

HANDBOOK ON
DEPARTMENTAL REVIEW OF
SECTION 4(f) EVALUATIONS

Department of the Interior
National Park Service
U.S. Fish and Wildlife Service
Office of Environmental Policy and Compliance
Washington, DC 20240

February 2002

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PURPOSE

This handbook provides guidance in the review of and the preparation of Interior Department comments on Section 4(f) evaluations prepared by the U.S. Department of Transportation (DOT) and its modal administrations. The main modal administrations in DOT are the Federal Highway Administration (FHWA), the Federal Aviation Administration (FAA), the U.S. Coast Guard (USCG), the Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA) (formerly the Urban Mass Transit Administration). Section 4(f) of the Department of Transportation Act of 1966 provides significant authority to the Secretary of the Interior to seek the protection of public (federal and non-federal) recreational lands, including parks and wildlife refuges, in the planning of DOT proposals.

SECTION 4(f) DEFINED

STATUTORY MANDATE: Section 4(f) of the Department of Transportation Act, as amended, now resides in the United States Code at 49 U.S.C. 303. It states:

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

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

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

(c) The Secretary may approve a transportation program or project (other than any project for a park road or parkway under Section 204 of Title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance, or land of an historic site of national, state, or local significance (as determined by the federal, state, or local officials having jurisdiction over the park, area, refuge, or site) only if -

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

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

REGULATORY DEFINITION: The DOT regulations in the Code of Federal Regulations, at 23 CFR 771.107(e), define “Section 4(f)” as follows:

Section 4(f) refers to 49 U.S.C. 303 and 23 U.S.C. 138.

The following footnote was given, and it is repeated here for historical information to support the common use of the term “Section 4(f).”

Section 4(f), which protected certain public lands and all historic sites, technically was repealed in 1983 when it was codified, without substantive change, as 49 U.S.C. 303. This regulation continues to refer to section 4(f) because it would create needless confusion to do otherwise; the policies section 4(f) engendered are widely referred to as “section 4(f)” matters. A provision with the same meaning is found at 23 U.S.C. 138 and applies only to FHWA actions.

ADMINISTRATIVE BACKGROUND

NATIONAL ENVIRONMENTAL POLICY ACT AND SECTION 4(f): With the exception of those laws and regulations that apply solely to DOT, this handbook may also apply to documents prepared by other federal agencies. This handbook also applies to the review of environmental impact statements (EISs) and environmental assessments (EAs) that may be included with Section 4(f) evaluations. Review of and comment on an EIS or EA/Section 4(f) evaluation should be in accord with instructions in the Department of the Interior (Interior) Manual, Part 516, Chapter 7 (516 DM 7).

The contents of an EIS or EA/Section 4(f) evaluation should comply with the provisions of the National Environmental Policy Act (NEPA) (PL 91-190, as amended) Council on Environmental Quality (CEQ) Regulations (40 CFR Parts 1500–1508), Section 4(f) of the Department of Transportation Act (49 U.S.C. 303), and the combined regulations of the FHWA and the FTA (23 CFR 771.101–771.137). Also applicable are the DOT Section 4(f) Policy Paper (revised June 7, 1989), the Department of the Interior Environmental Review Memorandum No. ERM94-4 (see appendix A), the Guidance on the Preparation and Processing of Environmental and Section 4(f) Documents (October 30, 1987), the FRA’s Procedures for Considering Environmental Impacts (May 26, 1999), and the FAA’s Airport Environmental Handbook (FAA Order 5050.4A, October 8, 1985). Copies of these documents are available on the Internet at the DOT Web site: <http://www.dot.gov>, which offers both DOT and modal administration search capabilities to locate the appropriate documents. The reader should remain current on the location of these documents because Internet addresses, as well as the information available at the addresses, can be updated periodically.

Interior’s Office of Environmental Policy and Compliance (OEPC) manages the review and commenting process through its environmental review system. This system includes assignment of lead bureaus, reviewing bureaus, and review schedules. CEQ regulations cite two instances when an agency should review and comment on an EIS: jurisdiction by law or special expertise. The regulations are binding on all federal agencies.

The National Park Service (NPS) usually serves as Interior's lead bureau for preparing the Department's comments on projects that may affect units of the National Park System, other public park and recreation resources, historic and archeological properties, and unique natural areas. Because these resources may have important fish and wildlife resources, the Fish and Wildlife Service (FWS) should provide to the NPS, as appropriate, its views related to NEPA compliance, the Fish and Wildlife Coordination Act (FWCA), the Endangered Species Act (ESA), and other laws and executive orders.

The FWS is usually designated as lead bureau for projects involving fish and wildlife refuges, dedicated wetlands, and similar areas. However, because refuges often involve recreational uses and values, the NPS should provide its views to the FWS on Section 4(f) issues involving refuges.

When the Bureau of Land Management (BLM), the Bureau of Reclamation (BR), or the Bureau of Indian Affairs (BIA) is made the lead bureau for a project involving Section 4(f) lands under its direct jurisdiction, the bureau should actively solicit the views of the FWS and the NPS if they have not already been provided. As a practical matter, however, these three bureaus are seldom involved in Section 4(f) matters and are very rarely named lead bureau.

Some Section 4(f) reviews involve lands and areas of interest to more than one Interior bureau—for example, a park and a refuge, or a refuge and a historic site. The lead bureau in these cases must ensure that the views of all bureaus are considered for incorporation in the Department's comments. The lead bureau must also perform its lead role *even if it has no comments of its own*. Sometimes intra-Departmental conflicts arise. These conflicts must be resolved before a Departmental letter is finalized. The following general procedures apply:

- The field level official of the lead bureau resolves conflicts through inter-bureau discussions. If unsuccessful, then,
- OEPC's regional environmental officer resolves conflicts through regional level coordination. If unsuccessful, then,
- The lead (or any other) bureau refers the case to OEPC headquarters through its Washington office.

The OEPC is always available for informal consultations at any stage of the process. Attempts at resolution should be documented in the package sent to the OEPC. The OEPC's distribution memorandum and the comments of other Interior bureaus must be on hand when the Departmental letter of comment is prepared. If the comments of any bureau are not on hand, the bureau should be contacted by telephone and the call documented. *Original bureau comments must accompany the draft Departmental comments through the process for final review and signature by the OEPC.*

PERTINENT LEGISLATION: Reviewers should be aware of and know how to locate and apply

information on pertinent legislation and regulations such as (but not limited to) the following:

- National Historic Preservation Act of 1966, as amended, and its implementing regulations at 36 CFR 800, revised on June 17, 1999;
- Fish and Wildlife Coordination Act 16 U.S.C. 661-667;
- Endangered Species Act and implementing regulations for interagency consultation at 50 CFR 402;
- National Environmental Policy Act and implementing regulations at 40 CFR 1500-1508; and
- Department of Transportation Act and implementing regulations at 23 CFR 771.

SECTION 4(f) PROPERTIES UNDER THE DEPARTMENT'S JURISDICTION

ACCEPTED SECTION 4(f) PROPERTIES: It is important that reviewers familiarize themselves with Interior Department Environmental Review Memorandum ERM94-4 containing the Secretary of the Interior's letter of June 20, 1980, to the Secretary of Transportation (see appendix A). The Secretary's letter details Interior's jurisdiction in Section 4(f) matters. The letter declares that Interior jurisdiction extends to any public park, recreation area, or wildlife and waterfowl refuge within the scope of the Department's statutory responsibilities and that these responsibilities extend to certain state or locally owned parks, recreation areas, or wildlife and waterfowl refuges. In addition, the Department's jurisdiction extends to sites that the Department determines to be of national, state, or local historic significance, regardless of ownership under the National Historic Preservation Act.

Accordingly, Interior has declared the following listed lands as being significant parks, recreation areas, wildlife and waterfowl refuges, and historic sites, and has stated its opinion that Section 4(f) applies to them for any use by DOT. The following list was developed consistent with the advice of the Department of the Interior's solicitor. However, the list may not be exhaustive, and there may be other areas that have been inadvertently omitted or that may need to be evaluated on a case-by-case basis. The DOT Section 4(f) Policy Paper (revised June 7, 1989) must also be consulted in these matters. Issues where the Department may still be in conflict with DOT should be brought to the attention of the OEPC and the solicitor's office as necessary for final decision.

- Lands of the National Park System.
- National Park Service "Affiliated Areas."
- Lands of the National Wildlife Refuge System.
- Lands of the National Fish Hatchery System.
- Lands acquired for mitigation purposes pursuant to the authority of the Fish and Wildlife Coordination Act, including general plan lands under Section 3(b) of that act.
- Lands under the jurisdiction of the Bureau of Reclamation that are administered as parks, recreation areas, wildlife refuges, or historic sites.

