHPA (Section 11504).

¹ <http://apps.trb.org/cmsfeed/TRBNetProjectDisplay.asp?ProjectID=3719>

² <https://www.environment.fhwa.dot.gov/histpres/recommend.asp>

³ <https://etdmpub.flas-estat.org/est/>

⁴ http://www.dot.state.mn.us/mnmodel/P3FinalReport/final_report.html

⁵ <http://www.fdot.gov/environment/sched/track2.shtm>

⁶ <https://static.tti.tamu.edu/conferences/tsc13/presentations/environment/kolla-sykes.pdf>

⁷ http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25%2849%29_FR.pdf

⁸ <https://www.paprojectpath.org/home>

⁹ http://environment.transportation.org/center/products_programs/practitioners_handbooks.aspx#14

¹⁰ <http://apps.trb.org/cmsfeed/TRBNetProjectDisplay.asp?ProjectID=3512>

¹¹ The Section 106 program comment for these bridges is estimated to remove 200,000 bridges from the review process, saving approximately \$78 million. http://www.achp.gov/news_bridgeagreement_20121207.html

FURTHER ACTIONS TO STREAMLINE AND IMPROVE EFFICIENCIES IN HISTORIC PRESERVATION REVIEWS

We recommend that DOT pursue the following approaches to remove obstacles to development of transportation infrastructure and make NEPA and NHPA reviews more efficient:

- 1) Complete the mandates of the FAST Act, especially those that relate to rail projects, and fully implement the recommendations of the March 2013 report to Congress from the Federal Rail Administration (FRA).
 - FRA provided a [Report](#) to Congress in March 2013 recommending streamlining procedures and efficiencies for federally-funded railroad infrastructure repair and improvement projects. Some of these procedures and efficiencies were included in the FAST Act, such as mandating that the FRA coordinate with the ACHP to prepare a formal exemption similar to the one prepared for the Interstate Highway System. Putting this exemption in place will clearly streamline future historic preservation reviews. Some of the recommended procedures and efficiencies identified in the March 2013 report were not included in the FAST Act and should be pursued. For example, FRA and the Federal Transit Administration (FTA) should adopt their own programmatic Section 4(f) evaluations, modeled after FHWA's programmatic evaluations¹². And as noted in the March 2013 report to Congress, FRA is not covered by 23 C.F.R. Part 774, which is a joint FHWA and FTA Section 4(f) regulation. We recommend that FRA should be covered by this regulation, and be encouraged to use the efficiencies included in this regulation.
- 2) Issue specific guidance for section 1312 of the FAST Act, with emphasis on strongly encouraging state DOTs and Metropolitan Planning Organizations (MPOs) to use a small part of the federal transportation funds they receive "to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes, including planning, approval, and consultation processes." Final guidance should provide examples of activities and best practices to maximize return on this investment and make the planning, approval and consultation process as efficient as possible.

It is imperative that DOT takes full advantage of this new authority under section 1312 of FAST to urge state DOTs and MPOs to use the federal transportation funds they receive "to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes, including planning, approval, and consultation processes." While it is widely acknowledged that transportation funding is tight, and many state DOTs and MPOs may be reluctant to expend their limited transportation dollars on activities and personnel not perceived as directly related to transportation projects, the success of programs implemented by a number of innovative state DOTs and MPOs should serve as useful models to guide their decisions. Strong encouragement by DOT in its implementation guidance for section 1312 currently under development will go a long way toward wider use of federal transportation funds by state DOTs and MPOs for transportation planning, environmental review, dedicated staffing,

¹² <https://www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp>

agency personnel training, information gathering and mapping, and programmatic agreement development in broad and flexible ways.

The ultimate objective of section 1312 is to speed up delivery of transportation projects while protecting historic resources and the environment from potential adverse impacts. Our organizations previously provided DOT an extensive list of suggested activities (attached) eligible for funding under section 1312, including examples of state DOTs utilizing such activities.

- 3) Fund efforts to digitize historic resource surveys for state historic preservation and tribal historic preservation offices so that a complete record of inventoried historic places is available in GIS format. According to an April 2014 survey of SHPOs across the country conducted by the National Conference of State Historic Preservation Officers, only 52% of inventoried historic resources in our nation have been digitized. Of these digitized resources, a much smaller percentage is linked to a GIS-based database (most are simply scanned pages of paper reports).

