2. Section 215.8 is proposed to be amended by revising paragraph (a)(1) as follows:

§ 215.8 Requirements for biometric identifiers from aliens on departure from the United States.

(a)(1) The Secretary of Homeland Security, or his designee, may establish pilot programs at land border ports of entry, and at up to fifteen air or sea ports of entry, designated through notice in the **Federal Register**, through which the Secretary or his delegate may require an alien admitted to or paroled into the United States, other than aliens exempted under paragraph (a)(2) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who were not otherwise required to present a visa or have been issued Form I–94 or Form I–95 upon arrival at the United States, who departs the United States from a designated port of entry, to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States.

* * * * *

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

3. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323 published on January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.

4. Sections 235.1 is proposed to be amended by revising paragraphs (d)(1)(ii) as follows:

§ 235.1 Scope of examination.

* * * * *

(d) * * *

(1) * * *

(ii) The Secretary of Homeland Security or his delegate may require any alien seeking admission to or parole into the United States, other than aliens exempted under paragraph (d)(1)(iv) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who are not otherwise required to present a visa or be issued Form I–94 or Form I–95 for admission or parole into the United States, to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States. The failure of an applicant for admission to comply with any requirement to provide biometric identifiers may result in a determination that the alien is inadmissible under section 212(a) of the Immigration and Nationality Act or any other law.

* * * * *

Dated: July 13, 2006.

Michael Chertoff,

Secretary.

[FR Doc. E6–11993 Filed 7–26–06; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 771 and 774

Federal Transit Administration

49 CFR Part 622

[Docket No. FHWA–05–22884]

RIN 2125–AF14 and 2132–AA83

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

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

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: This proposal would modify the procedures for granting approvals under 23 U.S.C. 138 and 49 U.S.C. 303 (hereafter referred to as ''Section 4(f)'' [1]) in several ways. First, this proposal clarifies the factors to be considered and the standards to be applied when determining if an alternative for avoiding the use of Section 4(f) property is feasible and prudent. Second, this NPRM proposes to clarify the factors to be considered when selecting a project alternative in situations where all alternatives use Section 4(f) property and no feasible and prudent avoidance alternative exists. Third, this proposal would establish procedures for determining that the use of a Section 4(f) property has *de minimis* impacts. Fourth, the proposal updates the regulation to recognize statutory and common-sense exceptions for uses that advance Section 4(f)'s preservationist goals; as well as the option of conducting certain Section 4(f) evaluations on a programmatic basis. Fifth, this proposal would move the Section 4(f) regulations out of the agencies' National Environmental Policy Act regulations (23 CFR part 771, ''Environmental Impact and Related Procedures''), into a separate part of 23 CFR, with a reorganized structure that is easier to use.

DATES: Comments must be received on or before September 25, 2006. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Written Comments: Submit written comments to the Dockets Management System, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001.

Comments. You may submit comments identified by the docket number (FHWA–05–22884) by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2478.
- Mail: Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: To the Docket Management System; Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this notice. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act heading under Supplementary Information.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to the Docket Management System (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: For FHWA, Diane Mobley, Office of the

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

Chief Counsel, 202–366–1372, or Lamar Smith, Office of Project Development and Environmental Review, 202–366–8994. For FTA, Joseph Ossi, Office of Planning and Environment, 202–366–1613, or Christopher VanWyk, Office of Chief Counsel, 202–366–1733. Both agencies are located at 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m. for FHWA, and 9 a.m. to 5:30 p.m. for FTA, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

SAFETEA–LU. Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144) is the impetus for this rulemaking action. Section 6009(b) directs the Secretary of Transportation (Secretary) to promulgate regulations within 1 year (*i.e.*, by August 10, 2006). The rulemaking must clarify ''the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives, to using Section 4(f) properties for transportation projects. Section 4(f) properties are significant parks, recreation areas, refuges, and historic sites described in section 4(f) of the Department of Transportation Act of 1966, (Pub. L. 89–670, 80 Stat. 931) currently codified at 23 U.S.C. 138 and 49 U.S.C. 303. A joint FHWA–FTA regulation implementing Section 4(f) is currently located at 23 CFR 771.135. The regulation does not currently address what factors should be considered and what standards should be applied when determining if an avoidance alternative is feasible and prudent. This rulemaking proposes to establish those factors and standards as directed by SAFETEA–LU.

The rulemaking also includes a new, alternative method of compliance for uses with *de minimis* impacts to a Section 4(f) property. Prior to SAFETEA–LU, Section 4(f) prohibited all uses of Section 4(f) properties for transportation projects unless the agency determined there was no feasible and prudent avoidance alternative and all possible planning to minimize harm had occurred. Section 6009(a) of SAFETEA–LU amended the statute such that uses with *de minimis* impacts can be approved without an analysis of avoidance alternatives. This section does not need regulations to become effective. However, we propose to incorporate the procedures implementing this provision into this rule. These procedures reflect the statutory provisions, and guidance issued on December 13, 2005 and provided to the public via FHWA's Web site at *http://www.fhwa.dot.gov/hep/legreg.htm*.