- Lands under the jurisdiction of the Bureau of Land Management that are administered for recreation, cultural, and wildlife purposes.
- Indian lands held in trust by Interior as parks, recreation areas, wildlife refuges, or historic sites.
- Local and state lands, and interests therein, and certain federal lands under lease to the states, acquired or developed in whole or in part with moneys from the Land and Water Conservation Fund (LWCF).
- Recreation areas and facilities developed or improved, in whole or in part, with grants under the Urban Park and Recreation Recovery Act of 1978 (Title 10 of PL 95-625).
- State lands and interests therein acquired or developed or improved with federal grants for fish and wildlife conservation, restoration, or management such as the Federal Aid in Sport Fish Restoration Act of 1950 (Dingell-Johnson Act), the Federal Aid in Wildlife Restoration Act of 1937 (Pittman-Robertson Act), and the Anadromous Fish Act of 1965.
- Federal surplus real property that has been deeded to state and local governments for park, recreation, wildlife, and historic purposes.
- Abandoned railroad rights-of-way acquired by state and local governments for recreational or conservation uses under Section 809(b) of the Railroad Revitalization and Regulatory Reform Act of 1976.
- Properties listed on or eligible for inclusion in the National Register of Historic Places.
- Areas publicly owned in fee, less than fee, lease, or otherwise, that receive de facto use as park, recreation, or refuge lands. De facto use is determined on a case-by-case basis by the Interior bureau having statutory or program jurisdiction over or interest in the land in question. In the case of Indian trust lands, such determination will be made in consultation with the appropriate tribal officials. De facto use may also include publicly owned lands or interest therein proposed or under study for inclusion in the National Wild and Scenic Rivers System, the National Trails System, or the National Wilderness Preservation System, or as critical habitat for endangered or threatened species. Early coordination with Interior about the applicability of Section 4(f) is especially important whenever lands administered by the Bureau of Reclamation or the Bureau of Land Management, or Indian trust lands administered by the Bureau of Indian Affairs, are affected by DOT projects.

All of the lands listed above may also contain significant, but presently unknown or undesignated, historic or archeological sites or properties that fall under the protection of Section 4(f). This matter will be determined on a case-by-case basis by the administering bureau/tribal officials in consultation with the state historic preservation officer (SHPO) (or others with historical expertise). Coordination of this matter with Interior is, therefore, essential. Such coordination with respect to Section 4(f) should be undertaken in addition to (although it may be concurrent with) any coordination that may be required under Section 106 of the National Historic Preservation Act. It should be noted, however, that each law is independent of the other.

PROPERTIES TO WHICH SECTION 4(f) MAY APPLY: For some other properties, Interior Department of the Interior Section 4(f) Handbook

has no direct or program jurisdiction; for others, Interior and DOT disagree as to the applicability of Section 4(f). In general, Interior believes these properties should receive Section 4(f) protection. Surface waters associated with these lands are also subject to Section 4(f). DOT, however, does not recognize historic sites of state and local significance as automatically falling under the protection of Section 4(f), unless such sites are also on or eligible for the National Register. The responsible DOT official may, at his or her discretion, apply Section 4(f) to such historic sites, but this is not mandatory. Such application of Section 4(f) may require further discussion among the NPS, the OEPC, the Office of the Solicitor, and the SHPO.

The following are some common 4(f) problem areas that reviewers have encountered. The list is not all-inclusive. Such problems should be resolved on a case-by-case basis, with frequent reference to the DOT Section 4(f) Policy Paper:

Private Lands: Private lands leased by governmental entities and operated as community parks and recreation areas may fall under the protection of Section 4(f). Factors such as lease conditions, significance, and use of the area must be considered in determining the application of 4(f). At the very least, reviewers should recommend special attention for such areas and request Section 4(f) consideration by DOT.

Public School Property: Public school property serving only as a recreation area for a school is not covered by Section 4(f). However, an area that is open to general public use, and that serves the recreational needs of the community as well as the school, is covered by Section 4(f), if it is found to be significant by the officials having responsibility for providing recreation opportunities to the community.

Private School Property: Private school property that receives public financial assistance in return for public recreational use of that property may be subject to Section 4(f). Applicability depends on conditions of the lease and other circumstances. Therefore, all the necessary facts with appropriate analysis must be assembled for any private school case in which Section 4(f) may be applicable.

Fairgrounds: Fairgrounds or portions of them that are open to the general public as a community park, recreation area, or similar area are generally considered to be under Section 4(f) protection.

Public Open Space: Public open spaces will fall under the protection of Section 4(f) when they are part of a park or recreation area, a historic site, or a wildlife area and local park and recreation officials have determined them to be significant.

State Game Lands: Interior believes that all state lands and interests therein acquired or developed or improved for fish and wildlife conservation, restoration, or management with grants under the Pittman-Robertson Act, the Dingell-Johnson Act, Section 6 of the Endangered Species Act of 1973, or the Anadromous Fish Act of 1965 (including, but not limited to, state fish hatcheries, state wildlife conservation areas, and state game lands) are protected by Section

4(f). However, the final decision on applicability lies with DOT. In making its determination, DOT will rely on the official having jurisdiction over the lands to identify the kinds of activities and functions that take place. The FWS will normally be Interior's lead bureau for these involvements.

Wetlands Easements: Wetlands easements lands are acquired pursuant to the Act of March 16, 1934, as amended, 48 Stat. 451, 16 U.S.C. 718 (1970), and administered by the FWS. Interior considers wetlands easements protected under Section 4(f). The FWS will normally be the lead for these involvements.

Floodplains: Floodplains are not 4(f) areas unless otherwise designated as park and recreation lands or wildlife refuges under other authority.

Projects Involving Highway Rights-of-Way Temporarily Used for Park Purposes: These lands should include sufficient documentation to show that the affected parkland is within the highway right-of-way. The deed and accompanying maps drawn at the time the right-of-way was acquired will usually provide satisfactory evidence. If the deed is not available and the exact boundary cannot be determined from existing records, the highway agency should carry out sufficient design work to address the parkland taking and involvement, including an on-the-ground finding to support the fact that no parkland will be taken outside the designated right-of-way. Measures to minimize harm in such cases should include removal or relocation of facilities that may be involved, fencing, noise abatement, landscaping, and access. Measures should be coordinated with and approved by the park authority, and implemented at project expense. Evidence to that effect should be included in the final statement.

National Forest Lands: Usually Interior does not involve itself in national forest/4(f) matters after the Forest Service (FS) makes a decision that Section 4(f) is not applicable to national forest lands that are affected by transportation projects. However, Interior should make an independent evaluation of the park, recreational, or refuge values of the area in question, and as appropriate request DOT and the FS to reevaluate their position.

Wild and Scenic Rivers: In general, rivers under study for designation as wild and scenic rivers are not subject to Section 4(f), but publicly owned parks, recreation areas, refuges, and historic sites within their corridors would be. Publicly owned waters of designated wild and scenic rivers are protected by 4(f). Publicly owned lands within immediate proximity of such rivers may be protected by 4(f). Refer to the DOT Section 4(f) Policy Paper (revised June 7, 1989).

SECTION 4(f)/SECTION 106 INVOLVEMENTS

Environmental statement/Section 4(f) evaluations should document actions taken to preserve and enhance districts, sites, buildings, structures, and objects of historical, archeological, architectural, or cultural significance. Reviewers should, therefore, familiarize themselves with Section 106 of the National Historic Preservation Act as it pertains to these properties.

Section 4(f) requires a more rigorous level of consideration for historic properties than does Section 106. Section 106 requires only that effects on historic properties be considered and that the SHPO or the tribal historic preservation officer, as well as the Advisory Council on Historic Preservation (ACHP) if necessary, be afforded the opportunity to comment. Section 4(f), in contrast, requires that historic properties be used only if there is no feasible and prudent alternative.

Although transportation agencies often contend that Section 4(f) and Section 106 compliance duplicate each other, we do not agree. We do, however, favor concurrent compliance and processing under both laws. Field reviewers should recommend (during early coordination) the circulation of a draft environmental document (EA/EIS) with a combined preliminary Section 106 case report/Section 4(f) evaluation. When an EA/EIS is not required, the combined 106/4(f) document will suffice. Such draft documents must discuss proposed mitigation, and may include a *proposed* memorandum of agreement (MOA). The SHPO and Interior will then make their *independent* comments on the combined document. The final EIS or the final 4(f)/106 documentation would then include DOT's 4(f) approval determination and an executed MOA, or otherwise indicate disposition of the case.

A rather special case is presented by archeological sites, some of which are significant only or primarily because they contain information that can be fully extracted through a data recovery program. Recently revised regulations of the ACHP have resulted in changes to the Section 106 process so that when a site is excavated, the effect on the site is considered adverse without exception. The FHWA's procedures for considering impacts to archeological sites and the relationship to Section 106 are generally described at 23 CFR 771.135.

ORGANIZATION AND CONTENT OF DEPARTMENTAL COMMENT LETTERS

The following sections provide a standard format for Section 4(f) letters and EIS/4(f) letters. It is advisable to use this format so as to ensure that all 4(f) considerations are accounted for and processed.

