IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15277

HONOLULUTRAFFIC.COM; *et al*,

Plaintiffs-Appellants,

v.

FEDERAL TRANSIT ADMINISTRATION; *et al.*

Defendants-Appellees,

and

FAITH ACTION FOR COMMUNITY EQUITY; *et al.*

Defendants-Intervenors-Appellees

On Appeal from the United States District Court,
For the District of Hawaii
Civil No. 11-00307 AWT

PLAINTIFFS-APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants hereby certify that none of them has a parent corporation and that none of them has issued stock of which 10% or more is owned by a publicly held corporation.

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INTRODUCTION

Only this Court can prevent Appellees from forever despoiling the integrity of Honolulu's historic downtown, its waterfront, and its Chinatown.

The Federal Transit Administration ("FTA") and the City and County of Honolulu ("City") have decided to use more than $5 billion of public funds to force an ill-conceived elevated heavy rail transit line (the "Project") through the heart of historic Honolulu despite the fact that other, less-damaging alternatives exist.

The rail line will not solve Honolulu's traffic problems; indeed, the City and the FTA candidly admit that "traffic congestion will be worse in the future with rail than what it is today without rail."[1]

The rail line is subject to the environmental review requirements of the National Environmental Policy Act ("NEPA") and Section 4(f) of the Department of Transportation Act ("Section 4(f)"). Careful, unbiased analysis of alternatives is at the core of both statutes: NEPA requires federal agencies to prepare Environmental Impact Statements analyzing all reasonable alternatives to a proposed project, while Section 4(f) prohibits federal approval of transportation projects that would damage historic resources unless there is no prudent and feasible alternative.

[1] 13 ER 3436.

Despite these clear statutory mandates, the FTA and the City contrived to prepare a "Final Environmental Impact Statement/Section 4(f) Evaluation" (the "EIS") limited in scope to three virtually-indistinguishable versions of the same elevated heavy rail project. It is undisputed that all three versions would irreparably damage the historic Dillingham Transportation Building and the Chinatown Historic District, among other impacts.

The administrative record demonstrates that there are reasonable, feasible alternatives capable of avoiding such harm, including bus rapid transit, light rail, and a system of high-occupancy and toll lanes known as "Managed Lanes." By excluding those alternatives from detailed consideration in the EIS, the FTA and the City violated NEPA and Section 4(f).

The District Court nonetheless upheld most of the environmental analyses prepared by the FTA and the City, ruling for Appellants on just three narrow Section 4(f) issues: failure to identify and evaluate Traditional Cultural Properties prior to project approval; arbitrary and capricious consideration of a potential tunnel beneath downtown Honolulu; and arbitrary and capricious consideration of the Project's potential to damage Mother Waldron Park, a protected historic resource.[2]

[2] Neither the FTA nor the City (nor the Intervenor-Appellees, a group of engineering, construction, and religious organizations) has appealed those three rulings.

In upholding Appellees' approval of the Project, the District Court failed to apply Section 4(f)'s implementing regulations; erroneously relied on prior case law and informal guidance superseded by those regulations; and ignored the results of an EIS prepared by the City which demonstrated the existence of reasonable, prudent alternatives to elevated heavy rail.

Appellants respectfully request that the District Court's errors be corrected, that Section 4(f) and NEPA be properly applied, and that Honolulu's irreplaceable historic resources be protected from illegal — and entirely unnecessary — harm.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel agency compliance with legal duty).

On November 1, 2012, the District Court issued an "Order on Cross-Motions for Summary Judgment" (the "Summary Judgment Order") resolving all outstanding merits issues, but reserving for the future a final determination regarding the appropriate remedy for three claims on which Appellants prevailed. 1 Excerpts of Record ("ER") 52-96.

On December 27, 2012, the District Court entered in its docket a "Judgment and Partial Injunction" (the "Judgment") granting in part and denying in part Appellants' request for permanent injunctive relief, and thereby resolving the only

remaining issue in the case. 1 ER 1-3. The Judgment says, on its face, "After due consideration, the court now enters its final Judgment which shall include partial injunctive relief." 1 ER 2.

Appellants timely filed a notice of appeal on February 11, 2013. 2 ER 175-186; Fed. R. App. P. 4(a)(1)(B). This Court now has jurisdiction pursuant to 28 U.S.C. § 1291 (appellate jurisdiction over final decisions of the district courts) or, in the alternative, pursuant to 28 U.S.C. § 1292(a)(1) (appellate jurisdiction over interlocutory orders granting or denying injunctive relief).

On April 5, 2013, the City filed a Motion to Dismiss this appeal in which it argued that the Judgment is not a "final decision" within the meaning of 28 U.S.C. § 1291. *See* Motion to Dismiss Appeal for Lack of Jurisdiction (Ninth Cir. Dkt. 22). The FTA and the Intervenors later joined the motion. On May 3, 2013, this Court denied the Motion to Dismiss.[3] *See* Order (Ninth Cir. Dkt. No. 22)

ISSUES PRESENTED

1. Did the EIS prepared by the FTA and the City violate NEPA's requirement to evaluate all reasonable alternatives, where

[3] In denying the Motion to Dismiss, the Court noted Circuit case law stating that the merits panel may consider appellate jurisdiction despite the earlier denial of a motion to dismiss. *See* Order (Ninth Cir. Dkt. No. 22) at 1.

- The range of alternatives evaluated in detail in the EIS was limited to three virtually-identical versions of the City's "preferred" elevated heavy rail project;
- The City and the FTA excluded Managed Lanes from detailed consideration in the EIS despite the recommendations of the City's own Transit Advisory Task Force; and
- The City and the FTA excluded light rail from detailed consideration in the EIS despite its apparent feasibility?

2. Did the EIS prepared by the FTA and the City violate NEPA by defining the Purpose and Need for the Project in terms so narrow as to preclude consideration of alternatives, where every alternative to the City's "locally preferred" elevated heavy rail project was eliminated from consideration for (alleged) inconsistency with Purpose and Need?

3. Did the FTA violate Section 4(f)'s substantive mandate prohibiting the approval of transportation projects that will damage historic resources unless there is no feasible and prudent alternative, where

- It is undisputed that the FTA approved an elevated heavy rail line that will cause permanent damage to the historic Dillingham Transportation Building and the Chinatown Historic District;

- The City and the FTA entirely failed to address the possibility of developing a bus rapid transit system despite the fact that they had recently issued an Environmental Impact Statement concluding that bus rapid transit (a) is the best transit alternative for Honolulu and (b) will not damage historic resources; and
- The City and the FTA claim that a system of high-occupancy and toll lanes would be imprudent without (a) applying the regulatory definition of "imprudence" or (b) addressing recommendations from the City's own Transit Advisory Task Force?

4. Did the FTA violate Section 4(f) by approving the elevated heavy rail line prior to completing its evaluation of the rail line's potential impacts on Native Hawaiian burial sites, where

- Section 4(f)'s implementing regulations and controlling circuit case law require that all potentially-historic resources be fully evaluated prior to project approval;
- The City and the FTA issued a technical report which found that comprehensive Archaeological Inventory Studies ("AISs") are necessary to properly evaluate potential impacts on burial sites; and
- It is undisputed that the City and the FTA approved the elevated heavy rail line without completing AISs for more than half of the Project?

Pursuant to Circuit Rule 28-2.7, pertinent statutes, regulations, and rules are set forth verbatim in an addendum to this brief.

STANDARD OF REVIEW

The District Court granted summary judgment to the Appellees on the issues presented above. That decision is reviewed *de novo*, with evidence viewed in the light most favorable to Appellants, to determine whether there are any genuine issues of material fact and whether the District Court correctly applied the substantive law. *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1093-94 (9th Cir. 2006).

Appellants' Section 4(f) and NEPA claims are reviewed under the Administrative Procedure Act ("APA"). *See N. Idaho Cmty. Action Network v. United States Dep't of Transp.*, 545 F.3d 1147, 1152-53 (9th Cir. 2008). The APA directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

Although the APA's "arbitrary and capricious" standard is narrow, it "nonetheless requires the court to engage in a substantial inquiry…a thorough, probing, in-depth review." *Native Ecosystems Council v. United Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citing *Citizens to Preserve Overton Park v. Volpe*,

401 U.S. 402, 415 (1971)); *see also Siskiyou Reg'l Educ. Proj. v. United States Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009).

Furthermore, an agency's decision may only be upheld on the basis articulated in the decision itself; courts may not "make up for deficiencies" in agency decisionmaking by "supply[ing] a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 n.7 (9th Cir. 2004) ("In no case are we to hypothesize [an agency's] rationales or accept [an agency's] post hoc rationalizations").

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an APA challenge to the final agency action approving the Project.[4] The Project is an elevated heavy rail line extending for 20 miles through the historic waterfront core of Honolulu and across the southern portion of the island of Oahu, creating a massive four-story concrete barrier along the way. In approving the Project, the FTA and the City violated Section 4(f) and NEPA.

Appellants are a broad coalition of business, environmental, Native Hawaiian, and civic leaders. They include a former Governor of the State of

[4] The formal name of the Project is the Honolulu High-Capacity Transit Corridor Project.

Hawaii (Benjamin Cayetano); a Native Hawaiian who formerly served as United States Attorney for the District of Hawaii and as a judge of the Hawaii Court of Appeals (Walter Meheula Heen); a 101-year-old non-profit organization dedicated to protecting Hawaii's environment (the Outdoor Circle); a non-profit transportation advocacy group and its chairman (honolulutraffic.com and Cliff Slater); a non-profit business and entrepreneurial foundation (Small Business Hawaii); a statewide non-profit organization dedicated to environmental and cultural preservation (Hawaii's Thousand Friends); a University of Hawaii law professor who previously served as president of the Hawaii State Bar Association (Randall Roth); and a Honolulu community leader (Dr. Michael Uechi).

Appellants seek relief requiring that the FTA's approval of the Project be vacated and set aside, that the City and FTA be ordered to comply with NEPA and Section 4(f), and that all further work on the Project be enjoined pending that compliance.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On May 11, 2011, Appellants timely filed the underlying lawsuit in the United States District Court for the District of Hawaii. All of the judges in the

United States District Court for the District of Hawaii recused themselves,[5] and the matter was assigned to Circuit Judge A. Wallace Tashima. 2 ER 245-246.

The District Court's Summary Judgment Order resolved the merits of the case. 1 ER 52-96. The District Court granted summary judgment to Appellants on three Section 4(f) issues: FTA's failure to evaluate Traditional Cultural Properties before approving the Project; FTA's arbitrary and capricious analysis of the Project's impacts on Mother Waldron Park; and FTA's arbitrary and capricious conclusion that a downtown tunnel would be imprudent. 1 ER 95. The District Court granted summary judgment to Appellees on all remaining issues. *Id*.

The District Court then requested briefing and argument regarding the appropriate remedy for the FTA's three violations of Section 4(f). 1 ER 96. The District Court's Judgment resolved all remedies issues by enjoining construction and real estate acquisition activities in downtown Honolulu (an area comprising the fourth and final phase of the Project), but authorizing construction of the remainder of the Project to proceed. 1 ER 1-3.

Meanwhile, the Hawaii Supreme Court ruled that the City's failure fully to evaluate Native Hawaiian burial sites before approving the Project violates state

[5] On November 18, 2008, eight of the nine judges then sitting in the United States District Court for the District of Hawaii signed a letter the City "to strongly voice our opposition to the proposed route of the Honolulu Rail Transit System on Halekauwila Street immediately adjacent to the federal court building." 7 ER 1890-1894.

historic preservation laws. *Kaleikini v. Yoshioka*, 283 P.3d 60, 71-81 (Haw. 2012). Construction of the Project is temporarily stayed pending the City's compliance with the Hawaii Supreme Court mandate.

On April 12, 2012, the City announced its intent to begin construction in late September. *See* Motion to Expedite (Ninth Cir. Dkt. 13-1) at 2, 9-11. Appellants filed a motion for expedited treatment seeking to have this appeal briefed and heard before construction begins. *Id*. at 1-18. On May 3, 2013, this Court granted Appellants' Motion to Expedite. *See* Order (Ninth Cir. Dkt. 22).

STATEMENT OF FACTS

The City has long sought to enhance its public transit system. 3 ER 525, 527. It has focused its planning efforts on creating a transit system linking Waikiki (in the southeast), the University of Hawaii campus at Manoa (in the northeast), and an agricultural area known as Kapolei (in the west). *See* 3 ER 529-35.

I. THE 2002 EIS

In 2002, the City and the FTA issued a "Primary Corridor Transportation Project Final Environmental Impact Statement" (the "2002 EIS"). 11 ER 2893-13 ER 3338. The 2002 EIS EIS evaluated several alternatives for a new public transit system within the Waikiki - Manoa - Kapolei transportation corridor, ultimately concluding that a bus rapid transit (or "BRT") system was the best option. 11 ER

2920-46 (executive summary); 11 ER 2983- 12 ER 3051 (discussion of alternatives); 11 ER 3331 (summary).

The BRT system endorsed in the 2002 EIS did not merely refine Honolulu's existing bus service. Instead, it provided an entirely new rapid transit system: 32 new transit stations connected by a new network of hybrid or electric express buses running in new exclusive (express buses only) and semi-exclusive (express buses and regular buses) transit lanes. *See* 11 ER 3010-3032 (discussion of system); 11 ER 2920, 11 ER 3012-19 (transit stations); 11 ER 2920, 2926 (hybrid or electric buses); 11 ER 2920, 2927, 3012 (transit lanes).

The 2002 EIS concluded that BRT would "offer a fast, efficient travel mode…for those choosing to travel by transit, because transit vehicles would use [] uncongested exclusive and semi-exclusive transit lanes." 11 ER 2927. More specifically, it found that BRT would provide an attractive alternative to private automobile travel, reduce traffic congestion, substantially improve transit service for minority and low-income populations, and facilitate sustainable patterns of transit-oriented development. *See, e.g.,* 11 ER 2927-30, 2939; 12 ER 3230-3236, 3326, 3331. The 2002 EIS also determined that a BRT system would not require the use of any historic sites or public parks protected by Section 4(f). 12 ER 3280.

The City and FTA approved a BRT system in 2003. In 2005, however, the City abandoned BRT, citing "a political decision" made by the new mayor of

Honolulu. *See* 11 ER 2891 ("political decision" and "the new administration has no intention to pursue the former administration's BRT project"). Although it abandoned BRT, the City continued to assert that the analysis in the 2002 EIS was valid. *Id.*[6]

II. THE 2005-2006 AA PROCESS

Approximately 10 months after abandoning BRT for "political" reasons, the City began a new planning level alternatives analysis for transit service in the Waikiki - Manoa - Kapolei transportation corridor (the "AA" or "AA process"). *See* 9 ER 2315-17 (background). The City and the FTA originally considered preparing an EIS in conjunction with the AA process. *See, e.g.*, 11 ER 2887(summary), 11 ER 2888 (alternatives); 9 ER 2328. But they ultimately decided to complete the AA *without* preparing an EIS or any other NEPA document. 9 ER 2328.[7]

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[6] After approving BRT but before abandoning it, the City unilaterally decided to implement only half of the BRT network proposed in the 2002 EIS. That decision was the subject of litigation. *Sensible Traffic Alternatives and Resources v. Federal Transit Admin.*, 307 F. Supp. 2d 1149, 1153-55, 1168-69 (D. Hawaii 2004). One of the Plaintiffs-Appellants in this case also participated in that litigation.

[7] The NEPA process should be undertaken at "the earliest possible time." 40 C.F.R. § 1501.2(d)(3). The process begins with a determination about whether to prepare an Environmental Assessment (an "EA") or a more comprehensive EIS. 40 C.F.R. §§ 1501.3, 1501.4. Here, the record is clear that the City proceeded with the AA process before preparing either an EA or an EIS.

The explicit purpose of the AA process was to help the City identify a preferred transit option. 9 ER 9435. Federal transit funding guidelines refer to such a preference as the "locally preferred alternative." *See* 9 ER 2458. "Locally preferred alternative" is not a concept recognized in NEPA or the Council on Environmental Quality's ("CEQ's") NEPA regulations. 42 U.S.C. §§ 4331-32; 40 C.F.R. §§ 1500-1508. Nor does "locally preferred alternative" appear in Section 4(f) or the Section 4(f) implementing regulations. 49 U.S.C. § 303; 23 C.F.R. 774.1-774.17.

The AA proceeded in three steps: A "screening" process; a report comparing the alternatives which survived the screening exercise; and the Honolulu City Council's selection of a locally preferred alternative.

A. The Alternatives Screening Memo (October 24, 2006)

The first step in the AA process was a "screening" exercise designed to identify alternatives capable of meeting the City's transit objectives. 11 ER 2743, 2757-78, 2761-67. The results of the screening analysis were memorialized in an "Alternatives Screening Memo." 11 ER 2737-64.

The Alternatives Screening Memo considered several alternatives, including a rail alternative (or "fixed guideway"), a Managed Lanes alternative (essentially, a new roadway for use by buses and other high-occupancy vehicles), and several

others. 11 ER 9584-89. The Screening Memo did not evaluate the BRT project endorsed in the 2002 EIS. *Id; see generally,* 11 ER 2737-2864.

The Alternatives Screening Memo concluded that building a tunnel beneath Pearl Harbor was "the only concept that fails to meet the needs of the project." 11 ER 2764. The Screening Memo found that all other alternatives — including Managed Lanes — would satisfy the Purpose and Need for action, though "some concepts may be better than others at improving [] overall system performance." 11 ER 2764-65.

B. The Alternatives Analysis Report (November 1, 2006)

The second step in the AA process was the preparation of an "Alternatives Analysis Report" to the Honolulu City Council. 9 ER 2367-2488(complete report). Whereas the purpose of the Alternatives Screening Memo was to weed out alternatives that would not meet the City's objectives, the purpose of the Alternatives Analysis Report was to evaluate which of the remaining reasonable alternatives would be most attractive to the City Council. 9 ER 2368, 2377-78, 2380-82, 2400-17.

The Alternatives Analysis Report evaluated the attractiveness alternatives which had survived the City's screening process, including: Transportation System Management or "TSM" (essentially, low-cost measures to "optimize" existing bus service); Managed Lanes; and Fixed Guideway. The Report evaluated

a two-lane Managed Lanes alternative, but did not evaluate a three-lane Managed Lanes alternative. 9 ER 9444, 9469-72. The Report did not evaluate the BRT system endorsed in the 2002 EIS. *Compare* 9 ER 2522-30 *with* 11 ER 3003-32.

The Alternatives Analysis Report suggested (albeit without explicitly concluding) that the City found the Fixed Guideway alternative more attractive than the Managed Lanes alternative. *See* 9 ER 2378-82. That suggestion was based on three sets of concerns about Managed Lanes: the possibility of congestion on local roadways near entrances and exits to the Managed Lanes; project costs and eligibility for federal funding; and integration of Managed Lanes with transit service. *See, e.g.*, 3 ER 558; 9 ER 9474 (congestion near entrances and exits); 3 ER 562, 9 ER 2479 (costs and federal funding); 3 ER 558-59, 9 ER 2477 (transit service and transit-dependant communities).

The Alternatives Analysis Report did not identify or evaluate the alternatives' potential to "use" historic resources or public parklands within the meaning of Section 4(f). 9 ER 2450-53 ("environmental consequences" discussion does not contain Section 4(f) analysis), 9 ER 2478-82 ("comparison of alternatives" section does not mention Section 4(f)); *see also* 23 C.F.R. §§ 774.15, 774.17 (definitions of use). Instead, it simply noted that any alternative with the potential for such use would require future compliance with Section 4(f). 9 ER 2453.

C. The City's Selection Of A Locally Preferred Alternative (January 6, 2007)

The third step in the AA process was the Honolulu City Council's selection of a locally preferred alternative. To assist in that selection, the City Council formed a "Transit Advisory Task Force" to "review the AA and [] make findings and recommendations to assist the Council in the selection of a Locally Preferred Alternative." 11 ER 2865-68; 11 ER 2866 (Task Force mission statement).

The Task Force found that "the Alternatives Analysis should have presented variations on the Managed Lane Alternative that could make this alternative more attractive." 9 ER 2327. The Task Force also provided specific recommendations for additional analysis of Managed Lanes. 9 ER 2363-64 ("[s]uggestions for further development of the Managed Lanes Alternative"); *see also* 9 ER 2342 (need for better engineering of access ramps), 9 ER 2357 (need for additional information about federal funding). The Task Force's recommendations addressed each of the three sets of concerns about Managed Lanes identified in the Alternatives Analysis Report (congestion near access points, funding, integration with transit). *See id.*

On January 6, 2007, the City Council passed an Ordinance selecting an elevated "fixed guideway" (*i.e.*, rail) system as its preferred alternative. 9 ER 2318-23. The Ordinance states City Council's decision as follows: "the council believes that, in its role as policymakers for the city, a fixed guideway system is

the best selection for the long-term needs and demands of our growing island population." 9 ER 2318. The Ordinance does not mention NEPA or Section 4(f), and it was not accompanied by an EIS or a Section 4(f) evaluation. 9 ER 2318.

III. THE 2010 EIS

The City (together with FTA) then set about preparing the "Honolulu High-Capacity Transit Corridor Environmental Impact Statement/Section 4(f) Evaluation." 3 ER 480- 5 ER 1087 (EIS); 9 ER 2314-17 (March, 2007 notice of intent to prepare EIS). The EIS evaluated three development alternatives: (1) an elevated heavy rail line from Ala Moana Center to Kapolei via the airport; (2) an identical elevated heavy rail line following the exact same route from the Ala Moana Center to Kapolei, except with a slight detour from the airport to the nearby Salt Lake neighborhood; and (3) an identical elevated heavy rail line including both the Salt Lake route and the airport route. 3 ER 563-97.

The EIS did not consider a light rail alternative, a Managed Lanes alternative, the BRT alternative endorsed in the 2002 EIS, or any other transit system. *Id*. The EIS stated that alternatives to an elevated heavy rail line had "eliminated" by the Honolulu City Council's selection of "fixed guideway" as the locally preferred alternative. 3 ER 562.

Because the Project implicates Section 4(f), the EIS also contained a "Final Section 4(f) Evaluation." 4 ER 913-85. The Final Section 4(f) Evaluation found

that the Project would "use" a variety of historic resources within the meaning of Section 4(f), including the Chinatown Historic District and the Dillingham Transportation Building. 4 ER 913-15, 951-60; *see also* 2 ER 258-59.

The City and the FTA admit that the Chinatown Historic District and the Dillingham Transportation Building are extremely significant historic resources. *See, e.g.*, 8 ER 1977 (25 of 27 buildings in Chinatown declared historic), 6 ER 1467 (Chinatown is "one of the few areas of Honolulu which has maintained a sense of identity over the years"); 5 ER 1132 (Dillingham building is "a very significant 4(f) property"). The Final Section 4(f) Evaluation did not consider BRT, Managed Lanes, or light rail as alternatives to the Project's use of Chinatown or the Dillingham Building. *See* 4 ER 680-991 (Section 4(f) evaluation); 4 ER 951-54 (discussion of Chinatown); 4 ER 954-60 (discussion of Dillingham).

IV. THE 2011 RECORD OF DECISION

On January 18, 2011, the FTA issued a Record of Decision ("ROD") approving the Project. 2 ER 247-463. The ROD includes a finding declaring that there is no feasible and prudent alternative to the Project's use of the Chinatown Historic District and the Dillingham Transportation Building. 2 ER 258-59.

SUMMARY OF ARGUMENT

The FTA and the City prepared an "Environmental Impact Statement / Section 4(f) Evaluation" that failed to consider any alternatives to the City's

"locally-preferred" elevated heavy rail system, despite evidence that reasonable, feasible, prudent, and less-damaging alternatives (including Managed Lanes, BRT, and light rail) exist.

The FTA also violated Section 4(f) by approving the Project without identifying and evaluating potential impacts on Native Hawaiian burial sites, despite unambiguous regulatory requirements (and case law from this Court) requiring that such evaluations be completed in advance of project approval.

ARGUMENT

I. THE FTA AND THE CITY VIOLATED NEPA

NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a); *California ex rel. Lockyer v. United States Dep't of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009). It establishes "action-forcing procedures that require agencies to take a hard look at environmental consequences" of proposed projects. *Center for Biological Diversity v. United States Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2009) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)).

NEPA's "chief" action-forcing procedure is the EIS, a comprehensive and detailed document addressing the Purpose and Need for the project, the project's environmental consequences, and reasonable alternatives to the project. *See Ctr. for Biological Diversity*, 623 F.3d at 642 ("chief among these procedures"); 42

U.S.C. § 4332(2)(C) (statutory EIS requirement); 40 C.F.R. §§ 1502.13, 1502.14, 1502.16 (regulations addressing Purpose and Need, alternatives, and environmental consequences).

A. The EIS Does Not Consider All Reasonable Alternatives

A careful, unbiased evaluation of alternatives is "the heart" of an EIS. 40 C.F.R. § 1502.14; *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1121 (9th Cir. 2008); *see also Se. Alaska Conservation Council v. Federal Highway Administration*, 649 F.3d 1050, 1057 (9th Cir. 2011) ("informed and meaningful consideration of alternatives…is thus an integral part of the statutory scheme").

Federal agencies have an affirmative obligation to "[r]igorously explore and objectively evaluate *all* reasonable alternatives." 40 C.F.R. § 1502.14 (emphasis added).[8] Thus, "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Se. Alaska Conservation Council*, 649 F.3d at 1056-57; *Ctr. for Biological Diversity*, 623 F.3d at 642; *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

Here, the EIS prepared by the City and the FTA failed to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14.

[8] The full text of 40 C.F.R. § 1502.14 is set forth in the addendum to this brief. *See* Cir. Rule 28-2.7.

That failure manifested itself in two ways: (1) the EIS does not consider a reasonable range of alternatives and (2) the EIS arbitrarily and capriciously excludes from detailed consideration the Managed Lanes and light rail, both of which are reasonable ways to address Honolulu's traffic problems.

1. The EIS Does Not Consider A Reasonable Range Of Alternatives

The range of alternatives that an EIS must consider is "dictated by the nature and scope of the proposed action." *Friends of Yosemite Valley*, 520 F.3d at 1038; *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

Here, the nature and scope of the proposed action was quite broad: A new $5 billion public transit system in one of the nation's largest metropolitan areas. Therefore, the range of alternatives in the EIS should also have been quite broad. *Friends of Yosemite Valley*, 520 F.3d at 1038; *Alaska Wilderness*, 67 F.3d at 729; *see also 'Ilio'ulaokaokalani Coalition*, 464 F.3d at 1097-98 (connection between breadth of action and breadth of required analysis).

But the range of alternatives in the EIS is anything but broad. The EIS considers three virtually-identical development alternatives: (1) the Project; (2) the "Salt Lake Alternative," an elevated heavy rail line identical to the Project in every respect except for a short detour through the Salt Lake neighborhood; and (3) the "alternative" of building both the Project and the Salt Lake detour. 3 ER 564-97

(describing alternatives considered in EIS). The EIS did not consider any alternatives to an elevated heavy rail line; the only choice presented was whether to build the detour through the Salt Lake neighborhood. *Id*.

That is not a reasonable range of alternatives. *See, e.g.*, *Friends of Yosemite Valley*, 520 F.3d at 1039 (all five action alternatives proposed similar outcomes); *Oregon Natural Desert Ass'n*, 531 F.3d at 1126, 1144-45 (all seven action alternatives would have increased off-road vehicle use); *Nat. Res. Def. Council v. United States Forest Serv.*, 421 F.3d 797, 814 (9th Cir. 2005) (ten action alternatives would have resulted in development of roadless areas). In fact, it is hardly a "range" at all.

Rather than evaluating a broad range of alternatives in an EIS (as NEPA requires), the City and FTA improperly relied on the AA process to exclude from consideration anything that was not part of the City's "locally preferred" alternative. *See, e.g.*, 3 ER 562 (City's selection of locally preferred alternative eliminated other options). This fundamental error improperly restricted the range of alternatives evaluated the EIS and violated NEPA in several distinct (though not unrelated) ways.

First, an EIS must "[r]igorously explore and objectively evaluate *all* reasonable alternatives," not merely those preferred by the project proponent. 40 C.F.R. § 1502.14(a) (emphasis added); *see also* 40 C.F.R. § 1502.14(c) (duty to

consider alternatives outside jurisdiction of lead agency). The Council on Environmental Quality ("CEQ"),[9] which oversees NEPA compliance throughout the federal government, has made it clear that reasonable alternatives "include those that are ***practical*** or ***feasible*** from the technical and economic standpoint, rather than simply ***desirable***" from the standpoint of a project proponent. Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 17, 1981) (emphasis original).[10]

Second, the selection of one alternative as "preferred" does not immediately or necessarily render all other alternatives "unreasonable" for NEPA purposes. *See Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (citing *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1327 (S.D. Cal. 1998) *aff'd* 196 F.3d 1057 (9th Cir. 1999).[11]

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[9] Lead counsel for Appellants previously served as General Counsel for CEQ, and, in that capacity, was the lead draftsperson for NEPA's implementing regulations, 40 C.F.R. parts 1500-1508.