History. Section 4(f) was enacted during the peak of the Interstate Highway construction program. At that time, many proposed Interstate Highways threatened major urban parks and historic districts. Much of the early case law on Section 4(f) was decided prior to the establishment of implementing regulations on cases involving these major new highways, prompting some courts to issue strict interpretations of Section 4(f). This began with the Supreme Court's seminal decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) (''*Overton Park*'').

In *Overton Park*, the Supreme Court considered a challenge to the Secretary's approval for the construction of a six-lane highway, mostly at-grade through Memphis, Tennessee's centerpiece, inner-city Overton Park. Much of the planning for the highway location occurred prior to the enactment of Section 4(f), and the reasons for FHWA's rejection of avoidance alternatives were not documented. The Court remanded the case to the district court on other grounds to answer several questions that could not be determined from the sparse administrative record. However, in its opinion, the Court articulated a high standard for compliance with Section 4(f), stating that Congress intended the protection of parkland to be of paramount importance. The Court further opined that an avoidance alternative to using Section 4(f) property must always be selected unless it would present ''uniquely difficult problems'' or require ''costs or community disruption of extraordinary magnitude.'' *Id.*, at 411–12, 416. The Court remanded the case back to the district court. This very stringent reading of Section 4(f) has guided courts ever since in applying Section 4(f) to specific decisions made by transportation agencies.

In the years following *Overton Park*, courts around the country applied the decision differently to essentially similar situations, reaching different conclusions as to how various factors may be considered and what weight may be attached to those factors when the agency determines if an avoidance alternative is or is not feasible and prudent. Some court decisions produced relatively strict and inflexible, almost mechanical, interpretations of Section 4(f) and resulted in an even more stringent interpretation of what is feasible and prudent than did *Overton Park.* Those decisions severely restricted the agencies' ability to make tradeoffs among societally important resources and forced the selection of alternatives that had other significant adverse economic, social, and environmental costs, even if the impact to the Section 4(f) property was minor or the property itself relatively unimportant. One early decision, for example, held that any harm to 4(f) property, no matter how small, would trigger the application of Section 4(f). *Louisiana Environmental Society* v. *Coleman*, 537 F.2d 79 (5th Cir. 1976). Further, an avoidance alternative with significant residential displacements (more than 1500 homes taken) could not be rejected as imprudent, regardless of the scale or degree of corresponding harm to the Section 4(f) property. *Id.*

Other later cases struggled to apply *Overton Park* to more factually complex projects, such as projects with multiple Section 4(f) properties and for which no total avoidance alternative is possible. At the same time, the highway program evolved from an emphasis on constructing the vast Interstate System to today's primary concerns of system preservation, congestion relief, and modernization of existing facilities. Regulations were implemented for Section 4(f) establishing a process for making and documenting decisions, including documenting the reasons for rejecting avoidance alternatives. See 23 CFR 771.135, 52 FR 32660, Aug. 28, 1987.

Planning rules evolved to require early attention to avoiding major Section 4(f) properties. Each State is now required to have a continual process for evaluating and updating its long range plan for transportation improvements. One element of the planning process is to ''consider, analyze as appropriate and reflect in the planning process products * * * access to * * * national parks, recreation and scenic areas, monuments and historic sites.'' 23 CFR 450.208(a)(4), 58 FR 58064, Oct. 28, 1993.[2] Innumerable new mitigation options and techniques have also been developed since Section 4(f) was enacted, including context sensitive design principles, new methods for mitigating noise and reducing adverse effects to historic properties, and new stormwater treatment options. The result of these developments is that the rigid interpretations from the early court decisions are often an awkward fit with the consequences to the Section 4(f)

[2] The statewide transportation planning process was also amended by SAFETEA–LU (sections 3006 and 6001); the agencies will likely implement these changes in a separate rulemaking.

property. In most instances, those consequences are not as extreme as what was considered in *Overton Park* and other early cases.

Over time, some courts reconciled these changes by interpreting the language of Section 4(f) and *Overton Park* in a way that balances the harm to the property with impacts to other resources. While those courts continued to insist on a heightened standard for protecting Section 4(f) sites, they did allow for consideration of mitigation opportunities, harm to other important resources, and the magnitude of impact to the Section 4(f) property. This balancing approach became the new case law standard in several areas of the country. An example of the balancing approach is a 1993 case involving the construction of a replacement road for one that had formerly traversed the top of a dam. The proposed road replacement alternative would travel through a 347 acre park, taking a total of 5.7 acres of the park. The FHWA found that there was no feasible and prudent alternative to this alignment. *Committee to Preserve Boomer Lake Park* v. *Skinner*, 4 F.3d 1543 (10th Cir. 1993).

