Appendix A

REGULATIONS AND GUIDANCE

BUREAU OF DESIGN AND ENVIRONMENT MANUAL

APPENDIX A
REGULATIONS AND GUIDANCE

Appendix A includes the following selected environmental regulations and guidance:

- 40 CFR 1500 – 1508 "CEQ Regulations";
- 23 CFR 771 "Environmental Impact and Related Procedures";
- 23 CFR 774 "Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(f))";
- FHWA Technical Advisory T6640.8A *Guidance for Preparing and Processing Environmental and Section 4(f) Documents*;
- CEQ Questions and Answers ("40 Questions");
- FHWA Section 4(f) Policy Paper, July 20, 2012;
- Programmatic Section 4(f) Evaluations;
  - + Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges
  - + Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges
  - + Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites
  - + Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property
  - + Programmatic Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects
- Federal-aid Highway Program, Illinois Stewardship/Oversight Agreement;
- Programmatic Agreement Between the Federal Highway Administration and the Illinois Department of Transportation Regarding the Processing of Actions Classified as Categorical Exclusions for Federal-Aid Highway Projects;
- Illinois Statewide Implementation Agreement Between the Federal Highway Administration and the Illinois Department of Transportation for Establishment of Timeframes for Environmental Impact Statements and Environmental Assessments;

- Statewide Implementation Agreement, National Environmental Policy Act and Clean Water Act Section 404, Concurrent NEPA/404 Processes for Transportation Projects in Illinois;

- Memorandum of Understanding By and Between the Illinois Department of Natural Resources and the Illinois Department of Transportation, January 10, 2013;

- Illinois Department of Transportation Wetlands Action Plan, April 15, 1998;

- Illinois Department of Transportation's Agricultural Land Preservation Policy Statement and Cooperative Working Agreement;

- Programmatic Agreement for the Rehabilitation and Replacement of Historic Bridges, Between the Illinois State Historic Preservation Office and the Federal Highway Administration; and

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CHAPTER V — COUNCIL ON ENVIRONMENTAL QUALITY

Part

1500 Purpose, policy, and mandate

1501 NEPA and agency planning

1502 Environmental impact statement

1503 Commenting

1504 Predecision referrals to the Council of proposed Federal actions determined to be environmentally unsatisfactory

1505 NEPA and agency decisionmaking

1506 Other requirements of NEPA

1507 Agency compliance

1508 Terminology and index

PART 1500 — PURPOSE, POLICY, AND MANDATE

Sec.
1500.1 Purpose.
1500.2 Policy.
1500.3 Mandate.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse affects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et. seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to de-emphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing than an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant

ffect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan 3. 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase “to the fullest extent possible” in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501 — NEPA AND AGENCY PLANNING

Sec.

1501.1 Purpose
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at any early stage the significant environmental issues deserving of study and de-emphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environ-mental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supple-menting these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environ-mental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environ-mental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and area wide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environ-mental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan 3. 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdic-tion by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other

required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controver-sial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environ-mental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502 — ENVIRONMENTAL IMPACT STATEMENT

Sec.

1502.1 Purpose
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.

1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.
1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunct with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for state-ments.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementa-tion, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supple-mented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The

disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environ-mental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date of which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus, sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The description shall be no longer than is necessary to understand

the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).

(d) The environmental effects of alternatives including the propose action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource require-ments and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impacts statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except

for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is un-usually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statement to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purpose of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503 — COMMENTING

Sec.
1503.1 Inviting comments.
1503.2 Duty to comment.
1503.3 Specificity of comments.
1503.4 Response to comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is

authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environ-mental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the

agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504 — PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

1504.1 Purpose.
1504.2 Criteria for referral.
1504.3 Procedure for referrals and response.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

[43 FR 55998, Nov. 29, 1978]

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environ-mental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally prefer-able alternatives.

[43 FR 55998, Nov. 29, 1978]

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft

environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts.

(ii) Identify any existing environmental requirements or policies which would be violated by the matter.

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory.

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason.

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommenda-tions as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council make take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagree-ments are irreconcilable.

(6) Publish its findings and recommenda-tions (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action).

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act) .

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505 — NEPA AND AGENCY DECISIONMAKING

Sec.
1505.1 Agency decisionmaking procedures.
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section
102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506 — OTHER REQUIREMENTS OF NEPA

Sec.

1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility.
1506.6 Public involvement.
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.,* long leadtime equipment and purchase options) made by non-govern-

mental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement require-ments in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement or a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action where is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall

be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments*. If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements*. Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the co-operating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rule-making may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearing-houses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested com-munity organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact

statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental
Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities:

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environ-mental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided,* That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring and environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the prospectus or the 11(b) Report of Building Project Surveys to the

Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street S.W., Washington, DC 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirements of availability to the President. EPA may issue guidelines to agencies to implement the responsibilities under this section and § 1506.10.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507 — AGENCY COMPLIANCE

Sec.

1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in

any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environ-mental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environ-mental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508 — TERMINOLOGY AND INDEX

Sec.

1508.1 Terminology.
1508.2 Act.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
1508.7 Cumulative impact.
1508.8 Effects.
1508.9 Environmental assessment.
1508.10 Environmental document.
1508.11 Environmental impact statement.
1508.12 Federal agency.
1508.13 Finding of no significant impact.
1508.14 Human environment.
1508.15 Jurisdiction by law.
1508.16 Lead agency.
1508.17 Legislation.
1508.18 Major Federal action.
1508.19 Matter.
1508.20 Mitigation.
1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970. as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

§ 1508.3 Affecting.

Affecting means will or may have an effect on.

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations, States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition

of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq*., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact of repairing, rehabilitation, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I or NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that

provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the signifi-cance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Index to Parts 1500 Through 1508

EDITORIAL NOTE: This listing is provided for information purposes only. It is compiled and kept up-to-date by the Council on Environmental Quality.

INDEX

Act 1508.2.
Action 1508.18, 1508.25.
Action-forcing 1500.1, 1502.1.
Adoption 1500.4(n), 1500.5(h), 1506.3.
Affected Environment 1502.10(f), 1502.15.
Affecting 1502.3, 1508.3.
Agency Authority 1500.6.
Agency Capability 1501.2(a), 1507.2.
Agency Compliance 1507.1.
Agency Procedures 1505.1, 1507.3.
Agency Responsibility 1506.5.
Alternatives 1501.2(c), 1502.2, 1502.10(e), 1502.14, 1505.1(e), 1505.2, 1507.2(d), 1508.25(b).
Appendices 1502.10(k), 1502.18, 1502.24.
Applicant 1501.2(d)(1), 1501.4(b), 1501.8(a), 1502.19(b), 1503.1(a)(3), 1506.1(d), 1506.5(a), 1506.5(b).
Apply NEPA Early in the Process 1501.2.
Categorical Exclusion 1500.4(p), 1500.5(k), 1501.4(a), 1507.3(b), 1508.4.
Circulating of Environmental Impact Statement. 1502.19, 1506.3.
Classified Information 1507.3(c).
Clean Air Act 1504.1, 1508.19(a).
Combining Documents 1500.4(o), 1500.5(l), 1506.4.
Commenting 1502.19, 1503.1, 1503.2, 1503.3, 1503.4,
Consultation Requirement 1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25.
Context 1508.27(a).
Cooperating Agency 1500.5(b), 1501.1(b), 1501.5(c), 1501.5(f), 1501.6, 1503.1(a)(1), 1503.2, 1503.3, 1506.5(a), 1508.5.
Cost-Benefit 1502.23.
Council on Environmental Quality. 1500.3, 1501.5(e), 1501.5(f), 1501.6(c), 1504.1, 1504.2, 1506.6(f), 1506.9, 1506.10(d), 1506.11, 1507.3, 1508.6,
Cover Sheet 1502.10(a), 1502.11.
Cumulative Impact 1508.7, 1508.25(a), 1508.25(c).
Decisionmaking 1505.1, 1506.1.
Decision points 1505.1(b).
Dependent 1508.25(a).
Draft Environmental Impact Statement. 1502.9(a).
Early Application of NEPA 1501.2.
Economic Effects 1508.8.
Effective Date 1506.12.
Effects 1502.16, 1508.8.
Emergencies 1506.11.
Endangered Species Act 1502.25, 1508.27(b)(9).
Energy 1502.16(e).
Environmental Assessment 1501.3, 1501.4(b), 1501.4(c), 1501.7(b)(3), 1506.5(b), 1508.4, 1508.10, 1508.13.

INDEX — Continued

Environmental Consequences 1502.10(g), 1502.16.
Environmental Consultation Requirements. 1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c).
Environmental Documents 1508.10.
Environmental Impact Statement. 1500.4, 1501.4(c), 1501.7, 1501.3, 1502.1, 1502.2, 1502.3, 1502.4, 1502.5, 1502.6, 1502.7, 1502.8, 1502.9, 1502.10, 1502.12, 1502.13, 1502.14, 1502.15, 1502.16, 1502.17, 1502.18, 1502.19, 1502.20, 1502.21, 1502.22, 1502.23, 1502.24, 1502.25, 1506.2(b)(4), 1506.3, 1506.8, 1506.11.
Environmental Protection Agency. 1502.11(f), 1504.1, 1504.3, 1506.7(c), 1508.9, 1506.10, 1506.19(a).
Environmental Review Requirements. 1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c).
Expediter 1501.8(b)(2).
Federal Agency 1508.12.
Filing 1506.9.
Final Environmental Impact Statement. 1502.9(b), 1503.1, 1503.4(b).
Finding of No Significant Impact. 1500.3, 1500.4(q), 1500.5(1), 1501.4(e), 1508.13.
Fish and Wildlife Coordination Act. 1502.25.
Format for Environmental Impact Statement. 1502.10.
Freedom of Information Act 1506.6(f).
Further Guidance 1506.7.
Generic 1502.4(c)(2).
General Services Administration. 1506.8(b)(2)(iii).
Geographic 1502.4(c)(1).
Graphics 1502.8.
Handbook 1506.7(a).
Housing and Community Development Act. 1506.12, 1508.12.
Human Environment 1502.3, 1502.22, 1508.14.
Impacts 1508.8, 1508.25(c).
Implementing the Decision 1505.3.
Incomplete or Unavailable Information. 1502.22.
Incorporation by Reference 1500.4(j), 1502.21.
Index 1502.10(j).
Indian Tribes 1501.2(d)(2), 1501.7(a)(1), 1502.16(c), 1503.1(a)(2)(ii), 1506.6(b)(3)(ii), 1508.5, 1508.12.
Intensity 1508.27(b).
Interdisciplinary Preparation 1502.6, 1502.17.
Interim Actions 1506.1.
Interdisciplinary Preparation 1502.6, 1502.17.
Interim Actions 1506.1.
Joint Lead Agency 1501.5(b), 1506.2.
Judicial Review 1500.3.
Jurisdiction by Law 1508.15.

INDEX

Lead Agency 1500.5(c), 1501.1(c), 1501.5, 1501.6, 1501.7, 1504.3, 1506.2(b)(4), 1506.8(a), 1506.10(d), 1508.16.
Legislation 1500.5(j), 1502.3, 1506.8, 1508.17, 1508.18(a).
Limitation on Action During NEPA Process. 1506.1.
List of Preparers 1502.10(h), 1502.17.
Local or State 1500.4(n), 1500.5(h), 1501.2(d)(2), 1501.5(d), 1501.8(c), 1502.16(c), 1503.1(a)(2), 1506.6(b)(3), 1508.5, 1508.12, 1508.18.
Major Federal Action 1502.3, 1508.18.
Mandate 1500.3.
Matter 1504.1, 1504.2, 1504.3, 1508.19.
Methodology 1502.24.
Mitigation 1502.14(f), 1502.16(h), 1503.3(d), 1505.2(c), 1505.3, 1508.20.
Monitoring 1505.2(c), 1505.3.
National Historic Preservation Act. 1502.25.
National Register of Historical Places. 1508.27(b)(8).
Natural or Depletable Resource Requirements. 1502.16(f).
Need for Action 1502.10(d), 1502.13.
NEPA Process 1508.21.
Non-Federal Sponsor 1502.2(d).
Notice of Intent 1501.7, 1507.3(e), 1508.22.
OMB Circular A-95 1503.1(a)(2)(iii), 1505.2, 1506.6(b)(3)(i).
102 Monitor 1506.6(b)(2), 1506.7(c).
Ongoing Activities 1506.12.
Page Limits 1500.4(a), 1501.7(b), 1502.7.
Planning 1500.5(a), 1501.2(b), 1502.4(a), 1508.18.
Policy 1500.2, 1502.4(b), 1508.18(a).
Program Environmental Impact Statement. 1500.4(l), 1502.4, 1502.20, 1508.18.
Programs 1502.4, 1508.18(b)
Projects 1508.18.
Proposal 1502.4, 1502.5, 1506.8, 1508.23.
Proposed Action 1502.10(e), 1502.14, 1506.2(c).
Public Health and Welfare 1504.1.

INDEX — Continued

Public Involvement 1501.4(e), 1503.1(a)(3), 1506.6.
Purpose 1500.1, 1501.1, 1502.1, 1504.1.
Purpose of Action 1502.10(d), 1502.13.
Record of Decision 1505.2, 1506.1.
Referrals 1504.1, 1504.2, 1504.3, 1506.3(d).
Referring Agency 1504.1, 1504.2, 1504.3.
Response to Comments 1503.4.
Rural Electrification Administration. 1506.1(d).
Scientific Accuracy 1502.24.
Scope 1502.4(a), 1502.9(a), 1508.25.
Scoping 1500.4(b), 1501.1(d), 1501.4(d), 1501.7, 1502.9(a), 1506.8(a).
Significantly 1502.3, 1508.27.
Similar 1508.25.
Small Business Associations 1506.6(b)(3)(vi).
Social Effects 1508.8.
Special Expertise 1508.26.
Specificity of Comments 1500.4(1), 1503.3.
State and Areawide Clearinghouses. 1501.4(e)(2), 1503.1(a)(2)(iii), 1506.6(b)(3)(i).
State and Local 1500.4(n), 1500.5(h), 1501.2(d)(2), 1501.5(b), 1501.5(d), 1501.7(a)(1), 1501.8(c), 1502.16(c), 1503.1(a)(2), 1506.2(b), 1506.6(b)(3), 1508.5, 1508.12, 1508.18.
State and Local Fiscal Assistance Act. 1508.18(a).
Summary 1500.4(h), 1502.10(b), 1502.12.
Supplements to Environmental Impact 1502.9(c).
Table of Contents 1502.10(c).
Technological Development 1502.4(c)(3).
Terminology 1508.1.
Tiering 1500.4(i), 1502.4(d), 1502.20, 1508.28.
Time Limits 1500.5(e), 1501.1(e), 1501.7(b)(2), 1501.8.
Timing 1502.4, 1502.5, 1506.10.
Treaties 1508.17.
When to Prepare an Environmental Impact 1501.3.
Wild and Scenic Rivers Act 1506.8(b)(ii).
Wilderness Act 1506.8(b)(ii).
Writing 1502.

PART 771 — ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Sec.

771.101 Purpose.
771.103 [Reserved]
771.105 Policy.
771.107 Definitions.
771.109 Applicability and responsibilities.
771.111 Early coordination, public involvement and project development.
771.113 Timing of Administration activities.
771.115 Classes of actions.
771.117 Categorical exclusions.
771.119 Environmental assessments.
771.121 Findings of no significant impact.
771.123 Draft environmental impact statements.
771.125 Final environmental impact statements.
771.127 Record of decision.
771.129 Re-evaluations.
771.130 Supplemental environmental impact statements.
771.131 Emergency action procedures.
771.133 Compliance with other requirements.
771.137 International actions.

AUTHORITY: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303, 5301(e), 5323(b), and 5324; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.48(b) and 1.51.

SOURCE: 52 FR 32660, Aug. 28, 1987, unless otherwise noted.

§ 771.101 Purpose.

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and supplements the NEPA regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulation). Together these regulations set forth all FHWA, FTA, and Department of Transportation (DOT) requirements under NEPA for the processing of highway and public transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 327, and 49 U.S.C. 303, 5301(e), 5323(b), and 5324(b) and (c).

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24469, May 9, 2005; 74 FR 12527, Mar. 24, 2009]

§ 771.103 [Reserved]

§ 771.105 Policy.

It is the policy of the Administration that:

(a) To the fullest extent possible, all envi-ronmental investigations, reviews, and consulta-tions be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental review document required by this regulation.[1]

(b) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvements; and of national, State, and local environmental protection goals.

(c) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions.

(d) Measures necessary to mitigate adverse impacts be incorporated into the action. Measures necessary to mitigate adverse impacts are eligible for Federal funding when the Administration determines that:

(1) The impacts for which the mitigation is proposed actually result from the Administration action; and

(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the

[1] FHWA and FTA have supplementary guidance on environmental review documents and procedures for their programs. This guidance includes: the FHWA Technical Advisory T6640.8A, October 30, 1987, "SAFETEA-LU Environmental Review Process: Final Guidance," November 15, 2006; Appendix A to 23 CFR part 450 titled "Linking the Transportation Planning and NEPA Processes"; and "Transit Noise and Vibration Impact Assessment," May 2006. The FHWA and the FTA supplementary guidance, and any updated versions of the guidance, are available from the respective FHWA and FTA headquarters and field offices as prescribed in 49 CFR part 7 and on their respective Web sites at *http://www.fhwa.dot.gov* and *http://www.fta.dot.gov*, or in hard copy by request.

benefits of the proposed mitigation measures. In making this determination, the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, Executive Order, or Administration regulation or policy.

(e) Costs incurred by the applicant for the preparation of environmental documents request-ed by the Administration be eligible for Federal assistance.

(f) No person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administra-tion program or procedural activity required by or developed pursuant to this regulation.

[52 FR 32660, Aug. 28, 1987; 53 FR 11065, Apr. 5, 1988, as amended at 70 FR 24469, May 9, 2005; 74 FR 12527, Mar. 24, 2009]

§ 771.107 Definitions.

The definitions contained in the CEQ regulation and in Titles 23 and 49 of the United States Code are applicable. In addition, the following definitions apply.

(a) *Environmental studies*. The investiga- tions of potential environmental impacts to determine the environmental process to be followed and to assist in the preparation of the environmental document.

(b) *Action*. A highway or transit project proposed for FHWA or UMTA funding. It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(c) *Administration action*. The approval by FHWA or UMTA of the applicant's request for Federal funds for construction. It also includes approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(d) *Administration*. The FHWA or FTA, whichever is the designated Federal lead agency for the proposed action. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law.

(e) *Section 4(f)*. Refers to 49 U.S.C. 303 and 23 U.S.C. 138.[2]

(f) *Applicant*. Any State, local, or federally-recognized Indian tribal governmental unit that requests funding approval or other action by the Administration and that the Administration works with to conduct environmental studies and prepare environmental review documents. When another Federal agency, or the Administration itself, is implementing the action, then the lead agencies (as defined in this regulation) may assume the responsibilities of the applicant in this part. If there is no applicant, then the Federal lead agency will assume the responsibilities of the applicant in this part.

(g) *Lead agencies*. The Administration and any other agency designated to serve as a joint lead agency with the Administration under 23 U.S.C. 139(c)(3) or under the CEQ regulation.

(h) *Participating agency*. A Federal, State, local, or federally-recognized Indian tribal governmental unit that may have an interest in the proposed project and has accepted an invitation to be a participating agency, or, in the case of a Federal agency, has not declined the invitation in accordance with 23 U.S.C. 139(d)(3).

(i) *Project sponsor*. The Federal, State, local, or federally-recognized Indian tribal governmental unit, or other entity, including any private or public-private entity that seeks an Administration action.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24469, May 9, 2005; 74 FR 12527, Mar. 24, 2009]

[2] 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.

§ 771.109 Applicability and responsibilities.

(a)(1) The provisions of this regulation and the CEQ regulation apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

(2) This regulation does not apply to or alter approvals by the Administration made prior to the effective date of this regulation

(3) Environmental documents accepted or prepared after the effective date of this regulation shall be developed in accordance with this regulation.

(b) It shall be the responsibility of the applicant, in cooperation with the Administration to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation. The FHWA will assure that this is accomplished as a part of its program management responsibilities that include reviews of designs, plans, specifications, and estimates (PS&E), and construction inspec-tions. The UMTA will assure implementation of committed mitigation measures through in-corporation by reference in the grant agreement, followed by reviews of designs and construction inspections.

(c) The following roles and responsibilities apply during the environmental review process:

(1) The lead agencies are responsible for managing the environmental review process and the preparation of the appropriate environmental review documents.

(2) Any applicant that is a State or local governmental entity that is, or is expected to be, a direct recipient of funds under title 23, U.S. Code, or chapter 53 of title 49 U.S. Code, for the action shall serve as a joint lead agency with the Administration in accordance with 23 U.S.C. 139, and may prepare environmental review documents if the Administration furnishes guidance and independently evaluates the documents.

(3) The Administration may invite other Federal, State, local, or federally-recognized Indian tribal governmental units to serve as joint lead agencies in accordance with the CEQ regulation. If the applicant is serving as a joint lead agency under 23 U.S.C. 139(c)(3), then the Administration and the applicant will decide jointly which other agencies to invite to serve as joint lead agencies.

(4) When the applicant seeks an Administration action other than the approval of funds, the role of the applicant will be determined by the Administration in accordance with the CEQ regulation and 23 U.S.C. 139.

(5) Regardless of its role under paragraphs (c)(2) through (c)(4) of this section, a public agency that has statewide jurisdiction (for example, a State highway agency or a State department of transportation) or a local unit of government acting through a statewide agency, that meets the requirements of section 102(2)(D) of NEPA, may prepare the EIS and other environmental review documents with the Administration furnishing guidance, participating in the preparation, and independently evaluating the document. All FHWA applicants qualify under this paragraph.

(6) The role of a project sponsor that is a private institution or firm is limited to providing technical studies and commenting on environmental review documents.

(d) When entering into Federal-aid project agreements pursuant to 23 U.S.C. 106, it shall be the responsibility of the State highway agency to ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental review documents unless the State requests and receives written FHWA approval to modify or delete such mitigation features.

[52 FR 32660, Aug. 28, 1987; 53 FR 11065, Apr. 5, 1988, as amended at 62 FR 6873, Feb. 14, 1997; 70 FR 24469, May 9, 2005; 74 FR 12527, Mar. 24, 2009]

§ 771.111 Early coordination, public involvement, and project development.

(a)(1) Early coordination with appropriate agencies and the public aids in determining the type of environmental review documents an action requires, the scope of the document, the
level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental review documents. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental review documents.

(2) The information and results produced by, or in support of, the transportation planning process may be incorporated into environmental review documents in accordance with 40 CFR 1502.21 and 23 CFR 450.212 or 450.318.[3]

(b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action.

(c) When both the FHWA and FTA are involved in the development of a project, or when the FHWA or FTA acts as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis.

(d) During the early coordination process, the lead agencies may request other agencies having an interest in the action to participate, and must invite such agencies if the action is subject to the project development procedures in 23 U.S.C. 139.[4] Agencies with special expertise may be invited to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies.

(e) Other States, and Federal land manage-ment entities, that may be significantly affected by the action or by any of the alternatives shall be notified early and their views solicited by the applicant in cooperation with the Administration. The Administration will prepare a written evaluation of any significant unresolved issues and furnish it to the applicant for incorporation into the environmental assessment (EA) or draft EIS.

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and area-wide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

(h) For the Federal-aid highway program:

[3] On February 14, 2007, FHWA and FTA issued guidance on incorporating products of the planning process into NEPA documents as Appendix A of 23 CFR part 450. This guidance, titled "Linking the Transportation Planning and NEPA Processes," is available on the FHWA Web site at *http://www.fhwa.dot.gov* or in hard copy upon request.

[4] The FHWA and FTA have developed guidance on 23 U.S.C. Section 139 titled "SAFETEA–LU Environmental Review Process: Final Guidance," November 15, 2006, and available at *http://www.fhwa.dot.gov* or in hard copy upon request.

(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 139 and CEQ regulation.

(2) State public involvement/public hearing procedures must provide for:

(i) Coordination of public involvement activities and public hearings with the entire NEPA process.

(ii) Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impactsassociated with relocation of individuals, groups, or institutions.

(iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any Federal-aid project which requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest.

(iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information. The notice shall also provide information required to comply with public involvement requirements of other laws, Executive orders, and regulations.

(v) Explanation at the public hearing of the following information, as appropriate:

(A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning,

(B) The project's alternatives, and major design features,

(C) The social, economic, environmental, and other impacts of the project,

(D) The relocation assistance program and the right-of-way acquisition process.

(E) The State highway agency's procedures for receiving both oral and written statements from the public.

(vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing.

(vii) An opportunity for public involvement in defining the purpose and need and the range of alternatives, for any action subject to the project development procedures in 23 U.S.C. 139.

(viii) Public notice and an opportunity for public review and comment on a Section 4(f) *de minimis* impact finding, in accordance with 49 U.S.C. 303(d).[5]

(3) Based on the reevaluation of project environmental documents required by §771.129, the FHWA and the State highway agency will determine whether changes in the project or new information warrant additional public involve-ment.

(4) Approvals or acceptances of involve-ment/public hearing procedures prior to the publication date of this regulation remain valid.

(i) Applicants for capital assistance in the FTA program achieve public participation on proposed projects by holding public hearings and seeking input from the public through the scoping process for environmental review documents. For projects requiring EISs, an early opportunity for public involvement in defining the purpose and need for action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS. For other projects that substantially affect the community or its public transportation service, an adequate opportunity for public review and comment must be provided, pursuant to 49 U.S.C. 5323(b).

(j) Information on the UMTA environmen-tal process may be obtained from: Director, Office of Planning Assistance, Urban

[5] The FHWA and FTA have developed guidance on Section 4(f) *de minimis* impact findings titled "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005, which is available at *http://www.fhwa.dot.gov* or in hard copy upon request.

Mass Transportation Administration, Washington, DC 20590. Information on the FHWA environmen-tal process may be obtained from: Director, Office of Environmental Policy, Federal Highway Administration, Washington, DC 20590.

[52 FR 32660, Aug. 28, 1987; as amended at 70 FR 24469, May 9, 2005; 74 FR 12528, Mar. 24, 2009]

§ 771.113 Timing of Administration activities.

(a) The lead agencies, in cooperation with the applicant (if not a lead agency), will perform the work necessary to complete a finding of no significant impact (FONSI) or a record of decision (ROD) and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed, except as otherwise provided in law or in paragraph (d) of this section:

(1)(i) The action has been classified as a categorical exclusion (CE), or

(ii) A FONSI has been approved, or

(iii) A final EIS has been approved and available for the prescribed period of time and a record of decision has been signed;

(2) For actions proposed for FHWA funding, the Administration has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR part 450, subpart B, and 23 CFR part 630, subpart A, have been met.

(b) Completion of the requirements set forth in paragraphs (a)(1) and (2) of this section is considered acceptance of the general project location and concepts described in the environmental review documents unless otherwise specified by the approving official.

(c) Letters of Intent issued under the authority of section 3(a)(4) of the UMT Act are used by UMTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by UMTA until the NEPA process is completed.

(d) The prohibition in paragraph (a)(1) of this section is limited by the following exceptions:

(1) Exceptions for hardship and protective acquisitions of real property are addressed in paragraph (d)(12) of § 771.117.

(2) Paragraph (d)(13) of § 771.117 contains an exception for the acquisition of pre-existing railroad right-of-way for future transit use in accordance with 49 U.S.C. 5324(c).

(3) FHWA regulations at 23 CFR 710.503 establish conditions for FHWA approval of Federal-aid highway funding for hardship and protective acquisitions.

(4) FHWA regulations at 23 CFR 710.501 address early acquisition of right-of-way by a State prior to the execution of a project agreement with the FHWA or completion of NEPA. In paragraphs (b) and (c) of § 710.501, the regulation establishes conditions governing subsequent requests for Federal-aid credit or reimbursement for the acquisition. Any State-funded early acquisition for a Federal-aid highway project where there will not be Federal-aid highway credit or reimbursement for the early acquisition is subject to the limitations described in the CEQ regulations at 40 CFR 1506.1 and other applicable Federal requirements.

(5) A limited exception for rolling stock is provided in 49 U.S.C. 5309(h)(6).

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 70 FR 24469, May 9, 2005; 74 FR 12528, Mar. 24, 2009]

§ 771.115 Classes of actions.

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EISs).* Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally required an EIS:

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location.

(3) New construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit).

(4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

(b) *Class II (CEs)*. Actions that do not in-dividually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in §771.117(c). When appropriately documented, additional projects may also qualify as CEs pursuant to §771.117(d).

(c) *Class III (EAs)*. Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

[52 FR 32660, Aug. 28, 1987, as amended at 74 FR 12529, Mar. 24, 2009]

§ 771.117 Categorical exclusions.

(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any signifi-cant environmental impacts.

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the Administration, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmen-tal grounds;

(3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following actions meet the criteria for CEs in the CEQ regulation (section 1508.4) and §771.117(a) of this regulation and normally do not require any further NEPA approvals by the Administration:

(1) Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 U.S.C. 307; approval of a unified work program and any findings required in the planning process pursuant to 23 U.S.C. 134; approval of statewide programs under 23 CFR part 630; approval of project concepts under 23 CFR part 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.

(2) Approval of utility installations along or across a transportation facility.

(3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's *highway safety plan* under 23 U.S.C. 402.

(5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

(8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(9) Emergency repairs under 23 U.S.C. 125.

(10) Acquisition of scenic easements.

(11) Determination of payback under 23 CFR part 480 for property previously acquired with Federal-aid participation.

(12) Improvements to existing rest areas and truck weigh stations.

(13) Ridesharing activities.

(14) Bus and rail car rehabilitation.

(15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

(16) Program administration, technical assis-tance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

(17) The purchase of vehicles by the applicant where the use of these vehicles can be accom-modated by existing facilities or by new facilities which themselves are within a CE.

(18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.

(19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

(20) Promulgation of rules, regulations and directives.

(21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, auto-matic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic mes-sage signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval. The applicant shall submit documenta-tion which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1) Modernization of a highway by resurfac-ing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).

(2) Highway safety or traffic operations improvement projects including the installation of ramp metering control devices and lighting.

(3) Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings.

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

(6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominant- ly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of exist-ing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

(10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street

improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and mainte-nance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition quality for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

(ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

(13) Acquisition of pre-existing railroad right-of-way pursuant to 49 U.S.C. 5324(c). No project development on the acquired railroad right-of-way may proceed until the NEPA pro-cess for such project development, including the consideration of alternatives, has been completed.

(e) Where a pattern emerges of granting CE status for a particular type of action, the Administration will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 70 FR 24469, May 9, 2005; 74 FR 12529, Mar. 24, 2009]

§ 771.119 Environmental assessments.

(a) An EA shall be prepared by the applicant in consultation with the Administration for each action that is not a CE and does not clearly require the preparation of an EIS, or where the Administration believes an EA would assist in determining the need for an EIS.

(b) For actions that require an EA, the applicant, in consultation with the Administra-tion, shall, at the earliest appropriate time, begin consultation with interested agencies and others to advise them of the scope of the project and to achieve the following objectives: determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements which should be performed concurrently with the EA. The applicant shall accomplish this through an early coordination process (i.e., procedures under §771.111) or through a scoping process. Public involvement shall be summarized and the results of agency coordination shall be included in the EA.

(c) The EA is subject to Administration approval before it is made available to the public as an Administration document.

(d) The EA need not be circulated for comment but the document must be made available for public inspection at the applicant's office and at the appropriate Administration field offices in accordance with paragraphs (e) and (f) of this section. Notice of availability of the EA, briefly describing the action and its impacts, shall be sent by the applicant to the affected units of Federal, State and local government. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(e) When a public hearing is held as part of the application for Federal funds, the EA

shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The notice of the public hearing in local newspapers shall announce the availability of the EA and where it may be obtained or reviewed. Comments shall be submitted in writing to the applicant or the Administration with applicant or the Administration within 30 days of the availability of the EA unless the Administration determines, for good cause, that a different period is warranted. Public hearing requirements are as described in §771.111.

(f) When a public hearing is not held, the applicant shall place a notice in a newspaper(s) similar to a public hearing notice and at a similar stage of development of the action, advising the public of the availability of the EA and where information concerning the action may be obtained. The notice shall invite comments from all interested parties. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the publication of the notice unless the Administration determines, for good cause, that a different period is warranted.

(g) If no significant impacts are identified, the applicant shall furnish the Administration a copy of the revised EA, as appropriate; the public hearing transcript, where applicable; copies of any comments received and responses thereto; and recommend a FONSI. The EA should also document compliance, to the extent possible, with all applicable environmental laws and Executive orders, or provide reasonable assurance that their requirements can be met.

(h) When the Administration expects to issue a FONSI for an action described in §771.115(a), copies of the EA shall be made available for public review (including the affected units of government) for a minimum of 30 days before the Administration makes its final decision (See 40 CFR 1501.4(e)(2).) This public availability shall be announced by a notice similar to a public hearing notice.

(i) If, at any point in the EA process, the Administration determines that the action is likely to have a significant impact on the environment, the preparation of an EIS will be required.

(j) If the Administration decides to apply 23 U.S.C. 139 to an action involving an EA, then the EA shall be prepared in accordance with the applicable provisions of that statute.

[52 FR 32660, Aug. 28, 1987; as amended at 70 FR 24470, May 9, 2005; 74 FR 12529, Mar. 24, 2009]

§ 771.121 Findings of no significant impact.

(a) The Administration will review the EA and any public hearing comments and other comments received regarding the EA. If the Administration agrees with the applicant's recommendations pursuant to §771.119(g), it will make a separate written FONSI incorporating by reference the EA and any other appropriate environmental documents.

(b) After a FONSI has been made by the Administration, a notice of availability of the FONSI shall be sent by the applicant to the affected units of Federal, State and local government and the document shall be available from the applicant and the Administration upon request by the public. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(c) If another Federal agency has issued a FONSI on an action which includes an element proposed for Administration funding, the Administration will evaluate the other agency's FONSI. If the Administration determines that this element of the project and its environmental impacts have been adequately identified and assessed, and concurs in the decision to issue a FONSI, the Administration will issue its own FONSI incorporating the other agency's FONSI. If environmental issues have not been adequately identified and assessed, the Administration will require appropriate environmental studies.

§ 771.123 Draft environmental impact statements.

(a) A draft EIS shall be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the applicant, after consultation with any project sponsor that is not the applicant, has notified the Administration in accordance with 23 U.S.C. 139(e) and the decision has been made by the Administration to

prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the FEDERAL REGISTER. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level.

(b) After publication of the Notice of Intent, the lead agencies, in cooperation with the applicant (if not a lead agency), will begin a scoping process which may take into account any planning work already accomplished, in accordance with 23 CFR 450.212 or 450.318. The scoping process will be used to identify the purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For the FHWA, scoping is normally achieved through public and agency involvement procedures required by §771.111. For FTA, scoping is achieved by soliciting agency and public responses to the action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the lead agencies in cooperation with the applicant (if not a lead agency). The draft EIS shall evaluate all reasonable alternatives to the action and discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate at this stage in the environmental process.

(d) Any of the lead agencies may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures and with 40 CFR 1506.5(c).

(e) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet.

(f) A lead, joint lead, or a cooperating agency shall be responsible for printing the EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet requirements for copies which can reasonably be expected from agencies, organizations, and individuals. Nor-mally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The draft EIS shall be circulated for comment by the applicant on behalf of the Administration. The draft EIS shall be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS shall be transmitted to:

(1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS;

(2) Federal, State and local governmental agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action. Copies shall be provided directly to appropriate State and local agencies, and to the State intergovernmental review contacts established under Executive Order 12372; and

(3) States and Federal land management entities which may be significantly affected by the proposed action or any of the alternatives. These copies shall be accompanied by a request that such State or entity advise the Administra-tion in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

(h) The FTA requires a public hearing during the circulation period of all draft EISs. FHWA public hearing requirements are as described in §771.111(h). Whenever a public hearing is held, the draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a

public hearing on an action proposed for FHWA funding is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(i) The FEDERAL REGISTER public avail-ability notice (40 CFR 1506.10) shall establish a period of not fewer than 45 days nor more than 60 days for the return of comments on the draft EIS unless a different period is established in accordance with 23 U.S.C. 139(g)(2)(A). The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

(j) For major new fixed guideway capital projects proposed for FTA funding, FTA may give approval to begin preliminary engineering on the principal alternative(s) under consideration after circulation of a draft EIS and consideration of comments received. During the course of such preliminary engineering, the applicant will refine project costs, effectiveness, and impact information with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. These studies will be used to prepare the final EIS or, where appropriate, a supplemental draft EIS.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005; 74 FR 12529, Mar. 24, 2009]

§ 771.125 Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in paragraphs (b) and (d) of §771.109. The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

(2) Every reasonable effort shall be made to resolve interagency disagreements on actions before processing the final EIS. If significant issues remain unresolved, the final EIS shall identify those issues and the consultations and other efforts made to resolve them.

(b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

(c) The Administration will indicate approval of the EIS for an action by signing and dating the cover page. Final EISs prepared for actions in the following categories will be submitted to the Administration's Headquarters for prior concurrence:

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that (i) additional coordination with other Federal, State or local governmental agencies is needed; (ii) the social, economic, or environ-mental impacts of the action may need to be more fully explored; (iii) the impacts of the proposed action are unusually great; (iv) major issues remain unresolved; or (v) the action involves national policy issues.

(2) Any action to which a Federal, State or local government agency has indicated opposi-tion on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

(d) The signature of the UMTA approving official on the cover sheet also indicates compliance with section 14 of the UMT Act and fulfillment of the grant application requirements of sections 3(d)(1) and (2), 5(h), and 5(i) of the UMT Act.

(e) Approval of the final EIS is not an Ad-ministration Action as defined in paragraph (c) of §771.107 and does not commit the Administration to approve any future grant request to fund the preferred alternative.

(f) The initial printing of the final EIS shall be in sufficient quantity to meet the

request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concur-rence, the party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. When filed with EPA, the final EIS shall be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005; 74 FR 12530, Mar. 24, 2009]

§ 771.127 Record of decision.

(a) The Administration will complete and sign a 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.

(b) If the Administration subsequently wishes to approval an alternative which was not identified as the preferred alternative but was fully evaluated in the final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised ROD shall be subject to review by those Administration offices which reviewed the final EIS under §771.125(c). To the extent practicable, the approved revised ROD shall be provided to all persons, organizations, and agencies that received a copy of the final EIS pursuant to §771.125(g).

[52 FR 32660, Aug. 28, 1987, as amended at 73 FR 13395, Mar. 12, 2008; 74 FR 12530, Mar. 24, 2009]

§ 771.129 Re-evaluations.

(a) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within three years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.

(b) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

(c) After approval of the ROD, FONSI, or CE designation, the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 74 FR 12530, Mar. 24, 2009]

§ 771.130 Supplemental environmental impact statements.

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS shall be supplemented whenever the Administra-tion determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or

(2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

(b) However, a supplemental EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or

(2) The Administration decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a revised ROD shall be prepared and circulated in accordance with §771.127(b).

(c) Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the Administration determines that a supplemental EIS is not necessary, the Administration shall so indicate in the project file.

(d) A supplement is to be developed using the same process and format (i.e., draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required.

(e) A supplemental draft EIS may be necessary for major new fixed guideway capital projects proposed for FTA funding if there is a substantial change in the level of detail on project impacts during project planning and development. The supplement will address site-specific impacts and refined cost estimates that have been developed since the original draft EIS.

(f) In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental EIS shall not necessarily:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activi-ties; for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration shall suspend any activities which would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005; 74 FR 12530, Mar. 24, 2009]

§ 771.131 Emergency action procedures.

Requests for deviations from the procedures in this regulation because of emergency circumstances (40 CFR 1506.11) shall be referred to the Administration's headquarters for evaluation and decision after consultation with CEQ.

§ 771.133 Compliance with other require-ments.

The final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the require-ments will be met. Approval of the environ-mental document constitutes adoption of any Administration findings and determinations that

are contained therein. The Administration's approval of an environmental document constitutes its finding of compliance with the report requirements of 23 U.S.C. 128.

[52 FR 32660, Aug. 28, 1987, as amended at 74 FR 12530, Mar. 24, 2009]

§ 771.137 International actions.

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of a foreign nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions which signifi-cantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign govern-ment concerning environmental studies or documentation is anticipated, the Administration shall coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

§ 771.135 [Reserved]

§ 771.139 Limitations on Actions.

Notices announcing decisions by the Adminis-tration or by other Federal agencies on a transportation project may be published in the FEDERAL REGISTER indicating that such deci-sions are final within the meaning of 23 U.S.C. 139(l). Claims arising under Federal law seeking judicial review of any such decisions are barred unless filed within 180 days after publication of the notice. This 180-day time period does not lengthen any shorter time period for seeking judicial review that otherwise is established by the Federal law under which judicial review is allowed.[6] This provision does not create any right of judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

[74 FR 12530, Mar. 24, 2009]

[6] The FHWA published a detailed discussion of US DOT's interpretation of 23 U.S.C. 139(l), together with information applicable to FHWA projects about implementation procedures for 23 U.S.C. 139(l), in Appendix E to the "SAFETEA-LU Environmental Review Process: Final Guidance," dated November 15, 2006. The implementation procedures in Appendix E apply only to FHWA projects. The section 6002 guidance, including Appendix E, is available at *http://www.fhwa.dot.gov/*, or in hard copy by request.

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

Sec.

774.1 Purpose.
774.3 Section 4(f) approvals.
774.5 Coordination.
774.7 Documentation.
774.9 Timing.
774.11 Applicability.
774.13 Exceptions.
774.15 Constructive use determinations.
774.17 Definitions.771.130

AUTHORITY: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transpor-tation Equity Act: A Legacy for Users (Pub. L. 109-59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

SOURCE: 73 FR 13395, Mar. 12, 2008, unless
otherwise noted.

§ 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)."

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24469, May 9, 2005; 74 FR 12527, Mar. 24, 2009]

§ 774.3 Section 4(f) approvals.

The Administration may not approve the use, as defined in § 774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in § 774.17, to the use of land from the property; and

(2) The action includes all possible planning, as defined in § 774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement mea-sures) committed to by the applicant, will have a *de minimis* impact, as defined in § 774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Admin-istration may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that:

(1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:

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

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

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

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

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

(vi) After reasonable mitigation, the mag-nitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in § 774.17, to minimize harm to Section 4(f) property.

(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Program-matic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of

avoidance alternatives.[1] An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met.

(1) The determination whether a program-matic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as specified in the applicable programmatic Section 4(f) evaluation.

(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agri-culture, and Department of Housing and Urban Development, and published in the FEDERAL REGISTER for comment prior to being finalized. New or revised programmatic Section 4(f) eval-uations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

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

[73 FR 13395, Mar. 12, 2008, as amended at 73 FR 31610, June 3, 2008]

[1] FHWA has issued 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; (2) Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites; (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites; (4) Historic Bridges; Programmatic Section 4(f) Evaluation and Approval; and (5) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.

§ 774.5 Coordination.

(a) Prior to making Section 4(f) approvals under § 774.3(a), the Section 4(f) evaluation shall be provided for coordination and comment to the official(s) with jurisdiction over the Section 4(f) resource and to the Department of the Interior, and as appropriate to the Department of Agri-culture and the Department of Housing and Urban Development. The Administration shall provide a minimum of 45 days for receipt of comments. If comments are not received within 15 days after the comment deadline, the Admin-istration may assume a lack of objection and proceed with the action.

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

(1) For historic properties:

(i) The consulting parties identified in accordance with 36 CFR part 800 must be consulted; and

(ii) The Administration must receive written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of "no adverse effect" or "no historic properties affected" in accordance with 36 CFR part 800. The Administration shall inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of "no adverse effect" or "no historic properties affected."

(iii) Public notice and comment, beyond that required by 36 CFR part 800, is not required.

(2) For parks, recreation areas, and wildlife and waterfowl refuges:

(i) 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. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

(ii) The Administration shall inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding. Following an

opportunity for public review and comment as described in paragraph (b)(2)(i) of this section, the official(s) with jurisdiction over the Section 4(f) resource 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. This concurrence may be combined with other comments on the project provided by the official(s).

(c) The application of a programmatic Section 4(f) evaluation to the use of a specific Section 4(f) property under § 774.3(d)(1) shall be coordinated as specified in the applicable programmatic Section 4(f) evaluation.

(d) When Federal encumbrances on Section 4(f) property are identified, coordination with the appropriate Federal agency is required to ascer-tain the agency's position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval.

§ 774.7 Documentation.

(a) A Section 4(f) evaluation prepared under § 774.3(a) shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property.

(b) A *de minimis* impact determination under § 774.3(b) shall 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; and that the coordination required in § 774.5(b) has been completed.

(c) If there is no feasible and prudent avoidance alternative the Administration may approve only the alternative that causes the least overall harm in accordance with § 774.3(c). This analysis must be documented in the Section 4(f) evaluation.

(d) The Administration shall review all Section 4(f) approvals under §§ 774.3(a) and 774.3(c) 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 EIS under § 771.111(g) of this chapter.

(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 documentation should address 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 Section 4(f) approval may be made at this time as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This preliminary approval shall include 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 may 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 Section 4(f) approval is then incorporated into the first-tier EIS.

(2) The Section 4(f) approval will be finalized in the second-tier study. If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

(3) The final Section 4(f) approval may be made in the second-tier CE, EA, final EIS, ROD or FONSI.

(f) In accordance with §§ 771.105(a) and 771.133 of this chapter, the documentation supporting a Section 4(f) approval should be included in the EIS, EA, or for a project classified as a CE, in a separate document. 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.

§ 774.9 Timing.

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in 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) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in § 774.13, if:

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

(2) The Administration determines that Section 4(f) applies to the use of 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 the measures to minimize harm.

(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 NEPA document. If a new or supplemental NEPA document is also required under § 771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. 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 chapter.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in § 774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance 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 Federal agency is the Federal lead agency for the NEPA process, the Administration shall make any required Section 4(f) approvals unless the Federal 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 wildlife and waterfowl 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 wildlife and waterfowl 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 wildlife and waterfowl 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 Section 4(f) resource. The Admin-istration will review this determination to assure its reasonableness.

(e) In determining the applicability 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 to historic sites on or eligible for the National Register unless the Administration determines that an exception under § 774.13 applies.

(1) The Section 4(f) requirements apply only to historic sites on or eligible for the National Register unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

(2) The Interstate System is not considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate System formally identified by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.

(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) Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as, or are designated in a management plan as, a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287, must be satisfied, independent of the Section 4(f) approval.

(h) When a property formally reserved for a future transportation facility temporarily func-tions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject the property to Section 4(f).

(i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established and concurrent or joint planning or development of the trans-portation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in § 774.17. 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 devel-opment by the entity with jurisdiction or own-ership of the property for both the potential transportation facility 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 facility 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 main-tenance of transportation facilities that are on or eligible for the National Register when:

(1) The Administration concludes, as a result of the consultation under 36 CFR 800.5, 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 Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(1) of this section.

(b) Archeological sites that are on or eligible for the National Register when:

(1) The Administration concludes 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 and where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and

(2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.

(c) Designations of park and recreation lands, wildlife and waterfowl 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) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.

(d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following con-ditions 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 Section 4(f) resource regarding the above conditions.

(e) Park road or parkway projects under 23 U.S.C. 204.

(f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

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

(2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241–1251, with the exception of those trail segments that are historic sites as defined in § 774.17;

(3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and

(4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.

(g) Transportation enhancement projects and mitigation activities, where:

(1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and

(2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

§ 774.15 Constructive use determinations.

(a) 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 the 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.

(b) If the project results in a constructive use of a nearby Section 4(f) property, the Admin-istration shall evaluate that use in accordance with § 774.3(a).

(c) The Administration shall determine when there is a constructive use, but the Administration is not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property. However, such documentation may be prepared at the discretion of the Administration.

(d) When a constructive use determination is made, it will be based upon the following:

(1) Identification of the current activities, features, or attributes of the 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; and

(3) Consultation, on the foregoing iden-tification and analysis, with the official(s) with jurisdiction over the Section 4(f) property.

(e) 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:

(i) Hearing the performances at an outdoor amphitheater;

(ii) Sleeping in the sleeping area of a campground;

(iii) Enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance;

(iv) Enjoyment of an urban park where serenity and quiet are significant attributes; or

(v) 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 Section 4(f) property 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 construction or operation of the project substantially impairs the use of a Section 4(f) property, such as projected vibration levels that are great enough to physically damage a historic building or substantially diminish the utility of the building, unless the damage is repaired and fully restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, i.e., the integrity of the contributing features must be returned to a condition which is substantially similar to that which existed prior to the project; or

(5) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife and waterfowl refuge adjacent to the project, substantially interferes with the access to a wildlife and 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 and waterfowl refuge.

(f) The Administration has reviewed the following situations and determined that a constructive use does not occur when:

(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 chapter, 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 (f)(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 or adoption of project location, or the Administration's approval of a final environmental document, established the location for the proposed transportation project before the designation, establishment, or change in the significance of the property. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section; or

(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, as determined after consultation with the official(s) with jurisdiction;

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

(8) Vibration levels from project con-struction 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.

§ 774.17 Definitions.

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

Administration. The FHWA or FTA, which-ever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

All possible planning. All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replace-ment 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.

(2) 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 Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under § 774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

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

(ii) 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 chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under § 774.3(b).

(5) A *de minimis* impact determination under § 774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

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.

CE. Refers to a Categorical Exclusion, which denotes an action with no individual or cumu-lative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

De minimis impact. (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have "no adverse effect" on the historic property in question.

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

EA. Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500–1508 and § 771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

EIS. Refers to an Environmental Impact Statement, which is a document prepared pur-suant to NEPA, 40 CFR parts 1500–1508, and §§ 771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

Feasible and prudent avoidance alternative.

(1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a mag-nitude that substantially outweighs the impor-tance 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 presser-vation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

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

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environ-mental impacts;

(B) Severe disruption to established com-munities;

(C) Severe disproportionate impacts to mi-nority or low income populations; or

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

(iv) It results in additional construction, maintenance, or operational costs of an extraor-dinary magnitude;

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

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

FONSI. Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and § 771.121 of this chapter.

Historic site. For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Official(s) with jurisdiction. (1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land, the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such

Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl 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.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

ROD. Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and § 771.127 of this chapter.

Section 4(f) evaluation. Refers to the documentation prepared to support the granting of a Section 4(f) approval under § 774.3(a), unless preceded by the word "programmatic." A "programmatic Section 4(f) evaluation" is the documentation prepared pursuant to § 774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

Section 4(f) Property. Section 4(f) property means 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.

Use. Except as set forth in §§ 774.11 and 774.13, 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 preservation purpose as determined by the criteria in § 774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

U.S. DEPARTMENT OF TRANSPORTATION Federal Highway Administration	
SUBJECT GUIDANCE FOR PREPARING AND PROCESSING ENVIRONMENTAL AND SECTION 4(F) DOCUMENT	FHWA TECHNICAL ADVISORY T 6640.8A October 30, 1987

1. **PURPOSE**. To provide guidance to Federal Highway Administration (FHWA) field offices and to project applicants on the preparation and processing of environmental and Section 4(f) documents**.**

2. **CANCELLATION**. Technical Advisory T 6640.8, "Guidance Material for the Preparation of Environmental Documents," dated February 24, 1982, is canceled effective on November 27, 1987.

3. **APPLICABILITY**.

a. This material is not regulatory. It has been developed to provide guidance for uniformity and consistency in the format, content and processing of the various environmental studies and documents pursuant to the National Environmental Policy Act (NEPA), 23 U.S.C. 109(h) and 23 U.S.C. 138 (Section 4(f) of the DOT Act) and the reporting requirements of 23 U.S.C. 128.

b. The guidance is limited to the format, content and processing of NEPA and Section 4(f) studies and documents. It should be used in combination with a knowledge and understanding of the Council on Environmental Quality (CEQ) Regulations for Implementing NEPA (40 CFR 1500-1508), FHWA's Environmental Impact and Related Procedures (23 CFR 771) and other environmental statutes and orders (see Appendix A).

c. This guidance should not be used until November 27, 1987, the effective date of the 1987 revisions to 23 CFR 771.

Ali F. Sevin
Director, Office of Environmental
Policy

Attachment

Distribution: Headquarters OPI: HEV-11
Special: Regions
Divisions

GUIDANCE FOR PREPARING AND PROCESSING ENVIRONMENTAL AND SECTION 4(F) DOCUMENTS

Background

An earlier edition of this advisory (dated February 24, 1982) placed major emphasis on environmental impact statements (EISs) and provided limited guidance on environmental assessments (EAs) and other environmental studies needed for a categorical exclusion (CE) determination or a finding of no significant impact (FONSI). The revised guidance gives expanded coverage to CE determinations, EAs, FONSIs, EISs, supplemental EISs, reevaluations, and Section 4(f) evaluations. This material is not regulatory. It does, however, provide for uniformity and consistency in the documentation of CEs and the development of environmental and Section 4(f) documents.

The FHWA subscribes to the philosophy that the goal of the NEPA process is better decisions and not more documentation. Environmental documents should be concise, clear, and to the point and should be supported by evidence that the necessary analyses have been made. They should focus on the important impacts and issues with the less important areas only briefly discussed. The length of EAs should normally be less than 15 pages and EISs should normally be less than 150 pages for most proposed actions and not more than 300 pages for the most complex proposals. The use of technical reports for various subject areas would help reduce the size of the documents.

The FHWA considers the early coordination process to be a valuable tool in determining the scope of issues to be addressed and in identifying and focusing on the proposed action's important issues. This process normally entails the exchange of information with appropriate Federal, State and local agencies and the public from inception of the proposed action to preparation of the environmental document or to completion of environmental studies for applicable CEs. Formal scoping meetings may also be held where such meetings would assist in the preparation of the environmental document. The role of other agencies and other environmental review and consultation requirements should be established during scoping. The Council on Environmental Quality (CEQ) has issued several guidance publications on NEPA and its regulations as follows: (1) "Questions and Answers about the NEPA Regulations," March 30, 1981; (2) "Scoping Guidance," April 30, 1981; and (3) "Guidance Regarding NEPA Regulations," July 28, 1983. This nonregulatory guidance is used by FHWA in preparing and processing environmental documents. Copies of the CEQ guidance are available in the FHWA Office of Environmental Policy (HEV-11).

Note, highway agency (HA) is used throughout this document to refer to a State and local highway agency responsible for conducting environmental studies and preparing environmental documents and to FHWAs Office of Direct Federal Programs when that office acts in a similar capacity.

SECTION	SUBJECT	PAGE
I	Categorical Exclusion (CE)	5
II	Environmental Assessment (EA)	7
III	Finding of No Significant Impact (FONSI)	9
IV	Distribution of EAs and FONSIs	11
V	EIS -- Format and Content	12
	Cover Sheet	12
	Summary	13
	Table of Contents	14
	Purpose of and Need for Action	14
	Alternatives	15
	Affected Environment	17
	Environmental Consequences	18
	Land Use Impacts	19
	Farmland Impacts	20
	Social Impacts	20
	Relocation Impacts	21
	Economic Impacts	22
	Joint Development	23
	Considerations Relating to Pedestrians and Bicyclists	23
	Air Quality Impacts	23
	Noise Impacts	25
	Water Quality Impacts	25
	Permits	26
	Wetland Impacts	27
	Water Body Modification and Wildlife Impacts	28
	Floodplain Impacts	28
	Wild and Scenic Rivers	30
	Coastal Barriers	30
	Coastal Zone Impacts	30
	Threatened or Endangered Species	31
	Historic and Archeological Preservation	32
	Hazardous Waste Sites	33
	Visual Impacts	34
	Energy	34
	Construction Impacts	34
	Relationship of Local Short-term Uses vs. Long-term Productivity	35
	Irreversible and Irretrievable Commitment of Resources	35
	List of Preparers	36

List of Agencies, Organizations and Persons to Whom Copies of the Statement are Sent 36
Comments and Coordination 36
Index 37
Appendices 37

VI Options for Preparing Final EISs 37

VII Distribution of EISs and Section 4(f) Evaluations 39

VIII Record of Decision — Format and Content 41

IX Section 4(f) Evaluations — Format and Content 42

X Other Agency Statements 45

XI Reevaluations 46

XII Supplemental EISs 47

XIII Appendices 48
Appendix A: Environmental Laws, Authority and Related Statutes and Orders
Appendix B: Notice of Intent

I. CATEGORICAL EXCLUSION (CE)

Categorical exclusions are actions or activities which meet the definition in 23 CFR 771.117(a) and, based on FHWA's past experience, do not have significant environmental effects. The CEs are divided into two groups based on the action's potential for impacts. The level of documentation necessary for a particular CE depends on the group the action falls under as explained below.

A. Documentation of Applicability

The first group is a list of 20 categories of actions in 23 CFR 771.117(c) which experience has shown never or almost never cause significant environmental impacts. These categories are non-construction actions (e.g., planning, grants for training and research programs) or limited construction activities (e.g., pedestrian facilities, landscaping, fencing). These actions are automatically classified as CEs, and except where unusual circumstances are brought to FHWA's attention, do not require approval or documentation by FHWA. However, other environmental laws may still apply. For example, installation of traffic signals in a historic district may require compliance with Section 106, or a proposed noise barrier which would use land protected by Section 4(f) would require preparation of a Section 4(f) evaluation (23 CFR 771.135(i)). In most cases, information is available from planning and programming documents for the FHWA Division Office to determine the applicability of other environmental laws. However, any necessary documentation should be discussed and developed cooperatively by the highway agency (HA) and the FHWA.

The second group consists of actions with a higher potential for impacts than the first group, but due to minor environmental impacts still meets the criteria for categorical exclusions. In 23 CFR 771.117(d), the regulation lists examples of 12 actions which past experience has found appropriate for CE classification. However, the second group is not limited to these 12 examples. Other actions with a similar scope of work may qualify as CEs. For actions in this group, site location is often a key factor. Some of these actions on certain sites may involve unusual circumstances or result in significant adverse environmental impacts. Because of the potential for impacts, these actions require some information to be provided by the HA so that the FHWA can determine if the CE classification is proper (23 CFR 771.117(d)). The level of information to be provided should be commensurate with the action's potential for adverse environmental impacts. Where adverse environmental impacts are likely to occur, the level of analysis should be sufficient to define the extent of impacts, identify appropriate mitigation measures, and address known and foreseeable public and agency concerns. As a minimum, the information should include a description of the proposed action and, as appropriate, its immediate surrounding area, a discussion of any specific areas of environmental concern (e.g., Section 4(f), wetlands, relocations), and a list of other Federal actions required, if any, for the proposal.

The documentation of the decision to advance an action in the second group as a CE can be accomplished by one of the following methods:

(1) Minor actions from the list of examples:

Minor construction projects or approval actions need only minimum documentation. Where project-specific information for such minor construction projects is included with the Section 105 program and clearly shows that the project is one of the 12 listed examples in Section 771.117(d), the approval of the Section 105 program can be used to approve the projects as CEs. Similarly, the three approval actions on the list (examples (6), (7) and (12)) should not normally require detailed documentation, and the CE determination can be documented as a part of the approval action being requested.

(2) Other actions from the list of examples:

For more complex actions, additional information and possibly environmental studies will be needed. This information should be furnished to the FHWA on a case-by-case basis for concurrence in the CE determination.

(3) Actions not on the list of examples:

Any action which meets the CE criteria in 23 CFR 771.117(a) may be classified as a CE even though it does not appear on the list of examples in Section 771.117(d). The actions on the list should be used as a guide to identify other actions that may be processed as CEs. The documentation to be submitted to the FHWA must demonstrate that the CE criteria are satisfied and that the proposed project will not result in significant environmental impacts. The classification decision should be documented as a part of the individual project submissions.

B. <u>Consideration of Unusual Circumstances</u>

Section 771.117(b) lists those unusual circumstances where further environmental studies will be necessary to determine the appropriateness of a CE classification. Unusual circumstances can arise on any project normally advanced with a CE; however, the type and depth of additional studies will vary with the type of CE and the facts and circumstances of each situation. For those actions on the fixed list (first group) of CEs, unusual circumstances should rarely, if ever, occur due to the limited scope of work. Unless unusual circumstances come to the attention of the HA or FHWA, they need not be given further consideration. For actions in the second group of CEs, unusual circumstances should be addressed in the information provided to the FHWA with the request for CE approval. The level of consideration, analysis, and documentation should be commensurate with the action's potential for significant impacts, controversy, or inconsistency with other agencies' environmental requirements.

When an action may involve unusual circumstances, sufficient early coordination, public involvement and environmental studies should be undertaken to determine the likelihood of significant impacts. If no significant impacts are likely to occur, the result of environmental studies and any agency and public involvement should adequately support such a conclusion and be included in the request to the FHWA for CE approval. If significant impacts are likely to occur, an EIS must be prepared (23 CFR 771.123(a)). If the likelihood of significant impacts is uncertain

even after studies have been undertaken, the HA should consult with the FHWA to determine whether to prepare an EA or an EIS.

II. ENVIRONMENTAL ASSESSMENT (EA)

The primary purpose of an EA is to help the FHWA and HA decide whether or not an EIS is needed. Therefore, the EA should address only those resources or features which the FHWA and the HA decide will have a likelihood for being significantly impacted. The EA should be a concise document and should not contain long descriptions or detailed information which may have been gathered or analyses which may have been conducted for the proposed action. Although the regulations do not set page limits, CEQ recommends that the length of EAs usually be less than 15 pages. To minimize volume, the EA should use good quality maps and exhibits and incorporate by reference and summarize background data and technical analyses to support the concise discussions of the alternatives and their impacts.

The following format and content is suggested:

A. Cover Sheet

There is no required format for the EA. However, the EIS cover sheet format, as shown in Section V, is recommended as a guide. A document number is not necessary. The due date for comments should be omitted unless the EA is distributed for comments.

B. Purpose of and Need for Action

Describe the locations, length, termini, proposed improvements, etc. Identify and describe the transportation or other needs which the proposed action is intended to satisfy (e.g., provide system continuity, alleviate traffic congestion, and correct safety or roadway deficiencies). In many cases the project need can be adequately explained in one or two paragraphs. On projects where a law, Executive Order or regulation (e.g., Section 4(f), Executive Order 11990 or Executive Order 11988) mandates an evaluation of avoidance alternatives, the explanation of the project need should be more specific so that avoidance alternatives that do not meet the stated project need can be readily dismissed.

C. Alternatives

Discuss alternatives to the proposed action, including the no-action alternative, which are being considered. The EA may either discuss (1) the preferred alternative and identify any other alternatives considered or (2) if the applicant has not identified a preferred alternative, the alternatives under consideration. The EA does not need to evaluate in detail all reasonable alternatives for the project, and may be prepared for one or more build alternatives.

D. Impacts

For each alternative being considered, discuss any social, economic, and environmental impacts whose significance is uncertain. The level of analysis should be sufficient to adequately identify the impacts and appropriate mitigation measures, and address known and foreseeable public and agency concerns. Describe why these impacts are considered not significant. Identified impact areas which do not have a reasonable possibility for individual or cumulative significant environmental impacts need not be discussed.

E. Comments and Coordination

Describe the early and continuing coordination efforts, summarize the key issues and pertinent information received from the public and government agencies through these efforts, and list the agencies and, as appropriate, members of the public consulted.

F. Appendices (if any).

The appendices should include only analytical information that substantiates an analysis which is important to the document (e.g., a biological assessment for threatened or endangered species). Other information should be referenced only (i.e., identify the material and briefly describe its contents).

G. Section 4(f) Evaluation (if any).

If the EA includes a Section 4(f) evaluation, the EA/Section 4(f) evaluation or, if prepared separately, the Section 4(f) evaluation by itself must be circulated to the appropriate agencies for Section 4(f) coordination (23 CFR 771.135(i). Section VII provides specific details on distribution and coordination of Section 4(f) evaluations. Section IX provides information on format and content of Section 4(f) evaluation.

If a programmatic Section 4(f) evaluation is used on the proposed project, this fact should be included and the Section 4(f) resource identified in the EA. The avoidance alternatives evaluation called for in Section 771.135(i) need not be repeated in the EA. Such evaluation would be part of the documentation to support the applicability and findings of the programmatic document.

H. EA Revisions.

Following the public availability period, the EA should be revised or an attachment provided, as appropriate, to (1) reflect changes in the proposed action or mitigation measures resulting from comments received on the EA or at the public hearing (if one is held) and any impacts of the changes, (2) include any necessary findings, agreements, or determination (e.g., wetlands, Section 106, Section 4(f) required for the proposal, and (3) include a copy of pertinent comments received on the EA and appropriate responses to the comments.

III. FINDING OF NO SIGNIFICANT IMPACTS (FONSI)

The EA, revised or with attachment(s) (see paragraph above) is submitted by the HA to the FHWA along with (1) a copy of the public hearing transcript, when one is held, (2) a recommendation of the preferred alternative, and (3) a request that a finding of no significant impact be made. The basis for the HA's finding of no significant impact request should be adequately documented in the EA and any attachment(s).

After review of the EA and any other appropriate information, the FHWA may determine that the proposed action has no significant impacts. This is documented by attaching to the EA a separate statement (sample follows) which clearly sets forth the FHWA conclusions. If necessary, the FHWA may expand the sample FONSI to identify the basis for the decision, uses of land from Section 4(f) properties, wetland findings, etc.

The EA or FONSI should document compliance with NEPA and other applicable environmental laws, Executive Orders, and related requirements. If full compliance with these other requirements is not possible by the time the FONSI is prepared, the documents should reflect consultation with the appropriate agencies and describe when and how the requirements will be met. For example, any action requiring the use of Section 4(f) property cannot proceed until FHWA gives a Section 4(f) approval (49 U.S.C. 303(c)).

(SAMPLE)

FEDERAL HIGHWAY ADMINISTRATION
FINDING OF NO SIGNIFICANT IMPACT
FOR
(Title of Proposed Action)

The FHWA has determined that alternative (identify the alternative selected) will have no significant impact on the human environment. This FONSI is based on the attached EA (reference other environmental and non-environmental documents as appropriate) which has been independently evaluated by the FHWA and determined to adequately and accurately discuss the need, environmental issues, and impacts of the proposed project and appropriate mitigation measures. It provides sufficient evidence and analysis for determining that an EIS is not required. The FHWA takes full responsibility for the accuracy, scope, and content of the attached EA (and other documents as appropriate).

Date For FHWA

IV. DISTRIBUTION OF EAs AND FONSIs

A. Environmental Assessment

After clearance by FHWA, EAs must be made available for public inspection at the HA and FHWA Division offices (23 CFR 771.119(d)). Although only a notice of availability of the EA is required, the HA is encouraged to distribute a copy of the document with the notice to Federal, State and local government agencies likely to have an interest in the undertaking and to the State intergovernmental review contacts. The HA should also distribute the EA to any Federal, State or local agency known to have interest or special expertise (e.g. EPA for wetlands, water quality, air, noise, etc.) in those areas addressed in the EA which have or may have had potential for significant impact. The possible impacts and the agencies involved should be identified following the early coordination process. Where an individual permit would be required from the Corps of Engineers (COE) (i.e., Section 404 or Section 10) or from the Coast Guard (CG) (i.e., Section 9), a copy of the EA should be distributed to the involved agency in accordance with the U.S. Department of Transportation (DOT)/Corps of Engineers Memorandum of Agreement or the FHWA/U.S. Coast Guard Memorandum of Understanding, respectively. Any internal FHWA distribution will be determined by the Division Office on a case-by-case basis.

B. Finding of No Significant Impact

Formal distribution of a FONSI is not required. The HA must send a notice of availability of the FONSI to Federal, State and local government agencies likely to have an interest in the undertaking and the State intergovernmental review contacts (23 CFR 771.121(b)). However, it is encouraged that agencies which commented on the EA (or requested to be informed) be advised of the project decision and the disposition of their comments and be provided a copy of the FONSI. This fosters good lines of communication and enhances interagency coordination.

V. Environmental Impact Statement (EIS) — FORMAT AND CONTENT

A. Cover Sheet

Each EIS should have a cover sheet containing the following information:

(EIS NUMBER)

Route, Termini, City or County, and State

Draft (Final) (Supplement)

Environmental Impact Statement

Submitted Pursuant to 42 U.S.C. 4332 (2) (c)

(and where applicable, 49 U.S.C. 303) by the

U.S. Department of Transportation

Federal Highway Administration

and

State Highway Agency

and

(As applicable, any other joint lead agency)

Cooperating Agencies
(Include List Here, as applicable)

Date of Approval	For (State Highway Agency)
Date of Approval	For FHWA

The following persons may be contacted for additional information concerning this document:

(Name, address, and telephone number of FHWA Division Office contact)	(Name, address, and telephone number of HA contact)

A one-paragraph abstract of the statement. Comments on this draft EIS are due by (date) and should be sent to (name and address).