[10] Although lacking the force of a regulation, CEQ's "Forty Questions" guidance has been cited with approval by this Court (and others) as a framework for applying NEPA. *See, e.g., Russell Country Sportsmen v. United States Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011); *Envtl. Protection Info. Ctr. v. United States Forest Serv.*, 451 F.3d 1005, 1015 n.6 (9th Cir. 2005).

[11] In the unusual situation presented by *Citizens for a Better Henderson*, failure to distinguish between "preference" and "reasonableness" was deemed harmless error. *Citizens for a Better Henderson*, 768 F.2d at 1057. The error was not

Third, the City's selection of a "locally preferred alternative" was not a NEPA decision and was not accompanied by a completed EIS; therefore, it does not serve to delimit the scope of subsequent NEPA review. 40 C.F.R. §§ 1502.20, 1508.28 (tiered analysis can only be based on a pre-existing EIS); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004) (invalidating EIS purporting to rely on prior watershed analysis); *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1068-69, 1073 (9th Cir. 2002) (invalidating EIS purporting to rely on prior planning documents); *see also N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1088 (9th Cir. 2011) (noting that "only document that have undergone NEPA analysis may be tiered").

Appellees may suggest that an appendix to 23 C.F.R. part 450 authorized them to exclude from the EIS all but the locally preferred alternative. But nothing in that Appendix modifies the above-cited requirements of NEPA. *See* 23 C.F.R. part 450 App. A. On the contrary, the Appendix specifically states that the validity of an EIS continues to be "judged by the standards applicable under the NEPA regulations and guidance from [CEQ]." 23 C.F.R. part 450 App. A at #2; [12] The

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harmless here; in fact, it was at the root of the EIS' failure to consider an appropriate range of alternatives.

[12] CEQ is entitled to "substantial deference" is due in interpreting NEPA. *Andrus v. Sierra Club*, 44 U.S. 347, 357-58 (1979). Other agencies' interpretations of NEPA are not entitled to deference. *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144, 1155 (D.C. Cir. 2001); *American Airlines v.*

Appendix is merely "informal," "non-binding" guidance that "should not be construed as a rule of general applicability." 23 C.F.R. part 450 App. A ("Background and Overview" section). As such, it did not (and cannot) relieve FTA of its duty to include in the EIS a full range of reasonable alternatives to the Project.

Appellees may also seek to rely on *League of Wilderness Defenders v. United States Forest Service*, in which this Court upheld an EIS analyzing in detail just two action alternatives. *League of Wilderness Defenders v. United States Forest Service*, 689 F.3d 1060, 1071-73 (9th Cir. 2012). But the *League of Wilderness Defenders* holding is limited to "the special circumstances of a research project in an experimental forest." *League of Wilderness Defenders*, 689 F.3d at 1071. This Court explicitly noted that the range of alternatives presented in *League of Wilderness Defenders* "would likely be inadequate" in other contexts. *Id*.

Department of Transportation, 202 F.3d 755, 803 (5th Cir. 2000); *Alaska Center for the Environment v. West*, 31 F. Supp. 2d 714, 721 (D. Alaska, 1998), *aff'd* 157 F.3d 680 (9th Cir. 1998). This rule makes perfect sense. After all, agencies proposing projects subject to NEPA's requirements are hardly the agencies to which to defer in interpreting the statute.

2. The EIS Improperly Excludes Managed Lanes And Light Rail From Detailed Consideration

The EIS also violated NEPA by arbitrarily and capriciously excluding Managed Lanes and light rail from detailed consideration in the EIS. *Se. Alaska Conservation Council*, 649 F.3d at 1056-57 ("existence of a viable but unexamined alternative renders an environmental impact statement inadequate").

(a) Managed Lanes Is A Reasonable Alternative

The City and the FTA claim that a Managed Lanes alternative was eliminated from detailed consideration during the AA process for failing to meet the Project's Purpose and Need. 3 ER 253. But, as explained above, it was improper for the FTA and the City to constrict the scope of the EIS on the basis of the AA process.

In addition, it suffers from several defects specific to Appellees' analysis of Managed Lanes. The Managed Lanes concept was originally proposed by Appellant honolulutraffic.com. *See* 11 ER 2869-81. Honolulutraffic.com's proposal included detailed information (supported by a 3-page list of sources) clearly explaining that a Managed Lanes alternative could include either two or three lanes. 11 ER 2869-81. Despite the rather obvious transportation benefits of building a three-lane facility, the City and the FTA only considered the possibility of a two-lane Managed Lanes alternative. 9 ER 2470; 10 ER 2737-2864.

The City and the FTA also relied on erroneous financial information in their analysis of Managed Lanes.[13] 13 ER 3357-58, 3385-86. Among other things, they inaccurately assumed that a Managed Lanes alternative could not be eligible for federal transportation funding. 9 ER 2459.

During the AA process, the City also claimed that traffic congestion on surface streets could offset travel time benefits associated with a Managed Lanes facility. 9 ER 2432-33. But that is not an issue unique to Managed Lanes. The Project, like Managed Lanes, is a fixed piece of linear transportation infrastructure that would be reached by customers traveling on local roadways.

The City's own Transit Advisory Task Force recognized these problems (and others) with Appellees' evaluation of Managed Lanes. *See* 9 ER 2327, 2363-64. The Task Force found that "the [AA] should have presented variations on the Managed Lanes alternative that could make it more attractive." 9 ER 2327.

The Task Force then made specific recommendations regarding those variations. 9 ER 2342, 2357, 2363-64. Among other things, the Task Force recommendations addressed federal funding issues, questions about coordinating

[13] These errors were so egregious that they attracted the attention of Tampa's Director of Planning, who penned a remarkable "open letter" to the citizens of Honolulu stating that Appellees' analysis "call[s] into question the objectivity of the City and its consultants" and suggesting that the City had "intentionally misrepresent[ed] the facts associated with the cost and operation" of the Tampa project. 9 ER 2298.

Managed Lanes with bus service, and feasible methods of reducing congestion near the entrances and exits to the Managed Lanes — precisely the issues on which the City based its criticism of Managed Lanes during the AA process. 9 ER 2342 (access to Managed Lanes "under-engineered" by a factor of three), 9 ER 2357 (federal funding), 9 ER 2363-64 (reducing congestion, better access to Managed Lanes). Neither the City nor the FTA followed through on any of the Task Force's recommendations. *See, e.g.*, 13 ER 3421 (erroneously dismissing Task Force recommendations as "non-substantive").

NEPA does not allow agencies to "simply [] sit back, like an umpire" while the public generates alternatives. *See Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 1119 (D.C. Cir. 1971). Instead, federal decisionmakers must "take the initiative of considering environmental values at every distinctive and comprehensive stage of the process." *Id.* Appellees' failure to correct their obvious errors and re-evaluate Managed Lanes was arbitrary, capricious, and a violation of NEPA. *See Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("[t]he idea behind NEPA is that if the agency's eyes are open…it may be persuaded to alter what it proposed").

(b) Light Rail Is A Reasonable Alternative

Light rail offers another feasible way to address Honolulu's traffic problems. Approximately 30 cities across the United States have light rail transit systems; it

is a presumptively reasonable option. *See* 3 ER 477 (vast majority of recent transit projects use light rail); 3 ER 479 (discussing number of light rail systems in United States).

In 2007, the FTA issued a Federal Register notice publicly stating its intent to address light rail in the EIS. 9 ER 2314-17. But the EIS does not, in fact, evaluate a light rail alternative. 3 ER 564-97 (description of alternatives), 3 ER 675- 4 ER 911 (environmental analysis). Instead, it presents three paragraphs purporting to justify light rail's absence from the document. 3 ER 555-56.

The administrative record contains conflicting evidence about the timing and method of light rail's exclusion from detailed consideration: some portions of the record suggest that the decision to exclude light rail took place during the AA process, while others indicate that the decision was made by a "panel of experts" retained by the City during the EIS process. *Compare*, *e.g.*, 2 ER 252; 7 ER 1846 (eliminated during AA) with 3 ER 555-56; 9 ER 2316 (eliminated subsequent to AA).

To the extent that the FTA and the City relied on the AA process to exclude light rail from the EIS, they erred for the reasons set forth above. Moreover, the AA's evaluation of light rail was flawed in its own right. The City claims that the AA process revealed several operational problems with light rail: downtown streets and traffic would limit light rail service to once every three minutes, would

prevent the transit system from expanding its service in the future, and would create the potential for accidents. 3 ER 556. But the Project is not scheduled to provide service more than once every three minutes; in fact, it will operate once every six minutes during most of the day. 3 ER 578. Neither the City nor the FTA has explained when, how, or why expanded or more frequent operations will be necessary. *See* 3 ER 545-47 (Purpose and Need statement does not mention expansion). And the administrative record contains no evidence that the other 30 or so light rail systems in the United States have created unacceptable safety problems. In short, the City's operational concerns are not enough to render light rail unreasonable.

To the extent that light rail was eliminated from consideration by a "panel of experts" appointed by the City, its exclusion presents a different set of problems. The panel of experts appears to have considered only system performance, cost, and reliability; it did not perform or review a full NEPA analysis. 3 ER 564. A technical review conducted by a panel of experts appointed by the project proponent cannot substitute for the rigorous, objective, agency-driven evaluation of environmental issues required by NEPA.

B. The FTA Violated NEPA By Illegally Restricting The Project's Purpose And Need

In defense of the extraordinarily narrow range of alternatives evaluated in their EIS, the City and the FTA claim that the City's preferred elevated heavy rail

line was the only option that would meet their Purpose and Need. For all of the reasons explained above, Appellants dispute that claim.

But *if* it is true (as the FTA and the City insist) that that the City's "locally-preferred alternative" is the only thing capable of meeting the Purpose and Need for action, the EIS violates NEPA by defining the Project so narrowly as to preclude consideration of reasonable alternatives.

An EIS must "briefly specify the underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13. While agencies enjoy some discretion to define the purposes of their proposed actions, they cannot define their objectives in unreasonably narrow terms. *National Parks & Conservation Ass'n v. U.S. Dep't of Interior*, 606 F.3d 1058, 1070 (9th Cir. 2010).

Specifically, an agency "may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action." *National Parks*, 606 F.3d at 1070 (9th Cir. 2010). Otherwise, the results of an EIS "would become a foreordained formality." *Id*.; *see also Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) ("One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration").

The City and the FTA have proposed an extremely broad and impactful project, but have prepared an EIS evaluating the narrowest possible range of alternatives. 3 ER 564-97. They cannot have it both ways. If their Statement of Purpose and Need permits consideration of a range of alternative solutions to Honolulu's traffic problems, the EIS violated NEPA by focusing exclusively on an elevated heavy rail project. 40 C.F.R. § 1502.14(a). On the other hand, if they properly eliminated every single alternative to elevated heavy rail as incompatible with their objectives, the Statement of Purpose and Need violated NEPA by defining those objectives "in terms so unreasonably narrow that only one alternative…would accomplish the goals of the agency's action." *National Parks*, 606 F.3d at 1070 (9th Cir. 2010); *see also Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002); *Simmons*, 120 F.3d at 668-670 (overly-narrow Purpose and Need constitutes an impermissible "end-run around NEPA's core requirement").

II. THE FTA VIOLATED SECTION 4(F)

In Section 4(f), Congress declared a national policy that "special effort should be made to preserve…public park and recreation lands…and historic sites." 49 U.S.C. § 303(a). The Supreme Court has held that this policy gives "paramount importance" to preventing parks and historic sites from being damaged by transportation projects. *Overton Park*, 401 U.S. at 412-13.

But Section 4(f) does not simply require federal agencies to *consider* potential impacts to parks and historic sites when evaluating a transportation project; it imposes a plain and explicit *prohibition* on federal funding or approval of transportation projects using[14] those resources unless there is "no prudent and feasible alternative" and "all possible planning to minimize harm" has been completed.[15] 49 U.S.C. § 303(c).

Federal agencies must comply with this mandate by identifying Section 4(f) resources and evaluating their potential use *before* approving a transportation project. 23 C.F.R. §§ 774.3, 774.9; *N. Idaho*, 545 F.3d at 1158-59; *see also Corridor H Alternatives v. Slater*, 166 F.3d 368, 370-72 (D.C. Cir. 1999); *Monroe County Conservation Council v. Volpe*, 472 F.2d at 700-01 (2d. Cir. 1972) (Section 4(f) analysis is a "condition precedent" to project approval); *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446

[14] "Use" of historic resources and parklands is a concept unique to Section 4(f). In general, a "use" occurs whenever an historic site or park would be physically incorporated into or severely damaged by a transportation project. *See* 23 C.F.R. § 774.15, 774.17 (definitions). In an early and often-cited Section 4(f) case, this Court held that "[t]he word 'use' is to be construed broadly…in cases in which environmental impact seems to be a substantial question." *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972).

[15] In this respect section 4(f) differs from NEPA and NHPA, which are primarily procedural. *See North Idaho*, 545 F. 3d at 1158. The full text of Section 4(f)'s substantive mandate is set forth verbatim in the addendum to this brief. *See* Cir. Rule 28-2.7.

F.2d 1013, 1022-23 (5th Cir. 1971) (invalidating partial approval of highway project made prior to full compliance with Section 4(f)).

In approving the Project, the FTA violated two fundamental requirements of Section 4(f): it approved the Project's use of the Chinatown Historic District and the Dillingham Transportation Building, both of which are historic resources entitled to protection under Section 4(f), despite the existence of multiple feasible and prudent alternatives (*see* § II.A, below); and it approved the Project identifying and evaluating the completing potential damage to Native Hawaiian burials. (*see* § II.B, below).

A. The FTA Violated Section 4(f) By Failing To Avoid The Use Of Historic Sites

Section 4(f) prohibits federal agencies from approving any transportation project "requiring the use of…an historic site" unless "there is no prudent and feasible alternative" and "all possible planning to minimize harm" has been completed. 49 U.S.C. § 303(c).

Here, there is no dispute that the Project will use at least two historic sites located in downtown Honolulu: The Chinatown Historic District and the Dillingham Transportation Building, both of which are listed on the National Register of Historic Places.[16] *See, e.g.*, 2 ER 258, 4 ER 951-54. The only

[16] It bears repeating that there is also no dispute about the fact that that both sites are extremely valuable historic resources. 6 ER 1467 (Chinatown is "one of the

remaining question is whether there was any "prudent and feasible" alternative to the Project's use of those sites. 49 U.S.C. § 303(c); *Overton Park*, 401 U.S. at 411-13.

1. FTA Was Required To Comply With The 2008 Section 4(f) Regulations Regarding Prudence And Feasibility

Overton Park remains the only Supreme Court case to address Section 4(f). There, the Supreme Court found that "only the most unusual situations" are exempted from Section 4(f)'s "clear and specific" preservation mandate. *Citizens to Preserve Overton Park*, 401 U.S. at 411. For that reason, alternatives to the use of Section 4(f) resources are not imprudent unless they present "truly unusual factors" and "unique problems." *Id.* at 413. This Court recognized and followed the Supreme Court's direction in cases like *Stop H-3 v. Dole*. *Stop H-3 v. Dole*, 740 F.2d 1442, 1451-52 (9th Cir. 1984) (applying *Overton Park* and concluding that alternatives are only imprudent "in the most exceptional cases").

Over time, however, *Overton Park* has been applied in a variety of different ways, some of which did not explicitly apply the Supreme Court's rule declaring that "truly unusual factors" and "unique problems" are needed to justify a finding of imprudence. *Overton Park*, 401 U.S. at 413 ("truly unusual factors" and "unique problems"); Final Rule, 73 Fed. Reg. 13,368 (Mar. 12, 2008) (hereinafter,

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few areas of Honolulu which has maintained a sense of identity over the years"); 5 ER 1132 (Dillingham Building is "a very significant 4(f) property").

"Final Rule") (statement of the United States Department of Transportation regarding application of *Overton Park*).[17]

Seeking to eliminate inconsistencies in the application of *Overton Park*, Congress in 2005 directed the United States Department of Transportation to promulgate regulations defining "the factors to be considered and the standards to be applied" in determining the prudence and feasibility of alternatives to the use of Section 4(f) property. Safe, Accountable, Flexible, Efficient Transportation Equity Act ("SAFETEA-LU") § 6009(b), P.L. 109-59, 119 Stat. 1876-77 (Congressional direction); *see also* Final Rule, 73 Fed. Reg. at 13,368 (discussion of same).

In direct response to Congress' direction, the Department of Transportation promulgated a new set of Section 4(f) regulations which (among other things) provided specific definitions of the terms "feasible" and "prudent." 23 C.F.R. part 774 (regulations); 23 C.F.R. § 774.17 (definitions of feasible and prudent); Final Rule, 73 Fed. Reg. at 13,391 (Congressional request was the "primary impetus" for rulemaking).

[17] The full text of the Final Rule is set forth in the addendum to this brief. See Cir. Rule 28-2.7. In addressing the application of *Overton Park*, the United States Department of Transportation (which is charged with administering Section 4(f)) noted that "courts around the country…reach[ed] different conclusions as to how various factors may be considered…to determine whether an avoidance alternative is or is not feasible and prudent." Final Rule, 73 Fed. Reg. at 13,368.

The new regulations became effective in April, 2008, more than two years before FTA approved the Project. Final Rule, 73 Fed. Reg. at 13,368 (effective date); 2 ER 247 (Project approval date). The 2008 regulations supersede any inconsistent provisions of previously-issued regulations or guidance. Final Rule, 73 Fed. Reg. at 13,374. Therefore, in evaluating the feasibility and prudence of alternatives to the Project's use of the Chinatown Historic District and the Dillingham Transportation Building, FTA was required to apply the 2008 Section 4(f) regulations.

2. The 2008 Section 4(f) Regulations Regarding Prudence And Feasibility Required FTA To Apply And Document The "Substantially Outweigh" Test

Four aspects of the 2008 Section 4(f) regulations are particularly important for purposes of this case.

First, the regulations specifically defines seven bases on which a finding of imprudence may be made. 23 C.F.R. § 774.17. Only one of the seven is relevant to this appeal.[18] It provides that an alternative may be found imprudent if it "compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need." 23 C.F.R. § 774.17. Thus, an alternative is not imprudent simply because it is perceived as less desirable than (or

[18] In the District Court, the parties disputed whether a tunnel beneath downtown Honolulu would be so expensive as to be imprudent. 1 ER 75-78. The District Court granted summary judgment to Appellants on that issue. *Id*. Neither the City nor the FTA has appealed; therefore, financial prudence is not at issue.

slightly inconsistent with) the proposed project; imprudence requires a finding that the alternative would render it unreasonable to proceed with any development. *Id.*

Second, the regulations require agencies to weigh the perceived drawbacks of an alternative (*i.e.*, the stated basis for imprudence) against the importance of the specific Section 4(f) property at issue. 23 C.F.R. § 774.17; *see also* Final Rule, 73 Fed. Reg. at 13,391 (definition of imprudence "requires the [agency] to take into consideration the importance of protecting the Section 4(f) property").

Third, the regulations explicitly provide that an alternative is only imprudent if its drawbacks "substantially outweigh" the importance of protecting the Section 4(f) property. 23 C.F.R. § 774.17; *see also* Final Rule, 73 Fed. Reg. 13,368 at 13,391 (Mar. 12, 2008) ("the balancing test is weighted in favor of avoiding the use of Section 4(f) properties"). In promulgating the regulations, the United States Department of Transportation declared that the "substantially outweighs" test is "at the very heart of *Overton Park*." Final Rule, 73 Fed. Reg. 13,368 at 13,392 (Mar. 12, 2008)

Fourth, the regulations require agencies to formally document their findings of imprudence in a Section 4(f) Evaluation. 23 C.F.R. §§ 774.3(a), 774.7(a). The Section 4(f) Evaluation must contain "sufficient supporting documentation to demonstrate" why the alternative is imprudent. 23 C.F.R. § 774.7(a).

In short, for purposes relevant to this appeal the 2008 Section 4(f) regulations required FTA to (1) properly determine that alternatives to the use of the Chinatown Historic District and the Dillingham Transportation Building would "compromise[] the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need"; (2) weigh the drawbacks of those alternatives against the importance of preserving Chinatown and the Dillingham Building; (3) determine that the drawbacks of each alternative "substantially outweigh" the importance of preserving Chinatown and the Dillingham Building; and (4) document its analyses in a Section 4(f) evaluation.

3. The FTA Failed Properly To Evaluate Prudent Alternatives

The FTA failed to satisfy the four requirements described above with respect to Managed Lanes and BRT, both of which are feasible, prudent alternatives to the Project's use of the Chinatown Historic District and the Dillingham Transportation Building.

(a) FTA Arbitrarily And Capriciously Concluded That Managed Lanes Are Imprudent

Implementing a Managed Lanes alternative would involve construction of a 2- or 3-lane roadway for use by express buses and other high-occupancy vehicles. 5 ER 1125. While a portion of the roadway would be elevated, that segment would terminate just west of the downtown area, thereby avoiding impacts to the

Chinatown Historic District and the Dillingham Transportation Building. *Id.* Indeed, Appellant honolulutraffic.com's Managed Lanes proposal was designed to improve transit while avoiding the use of downtown Honolulu's historic resources. *Id.*

The FTA's final Section 4(f) Evaluation does not discuss Managed Lanes as an alternative to the Project's use of Chinatown and the Dillingham Building. 4 ER 951-60. Instead, FTA claims that Managed Lanes were rejected as imprudent during the AA process for failing to meet the Project's Purpose and Need. 2 ER 253. That claim is fundamentally flawed in four respects.

First, the AA process did not provide — or even purport to provide — any Section 4(f) analysis or decisionmaking; instead, it resulted in the City's selection of elevated heavy rail as the locally *preferred* alternative. 9 ER 2318-23; *see also* 9 ER 2368, 2382. As a matter of both law and logic, the fact that one alternative is preferred does not mean that all others are imprudent.[19] 23 C.F.R. § 774.17 (standard for imprudence); *see also Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976) ("[w]hile the document does contain some discussion of the advantages and disadvantages of several alternatives…the analyses do not attempt

[19] Alternatives Screening Memo captures this distinction nicely: "Detailed consideration of the performance results for each concept shows that some concepts may be better than others at improving overall system performance, but they [all] meet the needs of the project and have the potential to improve conditions." 11 ER 2764-65.

to demonstrate, or purport to establish, that each of the alternatives is not 'feasible or prudent,' as those terms are defined within the context of section 4(f)").

Second, Appellees' position presents a fundamental, irreconcilable timing problem. The AA process took place in 2005 and 2006. The Section 4(f) regulations requiring FTA to apply the "substantially outweigh" test became effective in 2008. FTA did not admit that the Project will use the Dillingham Transportation Building and the Chinatown Historic District until 2009 and 2010, respectively. *See* 4 ER 913-14 (use of Chinatown not admitted until 2010). The 2005-2006 AA process could not possibly have applied the 2008 regulations to determine whether the (alleged) drawbacks of Managed Lanes "substantially outweigh" Project impacts identified in 2009-2010.

Third, as explained in greater detail in section I.A.2, above, the AA's analysis of Managed Lanes was arbitrary and capricious. Most notably, neither the City nor the FTA evaluated a three-lane Managed Lanes facility or followed up on the Transit Advisory Task Force's recommendations for developing a reasonable Managed Lanes alternative.

Fourth, unrebutted record evidence shows that Managed Lanes would, in fact, meet the Section 4(f) definitions of prudence and feasibility. A November 4, 2009 letter from Appellant honolulutraffic.com to the FTA (the "2009 Letter") — which appears to be the only document in the 150,000-page administrative record

providing an explicit, detailed evaluation of Managed Lanes pursuant to the 2008 Section 4(f) regulations — provided the agency with data demonstrating that Managed Lanes would increase transit ridership, reduce congestion, carry passengers at average speeds faster than rail, reduce transit operating subsidies, and avoid Section 4(f) resources. 5 ER 1125-27. The FTA did not respond to the 2009 Letter. Nor did it address the Letter in the EIS (issued in 2010) or the ROD (issued in 2011).

The District Court nonetheless held that the FTA properly rejected Managed Lanes as imprudent on the basis of the AA. In doing so, it relied on pre-2008 guidance and case law for the proposition that "if an alternative does not meet the purpose of a project, then the agency does not need to show that 'unique problems' or 'truly unusual factors' exist." 1 ER 72-73. As explained above, that holding is inconsistent with *Overton Park* and the 2008 Section 4(f) regulations, both of which required the FTA to carefully evaluate whether the (alleged) drawbacks of Managed Lanes "substantially outweigh" the value of preserving the Chinatown Historic District and the Dillingham Transportation Building *before* eliminating Managed Lanes from consideration. 23 C.F.R. § 774.17; *see also* Final Rule, 73 Fed. Reg. at 13,391-92. Here, the administrative record contains no evidence that FTA ever undertook such an analysis; in fact, given the timing of the AA process

(2005-2006), the regulations (2008), and the FTA's Section 4(f) evaluation (2009-10), there is no way that the agency could have done so.

The District Court also concluded that Appellants' arguments constitute an improper insistence on "magic words," noting that "[Appellants] point to no statute, regulation, or case requiring that Section 4(f) findings be made explicit in the record." That conclusion is simply not inaccurate. Throughout the proceedings, Appellants have consistently "pointed to" provisions of the 2008 Section 4(f) regulations "requiring that Section 4(f) findings be made explicit in the record." *See* 23 C.F.R. §§ 774.3(a) (requiring Section 4(f) evaluation), 774.7(a) (section 4(f) evaluation must document absence of feasible and prudent alternatives), 774.17 (definitions). Moreover, this is not a case where the FTA undertook the proper analysis but failed to use "magic words" in its findings; rather, this is a case where the FTA's prudence and feasibility analysis did not comply with the requirements of *Overton Park* and the 2008 Section 4(f) regulations.[20]

The District Court dismissed the 2009 Letter, reasoning that the agency was entitled to rely on its own experts. But that is not the issue here. While the FTA

[20] For that reason, the "magic words" cases cited by the District Court do not control here. It is also worth noting that all three cases predate the 2008 Section 4(f) regulations, which require agencies to properly document the presence or absence of feasible and prudent alternatives. 23 C.F.R. §§ 774.3(a), 774.9(a), 774.17.

was entitled to reasonably rely on its own experts, the agency was *not* entitled to simply ignore important information and data. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (failure to "consider an important aspect of the problem" is arbitrary and capricious). The November 4, 2009 letter provided the FTA with data demonstrating that the AA's conclusions about Managed Lanes were inaccurate. The FTA's decision to approve the Project without addressing — or even responding to — that data, whether in an expert report or otherwise, was arbitrary and capricious. *See Butte County v. Hogen*, 613 F.3d 190, 195 (D.C. Cir. 2010).

(b) FTA Arbitrarily And Capriciously Failed To Consider BRT

The 2002 EIS endorsed a BRT system serving precisely the same transportation corridor where the Project is now scheduled to be built. It concluded that BRT would reduce congestion, facilitate transit-oriented development, provide an alternative to private automobile travel, substantially improve mobility for minority and low-income populations, and "offer a fast, efficient travel mode through the congestion for those choosing to travel by transit, because transit vehicles would use [] un-congested exclusive and semi-exclusive transit lanes." 11 ER 2927-30. The 2002 EIS also found that BRT would not use any Section 4(f) resources. 12 ER 3280.

The FTA's final Section 4(f) Evaluation does not discuss BRT as an alternative to the Project's use of Chinatown and the Dillingham Building. 4 ER

951-60. In fact, the BRT system endorsed in the 2002 EIS was not evaluated anywhere in the AA process, the EIS prepared for the Project, or the ROD approving the Project. Instead, the City made a "political decision" not to pursue BRT. 11 ER 2891.

The District Court nonetheless held that the FTA properly rejected BRT as imprudent. 1 ER 78-79. Specifically, it concluded that "bus rapid transit would not meet the purpose and need of the Project because buses would still operate in mixed traffic, congestion would not be alleviated, and it would not have encouraged growth in the project corridor." *Id*. at 27:23-26.