In its review of FHWA's decision, the *Boomer Lake* court described the term ''prudent'' as involving a ''common sense balancing of practical concerns,'' although cautioning that the problems encountered by proposed avoidance alternatives must be ''truly unusual'' or reach ''extraordinary magnitude'' before parkland can be taken. The court found that the avoidance alternative had several problems when compared to the proposed route, including higher road user costs, substandard curves raising safety concerns, more traffic congestion due to failure to accommodate east-west traffic, more relocations, more intersection modifications, and higher construction costs. Additionally, the court found that the proposed alignment had beneficial impacts by providing better fishing access, improving water quality, and connecting the east and west sides of the park. The court concluded that, although none of these factors alone would be a basis for rejecting the avoidance alternative, their cumulative weight was sufficient to support FHWA's decision. *Id.*

General Discussion of the Proposed Rule

Feasible and Prudent Test. As directed by Congress, this NPRM proposes to clarify the factors to be considered and the standards to be applied in determining the feasibility and prudence of alternatives avoiding the use of Section 4(f) properties by transportation projects. In the SAFETEA–LU conference report, Congress noted that ''the fundamental legal standard contained in the *Overton Park* decision for evaluating the prudence and feasibility of avoidance alternatives will remain as the legal authority for these regulations, however, the Secretary will be able to provide more detailed guidance on applying these standards on a case-by-case basis.'' H.R. Rep. No. 109–203, at pp. 1057–1058 (2005).

This NPRM proposes a standard that is consistent with the fundamental legal standard of *Overton Park.* It would recognize the importance of protecting Section 4(f) properties and, when the impacts are more than *de minimis*, it would require the consideration and documentation of the severe problems associated with avoidance alternatives before the use of a Section 4(f) property could be approved. The agencies intend to adopt the reasoning of several U.S. Circuit Courts of Appeal that safety concerns, adverse impacts to non-Section 4(f) resources such as communities and natural environmental resources, and the costs of constructing and operating an alternative must be compared to the harm that would result to the features, activities, and attributes that qualify the Section 4(f) property for protection.

This balancing must be done with a ''thumb on the scale'' in favor of the Section 4(f) property because of the paramount importance Section 4(f) places on those properties. Thus, to support a finding that an avoidance alternative is not feasible and prudent, the problems associated with avoiding the Section 4(f) property would always have to be severe in nature and not easily mitigated. However, a sliding scale approach to the magnitude of harm is proposed, because it is appropriate to consider the value of the individual Section 4(f) property in context. For example, some historic sites are significant beyond doubt and are permanently protected. Such properties should be protected absent extraordinary problems with the avoidance alternatives. Other historic sites of less significance, or which are likely to be legally destroyed or developed by their owner in the near future, may be outweighed by relatively less severe problems with the avoidance alternatives.

A number of examples exist of a strict and inflexible interpretation of Section 4(f) causing the re-routing of a proposed transportation project at great cost in terms of money and other environmental impacts, only to see the historic property torn down soon after construction. The holistic approach proposed will provide the flexibility needed to make wise transportation decisions while still protecting Section 4(f) properties as well as other important resources. When Section 4(f) is applied without regard to other resources or without flexibility, it undermines support for Section 4(f).

This proposal does not require a finding that every factor mitigating against an avoidance alternative is ''unique,'' despite that term appearing several times in *Overton Park's* dicta. The Seventh Circuit has explained that the *Overton Park* Court ''was being emphatic, not substituting 'unique' for 'prudent' in the text of § 4(f).'' *Eagle Foundation* v. *Dole*, 813 F.2d 798, 804–05 (7th Cir. 1987). We agree that severe difficulties may justify the use of a Section 4(f) property even if the type of problem is not uncommonly encountered when constructing a transportation project. Therefore, we do not propose to require a finding in every instance that the problem rendering an avoidance alternative not feasible and prudent is a ''unique'' problem. Rather, in determining whether there are ''extraordinary circumstances'' that would lead to a conclusion that it is not feasible and prudent to avoid a Section 4(f) property, it is appropriate to consider the situation as a whole, taking into account the cumulative effects of avoiding the Section 4(f) property and the net harm to the property after incorporating available mitigation.

Standard for De Minimis Impacts. Section 6009(a) of SAFETEA–LU modified Section 4(f) to allow the agencies to approve a transportation use of Section 4(f) property with ''*de minimis*'' impacts, without an alternatives analysis and determination that no feasible and prudent avoidance alternative exists. The FHWA and the FTA issued guidance for implementing the *de minimis* impact provision on December 13, 2005. A copy of the guidance was placed in the docket for this NPRM and it is also available for review online at *http://www.fhwa.dot.gov/hep/legreg.htm.* This rulemaking includes a definition of *de minimis* impacts, and also proposes to include general standards and procedures for making findings of *de minimis* impacts.

Establishment of a New Part 774. This NPRM proposes to separate Section 4(f) from the agencies' National Environmental Policy Act (NEPA) regulations in 23 CFR 771. Years of applying Section 4(f) to new and unprecedented situations have led to a history of case experience that is reflected in the regulation. As a result,

the rules governing Section 4(f) have grown in length and complexity to the point that they warrant their own part in the CFR for ease of reference and citation. The new part was reorganized to make it more user-friendly, and consistent terminology was adopted where the current regulation uses inconsistent terms with the same meaning. For example, Section 4(f) properties would no longer be called Section 4(f) ''resources'' in some sections.

