Section 4(f) Updates

2009 Mn/DOT Environmental Stewardship & Streamlining Workshop

Presented by Dave Gamble
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Environment Technical Service Team
Objectives of Session

- Overview of 23 CFR 774
- Section 4(f) Approval Options
- *De Minimis* impacts
- Coming Attractions
- Example / Questions
Section 4(f) – the Law*

- 1966 US Dept. of Transportation Act

*Applicable only to U.S. DOT agencies
Section 4(f) – the Law*

- 1966 US Dept. of Transportation Act

*Applicable only to U.S. DOT agencies; 23 CFR 774 is applicable only to FHWA & FTA
Section 4(f) – the Law

- The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or land of a historic site of National, State, or local significance only if –

- There is no prudent and feasible alternative to using the land, and

- The program or project includes all possible planning to minimize harm to the ... Section 4(f) resource.
Section 4(f) – the Law

- Early application heavily influenced by case law
- Overton Park (1971) articulated very high standard for prudence (uniquely difficult problems)
- Varying degrees of interpretation
- … but, purpose was and still is preservation
23 CFR 774
March 12, 2008

- SAFETEA-LU* Section 6009(b):
  - “Clarification of Existing Standards”
- “… promulgate regulations that clarify factors to be considered and standards to be applied in determining feasibility and prudence of (avoidance) alternatives”

*Safe, Accountable, Flexible, Efficient Transportation Equity Act – Legacy for Users
• Additionally, 23 CFR 774 …
  – Least harm analysis
  – Procedures for *de minimis* impacts
  – Recognizes statutory and “common sense” exceptions
  – Assigns Section 4(f) its own regulation
23 CFR 774
March 12, 2008

• NPRM issued July 27, 2006
• Comment period ended Sept. 25, 2006
• 37 responses received
• DOTs, trade groups, advocacy groups, etc., ... and 2 individuals
• Final rule issued March 12, 2008*
• Effective date April 11, 2008
• Technical Correction on June 3, 2008

23 CFR 774
March 12, 2008

• Defines “use” and other terms
• No changes to constructive use
• Includes *de minimis* impacts
• Preamble stresses importance of preservation purpose of law
  – least harm: “balancing must be done with a ‘thumb on the scale’ in favor of protecting Section 4(f) properties”

Helpful tip → Read the preamble … yes, it’s long, but it contains a lot of useful material.
December 13, 2005 De Minimis guidance remains in effect

March 2005 Section 4(f) Policy paper remains in effect, but …*

SAFETEA-LU also required Implementation Study:

- Efficiencies; effectiveness of mitigation & avoidance commitments; number & types of projects with de minimis impacts

*... if a conflict arises between the two, the regulation RULES!
Step 1 – Try to Avoid
- “Feasible” has same meaning, but “Prudent” has new considerations
- No automatic leap into least harm
- Views of officials with jurisdiction
- Can consider impacts to non-4(f) resources
- SLIDING SCALE

Step 2 – Minimize Harm
- Include all reasonable measures
Prudence based upon:

- Failure to meet purpose and need
- Safety/operational problems
- Severe impacts (after considering reasonable mitigation) to non-4(f) resources
- Severe social, economic, or environmental impacts
- Severe disruption to established communities
- Severe disproportionate impacts to minority or low income populations
- Extraordinary additional costs (including maintenance & operational costs)
- Accumulation of factors
• **Prudent?** Does not cause “severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.”

• **Sliding Scale?** “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.”
• **Least Harm Factors**
  - Ability to mitigate impacts to each Section 4(f) property
  - Relative severity of harm – after mitigation – to Section 4(f) qualities
  - Relative significance of Section 4(f) properties
  - Views of officials w/ jurisdiction
  - Degree that purpose & need is met
  - Magnitude of impacts – after reasonable mitigation – to non-4(f) resources
  - Substantial differences in cost

23 CFR 774.3(c)
• **Coordination:** may assume no objection if comments not received 15 days after expiration of 45-day comment period

• **Applicability:** significance, joint planning, reserved corridors, Interstate system exemption, etc.

• **Exceptions:** certain late designations, temporary occupancy, trails/paths, transportation enhancements, etc.
23 CFR 774.3
Section 4(f) Approvals

Approval Options

- Individual Evaluation 774.3(a)
- De Minimis Impact Determination 774.3(b)
- Programmatic Evaluation 774.3(d)
Suggested Procedure

1. Identify all Section 4(f) properties in the project area with 23 CFR774.11 and the Section 4(f) Policy Paper

2. Identify all “uses” for each alternative per 23 CFR 774.13, 774.15, 774.17, and the Section 4(f) Policy Paper

3. Is the use *de minimis*?
   - If yes, approve the use under 774.3(b)

4. Is the use covered by a programmatic evaluation?
   - If yes, apply it and approve the use under 774.3(c)

5. Prepare an individual 4(f) evaluation
   - Approve the use under 774.3(c)
   - Least overall harm may apply 774.3(e)
De Minimis Impacts

- *De Minimis* guidance issued December 13, 2005
- 23 CFR 774 addresses in “Section 4(f) Approvals,” “Coordination,” “Documentation,” and “Definitions”
- Should be seeing fewer and fewer individual Section 4(f) evaluations

23 CFR 774.3, 774.5, 774.7, and 774.17
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 Impacts

• 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 Impacts
HISTORIC SITES

• 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 Impacts

HISTORIC SITES

• 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 Impacts**

PARKS et al

- 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

http://www.fhwa.dot.gov/hep/guidedeminimis.htm
De Minimis Impacts
PARKS et al

• 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 Impacts

“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 Impacts

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 Impacts

- 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 – Status?
Implementation Study

- 43 states have made *de minimis* determinations 326 times on 167 projects
- 62% involve historic properties
- 306 on highway projects
- 20 on transit projects

Source – December 2008 Phase I Report
De Minimis by Property Type

percentage of total

Wildlife Refuge
Rec Area
Park
Historic Site
De Minimis by Document Type

percentage of total

EIS  Re-eval.  EA  CE
De Minimis – Status?
Implementation Study

- Most interviewees report time and cost savings using de minimis
- Reasons – no evaluation of avoidance alternatives, no legal sufficiency reviews, no DOI review
- Improved coordination w/ park and recreation officials
- No change in project outcomes
- COMMON SENSE!