COMMON LETTER CONTENT: The content of a Departmental letter of comment on environmental statement/Section 4(f) evaluations may have several major sections: general comments, Section 4(f) evaluation comments, environmental statement comments, Fish and Wildlife Coordination Act comments, and summary comments. Sections dealing with other specific laws, such as Section 6(f) of the Land and Water Conservation Fund Act, the Fish and Wildlife Coordination Act, or the Endangered Species Act, should be added if applicable.

Addressee: The letter must be addressed to the appropriate federal official, with a copy to the state, local, or other sponsor (if any exists). The address should be on the first page at the upper left-hand corner of the letter. The OEPC control number should also appear at the upper left-hand corner of the letter under the Departmental seal. The second and succeeding pages of the

letter should carry a header with the name of the addressee, exactly as it is shown on the first page, flush with the left margin and the page number located to the right in the same header. The complimentary close, “Sincerely,” should be two lines below the last line of the letter and slightly to the right of center. If the signatory is known, type the signatory’s name five lines below the complimentary close, with title below the name. Material accompanying a letter should be identified in the text, with a notation at the end indicating an enclosure. When a copy of the letter is being sent to someone other than the addressee, note this fact at the lower left hand corner under the signature and include each recipient’s full address(es).

Project Identification: Generally, the initial paragraph should read something like this: “This letter is in response to your recent request for the Department of the Interior’s comments on the (type of document received) for the (include project identification exactly as it appears in the OEPC’s distribution memorandum).”

Reviewers should independently check project identification. Reviewers should also check type of review—for example, do not identify the review as a draft environmental statement/Section 4(f) evaluation unless a 4(f) evaluation is actually included. The OEPC frequently distributes a draft EIS for Interior 4(f) comments when the DOT agency does not recognize a 4(f) involvement. These are referred to as having a potential 4(f) involvement. In these cases, cite the document only as a draft EIS. Always include the project name, the county, and the state. The name of the city or town may be included if appropriate.

GENERAL COMMENTS: This section may contain comments of a general nature, and any that occur throughout the document should be consolidated to avoid needless repetition. Some examples are segmentation, scoping, coordination, maps, and graphics. The Section 4(f) and EIS sections of the letter may also contain a “General” section if it is appropriate to those sections.

Segmentation: Segmentation refers to the subdivision of a large project into smaller projects. NEPA requires that actions covered by an environmental statement should have independent significance and must be broad enough in scope to avoid subdivision of the project and to ensure meaningful consideration of alternatives. Segmentation can result in a lessening of the severity of a project’s impact. While reviewers should be alert to this problem, they should raise the issue only if they can substantiate it and only if it obviously affects the interests of Interior.

Scoping and Early Coordination: Scoping and early coordination at the beginning of the location study can assist in identifying park and recreation, natural, and cultural areas of significance; agency and public concerns; and the need for preparation of environmental statements. Reviewers should determine whether scoping and early coordination with park and recreation bureaus having jurisdiction over the Section 4(f) lands involved has occurred. They should also check the list of agencies that have been requested to review the draft environmental statement. If, for instance, the SHPO has been consulted, the SHPO’s comments should be included in the statement.

Maps and Graphics: Some statements provide only small-scale maps and very little other graphic information about a proposed project and the land uses within the transportation corridor. Other statements have more extensive graphics such as current U.S. Geological Survey maps, aerial photographs, photo mosaics, and orthophoto maps. Property boundaries showing major land uses (i.e., farm lands, park areas, residential areas) are often superimposed on these maps and graphics. Width of right-of-way can be shown on these maps, including a general right-of-way taking of land for interchange areas or for specific areas where there would be need for extensive cuts or fills. Reviewers should encourage the use of well-labeled maps and graphics in environmental statements. When necessary, we can always request more detailed boundary and right-of-way maps for specific 4(f) areas, which are especially important to have when discussing measures to minimize harm to Section 4(f) lands.

SECTION 4(f) EVALUATION COMMENTS:

General Comments: The first paragraph under Section 4(f) may include general comments as to the adequacy or inadequacy of the Section 4(f) submission. These may include concerns of a general nature, such as involvement under Section 6(f) or Section 7 of the LWCF Act, controversy over FS lands, or conflicts with the Wild and Scenic Rivers Act, the National Trails Act, the Federal Surplus Property Act, and others. We may review projects for which the DOT agency does not recognize, or rejects outright, the application of Section 4(f). This section would be a good place to address our differences with DOT about the application of 4(f), the use of 4(f) lands, determinations of significance, and other matters that may be needed to address the document's compliance with the requirements of DOT's 4(f) regulations.

Specific Comments:

Preliminary Section 4(f) Documents: Interior's Section 4(f) comments are provided on a clearly identifiable Section 4(f) document that discusses alternatives and measures to minimize harm. This may appear in a combined environmental statement/Section 4(f) evaluation or as a separate Section 4(f) document circulated for review and comment. However, there are instances where only *preliminary* Section 4(f) comments may be appropriate. Preliminary 4(f) comments are provided to give the sponsor an early indication of Interior's thoughts about the Section 4(f) information and involvements associated with a proposed project. In cases of this nature, we should make clear that the comments provided are preliminary and do not represent the results of formal consultation by DOT with Interior, pursuant to the consultative requirements of Section 4(f), and that this requirement will be fulfilled only when the Secretary of the Interior comments on a Section 4(f) document that may be prepared and approved by DOT for circulation. Normally, preliminary comments are provided in two kinds of cases: the case of environmental statements that have no identifiable Section 4(f) involvements but that Interior believes may involve Section 4(f) lands, or the case where the sponsor specifically asks for preliminary Section 4(f) comments before the circulation of a Section 4(f) document.

Alternatives and Their Impacts on Section 4(f) Lands: Section 4(f) requires a finding that there

is *no* feasible and prudent *alternative to the proposed use of the 4(f) property*. We must make an initial determination in writing that we concur (or do not concur). If we do not concur, we must state why.

CEQ regulations, as well as DOT Section 4(f) regulations, require rigorous exploration and objective evaluation of alternative actions that would avoid all use of Section 4(f) areas and that would avoid some or all adverse environmental effects. Analysis of such alternatives, their costs, and the impacts on the 4(f) area should be included in draft NEPA documents. In addition to the general CEQ regulation, the reviewer should be familiar with the specific 4(f) requirements of 23 CFR 771 and other regulations of DOT's modal administrations. The reviewer should consider applying the *Overton Park* criteria (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1972)) to the analysis of alternatives, but in so doing should also reasonably apply the dictates of sound land use planning in accepting or rejecting alternatives. The criteria that the Supreme Court established in the *Overton Park* case stipulate that Section 4(f) lands are "...not to be lost unless there are truly unusual factors present...or...the cost of community disruption resulting from alternative routes reaches extraordinary magnitudes." If not satisfied with an analysis of alternatives, the reviewer should explain the reasons in detail or request additional information and data essential for comparing alternatives. Reviewers can always suggest alternatives of their own, for evaluation by the project proponent, and not confine their comments to the alternatives presented in the statement.

If, on the other hand, the reviewer is satisfied that all alternatives have been thoroughly examined by the sponsor and the federal agency and there is no feasible and prudent alternative to the taking of Section 4(f) lands, simply say: "We concur that there is no feasible and prudent alternative to the proposed use of (insert name of 4(f) area to be used)."

In dealing with alternatives, reviewers should avoid using the phrase "based on the information provided in the document." It is appropriate to use this phrase only in cases where we might have a thought about another alternative but are not prone to promote it for whatever reason. Unless this is the situation, this phrase should not be used. Also avoid using wording such as the "most" feasible and prudent alternative.

Measures to Minimize Harm to Section 4(f) Lands: The second phase of a 4(f) review is to ensure that all possible planning has been done to minimize harm to Section 4(f) lands. This is often the most important phase and the one where we can be most effective because of our special expertise in the protection and management of all types of 4(f) areas.

The following is a partial list of the kinds of measures that might be taken to minimize harm to Section 4(f) lands and properties:

- Replacement of the Section 4(f) lands to be taken or provision of compensation based on the market value of those lands.

- Horizontal and vertical alignment changes to reduce, if not eliminate, the 4(f) involvement.
- Elevated facility over the site (this may, however, increase aesthetic impacts).
- Depressed facility or tunnel through or under the site (this may increase costs, impacts on ground water, etc.).
- Reduction in the number of travel lanes, parking lanes, and so on, or reduction of median width (use of Jersey-type concrete barrier).
- Access improvement to 4(f) properties to help motorists and pedestrians.
- Access limitation, in some cases, to control induced development and other secondary effects.
- Landscaped buffer zones, noise barriers, and similar measures.
- Appropriate signing and marking of sites to increase public awareness (this may, however, produce aesthetic impacts or increase usage beyond carrying capacity).
- Sensitive aesthetic design of facilities to maintain and enhance ambiance—for instance, compatible architectural design, tinted concrete, special surface textures, stone or brick facings, use of weathering steel, prevention of rust staining on masonry surfaces, and graffiti prevention.
- Adaptive re-use of historic structures.
- Moving and adequate restoration of historic structures on appropriate new sites (this is usually a last-resort measure).
- Adequate recordation and curatorial care of demolished historic structures (this, too, is a last-resort measure).
- Coordination of construction with recreation activities to permit orderly transition and continual usage of Section 4(f) land and facilities.
- Various regulatory measures such as speed limits, traffic capacity limits, and limited access to adjacent lands.