It should be noted that the proposed separation of the Section 4(f) and NEPA regulations is not intended to fragment compliance with Section 4(f) and NEPA. Our intent is to continue a fully integrated implementation under the unified and coordinated process provided by the NEPA procedures for compliance with the requirements of all applicable environmental laws. Placing the two regulations in close proximity within the Code of Federal Regulations, with cross-references between them, is intended to communicate the continued integration of Section 4(f) approvals with the NEPA process.

Section-by-Section Analysis

The following segment of this NPRM provides a section-by-section analysis of the proposed changes.

Title 23

Section 771.127 Record of Decision

Paragraph (a) of this section would be revised to refer to part 774 in place of 771.135.

Section 771.135 Section 4(f) (49 U.S.C. 303)

This section would be deleted in its entirety.

Part 774—Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(f))

We propose to move the current Section 4(f) regulations from the National Environmental Policy Act regulations (23 CFR part 771) into a new 23 CFR part 774. The title of the part is proposed to be revised from simply ''Section 4(f)'' to incorporate the descriptive language from the title of section 6009 of SAFETEA–LU; ''Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(f)).'' The authority is revised from part 771 to include only the citations relevant to Section 4(f) and a reference to SAFETEA–LU was added.

While the agencies propose to move the current Section 4(f) regulation from 23 CFR part 771 to 23 CFR part 774 without significant substantive changes other than those noted in this preamble, the existing provisions have been reorganized to make the requirements easier to understand. The proposed structure begins with the general framework of the process of Section 4(f) approvals, followed by coordination, format, and timing requirements for making approvals, and concluding with the many specific requirements applicable to Section 4(f) decisionmaking. Since a few of the definitions were quite lengthy and complex, the agencies propose to include the definitions section at the end, rather than the more typical location at the beginning, which the agencies believe would make the regulations easier to understand. Since most of the practitioners to whom this regulation would be directed are responsible for analyses under dozens of different environmental laws, the simplified structure will facilitate compliance. The proposed structure is:

Sec.
774.1 Purpose.
774.3 Section 4(f) approvals.
774.5 Coordination.
774.7 Format.
774.9 Timing.
774.11 Applicability.
774.13 Exceptions.
774.15 Constructive use determinations.
774.17 Definitions.

For ease of reference, a distribution table is provided tracking the current sections and proposed sections:

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

Section 774.1 Purpose

This section is new. It was added to clarify the purpose of the regulations, which is to implement 49 U.S.C. 303 and 23 U.S.C. 138 (Section 4(f)).

Section 774.3 Section 4(f) Approvals

This section describes the general requirements for approving the use of Section 4(f) property. Current section 771.135(a)(1) provided the basis for the part of this section concerning traditional Section 4(f) approvals. The new provision in section 6009(a) of SAFETEA–LU for making *de minimis* impact determinations in lieu of the traditional analysis is implemented with language that largely follows the statute. There are cross-references to the definitions for ''use,'' ''feasible and prudent,'' and ''all possible planning,'' and to the sections of the regulation governing the coordination, format, and timing of approvals as a road map for the practitioner.

This section would also provide new regulatory direction for how to analyze and select an alternative when all feasible and prudent project alternatives use some Section 4(f) property, with a list of factors that should be considered. The factors were drawn from case law experience and FHWA's Section 4(f) Policy Paper.[3] It should be kept in mind that the weight given each factor would necessarily depend on the facts in each particular case, and not every factor would be relevant to every decision. Our intent is to provide the tools that will allow wise transportation decisions that minimize overall harm in these situations, while still providing the special protection afforded by Section 4(f) by requiring the problems to be severe and not easily mitigated. We encourage commenters to provide actual or hypothetical project examples of how these factors can help arrive at a better overall decision.

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

Section 774.5 Coordination

This section would set forth the coordination required prior to making Section 4(f) approvals. With respect to the coordination for traditional Section 4(f) evaluations, part of current section 771.135(i) was included without significant substantive change. For *de minimis* impact determinations, section 6009(a) of SAFETEA–LU includes several specific coordination requirements, and those were included as well.

Section 774.7 Format

This section would contain the requirements related to the format for the various types of Section 4(f) analyses and approvals. Current sections 771.135(j), (k), (o), and part of (i) were the basis for this section, without significant substantive change except as discussed below. New text was added describing the format for making the *de minimis* impact determinations and for making approvals when all feasible and prudent project alternatives use some Section 4(f) property. The section also provides a clear regulatory basis for programmatic Section 4(f) evaluations and approvals, a practice which the FHWA uses from time to time,[4] and which FTA may also use in the future. Finally, we propose to clarify that a preliminary Section 4(f) determination made as part of the Administration's approval of a first-tier Environmental Impact Statement (EIS) is final with respect to those issues addressed in the preliminary determination and are not to be revisited after a final section 4(f) approval is granted during the second-tier NEPA study, which may or may not be an EIS.