Source – December 2008 Phase I Report
Programmatic Evaluation

Reminders

• Not an exemption, waiver or form of automatic compliance with Section 4(f)
• Project-level analysis & coordination required, but processing time & effort to document is reduced
• All five programmatics still in effect

http://environment.fhwa.dot.gov/projdev/4fnspeval.asp
### Section 4(f) Programmatic Agreements Comparison Chart – 4/12/06

<table>
<thead>
<tr>
<th>Date Enacted</th>
<th>Project Type</th>
<th>Resource Applicability</th>
<th>Impact Threshold</th>
<th>Coordination and Concurrence Requirements</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>Historic bridges that are not a National Historic Landmark.</td>
<td>No significant impacts (No displacements, minimal water quality impacts, etc.)</td>
<td>Official with jurisdiction concurs in writing that project is acceptable and consistent with designated use of property.</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>Rehabilitation or replacement of historic bridges.</td>
<td>If bridge can be rehabilitated without affecting the historic integrity, Section 4(f) does not apply.</td>
<td>If the bridge is to be demolished and/or replaced, Section 4(f) applies.</td>
<td>Official concurs in writing that replacement is proposed, the bridge must be made available for an alternative use. SHPO concurs in writing with assessment of impacts and proposed mitigation.</td>
<td></td>
</tr>
<tr>
<td>12/23/86</td>
<td>Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.</td>
<td>Parks, recreation lands, and wildlife and waterfowl refuges that are adjacent to the existing facility.</td>
<td>The amount of property that may be acquired/used is limited as specified in the PA.</td>
<td>Official with jurisdiction concurs in writing with assessment of impacts and proposed mitigation.</td>
<td></td>
</tr>
<tr>
<td>12/23/86</td>
<td>Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.</td>
<td>Historic sites that are adjacent to the existing facility.</td>
<td>May not be used for projects processed with an EIS.</td>
<td>SHPO concurs in writing with assessment of impacts and proposed mitigation.</td>
<td></td>
</tr>
<tr>
<td>4/20/05</td>
<td>Any type of project on existing or new alignment regardless of NEPA document type.</td>
<td>All Section 4(f) resources.</td>
<td>No impact limits, but project results in an overall enhancement to the resource.</td>
<td>Official with jurisdiction or SHPO concurs in writing with assessment of impacts and proposed mitigation.</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>
</tbody>
</table>
• Section 4(f) Policy Paper Update
• AASHTO Center for Environmental Excellence Section 4(f) Practitioner Guide
• NHI Section 4(f) Training
• Phase II Report SAFETEA-LU Section 6009 Implementation Study
Does Section 4(f) apply?

Federal-aid Project?

Significant publicly owned public park?

Is there a “use” of land from the property?
Processing Options?

Finding of *de minimis* impact?

Programmatic Evaluation?

Individual Evaluation?
Option 1 – Finding of *de minimis* impact

NEPA class of action for project doesn’t matter.

No limit on size of take.

**REQUIRED:** (1) concurrence from officials with jurisdiction …, and (2) opportunity for public involvement

**NOT REQUIRED:** (1) analysis of avoidance alternatives; (2) legal sufficiency review by FHWA lawyers; and (3) coordination with US DOI, unless …
Option 2 – Programmatic Evaluation

Minor Involvement with Parks, Recreation Areas, and Refuges.

Make sure all applicability criteria are met …

… can’t use if project processed with an EIS;

… size of take can’t exceed certain limit.
Option 2 – Programmatic Evaluation (continued)

Net Benefit to Section 4(f) Property

Make sure all applicability criteria are met …

… doesn’t matter if project processed with an EIS;

… no limit on size of take;

… officials must agree there is net benefit to property.
Option 2 – Programmatic Evaluation (continued)

REQUIRED: analysis of avoidance alternatives, and determination if avoidance is feasible and prudent.

NOT REQUIRED: Coordination with US DOI and Legal Sufficiency review by FHWA lawyers.
Option 3 – Individual Evaluation

**REQUIRED:** Analysis of avoidance alternatives, and determination if avoidance is feasible and prudent.

**REQUIRED:** Coordination with US DOI and Legal Sufficiency review by FHWA lawyers.
Other variations on a theme …

- Facilities impacted versus just land
- Size of take increases
- Privately owned but leased to public agency
- Title questions; ownership not clear
- Park officials object to conversion of land
- Concerns about who can access the property
- Property is historic; Section 106 process now required
- Park officials object to proposed mitigation
- U.S. DOI has property interest in the resource
- Section 6(f) funds used to improve or acquire property
Other variations on a theme

Size of take increases

Facilities impacted versus just land

Title questions; ownership not clear

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Park officials object to proposed mitigation

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Property is historic; Section 106 process now required

Section 6(f) funds used to improve or acquire property

Concerns about who can access the property