Federal Register

Wednesday,
March 12, 2008

Part III

Department of Transportation

Federal Highway Administration
Federal Transit Administration

23 CFR Parts 771 and 774

49 CFR Part 622

Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites; Final Rule

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.

[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.

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

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)