Section 774.9 Timing

This section would contain the requirements for the timing of Section 4(f) approvals. Current sections 771.135(l), and part of (b), and (g)(1) were incorporated into this section without significant substantive change. Current sections 771.135(m) and (n) were simplified and incorporated.

Section 774.11 Applicability

This section answers many common questions about when Section 4(f) is applicable (additional guidance for certain resource situations can be found in FHWA's Section 4(f) Policy Paper). The section incorporates current sections 771.135(c), (d), (e), and parts of (b) and (g)(1) without significant substantive change. New text was added clarifying that when recreational activities are permitted on rights-of-way formally reserved for future transportation use, Section 4(f) does not apply to the property. The purpose of this clarification is to encourage State and local transportation agencies to permit public recreation on reserved transportation corridors. Current text from section 771.135(p)(5)(v), regarding constructive use of parks adjacent to reserved corridors where the transportation use and the park were jointly planned, was also incorporated here without significant substantive change.

Section 774.13 Exceptions

This section would list exceptions to Section 4(f). Many of these situations are exceptions because the application of Section 4(f) would be contrary to the preservationist goals of the statute. Others are exceptions created by Congress in various statutes. Five of the exceptions, sections 771.135(f), (g)(2), (h), part of (p)(5), and (p)(7), are incorporated from the current regulations without significant substantive change. Five of the exceptions are new: (1) Park road and parkway projects constructed under the Federal Lands Highway Program; [5] (2) trail projects under the Recreational Trails Program; [6] (3) enhancement and mitigation projects solely for the purpose of enhancing the activities, features, or attributes of a Section 4(f) property; [7] (4) alternative transportation projects in parks and public lands; [8] and (5) the Interstate System and certain elements of the Interstate System.[9]

Section 774.15 Constructive Use Determinations

This section would set forth the standards and procedures for deciding if a proximity impact caused by a project would be so severe as to constitute a use under Section 4(f) where there is no physical taking of property. This section incorporates current sections 771.135(p)(3), (p)(4), and (p)(6) without significant substantive change. It also includes two new examples of constructive use of wildlife and waterfowl refuges.

Section 774.17 Definitions

This section incorporates the definitions contained in 23 U.S.C. 101(a), and also provides definitions for: Administration; All Possible Planning; Applicant; Constructive Use; *De Minimis* Impact; Environmental Assessment (EA); Environmental Impact Statement (EIS); Feasible and Prudent Alternative; Finding of No Significant Impact (FONSI); Official(s) with Jurisdiction; Record of Decision; and Use. The definitions of ''use'' and ''constructive use'' were incorporated from current sections 771.135(p)(1) and (2) without significant substantive change. The definition of ''Administration'' was incorporated from section 771.107(d) without substantive change. The other definitions are new.

The definition of ''Feasible and Prudent Alternative'' was required by section 6009(b) of SAFETEA–LU. The proposal includes the factors to consider when deciding if an avoidance alternative is a feasible and prudent alternative to the use of a Section 4(f) property. The list of factors would promote consistent decisionmaking nationwide. The factors are based on case law and the agencies' experience assessing the environmental impacts of transportation projects. An avoidance alternative may be found not feasible and prudent based on a single factor or a combination of factors; however, we intend that these factors would only render the alternative imprudent if the problem is severe in nature and not easily mitigated.

The feasible and prudent determination should include a comparison of the problems associated

[4] FHWA has issued the following five programmatic Section 4(f) Evaluations: (1) Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property, 70 Fed. Reg. 20618 (April 20, 2005); (2) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Public Parks, Recreational Lands, and Wildlife and Waterfowl Refuges, 52 Fed. Reg. 31111 (August 19, 1987); (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites, 52 Fed. Reg. 31118 (August 19, 1987); (4) Department of Transportation, Federal Highway Administration-Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges, 48 Fed. Reg. 38135 (August 22, 1983); and (5) Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects, FHWA Memorandum, May 23, 1977, can be found at *http://www.environment.fhwa.dot.gov/projdev/4fbikeways.htm.*

[5] 23 U.S.C. 204. Projects under this program are expressly excepted from Section 4(f) requirements within the Section 4(f) statute itself.

[6] These projects are expressly excepted from Section 4(f) requirements by 23 U.S.C. 206(h)(2).

[7] This exception is proposed as a common-sense addition to the regulations.

[8] This is a new transit program that was created by Congress in section 3021 of SAFETEA–LU ''to enhance the protection of national parks and public lands and increase the enjoyment of those visiting the parks and public lands.'' It is proposed as a common-sense addition to the regulations.

[9] These projects were expressly excepted from Section 4(f) requirements by section 6007 of SAFETEA–LU.

with the avoidance alternative and the magnitude of harm that would befall the activities, features, and attributes qualifying the property for protection under Section 4(f). As the magnitude of harm to the Section 4(f) property increases, the severity of the problems that would have to exist before the alternative could be deemed not feasible and prudent would also increase. For example, where the avoidance alternative being evaluated would cause only minor harm to an important feature of a Section 4(f) property, but would divide an established, cohesive community and relocate a substantial percent of the homes, the community impact might be considered severe enough to render the alternative not feasible and prudent. However, if the alternative would devastate the Section 4(f) property, the alternative might be deemed feasible and prudent despite the community impact. These will not always be easy decisions on which all parties will agree, and it will be crucial in such cases that the agencies thoroughly explain the reasons for their decisions.