The top left-hand corner of the cover sheet of all draft final and supplemental EISs contains an identification number. The following is an example:

FHWA-AZ-EIS-87-01-D(F)(S)

FHWA - name of Federal agency

AZ - name of State (cannot exceed four characters)

EIS - environmental impact statement

87 - year draft statement was prepared

01 - sequential number of draft statement for each calendar year

D - designates the statement as the draft statement

F - designates the statement as the final statement

S - designates supplemental statement and should be combined with draft (DS) or final (FS) statement designation. The year and sequential number will be the same as those used for the original draft EIS.

The EIS should be printed on 8-1/2 x 11-inch paper with any foldout sheets folded to that size. The wider sheets should be 8-1/2 inches high and should open to the right with the title or identification on the right. The standard size is needed for administrative recordkeeping.

B. <u>Summary</u>

The summary should include:

(1) A brief description of the proposed FHWA action indicating route, termini, type of improvement, number of lanes, length, county, city, State, and other information, as appropriate.

(2) A description of any major actions proposed by other governmental agencies in the same geographic area as the proposed FHWA action.

(3) A summary of all reasonable alternatives considered. (The draft EIS must identify the preferred alternative or alternatives officially identified by the HA (40 CFR 1502.14(e)). The final

EIS must identify the preferred alternative and should discuss the basis for its selection (23 CFR 771.125(a)(1)).

(4) A summary of major environmental impacts, both beneficial and adverse.

(5) Any areas of controversy (including issues raised by agencies and the public).

(6) Any major unresolved issues with other agencies.

(7) A list of other Federal actions required for the proposed action (i.e., permit approvals, land transfer, Section 106 agreements, etc.).

C. Table of Contents

For consistency with CEQ regulations, the following standard format should be used:

(1) Cover Sheet

(2) Summary

(3) Table of Contents

(4) Purpose of and Need for Action

(5) Alternatives

(6) Affected Environment

(7) Environmental Consequences

(8) List of Preparers

(9) List of Agencies, Organizations, and Persons to Whom Copies of the Statement are Sent

(10) Comments and Coordination

(11) Index

(12) Appendices (if any)

D. Purpose of and Need for Action

Identify and describe the proposed action and the transportation problem(s) or other needs which it is intended to address (40 CFR 1502.13). This section should clearly demonstrate that a “need” exists and should define the “need” in terms understandable to the general public. This discussion should clearly describe the problems which the proposed action is to correct. It will

form the basis for the "no action" discussion in the "Alternatives" section, and assist with the identification of reasonable alternatives and the selection of the preferred alternative. Charts, tables, maps and other illustrations (e.g., typical cross-section, photographs, etc.) are encouraged as useful presentation techniques.
The following is a list of items which may assist in the explanation of the need for the proposed action. It is by no means all-inclusive or applicable in every situation and is intended only as a guide:

(1) Project Status — Briefly describe the project history including actions taken to date, other agencies and governmental units involved, actions pending, schedules, etc.

(2) System Linkage — Is the proposed project a "connecting link?" How does it fit in the transportation system?

(3) Capacity — Is the capacity of the present facility inadequate for the present traffic? Projected traffic? What capacity is needed? What is the level(s) of service for existing and proposed facilities?

(4) Transportation Demand — Including relationship to any statewide plan or adopted urban transportation plan together with an explanation of the project's traffic forecasts that are substantially different from those estimates from the 23 U.S.C. 134 (Section 134) planning process.

(5) Legislation — Is there a Federal, State, or local governmental mandate for the action.

(6) Social Demands or Economic Development — New employment, schools, land use plans, recreation, etc. What projected economic development/land use changes indicate the need to improve or add to the highway capacity?

(7) Modal Interrelationships — How will the proposed facility interface with and serve to complement airports, rail and port facilities, mass transit services, etc.?

(8) Safety — Is the proposed project necessary to correct an existing or potential safety hazard? Is the existing accident rate excessively high? Why? How will the proposed project improve it.

(9) Roadway Deficiencies — Is the proposed project necessary to correct existing roadway deficiencies (e.g., substantial geometrics, load limits on structures, inadequate cross-section, or high maintenance costs)? How will the proposed project improve it?

E. <u>Alternatives</u>

This section of the draft EIS must discuss a range of alternatives, including all "reasonable alternatives" under consideration and those "other alternatives" which were eliminated from detailed study (23 CFR 771.123(c)). The section should begin with a concise discussion of how

and why the “reasonable alternatives” were selected for detailed study and explain why “other alternatives” were eliminated. The following range of alternatives should be considered when determining reasonable alternatives:

(1) “No-action” alternative: The “no-action” alternative normally includes short-term minor restoration types of activities (safety and maintenance improvements, etc.) that maintain continuing operation of the existing roadway.

(2) Transportation System Management (TSM) alternative: The TSM alternative includes those activities which maximize the efficiency of the present system. Possible subject areas to include in this alternative are options such as fringe parking, ride-sharing, high-occupancy vehicle (HOV) lanes on existing roadways, and traffic signal timing optimization. This limited construction alternative is usually relevant only for major projects proposed in urbanized areas over 200,000 population.

For all major projects in these urbanized areas, HOV lanes should be considered. Consideration of this alternative may be accomplished by reference to the regional transportation plan, when that plan considers this option. Where a regional transportation plan does not reflect consideration of this option, it may be necessary to evaluate the feasibility of HOV lanes during early project development. Where a TSM alternative is identified as a reasonable alternative for a “connecting link” project, it should be evaluated to determine the effect that not building a highway link in the transportation plan will have on the remainder of the system. A similar analysis should be made where a TSM element(s) (e.g., HOV lanes) is part of a build alternative and reduces the scale of the highway link.

While the above discussion relates primarily to major projects in urbanized areas, the concept of achieving maximum utilization of existing facilities is equally important in rural areas. Before selecting an alternative on new location for major projects in rural areas, it is important to demonstrate that reconstruction and rehabilitation of the existing system will not adequately correct the identified deficiencies and meet the project need.

(3) Mass Transit: This alternative includes those reasonable and feasible transit options (bus systems, rail, etc.) even though they may not be within the existing FHWA funding authority. It should be considered on all proposed major highway projects in urbanized areas over 200,000 population. Consideration of this alternative may be accomplished by reference to the regional or area transportation plan where that plan considers mass transit or by an independent analysis during early project development.

Where urban projects are multi-modal and are proposed for Federal funding, close coordination is necessary with the Urban Mass Transportation Administration (UMTA). In these situations, UMTA should be consulted early in the project-development process. Where UMTA funds are likely to be requested for portions of the proposal, UMTA must be requested to be either a joint lead agency or a cooperating agency at the earliest stages of project development (23 CFR 771.111(d)). Where applicable, cost-effectiveness studies that have been performed should be summarized in the EIS.

(4) Build alternatives: Both improvement of existing highway(s) and alternatives on new location should be evaluated. A representative number of reasonable alternatives must be presented and evaluated in detail in the draft EIS (40 CFR 1502.14(a)). For most major projects, there is a potential for a large number of reasonable alternatives. Where there is a large number of alternatives, only a representative number of the most reasonable examples, covering the full range of alternatives, must be presented. The determination of the number of reasonable alternatives in the draft EIS, therefore, depends on the particular project and the facts and circumstances in each case.

Each alternative should be briefly described using maps or other visual aids such as photographs, drawings, or sketches to help explain the various alternatives. The material should provide a clear understanding of each alternative's termini, location, costs, and the project concept (number of lanes, right-of-way requirements, median width, access control, etc.). Where land has been or will be reserved or dedicated by local government(s), donated by individuals, or acquired through advanced or hardship acquisition for use as highway right-of-way for any alternative under consideration, the draft EIS should identify the status and extent of such property and the alternatives involved. Where such lands are reserved, the EIS should state that the reserved lands will not influence the alternative to be selected.

Development of more detailed design for some aspects (e.g., Section 4(f), COE or CG permits, noise, wetlands, etc.) of one or more alternatives may be necessary during preparation of the draft and final EIS in order to evaluate impacts or mitigation measures or to address issues raised by other agencies or the public. However, care should be taken to avoid unnecessarily specifying features which preclude cost-effective final design options.

All reasonable alternatives under consideration (including the no-build) need to be developed to a comparable level of detail in the draft EIS so that their comparative merits may be evaluated (40 CFR 1502.14(b) and (d)). In those situations where the HA has officially identified a "preferred" alternative based on its early coordination and environmental studies, the HA should so indicate in the draft EIS. In these instances, the draft EIS should include a statement indicating that the final selection of an alternative will not be made until the alternatives' impacts and comments on the draft EIS and from the public hearing (if held) have been fully evaluated. Where a preferred alternative has not been identified, the draft EIS should state that all reasonable alternatives are under consideration and that decision will be made after the alternatives' impacts and comments on the draft EIS and from the public hearing (if held) have been fully evaluated.

The final EIS must identify the preferred alternative and should discuss the basis for its selection (23 CFR 771.125(a)(1)). The discussion should provide the information and rationale identified in Section VIII (Record of Decision), paragraph (B). If the preferred alternative is modified after the draft EIS, the final EIS should clearly identify the changes and discuss the reasons why any new impacts are not significant.

F. <u>Affected Environment</u>

This section provides a concise description of the existing social, economic, and environmental setting for the area affected by all alternatives presented in the EIS. Where possible, the

description should be a single description for the general project area rather than a separate one for each alternative. The general population served and/or affected (city, county, etc.) by the proposed action should be identified by race, color, national origin, and age. Demographic data should be obtained from available secondary sources (e.g., census data, planning reports) unless more detailed information is necessary to address specific concerns. All socially, economically, and environmentally sensitive locations or features in the proposed project impact area (e.g., neighborhoods, elderly/minority/ethnic groups, parks, hazardous material sites, historic resources, wetlands, etc.) should be identified on exhibits and briefly described in the text. However, it may be desirable to exclude from environmental documents the specific location of archeological sites to prevent vandalism.

To reduce paperwork and eliminate extraneous background material, the discussion should be limited to data, information, issues, and values which will have a bearing on possible impacts, mitigation measures, and on the selection of an alternative. Data and analyses should be commensurate with the importance of the impact, with the less important material summarized or referenced rather than be reproduced. Photographs, illustrations, and other graphics should be used with the text to give a clear understanding of the area and the important issues. Other Federal activities which contribute to the significance of the proposed action's impacts should be described.

This section should also briefly describe the scope and status of the planning processes for the local jurisdictions and the project area. Maps of any adopted land use and transportation plans for these jurisdictions and the project area would be helpful in relating the proposed project to the planning processes.

G. Environmental Consequences

This section includes the probable beneficial and adverse social, economic and environmental effects of alternatives under consideration and describes the measures proposed to mitigate adverse impacts. The information should have sufficient scientific and analytical substance to provide a basis for evaluating the comparative merits of the alternatives. The discussion of the proposed project impacts should not use the term significant in describing the level of impacts. There is no benefit to be gained from its use. If the term significant is used, however, it should be consistent with the CEQ definition and be supported by factual information.

There are two principal ways of preparing this section. One is to discuss the impacts and mitigation measures separately for each alternative with the alternatives as headings. The second (which is advantageous where there are few alternatives or where impacts are similar for the various alternatives) is to present this section with the impacts as the headings. Where appropriate, a sub-section should be included which discusses the general impacts and mitigation measures that are the same for the various alternatives under consideration. This would reduce or eliminate repetition under each of the alternative discussions. Charts, tables, maps, and other graphics illustrating comparisons between the alternatives (e.g., costs, residential displacements, noise impacts, etc.) are useful as a presentation technique.

When preparing the final EIS, the impacts and mitigation measures of the alternatives, particularly the preferred alternative, may need to be discussed in more detail to elaborate on information, firm-up commitments or address issues raised following the draft EIS. The final EIS should also identify any new impacts (and their significance) resulting from modification of or identification of substantive new circumstances or information regarding the preferred alternative following the draft EIS circulation. Note: Where new significant impacts are identified, a supplemental draft EIS is required (40 CFR 1502.9(c)).

The following information should be included in both the draft and final EIS for each reasonable alternative:

(1) A summary of studies undertaken, any major assumptions made and supporting information on the validity of the methodology (where the methodology is not generally accepted as state-of-the-art).

(2) Sufficient supporting information or results of analyses to establish the reasonableness of the conclusions on impacts.

(3) A discussion of mitigation measures. These measures normally should be investigated in appropriate detail for each reasonable alternative so they can be identified in the draft EIS. The final EIS should identify, describe and analyze all proposed mitigation measures for the preferred alternative.

In addition to normal FHWA program monitoring of design and construction activities, special instances may arise when a formal program for monitoring impacts or implementation of mitigation measures will be appropriate. For example, monitoring ground or surface waters that are sources for drinking water supply; monitoring noise or vibration of nearby sensitive activities (e.g., hospitals, schools); or providing an on-site professional archeologist to monitor excavation activities in highly sensitive archeological areas. In these instances, the final EIS should describe the monitoring program.

(4) A discussion, evaluation and resolution of important issues on each alternative. If important issues raised by other agencies on the preferred alternative remain unresolved, the final EIS must identify those issues and the consultations and other efforts made to resolve them (23 CFR 771.125(a)(2)).

Listed below are potentially significant impacts most commonly encountered by highway projects. These factors should be discussed for each reasonable alternative where a potential for impact exists. This list is not all-inclusive and, on specific projects, there may be other impact areas that should be included.

1. Land Use Impacts

This discussion should identify the current development trends and the State and/or local government plans and policies on land use and growth in the area which will be impacted by the proposed project.
These plans and policies are normally reflected in the area's comprehensive development plan, and include land use, transportation, public facilities, housing, community services, and other areas.

The land use discussion should assess the consistency of the alternatives with the comprehensive development plans adopted for the area and (if applicable) other plans used in the development of the transportation plan required by Section 134. The secondary social, economic, and environmental impacts of any substantial, foreseeable, induced development should be presented for each alternative, including adverse effects on existing communities. Where possible, the distribution between planned and unplanned growth should be identified.

2. Farmland Impacts

Farmland includes 1) prime, 2) unique, 3) other than prime or unique that is of statewide importance, and 4) other than prime or unique that is of local importance.

The draft EIS should summarize the results of early consultation with the Soil Conservation Service (SCS) and, as appropriate, State and local agriculture agencies where any of the four specified types of farmland could be directly or indirectly impacted by any alternative under consideration. Where farmland would be impacted, the draft EIS should contain a map showing the location of all farmlands in the project impact area, discuss the impacts of the various alternatives and identify measures to avoid or reduce the impacts. Form AD 1006 (Farmland Conversion Impact Rating) should be processed, as appropriate, and a copy included in the draft EIS. Where the Land Evaluation and Site Assessment score (from Form AD 1006) is 160 points or greater, the draft EIS should discuss alternatives to avoid farmland impacts.

If avoidance is not possible, measures to minimize or reduce the impacts should be evaluated and, where appropriate, included in the proposed action.

3. Social Impacts

Where there are foreseeable impacts, the draft EIS should discuss the following items for each alternative commensurate with the level of impacts and to the extend they are distinguishable:

(a) Changes in the neighborhoods or community cohesion for the various social groups as a result of the proposed action. These changes may be beneficial or adverse and may include splitting neighborhoods, isolating a portion of a neighborhood or an ethnic group, generating new development, changing property values, separating residents from community facilities, etc.

(b) Changes in travel patterns and accessibility (e.g., vehicular, commuter, bicycle, or pedestrian).

(c) Impacts on school districts, recreation areas, churches, businesses, police and fire protection, etc. This should include both the direct impacts to these entities and the indirect impacts resulting from the displacement of households and businesses.
(d) Impacts of alternatives on highway and traffic safety as well as on overall public safety.
(e) General social groups specially benefited or harmed by the proposed project. The effects of a project on the elderly, handicapped, nondrivers, transit-dependent and minority and ethnic groups are of particular concern and should be described to the extent these effects can be reasonably predicted. Where impacts on a minority or ethnic population are likely to be an important issue, the EIS should contain the following information broken down by race, color, and national origin: the population of the study area, the number of displaced residents, the type and number of displaced businesses, and an estimate of the number of displaced employees in each business sector. Changes in ethnic or minority employment opportunities should be discussed and the relationship of the project to other Federal actions which may serve or adversely affect the ethnic or minority population should be identified.

The discussion should address whether any social group is disproportionally impacted and identify possible mitigation measures to avoid or minimize any adverse impacts. Secondary sources of information such as census and personal contact with community leaders supplemented by visual inspections normally should be used to obtain the data for this analysis. However, for projects with major community impacts, a survey of the affected area may be needed to identify the extent and severity of impacts on these social groups.

4. Relocation Impacts

The relocation information should be summarized in sufficient detail to adequately explain the relocation situation including anticipated problems and proposed solutions. Project relocation documents from which information is summarized should be referenced in the draft EIS. Secondary sources of information such as census, economic reports and contact with community leaders, supplemented by visual inspections (and, as appropriate, contact with local officials) may be used to obtain the data for this analysis. Where a proposed project will result in displacements, the following information regarding households and businesses should be discussed for each alternative under consideration commensurate with the level of impact and to the extent they are likely to occur:

(a) An estimate of the number of households to be displaced, including the family characteristics (e.g., minority, ethnic, handicapped, elderly, large family, income level, and owner/tenant status). However, where there are very few displacees, information on race, ethnicity and income levels should not be included in the EIS to protect the privacy of those affected.

(b) A discussion comparing available (decent, safe, and sanitary) housing in the area with the housing needs of the displacees. The comparison should include (1) price ranges, (2) sizes (number of bedrooms), and (3) occupancy status (owner/tenant).

(c) A discussion of any affected neighborhoods, public facilities, non-profit organizations, and families having special composition (e.g., ethnic, minority, elderly, handicapped, or other factors) which may require special relocation considerations and the measures proposed to resolve these relocation concerns.

(d) A discussion of the measures to be taken where the existing housing inventory is insufficient, does not meet relocation standards, or is not within the financial capability of the displacees. A commitment to last resort housing should be included when sufficient comparable replacement housing may not be available.

(e) An estimate of the numbers, descriptions, types of occupancy (owner/tenant), and sizes (number of employees) of businesses and farms to be displaced. Additionally, the discussion should identify (1) sites available in the area to which the affected businesses may relocate, (2) likelihood of such relocation, and (3) potential impacts on individual businesses and farms caused by displacement or proximity of the proposed highway if not displaced.

(f) A discussion of the results of contacts, if any, with local governments, organizations, groups, and individuals regarding residential and business relocation impacts, including any measures or coordination needed to reduce general and/or specific impacts. These contacts are encouraged for projects with large numbers of relocatees or complex relocation requirements. Specific financial and incentive programs or opportunities (beyond those provided by the Uniform Relocation Act) to residential and business relocatees to minimize impacts may be identified, if available through other agencies or organizations.

(g) A statement that (1) the acquisition and relocation program will be conducted in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and (2) relocation resources are available to all residential and business relocations without discrimination.

5. Economic Impacts

Where there are foreseeable economic impacts, the draft EIS should discuss the following for each alternative commensurate with the level of impacts:

(a) The economic impacts on the regional and/or local economy such as the effects of the project on development, tax revenues and public expenditures, employment opportunities, accessibility, and retail sales. Where substantial impacts on the economic viability of affected municipalities are likely to occur, they should also be discussed together with a summary of any efforts undertaken and agreements reached for using the transportation investment to support both public and private economic development plans. To the extent possible, this discussion should rely upon results of coordination with and views of affected State, county, and city officials and upon studies performed under Section 134.

(b) The impacts on the economic vitality of existing highway-related businesses (e.g., gasoline stations, motels, etc.) and the resultant impact, if any, on the local economy. For example, the

loss of business or employment resulting from building an alternative on new location bypassing a local community.

(c) Impacts of the proposed action on established business districts, and any opportunities to minimize or reduce such impacts by the public and/or private sectors. This concern is likely to occur on a project that might lead to or support new large commercial development outside of a central business district.

6. Joint Development

Where appropriate, the draft EIS should identify and discuss those joint development measures which will preserve or enhance an affected community's social, economic, environmental, and visual values. This discussion may be presented separately or combined with the land use and/or social impacts presentations. The benefits to be derived, those who will benefit (communities, social groups, etc.) and the entities responsible for maintaining the measures should be identified.

7. Considerations Relating to Pedestrians and Bicyclists

Where current pedestrian or bicycle facilities or indications of use are identified, the draft EIS should discuss the current and anticipated use of the facilities, the potential impacts of the affected alternatives, and proposed measures, if any, to avoid or reduce adverse impacts to the facility(ies) and its users. Where new facilities are proposed as a part of the proposed highway project, the EIS should include sufficient information to explain the basis for providing the facilities (e.g., proposed bicycle facility is a link in the local plan or sidewalks will reduce project access impact to the community). The final EIS should identify those facilities to be included in the preferred alternative. Where the preferred alternative would sever an existing major route for non-motorized transportation traffic, the proposed project needs to provide a reasonable alternative route or demonstrate that such a route exists (23 U.S.C. 109(n)). To the fullest extent possible, this needs to be described in the final EIS.

8. Air Quality Impacts

The draft EIS should contain a brief discussion of the transportation-related air quality concerns in the project area and a summary of the project-related carbon monoxide (CO) analysis if such analysis is performed. The following information should be presented, as appropriate:

(a) Mesoscale Concerns: Ozone (0_3), Hydrocarbons (HC) and Nitrogen Oxide (NO_x) air quality concerns are regional in nature and as such meaningful evaluation on a project-by-project basis is not possible. Where these pollutants are an issue, the air quality emissions inventories in the State Implementation Plan (SIP) should be referenced and briefly summarized in the draft EIS. Further, the relationship of the project to the SIP should be described in the EIS by including one of the following statements:

(1) This project is in an area where the SIP does not contain any transportation control measures. Therefore, the conformity procedures of 23 CFR 770 do not apply to this project.

(2) This project is in an area which has transportation control measures in the SIP which was (conditionally) approved by the Environmental Protection Agency (EPA) on (date). The FHWA has determined that both the transportation plan and the transportation improvement program conform to the SIP. The FHWA has determined that this project is included in the transportation improvement program for the (indicate 3C planning area). Therefore, pursuant to 23 CFR 770, this project conforms to the SIP.

Under certain circumstances, neither of these statements will precisely fit the situation and may need to be modified. Additionally, if the project is a Transportation Control Measure from the SIP, this should be highlighted to emphasize the project's air quality benefits.

(b) Microscale Concerns: Carbon monoxide is a project-related concern and as such should be evaluated in the draft EIS. A microscale CO analysis is unnecessary where such impacts (project CO contribution plus background) can be judged to be well below the 1- and 8-hour National Ambient Air Quality Standards (or other applicable State or local standards). This judgment may be based on (1) previous analyses for similar projects; (2) previous general analyses for various classes of projects; or (3) simplified graphical or "look-up" table evaluations. In these cases, a brief statement stating the basis for the judgment is sufficient.

For those projects where a microscale CO analysis is performed, each reasonable alternative should be analyzed for the estimated time of completion and design year. A brief summary of the methodologies and assumptions used should be included in the draft EIS. Lengthy discussions, if needed, should be included in a separate technical report and referenced in the EIS. Total CO concentrations (project contribution plus estimated background) at identified reasonable receptors for each alternative should be reported. A comparison should be made between alternatives and with applicable State and nation standards. Use of a table for this comparison is recommended for clarity.

As long as the total predicted 1-hour CO concentration is less than 9 ppm (the 8-hour CO standard), no separate 8-hour analysis is necessary. If the 1-hour CO concentration is greater than 9 ppm, an 8-hour analysis should be performed. Where the preferred alternative would result in violations of the 1 or 8-hour CO standards, an effort should be made to develop reasonable mitigation measures through early coordination between FHWA, EPA, and appropriate State and local highway and air quality agencies. The final EIS should discuss the proposed mitigation measures and include evidence of the coordination.

9. Noise Impacts

The draft EIS should contain a summary of the noise analysis including the following for each alternative under detailed study:

(a) A brief description of noise sensitive areas (residences, businesses, schools, parks, etc.), including information on the number and types of activities which may be affected. This should include developed lands and undeveloped lands for which development is planned, designed, and programmed.

(b) The extent of the impact (in decibels) at each sensitive area. This includes a comparison of the predicted noise levels with both the FHWA noise abatement criteria and the existing noise levels. (Traffic noise impacts occur when the predicted traffic noise levels approach or exceed the noise abatement criteria or when they substantially exceed the existing noise levels). Where there is a substantial increase in noise levels, the HA should identify the criterion used for defining "substantial increase." Use of a table for this comparison is recommended for clarity.

(c) Noise abatement measures which have been considered for each impacted area and those measures that are reasonable and feasible and that would "likely" be incorporated into the proposed project. Estimated costs, decibel reductions and height and length of barriers should be shown for all abatement measures.

Where it is desirable to qualify the term "likely," the following statement or similar wording would be appropriate: "Based on the studies completed to date, the State intends to install noise abatement measures in the form of a barrier at (location(s)). These preliminary indications of likely abatement measures are based upon preliminary design for a barrier of _____ high and _____ long and a cost of $_____ that will reduce the noise level by _____ dBA for _____ residences (businesses, schools, parks, etc.). (Where there is more than one barrier, provide information for each one.) If during final design these conditions substantially change, the abatement measures might not be provided. A final decision on the installation of abatement measure(s) will be made upon completion of the project design and the public involvement process."

(d) Noise impacts for which no prudent solution is reasonably available and the reasons why.

10. <u>Water Quality Impacts</u>

The draft EIS should include summaries of analyses and consultations with the State and/or local agency responsible for water quality. Coordination with the EPA under the Federal Clean Water Act may also provide assistance in this area. The discussion should include sufficient information to describe the ambient conditions of streams and water bodies which are likely to be impacted and identify the potential impacts of each alternative and proposed mitigation measures. Under normal circumstances, existing data may be used to describe ambient conditions. The inclusion of water quality data spanning several years is encouraged to reflect trends.

The draft EIS should also identify any locations where roadway runoff or other nonpoint source pollution may have an adverse impact on sensitive water resources such as water supply reservoirs, ground water recharge areas, and high quality streams. The 1981 FHWA research report entitled "Constituents of Highway Runoff," the 1985 report entitled "Management Practices for Mitigation of Highway Stormwater Runoff Pollution" and the 1987 report entitled "Effects of Highway Runoff on Receiving Waters" contain procedures for estimating pollutant loading from highway runoff and would be helpful in determining the level of potential impacts and appropriate mitigation measures. The draft EIS should identify the potential impacts of each alternative and proposed mitigation measures.

Where an area designated as principal or sole-source aquifer under Section 1424(e) of the Safe Drinking Water Act may be impacted by a proposed project, early coordination with EPA will assist in identifying potential impacts. The EPA will furnish information on whether any of the alternatives affect the aquifer. This coordination should also identify any potential impacts to the critical aquifer protection area (CAPA), if designated, within affected sole-source aquifers. If none of the alternatives affect the aquifer, the requirements of the Safe Drinking Water Act are satisfied. If an alternative is selected which affects the aquifer, a design must be developed to assure, to the satisfaction of EPA, that it will not contaminate the aquifer (40 CFR 149). The draft EIS should document coordination with EPA and identify its position on the impacts of the various alternatives. The final EIS should show that EPA's concerns on the preferred alternative have been resolved.

Wellhead protection areas were authorized by the 1986 Amendments to the Safe Drinking Water Act. Each State will develop State wellhead protection plans with final approval by EPA. When a proposed project encroaches on a wellhead protection area, the draft EIS should identify the area, the potential impact of each alternative and proposed mitigation measures. Coordination with the State agency responsible for the protection plan will aid in identifying the areas, impacts and mitigation. If the preferred alternative impacts these areas, the final EIS should document that it complies with the approved State wellhead protection plan.

11. Permits

If a facility such as a safety rest area is proposed and it will have a point source discharge, a Section 402 permit will be required for point source discharge (40 CFR 122). The draft EIS should discuss potential adverse impacts resulting from such proposed facilities and identify proposed mitigation measures. The need for a Section 402 permit and Section 401 water quality certification should be identified in the draft EIS.

For proposed actions requiring a Section 404 or Section 10 (Corps of Engineers) permit, the draft EIS should identify by alternative the general location of each dredge or fill activity, discuss the potential adverse impacts, identify proposed mitigation measures (if not addressed elsewhere in the draft EIS), and include evidence of coordination with the Corps of Engineers (in accordance with the U.S. DOT/Corps of Engineers Memorandum of Agreement) and appropriate Federal, State and local resource agencies and State and local water quality agencies. Where the preferred alternative requires an individual Section 404 or Section 10 permit, the final EIS should identify for each permit activity the approximate quantities of dredge or fill material, general construction grades and proposed mitigation measures.

For proposed actions requiring Section 9 (U.S. Coast Guard bridge) permits, the draft EIS should identify by alternative the location of the permit activity, potential impacts to navigation and the environment (if not addressed elsewhere in the document), proposed mitigation measures and evidence of coordination with the U.S. Coast Guard (in accordance with the FHWA/U.S. Coast Guard Memorandum of Understanding). Where the preferred alternative requires a Section 9 permit, the final EIS should identify for each permit activity the proposed horizontal and vertical navigational clearances and include an exhibit showing the various dimensions.

For all permit activities, the final EIS should include evidence that every reasonable effort has been made to resolve the issues raised by other agencies regarding the permit activities. If important issues remain unresolved, the final EIS must identify those issues, the positions of the respective agencies on the issues and the consultations and other efforts made to resolve them (23 CFR 771.125(a)).

12. Wetland Impacts

When an alternative will impact wetlands the draft EIS should (1) identify the type, quality and function of wetlands involved, (2) describe the impacts to the wetlands, (3) evaluate alternatives which would avoid these wetlands, and (4) identify practicable measures to minimize harm to the wetlands. Wetlands should be identified by using the definition of 33 CFR 328.3(b) (issued on November 13, 1986) which requires the presence of hydrophytic vegetation, hydric soils and wetland hydrology. Exhibits showing wetlands in the project impact area in relation to the alternatives, should be provided.

In evaluating the impact of the proposed project on wetlands, the following two items should be addressed: (1) the importance of the impacted wetland(s) and (2) the severity of this impact. Merely listing the number of acres taken by the various alternatives of a highway proposal does not provide sufficient information upon which to determine the degree of impact on the wetland ecosystem. The wetlands analysis should be sufficiently detailed to provide an understanding of these two elements.

In evaluating the importance of the wetlands, the analysis should consider such factors as: (1) the primary functions of the wetlands (e.g., flood control, wildlife habitat, ground water recharge, etc.), (2) the relative importance of these functions to the total wetland resource of the area, and (3) other factors such as uniqueness that may contribute to the wetlands importance.

In determining the wetland impact, the analysis should show the project's effects on the stability and quality of the wetland(s). This analysis should consider the short- and long-term effects on the wetlands and the importance of any loss such as: (1) flood control capacity, (2) shore line anchorage potential, (3) water pollution abatement capacity, and (4) fish and wildlife habitat value. The methodology developed by FHWA and described in reports numbered FHWA-IP-82-23 and FHWA-IP-82-24, "A Method for Wetland Functional Assessment Volumes I and II," is recommended for use in conducting this analysis. Knowing the importance of the wetlands involved and the degree of the impact, the HA and FHWA will be in a better position to determine the mitigation efforts necessary to minimize harm to these wetlands. Mitigation measures which should be considered include preservation and improvement of existing wetlands and creation of new wetlands (consistent with 23 CFR 777).

If the preferred alternative is located in wetlands, to the fullest extent possible, the final EIS needs to contain the finding required by Executive Order 11990 that there are no practicable alternatives to construction in wetlands. Where the finding is included, approval of the final EIS will document compliance with the Executive Order 11990 requirements (23 CFR 771.125(a)(1)). The finding should be included in a separate subsection entitled "Only Practicable Alternative Finding" and should be supported by the following information:

(a) a reference to Executive Order 11990;

(b) an explanation why there are no practicable alternatives to the proposed action;

(c) an explanation why the proposed action includes all practicable measures to minimize harm to wetlands; and

(d) a concluding statement that: "Based upon the above considerations, it is determined that there is no practicable alternative to the proposed construction in wetlands and that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use."

13. <u>Water Body Modification and Wildlife Impacts</u>

For each alternative under detailed study, the draft EIS should contain exhibits and discussions identifying the location and extent of water body modifications (e.g., impoundment, relocation, channel deepening, filling, etc.). The use of the stream or body of water for recreation, water supply, or other purposes should be identified. Impacts to fish and wildlife resulting from loss degradation, or modification of aquatic or terrestrial habitat should also be discussed. The results of coordination with appropriate Federal, State and local agencies should be documented in the draft EIS. For example, coordination with FWS under the Fish and Wildlife Coordination Act of 1958.

14. <u>Floodplain Impacts</u>

National Flood Insurance Program (NFIP) maps or, if NFIP maps are not available, information developed by the highway agency should be used to determine whether an alternative will encroach on the base (100-year) floodplain. The location hydraulic studies required by 23 CFR 650, Subpart A must include a discussion of the following items commensurate with the level of risk or environmental impact, for each alternative which encroaches on base floodplains or would support base floodplain development:

(a) The flooding risks;

(b) The impacts on natural and beneficial floodplain values;

(c) The support of probable incompatible floodplain development (i.e., any development that is not consistent with a community's floodplain development plan);

(d) The measures to minimize floodplain impacts; and

(e) The measures to restore and preserve the natural and beneficial floodplain values.

The draft EIS should briefly summarize the results of the location hydraulic studies. The summary should identify the number of encroachments and any support of incompatible floodplain developments and their potential impacts. Where an encroachment or support of incompatible

floodplain development results in substantial impacts, the draft EIS should provide more detailed information on the location, impacts and appropriate mitigation measures. In addition, if any alternative (1) results in a floodplain encroachment or supports incompatible floodplain development having significant impacts or (2) requires a commitment to a particular structure size or type, the draft EIS needs to include an evaluation an discussion of practicable alternatives to the structure or to the significant encroachment. The draft EIS should include exhibits which display the alternatives, the base floodplains and, where applicable, the regulatory floodways.

If the preferred alternative includes a floodplain encroachment having significant impacts, the final EIS must include a finding that it is the only practicable alternative as required by 23 CFR 650, Subpart A. The finding should refer to Executive Order 11988 and 23 CFR 650, Subpart A. It should be included in a separate subsection entitled "Only Practicable Alternative Finding" and must be supported by the following information.

(a) The reasons why the proposed action must be located in the floodplain;

(b) The alternatives considered and why they were not practicable; and

(c) A statement indicating whether the action conforms to applicable State or local floodplain protection standards.

For each alternative encroaching on a designated or proposed regulatory floodway, the draft EIS should provide a preliminary indication of whether the encroachment would be consistent with or require a revision to the regulatory floodway. Engineering and environmental analyses should be undertaken, commensurate with level of encroachment, to permit the consistency evaluation and identify impacts. Coordination with the Federal Emergency Management Agency (FEMA) and appropriate State and local government agencies should be undertaken for each floodway encroachment. If the preferred alternative encroaches on a regulatory floodway, the final EIS should discuss the consistency of the action with the regulatory floodway. If a floodway revision is necessary, the EIS should include evidence from FEMA and local or State agency indicating that such revision would be acceptable.

15. Wild and Scenic Rivers

If the proposed action could have foreseeable adverse effects on a river on the National Wild and Scenic Rivers System or a river under study for designation to the National Wild and Scenic Rivers System, the draft EIS should identify early coordination undertaken with the agency responsible for managing the listed or study river (i.e., National Park Service (NPS), Fish and Wildlife Service (FWS), Bureau of Land Management (BLM), or Forest Service (FS)). For each alternative under consideration, the EIS should identify the potential adverse effects on the natural, cultural, and recreational values of the listed or study river. Adverse effects include alteration of the free-flowing nature of the river, alteration of the setting or deterioration of water quality. If it is determined that any of the alternatives could foreclose options to designate a study river under the Act, or adversely affect those qualities of a listed river for which it was designated, to the fullest extent possible, the draft EIS needs to reflect consultation with the managing agency

on avoiding or mitigating the impacts (23 CFR 771.123(c)). The final EIS should identify measures that will be included in the preferred alternative to avoid or mitigate such impacts.

Publicly owned waters of designated wild and scenic rivers are protected by Section 4(f). Additionally, public lands adjacent to a Wild and Scenic River may be subject to Section 4(f) protection. An examination of any adopted or proposed management plan for a listed river should be helpful in making the determination on applicability of Section 4(f). For each alternative that takes such land, coordination with the agency responsible for managing the river (either NPS, FWS, BLM, or FS) will provide information on the management plan, specific affected land uses and any necessary Section 4(f) coordination.

16. Coastal Barriers

The Coastal Barrier Resources Act (CBRA) establishes certain coastal areas to be protected by prohibiting the expenditure of Federal funds for new and expanded facilities within designated coastal barrier units. When a proposed project impacts a coastal barrier unit, the draft EIS should: include a map showing the relationship of each alternative to the unit(s); identify direct and indirect impacts to the unit(s); quantifying and describing the impacts as appropriate; discuss the results of early coordination with FWS, identifying any issues raised and how they were addressed, and; identify any alternative which (if selected) would require an exception under the Act. Any issues identified or exceptions required for the preferred alternative should be resolved prior to its selection. This resolution should be documented in the final EIS.

17. Coastal Zone Impacts

Where the proposed action is within, or is likely to affect land or water uses within the area covered by a State Coastal Zone Management Program (CZMP) approved by the Department of Commerce, the draft EIS should briefly describe the portion of the affected CZMP plan, identify the potential impacts, and include evidence of coordination with the State Coastal Zone Management agency or appropriate local agency. The final EIS should include the State Coastal Zone Management agency's determination on consistency with the State CZMP plan. (In some States, an agency will make a consistency determination only after the final EIS is approved, but will provide a preliminary indication before the final EIS that the project is "not inconsistent" or "appears to be consistent" with the plan.) (For direct Federal actions, the final EIS should include the lead agency's consistency determination and agreement by the State CZM agency.) If the preferred alternative is inconsistent with the State's approved CZMP, it can be Federally funded only if the Secretary of Commerce makes a finding that the proposed action is consistent with the purpose or objectives of the CZM Act or is necessary in the interest of national security. To the fullest extent possible, such a finding needs to be included in the final EIS. If the finding is denied, the action is not eligible for Federal funding unless modified in such a manner to remove the inconsistency finding. The final EIS should document such results.

18. Threatened or Endangered Species

The HA must obtain information from the FWS of the DOI and/or the National Marine Fisheries Service (NMFS) of the Department of Commerce to determine the presence or absence of listed

and proposed threatened or endangered species and designated and proposed critical habitat in the proposed project area (50 CFR 402.12(c)). The information may be (1) a published geographical list of such species or critical habitat; (2) a project-specific notification of a list of such species or critical habitat; or (3) substantiated information from other credible sources. Where the information is obtained from a published geographical list the reasons why this would satisfy the coordination with DOI should be explained. If there are no species or critical habitat in the proposed project area, the Endangered Species Act requirements have been met. The results of this coordination should be included in the draft EIS.

When a proposed species or a proposed critical habitat may be present in the proposed project area, an evaluation or, if appropriate, a biological assessment is made on the potential impacts to identify whether any such species or critical habitat are likely to be adversely affected by the project. Informal consultation with FWS and/or NMFS should be undertaken during the evaluation. The draft EIS should include exhibits showing the location of the species or habitat, summarize the evaluation and potential impacts, identify proposed mitigation measures, and evidence coordination with FWS and/or NMFS. If the project is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat, the HA in consultation with the FHWA must confer with FWS and/or NMFS to attempt to resolve potential conflicts by avoiding, minimizing, or reducing the project impacts (50 CFR 402.10(a)). If the preferred alternative is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat, a conference with FWS and/or NMFS must be held to assist in identifying and resolving potential conflicts. To the fullest extent possible, the final EIS needs to summarize the results of the conference and identify reasonable and prudent alternatives to avoid the jeopardy to such proposed species or critical habitat. If no alternatives exist, the final EIS should explain the reasons why and identify any proposed mitigation measures to minimize adverse effects.

When a listed species or a designated critical habitat may be present in the proposed project area, a biological assessment must be prepared to identify any such species or habitat which are likely to be adversely affected by the proposed project (50 CFR 402.12). Informal consultation should be undertaken or, if desirable, a conference held with FWS and/or NMFS during preparation of the biological assessment. The draft EIS should summarize the following data from the biological assessment:

(a) The species distribution, habitat needs, and other biological requirements;

(b) The affected areas of the proposed project;

(c) Possible impacts to the species including opinions of recognized experts on the species at issue;

(d) Measures to avoid or minimize adverse impacts; and

(e) Results of consultation with FWS and/or NMFS.

In selecting an alternative, jeopardy to a listed species or the destruction or adverse modification of designated critical habitat must be avoided (50 CFR 402.01(a)). If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the preferred alternative, the final EIS should evidence concurrence by the FWS and/or NMFS in such a determination and identify any proposed mitigation for the preferred alternative.

If the results of the biological assessment or consultation with FWS and/or NMFS show that the preferred alternative is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat, to the fullest extent possible, the final EIS needs to contain: (1) a summary of the biological assessment (see data above for draft EIS); (2) a summary of the steps taken, including alternatives or measures evaluated and conferences and consultations held, to resolve the project's conflicts with the listed species or critical habitat; (3) a copy of the biological opinion; (4) a request for an exemption from the Endangered Species Act; (5) the results of the exemption request; and (6) a statement that (if the exemption is denied) the action is not eligible for Federal funding.

19. Historic and Archeological Preservation

The draft EIS should contain a discussion demonstrating that historic and archeological resources have been identified and evaluated in accordance with the requirements of 36 CFR 800.4 for each alternative under consideration. The information and level of effort needed to identify and evaluate historic and archeological resources will vary from project to project as determined by the FHWA after considering existing information, the views of the SHPO and the Secretary of Interior's "Standards and Guidelines for Archeology and Historic Preservation." The information for newly identified historic resources should be sufficient to determine their significance and eligibility for the National Register of Historic Places. The information for archeological resources should be sufficient to identify whether each warrants preservation in place or whether it is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. Where archeological resources are not a major factor in the selection of a preferred alternative, the determination of eligibility for the National Register of newly identified archaeological resources may be deferred until after circulation of the draft EIS.
The draft EIS discussion should briefly summarize the methodologies used in identifying historic and archeological resources. Because Section 4(f) of the DOT Act applies to the use of historic resources on or eligible for the National Register and to archeological resources on or eligible for the National Register and which warrant preservation in place, the draft EIS should describe the historical resources listed in or eligible for the National Register and identify any archeological resources that warrant preservation in place. The draft EIS should summarize the impacts of each alternative on and proposed mitigation measures for each resource. The document should evidence coordination with the SHPO on the significance of newly identified historic and archaeological resources, the eligibility of historic resources for the National Register and the effects of each alternative on both listed and eligible historic resources. Where the draft EIS discusses eligibility for the National Register of archeological resources, the coordination with the SHPO on eligibility and effect should address both historic and archeological resources.

The draft EIS can serve as a vehicle for affording the Advisory Council on Historic Preservation (ACHP) an opportunity to comment pursuant to Section 106 requirements if the document contains the necessary information required by 36 CFR 800.8. The draft EIS transmittal letter to the ACHP should specifically request its comments pursuant to 36 CFR 800.6.

To the fullest extent possible, the final EIS needs to demonstrate that all the requirements of 36 CFR 800 have been met. If the preferred alternative has no effect on historic or archeological resources on or eligible for the National Register, the final EIS should indicate coordination with and agreement by the SHPO. If the preferred alternative has an effect on a resource on or eligible for the National Register, the final EIS should contain (a) a determination of no adverse effect concurred in by the Advisory Council on Historic Preservation, (b) an executed memorandum of agreement (MOA), or (c) in the case of a rare situation where FHWA is unable to conclude the MOA, a copy of comments transmitted from the ACHP to the FHWA and the FHWA response to those comments.

The proposed use of land from an historic resource on or eligible for the National Register will normally require an evaluation and approval under Section 4(f) of the DOT Act. Section 4(f) also applies to all archaeological sites on or eligible for the National Register and which warrant preservation in place. (See Section IX for information on Section 4(f) evaluation.)

20. Hazardous Waste Sites

Hazardous waste sites are regulated by the Resource Conservation and Recovery ACT (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). During early planning, the location of permitted and nonregulated hazardous waste sites should be identified. Early coordination with the appropriate Regional Office of the EPA and the appropriate State agency will aid in identifying known or potential hazardous waste sites. If known or potential waste sites are identified, the locations should be clearly marked on a map showing their relationship to the alternatives under consideration. If a known or potential hazardous waste site is affected by an alternative, information about the site, the potential involvement, impacts and public health concerns of the affected alternative(s) and the proposed mitigation measures to eliminate or minimize impacts or public health concerns should be discussed in the draft EIS.
If the preferred alternative impacts a known or potential hazardous waste site, the final EIS should address and resolve the issues raised by the public and governmental agencies.

21. Visual Impacts

The draft EIS should state whether the project alternatives have a potential for visual quality impacts. When this potential exists, the draft EIS should identify the impacts to the existing visual resource, the relationship of the impacts to potential viewers of and from the project, as well as measures to avoid, minimize, or reduce the adverse impacts. When there is potential for visual quality impacts, the draft EIS should explain the consideration given to design quality, art, and architecture in the project planning. These values may be particularly important for facilities located in visually sensitive urban or rural settings. When a proposed project will include features associated with design quality, art or architecture, the draft EIS should be circulated to officially designated State and local arts councils and, as appropriate, other organizations with an interest

in design, art, and architecture. The final EIS should identify any proposed mitigation for the preferred alternative.

22. Energy

Except for large scale projects, a detailed energy analysis including computations of BTU requirements, etc., is not needed. For most projects, the draft EIS should discuss in general terms the construction and operational energy requirements and conservation potential of various alternatives under consideration. The discussion should be reasonable and supportable. It might recognize that the energy requirements of various construction alternatives are similar and are generally greater than the energy requirements of the no-build alternative. Additionally, the discussion could point out that the post-construction, operational energy requirements of the facility should be less with the build alternative as opposed to the no-build alternative. In such a situation, one might conclude that the savings in operational energy requirements would more than offset construction energy requirements and thus, in the long term, result in a net savings in energy usage.

For large-scale projects with potentially substantial energy impacts, the draft EIS should discuss the major direct and/or indirect energy impacts and conservation potential of each alternative. Direct energy impacts refer to the energy consumed by vehicles using the facility. Indirect impacts include construction energy and such items as the effects of any changes in automobile usage. The alternative's relationship and consistency with a State and/or regional energy plan, if one exists, should also be indicated.

The final EIS should identify any energy conservation measures that will be implemented as apart of the preferred alternative. Measures to conserve energy include the use of high-occupancy vehicle incentives and measures to improve traffic flow.

23. Construction Impacts

The draft EIS should discuss the potential adverse impacts (particularly air, noise, water, traffic congestion, detours, safety, visual, etc.) associated with construction of each alternative and identify appropriate mitigation measures. Also, where the impacts of obtaining borrow or disposal of waste material are important issues, they should be discussed in the draft EIS along with any proposed measure to minimize these impacts. The final EIS should identify any proposed mitigation for the preferred alternative.

24. The Relationship Between Local Short-term Uses of Man's Environment and the Maintenance and Enhancement of Long-term Productivity

The EIS should discuss in general terms the proposed action's relationship of local short-term impacts and use of resources and the maintenance and enhancement of long-term productivity. This general discussion might recognize that the build alternatives would have similar impacts. The discussion should point out that transportation improvements are based on State and/or local comprehensive planning which consider(s) the need for present and future traffic requirements within the context of present and future land use development. In such a situation, one might then

conclude that the local short-term impacts and use of resources by the proposed action is consistent with the maintenance and enhancement of long-term productivity for the local area, State, etc.

25. Any Irreversible and Irretrievable Commitments of Resources Which Would be Involved in the Proposed Action

The EIS should discuss in general terms the proposed action's irreversible and irretrievable commitment of resources. This general discussion might recognize that the build alternatives would require a similar commitment of natural, physical, human, and fiscal resources. An example of such discussion would be as follows:

"Implementation of the proposed action involves a commitment of a range of natural, physical, human, and fiscal resources. Land used in the construction of the proposed facility is considered an irreversible commitment during the time period that the land is used for a highway facility. However, if a greater need arises for use of the land or if the highway facility is no longer needed, the land can be converted to another use. At present, there is no reason to believe such a conversion will ever be necessary or desirable.

Considerable amounts of fossil fuels, labor, and highway construction materials such as cement, aggregate, and bituminous material are expended. Additionally, large amounts of labor and natural resources are used in the fabrication and preparation of construction materials. These materials are generally not retrievable. However, they are not in short supply and their use will not have an adverse effect upon continued availability of these resources. Any construction will also require a substantial one-time expenditure of both State and Federal funds which are not retrievable.

The commitment of these resources is based on the concept that residents in the immediate area, State, and region will benefit by the improved quality of the transportation system. These benefits will consist of improved accessibility and safety, savings in time, and greater availability of quality services which are anticipated to outweigh the commitment of these resources."

H. List of Preparers

This section should include lists of:

(1) State (and local agency) personnel, including consultants, who were primarily responsible for preparing the EIS or performing environmental studies, and a brief summary of their qualifications, including educational background and experience.

(2) The FHWA personnel primarily responsible for preparation or review of the EIS and their qualifications.

(3) The areas of EIS responsibility for each preparer.

I. List of Agencies, Organizations, and Persons to Whom Copies of the Statement are Sent

Draft EIS: List all entities from which comments are being requested (40 CFR 1502.10). Final EIS: Identify those entities that submitted comments on the draft EIS and those receiving a copy of the final EIS (23 CFR 771.125(a) and (g)).

J. Comments and Coordination

1. The draft EIS should contain copies of pertinent correspondence with each cooperating agency, other agencies and the public and summarize: 1) the early coordination process, including scoping; 2) the meetings with community groups (including minority and non-minority interests) and individuals; and 3) the key issues and pertinent information received from the public and government agencies through these efforts.

2. The final EIS should include a copy of substantive comments from the U.S. Secretary of Transportation (OST), each cooperating agency, and other commentors on the draft EIS. Where the response is exceptionally voluminous the comments may be summarized. An appropriate response should be provided to each substantive comment. When the EIS text is revised as a result of the comments received, a copy of the comments should contain marginal references indicating where revisions were made, or the response to the comments should contain such references. The response should adequately address the issue or concern raised by the commentor or, where substantive comments do not warrant further response, explain why they do not, and provide sufficient information to support that position.

The FHWA and the HA are not commentors within the meaning of NEPA and their comments on the draft EIS should not be included in the final EIS. However, the document should include adequate information for FHWA and the HA to ascertain the disposition of the comment(s).

3. The final EIS should (1) summarize the substantive comments on social, economic, environmental and engineering issues made at the public hearing, if one is held, or the public involvement activities or which were otherwise considered and (2) discuss the consideration given to any substantive issue raised and provide sufficient information to support that position.

4. The final EIS should document compliance with requirements of all applicable environmental laws, Executive Orders, and other related requirements, such as Title VI of the Civil Rights Act of 1964. To the extent possible, all environmental issues should be resolved prior to the submission of the final EIS. When disagreement on project issues exists with another agency, coordination with the agency should be undertaken to resolve the issues. Where the issues cannot be resolved, the final EIS should identify any remaining unresolved issues, the steps taken to resolve the issues, and the positions of the respective parties. Where issues are resolved through this effort, the final EIS should demonstrate resolution of the concerns.

K. Index

The Index should include important subjects and areas of major impacts so that a reviewer need not read the entire EIS to obtain information on a specific subject or impact.

L. Appendices

The EIS should briefly explain or summarize methodologies and results of technical analysis and research. Lengthy technical discussions should be contained in a technical report. Material prepared as appendices to the EIS should:

(1) consist of material prepared specifically for the EIS;

(2) consist of material which substantiates an analysis fundamental to the EIS;

(3) be analytic and relevant to the decision to be made; and

(4) be circulated with the EIS within FHWA, to EPA (Region), and to cooperating agencies and be readily available on request by other parties. Other reports and studies referred to in the EIS should be readily available for review or for copying at a convenient location.

VI. OPTIONS FOR PREPARING FINAL EISs

The CEQ regulations place heavy emphasis on reducing paperwork, avoiding unnecessary work, and producing documents which are useful to decision makers and to the public. With these objectives in mind, three different approaches to preparing final EISs are presented below. The first two approaches can be employed on any project. The third approach is restricted to the conditions specified by CEQ (40 CFR 1503.4(c)).

A. Traditional Approach

Under this approach, the final EIS incorporates the draft EIS (essentially in its entirety) with changes made as appropriate throughout the document to reflect the selection of an alternative, modifications to the project, updated information on the affected environment, changes in the assessment of impacts, the selection of mitigation measures, wetland and floodplain findings, the results of coordination, comments received on the draft EIS and responses to these comments, etc. Since so much information is carried over from the draft to the final, important changes are sometimes difficult for the reader to identify. Nevertheless, this is the approach most familiar to participants in the NEPA process.

B. Condensed Final EIS

This approach avoids repetition of material from the draft EIS by incorporating, by reference, the draft EIS. The final EIS is, thus, a much shorter document than under the traditional approach; however, it should afford the reader a complete overview of the project and its impacts on the human environment.

The crux of this approach is to briefly reference and summarize information from the draft EIS which has not changed and to focus the final EIS discussion on changes in the project, its setting, impacts, technical analysis, and mitigation that have occurred since the draft EIS was circulated. In addition, the condensed final EIS must identify the preferred alternative, explain the basis for its selection, describe coordination efforts, and include agency and public comments, responses to these comments, and any required findings or determinations (40 CFR 1502.14(e) and 23 CFR 771.125(a)).

The format of the final EIS should parallel the draft EIS. Each major section of the final EIS should briefly summarize the important information contained in the corresponding section of the draft, reference the section of the draft that provides more detailed information, and discuss any noteworthy changes that have occurred since the draft was circulated.

At the time that the final is circulated, an additional copy of the draft EIS need not be provided to those parties that received a copy of the draft EIS when it was circulated. Nevertheless, if, due to the passage of time or other reasons, it is likely that they will have disposed of their original copy of the draft EIS, then a copy of the draft EIS should be provided with the final. In any case, sufficient copies of the draft EIS should be on hand to satisfy requests for additional copies. Both the draft EIS and the condensed final EIS should be filed with EPA under a single final EIS cover sheet.

C. Abbreviated Version of Final EIS

The CEQ regulation (40 CFR 1503.4(c)) provides the opportunity to expedite the final EIS preparation where the only changes needed in the document are minor and consist of the factual corrections and/or an explanation of why the comments received on the draft EIS do not warrant further response. In using this approach, care should be exercised to assure that the draft EIS contains sufficient information to make the findings in (2) below and that the number of errata sheets used to make required changes is small and that these errata sheets together with the draft EIS constitute a readable, understandable, full disclosure document. The final EIS should consist of the draft EIS and an attachment containing the following:

(1) Errata sheets making any necessary corrections to the draft EIS;

(2) A section identifying the preferred alternative and a discussion of the reasons it was selected. The following should also be included in this section where applicable:

(a) final Section 4(f) evaluations containing the information described in Section IX of these guidelines;

(b) wetland finding(s);

(c) floodplain finding(s);

(d) a list of commitments for mitigation measures for the preferred alternative; and

(3) Copies (or summaries) of comments received from circulation of the draft EIS and public hearing and responses thereto.

Only the attachment need be provided to parties who received a copy of the draft EIS, unless it is likely that they will have disposed of their original copy, in which case both the draft EIS and the attachment should be provided (40 CFR 1503.4(c)). Both the draft EIS and the attachment must be filed with EPA under a single final EIS cover sheet (40 CFR 1503.4(c)).

VII. DISTRIBUTION OF EISs AND SECTION 4(f) EVALUATIONS

A. Environmental Impact Statement

1. After clearance by FHWA, copies of all draft EISs must be made available to the public and circulated for comments by the HA to: all public officials, private interest groups, and members of the public known to have an interest in the proposed action or the draft EIS; all Federal, State, and local government agencies expected to have jurisdiction, responsibility, interest, or expertise in the proposed action; and States and Federal land management entities which may be affected by the proposed action or any of the alternatives (40 CFR 1502.19 and 1503.1). Distribution must be made no later than the time the document is filed with EPA for Federal Register publication and must allow for a minimum 45-day review period (40 CFR 1506.9 and 1506.10). Internal FHWA distribution of draft and final EISs is subject to change and is noted in memorandums to the Regional Administrators as requirements change.

2. Copies of all approved final EISs must be distributed to all Federal, State, and local agencies and private organizations, and members of the public who provided substantive comments on the draft EIS or who requested a copy (40 CFR 1502.19). Distribution must be made no later than the time the document is filed with EPA for Federal Register publication and must allow for a minimum 30-day review period before the Record of Decision is approved (40 CFR 1506.9 and 1506.10). Two copies of all approved EISs should be forwarded to the FHWA Washington Headquarters (HEV-11) for recordkeeping purposes.

3. Copies of all EISs should normally be distributed to EPA and DOI as follows, unless the agency has indicated to the FHWA offices the need for a different number of copies:

(a) The EPA Headquarters: five copies of the draft EIS and five copies of the final EIS (This is the “filing requirement” in Section 1506.9 of the CEQ regulation.) To the following address: Environmental Protection Agency, Office of Federal Activities (A-104), 401 M Street, SW., Washington, D.C. 20460.

(b) The appropriate EPA Regional Office responsible for EPA’s review pursuant to Section 309 of the Clean Air Act: five copies of the draft EIS and five copies of the final EIS.

(c) The DOI Headquarters to the following address:

U.S. Department of the Interior
Office of Environmental Project Review
Room 4239
18th and C Streets, NW.
Washington, D.C. 20240

(i) All States in FHWA Regions 1, 3, 4, and 5, plus Hawaii, Guam, American Samoa, Virgin Islands, Arkansas, Iowa, Louisiana, and Missouri; 12 copies of the draft EIS and 7 copies of the final EIS.

(ii) Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas: 13 copies of the draft EIS and 8 copies of the final EIS.

(iii) New Mexico and all States in FHWA Regions 8, 9, and 10, except Hawaii, North Dakota, and South Dakota: 14 copies of the draft EIS and 9 copies of the final EIS.

Note: DOI Headquarters will make distribution within its Department. While not required, advance distribution to DOI field offices may be helpful to expedite their review.

B. Section 4(f) Evaluation

If the Section 4(f) evaluation is included in a draft EIS, the DOI Headquarters does not need additional copies of the draft or final EIS/Section 4(f) evaluation. If the Section 4(f) evaluation is processed separately or as part of an EA, the DOI should receive seven copies of the draft Section 4(f) evaluation for coordination and seven copies of the final Section 4(f) evaluation for information. In addition to coordination with DOI, draft Section 4(f) evaluations must be coordinated with the officials having jurisdiction over the Section 4(f) property and the Department of Housing and Urban Development (HUD) and the United States Department of Agriculture (USDA) where these agencies have an interest in or jurisdiction over the affected Section 4(f) resource (23 CFR 771.135(i)). The point of coordination for HUD is the appropriate Regional Office and for USDA, the Forest Supervisor of the affected National Forest. One copy should be provided to the officials with jurisdiction and two copies should be submitted to HUD and USDA when coordination is required.

VIII. RECORD OF DECISION — FORMAT AND CONTENT

The Record of Decision (ROD) will explain the reasons for the project decision, summarize any mitigation measures that will be incorporated in the project and document any required Section 4(f) approval. While cross-referencing and incorporation by reference of the final EIS (or final EIS supplement) and other documents are appropriate, the ROD must explain the basis for the project decision as completely as possible, based on the information contained in the EIS (40 CFR 1502.2). A draft ROD should be prepared by the HA and submitted to the Division Office with the final EIS. The following key items need to be addressed in the ROD:

A. Decision.

Identify the selected alternative. Reference to the final EIS (or final EIS supplement) may be used to reduce detail and repetition.

B. Alternatives Considered.

This information can be most clearly organized by briefly describing each alternative and explaining the balancing of values which formed the basis for the decision. This discussion must identify the environmentally preferred alternative(s) (i.e., the alternative(s) that causes the least damage to the biological and physical environment) (40 CFR 1505.2(b)). Where the selected alternative is other than the environmentally preferable alternative, the ROD should clearly state the reasons for not selecting the environmentally preferred alternative. If lands protected by Section 4(f) were a factor in the selection of the preferred alternative, the ROD should explain how the Section 4(f) lands influenced the selection.

The values (social, economic, environmental, cost-effectiveness, safety, traffic, service, community planning, etc.) which were important factors in the decision-making process should be clearly identified along with the reasons some values were considered more important than others. The Federal-aid highway program mandate to provide safe and efficient transportation in the context of all other Federal requirements and the beneficial impacts of the proposed transportation improvements should be included in this balancing. While any decision represents a balancing of the values, the ROD should reflect the manner in which these values were considered in arriving at the decision.

C. Section 4(f).

Summarize the basis for any Section 4(f) approval when applicable (23 CFR 771.127(a)). The discussion should include the key information supporting such approval. Where appropriate, this information may be included in the alternatives discussion above and referenced in this paragraph to reduce repetition.

D. Measures to Minimize Harm.

Describe the specific measures adopted to minimize environmental harm and identify those standard measures (e.g., erosion control, appropriate for the proposed action). State whether all practicable measures to minimize environmental harm have been incorporated into the decision and, if not, why they were not (40 CFR 1505.2(c)).

E. Monitoring or Enforcement Program.

Describe any monitoring or enforcement program which has been adopted for specific mitigation measures, as outlined in the final EIS.

F. Comments on Final EIS.

All substantive comments received on the final EIS should be identified and given appropriate responses. Other comments should be summarized and responses provided where appropriate.

For recordkeeping purposes, a copy of the signed ROD should be provided to the Washington Headquarters (HEV-11). For a ROD approved by the Division Office, copies should be sent to both the Washington Headquarters and the Regional Office.

IX. SECTION 4(f) EVALUATIONS — FORMAT AND CONTENT

A Section 4(f) evaluation must be prepared for each location within a proposed project before the use of Section 4(f) land is approved (23 CFR 771.135(a)). For projects processed with an EIS or an EA/FONSI, the individual Section 4(f) evaluation should be included as a separate section of the document, and for projects processed as categorical exclusions, as a separate Section 4(f) evaluation document. Pertinent information from various sections of the EIS or EA/FONSI may be summarized in the Section 4(f) evaluation to reduce repetition. Where an issue on constructive use Section 4(f) arises and FHWA decides that Section 4(f) does not apply, the environmental document should contain sufficient analysis and information to demonstrate that the resource(s) is not substantially impaired.

The use of Section 4(f) land may involve concurrent requirements of other Federal agencies. Examples include consistency determinations for the use of public lands managed by the Bureau of Land Management, compatibility determinations for the use of land in the National Wildlife Refuge System and the National Park System, determinations of direct and adverse effects for Wild and Scenic Rivers, and approval of land conversions under Section 6(f) of the Land and Water Conservation Fund Act. The mitigation plan developed for the project should include measures which would satisfy the various requirements. For example, Section 6(f) directs the Department of the Interior (National Park Service) to assure that replacement lands of equal value, location and usefulness are provided as conditions to approval of land conversions. Therefore, where a Section 6(f) land conversion is proposed for a highway project, replacement land will be necessary. Regardless of the mitigation proposed, the draft and final Section 4(f) evaluations should discuss the results of coordination with the public official having jurisdiction over the Section 4(f) land and document the National Park Service's position on the Section 6(f) land transfer, respectively.

A. Draft Section 4(f) Evaluation

The following format and content are suggested. The listed information should be included in the Section 4(f) evaluation, as applicable.

1. Proposed Action.

Where a separate Section 4(f) evaluation is prepared, describe the proposed project and explain the purpose and need for the project.

2. Section 4(f) Property.

Describe each Section 4(f) resource which would be used by any alternative under consideration. The following information should be provided:

(a) A detailed map or drawing of sufficient scale to identify the relationship of the alternatives to the Section 4(f) property.

(b) Size (acres or square feet) and location (maps or other exhibits such as photographs, sketches, etc.) of the affected Section 4(f) property.

(c) Ownership (city, county, State, etc.) and type of Section 4(f) property (park, recreation, historic, etc.).

(d) Function of or available activities on the property (ball playing, swimming, golfing, etc.).

(e) Description and location of all existing and planned facilities (ball diamonds, tennis courts, etc.).

(f) Access (pedestrian, vehicular) and usage (approximate number of users/visitors, etc.).

(g) Relationship to other similarly used lands in the vicinity.

(h) Applicable clauses affecting the ownership, such as lease, easement, covenants, restrictions, or conditions, including forfeiture.

(i) Unusual characteristics of the Section 4(f) property (flooding problems, terrain conditions, or other features) that either reduce or enhance the value of all or part of the property.

3. Impacts on the Section 4(f) Property(EIS).

Discuss the impacts on the Section 4(f) property for each alternative (e.g., amount of land to be used, facilities and functions affected, noise, air pollution, visual, etc.). Where an alternative (or alternatives) uses land from more than one Section 4(f) property, a summary table would be useful in comparing the various impacts of the alternative(s). Impacts (such as facilities and functions affected, noise, etc.) Which can be quantified should be quantified. Other impacts (such as visual intrusion) which cannot be quantified should be described.

4. Avoidance Alternatives.

Identify and evaluate location and design alternatives which would avoid the Section 4(f) property. Generally, this would include alternatives to either side of the property. Where an alternative would use land from more than one Section 4(f) property, the analysis needs to evaluate alternatives which avoid each and all properties (23 CFR 771.135(l)). The design alternatives should be in the immediate area of the property and consider minor alignment shifts, a reduced facility, retaining structures, etc. individually or in combination, as appropriate. Detailed

discussions of alternatives in an EIS or EA need not be repeated in the Section 4(f) portion of the document, but should be referenced and summarized. However, when alternatives (avoiding Section 4(f) resources) have been eliminated from detailed study the discussion should also explain whether these alternatives are feasible and prudent and, if not, the reasons why.

5. Measures to Minimize Harm.

Discuss all possible measures which are available to minimize the impacts of the proposed action on the Section 4(f) property(ies). Detailed discussions of mitigation measures in the EIS or EA may be referenced and appropriately summarized, rather than repeated.

6. Coordination.

Discuss the results of preliminary coordination with the public official having jurisdiction over the Section 4(f) property and with regional (or local) offices of DOI and, as appropriate, the Regional Office of HUD and the Forest Supervisor of the affected National Forest. Generally, the coordination should include discussion of avoidance alternatives, impacts to the property, and measures to minimize harm. In addition, the coordination with the public official having jurisdiction should include, where necessary, a discussion of significance and primary use of the property.

Note: The conclusion that there are no feasible and prudent alternative is not normally addressed at the draft Section 4(f) evaluation stage. Such conclusion is made only after the draft Section 4(f) evaluation has been circulated and coordinated and any identified issues adequately evaluated.

B. Final Section 4(f) Evaluation

When the preferred alternative uses Section 4(f) land, the final Section 4(f) evaluation must contain (23 CFR 771.135(i) and (j)):

(1) All the above information for a draft evaluation.

(2) A discussion of the basis for concluding that there are no feasible and prudent alternatives to the use of the Section 4(f) land. The supporting information must demonstrate that “there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes” (23 CFR 771.135(a)(2)). This language should appear in the document together with the supporting information.

(3) A discussion of the basis for concluding that the proposed action includes all possible planning to minimize harm to the Section 4(f) property. When there are no feasible and prudent alternatives which avoid the use of Section 4(f) land, the final Section 4(f) evaluation must demonstrate that the preferred alternative is a feasible and prudent alternative with the least harm on the Section 4(f) resources after considering mitigation to the Section 4(f) resources.

(4) A summary of the appropriate formal coordination with the Headquarters Offices of DOI (and/or appropriate agency under that Department) and, as appropriate, the involved offices of USDA and HUD.

(5) Copies of all formal coordination comments and a summary of other relevant Section 4(f) comments received and an analysis and response to any questions raised. Where new alternatives or modifications to existing alternatives are identified and will not be given further consideration, the basis for dismissing these alternatives should be provided and supported by factual information. Where Section 6(f) land is involved, the National Park Service's position on the land transfer should be documented.

(6) Concluding statement as follows: "Based upon the above considerations, there is no feasible and prudent alternative to the use of land from the (identify Section 4(f) property) and the proposed action includes all possible planning to minimize harm to the (Section 4(f) property) resulting from such use."

X. OTHER AGENCY STATEMENTS

A. The FHWA review of statements prepared by other agencies will consider the environmental impact of the proposal on areas within FHWA's functional area of responsibility or special expertise (40 CFR 1503.2).

B. Agencies requesting comments on highway impacts usually forward the draft EIS to the FHWA Washington Headquarters for comment. The FHWA Washington Headquarters will normally distribute these EISs to the appropriate Regional or Division Office (per Regional Office request) and will indicate where the comments should be sent. The Regional Office may elect to forward the draft statement to the Division Office for response.

