Section 4(f) Updates

2007 Mn/DOT Environmental Stewardship & Streamlining Workshop

Presented by Dave Gamble
Federal Highway Administration Resource Center
Environmental Technical Service Team
Objectives of Session

• Updates on recent developments to Section 4(f) including ...

• ... pre-SAFETEA-LU events (Policy Paper Update and Beneficial Uses Programmatic Evaluation)

• ... and SAFETEA-LU changes (De Minimis Findings and Notice of Proposed Rulemaking)
Pre-SAFETEA-LU* Events

• Four “roundtables” held to discuss concerns and issues
• Revised Section 4(f) Policy Paper issued March 1, 2005
• “Beneficial Uses” Programmatic Section 4(f) Evaluation issued April 20, 2005

*Safe, Accountable, Flexible, Efficient Transportation Equity Act – Legacy for Users
Section 4(f) Policy Paper
Pre-SAFETEA-LU

• 1st comprehensive overhaul since 1987 inception & 1989 update
• Reviewed extensively within US DOT & by DOI, HUD, and DOA
• **Official FHWA policy on 4(f) applicability & other issues**
• Intended to be “living document”

http://environment.fhwa.dot.gov/projdev/4fpolicy.htm
Section 4(f) Policy Paper
Pre-SAFETEA-LU

1989 version:
• 22 subject areas
• 34 questions and answers

2005 version:
• 30 subject areas
• 53 questions and answers
• New Appendices
  Æ App. A – Analysis of Case Law
  Æ App. B – Evaluation Diagram

http://environment.fhwa.dot.gov/projdev/4fpolicy.htm
Section 4(f) Policy Paper
Pre-SAFETEA-LU

• **New Subject Areas:**
  - Golf Courses
  - User or Entrance Fees
  - Cemeteries
  - Non-transportation use of 4(f) resource
  - Transportation Enhancement Projects
  - Museums, Aquariums & Zoos
  - Tribal Lands & Indian Reservations
  - Tiered NEPA Documents

http://environment.fhwa.dot.gov/projdev/4fpolicy.htm
Section 4(f) Policy Paper
Pre-SAFETEA-LU

• *Rescinds the following:*
  ” November 15, 1989 Memorandum: Alternatives Selection Process for Projects Involving Section 4(f)
  ” August 22, 1994 Interim Guidance on Applying Section 4(f) on Transportation Enhancement Projects & National Recreation Trails

http://environment.fhwa.dot.gov/projdev/4fpolicy.htm
Section 4(f) Policy Paper
Pre-SAFETEA-LU

• **Worth a Special Look:**

• Discussion under “Examples of the Alternative Selection Process” beginning on page 6

• **Appendix A** – Analysis of Case Law

http://environment.fhwa.dot.gov/projdev/4fpolicy.htm
Beneficial Uses
Programmatic Evaluation
Pre-SAFETEA-LU

- **Reminders on Programmatic**
- Time saving procedural alternative to Individual Section 4(f) Evaluations
- Specific set of conditions for applicability to projects including project type, degree of use, and evaluation of avoidance alternatives

http://environment.fhwa.dot.gov/projdev/4fnetbenefits.asp
Beneficial Uses
Programmatic Evaluation
Pre-SAFETEA-LU

• **Reminders on Programmatic**:
  • Not an exemption or waiver from Section 4(f),
  • Not a form of automatic compliance with Section 4(f)
  • Project-level analysis & coordination required, but processing time & effort to document is reduced

http://environment.fhwa.dot.gov/projdev/4fnetbenefits.asp
Beneficial Uses
Programmatic Evaluation
Pre-SAFETEA-LU

• Actual Title …

“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” … whew!

http://environment.fhwa.dot.gov/projdev/4fnetbenefits.asp
Beneficial Uses
Programmatic Evaluation
Pre-SAFETEA-LU

• May be used for projects on existing or new alignments involving ...

• ... use of parks, recreation areas, refuges, or historic sites that ...