Title 49

Section 622.101 Cross-Reference to Procedures

This section, which contains FTA's cross-reference to 23 CFR part 771 for FTA's NEPA regulations, would be revised to include a cross-reference to the new 23 CFR part 774, which would contain the proposed joint FHWA/FTA Section 4(f) regulations.

Rulemaking Analyses and Notices

All comments received on or before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA and the FTA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

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

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

Regulatory Flexibility Act

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

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $120.7 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the agencies will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the affects on State, local, and tribal governments and the private sector.

Executive Order 13132 (Federalism)

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

Executive Order 12372 (Intergovernmental Review)

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

Paperwork Reduction Act

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

The information collected in Section 4(f) evaluations is not requested of non-Federal agencies or private parties. The State and local governments and transit agencies compiling information are voluntarily serving as consultants to FHWA and FTA for their own convenience. As the proposers of the actions subject to Section 4(f), and the owners, operators, and maintainers of the resulting transportation facility, and key decision makers regarding the choices involved in project development, it is easier for them to prepare the Section 4(f) evaluations. Information is not requested of outside entities except within the PRA exception relating to ''facts or opinions submitted in response to general solicitations of comments from the public.'' (5 CFR 1320.3(h)(4)).

National Environmental Policy Act

This proposed action would not have any effect on the quality of the environment under the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and is categorically excluded under 23 CFR 771.117(c)(20). The proposed action is intended to

lessen adverse environmental impacts by standardizing and clarifying compliance for Section 4(f), including the incorporation of clear direction to take into account the overall harm of each alternative.

Executive Order 12630 (Taking of Private Property)

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 13175 (Tribal Consultation)

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

Executive Order 13211 (Energy Effects)

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

Privacy Act

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

Regulation Identification Number

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

List of Subjects

23 CFR Part 771

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

23 CFR Part 774

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

49 CFR Part 622

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

Issued on: July 18, 2006.

Sandra K. Bushue,

Deputy Administrator, Federal Transit Administration.

J. Richard Capka,

Federal Highway Administrator.

For the reasons set forth in the preamble, and under the authority of 23 U.S.C. 103(c), 109, 138, and 49 U.S.C. 303, and the delegations of authority at 49 CFR 1.48(b) and 1.51, it is proposed to amend Chapter I of Title 23 and Chapter VI of Title 49, Code of Federal Regulations, by revising part 771, adding part 774, and revising part 622, respectively as set forth below.

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES [AMENDED]

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

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

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

§ 771.127 Record of decision.

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

§ 771.135 [Removed]

3. Remove § 771.135 in its entirety.

4. Add part 774 to read as follows:

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

Sec.

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

§ 774.1 Purpose.

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

§ 774.3 Section 4(f) approvals.

(a) The Administration may not approve the use, as defined in § 774.17(l), of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site unless a determination is made that:

(1) There is no feasible and prudent alternative, as defined in § 774.17(h), to the use of land from the property; and the action includes all possible planning, as defined in § 774.17(b), to minimize harm to the property resulting from such use; or

(2) The use of the property, including any avoidance, minimization, mitigation, or enhancement measures committed to by the applicant, will have a *de minimis* impact, as defined in § 774.17(e), on the property.

(b) If the analysis in paragraph (a)(1) of this section concludes that all of the feasible and prudent project alternatives use some Section 4(f) property, then the Administration may approve the most prudent alternative that minimizes overall harm by considering the following factors:

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

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

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

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

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

(6) The magnitude of any adverse impacts to resources not protected by Section 4(f);

(7) Extraordinary differences in costs among the alternatives; and

(8) Any history of concurrent planning or development of the proposed transportation project and the Section 4(f) property.

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

§ 774.5 Coordination.

(a) Prior to making Section 4(f) approvals under § 774.3(a)(1), the Section 4(f) evaluation shall be provided for coordination and comment to the official(s) with jurisdiction over the property and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. A minimum of 45 days shall be established by the Administration for receipt of comments.

(b) Prior to making *de minimis* impact findings under § 774.3(a)(2), the following coordination shall be undertaken:

(1) For historic properties, the consulting parties identified in accordance with 36 CFR part 800 must be consulted; and the official(s) with jurisdiction over the property must concur, in writing, in a finding of ''no adverse effect'' or ''no historic properties affected'' in accordance with 36 CFR part 800. The Administration shall inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding based on their concurrence in the finding of ''no adverse effect'' or ''no historic properties affected.'' Public notice and comment other than the consultation with consulting parties in accordance with 36 CFR part 800 is not required.