C. When a field office has received a draft EIS directly from another agency, it may comment directly to that agency if the proposal does not fall within the types indicated in item (d) of this section. If more than one DOT Administration is commenting at the Regional level, the comments should be coordinated by the DOT Regional Representative to the Secretary or designee. Copies of the FHWA comments should be distributed as follows:

(1) Requesting agency — original and one copy.
(2) P-14 — one copy.
(3) DOT Secretarial Representative--one copy.
(4) HEV-11 — one copy.

D. The following types of actions contained in the draft EIS require FHWA Washington Headquarters review and such EISs should be forwarded to the Director, Office of Environmental Policy, along with Regional comments, for processing:

(1) actions with national implications, and
(2) legislation or regulations having national impacts or national program proposals.

XI. REEVALUATIONS

A. Draft EIS Reevaluation

If an acceptable final EIS is not received FHWA within 3 years from the date of the draft EIS circulation, then a written evaluation is required to determine whether there have been changes in the project or its surroundings or new information which would require a supplement to the draft EIS or a new draft EIS (23 CFR 771.129(a)). The written evaluation should be prepared by the HA in consultation with FHWA and should address all current environmental requirements. The entire project should be revisited to assess any changes that have occurred and their effect on the adequacy of the draft EIS.

There is no required format for the written evaluation. It should focus on the changes in the project, its surroundings and impacts and any new issues identified since the draft EIS. Field reviews, additional studies (as necessary) and coordination (as appropriate) with other agencies should be undertaken and the results included in the written evaluation. If, after reviewing the written evaluation, the FHWA concludes that a supplemental EIS or a new draft EIS is not required, the decision should be appropriately documented. Since the next major step in the project development process is preparation of a final EIS, the final EIS may document the decision. A statement to this fact, the conclusions reached and supporting information should be briefly summarized in the Summary Section of the final EIS.

B. Final EIS Reevaluation

There are two types of reevaluation required for a final EIS: consultation and written evaluation (23 CFR 771.129(b) and (c)). For the first, consultation, the final EIS is reevaluated prior to proceeding with major project approval (e.g., right-of-way acquisition, final design, and plans, specifications, and estimates (PS&E)) to determine whether the final EIS is still valid. The level of analysis and documentation, if any, should be agreed upon by the FHWA and HA. The analysis and documentation should focus on and be commensurate with the changes in the project and its surroundings, potential for controversy, and length of time since the last environmental action. For example, when the consultation occurs shortly after final EIS approval, an analysis usually should not be necessary. However, when it occurs nearly 3 years after final EIS approval, but before a written evaluation is required, the level of analysis should be similar to what normally would be undertaken for a written evaluation. Although written documentation is left to the discretion of the Division Administrator, it is suggested that each consultation be appropriately documented in order to have a record to show the requirements was met.

The second type of reevaluation is a written evaluation. It is required if the HA has not taken additional major steps to advance the project (i.e., has not received from FHWA authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the PS&E) <u>within any 3-year time period</u> after approval of the final EIS, the final supplemental EIS, or the last major FHWA approval action. The written evaluation should be prepared by the HA in consultation with FHWA and should address all current environmental requirements. The entire project should be revisited to assess any changes that have occurred and their effect on the adequacy of the final EIS.

There is no required format for the written evaluation. It should focus on the changes in the project, its surroundings and impacts and any new issues identified since the final EIS was approved. Field reviews, additional environmental studies (as necessary), and coordination with other agencies should be undertaken (as appropriate to address any new impacts or issues) and the results included in the written evaluation. The FHWA Division Office is the action office for the written evaluation. If it is determined that supplemental EIS is not needed, the project files should be document appropriately. In those rare cases where an EA is prepared to serve as the written evaluation, the files should clearly document whether new significant impacts were identified during the reevaluation process.

XII. SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENTS (EISs)

Whenever there are changes, new information, or further developments on a project which result in significant environmental impacts not identified in the most recently distributed version of the draft or final EIS, a supplemental EIS is necessary (40 CFR 1502.9(c)). If it is determined that the changes or new information do not result in new or different significant environmental impacts, the FHWA Division Administrator should document the determination. (After final EIS approval, this documentation could take the form of notation to the files; for a draft EIS, this documentation could be a discussion in the final EIS.)

A. Format and Content of a Supplemental EIS

There is no required format for a supplemental EIS. The supplemental EIS should provide sufficient information to briefly describe the proposed action, the reason(s) why a supplement is being prepared, and the status of the previous draft or final EIS. The supplemental EIS needs to address only those changes or new information that are the basis for preparing the supplement and were not addressed in the previous EIS (23 CFR 771.130(a)). Reference to and summarizing the previous EIS is preferable to repeating unchanged, but still valid, portions of the original document. For example, some items such as affected environment, alternatives, or impacts which are unchanged may be briefly summarized and reference. New environmental requirements which became effective after the previous EIS was prepared need to be addressed in the supplemental EIS to the extent they apply to the portion of the project being evaluated and are relevant to the subject of the supplement (23 CFR 771.130(a)). Additionally, to provide an up-to-date status of compliance with NEPA, it is recommended that the supplement summarize the results of any reevaluations that have been performed for portions of or the entire proposed action. By this inclusion, the supplement will reflect an up-to-date consideration of the proposed action and its effects on the human environment. When a previous EIS is referenced, the supplemental EIS transmittal letter should indicate that copies of the original (draft or final) EIS are available and will be provided to all requesting parties.

B. Distribution of a Supplemental EIS

A supplemental EIS will be reviewed and distributed in the same manner as a draft and final EIS (23 CFR 771.130(d)). (See Section VII for additional information.)

XIII. Appendices

Two appendices are included as follows:

Appendix A: Environmental Laws, Authority and Related Statues and Orders

Appendix B: Preparation and Processing of Notices of Intent.

ENVIRONMENTAL LAWS,
AUTHORITY AND RELATED STATUTES AND ORDERS

AUTHORITY:

42 United States Code (U.S.C.) 4321 et seq., National Environmental Policy Act of 1969, as amended.

23 U.S.C. 138 and 49 U.S.C. 303, Section 4(f) of the Department of Transportation (DOT) Act of 1966.

23 U.S.C. 109(h), (i), and (j) standards.

23 U.S.C. 128, Public Hearings.

23 U.S.C. 315, Rules, Regulations and Recommendations.

23 Code of Federal Regulations (CFR), Part 771, Environmental Impact and Related Procedures.

40 CFR 1500 et seq., Council on Environmental Quality, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.

49 CFR 1.48(b), DOT Delegations of Authority to the Federal Highway Administration.

DOT Order 5610.1c, Procedures for Considering Environmental Impacts, September 18, 1979, and subsequent revisions.

RELATED STATUTES AND ORDERS: The following is a list of major statutes and orders on the preparation of environmental documents.

7 U.S.C. 4201 et seq., Farmland Protection Policy Act of 1981.

16 U.S.C. 461 et seq., Archaeological and Historic Preservation Act; and 23 U.S.C. 305.

16 U.S.C. 470f, Section 106, 110(d) and 110(f) of the National Historic Preservation Act of 1966.

16 U.S.C. 662, Section 2 of the Fish and Wildlife Coordination Act.

16 U.S.C. 1452, 1456, Sections 303 and 307 of the Coastal Zone Management Act of 1972.

16 U.S.C. 1271 et. seq., Wild and Scenic Rivers Act.

16 U.S.C. 1536, Section 7 of the Endangered Species Act of 1973.

33 U.S.C. 1251 et seq., Clean Water Act of 1977.

33 U.S.C. 1241 et seq., Resource Conservation and Recovery Act.

42 U.S.C. 300(f) et seq., Safe Drinking Water Act.

42 U.S.C. 4371 et seq., Environmental Quality Improvement Act of 1970.

42 U.S.C. 4601 et seq., Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

42 U.S.C. 4901 et seq., Noise Control Act of 1972.

42 U.S.C. 9601 et seq., Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

42 U.S.C. 7401 et seq., Clean Air Act.

42 U.S.C. 2000d-d4, Title VI of the Civil Rights Act of 1964.

43 U.S.C. Coastal Barriers Resources Act of 1982.

Executive Order 11514, Protection and Enhancement of Environmental Quality, as amended by Executive Order 11991, dated May 24, 1977.

Executive Order 11593, Protection and Enhancement of the Cultural Environment, dated May 13, 1971, implemented by DOT Order 5650.1, dated November 20, 1972.

Executive Order 11988, Floodplain Management, dated May 24, 1977, implemented by DOT Order 5650.2, dated April 23, 1979.

Executive Order 11990, Protection of Wetlands, dated May 24, 1977, implemented by DOT Order 5660.1A, dated August 24, 1978.

Preparation and Processing of Notices of Intent

The CEQ regulations and Title 23, Code of Federal Regulations, Part 771, Environmental Impact and Related Procedures, require the Administration to publish a notice of intent in the Federal Register as soon as practicable after the decision is made to prepare an environmental impact statement (EIS) and before the scoping process (40 CFR 1501.7). A notice of intent will also be published when a decision is made to supplement a final EIS, but will not be necessary when preparing a supplement to a draft EIS (23 CFR 771.130(d)). The responsibility for preparing notices of intent has been delegated to Regional Federal Highway Administrators and subsequently redelegated to Division Administrators. The notice should be sent directly to the Federal Register at the address provided in Attachment 1 and a copy provided to the Project Development Branch (HEV-11), Office of Environmental Policy, and the appropriate Region Office.

In cases where a notice of intent is published in the Federal Register and a decision is made not to prepare the draft EIS or, when the draft EIS has been prepared, a decision is made not to prepare a final EIS, a revised notice of intent should be published in the Federal Register advising of the decision and the reasons for not preparing the EIS. This applies to future and current actions being processed.

Notices of intent should be prepared and processed in strict conformance with the guidelines in Attachment 1 in order to ensure acceptance for publication by the Office of the Federal Register. A sample of each notice of intent for preparation of an EIS and a supplemental EIS is provided as Attachment 2.

The Project Development Branch (HEV-11) will serve as the Federal Register contact point for notice of intent. All inquiries should be directed to that office.

GUIDELINES FOR PREPARATION AND PROCESSING OF NOTICES OF INTENT

FORMAT

1. Typed in black on white bond paper.

2. Paper size: 8-1/2″ x 11″.

3. Margins: Left at least 1-1/2″, all others 1″.

4. Spacing: All material double spaced (except title in heading).

5. Heading: Four items on first page at head of document (see Attachment 2):

- Billing Code No. 4910-22 typed in brackets or parentheses

- DEPARTMENT OF TRANSPORTATION (all upper case)

- Federal Highway Administration

- ENVIRONMENTAL IMPACT STATEMENT; COUNTY OR CITY, STATE (all upper case; single space)

6. Text: Five sections - AGENCY, ACTION, SUMMARY, FOR FURTHER INFORMATION CONTACT, AND SUPPLEMENTARY INFORMATION; each section title in upper case followed by colon (see Content (below) and Samples 1 and 2).

7. Closing:

- Include the Catalog of Federal Domestic Assistance number and title

- Issued on:
  (Indent 5 spaces and type or stamp in date when document is signed)

- Signature line
  (begin in middle of page; type name, title, and city under the signature; use name and title of the official actually signing the document (e.g., “John Doe, District Engineer,” not “John Doe, for the Division Administrator”))

8. Document should be neat and in form suitable for public inspection. Two or more notices of intent can be included in a single document by making appropriate revisions to the heading and text of the document.

CONTENT

1. AGENCY: Federal Highway Administration (FHWA), DOT.

2. ACTION: Notice of Intent.

3. SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in . . . .

4. FOR FURTHER INFORMATION CONTACT: This section should state the name and address of a person or persons within the FHWA Division Office who can answer questions about the proposed action and the EIS as it is being developed. The listing of a telephone number is optional. State and/or local officials may also be listed, but always following the FHWA contact person.

5. SUPPLEMENTARY INFORMATION: This section should contain:

a. a brief narrative description of the proposed action (e.g., location of the action, type of construction, length of the project, needs which will be fulfilled by the action);

For a supplement to a final EIS add: the original EIS number and approval date, and the reason(s) for preparing the supplement;

b. a brief description of possible alternatives to accomplish the goals of the proposed action (e.g., upgrade existing facility, do nothing (should always be listed), construction on new alignment, mass transit, multi-modal design); and

c. a brief description of the proposed scoping process for the particular action including whether, when, and where any scoping meeting will be held.

For a supplement to a final EIS: the scoping process is not required for a supplement; however, scoping should be discussed to the extend anticipated for the development of the supplement;

In drafting this section -

- use plain English
- avoid technical terms and jargon
- always refer to the proposed action or proposed project (e.g., the proposed action would ...)
- identify all abbreviations

- list FHWA first when other agencies (State or local) are listed as being involved in the preparation of the EIS

PROCESSING

1. Send three (3) duplicate originals each signed in ink by the issuing officer to:

   Office of the Federal Register
   National Archives and Records Administration
   Washington, D.C. 20408

2. The duplicates must be identical in all respects. The Federal Register will accept electrostatic copies as long as they are readable and individually signed.

3. Three (3) additional copies are required if material is printed on both sides. If a single original and two certified copies are sent, the statement "CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL" and the signature of a duly authorized certifying officer must appear on each certified copy.

4. A record should be kept of the date on which each notice is mailed to the Federal Register.

5. Send one (1) copy each to the Project Development Branch (HEV-11) and the Regional office.

S A M P L E 1

[4910-22]

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

ENVIRONMENTAL IMPACT STATEMENT: WASHINGTON COUNTY, WASHINGTON

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in Washington County, Washington.

FOR FURTHER INFORMATION CONTACT: James West, District Engineer, Federal Highway Administration, 400 Market Street, State Capital, Washington 98507, Telephone: (206) 222-2222.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Washington Department of Transportation and the Washington County Highway Department, will prepare an

environmental impact statement (EIS) on a proposal to improve U.S. Route 10 (U.S.10) in Washington County, Washington. The proposed improvement would involve the reconstruction of the existing U.S. 10 between the towns of Eastern and Western for a distance of about 20 miles.

Improvements to the corridor are considered necessary to provide for the existing and projected traffic demand. Also, included in this proposal is the replacement of the existing East End Bridge and a new interchange with Washington Highway 20 (W.H. 20) west of Eastern. Alternatives under consideration include (1) taking no action ; (2) using alternate travel modes; (3) widening the existing two-lane highway to four lanes; and (4) constructing a four-line, limited access highway on new location. Incorporated into and studied with the various build alternatives will be design variations of grade and alignment.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A series of public meetings will be held in Eastern and Western between May and June 1985. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing. No formal scoping meeting is planned at this time.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments, and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: March 26, 1985.

_____
John Doe
Division Administrator
Capital

S A M P L E 2

[4910-22]

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

ENVIRONMENTAL IMPACT STATEMENT: WASHINGTON COUNTY, WASHINGTON

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that a supplement to a final environmental impact statement will be prepared for a proposed highway project in Washington County, Washington.

FOR FURTHER INFORMATION CONTACT: James West, District Engineer, Federal Highway Administration, 400 Market Street, State Capital, Washington 98507, Telephone:(206) 222-2222.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Washington Department of Transportation and the Washington County Highway Department, will prepare a supplement to the final environmental impact statement (EIS) on a proposal to improve U.S. Route 10 (U.S. 10) in Washington County, Washington. The original EIS for the improvements (FHWA-WA-EIS-85-06-F) was approved on December 21, 1985. The proposed improvements to U.S. 10 provide a divided four-lane, limited access highway on new location between the towns of Western and Eastern for a distance of about 20 miles. Improvements to the corridor are considered necessary to provide for existing and projected traffic demand.

The location and preliminary design of the western 15 miles portion of the proposed facility, from Western to U.S. 20, have been approved. However, substantial changes in the local street system and land use development in Eastern have reduced the suitability of the approved location east of U.S. 20. The portion of the proposed facility east of U.S. 20 is now to be restudied to determine if a new route location and connection to I-90 would be appropriate.

Alternatives under consideration include (1) taking no action and terminating the facility at U.S. 20; (2) constructing a four-lane, limited access highway on the approved location; (3) widening the existing two-lane U.S. 10 to four lanes with a connection to U.S. 20; and (4) constructing a four-lane, limited access highway on new location and connecting to I-90. Incorporated into and studied with the various build alternatives will be design variations of grade and alignment.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A public meeting will be held in Eastern in August 1987. In addition, a public hearing will be held. Public notice will be given of the time and place of the meeting and hearing. The draft supplemental EIS will be available for public and agency review and comment prior to the public hearing. No formal scoping meeting will be held.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: April 23, 1987

_____
John Doe
Division Administrator
Capital

EXECUTIVE OFFICE OF THE PRESIDENT

COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20006

March 16, 1981

MEMORANDUM FOR FEDERAL NEPA LIAISONS, FEDERAL, STATE AND LOCAL OFFICIALS

AND OTHER PERSONS INVOLVED IN THE NEPA PROCESS

SUBJECT: Questions and Answers About the NEPA Regulations

During June and July of 1980, the Council on Environmental Quality, with the assistance and cooperation of EPA's EIS Coordinators from the ten EPA regions, held one-day meetings with federal, state and local officials in the ten EPA regional offices around the country. In addition, on July 10, 1980, CEQ conducted a similar meeting for the Washington, D.C. NEPA liaisons and persons involved in the NEPA process. At these meetings, CEQ discussed (a) the results of its 1980 review of Draft EIS's issued since the July 30, 1979 effective date of the NEPA regulations, (b) agency compliance with the Record of Decision requirements in Section 1505 of the NEPA regulations, and (c) CEQ's preliminary findings on how the scoping process is working. Participants at these meetings received copies of materials prepared by CEQ summarizing its oversight and findings.

These meetings also provided NEPA liaisons and other participants with an opportunity to ask questions about NEPA and the practical application of the NEPA regulations. A number of these questions were answered by CEQ representatives at the regional meetings. In response to the many requests from the agencies and other participants, CEQ has compiled forty of the most important or most frequently asked questions and their answers and reduced them to writing. The answers were prepared by the General Counsel of CEQ in consultation with the Office of Federal Activities of EPA. These answers, of course, do not impose any additional requirements beyond those of the NEPA regulations. This document does not represent new guidance under the NEPA regulations, but rather makes generally available to concerned agencies and private individuals the answers which CEQ has already given at the 1980 regional meetings. The answers also reflect the advice which the Council has given over the past two years to aid agency staff and consultants in their day-to-day application of NEPA and the regulations.

CEQ has also received numerous inquiries regarding the scoping process. CEQ hopes to issue written guidance on scoping later this year on the basis of its special study of scoping, which is nearing completion.

NICHOLAS C. YOST
General Counsel

INDEX

Range of Alternatives
Alternatives Outside the Capability of Applicant or Jurisdiction of Agency
No-Action Alternative
Agency's Preferred Alternative
Proposed Action v. Preferred Alternative
Environmentally Preferable Alternative
Difference Between Sections of EIS on Alternatives and Environmental Consequences
Early Application of NEPA
Applicant Who Needs Other Permits
Limitations on Actions During 30-Day Review Period for Final EIS
Limitations on Actions by an Applicant During EIS Process
Effective Date and Enforceability of the Regulations
Use of Scoping Before Notice of Intent to Prepare EIS
Rights and Responsibilities of Lead and Cooperating Agencies
Commenting Responsibilities of EPA
Third Party Contracts
Disclosure Statement to Avoid Conflict of Interest
Uncertainties About Indirect Effects of A Proposal
Mitigation Measures
Worst Case Analysis
Combining Environmental and Planning Documents
State and Federal Agencies as Joint Lead Agencies
Conflicts of Federal Proposal With Land Use Plans, Policies, and Controls
Environmental Impact Statements on Policies, Plans, or Programs
Appendices and Incorporation by Reference
Index and Keyword Index In EISs
List of Preparers
Advance of Xerox Copies of EIS
Responses to Comments
Adoption of EISs
Application of Regulations to Independent Regulatory Agencies
Supplements To Old EISs
Referrals
Records of Decision
Time Required for the NEPA Process
Environmental Assessments (EA)
Findings of No Significant Impact (FONSI)
Public Availability of EAs v. FONSIs
Mitigation Measures Imposed in EAs and FONSIs
Propriety of Issuing EA When Mitigation Reduces Impacts

QUESTIONS AND ANSWERS ABOUT THE NEPA REGULATIONS (1981)

1a. Q. *What is meant by "range of alternatives" as referred to in Section 1505.1(e)?* *

A. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).

1b. Q. *How many alternatives have to be discussed when there is an infinite number of possible alternatives?*

a. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.

2a. Q. *If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?*

A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.

2b. Q. *Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?*

A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).

3. Q. *What does the "no action" alternative include? If an agency is under a court order or legislative command to act, must the EIS address the "no action" alternative?*

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* References throughout the document are to the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act. 40 CFR Parts 1500-1508.

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases, "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.

Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would <u>not</u> be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. Section 1502.14(c). See Question 2 above. Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. Section 1500.1(a).

4a. Q. *What is the "agency's preferred alternative"?*

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

4b. Q. *Does the "preferred alternative" have to be identified in the Draft EIS and the Final EIS or just in the Final EIS?*

A. Section 1502.14(e) requires the section of the EIS on alternatives to "identify the agency's preferred alternative if one or more exists, in the draft statement, and identify such alternative in the final statement ..." This means that if the agency has a preferred alternative at the Draft EIS stage, that alternative must be labeled or identified as such in the Draft EIS. If the responsible federal official in fact has no preferred alternative at the Draft EIS stage, a preferred alternative need not be identified there. By the time the Final EIS is filed, Section 1502.14(e) presumes the existence of a preferred alternative and requires its identification in the Final EIS "unless another law prohibits the expression of such a preference."

4c. Q. *Who recommends or determines the "preferred alternative"?*

A. The lead agency's official with line responsibility for preparing the EIS and assuring its adequacy is responsible for identifying the agency's preferred alternative(s). The NEPA regulations do not dictate which official in an agency shall be responsible for preparation of EIS's, but agencies can identify this official in their implementing procedures, pursuant to Section 1507.3.

Even though the agency's preferred alternative is identified by the EIS preparer in the EIS, the statement must be objectively prepared and not slanted to support the choice of the agency's preferred alternative over the other reasonable and feasible alternatives.

5a. Q. *Is the "proposed action" the same thing as the "preferred alternative"?*

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand, the proposed action may be granting an application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case, the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

5b. Q. *Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?*

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an <u>amount</u> of information to be provided, but rather, prescribes a <u>level of treatment</u>, which may, in turn, require varying amounts of information, to enable a reviewer to evaluate and compare alternatives.

6a. Q. *What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decisions? How is the term "environment" used in the phrase?*

A. Section 1505.2(b) requires that, in cases where an EIS has been prepared, the Record of Decision (ROD) must identify all alternatives that were considered "... specifying the alternative or alternatives which were considered to be environmentally preferable." The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.

The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

6b. Q. *Who recommends or determines what is environmentally preferable?*

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event, the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases, commentors from other agencies and the public are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

7. Q. *What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?*

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. Section 1502.14. It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific environmental impacts or effects of each of the alternatives including the proposed action. Section 1502.16. In order to avoid duplication between these two sections, most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impacts in a comparative form, including charts or tables, thus, sharply defining the issues and providing a clear basis for choice among options. Section 1502.14. The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

8. Q. *Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions. What must and can agencies do to apply NEPA early in these cases?*

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their

proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program," such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely, in connection with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases, the agency must still evaluate independently the environmental issues and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. Q. *To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?*

A. Agencies must integrate the NEPA process into other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically, the agency must "provide for cases

where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall ensure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See Question 8).

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval of assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should be then contacted, and the NEPA process coordinated, to ensure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

10a. Q. *What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?*

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. Sections 1505.2 and 1506.10. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude preliminary planning or design work which is needed <u>to support an application</u> for permits or assistance. 1506.1(d).

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. Section 1506.1(c).

10.b. Q. *Do these limitations on action (described in Question 10a) apply to state or local agencies that have statutory delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?*

A. Yes, these limitations do apply, without any variation from their application to federal agencies.

11. Q. *What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within the agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?*

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to ensure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's statutory mission. For example, the agency might advise an applicant that, if it takes such action, the agency will not process its application.

12a. Q. *What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?*

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a <u>particular environmental document</u>, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable"; i.e., if it is feasible to do so, in preparing the final document. Section 1506.12(a).

12b. Q. *Are projects authorized by Congress before the effective date of the Council's regulations grandfathered?*

No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and subject to the Council's former Guidelines.

12c. Q. *Can a violation of the regulations give rise to a cause of action?*

A. While a trivial violation of the regulations would not give rise to an independent cause of action, such a cause of action would arise from a substantial violation of the regulations. Section 1500.3.

13. Q. *Can the scoping process be used in connection with preparation of an environmental assessment; i.e., before both the decision to proceed with an EIS and publication of a notice of intent?*

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. Q. *What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?*

A. After a lead agency has been designated (Section 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process — primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason, the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement." (Emphasis added.) The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. Q. *How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail by analysis and the quality of data in impact statements?*

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise, they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the <u>information</u> and <u>analysis</u> on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that Alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. Q. *What are the specific responsibilities of federal and state cooperating agencies to review draft EIS's?*

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in Section 1503.3.

14d. Q. *How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?*

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

15. Q. *Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under Section 309 of the Clean Air Act independent of its responsibility as a cooperating agency?*

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EIS's, and new regulations. 42 U.S.C. Sec. 7609. This obligation is independent of its role as a cooperating agency under the NEPA regulations.

16. Q. *What is meant by the term "third party contracts" in connection with the preparation of an EIS? See Section 1506.5(c). When can "third party contracts" be used?*

A. As used by EPA and other agencies, the term "third party contract" refers to the preparation of EIS's by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

17a. Q. *If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?*

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

17b. Q. *If the firm in fact has no promise of future work or other interest in the outcome of the proposal, may the firm later bid in competition with others for future work on the project if the proposed action is approved?*

A. Yes.

18. Q. *How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?*

A. The EIS must identify all the indirect effects that are known and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future landowners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchases have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

19a. Q. *What is the scope of mitigation measures that must be discussed?*

A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emission, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14.

19b. Q. *How should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?*

A. All relevant, reasonable mitigation measure that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies and, thus, would not be committed as part of the ROD's of these agencies. Section 1502.16(h), 1505.2(c). This will serve to alert agencies or officials who <u>can</u> implement these extra measures and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus, the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2. If there is a history of non-enforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or non-enforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

20a. Q. *When must a worst case analysis be included in an EIS?*

A. If there are gaps in relevant information or scientific uncertainty pertaining to an agency's evaluation of significant adverse impacts on the human environment, an agency must make clear that such information is lacking or that the uncertainty exists. An agency must include a worst case analysis of the potential impacts of the proposal and an indication of the probability or improbability of their occurrence if (a) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining the information are exorbitant, or (b) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known.

NEPA requires that impact statements, at a minimum, contain information to alert the public and Congress to all known possible environmental consequences of agency action. Thus, one of the federal government's most important obligations is to present to the fullest extent possible, the spectrum of consequences that may result from agency decisions, and the details of their potential consequences for the human environment.

20b. Q. *What is the purpose of a worst case analysis? How is it formulated and what is the scope of the analysis?*

A. The purpose of the analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider those potential consequences when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.

For example, if there are scientific uncertainty and gaps in the available information concerning the numbers of juvenile fish that would be entrained in a cooling water facility, the responsible agency must disclose and consider the possibility of the loss of the commercial or sport fishery.

In addition to an analysis of a low probability/catastrophic impact event, the worst case analysis should also include a spectrum of events of higher probability but less drastic impact.

21. Q. *Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?*

A. Section 1502.25 of the regulations requires that draft EIS's be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork.

However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report of land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land-use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS, and vice versa. This is a reasonable functional separation of the documents: The EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both "EIS" and "management plan" or "project report." This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EIS's also satisfy the requirements for a project report.

22. Q. *May State and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant State Environmental Policy Act? How do they resolve differences in perspective where, for example, national and local needs may differ?*

A. Under Section 1501.5(b), federal, State or local agencies, as long as they include at least one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges State and local agencies and the relevant federal agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments, and the preparation of joint EIS's under NEPA and the relevant "little NEPA" State laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved State or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. Section 1506.2(d). (See Question 23).

Because there may be differences in perspective as well as conflicts among federal, State and local goals for resource management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how State and local interests have been accommodated or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land-use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, State and federal decisionmakers.

23a. Q. *How should an agency handle potential conflicts between a proposal and the objectives of federal, State or local land-use plans, policies and controls for the area concerned? See Section 1502.16(c).*

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans

are finished (see Question 23b below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land-use plans and policies and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.

23b. Q. *What constitutes a "land use plan or policy" for purposes of this discussion?*

A. The term "land use plans," includes all types of formally adopted documents for land-use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B, and C planning process, should also be included even though they are incomplete.

The term "policies" includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process or a formally adopted policy statement of the local, regional or state executive branch, even if it has not yet been formally adopted by the local, regional or state legislative body.

23c. Q. *What options are available for the decisionmaker when conflicts with such plans or policies are identified?*

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

24a. Q. *When are EIS's required on policies, plans or programs?*

A. An EIS must be prepared if an agency proposed to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

24b. Q. *When is an area-wide or overview EIS appropriate?*

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or

geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. Q. *What is the function of tiering in such cases?*

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EIS's. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

25a. Q. *When is it appropriate to use appendices instead of including information in the body of an EIS?*

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodology, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion, then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for response to comments.)

25b. Q. *How does an appendix differ from incorporation by reference?*

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus, the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by

EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EIS's, research papers in the general literature, technical background papers or other material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available, either by citing the literature, furnishing copies to central locations, or sending copies directly to commentors upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

26a. Q. *How detailed must an EIS index be?*

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

26b. Q. *Is a keyword index required?*

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example, it could consist of 20 terms which describe the most significant aspects of an EIS that a future research would need — type of proposal, type of impacts, type of environment, geographical area, sampling or modeling methodologies used. This technique permits the compilation of EIS data banks by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EIS's it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

27a. Q. *If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?*

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

27b. Q. *Should agency staff involved in reviewing and editing the EIS also be included in the list of preparers?*

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

27c. Q. *How much information should be included on each person listed?*

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had primary responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines), and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

28. Q. *May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?*

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires Federal agencies to file EIS's with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiching of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

29a. Q. *What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?*

A. Appropriate responses to comments are described in Section 1503.4. Normally, the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentor said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. Q. *How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?*

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

Section 1503.4(a). For example, a commentor on a draft EIS on a coal-fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and set-aside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2000, 4000, or 6000 units. A commentor on the draft EIS might urge the consideration of constructing 5000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all reasonable alternatives.

30. Q. *When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part*

of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. Section 1506.3(a), (c). If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees stating publicly why it did so. Section 1506.3(a).

A cooperating agency with jurisdiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. Section 1506.3(b).

31a. Q. *Do the Council's NEPA regulations apply to independent regulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission*?

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural provisions of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies; however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. Sections 1500.3, 1500.6, 1507.1 and 1507.3.

31b. Q. *Can an Executive Branch agency like the Department of the Interior adopt an EIS prepared by an independent regulatory agency such as FERC?*

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may, in accordance with Section 1506.3, adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case, the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus, forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made

applicable to all federal agencies in order to avoid this result and to achieve uniform application and efficiency of the NEPA process.

32. Q. *Under what circumstances do old EIS's have to be supplemented before taking action on a proposal?*

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EIS's that are more than five years old should be carefully re-examined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

33a. Q. *When must a referral of an interagency disagreement be made to the Council?*

A. The Council's referral procedure is a pre-decision referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

33b. Q. *May a referral be made after the issuance of a Record of Decision?*

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). Section 1506.10(b)(2). Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

34a. Q. *Must Records of Decision (ROD's) be made public? How should they be made available?*

A. Under the regulations, agencies must prepare a "concise public record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

34b. Q. *May the summary section in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?*

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency make take final

action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

34c. Q. *What provisions should Records of Decision contain pertaining to mitigation and monitoring?*

A. Lead agencies "shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals" and shall "condition funding of actions on mitigation." Section 1505.3. Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practicable mitigation measures have been adopted, and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3(a), (b). If the proposal is to be carried out by the federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment or incorporate by reference the portions of the EIS that do so.

34d. Q. *What is the enforceability of a Record of Decision?*

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisions and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

35. Q. *How long should the NEPA process take to complete?*

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large, complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EIS's may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data

which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months and, in many cases, substantially less, as part of the normal analysis and approval process for the action.

36a. Q. *How long and detailed must an environmental assessment (EA) be?*

A. The environmental assessment is a concise public document which has three defined functions: (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when no EIS is necessary (i.e., it helps to identify better alternatives and mitigation measures); and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions of detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EA's to not more than approximately 10-15 pages. Some agencies expressly provide page guidelines (e.g., 10-15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

36b. Q. *Under what circumstances is a lengthy EA appropriate?*

A. Agencies should avoid preparing lengthy EA's except in unusual cases where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 <u>and</u> where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

37a. Q. *What is the level of detail of information that must be included in a finding of no significant impact (FONSI)?*

A. The FONSI is a document in which the agency briefly explains the reasons why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The finding itself need not be detailed but must succinctly state the reasons for deciding that the action will have no significant environmental effects and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference the environmental assessment.

37b. Q. *What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?*

A. Public review is necessary, for example, (a) if the proposal is a borderline case; i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal

which is or is closely similar to one which normally requires preparation of an EIS. Section 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Section 2(a)(4); E.O. 11990, Section 2(b).

38. Q. *Must EA's and FONSI's be made public? If so, how should this be done?*

A. Yes, they must be available to the public. Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EA's and FONSI's. These are public "environmental documents" under Section 1506.6(b) and, therefore, agencies must give public notice of their availability. A combination of methods may be used to give notice, and the methods should be tailored to the needs of particular cases. Thus, a Federal Register notice of availability of the documents, coupled with notices in national publications and mailed to interested national groups, might be appropriate for proposals that are national in scope. Local newspaper notices may be more appropriate for regional or site-specific proposals.

The objective, however, is to notify all interested or affected parties. If this is not being achieved, then the methods should be re-evaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations.

39. Q. *Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no requirement in the regulations in such cases for a formal Record of Decision?*

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

40. Q. *If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?*

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such <u>possible</u> mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measure through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate downstream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decisions to do an EIS, as long as the agency or applicant resubmits the entire proposal, and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

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Federal Highway Administration

OFFICE OF PLANNING, ENVIRONMENT, AND REALTY
PROJECT DEVELOPMENT AND ENVIRONMENTAL REVIEW
WASHINGTON, DC 20590

SECTION 4(f) POLICY PAPER

JULY 20, 2012

FHWA SECTION 4(f) POLICY PAPER
TABLE OF CONTENTS

PART I -- SECTION 4(f) OVERVIEW 1

1.0 INTRODUCTION 1
1.1 Purpose 1
1.2 Agency Authority and Responsibilities 2
1.2.1 Role of U.S. DOT 2
1.2.2 Role of Officials with Jurisdiction 3
1.3 When Does Section 4(f) Apply? 4

2.0 BACKGROUND 5

3.0 ANALYSIS PROCESS 5
3.1 Identification of Section 4(f) Properties 5
3.2 Assessing *Use* of Section 4(f) Properties 6
3.3 Approval Options 8
3.3.1 Determination of a *De minimis* Impact to Section 4(f) Property 8
3.3.2 Programmatic Section 4(f) Evaluations 10
3.3.3 Individual Project Section 4(f) Evaluations 11
3.3.3.1 Feasible and Prudent Avoidance Alternatives 11
3.3.3.2 Alternative with Least Overall Harm 15
3.4 Examples of Section 4(f) Approvals 17
3.5 All Possible Planning to Minimize Harm 19

4.0 Documentation 20

PART II – QUESTIONS AND ANSWERS REGARDING SECTION 4(f) APPLICABILITY AND COMPLIANCE 23

IDENTIFICATION OF SECTION 4(F) PROPERTIES
1.Public Parks, Recreation Areas, and Wildlife and Waterfowl Refuges 23
2.Historic Sites 27
3.Archeological Resources 29
4.Public Multiple-Use Land Holdings 31
5.Tribal Lands and Indian Reservations 31
6.Traditional Cultural Places 32

USE OF SECTION 4(F) PROPERTIES
7.Use of Section 4(f) Property 32
8.Historic Bridges, Highways and Other Transportation Facilities 36

OFFICIALS WITH JURISDICTION; CONSULTATION; AND DECISIONMAKING
9. Officials with Jurisdiction 38
10. Section 4(f) Evaluations for Tiered Projects 42

***DE MINIMIS* IMPACT DETERMINATIONS**
11. De minimis Impact Determinations for Parks, Recreation Areas, and Wildlife and Waterfowl Refuges 43

12. *De minimis* Impact Determinations on Historic Sites 45
13. Other *de minimis* Impact Considerations 47

ADDITIONAL EXAMPLES AND OTHER CONSIDERATIONS
14. School Playgrounds 47
15. Trails and Shared Use Paths 48
16. User or Entrance Fees 50
17. Transportation Enhancement Projects 50
18. Golf Courses 53
19. Museums, Aquariums, and Zoos 53
20. Fairgrounds 54
21. Bodies of Water 54
22. Scenic Byways 56
23. Cemeteries 56
24. Joint Development (Park with Highway Corridor) 57
25. Planned Section 4(f) Properties 57
26. Late Designation and Late Discovery of Section 4(f) Properties 58
27. Temporary Recreational Occupancy or Uses of Highway ROW 58
28. Tunneling or Bridging (Air Rights) and Section 4(f) Property 59
29. Mitigation Activities on Section 4(f) Property 59
30. Emergencies 60
31. Section 6(f) and Other Non-U.S. DOT Grant-in-Aid Program Requirements 61

SECTION 4(f) FLOWCHART 62

GLOSSARY OF ACRONYMS 63

FHWA SECTION 4(f) POLICY PAPER

PART I – SECTION 4(f) OVERVIEW

1.0 Introduction

This *Section 4(f) Policy Paper* supplements the Federal Highway Administration's (FHWA) regulations governing the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites for Federal highway projects. Although these requirements are now codified at 23 U.S.C. § 138 and 49 U.S.C. § 303, this subject matter remains commonly referred to as Section 4(f) because the requirements originated in Section 4(f) of the *Department of Transportation Act of 1966* (Pub. L. 89-670, 80 Stat. 931). The *Section 4(f) Policy Paper* replaces the FHWA's 2005 edition of the document. The FHWA's Section 4(f) regulations, entitled *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites*, are codified at 23 CFR Part 774. Many of the terms used in this *Section 4(f) Policy Paper* are defined in the regulation at 23 CFR 774.17.

1.1 Purpose

This *Section 4(f) Policy Paper* was written primarily to aid FHWA personnel with administering Section 4(f) in a consistent manner. In situations where a State has assumed the FHWA responsibility for Section 4(f) compliance, this guidance is intended to help the State fulfill its responsibilities. Such situations may arise when Section 4(f) responsibilities are assigned to the State in accordance with 23 U.S.C. §§ 325, 326, 327, or a similar applicable law. Unless otherwise noted, references to "FHWA" in this document include a State department of transportation (State DOT) acting in FHWA's capacity pursuant to an assumption of FHWA's responsibilities under such laws.

This guidance is also intended to help State DOTs and other applicants for grants-in-aid for highway projects to plan projects that minimize harm to Section 4(f) properties. Experience demonstrates that when Section 4(f) is given consideration early in project planning, the risk of a project becoming unnecessarily delayed due to Section 4(f) processing is minimized. Ideally, applicants should strive to make the preservation of Section 4(f) properties, along with other environmental concerns, part of their long and short range transportation planning processes. Information and tools to help State DOTs, metropolitan planning organizations and other applicants accomplish this goal are available on FHWA's Planning and Environmental Linkages website located at: http://environment.fhwa.dot.gov/integ/index.asp.

This *Section 4(f) Policy Paper* is based on and is intended to reflect: the statute itself, the legislative history of the statute; the requirements of the Section 4(f) regulations; relevant court decisions; and FHWA's experience with implementing the statute over four decades, including interactions with the public and with agencies having jurisdiction over Section 4(f) properties. The information presented is not regulatory and does not create any right of action

that may be enforced by a private citizen in a court of law. This *Section 4(f) Policy Paper* sets forth the official policy of FHWA on the applicability of Section 4(f) to various types of land and resources, and other Section 4(f) related issues. While the other United States Department of Transportation (U.S. DOT) agencies may choose to rely upon some or all of this *Section 4(f) Policy Paper* as a reference, it was not written as guidance for any U.S. DOT agency other than FHWA.

This guidance addresses the majority of situations related to Section 4(f) that may be encountered in the development of a transportation project. If a novel situation or project arises which does not completely fit the situations or parameters described in this *Section 4(f) Policy Paper*, the relevant FHWA Division Office,[1] the FHWA Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Service Team, and/or the Office of Chief Counsel should be consulted as appropriate for assistance. For additional information on Section 4(f) beyond that which is contained in this *Section 4(f) Policy Paper*, readers should refer to the FHWA Environmental Review Toolkit.[2]

1.2 Agency Authority and Responsibilities

1.2.1 Role of U.S. DOT

The authority to administer Section 4(f) and make Section 4(f) approvals resides with the Secretary of the U.S. DOT. The statute designates the Secretaries of the Interior, Housing and Urban Development, and Agriculture, as well as the States, for consultation roles as appropriate. This means that the Secretary of Transportation is responsible for soliciting and considering the comments of these other entities, as well as the appropriate official(s) with jurisdiction over the Section 4(f) property, as part of the administration of Section 4(f). However, the ultimate decision maker is the Secretary of Transportation. In a number of instances, the Section 4(f) regulations require the concurrence of various officials in limited circumstances as discussed below.

The Secretary of Transportation has delegated the authority for administering Section 4(f) to the FHWA Administrator in 49 CFR 1.48. The authority has been re-delegated to the FHWA Division Administrators, the Associate Administrator for Planning, Environment, and Realty, and the Federal Lands Highway Associate Administrator by *FHWA Order M1100.1A,* Chapter 5, Section 17e and Chapter 6, Section 7d. Any approval of the use of Section 4(f) property, other than a use with a *de minimis* impact or a use processed with an existing programmatic Section 4(f) evaluation is subject to legal sufficiency review by the Office of Chief Counsel.

[1] This may be a Federal Lands Highway Division Office if the project is located on Federal lands.
[2] http://www.environment.fhwa.dot.gov/index.asp

1.2.2 Role of Officials with Jurisdiction

Consultation

The regulations define the entities and individuals who are considered the officials with jurisdiction for various types of property in 23 CFR 774.17. In the case of historic sites, the officials with jurisdiction are the State Historic Preservation Officer (SHPO), or, if the property is located on tribal land, the Tribal Historic Preservation Officer (THPO).[3] If the property is located on tribal land but the relevant Indian tribe has not assumed the responsibilities of the SHPO, then a representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the Advisory Council on Historic Preservation (ACHP) is involved in consultation concerning a property under Section 106 of the *National Historic Preservation Act* (NHPA) (16 U.S.C. § 470), the ACHP is also an official with jurisdiction over that resource for the purposes of Section 4(f). When the Section 4(f) property is a National Historic Landmark (NHL), the designated official of the National Park Service is also an official with jurisdiction over that resource for the purposes of Section 4(f). In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the officials with jurisdiction are the officials 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.

Coordination

The regulations require coordination with the official(s) with jurisdiction for the following situations prior to Section 4(f) approval (recognizing that additional coordination may be required under other statutes or regulations):

- Prior to making approvals, (23 CFR 774.3(a));
- Determining least overall harm, (23 CFR 774.3(c));
- Applying certain programmatic Section 4(f) evaluations, (23 CFR 774.5(c));
- Applying Section 4(f) to properties that are subject to Federal encumbrances, (23 CFR 774.5(d));
- Applying Section 4(f) to archeological sites discovered during construction, (23 CFR 774.9(e));
- Determining if a property is significant, (23 CFR 774.11(c));
- Determining application to multiple-use properties, (23 CFR 774.11(d));
- Determining applicability of Section 4(f) to historic sites, (23 CFR 774.11(e));
- Determining constructive use, (23 CFR 774.15(d));
- Determining if proximity impacts will be mitigated to equivalent or better condition, (23 CFR 774.15(f)(6)); and
- Evaluating the reasonableness of measures to minimize harm, (23 CFR 774.3(a)(2) and 774.17).

Lack of Objection

The regulations require a finding that the official(s) with jurisdiction have been consulted and "have not objected" in the following situations:

[3] *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities (16 U.S.C. § 470*w*).

- When applying the exception for restoration, rehabilitation, or maintenance of historic transportation facilities, (23 CFR 774.13(a)); and
- When applying the exception for archeological sites of minimal value for preservation in place. (23 CFR 774.13(b)(2)).

Concurrence

The regulations require written concurrence of the official(s) with jurisdiction in the following situations:

- Finding there are no adverse effects prior to making *de minimis* impact findings, (23 CFR 774.5(b));
- Applying the exception for temporary occupancies, (23 CFR 774.13(d)); and
- Applying the exception for transportation enhancement activities and mitigation activities, (23 CFR 774.13(g)).

1.3 When Does Section 4(f) Apply?

The statute itself specifies that Section 4(f) applies when a U.S. DOT agency approves a transportation program or project that uses Section 4(f) property. The FHWA does not currently approve any transportation programs; thus, Section 4(f) is limited to project approvals. In addition, for the statute to apply to a proposed project there are four conditions that must all be true:

1) The project must require an approval[4] from FHWA in order to proceed;
2) The project must be a transportation project;[5]
3) The project must require the use of land from a property protected by Section 4(f) (*See* 23 U.S.C. § 138(a) and 49 U.S.C. § 303(a)); and
4) None of the regulatory applicability rules or exceptions applies (*See* 23 CFR 774.11 and 13).

Examples of the types of proposed situations where Section 4(f) would not apply include, but are not limited to:

1) A transportation project being constructed solely using State or local funds and not requiring FHWA approval.
2) A project intended to address a purpose that is unrelated to the movement of people, goods, and services from one place to another (i.e., a purpose that is not a transportation purpose).
3) A project to be located adjacent to a Section 4(f) property, causing only minor proximity impacts to the Section 4(f) property (i.e., no constructive use).
4) A project that will use land from a privately owned park, recreation area, or refuge.

Additional information about these examples and many other examples of situations where Section 4(f) approval is or is not required is located in the questions and answers provided in Part II of this

[4] Examples include the obligation of construction funds and the approval of access modifications on the Interstate System.

[5] Most projects funded by FHWA are transportation projects; however, in a few instances certain projects eligible for funding, such as the installation of safety enhancement barriers on a bridge, have been determined not to have a transportation purpose and therefore do not require a Section 4(f) approval.

Section 4(f) Policy Paper. In situations where FHWA has determined that Section 4(f) does not apply, the project file should contain sufficient information to demonstrate the basis for that determination (*See* Section 4.0, *Documentation*).

2.0 Background

The FHWA originally issued the *Section 4(f) Policy Paper* in 1985, with minor amendments in 1989. A 2005 edition provided comprehensive new guidance on when and how to apply the provisions of Section 4(f), including how to choose among alternatives that all would use Section 4(f) property. Later in 2005, Congress substantially amended Section 4(f) in the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (SAFETEA-LU), (Pub. L. 109-59 (Aug. 10, 2005), 119 Stat. 1144). SAFETEA-LU directed the U.S. DOT to revise its Section 4(f) regulations. In response, FHWA and the Federal Transit Administration consulted with interested agencies and environmental organizations before drafting a notice of proposed rulemaking. The notice of proposed rulemaking was published for comment in the Federal Register (71 *Fed. Reg*. 42611, July 27, 2006).

Following careful consideration of the comments submitted, the new Section 4(f) regulations were issued in March 2008 (73 *Fed. Reg.*13368, March 12, 2008). A minor technical correction followed shortly thereafter (73 *Fed. Reg.* 31609, June 3, 2008). The new Section 4(f) regulations clarified the feasible and prudent standard, implemented a new method of compliance for *de minimis* impact situations, and updated many other aspects of the regulations, including the adoption of regulatory standards based upon the 2005 edition of the *Section 4(f) Policy Paper* for choosing among alternatives that all use Section 4(f) property. This 2012 edition of the *Section 4(f) Policy Paper* includes guidance for all of the changes promulgated in the Section 4(f) regulations in 2008.

If any apparent discrepancy between this *Section 4(f) Policy Paper* and the Section 4(f) regulation should arise, the regulation takes precedence. The previous editions of this *Section 4(f) Policy Paper* are no longer in effect.

3.0 Analysis Process

3.1 Identification of Section 4(f) Properties

Section 4(f) requires consideration of:

- Parks and recreational areas of national, state, or local significance that are both publicly owned and open to the public
- Publicly owned wildlife and waterfowl refuges of national, state, or local significance that are open to the public to the extent that public access does not interfere with the primary purpose of the refuge[6]

[6] Since the primary purpose of a refuge may make it necessary for the resource manager to limit public access for the protection of wildlife or waterfowl, FHWA's policy is that these facilities are not required to always be open to

- Historic sites of national, state, or local significance in public or private ownership regardless of whether they are open to the public (*See* 23 U.S.C. § 138(a) and 49 U.S.C. § 303(a))

When private institutions, organizations, or individuals own parks, recreational areas or wildlife and waterfowl refuges, Section 4(f) does not apply, even if such areas are open to the public. However, if a governmental body has a permanent proprietary interest in the land (such as a permanent easement, or in some circumstances, a long-term lease), FHWA will determine on a case-by-case basis whether the particular property should be considered publicly owned and, thus, if Section 4(f) applies (*See* Questions 1B and 1C). Section 4(f) also applies to all historic sites that are listed, or eligible for inclusion, in the National Register of Historic Places (NR) at the local, state, or national level of significance regardless of whether or not the historic site is publicly owned or open to the public.

A publicly owned park, recreational area or wildlife or waterfowl refuge must be a significant resource for Section 4(f) to apply (*See* 23 CFR 774.11(c) and Question 1A). Resources which meet the definitions above are presumed to be significant unless the official with jurisdiction over the site concludes that the entire site is not significant. The FHWA will make an independent evaluation to assure that the official's finding of significance or non-significance is reasonable. In situations where FHWA's determination contradicts and overrides that of the official with jurisdiction, the reason for FHWA's determination should be documented in the project file and discussed in the environmental documentation for the proposed action.

Section 4(f) properties should be identified as early as practicable in the planning and project development process in order that complete avoidance of the protected resources can be given full and fair consideration (*See* 23 CFR 774.9(a)). Historic sites are normally identified during the process required under Section 106 of the NHPA and its implementing regulations (*See* 36 CFR Part 800). Accordingly, the Section 106 process should be initiated and resources listed or eligible for listing in the NR identified early enough in project planning or development to determine whether Section 4(f) applies and for avoidance alternatives to be developed and assessed (*See* 23 CFR 774.11(e)).

3.2 Assessing *Use* of Section 4(f) Properties

Once Section 4(f) properties have been identified in the study area, it is necessary to determine if any of them would be used by an alternative or alternatives being carried forward for detailed study. *Use* in the Section 4(f) context is defined in 23 CFR 774.17 (*Definitions*) and the term has very specific meaning (*see* also Question 7 in this *Section 4(f) Policy Paper*). Any potential use of Section 4(f) property should always be described in related documentation consistent with this definition, as well as with the language from 23 CFR 774.13(d) (*Exceptions- temporary occupancy*) and 23 CFR 774. 15 (*Constructive Use Determinations*), as applicable. It is not recommended to substitute similar terminology such as affected, impacted, or encroached upon in describing when a use occurs, as this may cause confusion or misunderstanding by the reader.

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the public. Some areas of a refuge may be closed to public access at all times or during parts of the year to accommodate preservation objectives.

The most common form of use is when land is permanently incorporated into a transportation facility. This occurs when land from a Section 4(f) property is either purchased outright as transportation right-of-way or when the applicant for Federal-aid funds has acquired a property interest that allows permanent access onto the property such as a permanent easement for maintenance or other transportation-related purpose.

The second form of use is commonly referred to as temporary occupancy and results when Section 4(f) property, in whole or in part, is required for project construction-related activities. The property is not permanently incorporated into a transportation facility but the activity is considered to be adverse in terms of the preservation purpose of Section 4(f). Section 23 CFR 774.13(d) provides the conditions under which "temporary occupancies of land…are so minimal as to not constitute a use within the meaning of Section 4(f)." If all of the conditions in Section 774.13(d) are met, the temporary occupancy does not constitute a use. If one or more of the conditions for the exception cannot be met, then the Section 4(f) property is considered used by the project even though the duration of onsite activities is temporary. Written agreement by the official(s) with jurisdiction over the property with respect to all the conditions is necessary and should be retained in the project file. Assurances that documentation will eventually be obtained via subsequent negotiations are not acceptable. Also, it is typical that the activity in question will be detailed in project plans as an integral and necessary feature of the project.

The third and final type of use is called constructive use. A constructive use involves no actual physical use of the Section 4(f) property via permanent incorporation of land or a temporary occupancy of land into a transportation facility. A constructive use occurs when the proximity impacts of a proposed project adjacent to, or nearby, a Section 4(f) property result in substantial impairment to the property's activities, features, or attributes that qualify the property for protection under Section 4(f). As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance, will be meaningfully reduced or lost. The types of impacts that may qualify as constructive use, such as increased noise levels that would substantially interfere with the use of a noise sensitive feature such as a campground or outdoor amphitheater, are addressed in 23 CFR 774.15. A project's proximity to a Section 4(f) property is not in itself an impact that results in constructive use. Also, the assessment for constructive use should be based upon the impact that is directly attributable to the project under review, not the overall combined impacts to a Section 4(f) property from multiple sources over time. Since constructive use is subjective, FHWA's delegation of Section 4(f) authority to the FHWA Division Offices requires consultation with the Headquarters Office of Project Development and Environmental Review prior to finalizing any finding of constructive use.

In making any finding of use involving Section 4(f) properties, it is necessary to have up to date right-of-way information and clearly defined property boundaries for the Section 4(f) properties. For publicly owned parks, recreation areas, and refuges, the boundary of the Section 4(f) resource is generally determined by the property ownership boundary. Up-to-date right-of-way records are needed to ensure that ownership boundaries are accurately documented. For historic properties, the boundary of the Section 4(f) resource is generally the NR boundary. If the historic property boundary of an eligible or listed site has not been previously established via

Section 106 consultation, care should be taken in evaluating the site with respect to eligibility criteria. Depending upon its contributing characteristics, the actual legal boundary of the property may not ultimately coincide with the NR boundary. Since preliminary engineering level of detail (not final design) is customary during environmental analyses, it may be necessary to conduct more detailed preliminary design in some portions of the study area to finalize determinations of use.

Late discovery and/or late designations of Section 4(f) properties subsequent to completion of environmental studies may also occur. Each situation must be assessed to determine if the change in Section 4(f) status results in a previously unidentified need for a Section 4(f) approval pursuant to 23 CFR 774.13(c) (*See* Question 26). The determination should be considered and documented, as appropriate, in any re-evaluation of the project.

3.3 Approval Options

When FHWA determines that a project as proposed may use Section 4(f) property, there are three methods available for FHWA to approve the use:

1) Preparing a *de minimis* impact determination;
2) Applying a programmatic Section 4(f) evaluation; or
3) Preparing an individual Section 4(f) evaluation.

While the applicant will participate in gathering and presenting the documentation necessary for FHWA to make a Section 4(f) approval, the actual approval action is the FHWA's responsibility. The three approval options are set out in 23 CFR 774.3 and are discussed below**.**

3.3.1 Determination of a *De Minimis* Impact to Section 4(f) Property

A *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation or enhancement measures), results in either:

1) A Section 106 finding of no adverse effect or no historic properties affected on a historic property; or
2) A determination that the project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under Section 4(f).

In other words, a *de minimis* impact determination is made for the net impact on the Section 4(f) property. The final project NEPA decision document must include sufficient supporting documentation for any measures to minimize harm that were applied to the project by FHWA in order to make the *de minimis* impact determination (*See* 23 CFR 774.7(b)). A use of Section 4(f) property having a *de minimis* impact can be approved by FHWA without the need to develop and evaluate alternatives that would avoid using the Section 4(f) property. A *de minimis* impact determination may be made for a permanent incorporation or temporary occupancy of Section 4(f) property.

A *de minimis* impact determination requires agency coordination and public involvement as specified in 23 CFR 774.5(b). The regulation has different requirements depending upon the type of Section 4(f) property that would be used. For historic sites, the consulting parties identified in accordance with 36 CFR Part 800[7] must be consulted. The official(s) with jurisdiction must be informed of the intent to make a *de minimis* impact determination and must concur in a finding of no adverse effect or no historic properties affected in accordance with 36 CFR Part 800. Compliance with 36 CFR Part 800 satisfies the public involvement and agency coordination requirement for *de minimis* impact findings for historic sites.

For parks, recreation areas, or wildlife and waterfowl refuges, the official(s) with jurisdiction over the property must be informed of the intent to make a *de minimis* impact determination, after which an opportunity for public review and comment must be provided. After considering any comments received from the public, if the official(s) with jurisdiction concurs in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection, then FHWA may finalize the *de minimis* impact determination. The public notice and opportunity for comment as well as the concurrence for a *de minimis* impact determination may be combined with similar actions undertaken as part of the NEPA process. If a proposed action does not normally require public involvement, such as for certain minor projects covered by a categorical exclusion, an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided. The opportunity for public input may be part of a public meeting or another form of public involvement. The final determination should be made by the FHWA Division Administrator (or in the case of Federal Lands, the Division Engineer) and all supportive documentation retained as part of the project file (*See* Section 4.0, *Documentation*).

A *de minimis* impact determination (*see* Part II, Questions 11-12) is a finding. It is not an evaluation of alternatives and no avoidance or feasible and prudent avoidance alternative analysis is required. The definition of all possible planning in 23 CFR 774.17 explains that a *de minimis* impact determination does not require the traditional second step of including all possible planning to minimize harm because avoidance, minimization, mitigation, or enhancement measures are included as part of the determination.

A *de minimis* impact determination must be supported with sufficient information included in the project file to demonstrate that the *de minimis* impact and coordination criteria are satisfied (23 CFR 774.7(b)). The approval of a *de minimis* impact should be documented in accordance with the documentation requirements in 23 CFR 774.7(f). These requirements may be satisfied by including the approval in the NEPA documentation – i.e., an Environmental Assessment (EA), Environmental Impact Statement (EIS), or Categorical Exclusion (CE) determination, Record of Decision (ROD), or Finding of No Significant Impact (FONSI), -- or in an individual Section 4(f) evaluation when one is prepared for a project. When an individual Section 4(f) evaluation is required for a project in which one or more *de minimis* impact determinations will also be made, it is recommended that the individual Section 4(f) evaluation include the relevant documentation to support the proposed *de minimis* impact determination(s).

In situations where FHWA concludes in the individual Section 4(f) evaluation that there is no

[7] Regulations implementing Section 106 of the NHPA.

feasible and prudent avoidance alternative and there are two or more alternatives that use Section 4(f) property, a least overall harm analysis will be necessary pursuant to 23 CFR 774.3(c) (S*ee* Section 3.3.3.2, *Alternative with Least Overall Harm*). In such instances, while the *de minimis* impact will be considered in that analysis, the *de minimis* impact is unlikely to be a significant differentiating factor between alternatives because the net harm resulting from the *de minimis* impact is negligible. The determination of least overall harm will depend upon a comparison of the factors listed in the regulation, 23 CFR 774.3(c)(1).

3.3.2 Programmatic Section 4(f) Evaluations

Programmatic Section 4(f) evaluations are a time-saving procedural option for preparing individual Section 4(f) evaluations (discussed in Section 3.3.3) for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the FHWA based on experience with many projects that have a common fact pattern from a Section 4(f) perspective. Through applying a specific set of criteria, based upon common experience that includes project type, degree of use and impact, the evaluation of avoidance alternatives is standardized and simplified. An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in that programmatic evaluation are met. Programmatic evaluations can be nationwide, region-wide, or statewide. The development of any programmatic evaluation, including region-wide and statewide, must be coordinated with the FHWA Office of Project Development and Environmental Review and the FHWA Office of Chief Counsel.

As of the date of publication of this *Section 4(f) Policy Paper*, the FHWA has issued five nationwide programmatic Section 4(f) evaluations:[8]

1) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects
2) Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges
3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites
4) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges
5) Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property

Before being adopted, all of the nationwide programmatic Section 4(f) evaluations were published in draft form in the *Federal Register* for public review and comment. They were also provided to appropriate Federal agencies, including the Department of the Interior (U.S. DOI), for review. Each programmatic Section 4(f) evaluation was reviewed by FHWA's Office of Chief Counsel for legal sufficiency.

[8] http://www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp

It is not necessary to coordinate project-specific applications of approved programmatic Section 4(f) evaluations with the U.S. DOI unless the U.S. DOI owns or has administrative oversight over the Section 4(f) property involved (is an official with jurisdiction or has an oversight role as described Questions 9D and 31). As specified in the applicable programmatic Section 4(f) evaluation, it is still necessary to coordinate with the official(s) with jurisdiction over such properties. A legal sufficiency review of a project-specific application of an approved programmatic Section 4(f) evaluation is not necessary. As such, a primary benefit to using the prescribed step-by-step approach contained in a programmatic evaluation is the reduction of time to process a Section 4(f) approval.

Documentation required to apply a programmatic Section 4(f) evaluation must support that the specific programmatic criteria have been met (*See* 23 CFR 774.3(d)(1)). A separate Section 4(f) document is not required but an indication in the NEPA documentation that Section 4(f) compliance was satisfied by the applicable programmatic evaluation is required (*See* 23 CFR 774.7(f)). As specified in the programmatic evaluations, the requirement to assess whether there is a feasible and prudent avoidance alternative and all possible planning applies. The necessary information supporting the applicability of the programmatic evaluation will be retained in the project file (*See* Section 4.0, *Documentation*).

3.3.3 Individual Project Section 4(f) Evaluations

An individual Section 4(f) evaluation must be completed when approving a project that requires the use of Section 4(f) property if the use, as described in Sections 3.1 and 3.2 above, results in a greater than *de minimis* impact and a programmatic Section 4(f) evaluation cannot be applied to the situation (23 CFR 774.3). The individual Section 4(f) evaluation documents the evaluation of the proposed use of Section 4(f) properties in the project area of all alternatives. The individual Section 4(f) evaluation requires two findings, which will be discussed in turn:

1) That there is no feasible and prudent alternative that completely avoids the use of Section 4(f) property; and
2) That the project includes all possible planning to minimize harm to the Section 4(f) property resulting from the transportation use (*See* 23 CFR 774.3(a)(1) and (2)).

3.3.3.1 Feasible and Prudent Avoidance Alternatives

The intent of the statute, and the policy of FHWA, is to avoid and, where avoidance is not feasible and prudent, minimize the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites by our projects. Unless the use of a Section 4(f) property is determined to have a *de minimis* impact, FHWA must determine that no feasible and prudent avoidance alternative exists before approving the use of such land (*See* 23 CFR 774.3). The Section 4(f) regulations refer to an alternative that would not require the use of any Section 4(f) property as an avoidance alternative. Feasible and prudent avoidance alternatives are those that avoid using any Section 4(f) property and do not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property (23 CFR 774.17). This section of the *Section 4(f) Policy Paper* focuses on the identification,

development, evaluation, elimination and documentation of potential feasible and prudent avoidance alternatives in a Section 4(f) evaluation document.

The first step in determining whether a feasible and prudent avoidance alternative exists is to identify a reasonable range of project alternatives including those that avoid using Section 4(f) property. The avoidance alternatives will include the no-build. The alternatives screening process performed during the scoping phase of NEPA is a good starting point for developing potential section 4(f) avoidance alternatives and/or design options.[9] Any screening of alternatives that may have occurred during the transportation planning phase may be considered as well. It may be necessary, however, to look for additional alternatives if the planning studies and the NEPA process did not identify Section 4(f) properties and take Section 4(f) requirements into account. If Section 4(f) avoidance alternatives were eliminated during the earlier phases of project development for reasons unrelated to Section 4(f) impacts or a failure to meet the project purpose and need, they may need to be reconsidered in the Section 4(f) process. In addition, it is often necessary to develop and analyze new alternatives, or new variations of alternatives rejected for non-Section 4(f) reasons during the earlier phases.

The no-action or no-build alternative is an avoidance alternative and should be included in the analysis as such. In identifying other avoidance alternatives, FHWA should consider the reasonable alternatives that meet the purpose and need of the project. Potential alternatives to avoid the use of Section 4(f) property may include one or more of the following, depending on project context:

- **Location Alternatives** - A location alternative refers to the re-routing of the entire project along a different alignment.
- **Alternative Actions** - An alternative action could be a different mode of transportation, such as rail transit or bus service, or some other action that does not involve construction such as the implementation of transportation management systems or similar measures.
- **Alignment Shifts** - An alignment shift is the re-routing of a portion of the project to a different alignment to avoid a specific resource.
- **Design Changes** - A design change is a modification of the proposed design in a manner that would avoid impacts, such as reducing the planned median width, building a retaining wall, or incorporating design exceptions.

When considering alignment shifts and design changes, it is important to keep in mind the range of allowable configurations and design values for roadway elements and different types of roads. These guidelines are contained within the official state standards and/or the "Green Book," properly titled *A Policy on the Geometric Design of Highways and Streets and* published by the American Association of State Highway and Transportation Officials. The guidelines set out the generally acceptable ranges of dimensions for roadway elements and typical applications on different types of roadway facilities. These ranges of values provide planners and designers the

[9] In the Section 4(f) statute, the term *alternative* is used in the context of an option which avoids using land from a Section 4(f) property and is not limited to the context of the end-to-end alternative as defined by the project applicant. This section of the *Section 4(f) Policy Paper* uses the phrase "avoidance alternatives and/or design options" in order to clarify that, depending upon the project context, the potential alternatives that should be evaluated to avoid Section 4(f) property may be end-to-end alternatives *or* may be a change to only a portion of the end-to-end project.

ability to develop projects at an acceptable cost and level of performance (e.g. safety, traffic flow, sustainability), while balancing the site-specific conditions, constraints, and implications of design decisions. Where it may be appropriate to select a value or dimension outside of the ranges that are established in State and national guidelines, design exceptions are encouraged and permitted. However, the consideration and selection of a value outside of the established ranges should be based on the context of the facility and an analysis of how the design may affect the safety, flow of traffic, constructability, maintainability, environment, cost, and other related issues.

An important consideration in identifying potential avoidance alternatives is that they should have a reasonable expectation of serving traffic needs that have been identified in the project purpose and need. A final limitation in identifying potential avoidance alternatives is that a project alternative that avoids one Section 4(f) property by using another Section 4(f) property is not an avoidance alternative. The goal is to identify alternatives that would not use any Section 4(f) property. (Note: A determination of a *de minimis* impact for a specific Section 4(f) property may be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*.) Consequently, at this step of analysis the degree of impact to Section 4(f) property is not relevant – the only question is whether the alternative would require any use of Section 4(f) property because an alternative using any amount of Section 4(f) property is not an avoidance alternative. Subsequent steps in the analysis will consider the degree of impact as well as the availability of measures to minimize impacts.

Once the potential avoidance alternative(s) have been identified, the next task is to determine, for each potential avoidance option, whether avoiding the Section 4(f) property is feasible and prudent. The Section 4(f) regulations specify how FHWA is to determine whether a potential avoidance alternative is feasible and prudent in 23 CFR 774.17. The definition explains that a "feasible and prudent avoidance alternative" is one that avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property. In order to determine whether there are other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property, both the feasibility and the prudence of each potential avoidance alternative must be considered.

Care must be taken when making determinations of feasibility and prudence not to forget or de-emphasize the importance of protecting the Section 4(f) property. This stems from the statute itself, which requires 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. The regulation incorporates this aspect of the statute in the definition of feasible and prudent avoidance alternative which states that "it is appropriate to consider the relative value of the resource to the preservation purpose of the statute." In effect, the first part of the definition recognizes the value of the individual Section 4(f) property in question, relative to other Section 4(f) properties of the same type. This results in a sliding scale approach that maximizes the protection of Section 4(f) properties that are unique or otherwise of special significance by recognizing that while all Section 4(f) properties are important, some Section 4(f) properties are worthy of a greater degree of protection than others.

The regulations state that a potential avoidance alternative is not feasible if it cannot be built as a matter of sound engineering judgment (23 CFR 774.17). If a potential avoidance alternative cannot be built as a matter of sound engineering judgment it is not feasible and the particular engineering problem with the alternative should be documented in the project files with a reasonable degree of explanation. In difficult situations, the FHWA Division may obtain assistance from FHWA subject matter experts located in FHWA Headquarters or the FHWA Resource Center.