Park and Recreation Areas: Reviewers are alerted that a general statement from the sponsor indicating that the sponsor will comply with all federal, state, and local standards and specifications to minimize harm is not acceptable. Also not acceptable is a statement that all

planning to minimize harm has been done because there is no feasible and prudent alternative. Reviewers should make sure that all possible site-specific planning has been done to identify and list the measures which will be undertaken, at project expense, to minimize harm to Section 4(f) areas.

Replacement of Section 4(f) Lands: Sponsors of transportation projects are responsible for minimizing harm to Section 4(f) lands. These lands may be replaced by the sponsor directly with lands of equivalent usefulness and location, but if monetary compensation is made (for areas not involving LWCF moneys), that compensation should be sufficient to replace the lost lands and improvements thereon. Compensation based on “fair market value” of land taken is not necessarily satisfactory because purchasing areas of reasonable equivalent usefulness and location may require paying more than the appraised value of lost lands.

Monetary Compensation for Use of Section 4(f) Lands Not Involving Land and Water Conservation Fund Moneys: If replacement lands are not available, monetary compensation equal to replacement value may be acceptable. This compensation should be earmarked for capital park and recreation purposes. The conversion of parklands to transportation uses without compensation, or the diversion of monetary compensation received to other uses, constitutes indirect subsidization of the transportation programs by recreation funds. The occurrence of either should give rise to serious reservation about the advisability of approving future federal grant applications for park and recreation purposes to the agency responsible. Reviewers should always keep in mind that from a strict 4(f) viewpoint, land replacement is simply one of the most logical methods to minimize harm.

Constructive Use: Constructive use occurs when transportation projects do not incorporate land from a Section 4(f) property but due to their proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired. Constructive use remains a general issue between Interior and DOT because of its very subjective nature. However, the level, nature, and extent to which an area is constructively used should be subject to the expertise and determination of the agency responsible for management and administration of the parkland impacted by the constructive use. When constructive use is an issue in a particular project review, the reviewer is advised to consult 23 CFR 771.135(p); the DOT Section 4(f) Policy Paper; the October 5, 1987, FHWA letter from Eugene W. Cleckley to Bruce Blanchard (see appendix C); and the November 12, 1985, FHWA memorandum to regional FHWA administrators (see appendix D). These documents will provide background upon which to formulate comments on the review.

Projects Involving Section 6(f) of the LWCF Act: Section 6(f) provides, in part, that “...no property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and reasonable

equivalent usefulness and location.”

When a project results in a change in use of an LCWF-assisted park or recreation area, a determination has to be made, first by the state and ultimately by the NPS, as to whether a Section 6(f) involvement will result. If a Section 6(f) involvement will result and the NPS, under its delegated authority, is willing to consider approval of the conversion, then it is mandatory to acquire replacement land. *Only land will satisfy the provisions of Section 6(f). The value of new capital improvements or a reimbursement to the LCWF are not acceptable.* If the subject lands are considered part of the LWCF project scope, the NPS would generally consider a conversion of use to occur if one of the following actions were to be taken:

- Granting by the participant to another party either control or partial control of the land that would result in uses other than public outdoor recreation as approved by the NPS. Examples would be the construction and maintenance of a utility line, pipeline, irrigation ditch, road, or other similar facility, whether the intrusion is above or below ground level. A possible exception could occur if the participant, without relinquishing any control over the area, were to allow a non-owner to construct a subsurface water line, pipeline, underground utility, or similar facility that would not impair the present and future recreational use of the property and then to restore the surface area to its preconstruction condition.
- Constructing or installing structures or facilities by the project sponsor or others on lands considered within the project scope that would not be compatible with the existing outdoor recreation uses or would result in a nonrecreational use other than that acknowledged and approved by the NPS.
- Granting control or partial control of land for transportation rights-of-way, powerline rights-of-way, pipelines, sewer lines, and landfills, or for construction of structures such as fire stations, civic centers, libraries, indoor recreation facilities, communication towers, and tornado sirens.

The list above is not all-inclusive because other actions may also result in Section 6(f) involvement. The authority to determine whether a potential Section 6(f) involvement exists rests with the NPS, which administers the LWCF. As prerequisites for approval of any Section 6(f) conversion request, it should be determined that:

- All practical alternatives to the conversion have been evaluated and rejected on sound bases.
- The proposed replacement land is “...of reasonably equivalent usefulness and location.”
- All necessary coordination with other federal agencies has been satisfactorily accomplished.

- The guidelines for environmental evaluation enumerated in LWCF Manual Part 650 have been completed and considered by the NPS during its review of the proposed 6(f) action. In cases where the proposed conversion arises from another federal action, final review of a state's proposal shall not occur until the region is assured that all environmental requirements related to that other action have been met.
- Clearinghouse review procedures set forth in LWCF Manual Part 66.1.ID have been adhered to if the proposed conversion and substitution constitute significant changes to the original LWCF project.
- The proposed conversion and substitution are in accord with a state comprehensive outdoor recreation plan.

It should be noted that Interior's policy on conflicts between grants-in-aid and transportation projects provides that not only the property actually developed or acquired with LWCF moneys, but the entire area identified in the project agreement, is subject to the requirements of the LWCF and the conditions of the project agreement. Further, Interior has established that when assistance is provided to only one of five entirely separate parks within a state park system, and this fact is clearly recognized in the grant project agreement, then an area being taken for highway construction from a park that received no assistance would not be subject to the provisions of Section 6(f) of the LWCF Act.

If we do not concur that the first proviso of Section 4(f) is satisfied (in other words, there are feasible and prudent alternatives to the proposed 4(f) use), then we could not concur in a 6(f) conversion either, and this should be so stated in our letter. If we *do* concur in the 4(f) taking, Interior would be willing to consider a conversion request, and 6(f) compliance becomes one (but not necessarily the only one) of the measures to minimize harm to the 4(f) area. In this case we should be helpful in stating *exactly* what would be required by Interior under 6(f). We should recommend that 6(f) details be worked out and that a full proposed replacement package be included in the final 4(f) document. Unless we foresee grave 6(f) problems, we should not make our 4(f) concurrence contingent upon 6(f) approval (tentative or otherwise); *final* 6(f) approval can be given *only after* 4(f) approval. Our 4(f) comments could be something like: "We have no objection to Section 4(f) approval, *provided that* all measures to minimize harm, including an acceptable Section 6(f) replacement package, as discussed above, are included in project plans."

Lands Acquired Under Section 7 of the LWCF Act: Unlike Section 6(f) of the Act, Section 7 has no requirement that land purchased by a federal agency with LWCF moneys under this section must continue to be used solely for outdoor recreation purposes. In such a situation, there is no legal necessity for reimbursement to the LWCF, or a replacement of the taken land, by either the administering agency or the agency preparing to use the land for other than recreation purposes.

Therefore, when a transportation project encroaches upon federal lands acquired under Section 7

of the LWCF, only the requirements of Section 4(f) apply. However, there is no reason we cannot use replacement land in this case if, in our view, that is appropriate. When Interior lands (NPS, BLM, FWS, BR, BIA) are involved, wording related to our follow-up action should follow the statement on our Section 4(f) position, for instance: “The Department of the Interior would be willing to consider a right-of-way permit application for this project upon receipt of notice of Section 4(f) approval.” Or: “Because of our jurisdictional involvement, until the measures to minimize harm are mutually resolved, we do not concur with Section 4(f) approval and would defer acting on any right-of-way application.” Or, with Section 6(f) involvements: “Upon receipt of notice of Section 4(f) approval by DOT, the NPS would be willing to consider a request for a conversion of use as required by Section 6(f) of the LWCF Act.”

Lands Under the Urban Park and Recreation Recovery Act of 1978: Recreation areas and facilities developed or improved, in whole or part, with a grant under the Urban Park and Recreation Recovery Act of 1978 (Title 10 of PL 95-625) are subject to Section 1010 of the Act, which requires independent approval of the Secretary of the Interior for conversion to other than public recreation uses (see guidance above with respect to Section 6(f)).

Lands Under the Railroad Revitalization and Regulatory Reform Act of 1976: Abandoned railroad rights-of-way acquired by state and local governments for recreational or conservation uses with grants under Section 809(b) of the Railroad Revitalization and Regulatory Reform Act of 1976 require independent approval of conversion of use by the Secretary of the Interior (see guidance above on Section 6(f)).