• ... in the view of the officials having jurisdiction will result in a net benefit to the property

http://environment.fhwa.dot.gov/projdev/4fnetbenefits.asp
Beneficial Uses
Programmatic Evaluation
Pre-SAFETEA-LU

• May be used for projects processed as EIS
• May **not** be used if property’s historic characteristics are altered so that it is no longer eligible for National Register
• Officials w/ jurisdiction agree that net benefit will result to property

http://environment.fhwa.dot.gov/projdev/4fnetbenefits.asp
Beneficial Uses
Programmatic Evaluation
Pre-SAFETEA-LU

- **What is a Beneficial Use?**
- Transportation use & measures to minimize harm & mitigation result in overall enhancement of the property when compared with ...
- ...future no-build or avoidance alternatives ...
- ... and the present condition of the property

Beneficial Uses Example:
Reconstruction of deteriorated or lost historic feature (rock wall) in a slightly different location because of widened or additional lanes. Likely to be an adverse effect via Section 106, but all parties agree overall site qualities are enhanced.
Beneficial Uses Example:
Partial or total relocation of community park to a location that has greater value and use to the community.
Problems could be access, inconsistent adjacent land use, unsafe park conditions, etc.
Copies of all the programmatic Section 4(f) evaluations may be found online at the following address: http://environment.fhwa.dot.gov/projdev/4fnsp eval.asp
## Section 4(f) Programmatic Agreements Comparison Chart – 4/12/06

<table>
<thead>
<tr>
<th>Date Enacted</th>
<th>Independent Bikeway or Walkway Projects</th>
<th>Use of Historic Bridges</th>
<th>Minor Involvement with Parks, Recreation Lands, and Wildlife and Waterfowl Refuges</th>
<th>Minor Involvement with Historic Sites</th>
<th>Transportation Projects that have a Net Benefit to a Section 4(f) Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>5/23/77</td>
<td>Independent bikeway or walkway project, not incidental activities of a highway project.</td>
<td>Rehabilitation or replacement of historic bridges.</td>
<td>Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.</td>
<td>Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.</td>
<td>Any type of project on existing or new alignment regardless of NEPA document type.</td>
</tr>
<tr>
<td>7/5/83</td>
<td>Parks or recreation areas.</td>
<td>Historic bridges that are not a National Historic Landmark.</td>
<td>Parks, recreation lands, and wildlife and waterfowl refuges that are adjacent to the existing facility.</td>
<td>Historic sites that are adjacent to the existing facility.</td>
<td>All Section 4(f) resources.</td>
</tr>
<tr>
<td>12/23/86</td>
<td>No significant impacts (No displacements, minimal water quality impacts, etc.)</td>
<td>If bridge can be rehabilitated without affecting the historic integrity, Section 4(f) does not apply.</td>
<td>The amount of property that may be acquired/used is limited as specified in the PA.</td>
<td>Project may not remove or alter historic buildings, structures or objects, or archaeological resources important for preservation in place.</td>
<td>No impact limits, but project results in an overall enhancement to the resource.</td>
</tr>
<tr>
<td></td>
<td>If the bridge is to be demolished and/or replaced, Section 4(f) applies.</td>
<td>May not be used for projects processed with an EIS.</td>
<td>Project must result in a no effect or no adverse effect determination via the Section 106 process.</td>
<td>May not be used for projects processed with an EIS.</td>
<td>For historic resources the project doesn’t necessarily require a no effect or no adverse effect determination, but property remains eligible for NRHP.</td>
</tr>
<tr>
<td>12/23/86</td>
<td>Official with jurisdiction concurs in writing that project is acceptable and consistent with designated use of property.</td>
<td>Official with jurisdiction concurs in writing with assessment of impacts and proposed mitigation.</td>
<td>SHPO concurs in writing with assessment of impacts and proposed mitigation.</td>
<td>Official with jurisdiction or SHPO concurs in writing with assessment of impacts and proposed mitigation.</td>
<td>For projects with one or more public meetings or hearings, information on the proposed use of the Section 4(f) resources shall be communicated to the public.</td>
</tr>
<tr>
<td>4/20/05</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>

- **Project Type**
- **Resource Applicability**
- **Impact threshold**
- **Coordination and Concurrency Requirements**
Post-SAFETEA-LU* Events

- *De Minimis* guidance issued December 13, 2005
- Exemption of the Interstate System from Section 4(f)
- Notice of Proposed Rulemaking (NPRM) on Section 4(f) issued July 27, 2006

*Safe, Accountable, Flexible, Efficient Transportation Equity Act – Legacy for Users*
De Minimis Findings
part of SAFETEA-LU

• What does “de minimis” mean?
• Black's Law Dictionary (8th ed. 1999) defines *de minimis* as:
  – Trifling, minimal
  – (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case
  – *De Minimis Non Curat Lex*, The law does not concern itself with trifles.