The third and final part of the *feasible and prudent avoidance alternative* definition sets out standards for determining if a potential avoidance alternative is prudent. An alternative is not prudent if:

1) It compromises the project to a degree that it is unreasonable to proceed in light of the project's stated purpose and need (i.e., the alternative doesn't address the purpose and need of the project);
2) It results in unacceptable safety or operational problems;
3) After reasonable mitigation, it still causes severe social, economic, or environmental impacts; severe disruption to established communities; severe or disproportionate impacts to minority or low-income populations; or severe impacts to environmental resources protected under other Federal statutes;
4) It results in additional construction, maintenance, or operational costs of extraordinary magnitude;
5) It causes other unique problems or unusual factors; or
6) It involves multiple factors as outlined above that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

The prudence determination involves an analysis that applies each of the six factors, if applicable, to the potential avoidance alternative. If a factor is not applicable FHWA recommends simply noting that fact in the analysis.

Supporting documentation is required in the Section 4(f) evaluation for findings of no feasible and prudent alternatives (*See* 23 CFR 774.7(a)). Documentation of the process used to identify, develop, analyze and eliminate potential avoidance alternatives is very important. The Section 4(f) evaluation should describe all efforts in this regard. This description need not include every possible detail, but it should clearly explain the process that occurred and its results. It is appropriate to maintain detailed information in the project file with a summary in the Section 4(f) evaluation. If the information is especially voluminous, a technical report should be prepared, summarized, and referenced in the Section 4(f) evaluation. The discussion may be organized within the Section 4(f) evaluation in any manner that allows the reader to understand the full range of potential avoidance alternatives identified, the process by which potential avoidance alternatives were identified and analyzed for feasibility and prudence. Possible methods for organizing the discussion include a chronological discussion; a discussion organized geographically by project alternatives or project phases of construction; or by the type of Section 4(f) properties.

For larger highway projects with multiple Section 4(f) properties in the project area, it may be desirable to divide the analysis into a macro and a micro-level evaluation in order to distinguish

the analysis of end-to-end project alternatives that avoid using any Section 4(f) property from the analysis of design options to avoid using a single Section 4(f) property. The macro-level evaluation would address any end-to-end avoidance alternatives that can be developed, as well as any alternative actions to the proposed highway project such as travel demand reduction strategies or enhanced transit service in the project area. The micro-level evaluation would then address, for each Section 4(f) property, whether the highway could be routed to avoid the property by shifting to the left or right, by bridging over, or tunneling under the property, or through another alignment shift or design change. The analysis may be presented in any manner that demonstrates, for each Section 4(f) property used, that there is no feasible and prudent avoidance alternative. Even if all of the alternatives use a Section 4(f) property, there is still a duty to try to avoid the individual Section 4(f) properties within each alternative.

3.3.3.2 Alternative with Least Overall Harm

If the analysis described in the preceding section concludes that there is no feasible and prudent avoidance alternative, then FHWA may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that causes the least overall harm in light of the statute's preservation purpose. Pursuant to substantial case law, if the assessment of overall harm finds that two or more alternatives are substantially equal, FHWA can approve any of those alternatives. This analysis is required when multiple alternatives that use Section 4(f) property remain under consideration.

To determine which of the alternatives would cause the least overall harm, FHWA must compare seven factors set forth in 23 CFR 774.3(c)(1) concerning the alternatives under consideration. The first four factors relate to the net harm that each alternative would cause to Section 4(f) property:

1) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
2) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
3) The relative significance of each Section 4(f) property; and
4) The views of the officials with jurisdiction over each Section 4(f) property.

When comparing the alternatives under these factors, FHWA policy is to develop comparable mitigation measures where possible. In other words, the comparison may not be skewed by over-mitigating one alternative while under-mitigating another alternative for which comparable mitigation could be incorporated. In addition, the mitigation measures relied upon as part of this comparison should be incorporated into the selected alternative. If subsequent design or engineering work occurs after the alternative is selected that requires changes to the mitigation plans for Section 4(f) property, FHWA may require revisions to previous mitigation commitments commensurate with the extent of design changes in accordance with 23 CFR 771.109(b)and(d), 127(b), 129, and 130.

The remaining three factors enable FHWA to take into account any substantial problem with any of the alternatives remaining under consideration on issues beyond Section 4(f). These factors

are:

5) The degree to which each alternative meets the purpose and need for the project;
6) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
7) Substantial differences in costs among the alternatives.

By balancing the seven factors, four of which concern the degree of harm to Section 4(f) properties, FHWA will be able to consider all relevant concerns to determine which alternative would cause the least overall harm in light of the statue's preservation purpose. The least overall harm balancing test is set forth in 774.3(c)(1). This allows FHWA to fulfill its statutory mandate to make project decisions in the best overall public interest required by 23 U.S.C. § 109(h). Through this balancing of factors, FHWA may determine that a serious problem identified in factors (v) through (vii) outweighs relatively minor net harm to a Section 4(f) property. The least overall harm determination also provides FHWA with a way to compare and select between alternatives that would use different types of Section 4(f) properties when competing assessments of significance and harm are provided by the officials with jurisdiction over the impacted properties. In evaluating the degree of harm to Section 4(f) properties, FHWA is required by the regulations to consider the views (if any) expressed by the official(s) with jurisdiction over each Section 4(f) property. If an official with jurisdiction states that all resources within that official's jurisdiction are of equal value, FHWA may still determine that the resources have different value if such a determination is supported by information in the project file. Also, if the officials with jurisdiction over two different properties provide conflicting assessments of the relative value of those properties, FHWA should consider the officials' views but then make its own independent judgment about the relative value of those properties. Similarly, if the official(s) with jurisdiction decline to provide any input at all regarding the relative value of the affected properties, FHWA should make its own independent judgment about the relative value of those properties.

FHWA is required to explain how the seven factors were compared to determine the least overall harm alternative (*See* 23 CFR 774.7(c)). The draft Section 4(f) evaluation will disclose the various impacts to the different Section 4(f) properties thereby initiating the balancing process. It should also disclose the relative differences among alternatives regarding non-Section 4(f) issues such as the extent to which each alternative meets the project purpose and need. The disclosure of impacts should include both objective, quantifiable impacts and qualitative measures that provide a more subjective assessment of harm. Preliminary assessment of how the alternatives compare to one another may also be included. After circulation of the draft Section 4(f) evaluation in accordance with 23 CFR 774.5(a), FHWA will consider comments received on the evaluation and finalize the comparison of all factors listed in 23 CFR 774.3(c)(1) for all the alternatives. The analysis and identification of the alternative that has the overall least harm must be documented in the final Section 4(f) evaluation (*See* 23 CFR 774.7(c)). In especially complicated projects, the final approval to use the Section 4(f) property may be made in the decision document (ROD or FONSI).

3.4 Examples of Section 4(f) Approvals

The table below describes five project alternative scenarios. In each project scenario various alternatives are considered and there are various options available to approve the use of the Section 4(f) property needed for the project. The examples illustrate the approval options as well as the point that in some situations FHWA may only approve a certain alternative. These examples are not intended to address every possible scenario.

In Project 1 there is a single build alternative A, for which FHWA determines the use to be a *de minimis* impact and therefore does not require an individual Section 4(f) evaluation. Once the coordination required by 23 CFR 774.5(b) is completed, FHWA may approve the *de minimis* impact and the applicant may proceed with the build alternative.

Project 2 has two alternatives. The FHWA determines that alternative A has a *de minimis* impact on one Section 4(f) property, and alternative B has a *de minimis* impact on three Section 4(f) properties. Upon completion of the coordination required by 23 CFR 774.5(b), FHWA may approve either alternative under Section 4(f). As in the previous example, an individual Section 4(f) evaluation is not required, therefore the feasibility and prudence of avoiding Section 4(f) properties does not have to be determined. Furthermore, when there are only *de minimis* impacts, even among multiple alternatives, a least harm analysis is not necessary and there is no need to compare the significance of the competing Section 4(f) properties. The process to choose between alternatives A or B in the second example may be based on non-Section 4(f) considerations as determined appropriate through the project development process.

In Project 3, there are three alternatives under consideration. The FHWA determines that alternative A meets the criteria of a *de minimis* impact, while alternative B has a minor impact on a Section 4(f) property for which the programmatic Section 4(f) evaluation for minor uses is applicable. Alternative C would use a Section 4(f) property to an extent that a *de minimis* impact determination is not possible and no programmatic Section 4(f) evaluation applies. In this example, all three alternatives use a Section 4(f) property and thus none can be considered to be an avoidance alternative. For this project, alternative A may proceed immediately once the coordination required by 23 CFR 774.5 is complete, through an approved *de minimis* impact determination. Alternative B may be approved by following the procedures designated in the applicable programmatic Section 4(f) evaluation, whose end result demonstrates no feasible and prudent avoidance alternative. However, in this example if the applicant favors alternative C, then an individual Section 4(f) evaluation can be prepared to consider whether or not alternative C can be approved under Section 4(f). The individual Section 4(f) evaluation first determines that there is no feasible and prudent avoidance alternative as defined in 23 CFR 774.17. The evaluation then considers which alternative (A, B, or C) has the least overall harm using the factors in 23 CFR 774.3(c). Alternative C could only be approved if it is identified as having the least overall harm, which would be possible; for example, if alternatives A and B both have severe impacts to an important non-Section 4(f) resource and the impacts of alternative C can be adequately mitigated. In that case, upon completion of the coordination required by 23 CFR 775.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17, alternative C could be approved.

Project 4 differs slightly in having multiple *de minimis* impacts to Section 4(f) properties with alternative A, and a mix of *de minimis* impacts and greater than *de minimis* impacts not covered by a programmatic section 4(f) evaluation with alternative B. If alternative A is chosen, FHWA would satisfy Section 4(f) by making a *de minimis* impact determination for each property used in accordance with 23 CFR 774.3(b), 774.5(b), and 774.7(c). To consider selecting alternative B, an individual Section 4(f) evaluation would be prepared in accordance with 23 CFR 774.3(a), 774.5(a), and 774.7(a); however, a determination of *de minimis* impact for a specific Section 4(f) property can be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*. In this example, an additional alternative C is developed as part of the Section 4(f) evaluation. Alternative C avoids using any Section 4(f) property, and the evaluation then determines, using the definition in 23 CFR 774.17, that alternative C is feasible and prudent. Alternative C may proceed immediately because it does not use any Section 4(f) property and no Section 4(f) approval is needed. In this example, since alternative C is a feasible and prudent avoidance alternative the FHWA may not approve alternative B, although alternative A would still be available for selection because its impacts on Section 4(f) properties are *de minimis*. However, if the facts are changed and we now assume that the evaluation of avoidance alternative C had found that it was <u>not</u> feasible and prudent, then the Section 4(f) evaluation could be completed. The evaluation would determine the least overall harm amongst alternatives A and B using the factors in 23 CFR 774.3(c). (In this variation of the example, the least overall harm determination does not include alternative C in the comparison because alternative C was previously eliminated when it was found not to be feasible and prudent.) Alternative B could only be approved if it is identified as having the least overall harm. This would be possible, for example if alternative A would not meet the project purpose and need as well as alternative B, alternative A would be substantially more expensive, and the Section 4(f) property used by alternative B has no unusual significance and could be adequately mitigated. In that example, upon completion of the coordination required by 23 CFR 774.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17, alternative B could be approved even though it uses Section 4(f) property.

Project 5 has two alternatives, both having greater than *de minimis* impacts on a different Section 4(f) property. To choose among alternatives A and B, an individual Section 4(f) evaluation must be prepared in accordance with 23 CFR 774.3(a), 774.5(a), and 774.7(a) that demonstrates no feasible and prudent avoidance alternative exists, and a least overall harm analysis must be completed using the factors in 23 CFR 774.3(c). The alternative identified as having the least overall harm may proceed upon completion of the coordination required by 23 CFR 774.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17.

Table 1. Project Alternative Scenarios

ALTERNATIVE	USE OF SECTION 4(f) PROPERTY	INDIVIDUAL SECTION 4(f) EVALUATION?	OUTCOME
Project 1, alternative A	*De minimis* impact	Not necessary	May proceed with A
Project 2, alternative A	*De minimis* impact on one property	Not necessary	May proceed with A or B; Section 4(f) is not determinative
Project 2, alternative B	*De minimis* impact on three properties	Not necessary	

ALTERNATIVE	USE OF SECTION 4(f) PROPERTY	INDIVIDUAL SECTION 4(f) EVALUATION?	OUTCOME
Project 3, alternative A	*De minimis* impact	Not necessary	May proceed with A or B; Section 4(f) is not determinative
Project 3, alternative B	Minor use, programmatic Section 4(f) evaluation is applicable	Not necessary	
Project 3, alternative C	Greater than *de minimis* impact	Necessary. If no feasible and prudent avoidance alternative is identified, then a least overall harm analysis would compare A, B, and C.	May proceed with C only if C has less overall harm than A or B.
Project 4, alternative A	*De minimis* impact on two properties	Not necessary	May proceed with A
Project 4, alternative B	*De minimis* impact on one property & greater than *de minimis* impact on another property	Necessary. As part of the evaluation, a new Alternative C is developed that avoids using Section 4(f) property.	If C is found feasible and prudent, cannot proceed with B. If C is not feasible and prudent, may proceed with B only if B has less overall harm than A.
Project 4, alternative C	None	Not necessary to complete the Section 4(f) evaluation to proceed with C.	May proceed with C; no Section 4(f) approval is required.
Project 5, alternative A	Greater than *de minimis* impact	Necessary. The evaluation must seek to identify feasible and prudent avoidance alternatives. Assuming none are found, then a least harm analysis will compare A and B.	Least overall harm analysis determines which alternative, A or B, may proceed.
Project 5, alternative B	Greater than *de minimis* impact		

3.5 All Possible Planning to Minimize Harm

After determining that there are no feasible and prudent alternatives to avoid the use of Section 4(f) property, the project approval process for an individual Section 4(f) evaluation requires the consideration and documentation of all possible planning to minimize harm to Section 4(f) property (*See* 23 CFR 774.3(a)(2)). *All possible planning*, defined in 23 CFR 774.17, means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project. All possible planning to minimize harm does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1).

Minimization of harm may entail both alternative design modifications that reduce the amount of Section 4(f) property used and mitigation measures that compensate for residual impacts. Minimization and mitigation measures should be determined through consultation with the official(s) with jurisdiction. These include the SHPO and/or THPO for historic properties or officials owning or administering the resource for other types of Section 4(f) properties.

Mitigation measures involving public parks, recreation areas, or wildlife or waterfowl refuges may involve a replacement of land and/or facilities of comparable value and function, or monetary compensation to enhance the remaining land. Neither the Section 4(f) statute nor regulations requires the replacement of Section 4(f) property used for highway projects, but this option may be the most straightforward means of minimizing harm to parks, recreation areas, and wildlife waterfowl refuges and is permitted under 23 CFR 710.509 as a mitigation measure for direct project impacts.

Mitigation of historic sites usually consists of those measures necessary to preserve the historic integrity of the site and agreed to in accordance with 36 CFR 800 by FHWA, the SHPO or THPO, and other consulting parties. In any case, the cost of mitigation should be a reasonable public expenditure in light of the severity of the impact on the Section 4(f) property in accordance with 23 CFR 771.105(d). Additional laws such as Section 6(f) of the Land and Water Conservation Fund Act may have separate mitigation and approval requirements and compliance with such) requirements should also be described within the Section 4(f) discussion of all possible planning to minimize harm.

4.0 Documentation

U.S. DOT departmental requirements for documenting Section 4(f) analysis and approvals (DOT Order 5610.1C) have been incorporated into FHWA regulations, guidance and policy. The FHWA's procedures regarding the preparation and circulation of Section 4(f) documents is contained in 23 CFR 774.5 and FHWA's Technical Advisory, T 6640.8A, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents.[10]

The documentation of all Section 4(f) determinations, consultations, coordination and approvals is intended to establish a record of FHWA's compliance with the regulatory process. Documentation also provides evidence that the substantive requirements have been met. Section 4(f) documentation and processing requirements vary depending on the type of Section 4(f) property used and whether or not the use meets the criteria of a de minimis impact. However, all situations which involve Section 4(f) property will necessitate some degree of documentation: either in the NEPA document, a Section 4(f) evaluation, or the project file.

The project file is the agency's written record that memorializes the basis for determining that an impact is de minimis or that there is no feasible and prudent avoidance alternative to the use of the Section 4(f) property and that FHWA undertook all possible planning to minimize harm to Section 4(f) property. When the agency determines that Section 4(f) is not applicable to a particular resource, written documentation of that decision should be maintained as part of the project file. The project file should include all relevant correspondence which may include emails and other electronic information that is applicable to the decision-making process. The project file should generally be retained until three years after FHWA reimbursement on Federal-aid projects and three years after final payment on non-Federal aid projects (See FHWA Order M.1324.1A, 49 CFR 18.42, and 49 CFR 19.53).

[10] These and other resources are available at the FHWA Environmental Toolkit http://environment.fhwa.dot.gov/index.asp.

De Minimis Impact Determinations

The *de minimis* impact determination 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 23 CFR 774.17; and that the coordination required by 23 CFR 774.5(b) was completed.

Information related to the *de minimis* impact determination should be included in the project NEPA document (EA or EIS), or in the project file for a project processed as a CE (*See* 23 CFR 774.7(c)). Circulation of this information in the project NEPA document may satisfy the public involvement requirements required for *de minimis* impact findings. For projects which include both *de minimis* impacts and use of Section 4(f) property with more than a *de minimis* impact, the determination and supporting data should be included in a separate section of the Section 4(f) evaluation.

Applying Programmatic Section 4(f) Evaluations

Information related to an approval to use Section 4(f) property by applying a programmatic Section 4(f) evaluation should be included in the project NEPA document (EA or EIS), or in the project file for a project processed as a CE. For projects which include both a programmatic Section 4(f) approval and a use of Section 4(f) property for which there is more than a *de minimis* impact, information regarding the application of the programmatic Section 4(f) evaluation should be included in a separate section of the Section 4(f) evaluation.

The project file should include sufficient supporting documentation to demonstrate that the programmatic evaluation being relied upon applies to the use of the specific Section 4(f) property. In addition, the project file should include documentation that the coordination required by the applicable programmatic evaluation was completed and that all specific conditions of the applicable programmatic evaluation were met.

Individual Section 4(f) Evaluations

Individual Section 4(f) evaluations must include sufficient analysis and supporting documentation to demonstrate that there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm (23 CFR 774.7(a)). For projects requiring a least overall harm analysis under 23 CFR 774.3(c), that analysis must be included within the individual Section 4(f) evaluation (23 CFR 774.7(c)).

Individual Section 4(f) evaluations are processed in two distinct stages: draft and final. Draft evaluations must be circulated to the U.S. DOI and shared with the official(s) with jurisdiction. The public may review and comment on a draft evaluation during the NEPA process. When a project is processed as a CE the Section 4(f) evaluation must be circulated independently to the U.S. DOI. In all cases, final Section 4(f) evaluations are subject to FHWA legal sufficiency review prior to approval (23 CFR 774.5(d)).

Project Files

In general, the project file should contain the following essential information, with analysis, regarding Section 4(f):

- When making *de minimis* impact determinations

1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
2) Whether or not there is a use of section 4(f) property;
3) Records of public involvement, or Section 106 consultation;
4) Results of coordination with the officials with jurisdiction;
5) Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments; and
6) Avoidance, minimization or mitigation measures that were relied upon to make the *de minimis* impact finding.

- When applying programmatic Section 4(f) evaluations
  1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
  2) Whether or not there is a use of section 4(f) property;
  3) Records of public involvement, if any;
  4) Results of coordination with the officials with jurisdiction; and
  5) Documentation of the specific requirements of the programmatic evaluation that is being applied.
- When preparing an individual Section 4(f) evaluation
  1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
  2) Whether or not there is a use of Section 4(f) property;
  3) Activities, features, and attributes of the Section 4(f) property;
  4) Analysis of the impacts to the Section 4(f) property;
  5) Records of public involvement;
  6) Results of coordination with the officials with jurisdiction;
  7) Alternatives considered to avoid using the Section 4(f) property, including analysis of the impacts caused by avoiding the Section 4(f) property;
  8) A least overall harm analysis, if appropriate;
  9) All measures undertaken to minimize harm to the Section 4(f) property;
  10) Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments; and
  11) Results of the internal legal sufficiency review.

Administrative Records

If a Section 4(f) approval is legally challenged, the project file will be the basis of the administrative record that must be filed in the court for review. The administrative record will be reviewed in accordance with the *Administrative Procedure Act* (APA), (5 U.S.C. §706 (2)(A)), which provides judicial deference to U.S. DOT actions. Under the APA, the agency's action must be upheld unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court will review the administrative record to determine whether FHWA complied with the essential elements of Section 4(f). If an inadequate administrative record is prepared, the court will lack the required Section 4(f) documentation to review and, therefore, will be unable to defer to FHWA's decision, especially when a Section 4(f) evaluation was not required. While agency decisions are entitled to a presumption of regularity and the courts are not empowered to substitute their judgment for that of the agency, judges will carefully review whether FHWA followed the applicable requirements.

PART II – QUESTIONS AND ANSWERS REGARDING SECTION 4(f) APPLICABILITY AND COMPLIANCE

The following questions and answers are intended to provide additional and detailed guidance for complying with the requirements of Section 4(f). Examples to aid in determining the applicability of Section 4(f) to various types of property and project situations are included. These examples represent FHWA's policy regarding Section 4(f) compliance for situations most often encountered in the project development process. Since it is impossible to address every situation that could occur, it is recommended that the FHWA Division Office be consulted for advice and assistance in determining the applicability of Section 4(f) to specific circumstances not covered in this paper. The FHWA Division Offices are encouraged to consult with the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Services Team and/or the Office of the Chief Counsel in cases where additional assistance in Section 4(f) matters is required.

IDENTIFICATION OF SECTION 4(f) PROPERTIES

1. Public Parks, Recreation Areas and Wildlife and Waterfowl Refuges

Question 1A: When is publicly owned land considered to be a park, recreation area or wildlife and waterfowl refuge?

Answer: Publicly owned land is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such by a Federal, State or local agency, and the officials with jurisdiction over the land determine that its primary purpose is as a park, recreation area, or refuge. Primary purpose is related to a property's primary function and how it is intended to be managed. Incidental, secondary, occasional or dispersed activities similar to park, recreational or refuge activities do not constitute a primary purpose within the context of Section 4(f). Unauthorized activities, such as ad hoc trails created by the public within a conservation area, should not be considered as part of FHWA's determination of Section 4(f) applicability.

In addition, the statute itself requires that a property must be a significant public park, recreation area, or wildlife and waterfowl refuge. The term significant means that in comparing the availability and function of the park, recreation area or wildlife and waterfowl refuge, with the park, recreation or refuge objectives of the agency, community or authority, the property in question plays an important role in meeting those objectives. Except for certain multiple-use land holdings (Question 4), significance determinations are applicable to the entire property and not just to the portion of the property proposed for use by a project.

Significance determinations of publicly owned land considered to be a park, recreation area, or wildlife and waterfowl refuge are made by the official(s) with jurisdiction over the property. The meaning of the term significance, for purposes of Section 4(f), should be explained to the official(s) with jurisdiction if the official(s) are not familiar with Section

4(f). Management plans or other official forms of documentation regarding the land, if available and up-to-date, are important and should be obtained from the official(s) and retained in the project file. If a determination from the official(s) with jurisdiction cannot be obtained, and a management plan is not available or does not address the significance of the property, the property will be presumed to be significant. However, all determinations, whether stated or presumed, and whether confirming or denying significance of a property for the purposes of Section 4(f), are subject to review by FHWA for reasonableness pursuant to 23 CFR 774.11. When FHWA changes a determination of significance, the basis for this determination will be included in the project file and discussed in the environmental documentation for the proposed action.

Question 1B: Can an easement or other encumbrance on private property result in that property being subject to Section 4(f)?

Answer: Yes, in certain instances. Generally, an easement is the right to use real property without possessing it, entitling the easement holder to the privilege of some specific and limited use of the land. Easements take many forms and are obtained for a variety of purposes by different parties. Easements or similar encumbrances restricting a property owner from making certain uses of his/her property, such as conservation easements, are commonly encountered during transportation project development. Easements such as these often exist for the purpose of preserving open space, protection of habitat, or to limit the extent and density of development in a particular area, and they may be held by Federal, State or local agencies or non-profit groups or other advocacy organizations.

Although a conservation easement may not meet all of the requirements necessary to treat the property as a significant publicly-owned public park, recreation area, or wildlife and waterfowl refuge, it is a possibility that mandates careful case-by-case consideration when encountered. The terms of the easement should be carefully examined to determine if Section 4(f) applies to the property. Factors to consider include, but are not limited to, the views of the official(s) with jurisdiction, the purpose of the easement, the term of the easement, degree of public access to the property, how the property is to be managed and by whom, what parties obtained the easement (public agency or non-public group), termination clauses, and what restrictions the easement places on the property owner's use of the easement area. Questions on whether or not an easement conveys Section 4(f) status to a property should be referred to the FHWA Division Office and, if necessary, the Division Office should consult with the Headquarters Office of Project Development and Environmental Review, the Headquarters Office of Real Estate Services, the Resource Center Environment Technical Service Team, or the Office of Chief Counsel.

Easements and deed restrictions for the purpose of historic preservation are also commonly encountered during transportation project development. Section 4(f) applicability questions are unlikely to be encountered for these properties because if the property is not on or eligible for the NR Section 4(f) does not apply, notwithstanding the preservation easement. If the property is on or eligible for the NR, Section 4(f) applies. However, the existence and nature of such easements should be documented and considered as necessary within the

feasible and prudent analysis and least harm analysis if a Section 4(f) evaluation is prepared.

Question 1C: When does a lease agreement with a governmental body constitute public ownership?

Answer: In some instances, a lease agreement between a private landowner and a governmental body may constitute a proprietary interest in the land for purposes of Section 4(f). Generally, under a long term lease to a governmental body, such land may be considered to be "publicly owned" land and if the property is being managed by the governmental body as a significant public park, recreation area, or wildlife and waterfowl refuge then a use of the property will be subject to the requirements of Section 4(f). Such lease agreements should be examined on a case-by-case basis with consideration of such factors as the term of the lease, the understanding of the parties to the lease, the existence of a cancellation clause, and how long the lease has been in place. Questions on whether or not the leasehold constitutes public ownership should be referred to the FHWA Division Office, and if necessary the Division Office should consult with the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Service Team, or the Office of Chief Counsel. If FHWA determines that the lease agreement creates a proprietary interest that is equivalent to public ownership, FHWA must then determine whether the property is in fact being managed by the government body as a significant public park, recreation area, or wildlife and waterfowl refuge. If so, the property is subject to Section 4(f).

Question 1D: Are significant publicly owned parks and recreation areas that are not open to the general public subject to the requirements of Section 4(f)?

Answer: The requirements of Section 4(f) would apply if the entire public park or public recreation area permits visitation of the general public at any time during the normal operating hours. Section 4(f) would not apply when visitation is permitted to a select group only and not to the entire public. Examples of select groups include residents of a public housing project; military service members and their dependents; students of a public school; and students, faculty, and alumni of a public college or university (*See* Question 18B). The FHWA does, however, strongly encourage the preservation of such parks and recreation areas even though they may not be open to the general public or are not publicly owned and therefore are not protected by Section 4(f).

It should be noted that wildlife and waterfowl refuges have not been included in this discussion. Many wildlife and waterfowl refuges allow public access, while others may restrict public access to certain areas within the refuge or during certain times or seasons of the year for the protection of refuge habitat or species. In these cases, the property should be examined by the FHWA Division Office to verify that the primary purpose of the property is for wildlife and waterfowl refuge activities and not for other non-Section 4(f) activities, and that the restrictions on public access are limited to measures necessary to protect refuge habitat or species. If it is determined that the primary purpose of the property is for wildlife and waterfowl refuge activities and that the restrictions on public access are limited to the measures necessary to protect the refuge habitat or species, then the property is

subject to Section 4(f) notwithstanding the access restriction.

Question 1E: What is a wildlife and waterfowl refuge for purposes of Section 4(f)?

Answer: The term wildlife and waterfowl refuge is not defined in the Section 4(f) law. On the same day in 1966 that Section 4(f) was passed, Congress also passed the *National Wildlife Refuge System Administration Act* (Pub. L. 89-669, 80 Stat. 926) to provide for the conservation, protection, and propagation of native species of fish and wildlife, including migratory birds, that are threatened with extinction; to consolidate the authorities relating to the administration by the Secretary of the Interior of the National Wildlife Refuge System; and for other purposes. The Refuge System referred to in that Act includes areas that were designated as wildlife refuges and waterfowl refuges.[11] FHWA has considered this contemporaneous legislation in our implementation of Section 4(f) regarding refuges. For purposes of Section 4(f), National Wildlife Refuges[12] are always considered wildlife and waterfowl refuges by FHWA in administering Section 4(f); therefore no individual determination of their Section 4(f) status is necessary. In addition, any significant publicly owned public property (including waters) where the primary purpose of such land is the conservation, restoration, or management of wildlife and waterfowl resources including, but not limited to, endangered species and their habitat is considered by FHWA to be a wildlife and waterfowl refuge for purposes of Section 4(f).

In determining the primary purpose of the land, consideration should be given to:

1) The authority under which the land was acquired;
2) Lands with special national or international designations;
3) The management plan for the land; and,
4) Whether the land has been officially designated, by a Federal, State, or local agency with jurisdiction over the land, as an area whose primary purpose and function is the conservation, restoration, or management of wildlife and waterfowl resources including, but not limited to, endangered species and their habitat.

Many refuge-type properties permit recreational activities that are generally considered not to conflict with species conservation, such as trails, wildlife observation and picnicking. Other activities, such as educational programs, hunting, and fishing, may also be allowed when the activity is consistent with the broader species conservation goals for the property.

Examples of properties that may function as wildlife and waterfowl refuges for purposes of

[11] The *National Wildlife Refuge System* is currently comprised of the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas (16 U.S.C. § 668dd(a)(1)).

[12] The DOI's regulations state: "All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources" (50 CFR 25.11(b)).

Section 4(f) include: State or Federal wildlife management areas, a wildlife reserve, preserve or sanctuary; and waterfowl production areas including wetlands and uplands that are permanently set aside (in a form of public ownership) primarily for refuge purposes. The FHWA should consider the ownership, significance, function and primary purpose of such properties in determining if Section 4(f) will apply. In making the determination, the FHWA should review the existing management plan and consult with the Federal, State or local official(s) with jurisdiction over the property. In appropriate cases, these types of properties will be considered multiple-use public land holdings (*See* 23 CFR 774.11(d) and Question 4) and must be treated accordingly.

The U.S. DOI administers a variety of Federal grant programs in support of hunting, fishing, and related resource conservation. While the fact that a property owned by a State or local government has at some time in the past been the beneficiary of such a grant does not automatically confer Section 4(f) status, the existence and terms of such a prior grant, when known, should be considered along with the other aspects of the property described above when determining if the property should be treated as a wildlife and waterfowl refuge for purposes of Section 4(f). Finally, it should be noted that sites purchased as mitigation for transportation projects (e.g., for endangered species impacts) can be considered refuges for purposes of Section 4(f) if the mitigation sites meet all of the applicable criteria for Section 4(f) status as a refuge, including public ownership and access, significance, and functioning primarily as a refuge.

2. Historic Sites

Question 2A: How is Section 4(f) significance of historic sites determined?

Answer: *Historic site* is defined in 23 CFR 774.17. For purposes of Section 4(f), a historic site is significant only if it is on or eligible for the NR. Pursuant to the NHPA, FHWA in cooperation with the applicant consults with the SHPO and/or THPO, tribes that may attach religious and cultural significance to the property, and when appropriate, with local officials to determine whether a site is eligible for the NR. In case of disagreement between FHWA and the SHPO/THPO or if so requested by the ACHP, FHWA shall request a determination of eligibility from the Keeper of the NR (36 CFR 800.4(c)(2)). Any third party may also seek the involvement of the Keeper by asking the ACHP to request that the Federal agency seek a determination of eligibility.

If a site is determined not to be on or eligible for the NR, FHWA still may determine that the application of Section 4(f) is appropriate when an official (such as the Mayor, president of the local historic society, etc.) formally provides information to indicate that the historic site is of local significance. In rare cases such as this, FHWA <u>may</u> determine that it is appropriate to apply Section 4(f) to that property. In the event that Section 4(f) is found inapplicable, the FHWA Division Office should document the basis for not applying Section 4(f). Such documentation might include the reasons why the historic site was not eligible for the NR.

Question 2B: How does Section 4(f) apply in historic districts that are on or eligible for the NR?

Answer: Within a NR listed or eligible historic district, FHWA's long-standing policy is that Section 4(f) applies to those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. Elements within the boundaries of a historic district are assumed to contribute, unless they are determined by FHWA in consultation with the SHPO/THPO not to contribute (*See also* Question 7C).

Question 2C: How should the boundaries of a property eligible for listing on the NR be determined where a boundary has not been established?

Answer: In this situation, FHWA makes the determination of a historic property's boundary under the regulations implementing Section 106 of the NHPA in consultation with the SHPO/THPO. The identification of historic properties and the determination of boundaries should be undertaken with the assistance of qualified professionals during the early stages of the NEPA process. This process should include the collection, evaluation and presentation of the information to document FHWA's determination of the property boundaries. The determination of eligibility, which would include boundaries of the site, rests with FHWA, but if the SHPO or THPO objects, or if the ACHP or the Secretary of the Interior so requests, then FHWA shall obtain a determination from the Keeper of the NR (36 CFR 800.4(c)(2)).

Selection of boundaries is a judgment based on the nature of the property's significance, integrity, setting and landscape features, functions and research value. Most boundary determinations will take into account the modern legal boundaries, historic boundaries (identified in tax maps, deeds, or plats), natural features, cultural features and the distribution of resources as determined by survey and testing for subsurface resources. Legal property boundaries often coincide with the proposed or eligible historic site boundaries, but not always and, therefore, should be individually reviewed for reasonableness. The type of property at issue, be it a historic building, structure, object, site or district and its location in either urban, suburban or rural areas, should include the consideration of various and differing factors set out in the *National Park Service Bulletin: Defining Boundaries for National Register Properties.*[13]

Question 2D: How do you reconcile the phased approach to identification and evaluation and treatment of historic properties under Section 106 of the NHPA with the timing for the completion of Section 4(f) requirements?

Answer: Compliance with Section 4(f) requires FHWA to carry out a reasonable level of effort to identify historic properties prior to issuing a Section 4(f) approval. The reasonableness of the level of effort depends upon the anticipated effects of the project and nature of likely historic resources present in the affected project area. Accordingly, the reasonable level of effort varies from project to project. While a visual survey may be

[13] http://www.cr.nps.gov/nr/publications/bulletins/boundaries

necessary to identify above ground resources, it may be possible to rule out the likelihood for the presence of significant below ground resources based on literature review, prior studies of the area, consultation with consulting parties (e.g., Indian tribes) and factors that relate to archeological preservation such as soil and slope types. If a phased approach to identification and evaluation of historic properties is adopted pursuant to the Section 106 regulations, the methodology for that approach should be coordinated with FHWA to ensure that it will also satisfy Section 4(f) requirements.

You may be able to establish without carrying out a field survey that there is little or no potential for the presence of archeological resources that have value for preservation in place, and therefore are subject to Section 4(f). The project file should include documentation of the level of effort and justification for the conclusion that it is unlikely that there are additional unrecorded historic properties that could be subject to Section 4(f). A Memorandum of Agreement or project specific Programmatic Agreement focusing on a process for subsequent compliance should be executed prior to project approval. Those agreements may provide for the completion of additional identification and evaluation (e.g., archeological resource studies), assessment of effects, and refinement of mitigation measures after NEPA is approved.

Question 2E: How are National Historic Landmarks (NHL) treated under Section 4(f)?

Answer: Section 4(f) requirements related to the potential use of an NHL designated by the Secretary of Interior are essentially the same as they are for any historic property determined eligible under the Section 106 process, except that the July 5, 1983 *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* may not be relied upon to approve the use of a historic bridge that is an NHL.

Section 110(f) of the NHPA (16 U.S.C. § 470-h-2) outlines the specific actions that an Agency must take when a NHL may be directly and adversely affected by an undertaking. Agencies must, "to the maximum extent possible...minimize harm" to the NHL affected by an undertaking. While not expressly stated in the Section 4(f) statute or regulations, the importance and significance of the NHL should be considered in the FHWA's Section 4(f) analysis of least overall harm pursuant to 23 CFR 774.3(c)(1)(iii). In addition, where there is a potential adverse effect to an NHL determined under the Section 106 process, the Secretary of Interior must be notified and given the option to participate in the Section 106 process. When the U.S. DOI has elected to participate, their representative (typically, the National Park Service) should be recognized as an additional official with jurisdiction and included in the required coordination in the course of the Section 4(f) process.

3. Archeological Resources

Question 3A: When does Section 4(f) apply to archeological sites?

Answer: Section 4(f) applies to archeological sites that are on or eligible for the NR <u>and</u> that warrant preservation in place, including those sites discovered during construction as

discussed in Question 3B. Section 4(f) does not apply if FHWA determines, after consultation with the SHPO/THPO, federally recognized Indian tribes (as appropriate), and the ACHP(if participating) that the archeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed not to recover the resource) and has minimal value for preservation in place, and the SHPO/THPO and ACHP (if participating) does not object to this determination (*See* 23 CFR 774.13(b)). The destruction of a significant archaeological resource without first recovering the knowledge of the past inherent in that resource should not be taken lightly. Efforts to preserve the resource or develop and execute a data recovery plan should be addressed in the Section 106 process.

Question 3B: How are archeological sites discovered during construction of a project handled?

Answer: When archeological sites are discovered during construction(23 CFR 774.9(e) and 11(f)), FHWA must determine if an approval is necessary or if an exception applies under 23 CFR 774.13(c) (*See* Question 26). Where preservation in place is warranted and a Section 4(f) approval would be required, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take into account the level of investment already made. The review process, including the consultation with other agencies should be shortened, as appropriate consistent with the process set forth in Section 106 of the NHPA regulations and should include Indian tribes that may attach religious and cultural significance to sites discovered (36 CFR 800.13). Discoveries may be addressed prior to construction in agreement documents that set forth procedures that plan for subsequent discoveries. When discoveries occur without prior planning, the Section 106 regulation calls for reasonable efforts to avoid, minimize, or mitigate such sites and provides an expedited timeframe for interested parties to reach resolution regarding treatment of the site. A decision to apply Section 4(f), based on the outcome of the Section 106 process, to an archeological discovery during construction would trigger an expedited Section 4(f) evaluation. Because the U.S. DOI has a responsibility to review individual Section 4(f) evaluations and is not usually a party to the Section 106 process, the U.S. DOI should be notified and any comments they provide considered within a shortened response period.

Question 3C: How do the Section 4(f) requirements apply to archaeological districts?

Answer: Section 4(f) requirements apply to archeological districts in the same way they apply in historic districts, but only where preservation in place is warranted. There would not be a Section 4(f) use if, after consultation with the SHPO/THPO, FHWA determines that the project would use only a part of the archaeological district which is considered a non-contributing element of that district or that the project occupies only a part of the district which is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. As with a historic district, if the project does not use any individual contributing element of the archeological district which is significant for preservation in place and FHWA determines that the project will result in an adverse effect , then FHWA must consider whether or not the proximity impacts will result in a constructive use in accordance with 23 CFR 774.15.

4. Public Multiple-Use Land Holdings

Question 4: Are multiple-use public land holdings (e.g., National Forests, State Forests, Bureau of Land Management lands) subject to the requirements of Section 4(f)?

Answer: When applying Section 4(f) to multiple-use public land holdings, FHWA must comply with 23 CFR 774.11(d). Section 4(f) applies only to those portions of a multiple-use public property that are designated by statute or identified in an official management plan of the administering agency as being primarily for public park, recreation, or wildlife and waterfowl refuge purposes, and are determined to be significant for such purposes. Section 4(f) will also apply to any historic sites within the multiple-use public property that are on or eligible for the NR. Multiple-use public land holdings are often vast in size, and by definition these properties are comprised of multiple areas that serve different purposes. Section 4(f) does not apply to those areas within a multiple-use public property that function primarily for any purpose other than significant park, recreation or refuge purposes. For example, within a National Forest, there can be areas that qualify as Section 4(f) resources (e.g. campgrounds, trails, picnic areas) while other areas of the property function primarily for purposes other than park, recreation or a refuge such as timber sales or mineral extraction. Coordination with the official(s) with jurisdiction and examination of the management plan for the area will be necessary to determine if Section 4(f) should apply to an area of a multiple-use property that would be used by a transportation project.

For multiple-use public land holdings which either do not have formal management plans or when the existing formal management plan is out-of-date, FHWA will examine how the property functions and how it is being managed to determine Section 4(f) applicability for the various areas of the property. This review will include coordination with the official(s) with jurisdiction over the property.

5. Tribal Lands and Indian Reservations

Question 5: How are lands owned by Federally Recognized Tribes, and/or Indian Reservations treated for the purposes of Section 4(f)?

Answer: Federally recognized Indian Tribes are sovereign nations and the land owned by them is not considered publicly owned within the meaning of Section 4(f). Therefore, Section 4(f) does not automatically apply to tribal land. In situations where it is determined that the property or resource owned by a Tribal Government or within an Indian Reservation functions as a significant public park, recreational area, or wildlife and waterfowl refuge (which is open to the general public), or is eligible for the NR, the land would be considered Section 4(f) property.

6. Traditional Cultural Places (TCPs)

Question 6: Are lands that are considered to be traditional cultural places subject to the provisions of Section 4(f)?

Answer: A TCP is defined generally as land that may be eligible for inclusion in the NR because of its association with cultural practices or beliefs of a living community that; (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.[14] Land referred to as a TCP is not automatically considered historic property, or treated differently from other potentially historic property. A TCP must also meet the NR criteria as a site, structure, building, district, or object to be eligible under Section 106, and thus for Section 4(f) protection. For those TCPs of significance to an Indian tribe or Native Hawaiian Organization (NHO), the THPO or designated representative of the Indian tribe or NHO should be acknowledged as possessing special expertise to assess the NR eligibility of the resources that possess religious and cultural significance to them. TCPs may be eligible under multiple criteria and therefore should not be presumed to be eligible only as archeological resources (*See* 23 CFR 774.11(e)).

USE OF SECTION 4(f) PROPERTIES

7. Use of Section 4(f) Property

Question 7A: What constitutes a transportation use of property from publicly owned public parks, public recreation areas, wildlife and waterfowl refuges and public or privately owned historic sites?

Answer: A use of Section 4(f) property is defined in 23 CFR 774.17. A use occurs when:

1) Land is permanently incorporated into a transportation facility;
2) There is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute's preservationist purposes; or
3) There is a constructive use of a Section 4(f) property.

Permanent Incorporation: Land is considered permanently incorporated into a transportation project when it has been purchased as right-of-way or sufficient property interests have otherwise been acquired for the purpose of project implementation. For example, a permanent easement required for the purpose of project construction or that grants a future right of access onto a Section 4(f) property, such as for the purpose of routine maintenance by the transportation agency, would be considered a permanent incorporation of land into a transportation facility.

Temporary Occupancy: Examples of temporary occupancy of Section 4(f) land include right-of-entry, project construction, a temporary easement, or other short- term arrangement

[14] For more information on the subject of TCPs see National Register Bulletin #38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* http://www.nps.gov/history/NR/publications/bulletins/nrb38/nrb38.pdf

involving a Section 4(f) property. A temporary occupancy will not constitute a Section 4(f) use when all of the conditions listed in 23 CFR 774.13(d) are 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 Section 4(f) resource regarding the above conditions.

In situations where the above criteria cannot be met, the temporary occupancy will be a use of Section 4(f) property and the appropriate Section 4(f) analysis, coordination, and documentation will be required (*See* 23 CFR 774.13(d)). In those cases where a temporary occupancy constitutes a use of Section 4(f) property and the *de minimis* impact criteria (Questions 10 and 11) are also met, a *de minimis* impact finding may be made. *De minimis* impact findings should not be made in temporary occupancy situations that do not constitute a use of Section 4(f) property.

Constructive Use: FHWA must comply with 23 CFR 774.15 to determine whether or not there is a constructive use of Section 4(f) property. Constructive use of Section 4(f) property is only possible in the absence of a permanent incorporation of land or a temporary occupancy of the type that constitutes a Section 4(f) use. Constructive use occurs when the proximity impacts of a project on an adjacent or near-by Section 4(f) property, after incorporation of impact mitigation, are so severe that the activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs when the protected activities, features, or attributes of the Section 4(f) property are substantially diminished. As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance (Questions 1 and 2), will be meaningfully reduced or lost. The degree of impact and impairment must be determined in consultation with the officials with jurisdiction in accordance with 23 CFR 774.15(d)(3). In those situations where a potential constructive use can be reduced below a substantial impairment by the inclusion of mitigation measures, there will be no constructive use and Section 4(f) will not apply.

The Section 4(f) regulations identify specific project situations where constructive use would and would not occur. The impacts of projects adjacent to or in reasonable proximity of Section 4(f) property should be carefully examined early in the NEPA process pursuant to 23 CFR Part 771. If it is determined that the proximity impacts do not cause a substantial impairment, FHWA can reasonably conclude that there will be no constructive use. The analysis of proximity impacts and potential constructive use should be documented in the project file. Documentation of a finding of *no constructive use* should apply the legal standards and terminology used in 23 CFR 774.15, *Constructive Use Determinations*. The use

of the term "constructive use" is not required in such documentation, but should be used when appropriate – for example, when responding to comments in NEPA documents that specifically address constructive use, or where it is useful in demonstrating that FHWA has specifically considered the potential for a constructive use. Where a constructive use determination seems likely, the FHWA Division Office is required by the Administrator's delegation of Section 4(f) authority to consult with the Headquarters Office of Project Development and Environmental Review before the determination is finalized.

Since a *de minimis* impact finding can only be made where the transportation use does not adversely affect the activities, features, or attributes that qualify a property for protection under Section 4(f), a *de minimis* impact finding is inappropriate where a project results in a constructive use (*See* 23 CFR 774.3(b) and the definition of *de minimis* impact in 774.17).

Question 7B: Does Section 4(f) apply when there is an adverse effect determination under the regulations implementing Section 106 of the NHPA?

Answer: FHWA's determination of adverse effect under the Section 106 process (*See* 36 CFR 800.5) does not automatically mean that Section 4(f) will apply. Nor does a determination of no adverse effect mean that Section 4(f) will not apply in some cases. When a project permanently incorporates land of a historic site, regardless of the Section 106 determination, Section 4(f) will apply. If a project does not permanently incorporate land from the historic property but results in an adverse effect, it will be necessary for FHWA to further assess the proximity impacts of the project in terms of the potential for constructive use (Question 7A). This analysis is necessary to determine if the proximity impact(s) substantially impair the features or attributes that contribute to the NR eligibility of the historic site. If there is no substantial impairment, notwithstanding an adverse effect determination, there is no constructive use and Section 4(f) does not apply. The FHWA determines if there is a substantial impairment by consulting with all identified officials with jurisdiction, including the SHPO/THPO and the ACHP if participating, to identify the activities, features, and attributes of the property that qualify it for Section 4(f) protection and by analyzing the proximity impacts of the project (including any mitigation) on those activities, features, and attributes (*See* 23 CFR 774.15(d)(3)). The determination of Section 4(f) applicability is ultimately FHWA's decision, and the considerations and consultation that went into that decision should be documented in the project file.

An example of a situation in which there is a Section 106 adverse effect but no Section 4(f) use, is a proposed transportation enhancement project that would convert a historic railroad depot into a tourist center. For public use, the project will require consistency with the American with Disabilities Act (ADA). The incorporation of accessible ramps or elevator may result in a determination of adverse effect; however, there is no permanent incorporation of Section 4(f) land into a transportation facility. The FHWA may determine, after consultation with the SHPO/THPO on the historic attributes and impacts thereto, that the project will not substantially impair the attributes of the historic property. There would not be a Section 4(f) use in this case. There would be a Section 4(f) use only if land from the property is either incorporated into a transportation facility or if the property is substantially impaired.

Another example of an adverse effect where there is no Section 4(f) use might be construction of a new highway within the immediate view shed of a historic farmstead that results in an adverse effect finding under Section 106 for the diminishment of the setting. It is unlikely this visual intrusion would reach the threshold of substantial impairment of the attributes which cause the farmstead to be eligible for the NR as it would still retain its historic fabric and use features; however, a constructive use could occur where 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.

An example of a Section 4(f) use without a Section 106 adverse effect involves a project on existing alignment, which proposes minor modification at an intersection. To widen the roadway sufficiently a small amount of land from an adjacent historic site will be acquired. The land acquisition does not alter the integrity of the historic site and the SHPO concurs in FHWA's determination of no adverse effect. Even though under Section 106 there is no adverse effect, land from the site will be permanently incorporated into the transportation facility and Section 4(f) will apply. The use would likely qualify as a *de minimis* impact or may be approved using the *Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites* [15] depending on the circumstances of the project.

Question 7C: How is a Section 4(f) use determined in historic districts?

Answer: When a project requires land from a non-historic or non-contributing property lying within a historic district and does not use other land within the historic district that is considered contributing to its historic significance, FHWA's longstanding policy is that there is no direct use of the historic district for purposes of Section 4(f). With respect to constructive use, if the Section 106 consultation results in a determination of no historic properties affected or no adverse effect, there is no Section 4(f) constructive use of the district as a whole. If the project requires land from a non-historic or non-contributing property, and the Section 106 consultation results in a determination of adverse effect to the district as a whole, further assessment is required pursuant to 23 CFR 774.15 to determine whether or not there will be a constructive use of the district. If the use of a non-historic property or non-contributing element substantially impairs the activities, features, or attributes that are related to the NR eligibility of the historic district, then Section 4(f) would apply. In any case, appropriate steps, including consultation with the SHPO/THPO on the historic attributes of the district and impacts thereto, should be taken to establish whether the property is contributing or non-contributing to the district and whether its use would substantially impair the historic attributes of the historic district.

For example, an intersection improvement proposed in a NR listed or eligible historic district, requires the demolition of a modern building that is neither individually eligible for the NR nor is a contributing element of the district. Although no right-of-way will be acquired from an individually eligible or contributing property, it is consistent with the

[15] http://www.environment.fhwa.dot.gov/projdev/pd5sec4f.asp

NHPA regulations that there will be an adverse effect to the historic district because of changes resulting from the wider intersection and installation of more extensive traffic signals. It may be reasonably determined, however, that no individually eligible property, contributing element, or the historic district as a whole will be substantially impaired. Accordingly, in this example a Section 4(f) use will not occur in the form of either a permanent incorporation or a constructive use.

When a project uses land from an individually eligible property within a historic district, or a property that is a contributing element to the historic district, Section 4(f) is applicable. In instances where a determination is made under Section 106 of no historic properties affected or no adverse effect, then the use may be approved with a *de minimis* impact determination. If the use does not qualify for a *de minimis* impact determination, an individual Section 4(f) evaluation will be necessary. Exceptions recognized in 23 CFR 774.13 may be applied to individually eligible or contributing properties within a historic district, and to contributing elements within a historic district.

Question 7D: How are historic resources within highway rights-of-way considered?

Answer: In some parts of the country it is not uncommon for historic objects or features not associated with the roadway to exist within the highway right-of-way. Examples include rock walls, fences, and structures that are associated with an adjacent historic property. Others are linear properties such as drainage systems or railroad corridors. These properties, objects, or features are either not transportation in nature or are part of the roadway itself. This condition occurs for various reasons such as historic property boundaries coinciding with the roadway centerline or edge of the road, or situations where right-of-way was acquired but historic features were allowed to remain in place. When a future transportation project is advanced resulting in a Section 106 determination of no historic properties affected or no adverse effect to such resources, there would be no Section 4(f) use. If the historic features are determined to be adversely affected, the adverse effect should be evaluated to determine whether it results in a Section 4(f) use.

8. Historic Bridges, Highways and Other Transportation Facilities

Question 8A: How does Section 4(f) apply to historic transportation facilities?

Answer: The Section 4(f) statute imposes conditions on the use of land from historic sites for highway projects but makes no mention of bridges, highways, or other types of facilities such as railroad stations or terminal buildings, which may be historic and are already serving as transportation facilities. The FHWA's interpretation is that the Congress clearly did not intend to restrict the rehabilitation or repair, of historic transportation facilities. The FHWA therefore established a regulatory provision that Section 4(f) approval is required only when a historic bridge, highway, railroad, or other transportation facility is adversely affected by the proposed project; e.g. the historic integrity (for which the facility was determined eligible for the NR) is adversely affected by the proposed project (*See* 23 CFR 774.13(a)).

Question 8B: Will Section 4(f) apply to the replacement of a historic bridge that is left in place?

Answer: FHWA's longstanding policy is that Section 4(f) does not apply to the replacement of a historic bridge on new location when the historic bridge is left in its original location and its historic integrity and value will be maintained. To maintain the integrity of the historic bridge, FHWA should ensure that a mechanism is in place for continued maintenance of the bridge that would avoid harm to the bridge due to neglect. In these situations it is also necessary to consider whether or not the proximity impacts of the new bridge will result in substantial impairment of the historic bridge that is left in place or whether there are other properties present which should be afforded consideration pursuant to Section 4(f). These considerations should be documented in the project file.

Question 8C: How do the requirements of Section 4(f) apply to donations of historic bridges to a State, locality, or responsible private entity?

Answer: A State DOT or local public agency that proposes to demolish a historic bridge for a replacement project may first make the bridge available for donation to a State, locality or a responsible private entity. This process is commonly known as marketing the historic bridge and often involves relocation of the structure, if the bridge is of a type suitable for relocation. Provided the State, locality or responsible entity that accepts the bridge enters into an agreement to maintain the bridge and the features that contribute to its historic significance and assume all future legal and financial responsibility for the bridge, Section 4(f) will not apply to the bridge.

If the bridge marketing effort is unsuccessful and the bridge will be demolished or relocated without preservation commitments, Section 4(f) will apply and the appropriate Section 4(f) analysis, consultation and documentation will be required. The *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*[16] may be used.

Question 8D: Can the *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* be applied to the replacement of a historic bridge or culvert that lacks individual distinction but is identified as a contributing element of a historic district that is on or eligible for listing on the NR?

Answer: Historic districts may include properties or elements that lack individual distinction but possess sufficient integrity to contribute to the overall significance of the district, as well as individually distinctive features that may be separately listed or determined eligible for the NR. All contributing properties or elements, including identified features and their settings are considered eligible for the NR and are therefore Section 4(f) resources. As such, bridges in historic districts may be individually eligible but may also be identified as contributing features within the larger historic district. The *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic*

[16] The Section 4(f) programmatic evaluations are available at http://www.environment.fhwa.dot.gov/4f/index.asp

Bridges[17] may be applied to any historic bridge or culvert, either contributing to a district or individually eligible. The application of the historic bridge programmatic Section 4(f) evaluation would be limited to the bridge replacement or rehabilitation only and must meet all the applicability criteria stated in the programmatic Section 4(f) evaluation. If the bridge replacement requires use, either direct or constructive, of surrounding or adjoining property that contributes to the significance of the historic district, the use of that property would have to be evaluated via another form of Section 4(f) evaluation, including possibly an individual evaluation.

Question 8E: Does Section 4(f) apply to the construction of an access ramp providing direct vehicular ingress/egress to a public boat launch area from an adjacent highway?

Answer: When an access ramp is constructed as part of a project to construct a new bridge or to reconstruct, replace, repair, or alter an existing bridge on a Federal-aid system, FHWA's longstanding policy is that Section 4(f) approval is not necessary for the access ramp and public boat launching area. This policy was jointly developed by FHWA and the U.S. DOI in response to the enactment of section 147 of the *Federal-Aid Highways Act of 1976* (Pub. L. 94-280 (HR 8235) May 5, 1976). Where public boat launching areas are located in publicly owned parks, recreational areas, or refuges otherwise protected by the provision of Section 4(f), it would be contrary to the intent of section 147 to search for feasible and prudent alternatives to the use of such areas as a site for an access ramp to the public boat launching area. Such ramps must provide direct access to a public boat launching area adjacent to the highway. This policy only applies to the access ramp and public boat launching area; any other use of Section 4(f) property for the project will require Section 4(f) approval.

Question 8F: Is compliance with Section 4(f) necessary for park roads and parkways projects funded under FHWA's Federal Lands Highway Program, 23 U.S.C. § 204?

Answer: No. Park roads and parkways projects funded under FHWA's Federal Lands Highway Program, 23 U.S.C. § 204, are expressly excepted from Section 4(f) requirements within the Section 4(f) statute itself and by 23 CFR 774.13(e). A park road is "a public road, including a bridge built primarily for pedestrian use, but with capacity for use by emergency vehicles, that is located within, or provides access to, an area in the National Park System with title and maintenance responsibilities vested in the United States" and a parkway is a road "authorized by Act of Congress on lands to which title is vested in the United States" (23 U.S.C. § 101(a)).

OFFICIALS WITH JURISDICTION; CONSULTATION; AND DECISIONMAKING

9. Officials with Jurisdiction

Question 9A: Who are the officials with jurisdiction for a park, recreation area, or wildlife

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[17] The Section 4(f) programmatic evaluations are available at http://www.environment.fhwa.dot.gov/[18] 36 CFR Part 800 (http://www.achp.gov/work106.html)

and waterfowl refuge and what is their role in determining Section 4(f) applicability?

Answer: The officials with jurisdiction are defined in 23 CFR 774.17. Under that definition, there may be more than one official with jurisdiction for the same Section 4(f) property. For public parks, recreation areas, and wildlife and waterfowl refuges (Question 1) the official(s) with jurisdiction are the official(s) of an agency or agencies that own and/or administer the property in question and who are empowered to represent the agency on matters related to the property.

There may be instances where the agency owning or administering the land has delegated or relinquished its authority to another agency, via an agreement on how some of its land will function or be managed. The FHWA will review the agreement and determine which agency has authority on how the land functions. If the authority has been delegated or relinquished to another agency, that agency should be contacted to determine the purposes and significance of the property. Management plans that address or officially designate the purposes of the property should be reviewed as part of this determination. After consultation, and in the absence of an official designation of purpose and function by the officials with jurisdiction, FHWA will base its decision of Section 4(f) applicability on an examination of the actual functions that exist (*See* 23 CFR 774.11(c)).

The final decision on the applicability of Section 4(f) to a particular property is the responsibility of FHWA. In reaching this decision FHWA will rely on the official(s) with jurisdiction to identify the kinds of activities and functions that take place, to indicate which of these activities constitute the primary purpose, and to state whether the property is significant. Documentation of the determination of non- applicability should be included in the project file.

Question 9B: Who are the officials with jurisdiction for historic sites?

Answer: The officials with jurisdiction are defined in 23 CFR 774.17. For historic properties (Question 2 and 7) the official with jurisdiction is the State Historic Preservation Officer (SHPO). If the historic property is located on tribal land the Tribal Historic Preservation Officer (THPO) is considered the official with jurisdiction. If the property is located on tribal land but the tribe has not assumed the responsibilities of the SHPO, as provided for in the NHPA, then the representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the Advisory Council on Historic Preservation (ACHP) is involved in the consultation concerning a property under Section 106 of the NHPA,[18] the ACHP will also be considered an official with jurisdiction over that resource. For a NHL, the National Park Service is also an official with jurisdiction over that resource.

Question 9C: Who are the officials with jurisdiction when a park, recreation area, or refuge is also a historic site or contains historic sites within its boundaries?

Answer: Some public parks, recreation areas, and wildlife and waterfowl refuges are also

[18] 36 CFR Part 800 (http://www.achp.gov/work106.html)

historic properties either listed or eligible for listing on the NR. In other cases, historic sites are located within the property boundaries of public parks, recreation areas, or wildlife and waterfowl refuges. When either of these situations exists and a project alternative proposes the use of land from the historic site there will be more than one official with jurisdiction. For historic sites the SHPO/THPO and ACHP if participating are officials with jurisdiction. Coordination will also be required with 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, such as commenting on project impacts to the activities, features, or attributes of property and on proposed mitigation measures. For a NHL, the National Park Service is also an official with jurisdiction over that resource.

Question 9D: When is coordination with the U.S. DOI required?

Answer: Prior to FHWA's final approval of a Section 4(f) use, individual Section 4(f) evaluations are provided to the U.S. DOI Office of Environmental Compliance and Policy, which coordinates the comments of all U.S. DOI agencies involved in the project (*See* 23 CFR 774.5(a)). However, the official with jurisdiction for Section 4(f) purposes is typically the field official charged with managing the Section 4(f) property at issue. For example, the official with jurisdiction for a project involving the use of a National Wildlife Refuge would be the Refuge Manager. If it is not clear which individual within the U.S. DOI is the official with jurisdiction for a particular Section 4(f) property, U.S. DOI's Office of Environmental Compliance and Policy should be consulted to resolve the question. The U.S. DOI has very specific expectations regarding the submission of Section 4(f) documents.[19] If the Section 4(f) property is under the jurisdiction of the U.S. Forest Service, the Department of Agriculture would be contacted for its review. The final authority on the content and format of Section 4(f) documents is FHWA's, as specified in 23 CFR Part 774, this *Section 4(f) Policy Paper* and the *Technical Advisory*, T 6640.8A, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents.

It is not necessary to coordinate project specific applications of existing programmatic Section 4(f) evaluations with the U.S. DOI unless the U.S. DOI owns or has administrative oversight over the Section 4(f) property involved. In these cases, FHWA will need written concurrence from the U.S. DOI as the official with jurisdiction as stipulated in the applicable programmatic Section 4(f) evaluation. Consultation with the U.S. DOI was conducted during the development of all the existing programmatic Section 4(f) evaluations. Development of any new programmatic Section 4(f) evaluations would also require coordination with the U.S. DOI before they are made available for use (*See* 23 CFR 774.3(d)(2)).

Similarly, it is not necessary to conduct project-level coordination with the U.S. DOI when processing *de minimis* impact determinations unless the U.S. DOI has administrative oversight over the public park, recreation area, or wildlife and waterfowl refuge involved. In these situations, FHWA must obtain concurrence from the U.S. DOI as the official having jurisdiction that there is no adverse effect to the activities, features, or attributes of the property (*See* 23 CFR 774.5(b)). When a *de minimis* impact determination is anticipated for a historic site owned or administered by the U.S. DOI, and when the historic site is a NHL,

[19] http://www.doi.gov/pmb/oepc/nrm/upload/Environmental_Review_Process.pdf

the U.S. DOI will have the opportunity to participate during the Section 106 consultation as a consulting party (*See* Questions 11 through 13 for further guidance on de minimis impact determinations).

For situations in which the Section 4(f) property is encumbered with a Federal interest, for example as a result of a U.S. DOI grant, the answer to Question 1D or Question 31 may apply.

Question 9E: What is the official status of the *Handbook on Departmental Reviews of Section 4(f) Evaluations,* originally issued in February 2002 (and any subsequent revisions) by the U.S. DOI Office of Environmental Policy and Compliance?

Answer: The U.S. DOI Handbook[20] is intended to provide guidance to the National Park Service (NPS), the U.S. Fish and Wildlife Service and other designated lead bureaus in the preparation of U.S. DOI comments on the Section 4(f) evaluations prepared by the U.S. DOT pursuant to the authority granted in the Section 4(f) statute. The Handbook is an official U.S. DOI document and includes departmental opinion related to the applicability of Section 4(f) to lands for which they have jurisdiction and authority. The Section 4(f) statute requires U.S. DOT to consult and cooperate with the U.S. DOI as well as the Departments of Agriculture and Housing and Urban Development, as appropriate in Section 4(f) program and project related matters. The FHWA values the U.S. DOI's opinions related to the resources under their jurisdiction, and while the Handbook is a resource which FHWA may consider, it is not the final authority on Section 4(f) determinations.

Official FHWA policy on the applicability of Section 4(f) to lands that fall within the jurisdiction of the U.S. DOI is contained within 23 CFR 774 and this Section 4(f) Policy Paper. While FHWA is not legally bound by the guidance contained within the Handbook or the comments provided by the U.S. DOI or lead bureaus, every attempt should be made to reach agreement during project consultation. In some situations, one of the bureaus may be an official with jurisdiction. When unresolved conflicts arise during coordination with the U.S. DOI related to the applicability of Section 4(f) to certain types of property, it might be necessary for the Division Office to contact the FHWA Headquarters Office of Project Development and Environmental Review for assistance.

Question 9F: Section 4(f) also requires cooperation and consultation with the U.S. Department of Agriculture (USDA) and the U.S. Department of Housing and Urban Development (HUD). When is coordination with the USDA or HUD on a Section 4(f) matter appropriate?

Answer: Many national forests under the jurisdiction of the U.S. Forest Service of the USDA serve as multiple-use land holdings as described in Question 4. If the project uses land of a national forest, coordination with the USDA as the official with jurisdiction over the resource would be appropriate in determining the purposes served by the land holding and the resulting extent of Section 4(f) applicability to the land holding. HUD would be involved only in cases where HUD had an interest in a Section 4(f) property.

[20] http://www.doi.gov/oepc/handbook.html

Question 9G: Who makes Section 4(f) decisions and *de minimis* impact determinations?

Answer: The FHWA Division Administrator is the responsible official for all Section 4(f) applicability decisions, approvals, and *de minimis* impact determinations for Federal-aid projects. The FHWA Federal Lands Highway Division Engineer has this authority for Federal Lands projects. Coordination with the FHWA Headquarters or the FHWA Office of the Chief Counsel is not required for routine *de minimis* impact determinations but is recommended where assistance is needed for controversial projects or complex situations. It will be necessary for FHWA to consult and coordinate with the official(s) with jurisdiction as discussed above in making determinations of applicability and in approving the use of Section 4(f) property. When a programmatic Section 4(f) evaluation is relied upon to satisfy Section 4(f), the consultation requirements and approval process for the specific programmatic evaluation must be followed (*See* 23 CFR 774.3(d)).

10. Section 4(f) Evaluations for Tiered Projects

Question 10: How is Section 4(f) handled in tiered NEPA documents?

Answer: The FHWA must comply with 23 CFR 774.7(e) when tiered NEPA documents are used. In a tiered Environmental Impact Statement (EIS), the project development process moves from a broad scale examination at the first-tier stage to a more site specific evaluation in the second-tier stage. During the first-tier stage the detailed information necessary to complete the Section 4(f) approval may not be available. Even so, this does not relieve the FHWA from its responsibility to determine the possibility of making *de minimis* impact determinations or to consider alternatives that avoid the use of Section 4(f) properties during the first-tier stage. This analysis and documentation should address potential uses of Section 4(f) property and whether those uses could have a bearing on the decision to be made during this tier.

If sufficient information is available, a preliminary Section 4(f) approval may be made at the first-tier stage as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This preliminary approval must include all possible planning to minimize harm to the extent that the level of detail available at this stage allows (23 CFR 774.7(e)(1)). This planning may be limited to a commitment to ensure that opportunities to minimize harm at subsequent stages in the project development process have not been precluded by decisions made at the first-tier stage. Any preliminary Section 4(f) approvals must be incorporated into the first-tier EIS (23 CFR 774.7(e)(1)).

If sufficient information is unavailable during the first-tier stage, then the EIS may be completed without any preliminary Section 4(f) approvals. The documentation should state why no preliminary approval is possible during the first-tier stage and clearly explain the process that will be followed to complete Section 4(f) evaluations during subsequent tiers. The extent to which a Section 4(f) approval (preliminary or final) anticipated to be made in a

subsequent tier may have an effect on any decision made during the first-tier stage should be discussed. Schedules to complete Section 4(f) evaluations, if available, should also be reported.

Preliminary first-tier Section 4(f) approvals will be finalized in the second-tier CE, EA, final EIS, ROD or FONSI, as appropriate (*See* 23 CFR 774.7(e)(2)). If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

***DE MINIMIS* IMPACT DETERMINATIONS**

11. *De minimis* Impact Determinations for Parks, Recreation Areas, and Wildlife and Waterfowl Refuges

Question 11A: What constitutes a *de minimis* impact with respect to a park, recreation area, or wildlife and waterfowl refuge?

Answer: An impact to a public park, recreation area, or wildlife and waterfowl refuge may be determined to be *de minimis* if the transportation use of the Section 4(f) property, including incorporation of any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures), does not adversely affect the activities, features, or attributes that qualify the resource for protection under Section 4(f). Language included in the SAFETEA-LU Conference Report provides additional insight on the meaning of *de minimis* impact:

> The purpose of the language is to clarify that the portions of the resource important to protect, such as playground equipment at a public park, should be distinguished from areas such as parking facilities. While a minor but adverse effect on the use of playground equipment should not be considered a *de minimis* impact under Section 4(f), encroachment on the parking lot may be deemed *de minimis*, as long as the public's ability to access and use the site is not reduced.