Landscaping and Scenic Enhancement: Landscaping and scenic enhancement is a legitimate transportation project cost. A plan for landscaping and scenic enhancement should be developed jointly with and to the satisfaction of the agency having jurisdiction over affected Section 4(f) properties. The visual impact on Section 4(f) properties requires a professional value judgment. No one is better qualified to make this judgment than the land administrator who knows the historical, natural, recreational, and other environmental resource values that are to be preserved and protected.

Noise Abatement Measures: Noise abatement measures should be incorporated into projects when necessary to minimize harm to Section 4(f) lands. These may include planting special belts of trees and shrubs, building earthen berms or other noise barriers, building depressed roadways, and planting grass to reduce reflected noise. Noise abatement measures are especially important if affected Section 4(f) lands are used for passive recreation or for enjoyment as natural areas or historic sites. Reviewers might consider giving some advice about what constitutes an adverse noise impact on 4(f) lands.

Safety and Access: Project plans should include measures to protect the park user and the motorist. These measures may include fencing, pedestrian overpasses or underpasses, lights, traffic signals, and adequate vehicular (including bicycle) access to and from the park.

Project Design: Often highways are designed with wide median strips and require excessive right-of-way from Section 4(f) lands. In such situations, the amount of “take” can be reduced greatly in the Section 4(f) areas if the project uses a New Jersey-type concrete median barrier in lieu of a wide median strip. Use of such concrete barriers should be discussed as a measure to minimize harm to Section 4(f) lands.

Historic and Archeological Properties: Reviewers should keep in mind that the MOA concluded under the Section 106 consultation process by the DOT agency, the SHPO, and the ACHP is not a Section 4(f) document. The appearance of an MOA in a Section 4(f) document has historically been the exception rather than the rule.

Interior should independently review the measures to minimize harm for a historic site and express judgment about them. The measures to minimize harm may be only described in a Section 4(f) document with no reference to an MOA, or they may be identified in a proposed MOA. The reviewers should address the listed measures and comment accordingly.

An exception occurs when an NPS historic property is involved. Here we make Section 4(f) comments and become a signatory to the MOA in some cases. Hence reference to the MOA and the ACHP is acceptable. A number of measures to minimize harm to recreation resources discussed before, such as improved access, noise barriers, and landscaped buffer zones, may be applicable to historic sites. However, there are some specific measures to minimize harm that are unique to historic sites. These may include the following:

- Appropriate signing and marking of historic sites to increase public awareness. These measures may produce aesthetic impacts or increase usage beyond carrying capacity.
- Sensitive aesthetic design of facilities to maintain and enhance historic ambiance. Examples are compatible architectural design, tinted concrete, special surface textures, stone or brick facings, use of weathering steel, prevention of rust staining on masonry surfaces, and graffiti prevention.
- Adaptive re-use of historic structures, such as moving and adequate restoration of historic structures on appropriate new sites (usually a last-resort measure).
- Adequate recordation and curatorial care of demolished structures (again a last-resort measure).

ENVIRONMENTAL STATEMENT COMMENTS: This section is a consolidation of all bureau comments on the EIS, in addition to settlement by the lead bureau of any conflicting comments, recommendations, or positions. If lead bureau reviewers have doubts or questions, they should discuss the matter with the other reviewers who supplied the comments and enlist the assistance of the regional environmental officer as needed. *The lead bureau must provide this service even if it has no comments.* (See 516 DM 7.)

General Comments: This section of a Departmental letter contains Interior comments on the adequacy or inadequacy of the environmental statement with respect to the concerns of Interior in a general manner. General comments should be followed by detailed discussion of the specific shortcomings in the environmental statement and suggestions for improvements or areas where more information is needed.

Project Description: This section of the environmental statement should include a clear, concise description of the proposed project and its major design features. Especially important is information on the relationship of the project to resources of concern to Interior. The Departmental letter should request additional information when it is difficult or impossible to ascertain the extent of impacts of concern to Interior. This section need describe the environment only to the degree necessary to evaluate the impacts (with or without the project). In addition, the reviewers should be especially aware of those environmental attributes having potential recreation value, including the intangible qualities of aesthetics. Land use data should include acreage by farmland, wetlands, residential, commercial, public land, and type of use (recreation, school, etc.). Lands and waters supporting wildlife and fisheries should be identified, as should unique natural areas. Cultural resources should be identified, but care should be taken not to locate sites so precisely as to make them subject to vandalism.

Probable Impact of the Proposed Action on the Environment: This section should include the impact of the proposed project on ecological systems and use. Both primary and secondary significant consequences (e.g., changes in land use) should be analyzed. Other matters that should be discussed under this section include the following:

- Total acreage of right-of-way required for the project proposal and each of the alternatives, including a breakdown of farmland, wetlands, residential properties, recreational areas, and school property.
- Location of borrow/spoil areas. The selection, use, and restoration of borrow and spoil areas pose potentially adverse impacts. Our comments should note that borrow and spoil areas are the primary responsibility of the highway agency rather than the contractor, and that impacts resulting from development and use of borrow/spoil areas should be addressed in the environmental statement.
- Consultation with the SHPO for matters relating to historical, architectural, and archeological values, properties on the National Register of Historic Places, or properties in the process of being nominated to the Register.
- Impacts on local and regional general recreational values.
- Impacts on rare, endangered, or protected plant and animal species.

- Noise impacts—especially those on cultural and recreational resources.
- Effects on water resources, including location and area of impact and identification of stream channelization, channel changes, floodplains, and wetlands.

Channelization: This activity may affect life in the area of the stream to be channelized as well as the upstream and downstream ecosystem. Therefore, project alternatives passing through natural waters must be designed to maintain the functioning of the aquatic ecosystem that makes possible the continuance of a stream's water quality and prevention of flooding. The stream and its floodplain are an integral system that is designed to moderate the effects of flooding water and maintain high productivity in the stream proper. Disturbing the system inevitably results in a reduction of diversity of species and productivity.

Floodplains and Wetlands : Floodplains and wetlands are very valuable natural resources. They have great value as habitats for wildlife and as aquifer recharge areas. They also constitute natural floodwater absorbing areas. When confronted with inadequate information about projects involving floodplains and wetlands, reviewers should recommend that the statement include an evaluation of these areas in compliance with Presidential Executive Orders 11988 and 11990. These executive orders direct that special attention be given to floodplains and wetlands when planning the location of federally financed or supported new facilities such as highways.

Adverse Impacts That Cannot Be Avoided: These impacts may include water, air, or noise pollution, undesirable land use patterns, damage to wildlife systems, urban congestion, and threats to health. Water, air, or noise pollution should be discussed as they relate to Interior's interests. Although EPA has certain statutory responsibilities for air, water, and noise pollution, this does not mean that Interior should not tell other agencies when such pollution affects our program interests. While many Interior bureaus have certain in-house expertise, the Geological Survey is the recognized expert on ground and surface waters, the FWS on fish and wildlife resources, and the NPS on park, recreation, and cultural resources.

Alternatives: CEQ regulations require rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the project's adverse environmental effects. The regulations further stipulate that sufficient analysis of such alternatives and their costs and impacts on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options that have less detrimental effects. We should recommend further consideration of alternatives not discussed in the statement, and we should do this as early as possible in the process in order to be effective. There is no reason we have to confine our review to alternatives presented by the sponsor if we have sound reasons for suggesting others. Analysis of alternatives is especially important under Section 4(f), and Interior should always strive to make responsible and timely alternative recommendations to the DOT agency, rather than postponing any recommendation until the agency makes its final selection.

Irreversible and Irretrievable Commitment of Resources: In many statements, the only resources addressed are sand, gravel, concrete, other supplies, and human energy used in the highway construction. Curtailment of other uses of the environment is seldom given explicit treatment. Loss of flora, fauna, stream habitat, and wildlife habitat and changes in drainage patterns all represent commitments of resources that may not be reclaimed. Any land taken from a fish and wildlife refuge, state game area, public recreational area, or historic site becomes an irreversible and irretrievable commitment of resources and should be so identified in environmental statements.

Minimizing Harm to the Environment: Details of actions to minimize harm to the environment should be included in the statement. A general statement that the sponsor will comply with all federal, state, and local standards and specifications is not acceptable. Actions to minimize harm should be explained in detail. These may include control of air, water, and noise pollution; landscaping; and sign and billboard removal. We should consider recommending appropriate mitigation measures for the whole project, not just for 4(f) areas (note that for 4(f) areas our mitigation recommendations are essential). As lead bureau, the NPS will find that the FWS will probably have numerous mitigation recommendations for wetlands and other fish and wildlife values that it wants incorporated into the Departmental letter. NPS reviewers should be familiar with the FWS policy in this area so that they can properly evaluate the comments. (See *FWS Mitigation Policy* in the *Federal Register*, January 23, 1981, as amended.)

Multiple use and joint development programs should be recommended wherever they can be used to reduce impacts or enhance the environment.