In reaching that conclusion, the District Court confused the alternative of developing a new BRT system (as described above and in the 2002 EIS) with the City's TSM alternative (which was described and rejected during the AA process). Although both alternatives rely on buses — rather than trains — as the primary vehicle for transit service, they are very different in other respects. Most importantly, the TSM alternative involved "optimizing" existing bus routes "without building…a system of dedicated bus lanes," whereas the BRT system endorsed in the 2002 EIS included a new network of exclusive bus lanes and bus stations. *Compare*, *e.g.*, 9 ER 2480 (chart showing that TSM alternative did not include any exclusive transit lanes) *with* 11 ER 2920, 3012 (description of exclusive transit lanes in 2002 EIS).

Moreover, the 2002 EIS demonstrates that BRT can feasibly and prudently meet the objectives of the Project. *Compare, e.g.*, 3 ER 545-46 (Project goals are to improve mobility, reduce congestion, promote transit-oriented development, and serve low-income and transit-dependent households) *with* 11 ER 2927-30, 2939; 12 ER 3230-36, 3326-27, 3331 (BRT would meet those same objectives). Therefore, the FTA's failure to evaluate and adopt the BRT system endorsed in the 2002 EIS was arbitrary, capricious, and a violation of Section 4(f). 49 U.S.C. § 303(c); 23 U.S.C. §§ 774.3, 774.17; *see also Humane Soc'y v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (agency failure to address findings of previous NEPA document was arbitrary and capricious); *Native Ecosystems Council v. United States Forest Serv.*, 418 F.3d 953 (9th Cir. 2005) (unexplained changes in agency analysis were arbitrary and capricious).

B. The FTA Violated Section 4(f) By Failing Fully To Identify And Evaluate Native Hawaiian Burials Before Approving The Project

One of the core elements of Native Hawaiian culture is a belief that burial sites (often referred to as "*iwi kupuna*" or "*iwi*") provide a critical spiritual connection among the living, their ancestors, and the community as a whole. 5 ER 1141. For that reason, burial sites are sacred and not to be disturbed. The Oahu Island Burial Council, a state agency charged with protecting Native Hawaiian historic and cultural properties, has characterized disruption of burial sites as "akin to disrobing a living person and physically handling them against their will." *Id.*

1. Section 4(f) Requires That Potential Impacts Be Identified And Evaluated Prior To Project Approval

Native Hawaiian burial sites are eligible for protection as "historic sites" under Section 4(f). 23 C.F.R. §§ 774.11(e), 774.17 (definition of "historic sites").[21] Appellees admit that the FTA is responsible for identifying potential historic sites and determining whether those sites are, in fact, protected. *See* 2 ER 206:7-10.

The Section 4(f) regulations govern the timing of the FTA's duty to identify and evaluate historic sites. *See* 23 C.F.R. § 774.9. The regulations provide that historic sites must be identified — and potential "use" of those sites evaluated — during the period "when alternatives to the proposed action are under study." 23 C.F.R. § 774.9(a).

The study of alternatives, in turn, must be completed before a project is approved. 23 C.F.R. §§ 774.3, 774.9(b). Therefore, ***all*** historic resources qualifying for protection under Section 4(f) must be identified and evaluated prior to project approval. 23 C.F.R. §§ 774.3, 774.9(a), 774.9(b); *N. Idaho*, 545 F.3d at 1159 ("an agency is required to complete the [Section] 4(f) evaluation for the

[21] There is a narrow exception to this rule for burial sites which are eligible for listing in the National Register of Historic Places but do not merit preservation in place. 23 C.F.R. § 774.13(b). The FTA admits that Native Hawaiian burials merit preservation in place; therefore, the exception does not apply here. *See* 5 ER 1128 ("[c]learly, the *iwi kupuna* merit preservation in place").

entire Project prior to issuing its ROD"); *see also Corridor H Alternatives*, 166 F.3d at 370-72; *Named Individual Members*, 446 F.2d at 1022-23.

In this respect, the Section 4(f) regulations differ significantly from federal regulations implementing Section 106 of the National Historic Preservation Act ("NHPA"). Whereas the Section 4(f) regulations require that all historic resources be identified prior to project *approval*, the Section 106 regulations contain a "phasing" provision, set forth in 36 C.F.R. § 800.4, which allows agencies to defer their efforts to identify and evaluate historic resources until project *implementation*. *Compare* 23 C.F.R. §§ 774.3, 774.9 *with* 36 C.F.R. § 800.4; *see also N. Idaho*, 545 F.3d at 1158-60 (distinguishing between requirements).

This distinction between the two sets of regulations makes sense. Unlike Section 106, Section 4(f) imposes a substantive prohibition on the use of historic resources unless there is no feasible and prudent alternative. 49 U.S.C. § 303(c); *Overton Park*, 401 U.S. at 404-405 (Section 4(f) imposes substantive mandate); *Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior*, 608 F.3d 592, 610 (9th Cir. 2010) (Section 106 imposes procedural requirements). If that substantive mandate (and the Supreme Court's endorsement of it) is to have meaning, agencies must obtain all information needed to identify historic resources, evaluate potential uses of those resources, and consider feasible and prudent alternatives *before* project approval. *Overton Park*, 401 U.S at 411 ("plain and explicit bar" to

approval), 413 ("if the statutes are to have any meaning…"); *see also Named Individual Members*, 446 F.2d at 1023 (artificial segmentation of analysis "makes a joke of" Section 4(f)'s substantive mandate).

This Court explicitly recognized the distinction between the requirements of Section 4(f) (substantive) and the requirements of Section 106 (procedural) in *North Idaho Community Action Network v. United States Department of Transportation*, which explicitly held that "an agency is required to complete the § 4(f) evaluation for the entire Project prior to issuing its ROD." *N. Idaho*, 545 F.3d at 1158-59. Moreover (and equally explicitly), *North Idaho* held that the "phasing" procedures set forth in the Section 106 regulations at 36 C.F.R. § 800.4 *do not* permit Section 4(f) analysis to be deferred until after project approval. *N. Idaho*, 545 F.3d at 1158-59.

2. The FTA Failed To Complete Its Identification And Evaluation Of Native Hawaiian Burials Before Approving The Project

The FTA blatantly and intentionally violated both Section 4(f) and binding circuit law by electing to defer its identification and evaluation of Native Hawaiian burial sites until after approving the Project.

In 2008, the City directed preparation of a preliminary technical report on archaeology. 8 ER 2051-9 ER 2257. The 2008 archaeology report briefly summarized pre-existing literature on Native Hawaiian burials (essentially, studies

prepared in connection with other construction projects in metropolitan Honolulu) and, on the basis of that summary, provided a "provisional" identification of neighborhoods where burial sites are especially likely to be found. 8 ER 2181 (information "should be considered provisional"), 8 ER 2181- 9 ER 2196 (identification of neighborhoods); 8 ER 2061; 9 ER 2195 (charts identifying neighborhoods with high potential for burials).

The 2008 archaeology report did not provide a Section 4(f) analysis of Native Hawaiian burials. It did not involve any original fieldwork or analysis, and therefore did not evaluate the portions of the Project not previously studied by others. *See, e.g.*, 8 ER 2084-87 (methodology), 8 ER 2179 (additional burials likely to be found in areas not previously subject to investigation). Nor did it evaluate the extent to which the Project was likely to use burial sites. 8 ER 2181-9ER 2212 ("consequences" and "historic review" sections of report); 23 C.F.R. §§ 774.15, 774.17 (definitions of use). Nor, for that matter, did it identify or recommend alternative routes avoiding neighborhoods deemed likely to contain burials. 8 ER 2179 - 9 ER 2211.

Indeed, the 2008 archaeology report explicitly stated that "the project proponents" had decided to "defer most of the Project's archaeological resource and evaluation effort" until later. 8 ER 2080; *see also* 8 ER 2088 (describing Project's "phased" approach to identification of resources). The report further

admitted that "the bulk of the archaeological investigation, documentation, and associated mitigation decisions will be deferred and carried out subsequent to conclusion of the Project's federal environmental and historic preservation review." *Id.*

The 2008 archaeology report also concluded that proper identification and evaluation of Native Hawaiian burials would require detailed analyses known as Archaeological Inventory Studies ("AISs"). 9 ER 2198-2211. Specifically, the report found that an AIS represents the appropriate level of "effort" needed to properly identify, evaluate, and mitigate the Project's potential impacts to burial sites. 9 ER 2197-2202 (discussing level of "effort"); 9 ER 2202-11 (identifying neighborhoods requiring AISs).

In April, 2010, the FTA and the City prepared an AIS for one of the Project's four segments. *See* 5 ER 1107 (scope of AIS limited to westernmost 7.4 miles of 20-mile Project). But they approved the Project without completing AISs for any of the other three segments. The portions of the Project for which no AISs were prepared included the neighborhoods identified in the 2008 archaeology report as most likely to contain Native Hawaiian burial sites. *Compare* 5 ER 1107 (scope of AIS) *with* 8 ER 2061; 9 ER 2195 (charts identifying neighborhoods with high potential for burials). The FTA and the City purported to justify their failure to complete other AISs by citing 36 C.F.R. § 800.4, the provision of the Section

106 regulations authorizing "phased" evaluations. 2 ER 302 (ROD); *see also* 8 ER 2079; 9 ER 2197 (archaeology report).

3. The District Court Erred In Upholding FTA's Approach To Identifying And Evaluating Native Hawaiian Burials

The District Court upheld the FTA's "phased" approach to identifying and evaluating Native Hawaiian burials. 1 ER 57-61. Relying on 36 C.F.R. § 800.4, it concluded that the FTA had applied an appropriate "level of effort" to analyzing Native Hawaiian burial issues. 1 ER 60-62. That conclusion suffers from four fundamental errors, each of which requires reversal.

First, the District Court failed to apply the Section 4(f) regulations, which require that potentially historic resources be identified and evaluated prior to project approval. 23 C.F.R. §§ 774.3, 774.9. Although the District Court's Summary Judgment Order decision mentions the Section 4(f) regulations in an introductory paragraph, its *analysis* simply ignores the relevant regulatory provisions. 1 ER 57; 1 ER 57: 14-61: 22.

Second, the District Court's decision is contrary to this Court's unambiguous ruling in *North Idaho*. *See N. Idaho*, 545 F.3d 1158-59 (all Section 4(f) resources must be identified prior to project approval; 36 C.F.R. § 800.4 does not authorize "phased" Section 4(f) compliance). The District Court was required to follow circuit precedent. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th

Cir. 2001) ("[o]nce a panel resolves an issue…the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court").[22]

Third, the District Court erroneously suggested that *North Idaho* may be distinguished because "in contrast to North Idaho…Defendants here have not deferred all Section 4(f) site identification to a later date." 1 ER 60:11-13. There is simply no factual basis for that conclusion (and, tellingly, the District Court cites none). *Id.* In fact, for relevant purposes *North Idaho* is factually similar to this case: both cases involve a linear transportation project scheduled to be built in phases; in both cases, the project proponent prepared a preliminary report generally identifying areas likely to contain historic resources, but deferring detailed identification and evaluation of those resources efforts until later; and in both cases a federal agency completed detailed identification and evaluation efforts for just one of four phases prior to approving the project. *See* 8 ER 2080, 2088; 8 ER 2181- 9 ER 2196, 2198- 2211; 5 ER 1107; *N. Idaho*, 545 F.3d at 1157-60; *North Idaho Community Action Network v. U.S. Dep't of Transp.*, 2008 U.S. Dist. Lexis 24718 at *35-38 (D. Idaho March 27, 2008); *see also* 1 ER 116, 162: 16-25, 163.

Fourth, even if the District Court's focus on "appropriate levels of effort" were proper (and, as described above, it was not), its conclusion on that issue was

[22] While the District Court failed to follow *North Idaho*, the Hawaii Supreme Court relied on that case in finding that approval of the Project violated state law. *See Kaleikini*, 283 P.3d at 87 (Haw. 2012).

erroneous. The District Court concluded that the 2008 burials report represented a sufficient effort to identify and evaluate Native Hawaiian burial sites. 1 ER 61. But the text of the 2008 burials report says that the level of "effort" needed to properly identify and evaluate burial sites involved the preparation of more comprehensive AISs. 9 ER 2197-98. 2022-11. The District Court's reliance on a justification "that the agency itself has not given" —in fact, a justification that is directly contrary to the agency's statements in the administrative record — was plainly erroneous. *Motor Vehicle Mfrs.*, 463 U.S. at 43; *see also Coleman*, 533 F.2d at 444-45 (rejecting litigation position contradicted by agency's statements during administrative process).

CONCLUSION AND REQUESTED RELIEF

Appellants respectfully request this Court to reverse the District Court and remand with instructions to grant summary judgment in favor of Appellants on all claims raised in this appeal. Appellants also seek reasonable attorney fees.

RELATED CASES

Appellants do not know of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2002, the body of the foregoing brief contains 12,453 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. See Fed. R. App. P. 32(a)(5), (6).

By /s/ Nicholas C. Yost

Dated: May 15, 2013

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TABLE OF ADDENDA

ADDENDUM

42 U.S.C. § 4332

Title 42: The Public Health and Welfare
Chapter 55: National Environmental Policy
Subchapter I. Policies and Goals

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

> The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

40 C.F.R § 1502.14

Title 40: Protection of the Environment
Chapter 5: Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 1405.14. Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

49 U.S.C. § 303

Title 49: Transportation
Subtitle I: Department of Transportation
Chapter 3. General Duties and Powers
Subchapter I: Duties of the Secretary of Transportation

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) **Approval of Programs and Projects.—** Subject to subsection (d), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) ***De Minimis*** **Impacts.—**

(1) **Requirements.—**

(A) **Requirements for historic sites**.— The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a *de minimis* impact on the area.

(B) **Requirements for parks, recreation areas, and wildlife or waterfowl refuges.—** The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a *de minimis* impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) **Criteria.—** In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) **Historic sites**.— With respect to historic sites, the Secretary may make a finding of *de minimis* impact only if—

(A) the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that—

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) **Parks, recreation areas, and wildlife or waterfowl refuges**.— With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of *de minimis* impact only if—

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

23 C.F.R. § 774.9

Title 23: Highways
Chapter 1: Federal Highway Administration, Department Of Transportation
Subchapter H - Right-Of-Way And Environment
Part 774 - Parks, Recreation Areas, Wildlife And Waterfowl Refuges, and Historic Sites (Section 4(F))

§ 774.9 Timing.

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in the final EIS or in the ROD. Where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD. Actions requiring the use of Section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notification by the Administration of Section 4(f) approval.

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in § 774.13, if:

(1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or

(2) The Administration determines that Section 4(f) applies to the use of a property; or

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original Section 4(f) approval) would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental NEPA document. If a new or supplemental NEPA document is also required under § 771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with § 771.130(f) of this chapter.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in § 774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

23 C.F.R § 774.17

Title 49: Transportation
Subtitle I: Department of Transportation
Chapter 3. General Duties and Powers
Subchapter I: Duties of the Secretary of Transportation

§ 774.17. Definitions

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

Administration. The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

All possible planning. All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

> (1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.
>
> (2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.
>
> (3) In evaluating the reasonableness of measures to minimize harm under § 774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with § 771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under § 774.3(b).

(5) A *de minimis* impact determination under § 774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

Applicant. The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein.

CE. Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

De minimis impact. (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have “no adverse effect” on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

EA. Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500-1508 and § 771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

EIS. Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500-1508, and §§ 771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

Feasible and prudent avoidance alternative. (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

FONSI. Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and § 771.121 of this chapter.

Historic site. For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Official(s) with jurisdiction. (1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land, the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

ROD. Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and § 771.127 of this chapter.

Section 4(f) evaluation. Refers to the documentation prepared to support the granting of a Section 4(f) approval under § 774.3(a), unless preceded by the word "programmatic." A "programmatic Section 4(f) evaluation" is the documentation prepared pursuant to § 774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

Section 4(f) Property. Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance.

Use. Except as set forth in §§ 774.11 and 774.13, a "use" of Section 4(f) property occurs:

(1) When land is permanently incorporated into a transportation facility;

(2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in § 774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

73 Fed. Reg. 13368-13401 (Mar. 12, 2008)
Agency: Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), DOT
Action: Final Rule

[Beginning on Next Page]

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Federal Transit Administration

23 CFR Parts 771 and 774

49 CFR Part 622

[Docket No. FHWA–2005–22884]

RIN 2125–AF14 and 2132–AA83

Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites

AGENCY: Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), DOT.

ACTION: Final rule.

SUMMARY: This final rule modifies the procedures for granting Section 4(f) approvals in several ways. First, the final rule clarifies the factors to be considered and the standards to be applied when determining if an alternative for avoiding the use of Section 4(f) property is feasible and prudent. Second, the final rule clarifies the factors to be considered when selecting a project alternative in situations where all alternatives would use some Section 4(f) property. Third, the final rule establishes procedures for determining that the use of a Section 4(f) property has a *de minimis* impact on the property. Fourth, the final rule updates the regulation to recognize statutory and common-sense exceptions for uses that advance Section 4(f)'s preservation purpose, as well as the option of applying a programmatic Section 4(f) evaluation. Fifth, the final rule moves the Section 4(f) regulation out of the agencies' National Environmental Policy Act regulation, "Environmental Impact and Related Procedures," into its own part with a reorganized structure that is easier to use.

DATES: *Effective Date:* April 11, 2008.

FOR FURTHER INFORMATION CONTACT: For FHWA: Diane Mobley, Office of the Chief Counsel, 202–366–1366, or Lamar Smith, Office of Project Development and Environmental Review, 202–366–8994. For FTA: Joseph Ossi, Office of Planning and Environment, 202–366–1613, or Christopher VanWyk, Office of Chief Counsel, 202–366–1733. Both agencies are located at 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., for FHWA, and 9 a.m. to 5:30 p.m., e.t., for FTA, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

This document, the notice of proposed rulemaking (NPRM) of July 27, 2006, at 71 FR 42611, and all comments received by the U.S. DOT Docket Facility may be viewed through the Federal Docket Management System (FDMS) at *http://www.regulations.gov*. The FDMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of this Web site.

An electronic copy of this document may be downloaded by using a computer, modem, and suitable communications software, from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the Office of the Federal Register's home page at: *http://www.archives.gov* and the Government Printing Office's Web site at: *http://www.access.gpo.gov/nara*.

Statutory Authority

The principal statutory authority for this rulemaking action is Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, Aug. 10, 2005, 118 Stat. 1144).

Background

Section 4(f) of the Department of Transportation Act of 1966 (Pub. L. 89–670, 80 Stat. 931)[1] prohibits the use of land of significant publicly owned public parks, recreation areas, wildlife and waterfowl refuges, and land of a historic site for transportation projects unless the Administration (as defined in section 774.17 of this part)[2] determines that there is no feasible and prudent avoidance alternative and that all possible planning to minimize harm has occurred. Early case law strictly interpreted Section 4(f), beginning with the Supreme Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) (*Overton Park*). In *Overton Park*, the Court articulated a very high standard for compliance with Section 4(f), stating that Congress intended the protection of parkland to be of paramount importance. The Court also made clear that an avoidance alternative must be selected unless it would present "uniquely difficult problems" or require "costs or community disruption of extraordinary magnitude." *Id.* at 411–21, 416.

Courts around the country have applied the *Overton Park* decision, reaching different conclusions as to how various factors may be considered and what weight may be attached to the factors an agency uses to determine whether an avoidance alternative is or is not feasible and prudent. Some courts have interpreted *Overton Park* to mandate the avoidance of Section 4(f) properties at the expense of other important environmental and social resources. Congress amended Section 4(f) in 2005 to address the uncertainty surrounding its application. Section 6009(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144) directed the Secretary of Transportation to promulgate regulations clarifying "the factors to be considered and the standards to be applied" in determining the prudence and feasibility of alternatives that avoid the use of Section 4(f) property by transportation projects. The FHWA and FTA published a NPRM on July 27, 2006, at 71 FR 42611. The NPRM requested comments on the factors proposed to be considered and standards proposed to be applied when determining whether an avoidance alternative is feasible and prudent. The NPRM also solicited comments on a new, alternative method of compliance created by SAFETEA–LU section 6009(a) for uses that result in a *de minimis* impact to a Section 4(f) property and on other proposed changes to the Section 4(f) regulation. The comment period remained open until September 25, 2006. All comments, including several comments submitted late, have been fully considered in this final rule.

Profile of Respondents

The docket received a total of 37 responses to the NPRM. Out of the 37 responses, 17 were submitted by 20 State and regional transportation agencies; 6 responses were submitted by trade associations; 9 responses were submitted by 11 national and local

[1] Section 4(f) of the Department of Transportation Act of 1966 was technically repealed in 1983 when it was codified without substantive change at 49 U.S.C. 303. A provision with the same meaning is found at 23 U.S.C. 138 and applies only to FHWA actions. This regulation continues to refer to Section 4(f) as such because it would create needless confusion to do otherwise; the policies Section 4(f) engendered are widely referred to as "Section 4(f)" matters.

[2] Section 774.14 of this final rule defines "Administration" as "The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law." All references to the "Administration" in the preamble to this final rule are consistent with this definition.

environmental advocacy groups; 2 responses were from Federal agencies; 1 response was from a State Historic Preservation Officer; and 2 responses were from private individuals. The trade associations submitting comments were: The American Association of State Highway and Transportation Officials, the American Council of Engineering Companies, the American Cultural Resources Association, the American Highway Users Alliance, the American Public Transportation Association, and the American Road and Transportation Builders Association. The Federal agencies submitting comments were the United States Department of the Interior and the Advisory Council on Historic Preservation. The national environmental advocacy organizations submitting comments included the National Recreation and Park Association, The Nature Conservancy, and the National Trust for Historic Preservation, the Rails to Trails Conservancy, the Surface Transportation Policy Project, the Natural Resources Defense Council, and Environmental Defense.

Overall Position of Respondents

The majority of comments received in response to the NPRM were generally supportive of the proposed changes. Most comments agreed with the decision to clarify the feasible and prudent test in a manner that will continue a high level of protection of Section 4(f) properties from the impacts of transportation projects. Respondents from all across the board, including State Departments of Transportation (SDOTs) and the private sector, commented positively on the rule's specificity and the flexibility allowed in dealing with various aspects of Section 4(f). Moreover, there was substantial support for the idea that implementation of the proposed regulations would improve transportation decisionmaking and expedite environmental reviews, while continuing to protect Section 4(f) properties.

On the other hand, several respondents had a generally negative reaction to the proposed regulation. Concerns included that the proposed regulations do not track the actual process the Administration and applicant would follow in writing a Section 4(f) evaluation; that the rule exceeds the requirements of SAFETEA–LU by addressing *de minimis* requirements; that the proposed rule's writing, structure, and organization are very confusing and will cause more litigation; and that the proposed rule will not streamline environmental analysis or adequately protect Section 4(f) properties.

General Comments

A general comment noted that the regulation often refers simply to "refuges" while the statute refers to "wildlife and waterfowl refuges." For consistency, we have replaced "refuges" with the statutory terminology throughout the final rule.

Another general comment expressed concern that the final decisionmaking responsibility under the proposed rule rests with the U.S. DOT. We considered this view but concluded that the statute entrusts final decisionmaking responsibility for approving the use of Section 4(f) property with the Secretary of Transportation, who has delegated that responsibility to the modal Administrations within the U.S. DOT.

Another comment asked if this rule would apply to the Federal Aviation Administration (FAA) and the Federal Railroad Administration (FRA). The final rule will apply only to the FHWA and FTA. However, section 6009 of SAFETEA–LU amended 49 U.S.C. 303, which applies to all U.S. DOT agencies including FAA and FRA. The FAA and FRA may choose to adopt or use this rule and other FHWA and FTA guidance on Section 4(f).

Finally, one commenter suggested that "inside metropolitan areas, any 4(f) related activities, analysis, and decisions should be carried out in the context of the region-wide environmental mitigation element of the metropolitan transportation plan." Reference is made to the transportation planning regulation (23 CFR part 450) published in February 2007. The FHWA and FTA do not agree with this comment. The environmental mitigation discussed in the metropolitan plan generally would not delve into the site-specific impacts of individual projects and the mitigation thereof. That impact assessment will continue to be performed at the project level generally as part of the documentation prepared under the National Environmental Policy Act (NEPA). The discussion in the transportation plan would identify broader environmental mitigation needs and opportunities that individual transportation projects might later take advantage of. For example, as a result of consultation with resource agencies, the plan might identify an expanse of degraded wetlands associated with a troubled body of water that represents a good candidate for establishing a wetlands bank or habitat bank for wildlife and waterfowl. The plan might identify locations where the purchase of development rights would assist in preserving a historic battlefield or historic farmstead. Assessments of each individual project would still be needed to determine the appropriateness of devoting project funds to one of the mitigation activities identified in the plan, to a mitigation bank discussed in the plan, or to new mitigation developed during the NEPA/Section 4(f) process and not mentioned in the plan. We therefore did not make changes in response to this comment.

Section-by-Section Analysis of NPRM Comments and the Administration's Response

For ease of reference, the following table is provided which maps the former sections of the rule into the corresponding new sections:

Former section in part 771	New section in part 774
None	774.1 Purpose.
771.135(a)(1)	774.3 Section 4(f) approvals.
771.135(i) [in part]	774.5 Coordination.
771.135(a)(2), (i) [in part], (j), (k), and (o)	774.7 Documentation.
771.135(b) [in part], (g)(1) [in part], (l), (m) [in part] and (n)	774.9 Timing.
771.135(b) [in part], (c), (d), (e), (g)(1) [in part], (m)(4) and (p) (5)(v)	774.11 Applicability.
771.135(f), (g)(2), (h), (p)(5) [in part], and (p)(7)	774.13 Exceptions.
771.135(p)(3), (p)(4), (p)(5) [in part] and (p)(6)	774.15 Constructive use determinations.
771.107(d) and 771.135(p)(1) and (p)(2)	774.17 Definitions.

In this preamble, all references to provisions of 23 CFR part 774 refer to the final rule as presented herein. Several provisions proposed in the NPRM were moved to new sections in response to comments on the NPRM. A reference to an NPRM section will be explicitly labeled as such.

Section 771.127 Record of Decision

One comment objected to the provision for signing a Record of Decision "no sooner than 30 days after publication of the final environmental impact statement (EIS) notice in the **Federal Register** or 90 days after publication of a notice for the draft EIS, whichever is later." This sentence was incorporated verbatim from the FHWA and FTA's existing regulation implementing the National Environmental Policy Act (NEPA), and it is consistent with the NEPA regulations of the Council on Environmental Quality (CEQ), 40 CFR 1506.10(b). Substantive modifications to the FHWA and FTA joint NEPA regulation are outside the scope of this rulemaking. Thus, we have retained the language as proposed in the NPRM.

Section 774.1 Purpose

This section clarifies the purpose of the regulations, which is to implement 49 U.S.C. 303 and 23 U.S.C. 138 (Section 4(f)). There were no major comments in response to this section. Therefore, we have retained the language as proposed in the NPRM.

Section 774.3 Section 4(f) Approvals

This section sets forth the determination required by the Administration prior to approving a project that uses Section 4(f) property. Paragraph 774.3(a) is the traditional Section 4(f) approval, similar to the previous rule at paragraph 771.135(a)(1). Paragraph 774.3(b) implements the new provision in section 6009(a) of SAFETEA–LU for making *de minimis* impact determinations in lieu of the traditional analysis. Section 774.3 includes cross-references to the definitions for "use," "feasible and prudent avoidance alternative," "de minimis impact," and "all possible planning," which are located in the definitions section, 774.17.

Paragraph 774.3(c) provides new regulatory direction for how to analyze and select an alternative when it has been determined that no feasible and prudent avoidance alternatives exist and all viable alternatives use some Section 4(f) property. The paragraph provides a list of factors that should be considered in the analysis and selection of an alternative. The factors were drawn from case law experience and the FHWA "Section 4(f) Policy Paper." [3] It should be noted that the weight given each factor would necessarily depend on the facts in each particular case, and not every factor would be relevant to every decision. Our intent is to provide the tools that will allow wise transportation decisions that minimize overall harm in these situations, while still providing the special protection afforded by Section 4(f) by requiring the other weighed factors to be severe and not easily mitigated.

Paragraph 774.3(d) provides a clear regulatory basis for programmatic Section 4(f) evaluations, and it distinguishes between the promulgation of new programmatic Section 4(f) evaluations and the application of an existing programmatic Section 4(f) evaluation to a particular project. Paragraph 774.3(e) provides cross-references to the sections of the regulation governing the coordination, documentation, and timing of approvals as a road map for the practitioner.