In addition to digitizing existing databases, DOT should expand its support for predictive models that anticipate where cultural resources are likely to be discovered. A GIS tool that accurately predicts areas of high, medium, and low risk for encountering such cultural resources will allow DOTs to plan projects in ways that avoid and minimize adverse impacts—leading to shortened review times and expedited project schedules. We note that DOT has funded such models in Florida, Minnesota, North Carolina, Pennsylvania, and Texas.

- 4) Enforce concurrent review guidelines already available for agencies' reviews.
 - MAP-21 directs agencies to coordinate and carry out reviews concurrently, instead of sequentially, in conjunction with the NEPA review process. Similarly, Title 41 of the FAST Act (FAST-41) requires state and federal permitting reviews to run concurrently for a "covered project," provided that doing so does not impair a federal agency's ability to review the project.
- 5) Increase use of programmatic approaches to environmental and historic preservation reviews.
- 6) Improve and make universal the merging of NEPA and Clean Water Act section 404 permitting processes, with the U.S. Army Corps of Engineers issuing a 404 permit at the end of the NEPA process, based on the information generated by the NEPA review, as opposed to the all-too-often current practice of the Corps conducting a separate and subsequent permit review.
- 7) Improve public involvement and conduct public involvement during project planning stages and early stages of project development. This provides the public an early opportunity to voice concerns about project impacts on their community, which then can be addressed early in project development, thus avoiding or reducing subsequent controversies and conflicts, and reducing potential for litigation.

We appreciate the opportunity to provide input for the U.S. Department of Transportation review of existing policy statements, guidance documents, and regulations to identify unnecessary obstacles to transportation infrastructure projects.

Contact:

Adam Jones

National Trust for Historic Preservation

(202) 588-6067

ajones@savingplaces.org

The **National Trust for Historic Preservation** is a private, nonprofit organization chartered by Congress in 1949 to facilitate public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. Congress intended the National Trust “to mobilize and coordinate public interest, participation and resources in the preservation and interpretation of sites and buildings.” With headquarters in Washington, D.C., nine field offices, 27 historic sites, more than one million members and supporters, and a national network of partners in states, territories, and the District of Columbia, the National Trust works to save America’s historic places and advocates for historic preservation as a fundamental value in programs and policies at all levels of government.

The **National Conference of State Historic Preservation Officers** (NCSHPO) is the professional association of the State government officials who carry out the national historic preservation program as delegates of the Secretary of the Interior pursuant to the [National Historic Preservation Act of 1966](#), as amended (NHPA) (16 USC 470).

The **National Association of Tribal Historic Preservation Officers** (NATHPO) is a national organization of Tribal government officials who implement federal and tribal preservation laws. Membership is limited to federally recognized Tribal government officials who are committed to preserving, rejuvenating, and supporting American Indian, Alaska Native, and Native Hawaiian cultures, heritage, and practices. NATHPO member tribes work with a variety of federal agencies on small and large infrastructure projects.

American Anthropological Association (AAA) is the world’s largest association for professional anthropologists, with 10,000 members. Based in Washington, D.C., the Association was founded in 1902, and covers all four main fields of anthropology (cultural anthropology, biological/physical anthropology, archaeology, and linguistic anthropology). Our members are employed in higher education or are students of anthropology, and others work in the public, private, and non-governmental sectors. AAA publishes 22 journals, offers career planning and professional development services, supports college and university departments, awards numerous prizes and fellowships, sponsors a paid summer internship program, a summer field school in ethnography and occupational therapy, and stages research conferences.

American Cultural Resources Association (ACRA) is the national trade association supporting and promoting the common interests of cultural resource management (CRM) firms. Our

member firms have a vital role in the National Historic Preservation Act Section 106 process, helping clients by identifying and assessing historic and cultural resources prior to development, and by recommending responsible solutions that appropriately balance preservation values with development goals. ACRA's member firms employ thousands of CRM professionals nationwide, working in historic preservation, archaeology, anthropology, architectural history, and historical and landscape architecture.

Society for American Archaeology (SAA) is an international organization that, since its founding in 1934, has been dedicated to the research about and interpretation and protection of the archaeological heritage of the Americas. With more than 5,000 members, SAA represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world.

With more than 2,300 members, the **Society for Historical Archaeology (SHA)** is the largest organization in the world dedicated to the archaeological study of the modern world and the third largest anthropological organization in the United States. Members come from a dozen countries, and most are professional archaeologists who teach, work in museums or consulting firms, or have government posts. Our members also include many of the world's underwater archaeologists through the Advisory Council for Underwater Archaeology.