(Conference Report of the Committee of Conference on H.R. 3, Report 109-203, page 1057). This simple example helps to distinguish the activities, features, or attributes of a Section 4(f) property that are important to protect from those which can be used without resulting in adverse effects. Playground equipment in a public park may be central to the recreational value of the park that Section 4(f) is designed to protect. The conference report makes it clear that when impacts are proposed to playground equipment or other essential features, a *de minimis* impact finding will at a minimum require a commitment to replace the equipment with similar or better equipment at a time and in a location that results in no adverse effect to

the recreational activity. A parking lot encroachment or other similar type of land use, on the other hand, could result in a *de minimis* impact with minimal mitigation, as long as there are no adverse effects on public access and the official(s) with jurisdiction agree.

The impacts of a transportation project on a park, recreation area, or wildlife and waterfowl refuge that qualifies for Section 4(f) protection may be determined to be *de minimis* if:

1) The transportation use of the Section 4(f) property, together with any impact avoidance, minimization, and mitigation or enhancement measures incorporated into the project, does not adversely affect the activities, features, or attributes that qualify the resource for protection under Section 4(f);
2) The public has been afforded an opportunity to review and comment on the effects of the project on the protected activities, features, or attributes of the Section 4(f) property; and
3) The official(s) with jurisdiction over the property, after being informed of the public comments and FHWA's intent to make the *de minimis* impact finding, concur in writing that the project will not adversely affect the activities, features, or attributes that qualify the property for protection under Section 4(f).

(*See* 23 CFR 774.5(b)(2), 23 CFR 774.17). The concurrence of the official(s) with jurisdiction that the protected activities, features, or attributes of the resource are not adversely affected must be in writing (23 CFR 774.5(b)(2)(ii)). The written concurrence can be in the form of a signed letter on agency letterhead, signatures in concurrence blocks on transportation agency documents, agreements provided via e-mail or other method deemed acceptable by the FHWA Division Administrator. Obtaining these agreements in writing and retaining them in the project file is consistent with effective practices related to preparing project administrative records.

Question 11B: What role does mitigation play in the *de minimis* impact finding?

Answer: *De minimis* impact determinations are based on the degree of impact after the inclusion of any measure(s) to minimize harm, (such as any avoidance, minimization, mitigation, or enhancement measures) to address the Section 4(f) use (i.e., net impact). The expected positive effects of any measures included in a project to mitigate the adverse effects to a Section 4(f) property must be taken into account when determining whether the impact is *de minimis* (*See* 23 CFR 774.3(b)). The purpose of taking such measures into account is to encourage the incorporation of Section 4(f) protective measures as part of the project. *De minimis* impact findings must be expressly conditioned upon the implementation of any measures that were relied upon to reduce the impact to a *de minimis* level (*See* 23 CFR 774.7(b)). The implementation of such measures will become the responsibility of the project sponsor with FHWA oversight (*See* 23 CFR 771.109(b)).

Question 11C: What constitutes compliance with the public notice, review and comment requirements for *de minimis* impact findings for parks, recreation areas or wildlife and waterfowl refuges?

Answer: Information supporting a *de minimis* impact finding for a park, recreation area or

refuge should be included in the NEPA document prepared for the project. This information includes, at a minimum, a description of the involved Section 4(f) property(ies), use and impact(s) to the resources and any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) that are included in the project as part of the *de minimis* impact finding. The public involvement requirements associated with specific NEPA document and process will, in most cases, be sufficient to satisfy the public notice and comment requirements for the *de minimis* impact finding (*See* 23 CFR 774.5(b)(2)).

In general, the public notice and comment process related to *de minimis* impact findings will be accomplished through the State DOT's approved public involvement process (*See* 23 CFR 771.111(h)(1)). For those actions that do not routinely require public review and comment (e.g., certain categorical exclusions and re-evaluations) but for which a *de minimis* impact finding will be made, a separate public notice and opportunity for review and comment will be necessary. In these cases, appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of the Section 4(f) property, the impacts, and public interest. Possible methods of public involvement are many and include newspaper advertisements, public meetings, public hearings, notices posted on bulletin boards (for properties open to the public), project websites, newsletters, and placement of notices or documents at public libraries. All comments received and responses thereto, should be documented in the same manner that other comments on the proposed action would be incorporated in the project file. Where public involvement was initiated solely for the purpose of a *de minimis* impact finding, responses or replies to the public comments may not be required, depending on the substantive nature of the comments. All comments and responses should be documented, as appropriate, in the project file.

12. *De minimis* Impact Determinations on Historic Sites

Question 12A: What are the requirements for *de minimis* impact on a historic site?

Answer: A finding of *de minimis* impact on a historic site may be made when:

1) FHWA has considered the views of any consulting parties participating in the consultation required by Section 106 of the NHPA, including the Secretary of the Interior or his representative if the property is a NHL;
2) The SHPO/THPO, and Advisory Council on Historic Preservation (ACHP) if participating in the Section 106 consultation, are informed of FHWA's intent to make a *de minimis* impact finding based on their written concurrence in the Section 106 determination of "no adverse effect;" and
3) The Section 106 process results in a determination of "no adverse effect" with the written concurrence of the SHPO/THPO, and ACHP if participating in the Section 106 consultation.[21]

[21] Although the Section 4(f) statute and regulations also provide for a *de minimis* impact determination in the situation where there is a use of a historic site resulting in a Section 106 determination of *no historic properties affected*, FHWA has not yet encountered any such situation in practice. If such situation arises, a *de minimis* impact determination would be appropriate.

(*See* 23 CFR 774.5(b)(1) and the definition of *de minimis* impact in 23 CFR 774.17.)

Question 12B: How should the concurrence of the SHPO/THPO, and ACHP if participating in the Section 106 determination of effect, be documented when the concurrence will be the basis for a *de minimis* impact finding?

Answer: Section 4(f) requires that the SHPO/THPO, and ACHP if participating, must concur in writing in the Section 106 determination of no adverse effect (*See* 23 CFR 774.5(b)(1)(ii)). The request for concurrence in the Section 106 determination should include a statement informing the SHPO/THPO, and ACHP if participating, that FHWA or FTA intends to make a *de minimis* impact finding based upon their concurrence in the Section 106 determination.

Under the Section 106 regulation, if a SHPO/THPO does not respond within a specified time frame FHWA may move forward to the next step of the Section 106 process but Section 4(f) explicitly requires their written concurrence (*See* 23 CFR 774.5(b)(1)(ii)). It is therefore recommended that transportation officials share this guidance with the SHPOs and THPOs in their States so that these officials fully understand the implication of their concurrence in the Section 106 determinations and the reason for requesting written concurrence.

Question 12C: For historic sites, will a separate public review process be necessary for the determination of a *de minimis* impact?

Answer: No. The FHWA will consult with the parties participating in the Section 106 process but is not required to provide additional public notice or provide additional opportunity for review and comment. Documentation of consulting party involvement is required (*See* 23 CFR 774.5(b) and 774.7(b)). In addition, for projects requiring the preparation and distribution of a NEPA document, the information supporting a *de minimis* impact finding will be included in the NEPA documentation and the public will be afforded an opportunity to review and comment during the formal NEPA process.

Question 12D: Certain Section 106 programmatic agreements (PAs) allow the lead agency to assume the concurrence of the SHPO/THPO in the determination of *no adverse effect* or *no historic properties affected* if a response to a request for concurrence is not received within the time period specified in the PA. Does such concurrence through non-response, in accordance with a written and signed Section 106 PA, constitute the written concurrence needed to make a *de minimis* impact finding?

Answer: In accordance with the provisions of a formal Section 106 programmatic agreement (PA), if the SHPO/THPO does not respond to a request for concurrence in the Section 106 determination within a specified time frame, the non-response together with the written PA, will be considered written concurrence in the Section 106 determination that will be the basis for the *de minimis* impact finding by FHWA. The FHWA must inform the SHPO/THPO who are parties to such PAs, in writing, that a non-response which is treated as a concurrence in a no adverse effect or no historic properties affected determination will also be treated as

the written concurrence for purposes of the FHWA *de minimis* impact finding (*See* 23 CFR 774.5(b)(1)(ii)). It is recommended that this understanding of the parties be documented via formal correspondence or other written means and appended to the existing PA. There is no need to amend the PA itself.

13. Other *De minimis* Impact Considerations

Question 13A: Are *de minimis* impact findings limited to any particular type of project or National Environmental Policy Act (NEPA) document?

Answer: No, the *de minimis* impact criteria may be applied to any project, as appropriate, regardless of the type of environmental document required by the NEPA process as described in the FHWA Environmental Impact and Related Procedures (*See* 23 CFR 771.115).

Question 13B: What effect does the *de minimis* impact provision have on the application of the existing FHWA nationwide programmatic Section 4(f) evaluations?

Answer: None. Existing FHWA programmatic Section 4(f) evaluations[22] remain in effect and may be applied, as appropriate, to the use of Section 4(f) property by a highway project.

Question 13C: Can a *de minimis* impact finding be made for a project as a whole, when multiple Section 4(f) properties are involved?

Answer: No, when multiple Section 4(f) properties are present in the study area and potentially used by a transportation project, *de minimis* impact findings must be made for the individual Section 4(f) properties because 23 CFR 774.3 requires an approval to use Section 4(f) property. The impacts to Section 4(f) properties and any impact avoidance, minimization, and mitigation or enhancement measures must be considered on an individual resource basis and *de minimis* impact findings made individually for each Section 4(f) property. When there are multiple resources for which *de minimis* impact findings are appropriate, however, the procedural requirements of Section 4(f) can and should be completed in a single process, document and circulation, so long as it is clear that distinct determinations are being made. Also in these cases, the written concurrence of the official(s) with jurisdiction may be provided for the project as a whole, so as long as the *de minimis* impacts findings have been made on an individual resource basis. For example, a no adverse effect determination made on an undertaking as a whole may be used to support individual *de minimis* impact findings provided individual historic sites are clearly identified in the Section 106 documentation.

ADDITIONAL EXAMPLES ANDOTHERCONSIDERATIONS

14. School Playgrounds

Question 14: Are publicly owned school playgrounds subject to the requirements of

[22] http://environment.fhwa.dot.gov/projdev/4fnspeval.asp

Section 4(f)?

Answer: While the primary purpose of public school playgrounds is generally for structured physical education classes and recreation for students, these properties may also serve significant public recreational purposes and therefore may be subject to Section 4(f) requirements. When a public school playground serves only school activities and functions, the playground is not subject to Section 4(f). When a public school playground is open to the public and serves either organized or substantial walk-on recreational purposes that are determined to be significant (*See* Question 1), it will be subject to the requirements of Section 4(f). The actual function of the playground is the determining factor in these circumstances. Documentation should be obtained from the officials with jurisdiction over the facility stating whether or not the playground is of local significance for recreational purposes.

There may be more than one official with jurisdiction over a school playground. A school official is considered to be the official with jurisdiction of the land during school activities. However, in some cases a school board may have authorized another public agency (e.g., the city park and recreation department) to control the facilities after school hours. In such cases, the public agency with authority to control the playground would be considered an official with jurisdiction with regard to any after-hours use of the playground. The FHWA is responsible for determining which official or officials have jurisdiction over a playground.

The term playground refers to the area of the school property developed and/or used for public park or recreation purposes such as baseball diamonds, soccer fields, tennis courts, track and field facilities, and other features such as jungle gyms or swing sets. This can also include open space or practice fields if those areas serve a park or recreation function. Section 4(f) would apply to the playground areas only and not the entire campus, unless the school and campus are also significant historic sites.

15. Trails and Shared Use Paths

Question 15A: Do the requirements of Section 4(f) apply to shared use paths or similar facilities?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If the publicly owned facility is primarily used for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply since it is not a recreational area. Section 4(f) would apply to a publicly owned, shared use path or similar facility (or portion thereof) designated or functioning primarily for recreation, unless the official(s) with jurisdiction determines that it is not significant for such purpose. During early consultation, it should be determined whether or not a management plan exists that addresses the primary purpose of the facility in question. If the exceptions in 23 CFR 774.13(f) and (g) do not apply, the utilization of the *Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects* should be considered if the facility is within a park or

recreation area. Whether Section 4(f) applies or not, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated shared use paths and similar facilities.[23]

Question 15B: The National Trails System Act permits the designation of scenic, historic, and recreation trails. Are these trails or other designated scenic or recreation trails on publicly owned land subject to the requirements of Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. National Scenic Trails (other than the Continental Divide National Scenic Trail) and National Recreation Trails that are on publicly owned recreation land are subject to Section 4(f), provided the trail physically exists on the ground thereby enabling active recreational use.

The Continental Divide National Scenic Trail and National Historic Trails are treated differently. Public Law 95-625 provides that "except for designated protected components of the trail, no land or site located along a designated National Historic Trail or along the Continental Divide National Scenic Trail shall be subject to the provisions of [Section 4(f)] unless such land or site is deemed to be of historical significance under the appropriate historical criteria such as those for the [NR]." FHWA interprets this to mean that while the Continental Divide National Scenic Trail and the National Historic Trails themselves are exempt from Section 4(f), trail segments (including similar components such as trail buffers or other adjacent sites that were acquired to complement the trails) that are on or eligible for the NR are subject to Section 4(f) (*See* 23 CFR 774.13(f)(2)).

Question 15C: Are shared use paths, bikeways, or designated scenic or recreational trails on highway rights-of-way subject to the requirements of Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If a path or trail is simply described as occupying the right-of-way of the highway and is not limited to any specific location within the right-of-way, a use of land would not occur provided that adjustments or changes in the alignment of the highway or the trail would not substantially impair the continuity of the path or trail. In this regard, it would be helpful if all future designations, including those made under the National Trails System Act, describe the location of the trail only as generally in the right-of- way.

Question 15D: Are trails on privately owned land, including land under public easement and designated as scenic or recreational trails subject to the requirements of Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f)

[23] Title 23, Section 109(m) states: "The Secretary shall not approve any project or take any regulatory action under this title that will result in the severance of an existing major route or have significant adverse impact on the safety for non- motorized transportation traffic and light motorcycles, unless such project or regulatory action provides for a reasonable alternate route or such a route exists."

approval is necessary for the use of a trail, path, bikeway, or sidewalk. Section 4(f) generally does not apply to trails on privately owned land. Section 4(f) could apply if an existing public easement permits public access for recreational purposes. In any case, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated trails.

Question 15E: Does Section 4(f) apply to trail-related projects funded under the Recreational Trails Program (RTP)?

Answer: No, projects funded under the Recreational Trails Program (RTP)[24] are exempt from the requirements of Section 4(f) by statute.[25] The exemption is limited to Section 4(f) and does not apply to other environmental requirements, such as NEPA or the NHPA.

16. User or Entrance Fees

Question 16: Does the charging of an entry or user fee affect Section 4(f) eligibility?

Answer: Many eligible Section 4(f) properties require a fee to enter or use the facility such as State Parks, National Parks, publicly owned ski areas, historic sites and public golf courses. The assessment of a user fee is generally related to the operation and maintenance of the facility and does not in and of itself negate the property's status as a Section 4(f) property. Therefore, it does not matter in the determination of Section 4(f) applicability whether or not a fee is charged, as long as the other criteria are satisfied.

Consider a public golf course as an example. Greens-fees are usually if not always required (Question 18A) and these resources are considered Section 4(f) properties when they are open to the public and determined to be significant. The same rationale should be applied to other Section 4(f) properties in which an entrance or user fee is required.

17. Transportation Enhancement Projects

Question 17A: How is Section 4(f) applied to transportation enhancement activity projects?[26]

Answer: FHWA must comply with 23 CFR 774.13(g) when determining if a Section 4(f) approval is necessary for a use by a transportation enhancement project or a mitigation activity. A transportation enhancement activity (TEA) is one of the specific types of activities set forth by statute at 23 U.S.C. § 101(a)(35). TEAs often involve the enhancement of an activity, feature or attribute on property that qualifies as a Section 4(f) property. In most cases, such work would be covered by the exception in 23 CFR 774.13(g) when the work is solely

[24] More information on the Recreational Trails Program is available at www.fhwa.dot.gov/environment/rectrails/.
[25] 23 U.S.C. § 206(h)(2) Recreational purpose.--A project funded under this section is intended to enhance recreational opportunity and is not subject to section 138 of this title or section 303 of title 49.
[26]. For more information see the *FHWA Final Guidance on Transportation Enhancement Activities;* December 17, 1999, and the TE Program Related Questions & Answers; August 2002, found at the Transportation Enhancement Website (www.fhwa.dot.gov/environment/te/index.htm).

for the purpose of preserving or enhancing an activity, feature or attribute that qualified the property for Section 4(f) protection. The official(s) with jurisdiction over the Section 4(f) property must concur in writing with this assessment. For a use of Section 4(f) property to occur in conjunction with a TEA, there must be a transportation use of land from an existing Section 4(f) property. In other words, the State DOT or other applicant as defined in 23 CFR 774.17 must acquire land from a Section 4(f) property and convert its function from park, recreation, refuge or historic purposes to a transportation purpose.

Many TEA-funded activities will occur on land that remains owned by a non- transportation entity (such as a local or State parks and recreation agency). An example would be a TEA proposed to construct a new bicycle/pedestrian path within a public park or to reconstruct an already existing bicycle/pedestrian path within a public park. Though related to surface transportation, this type of project is primarily intended to enhance the park. Either scenario would qualify as an exception for Section 4(f) approval assuming the official(s) with jurisdiction agree in writing that the TEA provides for enhancement of the bicycle/pedestrian activities within the park.

A variation of the above example is local public agency that proposes a TEA for construction of a new bicycle/pedestrian facility that requires the acquisition of land from a public park. The purpose of the project is to promote a non- motorized mode of travel for commuters even though some recreational use of the facility is likely to occur. This TEA requires a transfer of land from the parks and recreation agency to the local transportation authority for ultimate operation and maintenance of the newly constructed bicycle/pedestrian facility.
Since this TEA would involve the permanent incorporation of Section 4(f) land into a transportation facility, there is a use of Section 4(f) land and the appropriate Section 4(f) evaluation and documentation would be required. In this instance, the *Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects*[27] would likely apply depending on the particular circumstances of the project.

Other TEAs that involve acquisition of scenic or historic easements, or historic sites, often result in ultimate ownership and management of the facility by a non- transportation entity (such as a tourism bureau or historical society). An example would be the acquisition and/or restoration of a historic railroad station for establishment of a museum operated by a historical society. Even though Federal-aid transportation funds were used to acquire a historic building, a non- transportation entity ultimately will own and manage it. Accordingly, this TEA would qualify as an exception for Section 4(f) approval.

Section 106 still applies for any TEA involving a historic site on or eligible for listing on the NR. Please refer to the Nationwide Programmatic Agreement for Implementation of Transportation Enhancement Activities[28] that was issued in 1997 for more details.

For other complex or complicated situations involving TEA projects, it is recommended that the FHWA Division Office contact the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Services Team, or the

[27] http://www.environment.fhwa.dot.gov/projdev/4fbikeways.asp
[28] http://www.fhwa.dot.gov/environment/te/gmemo_program.htm

Office of the Chief Counsel for assistance.

Question 17B: Is the exception in 23 CFR 774.13(g) limited solely to work that is funded as a TEA pursuant to 23 U.S.C. § 101(a)(35)?

Answer: No. The exception cited in 23 CFR 774.13(g) refers to TEAs – though the term "project" is used instead of "activity" - and to mitigation activities (*See* Question 29 regarding mitigation activities). The discussion in the corresponding section of the preamble to the regulation involves TEAs within the context of 23 U.S.C. § 101(a)(35), but does not explicitly limit the exception to TEAs funded via the 10% set aside of Surface Transportation Program funds (*See* 73 *Fed. Reg.*13368, March 12, 2008). If proposed work very closely resembles a TEA but is not proposed for funding as a TEA, there are several options to consider.

If the proposed work could be characterized as a project mitigation feature, then the exception in 23 CFR 774.13(g) would apply without further consideration contingent upon the official(s) with jurisdiction concurring in writing that the work is solely for the purpose of preserving or enhancing an activity, feature or attribute that qualified the property for Section 4(f) protection.

In addition, the introductory paragraph of this section of the regulation indicates that the "exceptions include, but are not limited to" those listed in the ensuing paragraphs. If proposed work resembles a TEA, avoidance of the property could be characterized as being inconsistent with the preservation purpose of the Section 4(f) statute. Uses of Section 4(f) property under the statute have long been considered to include only adverse uses that harm or diminish the resource that the statute seeks to protect. Further, this exception is limited to situations in which the official(s) with jurisdiction over the Section 4(f) property agrees that the use will either preserve or enhance an activity, feature, or attribute of the property that qualifies it for protection under Section 4(f). Work similar to TEAs may be very carefully evaluated on a case-by-case basis to determine if an exception for Section 4(f) approval might be justified consistent with the preservation purpose of the statute and 23 CFR 774.13(g).

If a Section 4(f) use is identified, under any scenario, the potential for complying with Section 4(f) via a *de minimis* impact finding or utilization of an approved programmatic Section 4(f) evaluation should be considered.

Question 17C: Is it possible for a TEA to create a Section 4(f) property?

Answer: Yes. TEA projects that are funded under TEA categories (A) *Provision of facilities for pedestrians and bicycles* and (H) *Preservation of abandoned railway corridors* (including the conversion and use of the corridors for pedestrian or bicycle trails) could create a new Section 4(f) resource. If a future Federal-aid highway project were to use the property, the fact that the resource was created with TEA funding would not preclude the application of Section 4(f).

18. Golf Courses

Question 18A: Are public golf courses subject to Section 4(f), even when fees and reservations are required?

Answer: Section 4(f) applies to golf courses that are owned, operated and managed by a public agency for the primary purpose of public recreation and determined to be significant. Section 4(f) does not apply to privately owned and operated golf courses even when they are open to the general public. Golf courses that are owned by a public agency but managed and operated by a private entity may still be subject to Section 4(f) requirements depending on the structure of the agreement.

The fact that greens-fees (Question 16) or reservations (tee times) are required by the facility does not alter the Section 4(f) applicability, as long as the standards of public ownership, public access and significance are met.

Some golf courses are also historic sites. If a golf course is on or eligible for listing in the NR, then the Section 4(f) requirement for public ownership and public access will not apply.

Question 18B: Are military golf courses subject to the requirements of Section 4(f)?

Answer: Military golf courses are publicly owned (by the Federal Government) but are not typically open to the public at large. Because the recreational use of these facilities is limited to active duty and retired military personnel, family, and guests they are not considered to be public recreational areas and are not subject to the requirements of Section 4(f) (*See* Question 1D), unless they are significant historic sites (Question 2A).

19. Museums, Aquariums, and Zoos

Question 19: Does Section 4(f) apply to museums, aquariums and zoos?

Answer: Publicly owned museums, aquariums, and zoos are not normally considered parks, recreational areas, or wildlife and waterfowl refuges and are therefore not subject to Section 4(f), unless they are significant historic sites (Question 2A).

Publicly owned facilities such as museums, aquariums or zoos may provide additional park or recreational opportunities and will need to be evaluated on a case-by-case basis to determine if the primary purpose of the resource is to serve as a significant park or recreation area. To the extent that zoos are considered to be significant park or recreational areas, or are significant historic sites they will be treated as Section 4(f) properties.

20. Fairgrounds

Question 20: Are publicly owned fairgrounds subject to the requirements of Section 4(f)?

Answer: Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g. stock car races, horse racing, county or state fairs), rather than as park or recreation areas. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) applies only to those portions of land determined significant for park or recreational purposes (*See* Question 1A), unless they are significant historic sites (Question 2A).

21. Bodies of Water

Question 21A: How does the Section 4(f) apply to publicly owned lakes and rivers?

Answer: Lakes are sometimes subject to multiple, even conflicting, activities and do not readily fit into one category or another. Section 4(f) would only apply to those portions of publicly owned lakes and/or adjacent publicly owned lands that function primarily for park, recreation, or refuge purposes. Section 4(f) does not apply to areas which function primarily for other purposes or where recreational activities occur on incidental, secondary, occasional or dispersed basis.

In general, rivers are not subject to the requirements of Section 4(f). Those portions of publicly owned rivers, which are designated as recreational trails are subject to the requirements of Section 4(f). Of course, Section 4(f) would also apply to lakes and rivers, or portions thereof, which are contained within the boundaries of a park, recreation area, refuge, or historic site to which Section 4(f) otherwise applies.

Question 21B: Are Wild and Scenic Rivers (WSR) subject to Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.11(g) when determining if there is a use of a WSR. The *National Wild and Scenic Rivers Act* (WSRA) (16 U.S.C. § 1271 et seq. and 36 CFR 297.3) identifies those rivers in the United States which are designated as part of the WSR System. A WSR is defined as a river and the adjacent area within the boundaries of a component of the National Wild and Scenic Rivers System (National System). WSRs may be designated by Congress or, if certain requirements are met, the Secretary of the Interior. Each river is administered by either a Federal or state agency. Four Federal agencies have primary responsibility for the National Wild and Scenic Rivers System, specifically the Forest Service, the National Park Service, the Fish and Wildlife Service and the Bureau of Land Management.

Within this system there are wild, scenic and recreational designations. A single river can be classified as having separate or combined wild, scenic and recreation areas along the entire river. The designation of a river under the WSRA does not in itself invoke Section 4(f) in

the absence of significant Section 4(f) attributes and qualities. In determining whether Section 4(f) is applicable to these rivers, FHWA should consult with the official with jurisdiction (Question 21D) to determine how the river is designated, how the river is being used and examine the management plan over that portion of the river. If the river is publicly owned and designated a recreational river under the WSRA or is a recreation resource under a management plan, then it would be a Section 4(f) property. Conversely, if a river is included in the System and designated as wild but is not being used as or designated under a management plan as a park, recreation area, wildlife and waterfowl refuge and is not a historic site, then Section 4(f) would not apply.

Significant publicly owned public parks, recreation areas, or wildlife and waterfowl refuges and historic sites (on or eligible of the NR) in a WSR corridor are subject to Section 4(f). Other lands in WSR corridors managed for multiple purposes may or may not be subject to Section 4(f) requirements, depending on the manner in which they are administered by the managing agency. Close examination of the management plan (as required by the WSRA) prior to any use of these lands for transportation purposes is necessary. Section 4(f) would apply to those portions of the land designated in a management plan for recreation or other Section 4(f) purposes as discussed above. Where the management plan does not identify specific functions, or where there is no plan, FHWA should consult further with the official with jurisdiction (Question 21D) prior to making the Section 4(f) determination. Privately owned lands in a WSR corridor are not subject to Section 4(f), except for significant historic and archeological sites when important for preservation in place (Question 3).

Question 21C: Does Section 4(f) apply to potential WSR corridors and adjoining lands under study (pursuant to Section 5(a) of the WSRA)?

Answer: No, Section 4(f) does not apply to potential WSRs and adjoining lands. In these cases, Section 4(f) would apply only to existing significant publicly owned public parks, recreation areas, refuges, or significant historic sites in the potential river corridor. It must be noted, however, that such rivers are protected under Section 12(a) of the WSRA,[29] which directs all Federal departments and agencies to protect river values and further recognizes that particular attention should be given to timber harvesting, road construction, and similar activities, which might be contrary to the purposes of this Act.

Question 21D: Who are the Officials with Jurisdiction for WSRs?

Answer: The definition of officials with jurisdiction is located in 23 CFR 774.17. For those portions of a WSR to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of

[29] "The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 2(a)(ii), 3(a), or 5(a), shall take such action respecting management policies, regulations, contracts, plans, affecting such lands, following the date of enactment of this sentence, as may be necessary to protect such rivers in accordance with the purposes of this Act."

the river corridor in question. For State administered, federally designated rivers[30] the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

22. Scenic Byways

Question 22: How does Section 4(f) apply to scenic byways?

Answer: The designation of a road as a scenic byway is not intended to create a park or recreation area within the meaning of Section 4(f). The reconstruction, rehabilitation, or relocation of a publicly-owned scenic byway would not trigger Section 4(f) unless they are significant historic sites (Question 8).

23. Cemeteries

Question 23A: Does Section 4(f) apply to cemeteries?

Answer: Cemeteries would only be considered Section 4(f) properties if they are determined to be on or eligible for the NR as historic sites deriving significance from association with historic events, from age, from the presence of graves of persons of transcendent importance, or from distinctive design features.[31]

Question 23B: Does Section 4(f) apply to other lands that contain human remains?

Answer: Informal graveyards, family burial plots, or Native American burial sites and those sites that contain Native American grave goods associated with burials, are not in and of themselves considered to be Section 4(f) property except when they are individually listed in or eligible for the NR. These sites should not automatically be considered only as archeological resources as many will have value beyond what can be learned by data recovery. If these sites are considered archeological resources on or eligible for the NR and also warrant preservation in place, Section 4(f) applies (*See* Question 3A).

When conducting the Section 4(f) determination for lands that may be Native American burial sites or sites with significance to a federally recognized tribe, consultation with appropriate representatives from the federally recognized tribes with interest in the site is essential. Sites containing human remains may also have cultural and religious significance to a tribe (S*ee* Question 6 for a discussion of Traditional Cultural Places).

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[30] Section 2(a)(ii) of the WSRA, 16 U.S.C. § 1273(a)(ii))

[31] For more information on the subject of historic cemeteries see National Register Bulletin #41, *Guidelines for Evaluating and Registering Cemeteries and Burial Places*, 1992 http://www.cr.nps.gov/nr/publications/bulletins/nrb41/

24. Joint Development (Park with Highway Corridor)

Question 24: When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the Section 4(f) property is reserved for transportation use prior to or at the same time the Section 4(f) property was established, do the requirements of Section 4(f) apply?

Answer: The FHWA must comply with 23 CFR 774.11(i) when determining if Section 4(f) applies to a property that was jointly planned for development with a future transportation corridor. Generally, the requirements of Section 4(f) do not apply to the subsequent use of the reserved area for its intended transportation purpose. This is because the land used for the transportation project was reserved from and, therefore, has never been part of the protected Section 4(f) property. Nor is a constructive use of the Section 4(f) property possible, since it was jointly planned with the transportation project. The specific governmental action that must be taken to reserve a transportation corridor with the Section 4(f) property is a question of State and local law, but may include ordinances, adopted land use plans, deed restrictions, or other actions. Evidence that the reservation was contemporaneous with or prior to the establishment of the Section 4(f) property should be documented in the project file. Subsequent statements of intent to construct a transportation project within the resource should not be considered sufficient documentation. All measures which have been taken to jointly develop the transportation corridor and the park should be completely documented in the project files. To provide flexibility for the future transportation project, State and local transportation agencies are advised to reserve wide corridors. Reserving a wide corridor will allow the future transportation project to be designed to minimize impacts on the environmental resources in the corridor. The FHWA encourages the joint planning for the transportation project and the Section 4(f) property to specify that any land not needed for the transportation project right-of-way be transferred to the adjacent Section 4(f) property once the transportation project is completed.

25. Planned Section 4(f) Properties

Question 25: Do the requirements of Section 4(f) apply to publicly owned properties planned for park, recreation area, or wildlife refuge and waterfowl refuge purposes, even though they are not presently functioning as such?

Answer: Section 4(f) applies when the land is one of the enumerated types of publicly owned lands and the public agency that owns the property has formally designated and determined it to be significant for park, recreation area, or wildlife and waterfowl refuge purposes. Evidence of formal designation would be the inclusion of the publicly owned land, and its function as a Section 4(f) property into a city or county Master Plan. A mere expression of interest or desire is not sufficient. For example, when privately held properties of these types are formally designated into a Master Plan for future park

development, Section 4(f) is not applicable. The key is whether the planned facility is presently publicly owned, presently formally-designated for Section 4(f) purposes, and presently significant. When this is the case, Section 4(f) would apply.

26. Late Designation and Late Discovery of Section 4(f) Properties

Question 26A: Are properties in the transportation right-of-way designated (as park and recreation lands, wildlife and waterfowl refuges, or historic sites) late in the development of a proposed project subject to the requirements of Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.13(c) when determining if a Section 4(f) approval is necessary to use a late-designated property. Except for archaeological resources, including those discovered during construction (Question 3B), a project may proceed without consideration under Section 4(f) if that land was purchased for transportation purposes prior to the designation or prior to a change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to the acquisition. The adequacy of effort made to identify properties protected by Section 4(f) should consider the requirements and standards that existed at the time of the search.

Question 26B: How do you address a Section 4(f) use identified late in the process?

Answer: When there will be a use of a Section 4(f) property that has changed or was not identified prior to processing a CE, FONSI, or ROD, a separate Section 4(f) approval will be required (23 CFR 774.9(c)) if a proposed modification of the alignment or design would require use of a Section 4(f) property; FHWA determines that Section 4(f) applies to the use of a property; or if a proposed modification of the alignment, design, or measures to minimize harm 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 the measures to minimize harm. 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. A late discovery situation could also result when a property is overlooked despite a good faith effort to carry out adequate identification efforts and FHWA decides Section 4(f) now applies to a property. In cases where Section 4(f) may apply to archeological sites discovered during construction, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made (*See* Question 3B).

27. Temporary Recreational Occupancy or Use of Highway Rights-of-way

Question 27: Does Section 4(f) apply to temporary recreational uses of land owned by a State DOT or other applicant and designated for transportation purposes?

Answer: FHWA must comply with 23 CFR 774.11(h) when determining the applicability of Section 4(f) to non-park properties that are temporarily functioning for recreation purposes. In situations where land owned by a SDOT or other applicant and designated for future transportation purposes (including highway rights-of-way) is temporarily occupied or being used for either authorized or unauthorized recreational purposes such as camping or hiking, Section 4(f) does not apply (*See* 23 CFR 774.11(h)). For authorized temporary occupancy of transportation rights-of-way for park or recreation purposes, it is advisable to make clear in a limited occupancy permit, with a reversionary clause that no long-term right is created and the park or recreational activity is a temporary one that will cease once completion of the highway or transportation project resumes.

28. Tunneling or Bridging (Air Rights) and Section 4(f) Property

Question 28A: Is tunneling under a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site subject to the requirements of Section 4(f)?

Answer: Section 4(f) applies to tunneling only if the tunneling:

1) Disturbs archaeological sites that are on or eligible for the NR which warrant preservation in place;
2) Causes disruption which would permanently harm the purposes for which the park, recreation, wildlife or waterfowl refuge was established;
3) Substantially impairs the historic values of a historic site; or
4) Otherwise does not meet the exception for temporary occupancy (*See* Question 7A).

Question 28B: Do the requirements of Section 4(f) apply to bridging over a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site?

Answer: Section 4(f) applies to bridging a Section 4(f) property if piers or other appurtenances are physically located in the Section 4(f) property, requiring an acquisition of land from the property (actual use). Where the bridge will span the Section 4(f) property entirely, the proximity impacts of the bridge on the Section 4(f) property should be evaluated to determine if the placement of the bridge will result in a constructive use (*See* 23 CFR 774.15 and Question 7A). An example of a potential constructive use would be substantial impairment to the utility of a trail resulting from severely restricted vertical clearance. If temporary occupancy of a Section 4(f) property is necessary during construction, the criteria discussed in Question 7A will apply to determine use.

29. Mitigation Activities on Section 4(f) Property

Question 29: Does the expenditure of Title 23 funds for mitigation or other non-transportation activity on a Section 4(f) property result in a use of that property?

Answer: FHWA must comply with 23 CFR 774.13(g) when determining if a Section 4(f) approval is necessary for a proposed mitigation activity. A Section 4(f) use occurs only when Section 4(f) land is permanently incorporated into a transportation facility, there is a temporary occupancy that is adverse, or there is a constructive use. If mitigation activities proposed within a Section 4(f) property are solely for the preservation or enhancement of the resource and the official(s) with jurisdiction agrees in writing with this assessment, a Section 4(f) use does not occur.

An example involves the enhancement, rehabilitation or creation of wetland within a park or other Section 4(f) property as mitigation for a transportation project's wetland impacts. Where this work is consistent with the function of the existing park and considered an enhancement of the Section 4(f) property by the official with jurisdiction, then Section 4(f) would not apply. In this case the Section 4(f) land is not permanently incorporated into the transportation facility, even though it is a part of the project as mitigation.

30. Emergencies

Question 30: How does Section 4(f) apply in emergency situations?

Answer: In emergency situations, the first concern is responding to immediate threats to human health or safety, or immediate threats to valuable natural resources. Compliance with environmental laws, such as Section 4(f), is considered later. The FHWA may participate in the costs of repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of (1) natural disasters or (2) catastrophic failures from an external cause. The Emergency Relief (ER) Program, (23 U.S.C. § 125), supplements the commitment of resources by States, their political subdivisions, or other Federal agencies to help pay for unusually heavy expenses resulting from extraordinary conditions. As FHWA retains discretionary control over whether to fund projects under this program, Section 4(f) applies to all ER funding decisions. The general sequence of events following the emergency is:

1) Restore essential service. State and local highway agencies are empowered to respond immediately, which includes beginning emergency repairs to restore essential traffic service and to prevent further damage to Federal-aid highway facilities. Section 4(f) compliance is not required at this stage.
2) Governor's proclamation
3) Preliminary notification
4) Acknowledgement
5) Damage assessments
6) Formal state request
7) Division Administrator's finding
8) Implementation of projects (this is where Section 4(f) compliance occurs)

Under the ER Program, repairs are categorized either as "emergency" or "permanent." Emergency repairs are made during and immediately following a disaster to restore essential traffic, to minimize the extent of damage, or to protect the remaining facilities. Permanent repairs to restore the highway to its pre-disaster condition normally occur after the emergency repairs have been completed.

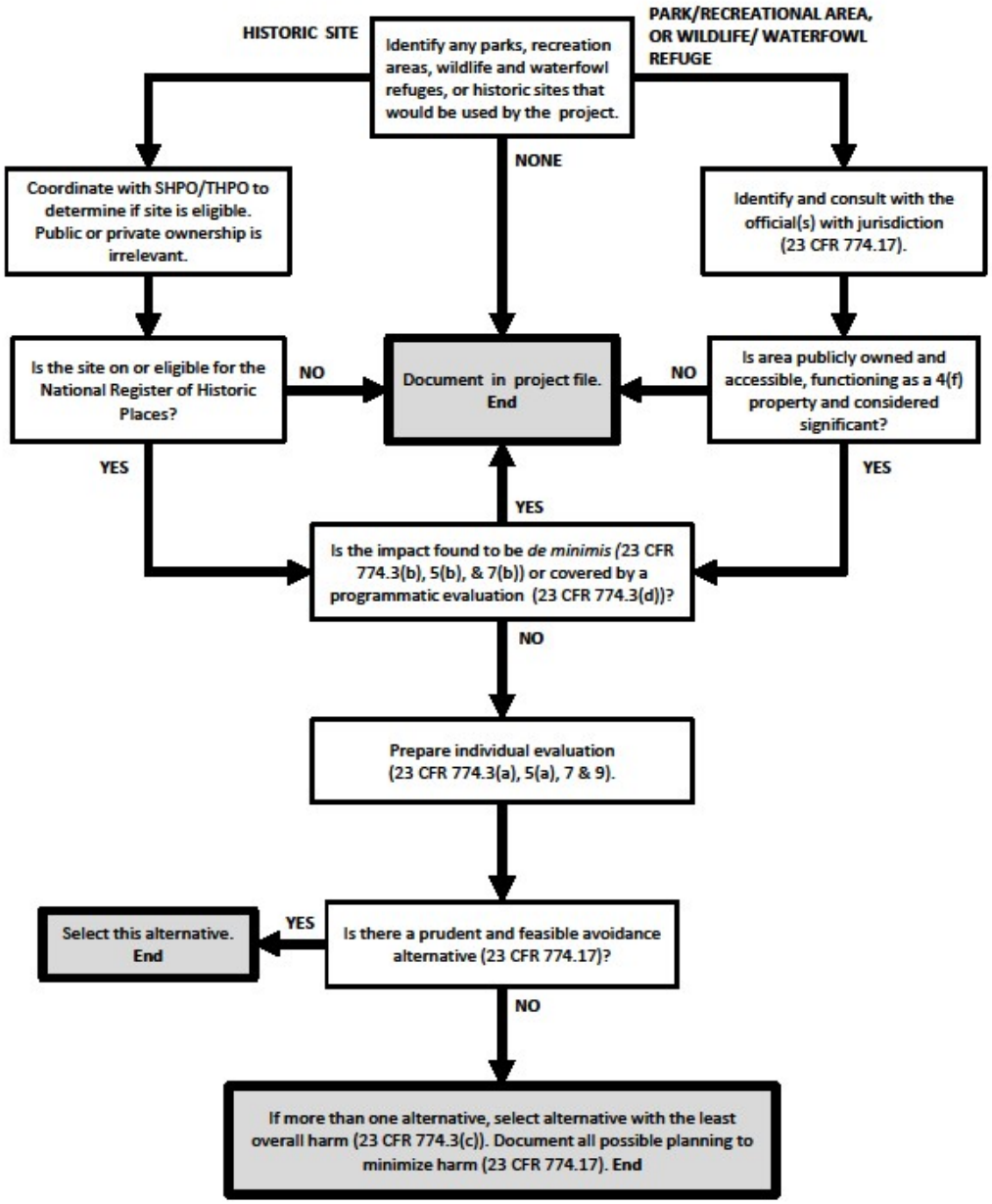
Section 4(f) compliance occurs during the "implementation of projects" stage for both emergency repairs and permanent repairs. For emergency repairs, Section 4(f) compliance is undertaken after the emergency repairs have been completed. For permanent repairs, Section 4(f) compliance is undertaken as part of the normal NEPA project development process, just as it would be for any other type of Federal-aid or Federal lands project (i.e. it must be completed prior to the authorization of right-of-way and construction).

31. Section 6(f) and Other Non-U.S. DOT Grant-in-Aid Program Requirements

Question 31: How are Section 6(f) of the Land and Water Conservation Fund Act and other non-U.S. DOT Federal grant-in-aid program requirements administered for purposes similar to Section 4(f)'s preservationist purpose treated in the Section 4(f) process?

Answer: For projects that propose the use of land from a Section 4(f) property purchased or improved with Federal grant-in-aid funds under the *Land and Water Conservation Fund Act*, the *Federal Aid in Fish Restoration Act* (Dingell-Johnson Act), the *Federal Aid in Wildlife Act* (Pittman-Robertson Act), or other similar law, or the lands are otherwise encumbered with a Federal interest, coordination with the appropriate Federal agency is required to ascertain the agency's position on the land conversion or transfer. Other Federal requirements that may apply to the property should be determined through consultation with the officials with jurisdiction and/or appropriate U.S. DOI, Housing and Urban Development, Federal Emergency Management Agency, or other Federal officials (*See* 23 CFR 774.5(d)). These Federal agencies may have regulatory authority or other requirements for converting land to a different use. These requirements are independent of the Section 4(f) requirements and must be satisfied during the project development process.

Section 4(f) Process



GLOSSARY OF ACRONYMS

ACHP – Advisory Council on Historic Preservation

CE – Categorical Exclusion

CFR – Code of Federal Regulations

DOI –Department of the Interior

DOT –Department of Transportation

EIS – Environmental Impact Statement

EA – Environmental Assessment

FHWA – Federal Highway Administration

FONSI – Finding of No Significant Impact

NEPA – National Environmental Policy Act

NHL – National Historic Landmark

NHPA – National Historic Preservation Act

NR – National Register of Historic Places

RTP – Recreational Trails Program

ROD – Record of Decision

TCP – Traditional Cultural Place

TEA – Transportation Enhancement Activity

THPO – Tribal Historic Preservation Officer

U.S.C. – United States Code

WSR – Wild and Scenic River

Programmatic Section 4(f) Evaluations

This Section includes the following documents:

Page 1 Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges

Page 5 Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges

Page 10 Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites

Page 15 Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property

Page 20 Programmatic Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects

Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges

[As published in the Federal Register / Volume 48, No. 163 / Monday, August 22, 1983.]

This statement sets forth the basis for a programmatic Section 4(f) approval that there are no feasible and prudent alternatives to the use of certain historic bridge structures to be replaced or rehabilitated with Federal funds and that the projects include all possible planning to minimize harm resulting from such use. This approval is made pursuant to Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303, and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138.

Use

The historic bridges covered by this programmatic Section 4(f) evaluation are unique because they are historic, yet also part of either a Federal-aid highway system or a State or local highway system that has continued to evolve over the years. Even though these structures area on or eligible for inclusion on the National Register of Historic Places, they must perform as an integral part of a modern transportation system. When they do not or cannot, they must be rehabilitated or replaced in order to assure public safety while maintaining system continuity and integrity. For the purpose of this programmatic Section 4(f) evaluation, a proposed action will "use" a bridge that is on or eligible for inclusion on the National Register of Historic Places when the action will impair the historic integrity of the bridge either by rehabilitation or demolition. Rehabilitation that does not impair the historic integrity of the bridge as determined by procedures implementing the National Historic Preservation Act of 1966, as amended (NHPA), is not subject to Section 4(f).

Applicability

This programmatic Section 4(f) evaluation may be applied by the Federal Highway Administration (FHWA) to projects which meet the following criteria:

1. The bridge is to be replaced or rehabilitated with Federal funds.

2. The project will require the use of a historic bridge structure which is on or is eligible for listing on the National Register of Historic Places.

3. The bridge is not a National Historic Landmark.

4. The FHWA Division Administrator determines that the facts of the project match those set forth in the sections of this document labeled as Alternatives, Findings, and Mitigation.

5. Agreement among the FHWA, the State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP) has been reached through procedures pursuant to Section 106 of the NHPA.

Alternatives

The following alternatives avoid any use of the historic bridge:

1. Do nothing.

2. Build a new structure at a different location without affecting the historic integrity of the old bridge, as determined by procedures implementing the NHPA.

3. Rehabilitate the historic bridge without affecting the historic integrity of the structure, as determined by procedures implementing the NHPA.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a reasonable alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated and that it must further demonstrate that all applicability criteria listed above were met before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. *Do Nothing*. The do nothing alternative has been studied. The do nothing alternative ignores the basic transportation need. For the following reasons, this alternative is not feasible and prudent:

a. Maintenance—The do nothing alternative does not correct the situation that causes the bridge to be considered structurally deficient or deteriorated. These deficiencies can lead to sudden collapse and potential injury or loss of life. Normal maintenance is not considered adequate to cope with the situation.

b. Safety—The do nothing alternative does not correct the situation that causes the bridge to be considered deficient. Because of these deficiencies, the bridge poses serious and unacceptable safety hazards to the traveling public or places intolerable restriction on transport and travel.

2. *Build on New Location Without Using the Old Bridge*. Investigations have been conducted to construct a bridge on new location or parallel to the old bridge (allowing for a one-way couplet), but, for one or more of the following reasons, this alternative is not feasible and prudent:

a. Terrain—The present bridge structure has already been located at the only feasible and prudent site, i.e., a gap in the land form, the narrowest point of the river canyon, etc. To build a new bridge at another site will result in extraordinary bridge and approach engineering and construction difficulty or costs or extraordinary disruption to established traffic patterns.

b. Adverse Social, Economic, or Environmental Effects—Building a new bridge away from the present site would result in social, economic, or environmental impact of extraordinary magnitude. Such impacts as extensive severing of productive farmlands,

displacement of a significant number of families or businesses, serious disruption of established travel patterns, and access and damage to wetlands may individually or cumulatively weigh heavily against relocation to a new site.

c. Engineering and Economy—Where difficulty associated with the new location is less extreme than those encountered above, a new site would not be feasible and prudent where cost and engineering difficulties reach extraordinary magnitude. Factors supporting this conclusion include significantly increased roadway and structure costs, serious foundation problems, or extreme difficulty in reaching the new site with construction equipment. Additional design and safety factors to be considered include an ability to achieve minimum design standards or to meet requirements of various permitting agencies such as those involved with navigation, pollution, and the environment.

d. Preservation of Old Bridge—It is not feasible and prudent to preserve the existing bridge, even if a new bridge were to be built at a new location. This could occur when the historic bridge is beyond rehabilitation for a transportation or an alternative use, when no responsible party can be located to maintain and preserve the bridge, or when a permitting authority, such as the Coast Guard requires removal or demolition of the old bridge.

3. *Rehabilitation Without Affecting the Historic Integrity of the Bridge.* Studies have been conducted of rehabilitation measures, but, for one or more of the following reasons, this alternative is not feasible and prudent:

a. The bridge is so structurally deficient that it cannot be rehabilitated to meet minimum acceptable load requirements without affecting the historic integrity of the bridge.

b. The bridge is seriously deficient geometrically and cannot be widened to meet the minimum required capacity of the highway system on which it is located without affecting the historic integrity of the bridge. Flexibility in the application of the American Association of State Highway and Transportation Officials geometric standards should be exercised as permitted in 23 CFR Part 625 during the analysis of this alternative.

Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. This has occurred when:

1. For bridges that are to be rehabilitated, the historic integrity of the bridge is preserved, to the greatest extent possible, consistent with unavoidable transportation needs, safety, and load requirements;

2. For bridges that are to be rehabilitated to the point that the historic integrity is affected or that are to be moved or demolished, the FHWA ensures that, in accordance with the Historic American Engineering Record (HAER) standards, or other suitable means developed through consultation, fully adequate records are made of the bridge;

3. For bridges that are to be replaced, the existing bridge is made available for an alternative use, provided a responsible party agrees to maintain and preserve the bridge; and

4. For bridges that are adversely affected, agreement among the SHPO, ACHP, and FHWA is reached through the Section 106 process of the NHPA on measures to minimize harm and those measures are incorporated into the project. This programmatic Section 4(f) evaluation does not apply to projects where such an agreement cannot be reached.

Procedures

This programmatic Section 4(f) evaluation applies only when the FHWA Division Administrator:

1. Determines that the project meets the applicability criteria set forth above;

2. Determines that all of the alternatives set forth in the Findings section have been fully evaluated;

3. Determines that use of the findings in this document that there are no feasible and prudent alternatives to the use of the historic bridge is clearly applicable;

4. Determines that the project complies with the Measures to Minimize Harm section of this document;

5. Assures that implementation of the measures to minimize harm is completed; and

6. Documents the project file that the programmatic Section 4(f) evaluation applies to the project on which it is to be used.

Coordination

Pursuant to Section 4(f), this statement has been coordinated with the Departments of the Interior, Agriculture, and Housing and Urban Development.

Issued on July 5, 1983.

Ali F. Sevin

Director, Office of Environmental Policy,
Federal Highway Administration

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges

[As published in the Federal Register / Volume 52, No. 160 / Wednesday, August 19, 1987.]

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of publicly owned public parks, recreations lands, or wildlife and waterfowl refuges that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects.

[Note: A similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of land from historic sites.]

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

Applicability

This programmatic Section 4(f) evaluation may be applied by FHWA only to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation, and reconstruction); safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment; and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on a new location.

2. The Section 4(f) lands are publicly owned public parks, recreation lands, or wildlife and waterfowl refuges located adjacent to the existing highway.

3. The amount and location of the land to be used shall not impair the use of the remaining Section 4(f) land, in whole or in part, for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented in relation to the size, use, and/or other characteristics deemed relevant.

The total amount of land to be acquired from any Section 4(f) site shall not exceed the values in the following Table:

Total size of section 4(f) site	Maximum to be acquired
<10 acres	10 percent of site
10 acres – 100 acres	1 acre
>100 acres	1 percent of site

4. The proximity impacts of the project on the remaining Section 4(f) land shall not impair the use of such land for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented with regard to noise, air, and water pollution, wildlife and habitat effects, aesthetic values, and/or other impacts deemed relevant.

5. The officials having jurisdiction over the Section 4(f) lands must agree, in writing, with the assessment of the impacts of the proposed project on, and the proposed mitigation for, the Section 4(f) lands.

6. For projects using land from a site purchased or improved with funds under the Land and Water Conservation Fund Act, the Federal Aid in Fish Restoration Act (Dingell-Johnson Act), the Federal Aid in Wildlife Act (Pittman-Robertson Act), or similar laws, or the lands are otherwise encumbered with a Federal interest (e.g., former Federal surplus property), coordination with the appropriate Federal agency is required to ascertain the agency's position on the land conversion or transfer. The programmatic Section 4(f) evaluation does not apply if the agency objects to the land conversion or transfer.

7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4(f) lands is discovered after the approval of the final EIS. Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

Alternatives

The following alternatives avoid any use of the public park land, recreational area, or wildlife and waterfowl refuge:

1. Do nothing.

2. Improve the highway without using the adjacent public park recreational land, or wildlife and waterfowl refuge.

3. Build an improved facility on new location without using the public park, recreation land, or wildlife or waterfowl refuge.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated

before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. *Do Nothing Alternative*. The Do Nothing Alternative is not feasible and prudent because:

a. It would not correct existing or projected capacity deficiencies; or

b. It would not correct existing safety hazards; or

c. It would not correct existing deteriorated conditions and maintenance problems; and

d. Not providing such correction would constitute a cost or community impact of extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.

2. *Improvement Without Using the Adjacent Section 4(f) Lands*. It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in:

a. Substantial adverse community impacts to adjacent homes, businesses, or other improved properties; or

b. Substantially increased roadway or structure cost; or

c. Unique engineering, traffic, maintenance, or safety problems; or

d. Substantial adverse social, economic, or environmental impacts; or

e. The project not meeting identified transportation needs; and

f. The impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR Part 625, during the analysis of this alternative.

3. *Alternatives on New Location*. It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because:

a. The new location would not solve existing transportation, safety, or maintenance problems; or

b. The new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing of productive

farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) lands); or

c. The new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); and

d. Such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR Part 625, during the analysis of this alternative.

Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. This has occurred when the officials having jurisdiction over the Section 4(f) property have agreed, in writing, with the assessment of impacts resulting from the use of the Section 4(f) property and with the mitigation measures to be provided. Mitigation measures shall include one or more of the following:

1. Replacement of lands used with lands of reasonably equivalent usefulness and location and of at least comparable value.

2. Replacement of facilities impacted by the project including sidewalks, paths, benches, lights, trees, and other facilities.

3. Restoration and landscaping of disturbed areas.

4. Incorporation of design features (e.g., reduction in right-of-way width, modifications to the roadway section, retaining walls, curb and gutter sections, and minor alignment shifts); and habitat features (e.g., construction of new, or enhancement of existing wetlands or other special habitat types); where necessary to reduce or minimize impacts to the Section 4(f) property. Such features should be designed in a manner that will not adversely affect the safety of the highway facility. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR Part 625, during such design.

5. Payment of the fair market value of the land and improvements taken or improvements to the remaining Section 4(f) site equal to the fair market value of the land and improvements taken.

6. Such additional or alternative mitigation measures as may be determined necessary based on consultation with the officials having jurisdiction over the parkland, recreation area, or wildlife or waterfowl refuge.

If the project uses Section 4(f) lands that are encumbered with a Federal interest (see *Applicability*), coordination is required with the appropriate agency to ascertain what special measures to minimize harm, or other requirements, may be necessary under that agency's regulations. To the extent possible, commitments to accomplish such special measures and/or requirements shall be included in the project record.

Coordination

Each project will require coordination in the early stages of project development with the Federal, State, and/or local agency officials having jurisdiction over the Section 4(f) lands. In the case of non-Federal Section 4(f) lands, the official with jurisdiction will be asked to identify any Federal encumbrances. Where such encumbrances exist, coordination will be required with the Federal agency responsible for the encumbrance.

For the interests of the Department of Interior, Federal agency coordination will be initiated with the Regional Directors of the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Reclamation; the State Directors of the Bureau of Land Management; and the Area Directors of the Bureau of Indian Affairs. In the case of Indian lands, there will also be coordination with appropriate Indian Tribal officials.

Before applying this programmatic evaluation to projects requiring an individual bridge permit, the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

Copies of the final written analysis and determinations required under this programmatic Section 4(f) evaluation shall be provided to the officials having jurisdiction over the involved Section 4(f) area and to other parties upon request.

Approval Procedures

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;

2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;

3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of the publicly owned public park, recreation area, or wildlife or waterfowl refuge) are clearly applicable to the project;

4. Determined that the project complies with the Measures to Minimize Harm section of this document;

5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;

6. Assured that the measures to minimize harm will be incorporated in the project; and

7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on December 23, 1986.

Ali F. Sevin

Director, Office of Environmental Policy,
Federal Highway Administration

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites

[As published in the Federal Register / Volume 52, No. 160 / Wednesday, August 19, 1987.]

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of land (including non-historic improvements thereon) from historic sites that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects.

[Note: A similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of publicly owned parks, recreation lands, or wildlife and waterfowl refuges.]

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determination will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

Applicability

This programmatic Section 4(f) evaluation may be applied by FHWA to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation, and reconstruction); safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment; and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on new location.
2. The historic site involved is located adjacent to the existing highway.

3. The project does not require the removal or alteration of historic buildings, structures, or objects on the historic site.

4. The project does not require the disturbance or removal of archaeological resources that are important to preserve in place rather than to recover for archaeological research. The determination of the importance to preserve in place will be based on consultation with the State

Historic Preservation Officer (SHPO) and, if appropriate, the Advisory Council on Historic Preservation (ACHP).

5. The impact on the Section 4(f) site resulting from the use of the land must be considered minor. The word minor is narrowly defined as having either a "no effect" or "no adverse effect" (when applying the requirements of section 106 of the National Historic Preservation Act and 36 CFR Part 800) on the qualities which qualified the site for listing or eligibility on the National Register of Historic Places. The ACHP must not object to the determination of "no adverse effect."

6. The SHPO must agree, in writing, with the assessment of the impacts of the proposed project on and the proposed mitigation for the historic sites.

7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4(f) lands is discovered after the approval of the final EIS.

Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

Alternatives

The following alternatives avoid any use of the historic site.

1. Do nothing.

2. Improve the highway without using the adjacent historic site.

3. Build an improved facility on new location without using the historic site.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. *Do Nothing Alternative*. The Do Nothing Alternative is not feasible and prudent because:

a. It would not correct existing or projected capacity deficiencies; or

b. It would not correct existing safety hazards; or

c. It would not correct existing deteriorated conditions and maintenance problems; and

d. Not providing such correction would constitute a cost or community impact of extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.

2. *Improvement Without Using the Adjacent Section 4(f) Lands*. It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in:

a. Substantial adverse community impacts to adjacent homes, businesses or other improved properties; or

b. Substantially increased roadway or structure cost; or

c. Unique engineering, traffic, maintenance, or safety problems; or

d. Substantial adverse social, economic, or environmental impacts; or
e. The project not meeting identified transportation needs; and

f. The impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR Part 625, during the analysis of this alternative.

3. *Alternatives on New Location*. It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because:

a. The new location would not solve existing transportation, safety, or maintenance problems, or

b. The new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) lands); or

c. The new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); and

d. Such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR Part 625, during the analysis of this alternative.

Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. Measures to minimize harm will consist of those measures necessary to preserve the historic integrity of the site and agreed to, in accordance with 36 CFR Part 800 by the FHWA, the SHPO, and, as appropriate, the ACHP.

Coordination

The use of this programmatic evaluation and approval is conditioned upon the satisfactory completion of coordination with the SHPO, the ACHP, and interested persons as called for in 36 CFR Part 800. Coordination with interested persons, such as the local government, the property owner, a local historical society, or an Indian tribe, can facilitate in the evaluation of the historic resource values and mitigation proposals and is therefore highly encouraged.

For historic sites encumbered with Federal interests, coordination is required with the Federal agencies responsible for the encumbrances.

Before applying this programmatic evaluation to projects requiring an individual bridge permit, the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

Approval Procedure

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;

2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;

3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of land from or non-historic improvements on the historic site) are clearly applicable to the project;

4. Determined that the project complies with the Measures to Minimize Harm section of this document;

5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;

6. Assured that the measures to minimize harm will be incorporated in the project; and

7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on December 23, 1986.

Ali F. Sevin

Director, Office of Environmental Policy,
Federal Highway Administration

Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property

[As published in the Federal Register / Volume 70, No. 75 / Wednesday, April 20, 2005.]

This nationwide programmatic Section 4(f) evaluation (programmatic evaluation) has been prepared for certain federally assisted transportation improvement projects on existing or new alignments that will use property of a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic property, which in the view of the Administration and official(s) with jurisdiction over the Section 4(f) property, the use of the Section 4(f) property will result in a net benefit to the Section 4(f) property.

Definitions:

"Administration" refers to the Federal Highway Division Administrator or Division Engineer (as appropriate).

"Applicant" refers to a State Highway Agency or State Department of Transportation, local governmental agency acting through the State Highway Agency or State Department of Transportation.

A "net benefit" is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project results in an overall enhancement of the Section 4(f) property when compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property, considering the activities, features and attributes that qualify the property for Section 4(f) protection. A project does not achieve a "net benefit" if it will result in a substantial diminishment of the function or value that made the property eligible for Section 4(f) protection.

"Official(s) with jurisdiction" over Section 4(f) property (typically) include: for a park, the Federal, State or local park authorities or agencies that own and/or manage the park; for a refuge, the Federal, State or local wildlife or waterfowl refuge owners and managers; and for historic sites, the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), whichever has jurisdiction under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f).

Applicability

The Administration is responsible for review of each transportation project for which this programmatic evaluation is contemplated to determine that it meets the criteria and procedures of this programmatic evaluation. The information and determination will be included in the applicable National Environmental Policy Act (NEPA) documentation and administrative record. This programmatic evaluation will not change any existing procedures for NEPA compliance, public involvement, or any other applicable Federal environmental requirement.

This programmatic evaluation satisfies the requirements of Section 4(f) for projects meeting the applicability criteria listed below. An individual Section 4(f) evaluation will not need to be prepared for such projects:

1. The proposed transportation project uses a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic site.

2. The proposed project includes all appropriate measures to minimize harm and subsequent mitigation necessary to preserve and enhance those features and values of the property that originally qualified the property for Section 4(f) protection.

3. For historic properties, the project does not require the major alteration of the characteristics that qualify the property for the National Register of Historic Places (NRHP) such that the property would no longer retain sufficient integrity to be considered eligible for listing. For archeological properties, the project does not require the disturbance or removal of the archaeological resources that have been determined important for preservation in-place rather than for the information that can be obtained through data recovery. The determination of a major alteration or the importance to preserve in-place will be based on consultation consistent with 36 CFR part 800.

4. For historic properties, consistent with 36 CFR part 800, there must be agreement reached amongst the SHPO and/or THPO, as appropriate, the FHWA and the Applicant on measures to minimize harm when there is a use of Section 4(f) property. Such measures must be incorporated into the project.

5. The official(s) with jurisdiction over the Section 4(f) property agree in writing with the assessment of the impacts; the proposed measures to minimize harm; and the mitigation necessary to preserve, rehabilitate and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the Section 4(f) property.

6. The Administration determines that the project facts match those set forth in the Applicability, Alternatives, Findings, Mitigation and Measures to Minimize Harm, Coordination, and Public Involvement sections of this programmatic evaluation.

This programmatic evaluation can be applied to any project regardless of class of action under NEPA.

Alternatives

To demonstrate that there are no feasible and prudent alternatives to the use of Section 4(f) property, the programmatic evaluation analysis must address alternatives that avoid the Section 4(f) property. The following alternatives avoid the use of the Section 4(f) property:

1. Do nothing.

2. Improve the transportation facility in a manner that addresses the project's purpose and need without a use of the Section 4(f) property.

3. Build the transportation facility at a location that does not require use of the Section 4(f) property.

This list is intended to be all-inclusive. The programmatic evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the Administration can conclude that the programmatic evaluation can be applied to the project.

Findings

For this programmatic evaluation to be utilized on a project there must be a finding, given the present condition of the Section 4(f) property, that the do-nothing and avoidance alternatives described in the Alternatives section above are not feasible and prudent. The findings (1, 2, and 3. below) must be supported by the circumstances, studies, consultations, and other relevant information and included in the administrative record for the project. This supporting information and determination will be documented in the appropriate NEPA document and/or project record consistent with current Section 4(f) policy and guidance.

To support the finding, adverse factors associated with the no-build and avoidance alternatives, such as environmental impacts, safety and geometric problems, decreased transportation service, increased costs, and any other factors may be considered collectively. One or an accumulation of these kinds of factors must be of extraordinary magnitude when compared to the proposed use of the Section 4(f) property to determine that an alternative is not feasible and prudent. The net impact of the do-nothing or build alternatives must also consider the function and value of the Section 4(f) property before and after project implementation as well as the physical and/or functional relationship of the Section 4(f) property to the surrounding area or community.

1. *Do-Nothing Alternative*. The Do-Nothing Alternative is not feasible and prudent because it would neither address nor correct the transportation need cited as the NEPA purpose and need, which necessitated the proposed project.

2. *Improve the transportation facility in a manner that addresses purpose and need without use of the Section 4(f) property*. It is not feasible and prudent to avoid Section 4(f) property by using engineering design or transportation system management techniques, such as minor location shifts, changes in engineering design standards, use of retaining walls and/or other structures and traffic diversions or other traffic management measures if implementing such measures would result in any of the following:

- Substantial adverse community impacts to adjacent homes, businesses or other improved properties; or
- Substantially increased transportation facility or structure cost; or
- Unique engineering, traffic, maintenance or safety problems; or
- Substantial adverse social, economic or environmental impacts; or
- A substantial missed opportunity to benefit a Section 4(f) property; or
- Identified transportation needs not being met; and

◦ Impacts, costs or problems would be truly unusual, unique or of extraordinary magnitude when compared with the proposed use of Section 4(f) property after taking into account measures to minimize harm and mitigate for adverse uses, and enhance the functions and value of the Section 4(f) property.

Flexibility in the use of applicable design standards is encouraged during the analysis of these feasible and prudent alternatives.

3. Build a new facility at a new location without a use of the Section 4(f) property. It is not feasible and prudent to avoid Section 4(f) property by constructing at a new location if:

◦ The new location would not address or correct the problems cited as the NEPA purpose and need, which necessitated the proposed project; or

◦ The new location would result in substantial adverse social, economic or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of community cohesion, jeopardize the continued existence of any endangered or threatened species or resulting in the destruction or adverse modification of their designated critical habitat, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) properties); or

◦ The new location would substantially increase costs or cause substantial engineering difficulties (such as an inability to achieve minimum design standards or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, or the environment); and

◦ Such problems, impacts, costs, or difficulties would be truly unusual or unique or of extraordinary magnitude when compared with the proposed use of the Section 4(f) property after taking into account proposed measures to minimize harm, mitigation for adverse use, and the enhancement of the Section 4(f) property's functions and value.

Flexibility in the use of applicable design standards is encouraged during the analysis of feasible and prudent alternatives.

Mitigation and Measures To Minimize Harm

This programmatic evaluation and approval may be used only for projects where the Administration, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm, includes appropriate mitigation measures, and that the official(s) with jurisdiction agree in writing.

Coordination

In early stages of project development, each project will require coordination with the Federal, State, and/or local agency official(s) with jurisdiction over the Section 4(f) property. For non-Federal Section 4(f) properties, i.e., State or local properties, the official(s) with jurisdiction will be asked to identify any Federal encumbrances. When encumbrances exist, coordination will be required with the Federal agency responsible for such encumbrances.

Copies of the final written report required under this programmatic evaluation shall be offered to the official(s) with jurisdiction over the Section 4(f) property, to other interested parties as part of the normal NEPA project documentation distribution practices and policies or upon request.

Public Involvement

The project shall include public involvement activities that are consistent with the specific requirements of 23 CFR 771.111, Early coordination, public involvement and project development. For a project where one or more public meetings or hearings are held, information on the proposed use of the Section 4(f) property shall be communicated at the public meeting(s) or hearing(s).

Approval Procedure

This programmatic evaluation approval applies only after the Administration has:

1. Determined that the project meets the applicability criteria set forth in Applicability section;

2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;

3. Determined that the findings in the programmatic evaluation (which conclude that the alternative recommended is the only feasible and prudent alternative) result in a clear net benefit to the Section 4(f) property;

4. Determined that the project complies with the Mitigation and Measures to Minimize Harm section of this document;

5. Determined that the coordination and public involvement efforts required by this programmatic evaluation have been successfully completed and necessary written agreements have been obtained; and

6. Documented the information that clearly identifies the basis for the above determinations and assurances.

Programmatic Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects

The following pages include the 1977 "Final Negative Declaration/Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects" and copies of correspondence from the FHWA advising that the Section 4(f) Statement and Determination remains valid. The FHWA correspondence confirms that the programmatic statement may be used, as appropriate, for bikeway and walkway projects financed with transportation enhancement funds.

As indicated in the July 9, 1992 memorandum from FHWA headquarters, where out of date terms and references are used in the programmatic Section 4(f) Statement (e.g., negative declaration, FHPM, references to FHWA offices), current terminology should be substituted when using the programmatic Section 4(f) Statement.

As indicated in the "Application" section on page 2 of the Programmatic Section 4(f) Statement, it is only applicable to independent bikeway or walkway construction projects and its use is subject to the following constraints:

1. It is applicable only to the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes.

2. It is applicable only when the official having specific jurisdiction over the Section 4(f) property has given approval in writing that the project is acceptable and consistent with the designated use of the property and that all possible planning to minimize harm has been accomplished in the location and design of the bikeway or walkway facility.

3. The document does not apply if the project would require the use of critical habitat of endangered species.

4. It does not apply to the use of any land from a publicly owned wildlife or waterfowl refuge or any land from a historic site of national, State, or local significance.