Many comments were received in response to this section. The majority of comments were generally supportive of the approach proposed in the NPRM, although many offered minor re-wording for clarity. Those suggestions are discussed below for each paragraph. Several comments were strongly opposed to the proposed procedural structure. The NPRM proposed different processes for approving uses with *de minimis* and non-*de minimis* impacts to Section 4(f) property, and the proposed rule requires an additional step when approving projects for which all alternatives use some Section 4(f) property. A use with more than *de minimis* impacts would be processed with the traditional two-step inquiry pursuant to paragraph 774.3(a) (a determination that there is no feasible and prudent avoidance alternative, followed by a determination that the action includes all possible planning to minimize harm to the property). A use with *de minimis* impacts would be processed in a single step pursuant to paragraph 774.3(b) (without the need for the development and analysis of avoidance alternatives, and with the planning to minimize harm folded into the development of measures needed to reduce the impacts of the Section 4(f) use to a *de minimis* level). Projects for which all viable alternatives use some Section 4(f) property would be processed in two steps pursuant to paragraph 774.3(c) (a determination that there is no feasible and prudent avoidance alternative, followed by the selection of an alternative by weighing the factors in paragraph 774.3(c) and a determination, with documentation, that the action includes all possible planning to minimize harm).

The commenters opposed to the structure proposed in the NPRM indicated that the regulation in all situations should first require a determination of which alternative minimizes harm to the Section 4(f) resource(s), followed by a determination of whether that alternative is feasible and prudent and may therefore be selected. Comments stated that in *Overton Park*, the Supreme Court required such a structure for Section 4(f) decisionmaking. We disagree. We have re-read *Overton Park* and considered this concern very carefully, but we do not agree that *Overton Park* stands for the process favored by these commenters or that the process proposed in the NPRM should be restructured. First, the NPRM structure follows the order of the requirements as they appear in the statute. Second, the statute does not require a determination of which alternative minimizes harm, it requires "all possible planning" to minimize harm. It is much more efficient to conduct all possible planning to minimize harm as the last step for the selected alternative than to undertake all possible planning repeatedly for each alternative, including those that are not feasible and prudent, and for a variety of reasons, cannot be selected. Such a process would be very inefficient. Finally, the structure and processes in the final rule are consistent with longstanding FHWA and FTA procedures, with the exception of the procedures for approving the new concept of *de minimis* impacts. For these reasons, we retained the structure proposed in the NPRM.

Another comment strongly recommended the separation of the analysis, coordination, documentation, and timing requirements for *de minimis* impacts and the traditional Section 4(f) evaluation into discrete sections of the regulation. We decided not to make this proposed change because we do not agree that re-structuring the regulation in this manner would make it easier to use. In addition, for those who prefer the suggested structure, the existing joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005,[4] already provides a complete

[3] The FHWA "Section 4(f) Policy Paper," issued March 1, 2005, is available for review online at *http://environment.fhwa.dot.gov/projdev/4fpolicy.htm*. A copy was also placed in the docket for this rulemaking.

[4] *http://www.fhwa.dot.gov/hep/guidedeminimus.htm*.

discussion of the process for determining *de minimis* impacts, separate from any discussion of the requirements for traditional Section 4(f) approvals.

Another comment requested definitions of numerous phrases used in section 774.3; for example, "relative severity of the harm," "relative significance," and "the ability to mitigate." We did not include the requested definitions in the final rule because these words are all used with their common English meanings. The provisions of section 774.3 will be applied to an extensive variety of fact situations, and regulatory definitions would unduly limit the applicability of the provisions to the particular fact situations anticipated in those definitions.

- Section 774.3—One comment suggested that section 774.3, which prohibits the use of Section 4(f) property unless certain determinations are made, should simply refer to "section 4(f) property" instead of "public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site." We agree that this suggested change improves the readability of the regulation, so we substituted the phrase "Section 4(f) property" and moved the terminology proposed in the NPRM into a new definition of "Section 4(f) property" in section 774.17. The defined term is now used throughout the regulation.
- Paragraph 774.3(a)(1)—Another comment asked that we confirm "that an alternative with a net benefit 4(f) use can be chosen over an alternative with no Section 4(f) use." If avoidance alternatives are determined not to be feasible and prudent then the use may be approved, whether or not it is a "net benefit." For FHWA projects, the "Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property," 70 FR 20618, April 20, 2005, would generally apply to situations envisioned by the commenter. This programmatic Section 4(f) evaluation remains in effect. In cases where application of this programmatic evaluation is appropriate, the criteria for evaluating the existence of a feasible and prudent avoidance alternative is specified in the Findings section of the programmatic evaluation. If, through the application of this programmatic Section 4(f) evaluation, the FHWA determines that there are no feasible and prudent avoidance alternatives, then the alternative with a net benefit to Section 4(f) property can be selected. This programmatic Section 4(f) evaluation is applicable only to FHWA actions.
- Paragraph 774.3(b)—One comment requested clarification whether an analysis of avoidance alternatives must be conducted when determining that a *de minimis* impact occurs to a Section 4(f) property. An analysis of avoidance alternatives is not necessary for a *de minimis* impact determination, and the NPRM did not propose to require one. Using words taken directly from section 6009(a) of SAFETEA–LU, the NPRM would have allowed a Section 4(f) *de minimis* impact approval when "the use of the property, including any avoidance, minimization, mitigation, or enhancement measures committed to by the applicant, will have a *de minimis* impact * * *." We agree with the commenter that the term "avoidance" as used in this sentence could cause confusion. The final rule was reworded to clarify that the term "avoidance," along with other mitigation or enhancement measures, is used in the context of project features or designs that minimize harm to the individual Section 4(f) property and not meant to imply that the applicant must search for alternatives avoiding the Section 4(f) property altogether. In this context, the term "avoidance" could mean a partial change to the alignment to avoid a portion of the Section 4(f) property. The sentence now reads "* * * the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in § 774.17, on the property." The development and evaluation of alternatives that completely avoid the use of the Section 4(f) property is not required when the Administration intends to make a finding of *de minimis* impact determination. Indeed, to require such an analysis would defeat the purpose of the *de minimis* provision in the statute. However, if the Administration's intention of making a *de minimis* impact finding is not realized, then a traditional Section 4(f) evaluation, including the development and evaluation of alternatives that completely avoid the use of Section 4(f) property, would be necessary.
- Paragraph 774.3(c)—Two comments criticized the choice of the word "may" referencing the portion of the rule which allows the Administration to approve an alternative that "minimizes overall harm" in light of the enumerated factors. They explain that this articulation leaves the FHWA and FTA with too much discretion. We are concerned that if the words "may select" were replaced with the suggested "shall select" or "must select," the provision would require the agencies to actually fund the project, which is not an obligation imposed by Section 4(f). In response to the comments, after "may approve" we added the word "only." This change clarifies our intent that the FHWA and FTA may only select the alternative that causes the least overall harm.

When there is no feasible and prudent avoidance alternative, many comments suggested various replacements for the phrase "most prudent" as a criterion for choosing among several project alternatives and determining which would cause the least overall harm. After considering the range of proposals and their rationales, we have decided to remove the words "most prudent" from the analysis of overall harm. It appears to cause confusion and it detracts from the purpose of this portion of the rule, which is to provide clear criteria for choosing a course of action when all available alternatives use Section 4(f) property. Deleting the modifier "most prudent" appropriately shifts the focus of the multi-factor inquiry to the requirement of minimizing overall harm.

Several commenters suggested that the proposed weighing of factors in determining the alternative with the least overall harm would not place a "thumb on the scale" in favor of the preservation of the Section 4(f) properties, as required by the statute. The FHWA and FTA agree that a reminder about the preservation purpose of the statute in the balancing of various factors is appropriate. Accordingly, paragraph 774.3(c)(1) now states that the Administration may approve the alternative that causes the least overall harm "in light of the statute's preservation purpose." The preservation purpose of Section 4(f) is described in 49 U.S.C. 303(a), which states: "It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." Virtually identical language appears in 23 U.S.C. 138. This addition does not change the settled principle that where there is no feasible and prudent avoidance alternative, Section 4(f) does not preclude the Administration from selecting any alternative from among those with substantially equal harm. In such instances, the selection will be based primarily on the relative performance of those alternatives with respect to factors (v) "the degree to which each alternative meets the

purpose and need for the project," (vi) "after reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f)," and (vii) "substantial differences in costs among the alternatives."

Two comments proposed incorporating by reference the NPRM definition of "feasible and prudent alternative" into paragraph 774.3(c), explaining that this change would ensure consistency in the use of the term, especially in the meaning of "prudent." We decline to adopt this proposal because the term "feasible and prudent alternative" as used in the definitions and paragraph 774.3(a) signifies an alternative to the use of Section 4(f) property, whereas in paragraph 774.3(c) all alternatives under consideration use some Section 4(f) property and use of the term in this context would be confusing.

Several comments proposed substituting the word "balancing" for the term "considering," as a more precise way to describe the analytical process described in the NPRM. We have adopted the suggestion to replace the term "considering" with the term "balancing" as a better way to articulate the intent of paragraph 774.3(c). We agree that such an inquiry will necessarily involve a balancing of competing and conflicting considerations given that some of the factors may weigh in favor of one alternative, yet other factors may weigh against it. Mere "consideration" of the factors does not capture this idea—the factors must be weighed against each other. How the various factors listed in paragraph 774.3(c)(1) are balanced and weighed in a given instance is within the discretion of FHWA and FTA, and is subject to the facts and circumstances of the particular project and Section 4(f) properties involved. As previously noted, the FHWA and FTA have inserted a reminder that the preservation purpose of the statute in the balancing of the various factors must be given its proper weight.

Several comments interpreted the balancing test of paragraph 774.3(b) as satisfying the statutory requirement to undertake "all possible planning to minimize harm" to the Section 4(f) property. One comment proposed that we add a statement that performing the analysis pursuant to paragraph 774.3(c) satisfies FHWA's obligation to undertake all possible planning to minimize harm to Section 4(f) properties. Other comments suggested that paragraph 774.3(c) should expressly state that any alternative selected based on the enumerated factors should include all possible planning to minimize harm to Section 4(f) property resulting from the use.

Contrary to the interpretation suggested in some comments, we did not intend that engaging in the balancing test alone would fulfill the requirement to undertake "all possible planning to minimize harm" to the Section 4(f) property. The selection of an alternative pursuant to paragraph 774.3(c) is not in itself a Section 4(f) approval and does not complete the evaluation process. After the alternative is selected, the additional step of identifying, adopting, and committing to measures that will minimize the harm to the Section 4(f) property must be documented before Section 4(f) approval can be granted. The extent of effort needed to satisfy the requirement to undertake all possible planning to minimize harm is included in the definitions section, 774.17. When the characteristics of a Section 4(f) property lend themselves to mitigation, and with mitigation the alternative that uses that property would have a lower net impact, the balancing test would weigh these facts and may result in the alternative being selected. We addressed the confusion on this topic by dividing the NPRM paragraphs 774.3(a)(1) and 774.3(b) each into two paragraphs and stating separately in each the requirement to undertake all possible planning to minimize harm. We also slightly reworded the paragraph for additional clarity.

We received a variety of comments regarding the list of factors in paragraph 774.3(c)(1) which the Administration would balance in making the decision on which alternative causes the least overall harm. It is important to keep in mind the situations in which the factors will apply—these factors will only apply after a determination has already been made that there is no feasible and prudent alternative to avoid the use of Section 4(f) property. The point of the analysis is a comprehensive inquiry that balances the net harm to Section 4(f) properties caused by each alternative with all other relevant concerns. One comment provided examples of how the balancing of factors in paragraph 774.3(c) will help transportation agencies arrive at better overall decisions.

We reiterate here the point made above and in the NPRM that this balancing must be done with a "thumb on the scale" in favor of protecting Section 4(f) properties. A scale that takes into account the preservation purpose of the statute must be used to compare the net harm to Section 4(f) properties (factors in paragraphs 774.3(c)(1)(i)–(iv)) with other relevant concerns (the remaining factors). One commenter asked if this means "an alternative with somewhat more harm to Section 4(f) properties could be selected over one with somewhat lesser harm if the one with lesser harm to Section 4(f) properties would result in more adverse effects to non-Section 4(f) properties/higher costs/lesser ability to satisfy needs, or some combination thereof?" The answer is yes, so long as the difference in overall harm is substantial. Where the factors favoring the selection of the alternative with greater harm to Section 4(f) property do not clearly and substantially outweigh the factors favoring the alternative with less harm to Section 4(f) property, the alternative with less harm to Section 4(f) property must be selected. As the significance of the Section 4(f) property or the degree of harm to the Section 4(f) property increases, another alternative must entail correspondingly greater harm to non-Section 4(f) properties to outweigh the harm to the Section 4(f) property and be selected. Because there is necessarily a degree of judgment involved in these decisions, the Administration must be mindful to carefully document its reasoning.

With respect to the factors in paragraphs 774.3(c)(1)(ii) and (iii), one comment suggested that the determinations of the relative severity of the harm and relative significance of the Section 4(f) properties should be made solely by the officials with jurisdiction over the resource. We did not adopt this suggestion because, in practice, competing views are often expressed when multiple Section 4(f) properties are being evaluated. The park may seem more important to the park official than the historic building beside the park, whereas the SHPO may feel just the opposite. The Administration, after listening to these competing points of view, must ultimately decide. In the statute, Congress chose to entrust the Secretary of Transportation with the final decision.

With respect to the factor in paragraph 774.3(c)(1)(i), "The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property)," one comment suggested that only "legally binding" mitigation (i.e., mitigation committed to in the ROD) should be considered. We do not agree because the purpose of the balancing test is to select an alternative, so there is no legally binding mitigation at that point in the process. However, we expect that mitigation used to offset harm would be a matter of record and the appropriate commitments should be included in the project decision.

Another comment stated that nothing in the regulation requires the adoption of any mitigation relied upon in this factor. This is not true. The new definition of "all possible planning" to minimize harm sets forth specific criteria which will govern whether the identified mitigation must be adopted. Where the availability of adequate mitigation measures is a factor that is relied upon in selecting an alternative, the measures that were identified in the analysis must be incorporated into the project through the CE determination, ROD or FONSI, or by other means. There is additional discussion of this issue in the analysis of section 774.17 below.

Several commenters felt that the only consideration in alternative selection should be minimizing harm to the Section 4(f) properties. Consequently, in their view, the factors in NPRM subparagraphs 774.3(b)(5) through (8), which introduce non-Section 4(f)-related concerns into the selection process, should be eliminated. We have carefully reviewed those comments but decided to keep the first three of these factors, now numbered 774.3(c)(1)(v)–(vii) for the reasons discussed below. The final factor in the NPRM, concerning joint planning, was dropped for other reasons, as discussed below following the discussion of the factors retained.

The factors in 774.3(c)(1)(v)–(vii) were retained in the final rule for several reasons. First, the selection of an alternative in instances where all viable alternatives use some Section 4(f) property must be distinguished from the selection process where there is a viable alternative that avoids using Section 4(f) property. While the caselaw is not entirely consistent, there is ample support for the FHWA and FTA's approach in the courts. The Supreme Court's *Overton Park* decision did not consider this aspect of Section 4(f), as that case turned on the FHWA's failure to document any consideration of feasible and prudent alternatives to the use of the park. Second, since Section 4(f) was enacted in 1966, Congress has identified many other types of environmental resources for protection under Federal law besides Section 4(f) properties; for example, threatened and endangered species, prime farmland, and wetlands of national importance. There is nothing in SAFETEA–LU to suggest that Section 4(f) protection should trump all other concerns when there is no feasible and prudent avoidance alternative. The FHWA and FTA's approach interprets Section 4(f), as amended by SAFETEA–LU, in a way that gives appropriate weight to all of the resources impacted by a proposed transportation project. Third, 23 U.S.C. 109(h) directs FHWA to make final project decisions "in the best overall public interest, taking into account the need for fast, safe and efficient transportation, public services, and the costs of eliminating such adverse effects and the following: (1) Air, noise, and water pollution; (2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services; (3) adverse employment effects, and tax and property value losses; (4) injurious displacement of people, businesses and farms; and (5) disruption of desirable community and regional growth." FTA law similarly requires that "the preservation and enhancement of the environment and the interest of the community in which the project is located" be considered. (49 U.S.C. 5324(b)(3)(A)(ii)). These statutes support the FHWA and FTA's interpretation of Section 4(f) as allowing the consideration of other significant impacts when it is not possible to avoid using Section 4(f) property. As described in the NPRM preamble, the balancing approach adopted in this rule enables the Administration to take all of these concerns into account by allowing serious problems to outweigh relatively minor Section 4(f) impacts, as well as Section 4(f) impacts that can be satisfactorily mitigated.

One comment pointed out that the list of factors in paragraph 774.3(c)(1) is inconsistent with the lists in the proposed definitions of "all possible planning" and "feasible and prudent alternative" in 774.17, which includes some similar and some additional factors. This disparity, in the commenter's opinion, confused the application of the factors in the overall Section 4(f) analysis. This comment proposed that we combine the multi-factor lists. We considered this comment, but decided not to adopt it. The three lists of factors included in the NPRM apply to three distinct situations. The factors enumerated in the proposed definition of "feasible and prudent alternative" are used to determine whether an alternative that avoids using Section 4(f) property exists. If the analysis concludes that no such avoidance alternative exists, then a different set of factors, those in paragraph 774.3(c), comes into play to guide the Administration in selecting from among the alternatives all of which use some Section 4(f) property. Once an alternative is chosen, if it uses Section 4(f) property, then the Administration has a further obligation to undertake all possible planning to minimize harm to that property. The third set of factors in the definition of this term is used to determine the appropriate extent of the planning to minimize harm.

With respect to the factor in paragraph 774.3(c)(1)(vii), "[e]xtraordinary differences in costs among the alternatives," some comments suggested that the word "extraordinary" should be deleted, thus allowing any difference in costs to be considered and balanced with all other factors in determining which of the alternatives minimizes overall harm. Since this factor is a comparison of the costs of alternatives under consideration, all of which use Section 4(f) property, the FHWA and FTA agree that the difference in cost would not have to be "extraordinary," but that the magnitude of the difference would determine its appropriate weight when balancing it with the other factors. Consideration of a minor difference in the cost among alternatives in the balancing test would be inappropriate in that there must be a measurable and significant degree of difference. For this reason we are substituting the word "substantial" in place of the word "extraordinary" in this factor. Requiring a substantial cost difference between alternatives emphasizes the importance of devoting funds to minimizing harm to the Section 4(f) property and other important resources more so than if any difference in cost were allowed to influence the choice of alternatives. When deciding whether to consider a cost difference "substantial," in addition to considering the cost as a number in isolation, the FHWA and FTA may consider factors such as the percentage difference in the cost of the alternatives; how the cost difference relates to the total cost of similar transportation projects in the applicant's annual budget; and the extent to which the increased cost for the subject project would adversely impact the applicant's ability to fund other transportation projects.

Several comments expressed confusion regarding the factor in NPRM paragraph 773.4(b)(8), "[A]ny history of concurrent planning or development of the proposed transportation project and the Section 4(f) property." Some commenters were concerned about how this factor was related to, and would apply in, the balancing of factors and the ultimate determination of overall harm. Others suggested that the scope of concurrent planning in this context was unclear and others thought the term should be defined in section 774.17. In response to these comments, we have decided to eliminate concurrent

planning as a factor in determining overall harm. Concurrent planning, in which the "concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs," more appropriately relates to the applicability of Section 4(f) requirements to a specific property. Concurrent planning in this context is addressed in paragraph 774.11(i).

Another comment pointed out the lack of reference to the no-action alternative in this paragraph, and asked whether that means it need not be discussed in the evaluation. The no-action alternative should always be considered in a Section 4(f) evaluation and the reasons for not selecting it must be identified.

- Paragraph 774.3(d)—Several comments on the NPRM indicated that programmatic Section 4(f) evaluations are misunderstood by some. In response, we have clarified what is meant by a programmatic Section 4(f) evaluation in paragraph 774.3(d), and have specified the process for the development of a programmatic evaluation as well as the application of an existing programmatic evaluation. The paragraph makes clear that a programmatic Section 4(f) evaluation does not automatically satisfy Section 4(f) for an entire class of projects—rather it establishes a simpler approach to compliance that is tailored to that class of projects. They are not exemptions and individual projects must still be reviewed in accordance with the process established in the programmatic Section 4(f) evaluation.
- Paragraph 774.3(e)—No substantive comments were received on this subsection. We have retained the language as proposed in the NPRM.

Section 774.5 Coordination

One general comment recommended the separation of the analysis, coordination, format, and timing requirements for *de minimis* impacts into discrete sections of the regulation. We decided not to make this proposed change because we believe that grouping all of the requirements for coordination, all of the requirements for timing, and all of the requirements for documentation together is a reasonable structure for the regulation and is more consistent with the familiar, former regulation. For practitioners who need more guidance on the *de minimis* impact requirements, the joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts," December 13, 2005, discusses all of the *de minimis* impact requirements together in one document.

Another general comment suggested that this section should be revised to explain the coordination of reviews performed under NEPA, Section 4(f), and Section 106 of the National Historic Preservation Act. We did not adopt this suggestion because it is already stated in 23 CFR 771.105(a), which explains that it is the policy of the FHWA and FTA that "[t]o the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation." A similar statement with regard to the content of environmental documents is found at 23 CFR 771.133.

We received a general comment that clear guidance is needed on the coordination process for Section 4(f) uses with impacts greater than *de minimis*, to ensure that the officials with jurisdiction are fully engaged in the development of avoidance alternatives and the determination of appropriate measures to minimize harm. We agree that coordination with the officials with jurisdiction is important and integral to Section 4(f) compliance, and note that the regulation already includes explicit coordination requirements in paragraph 774.5(a). Additional guidance is included in the FHWA "Section 4(f) Policy Paper," March 2, 2005, so we did not make any changes in response to this comment.

One general comment requested that we clarify in the preamble to this regulation that the existing Section 4(f) *de minimis* impact guidance, issued on December 13, 2005, remains in effect and is not superseded by these regulations. We agree that the inclusion of requirements for *de minimis* impacts in these regulations was not intended to supersede or replace the existing guidance, but to ensure that the current Section 4(f) regulation is consistent with the Section 4(f) statute, as amended by SAFETEA–LU. The joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005, remains in effect, but the Administration may review it and make clarifying revisions some time in the future. The FHWA "Section 4(f) Policy Paper," March 2, 2005, which was written prior to enactment of the SAFETEA–LU amendment to the Section 4(f) statute, remains in effect except where it could be interpreted to conflict with this regulation, in which case the regulation takes precedence. The FHWA plans to update the "Section 4(f) Policy Paper" to reflect SAFETEA–LU and this final rule.

One comment requested that the regulation address the additional coordination that is needed when the impacted Section 4(f) property was created or was improved with funds from various programs administered by the U.S. Department of the Interior. Guidance for such coordination is already addressed in the FHWA "Section 4(f) Policy Paper" and in the "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources." However, because we agree that this coordination is important, we addressed the comment by adding a new paragraph (d) to section 774.5: "When Federal encumbrances on Section 4(f) property are identified, coordination with the appropriate Federal agency is required to ascertain the agency's position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval."

- Paragraph 774.5(a)—A number of comments focused on the length of the notice and comment period. The NPRM proposed to continue the current 45-day comment period. The comments urged a period ranging from as short as 15 days, up to a maximum of 60 days. Specifically, one comment urged a maximum of 60 days with presumed concurrence if no comment was received within 15 days after the deadline. One comment urged a period of 60 days, but suggested that comments be open to the public and other Federal agencies, and not just to those with jurisdiction over the Section 4(f) property. One comment urged a period of at least 45 days, not to exceed 60 days.

Several commenters reasoned that a period with a maximum of 60 days would be harmonious with the streamlining provisions of section 6002 of SAFETEA–LU and the comment period provided by Section 106 of the National Historic Preservation Act for consultation with State Historic Preservation Officers and the Advisory Council on Historic Preservation. Those urging a provision for presuming concurrence if the comments are not received by various deadlines stated that such a provision is needed because, in the experience of many applicants, comments are routinely submitted many months late. Another commenter thought the requirement for the U.S. Department of the Interior (DOI) to review Section 4(f) evaluations added minimal value to the process and suggested that DOI's role should be eliminated altogether.

After considering all of the views submitted, we decided to keep the 45-day comment period in the final rule.

This period appears to be a reasonable length of time, in light of the current practice with which all are familiar. We did not eliminate the requirement for a comment period because the statute itself requires coordination with certain agencies, including DOI. However, we decided to adopt a deadline for the receipt of comments by adding the following at the end of paragraph 774.5(a): "If comments are not received within 15 days after the comment deadline, the Administration may assume a lack of objection and proceed with the action." This change addresses the concern that comments are routinely sent late, but it allows flexibility for the Administration to extend the comment period in individual cases upon request.

• Paragraph 774.5(b)—Several comments requested additional requirements for public notice, review, and comment related to *de minimis* impacts to historic properties. In response, the FHWA and FTA decided to accept the wording suggested by one of the commenters. Paragraph 774.5(b)(1)(iii) now says: "Public notice and comment, beyond that required by 36 CFR Part 800, is not required." The regulation is consistent with the provisions of SAFETEA–LU that allow the *de minimis* impact determination to be made based on the process required under section 106 of the National Historic Preservation Act.

Other comments requested additional guidance on public notice, review, and comment related to *de minimis* impacts to parks, recreation areas, and wildlife/waterfowl refuges. One commenter believes that public notice, review, and comment are adequately covered by NEPA and its implementing regulations, and any additional opportunities are unnecessary. We decided to retain the proposed regulatory text on public notice and comment, but to add: "This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document." SAFETEA–LU requires public notice and the opportunity for public review and comment before the Administration can make a *de minimis* impact determination. Where the NEPA process already provides opportunities for public notice, review, and comment [i.e., for environmental assessments (EAs) and EISs], the same opportunities can be used for projects where the Administration is considering a *de minimis* impact determination. For those actions that do not routinely require public review and comment under NEPA [e.g., categorical exclusions (CEs) and certain reevaluations] a separate public notice and opportunity for review and comment will be necessary for a *de minimis* impact determination. In these situations, the public notice and opportunity for review and comment should be based on the specifics of the situation and commensurate with the type and location of the Section 4(f) property, impacts, and public interest.

• Paragraph 774.5(b)(1)—Several comments suggested that the concurrence of the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) in a proposed *de minimis* impact determination should be assumed if 30 days pass without written concurrence. We did not adopt this change because the statute explicitly requires written concurrence in the Section 106 determination to support a *de minimis* impact determination. The joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005, explains the use of Section 106 programmatic agreements (PA) in making *de minimis* impact determinations. It says that when a Section 106 PA explicitly states that an individual Section 106 determination of "no historic property affected" or "no adverse effect," is made in accordance with the PA, it may be relied upon as the basis for *de minimis* impact determination. If the PA specifies that the SHPO or THPO's concurrence in such a determination may be assumed after a specified timeframe, then the SHPO or THPO's signature on the PA itself constitutes the required written concurrence in the Section 106 determination that is necessary for a *de minimis* impact determination. With such a PA, a SHPO or THPO is within its rights asking for a side agreement that would specify conditions under which a nonresponse would not be used as the basis for a *de minimis* impact determination. In any case it is expected that the SHPO or THPO will be apprised of the agency's intention to make a *de minimis* determination under the PA approach and afforded an opportunity to engage in the process on a project-by-project basis, if desirable by either party.

Several comments stated that paragraph 774.5(b)(1) should spell out the written concurrences necessary to support a *de minimis* impact determination for a historic property in order to clarify which concurrences are required. We agree, and the final rule explicitly states which parties must concur, consistent with 49 U.S.C. 303(d)(2)(B) and 23 U.S.C. 138(b)(2)(B).

A number of comments objected to the statement in paragraph 774.5(b)(1) that public notice and comment other than the Section 106 consultation is not required. These commenters pointed out that the Section 106 regulation (36 CFR part 800) has its own public involvement requirements, which may apply in a particular case. One commenter suggested alternative language to recognize that pertinent requirements of the Section 106 regulation must be met. We adopted the suggested language, and the sentence now says that "public notice and comment, beyond that required by 36 CFR part 800, is not required."