http://www.fhwa.dot.gov/hep/guidedeminimis.htm
De Minimis Findings
part of SAFETEA-LU

- Purpose of *de minimis*?
- To simplify processing and approval of projects with minimal impacts to Section 4(f) properties
- Legal Sufficiency review and traditional evaluation of avoidance alternatives to determine their feasibility & prudence no longer required

http://www.fhwa.dot.gov/hep/guidedeminimis.htm
De Minimis Findings

HISTORIC SITES – part of SAFETEA-LU

• Section 4(f) requirements are satisfied if:
  – no hist. properties affected, or …
  – no adverse effect on historic sites

• Determined via Section 106 consultation process, including considering views of consulting parties

http://www.fhwa.dot.gov/hep/guidedeminimis.htm
De Minimis Findings
HISTORIC SITES – part of SAFETEA-LU

• Written concurrence necessary from SHPO or THPO (and ACHP if participating) in Section 106 determination of no effect or no adverse effect, ...

• ... but not in FHWA’s finding of de minimis impact (though they must be informed it will be based upon their concurrence in 106 call)

http://www fhwa dot gov/hep/guidedeminimis htm
De Minimis Findings

- Section 4(f) requirements satisfied if project has *de minimis* impact on park, recreation area, or refuge

- *De minimis* means no adverse effect to property’s activities, features, & attributes

De Minimis Findings

PARKS et al – part of SAFETEA-LU

- Officials w/ jurisdiction must be informed of FHWA’s intent to make *de minimis* finding …
- … and must concur in writing with assessment of project effect
- Public notice and opportunity for review & comment also required

http://www.fhwa.dot.gov/hep/guidedeminimis.htm
De Minimis Findings
part of SAFETEA-LU

“In making any (de minimis) determination, the Secretary shall consider to be part of a ... project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the ... project.”

Section 6009 of SAFETEA-LU
De Minimis Findings
part of SAFETEA-LU

May be used:
• on any level NEPA document
• on “pipeline” projects
• in “temporary occupancy” scenarios

May not be used:
• in “constructive use” scenarios
• on a project-wide basis (only resource by resource)

http://www.fhwa.dot.gov/hep/guidedeminimis.htm
De Minimis Findings
part of SAFETEA-LU

- Existing Programmatic Section 4(f) Evaluations remain in effect
- Study & report on new provisions due after first three years
  - processes & efficiencies
  - mitigation effectiveness
  - location, size, & cost of projects

http://www.fhwa.dot.gov/hep/guidedeminimis.htm
De Minimis Findings
part of SAFETEA-LU

- **29** states have done *De Minimis* on 167 projects involving 263 properties
- **88%** involve historic properties

*Handout says 27, so please correct to 29*
Exemption of Interstate

- Being declared historic might have created enormous administrative burdens
- Exemption from Section 106 became effective on 03/10/05
- Exemption from Section 4(f) became effective on 08/10/05 (SAFETEA-LU)

http://www.environment.fhwa.dot.gov/histpres/highways.asp
Exemption of Interstate

- The system as a whole is exempt, but not individually distinctive features such as bridges or tunnels.
- Does not negate the need for overall compliance with Section 106 on Interstate projects (assessing effects on nearby historic properties).

http://www.environment.fhwa.dot.gov/histpres/highways.asp
Exemption of Interstate

- List of which Interstate elements should be considered historic finalized 12-19-06

- Minnesota has three …

http://www.environment.fhwa.dot.gov/histpres/highways.asp
Lowry Tunnel (I-94) in Minneapolis
Minnesota Road Research Project (I-94) in Otsego
I-35 in Duluth
NPRM on Section 4(f)

• Issued July 27, 2006
• Clarifies factors to be considered when determining if avoidance is feasible and prudent
• Clarifies alternative selection when all alternatives use some Section 4(f) property (remember my recommendation to check out “Examples of the Alternative Selection Process” beginning on page 6 of the new 4(f) Policy Paper?)

http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-6496.htm
NPRM on Section 4(f)

- Establishes in regulation the new *de minimis* procedures
- Recognizes statutory and “common sense” exceptions
- Establishes stand alone Section 4(f) regulation (23 CFR 774)
- Comment period closed September 25, 2006

http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-6496.htm
“Laws are like sausages. It’s better not to see them being made.”

Otto von Bismarck
“Laws are like sausages. It’s better not to see them being made.”

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Did You Forget???

Section 4(f) turned 40 on October 15, 2006