Another mitigation measure that should be considered in our review is improving access to navigable water. Funds apportioned to the states may be used for construction of access ramps adjacent to bridges under construction, reconstruction, replacement, repair, or alteration on the federal-aid primary, secondary, and urban system highways.

FISH AND WILDLIFE COORDINATION ACT COMMENTS: Under provisions of the Fish and Wildlife Coordination Act, the FWS investigates and reports on projects affecting certain waters of the United States. Whenever federal permits are required for transportation project implementation, reviewers should make sure that the FWS's FWCA comments and a tentative position are received and included in the Departmental letter. Close coordination must be maintained with the appropriate FWS field office.

HOW TO ADDRESS COMMENTS OF OTHER DEPARTMENTAL BUREAUS: The comments of all Interior bureaus must be appropriately incorporated in the Departmental letter. We emphasize this so that, in a lead bureau role, a bureau develops a letter that reflects total Departmental concerns rather than just the items of interest to that bureau's programs. These comments can be used verbatim or edited. Major changes or deletions, however, must be discussed with the bureau supplying the comments and such discussion documented in the package sent forward.

Reviewers should avoid specific mention of each Interior agency in the Departmental letter because the comments belong to the Department. We usually write “The Department believes...” in a Departmental letter. However, when a comment is clearly related to a bureau and recognizing the bureau by name is important, the letter should do so. An example would be: “The FWS informs us that it will oppose the issuance of a USCG bridge permit pursuant to its responsibilities under the FWCA....”

Otherwise, if any bureau has major problems in its area of expertise, we should say something like: “Because of the above hydrologic problems, we recommend that you consult further with the USGS, which would be happy to provide technical assistance in the development of a mitigation plan for inclusion in the final statement....”

We must always send copies of all comments received with the proposed Departmental letter of comment so that OEPC’s file will be complete. A “No Comment” phone call from another bureau constitutes its comment; make a record of this, including date, on a separate sheet and forward it with the package.

SUMMARY COMMENTS:

Content of Section 4(f) Evaluation Comments: Reviewers should keep in mind that Section 4(f) evaluation comments focus on

- Concurring or not concurring (with supporting evidence) with the agency’s response to the first proviso of Section 4(f).
- Concurring or not concurring (with supporting evidence) with the agency’s response to the second proviso of Section 4(f).

Content of Summary Comments: Based on our discussion of alternatives and measures to minimize harm under Section 4(f) evaluation comments, the text of the summary comments may include different scenarios, as follows:

- *Full Concurrence with Both Provisos of Section 4(f):* On projects where we are in full concurrence with both provisos of Section 4(f), a simple sign-off sentence is recommended, such as: “The Department of the Interior has no objection to Section 4(f) approval of this project.”
- *Concurrence with Only the First Proviso:* On projects where we concur only with the first proviso of Section 4(f) and have problems with the measures to minimize harm, the following situations may arise:
- In a situation where we recommend further investigation and consultation for resolution of suggested additional measures to minimize harm, and where we will accept whatever decision is reached among the parties involved, the summary comments can state: “The Department of the Interior has no objection to Section 4(f) approval of this project,

contingent upon resolution (among the FHWA, the state highway/transportation agency, and all other involved parties [cite by name]) and documentation in the final statement of the additional measures to minimize harm, as recommended under the Section 4(f) evaluation comments.”

- In a situation where we have recommended additional measures to minimize harm about which we feel strongly, we can state: “The Department of the Interior has no objection to Section 4(f) approval of this project, *provided* the measures to minimize harm mentioned above are included in project plans and documented in the final statement.” This should be followed with the standard technical assistance offer, such as: “Because this Department has a continuing interest in this project, we are willing to cooperate and coordinate with you on a technical assistance basis in further project evaluation and assessment. For matters pertaining to cultural and recreational resources, please contact (provide necessary contact person as well as mailing and telephone information).”

Objection to Section 4(f) Approval: On projects where we object to Section 4(f) approval, the Interior objection may take several forms, the most common of which are the following:

- Interior objects to the preferred alternative and indicates a preference for another or identifies and recommends further alternatives for study and evaluation. Measures to minimize harm can be discussed for our alternatives, or we can defer comments on measures to minimize harm pending the selection of a feasible and prudent alternative. We should urge field consultation among involved parties to select a feasible and prudent alternative and develop measures to minimize harm. Indicate that in order to resolve recreational and cultural resource issues mentioned above, we would be willing to provide expeditious review of any revised Section 4(f) documentation that may be circulated for review and comment.
- Interior concurs that there is no feasible and prudent alternative, yet it objects to the project because measures to minimize harm are grossly inadequate. Our summary comments might read: “The Department of the Interior does not concur with Section 4(f) approval of this project at this time. We would be pleased to reconsider this position upon receipt of revised material that includes adequate information and full discussion of measures to minimize harm as mentioned earlier in our Section 4(f) evaluation comments.”

Lack of Section 4(f) Information in the Document: There may be occasions where a project’s involvement with Section 4(f) lands/properties has been totally ignored by the project sponsor. The lack of Section 4(f) information in the statement, namely the absence of discussion of the provisos of Section 4(f), should be pointed out in our letter and a recommendation made that a Section 4(f) evaluation be prepared and circulated for review.

- Summary comments could be: “The Section 4(f) evaluation comments in this letter are

provided to give you an early indication of our thoughts about the Section 4(f) information and involvements. They do not represent the results of formal consultation by DOT with the Department of the Interior, pursuant to the consultative requirements of Section 4(f). Such requirements would be fulfilled only when the Office of the Secretary of the Interior comments separately on any Section 4(f) evaluation that may be prepared and approved by you for circulation.” Follow this with the normal technical assistance paragraph.

- Another option may be appropriate to use in those few cases where we have no formal Section 4(f) evaluation but field-level consultations uncover the highway agency’s preference for a particular alternative and we can concur that (1) there is no feasible and prudent alternative and (2) the measures to minimize harm are *totally* adequate. In the interest of efficiency, we then could sign off at this early stage. Our summary comments would normally state: “Usually we make preliminary Section 4(f) comments when commenting on Section 4(f) information in a draft environmental statement. However, for this case, we are willing to provide you with Section 4(f) comments that will satisfy the consultative requirements of Section 4(f) of the Department of Transportation Act. If a certain alternative is selected, we would concur that there is no feasible and prudent alternative to use of the Section 4(f) area for the proposed transportation project. In addition, contingent upon a commitment for the implementation of all proposed measures to minimize harm, we would concur that the second proviso of Section 4(f) will be satisfied. Accordingly, the Department of the Interior offers no objection to Section 4(f) approval of the alternative.” The summary comments should also succinctly indicate any major non-Section 4(f) problems we have with the project, but they should not repeat minor criticisms of the environmental documentation.

The examples above are intended primarily as suggestions and are offered to assist the reviewer facing a unique situation for the first time. Reviewers are urged to continue to develop letters that are responsive to the specific conditions of each statement under review.

APPENDICES

A. Andrus letter of June 20, 1980, currently embodied in ERM94-4. Letter states what we believe constitute 4(f) properties.

B. Acronym list.

C. Letter from FHWA to OEPC dated October 5, 1987, explaining continuing areas of disagreement between DOT and Interior on various Section 4(f) issues.

D. Letter from FHWA's Office of Environmental Policy to FHWA regional administrators on constructive use.

APPENDIX A. ANDRUS LETTER ON SECTION 4(f) PROPERTIES

This memorandum has been electronically scanned from the original signed by Jonathan P. Deason on August 17, 1994.

PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM94-4

To: Heads of Bureaus and Offices
From: Director, Office of Environmental Policy and Compliance
Subject: Section 4(f) of the Department of Transportation Act

The Secretary has identified, by the attached letter of June 20, 1980, to the Secretary of Transportation, those park and recreation areas, wildlife and waterfowl refuges and historic sites which are under Interior's direct and indirect jurisdiction and which are significant within the context of Section 4(f) of the DOT Act (49 U.S.C. 303, formerly 49 U.S.C. 1653 [f]).

This guidance should be provided to all Departmental officials who have land management or program responsibilities for those areas and resources to which Section 4 (f) would apply, in addition to those personnel who normally review DOT NEPA/4 (f) documents.

This memorandum replaces ER80-2.

Attachment

This letter has been electronically scanned from the original signed by Cecil D. Andrus on June 20, 1980.

United States Department of the Interior

Office of the Secretary
Washington, DC 20240

Honorable Neil Goldschmidt
Secretary
U.S. Department of Transportation
Washington, D.C. 20590

Dear Secretary Goldschmidt:

I am aware of your concerns to expedite the planning process for transportation projects. To the fullest extent we can, I want my Department to assist you in that effort.

It has been our observation, principally with highway projects, that certain delays can be traced to resolution of questions concerning (1) what constitutes land falling under the provisions of Section 4(f) of the DOT Act and (2) whether or not such land is significant within the meaning of Section 4(f).