• Paragraph 774.5(b)(2)—Several commenters requested clarification of the sequence of events for coordinating with the official(s) with jurisdiction over parks, recreation areas, and refuges prior to making *de minimis* impact determinations. These commenters proposed revising the regulation to enable the Administration to notify the official(s) with jurisdiction of its intent to make a *de minimis* impact determination at any time during the coordination process, instead of postponing notification until the conclusion of the public review and comment period. The FHWA and FTA decided to adopt this proposed change by moving the clause "following an opportunity for public review and comment" from the beginning of the second sentence and inserting it directly before the concurrence requirement: "Following an opportunity for public review and comment as described in paragraph (b)(2)(i) of this section, the official(s) with jurisdiction over the property must concur in writing * * *." The regulation would still require the Administration to wait until after the public comment process before making a formal request for concurrence, but no specific timeframe is provided for notifying the officials with jurisdiction. The revised paragraph will begin with "The Administration shall inform the official(s) with jurisdiction of its intent * * *." The FHWA and FTA reasoned that it would be beneficial to have the flexibility to notify the official(s) with jurisdiction early in the coordination process to ascertain the position of the officials and so that the preliminary views of such official(s), if available, can be included in the notice provided to the public.

One commenter suggested eliminating the provision that requires the Administration to inform the official(s) with jurisdiction of the intent to make a *de minimis* impact determination based on those officials' concurrence that the project will not adversely affect the Section 4(f) property. The FHWA and FTA decided not to make this

change. The sequence of events leading to the Administration's finding is important and will ensure that the official(s) with jurisdiction understand that their written concurrence is required for the Administration's *de minimis* impact determination and that they agree with any proposed mitigation necessary to the *de minimis* impact determination.

One commenter suggested that the FHWA and FTA add a further provision to the coordination process in paragraph 774.5(b)(2) that would expressly allow the concurrence in the *de minimis* impact determination to be combined with other comments provided by the official(s) on the project. The FHWA and FTA decided to follow this recommendation and incorporated the proposed language: "This concurrence may be combined with other comments on the project provided by the official(s)." Another comment asked for clarification whether the coordination can be accomplished in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document. The FHWA and FTA's NEPA regulation provides for integrated procedures in 23 CFR 771.105 and 771.133, so this point was clarified as suggested. With the clarifications described above, the new provision will help streamline the environmental review process because it will allow the official(s) with jurisdiction to combine comments on the *de minimis* impact proposal with comments submitted on other environmental issues related to the project.

- Paragraph 774.5(c)—One commenter believed that the coordination requirements discussed in section 774.5 did not differentiate between individual and programmatic Section 4(f) evaluations and requested clarification. Programmatic evaluations are differentiated by virtue of being addressed in a separate paragraph, 774.5(c). We have now clarified what is meant by a programmatic evaluation in paragraph 774.3(d), as previously discussed.

Another comment suggested a 60-day comment period be required when there is a use of land from a Section 4(f) property that is covered by a programmatic Section 4(f) evaluation. The comment also suggested that the coordination during the use of a programmatic Section 4(f) evaluation should "be open to the public and not just the official(s) with jurisdiction." Programmatic Section 4(f) evaluations provide procedural options for demonstrating compliance with the statutory requirements of Section 4(f). The FHWA has issued five nationwide programmatic Section 4(f) evaluations. (FTA has not issued any, but has plans to do so.) Before being adopted, all of the FHWA programmatic evaluations were published in draft form in the **Federal Register** for public review and comment. They were also provided to appropriate Federal agencies for review. Each programmatic evaluation contains specific criteria, consultation requirements, and findings that must be met before the programmatic evaluation may be applied on any given project. A primary benefit to using this prescribed step-by-step approach is a reduction of the time it takes to achieve Section 4(f) approval.

The NPRM did not stipulate any specific comment period or coordination process when programmatic Section 4(f) evaluations are used. When applied to individual projects each of the five approved programmatic evaluations has coordination requirements, but none of them requires a specific comment period.[5] We did not make the changes proposed by the commenter because we believe the imposition of additional comment periods, coordination periods, or public involvement at the time a programmatic evaluation is applied to an individual project would severely limit the effectiveness of this approach.

One commenter expressed concern about the potential lack of public notice or opportunity to comment on the evaluation of certain historic resources, such as bridges, under the relevant programmatic Section 4(f) evaluation, when the project is processed with a NEPA categorical exclusion (CE). It was suggested that, at a minimum, a CE project processed under a programmatic Section 4(f) evaluation should be posted on the applicant's Web site. The public involvement requirements related to categorical exclusions, as well as other classes of actions, are addressed in 23 CFR 771.111. The public involvement requirements for application of a particular programmatic Section 4(f) evaluation are specified in the programmatic evaluation itself. Hence, the FHWA and FTA concluded that the issue has been adequately addressed and additional requirements are not necessary.

Section 774.7 Documentation

This section contains the requirements related to the documentation of the various Section 4(f) analyses and approvals. In the NPRM this section was titled "Format." The title was changed to "Documentation" to more accurately reflect the content of this section.

In response to a general comment that it was difficult to locate the requirements for *de minimis* impact determinations, the section was re-ordered so that it now tracks the order of section 774.3, "Section 4(f) approvals." Thus, paragraph 774.7(a) now addresses the documentation of Section 4(f) evaluations prepared to comply with approvals under 774.3(a); paragraph 774.7(b) contains the format requirements for *de minimis* impact determinations under paragraph 774.3(b); and paragraph 774.7(c) contains the requirements for determinations of the least overall harm under paragraph 774.3(c) when there is no feasible and prudent avoidance alternative. Paragraphs (d)–(f) are additional documentation requirements for particular situations that have no corresponding paragraphs within section 774.3.

Several comments demonstrated confusion over NPRM paragraph 774.7(g) which contained the documentation requirements for programmatic Section 4(f) evaluations. This material was moved to paragraph 774.3(d) in the final rule so that the discussion of approvals using programmatic Section 4(f) evaluations and the documentation requirements are now grouped together. We felt this restructuring was needed to clarify the difference between promulgating a programmatic Section 4(f) evaluation and the subsequent application of the programmatic evaluation to an individual project decision.

Paragraph 774.7(e) in both the NPRM and this final rule contains the requirements for making Section 4(f) approvals for tiered environmental documents. This paragraph received the most comments of any part of section 774.7; substantial parts of the paragraph were re-worded for clarity in response to the comments, as described below.

- Paragraph 774.7(a)—One comment suggested that the last part of the sentence be revised to repeat the exact language from the statute. This section, though, does not set forth the standard

[5] Three of the programmatic Section 4(f) evaluations have public involvement requirements. The "Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property" requires project-level public involvement activities consistent with 23 CFR 771.111. The "Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites" and the final "Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges" both require coordination with various parties in accordance with 36 CFR part 800, which may include members of the public identified as interested persons, or consulting parties..

for Section 4(f) approvals, but rather provides the format of the documentation for Section 4(f) approvals. Thus, the language need not exactly duplicate the statutory standard for approvals, which is implemented by section 774.3. We believe that the language used is consistent with the statute but provides direction for project applicants preparing Section 4(f) documents.

Another comment suggested adding the language "or reduce its use significantly" after "that would avoid using the Section 4(f) property." We did not adopt this change because the language at the end of the paragraph requires a summary of "the results of all possible planning to minimize harm to the Section 4(f) property." The documentation of "all possible planning to minimize harm" would show, among other things, how any reductions in the use of Section 4(f) property would be accomplished. In addition, the Section 4(f) caselaw is fairly uniform in holding that an alternative that uses Section 4(f) property is not properly considered an "avoidance alternative" under the statute. Incidentally, the words "that would avoid using the Section 4(f) property" which delimited "avoidance alternative" in the NPRM, have now been deleted as redundant.

• Paragraph 774.7(b)—Regarding paragraph 774.7(b), one commenter requested clarification that the mitigation measures suggested in the proposed regulation should be considered only if an applicant has committed to incorporate the measures into the project. The commenter suggested changing the provision to refer to "any avoidance, minimization, mitigation, or enhancement measures committed to by the applicant." The FHWA and FTA decided not to make this proposed change because the statute requires any measures that are required to be implemented as a condition of approval of a *de minimis* impact determination to be part of the project. An applicant does not have a choice regarding whether to incorporate the measures into a project if the measures were mentioned when the impacts were classified as *de minimis*. Accordingly, the FHWA and FTA determined that the suggested language would be redundant since, as the regulation currently states, the applicant will automatically be required to incorporate these measures.

Another commenter suggested that the determination whether the project impacts are *de minimis* for Section 4(f) purposes should be made before mitigation is applied, not after. This commenter claimed that this regulation would allow an applicant to illegally characterize the impacts of a project that are greater than *de minimis* impacts as *de minimis* to avoid having the project analyzed, assessed, and evaluated. The FHWA and FTA did not accept this proposal because it violates the governing statute. As amended by section 6009(a) of SAFETEA–LU, Section 4(f) plainly requires that "[t]he Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project." 49 U.S.C. 303(d)(1)(C). Mitigation measures must be applied up front, with the determination made after taking such mitigation into account. The proposed language has been retained.

For consistency with paragraph 774.3(b) and the statute, the word "determination" was substituted for "finding" in this paragraph.

• Paragraph 774.7(c)—One commenter pointed out that framing the regulatory provision in terms of what an "applicant" must do is misleading as it implies that, contrary to statute, the applicant has a decision-making role in the Section 4(f) approval process. This commenter proposed rewriting paragraph (c) to reflect the decision-making role of the Administration in the Section 4(f) approval process: "the Administration, in consultation with the applicant, must select. . . ." Section 4(f) assigns the responsibility for evaluating and approving transportation projects to the Secretary of Transportation (who, in turn, has delegated it to the modal administrations within the U.S. DOT). The FHWA and FTA agree with the comment that the Administration, and not the applicant, has the statutory authority to approve an alternative under Section 4(f), but declines to adopt the commenter's proposed text. Instead, the FHWA and FTA have decided to convey the same idea by using language consistent with paragraph 774.3(c), to which the requirements in paragraph 774.7(c) pertain. The relevant portion of the provision now reads as follows: "the Administration may approve only the alternative that causes the least overall harm in accordance with § 774.3(c)." This language relies heavily on the revised text of paragraph 774.3(c) and appropriately reserves the decision-making role to the Administration.

In a slight variation on the comment discussed above, one commenter objected to the use of the word "applicant" because it fails to recognize the role of most applicants and the Administration as joint lead agencies in preparing the NEPA review of the project, in accordance with SAFETEA–LU section 6002. The commenter suggested changing the provision to read "the applicant, with approval from the NEPA Lead Agency, must select. * * *" The FHWA and FTA did not follow this recommendation because, whereas the responsibility for document preparation, review, and approval under NEPA is now shared between the Administration and the recipient of Federal funds, the Administration has the exclusive statutory authority to grant Section 4(f) approvals. An applicant's role under NEPA does not authorize it to make Section 4(f) approvals unless the applicant is a State that has assumed Section 4(f) responsibilities as part of an assumption of environmental responsibility under applicable law, such as 23 U.S.C. 325, 326, or 327.

• Paragraph 774.7(d)—This paragraph requires a legal sufficiency review for certain Section 4(f) approvals. One commenter questioned its need. The Administration has legal responsibility to ensure compliance with applicable environmental laws, regulations, and Executive Orders. Section 4(f) has been extensively interpreted by the Courts, and the application of the law to a specific approval may involve the application of complex legal principles. The Administration's application of Section 4(f) benefits from the legal sufficiency review. Moreover, Administration attorneys familiar with the judicial interpretations of Section 4(f) law in the Federal Circuit where the project is located perform the legal sufficiency review. Thus, the legal sufficiency review enhances the likelihood that the Administration's Section 4(f) decisions will be appropriate and will be sustained in Federal court if litigation ensues. Finally, the legal sufficiency review is required by a Department-wide order implementing Section 4(f). See DOT Order 5610.1C. The requirement for a legal sufficiency review is retained.

Paragraph 774.7(d) says: "The Administration shall review all Section 4(f) approvals under §§ 774.3(a) and 774.3(c) for legal sufficiency." A commenter suggested that the meaning of "legal sufficiency" in the context of a Section 4(f) approval be defined. We decline to define "legal sufficiency" as there are too many variable factors considered in a legal sufficiency review. These include, but are not limited to, the type of Section 4(f) approval under consideration, the law of the Federal Circuit where the project is located, and, most importantly, the facts and circumstances of the particular project. Legal sufficiency reviews assess the Section 4(f) documentation from the

perspective of legal standards, as well as technical adequacy. Because of the inherent differences among document writers and reviewers, the projects, court decisions in the relevant circuit, and other factors, the comments on legal sufficiency for one project may differ in content and format from those for another project with similar issues. This variability makes defining a standard for the review of legal sufficiency impractical.

• Paragraph 774.7(e)—Numerous comments were received about this section, which concerns Section 4(f) approvals of projects developed using tiered environmental impact statements. Most commenters thought it was helpful to clarify the different levels of detail necessary at the different stages, although several negatively commented on the proposal to consider the preliminary first-tier Section 4(f) approval final. Nearly all commenters were confused by some aspect of what the FHWA and FTA intended by authorizing a "preliminary" Section 4(f) approval to be made at the conclusion of the first tier stage and a final Section 4(f) approval at the conclusion of the second-tier stage. One commenter thought we intended to "immunize" the first-tier Section 4(f) approval from reconsideration, even in the event it should subsequently be determined no longer valid during the second tier review. This was not our intent. A variety of revisions were suggested to clarify the intent of this section. All of these suggestions were considered in revising the provision to clarify what is required.

The intent behind this section is that the relationship between the preliminary and final Section 4(f) approval should be analogous to the relationship between a first-tier EIS and a second-tier NEPA document. In the same manner that a second-tier NEPA document can rely on the conclusions of the first-tier EIS (thereby avoiding duplication), the final Section 4(f) approval may rely upon the conclusions reached in the preliminary Section 4(f) approval. However, both the second-tier NEPA document and the final Section 4(f) approval must still take into account any significant new information or relevant details that become known during the second-level review.

If the second-tier NEPA document identifies a new or additional use of Section 4(f) property with greater than *de minimis* impacts, then additional consideration of feasible and prudent avoidance alternatives and of potential measures to minimize harm to Section 4(f) property will be necessary. If the second-tier NEPA document does not identify any new or greater than expected use of Section 4(f) property, or if there is a new or additional use of Section 4(f) property but its impacts are determined to be *de minimis* under paragraph 774.3(b) of this regulation, then the final Section 4(f) approval shall document the determination that the new or additional use is *de minimis* and may incorporate by reference the documentation developed for the first-tier preliminary approval since the first-tier information remains valid. In this situation, the applicant must consider whether all possible planning to minimize harm (which is defined in section 774.17) has occurred. Additional planning to minimize harm to a Section 4(f) property will often be needed during the second-tier study and can be undertaken without reopening the first-tier decision. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered. The final regulation clarifies the requirements for tiered Section 4(f) approvals, consistent with the above discussion.

• Paragraph 774.7(f)—One comment suggested that paragraph 774.7(f) be revised to clarify that including a required Section 4(f) evaluation in the NEPA document is normal practice but is not mandatory. Another comment suggested that such inclusion in the NEPA document should be mandatory. We re-worded this paragraph to clarify our intent, but we do not agree that including the Section 4(f) evaluation in the NEPA document should be mandatory. There are many instances where the timing is off due to late discoveries or other circumstances beyond the control of the applicant. In such cases, processing a stand-alone Section 4(f) evaluation is permissible. Thus, applicants should endeavor to include any required Section 4(f) evaluation within the relevant NEPA document, to the extent possible.

Another comment suggested that paragraph 774.7(b) should explicitly state that the Section 4(f) evaluation may be included in an appendix to the NEPA document, with a summary of the evaluation in the main body of the document. FHWA will allow the Section 4(f) evaluation to be included in an appendix to the NEPA document, so long as the appendices accompany the NEPA document and the distribution and commenting requirements of Section 4(f) will be met. The FHWA and FTA decline to include this provision in the final rule as we believe that guidance, not regulation, is the appropriate method for addressing the issue. The FHWA and FTA will address it in a future update of the Section 4(f) Policy Paper or the Technical Advisory on preparing and processing environmental documents.

Section 774.9 Timing

This section addresses the timing of Section 4(f) approvals within the NEPA process, and after project approval or during construction, where necessary. There were no generally applicable comments on this section. Comments on specific paragraphs are discussed in turn below.

• Paragraph 774.9(a)—One comment asked for clarification that the analysis of possible Section 4(f) uses during project development is really only an evaluation of "potential" uses (i.e., a proposed project does not actually use Section 4(f) property at the time of project development). We agree, and have clarified this point by changing the beginning of the first sentence from "Any use of lands" to "The potential use of lands." The same comment also suggested changing "shall be evaluated early in the development" within the same sentence to "shall be evaluated as early as practicable in the development," because potential uses of Section 4(f) property can only be evaluated after a certain minimum level of information about the proposed action and alternatives has been developed. We agree, and we have adopted these proposed edits in this final rule.

• Paragraph 774.9(b)—One comment sought clarification that Section 4(f) approval can be made "in a separate Section 4(f) evaluation" in certain circumstances. We agree, and accordingly added at the beginning of this paragraph "Except as provided in paragraph (c), for * * *." Paragraph 774.9(c) covers the circumstances where a separate Section 4(f) approval is appropriate.

Another comment sought clarification that an EIS, EA, or CE must always include the actual Section 4(f) approval. Section 4(f) approvals are incorporated and coordinated with the NEPA process, and to the extent practicable, the NEPA document should include all documentation and analysis supporting the Section 4(f) approval. However, the actual approval may be made in the subsequent decision document in order to consider public and interagency comment submitted in response to the NEPA document. The Section 4(f) approval and the supporting information are always available to the public for review upon request. As such,

we have retained the proposed language in the final rule.

• Paragraph 774.9(c)—Two comments pointed out that the introductory clause in NPRM paragraph 774.9(c), "If the Administration determines that Section 4(f) is applicable" repeats one of the numbered subparagraphs—"(2) The Administration determines that Section 4(f) applies to the use of a property." The redundant language has been deleted.

One comment suggested replacing "final EIS" with "ROD" to ensure consistency with references to a FONSI and a CE in paragraph 774.9(c). Both the FONSI and CE are decision documents, as is the ROD. The FHWA and FTA decided to follow this recommendation. The change helps clarify the timing of the separate Section 4(f) approval required by section 774.9. Paragraph (c) applies only after the NEPA process has been completed and the Administration has already made a Section 4(f) determination in a decision document.

One comment recommended explicitly stating in paragraph 774.9(c)(2) that the identification of a new property subject to Section 4(f) does not require a separate Section 4(f) approval if the "late designation" exception in paragraph 774.13(c) applies. The FHWA and FTA agree with the substance of this comment, though not with the suggested language. Instead, the FHWA and FTA included the phrase "except as provided in § 774.13 of this title" at the end of the introductory sentence of paragraph (c): "a separate Section 4(f) approval will be required, except as provided in § 774.13, if * * *." The FHWA and FTA believe that the exceptions listed in section 774.13 pertain to all three situations addressed in paragraph (c), not exclusively to the scenario in paragraph (c)(2). Furthermore, exceptions other than paragraph 774.13(c) dealing with "late designation" could potentially apply to the circumstances described in paragraph (c). Consequently, a more general statement concerning exceptions is appropriate.

Another comment asked for clarification in paragraph 774.9(c)(2) that the provision requires a separate Section 4(f) approval when the Administration determines after project approval that Section 4(f) applies to a new use of Section 4(f) property. That was our intent, so we modified paragraph 774.9(c)(2) to state that "Section 4(f) applies to 'the use of' a property."

One comment proposed a slight revision to the provision by substituting "if" instead of "when" before enumerating situations necessitating a separate Section 4(f) evaluation. In the context of the introductory sentence, the choice of the word "if" better articulates the conditional nature of the applicability of paragraph (c) and is less likely to be misconstrued. We have therefore adopted this suggested change.

One commenter asked for definitions of the phrases "substantial increase in the amount of Section 4(f) property used," "substantial increase in the adverse impacts to Section 4(f) property," and "substantial reduction in mitigation measures." These words were used with their plain English meanings. We think that the meanings of these phrases are self-evident, and they rely upon the context of each particular factual situation to which this paragraph of the regulation is being applied. Therefore, we did not provide definitions of these phrases.

• Paragraph 774.9(d)—Two comments expressed the opinion that new or supplemental environmental documents should always be required if a separate Section 4(f) approval is required after the original environmental document has been processed. The proposed regulation stated that a new or supplemental environmental document "will not necessarily" be required in such instances and that project activities not directly affected by the separate Section 4(f) approval may proceed. Paragraph 774.9(d) of this Section 4(f) regulation deals strictly with Section 4(f) requirements and is not intended to explain when supplementation under NEPA is required. A provision in the joint FHWA/FTA NEPA regulation, located at 23 CFR 771.130, governs when supplementation is required under NEPA. It requires a supplemental EIS "whenever the Administration determines that: (1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or (2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." The circumstances that necessitate a separate Section 4(f) approval under paragraph 774.9(c) may or may not rise to the level of significance described in 23 CFR 771.130(a). It should also be noted that 23 CFR 771.130(c) provides for the preparation of environmental studies or, if appropriate, an EA to assess the impacts of the changes, new information, or new circumstances and determine whether a supplemental EIS is necessary. The NEPA question must be answered in the context of the particular new or changed impacts at issue, while the Section 4(f) question depends on the new or changed use of Section 4(f) property at issue. The FHWA and FTA recognize that the changes, new information, or new circumstance requiring a separate Section 4(f) evaluation may also require additional NEPA documentation. Paragraph 774.9(d) now states that when, in accordance with paragraph (c), a separate Section 4(f) approval is required and, in accordance with 23 CFR 771.130, additional NEPA documentation is needed, these documents should be combined for efficiency and comprehensiveness. Further, 23 CFR 771.130(f) provides for a supplemental EIS of "limited scope" when issues of concern affect only a limited portion of the project, and it states that any project activity not directly affected by the supplemental review may proceed. The FHWA and FTA believe that the last sentence in paragraph 774.9(d) is consistent with 23 CFR 771.130(f) and that no change is warranted.

• Paragraph 774.9(e)—Several comments expressed support for the proposal in paragraph 774.9(e) that, when Section 4(f) applies to archeological sites discovered during construction, the Section 4(f) process may be expedited and the evaluation of alternatives may take into account the level of investment already made. One commenter objected to the expedited process and consideration of prior investment. Another stated that this provision is too vague. However, no substantive change was made to the language because this paragraph continues existing policy that has worked well in past applications. Because archeological resources are underground and can occur in unexpected locations, it is not always possible to anticipate their presence prior to construction. Thus, when such resources are uncovered during construction, it is appropriate to take the scientific and historical value of the resource into account in deciding how to expedite the Section 4(f) process. Further elaboration in the regulation would hamper the deliberation necessary when this circumstance arises.

One commenter asked whether a particular applicant can enter into a programmatic agreement with their SHPO setting forth more detailed procedures to comply with Section 4(f) and the National Historic Preservation Act when archeological resources are discovered during construction. We believe that this would be appropriate and desirable as long as the proposed

agreement is reviewed by the Administration through the appropriate field office for consistency with this regulation. Another approach that is encouraged is the inclusion of procedures for identifying and dealing with archaeological resources in the project-level Section 106 Memorandum of Agreement under the National Historic Preservation Act. Another comment sought clarification whether the exception in paragraph 774.13(b) for archeological resources lacking value for preservation in place applies when the archeological resource is discovered during construction. It does, and this has been clarified in the final rule.

Section 774.11 Applicability

This section is intended to answer many common questions about when Section 4(f) is applicable. There were no generally applicable comments on this section. Comments on specific paragraphs are discussed in turn below.

- Paragraph 774.11(a)—There were no major comments in response to this paragraph. Therefore, we have retained the language as proposed in the NPRM.
- Paragraph 774.11(b)—Several comments requested clarification on the roles of the various agencies involved in the Section 4(f) evaluation in relation to the provisions of 23 U.S.C. 139, which was created by SAFETEA–LU section 6002, regarding joint lead agencies. Section 4(f) only applies to U.S. DOT agencies, but there are transportation projects for which a non-U.S. DOT agency is the Federal lead agency and a U.S. DOT agency is a cooperating or participating agency. In these cases, only the U.S. DOT agency can make the Section 4(f) approval. For example, a hospital expansion project was proposed in the midwest, utilizing funds from the U.S. Army Corps of Engineers, a non-U.S. DOT agency that was the lead agency under NEPA, and the U.S. Department of Housing and Urban Development, another non-U.S. DOT agency. The FHWA had funding involvement for the relocation of roads within the project area and was a cooperating agency. FHWA was, however, the Federal lead agency for Section 4(f) approvals. To further clarify this point, the word "Federal" was inserted in the first sentence of this paragraph: "When another 'Federal' agency is the Federal lead agency for the NEPA process * * *."
- Paragraphs 774.11(c) and (d)—These paragraphs were proposed to remain substantively unchanged from the previous regulation. Three comments objected to paragraph (c), which presumes that parks, refuges, and recreation areas are significant unless the official(s) with jurisdiction determine that the entire property is not significant. The FHWA and FTA proposed in paragraph (d) to retain the right to review such determinations of non-significance for reasonableness. One commenter objected to the presumption of significance, stating "if the official with jurisdiction over the property chooses to not make a ruling on significance, we should assume the property is not significant as opposed to assuming it is." The same commenter felt that the Administration should not be permitted to overturn a non-significance determination. Another commenter proposed adding a public hearing requirement to this paragraph, and the third comment proposed deleting the paragraph (c) on significance altogether because it "guts the statutory standard" to allow the official(s) with jurisdiction over a property to declare it non-significant. After considering these comments, we decided to retain the language as proposed. The statute is limited by its own terms to significant properties "as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site." 49 U.S.C. 303(c). Therefore, these paragraphs implement a provision of the statute itself and are part of the current Section 4(f) regulations at 23 CFR 771.135(c) and (d). With respect to the presumption of significance in paragraph (c), the FHWA and FTA decided to keep the presumption since it continues to provide the benefit of a doubt in favor of protecting the Section 4(f) property, which has been the FHWA and FTA's policy on this issue for several decades.
- Paragraph 774.11(e)—Several comments were received on this paragraph, which specifies standards and procedures for determining the applicability of Section 4(f) to historic sites. Two comments asked for a definition of "historic site." A definition was added to section 774.17, which defines the term as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register." The term "includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register." This definition is consistent with the definition of "historic property" used in the regulation implementing Section 106 of the National Historic Preservation Act (36 CFR part 800).

  Another comment on this paragraph stated that we should not limit historic sites to those that are eligible for the National Register of Historic Places, but also consider other sites that may be important for historic purposes. We agree with the commenter that it is important to allow for the possibility of protecting sites that are historic but not eligible for the National Register. The proposed text of paragraph 774.11(e)(1) provides for this situation by stating that Section 4(f) applies "only to historic sites on or eligible for the National Register unless the Administration determines that that the application of Section 4(f) is otherwise appropriate." This provision allows the Administration to consider sites that are historically important for protection but are not eligible for the National Register.

  Other comments stated that the section did not adequately address "negligible" impacts to large historic districts. We think that changes to the proposed language to address this issue are not warranted. For example, in the case of historic districts, the assessment of effects under Section 106 of the National Historic Preservation Act would be based on the effect to the district as a whole, as opposed to individual impacts on each contributing property. Accordingly, when an assessment of effects on the overall historic district is performed, if the effects on the historic district are truly negligible, then the result of the assessment of effects would be a "no adverse effect" on the historic district. With appropriate concurrences, such finding would qualify the project as having *de minimis* impact and therefore not subject to further consideration under Section 4(f). On the other hand, where contributing elements of a historic district are individually eligible for the National Register, an assessment of the effects on the individual properties that are eligible would also be required. This assessment of effects would be independent of the assessment for the overall historic district and may or may not result in "no adverse effect" and *de minimis* impact determinations.

  Paragraph 774.11(e)(2), concerning the application of Section 4(f) to the Interstate Highway System, was moved to this location in the final rule (from paragraph 774.13(j) in the NPRM) so that all provisions governing the applicability to historic sites are in one location. One comment was received on the exemption of the Interstate Highway System. The comment expressed concern over the inclusion of this exemption in the proposed regulation. This exception was included in the NPRM in response to section 6007 of SAFETEA–LU (codified at 23 U.S.C. 103(c)(5)), which states, in pertinent

part, that the Interstate Highway System is not considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate Highway System formally designated by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance. FHWA implemented this directive through a formal process that designated 132 significant elements of the Interstate Highway System for Section 4(f) protection after considering input from relevant agencies and the public. See 71 FR 76019. While Section 4(f) does not apply to all other segments and features of the Interstate Highway System, Section 4(f) continues to apply to any historic sites located in proximity to an Interstate Highway that are unrelated to the Interstate Highway System. As an example, a highway project will widen and reconfigure an interchange on the Interstate System constructed 50 years ago that has some historic value but is not designated on the list of 132 significant elements. Section 4(f) does not apply to the use of this interchange. However, a historic farm, circa 1850 and on the National Register, also abuts the project. Section 4(f) would apply to the project's use of the historic farm because the farm is not part of the Interstate Highway System and its historic significance is unrelated to the Interstate Highway System.