5. It does not apply to projects where there are unusual circumstances (major impacts, adverse effects, or controversy).

To obtain approval under the programmatic Section 4(f) Statement, conformance with each of the above constraints must be documented to the satisfaction of the FHWA. If the applicability criteria cannot be satisfied for an independent bikeway or walkway project involving use of Section 4(f) land, processing with a separate Section 4(f) evaluation or under another programmatic Section 4(f) evaluation, when applicable, will be required.

Memorandum

U.S. Department of Transportation
Federal Highway Administration

DA:	
ADA	
ADM	
ROW	
S & E	
E-ST	
BR	
PD	
HMPL	
MCS	
LIB	
IDOT	

Subject: Programmatic Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects

Date: JUL 9 1992

From: Eugene W. Cleckley
Chief, Environmental Operations Division

Reply to Attn. of: HEP-3

To: Regional Federal Highway Administrators
Federal Lands Highway Program Administrator

Attached is a copy of the May 23, 1977 memorandum signed by former FHWA Executive Director L.P. Lamm, which transmitted the subject Section 4(f) statement to your office. In an effort to speed up the processing of environmental documentation for the transportation enhancement projects contained in ISTEA, this office has been re-examining all of our policy and guidance material. Based on discussions with our Environmental and Right of Way Law Branch, the subject document is still valid. It should be noted that there are terms and references used in the document which are out of date, such as negative declaration, FHPM, and FHWA office names. However, these are all minor items and do not affect the thought process used in the development of the programmatic document. Where these terms are used, simply substitute the current terminology, such as CE or EA/FONSI for negative declaration, Project Development Branch for Environmental Review Branch, etc. We believe this document combined with the bicycle and pedestrian facilities CE contained in 23 CFR 771.117(c) can greatly reduce the time required to process these types of enhancement projects.

Should you have any questions concerning the document and its use, please contact any of the Project Development Specialist in my office.

Kenneth A. Perret

Kenneth A. Perret

1st Endorsement

July 14, 1992

Fr: Director
Ofc. of Planning & Program Development
Homewood, Illinois

HPP-05

To: Division Administrators - Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

The subject programmatic Section 4(f) is being recirculated for your information and appropriate use.

Ennis V. Heathcock

By: Paul D. Quinn
Regional Environmental Specialist

Attachment

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

DATE: May 23, 1977

In reply refer to: HEV-11

RECEIVED
REG. 4 F.H.W.A.
MAY 31 1977

SUBJECT: Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects

FROM: Federal Highway Administrator

TO: Regional Federal Highway Administrators
Regions 1-10, and
Regional Engineer, Region 15

In order to reduce processing time and delays, we have prepared a negative declaration/Section 4(f) statement and determination (copy attached) to cover those independent bikeway and pedestrian walkway projects (FHPM 6-1-1-1) which require the use of recreation and park areas. This approved document should be distributed to Division Offices and State highway agencies for their use.

A draft of the negative declaration/Section 4(f) statement was published in the Federal Register (42 F.R. 15394) on March 21, 1977, inviting interested persons to comment. No major adverse comments were received during this commenting period. The majority of letters received were favorable and recommended approval of the document.

This environmental document will not relieve the Division Administrator from reviewing the impacts, mitigation measures, location, and design of individual bikeways. If there are any unusual circumstances (major impacts or controversy), a separate Section 4(f) statement and environmental document (EIS or negative declaration) should be considered for the individual project. It is likely that most projects which do not involve Section 4(f) properties would be nonmajor actions and would not require a formal environmental document.

It is also important to obtain approval from the official having specific jurisdiction over the Section 4(f) property that the project is acceptable and consistent with the designated use of the property, and that the location and design have been accomplished in a manner that will not cause harm to the property. A copy of the negative declaration/Section 4(f) statement, along with the approval letter from the official, should be placed in the individual project file.

If you have any question concerning the subject document, please contact the Environmental Review Branch, (202) 426-0106, in the Office of Environmental Policy.

L. P. Lamm

For William M. Cox

Final Negative Declaration/Section 4(f) Statement
and Determination for Independent Bikeway
or Walkway Construction Projects

Background

There is a growing interest in bicycling and walking for commuting, for recreation, and for other trip purposes. Where this activity occurs on high-speed roadways, both safety and efficiency can be impaired because of the mixture of motorized and non-motorized modes of travel. Construction of bikeways or pedestrian walkways can promote safety and will assist in retaining the motor vehicle carrying capacity of the highway while enhancing bicycle capacity.

The United States Congress recognized the importance of bicycle and pedestrian travel by including special provisions for these modes in the Federal-Aid Highway Act of 1973, Public Law 93-87. Section 124 of this Act (amended Title 23, U.S. Code, by adding Section 217) contained the following principal provisions:

(1) Federal funds available for the construction of preferential facilities to serve pedestrians and bicyclists are those apportioned in accordance with paragraphs (1), (2), (3) and (6) of Section 104(b), 23 U.S.C., and those authorized for Forest highways, Forest development roads and trails, public land development roads and trails, park roads and trails, parkways, Indian reservation roads, and public land highways.

(2) Not more than $40 million (amended to $45 million by Section 134 of the Federal-Aid Highway Act of 1976) apportioned in any fiscal year for purposes described in the preceding paragraph may be obligated for bicycle projects and pedestrian walkways.

(3) No State shall obligate more than $2 million (amended to $2.5 million by Section 134 of the Federal-Aid Highway Act of 1976) of Federal-aid funds for such projects in any fiscal year.

(4) Such projects shall be located and designed pursuant to an overall plan which will provide due consideration for safety and contiguous routes.

The funding limitations described in (2) and (3) above are applicable only to independent bikeway and walkway construction projects.

Project Description

Independent bikeway or walkway construction projects are those highway construction projects which provide bicycle or pedestrian facilities in contrast to a project whose primary purpose is to serve motorized vehicles. The requirements for qualification of proposed bikeway or walkway facilities as independent bikeway or walkway construction projects are contained in Volume 6, Chapter 1, Section 1, Subsection 1, of the Federal-Aid Highway Program Manual, codified as Part 652 of Chapter 1 of Title 23 of the Code of Federal Regulations (CFR).

The bikeways and walkways will be designed and constructed in a manner suitable to the site conditions and the anticipated extent of usage. In general, a bikeway will be designed with an alignment and profile suitable for bicycle use with a surface that will be reasonably durable that incorporates drainage as necessary, and that is of a width appropriate for the planned one-way or two-way use.

The facilities will be accessible to the users or will form a segment located and designed pursuant to an overall plan.

Projects may include the acquisition of land outside the right-of-way, provided the facility will accommodate traffic which would have normally used a Federal-aid highway route, disregarding any legal prohibitions on the use of the route by cyclists or pedestrians.

It is required that a public agency be responsible for maintenance of the federally funded bikeway or walkway. No motorized vehicles will be permitted on the facilities except those for maintenance purposes and snowmobiles where State or local regulations permit.

Application

This negative declaration/preliminary Section 4(f) document is only applicable for independent bikeway or walkway construction projects which require the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes. Additionally, this document is applicable only when the official having specific jurisdiction over the Section 4(f) property has given his approval in writing that the project is acceptable and consistent with the designated use of the property and that all possible planning to minimize harm has been accomplished in the location and design of the bikeway or walkway facility. This document does not apply if the project would require the use of critical habitat of endangered species.

This document does not cover the use of any land from a publicly owned wildlife or waterfowl refuge or any land from a historic site of national, State, or local significance. It also does not cover those projects where there are unusual circumstances (major impacts, adverse effects, or controversy). A separate Section 4(f) statement and environmental document must be prepared in these categories.

This document does not cover bicycle or pedestrian facilities that are incidental items of construction in conjunction with highway improvements having the primary purpose of serving motor vehicular traffic.

Summary

The primary purpose for the development of independent bikeway and walkway projects is to provide a facility for traffic which would have normally used a Federal-aid highway route. In some cases, the bikeway and walkway projects can serve a dual function by also providing for recreational use. Where this situation occurs, artificially routing a bikeway or walkway around a compatible park area is not a prudent alternative because it would decrease the recreational value of the bikeway or walkway.

The written approval of the official having specific jurisdiction over the Section 4(f) property and construction authorization by FHWA will confirm that all possible planning to minimize harm has been accomplished in the location and design of the bikeway or walkway facility.

Noise and air quality will not be affected by bicycles. There would be increase in the noise level if snowmobiles are permitted. However, this would likely occur at a time when other uses of the recreational facilities will be minimal.

Temporary impacts on water quality will be minimal. Erosion control measures will be used through the construction period. A certain amount of land will be removed from other uses. The type of land and uses will vary from project to project. However, due to the narrow cross-section of the bikeways and walkways, a minimal amount of land will be required for the individual projects. The projects will be blended into existing terrain to reduce any visual impacts.

Displacement of families and businesses will not be required.

No significant adverse social or economic impacts are anticipated. There will be beneficial impacts such as the enhancement of the recreational potential of the parks and the provision of an alternate mode of transportation for the commuter.

Comments and Coordination

A draft of this negative declaration/Section 4(f) statement was published in the Federal Register (42 F.R. 15394) March 21, 1977, inviting interested persons to comment. The majority of the letters received were favorable and recommended approval of the document.

The document was also circulated to the Departments of the Interior (DOI), Housing and Urban Development (HUD), and Agriculture. Comments were received from DOI and HUD and are included in the appendix along with our responses.

Individual projects will be coordinated at the earliest feasible time with all responsible local officials, including the State Outdoor Recreation Liaison Officer. The use of properties acquired or developed with Federal monies from the Land and Water Conservation Fund will also be coordinated with the Bureau of Outdoor Recreation of DOI.

If HUD Community Development Block Grant Funds are used in conjunction with Federal Highway Administration Funds, HUD environmental review procedures set forth in 24 CFR, Section 58, are applicable.

Determination

Based on the above and on the scope of these bikeway and walkway projects, it is determined that they will not have a significant effect upon the quality of the human environment. It is also our determination that (1) there is no feasible and prudent alternative to the use of Section 4(f) lands, and (2) the conditions for approval will insure that the bikeway proposals will include all possible planning to minimize harm resulting from such use.

May 23, 1977 [Original signed by L.P. Lamm]

DATE

For William M. Cox
Federal Highway Administrator

APPENDIX

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

In reply refer to:
(ER-77/105)

MAR 21 1977

Dear Mr. Lash:

This is in response to your February, 1977 request for the Department of the Interior's comments on the proposed Negative Declaration/Section 4(f) statement for Independent Bikeway or Walkway Construction Projects.

We are pleased that the proposed document responds to a number of the comments made in our letter of June 25, 1976, on the Bikeway Demonstration Program. We note that the present document is not applicable to the use of land from a publicly owned wildlife or waterfowl refuge or any land from a historic site, nor is it applicable if the project would require the use of critical habitat of endangered species. We note further that the document applies only to the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes.

We concur with these limitations on the application of the proposed Negative Declaration/Section 4(f) statement. However, we wish to again express our opinion that the proposed document not be applicable to: (1)

1. Significant wetlands;

2. Unique ecological areas set aside for the preservation, interpretation, or scientific study of plant and animal communities, e.g., Registered Natural Landmarks and Registered Environmental Education Landmarks.

3. Play areas for small children (tot lots, etc.,); and

4. Small park areas where the bikeway or walkway may use a significant portion of the available space (vest-pocket parks, etc.,).

We are also pleased that the document makes provision for early coordination with all responsible local officials, including the State Outdoor Recreation Liaison Officer, and the Bureau of Outdoor Recreation (BOR) when Land and Water Conservation Fund grants are involved. We suggest, however, that you may wish to coordinate all projects of this type with the appropriate Regional Office of BOR for the technical assistance they can provide on bikeways and walkways. (2)

According to our calculations, a funding level of $45,000,000 for these bikeways and walkways would amount to somewhere between 1,800 and 4,500 miles of trail per year. This would directly remove from all other use (including use by flora and fauna) roughly 1,000 to 6,800 acres per year. This impact should be addressed in the proposed negative declaration. (3)

Thank you for the opportunity to review this proposed document.

Sincerely yours,

Stanley D. Rosenberg

Deputy Assistant Secretary of the Interior

Mr. Michael Lash
Director of Environmental Policy
U.S. Department of Transportation
Federal Highway Administration
Washington, D. C. 20590

Responses to the Department of the Interior
Letter of March 21, 1977

(1) We believe the Application section is adequate to cover those cases where there are unusual circumstances such as major impacts or adverse effects. The key point is that the official having specific jurisdiction over the Section 4(f) property has to agree that the project is acceptable and consistent with the designated use of the property, and that the location and design have been accomplished in a manner that will not cause harm to the property.

(2) The FHWA Division Administrator and the local officials will have the option of requesting additional coordination with the Bureau of Outdoor Recreation on all bikeway and walkway projects.

(3) The use of land for the bikeways and walkways has been addressed in the Summary section. However, it should be understood that this document is for individual projects and was not prepared to address the impacts of the entire bikeway program.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

FEB 15 1977

OFFICE OF THE ASSISTANT SECRETARY
FOR COMMUNITY PLANNING AND DEVELOPMENT

IN REPLY REFER TO:
CSR

Your reference:
HEV-11

Mr. Michael Lash
Director of
Environmental Policy
Department of Transportation
Federal Highway Administration
Nassif Building - Room 3234
Washington, D. C. 20590

Dear Mr. ~~Lash~~: Mike

Thank you for providing this Office with the opportunity to review and comment on the proposed draft negative declaration/Section 4(f) for the construction of independent bikeways and pedestrian walkways. While your negative declaration proposal will reduce processing time, we propose for your consideration the following recommendations:

1. Under the caption Application insert the following before the last sentence in the first paragraph: The project must be in accord with a unified and officially coordinated program for the development of open space land as part of local and areawide comprehensive planning. (1)

2. Under the caption Application add the following to the second paragraph: If unusual natural or man-made conditions exist in the proposed project area which might be deleteriously affected by the proposed bikeway or pedestrian walkway, then a Section 4(f) and an environmental impact statement shall be prepared for the project. (2)

3. Under the caption Coordination, second paragraph add the following: If HUD Community Development Block Grant (CDBG) funds are used by applicants in conjunction with Section 124 funds, HUD environmental review procedures set forth in 24 CFR Section 58 are applicable. (Copy attached) The CDBG program permits the use of funds for the construction of certain public works in conjunction with recreational purposes. (3)

Sincerely yours,

Richard H. Broun
Director, Office of
Environmental Quality

Attachment

Responses to the Department of Housing
and Urban Development Letter of
February 15, 1977

(1) We do not believe it is necessary to add this sentence to the Application section since this is already a Federal-aid qualification requirement. (See 23 CFR, Part 652.)

(2) This provision has been added to the Application section.

(3) The Coordination section has been expanded to include this situation.

STEWARDSHIP AND OVERSIGHT AGREEMENT
ON PROJECT ASSUMPTION AND PROGRAM OVERSIGHT
BY AND BETWEEN
FEDERAL HIGHWAY ADMINISTRATION, ILLINOIS DIVISION
AND THE
STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION

SECTION I. BACKGROUND AND INTRODUCTION

The Federal-aid Highway Program (FAHP) is a federally-assisted program of State-selected projects. The Federal Highway Administration (FHWA) and the State Departments of Transportation have long worked as partners to deliver the FAHP in accordance with Federal requirements. In enacting 23 U.S.C. 106(c), as amended, Congress recognized the need to give the States more authority to carry out project responsibilities traditionally handled by FHWA. Congress also recognized the importance of a risk-based approach to FHWA oversight of the FAHP, establishing requirements in 23 U.S.C. 106(g). This Stewardship and Oversight (S&O) Agreement sets forth the agreement between the FHWA and the State of Illinois Department of Transportation (IDOT) on the roles and responsibilities of the FHWA and the IDOT with respect to Title 23 project approvals and related responsibilities, and FAHP oversight activities.

For the purposes of this agreement, stewardship is defined as the efficient and effective management of the public funds that have been entrusted to FHWA for the Federal-aid Highway Programs. Oversight, an integral part of stewardship, is defined as specific activities which ensure that the implementation of the various elements of the Federal-aid Highway Program is in accordance with applicable laws, regulations, and policies.

The scope of FHWA responsibilities, and the legal authority for IDOT assumption of FHWA responsibilities, developed over time. The U.S. Secretary of Transportation delegated responsibility to the Administrator of the FHWA for the FAHP under Title 23 of the United States Code, and associated laws. (49 CFR 1.84 and 1.85) The following legislation further outlines FHWA's responsibilities:

- Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991;
- Transportation Equity Act for the 21st Century (TEA-21) of 1998;
- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005; and
- Moving Ahead for Progress in the 21st Century Act (MAP-21) of 2012 (P.L. 112-141).

The FHWA may not assign or delegate its decision-making authority to a State Department of Transportation unless authorized by law. Section 106 of Title 23, United States Code (Section

106), authorizes the State to assume specific project approvals. For projects that receive funding under Title 23, U.S.C., and are on the National Highway System (NHS) including projects on the Interstate System, the State may assume the responsibilities of the Secretary of the U.S. Department of Transportation under Title 23 for design, plans, specifications, estimates, contract awards, and inspections with respect to the projects unless the Secretary determines that the assumption is not appropriate. (23 U.S.C. 106(c)(1)) For projects under Title 23, U.S.C. that are not on the NHS, the State shall assume the responsibilities for design, plans, specifications, estimates, contract awards, and inspections unless the State determines that such assumption is not appropriate. (23 U.S.C. 106(c)(2))

For all other project activities which do not fall within the specific project approvals listed in Section 106 or are not otherwise authorized by law, the FHWA may authorize IDOT to perform work needed to reach the FHWA decision point, or to implement FHWA's decision. However such decisions themselves are reserved to FHWA.

The authority given to the IDOT under Section 106(c)(1) and (2) is limited to specific project approvals listed herein. Nothing listed herein is intended to include assumption of FHWA's decision-making authority regarding Title 23, U.S.C. eligibility or Federal-aid participation determinations. The FHWA always must make the final eligibility and participation decisions for the Federal-aid Highway Program.

Section 106(c)(3) requires FHWA and the IDOT to enter into an agreement relating to the extent to which the IDOT assumes project responsibilities. This Stewardship and Oversight Agreement (S&O Agreement), includes information on specific project approvals and related responsibilities, and provides the requirements for FHWA oversight of the FAHP (Oversight Program), as required by 23 U.S.C. 106(g).

SECTION II. INTENT AND PURPOSE OF S&O AGREEMENT

The intent and purpose of this S&O Agreement is to document the roles and responsibilities of the FHWA's Illinois Division Office (FHWA or Division) and Illinois Department of Transportation (IDOT) with respect to project approvals and related responsibilities, and to document the methods of oversight which will be used to efficiently and effectively deliver the FAHP.

The Project Action Responsibility Matrix, Attachment A to this S&O Agreement and as further described in Section VIII of this S&O Agreement, identifies FHWA FAHP project approvals and related responsibilities State DOT assumes from FHWA on a program-wide basis pursuant to 23 U.S.C. 106(c) and other legal authorities. Upon execution of this agreement, Attachment A shall be controlling and except as specifically noted in Attachment A, no other agreements, attachments, or other documents shall have the effect of delegating or assigning FHWA approvals to State DOT on a program-wide basis under 23 U.S.C 106 or have the effect of altering Attachment A.

SECTION III. ASSUMPTION OF RESPONSIBILITIES FOR FEDERAL-AID PROJECTS ON THE NATIONAL HIGHWAY SYSTEM

A. The IDOT *may assume* the FHWA's Title 23 responsibilities for design; plans, specifications, and estimates (PS&E); contract awards; and inspections, with respect to *Federal-aid projects on the National Highway System (NHS)* if both the *IDOT* and *FHWA* determine that assumption of responsibilities is appropriate.

B. Approvals and related activities for which the IDOT has assumed responsibilities as shown in Attachment A will apply program wide unless project specific actions for which the Division will carry out the approval or related responsibilities are documented in accordance with the FHWA Project of Division Interest/Project of Corporate Interest Guide (FHWA PoDI/PoCI Guide) located at http://www.fhwa.dot.gov/federalaid/stewardship/

   Attachment D, "Selection and Monitoring of Projects of Division Interest (PoDI's)" outlines the processes for coordination of PoDI's between IDOT and FHWA.

C. The IDOT may not assume responsibilities for Interstate projects that are in high risk categories. (23 U.S.C. 106(c)(1))

D. The IDOT is to exercise any and all assumptions of the Secretary responsibilities for Federal-aid projects on the NHS in accordance with Federal laws, regulations and policies.

SECTION IV. ASSUMPTION OF RESPONSIBILITIES FOR FEDERAL-AID PROJECTS OFF THE NATIONAL HIGHWAY SYSTEM

A. The IDOT *shall assume* the FHWA's Title 23 responsibilities for design, PS&Es, contract awards, and inspections, with respect to *Federal-aid projects off the NHS (non-NHS)* unless the *IDOT* determines that assumption of responsibilities is not appropriate. (23 U.S.C. 106(c)(2))

B. Except as provided in 23 U.S.C. 109(o), the IDOT is to exercise the Secretary's approvals and related responsibilities on these projects in accordance with Federal laws.

C. The IDOT, in its discretion, may request FHWA carry out one or more non-NHS approvals or related responsibilities listed as "State" in Attachment A on a program-wide basis. For a project specific request, the State may request FHWA carry out any approval or related responsibility listed in Attachment A off the NHS. Such project-specific requests shall be documented in accordance with the FHWA PoDI/PoCI Guide.

   Attachment D, "Selection and Monitoring of Projects of Division Interest (PoDI's)" outlines the processes for coordination of PoDI's between IDOT and FHWA.

D. Pursuant to 23 U.S.C. 109(o), non-NHS projects shall be designed and constructed in accordance with State laws, regulations, directives, safety standards, design standards, and construction standards.

SECTION V. ASSUMPTION OF RESPONSIBILITIES FOR LOCALLY ADMINISTERED PROJECTS

The IDOT may permit local public agencies (LPAs) to carry out the IDOT's assumed responsibilities on locally administered projects. The IDOT is responsible and accountable for LPA compliance with all applicable Federal laws and requirements.

SECTION VI. PERMISSIBLE AREAS OF ASSUMPTION UNDER 23 U.S.C. 106(c)

An assumption of responsibilities under 23 U.S.C. 106(c) may cover only activities in the following areas:

A. Design which, includes preliminary engineering, engineering, and design-related services directly relating to the construction of a FAHP-funded project, including engineering, design, project development and management, construction project management and inspection, surveying, mapping (including the establishment of temporary and permanent geodetic control in accordance with specifications of the National Oceanic and Atmospheric Administration), and architectural-related services.

B. PS&E which, represents the actions and approvals required before authorization of construction. The PS&E package includes geometric standards, drawings, specifications, project estimates, certifications relating to completion of right-of-way acquisition and relocation, utility work, and railroad work.

C. Contract awards which, include procurement of professional and other consultant services and construction-related services to include advertising, evaluating, and awarding contracts.

D. Inspections which, include general contract administration, material testing and quality assurance, review, and inspections of Federal-aid contracts as well as final inspection/acceptance.

E. Approvals and related responsibilities affecting real property as provided in 23 CFR 710.201(i) and any successor regulation in 23 CFR Part 710.

SECTION VII. FEDERAL APPROVALS AND RELATED RESPONSIBILITIES THAT MAY NOT BE ASSUMED BY THE IDOT

A. Any approval or related responsibility not listed in Attachment A cannot be assumed by the State without prior concurrence by FHWA Headquarters. The following is a list of the most frequently-occurring approvals and related responsibilities that may not be assumed by the IDOT:

- Civil Rights Program approvals;
- Environmental approvals, except those specifically assumed under other agreements. (23 U.S.C. 326 and 327; programmatic categorical exclusion agreements);
- Federal air quality conformity determinations required by the Clean Air Act;
- Approval of current bill and final vouchers;
- Approval of federally-funded hardship acquisition, protective buying, and 23 U.S.C. 108(d) early acquisition;
- Project agreements and modifications to project agreements and obligation of funds (including advance construction);
- Planning and programming pursuant to 23 U.S.C. 134 and 135;
- Special Experimental Projects (SEP-14 and SEP-15);
- Use of Interstate airspace for non-highway-related purposes;
- Any Federal agency approval or determination under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), as amended, and implementing regulations in 49 CFR Part 24;
- Waivers to Buy America requirements;
- Approval of Federal participation under 23 CFR 1.9(b);
- Provide pre-approval for preventive maintenance project;
- Requests for credits toward the non-Federal share of construction costs for early acquisitions, donations, or other contributions applied to a project;
- Functional replacement of property;
- Approval of a time extension for preliminary engineering projects beyond the 10-year limit, in the event that actual construction or acquisition of right-of-way for a highway project has not commenced;
- Approval of a time extension beyond the 20-year limit for right of way projects, in the event that actual construction of a road on the right-of-way is not undertaken;
- Determine need for Coast Guard Permit;
- Training Special Provision – Approval of New Project Training Programs; and
- Any other approval or activity not specifically identified in Attachment A unless otherwise approved by the FHWA, including the Office of Chief Counsel.

B. For all projects and programs, the IDOT will comply with Title 23 and all applicable non-Title 23, U.S.C. Federal-aid program requirements, such as metropolitan and statewide planning; environment; procurement of engineering and design related service contracts (except as provided in 23 U.S.C. 109(o)); Civil Rights including Title VI of the *Civil Rights Act*, and participation by Disadvantaged Business Enterprises; prevailing wage rates; and acquisition of right-of-way, etc.

C. This Agreement does not modify the FHWA's non-Title 23 program approval and related responsibilities, such as approvals required under the Clean Air Act; National Environmental Policy Act, Executive Order on Environmental Justice (E.O. 12898), and other related environmental laws and statutes; the Uniform Act; and the Civil Rights Act of 1964 and related statutes.

SECTION VIII. PROJECT ACTION RESPONSIBILITY MATRIX

Attachment A, Project Action Responsibility Matrix, to this S&O Agreement identifies FAHP project approvals and related responsibilities. The Matrix specifies which approvals and related responsibilities are assumed by the State under 23 U.S.C. 106(c) or other statutory or regulatory authority, as well as approvals and related responsibilities reserved to FHWA.

SECTION IX. HIGH RISK CATEGORIES

A. In 23 U.S.C. 106(c), Congress directs that the Secretary shall not assign any approvals or related responsibilities for projects on the Interstate System if the Secretary determines the project to be in a high risk category. Under 23 U.S.C. 106(c)(B)(8), the Secretary may define high risk categories on a national basis, State-by-State basis, or national and State-by-State basis.

B. The Division has determined there are no high risk categories.

SECTION X. FHWA OVERSIGHT PROGRAM UNDER 23 U.S.C. 106(g)

A. In 23 U.S.C. 106(g), Congress directs that the Secretary shall establish an oversight program to monitor the effective and efficient use of funds authorized to carry out the FAHP. This program includes FHWA oversight of the State's processes and management practices, including those involved in carrying out the approvals and related responsibilities assumed by the State under 23 U.S.C. 106(c). Congress defines that, at a minimum, the oversight program shall be responsive to all areas relating to financial integrity and project delivery.

B. The FHWA shall perform annual reviews that address elements of the IDOT"s financial management system in accordance with 23 U.S.C. 106(g)(2)(A). FHWA will periodically review the IDOT's monitoring of subrecipients pursuant to 23 U.S.C. 106(g)(4)(B).

C. The FHWA shall perform annual reviews that address elements of the project delivery systems of the IDOT, which elements include one or more activities that are involved in the life cycle of project from conception to completion of the project. The FHWA will also evaluate the practices of the IDOT for estimating project costs, awarding contracts, and reducing costs. 23 U.S.C. 106(g)(2) and (3).

D. To carry out the requirements of 23 U.S.C. 106(g), the FHWA will employ a risk management framework to evaluate financial integrity and project delivery, and balance risk with staffing resources, available funding, and the State's transportation needs. The FHWA may work collaboratively with the IDOT to assess the risks inherent with the FAHP and funds management, and how that assessment will be used to align resources to develop appropriate risk response strategies

Techniques the Division and IDOT may use to identify and analyze risks and develop response strategies include the following:

- Program Assessments;
- FIRE Reviews;
- Program Reviews;
- Certification Reviews;
- Recurring or periodic reviews such as the Compliance Assessment Program (CAP); and
- Inspections of project elements or phases.

These techniques will be carried out in a manner consistent with applicable Division Standard Operating Procedures or other control documents relating to program assessments, FIRE, program reviews, CAP, etc.

The following techniques and processes will be used to carry out the requirements of 23 U.S.C. 106(g):

The FHWA will monitor Federal Highway Programs and will maintain review and/or approval authority of activities that are not delegated to IDOT. In addition, FHWA and IDOT are responsible for ensuring financial integrity and compliance with applicable laws and regulations. The FHWA can review any program or project including those that have unique features, high-risk elements, unusual circumstances, or projects included in program and/or process reviews. FHWA will not require higher standards and policies be applied on a project merely because FHWA is involved in that project. FHWA's involvement in a project does not change governing policies although FHWA may request consideration of more rigorous criteria or alternative approaches.

The IDOT and FHWA are established leaders in the joint process review program. The cooperative approach taken in Illinois has led to reviews that are an integral part of process improvement at IDOT and FHWA. These reviews meet and exceed the requirements of 23 U.S. Code, Section 106(g)(3). During the annual process review selection meeting, IDOT and FHWA will ensure at least one review addressing project delivery is selected. Most of these reviews do address project delivery. Additional program reviews will be conducted at the required frequencies. These include, but are not limited to, the following:

The IDOT research program conducts a peer review of its program.
The FHWA reviews IDOT's Highway Performance Monitoring System program.
The FHWA reviews Illinois' Motor Fuel and Truck Tax collection program.
The FHWA and Federal Transit Administration conduct MPO Certification Reviews.
The IDOT and FHWA review construction work zones.
The IDOT and FHWA conduct ad hoc reviews based on issues that emerge.
The IDOT audit program, with some FHWA participation, is conducted.
Other State entities review IDOT's program: Auditor General, Department of Central Management Services.

E. Program Responsibility Matrix

Attachment B to this S&O Agreement is the Program Responsibility Matrix example that identifies all relevant FHWA program actions, and Division and IDOT program contact offices.

F. Manuals and Operating Agreements

IDOT manuals, agreements and other control documents that have been approved for use on Federal-aid projects are listed in Attachment C to this S&O Agreement.

G. Stewardship and Oversight Indicators

FHWA and IDOT will jointly develop a set of Stewardship and Oversight Indicators (Indicators) as tools to assess whether the assumptions of responsibility outlined in this agreement are functioning appropriately. The Indicators will be risk-based, will continue to evolve to meet the needs of FHWA and IDOT and be reviewed annually for effectiveness. Once developed, Indicators will be included in an attachment to this agreement.

SECTION XI. IDOT OVERSIGHT AND REPORTING REQUIREMENTS

A. IDOT Oversight and Reporting Requirements

The IDOT is responsible for demonstrating to the FHWA how it is carrying out its responsibilities in accordance with this S&O Agreement. In order to fulfill this responsibility, the IDOT will meet its responsibilities in accordance with Illinois control documents, which are listed in Attachment C. The IDOT will consult with FHWA in accordance with Attachment A when IDOT considers deviating from the control documents, which represent established policies, guidance, standard procedures, and programmatic agreements. With FHWA approval, IDOT may implement an alternative approach to meeting State and Federal requirements.

IDOT will assume all responsibilities in accordance with Section 106 of Title 23. This applies to all design activities, Plan, Specifications, and Estimates (PS&E) approvals, concurrence in awards, and all construction and maintenance activities. This precludes the need for any FHWA approval or concurrence, except for those actions that require FHWA approval outside of Title 23 U.S.C., such as NEPA (42 USC 4321 et seq), Title VI of the Civil Rights Act (42 USC 2000d et seq), Fair Housing Act (42 USC 3601 et seq), and the Uniform Relocation Assistance and Land Acquisitions Policies Act (42 USC 4601 et seq).

Project level actions from FHWA are summarized in Attachment A. The IDOT will ensure the appropriate approvals are obtained and the appropriate documentation is submitted. For all Federal-aid projects on the NHS, under State or Local jurisdiction, IDOT will conduct all final inspections in lieu of FHWA to ensure the work was completed in substantial conformance with the approved PS&E. Although FHWA may

request to participate in a PoDI's final inspection, IDOT will still have the lead in completing this action.

The process by which PoDI's are coordinated between IDOT and FHWA is outlined in Attachment D.

B. IDOT Oversight of Locally Administered Projects

B.1. IDOT is required to provide adequate oversight of subrecipients including oversight of any assumed responsibilities the IDOT delegates to a LPA.

B.2. Pursuant to 23 U.S.C. 106(g)(4), the IDOT shall be responsible for determining that subrecipients of Federal funds have adequate project delivery systems for locally administered projects and sufficient accounting controls to properly manage such Federal-aid funds. The State DOT is also responsible for ensuring compliance with reporting and other requirements applicable to grantees making sub-awards, such as monthly reporting requirements under the Federal Funding Accountability and Transparency Act of 2006, PL 109-282 (as amended by PL 110-252).

B.3. The IDOT acknowledges that it is responsible for sub-recepient awareness of Federal grant requirements, management of grants, awards and sub-awards and is familiar with and comprehends pass through entity responsibilities (2 C.F.R. 200.331 Requirements for Pass-thru Entities)The IDOT shall carry out these responsibilities using the following actions, programs, and processes:

As IDOT makes programs available to local units of government, IDOT provides the parameters, assists the locals in administration, and provides oversight of Federal and State funded programs. Eligible public agencies may be permitted, by IDOT, to take approval actions and administer Federal-aid design and construction projects when IDOT assures the public agency has the knowledge and capability to achieve compliance with State and Federal requirements.

State stewardship efforts include oversight and approval actions, as well as many day-to-day actions that are routinely performed to ensure the Federal-aid Highway Program is administered in regulatory compliance and in ways that enhance the value of the program funds. In addition, IDOT maintains its Bureau of Local Roads and Streets Manual and provides training opportunities to communicate requirements, and IDOT staff reviews project documentation to ensure compliance.

B.4. The IDOT shall assess whether a sub-recipient has adequate project delivery systems and sufficient accounting controls to properly manage projects, using the following actions, programs, and processes:

Control documents, including the IDOT Bureau of Local Roads and Streets Manual, will be followed to ensure LPA projects are suitably administered. IDOT financial monitoring procedures will be applied to these projects.

B.5. The IDOT shall assess whether a sub-recipient is staffed and equipped to perform work satisfactorily and cost effectively, and that adequate staffing and supervision exists to manage the Federal project(s), by using the following actions, programs, and processes:

Control documents, including the IDOT Bureau of Local Roads and Streets Manual, will be followed to ensure LPA projects are suitably administered.

B.6. The IDOT shall assess whether sub-recipient projects receive adequate inspection to ensure they are completed in conformance with approved plans and specifications, by using the following actions, programs, and processes:

Control documents, including the IDOT Bureau of Local Roads and Streets Manual, will be followed to ensure LPA projects are suitably administered.

B.7. The IDOT shall ensure that when LPAs elect to use consultants for engineering services, the LPA, as provided under 23 CFR 635.105(b), shall provide a full-time employee of the agency to be in responsible charge of the project. The IDOT's process to ensure compliance with this requirement is documented by the following actions, programs, and processes:

Control documents, including the IDOT Bureau of Local Roads and Streets Manual, will be followed to ensure LPA projects are suitably administered.

B.8. The IDOT shall ensure that project actions will be administered in accordance with all applicable Federal laws and regulations. The IDOT will use the following process on required approvals on sub-recipient projects as described in control documents, such as the IDOT Bureau of Local Roads and Streets Manual, and approved on sub-recipient administered projects.

B.9. The IDOT shall document its oversight activities for LPA-administered projects and findings, and how it will share this information with the FHWA. FIRE reviews and monitoring projects' financial status will include LPA projects. IDOT will also coordinate resolution of project issues that deviate from control documents with FHWA.

SECTION XII. IMPLEMENTATION AND AMENDMENTS

A. This S&O Agreement will take effect as of the effective date of the signature of the FHWA Illinois Division Administrator, who shall sign this S&O Agreement last.

B. The Division and IDOT agree that updates to this Agreement will be considered periodically on a case-by-case basis or when:

- Significant new legislation, Executive orders, or other initiatives affecting the relationship or responsibilities of one or both parties to the S&O Agreement occurs;
- Leadership, or leadership direction, changes at the IDOT or FHWA; or
- Priorities shift as a result of audits, public perception, or changes in staffing at either the IDOT or Division Office.

C. The Division and IDOT agree that changes may occur to the contents of the Attachments to this S&O Agreement and documents incorporated by reference into the S&O Agreement. Except as provided in paragraph XII.D., and E, changes to the Attachments and documents incorporated by reference will not require the Division and IDOT to amend this S&O Agreement. The effective date of any revisions to one of these documents shall be clearly visible in the header of the revised document. This Agreement and any revised document shall be posted on the Division's S&O Agreement internet site within five (5) business days of the effective date.

D. Any changes to the high risk categories must be documented by an amendment to this S&O Agreement.

E. Any changes to the Project Action Responsibility Matrix must be approved by the FHWA Office of Infrastructure in writing and documented by an amendment to this S&O Agreement. *(Drafting Note: The Project Action Responsibility Matrix is generally Attachment A.)*

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EXECUTION BY THE FHWA ILLINOIS DIVISION OFFICE

Executed this 27 day of May, 201__.

Signature

CATHERINE A. BATEY

Catherine A. Batey
Division Administrator

EXECUTION BY THE ILLINOIS DEPARTMENT OF TRANSPORTATION

Executed this 26 day of May, 2015.

Signature

Randall S. Blankenhorn

Randall S. Blankenhorn
Acting Secretary

ATTACHMENT A
PROJECT ACTION RESPONSIBILITY MATRIX
(As of November 14, 2014)

The following matrix identifies Federal-aid highway program (FAHP) project approvals and related responsibilities. The matrix addresses which ones are subject to State assumption under the provisions of 23 U.S.C. 106(c) or other statutory or regulatory authority, as well as those which are reserved to FHWA.

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
PROGRAMMING (All phases)		
Ensure project in Statewide Transportation Improvement Program (STIP)/Transportation Improvement Program (TIP)	STATE	STATE
Identify proposed funding category	STATE (1)	STATE (1)
FINANCIAL MANAGMENT (All phases)		
Obligate funds/approve Federal-aid project agreement, modifications, and project closures (project authorizations) (Note: this action cannot be assumed by State)	FHWA	FHWA
Authorize current bill (Note: this action cannot be assumed by State)	FHWA	FHWA
Review and Accept Financial Plan and Annual Updates for Federal Major Projects over $500 million [23 U.S.C. 106(h)] (Note: this action cannot be assumed by State)	FHWA	FHWA
Review Cost Estimates for Federal Major Projects over $500 million [23 U.S.C. 106(h)] (Note: this action cannot be assumed by State)	FHWA	FHWA

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
Develop Financial Plan for Federal Projects between $100 million and $500 million. [23 U.S.C. 106(i)]	STATE	STATE
ENVIRONMENT (All phases)		
All EA/FONSI, EIS/ROD, 4(f), 106, 6(f) and other approval actions required by Federal environmental laws and regulations	FHWA (2)	FHWA (2)
Categorical Exclusion approval actions (Note this action cannot be assumed by the State except through an assignment under 23 U.S.C. 326 or 327, or through a programmatic agreement pursuant to Section 1318(d) of MAP-21 and 23 CFR 771.117(g)))	FHWA (2) for CEII STATE FOR CE-I	FHWA (2) for CEII STATE FOR CE-I
PRELIMINARY DESIGN (Design Phase)		
Consultant Contract Selection	STATE (3)	STATE (3)
Sole source Consultant Contract Selection	STATE (3)	STATE (3)
Approve hiring of consultant to serve in a "management" role (Note: this action cannot be assumed by State) [23 CFR 172.9]	FHWA	FHWA
Approve consultant agreements and agreement revisions (Federal non-Major Projects) [23 CFR 172.9]	STATE	STATE
Approve consultant agreements and agreement revisions on Federal Major Projects [23 CFR 172.9] (Note: this action cannot be assumed by State)	FHWA	FHWA
Approve exceptions to design standards [23 CFR 625.3(f)]	FHWA for Interstate; STATE for Non-Interstate	STATE
Interstate System Access Change [23 USC 111] (Note: this action	FHWA	N/A

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
cannot be assumed by State)		
Interstate System Access Justification Report [23 USC 111] (Note: action may be assumed by State pursuant to 23 USC 111(e))	FHWA	N/A
Airport highway clearance coordination and respective public interest finding (if required) [23 CFR 620.104]	STATE	STATE
Approve Project Management Plan for Federal Major Projects over $500 million [23 USC 106(h)] (Note: this action cannot be assumed by State)	FHWA	FHWA
Approve innovative and Public-Private Partnership projects in accordance with SEP-14 and SEP-15 (Note: this action cannot be assumed by State)	FHWA	FHWA
Provide pre-approval for preventive maintenance project (until FHWA concurs with STATE procedures) (Note: this action cannot be assumed by State)	FHWA	FHWA
DETAILED / FINAL DESIGN (Design Phase)		
Provide approval of preliminary plans for unusual/complex structures on the Interstate. [23 USC 109(a) and FHWA Policy]	FHWA (4)	N/A
Provide approval of preliminary plans for unusual/complex structures (non-Interstate). [23 USC 109(a) and FHWA Policy]	STATE (4)	STATE
Approve retaining right-of-way encroachments [23 CFR 1.23 (b) & (c)]	STATE (5)	STATE
Approve use of local force account agreements	STATE	STATE

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
[23 CFR 635.104 & 204]		
Approve use of publicly owned equipment [23 CFR 635.106]	STATE	STATE
Approve the use of proprietary products, processes [23 CFR 635.411]	STATE	STATE
Concur in use of publicly furnished materials [23 CFR 635.407]	STATE	STATE
RIGHT-OF-WAY (Design and Operational Phases)		
Make feasibility/practicability determination for allowing authorization of construction prior to completion of ROW clearance, utility and railroad work [23 CFR 635.309(b)]	FHWA for Interstate; STATE for Non-Interstate	STATE
Make public interest finding on whether State may proceed with bid advertisement even though ROW acquisition/relocation activities are not complete for some parcels [23 CFR 635.309(c)]	FHWA	FHWA
Ensure compliant ROW certificate is in place [23 CFR 635.309(c)]	STATE	STATE
Approve Hardship and Protective Buying [23 CFR 710.503] (If a Federal-aid project) (Note: this action cannot be assumed by State)	FHWA	FHWA
Approve Interstate Real Property Interest Use Agreements [23 CFR 710.405] (Note: this action cannot be assumed by State)	FHWA	N/A
Approve non-highway use and occupancy [23 CFR 1.23(c)]	FHWA for Interstate STATE for Non-Interstate (3)	STATE (3)
Approve disposal at less than fair	FHWA	FHWA

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
market value of federally funded right-of-way, including disposals of access control [23 U.S.C. 156] (Note: this action cannot be assumed by State)		
Approve disposal at fair market value of federally funded right-of-way, including disposals of access control [23 CFR 710.409] (Note: Exception allowed per 23 CFR 710.201)	FHWA for Interstate STATE for Non-Interstate (3)	STATE (3)
Requests for credits toward the non-Federal share of construction costs for early acquisitions, donations or other contributions applied to a project (note: this action cannot be assumed by State)	FHWA	FHWA
Federal land transfers [23 CFR 710, Subpart F] (Note: this action cannot be assumed by State)	FHWA	FHWA
Functional replacement of property [23 CFR 710.509] (Note: this action cannot be assumed by State)	FHWA	FHWA
SYSTEM OPERATIONS AND PRESERVATION (Design Phase)		
Accept Transportation Management Plans (23 CFR 630.1012(b))	STATE	STATE
Approval of System Engineering Analysis (for ITS) [23 CFR 940.11]	STATE	STATE
PS&E AND ADVERTISING (Design Phase)		
Approve PS&E [23 CFR 630.201]	STATE	STATE
Authorize advance construction and conversions [23 CFR 630.703 & 709] (Note: this action cannot be assumed by State)	FHWA	FHWA
Approve utility or railroad force	STATE	STATE

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
account work [23 CFR 645.113 & 646.216]		
Approve utility and railroad agreements [23 CFR 645.113 & 646.216]	STATE	STATE
Approve use of consultants by utility companies [23 CFR 645.109(b)]	STATE	STATE
Approve exceptions to maximum railroad protective insurance limits [23 CFR 646.111]	STATE	STATE
Authorize advertising for bids (FHWA authorization done via construction authorization) [23 CFR 635.112, 309]	STATE	STATE
CONTRACT ADVERTISEMENT AND AWARD (Design Phase) All contracts to be done by competitive bidding unless otherwise authorized by law		
Approve cost-effectiveness determinations for construction work performed by force account or by contract awarded by other than competitive bidding [23 CFR 635.104 &.204]	STATE	STATE
Approve emergency determinations for contracts awarded by other than competitive bidding [23 CFR 635.104 &.204]	FHWA	FHWA
Approve construction engineering by local agency [23 CFR 635.105]	STATE	STATE
Approve advertising period less than 3 weeks [23 CFR 635.112]	FHWA	FHWA
Approve addenda during advertising period [23 CFR 635.112]	STATE	STATE
Concur in award of contract [23 CFR 635.114]	STATE	STATE
Concur in rejection of all bids [23 CFR 635.114]	STATE	STATE
Approval of Design-Build	STATE	STATE

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
Requests-for-Proposals and Addenda [23 CFR 635.112]		
CONSTRUCTION (Construction Phase)		
Approve changes and extra work [23 CFR 635.120]	STATE	STATE
Approve contract time extensions [23 CFR 635.120]	STATE	STATE
Concur in use of mandatory borrow/disposal sites [23 CFR 635.407]	STATE	STATE
Accept materials certification [23 CFR 637.207]	STATE	STATE
Concur in settlement of contract claims [23 CFR 635.124]	STATE	STATE
Concur in termination of construction contracts [23 CFR 635.125]	STATE	STATE
Waive Buy America provisions [23 CFR 635.410] (Note: this action cannot be assumed by State)	FHWA	FHWA
Final inspection/acceptance of completed work [23 USC 114(a)]	STATE	STATE
CIVIL RIGHTS (All phases)		
Approval of Disadvantaged Business Enterprise (DBE) Project Contract Goal set by the State DOT under 49 CFR 26.51(d). [49 CFR 26.51(e)(3)]	STATE	STATE
Acceptance of Bidder's Good Faith Efforts to Meet Contract Goal [49 CFR 26.53] or of Prime Contractor's Good Faith Efforts to Find Another DBE Subcontractor When a DBE Subcontractor is Terminated or Fails to Complete Its Work [49 CFR 26.53(g)] (Note: this action cannot be performed by the FHWA)	STATE	STATE

PROJECT ACTION RESPONSIBILITY MATRIX (Excluding PoDIs, which are subject to separate PoDI Plans)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
Equal Employment Opportunity (EEO) Contract Compliance Review [23 CFR Part 230, Subpart D]).	STATE	STATE
Training Special Provision – Approval of Project Goal for training slots or hours [23 CFR Part 230, Subpart A]	STATE	STATE
Training Special Provision – Approval of New Project Training Programs (Note: this action cannot be assumed by State) [23 CFR 230.111(d), (e)]	FHWA	FHWA

FOOTNOTES:

(1) State is responsible for ensuring that all individual elements of the project are eligible. FHWA will check that the scope of the project as described in submitted project agreement is eligible for the category of funding sought. All final eligibility and participation determinations are retained by FHWA.

(2) This action cannot be assumed by the State except through an assignment under 23 U.S.C. 326 or 327, or through a programmatic agreement pursuant to Section 1318(d) of MAP-21. If there is a 23 U.S.C. 326 or 327 assignment or PCE agreement, decisions are handled in accordance with those assignments or agreements. Illinois has a PCE, and IDOT categorizes CE-I determinations, which are generally items in 23 CFR 771.117 (c) with no unusual circumstances.

(3) State's process and modifications to, or variation in process, require FHWA approval.

(4) Unusual/Complex bridges and structures are those that the Division determines to have unique foundation problems, new or complex designs, exceptionally long spans, exceptionally large foundations, complex hydrologic (including climate change and extreme weather events) aspects, complex hydraulic elements or scour related elements, or that are designed with procedures that depart from currently recognized acceptable practices (i.e., cable-stay, suspension, arch, segmental concrete, moveable, truss, tunnels, or complex geotechnical walls or ground improvement systems)

(5) FHWA approval is required for revocable occupancy permits of non-conforming outdoor advertising signs.

ATTACHMENT B
PROGRAM RESPONSIBILITY MATRIX

PROGRAM ACTION RESPONSIBILITY

The following matrix is an example list of program actions. The Division should refer to http://our.dot.gov/office/fhwa.hq/OfficeofInfrastructure/hipa/SO/Resources/Lists/Program%20Responsibilities%20Matrix/for the latest updated version which can be incorporated into the agreement or referenced as a control document. Modify the matrix to reflect the Division and State "Responsible Program Office." The primary office of contact should be listed, rather than an individual or the approving official.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Appropriations, Allotments, Obligations	31 USC 1341(a)(1)(A)& (B); 31 USC 1517(a); 23 USC 118(b), 23 USC 121	As needed	Not Applicable	Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	State will monitor appropriations, allotments and obligations to ensure that all funding is used efficiently within each quarter and use all Obligation Authority (OA) by the end of the year.
Approval of Indirect Cost Allocation Plans (ICAPs)	2 CFR 200 Subpart E; ASMBC-10	As needed	Not Applicable	Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	The State will certify that the ICAP was prepared in accordance with 2 CFR 200 Subpart E.

[1] All actions taken on or after December 26, 2014, shall be governed by the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR Part 200. Part 200 of 2 CFR supersedes 49 CFR Parts 18 and 19, and requirements from OMB Circulars A-21, A-87, A-110, and A-122 (which have been placed in OMB guidances); Circulars A-89, A-102, and A-133; and the guidance in Circular A-50 on Single Audit Act follow-up.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
FIRE Program Activities	FHWA Order 4560.1C (or as superseded)	Ongoing		Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	State will continue to provide oversight and conduct reviews to ensure Federal-aid compliance. FHWA will review and monitor. State responsibilities include multiple tasks in support of risk assessments, conducting reviews and implementation of recommendations.
Audit Coordination/FHWA Financial Statement Audit/State External Audit Reviews/State Internal Audit Reviews	FMFIA, 2 C.F.R. Part 200, Subpart F;; GAAP, CFO Act of 1990; DOT Order 8000.1C	As needed	Not Applicable	Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	State assures corrective action is taken to resolve audit findings and FHWA will monitor activities to ensure implementation.
Improper Payments Review	Improper Payments Information Act of 2002, PL 107-300, Improper Payments Elimination and Recovery Act of 2010, PL 111-204, Improper Payments Elimination and Recovery Improvement Act of 2012, PL 112-248	Annually		Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	State will provide all information necessary to document sampled payments and FHWA offices will review and complete appropriate data submittal forms.
Transfer of Funds between programs or to other FHWA offices or agencies as requested by State	23 USC 126, 23 USC 132, and FHWA Order 4551.1	As needed	Not Applicable	Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	State will submit requests for transfer and FHWA approves and processes the funding transfers between programs, to other States, to other agencies, and to FHWA HQ, Federal Lands, or Research offices.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Reviews of State Transportation Departments Financial Management Systems - Financial Integrity	23 USC 106(g)(2)(A)	Annually	Not Applicable	Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	23 USC 106(g)(2)(A) states that the Secretary shall perform annual reviews that address elements of the State transportation departments' financial management systems that affect projects approved under subsection (a).
Review Adequacy of Sub-recipient Project Delivery Systems and Sufficient Accounting Controls to Manage Federal Funds	23 USC 106(g)(4)(A)(i)	As needed	Not Applicable	Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	
Periodic Reviews of States Monitoring of sub-recipients	23 USC 106(g)(4)(B)	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	
Approval of Increased Federal Share Agreement (Sliding Scale)	23 USC 120(b)(2)	As determined by the Federal Share Agreement	Not Applicable	Office of Chief Financial Officer	Finance & Logistics	Finance & Administration	A State must enter into an agreement with FHWA for use of the increased Federal share allowable under this section, which must be reviewed and updated periodically as agreed to in the agreement. States must demonstrate that they are in compliance with the statute and the agreement.
Prepare / Review Title VI Plan Accomplishments and Next Year's Goals	23 CFR 200.9(b)(10)	Annually	1-Oct	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Division office reviews and comments.
Prepare / EEO Contractor Compliance Plan accomplishments and next year's goals	23 CFR 230, Subpart C, Appendix A, Part I, III	Annually	1-Oct	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division office reviews and comments.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Prepare / Review State Internal EEO Affirmative Action Plan (Title VII) Accomplishments and Goals	23 CFR 230.311	Annually	1-Oct	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Courtesy copy to HQ.
Review DBE Program Revisions	49 CFR 26.21(b)(2)	As needed	Not Applicable	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division sends to HCR for review and approval as
Prepare / DBE Uniform Awards and Commitment Report	49 CFR 26, Appendix B	Semi-Annual	June 1st December 1st	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division Office reviews and sends to HCR
Prepare / Annual Analysis and Corrective Action Plan (if necessary)	49 CFR 26.47(c)	Annual (as necessary)	December 31st	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division Office approves sends copy to HCR
Prepare / State DBE Program Goals	49 CFR 26.45(f)(1)	Triennial	August 1st	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division reviews and approves; HCC provides legal sufficiency review and approval sends copy to HCR
Prepare / Review On-the-Job-Training (OJT) goals & accomplishments	23 CFR 230.111(b)	Annually	TBA	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division office reviews and comments.
Approval of OJT and DBE Supportive Services fund requests	23 CFR 230.113 & 23 CFR 230.204	Annual	TBA	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division recommends approval submits to HCR for final approval
Return of any unused discretionary grant program funding	23 CFR 230.117(2)	Annual	TBA	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division works with HCR and CFO
Prepare / Review of Report on Supportive Services (OJT & DBE)	23 CFR 230.113(g), 230.121(e), 230.204(g)(6)	Quarterly		Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Division office reviews and comments.
Prepare / Review Annual Contractor Employment Report (Construction Summary of Employment Data (Form PR-1392)	23 CFR 230.121(a); Appendix D to Subpart A, Part 230, General Information and Instructions	Annually	1-Dec	Office of Civil Rights	Assistant Division Administrator	Business & Workforce Diversity	Recommendation sent to HQ for approval.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Prepare / Review State DOT Employment Statistical Data (EEO-4)	23 CFR, Subpart C, Appendix A	Biannual	1-Dec	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Report sent to HQ quarterly for informational purposes and recommendation sent to HQ annually for approval.
Prepare / Review Annual Federal Projected Awards Reports - Historically Black Colleges & Universities/Tribal Colleges & Universities/Hispanic Serving Institutes, American Indian Alaskan Native, Asian Pacific & American Islander.	Presidential Executive Orders: 13230, 13256,13270, 13361, 13515	Annual	TBA	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Divisions submit data to HCR who prepares report for DOCR
Prepare / Review ADA Complaint Reports of Investigation	28 CFR 35.190	As needed	Not Applicable	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Division office reviews, FHWA HQ approves and issues finding.
Review Americans with Disabilities Act (ADA) /Sec. 504 Program Plan accomplishments and next year's goals	49 CFR 27.11(c), EO 12250	Annually	1-Oct	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Division office reviews and comments.
Return of unexpended funds used for Summer Transportation Institutes	23 CFR 230.117(2)	Annual	August 30; however, State procurement rules may govern	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Divisions work with HCR and CFO
Prepare / Review Request for National Summer Transportation Institute (NSTI) Proposals (SOWs)	23 USC 140(b)	Annual	TBA	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Divisions recommend approval. HCR gives final approval
Prepare / Review NSTI Report (questionnaire)	23 USC 140(b)	Annual	October 15th	Office of Civil Rights	Assistant Division Administrator	Chief Counsel	Divisions provide to HCR
Receipt of State Consultation Process with Tribal Governments	23 CFR 450.210(c)	As needed	Not Applicable	Office of Federal Lands Highway	Planning, Environment & ROW	Highways	Informational Purposes.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Approval of Contracting Procedures for Consultant Selection	23 CFR 172.5 & 172.9	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval.
Determination of High Risk Categories - Limitation on Interstate Projects	23 USC 106(c)(4)(B)	As needed	Not Applicable	Office of Infrastructure	Division Administrator	Highways	Office of Program Administration determines national categories and must concur on any State designations.
Approval of State 3R Program	23 CFR 625.4(a)(3), 23 USC 109(n)	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval.
Verify adoption of Design Standards (National Highway System, including Interstate)	23 CFR 625, 23 USC 109(b), 23 USC 109(c)(2), 23 USC 109(o)	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA HQ regulatory action to adopt NHS standards.
Approval of preliminary plans of Major and Unusual Bridges on the Interstate Highway System	(M1100.A)	As needed	Not Applicable	Office of Infrastructure	Assistant Division Administrator	Highways	Director of HIBT has approval of preliminary plans of Major and Unusual Bridges on the Interstate Highway System (M1100.A)
Approval of State Standard Specifications	23 CFR 625.3	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval.
Verify State Design Exception Policy complies with FHWA Policy	23 CFR 625.3	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval.
Approval of State Standard Detail Plans	23 CFR 625.3	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval.
Approval of Pavement Design Policy	23 CFR 626.3	As needed	Not Applicable	Office of Infrastructure	Planning & Program Development	Highways	FHWA Division Office Approval.
Review of Value Engineering Policy and Procedures	23 CFR 627.1(b)&(c), 23 CFR 627.7 FHWA Order 1311.1B	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Review.
Review of Value Engineering Annual Report	23 CFR 627.7, FHWA Order 1311.1B	Annual	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office collects, reviews, and submits to HQ for review and reporting.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Review and Approval of Interstate Access Requests	23 USC 111, 23 CFR 710, 74 FR 43743-43746 (Aug. 27, 2009)	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office approval with concurrence from HQ on more complex access requests.
Approval of Liquidated Damages Rate	23 CFR 635.127	Every 2 years	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval.
Approval of Quality Assurance Program	23 CFR 637.205	As needed	Not Applicable	Office of Infrastructure	Planning & Program Development	Highways	State administers, with programmatic agreement by the Division Office, as part of their materials testing and construction quality assurance/acceptance program.
Assure Central Laboratory accredited by AASHTO Accreditation Program or FHWA approved comparable program	23 CFR 637.209	As needed	Not Applicable	Office of Infrastructure	Planning & Program Development	Highways	State administers, with programmatic agreement by the Division Office, as part of their materials testing and construction quality assurance/acceptance program.
Assure Non-STD designated lab performing Independent Assurance sampling and testing accredited by AASHTO Accreditation Program or FHWA approved comparable program	23 CFR 637.209	As needed	Not Applicable	Office of Infrastructure	Planning & Program Development	Highways	State administers, with programmatic agreement by the Division Office, as part of their materials testing and construction quality assurance/acceptance program.
Assure Non-STD designated lab used in dispute resolution accredited by AASHTO Accreditation Program or FHWA approved comparable program	23 CFR 637.209	As needed	Not Applicable	Office of Infrastructure	Planning & Program Development	Highways	State administers, with programmatic agreement by the Division Office, as part of their materials testing and construction quality assurance/acceptance program.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Review Independent Assurance Annual Report	23 CFR 637.207	Annually	1-Mar	Office of Infrastructure	Planning & Program Development	Highways	State administers, with programmatic agreement by the Division Office, as part of their materials testing and construction quality assurance/acceptance program.
Assure Labor Compliance - Prevailing Wage Rate	23 USC 113	As needed	Not Applicable	Office of Infrastructure	Assistant Division Administrator	Highways	FHWA Division Office Review and Approval
Determination of Eligible Preventive Maintenance Activity - Cost-Effective Means of Extending Useful Life Determination	23 USC 116(e)	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval
Approval of Utility Agreement / Alternate Procedure	23 CFR 645.119	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval
Approval of Utility Accommodation Policy	23 CFR 645.215, 23 USC 109(l), 23 USC 123	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	FHWA Division Office Approval
Review Bridge Construction, Geotechnical, and Hydraulics	23 CFR 650	As needed	Not Applicable	Office of Infrastructure	Assistant Division Administrator	Highways	
Review Plans of Corrective Action established to address NBIS compliance issues	23 CFR 650, 23 USC 144	Annually		Office of Infrastructure	Assistant Division Administrator	Highways	Division office performs annual compliance review and reports results to HQ.
Review NBI Data Submittal	23 CFR 650 Subpart C, Annual Memo from HQ, 23 USC 144	Annually	1-Apr	Office of Infrastructure	Assistant Division Administrator	Highways	Division resolve errors with States; States submit to HQ.
Review structurally deficient bridge construction Unit Cost submittal	23 USC 144	Annually	1-Apr	Office of Infrastructure	Assistant Division Administrator	Highways	Submit to HQ.
Review Section 9 of the Rivers and Harbors Act Submittals (Bridge Permits)	23 CFR 650 Subpart H; 33 CFR 114 & 115	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Approval for reduction of expenditures for off-system bridges	23 USC 133(g)(2)(B)	As needed	Not Applicable	Office of Infrastructure	Assistant Division Administrator	Highways	The FHWA Administrator may reduce the requirement for expenditures for off-system bridges if the FHWA Administrator determines that the State has inadequate needs to justify the expenditure.
Determination on Adequacy of State's Asset Management Plan	23 USC 119(5)	Annually beginning second fiscal year after establishment of the process		Office of Infrastructure	Planning & Program Development	Planning & Programming	
Certification and Recertification of States Process for Development of State Asset Management Plan	23 USC 119(6)	Recertification every four years after establishment of the process		Office of Infrastructure	Planning & Program Development	Planning & Programming	
Review Reporting on Performance Targets	23 USC 150(e)	Beginning four years after enactment of MAP-21 and biennially thereafter		Office of Infrastructure	Planning & Program Development	Planning & Programming	
Review National Highway System Performance Achievement Plan for Actions to achieve the targets (when State does not achieve or make significant progress toward achieving)	23 USC 119(7)	Required if State does not achieve targets (or significant progress) for 2 consecutive reports		Office of Infrastructure	Planning & Program Development	Planning & Programming	
States and sub-recipient failure to maintain projects - Notice and withholding Federal-aid Funds	23 USC 116(d)	As needed	Not Applicable	Office of Infrastructure	Planning & Program Development	Planning & Programming	
Emergency Relief (ER) Damage Assessments and Reports	23 CFR 668 23 USC 120 and 125	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	Perform with State.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Toll Credit and Maintenance of Effort (MOE) Calculation and Agreement	23 USC 120(i)	Annually		Office of Infrastructure	Field Engineering	Planning & Programming	State will calculate the amount of eligible toll credit and submit for approval. FHWA will review and approve the request.
Local Public Agency (LPA) Oversight	2 CFR 200.331; 23 USC 106(g)(4)	As needed	Not Applicable	Office of Infrastructure	Field Engineering	Highways	States are responsible to ensure that LPAs are aware of all the applicable Federal-aid Program requirements; States are responsible to ensure monitoring and oversight to assure compliance with Federal requirements. 23 USC further reinforces stressing accountability on "project delivery systems" and "accounting controls."
Approval to Sell, Lease or Otherwise Dispose of a Ferry Purchased with Federal-aid Funds	23 USC 129 (c)(6)	As needed	Not Applicable	Office of Infrastructure	Planning, Environment & ROW	Highways	Division Office reviews and submits for Office of Program Administration for Administrator Approval
Territorial Highway Program - Approval of Territory Agreement	23 USC 165(c)(5)	Reviewed and Revised as needed every two years		Office of Infrastructure	N/A	N/A	Division Office works with Office of Program Administration and HCC
TIFIA Credit Program	23 USC 601-609	As needed	Not Applicable	Office of Innovative Program Delivery	Finance & Logistics	Innovative Project Delivery	Project sponsors submit requests for credit assistance to the TIFIA JPO for review; approval by the Secretary
GARVEEs	23 USC 122; GARVEE Guidance 3/14	As needed	Not Applicable	Office of Innovative Program Delivery	Finance & Logistics	Innovative Project Delivery	MOUs strongly suggested for each GARVEE issue. FM contacts OIPD for review/concurrence before final approval

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
State Infrastructure Banks	NHS Act Section 308; 23 USC 610; SIB Guidance 3/14	Annual Report	Not Applicable	Office of Innovative Program Delivery	Finance & Logistics	Innovative Project Delivery	Division sends copy of report to OIPD. SIB submits annual report to Division Office.
Section 129 Tolling Authority Requests	23 USC 129(a)	As needed	Not Applicable	Office of Innovative Program Delivery	Field Engineering	Innovative Project Delivery	At the option of the project sponsor, may execute a Tolling Eligibility MOU with the Division Office; HIN coordinates FHWA HQ review
Section 166 HOV/HOT Lanes Tolling Authority Requests	23 USC 166(d)	As needed	Not Applicable	Office of Innovative Program Delivery	Field Engineering	Innovative Project Delivery	At the option of the project sponsor, may execute a Tolling Eligibility MOU with the Division Office; HIN coordinates FHWA HQ review
Value Pricing Pilot Program Tolling Authority Requests	ISTEA Section 1012(b)	As needed	Not Applicable	Office of Innovative Program Delivery	Field Engineering	Innovative Project Delivery	Requests submitted to HIN to coordinate review; approval by the Administrator
Interstate System Reconstruction and Rehabilitation Pilot Program Tolling Authority Requests	TEA-21 Section 1216(b)	As needed	Not Applicable	Office of Innovative Program Delivery	Field Engineering	Innovative Project Delivery	Applications submitted to HIN to coordinate review; approval by the Administrator
Annual Audit of Toll Facility Records and Certification of Adequate Maintenance - Report Submittal	23 USC 129(a)(3)(B); TEA-21 Section 1216(b)(5)(B); SAFETEA-LU Section 1604(b)(3)(A); ISTEA Section 1012(b)(3)	Annually		Office of Innovative Program Delivery	Field Engineering	Innovative Project Delivery	Division Office to receive the reports.
Project Management Plan (Major Projects)	23 U.S.C. 106(h)(2)	Prior to first federal authorization of construction funds for a Major Project	Not Applicable	Office of Innovative Program Delivery	Division Office will conduct concurrent review with HQ Office of Innovative Program Delivery.	State DOT or Project Sponsor will prepare and submit Project Management Plan.	Division Office will provide approval after receiving concurrence from HQ Office of Innovative Program Delivery.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Financial Plan (Major Projects)	23 U.S.C. 106(h)(3)	Prior to first federal authorization of construction funds for a Major Project and then annually.	Annually as noted in the approved Initial Financial Plan	Office of Innovative Program Delivery	Division Office will conduct concurrent review with HQ Office of Innovative Program Delivery.	State DOT or Project Sponsor will prepare and submit annual Financial Plans.	Division Office will provide approval after receiving concurrence from HQ Office of Innovative Program Delivery.
Financial Plan (Other Projects)	23 U.S.C. 106(i)	Prior to first federal authorization of construction funds for an Other Project and then annually.	Annually as noted in the approved Initial Financial Plan	Office of Innovative Program Delivery	Division Office will review and approve Financial Plans for Other Projects in accordance with its stewardship and oversight agreement with the State DOT or Project Sponsor.	State DOT or Project Sponsor will prepare and submit annual Financial Plans to the Division Office, only upon request.	Other Projects are defined as projects with an estimated total cost of $100 million or more that have not been designated as Major Projects.
Review Designation and Re-designation of Primary Freight Network	23 USC 167(d)	One year after enactment of MAP-21 and every ten years thereafter		Office of Operations	Planning, Environment & ROW	Planning & Programming	Under development, initial PFN designation scheduled for Spring 2014 completion.
Review Development and Update of National Freight Strategic Plan	23 USC 167(f)	Three years after enactment of MAP-21 and every five years thereafter		Office of Operations	Planning, Environment & ROW	Planning & Programming	OST lead
Review Freight Transportation Conditions and Performance Report	23 USC 167(g)	Two years after enactment of MAP-21 and every two years thereafter		Office of Operations	Planning, Environment & ROW	Planning & Programming	OST lead
Review HOV Operations Report for Tolled Use and Low-Emission and Energy-Efficient Vehicle Use	23 USC 166(d)	Annually		Office of Operations	Planning, Environment & ROW	Planning & Programming	
Congestion Partnerships Assessment	Annual Memo from HQ	Annually	1-Jul	Office of Operations	Planning, Environment & ROW	Planning & Programming	Complete with partners and forward to HQ.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Traffic Incident Management Self-Assessment	Annual Memo from HQ	Annually	1-Jul	Office of Operations	Mobility & Safety	Highways	Complete with partners and forward to HQ.
Work Zone Self-Assessment	Annual Memo from HQ	Annually	7/1/2013, This project is currently on hiatus and has not been determined whether it will be reestablished or not.	Office of Operations	Mobility & Safety	Highways	Complete with partners and forward to HQ.
Approval of State-Prepared Manual on Uniform Traffic Control Devices - State Traffic Control Manuals	23 CFR 655.603, 23 USC 109(d)	As needed	Not Applicable	Office of Operations	Mobility & Safety	Highways	
Review Vehicle Size & Weight Enforcement Plan	23 CFR 657.11, 23 USC 127	Annually	1-Oct	Office of Operations	Mobility & Safety	Highways	
Review Vehicle Size & Weight Enforcement Certification	23 CFR 657.13, 23 USC 141	Annually	1-Jan	Office of Operations	Mobility & Safety	Highways	
Approval of National Network Modifications	23 CFR 658.11	As needed	Not Applicable	Office of Operations	Mobility & Safety	Highways	
Intelligent Transportation System Architecture & Standards	23 CFR Part 940	As needed	Not Applicable	Office of Operations	Mobility & Safety	Highways	
Approval of Work Zone Significant Project Determination	23 CFR 630.1010	As needed		Office of Operations	Mobility & Safety	Highways	
Approval of Exceptions to Work Zone Procedures for Interstate Projects	23 CFR 630.1010	As needed		Office of Operations	Mobility & Safety	Highways	
Approval of Work Zone Policy and Procedures Conformance Review	23 CFR 630.1014	At appropriate intervals		Office of Operations	Mobility & Safety	Highways	
Process Review of Work Zone Safety and Mobility Procedures	23 CFR 630.1008, 23 USC 109(e)(2), 23 USC 112(g)	Every 2 years		Office of Operations	Mobility & Safety	Highways	

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Approval of State Planning Work Program and Revisions (Part 1)	23 CFR 420.111, 23 CFR 420.115, and 23 CFR 420.209	Annually	Prior to Program Period	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA Division Office Approval.
Approval of State Research and Development Work Program (Part 2)	23 CFR 420.111, 23 CFR 420.115, and 23 CFR 420.209	Annually	Prior to Program Period	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA Division Office Approval.
Approval of State's Distribution of Planning Funds Formula - Allocation Formulas for PL Funds	23 CFR 420.109, 23 USC 104(d)(2)(A)(i)	When Revised	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA Division Office Approval.
Review of State Public Involvement Procedures	23 CFR 450.210(a)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA Division Office Review to Assure Compliance.
Receipt of State Consultation Process for Non- metropolitan Local Officials	23 CFR 450.210(b)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Informational Purposes.
Review of Long-range Statewide Transportation Plan	23 CFR 450.214	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA Division Office Review to Assure Compliance.
Approval of Statewide Transportation Improvement Program (STIP)	23 CFR 450.216, 23 CFR 450.218(a) & (c), 23 USC 135(g)(7)	At least every 4 years	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Joint FHWA and FTA approval.
Approval of STIP Amendments	23 CFR 450.218(a) & (c)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Joint FHWA and FTA approval.
Finding of Consistency of Planning Process with Section 134 and 135	23 USC 135(g)(8), 23 CFR 450.218(b)	Concurrent with STIP approval	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA and FTA issue a joint finding concurrent with STIP approval.
Review of State Self-certification that Planning Process is in Accordance with Applicable Requirements	23 CFR 450.218(a)	Submitted with proposed STIP or STIP amendments	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Received with STIP.
Approval of Transportation Management Area (TMA) MPO Unified Planning Work Programs (UPWP)	23 CFR 450.308(b) and 23 CFR 420 (Subpart A)	Prior to Program End	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Approval of Non-TMA UPWA	23 CFR 450.308(b) and 23 CFR 420 (Subpart A)	Prior to Program End	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	May use simplified work statement.
Approval of UPWP Revisions and Amendments (All MPO's)	23 CFR 420.115	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Review of UPWP Performance and Expenditure Reports (All MPO's)	23 CFR 420.117(b)	Not more frequently than quarterly	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Approval of Report Before Publication (All MPO's)	23 CFR 420.117(e)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Waiver may be granted.
Approval to use Planning Funds outside Urbanized Areas for States Receiving Minimum Apportionment	23 USC 104(d)(1)(A)(ii)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Review of Metropolitan Planning Area Boundary (Establishment and Changes)	23 CFR 450.312	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Approval by MPO and the Governor, shape files forwarded to HQ. (Comment: No action is required by FHWA/FTA).
Review of Metropolitan Transportation Planning Organizations (MPO) Designation and Re-designation	23 CFR 450.310	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Require agreement between Governor and local governments.
Review of Metropolitan Planning Agreements (MPA) for Attainment or Entire Nonattainment Area	23 CFR 450.314(a)	When Completed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Between MPO/State DOT/Transit Operator. Included in UPWP or Prospectus (23 CFR 450.314(d)).
Review of MPA - for MPA that do not include the entire nonattainment or maintenance area	23 CFR 450.314(b), 23 USC 109(j)	When Completed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Between MPO/State DOT/State AQ Agency.
Review of MPO Public Participation Procedures	23 CFR 450.316(a)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Must be developed and published.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Review of Metropolitan Transportation Plan (MTP) in Attainment Areas (and Updates)	23 CFR 450.322	Every 4 years	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Review of MTP in Non-Attainment and Maintenance Areas (and Updates)	23 CFR 450.322	Every 5 years	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Review of MTP Amendments	23 CFR 450.322(c)	As Needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Air Quality Conformity Determination on LRTP in Non-attainment and Maintenance Areas	23 CFR 450.322(d)	Concurrent with LRTP updates at least every 4 years and as needed on amendments	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	After receipt of MPO determination; Joint FHWA and FTA determination; In consultation with the Environmental Protection Agency (EPA).
Review of Transportation Improvement Program (TIP)	23 CFR 450.300(a); 23 CFR 450.324(b); 23 CFR 450.328(a), 23 USC 134(j)(1)(D)	Prior to Program Period	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	No succinct Federal approval action is required for the TIP. FHWA/FTA approval of the TIP is through the STIP approval process.
Review of TIP Amendments	23 CFR 450.324(a); 23 CFR 450.328(b)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	No succinct Federal approval action is required for the TIP. FHWA/FTA approval of the TIP is through the STIP approval process.
Approval of Air Quality Conformity Determination on TIP	23 CFR 450.326; 23 CFR 450.328	At least every 4 years, or when the TIP has been modified (unless exempt projects)	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Applies to non-attainment and maintenance areas only. After receipt of MPO determination, joint determination with FTA (in cooperation with EPA).