In order to be helpful and to assist in expediting your transportation project-planning process, a list has been developed identifying areas pursuant to my jurisdictional responsibility as the Federal official for making determinations of significance in accordance with Section 4(f) of the DOT Act, 49 U.S.C. 1653(f). That responsibility is contained in the following provision:

“After August 23, 1968, the Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless”[emphasis added]

The Solicitor of this Department advises that our jurisdiction extends to any public park, recreation area, or wildlife and waterfowl refuge within the scope of the Department’s statutory responsibilities and that these responsibilities extend to certain State or locally owned (in fee, less than fee, lease, easement, or otherwise) parks, recreation areas or wildlife and waterfowl refuges. In addition, the Department’s jurisdiction extends to sites which the Department determines to be of national State, or local historic significance, regardless of ownership. See Stop H-3 Ass’n. v. Coleman 533 F2d 434, 441 (1976) Cert. denied 429 U.S. 999 (1976).

Jurisdiction to determine areas of national, State, or local historic significance includes any property “significant in American history, architecture, archeology, and culture.” Id. at 441 note 13.

Accordingly, the Department of the Interior declares the following listed lands as being significant parks, recreation areas, wildlife and waterfowl refuges and historic sites and therefore Section 4(f) would be applicable to all for any Department of Transportation use. The list has been developed consistent with my Solicitor’s advice. Moreover, this list may not be exhaustive and there may be other areas that have been inadvertently omitted or that may need to be evaluated on a case-by-case basis.

1. All lands or interests therein authorized, established, or administered as part of the National Park System.
2. All National Park Service “Affiliated Areas.”
3. All lands or interests therein authorized, established, or administered as National Wildlife Monuments, or as part of the National Wildlife Refuge System, including Waterfowl Production Areas (wetland easements).
4. All lands or interests therein authorized, established, or administered as part of the National Fish Hatchery System.
5. All waters, lands, and interests therein acquired for mitigation purposes pursuant to the authority of the Fish and Wildlife Coordination Act (16 U.S.C. 661-667e). Such lands and waters are in many cases administered by other Federal agencies, notably the Corps of Engineers, or by State agencies, pursuant to general planning authority (Sec. 663(b)). They may not be made subject to transactions that would “defeat the initial purpose of their acquisition.” (Sec. 663(d)).
6. All lands or interests therein under the jurisdiction of the Water and Power Resources Service which are administered or which receive de facto use as parks, recreation areas, wildlife refuges, or historic sites.
7. All lands or interests therein under the jurisdiction of the Bureau of Land Management which are administered or which receive de facto use as parks, natural areas, natural systems (e.g., flood plains, wetlands, or riparian habitat), environmental education areas, cultural and historic areas, areas of critical environmental concern, recreation areas, or wildlife refuges, or which meet wilderness criteria or are wilderness study areas.
8. All lands held in trust by this Department for the benefit of Indian Tribes which are administered by the Tribe as parks, recreation areas, wildlife refuges, or historic sites, or which receive similar de facto use.

9. All local and State lands, and interests therein, and certain Federal lands under lease to the States, acquired or developed in whole or in part with monies from the Land and Water Conservation Fund Act. Such lands, and interests therein, are also subject to Section 6(f) of the Act requiring independent approval of conversion of use by the Secretary of the Interior.

10. All recreation areas and facilities (as defined in Section 1004) developed or improved, in whole or in part, with a grant under the Urban Park and Recreation Recovery Act of 1978 (Title 10 of P.L. 95-625). Such recreation areas and facilities are also subject to Section 1010 of the Act which requires independent approval of the Secretary of the Interior (Heritage Conservation and Recreation Service) for a conversion to other than public recreation uses.

11. All State lands and interests therein acquired or developed or improved for fish and wildlife conservation, restoration, or management with grants under the Pittman-Robertson Act, the Dingell-Johnson Act, Section 6 of the Endangered Species Act of 1973, and/or the Anadromous Fish Act of 1965 (including, but not limited to, State fish hatcheries, State wildlife conservation areas, and State game lands). For most of these lands, conversion to a non-designated use requires independent approval by the Secretary of the Interior.

12. All Federal surplus real property which has been deeded to State and local governments for use and management as park demonstration areas, recreation areas, or wildlife conservation preserves and refuges, and all historic monuments and properties so deeded, under the Recreation Demonstration Act of 1942, or the Federal Property and Administrative Services Act of 1949, as amended. Most of these lands are also subject to independent approval of conversion of use by the Secretary of the Interior.

13. All abandoned railroad rights-of-way acquired by State and local governments for recreational and/or conservation uses with grants under Section 809(b) of the Railroad Revitalization and Regulatory Reform Act of 1976. Such lands are also subject to independent approval of conversion of use by the Secretary of the Interior.

14. All properties included in or eligible for inclusion in the National Register of Historic Places.

15. All areas publicly owned in fee, less than fee, lease, or otherwise, which receive de facto use as park, recreation, or refuge lands, and which are listed on the National Registry of Natural Landmarks¹, the National Registry of Environmental Landmarks², the World Heritage List (U.S. listings based on nominations by Secretary of the Interior³), or designated as Biosphere Reserves

¹Program administered by Heritage Conservation and Recreation Service.

²Program administered by the National Park Service.

³Handled by Heritage Conservation and Recreation Service.

by the Secretary General, United Nations Educational, Scientific and Cultural Organization (after consultation with the Secretary of the Interior⁴ and the Secretary of State).

De facto use, as mentioned above, will be determined on a case-by-case basis by the Interior bureau having statutory or program jurisdiction over or interest in the land in question. In the case of Indian trust lands, such determination will be made by us, in consultation with the appropriate Tribal officials. De facto use may also include publicly owned lands or interests therein proposed or under study for inclusion in the National Wild and Scenic Rivers System, the National Trails System, or the National Wilderness Preservation System, or as critical habitat for endangered or threatened species. Early coordination with this Department concerning applicability of Section 4(f) is especially important whenever lands administered by the Water and Power Resources Service or Bureau of Land Management, or whenever Indian trust lands (Tribal Officials/Bureau of Indian Affairs), are affected by DOT projects. Needless to say, such early coordination concerning other aspects of Section 4(f) is equally important when the lands and interest or our other bureaus are affected.

All of the above lands may also contain significant, but presently unknown or undesignated, historic or archeological sites or properties falling under the protection of Section 4(f). This will be determined on a case-by-case basis by the administering bureau/Tribal officials in consultation with the SHPO (and/or others with historical expertise). Coordination with this Department, therefore, is also essential in this matter. Such coordination with reference to Section 4(f) should be in addition to (although it may be concurrent with) any coordination that may be required under Section 106 of the National Historic Preservation Act. We would note however, that each is independent of the other.

You may be assured that we stand ready to provide timely technical assistance in the preparation of Section 4(f) documentation for projects involving our lands or interests in lands. You realize, of course, that this Department must make an independent and separate (1) judgment of the need for use of its lands, or interests in lands, by a Department of Transportation program or project, as well as (2) documented determination of project compatibility with the purpose for which the land was acquired (as authorized by Congress) and is being managed.

Also, any approval of conversion of use or of transfers of land is an action requiring our compliance with the National Environmental Policy Act. Such compliance with NEPA would be satisfied by an environmental document prepared by the lead agency and approved by the appropriate bureau(s) in this Department [reference: 40 CFR 1501.5 and .6]. Again, we stand ready to provide timely technical assistance in the preparation of such documents.

There are, of course, other Section 4(f) properties over which the Department of the Interior has no direct or program jurisdiction, which should continue to receive Section 4(f) protection. These include, but are not limited to, community and village parks and playgrounds; State,

⁴Handled by National Park Service.

county and regional park, recreation and refuge lands; school playgrounds open to general public use; State fairgrounds; and all properties determined to have State and local significant historic values, but which were determined not eligible for the National Register. This Department is committed to timely review of Section 4(f) statements prepared for such involvements.

I would appreciate it if you made the above information available to your operating administrations. Additionally, we hope you would instruct the Federal Highway Administration to have this letter included as an addendum to each State's Highway Action Plan, developed pursuant to 23 U.S.C. 109(h) and FHPM 7-7-1. Only with this broad distribution do we believe that the several administrative levels of a State highway agency will be cognizant of the contents of this letter and be able to work with you and us in expediting the planning process.

Thank you for your attention to this matter.