- Paragraph 774.11(f)—One commenter requested specific procedures to be used for the identification of archaeological resources. The FHWA and FTA decided not to include procedures for identifying archaeological resources in this regulation because it is beyond the scope of this rulemaking. The FHWA and FTA believe that a good faith effort must be made to identify archaeological resources, but specifying procedures to be used in each situation is not appropriate in this regulation.
- Paragraph 774.11(g)—This paragraph of the final rule was added to clarify the applicability of Section 4(f) to Wild and Scenic Rivers. The provision is consistent with longstanding FHWA and FTA policy as set forth in FHWA's Section 4(f) Policy Paper. It was inserted in response to the comments of the U.S. Department of the Interior. The provision limits the applicability of Section 4(f), in accordance with the statutory language, to those portions of Wild and Scenic Rivers that are publicly owned and serve a function protected by Section 4(f). The paragraph states "Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as, or are designated in a management plan as a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the National Wild and Scenic Rivers Act must be satisfied, independent of the Section 4(f) approval."
- Paragraphs 774.11(h) and (i)—These paragraphs of section 774.11 concern the applicability of Section 4(f) to properties formally reserved for future transportation projects but temporarily serving a Section 4(f) purpose. One commenter noted that the NPRM had addressed interim Section 4(f) activity on property reserved for transportation use and the concurrent or joint development of parks, recreation areas, or refuges with transportation facilities in the same paragraph. That commenter suggested that these two topics should be separated because the NPRM was confusing. As these issues have been traditionally treated separately, the FHWA and FTA agree with this suggestion, and the topics of interim Section 4(f) activities and joint planning are now addressed in paragraphs 774.11(g) and (h), respectively.

Another commenter was concerned with the term "temporary recreational activity" in the first sentence of this paragraph of the proposed rule, explaining that the word "temporary" could be construed to refer only to uses of relatively short duration. The FHWA and FTA have never imposed any time limit on how long a future transportation corridor can be made available for recreation while it is not yet needed for transportation, and there is no public purpose in limiting the time during which interim recreational activities may be permitted on the future transportation corridor.

The commenter was also concerned that the proposed language did not consider other non-recreational temporary uses of a future transportation corridor, for example as a wildlife or waterfowl refuge. The FHWA and FTA decided to address these comments by clarifying the wording of the section. The language in the final rule says: "[w]hen a property formally reserved for a future transportation facility temporarily functions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject that property to Section 4(f)." The temporary activity is not protected under Section 4(f) in this case, regardless of whether the property owner has authorized the interim use of the transportation land or has simply not fenced the property off or taken other measures to prevent trespassing.

Another comment suggested that allowing temporary recreational activity on a reserved transportation corridor is an exception to Section 4(f) and therefore should be moved from section 774.11, "Applicability," to section 774.13, "Exceptions." We think that the proposed paragraph does not set forth an exception to Section 4(f), but rather explains the applicability of Section 4(f) in certain situations. Therefore, this provision was retained in the "Applicability" section.

Another comment addressed the second example of joint planning between two or more agencies with jurisdiction over the transportation project and Section 4(f) property. The comment suggested that a broader range of scenarios of joint planning be addressed in the rule, and suggested the example be revised to indicate that such planning could be done concurrently or in consultation between the agencies. It appears the concern involved the need for formal coordination, though the word "formal" did not appear in the NPRM. Since this paragraph of the rule deals with joint planning of transportation projects and Section 4(f) properties, any instance of concurrent planning would qualify for consideration of whether Section 4(f) applied. The basis for determining the compatibility of jointly-planned transportation projects and Section 4(f) properties, however, depends heavily upon the degree to which the multiple agencies involved have consulted on various aspects of the proposals. The purpose of this provision had been accurately described as:

> Section 4(f) is not meant to force upon a community, wishing to establish a less than pristine park affected by a road, the choice between a pristine park and a road. A community faced with this choice might well choose not to establish any park, thus frustrating Section 4(f)'s goal of preserving the natural beauty of the countryside.

See *Sierra Club* v. *Dept. of Transp.*, 948 F.2d 568, 574–575 (9th Cir. 1991). The consultation that occurs, formal or otherwise, will be examined on a case-by-case basis in light of this purpose to determine if a constructive use occurs when the jointly-planned transportation project is eventually proposed for construction. We have retained the proposed language in the final rule.

Section 774.13 Exceptions

This section sets forth various exceptions to the otherwise applicable Section 4(f) requirements. The exceptions either are founded in statute or reflect longstanding FHWA and FTA policies governing when to apply Section 4(f). The exceptions are limited

in number and scope and do not compromise the preservation purpose of the statute, which is to "preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."

One comment asked for clarification whether an exception for a project under this regulation would also provide an exemption for the project from compliance with the NEPA and the National Historic Preservation Act. The answer is no. The exceptions in Section 774.13 relate solely to the applicability of, and requirements for, Section 4(f) approval. All other applicable environmental laws must still be addressed.

Several comments favored additional exceptions beyond those proposed by the FHWA and FTA. One such comment suggested that an exception be added for active historic railroads and transit systems, along the lines of the exemption for the Interstate Highway System that was included in section 6007 of SAFETEA–LU. The FHWA and FTA decided not to pursue the suggested exception for several reasons. First and foremost, the FHWA and FTA do not have statutory authority for such an exception, as it was not included in section 6007. Second, there is already an exception in paragraph 774.13(a) for the restoration, rehabilitation, or maintenance of historic transportation facilities when there is no adverse effect on the historic qualities of the facility that caused it to be on or eligible for the National Register. For many FTA-funded maintenance or rehabilitation projects on historic transit systems, such as those in New York, Chicago, and Boston, system-specific programmatic agreements with the relevant SHPO under Section 106 have specified the conditions for a "no adverse effect" determination and, as a logical consequence, the conditions for the Section 4(f) exception noted above. Finally, when the project does result in an adverse effect and the traditional Section 4(f) evaluation process applies, the demonstration that there is no feasible and prudent avoidance alternative that would accomplish the project purpose of keeping the historic transportation facility in operation is usually straightforward. Therefore, the applicant in such a case can focus on how to minimize the harm to historic features of the transportation facility and still accomplish the project's purpose. Accordingly, the FHWA and FTA do not agree that the creation of a new exception for active, historic railroads and transit systems is necessary or permissible.

Another comment suggested adding an exception for all "local or state transportation projects that have not or will not receive U.S. Department of Transportation funds for construction of the project." In support of this proposal, the commenter cited a number of court cases holding that Section 4(f) requirements are triggered when a U.S. DOT agency approves a transportation project receiving Federal construction funds but not when the project is locally funded. The FHWA and FTA decided not to incorporate the proposed exception because Federal funding is not the sole determinant of Section 4(f) applicability. Section 4(f) may be implicated in other Administration approval actions not involving the disbursement of U.S. DOT funds when there is sufficient control over the project. For example, the U.S. DOT approval of a new interchange on the Interstate Highway System requiring the use of adjacent parkland may trigger Section 4(f) even if Federal funding is not involved. The overwhelming majority of projects not receiving U.S. DOT funding, including those in the court cases cited by the commenter, do not require any Administration approval at all and therefore would not trigger Section 4(f).

Comments on specific paragraphs within Section 774.13 are discussed in order below.

• Paragraph 774.13(a)—Paragraph 774.13(a) is an exception from the Section 4(f) process for projects involving work on a transportation facility that is itself historic. The FHWA and FTA's policy for several decades has been that when a project involves a historic facility that is already dedicated to a transportation purpose, and does not adversely affect the historic qualities of that facility, then the project does not "use" the facility within the meaning of Section 4(f). If there is no use under Section 4(f), then its requirements do not apply. This interpretation is consistent with the preservation purpose of Section 4(f) and with caselaw on this issue.

Two comments recommended revising this section to clarify that the exception for restoration, rehabilitation, or maintenance of transportation facilities applies only if the Administration makes a finding of "no adverse effect" in accordance with the consultation process required under Section 106. One comment pointed out that other interested parties besides the official(s) with jurisdiction may be participating in the Section 106 consultation. We agree and revised the paragraph to clarify these points.

• Paragraph 774.13(b)—Paragraph 774.13(b) is an exception from the Section 4(f) process for those archeological sites whose significance lies primarily in the historical or scientific information or data they contain. The exception does not apply when the Administration determines that a site is primarily important for preservation in place (*e.g.*, to preserve a major portion of the resource in place for the purpose of public interpretation), or that the site has value beyond what may be learned by data recovery (*e.g.*, as a result of considerations that may arise when human remains are present). This distinction between the primary values for what can be learned by data recovery versus the primary value for preservation in place has been central to the Administration's implementation of the statute for archeological sites for several decades.

The intent of the exception is not to narrow unnecessarily the application of Section 4(f) when dealing with archeological sites, but, rather, to apply the protections of Section 4(f) only in situations where the preservation purpose of the statute would be sustained. Frequently, the primary information value of an archeological resource can only be realized through data recovery. In those cases, the primary mandate of Section 4(f)—to investigate every feasible and prudent alternative to avoid the site—would serve no useful purpose. Conversely, where the artifacts would lose essential aspects of the information they might yield if removed from the setting, or if the site is complex and it is not reasonable to expect to be able to recover much of the data resident there, or where technology does not exist to preserve the artifacts once removed from the ground, requiring the applicant to search for a feasible and prudent avoidance alternative is consistent with the statute.

One commenter expressed the view that in light of the 1999 and 2000 amendments to the Section 106 regulations concerning archeological resources, "the outdated approach to archeology reflected in the Section 4(f) regulations is inconsistent with the National Historic Preservation Act (NHPA)." Transportation projects subject to Section 4(f) must also comply with the NHPA, an entirely different statute that also affords certain protection to historic sites. The NHPA has its own very detailed regulations that must be followed. An "adverse effect" to an archeological site under the NHPA is not the same as a "use" of an archeological site under Section 4(f).

The comment did not propose specific revisions to the proposed regulation, but generally recommended that consideration be given to whether an archeological site may have "broader religious or cultural significance to any Indian tribe(s)," and that the Administration should be required to "defer to the SHPO's or THPO's views regarding significance." We carefully considered these suggestions and decided to revise the wording in the final rule in response to the concerns raised. We agree that deference to the expertise of SHPOs and THPOs is warranted in determining whether an archeological site is worthy of preservation in place or is important chiefly for what could be learned through data recovery. Accordingly, the final rule requires that "[t]he official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding * * *" regarding the relative importance of data recovery versus preservation in place.

• Paragraph 774.13(c)—This paragraph is an exception to the requirement for Section 4(f) approval for parks, recreational areas, wildlife and waterfowl refuges, and historic sites that are designated or determined to be significant late in the development of a transportation project. Late designation is not the same thing as a late discovery of a Section 4(f) property. This exception, which has been FHWA and FTA policy for several decades, applies only if a good faith effort was made during the NEPA process to identify all properties eligible for Section 4(f) protection. The purpose of the exception is to provide reasonable finality to the environmental review phase of project development.

Many comments were received on the late-designation exception. One comment asserted that no exception is warranted until construction has begun in order to provide maximum protection to Section 4(f) properties. Another comment objected to the exception in the case of projects "languishing" in project development for long periods of time during which time a resource on the project site might be legitimately designated as a new or significant Section 4(f) property. In this commenter's view, such projects should not be allowed to proceed without a new Section 4(f) evaluation, even if the property in question was acquired by a transportation agency for transportation purposes prior to the new designation. The commenter suggested limiting the exception by including a "staleness" provision mandating that if a planned transportation project is not constructed within a specified period of time (three years was suggested) the exception would not apply and a new evaluation under Section 4(f) would be required. At the opposite end of the spectrum, we received comments asserting that project opponents frequently wait until late in project development to assert that properties are eligible for Section 4(f) protection, solely for the purpose of delaying the project. Several modifications were suggested to guard against that possibility. One such proposal suggested broadening this exception so that an applicant would only need to establish the project's location and complete the NEPA process in order to benefit from the late-designation exception. The comment proposed that the applicant not be required to take the additional step of acquiring the right-of-way for this exception to apply.

The FHWA and FTA decided not to adopt any of the suggested changes to the proposed regulation. The exception is intended to balance competing interests—protecting Section 4(f) properties while facilitating timely project delivery. The exception provides that "the Administration may permit a project to proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition." These conditions will ensure that the initial Section 4(f) approval was proper and that the project has progressed far enough to warrant special treatment. The acquisition of right-of-way typically is the last step of project development prior to construction. Conversely, if the right-of-way has not yet been acquired prior to the redesignation or change in significance, then the exception does not apply. Recognizing the variability in development schedules among different transportation projects, we did not include any arbitrary time limits. A "staleness" provision would often delay project implementation unnecessarily and may compromise project plans after considerable investment in engineering design and land acquisition. The regulatory language draws the line at purchase of the property to ensure that, prior to the redesignation or change in significance, the applicant has completed the NEPA process, has made a good faith effort to address Section 4(f) concerns, and has advanced the project beyond preliminary engineering into actual implementation activities. We also note that if, after the completion of the NEPA process and Section 4(f) approval, the project has to be modified in a way that would use newly designated Section 4(f) property, the applicant would be obligated to conduct a separate Section 4(f) evaluation in accordance with paragraph 774.9(c).

Lastly, a comment suggested that the FHWA and FTA should "ensure internal consistency" between this provision and Paragraph 774.15(f)(4), which provides that there is no constructive use if the Section 4(f) designation occurs after either a right-of-way acquisition or adoption of project location through the approval of a final environmental document. We do not agree. The "late designation" exception in paragraph 774.13(c), which applies generally to both actual and constructive use, is distinct from the narrower exception in paragraph 774.15(f)(4), which addresses proximity impacts of a transportation project and applies only to constructive use.

Several comments suggested removing or modifying the sentence at the end of paragraph 774.13(c) that, as worded in the NRPM, would preclude the use of the late-designation exception where a historic property is close to, but less than, 50 years of age. One commenter pointed out that the sentence would perpetuate the false assumption that properties over 50 years old are automatically eligible for the National Register. Another commenter stated that the provision is confusing because there is no parallel in Section 106 of the National Historic Preservation Act, and the sentence could be read to effectively extend Section 4(f) protections to properties that are not necessarily historically significant under Section 106. The commenter also pointed out the potential confusion caused by having an exception to the exception. The FHWA and FTA agree that this sentence was confusing and has modified it to say: "if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section." The determination whether it is reasonably foreseeable should take into account the possibility that changes in the property beyond the Administration's control might reduce its eligibility, as well as the sometimes unpredictable nature of construction schedules.

• Paragraph 774.13(d)—Paragraph 774.13(d) is an exception to the requirement for Section 4(f) approval for temporary occupancies of Section 4(f)

property. This exception is limited to situations where the official with jurisdiction over the resource agrees that a minor, temporary occupancy of Section 4(f) property will not result in any permanent adverse impacts and will not interfere with the protected activities, features, or attributes of the property, the property will be fully restored, and the ownership of the property will not change. This exception, which has been part of the Section 4(f) regulation since 1991, is founded on the FHWA and FTA's belief that the statute's preservation purpose is met when the Section 4(f) land, though temporarily occupied, is not permanently incorporated into a transportation facility and is returned to the same or better condition than it was found, with the consent of the official with jurisdiction over the Section 4(f) resource. Some construction-related activities taking place on Section 4(f) property may be so minor in scope and duration that its continued preservation is in no way impeded. Using publicly owned land for construction easements can result in less disruption to the surrounding community and often may result in an enhancement of the protected resource, such as landscaping, installation of new play equipment, or other improvement following construction.

A commenter asked whether a temporary occupancy not falling within this exception could be treated as a use with *de minimis* impact if the Section 4(f) land would be fully restored after construction. The answer is yes, a temporary occupancy that is determined to be a Section 4(f) use may qualify for a *de minimis* impact determination by the Administration if the requirements for such determination are met. This circumstance would arise when one or more of the criteria for the temporary-occupancy exception are not met, but the requirements for a *de minimis* impact determination are met. *De minimis* impact determinations related to temporary occupancies are addressed in more detail in the joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005.

One comment asserted that excepting "temporary" occupancies of land from the provisions of Section 4(f) would be problematic for "megaprojects" (usually defined as projects with a total estimated cost of more than $500 million) whose construction period might stretch over a decade or more. Another commenter expressed the opinion that occupation of Section 4(f) properties during such projects should not be considered "temporary" even if the occupancy period is less than the total time needed for construction. We agree that in some circumstances a very long-term occupancy of Section 4(f) properties, even if shorter in duration than the total time it takes to construct a particular project, could be contrary to the preservation purpose of Section 4(f) and, therefore, constitute a use. However, we did not change the relevant text ("[d]uration must be temporary, *i.e.*, less than the time needed for construction of the project") because the regulation imposes several other stringent conditions that would be difficult to satisfy in the case of a long-term occupancy. These other stringent conditions include the requirement that the occupancy not interfere with the activities, features, and attributes that qualify the property for Section 4(f) protection, and that the official with jurisdiction over the Section 4(f) property concur in its being occupied for this period of time.

Another commenter recommended elimination of the conditions for the "temporary occupancy" of land. These conditions, the commenter argues, create a major burden for determining whether the temporary-occupancy exception applies. Another comment recommended changing the wording in paragraph 774.13(d)(1) from "less than the time needed for construction" to "no greater than the time needed for construction." This change would allow the temporary occupancy of land to continue for the entire duration of construction. After carefully considering all of the comments, we decided that no change to the proposed language of paragraph 774.13(d) was warranted. If an applicant finds the exception burdensome, a traditional Section 4(f) evaluation, programmatic evaluation, or a *de minimis* impact determination are potentially available options. The paragraph is unchanged from the provision that has been in effect since 1991 and has not been controversial, and it strikes a reasonable balance between protecting Section 4(f) resources and advancing transportation projects.

Other comments recommended revising paragraph 774.13(d)(3). One proposed adding the word "significant" to modify the word "interference," and another suggested deleting the words "either a temporary or" so that only permanent interference would be a concern. We considered these comments, but decided not to make any changes. The appropriate question is not whether an interference with the protected activities, features, or attributes of a Section 4(f) property is significant, but whether the interference, taken together with the requirements of the other criteria in this exception, constitutes a use of Section 4(f) property. The duration of the interference is but one of several criteria that must be satisfied in order for the exception to apply. The criteria must be addressed in consultation with the official(s) with jurisdiction to determine if the temporary-occupancy exception is appropriate. The official with jurisdiction over the property is in the best position to determine whether the temporary occupancy would interfere inappropriately with any of the protected activities, features, or attributes of the property.

Several comments asked for clarification as to whether the condition of a Section 4(f) property after the temporary occupancy must be identical to the condition prior to the temporary occupancy, and one comment proposed an addition to the regulatory text to address the issue. One comment further requested that the regulation state that the restoration after a temporary occupancy must focus on the "protected features, activities, or attributes" of the site. We believe that the proposed text, which states that the land must be "returned to a condition at least as good as that which existed prior to the project" already provides the flexibility requested by these comments. The regulation does not require that the property be restored to a condition identical to its pre-occupancy condition. Often the official(s) with jurisdiction have plans to improve the property in some way and prefer to have the property restored in a manner that is consistent with those plans rather than returning to its pre-occupancy condition. Further, in light of the preservation purpose of Section 4(f), the focus of the restoration should certainly be on the protected features, activities, and attributes that make the property eligible for Section 4(f) protection. Because the proposed regulatory text already covers the issues raised by the comments, we did not make the requested changes.

- Paragraph 774.13(e)—Paragraph 774.13(e) is an exception for park roads and parkway projects under FHWA's Federal Lands Highway Program, 23 U.S.C. 204. Projects under this program are expressly excepted from Section 4(f) requirements within the Section 4(f) statute itself. Several comments were received on this exception. One comment recommended deleting "in accordance with" and substituting the statutory term "under." We agree, and modified the final rule accordingly. Another comment, repeated by several commenters, urged that the exception be

deleted, because parkways should be designed and routed so as to minimize damage to parks, and applying Section 4(f) would ensure that such planning occurs. We agree that park roads and parkways should be carefully designed and routed, and note that the FHWA's program funding these roads is jointly administered with the National Park Service pursuant to an interagency agreement that protects park values. However, by its own terms, the statutory language of Section 4(f) explicitly states that it does not apply to projects "for a park road or a parkway under section 204" of Title 23, United States Code. 49 U.S.C. 303(c); 23 U.S.C. 138(a). Therefore, the Administration is not required to apply Section 4(f) to these projects.

• Paragraph 774.13(f)—Paragraph 774.13(f) is an exception for certain trails, paths, sidewalks, bikeways, and other recreational facilities designed primarily for non-motorized vehicles [all of which are referred to collectively as "trails" in the remainder of the discussion of paragraph 774.13(f)]. Such trails generally serve recreational purposes and therefore represent the kind of resource that Section 4(f) was enacted to protect. When the Administration funds the construction or maintenance of trails, the application of Section 4(f), including the consideration of avoiding the Section 4(f) property, would not advance the preservation purpose of the statute.

One comment was received specifically concerning the construction of Recreational Trail projects. The Recreational Trails Program is an FHWA program that benefits recreation by making funds available to the States to develop and maintain recreational trails and trail-related facilities for both non-motorized and motorized recreational trail uses. The statute authorizing the Recreational Trails program (23 U.S.C. 206) limits the circumstances under which trails for motorized vehicles can be constructed and requires that States give consideration to project proposals that benefit the natural environment or that mitigate and minimize the impact to the natural environment. In addition, these projects must comply with NEPA. The comment notes that recreational trails for all-terrain-vehicles (ATVs) and motorcycles can cause significant damage to park properties. The FHWA and FTA acknowledge the validity of this comment, but the authorizing statute at 23 U.S.C. 206(h)(2) specifically excepts Recreational Trail projects from Section 4(f) because they are intended to enhance recreational opportunities. Thus, the FHWA and FTA have no discretion to apply Section 4(f) to these projects.

Several comments sought other types of clarification concerning trails. The FHWA and FTA have several longstanding, common-sense policies regarding trails which are articulated in the FHWA's Section 4(f) Policy Paper.[6] First, Section 4(f) does not apply to trails that are designated as part of the local transportation system. The reason for this policy is that such trails are not primarily recreational in nature, even though, like most transportation facilities, they may occasionally be used by the public for recreational purposes. A related long-standing FHWA and FTA policy from FHWA's Section 4(f) Policy Paper is that Section 4(f) does not apply to a permanent trail within a transportation corridor if the trail is not limited to a specific location within the right-of-way and the continuity of the trail is maintained following a change to the highway or transit guideway.[7] For example, an FHWA-funded project would widen a 5-mile stretch of roadway that has a parallel sidewalk within its right-of-way. The sidewalk, which is used primarily for recreation, is not tied to any specific location within the right-of-way through an easement, permit, memorandum of agreement, or other legal document. As part of the widening project, the sidewalk would be relocated several hundred feet from its current location, for the length of the project. All existing connections with intersecting sidewalks and paths would be maintained in the new location. The trail exception in paragraph 774.13(f) would apply to this sidewalk. In this example, the preservation purpose of Section 4(f) would not be advanced by requiring a search for alternatives that avoid moving the sidewalk. A third long-standing FHWA and FTA policy on trails concerns Section 7 of the National Trail Systems Act, 16 U.S.C. 1246(g). The National Trail Systems Act includes an exception to Section 4(f) compliance for any segment of a National Scenic Trails and National Historic Trails that is not on or eligible for the National Register. In order to clarify the application of Section 4(f) to trails, the three FHWA and FTA policies described above were incorporated into the final rule in paragraph 774.13(f).

One commenter asked that the trails exception specify that Section 4(f) does not apply to trails that are located within a transportation corridor by permission of the transportation agency, regardless whether the trail is permanent or temporary. We see no basis for incorporating this suggestion into the final rule. Permanent trails within the transportation right-of-way would be covered by the exception in paragraph 774.13(f)(3) if the trail is not limited to a specific location with the right-of-way, and if the continuity of the trail is maintained after the project. Temporary trails within transportation corridors are already adequately covered by paragraph 774.11(h).

• Paragraph 774.13(g)—Paragraph 774.13(g) is the exception for transportation enhancement projects and mitigation activities. The transportation enhancement activities (TEAs) listed in 23 U.S.C. 101(a)(35) that are eligible for certain FHWA funds include several activities that are intended to enhance Section 4(f) properties. Such TEAs must therefore use the Section 4(f) property, and avoidance of the property would be inconsistent with the authorizing statute in this case. Also, this exception is consistent with past FHWA and FTA practice and caselaw. A use of Section 4(f) property under the statute has long been considered to include only adverse uses—uses that harm or diminish the resource that the statute seeks to protect. Accordingly, this exception is limited to situations in which the official with jurisdiction over the Section 4(f) property agrees that the use will either preserve or enhance an activity, feature, or attribute of the property that qualifies it for protection under Section 4(f).

Two comments were received on the exception for transportation enhancement projects and mitigation activities. One comment suggested that recreational facilities that have previously been improved with transportation enhancement funds should not be subject to Section 4(f). We see no legal basis for incorporating this suggestion into the final rule. The purpose of Section 4(f) is the preservation of Section 4(f) property without regard to the past history of the property. A transportation enhancement project may create, add to, or enhance the Section 4(f) activities, features, or attributes of a Section 4(f) property. The result would be an improved Section 4(f) resource more deserving of Section 4(f) protection not less deserving. That Section 4(f) property would have to be afforded Section 4(f) protection in any subsequent transportation project that might use it.

The other commenter believed this paragraph contradicts a statement in FHWA's "Section 4(f) Policy Paper"

[6] "Section 4(f) Policy Paper," March 1, 2005, Question 14. See *http://environment.fhwa.dot.gov/projdev/4fpolicy.htm.*

[7] "Section 4(f) Policy Paper," March 1, 2005, Question 14. See *http://environment.fhwa.dot.gov/projdev/4fpolicy.htm.*

involving a TEA that does not incorporate land from the Section 4(f) property into a transportation facility. The statement from the "Section 4(f) Policy Paper" cited by the commenter is from Question and Answer (Q&A) 24A. That Q&A illustrates two possible scenarios in which transportation enhancement funds are used for the construction of a walkway or bike path, one scenario resulting in a Section 4(f) use and one not resulting in a Section 4(f) use. The commenter suggested that the written concurrence of the officials with jurisdiction should not be needed for the latter scenario, since no Section 4(f) use would occur. The comment does not appear to suggest that coordination with the officials with jurisdiction would not be necessary at all, but rather it suggests that the required written concurrence of those officials in the second scenario would be unnecessary. Certainly, thorough coordination with the officials with jurisdiction over any Section 4(f) property involved in a project has been a fundamental principle in complying with Section 4(f). When a TEA or mitigation activity is proposed on a Section 4(f) property, the Administration must ensure that the resultant effect on the property is, in the view of the officials with jurisdiction over the property, acceptable and consistent with the officials' existing and planned use of that property. Such coordination and assurances are needed even in situations where no transfer of property to a transportation use is anticipated. While the ultimate decision on whether a Section 4(f) use occurs always rests with the Administration, documentation of the views of the officials with jurisdiction over the Section 4(f) property is needed in the administrative record. Accordingly, the requirement for the written concurrence of the officials with jurisdiction was not removed from the final rule, though the text was revised for greater clarity.

- NPRM Paragraph 774.13(i)—The FHWA and FTA proposed a Section 4(f) exception for the new FTA program that funds "Alternative Transportation in Parks and Public Lands" (49 U.S.C. 5320). Avoidance of parks and public lands seems inconsistent with a program authorized by Congress specifically to provide transportation facilities in parks and public lands. Nevertheless, several comments were strongly opposed to this exception, and none favored it. Considering the lack of support for the proposed exception and the lack of an explicit statutory basis for the exception, we removed it from the final rule.

Section 774.15 Constructive Use

This section addresses the concept of the constructive use of Section 4(f) property, which can only occur where there is no actual physical taking of the property. One comment asserted that the proposed constructive use regulation is "much more extensive than what exists now." Aside from reorganizing the content, the NPRM only proposed adding to two of the existing examples of when a constructive use occurs, a minor change from the current regulation. Many other comments were received suggesting additional examples, deletions, modifications, and clarifications regarding constructive use. One general comment was that, to improve the readability of the regulation, the definition of constructive use and the list of examples of circumstances not constituting constructive use should be consolidated in Section 774.15, which already contained the bulk of the provisions related to constructive use. We agree and have accordingly moved the definition of constructive use to paragraph 774.15(a) and the list of examples to paragraph 774.15(f). Another comment suggested breaking the several different but related provisions of NPRM paragraph 774.15(a) into separate paragraphs. Briefly, these provisions are: that a traditional Section 4(f) evaluation process is appropriate when there is a constructive use; that the Administration's determination that there is no constructive use need not be documented; and that a constructive use determination will be based on certain specified analyses. We agree that separating these provisions would improve the clarity and readability of the rule, so the final rule addresses these issues in three paragraphs designated (b), (c) and (d), respectively.