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Federal Finding of Consistency of Planning Process with Section 134 and 135	23 CFR 450.218(b); 23 CFR 450.334(a)	Concurrent with (S)TIP submittal	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	At least every four years, joint finding with FTA when TIP is submitted.
In Metropolitan Planning Areas, Review of State and MPO Self-certification that Planning Process is in Accordance with Applicable Requirements	23 CFR 450.334 (a), 23 CFR 218(a)	Annually or concurrent with the STIP/TIP cycle	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Required for all MPO's. May be included in the STIP, TIP, or UPWP, at least every 4 years.
In TMA's, Certification that Planning Process is in Accordance with Applicable Requirements	23 CFR 450.334(b), 23 USC 134(k)(5)	Every 4 years		Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Joint FHWA and FTA Certification.
Approval of Federal-Aid Urban Area Boundaries	23 CFR 470.105 (a), 23 USC 101(a)(33)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Approval of Revision of Functional Classification	23 CFR 470.105 (b)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	
Approval by Administrator of Interstate Additions & Revisions	23 USC 103(c)(1)(D), 23 CFR 470.111, 23CFR 470.115 (a)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Approval by HQ – Administrator.
Approval by Office Director of National Highway System (NHS) Additions and Revisions	23 USC 103(b)(3), 23 CFR 470.113 and 470.115(a)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Approved by HQ - Office Director.
Review of CMAQ Annual Report	CMAQ Guidance Memo October 31, 2006	Annually	1-Mar	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Division provides information on CMAQ projects including: amount of obligation, project description and location, and air quality benefits. The report must be submitted via the web-based CMAQ Tracking System.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Transportation Planning Excellence Awards		Annually	1-Feb	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	Call for entries for the FHWA FTA Transportation Planning and Excellence Awards.
Approval of Local Technical Assistance Program (LTAP) Centers Work Plan and Budget	FHWA LTAP Field Manual	Annually	31-Mar	Office of Planning, Environment & Realty	Field Engineering	Highways	FHWA HQ approval.
Approval of Public Involvement Program Procedures	23 CFR 771.111(h), 23 USC 128	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of NEPA Procedures, including Section 4(f)	23 CFR 771; 23 CFR 774; SAFETEA-LU 6007 & 6009, 23 USC 109(h)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Noise Policies	23 CFR 772.7, 772.9, and 772.13, 23 USC 109(i)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	FHWA approves State' noise abatement policy.
EIS Status Updates	FHWA Strategic Goal - EIS Timeliness	Quarterly	(Fiscal Year - Oct, Jan, Apr, Jul)	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	Monitor time required to complete EIS's. Determine projects which have exceeded recommended timeline (3 years). Identify projects which should be listed as dormant. Submit to HEPE.
Endangered Species Act Cost Report		Annually	1-Mar	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Exemplary Ecosystem Initiatives Applications		Annually	1-Apr	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Acquisitions, Appraisals, and Relocations Program and Procedures	49 CFR Part 24, The UA	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Early Acquisitions	23 CFR 710.501	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Local Public Agency Oversight	49 CFR 24.4(b); 23 CFR 710.201	As needed	Not Applicable	Office of Planning, Environment &	Planning, Environment &	Highways	

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
				Realty	ROW		
Approval of Highway Facility Relinquishment	23 CFR 620.203	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of ROW Disposal Authorization Request	23 CFR 710.409	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of ROW Operations Manual (Organization, Policies and Procedures), Updates, and Certification	23 CFR 710.201	January 1, 2001 and every 3 years thereafter or as required by changes in State law or Federal regulation or law	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Exception to Charging Fair Market Value	23 CFR 710.403 and 23 CFR 710.409	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Interstate Real Property Use Agreements	23 CFR 710.405	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Request for Federal Land Transfer	23 CFR 710.601	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Request for Direct Federal Acquisition	23 CFR 710.603	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Outdoor Advertising Policies and Procedures, and Regulation and Procedure Approval	23 CFR 750.304, 23 CFR 750.705, 23 USC 131	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Requests to Exempt Certain Nonconforming Signs, Displays, and Devices	23 CFR 750.503	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Approval of Railroad Agreement Alternate Procedure	23 CFR 646.220	As needed	Not Applicable	Office of Planning, Environment & Realty	Field Engineering	Highways	
Approval of Uniform Act Waivers and Waivers from Availability of Comparable Replacement Dwelling before Displacement	49 CFR 24.7, 49 CFR 24.204(b)	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	Requests reviewed and approved by HEPR Office Director.
Review of Uniform Relocation Assistance & Real Property Acquisition Report -(OMB Form 2125-0030)	49 CFR 24.9c & Appendix B 49 CFR 24.603	Annually	15-Nov	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	Submitted to FHWA Headquarters (HQ).
Review of Real Property Acquisition Statistical Report	FHWA Order 6540.1	Annually	15-Nov	Office of Planning, Environment & Realty	Planning, Environment & ROW	Highways	
Approval of Management Process and Project Selection Procedures and Certification for Research, Development & Technology Transfer Program and Revisions to Process	23 CFR 420.115 and 23 CFR 420.209	As needed	Not Applicable	Office of Planning, Environment & Realty	Planning & Program Development	Highways	FHWA Division Office Approval.
Periodic Review of States Management Process of the Research, Development & Technology Transfer Program	23 CFR 420.209	Periodic	Not Applicable	Office of Planning, Environment & Realty	Planning & Program Development	Highways	FHWA Division Office Periodic Review.
Approval of Performance and Expenditure Reports for SPR Research Work Programs	23 CFR 420.117	No less frequently than annual and no more frequently than quarterly	90 Days After End Of Period	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA Division Office Approval.
Approval of SPR research reports	23 CFR 420.117	Prior to publication unless prior approval is waved	Not Applicable	Office of Planning, Environment & Realty	Planning, Environment & ROW	Planning & Programming	FHWA Division Office Approval unless waived.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Annual Traffic Reports	Traffic Monitoring Analysis System and Traffic Monitoring Guide reporting	When Published	As needed	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	When Published
Approval of Annual Field Review Report	HPMS Field Review Guidelines (June 2001) Continuous Process Improvement Model for HPMS(February 2003)	Annually	1-Nov	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Review memo to HQ.
Approval of Certified Public Road Mileage	23 CFR 460.3(b)	Annually	1-Jun	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Each year, the Governor of each State and territory or a designee must certify Public Road Mileage. FHWA division reviews the Mileage and sends to HQ with division review/concurrence. This is reported to NHTSA for Apportionment of Safety Funds.
Approval of Data Submittal	23 CFR 420.105(b), HPMS Field Manual	Annually	15-Jun	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	State DOT sends directly to Division Office and HQ.
Highway Statistics Reports	Guide to Reporting Highway Statistics			Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	State DOT of Division Office sends directly to HQ.
Motor Fuels Report	A Guide to Reporting Highway Statistics, Chapter 2	Due 60 days after end of each reporting month		Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	
Vehicles and Drivers (561, 562, 566, and 571)	A Guide to Reporting Highway Statistics, Chapters 3, 4, 5, and 6	1-Apr	1-Apr	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	
Finance (531, 532, 541, 542, and 543 (optional)	A Guide to Reporting Highway Statistics, Chapters 8 and 9	1-Apr	1-Apr	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	
Transportation Bond Referendums	A Guide to Reporting Highway Statistics, Chapter 9	When Published	When Published	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
State DOT / Toll Authority Audits and Published Annual Reports and Form 539 (optional)	A Guide to Reporting Highway Statistics, Chapter 10	When Published	When Published	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Annually, Due as soon as available.
Finance (536)	A Guide to Reporting Highway Statistics, Chapter 11	30-Sep	30-Sep	Office of Highway Policy information	Finance & Logistics	Finance & Administration	Biennially for odd-numbered years. Due nine months after end of reporting year
Finance (534)	A Guide to Reporting Highway Statistics, Chapter 12	15-Jun	15-Jun	Office of Highway Policy information	Finance & Logistics	Finance & Administration	Annually for State, Biennially for local
Highway Finance and Tax Legislation	A Guide to Reporting Highway Statistics, Chapter 13	When Published	When Published	Office of Highway Policy information	Finance & Logistics	Finance & Administration	
State DOT Budgets and Published Annual Reports	A Guide to Reporting Highway Statistics, Chapter 13	When Published	When Published	Office of Highway Policy information	Finance & Logistics	Finance & Administration	
Motor Fuel Oversight Review	July 24, 2001 HQ Memo	Initial baseline reports no later than December 31, 2003		Office of Highway Policy information	Planning, Environment & ROW	Finance & Administration	Annual progress reports and statement of verification by June 30. Submitted via UPACS.
Review of Biennial - Toll Facilities in the United States	23 CFR 450.105(b) HPMS Field Manual	Biennially - Odd Years	June 15 (Odd Years)	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Division Office sends to HQ.
State Highway Maps (Tourist)		When Published	When Published	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Two copies to each Division Office and 100 copies to HQ.
Traffic Flow Maps		When Published		Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	When Published.
Vehicle Classification Data	MAP-21, HPMS Field Manual, Traffic Monitoring Guide	15-Jun	15-Jun	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Part of Annual HPMS submittal.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Highway Use Tax Evasion Grant Awards	23 USC 143	Annual	Not Applicable	Office of Highway Policy information	Finance & Logistics	N/A	FHWA along with the Internal Revenue Service will review applications and select awardees for projects designed to reduce or eliminate fuel tax evasion. FHWA will also review annual progress reports on projects.
Heavy Vehicle Use Tax (HVUT) – Certification of verifying proof-of-payment of HVUT	23 CFR 669.7	1-Jul	1-Jul	Office of Highway Policy information	Planning, Environment & ROW	N/A	Each year, the Governor of each State, or a designee must certify that the State is verifying that the HVUT has been paid before they issue or renew registrations on vehicles over 55,000 lbs. The HVUT program is administered by the Internal Revenue Service.
Heavy Vehicle Use Tax (HVUT) – Certification of verifying proof-of-payment of HVUT	23 CFR 669	Annual	1-Jan	Office of Highway Policy information	Planning, Environment & ROW	N/A	Each year, the Governor of each State, or a designee must certify that the State is verifying that the HVUT has been paid before they issue or renew registrations on vehicles over 55,000 lbs. The HVUT program is administered by the Internal Revenue Service.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Heavy Vehicle Use Tax (HVUT) – Triennial review of State program	23 CFR 669.21	Triennial	Not Applicable	Office of Highway Policy information	Planning, Environment & ROW	N/A	Every 3 years, the local Division Office will perform a review of the State process for verifying that the HVUT has been paid before a registration can be issued or renewed for vehicles over 55,000 lbs. The HVUT program is administered by the Internal Revenue Service.
Permanent ATR Data	Heavy Vehicle Travel Information System Field Manual	Monthly	Monthly	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Submit monthly, within 20 days after the close of the month for which the data were collected.
Continuous Automatic Vehicle Classifier Data	Heavy Vehicle Travel Information System Field Manual	Monthly	Monthly	Office of Highway Policy information	Planning, Environment & ROW	Planning & Programming	Send up to one week of data per quarter
Weight and Vehicle Classification Data Collected at Weigh-in-motion sites	Heavy Vehicle Travel Information System Field Manual	15-Jun	As needed	Office of Highway Policy information	Planning, Environment & ROW	Highways	WIM data collected at non-continuous sites during a year should be submitted by June 15 of the following year. If continuous WIM data are available, then up to one week of data per quarter.
Approval of MAP-21 compliant SHSP update within the legislatively required timeframe.	23 U.S.C. 148 (d)(2)(B)	Non Recurring	By Aug. 1 of the fiscal year after the HSIP final rule is established	Office of Safety	Mobility & Safety	Highways	FHWA Division Offices provide copy of SHSP process approval letter to HQ.
Highway Safety Improvement Program (HSIP) and Railway-Highway Crossing Program (RHCP) Reports	23 USC 148(h), 23 CFR 924.15	Annually	31-Aug	Office of Safety	Mobility & Safety	Highways	As per MAP-21 guidance, reports are due to FHWA Division Office by August 31st and to the Office of Safety by September 30.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Transportation Performance Management (TPM) for Safety	23 USC 150, 23 USC 134, 23 USC 135, 23 USC 148(i)	Annually	31-Aug	Office of Safety	Mobility & Safety	Transportation Safety	Per MAP-21, States and MPOs must set targets for established measures. Targets must be assessed for achievement
Review Drug Offender Driver's License Suspension Law & Enforcement Certification (Section 159)	23 USC 159 23, CFR 192.5	Annually	1-Jan	Office of Safety	Mobility & Safety	Transportation Safety	Certifications due to the Division Office by January 1.
Section 154/164 Compliance Status - Funds Reservation	23 USC 154 and 23 USC 164	Annually	30-Oct	Office of Safety	Mobility & Safety	Transportation Safety	States must submit a Shift letter to the Division Office by Oct. 30 indicating how to apply the penalty. New penalty states have additional time. The Office of Safety processes the compilation of information in a memo to the CFO.
Review Safety Belt Compliance Status	23 USC 153, 23 CFR 1215.6	Annually	Annually	Office of Safety	Mobility & Safety	Transportation Safety	NHTSA
High Risk Rural Roads (HRRR) Special Rule	23 USC 148(g)(1)	Annually	Annually	Office of Safety	Mobility & Safety	Highways	After the final FARS and HPMS data are available, FHWA HQ will inform the States if the HRRR Special Rule applies for the following FY.

Activity	Authority[1]	Frequency	Due Date	FHWA HQ Program Office	FHWA Division Responsible Program Office	State DOT Responsible Program Office	Remarks
Older Drivers and Pedestrians Special Rule	23 USC 148 (g)(2)	Annually	31-Aug	Office of Safety	Mobility & Safety	Highways	States should include in their annual HSIP reports (due August 31st) the calculations performed, verifying whether the Older Driver Special Rule applies in the State. If the Special Rule applies to a State in a given year, the State must include in its subsequent SHSP strategies to address the increases in the fatality and serious injury rates for drivers and pedestrians over the age of 65.
FHWA Emergency Preparedness Program	Executive Order 12656 and FHWA Order 1910.2C	As needed	Not Applicable	Office of Operations	Field Engineering	Highways	National Programs.

ATTACHMENT C
MANUALS AND OPERATING AGREEMENTS

IDOT Manuals

Bureau of Design and Environment Manual
Land Acquisition Policies and Procedures Manual
Construction Manual
Manual for Materials Inspection – Project Procedures Guide
Standard Specifications for Road and Bridge Construction
Bureau of Operations Traffic Policies and Procedures Manual
Illinois Manual on Uniform Traffic Control Devices
Highway Standards
Bridge Manual
Bureau of Local Roads & Streets Manual
Water Quality Manual
Disadvantaged Business Enterprise (DBE) Plan
Title VI Plan
Affirmative Action Plan
Civil Rights Procedures Manual
Procedural Memoranda

Access Policy
Bid Evaluation Procedures
Consultant Selection Process
Contract Administration Manual
Contract Compliance Plan
Environmental Process Manual
Financial Services Manual
Highway Safety Improvement Plan
Indirect Cost Allocation Plan (Cost Pool Composition/Eligibility)
Statewide Transportation Improvement Plan
Supplemental and Standard Specifications
Transportation Improvement Plan
Utility Manual
Work Programs

- Local Technical Assistance Program (LTAP)
- Statewide Planning and Research
- Transportation Management Area/Metropolitan Planning Organization (TMA/MPO)

Operating (Programmatic) Agreements

NEPA/404
Endangered Species Act Section 7
Endangered Species Act Informal Consultation
Risk-Based Project Level Oversight
Categorical Exclusions
EIS/EA Timeframes

ATTACHMENT D
SELECTION AND MONITORING OF PROJECTS OF DIVISION INTEREST (PODI'S)
IDOT/FHWA STEWARDSHIP AND OVERSIGHT AGREEMENT

Projects of Division Interest (PoDI's)[2] are IDOT projects on which there will be any sort of direct FHWA involvement beyond actions shown in Attachment A, "Project Action Responsibility Matrix". Projects of Corporate Interest (PoCI's) are a subset of PoDI's. PoCI's are IDOT projects on which there will be direct FHWA involvement but also have national significance and the increased potential for additional FHWA resources beyond the Illinois Division.

Projects designated as a PoDI / PoCI will typically be on the National Highway System (NHS). Due to special requirements needed to address federal requirements, projects funded through the TIGER program and projects classified as Major Projects will be designated as PoDI's regardless of the NHS status. Otherwise, projects off the NHS will only be considered for PoDI designation by IDOT request and FHWA concurrence although FHWA may prompt IDOT to make the request for a project with complex challenges or unusual circumstances.

Attachment A, "Project Action Responsibility Matrix", identifies the FHWA's level of direct involvement on the routine Federal Highway Program delivery. However, when a project is designated as a PoDI/ PoCI, various project actions normally marked State, will be assumed by FHWA due to the projects significance or risk identified, and stipulated in the project PoDI plan. The form of FHWA's approvals can be documented either through an FHWA letter, signature on an IDOT document, captured in meeting minutes sent to FHWA, or informal email from a FHWA representative.

The coordination process of PoDI's / PoCI's between the IDOT and the FHWA will be governed as follows:

- Annually, the IDOT will publish its Multi-Year Program on the IDOT website. The MYP is typically available in April of each year.
- The FHWA will then select PoDI's / PoCI's from the MYP and also identify the specific area(s) of federal involvement for each project. The PoDI / PoCI list will be finalized in June of each year.
- PoDI / PoCI milestones, such as designation and completion will be memorialized via formal correspondence between FHWA and IDOT. The PoDI plan will be the guide for when FHWA involvement is limited to a project phase and not the entirety of the authorized work.
- PoDI / PoCI status and tracking will be done electronically (i.e. website or SharePoint site) and FHWA will provide the tracking information to IDOT on an agreed upon frequency.

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[2] *The following are considered PoDI projects: Major Projects (>$500M); Appalachian Development Highway Projects; TIGER Discretionary Grant Projects; NHS Projects with Retained FHWA Project Approval; Non-NHS Projects with Retained FHWA Project Approval;* and *Projects Selected by FHWA for Risk-based Stewardship & Oversight.* Regardless of retained project approval actions, any Federal-aid Highway Project either on or off the NHS that the Division identifies as having an elevated level of risk can be selected for risk-based stewardship and oversight and would then be identified as a PoDI. Please see *"Projects of Division Interest (PoDI)/Projects of Corporate Interest (PoCI) Guidance (available at* http://www.fhwa.dot.gov/federalaid/stewardship/

PROGRAMMATIC AGREEMENT
BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION AND THE ILLINOIS DEPARTMENT OF TRANSPORTATION REGARDING THE PROCESSING OF ACTIONS CLASSIFIED AS CATEGORICAL EXCLUSIONS FOR FEDERAL-AID HIGHWAY PROJECTS

THIS PROGRAMMATIC AGREEMENT ("Agreement"), made and entered into this 14th day of October 2015, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE OF ILLINOIS acting by and through its DEPARTMENT OF TRANSPORTATION ("IDOT") hereby provides as follows:

WITNESSETH:

Whereas, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2014), and the Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500-1508) direct Federal agencies to consider the environmental impacts of their proposed major Federal actions through the preparation of an environmental assessment (EA) or environmental impact statement (EIS) unless a particular action is categorically excluded;

Whereas, the FHWA distribution and spending of Federal funds under the Federal-aid Highway Program and approval of actions pursuant to Title 23 of the U.S. Code are major Federal actions subject to NEPA;

Whereas, the Secretary of Transportation has delegated to FHWA the authority to carry out functions of the Secretary under NEPA as they relate to matters within FHWA's primary responsibilities (49 CFR 1.81(a)(5));

Whereas, the FHWA's NEPA implementing procedures (23 CFR part 771) list a number of categorical exclusions (CE) for certain actions that FHWA has determined do not individually or cumulatively have a significant effect on the human environment and therefore do not require the preparation of an EA or EIS;

Whereas, IDOT is a State agency that undertakes transportation projects using Federal funding received under the Federal-aid Highway Program and must assist FHWA in fulfilling its obligations under NEPA for IDOT projects (23 CFR 771.109);

Whereas, this Agreement applies to all action as defined in 23 CFR 771.107(b), which includes local government projects, in the State of Illinois;

Whereas, Section 1318(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405 (July 6, 2012), allows FHWA to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews, including agreements that allow a State to determine whether a project qualifies for a CE on behalf of FHWA;

Whereas, the FHWA developed regulations implementing the authorities in section 1318(d), effective November 6, 2014;

Whereas, the FHWA may not authorize final design activities, property acquisition, or construction activities until a CE approval has been made;

Whereas, this Agreement supersedes all previous CE processing agreements held between FHWA and IDOT;

Whereas, FHWA has issued a Wetland Finding for Federal Aid Projects processed as Categorical Exclusions and is attached to this Agreement as Attachment I; and

Now, therefore, the FHWA and IDOT enter into this Programmatic Agreement ("Agreement") for the processing of CEs.

I. PARTIES

The Parties to this Agreement are FHWA and IDOT.

II. PURPOSE

A. The purpose of this Agreement is to authorize IDOT to determine on behalf of FHWA whether a project qualifies for a CE specifically listed in 23 CFR 771.117 (listed in Appendix A and B of this Agreement) subject to the conditions specified in Section V of this Agreement.

B. This Agreement also requires IDOT to present information to FHWA for CE actions that 1) do not meet the conditions specified in this Agreement for IDOT to approve and 2) are not specifically listed in 23 CFR 771.117, but meet the CE criteria in 40 CFR 1508.4 and 23 CFR 771.117(a). For these actions, IDOT must request FHWA's approval of the action as a CE.

III. AUTHORITIES

This agreement is entered into pursuant to the following authorities:

A. National Environmental Policy Act, 42 U.S.C. 4321 - 4370

B. Moving Ahead for Progress in the 21st Century Act, P.L. 112-141, 126 Stat. 405, Sec. 1318(d)

C. 40 CFR parts 1500 - 1508

D. DOT Order 5610.1C

E. 23 CFR 771.117

IV. RESPONSIBILITIES

A. IDOT is responsible for:

1. Ensuring the following process is completed for each project that qualifies for a CE:

   a. For actions qualifying for a CE listed in Appendix A (CEs established in 23 CFR 771.117(c)) and Appendix B (CEs established in 23 CFR 771.117(d)), that do not exceed the thresholds in Section V of this Agreement ("Potential for Unusual Circumstances and Exclusions to State-Approved CEs"), IDOT may make a CE approval on behalf of FHWA ("State Approved CE"). IDOT will identify the applicable listed CE, ensure any conditions or constraints are met, verify that there is no potential for unusual circumstances, address any and all other environmental requirements, and complete the review with an appropriate signature evidencing approval, per Section VII of this Agreement ("NEPA Approvals and Re-evaluations"). No separate review or approval of State Approved CEs by FHWA is required.

   b. Actions listed in Appendices A and B that exceed the thresholds in Section V may not be approved by IDOT. Any actions that meet the definition of a CE and may be classified as a CE according to the open-ended authority in 771.117(d) may not be approved by IDOT. Additionally, IDOT may request FHWA approval on an action that does not exceed the thresholds in Section V. For any of these actions, IDOT must compile and present to FHWA information that the action qualifies for a CE classification. These actions require FHWA review, and if in agreement with the CE classification, FHWA approval of the CE ("Federal Approved CE"), based on the information IDOT provides on the action.

   c. IDOT shall submit, at a minimum, the following information to FHWA for review and CE approval prior to the time FHWA considers its next approval action for the project:

      i. If requested by FHWA, IDOT shall provide a copy of the CE documentation prepared for the actions(s) in accordance with Section VI of this Agreement.

ii. If any project requires a Section 4(f) de minimis determination or programmatic evaluation, IDOT shall submit the 4(f) documentation for FHWA determination and approval.

iii. If FHWA determines that the information IDOT has provided is inadequate, they may request additional studies and documentation, and/or consultation with other agencies.

2. Consulting with FHWA for actions that involve potential for unusual circumstances (23 CFR §771.117(b)), to determine the appropriate class of action for environmental analysis and documentation. IDOT may decide, or FHWA may require that, additional studies need to be performed prior to making a CE approval, or deciding on the need to prepare an EA or EIS.

3. Meeting applicable documentation requirements in Section VI for State Approved CEs and Federal Approved CEs, providing information on CE projects to FHWA, applicable approval and re-evaluation requirements in Section VII, and applicable quality control/quality assurance, monitoring, and performance requirements in Section VIII.

4. Relying only upon employees directly employed by the State to make CE approvals, or requesting CE approvals from FHWA, under this agreement. IDOT may not delegate its responsibility for CE approvals, or requests for FHWA approval, to third parties (i.e., consultants, local government staff, and other State agency staff).

5. Maintaining adequate organizational and staff capability and expertise to effectively carry out the provisions of this Agreement. This includes, without limitation:

   a. Using appropriate technical and managerial expertise to perform the functions set forth under this Agreement.

   b. Devoting adequate financial and staff resources to carry out the approvals and processing of projects under this Agreement.

   c. All individuals participating in the determination and approval of projects under this Agreement will be familiar with and follow the appropriate subsections of 23 CFR 771,the NEPA process, IDOT procedural manuals and memoranda, and any other policies relevant to CE determinations and documentation.

   d. At a minimum, all individuals and their designees who make CE approvals and determinations will:

i. Have completed the web based course FHWA-NHI-142052, "Introduction to NEPA and Transportation Decisionmaking" or equivalent; and

ii. Have experience addressing NEPA compliance for transportation projects; or

iii. Have their work reviewed by staff who have met items 1 and 2.

6. Whenever there is a conflict between FHWA regulations and this Agreement or IDOT's policies and procedures manual, FHWA regulations shall be followed.

B. The FHWA is responsible for:

1. Providing timely advice and technical assistance on CEs to IDOT, as requested.

2. Providing timely input and review of CE actions requiring FHWA approval. FHWA will base its approval of CE actions on the project documentation prepared by IDOT under this Agreement.

3. Overseeing the implementation of this Agreement in accordance with the provisions in Section VIII, including applicable monitoring and performance provisions.

V. POTENTIAL FOR UNUSUAL CIRCUMSTANCES AND EXCLUSIONS TO STATE-APPROVED CEs

Projects that IDOT proposes to approve as a CE on FHWA's behalf shall be evaluated for unusual circumstances. This evaluation must consider the effects of all aspects of the project, which includes, but is not limited to, detours, runarounds, or ramp closures that the action will require. IDOT CE documentation will record the outcome of this evaluation (see Part VI(A)(1) below).

Exclusions to State-Approved CEs: IDOT cannot approve, on FHWA's behalf, actions involving any of the following circumstances:

1) Require one or more residential or business relocations and/or the acquisition of more than 10 acres total for a non-linear improvement (spot improvement, e.g. bridge, intersection) or the acquisition of more than 3 acres per mile; or

2) Are defined as a "Type I project" per 23 CFR 772.5 and therefore requires a noise analysis; or

3) Result in an "adverse effect" finding to a historic property, as defined in 36 CFR 800.16(l); or

4) Require the use of properties as defined and protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303) that cannot be documented with either an FHWA *de minimis* determination or a programmatic Section 4(f) evaluation; or

5) Involve impacts that would require an Individual Section 404 Permit from the U.S. Army Corps of Engineers or involve stream channelization or stream relocations; or

6) Through Section 7 of the Endangered Species Act consultation, result in a finding of "may affect, likely to adversely affect" a federally listed or candidate species, or proposed or designated critical habitat; or

7) Through consultation with the Illinois Department of Natural Resources (IDNR) under the Illinois Endangered Species Act, an Incidental Take Authorization will be required; or

8) Require substantial changes in access, access control, or travel patterns. IDOT will present such information to FHWA to determine if changes are substantial; or

9) Require the use of a temporary road, detour or ramp closure, unless the use of such facilities satisfies the following conditions:

    a) Provisions are made for access by local traffic and so posted,

    b) Businesses dependent on through-traffic will not be adversely affected,

    c) To the extent possible, there is no interference with any local special event or festival,

    d) There is no substantial change to the environmental consequences of the action, and

    e) There is no substantial controversy associated with such facilities.

10) Involve State designated Nature Preserves, areas listed on the Illinois Natural Area Inventory, Land and Water Reserves; or

11) Exceed the IDNR threshold for an increase in 100-year flood water surface elevations, or has potential for a "significant encroachment" to floodplains, as defined in Executive Order 11988; or

12) Require a permit from U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899; or

13) Require an individual Water Quality Certification from the Illinois Environmental Protection Agency; or

14) Require the acquisition of lands under the protection of Section 6(f) of the Land and Water Conservation Act of 1965 or other unique areas or special lands that were acquired in fee or easement with public-use money and have deed restrictions or covenants on the property; or

15) Involve impacts to a stream listed on the National Park Service's National Rivers Inventory; or

16) Have potential for controversy on environmental grounds as determined by FHWA, or inconsistency with Federal, State, or local requirements relating to the environment or planning.

VI. DOCUMENTATATION OF CE APPROVALS

A. For both IDOT CE approvals and FHWA CE approvals, IDOT shall ensure that it fulfills the following responsibilities for documenting the project-specific determinations made:

1. For actions listed in Appendix A and B that do not exceed the thresholds in Section V of this Agreement, IDOT will identify the applicable action, ensure any conditions specified in FHWA regulation are met, verify that there are no potential unusual circumstances, address all other environmental requirements, and complete the review with the appropriate IDOT signature evidencing approval.

2. For actions listed in Appendix A and B that exceed the thresholds in Section V of this Agreement and therefore require FHWA CE approval, IDOT shall prepare documentation that supports the CE determination and that no unusual circumstances exist that would make the CE approval inappropriate and address all other environmental requirements.

B. IDOT shall maintain a project record for CE approvals it makes on FHWA's behalf and each CE approval made by FHWA. This record should include as appropriate:

1. Any checklists, forms, or other documents and exhibits that summarize the consideration of project effects and potential for unusual circumstances;

2. A summary of public involvement complying with the requirements of IDOT's public involvement policy;

3. Any stakeholder (including resource and regulatory agencies) communication,

correspondence, consultation, or public meeting documentation;

4. The name and title of the CE approver and the date of the approval; and

5. Any documented re-evaluation (when required) or a statement that a re-evaluation was completed for the project (when supporting documentation is not necessary), and the date of approval of the determination that the CE decision is still valid, per Section VII.B. of this Agreement ("NEPA Approvals and Re-evaluations").

C. Any project records maintained by IDOT shall be provided to FHWA at their request. IDOT should retain those records, including any stakeholder (including resource and regulatory agencies) communication, correspondence, consultation, or public meeting documentation for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve IDOT of its project or program recordkeeping responsibilities under 2 CFR § 200.333 or any other applicable laws, regulations, or policies.

VII. NEPA APPROVALS AND RE-EVALUATIONS

A. IDOTs approval of Appendix A and Appendix B CEs is delegated to the Approving Officials and their Designees as identified in Appendix C.

B. In accordance with 23 CFR 771.129, prior to requesting any subsequent project approvals from FHWA, regardless of how much time has passed since the CE approval, IDOT shall ensure that CE determinations are still valid. If there are any changes to the proposed actions, or new information or circumstances relevant to the project actions, it may be necessary for IDOT to re-evaluate CE approvals, consult with FHWA, and prepare additional documentation to ensure that CE determinations are still valid.

VIII. QUALITY CONTROL/QUALITY ASSURANCE, MONITORING AND PERFORMANCE

A. IDOT Quality Control & Quality Assurance

IDOT agrees to carry out regular quality control and quality assurance activities to ensure that its CE approvals and CE submissions to FHWA for approval are made in accordance with applicable law and this Agreement.

B. IDOT Performance Monitoring and Reporting

1. The FHWA and IDOT should cooperate in monitoring performance under this Agreement and work to assure quality performance.

2. IDOT shall annually submit to FHWA (electronically or hard copy) a report summarizing its performance under this Agreement, no later than February 28 of each calendar year. The report will identify any areas where improvement is needed and what measures IDOT is taking to implement those improvements. The report will include a description of actions taken by IDOT as part of its quality control efforts under Section VIII(A).

C. FHWA Oversight and Monitoring

1. Monitoring by FHWA will include consideration of the technical competency and organizational capacity of IDOT, as well as IDOT's performance of its CE processing functions. Performance considerations include, without limitation, the quality and consistency of IDOT's CE approvals, CE submissions to FHWA for approval, adequacy and capability of IDOT staff and consultants, and the effectiveness of IDOT's administration of its internal CE approvals. FHWA will conduct this oversight and monitoring through its participation in the regularly scheduled coordination meetings in each IDOT District Office.

2. Through the joint process review program, FHWA and IDOT will conduct one or more program reviews, during the term of this Agreement. This will serve to satisfy FHWA's oversight requirements under this Agreement. IDOT and FHWA, prior to completing the joint process review, will prepare and implement a corrective action plan to address any findings or observations identified in the joint process review. The results of the joint process review and corrective actions taken by IDOT shall be considered at the time this Agreement is considered for renewal.

3. Nothing in this Agreement prevents FHWA from undertaking other monitoring or oversight actions, including audits, with respect to IDOT's performance under this Agreement. The FHWA may require IDOT to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with applicable Federal laws and regulations.

4. IDOT agrees to cooperate with FHWA in all oversight and quality assurance activities.

IX. AMENDMENTS

A. If the parties agree to amend this Agreement, then FHWA and IDOT may execute an amendment with new signatures and dates of the signatures. The term of the Agreement shall remain unchanged unless otherwise expressly stated in the amended Agreement.

B. Appendix A and B may be modified through verbal agreement by FHWA and IDOT

without new signatures to this agreement based on activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date ofthe execution ofthis Agreement. A modification date will be noted on the revised Appendix A and B.

C. IDOT may request in writing to modify Appendix C. Upon written concurrence from FHWA, Appendix C may be modified without new signatures to this Agreement. A modification date will be noted on the revised Appendix C.

X. TERM, RENEWAL, AND TERMINATION

A. This Agreement shall have a term of five (5) years, effective on the date of the last signature. IDOT shall post and maintain an executed copy of this Agreement on its website, available to the public.

B. This Agreement is renewable for additional five (5) year terms if IDOT requests renewal and FHWA determines that IDOT has satisfactorily carried out the provisions of this Agreement. In considering any renewal of this Agreement, FHWA will evaluate the effectiveness of the Agreement and its overall impact on the environmental review process.

C. Either party may terminate this Agreement at any time only by giving at least 30 days written notice to the other party.

D. Expiration or termination of this Agreement shall mean that IDOT is not able to make CE approvals on FHWA's behalf.

Execution of this Agreement and implementation of its terms by both parties provides evidence that both parties have reviewed this Agreement and agree to the terms and conditions for its implementation. This Agreement is effective upon the date of the last signature below.

Randall S. Blankenhorn
Illinois Secretary of Transportation

10/14/2015
Date

Catherine A. Batey
Division Administrator, Illinois Division
Federal Highway Administration

10/14/2015
Date

APPENDIX A (From 23 CFR 771.117(c))

(1) Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.

(2) Approval of utility installations along or across a transportation facility.

(3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's *highway safety plan* under 23 U.S.C. 402.

(5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

(8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(9) The following actions for transportation facilities damaged by an incident resulting in an emergency declared by the Governor of the State and concurred in by the Secretary, or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121):

(i) Emergency repairs under 23 U.S.C. 125; and

(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

(10) Acquisition of scenic easements.

(11) Determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation.

(12) Improvements to existing rest areas and truck weigh stations.

(13) Ridesharing activities.

(14) Bus and rail car rehabilitation.

(15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

(16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

(17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.

(19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

(20) Promulgation of rules, regulations, and directives.

(21) Deployment of electronics, photonics, communications, or information processing used singly or in combination, or as components of a fully integrated system, to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. Examples include, but are not limited to, traffic control and detector devices, lane management systems, electronic payment equipment, automatic vehicle locaters, automated passenger counters, computer-aided dispatching systems, radio communications systems, dynamic message signs, and security equipment including surveillance and detection cameras on roadways and in transit facilities and on buses.

(22) Projects, as defined in 23 U.S.C. 101, that would take place entirely within the existing operational right-of-way. Existing operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose. This area includes the features associated with the physical footprint of the transportation facility (including the roadway, bridges, interchanges, culverts, drainage, fixed guideways, mitigation areas, etc.) and other areas maintained for transportation purposes such as clear zone, traffic control signage, landscaping, any rest areas with direct access to a controlled access highway, areas maintained for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transit power substations, transit venting structures, and transit maintenance facilities. Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way.

(23) Federally-funded projects:

(i) That receive less than $5,000,000 of Federal funds; or

(ii) With a total estimated cost of not more than $30,000,000 and Federal funds comprising less than 15 percent of the total estimated project cost.

(24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water

Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation.

(26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e)* of this section.

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e)* of this section.

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e)* of this section.

(29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(30) Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities, buildings, and terminals.

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*Note: In items (26), (27), and (28), "paragraph (e)" constraints are as follows:

23 CFR 117.117(e) Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:

(1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;

(2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;

(3) A finding of "adverse effect" to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of "may affect, likely to adversely affect" threatened or endangered species or critical habitat under the Endangered Species Act;

(4) Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;

(5) Changes in access control;

(6) A floodplain encroachment other than functionally dependent uses (*e.g.,* bridges, wetlands) or actions that facilitate open space use (*e.g.,* recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

Appendix B
(From 23 CFR 771.117(d))

(1)-(3) [Reserved]

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

(6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

(10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

(ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

(13) Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section.*

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* Note: In Item (13), paragraphs (c)(26), (c)(27), and (c)(28) are in reference to actions listed in Appendix A as items (26), (27), and (28).

Appendix C

IDOT Officials Approval Authority for State Approved CEs

Table C-1

State Projects		
	Approving Officials	**Designees**
Districts	Regional Engineer	None
Central Office	None	None

Table C-2

Local Public Agency Projects		
	Approving Officials	**Designees**
Districts	Regional Engineer	District Engineer of Local Roads and Streets
Central Office	Engineer of Local Roads and Streets	Local Project Implementation Engineer AND Local Project Development Engineers

WETLAND FINDING FOR FEDERAL AID PROJECTS COVERED UNDER THE PROGRAMMATIC AGREEMENT REGARDING THE PROCESSING OF CATEGORICAL EXCLUSIONS

Introduction

This wetland finding is made on a program-wide basis and has been prepared for transportation improvement projects, which are classified as a categorical exclusion (CE). It satisfies the requirements of Executive Order 11990 (EO) titled "Protection of Wetlands" and U.S. Department of Transportation Order 5660.1A (DOT Order) titled "Preservation of the Nation's Wetlands." No individual wetland finding needs to be prepared for such projects. An individual wetland finding shall be made for each Environment Assessment (EA) and Environmental Impact Statement (EIS).

Background

EO 11990, issued on May 24, 1977, requires each agency to develop procedures for Federal actions whose impact is not significant enough to require the preparation of an EIS under Section 102 (2)(c) of the National Environmental Policy Act (NEPA), as amended. The EO states that each Federal agency "shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result for such use."

The EO defines "new construction" to include "draining, dredging, channelizing, filling, diking, impounding, and related activities." This EO essentially requires a wetland finding for all Federal undertakings, which have virtually any impact to a wetland. DOT Order 5660.1A, issued on August 24, 1978 clarified "new construction" by excluding only "routine repairs and maintenance of existing facilities."

The U.S. DOT Order states, "In carrying out any activities (including small scale projects which do not require documentation) with a potential effect on wetlands, operating agencies should consider the following factors…" This requires U.S. DOT agencies to consider the effects on wetlands for all projects (including CEs). Effects on wetlands are considered through coordination and consultation with the Illinois Department of Natural Resources and with the US Fish and Wildlife Service (USWS), US Army Corps of Engineers (USACE), US Environmental Protection Agency (USEPA), and the Illinois Environmental Protection Agency (IEPA), as appropriate. The Illinois Department of Transportation (IDOT) and Federal Highway Administration (FHWA) evaluate wetland resources and consider practicable avoidance alternatives or options. If avoidance alternatives are not practicable, then practicable measures to minimize harm are considered and included in the project. Unavoidable impacts are mitigated.

Federal-aid applicants consider these effects through the NEPA evaluation process and further consider these effects through the wetland permitting process and any associated meetings with resource agencies (USACE, USEPA, USFWS, and IEPA). IDOT and FHWA evaluate practicable avoidance alternatives or options. If avoidance alternatives are not practicable, then practicable measures to minimize harm are considered and included in the project.

The U.S. DOT Order requires U.S. DOT agencies to make a formal wetland finding for all EAs and EISs. This formal wetland finding will be made in the EA/Finding ofNo Significant Impact or Final EIS/Record of Decision.

Finding:

In accordance with Executive Order 11990, and based on the above procedures, the FHWA Illinois Division finds for all Federal-aid projects classified as a categorical exclusion with an approved USACE permit that:

1. There will be no practicable alternative to the proposed construction in wetlands, and
2. The proposed project will include all practicable measures to minimize harm to the involved wetlands which may result from such use.

Any Federal-aid transportation project requiring an EA or EIS shall require an individual wetland finding.

10/14/2015
Date

Catherine A. Batey
Division Administrator

ILLINOIS STATEWIDE IMPLEMENTATION AGREEMENT
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION
AND
THE ILLINOIS DEPARTMENT OF TRANSPORTATION
FOR
ESTABLISHMENT OF TIMEFRAMES FOR ENVIRONMENTAL IMPACT STATEMENTS AND ENVIRONMENTAL ASSESSMENTS

I. BACKGROUND

Section 1309 of the Transportation Equity Act of the 21st Century (TEA-21) established the need to conduct a coordinated environmental review process with concurrent interagency reviews and established time periods. This need was also reflected in Executive Order 13274, *Environmental Stewardship and Transportation Infrastructure Project Reviews*.

In July 1999 the U.S. Department of Transportation (DOT) and six Federal agencies entered into a National Environmental Streamlining Memorandum of Understanding (MOU). The six agencies included the Environmental Protection Agency, the Advisory Council on Historic Preservation, the US Army Corps of Engineers, and the Departments of Commerce, Agriculture and the Interior. In the MOU, all of the agencies agreed to streamline environmental review processes in accordance with TEA-21 and other relevant environmental statutes in ways that reinforce the federal responsibility to protect the environment. With respect to establishing timeframes, the MOU calls upon all agencies to:

"Support and encourage field offices to explore flexible streamlining opportunities on their own and with state transportation and environmental partners including developing MOUs to lay out mutual expectations, funding agreements in support of streamlining, and concurrent review within cooperatively determined time frames."

Through an intensive and interactive process to identify the Federal Highway Administration's (FHWA) goals, objectives, and performance targets, FHWA selected the establishment and meeting of timeframes as a measure of improved timeliness. The FHWA has established specific national targets, which include the following that apply to all Environmental Impact Statements (EISs) and Environmental Assessments (EAs):

o Establish timeframes for EAs and EISs and meet the schedules for 90% of those projects by 09/30/07;

o Decrease the median time it takes to complete an EIS from 54 months to 36 months by 09/30/07; and

o Decrease the median time to complete an EA from approximately 18 months to 12 months by 09/30/07.

II. PURPOSE

This Statewide Implementation Agreement (SIA) is based on the legislation and actions cited above and the attached "Questions and Answers Regarding the Environmental Vital Few Goal of Negotiated Timeframes".

Good project management: The establishment of timeframes for the environmental review process is viewed as an element of good project management. Timeframes can provide goals and structure for the process and can be an effective continuous process improvement tool to identify bottlenecks, conflicts, and systematic issues, as well as to monitor progress.

Timeliness: There may be sources of delays throughout the entire project development process, such as changes in program/political priorities, local controversy, or other issues outside the control of the parties involved in negotiating timeframes. However, since congressional directives and statutory mandates focus heavily on the Federal environmental review process as a source of project delay, FHWA deems it important to pursue the improvement of timeliness, and thus selected a target goal of 90% of EIS and EA timeframes being met by 09/30/07.

Project efficiencies: Establishing timeframes will require upfront discussion among FHWA, the State DOT and other involved agencies (Federal, State and local) and can lead to the realization of project efficiencies, such as the following:

Improved timeliness of the process
Early identification of issues
Early participation of environmental resource and permitting agencies
Recognition of resource limitations upfront

Accountability: Timeframes should create a sense of predictability and accountability with the public and agencies. There are no legal consequences for not meeting the established timeframes. Reasons for schedule delays should be analyzed for lessons learned and, where appropriate, these lessons should be applied to future studies.

III. APPLICABILITY OF SIA

All EIS and EA documents initiated after the start of the federal FY 04 (October 1, 2003) shall have negotiated timeframes for the environmental review process.

IV. IMPLEMENTING PROCEDURES

A. DEFINITIONS

The following definitions are adopted for this SIA:

Timeframe: This term refers to the established schedule or timeline for the processing of an EIS or EA. This schedule is generally part of a larger project schedule that includes final design, right-of-way acquisition, and construction.

Negotiated: Project schedules should be developed by the FHWA Illinois Division office in cooperation with the Illinois Department of Transportation (IDOT). On locally

sponsored projects the appropriate local agency should be involved in the negotiation process.

Initiated. For an EIS, this is the date that the Notice of Intent (NOI) is published in the *Federal Register*. For an EA, this is the date of the initial public meeting held to present the general scope of work, the possible alternatives that have been identified, and the preliminary decision on preparing an EA for the project (herein referred to as "initial public meeting").

Median Time. A national aggregate of processing times for environmental documents. This is the value below and above which there is an equal number of values. Using the median helps avoid the disproportionate skew due to extremely short or long processing times.

B. PROCESS

The appropriate IDOT District office will notify the FHWA Illinois Division office early in the project planning to allow ample time to establish timeframes for each EIS and EA prior to its initiation (NOI or initial pubic meeting).

The FHWA and IDOT (and local agencies when applicable) will work together to establish timeframes using the attached flowcharts as examples. The timeframes should cover the environmental review process and identify milestones as well as set a target completion date for each milestone. Actual milestone activities and time periods may vary from project to project.

Timeframe negotiations should typically occur in conjunction with FHWA/IDOT coordination meetings. The meeting minutes will document the approval of the timeframe for the project by the appropriate FHWA and IDOT district personnel. The dated flowcharts with the agreed-upon timeframes will be attached to the minutes. These same procedures will apply if timeframes are revised (see Section E).
Timeframes will account for the necessary review periods by the FHWA Division Office and IDOT Headquarters, and legal sufficiency review by the FHWA Office of Chief Counsel. Both the FHWA and IDOT are committed to a timely review of all documents.

The FHWA and IDOT will than provide a copy of the timeframes to the involved environmental review and permitting agencies (e.g., U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service) as part of the early coordination/scoping process (e.g., NEPA/ 404 Merger or other meetings, electronic or written correspondence).

Timeframes should be established based on the complexity and characteristics of the project(s), as well as IDOT's own sense of priority. Dates will be adjusted as necessary, depending on agency resources or known project issues that are likely to affect the dates. A complex project may require acknowledgement upfront that a long timeframe will be required and that, as the project progresses, ongoing assessment and tracking must be provided to determine if it is necessary to modify the timeframe.
Timeframes can be affected by limitations of human, financial, and time resources, as well as seasonal schedules beyond human control, such as growing seasons for

assessment of biological resources. These issues should be considered early in the process, along with a general level of priority established for the project.

Schedules should be achievable and realistic, and should strive to maintain high quality of documents and reviews.

All parties involved will receive a copy of the agreed upon schedule, including revisions when they occur.

C. GOALS FOR COMPLETION DATES

All EIS and EA projects initiated after the start of federal FY 04 **(October 1, 2003)** are to have negotiated timeframes for the environmental review process.

In **Illinois** the established goals for establishing maximum completion timeframes for projects initiated in federal FY 04-07 are:

FY 04:	**EIS – 54 months**	**FY 06:**	**EIS – 42 months**
	EA – 18 months		**EA – 15 months**
FY 05:	**EIS – 48 months**	**FY 07:**	**EIS – 36 months**
	EA – 18 months		**EA – 12 months**

In pursuing the targets of reducing the median processing times, all agencies involved in the environmental review process should continue seeking methods to streamline, yet also maintain a high quality of decision-making documents. Timeframe objectives should not compromise quality.

D. TRACKING OF DATES

Coordinating with IDOT, the FHWA will enter the actual dates on the project's individual flowchart to assess whether the milestone dates are being met throughout the project's development and whether the final target date will be achieved. FHWA will also enter the information in the Illinois Division's ITRACKS database and in the FHWA's national Environmental Document Tracking System (EDTS), including any reasons for delays and revision of dates.

E. REVISIONS TO TIMEFRAMES

When new issues arise or priorities change, the timeframes may be reviewed and revised as necessary, subject to the following limits:

Modifications to the timeframe of an EIS may be made up to 30 days following the end of the Draft EIS comment period, and on an EA up to 15 days following the end of the public availability period.

The updated timeframes will typically be discussed at FHWA/IDOT coordination meetings. Approval by the applicable IDOT district and the FHWA Division personnel will be documented

in the minutes, and the date of the agreed revision will be included on the flowchart attached to the minutes. All involved agencies should be provided a copy of these changes.

F. MODIFICATION / TERMINATION

This agreement may be modified at any time by mutual agreement of both FHWA and IDOT. Proposal for modification will be given a 30-day review period, after which approval by the other agency will be indicated by written acceptance. Either agency may also terminate participation in this agreement upon written notice to the other agency.

G. APPROVAL OF AGREEMENT

The undersigned have reviewed this agreement and determined that it complies with Section 1309 of TEA-21 and related guidance. Accordingly, it is hereby approved and becomes effective on the last date noted below.

Illinois Department of Transportation	**Federal Highway Administration**
[signed 3/29/05]	[signed 3/3/05]
Victor A. Modeer, P.E. Director of Highways	Norman R. Stoner, P.E. Division Administrator

STATEWIDE IMPLEMENTATION AGREEMENT

NATIONAL ENVIRONMENTAL POLICY ACT
AND
CLEAN WATER ACT SECTION 404

CONCURRENT NEPA/404 PROCESSES
FOR
TRANSPORTATION PROJECTS
IN
ILLINOIS

I. Background

In 1996, the Federal Highway Administration –Illinois Division (FHWA); the Illinois Department of Transportation (IDOT); the U.S. Army Corps of Engineers (USACE) - Rock Island, Chicago, St. Louis, Memphis and Louisville Districts; the U.S. Environmental Protection Agency (USEPA); the U.S. Fish and Wildlife Service (USFWS) -Rock Island and Chicago Field Offices; and the Eighth District of the U.S. Coast Guard entered into a Statewide Implementation Agreement (SIA) for Concurrent National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act (Section 404) processes for transportation actions in Illinois. The SIA was based on guidance from FHWA's Region 5 that encouraged cooperation between the agencies and the efficient implementation of transportation actions. The signatory agencies periodically revisit the SIA to ensure that it meets all current laws and regulations and to ensure efficiency in the use of the agreement. This SIA supersedes all previous SIA agreements among the signatories and addresses current Federal and State legislation and requirements.

In August of 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act -A Legacy for Users (SAFETEA-LU). Section 6002 of SAFETEA-LU created a new section in the U.S. Code (23 USC § 139) that contained provisions establishing new requirements for the environmental processes for Environmental Impact Statements (EISs). These new requirements include the opportunity for public and agency input in defining the Purpose and Need for an action and the range of alternatives carried forward in the EIS. While the Section 6002 requirements are not directly referenced in this SIA, nothing in this SIA contradicts the Section 6002 requirements.

In addition, in August of 2005 IDOT adopted a Context Sensitive Solutions (CSS) policy. This policy requires IDOT to implement the CSS approach on all new construction, reconstruction, and major expansion of transportation facilities in Illinois. The CSS approach requires early, often, and continual involvement of stakeholders from the conceptual phases through design, construction, and operation phases of a transportation project in Illinois. Through the CSS approach, the signatories of this SIA will be identified as

stakeholders when appropriate. Stakeholder input will be sought for the Purpose and Need, alternatives analysis, and preferred alternative. FHWA and IDOT have developed a procedural memorandum outlining the CSS approach for highway projects in Illinois. While the CSS approach is not specifically addressed in this SIA, and while the concurrent NEPA/404 processes described in this SIA are separate and distinct, CSS procedures will be utilized in conjunction with this SIA in most instances.

II. Purpose

The purpose of this SIA is to establish a process to coordinate the review among resource agencies of transportation projects that impact waters of the United States. This process is intended to:

• Expedite construction of necessary transportation projects, with benefits to mobility and the economy at large, and

• Enable more transportation projects to proceed on budget and on schedule, while Protecting and enhancing the chemical, physical, and biological integrity of the waters of the United States in Illinois.

III. Applicability

Proposed projects meeting the following applicability criteria will be processed in accordance with the terms of this SIA:

• The FHWA is required to complete either an Environmental Assessment (EA) or an EIS under NEPA; and

• An individual permit under Section 404 is required for the project.

Proposed projects that meet the applicability criteria may be excluded from this SIA if:

• The signatory agencies agree that the project is not of sufficient complexity to warrant coordination under this SIA, or

• The signatory agencies agree that the discovery of the need for an individual Section 404 permit occurs after FHWA has approved the EA or final EIS, making the application of the SIA impractical.

If a project initially meets the applicability criteria, but is later found to be eligible for a nationwide or regional permit, FHWA and IDOT will notify the other signatory agencies and the project will cease to be processed under this SIA. FHWA and IDOT may initially determine a project is eligible for a nationwide or regional permit and later conclude an individual permit will be required. Under these circumstances, FHWA and IDOT will review the applicability criteria and determine if the project should be processed under this SIA.

Projects that do not meet the applicability criteria may warrant processing in accordance with this SIA. FHWA and IDOT may consult with the other signatory agencies to determine if project that does not meet the applicability criteria should be processed under this SIA. Any signatory agency may request FHWA and IDOT develop a project that does not meet the applicability criteria under this SIA. FHWA and IDOT reserve the right to determine if project will be processed under this SIA if the applicability criteria are not met.

IV. Definitions

Concurrence -Confirmation by the agency that:
1. The information to date is sufficient for this stage, and

2. The project may proceed to the next stage of project development.

Concurrence Points -Milestones within the NEPA process where FHWA and IDOT request agency concurrence. The concurrence points under this SIA are 1) purpose and need, 2) alternatives to be carried forward, and 3) preferred alternative. The intent of the concurrence points in the process is to limit the revisiting of decisions that have been agreed upon earlier in the process and encourage early substantive participation by the agencies.

Waters of the United States -Those waters as defined in 33 CFR 328.3.

V. Signatory Agency Roles and Responsibilities

Under this SIA, signatory agencies commit to:

- Considering the potential impacts to waters of the United States in Illinois at the earliest practicable time in the planning phase of project development;
- Avoiding adverse impacts to such waters to the extent practicable;
- Minimizing and mitigating unavoidable adverse impacts and for wetlands, striving to achieve a goal of no overall net loss of values and functions; and
- Pursuing interagency cooperation and consultation diligently throughout the integrated NEPA/404 process to ensure that the concerns of the signatory agencies are given timely and appropriate consideration and that those agencies are involved at key decision points in project development.

Signatory agency participation in this process does not imply endorsement of transportation projects. Nothing in this SIA is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the agencies involved.

IDOT will ensure data collection, including information for determining compliance with the Section 404(b)(1) guidelines, will take place early in the coordination process so that information will be available for discussion at the concurrence point meetings. All signatory agencies will be responsible for reviewing the data and evaluations, and providing supplemental information and/or comments, as appropriate.

IDOT will provide information to the signatory agencies regarding the analysis of alternatives to avoid, minimize, and mitigate adverse impacts to Waters of the United States. This information may be presented in a matrix or similar summary. The signatory agencies will provide input on the adequacy of the avoidance, minimization, and mitigation analysis of the alternatives.

VI. Implementing Procedures

FHWA and/or IDOT will notify the other signatory agencies of their intention to process a project in accordance with this SIA. FHWA and IDOT may invite additional resource agencies to attend meetings for informational purposes.

FHWA and IDOT will seek concurrence from the appropriate signatory agencies for the following:

1) Purpose and Need,
2) Alternatives to be Carried Forward, and
3) Preferred Alternative

Concurrence does not imply an agency has endorsed the project or released its obligation to determine if the project meets statutory review criteria. Concurrence points will not be revisited unless there is new information or significant changes to the project, the environment, or laws and regulations which affect the concurrence point achieved.

Concurrence on projects processed under this SIA will occur at regularly scheduled NEPA/404 concurrence meetings. The regularly scheduled concurrence meetings will be planned for the first week in February, June, and September. FHWA will contact all signatory agencies within 60 days of these times to confirm the meeting will be held and obtain a specific date. FHWA, in consultation with the signatory agencies, may adjust the meeting date or cancel the meeting. At least 30 days prior to a concurrence meeting, FHWA or IDOT will provide the signatory agencies, and other agencies as appropriate, the concurrence point package for each proposed action that will be discussed to allow agencies sufficient time to review and prepare their comments. The notification letter will include the time and place of the meeting, an agenda, descriptions of the proposed actions to be discussed, and the concurrence point(s) being sought by FHWA and IDOT.

The timing of the FHWA and IDOT request for signatory agency concurrence on the concurrence points may vary based upon the proposed action's complexity. On less complex actions, FHWA and IDOT may seek concurrence on several or all concurrence points simultaneously. For more complex actions, FHWA and IDOT will seek concurrence on the concurrence points separately.

FHWA and IDOT will summarize and distribute to all signatory agencies a meeting summary following a concurrence meeting. The signatory agencies will provide comments on the meeting summary within 30 days of receipt. FHWA and IDOT will finalize the meeting summary and redistribute it to the signatory agencies. The finalized meeting summary will serve to document the decisions on concurrence for the proposed actions discussed at the NEPA/404 concurrence meeting.

For major or complex actions, or those on expedited schedules, separate NEPA/404 concurrence meetings may be scheduled in lieu of the regularly scheduled concurrence meetings. FHWA and IDOT may also request signatory agency concurrence via e-mail. Signatory agencies may indicate their concurrence bye-mail to FHWA and IDOT.

Attachment 1 to this agreement provides a summary of the roles of state and federal agencies in the transportation project development process from planning through project implementation. FHWA and IDOT may make updates to Attachment 1 to reflect changes in transportation legislation, policies or procedures without requiring signatures from parties to this agreement.

Concurrence Point #1, Purpose and Need

The Concurrence Point #1 Package will include the preliminary Purpose and Need statement developed by FHWA and IDOT. Prior to submitting the package, FHWA and IDOT will ensure it:

- Provides sufficient data and analysis to support the reasons for proposing the action;
- Establishes the logical termini for the proposed action;
- Establishes that the proposed action has independent utility; and
- Is as comprehensive, specific and concise as possible, while not being so narrowly constrained that it limits the range of alternatives or establishes the preferred alternative.

Concurrence Point #2, Alternatives to be Carried Forward

The Concurrence Point #2 Package will include the Purpose and Need statement resulting from Concurrence Point # 1 and the preliminary alternatives proposed to be carried forward for further analysis developed by FHWA and IDOT. The alternatives proposed to be carried forward will satisfy both the NEPA requirements and the Corps of Engineer's 404(b)(1) guidelines for alternatives analysis. Prior to submitting the package, FHWA and IDOT will ensure it contains:

- A description of all alternatives considered;
- The alternatives analysis methodology for eliminating alternatives; and
- An explanation of the way in which Alternatives to be Carried Forward address the Purpose and Need and that they are reasonable and practicable.

Alternatives may be dismissed for reasons including, but not limited to, not satisfying the purpose and need, environmental impacts, or engineering and economic factors.

Concurrence Point #3, Preferred Alternative

The Concurrence Point #3 Package will include the Purpose and Need resulting from Concurrence Point #1, the alternatives analysis resulting from Concurrence Point #2, and FHWA and IDOT's preliminary Preferred Alternative. Prior to submitting the package, FHWA and IDOT will ensure it:

- Identifies the environmentally Preferred Alternative,
- Summarizes comments received on the draft EIS or the EA,
- Explains the rationale for the selection of the preliminary Preferred Alternative,
- Explains the rationale for the dismissal of the other Alternatives Carried Forward, and
- Contains a draft of the "Only Practicable Alternative Finding" required by Executive Order 11990, Protection of Wetlands.

Dispute Resolution

If any signatory agency does not concur with any concurrence point, FHWA and IDOT will work with them to address their concerns. If FHWA and IDOT, after making good-faith efforts to address their concerns, conclude that an impasse has been reached on concurrence with one or more signatory agencies, FHWA and IDOT may proceed to the next stage of project development without that agency's concurrence. FHWA and

IDOT will notify all signatory agencies of their decision and proposed course of action. The decision to move an action forward without concurrence does not eliminate a signatory agency's statutory or regulatory authorities, or their right to elevate the dispute through established agency dispute resolution procedures. FHWA and IDOT recognize and accept the risk of proceeding on an action without receiving a signatory agency's concurrence.

VII. Modification/Termination

This SIA may be modified upon approval of all signatory agencies. Signatory agencies may submit proposed modifications to FHWA and IDOT. FHWA and IDOT will circulate proposals for modification to the other signatory agencies for a 30-day period of review. Approval of such proposals will be indicated by written acceptance. A signatory agency may terminate participation in this agreement upon written notice to all other signatory agencies.

STATEWIDE IMPLEMENTATION AGREEMENT
NATIONAL ENVIRONMENTAL POLICY ACT
AND
CLEAN WATER ACT SECTION 404
CONCURRENT NEPA/404 PROCESSES
FOR
TRANSPORTATION PROJECTS
IN
ILLINOIS

The Federal Agencies in cooperation with the Illinois Department of Transportation (IDOT) agree to implement, to the fullest extent practicable and as funding and staffing level allow, the process in the Statewide Implementation Agreement.

This agreement becomes effective upon signature of all agencies and may be modified by written approval of each agency. This agreement may be revoked by agreement of all agencies or by any agency upon 30-days written notice to the other agencies.