(2) For parks, recreation areas, and refuges, public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. Following the opportunity for public review and comment, the Administration shall inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding; and the official(s) with jurisdiction over the property must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection.

(c) Uses of Section 4(f) property covered by a programmatic Section 4(f) evaluation under § 774.7(g) shall be documented and coordinated as specified in the programmatic Section 4(f) evaluation.

§ 774.7 Format.

(a) A Section 4(f) evaluation prepared under § 774.3(a)(1) must include sufficient supporting documentation to demonstrate why there is no feasible and prudent alternative, as defined in § 774.17(h), that would avoid using the Section 4(f) property; and the evaluation must summarize all possible planning, as defined in § 774.17(b), that occurred to minimize harm to the Section 4(f) property.

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

(c) If all feasible and prudent alternatives use some Section 4(f) property, the applicant must select the most prudent alternative that minimizes overall harm by considering the factors listed in § 774.3(b). This information must be documented in the Section 4(f) approval document.

(d) All Section 4(f) approvals under § 774.3(a)(1) must be reviewed for legal sufficiency.

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

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

(2) A preliminary Section 4(f) determination made in the first-tier stage shall be considered final and need not be revisited as part of a final Section 4(f) approval granted during the second-tier stage.

(3) The final Section 4(f) approval shall be made in the second-tier categorical exclusion (CE), environmental assessment (EA), or final EIS or in the record of decision (ROD) or finding of no significant impact (FONSI). Where the Section 4(f) approval is made in a second-tier final EIS or EA, the Administration will summarize the basis for its Section 4(f) approval in the ROD or FONSI.

(f) A *de minimis* impact finding under § 774.3(a)(2) must include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are *de minimis* as defined in § 774.17(e); and that the coordination required in § 774.5(b) has been completed.

(g) The Administration may develop additional programmatic Section 4(f) determinations. Programmatic Section 4(f) determinations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

§ 774.9 Timing.

(a) Any use of lands from a Section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.

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

(c) If the Administration determines that Section 4(f) is applicable after the CE, FONSI, or final EIS has been processed, a separate Section 4(f) approval will be required when:

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

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

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

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental environmental document. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with § 771.130(f) of this title.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in §§ 774.11(f) and 774.13(b) of this part. In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

§ 774.11 Applicability.

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

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

(c) Consideration under Section 4(f) is not required when the official(s) with jurisdiction over a park, recreation area or refuge determine that the property, considered in its entirety, is not significant. In the absence of such a determination, the Section 4(f) property will be presumed to be significant. The Administration will review a determination that a park, recreation area, or refuge is not significant to assure its reasonableness.

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

(e) In determining the application of Section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the official(s) with jurisdiction to identify all properties on or eligible for the National Register of Historic Places (National Register). The Section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

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

(g) Temporary recreational activity on property formally reserved for future transportation use will not subject the property to Section 4(f). Where the property is formally reserved for transportation use before or at the same time an adjacent park, recreation area, or refuge is established and concurrent or joint planning or development occurs, then any resulting proximity impacts of the transportation project will not be considered a constructive use as defined in § 774.17(d). Examples of such concurrent or joint planning or development include, but are not limited to:

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

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

§ 774.13 Exceptions.

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

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

(1) The Administration finds that such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, and

(2) The official(s) with jurisdiction over the property have been consulted and have not objected to the

Administration finding in paragraph (a)(1) of this section.

(b) Archeological sites where the Administration, after consultation with the official(s) with jurisdiction over the property, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource.

(c) Designations of park and recreation lands, refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in § 774.9(e), the Administration may permit a project to proceed without consideration under Section 4(f) if the property interest in the Section 4(f) lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency's acquisition, adoption, or approval, and except for its age it would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register.

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

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

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

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

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

(5) There must be documented agreement of the official(s) with jurisdiction over the property regarding the above conditions.

(e) Proximity impacts that are not substantial enough to constitute a ''constructive use'' as defined in § 774.17(d). Examples include:

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

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

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

(4) There are proximity impacts to a Section 4(f) property, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the Administration approval of a final environmental document, established the location for a proposed transportation project before the designation, establishment, or change in the significance of the property. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency's acquisition, adoption, or approval, and except for its age it would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register;

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

(6) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built;

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

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

(f) Park road or parkway projects developed in accordance with 23 U.S.C. 204.

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

(h) Transportation enhancement and mitigation projects where the use of the Section 4(f) property is solely for the purpose of preserving or enhancing the activities, features, or attributes that qualify the property for Section 4(f) protection; and the official(s) with jurisdiction over the property agrees in writing that the use benefits or improves said activities, features, or attributes of the property.

(i) Alternative transportation facilities and services in parks and public lands that are funded under 49 U.S.C. 5320.

(j) The Interstate System and individual elements of the Interstate System, with the exception of those elements formally designated by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.

§ 774.15 Constructive use determinations.