Several comments asked that various terms be defined, including "not substantial enough to constitute a constructive use," "substantially impair the activities, features, and attributes," and "substantially diminish." We did not define these terms in the final rule because the words are all used with their common English meanings. The terms will be applied to a variety of fact situations, and narrowing the meaning of any of the terms would limit its applicability to particular fact situations that cannot be anticipated now. In addition, these terms are not new—the same terminology is used in the current regulation, and it has not been controversial or problematic. Additional guidance on the meaning of these terms can be found in FHWA's "Section 4(f) Policy Paper."

Another general comment proposed adding a paragraph to the final rule to clarify that a finding of "adverse effect" under Section 106 of the National Historic Preservation Act (NHPA) does not automatically equate to constructive use under Section 4(f), nor does an adverse effect create a presumption of a constructive use. We agree that the threshold for constructive use under Section 4(f) has generally been higher than the threshold for finding an adverse effect under Section 106 of the NHPA. However, we believe that making this distinction in the Section 4(f) regulation would be inappropriate because the NHPA is an entirely separate statute with its own implementing regulation promulgated by another Federal agency.

Comments on specific paragraphs within Section 774.15 are discussed in order below.

- Paragraph 774.15(a)—Paragraph 774.15(a) contains the definition of "constructive use." The definition was moved here from NPRM Section 774.17 as discussed above.

One comment asked for the word "permanently" to be added to the definition, so that a constructive use could not occur if the substantial impairment is only temporary. We did not adopt this proposal because some "temporary" impacts (for example, the construction impacts of a major, complex project) may last for many years. In addition, we think that the duration of the impacts can already be considered under the existing definition. A constructive use occurs when the proximity impacts are so severe as to substantially diminish the activities, features, or attributes that qualify the property for protection. The duration of a proximity impact is one factor that should be considered in determining if the protected activities, features, or attributes would be substantially diminished.

Another commenter asked that the last sentence of the definition be deleted, as it purportedly discourages findings of constructive use. The sentence says "substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished." An identical sentence appears in the current regulation. We carefully considered this comment, but decided to keep the sentence. It helps to explain what is meant by "substantial impairment." In addition, we believe that the concept of constructive use has been correctly applied since the promulgation of the constructive-use provision in 1991. Findings that a project constructively uses a Section 4(f)

property have been appropriately rare, because, by definition, there is no physical taking of property in these situations, and because the FHWA and FTA support the mitigation of proximity impacts on Section 4(f) properties to the point that a substantial impairment of the protected activities, features or attributes does not often occur.

• Paragraphs 774.15(b), (c), and (d)—A number of comments were received on the constructive-use requirements in paragraphs 774.15(b), (c), and (d), which are separated into distinct paragraphs in the final rule, as previously discussed. Each comment proposed an alternative re-wording purported to explain more clearly how a constructive use should be evaluated or to clarify that a constructive use determination is not required for each nearby Section 4(f) property. These provisions have been in place since 1991 and we think that they are clear and are being applied consistently. Therefore, we decided to adopt only one proposed re-wording and that is in paragraph 774.15(c). The provision was clarified to convey our intent to avoid excessive documentation regarding determinations of no constructive use, and not to avoid determining whether or not a constructive use exists. Paragraph (c) now reads: "The Administration shall determine when there is a constructive use, but the Administration is not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property. However, such documentation may be prepared at the discretion of the Administration." The same commenter also requested a change to require "substantial evidence" as the basis for a constructive use finding. We considered the comment but decided not to make the change because it would introduce a new term that provides little added value. The Administration may decide that a constructive use determination is inappropriate if the evidence of substantial impairment is inadequate.

Another comment expressed concern with the inclusion of the phrase "to the extent it reasonably can" in paragraph 774.15(d), related to basing a determination of constructive use on consultation with the official(s) with jurisdiction over the Section 4(f) property. The FHWA and FTA agree that a determination of constructive use should always be based upon the factors identified, so the phrase "to the extent it reasonably can" was removed from the final rule.

Two comments expressed an opinion that paragraph 774.15(d)(2) would invite a great deal of inappropriate and irrelevant speculation about what might or could occur to Section 4(f) properties in the future if a project were not built. One suggested that we strike the last sentence, which states "The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project." We disagree and have decided not to make the suggested change. First, the language proposed in the NPRM is not new, and we have not proposed any substantive change from current regulation or practice. We have no reason to believe, based on our experience with Section 4(f) and constructive use, that this consideration, taken together with other considerations, is an invitation to "speculate" about an owner's future plans regarding a Section 4(f) property. To the contrary, the provision requires an appropriate and relevant consideration that must be grounded in facts. Examples of the basis for reasonable expectations of future impacts include, in appropriate situations: discussions with the property owner, zoning applications, analysis of local development trends, and the existence of conservation easements or other legal protections to preserve the protected features, activities, and attributes of the property. The consideration of reasonably foreseeable non-project impacts is both appropriate and relevant to the decision of whether or not the proximity impacts of the project will cause a substantial impairment of the protected features, activities, or attributes of a Section 4(f) property. Also, including this information in the analysis could be beneficial to the resource by highlighting reasonably foreseeable impacts not caused by the transportation project because it would inform the State or local governmental authorities who are the best position to consider protective actions that are not within the power of the Administration.

• Paragraph 774.15(e)—Comments were received on the list of examples of situations in which a constructive use is presumed to occur. One comment asked for definitions of, and a method to measure, many phrases in the paragraph such as "substantially interferes with use and enjoyment of a noise-sensitive facility," "substantially diminish the utility of the building," and "substantially reduces the wildlife use." These words are all used with their plain English meanings, and they generally describe situations that require judgment and are not conducive to standardized quantitative analysis. The relevant phrase must be applied to a particular set of facts to provide context. For example, one would need to know how a particular noise-sensitive facility is used by the public and what the layout and design of the facility is in order to make a reasonable judgment whether a proposed transportation project would "substantially interfere with use and enjoyment" of that noise-sensitive facility. We did not make any changes to the regulation in response to this comment.

Another comment suggested removing the examples from the regulation in favor of including or expanding the examples in the FHWA's "Section 4(f) Policy Paper." This comment expressed the view that the examples have the potential to lead to more frequent findings that proximity impacts constitute constructive uses. The FHWA and FTA considered this comment but have decided to retain the examples in the Section 4(f) regulation, where they have been codified since 1991 and have not resulted in the problems envisioned by the commenter. Illustrating the concept of constructive use through practical examples has facilitated the application of the concept in fact situations not represented in the examples.

Another comment asked for a clarification that the list of examples in which a noise impact would be considered a constructive use is not an exhaustive list. We agree and restructured the paragraph in the final rule to clarify that these are simply illustrative examples of constructive use and not an exhaustive list. The reorganization of the paragraph also makes the examples easier to follow by separating them into subparagraphs.

Two additional comments specifically focused on the examples of constructive use due to noise. One comment suggested that campgrounds should not be considered Section 4(f) properties because they are essentially multiple use areas. We disagree with this conclusion and therefore reject the suggestion. The FHWA and FTA have always considered publicly owned campgrounds to be recreational areas covered by Section 4(f), and this position is supported by case law. Another commenter suggested that an example be added to clarify that the provision applies not only to man-made facilities such as campgrounds, but also to natural areas where the protection of natural sounds is important. We agree that some Section 4(f) properties may include natural features emitting sounds that are enjoyed by humans, such as the enjoyment of listening to a babbling

brook. When such features are a significant and officially recognized attribute of a park, then the Administration should consider whether the noise increase attributable to the highway or transit project would substantially diminish the continued enjoyment of the natural feature. However, we did not add this example to the regulation because the regulation is necessarily applied on a case-by-case basis and there are already four examples of a constructive use due to noise increases. Another substantially similar example is not desirable, as this narrow distinction can be adequately covered in future FHWA and FTA Section 4(f) guidance.

Another comment suggested rewording the example in paragraph 774.15(e)(2) as follows: "the location of a proposed transportation facility in such proximity that it substantially obstructs or completely eliminates the primary view * * *". The FHWA and FTA decided not to make the proposed change. In some circumstances a substantial impairment could result from a partial obstruction or partial elimination of the primary view of a historic building, depending on the criteria that makes the property eligible for the National Register.

Another comment on this paragraph referred to the noise abatement criteria in FHWA's noise regulation (23 CFR part 772), and expressed the opinion that, for certain types of properties there may be more appropriate measures of noise and unwanted sounds than those used in the noise regulation. The comment suggested that the FHWA and FTA consult with the National Park Service office working on "Soundscapes" for further information. This comment and suggestion were discussed with FHWA highway noise experts, and the FHWA and FTA considered the views of the National Park Service office, as suggested. However, we have concluded that the suggestion is beyond the scope of this rulemaking because it concerns an entirely separate part of Title 23, Code of Federal Regulations, which was not proposed for revision in the NPRM.

Another commenter suggested that the noise threshold for constructive use should be specified as 57 dBA (Category A, Table 1 in 23 CFR part 772). We disagree that a single threshold can be specified due to the varied purposes and functions of different types of Section 4(f) property. The appropriate noise abatement criteria will depend on the activity category of the particular Section 4(f) property. When a Section 4(f) property is determined to be covered under Activity Category A in Table 1 of 23 CFR part 772, then the applicable noise abatement criteria would include the 57 dBA threshold. Examples of Section 4(f) resources covered under Category A are those for which a quiet setting is essential to their continued function, such as an amphitheater or the gardens of an historic monastery. The vast majority of Section 4(f) properties will not fall under Category A. Regardless of which Category the Administration deems applicable to the Section 4(f) property, a constructive use occurs when the relevant noise criteria cannot be met, if the resulting noise substantially impairs the protected activities, features, and attributes of the Section 4(f) property.

Several comments focused on the example of constructive use due to substantial impairment of aesthetic features. One comment asked that the final rule clarify that for visual and aesthetic effects to constitute a constructive use of an architecturally significant historic property, the site would have to derive its value in substantial part due to its setting. We did not adopt this comment. Historic buildings that are significant due to their architecture, do not as a rule, rely upon their setting. The language proposed ("[locating] a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building") captures the more important criteria—the views of such a building available to the public.

Another comment suggested adding "qualifying wild and scenic rivers" to this paragraph. The Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287, sets forth those rivers in the United States designated as part of the Wild and Scenic River System. Within the System there are wild, scenic, and recreational designations. In determining whether Section 4(f) is applicable to a particular river within the System, one must look at the ownership of the river, how the river is designated, how the river is being used, and the management plan for the relevant portion of the river. Only if the river is publicly owned and is designated as a recreational river under the Wild and Scenic Rivers Act or is designated in the management plan for the river as serving a Section 4(f) purpose would it be considered a Section 4(f) property. A single river may be divided into segments that are separately classified as wild, scenic, or recreational. Only those segments that are classified as serving a purpose protected by Section 4(f), such as recreation, would be subject to Section 4(f). The designation of a river under the Wild and Scenic Rivers Act does not, by itself, impart the protections of Section 4(f). Section 4(f) protections are imparted only if the section of the river used by the proposed project fits one or more of the categories of properties protected by Section 4(f). For example, if a river is included in the System and is designated as "wild," but is not being used as, or is not designated under a management plan as, a park, recreation area, wildlife or waterfowl refuge and is not an historic site, then Section 4(f) would not apply. In light of these complexities, we believe that simply adding the phrase "qualifying wild and scenic river" could cause confusion and create the potential for the misapplication of Section 4(f). Accordingly, the FHWA and FTA decline to adopt the proposed language. However, we have clarified the applicability of Section 4(f) to Wild and Scenic Rivers by adding paragraph (g) to Section 774.11, which states: "Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as or are designated in a management plan as a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act must be satisfied, independent of the Section 4(f) approval." This language is consistent with long standing FHWA and FTA policy presented in the FHWA's "Section 4(f) Policy Paper."

Several comments were received on the example of a constructive use due to vibration impacts. One commenter noted with approval that the proposed language apparently only considered the vibration impacts of operating a transportation project and not the construction impacts. Another commenter had the opposite view, and proposed that construction impacts be added to the regulation, along with other edits for clarity. We agree that severe construction vibration can substantially impair the use of a Section 4(f) property in the same way as severe operational vibrations. The final rule clarifies that vibration due to construction should be considered, and that vibration should be considered for any mode of transportation project to which this rule applies. Also in the same sentence, we replaced "affect the structural integrity of" with the simpler and clearer "physically damage." Another comment on this section suggested that repair of damage should be mandatory, and that irreparable vibration damage should be considered a use. The comment proposed adding at

the end of the sentence, "unless the damage is repaired and fully restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, i.e., the site must be returned to a condition which is at least as good as that which existed prior to the project." We clarified the intent of this paragraph with language similar to what was proposed.

• Paragraph 774.15(f)—Many comments were received on paragraph 774.15(f), which provides examples of proximity impacts that are not severe enough to constitute a constructive use. Several comments asserted that the regulation would be easier to use if this list were moved to Section 774.15, Constructive Use, so that all examples regarding possible constructive uses are in one place. We agree, and moved NPRM paragraph 774.13(e) into paragraph 774.15(f) in this final rule. One general comment was that the list should be deleted for fear that the Administration will apply the paragraph as if it were an inclusive list of all possible proximity impacts that are not constructive uses. This fear is unfounded because the language, "examples include," makes it clear that the list is not all-inclusive. Another comment asked that the examples indicate the requirement that an EA or EIS be prepared. The issue of which NEPA document to prepare depends on whether there are significant impacts expected and is addressed in 23 CFR Part 771. The issue is outside the scope of this regulation. Several comments on this paragraph requested clarification that an adverse effect under Section 106 is not automatically a Section 4(f) constructive use. We agree with this comment. The FHWA "Section 4(f) Policy Paper," Question 3B, explains that if a project does not physically take (permanently incorporate) historic property but the project causes an adverse effect under Section 106, then one should consider whether the proximity impacts of the project constitute a constructive use. We did not, however, feel that this nuance needed clarification within the regulation itself.

Several comments suggested modifying or deleting the last sentence in paragraph 774.15(f)(4), which disallows the use of a late-designation exception where a historic property is close to, but less than, 50 years of age. In the case of a constructive use, the late-designation exception says that a constructive use does not occur if a property has been acquired for transportation purposes after adequate effort to identify Section 4(f) resources or if the project location has been established in a final environmental document, and the property is subsequently designated as a Section 4(f) property or is determined to be significant. One commenter points out that the sentence proposed for modification or deletion perpetuates the false assumption that properties over 50 years old are automatically eligible for the National Register. Another commenter states that the provision is confusing because there is no parallel in Section 106, and the sentence could be read to effectively extend Section 4(f) protections to properties that are not necessarily historically significant under Section 106. The FHWA and FTA agree that this sentence could be confusing and have modified the sentence in question to clarify that if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.

One comment suggested that in paragraph 774.15(f)(6) we include consultation on the appropriateness of any mitigation proposed for proximity impacts in order to ensure that the views of the officials with jurisdiction over the Section 4(f) property regarding the appropriateness of the mitigation and the resulting condition of the Section 4(f) property are considered. We agree, and have made this change. The provision now reads: "Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built, as determined after consultation with the official(s) with jurisdiction."

Another comment requested that we revise this paragraph so that the analysis must include consideration of the condition of the Section 4(f) resource as it existed prior to construction of the transportation project, rather than the condition that would exist if the project were not built. We did not make this change because it is more appropriate to consider the true future no-action scenario than to invent a highly unlikely, hypothetical future in which current conditions are frozen in time. This approach is consistent with NEPA practice, in which the Administration compares the impacts expected under the future build alternatives to the expected future no-action scenario.

We received one comment on the example of a vibration impact not rising to the level of a constructive use of a Section 4(f) property. The comment suggested that the regulatory text should contain detailed, measurable limits for vibration levels based on guidance issued by FTA and guidance issued by the U.S. Bureau of Mines. (The FHWA does not have equivalent guidance on vibration.) The impact thresholds for vibration are presented in voluminous guidance that provides background on the complex science involved in their development and application. There are different vibration metrics whose appropriateness in a particular situation must be determined by acoustical experts. The background information that would be needed would be highly technical, voluminous, and difficult to properly present in the regulation. The FHWA and FTA does not agree with the notion that a single vibration threshold applicable in all situations could be specified in regulation and has therefore declined to do so.

Section 774.17 Definitions

A few comments stated that the definitions should be moved to the beginning of the regulation because the beginning is the more common location. The NPRM explained that the definitions were placed at the end because some of them are lengthy and complex. The final rule includes cross-references to the definitions at key points within the regulatory text. Therefore, we did not adopt the suggestion to move the definitions. Other comments proposed definitions for various words that appear only once in this regulation. Where we felt it was appropriate to add clarification in those instances, it was done where the term appears and not in the definitions section. For example, an explanation of "concurrent planning" was integrated into paragraph 774.11(i). One comment suggested combining the definitions of "all possible planning," "*de minimis* impact," and "feasible and prudent alternative" in a separate section of the regulation. We did not adopt this suggestion because it would not have improved a reader's understanding of these terms.

One commenter felt that including a definition of "transportation facility" would obviate the need for the exception for transportation enhancement activities. The idea likely behind this is that, with most transportation enhancement projects, there is no use of the Section 4(f) property by a transportation facility. The FHWA and FTA decided not to follow this suggestion because an explicit exception for transportation enhancement activities is more definitive and covers a broader range of possible transportation enhancement activities.

Many comments proposed additional definitions of various terms. These proposals were all carefully considered,

but in most cases were not adopted. Many of the proposed definitions are dependent on the context in which they are applied, and therefore do not lend themselves easily to definition. In other cases, the meaning of the term is obvious or the proposed definition is beyond the scope of this rulemaking. For example, we declined to include the definition for the NEPA term "significant impact on the environment," which is addressed in the NEPA regulations of the Council on Environmental Quality (CEQ). One comment recommended the addition of definitions for all of the following words and phrases: "Relative value," "matter of sound engineering judgment," "unreasonable to proceed," "severe safety or operation problems," "reasonable mitigation," "severe social, economic, or environmental impacts," "severe disruption to established communities," "severe disproportionate impacts to minority or low income populations," "severe impacts to environmental resources protected under other Federal statutes," "operational cost of an extraordinary magnitude," "unique problems," and "cumulatively cause unique problems or impacts of extraordinary magnitude." The FHWA and FTA decided that including definitions for these terms in this final rule was inappropriate or unnecessary as the terms are used in their plain English meaning and likely involve judgments that depend on the context of the specific project, location, and Section 4(f) property.

Comments on specific definitions within Section 774.17 are discussed in order below.

• "Administration"—One comment noted that SAFETEA–LU amended Sections 325, 326, and 327 of Title 23, United States Code to allow the FHWA (and in the case of Section 326, the FTA also) to assign certain specified environmental responsibilities to a State through a written memorandum of understanding (MOU) or agreement. Section 4(f) is one of the assignable responsibilities. When the FHWA or FTA enters into such MOU or agreement, the State will act in lieu of the FHWA or FTA for those responsibilities that are specified in this regulation as Administration responsibilities and that have been assigned to the State through the MOU or agreement. Therefore, the definition of "Administration" was extended to include a State that has been assigned responsibility for certain environmental requirements in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law, to the extent that the required agreement between the State and FHWA or FTA allows the State to act in place of the FHWA or FTA on Section 4(f) matters.

• "All Possible Planning"—The NPRM proposed a definition of the statutory phrase "all possible planning" to minimize harm when a transportation project uses Section 4(f) property. A number of comments were received proposing various revisions to the regulatory language addressing "all possible planning" in the context of *de minimis* impact determinations. One commenter objected to the use of the word "obviates" because, in the commenter's opinion, it would imply that the Administration is not required to reduce impacts to the minimum level possible in the approval of a *de minimis* impact determination. Another commenter expressed a concern that paragraph (5) of this definition would relieve the Administration from any "independent obligation" to comply with the "all possible planning to minimize harm" requirement of Section 4(f) when the Administration makes a *de minimis* impact determination. According to this comment, the proposed regulatory text is inconsistent with SAFETEA–LU section 6009 which "explicitly retained" the "all possible planning" requirement with respect to projects with *de minimis* impact on non-historic Section 4(f) properties. Other comments suggested replacing the phrase "subsumes and obviates" with "eliminates" or "is presumed to satisfy" the requirement for all possible planning to minimize harm, in order to convey more clearly the idea that if a *de minimis* impact determination is made, then no separate minimization-of-harm finding is required.

The FHWA and FTA carefully considered these objections and alternative language proposals and has deleted the word "obviates," and has retained the word "subsumes" in response. The intent of the provision is not to eliminate the Administration's obligation to minimize harm to affected Section 4(f) properties, but rather to explain that, in a *de minimis* impact situation, the effort to reduce the impacts to *de minimis* levels and "all possible planning" to minimize harm are folded together into a single step. In other words, when a *de minimis* impact determination is approved, either the project already includes measure(s) to minimize harm to which the applicant is committed or the project will have such minor impacts on the Section 4(f) property that the harm to it is negligible without additional measures. The FHWA and FTA believe that the word "subsumes" articulates this intended meaning better than "presumed to satisfy."

Lastly, in the FHWA and FTA's view, paragraph (5) as revised is entirely consistent with the *de minimis* impact provision in SAFETEA–LU section 6009. Contrary to the commenter's interpretation, 49 U.S.C. 303(d)(1)(B), as amended by SAFETEA–LU, does not impose on the Administration an "independent obligation" to comply with the minimization of harm requirement of Section 4(f). Rather, the purpose of the provision is to ensure that the applicant anticipating a *de minimis* impact determination conducts "all possible planning" to minimize harm when developing and committing to "any avoidance, minimization, mitigation, or enhancement measures" necessary to reduce impacts to *de minimis* levels. Furthermore, paragraph (5) of this definition must be read in conjunction with paragraph 774.3(a)(2) which precisely tracks the statutory language regarding the inclusion of measures to minimize harm, and the definition of "*De Minimis* Impact" in Section 774.17, which is an impact that "will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f)."

• "Applicant"—One comment was received on the definition of applicant. The comment notes that while the definition provides for the applicant to work with the Administration to conduct environmental studies and prepare environmental documents, the definition does not provide for the applicant to help prepare decision documents and determinations. While an applicant may in some cases be asked to help prepare decision documents and determinations, the definition was not changed because the applicant does not always do so. In any case, all decisions and determinations required under Section 4(f) are ultimately the responsibility of the Administration, unless the applicant is a State that has been specifically assigned Section 4(f) authority under the aforementioned statutes providing for such assignment.

• "CE"—The proposed rule included definitions for the NEPA terms "EIS" and "EA," including cross-references to the FHWA and FTA's NEPA regulations. A definition and cross-reference for the NEPA term "CE" was added for consistency. The definition states: "*CE.* Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR § 1508.4 and § 771.117 of this title." When deciding whether to issue a CE from NEPA under

the FHWA and FTA NEPA regulations, FHWA and FTA take into account whether there are unusual circumstances.

• *"De Minimis Impact"*—Several comments asked that the proposed definition of *de minimis* impact be expanded not only to describe what a *de minimis* impact is, but also to prescribe the process for making a *de minimis* impact determination. The FHWA and FTA have considered these comments and decided that the definition of *de minimis* impact will not include the procedures for making *de minimis* impact determinations because the regulation describes the process and documentation in paragraphs 774.5(b) and 774.7(b), which are the more appropriate locations.

One comment requested that the definition address the transfer of lands in which there are Federal encumbrances under other statutes. The FHWA and FTA did not make this change because it is an issue unrelated to the definition and is addressed in paragraph 774.5(d). In addition, the joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005, explains that Section 4(f) lands with other Federal encumbrances must address and comply with the requirements of the laws associated with those encumbrances.

One comment recommended the elimination of *de minimis* impact determinations from the final rule. The FHWA and FTA retained the option to grant Section 4(f) approvals via a *de minimis* impact determination because Congress amended Section 4(f) in 2005 to allow *de minimis* impact determinations. (SAFETEA–LU, Pub. L. 109–59, sec. 6009(a), 119 Stat. 1144 (2005)).

One comment recommended a change to the proposed language that would allow a temporary adverse effect to be treated as a *de minimis* impact. The FHWA and FTA decided not to include this change because temporary occupancy of Section 4(f) property is already dealt with under paragraph 774.13(d). The final rule provides the flexibility to appropriately address temporary adverse impacts, which may or may not be *de minimis*.

Several comments recommended changes to the definition of a *de minimis* impact for historic sites. One comment stated that the proposed definition of *de minimis* impact for historic sites did not adequately emphasize that the determination of "no adverse effect" or "no historic property affected" must be made in accordance with the requirements of the Section 106 regulation, including consultation. The FHWA and FTA agree and have reworded the definition to emphasize that the Administration must determine, in accordance with the Section 106 regulation, that there is no adverse effect or that no historic property is affected. Another comment recommended language that would allow adverse effects to contributing elements of a historic district to be considered a *de minimis* impact if the historic district, as a whole, is not adversely affected. The FHWA and FTA did not adopt this suggestion because Section 106 policy and regulations define how adverse effects to historic districts are to be considered.

• "EA"—One comment recommended deleting this definition from the regulation because it is defined in the CEQ's NEPA regulations. The proposed definition is consistent with the CEQ NEPA regulations and is necessary to provide consistency between the FHWA and FTA's Section 4(f) and NEPA regulations.

• "EIS"—One comment recommended deleting this definition from the regulation because it is defined in the CEQ's NEPA regulations. The proposed definition is consistent with NEPA and the CEQ NEPA regulations and is necessary to provide consistency between the FHWA and FTA's Section 4(f) and NEPA regulations. Another comment asked that this definition define the phrase "significant impacts on the environment." The concept of significant impacts is addressed by CEQ in its NEPA regulations and by various Federal courts in caselaw, and its definition is outside the scope of this rulemaking. The definition of EIS cross-references the NEPA regulations.

• "Feasible and Prudent Avoidance Alternative"—This definition was the primary impetus for this rulemaking. In section 6009(b) of SAFETEA–LU, Congress directed the U.S. DOT to "promulgate regulations that clarify the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives" to using Section 4(f) properties for transportation projects. Because these are fact-specific determinations, the NPRM proposed a definition that requires consideration of the totality of the circumstances and the relative significance of the Section 4(f) property. The definition proposed six factors that could support a determination that there is "no feasible and prudent avoidance alternative." A seventh factor is the accumulation of the other factors, and whether in combination the overall impact is severe.

This definition was the subject of the most comments of any proposed section of the NPRM. The views expressed varied drastically, and a wide variety of revisions were proposed. In general, comments opposed to the proposed definition feared that it was not stringent enough to protect Section 4(f) properties because it involves a balancing test. The definition provided in this final rule addresses this concern by adding the word "substantially" to clarify that the balancing test is weighted in favor of avoiding the use of Section 4(f) properties: "A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." Another general concern was that the U.S. Supreme Court rejected any type of balancing test in *Overton Park*. After careful consideration, the FHWA and FTA do not agree with this view. In *Overton Park*, the Court instructed that cost, directness of route, and community disruption should not be considered "on an equal footing with the preservation of parkland." 401 U.S. 402 at 412. The NPRM proposed to define a feasible and prudent avoidance alternative as one that "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation goals of the statute." This definition is consistent with the decision in *Overton Park* because it requires the Administration to take into consideration the importance of protecting the Section 4(f) property. Avoiding the Section 4(f) property is not on equal footing with other concerns but, as the NPRM noted, the consideration of avoidance alternatives must begin with a "thumb on the scale" on the side of avoiding the Section 4(f) property. 71 FR 42611, 42613 (2006). Therefore, the definition in this final rule is unchanged from that proposed in the NPRM except for the aforementioned addition of "substantial" and a change in reference to "preservation goals" to refer to the "preservation purpose" in order to emphasize that the statute itself in 49 U.S.C. 303(a) establishes as its purpose "that special effort should be made to preserve the natural beauty of the countryside and public parks and

recreation lands, wildlife and waterfowl refuges, and historic sites."