Sincerely,

CECIL D. ANDRUS

Secretary

cc:Council on Environmental Quality

APPENDIX B. LIST OF ACRONYMS USED IN THIS HANDBOOK

ACRONYM LIST

| | |
|---------|---|
| ACHP | Advisory Council on Historic Preservation |
| BIA | Bureau of Indian Affairs |
| BLM | Bureau of Land Management |
| BR | Bureau of Reclamation |
| CEQ | Council on Environmental Quality |
| DOI | Department of the Interior |
| DOT Act | Department of Transportation Act |
| DOT | U.S. Department of Transportation |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| ER | Environmental Review System |
| ERM | Environmental Review Memorandum |
| ESA | Endangered Species Act |
| FAA | Federal Aviation Administration |
| FHWA | Federal Highway Administration |
| FRA | Federal Railroad Administration |
| FS | Forest Service |
| FTA | Federal Transit Administration |
| FWCA | Fish and Wildlife Coordination Act |
| FWS | Fish and Wildlife Service |
| LWCF | Land and Water Conservation Fund Act |
| MOA | Memorandum of Agreement |
| MOU | Memorandum of Understanding |

| | |
|--------|---|
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act of 1966 |
| NPS | National Park Service |
| NRHP | National Register of Historic Places |
| OEPC | Office of Environmental Policy and Compliance |
| REO | Regional Environmental Officer; OEPC |
| RRRRA | Railroad Revitalization and Regulatory Reform Act of 1976 |
| SHPO | State Historic Preservation Officer |
| SOL | Office of the Solicitor; DOI |
| UPRRRA | Urban Park and Recreation Recovery Act of 1978 |
| USCG | U.S. Coast Guard |

APPENDIX C. FHWA LETTER TO OEPC ON DISAGREEMENTS BETWEEN DOT AND INTERIOR

This letter has been electronically scanned from the original signed by Eugene W. Cleckley on October 5, 1987.

U.S. Department of Transportation
Federal Highway Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

October 5, 1987

In Reply Refer To: HEV-11

Mr. Bruce Blanchard
Director, Office of Environmental
Project Review
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Blanchard:

Thank you for your constructive comments on our Section 4(f) Policy Paper. We have revised the policy paper (copy enclosed) to incorporate most of your comments. However, there are some major areas (constructive use, public parks and recreation areas, historic sites, archeological sites, late designation, wild and scenic rivers, joint development, and wildlife management areas) where we still disagree. The following is a summary of these areas.

Constructive Use - You stated you might consider the following as examples of constructive use: (1) where the proximity of a highway alters a habitat area in a wildlife refuge or interferes with the normal behavior of wildlife populations; (2) where a highway reduces the level of access to a park or recreation area; and (3) where a highway changes the character of the view from a historic district that is incompatible with the historic nature of the district. Your description of the threshold for constructive use of Section 4(f) resources contains terms such as alters, interferes, reduces, and changes. We agree that these types of impacts where they are sufficiently severe to substantially impair the resource would be a constructive use. However, standing alone, we view these terms as establishing a lower threshold than those generally found in case law. A number of court decisions, including Adler v. Lewis, 675 P.2d 1085 (9th Cir. 1982) (copy enclosed), have established "substantial impairment" as the threshold for

constructive use.

Public Parks and Recreation Areas - You stated that public housing and military recreation areas, even if they have some restrictions on the use of them, should be protected by Section 4(f). The Section 4(f) statute applies to “publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge.” We take this to mean that the land must be open to the entire public to be protected by Section 4(f). We agree with you that recreation areas associated with public housing and military bases do not need unrestricted public access to receive protection under Section 4(f). We have added a sentence to question 2.C. to clarify this point. The Federal Highway Administration strongly encourages the preservation of parks and recreation areas that are not open to the public at large. A statement to that effect has been added to the policy paper.

Historic Sites - You want to afford Section 4(f) protection to historic sites if they are not on or eligible for the National Register of Historic Places. Obviously, we cannot afford Section 4(f) protection to every site which is claimed historic by any individual. It has been a longstanding Department of Transportation Policy to apply Section 4(f) to all sites on or eligible for the National Register. In addition, our environmental regulation and this policy paper extend Section 4(f) protection to other historic sites based on an individual site-by-site review.

Archeological Sites - You want to afford Section 4(f) protection to archeological sites even if they are important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. This position is contrary to our Section 4(f) regulation. This portion of our regulation was upheld in the Belmont case (Town of Belmont v. Dole, 755 F.2d 28 (1st Cir. 1985)).

Late Designation - You want to afford Section 4(f) protection to properties which are designated as significant historic sites even after acquisition for highway purposes. You base your position on a belief that such a situation would be the result of a totally inadequate effort to identify historic properties at the time of search. Our policy clearly states that, if the effort was not adequate (using the Section 106 requirements at the time of search), Section 4(f) would apply. Our policy does not seek to obtain any advantage because of inadequate resource identification, but rather to disqualify properties which did not meet the eligibility requirements at the time of search (for example, the property was not old enough).

Wild and Scenic Rivers - You stated that (1) all rivers now in the System have been designated for their recreational and park (conservation, etc.) values, (2) the primary use of all publicly owned lands within their boundaries is for Section 4(f) purposes, and (3) the officials having jurisdiction will certify that this is so if asked. We do not necessarily base application of Section 4(f) on titles or systems designation; instead, we base Section 4(f) application on actual function. If portions of the publicly owned lands are designated or function primarily for recreational purposes, then those portions would be subject to Section 4(f). We do not believe that publicly owned lands designated only for conservation values are recreational areas subject to Section 4(f).

Joint Development - You expressed a desire to apply Section 4(f) to park or recreation land reserved for highway right-of-way if the reserved land is managed and/or maintained with park or recreation funds. Section 4(f) application to publicly owned land is not based on the type of funds spent to manage or maintain that land. Public land reserved for highway right-of-way is considered highway right-of-way. Section 4(f) does not apply to either authorized or unauthorized temporary occupancy of highway right-of-way pending project development. Applying Section 4(f) to the temporary occupancy of this land would be a strong deterrent to State and local governments to permit such activities and would encourage these areas to be fenced off. We believe that temporary occupancy of highway right-of-way (reserved for future construction) for park or recreation should be encouraged by our Section 4(f) policy rather than discouraged.

Wildlife Management Areas (WMA) - You stated that Federal WMAs are part of the National Wildlife Refuge System and therefore are considered to be a refuge within the meaning of Section 4(f). We have revised the discussion on wildlife management areas to state that such areas would be protected by Section 4(f) where they perform the same functions as a refuge (i.e., protection of species). As explained in answer 2A, we would, of course, rely heavily on the views of the officials having jurisdiction over these areas in determining their function.

Enclosed is a copy of the Section 4(f) policy paper (along with a summary of your position). Since we included most of your comments, we felt that it would be counterproductive to send your memo intact to our field organization along with the Section 4(f) policy paper. Consequently, we summarized your position for the major areas on which we disagree. A copy is enclosed. We appreciate the assistance you have given us in finalizing our paper.

Sincerely yours,

EUGENE W. CLECKLEY

Chief, Environmental Operations Division

APPENDIX D. LETTER TO FHWA REGIONAL ADMINISTRATORS ON CONSTRUCTIVE USE

This memorandum has been electronically scanned from the original signed by Ali F. Sevin on November 12, 1985.

U.S. Department of Transportation
Federal Highway Administration

MEMORANDUM

Subject: Section 4(f) - Constructive Use

From: Director, Office of Environmental Policy
Washington, D.C. 20590

To: Regional Federal Highway Administrators
Regions 1-10, and Direct Federal Program Administrator

Concern has been expressed from several State highway agencies and from several Federal Highway Administration (FHWA) offices about the results of litigation on constructive use of Section 4(f) lands. The two most notable cases are I-CARE in Fort Worth, Texas, and H-3 in Hawaii

While each of these decisions represented major setbacks for the respective projects and may present formidable obstacles from the standpoint of nationwide precedent, we believe that FHWA can construct a defensible position on the proper application of the constructive use doctrine on future projects.

The first step in the defense is a recognition that a constructive use can occur. The second step is to establish a threshold or standard for determining when the constructive use occurs. The FHWA has determined that the threshold for constructive use is proximity impacts which substantially impair the function of a park, recreation area, or waterfowl or wildlife refuge, or substantially impair the historic integrity of a historic site.

Steps 3, 4, and 5 are project specific and should be applied whenever there is a likelihood that constructive use could occur or will be an issue on a project. The third step is to identify the functions, activities, and qualities of the Section 4(f) resource which may be sensitive to proximity impacts. The fourth step is to analyze the proximity impacts on the Section 4(f) resource. Impacts (such as noise, water runoff, etc.) which can be quantified, should be quantified. Other proximity impacts (such as visual intrusion) which lend themselves to qualitative analysis should be qualified. The fifth step is to determine whether these impacts

substantially impair the function of the Section 4(f) resource or the historic integrity of a historic site. This determination on impairment should, of course, be coordinated with the public agency which owns the park, recreation area, or refuge, or with the State Historic Preservation Officer in the case of historic sites.

If it is concluded that the proximity effects do not cause a substantial impairment, the FHWA can reasonably conclude that there is no constructive use. Project documents should, of course contain the analysis of proximity effects and whether there is substantial impairment to a Section 4(f) resource. Except for responding to review comments in environmental documents which specifically address constructive use, the term “constructive use” need not be used. Where it is decided that there will be a constructive use, the draft Section 4(f) evaluation must be cleared with the Washington Headquarters prior to circulation.

ALI F. SEVIN