(a) If the project results in a constructive use, as defined in § 774.17(d), of a nearby Section 4(f) property, the Administration shall evaluate that use in accordance with § 774.3(a)(1). The Administration is not required to determine that a project would not result in a constructive use of a nearby Section 4(f) property. However, such a determination may be made at the discretion of the Administration. When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following:

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

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

(3) Consultation, on the foregoing identification and analysis, with the

official(s) with jurisdiction over the Section 4(f) property.

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

(1) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as hearing the performances at an outdoor amphitheater, sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, enjoyment of an urban park where serenity and quiet are significant attributes, or viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing;

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

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

(4) The vibration impact from operation of the project substantially impairs the use of a Section 4(f) property, such as projected vibration levels from a rail transit project that are great enough to affect the structural integrity of a historic building or substantially diminish the utility of the building; or

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

§ 774.17 Definitions.

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

(a) *Administration.* The Federal Highway Administration or the Federal Transit Administration, whichever is making the approval for the transportation program or project at issue.

(b) *All Possible Planning.* All possible planning to minimize harm means that measures that would reduce the adverse impacts resulting from the use of Section 4(f) property must be included in the project unless such measures are not prudent. All possible planning does not require analysis of avoidance alternatives.

(1) In evaluating the prudence of minimization and mitigation measures to minimize harm under § 774.3(a)(1), the Administration will consider:

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

(ii) With regard to public parks, recreation areas, and refuges, the measures may involve a replacement of land or facilities of comparable value and function, or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways;

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

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

(v) The impacts of the measures outside of the Section 4(f) property.

(2) A *de minimis* impact finding under § 774.3(a)(2) subsumes and obviates the requirement for all possible planning to minimize harm.

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

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

(e) *De Minimis Impact.*

(1) For historic sites, *de minimis* impact means that a determination of ''no adverse effect'' or ''no historic properties effected,'' in accordance with the regulation (36 CFR part 800) implementing Section 106 of the National Historic Preservation Act of 1966, is appropriate.

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

(f) *Environmental Assessment (EA).* Refers to a document prepared pursuant to NEPA and § 771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

(g) *Environmental Impact Statement (EIS).* Refers to a document prepared pursuant to NEPA and §§ 771.123 and 771.125 of this title for a proposed project that is likely to cause significant impacts on the environment.

(h) *Feasible and Prudent Alternative.* A feasible and prudent alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation goals of the statute. An alternative may be determined not feasible and prudent if:

(1) It cannot be built as a matter of sound engineering judgment;

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

(3) It results in severe safety or operational problems;

(4) After reasonable mitigation, it causes:

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

(ii) Severe disruption to established communities;

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

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

(5) It results in additional construction, maintenance, or

operational costs of an extraordinary magnitude;

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

(7) It involves multiple factors in paragraphs (1) through (6) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

(i) *Finding of No Significant Impact (FONSI).* Refers to a decision document prepared pursuant to NEPA and § 771.121 of this chapter.

(j) *Official(s) with Jurisdiction.*

(1) In the case of historic properties, the official with jurisdiction is the State Historic Preservation Officer or Tribal Historic Preservation Officer for the State or Tribal government wherein the property is located. When the Advisory Council on Historic Preservation (ACHP) is involved in a consultation concerning a property under Section 106 of the National Historic Preservation Act, the ACHP is also an official with jurisdiction over that property for purposes of this part.

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

(k) *Record of Decision (ROD).* Refers to a decision document prepared pursuant to NEPA and § 771.127 of this chapter.

(l) *Use.* Except as set forth in § 774.13 of this part, a ''use'' of Section 4(f) property occurs:

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

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

(3) When there is a constructive use of a Section 4(f) property as defined in paragraph (d) of this section.

Federal Transit Administration

Title 49—Transportation

CHAPTER VI—FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES [AMENDED]

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

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

6. Revise § 622.101 to read as follows:

Subpart A—Environmental Procedures

§ 622.101 Cross-reference to procedures.

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

[FR Doc. 06–6496 Filed 7–24–06; 10:10 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 63, 85, 90, 1048, 1065 and 1068

[EPA–HQ–OAR–2005–0030, FRL–8203–9]

RIN 2060–AM81 and 2060–AN62

Standards of Performance for Stationary Spark Ignition Internal Combustion Engines and National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of public comment period.

SUMMARY: On June 12, 2006 (71 FR 33804), EPA proposed new source standards of performance for stationary spark ignition internal combustion engines. EPA also proposed national emission standards for hazardous air pollutants for stationary reciprocating internal combustion engines that either are located at area sources of hazardous air pollutant emissions or that have a site rating of less than or equal to 500 brake horsepower, and are located at major sources of hazardous air pollutant emissions. In this notice, we are announcing a 30-day extension of the public comment period.

DATES: Submit comments on or before October 11, 2006.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2005–0030, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* Air and Radiation Docket and Information Center, U.S. EPA, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of 2 copies. EPA requests a separate copy also be sent to the contact person identified below (see **FOR FURTHER INFORMATION CONTACT**). In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: Desk Officer for EPA, 735 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* Air and Radiation Docket and Information Center, U.S. EPA, Room B102, 1301 Constitution Avenue, NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2005–0030. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m.,