More specific comments and changes are addressed below. One comment opposed the requirement that balancing be performed with a "thumb on the scale" in favor of the Section 4(f) property. This comment also opposed the requirement that problems with an avoidance alternative be severe and not easily mitigated before that alternative may be rejected as one that is not prudent and feasible. The requirement that balancing be done with a thumb on the scale is at the very heart of *Overton Park*, the only U.S. Supreme Court case interpreting the application of Section 4(f) at this time. Further, in the conference report accompanying SAFETEA–LU, Congress made clear that the U.S. DOT must set forth factors to be considered and the standards to be applied when determining whether an avoidance alternative is prudent and feasible, and that the factors must adhere to the legal standard set forth in *Overton Park*. H.R. Rep. No. 109–203, at 1057–58 (Conf. Rep.).

The precise term that the NPRM proposed to define was "feasible and prudent alternative." In this final rule, the defined term was changed to "feasible and prudent avoidance alternative." This change was necessary to clarify that Section 4(f) directs the Administration to search for alternatives that avoid using Section 4(f) property. One comment had suggested that we clarify within the definition of "feasible and prudent alternative" that the feasible and prudent standard applies to all project alternatives, not only avoidance alternatives. Based on this and other comments we took a close look at the definition and the way in which the term "feasible and prudent alternative" was used throughout the NPRM. We found that there were instances in which the use of the term was inconsistent with the definition. This has been corrected throughout the final rule and the definition has been clarified as "feasible and prudent avoidance alternatives," as previously discussed. In responding to the comment, we point out that Section 4(f) itself speaks of a "feasible and prudent alternative to using that land", i.e., a feasible and prudent avoidance alternative. (49 U.S.C. 303(c)(1)). As a result, the concept of a feasible and prudent alternative is closely associated with the avoidance of Section 4(f) use.

Several comments suggested that the words "feasible" and "prudent" be split and defined separately in the final rule because the U.S. Supreme Court had discussed each term separately in *Overton Park*. Therefore, each word has "a separate and distinct meaning," which could become confused by combining them into "a single concept." The FHWA and FTA agree that the comment has merit, and have modified the definition to expand upon the meaning of each specific word in a separate paragraph within the definition of "feasible and prudent avoidance alternative." The two terms were not completely separated into distinct definitions because "feasible" and "prudent" are two factors that, when combined, constitute a single test. In other words, the key is not whether a particular avoidance alternative is feasible or prudent, but rather whether it is feasible and prudent. That being the case, the agencies believe the regulation should reflect this important link between the terms.

Several comments opposed designating "severe impacts to environmental resources protected under other Federal statutes" as a factor in determining prudence. One favored changing the language to require another Federal agency to formally deny a permit under another Federal law before this factor could be considered in rejecting an avoidance alternative. This change was not adopted because there is no indication that Congress intended the Administration to elevate Section 4(f) protection above all other environmental concerns. The FHWA and FTA believe that the factor proposed is a relevant concern for determining the prudence of an avoidance alternative and that the language proposed is adequate. Requiring an applicant to submit permit applications and obtain a formal denial when a regulatory agency has indicated its objections to an avoidance alternative would create additional process and delay that do not necessarily equate to better project development. In addition, there is substantial caselaw supporting the consideration of other environmental concerns.

One comment expressed concern that designating "additional construction, maintenance, or operational costs of an extraordinary magnitude" as a factor in determining prudence does not clarify the issue of how much money should be spent to avoid the use of Section 4(f) property. Other comments questioned the requirement that such costs be "of extraordinary magnitude." We understand that deciding what amount constitutes a reasonable public expenditure for avoiding the use of a Section 4(f) property may not be simple. Nevertheless, it is not appropriate to set a single dollar amount or even a percentage of total project cost as the threshold. The decision must take into account multiple factors including the type, function, and significance of the Section 4(f) property. Having multiple factors to weigh, of which cost is but one, should simplify the decision about the prudence of an avoidance alternative. If increased cost alone is the only downside to an avoidance alternative, the preservation purpose of Section 4(f) requires that the increased cost reach an extraordinary magnitude before it would outweigh the protection of Section 4(f) property. Merely a "substantial cost increase" is not enough.

One commenter recommended the deletion of the first two sentences of the definition of "feasible and prudent avoidance alternative" because the commenter felt that measuring the relative value of a Section 4(f) resource would be difficult and that the language is not consistent with paragraph 774.3(a). The FHWA and FTA decided not to delete these sentences because the regulation does not require the measurement of the relative value. Rather, it states that it is appropriate to consider the relative value of the Section 4(f) resource. Also, the FHWA and FTA do not agree that this definition is inconsistent with paragraph 774.3(a) and are following an explicit directive of Congress in providing a definition that elaborates on the meaning of that paragraph.

One comment advocated that a feasible-and-prudent determination should be based only upon whether the alternative causes an extraordinary level of disruption rather than balancing the relative value of the resource and the preservation purpose of the statute against the drawbacks of the avoidance alternative. The FHWA and FTA decided not to change the definition in response to this comment because we continue to believe that it is appropriate to consider the relative value of the Section 4(f) resource and other resources affected by an avoidance alternative in assessing the importance of protecting the Section 4(f) property.

Many comments questioned the proposed provision allowing the accumulation of multiple drawbacks to be considered cumulatively when assessing the prudence of an avoidance alternative. The FHWA and FTA decided to keep this provision because a substantial body of caselaw supports this approach, and because it allows for prudent transportation decisions that consider the totality of the circumstances surrounding each alternative. In some instances, such as where the Section 4(f) property is of relatively low significance, a series of

drawbacks associated with an avoidance alternative may cumulatively be so severe that it would not be prudent to reject the alternative using the low-quality Section 4(f) property.

Several comments expressed concern with the use of the word "severe" in the proposed definition for various reasons, while others supported this terminology. The FHWA and FTA proposed the term "severe" as a way to encompass in simpler language, while still providing stringent protection for Section 4(f) properties, the more complex and often confusing language used in Overton Park—i.e., "unique problems or unusual factors" and "extraordinary magnitude." There is case law support for the idea that the Supreme Court did not literally intend that those precise terms must be used. We have reviewed each instance, including the context, where the term "severe" was used in this definition, and decided to retain the term except in NPRM factor 3 (factor 2 in this final rule) which now states: "It results in unacceptable safety or operational problems." In this factor, the term "severe" was replaced with "unacceptable" to better reflect the Administration's knowledge of accepted standards and practices for designing safe and functional transportation projects. In the other instances, "severe" was retained for the reasons stated above.

One comment was concerned that factors i, ii, and vi in the NPRM's definition of "feasible and prudent" are subjective and unnecessary, and that they may be adequately represented in the other factors. This commenter suggested that these three factors be deleted or that guidance be issued as to how they will be applied and by whom. The factors will be applied by the Administration in a manner consistent with this final rule. Additional guidance will be issued in the future if necessary. The first of these factors, whether an alternative can "be built as a matter of sound engineering judgment," defines when an alternative is feasible. This language was first used by the U.S. Supreme Court in *Overton Park* to explain the meaning of "feasible," and was subsequently adopted verbatim by every U.S. Circuit Court that has considered the issue. The FHWA and FTA will leave this factor in the regulatory language because the conference report for SAFETEA–LU states that DOT must adhere to the legal standard set forth in *Overton Park* and this factor was so clearly articulated. Clarifying language was added to the final rule that makes clear the factor defines whether an avoidance alternative is "feasible". *See* H.R. Rep. No. 109–203, at 1057–58 (Conf. Rep.).

The second factor of concern to this commenter, whether a project can go forward in a way that meets its purpose and need, is at the heart of why the project is being built. For example, if a primary purpose of the project is to rectify a safety concern, it would not be prudent to choose an avoidance alternative that fails to address the safety issue. The FHWA and FTA will keep this factor because of its importance to meeting the transportation mission of the FHWA and FTA and the clear support in caselaw for eliminating alternatives that do not meet the transportation needs that the project is designed to fulfill. *See, e.g., City of Alexandria* v. *Slater*, 198 F.3d 862 (D.C. Cir. 1999).

The final factor of concern to this commenter, whether an avoidance alternative causes "unique problems or unusual factors," was included to ensure that the standard in the regulation is consistent with that set forth by the U.S. Supreme Court in *Overton Park*, which suggested that avoidance alternatives that "involve unique problems" could properly be rejected as not prudent.

- "FONSI"—No comments were received on the proposed definition of "FONSI" and it is unchanged in this final rule.
- "Historic Site"—One comment noted that the NPRM seemed to use the terms "historic site" and "historic property" interchangeably and suggested that only one be used and that a definition would be helpful. This final rule consistently uses the statutory term "historic site" and a definition of "historic site" was added to distinguish the term as it is used under Section 4(f) from its use under other statutes. The definition added is consistent with current FHWA and FTA policy and the National Historic Preservation Act. The definition states: "*Historic Site.* For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register."
- Official(s) with Jurisdiction—One comment stated that the rule fails to provide clear guidance on the instances in which coordination with, or concurrence of, the officials with jurisdiction is required. The final rule requires coordination with the official(s) with jurisdiction at the following points:

(1) Prior to making Section 4(f) approvals under paragraphs 774.3(a) and 774.5(a);

(2) When determining the least overall harm under paragraph 774.3(c);

(3) When applying certain programmatic Section 4(f) evaluations under paragraph 774.5(c);

(4) When applying Section 4(f) to properties subject to Federal encumbrances under paragraph 774.5(d);

(5) When applying Section 4(f) to archeological sites discovered during construction under paragraph 774.9(e);

(6) When determining if a Section 4(f) property is significant under paragraph 774.11(c);

(7) When determining the application of Section 4(f) to multiple use properties under paragraph 774.11(d);

(8) When determining the applicability of Section 4(f) to historic sites under paragraph 774.11(e);

(9) When determining if there is a constructive use under paragraph 774.15(d);

(10) When determining if proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built under paragraph 774.15(f)(6); and

(11) When evaluating the reasonableness of measure to minimize harm under paragraph 774.3(a)(2) and Section 774.17.

The final rule published today requires the concurrence of the official(s) with jurisdiction at the following points:

(1) When finding that there are no adverse effects prior to making *de minimis* impact determinations under paragraph 774.5(b);

(2) When applying the exception for restoration, rehabilitation, or maintenance of historic transportation facilities under paragraph 774.13(a);

(3) When applying the exception for archeological sites of minimal value for preservation in place under paragraph 774.13(b);

(4) When applying the exception for temporary occupancies under paragraph 774.13(d); and

(5) When applying the exception for transportation enhancement projects and mitigation activities under paragraph 774.13(g).

The FHWA and FTA gave careful consideration to the statutory language in determining the appropriate role of other agencies within the procedures for granting Section 4(f) approvals. The statute requires consultation with the U.S. Departments of Agriculture, Housing and Urban Development, and

the Interior, but the ultimate responsibility for approving, or not approving, the use of Section 4(f) property is entrusted to the Administration. Although no other coordination is expressly required by the statute, the FHWA and FTA have decided to require consultation or concurrence at the points listed above with all officials with jurisdiction over the impacted properties in order to ensure that Section 4(f) approvals are granted only after careful consideration of all relevant facts.

One comment questioned the role that designated Tribal Historic Preservation Officers (THPOs) have in the Section 4(f) process. A THPO has jurisdiction over historic sites located on tribal land and is therefore an official with jurisdiction over such historic sites. When a project affects a historic site on tribal land, a recognized THPO would be acting in place of the SHPO, not in addition to the SHPO. However, if in this case the tribe in question has no officially recognized THPO, then the SHPO would be an official with jurisdiction in addition to a representative of the tribal government.

Applicants should be mindful of the interest that many tribes hold in properties of religious and cultural significance off tribal lands. Although the final rule does not designate the THPO as an official with jurisdiction over historic properties located off tribal lands, all interested tribes should be identified and consulted under the National Historic Preservation Act. The National Historic Preservation Act calls for the agency official to acknowledge the special expertise of tribes in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to the tribe.

One comment noted that the definition of "official(s) with jurisdiction" is unclear in the case of federally designated Wild and Scenic Rivers. Suggested language was provided. We agree that this point should be clarified, and have added a Paragraph (c) to the definition of "Official(s) with Jurisdiction" that states: "In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers [Section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)], the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior." Paragraph 774.11(g) explains how Section 4(f) applies to designated Wild and Scenic Rivers, and portions thereof.

- " ROD"—No comments were received on this definition and it is unchanged in this final rule.
- " Section 4(f) Evaluation"—A definition was added for this term to clarify that a Section 4(f) Evaluation is the documentation prepared to evidence the consideration of feasible and prudent avoidance alternatives when the impacts to a Section 4(f) property resulting from its use are not *de minimis*. The documentation may be a stand-alone document or part of a NEPA document, and it may rely upon information contained in technical studies.
- "Section 4(f) Property"—A definition was added that incorporates the statutory language.
- "Use"—One comment recommended that the definition of "use" be changed to clarify that a permanent use occurs when land is acquired for permanent incorporation into a transportation facility. The FHWA and FTA believe the proposed definition, which has been a part of the Section 4(f) regulations for many years, is clear as written and has not been the subject of controversy or confusion in the past. Therefore, the FHWA and FTA decline to make the suggested change.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

We have determined that this action will be a significant regulatory action within the meaning of Executive Order 12866 and will be significant within the meaning of DOT regulatory policies and procedures because of substantial congressional, State and local government, and public interest. Those interests include the receipt of Federal financial support for transportation investments, appropriate compliance with statutory requirements, and balancing of transportation mobility and environmental goals. We anticipate that the direct economic impact of this final rule will be minimal. The clarification of current regulatory requirements is mandated in SAFETEA–LU. We also consider this final rule a means to clarify and reorganize the existing regulatory requirements. These changes will not adversely affect, in a material way, any sector of the economy. In addition, we expect that these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) the agencies have evaluated the effects of this rule on small entities and have determined that the rule will not have a significant economic impact on a substantial number of small entities. This rule does not include any new regulatory burdens that will affect small entities. For this reason, the FHWA and the FTA certify that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism)

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA and the FTA have determined that this rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. The agencies have also determined that this rule will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction; 20.500 *et seq.*, Federal Transit Capital Investment Grants. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to these programs and were carried out in the development of this rule.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA and the FTA have determined that this rule does not contain new collection of

information requirements for the purposes of the PRA.

National Environmental Policy Act

This rule will not have any effect on the quality of the environment under the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and is categorically excluded under 23 CFR 771.117(c)(20). The rule is intended to lessen adverse environmental impacts by standardizing and clarifying compliance for Section 4(f), including the incorporation of clear direction to take into account the overall harm of each alternative.

Executive Order 12630 (Taking of Private Property)

We have analyzed this rule under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights. We do not anticipate that this rule will effect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. We certify that this rule is not an economically significant rule and will not cause an environmental risk to health or safety that may disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

We have analyzed this rule under Executive Order 13175, dated November 6, 2000, and believe that the rule will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. The rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and to public transit agencies for capital transit projects and would not impose any direct compliance requirements on Indian tribal governments. While some historic Section 4(f) properties are eligible for Section 4(f) protection because of their cultural significance to a tribe, the rule does not impose any new consultation or compliance requirements on tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, dated May 18, 2001. We have determined that this rule is not a significant energy action because, although it is a significant regulatory action under Executive Order 12866, the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit FDMS at *http://www.regulations.gov*.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RINs contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 771

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Mass transportation, Public lands, Recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

23 CFR Part 774

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Mass transportation, Public lands, Recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

49 CFR Part 622

Environmental impact statements, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements.

Issued on: March 4, 2008.

James D. Ray,

Federal Highway Administrator, Acting Administrator.

James S. Simpson,

Federal Transit Administrator.

■ For the reasons set forth in the preamble, and under the authority of 23 U.S.C. 103(c), 109, 138, and 49 U.S.C. 303, and the delegations of authority at 49 CFR 1.48(b) and 1.51, the FHWA and FTA hereby amend Chapter I of Title 23 and Chapter VI of Title 49, Code of Federal Regulations, as set forth below:

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

■ 1. The authority citation for part 771 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 110, 128, 138 and 315; 49 U.S.C. 303, 5301(e), 5323(b), and 5324; 40 CFR parts 1500 *et seq.*; 49 CFR 1.48(b) and 1.51.

■ 2. Revise § 771.127(a) to read as follows:

§ 771.127 Record of decision.

(a) The Administration will complete and sign a record of decision (ROD) no sooner than 30 days after publication of the final EIS notice in the **Federal Register** or 90 days after publication of a notice for the draft EIS, whichever is later. The ROD will present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project and document any required Section 4(f) approval in accordance with part 774 of this chapter. Until any required ROD has been signed, no further approvals may be given except for administrative activities taken to secure further project funding and other activities consistent with 40 CFR 1506.1.

* * * * *

§ 771.135 [Removed]

■ 3. Remove § 771.135.

■ 4. Add part 774 to read as follows:

PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(F))

Sec.

Authority: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

§ 774.1 Purpose.

The purpose of this part is to implement 23 U.S.C. 138 and 49 U.S.C. 303, which were originally enacted as Section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as "Section 4(f)."

§ 774.3 Section 4(f) approvals.

The Administration may not approve the use, as defined in § 774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in § 774.17, to the use of land from the property; and

(2) The action includes all possible planning, as defined in § 774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in § 774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Administration may approve only the alternative that:

(1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:

(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

(ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;

(iii) The relative significance of each Section 4(f) property;

(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in § 774.17, to minimize harm to Section 4(f) property.

(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives.[1] An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met

(1) The determination whether a programmatic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as specified in the applicable programmatic Section 4(f) evaluation.

(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the **Federal Register** for comment prior to being finalized. New or revised programmatic Section 4(f) evaluations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

(e) The coordination requirements in § 774.5 must be completed before the Administration may make Section 4(f) approvals under this section. Requirements for the documentation and timing of Section 4(f) approvals are located in §§ 774.7 and 774.9, respectively.

[1] FHWA has issued five programmatic Section 4(f) evaluations: (1) Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property; (2) Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites; (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites; (4) Historic Bridges; Programmatic Section 4(f) Evaluation and Approval; and (5) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.

§ 774.5 Coordination.

(a) Prior to making Section 4(f) approvals under § 774.3(a), the Section 4(f) evaluation shall be provided for coordination and comment to the official(s) with jurisdiction over the Section 4(f) resource and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. The Administration shall provide a minimum of 45 days for receipt of comments. If comments are not received within 15 days after the comment deadline, the Administration may assume a lack of objection and proceed with the action.

(b) Prior to making *de minimis* impact determinations under § 774.3(b), the following coordination shall be undertaken:

(1) For historic properties:

(i) The consulting parties identified in accordance with 36 CFR part 800 must be consulted; and

(ii) The Administration must receive written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of "no adverse effect" or "no historic properties affected" in accordance with 36 CFR part 800. The Administration shall inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of "no adverse effect" or "no historic properties affected."

(iii) Public notice and comment, beyond that required by 36 CFR part 800, is not required.

(2) For parks, recreation areas, and wildlife and waterfowl refuges:

(i) Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

(ii) The Administration shall inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding. Following an opportunity for public review and comment as described in paragraph (b)(2)(i) of this section, the official(s) with jurisdiction

over the Section 4(f) resource must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection. This concurrence may be combined with other comments on the project provided by the official(s).

(c) The application of a programmatic Section 4(f) evaluation to the use of a specific Section 4(f) property under § 774.3(d)(1) shall be coordinated as specified in the applicable programmatic Section 4(f) evaluation.

(d) When Federal encumbrances on Section 4(f) property are identified, coordination with the appropriate Federal agency is required to ascertain the agency's position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval.

§ 774.7 Documentation.

(a) A Section 4(f) evaluation prepared under § 774.3(a) shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property.

(b) A *de minimis* impact determination under § 774.3(b) shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are *de minimis* as defined in § 774.17; and that the coordination required in § 774.5(b) has been completed.

(c) If there is no feasible and prudent avoidance alternative the Administration may approve only the alternative that causes the least overall harm in accordance with § 774.3(c). This analysis must be documented in the Section 4(f) evaluation.

(d) The Administration shall review all Section 4(f) approvals under §§ 774.3(a) and 774.3(c) for legal sufficiency.

(e) A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS under § 771.111(g) of this chapter.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the Section 4(f) approval may not be available at that stage in the development of the action. In such cases, the documentation should address the potential impacts that a proposed action will have on Section 4(f) property and whether those impacts could have a bearing on the decision to be made. A preliminary Section 4(f) approval may be made at this time as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This preliminary approval shall include all possible planning to minimize harm to the extent that the level of detail available at the first-tier EIS stage allows. It is recognized that such planning at this stage may be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary Section 4(f) approval is then incorporated into the first-tier EIS.

(2) The Section 4(f) approval will be finalized in the second-tier study. If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

(3) The final Section 4(f) approval may be made in the second-tier CE, EA, final EIS, ROD or FONSI.

(f) In accordance with §§ 771.105(a) and 771.133 of this chapter, the documentation supporting a Section 4(f) approval should be included in the EIS, EA, or for a project classified as a CE, in a separate document. If the Section 4(f) documentation cannot be included in the NEPA document, then it shall be presented in a separate document. The Section 4(f) documentation shall be developed by the applicant in cooperation with the Administration.

§ 774.9 Timing.

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in the final EIS or in the ROD. Where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD. Actions requiring the use of Section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notification by the Administration of Section 4(f) approval.

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in § 774.13, if:

(1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or

(2) The Administration determines that Section 4(f) applies to the use of a property; or

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original Section 4(f) approval) would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental NEPA document. If a new or supplemental NEPA document is also required under § 771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with § 771.130(f) of this chapter.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in § 774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

§ 774.11 Applicability.

(a) The Administration will determine the applicability of Section 4(f) in accordance with this part.

(b) When another Federal agency is the Federal lead agency for the NEPA process, the Administration shall make any required Section 4(f) approvals unless the Federal lead agency is another U.S. DOT agency.

(c) Consideration under Section 4(f) is not required when the official(s) with jurisdiction over a park, recreation area, or wildlife and waterfowl refuge determine that the property, considered in its entirety, is not significant. In the absence of such a determination, the

Section 4(f) property will be presumed to be significant. The Administration will review a determination that a park, recreation area, or wildlife and waterfowl refuge is not significant to assure its reasonableness.

(d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, Section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl refuge purposes. The determination of which lands so function or are so designated, and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource. The Administration will review this determination to assure its reasonableness.

(e) In determining the applicability of Section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the official(s) with jurisdiction to identify all properties on or eligible for the National Register of Historic Places (National Register). The Section 4(f) requirements apply to historic sites on or eligible for the National Register unless the Administration determines that an exception under § 774.13 applies.

(1) The Section 4(f) requirements apply only to historic sites on or eligible for the National Register unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

(2) The Interstate System is not considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate System formally identified by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.

(f) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction, except as set forth in § 774.13(b).

(g) Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as, or are designated in a management plan as, a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287, must be satisfied, independent of the Section 4(f) approval.

(h) When a property formally reserved for a future transportation facility temporarily functions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject the property to Section 4(f).

(i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in § 774.17. Examples of such concurrent or joint planning or development include, but are not limited to:

(1) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation facility and the Section 4(f) property; or

(2) Designation, donation, planning, or development of property by two or more governmental agencies with jurisdiction for the potential transportation facility and the Section 4(f) property, in consultation with each other.

§ 774.13 Exceptions.

The Administration has identified various exceptions to the requirement for Section 4(f) approval. These exceptions include, but are not limited to:

(a) Restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) The Administration concludes, as a result of the consultation under 36 CFR 800.5, that such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, and

(2) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(1) of this section.

(b) Archeological sites that are on or eligible for the National Register when:

(1) The Administration concludes that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and

(2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.

(c) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in § 774.9(e), the Administration may permit a project to proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.

(d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:

(1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;

(2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal;

(3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;

(4) The land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and

(5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

(e) Park road or parkway projects under 23 U.S.C. 204.

(f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

(1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);

(2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241–1251, with the exception of those trail segments that are historic sites as defined in § 774.17;

(3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and

(4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.

(g) Transportation enhancement projects and mitigation activities, where:

(1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and

(2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

§ 774.15 Constructive use determinations.

(a) A constructive use occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

(b) If the project results in a constructive use of a nearby Section 4(f) property, the Administration shall evaluate that use in accordance with § 774.3(a).

(c) The Administration shall determine when there is a constructive use, but the Administration is not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property. However, such documentation may be prepared at the discretion of the Administration.

(d) When a constructive use determination is made, it will be based upon the following:

(1) Identification of the current activities, features, or attributes of the property which qualify for protection under Section 4(f) and which may be sensitive to proximity impacts;

(2) An analysis of the proximity impacts of the proposed project on the Section 4(f) property. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project; and

(3) Consultation, on the foregoing identification and analysis, with the official(s) with jurisdiction over the Section 4(f) property.

(e) The Administration has reviewed the following situations and determined that a constructive use occurs when:

(1) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as:

(i) Hearing the performances at an outdoor amphitheater;

(ii) Sleeping in the sleeping area of a campground;

(iii) Enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance;

(iv) Enjoyment of an urban park where serenity and quiet are significant attributes; or

(v) Viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.

(2) The proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a Section 4(f) property which derives its value in substantial part due to its setting;

(3) The project results in a restriction of access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;

(4) The vibration impact from construction or operation of the project substantially impairs the use of a Section 4(f) property, such as projected vibration levels that are great enough to physically damage a historic building or substantially diminish the utility of the building, unless the damage is repaired and fully restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, i.e., the integrity of the contributing features must be returned to a condition which is substantially similar to that which existed prior to the project; or

(5) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife and waterfowl refuge adjacent to the project, substantially interferes with the access to a wildlife and waterfowl refuge when such access is necessary for established wildlife migration or critical life cycle processes, or substantially reduces the wildlife use of a wildlife and waterfowl refuge.

(f) The Administration has reviewed the following situations and determined that a constructive use does not occur when:

(1) Compliance with the requirements of 36 CFR 800.5 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register, results in an agreement of "no historic properties affected" or "no adverse effect;"

(2) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment;

(3) The projected noise levels exceed the relevant threshold in paragraph (f)(2) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(4) There are proximity impacts to a Section 4(f) property, but a governmental agency's right-of-way acquisition or adoption of project location, or the Administration's approval of a final environmental document, established the location for the proposed transportation project before the designation, establishment, or change in the significance of the property. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section; or

(5) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a property for protection under Section 4(f);

(6) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built, as determined after consultation with the official(s) with jurisdiction;

(7) Change in accessibility will not substantially diminish the utilization of the Section 4(f) property; or

(8) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of protected activities, features, or attributes of the Section 4(f) property.

§ 774.17 Definitions.

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

Administration. The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

All possible planning. All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.

(2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under § 774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with § 771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under § 774.3(b).

(5) A *de minimis* impact determination under § 774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

Applicant. The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein.

CE. Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

De minimis impact. (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have "no adverse effect" on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

EA. Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500–1508 and § 771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

EIS. Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500–1508, and §§ 771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

Feasible and prudent avoidance alternative. (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

FONSI. Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and § 771.121 of this chapter.

Historic site. For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Official(s) with jurisdiction. (1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land,

the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

ROD. Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and § 771.127 of this chapter.

Section 4(f) evaluation. Refers to the documentation prepared to support the granting of a Section 4(f) approval under § 774.3(a), unless preceded by the word "programmatic." A "programmatic Section 4(f) evaluation" is the documentation prepared pursuant to § 774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

Section 4(f) Property. Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance.

Use. Except as set forth in §§ 774.11 and 774.13, a "use" of Section 4(f) property occurs:

(1) When land is permanently incorporated into a transportation facility;

(2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in § 774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

Federal Transit Administration

Title 49—Transportation

CHAPTER VI—FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

■ 5. Revise the authority citation for Subpart A to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303, 5301(e), 5323(b), and 5324; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 40 CFR parts 1500 *et seq.*; 49 CFR 1.51.

■ 6. Revise § 622.101 to read as follows:

Subpart A—Environmental Procedures

§ 622.101 Cross-reference to procedures.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations, and orders are set forth in part 771 of title 23 of the Code of Federal Regulations. The procedures for complying with 49 U.S.C. 303, commonly known as "Section 4(f)," are set forth in part 774 of title 23 of the Code of Federal Regulations.

[FR Doc. E8–4596 Filed 3–11–08; 8:45 am]
BILLING CODE 4910–22–P

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. **PLAINTIFFS-APPELLANTS' BRIEF**
2. **PLAINTIFFS-APPELLANTS' EXCERPTS OF RECORDS VOLUMES 1-13**

was served on all interested parties electronically through CM/ECF

DATED: May 15, 2013

/s/Nicholas C. Yost
NICHOLAS C. YOST