U.S. Army Corps of Engineers

[signed] [signed]

Daniel J. Johnson, Chief
Regulatory Branch
Rock Island District

Mitchell Isoe, Chief
Regulatory Branch
Chicago District

[signed] [signed]

Danny D. McClendon, Branch Chief
Regulatory Branch
St. Louis District

Jim Townsend, Chief
Regulatory Branch
Louisville District

[signed]

Larry Watson, Chief
Regulatory Branch
Memphis District

U.S. Fish and Wildlife Service

[signed] [signed]

Richard C. Nelson
Supervisor
Rock Island Illinois Field Office

John D. Rogner
Supervisor
Chicago Illinois Field Office

U.S. Environmental Protection Agency

[signed]
Mary A. Gade
Regional Administrator
Region Five

U.S. Coast Guard

[signed]
Roger K. Wiebusch
Bridge Administrator
Eighth Coast Guard District

Illinois Department of Transportation

[signed]
Christine M. Reed, Director, Division of Highways

Federal Highway Administration

[signed]
MAY 8 2008
Norman R. Stoner
Division Administrator

Attachment 1 to NEPA/404 Illinois Merger Agreement
Project Development Flowchart
(NEPA/404 Merger – CSS – Section 6002 Requirements)

	IDOT	FHWA	USEPA	USACE	USFWS	USCG	State Agencies (IDOA, IEPA, IDNR, IHPA)
Systems Planning Process	Develop data-driven initial Purpose and Need based on transportation system deficiencies Coordinate with locals/MPOs Arrange presentations for resource agencies after statewide plan update Coordinate review of draft state transportation plans with agencies	Participate with MPOs in metropolitan planning process and with IDOT in statewide planning process	Provide inventories, conservation plans or maps for consultation on environmental protection and conservation during development of long-range transportation plans Participate in discussions on potential environmental mitigation activities during development of long-range transportation plans	Provide inventories, conservation plans or maps for consultation on environmental protection and conservation during development of long-range transportation plans Participate in discussions on potential environmental mitigation activities during development of long-range transportation plans	Provide inventories, conservation plans or maps for consultation on environmental protection and conservation during development of long-range transportation plans Participate in discussions on potential environmental mitigation activities during development of long-range transportation plans	Provide inventories, conservation plans or maps for consultation on environmental protection and conservation during development of long-range transportation plans Participate in discussions on potential environmental mitigation activities during development of long-range transportation plans	Provide inventories, conservation plans or maps for consultation on environmental protection and conservation during development of long-range transportation plans Participate in discussions on potential environmental mitigation activities during development of long-range transportation plans
Scoping	Send project initiation letter to FHWA (EIS) Develop negotiated timeframe Refine data-driven preliminary Purpose and Need based on transportation system deficiencies Identify logical termini and study area Form CSS project study group Request state and local Cooperating Agencies (CA) and Participating Agencies (PA) participation and request agencies identify areas of potential concern Develop Stakeholder Involvement Plan (SIP) and coordinate with agencies Establish study methodologies and level of detail, in collaboration with PAs Coordinate field review/meeting, if appropriate	Issue project Notice of Intent (EIS) Develop negotiated timeframe Identify logical termini and study area Request Federal Agencies to become CA and PA Comment on SIP Participate in CSS project study group Establish study methodologies and level of detail, in collaboration with PAs Participate in scoping meetings	Respond to CA/PA request Identify areas of potential concern and data needs Comment on study methodology and level of detail Comment on SIP Participate in scoping meetings	Respond to CA/PA request Identify areas of potential concern and data needs Comment on study methodology and level of detail Comment on SIP Participate in scoping meetings Identify permit needs, if possible	Respond to CA/PA request Identify areas of potential concern and data needs Comment on study methodology and level of detail Comment on SIP Participate in scoping meetings	Respond to CA/PA request Identify areas of potential concern and data needs Comment on study methodology and level of detail Comment on SIP Participate in scoping meetings Determine if bridge permit required and identify bridge permit needs, if possible	Respond to CA/PA request Identify areas of potential concern and data needs Comment on study methodology and level of detail Comment on SIP Participate in scoping meetings Initiate applicable regulatory processes

Attachment 1 to NEPA/404 Illinois Merger Agreement
Project Development Flowchart
(NEPA/404 Merger – CSS – Section 6002 Requirements)

	IDOT	FHWA	USEPA	USACE	USFWS	USCG	State Agencies (IDOA, IEPA, IDNR, IHPA)
Purpose and Need	Develop Purpose and Need concurrence package for agencies Conduct stakeholder involvement per SIP Seek CSS stakeholder consensus on Purpose and Need	Participate in developing the Purpose and Need concurrence package for agencies Review concurrence package, distribute to agencies and facilitate merger meeting Request signatory agency concurrence on Purpose and Need	Participate in development of Purpose and Need Review concurrence package and participate in merger meeting Concur on Purpose and Need	Participate in development of Purpose and Need Review concurrence package and participate in merger meeting Concur on Purpose and Need	Participate in development of Purpose and Need Review concurrence package and participate in merger meeting Concur on Purpose and Need	Participate in development of Purpose and Need Review concurrence package and participate in merger meeting Concur on Purpose and Need	Participate in development of Purpose and Need Review concurrence package and participate in merger meeting Concur on Purpose and Need
Concurrence Achieved for Purpose and Need							
Alternatives Development and Analysis	Develop reasonable Range of Alternatives and Eliminate alternatives that are not Reasonable or Practicable Develop concurrence package for Alternatives to be Carried Forward Conduct stakeholder involvement per SIP Seek CSS stakeholder consensus	Participate in developing reasonable range of alternatives and eliminate alternatives that are not reasonable and practicable Address avoidance of environmental resources Review concurrence package, distribute to agencies and facilitate merger meeting Request signatory agency concurrence on Alternatives to be Carried Forward	Participate in developing Alternatives to be Carried Forward and comment on adequacy of information Review concurrence package and participate in merger meeting Concur on Alternatives to be Carried Forward	Participate in developing Alternatives to be Carried Forward and comment on adequacy of information Review concurrence package and participate in merger meeting Concur on Alternatives to be Carried Forward	Participate in developing Alternatives to be Carried Forward and comment on adequacy of information Review concurrence package and participate in merger meeting Concur on Alternatives to be Carried Forward	Participate in developing Alternatives to be Carried Forward and comment on adequacy of information Review concurrence package and participate in merger meeting Concur on Alternatives to be Carried Forward Identify pier locations for each alternative.	Participate in developing Alternatives to be Carried Forward and comment on adequacy of information Review and comment on concurrence package and participate in merger meeting
Concurrence Achieved for Alternatives to be Carried Forward							
Draft NEPA Document Review	Coordinate with FHWA on draft NEPA document review; address comments from FHWA Provide draft NEPA document for review by CA	Review and comment on draft NEPA Document	Review and comment on draft NEPA document, if a CA	Review and comment on draft NEPA document, if a CA, including 404 concerns	Review and comment on draft NEPA document, if a CA	Review and comment on draft NEPA document, if a CA, including bridge permit concerns	Review and comment on draft NEPA cocument, if a CA, and 401 and other regulatory concerns
DEIS or EA	Provide FHWA with signature-ready NEPA document Submit to USACE a 404 permit application along with DEIS, if appropriate Circulate NEPA document to agencies and the public and conduct other SIP activities as appropriate	Sign NEPA document for public release Publish Notice of Availability of DEIS in Federal Register to initiate comment period	Review and provide comments on document, including the rating of the EIS	Review and provide comments on document Review permit application, if submitted with DEIS	Review and provide comments on document	Review and provide comments on document, including bridge permit concerns	Review and provide comments on document

May 8, 2008
FHWA – Illinois Division

Attachment 1 to NEPA/404 Illinois Merger Agreement
Project Development Flowchart
(NEPA/404 Merger – CSS – Section 6002 Requirements)

	IDOT	FHWA	USEPA	USACE	USFWS	USCG	State Agencies (IDOA, IEPA, IDNR, IHPA)
Comment Responses, Preferred Alternative Identification and Pre-Final Preparation	Review comments received and develop responses on circulated NEPA document Identify Preferred Alternative in consultation with FHWA Conduct stakeholder involvement, including SIP requirements Seek CSS stakeholder consensus on Preferred Alternative Develop Preferred Alternative concurrence package for agencies Prepare final NEPA document	Review comments received and responses on circulated NEPA document Identify Preferred Alternative in consultation with IDOT Review Preferred Alternative concurrence package, distribute to agencies, and facilitate merger meeting Request signatory agency concurrence on Preferred Alternative Review and comment on final NEPA document Obtain legal sufficiency of final NEPA document	Review IDOT/FHWA response to comments Review concurrence package and participate in merger meeting Concur on Preferred Alternative	Review IDOT/FHWA response to comments Review concurrence package and participate in merger meeting Concur on Preferred Alternative Conduct internal review and coordination of comments	Review IDOT/FHWA response to comments Review concurrence package and participate in merger meeting Concur on Preferred Alternative Complete Section 7 consultation, if applicable	Review IDOT/FHWA response to comments Review concurrence package and participate in merger meeting Concur on Preferred Alternative	Review IDOT/FHWA response to comments Review and comment on concurrence package and participate in merger meeting
Concurrence Achieved for Preferred Alternative							
FEIS	Provide FHWA with signature-ready FEIS Circulate FEIS to agencies and the public	Approve and issue Notice of Availability in the Federal Register	Review FEIS and verify comments addressed	Review FEIS and verify comments addressed Prepare public notice for 404 permit, if appropriate	Review FEIS and verify comments addressed	Review FEIS and verify comments addressed	Review FEIS and verify comments addressed
Record of Decision (ROD) or Finding of No Significant Impact (FONSI)	Consider any additional comments submitted during waiting period (EIS) or public availability (EA) Prepare ROD or FONSI for FHWA review and action Prepare the draft 180-day Statue of Limitations notice, if desired, and submit to FHWA	Consider any additional comments submitted during waiting period (EIS) or public availability (EA) Finalize ROD or FONSI and take appropriate action Distribute ROD or FONSI to NEPA/404 signatories Finalize 180-day Statute of Limitations notice and publish in Federal Register, if appropriate					
Record of Decision or FONSI							

May 8, 2008
FHWA – Illinois Division

Attachment 1 to NEPA/404 Illinois Merger Agreement
Project Development Flowchart
(NEPA/404 Merger – CSS – Section 6002 Requirements)

	IDOT	FHWA	USEPA	USACE	USFWS	USCG	State Agencies (IDOA, IEPA, IDNR, IHPA)
Project Design	Conduct minimization and other mitigation activities Continue stakeholder involvement, per SIP requirements Prepare final design	Ensure design addresses all comments and includes all commitments made in the ROD or FONSI				Ensure design satisfies navigation requirements	
Final Permit Review	Coordinate with agencies as necessary to obtain permits and conduct further mitigation or project review activities	Coordinate with agencies, as necessary	Participate in the 404 review, as appropriate	Prepare decision-making documents Issue or deny 404 permit	Participate in the 404 review, as appropriate	Process bridge permit application	Complete state regulatory review
Permit Decision							
Project Implementation and Monitoring	Begin project construction Continue mitigation, construction and maintenance Monitor project construction and mitigation activities	Conduct program-level permit compliance reviews such as the IDOT/FHWA joint review program Conduct program-level ROD/FONSI compliance such as the IDOT/FHWA joint review program		Ensure compliance with permit conditions		Ensure compliance with bridge permit, including approval of construction-stage elements affecting navigation (e.g., temporary docks, barge ramps, cofferdams)	

May 8, 2008
FHWA – Illinois Division

MEMORANDUM OF UNDERSTANDING BY
AND BETWEEN
THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES
AND
THE ILLINOIS DEPARTMENT OF TRANSPORTATION

Pursuant to Title 17 Pa1t1075.30(d) of the Illinois Administrative Code, this agreement between the Illinois Department of Natural Resources {IDNR) and the Illinois Department of Transportation (IDOT) sets forth the framework for an expedited review process for compliance with Section II (b) of the Illinois Endangered Species Protection Act (520 ILCS 10/Il(b)), Section 17 of the Illinois Natural Areas Preservation Act (525 ILCS 30/17), and administrative r u les promulgated thereunder (11 Ill. Adm. Code Part 1 075). The parties enter into this MOU pursuant to the provisions of the Intergovernmental Cooperation Act (5 ILCS 220/1-16). This Memorandum of Understanding (MOU) supersedes the MOU effective December 30, 2010.

General Principles of Coordination

The review processes required under the Illinois Endangered Species Act and the Illinois Natural Areas Preservation Act, and provisions of the Interagency Wetland Policy Act of 1989, are designed to examine potential impacts to protected natural resources. The IDNR Division of Ecosystems and Environment (E&E) and the IDOT Bureau of Design and Environment (BDE) will be the points of contact for processing of all proposed projects. All official comments, recommendations, and responses made by either IDNR or IDOT shall be made via email or letter, except in emergency situations as defined in 17 Ill. Admin. Code 1075.60.

The !DOT agrees to:

I. Ensure that proposed projects funded or performed by IDOT comply with the Interagency Wetland Policy Act of 1989 and the IDOT Wetlands Action Plan.

2. Review proposed projects that will be funded or performed by IDOT to determine if they could have an adverse effect on a State-listed threatened or endangered species (T&E species), or a site listed on the Illinois Natural Areas Inventory (INAI site), which include Illinois Natural Area Inventory sites, dedicated Illinois Nature Preserves, and registered Land and Water Reserves.

3. Submit to the IDNR EcoCAT website consultation requests for proposed actions that could have an adverse effect, that are adjacent to a Nature Preserve or Land and Water Reserve, or that entail excavation outside of an existing right-of-way and are within one mile of a Nature Preserve or Land and Water Reserve.

4. Determine if proposed projects funded or performed by IDOT could adversely affect additional natural resources (listed below). Submit to IDNR for review those actions that could have an adverse effect on these resources.
   a. Streams
   b. Forest/trees
      i. Alignment bisects or fragments a block of trees ≥ 20 acres
      ii. New alignment on any stream segment
      iii. Existing alignment in a riparian corridor
   c. Prairie/savanna areas
   d. Properties owned, leased, or managed by IDNR

5. Conduct biological surveys at IDOT's discretion or when recommended by IDNR. Provide copies

of the survey results to IDNR, or a written explanation if recommended surveys are not conducted.

6. Develop measures to avoid, minimize or mitigate potential adverse effects to T&E species, INAI sites, or the natural resources listed in Paragraph 4. Submit the measures to IDNR for concurrence.

7. Implement and monitor mitigation measures per IDNR 3(b).

8. By February 1st of each year, report to IDNR the total number of proposed actions that were reviewed by BDE the previous year and not submitted for consultation because there were no protected resources in the vicinity or IDOT determined that the actions were unlikely to have an adverse effect. Provide copies of a random 2% of those reviews to IDNR.

9. Take all reasonable precautions to protect and maintain the confidentiality of protected natural resource data consistent with the use intended by this MOU.

The IDNR agrees to:

1. Review BDE EcoCAT reports within 30 days of receipt. After review, IDNR will either:
   a. Terminate consultation because adverse effects are unlikely, or
   b. Request additional information and/or request a biological survey.

2. Review mitigation measures submitted by IDOT and coordinate with appropriate IDNR staff to determine whether further analysis or recommendations are required.

3. Within 90 days of receipt of IDOT-proposed mitigation measures, IDNR will either:
   a. Recommend additional measures to avoid or minimize adverse effects, or
   b. Concur with proposed mitigation measures and terminate consultation.

Both agencies have 45 days to resolve any differences that may remain. If resolution is not reached within this time, both parties can agree to: terminate consultation, elevate the issue within each department, or continue negotiations.

TERMS OF THE MOU

The term of this MOU shall be a period of three (3) years from the date this MOU is executed by all parties. This MOU shall automatically be renewed for an additional three (3) year period unless terminated per the terms of this agreement. Either party shall have the right to terminate this MOU at any time by providing at least ninety (90) days written notice to the other party.

IN WITNESS WHEREOF, the Departments have entered into this Agreement as of the date written below.

ILLINOIS DEPARTMENT OF NATURAL RESOURCES

By: _____
Marc Miller, Director

Date: 1-10-13

ILLINOIS DEPARTMENT OF TRANSPORTATION

By: Ann L. Schneider
Ann L. Schneider, Secretary

Date: 12/12/12

APPROVED FOR EXECUTION
Date: 1/03/2013
Legal Counsel: S L Kruzel

APPROVED FOR EXECUTION
Date: 1-4-13
Chief Fiscal Officer: D R Stotts

Illinois Department of Transportation
WETLANDS ACTION PLAN
April 15, 1998

[signed]	4/15/98	[signed]	4/21/98
IDOT Approval	Date	IDNR Approval	Date

I. Purpose

The purpose of this Action Plan is to set forth a framework of policy and procedures for the Illinois Department of Transportation (IDOT) that will establish compliance with the goals of the Interagency Wetland Policy Act of 1989 (the Act) and the "Implementing Procedures for the Interagency Wetland Policy Act" (17 Ill. Adm. Code 1090).

II. Applicability

This Action Plan applies to all IDOT and IDOT pass-through funded projects involving adverse impacts to wetlands except those actions specifically exempted. Approvals to proceed with construction of non-exempted actions adversely affecting wetlands will be contingent on demonstrating compliance with this Plan. For IDOT pass-through funded projects, the entity receiving the pass-through funds will be responsible for complying with the provisions of this Plan. For such projects, IDOT may require the entity receiving the pass-through funds to assume responsibility for necessary wetlands-related studies and coordination with the Illinois Department of Natural Resources (IDNR) which this Plan describes as IDOT responsibilities.

In accordance with 17 Ill. Admin. Code 1090.20 (Implementing Procedures for the Interagency Wetland Policy Act), actions that may involve adverse wetlands impacts include, but are not limited to:
The alteration, removal, excavation, or dredging of soil, sand, gravel, minerals, organic matter, vegetation, or naturally occurring materials of any kind from a wetland;
The discharge or deposit of fill material or dredged material into a wetland;
The alteration of existing drainage characteristics, sedimentation patterns, or flood retention characteristics of a wetland;
The disturbance of the water level or water table of a wetland;
The destruction or removal of plant life that would alter the character of a wetland, except for activities undertaken in accordance with the Illinois Noxious Weed Act; and
The transfer of State-owned wetlands to any entity other than another State agency.

Compliance with this Action Plan is not required for any construction, land management, or other activity funded or performed by IDOT which will *not* result in an adverse impact to a wetland. In addition, in accordance with 17 Ill. Admin. Code 1090.20, the following activities also are specifically excluded from the State wetlands compliance requirements:
Activities undertaken for the maintenance of existing ponds, storm water detention basins and channels, drainage ditches or navigation channels
Installation of signs, lighting and fences and the mowing of vegetation within existing maintained rights-of-way, provided such actions do not jeopardize the existence of a

threatened or endangered species, Illinois Natural Area Inventory Site, or the designated essential habitat of a threatened or endangered species
Repair and maintenance of existing buildings, facilities, lawns, and ornamental plantings
Issuance of permits and licenses
Construction projects that were let for bidding prior to May 6, 1996
Application of media (including deicing chemicals) on the surface of existing roads for the purposes of public safety
Non-surface disturbing surveys and investigations for construction, planning, maintenance or location of environmental resources

After initial approval by IDNR, this Plan shall continue in effect, subject to renewal through IDNR every 4 years in accordance with 17 Ill. Adm. Code 1090.40(d).

III. Consistency with Existing IDOT Policies and Procedures

Upon acceptance by IDNR, this Action Plan becomes IDOT's framework for compliance with the Interagency Wetland Policy Act. To the extent that there are any inconsistencies between this Plan and existing IDOT Departmental Orders, policies, and operating procedures regarding wetlands, this Action Plan supersedes such Orders, policies, and procedures until they are revised to achieve consistency.

IV. Identification and Delineation of Wetlands

At the earliest practical stage in the project planning process, an assessment will be made of the extent to which wetlands will be affected. Unless an Illinois-specific manual is available and approved for use, the current approved federal manual for identifying and delineating wetlands shall be used as the basis for determining wetlands subject to the Act. Wetlands shall be categorized according to the types listed in Appendix B. Additional regulatory guidance issued by the Corps of Engineers for the federal wetlands manual (e.g., concerning the treatment of farmed wetlands) also will be followed, as applicable. The most recent version of the "National List of Plant Species that Occur in Wetlands" published by the U S Fish and Wildlife Service will be used to determine hydrophytic vegetation. The most recent list of hydric soil map units maintained by each county Natural Resources Conservation Service Office will be used when locating areas of hydric soils.

The National Wetlands Inventory (NWI) maps and wetland maps that may be produced by local jurisdictions shall be used in determining the need to undertake field surveys to delineate and evaluate wetlands affected by IDOT or IDOT pass-through funded projects. Consideration also shall be given to the location of the project in the landscape and the proposed scope of work. Where wetlands are likely to occur and where such wetlands could be affected by the proposed project, field investigations shall be conducted to verify the presence of wetlands and to delineate any wetlands in the area the project may affect.

V. Policy on Wetlands Impacts and Compensation

Each Division of IDOT responsible for activities subject to the requirements of this Action Plan shall ensure that its policies and operating procedures reflect the following sequence of actions

for addressing adverse wetlands impacts while giving due consideration to safety and appropriate design standards:

First priority: Avoidance of adverse wetland impacts.

Second priority: Minimization of adverse wetland impacts.

Third priority: Compensation for unavoidable adverse wetland impacts in accordance with the ratios in 17 Ill. Admin. Code 1090.50 c 8.

Wetland impacts of less than 0.3 acre resulting from IDOT or IDOT pass-through funded projects will be compensated for from a wetland compensation account site or other approved source of preexisting wetland credits (e.g., commercial wetland bank), or may be accumulated for compensation in a larger compensation site or sites. In either case, the compensation will be subject to the applicable ratios specified in 17 Ill. Admin. Code 1090.50 (c) (8). Opportunities to compensate for accumulated impacts will be pursued, as practical, when developing project-specific wetlands compensation for larger impacts, when new wetland compensation account/bank sites become available for use, or when establishment of a site or sites to offset accumulated impacts is determined appropriate as a stand-alone project.

Any accumulated acres of impact associated with IDOT or IDOT pass-through funded projects will be accounted for on the basis of the boundaries of the nine IDOT highway districts. IDOT will confer with IDNR at least once each year regarding the status of any accumulated impact balances in each of the IDOT highway districts and the status of compensation to offset the accumulated balances. The total of accumulated acres of impacts at any given time shall not exceed 5 acres in any IDOT highway district or 25 acres statewide. If accumulated balances approach either of these thresholds, IDOT will confer with IDNR to decide how compensation will be provided to reduce the accumulated balances.

Compensation for unavoidable adverse impacts of 0.3 acre or more, will be provided prior to or concurrent with the project action causing the wetland impact. In proposing such compensation for IDOT or IDOT pass-through funded projects, priority shall be given to locating the compensation close to the impacted wetlands to the extent practical. In evaluating the practicality of sites for potential use, the following will be considered:

The site must be suitable for establishment of wetlands; i.e., contain hydric soils and be capable of providing suitable wetlands hydrology.
IDOT, or the local agency responsible for an IDOT pass-through funded project, must be able to acquire the site for wetlands compensation purposes (i.e., for sites that are not adjacent to existing or proposed project right-of-way, either the site must have a willing seller or IDNR will provide written documentation confirming suitability of the site for use, in order to support condemnation action by IDOT, or local agency, in the case of an IDOT pass-through funded project).
For sites that are not adjacent to existing or proposed project right-of-way, it must be possible for an agreement to be reached for transferring jurisdiction and responsibility for long-term management to the IDNR or another entity that meets the requirements of 17 Ill. Admin. Code 1090.90. (IDOT or a local highway agency ordinarily will assume responsibility for long-term management of sites adjacent to existing or proposed highway rights-of-way.)

When adverse wetlands impacts occur, one-for-one replacement of new wetlands of comparable functional type and size will be provided through wetlands restoration or creation before acquisition or research alternatives are considered. Buffer areas may be included for compensation credit when such areas are important to the protection of the compensation wetlands and the maintenance of their functions. The amount of credit allowed for buffer areas will be determined in consultation with IDNR on a case-by-case basis.

If a wetland compensation plan that meets the objectives of the Act cannot be developed, or if unique opportunities exist to further the goals of the Act through other means, approval may be requested from IDNR for the following:
Acquisition of high quality wetlands and associated buffer;
Funding of needed relevant research; or
Wetlands compensation that provides replacement of the same and different wetland types as the adversely impacted wetlands.

Consistent with the requirements of the Interagency Wetland Policy Act, IDOT Divisions shall consider opportunities for increasing the quantity and quality of the State's wetlands resources as a component of ongoing operations to augment the amounts of wetlands provided through compensatory mitigation. These opportunities will be pursued primarily through cooperative initiatives with the IDNR. Such opportunities will be assessed for practicality and implemented as funding and manpower resources allow.

In identifying and evaluating potential sites for IDOT wetlands compensation accounts or other project-specific wetlands compensation, IDOT will coordinate with IDNR to obtain information as appropriate on potential sites that would be suitable for establishment of wetlands and that would complement IDNR natural resource programs and property management objectives. IDOT will consider the information from IDNR along with information obtained from other sources in proposing sites for approval. As practical, IDOT will give priority to pursuing the sites that would complement IDNR programs and objectives in developing compensation for IDOT projects.

VI. Processing Procedures

Project coordination with IDNR for actions subject to this Action Plan will be in accordance with the "Natural Resource Review and Coordination Agreement Between IDNR and IDOT," as executed in January 1996, or as subsequently amended, and the procedures in this section.

When potential impacts are identified, alternatives for avoiding and minimizing adverse impacts will be analyzed, consistent with applicable design standards and safety considerations. When the analysis of alternatives determines that the project will involve unavoidable adverse wetland impacts, IDOT will coordinate wetlands issues with IDNR in accordance with the following:

A. Programmatic Review Actions

For purposes of this Action Plan, Programmatic Review Actions are those which involve impacts to wetlands only in areas where construction is within existing rights-of-way or in new right-of-way which is contiguous to (i.e., does not separate from) the existing right-of-way and for which there is no practicable alternative which would avoid adverse wetlands impacts. Examples of project-types that could qualify as Programmatic Review Actions if they meet the preceding criteria include, but are not limited to, the following: adding through or auxiliary lanes to an existing highway, widening and resurfacing existing pavements, widening shoulders on an existing highway, realigning an existing intersection, reconstructing or replacing an existing bridge, constructing runaround detours or temporary stream crossings, and installing scour countermeasures (e.g., flexible revetment, rigid revetment, or flow control structures) for existing bridges.

Adverse wetland impacts resulting from Programmatic Review Actions will be compensated in accordance with the "minimal alteration" ratios specified in 17 Ill. Admin. Code 1090.50 c 8 except when the affected wetlands involve any of the factors specified in that section as requiring application of a 5.5:1 ratio.

For projects which qualify as Programmatic Review Actions, project-specific coordination with IDNR for wetlands compliance generally will not be required. However, when the work involving wetlands will require coordination with the Corps of Engineers for approval of a wetlands compensation plan, IDOT will provide information describing the proposed compensation to IDNR. This submittal will allow appropriate IDNR staff the opportunity to review and comment on the proposed compensation prior to receiving the compensation plan information as a part of the permit information from the Corps. In addition, IDOT will provide IDNR periodic lists of all projects that qualified as Programmatic Review Actions and were not coordinated with IDNR. The lists will be provided quarterly during the first year of operation under this Wetlands Action Plan, semiannually during the second year of operation, and annually thereafter. The lists will include the following information for each Programmatic Review Action:

Project name/number
Project type and location
NWI classification code for each wetland affected
Approximate size of the wetlands area(s) to be adversely affected by the project
Description of compensation
Current status and anticipated year of construction

IDOT will maintain complete files on all actions processed under this programmatic procedure. These files will be made available for audit by IDNR upon request.

For each Programmatic Review Action in which compensation will be provided through wetlands restoration or creation on a project-specific basis, IDOT will provide periodic monitoring reports in accordance with Section X of this Plan. IDOT also will notify IDNR at the end of the wetland compensation monitoring period to advise that the compensation work has been completed and to report on its success.

B. Standard Review Actions

For purposes of this Plan, Standard Review Actions are projects which involve unavoidable adverse wetlands impacts and which do not qualify as Programmatic Review Actions. Consultation with IDNR regarding wetlands shall occur on a project-by-project basis for Standard Review Actions. As the initial step in the wetlands coordination process for Standard Review Actions, IDOT will submit a Wetland Impact Evaluation to IDNR. This evaluation will be submitted after the analysis of avoidance and minimization alternatives has been completed and the anticipated location and extent of any unavoidable adverse wetlands impacts has been determined. The Wetland Impact Evaluation will include the following:

Information identifying the wetland site(s) affected and the relationship to the proposed action (including wetland delineation report(s), forms, and map(s), and NWI map(s) for the project area);

Information describing the proposed work affecting each individual wetland (e.g., placement of fill, excavation, draining, removal of vegetation) in sufficient detail to allow a thorough review of the potential adverse wetlands impacts;

Anticipated starting and ending dates for the project, if known;

Indication of the total acreage expected to be converted from wetland habitat to other use(s); and

Description of alternatives considered and an explanation of why there are no practicable alternatives to the proposed action.

Within 30 days of receipt of the Wetlands Impact Evaluation, IDNR will advise IDOT of any deficiencies in the information provided. IDNR will notify IDOT in writing of the date the Wetlands Impact Evaluation is deemed filed. Unless extended by written agreement between IDOT and IDNR, IDNR will complete its review of the Wetland Impact Evaluation within 60 days of the date it is deemed filed and will respond in accordance with 17 Ill. Adm. Code 1090.50 (a)(2). IDOT may request a reevaluation of IDNR's response in accordance with 17 Ill. Adm. Code 1090.50 (a)(2)(D). IDNR's final response to the Wetland Impact Evaluation will be valid for 3 years and shall be extended by IDNR upon demonstration that the project is being pursued in good faith and the conditions of the site have remained substantially unchanged.

For unavoidable adverse wetlands impacts resulting from Standard Review Actions, a project-specific wetland compensation plan will be prepared for approval by IDNR. When the necessary compensation is proposed from a wetland compensation account or other approved source of preexisting compensation credits, the compensation plan will provide information in accordance with Section VII A, below. For all other Standard Review Actions, IDNR will be provided a project-specific conceptual plan (see Section VII B) for concurrence and a wetland compensation plan (see Section VII C) for approval. IDOT will expect that the response from IDNR to the conceptual plan will indicate whether compensation sites proposed are acceptable, and whether IDNR has any other suitable sites available on which the necessary compensation would be feasible.

Unless IDOT and IDNR mutually agree to a longer time period, IDNR will respond to compensation plan submittals within 45 days of receipt. IDOT will accomplish follow-up

coordination with IDNR as necessary to respond to comments from IDNR regarding the compensation proposal.

Proposals for use of wetland research funds to provide any part of the required compensation will be developed in consultation and coordination with IDNR and the Interagency Wetland Committee. Review and processing times described above will not be operative when compensation plans propose use of research funding for compensation. In these cases, IDNR will notify IDOT within 30 days of receipt of the compensation plan as to when the Committee will be convened to review the proposal for use of research funds. The review by the Committee should occur at the next regularly-scheduled Committee meeting or within 60 days of receipt of the plan by IDNR, whichever occurs first.

For Standard Review Actions, construction that would adversely affect wetlands will not commence until consultation with IDNR has occurred and IDNR has either approved the wetland compensation plan for unavoidable adverse wetland impacts or agreed that the impacts may be accumulated for after-the-fact compensation.

As provided in 17 Ill. Adm. Code 1090.50 (5), IDNR approval of a compensation plan is valid for three years. For projects involving a conceptual plan and a wetland compensation plan, the three-year time frame will begin upon approval of the wetland compensation plan. If IDOT does not commence implementation of a wetland compensation plan within the three year time frame, IDOT will re-coordinate with IDNR to renew the approval prior to proceeding with implementation of the compensation plan. IDOT will determine whether any changes have occurred at the proposed compensation site which would require revision of the compensation plan and will advise IDNR. If such changes have occurred, the plan will be revised as necessary to respond to those changes.

For Standard Review Actions, status reports will be provided to IDNR on implementation of wetland compensation plans involving wetlands restoration or creation, in accordance with 17 Ill. Adm. Code 1090.50 (6). These reports will include the following:

A post-construction site evaluation report which will be submitted within 90 days after completion of any construction, seeding, planting, etc. necessary for establishing the replacement wetlands;
Up to 4 annual reports on the status of the replacement wetlands and any associated buffer; and
A final report on the status of the replacement wetlands and any associated buffer which will be submitted 5 years after the post-construction evaluation report.

VII. Content of Wetland Compensation Plans

A. Plans for Use of Approved Preexisting Compensation Credits

When all of the necessary wetland compensation for a project is proposed from an approved wetland compensation account or other approved source of preexisting wetland credits, the following information will be provided in the wetland compensation plan:

Project name/number, location, and description
Name and address of the office responsible for the project
Indication of type(s) (per Appendix B), amount(s), and locations of wetlands affected, including the drainage basin(s) and watercourses involved
Description of alternatives which would avoid or minimize adverse impacts to the wetland and, as applicable, the reasons for their rejection
Reasons for proposing use of an approved wetland compensation account or other source of preexisting wetland credits
Description of the applicable compensation ratio(s), the amount and type (per Appendix B) of compensation credit to be provided, and the source of the credits, including location, current balances and any pending changes

B. Conceptual Plan

When all or a part of the necessary compensation will be provided through establishment of wetlands on a project-specific basis, a conceptual plan will be provided to outline the proposed compensation. The conceptual plan will present sufficient preliminary information to enable IDNR to concur in the proposed location and approach to providing compensation prior to proceeding with development of the details necessary for actually implementing the compensation.

The following is an outline of information that a conceptual compensation plan may include. The first two items will be provided in all cases. The remaining items will be addressed as necessary and appropriate to adequately describe the project's involvement with wetlands and the proposed compensation.

Project name/number, location, and description
Name and address for the office responsible for implementation of the wetland compensation plan
Date of and summary statement of wetland surveys and the name, work address, and phone number of person(s) conducting surveys
Indication of type(s) (per Appendix B) and amount(s) of wetland affected, including drainage basin(s) and watercourse(s) involved
Description of alternatives considered which would avoid or minimize adverse impacts to the wetland and, as applicable, the reasons for their rejection
Description of the precise location of the proposed wetland replacement site (including a map, legal description, and an indication of the distance from the wetland impact location(s) for which it provides compensation) and an indication of its current land use, biological, hydrological, and soils characteristics

Description of the proposed wetlands compensation, including a clear statement of goals, description of compensating wetlands to be created, restored, or acquired (including type(s) per Appendix B, and a conceptual plan drawing showing approximate layout, shape, etc.); compensation ratios to be applied; any research funding proposed in lieu of other compensation; and, if use of preexisting wetlands credits is proposed as a component of the compensation, the source of the credits, including current balances and pending changes
General description of the work (e.g., grading, planting, importation of topsoil, alteration of hydrology) proposed to establish compensation site(s)
Indication of the entity(ies) that will assume long-term responsibility for compensation sites to be established

C. Wetland Compensation Plan

A detailed wetlands compensation plan will provide the level of information necessary for implementing proposed compensation. The wetland compensation plan will include the information from the conceptual plan in addition to the items listed in 17 Ill. Adm. Code 1090.50 (c) (3), as necessary and appropriate for the specific compensation proposed.

VIII. Wetland Compensation Accounts

IDOT recognizes the benefits of consolidating compensation for numerous small impacts in larger sites. Such consolidation allows for economies of scale in planning, implementation, and maintenance of compensation and promotes the establishment of wetlands in advance of impacts that offer the potential for providing a broader range of functional benefits. IDOT also acknowledges the advantages such sites offer in terms of their potential for being located and sized to complement the plans and programs of resource agencies to make the sites more desirable for long term management and to provide enhanced environmental and social benefits for the people of Illinois. IDOT will actively pursue the development and use of wetland compensation account sites as practical for IDOT and IDOT pass-through funded projects, to maximize the benefits such sites provide. Establishment of wetland compensation accounts by IDOT or local agencies and project sponsors for use in complying with wetlands compensation requirements under the Act will be accomplished through formal agreement with IDNR. The unit of measurement for debits and credits will be established in the agreement for the compensation account. Use of credits from wetland compensation accounts will be subject to the compensation ratios in 17 Ill. Admin. Code 1090.50.

IX. Authority and Policies for Acquisition of Wetland Compensation Land

IDOT may acquire for highway purposes any property necessary for a highway project, or any other property for which a specific appropriation has been made. Mitigation property on-site or contiguous to a project will be described and discussed in appropriate project planning and design documents to adequately establish the necessity of acquisition. For other mitigation parcels, the need will be documented in wetland compensation account proposals or compensation plans submitted by IDOT and in written approval of such proposals and plans by IDNR.

Lands for IDOT wetland compensation accounts will be acquired through whatever means IDOT determines appropriate, consistent with IDOT's statutory powers and authorities.

Local agencies and sponsors may use available eminent domain authority for compensation land within project rights-of-way and, when specifically allowed by law, for off-site compensation.

X. Monitoring

Monitoring and reporting procedures for wetland compensation areas will be addressed in accordance with the following:

For IDOT or local agency wetlands compensation account (bank) sites, monitoring and reporting requirements will be specified in the interagency agreement with IDNR and other appropriate signatories authorizing establishment of the sites.

For project-specific wetlands restoration or creation associated with Standard Review Actions or with Programmatic Review Actions that will require coordination with the Corps of Engineers for approval of the wetland compensation plan, monitoring and reporting procedures will be determined in consultation with the IDNR and the Corps of Engineers as a part of the Wetland Compensation Plan.

For project-specific wetlands restoration or creation associated with Programmatic Review Actions that do not require coordination with the Corps of Engineers for approval of a wetlands compensation plan, monitoring procedures will be documented in the compensation plan on file for the project and will be based on the guidance in Chapter 5 of the "Illinois Wetland Restoration and Creation Guide" (Illinois Natural History Survey Special Publication 19, March 1997), and Chapter 8 of NCHRP Report 379 "Guidelines for the Development of Wetland Replacement Areas." The monitoring procedures will be commensurate with the size and complexity of the wetlands to be restored/created. For these actions, IDNR will be provided an annual report of the monitoring results for a period of up to 5 years, as necessary to verify wetlands success. This will be in addition to the information provided in the periodic summary reports on Programmatic Review Actions described in Section VI A.

Monitoring will be carried out by or under the direction of IDOT except when that responsibility is delegated to a local agency or sponsor, subject to approval by IDNR of the monitoring plan of that local agency or sponsor.

XI. Transfer of Wetlands

Whenever IDOT can transfer management responsibility for wetland compensation areas without jeopardizing project operation, it will submit a written request to IDNR for approval of the transfer. IDOT will ask that IDNR respond to such requests within 60 days. IDOT will identify the proposed recipient of the land and will provide or outline the terms of the transfer agreement. IDOT generally will give preference to qualified entities which can ensure appropriate management without need for funding support from IDOT for assuming the management activities.

In accordance with the requirements of the Act, and subject to obtaining any required approvals from the Governor or the State Legislature, IDOT will transfer compensation wetlands (other than those which are located within or that are otherwise an integral part of project rights-of-way) to IDNR or other eligible sponsors subject to formal transfer agreements that will fulfill all

obligations of IDOT related to the approved compensation plan. In the event that IDOT is unable to find any other suitable entity to assume responsibility for long-term management of IDOT-developed wetland compensation sites, IDOT will transfer such sites to IDNR for long-term management. Such transfer shall not require a commitment from IDOT to provide funds to IDNR to support the management activities.

As long as wetland compensation property is held by IDOT, it will be maintained for its designated use. Where wetland compensation sites for IDOT pass-through funded projects are under the jurisdiction of a local agency, IDOT will require the local agency to ensure that the site will be maintained for wetlands purposes. Local agencies or sponsors may transfer wetlands or maintenance responsibilities to other public or private entities when allowed by law, subject to obtaining IDNR approval of such transfer.

If IDOT proposes the sale, exchange, or release of State-owned land containing wetlands to an entity other than another State agency, it will require the recipient of the land to grant a conservation easement which must contain provisions to protect the wetlands and any associated buffer areas from adverse impacts. Such easements will be written and recorded pursuant to the Real Property Conservation Rights Act. IDOT will attempt to have a unit of local government be the grantee of the easement. If a unit of local government cannot be obtained, IDOT will attempt to have an acceptable not-for-profit corporation or charitable trust be the grantee. If a unit of local government or not-for-profit entity cannot be obtained, IDOT will reserve conservation rights in its deed or release document and will transfer those rights to IDNR. Prior to the sale, exchange, or release of State-owned lands under IDOT control to an entity other than another State agency, the department will submit a written request to IDNR in accordance with 17 Ill. Adm. Code 1090.90 c 4.

XII. Compliance with Other Requirements

In implementing the provisions of this Action Plan, IDOT will ensure appropriate compliance with laws and regulations applicable to significant historic and archaeological sites and other resources requiring special consideration.

XIII. Conflict Resolution Procedures

Every effort will be made to cooperate with and coordinate wetland matters with IDNR. If circumstances arise in which a disagreement occurs over any substantive matter contained in this Action Plan or its application to IDOT actions or projects, the first attempt at resolution shall occur with technical managers in both Departments. If the matter cannot be resolved at this level within a reasonable period, it may be referred to higher management levels for resolution. The priority of the issues involved and the urgency of the need for resolution shall determine the time frames for referral to higher levels and how high within each organization the matter ultimately will be referred. If a conflict cannot be satisfactorily resolved between administrators in IDOT and IDNR, up to and including the Secretary of IDOT and Director of IDNR, the matter may be referred to the Governor’s office for resolution.

XIV. Reports on Action Plan Implementation

Following approval of this Action Plan, IDOT will submit to IDNR a biennial report summarizing actions taken to implement the provisions of the Action Plan. The report will provide a listing of projects advanced through the wetlands compliance process and a tabulation of the amounts and types of associated mitigation accomplished. The report also will provide a description of other activities that resulted in the establishment of wetlands and a tabulation of the amount and type(s) of wetlands generated by those activities. The first biennial report will be submitted to IDNR on or before June 30 of the second year following initial approval of the Action Plan. Subsequent reports will be submitted on or before June 30 every other year thereafter.

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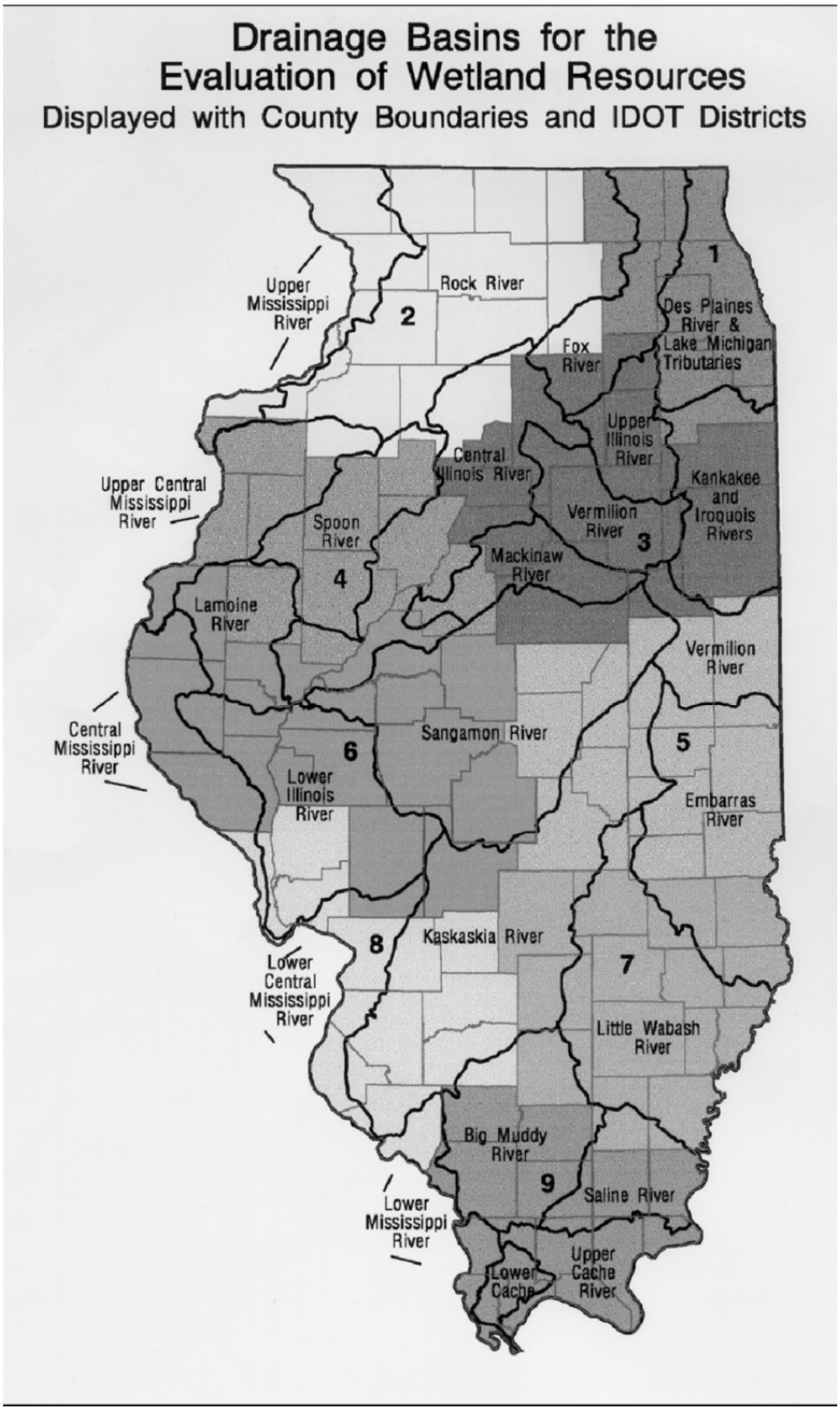
Appendix A


Drainage Basins for the
Evaluation of Wetland Resources
Displayed with County Boundaries and IDOT Districts
Upper Mississippi River
Rock River
2
1
Des Plaines River & Lake Michigan Tributaries
Fox River
Upper Illinois River
Central Illinois River
Kankakee and Iroquois Rivers
Upper Central Mississippi River
Spoon River
Vermilion River
3
Mackinaw River
4
Lamoine River
Vermilion River
Central Mississippi River
Sangamon River
5
6
Lower Illinois River
Embarras River
8
Kaskaskia River
7
Lower Central Mississippi River
Little Wabash River
Big Muddy River
9
Saline River
Lower Mississippi River
Upper Cache River
Lower Cache

Appendix B

Wetlands Categories

Wetlands in Illinois can be classified into 12 categories as indicated below (refer to the accompanying category definitions), all of which are afforded protection under the Interagency Wetland Policy Act of 1989. For purposes of the IDOT wetland action plan, "disturbed" wetlands are treated as a separate category and the remaining categories are placed in three groups indicating their relative quality/complexity/rarity. (The order in which the wetland types are listed within each group does not indicate a relative ranking of the types within the group.) The groups are discussed in the following paragraphs and are intended primarily to guide project decision makers in planning wetlands compensation that will contribute to improving the quality of wetlands in Illinois.

□Group 1

Bog
Fen
Flatwoods

Wetland types represented by the Group 1 categories are the rarest types in Illinois. Because of the unique geological and topographic conditions essential to their existence, the potential for creating replacement wetlands of these types is extremely limited (in the case of fens) or nonexistent (in the case of bogs and flatwoods). The utmost effort shall be made to avoid any adverse impacts to wetlands in these categories.

□Group 2

Sedge Meadow
Prairie, wet
Swamp

Group 2 wetland types are high quality, relatively complex systems. They are somewhat limited in their occurrence in the State because of the special conditions on which their existence depends. Because of their complexity, they will be somewhat difficult to create or establish and will have to meet demanding site criteria in order to be sustainable. For unavoidable impacts to Group 2 wetlands, compensation shall be of the same type as the wetland affected, to the fullest extent possible.

□Group 3

Marsh
Wet meadow
Forested
Scrub-shrub
Open water

Group 3 wetlands are the most prevalent in Illinois. These categories also can be more readily created or established in more areas of the State than can Group 1 or Group 2 wetlands.

□Disturbed wetlands

Disturbed wetlands include sites such as farmed wetlands, successional old fields, and urban disturbed areas which, because of their disturbed nature, do not readily fit any other wetlands category. For Disturbed wetlands, compensation for unavoidable adverse impacts will not be in-kind; it shall be either a Group 3 type or a Group 2 type.

Definitions of Wetland Categories

Bog The bog communities of Illinois are found almost exclusively in glaciated depressions of the northeast corner of the state. Drainage is usually restricted, and this, coupled with an abundance of sphagnum moss, results in conditions which are highly acidic. The soils of a bog are saturated throughout the growing season in most years, and small open water areas are common. Vegetation consists of a variety of emergents with shrubs and/or small trees occurring on more consolidated peat. (At the beginning of 1994, there were 10 identified bogs in Illinois which comprised 232.8 acres.)
Definition adapted from A Field Guide to the Wetlands of Illinois, 1988)

Fen A fen is a type of wet meadow fed by an alkaline water source such as a calcareous spring or seep. The deposition of calcium and magnesium in the soil results in an elevated soil pH and gives rise to a variety of unique plants adapted to surviving these conditions. The vegetation is normally comprised of herbaceous emergents although woody shrubs or even trees sometimes occur. (At the beginning of 1994, there were 20 identified fens in Illinois which comprised 153.1 acres.)
Definition adapted from A Field Guide to the Wetlands of Illinois, 1988.

Flatwoods Flatwoods are woodlands growing on level surfaces, usually with widely spaced trees, with slowly permeable and poorly drained soils that contain an argillic horizon or claypan. (At the beginning of 1994, there were 24 identified flatwoods in Illinois which comprised 617.5 acres.)

Definition adapted from White, John, 1978. Illinois Natural Areas Inventory Technical Report, Volume 1 Survey Methods and Results.

Sedge Meadow A sedge meadow is a wetland dominated by sedges (*Carex*) and occurring on peat, muck, or wet sand.
Definition adapted from White, John, 1978. Illinois Natural Areas Inventory Technical Report, Volume 1 Survey Methods and Results.

Prairie, wet A wet prairie is a community dominated by graminoid vegetation on mineral soil which is almost always saturated.

Definition adapted from White, John, 1978. Illinois Natural Areas Inventory Technical Report, Volume 1 Survey Methods and Results.

Swamp A swamp is a wetland characterized by the presence of permanent to semipermanent water and a greater than 30% areal canopy cover of tall (over 20 feet) woody vegetation. In many areas, the canopy cover exceeds 80%.
Definition adapted from A Field Guide to the Wetlands of Illinois, 1988.

Marsh A marsh is a wetland in which tall graminoid plants dominate the plant communities. Marshes have water near or above the surface for most of the year. Soils may be peat, muck, or mineral.
Definition adapted from White, John, 1978. Illinois Natural Areas Inventory Technical Report, Volume 1 Survey Methods and Results.

Wet meadow A wet meadow is a wetland characterized by moist to saturated soils with standing water present for only brief to moderate periods during the growing season. Vegetation includes a wide variety of herbaceous species, from sedges and rushes to forbs and grasses. Woody vegetation, if present, accounts for less than 30% of the total areal cover.
Definition adapted from A Field Guide to the Wetlands of Illinois, 1988.

Forested Forested wetlands differ from true swamps in that they lack continuously standing water, although repeated flooding is common. Differences in the length of inundation give rise to a variety of community types within this classification.
Definition adapted from A Field Guide to the Wetlands of Illinois, 1988.

Scrub-shrub A scrub-shrub wetland typifies a community in transition and exemplifies the dynamic nature of wetlands in general. Many emergent wetlands left undisturbed, will gradually be replaced through succession by woody vegetation that will in time develop into a mature forest. The scrub-shrub wetland is often found grading shoreward from an emergent wetland which borders a lake, stream, or pond. The woody vegetation accounts for at least 30% of the vegetation present, and must be less than 20 feet (6 meters) tall. Species composition is dependent on the length of inundation, with willows and dogwood growing in the temporarily to seasonally wet areas and buttonbush in semipermanently flooded areas.
Definition adapted from A Field Guide to the Wetlands of Illinois, 1988.

Open water wetlands Small and shallow [area < 20 acres (8.1 ha) and depth < 6.6 ft. (2 m)] open water areas that lack emergent woody or graminoid vegetation. Natural ponds, farm ponds, borrow pits, and open water areas that occur within a marsh or swamp are included in this category. (Lacustrine and riverine systems are not included in this category.)

ILLINOIS DEPARTMENT OF TRANSPORTATION'S AGRICULTURAL LAND PRESERVATION POLICY STATEMENT AND COOPERATIVE WORKING AGREEMENT

PREFACE

The Farmland Preservation Act [505 ILCS 75/1 et seq.] requires the Department of Transportation (IDOT) and seven other State agencies to develop a policy statement specifying each agency's policy toward farmland preservation. IDOT has prepared the following statement in response to that requirement. A working agreement has also been prepared to describe the administrative process that will be used to implement the policy. The Agricultural Land Preservation Policy prepared in response to Executive Order 80-4, signed by Governor James R. Thompson on July 22, 1980, will also remain in effect in accordance with Section 4 of the Farmland Preservation Act.

POLICY

Recognizing that its transportation objectives must be in concert with the overall goals of the State, it is the policy of the IDOT, in its programs, procedures, and operations, to preserve Illinois farmland to the extent practicable and feasible, giving appropriate consideration to the State's social, economic, and environmental goals.

BACKGROUND/PERSPECTIVE

Highways, rail systems, airports, and port terminals by their nature, occupy land. The extent that transportation facilities will occupy today's farmland in the future primarily will depend on the IDOT's programs, safety and operational requirements, and the degree to which a responsible balance is established among the various development and preservation interests of the State of Illinois.

With the existence of a comprehensive and largely complete transportation system in Illinois, the IDOT's major program emphasis is directed toward preservation and rehabilitation of existing facilities, rather than expansion. Rehabilitation of the system for full and effective use, however, will require some additional land acquisitions to satisfy current safety and operational requirements. A limited number of new or expanded transportation facilities will be required in order to attract business and industry and improve service and access to Illinois markets. Expansion efforts must be carefully managed to preserve the agricultural community while serving the rural areas of the State.

In the past, new transportation facilities often were constructed on farmlands. This was due, in part, to a number of Federal laws and regulations pertaining to the protection of other sensitive areas, such as floodplains, wetlands, wildlife habitat, etc. Special protection is also provided for parks and historic sites. Federal law requires that such lands not be used for Federal-aid highway purposes, unless no feasible and prudent alternative is available. Executive Order 80-4 and the Farmland Preservation Act increase the protection afforded to farmland, so that it is commensurate with the importance of the resource.

It should be noted that new transportation facilities generally involve some conversion of farmland since farmland occupies a major portion of the State and engineering constraints, safety considerations, occurrence of developed areas and protection afforded to other types of resources (e.g., historic sites, publicly owned parks, recreation area and wildlife and waterfowl refuges, wetlands and habitat essential to threatened or endangered) often limit the options for avoiding conversion.

AGRICULTURAL IMPACTS OF HIGHWAY CONSTRUCTION

The rate of farmland conversion for highway usage is expected to remain near current levels. The current emphasis on rehabilitation of the existing system is expected to continue in the future and such a program is not expected to require significant land acquisitions. Because much of today's system was constructed in the 1920's and 1930's, an extensive and continuing program is necessary to rehabilitate and replace narrow and deteriorated bridges and pavements. However, a great amount of farmland could sustain conversion due to the rehabilitation of existing highways and the construction of new interstate projects. Mitigation measures for reducing adverse agricultural impacts are routinely introduced into highway designs. For example, current design practices encourage use of narrower medians and smaller interchanges. There is an increased importance given to agricultural conversions in decisions regarding highway projects. Where practicable, highway designs feature reduced medians, larger crossovers to accommodate farm equipment, minimization of landlocked parcels and severances, as well as upgraded field entrances to reduce farmland conversion impacts and secondary impacts to agricultural operations.

AGRICULTURAL IMPACTS OF AIRPORT DEVELOPMENT

With a few exceptions, the State Airport System is mature and in place. One exception includes the development of a third major airport to serve the Chicago area and its environs. In addition, construction of four or five new small airports is anticipated over the next 20 years. Limited expansion of existing airports may also be undertaken. Safety requirements of proposed airport projects will be balanced with an analysis of farmland impacts as required by Executive Order 80-4, the Farmland Protection Act, and this Department Policy Statement.

AGRICULTURAL IMPACTS OF RAILROADS

The Illinois railroad system is a mature network which includes mainlines and branchlines. This system has been gradually shrinking over the years as light density lines are abandoned and traffic is concentrated on fewer lines. Occasionally, the net result of branchline abandonment has been an increase in the amount of land in agricultural production since abandoned right-of-way can be restored to farmland usage.

The IDOT does not own or operate railroad lines and does not exercise jurisdiction over most railroad project which might affect farmland. However, in those instances where future IDOT decisions regarding railroad projects might impact the State's farmland resources, due consideration will be given to preserving agricultural land and minimizing adverse impacts on its productive capacity.

IMPACT MITIGATION

The IDOT is committed to initiating special measures when transportation projects affect agricultural lands. Design standards are periodically reviewed and revised, and the new standards tend to favor minimal land acquisition, taking only those lands needed for construction and maintenance. For example, standardized right-of-way requirements for certain types of highways have been eliminated in favor of flexible requirements that stipulate acquisition of only those lands essential for construction and maintenance. Minimum median widths and compressed diamond interchanges also are representative of mitigation measures that reduce the adverse impact of highway construction on agricultural resources. The IDOT will also place a high priority on selecting lands which are not upland prime farmlands for wetland mitigation purposes in devising wetland compensation plans. Consideration will also be given to mitigating wetland impacts on publicly owned lands (State or Federal lands). In developing proposals for wetland compensation or other environmental mitigation and in the selection of State furnished borrow pits, IDOT will pursue practical alternatives to minimize impacts to prime and important farmland and farm operations. Where land is purchased to prevent developments incompatible with transportation system safety or noise standards, such as land adjacent to airports, the IDOT will give priority to acquiring easements on its own projects and will encourage other agencies to acquire only the development rights in the surrounding areas, so that the acreage can continue in agricultural use.

Planning studies for transportation will include an early determination of the potential for farmland impacts. The IDOT will carefully consider the impacts of farmland conversion on the agricultural economy of the State. Studies conducted in conjunction with transportation projects will include early coordination and consultation with the Illinois Department of Agriculture (IDOA) and, when appropriate, other agricultural representatives. This interdisciplinary approach should assure that the impacts of IDOT projects on the agricultural community are adequately and accurately assessed.

Although the IDOT's mitigation measures will not necessarily eliminate the conversion of farmland to non-agricultural purposes, impact analysis and extensive coordination will assure that a given conversion is consistent with our programmatic responsibilities, Executive Order 80-4, and the Farmland Preservation Act.

Illinois Department of Transportation – Illinois Department of Agriculture
Cooperative Working Agreement

Pursuant to Section 4 of the Farmland Preservation Act, the Illinois Department of Transportation ("IDOT") and the Illinois Department of Agriculture ("IDOA") hereby mutually agree to the following:

This Cooperative Working Agreement ("AGREEMENT") sets the guidelines for the implementation of the IDOT Agricultural Land Preservation Policy.
This AGREEMENT shall apply to those projects which the IDOT authorizes, or in which it participates, except the following:
a) Those non-linear (spot) projects acquiring 10 acres or less of land;
b) Those linear projects acquiring 3 acres or less of land per project mile;
c) Those projects located within the boundary of an incorporated municipality.
If any of the above thresholds are exceeded, it is the responsibility of IDOT to coordinate projects that will convert prime and important farmland to nonagricultural purposes. The IDOT agrees to notify, in writing, the IDOA of projects that will have an impact on farmland in Illinois. The notice from the IDOT should always be sent to the IDOA in the early planning stage of project development, within the location and environmental study phase and prior to the holding of any public hearings related to the project. For projects involving compensation for wetland or other environmental impacts, environmental analysis provided to IDOA in accordance with this Section will include information describing the impacts and associated proposed mitigation. This notice may be accomplished by the transmission of documents such as, but not limited to, the following:
a) proposed airport layout plans;
b) draft and / or final Environmental Assessments, Environmental Impact Statements, or Technical Reports;
c) Illinois Rail Plan, and
d) FY_____Highway Improvement Plan
The IDOA shall determine whether a Study of Agricultural Impacts is needed or not. When IDOA finds that such a study is necessary, the study shall be conducted as provided in paragraph 8 below.
The IDOT will update its notices of farmland impacts to the IDOA as plans are changed and new information becomes available.
The IDOT will cooperate in IDOA's preparation of its annual report to the Governor and to the General Assembly on the amount of farmland converted to non-agricultural uses as a result of State agency action. The IDOA will attempt to advise the IDOT of the type of information needed one year in advance of the request for that information.

The IDOT will mitigate the agricultural impacts of its projects covered by this AGREEMENT as provided in the Illinois Department of Transportation “Agricultural Land Preservation Policy” and its subsequent amendments.

The IDOA further agrees to the following:

a) to follow its project review process contained in its “Agricultural Land Preservation Policy” as amended, or other procedures upon which the parties have agreed, in carrying out its review under this AGREEMENT;

b) to complete its review of IDOT projects within 30 days after notice with all required project information from the IDOT;

c) to provide information and assistance to the IDOT and its consultant upon request, and

d) to provide its comments in accordance with the procedures specified in the relevant documents or as otherwise agreed between it and the IDOT.

The Illinois Departments of Agriculture and Transportation further agree that this AGREEMENT shall bind each only to the other and creates no rights in third parties.

All changes to the AGREEMENT shall be made after consultation with and concurrence by both parties.

This AGREEMENT shall become effective upon its signature by the Secretary of Transportation and the Director of Agriculture and shall remain in effect until January 1, 2011.

APPROVED:

ILLINOIS DEPARTMENT OF AGRICULTURE

By: [signed] 5/21/08
Thomas E. Jennings, Acting Director Date

ILLINOIS DEPARTMENT OF TRANSPORTATION

By: [signed] 5/12/08
Milton R. Sees, Secretary Date

PROGRAMMATIC AGREEMENT
FOR THE
REHABILITATION AND REPLACEMENT OF HISTORIC BRIDGES
BETWEEN
THE ILLINOIS STATE HISTORIC PRESERVATION OFFICER
AND
THE FEDERAL HIGHWAY ADMINISTRATION

WHEREAS, the Federal Highway Administration (FHWA), will fund the rehabilitation and replacement of highway bridges in Illinois, and

WHEREAS, the FHWA is mandated to comply with 23 U.S.C. 144(o) and Section 106 of the National Historic Preservation Act, as amended, and

WHEREAS, the Illinois Department of Transportation (IDOT) has participated in the consultation regarding this programmatic agreement and has been invited to concur with it, and

WHEREAS, FHWA has determined that such bridge rehabilitation and replacement programs may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places and have consulted with the Illinois Historic Preservation Agency (IHPA) pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended, (16 U.S.C. 470f) and its implementing regulations (36 CFR part 800), and the Illinois State Agency Historic Resources Preservation Act,

NOW, THEREFORE, FHWA, IDOT and IHPA agree that the Illinois Federal Bridge Program shall be administered in accordance with the following stipulations to satisfy FHWA's Section 106 responsibilities for individual undertakings of the program, and IDOT's responsibilities pursuant to 20 ILCS 3420.

STIPULATIONS

FHWA shall ensure that the following measures are carried out.

The Illinois Department of Transportation shall maintain a Bridge Survey, which shall be comprised of primary and secondary lists. These lists, which were developed in consultation with the IHPA, include all Illinois highway bridges that meet the criteria for eligibility for listing on the National Register of Historic Places. The FHWA has previously submitted documentation for formal Determination of Eligibility (DOE) on all Illinois highway bridges currently included on the primary list from the Keeper of the National Register of Historic Places. All other Illinois highway bridges that are not included on the primary or secondary lists shall be considered to have no historic value and may be repaired or replaced without further review under Section 106.
Bridges included on the primary and secondary lists shall receive routine maintenance consisting of repair or replacement with in-kind existing structural and architectural elements. This maintenance shall comply with the recommended approaches of the Secretary of the Interior's Standards for Rehabilitation (Standards). Photographs shall be taken before and after such maintenance and these, along with rehabilitation plans or work write-ups, shall be retained

by IDOT. From time to time, the IHPA will inspect these records to determine compliance with the Standards.

IDOT shall make every reasonable effort to retain and maintain bridges on the primary list. However, in the event a bridge on the primary list is destroyed due to accident or natural causes, an analogous bridge will be moved from the secondary list to the primary list. Documentation shall be forwarded to the Keeper of the National Register to remove the destroyed bridge from the eligible list and for a determination of eligibility for the replacement bridge. An analogous bridge shall then be selected by IDOT in consultation with IHPA and placed on the secondary list, as long as that type exists within the State.

In the event that IDOT determines that it is necessary to replace a bridge on the primary or secondary lists for overriding transportation safety concerns, they shall notify the IHPA and supply them with the following documentation:

good, current photographs of the bridge documenting its condition;

a structural survey documenting why rehabilitation in accordance with the Standards is considered infeasible;

a careful and well-documented analysis of the following alternatives:

do nothing

avoidance/new alignment

moving the structure for pedestrian or other vehicular use

marketing the structure for alternative uses in place or at an analogous location

the replacement bridges to be named to the primary and secondary lists

IHPA shall then review the documentation and, if it agrees with IDOT's determination that the bridge must be removed, IDOT, in accordance with 36 CFR 800.6(b), shall consult with FHWA, IHPA, and other consulting parties to seek ways to avoid, minimize, or mitigate the adverse effects to the bridge. If all parties agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement (MOA). A copy of the fully executed MOA will be forwarded to the ACHP for their files. If the parties fail to agree on the terms of a MOA, the FHWA shall request that the ACHP join the consultation.

The public will be informed of a bridge's status as to whether it is or is not considered historic at all public meetings involving a proposed bridge project.

Should a bridge be listed on the NRHP due to nomination by a member of the public, that bridge shall be added to the Historic Bridge Survey and shall become subject to the terms of this agreement.

Recordation

If IHPA and IDOT agree that a bridge may be demolished, IDOT agrees to record the bridge in accordance with Historic American Engineering Record (HAER) Standards. Such recordation is not required when archival records of three bridges of the same type categories and chronological periods have been deposited in the State Historical Library.

Administration

IDOT shall retain documentation of actions taken pursuant to this Agreement, including documentation of the public participation process and the views of the public for all projects. Annually, the IHPA may review such documentation to ensure all provisions of this agreement are carried out.

Annually, IDOT will submit a written report to the IHPA and the FHWA detailing work carried out pursuant to this Agreement. This report will include the comments of the IHPA concerning their annual review.

The IHPA will offer training courses as appropriate to IDOT personnel in the application of the Standards to bridge projects.

Nothing in this Agreement shall be construed as meaning that IDOT or FHWA cannot consult with the IHPA more frequently or informally concerning any questions that may arise or on the application of the Standards to specific projects.

This agreement may be modified or revoked by agreement of the parties or revoked by any party alone upon six (6) months written notice. During these six months, the parties will work to resolve any objections to continuing the agreement.

The IDOT bridge survey will be updated periodically in consultation with the IHPA for additions, revisions and deletions. FHWA shall request determinations of eligibility or removals from the eligible list, as appropriate, from the Keeper of the National Register.

This agreement shall remain in effect for five years from the date of ratification. At that time, FHWA, IDOT and the SHPO shall review its terms for extension and/or modification.

Execution and implementation of this Programmatic Agreement evidences that FHWA has satisfied their responsibilities pursuant to Section 106 of the National Historic Preservation Act for the Bridge Rehabilitation and Replacement Program.

FEDERAL HIGHWAY ADMINISTRATION
Signed by Norman R. Stoner 4/30/04

ILLINOIS HISTORIC PRESERVATION AGENCY
Signed by Anne E. Haaker 4/23/04

CONCUR:
ILLINOIS DEPARTMENT OF TRANSPORTATION
Signed by Michael L. Hine 4/23/04

EXTENSION OF THE
PROGRAMMATIC AGREEMENT
FOR THE
REHABILITATION AND REPLACEMENT OF HISTORIC BRIDGES
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION,
AND THE ILLINOIS STATE HISTORIC PRESERVATION OFFICER

WHEREAS, the Federal Highway Administration, the Illinois State Historic Preservation Officer and the Illinois Department of Transportation executed a Programmatic Agreement for the Rehabilitation and Replacement of Historic Bridges (Agreement) in the State of Illinois on April 30, 2004; and

WHEREAS, the Advisory Council on Historic Preservation was provided an opportunity to participate in consultation prior to executing the Agreement and declined to participate; and

WHEREAS, IDOT, the Illinois SHPO and FHWA recognize the benefits of the Agreement include the preservation of historic bridges and streamlining the Section 106 process; and

WHEREAS, in accordance with the Agreement, FHWA, the Illinois SHPO and IDOT reviewed its terms; and

WHEREAS, IDOT, the Illinois SHPO and FHWA recognize the bridge survey completed in the early 1980s must be updated during the extension of the Agreement to ensure that all historic bridges eligible for or listed in the National Register of Historic Places are considered in the project development process; and

NOW, THEREFORE, IDOT, the Illinois SHPO and FHWA agree to extend the Agreement for a twenty-four month period from the date of its execution and continue consultation to assess the successes and opportunities for improvements to the Agreement during the extension; and

Execution and implementation of this extension to the Agreement evidences that FHWA has satisfied its responsibilities pursuant to Section 106 of the National Historic Preservation Act for the Bridge Rehabilitation and Replacement Program.

FEDERAL HIGHWAY ADMINISTRATION
Signed by Norman R. Stoner 6/9/09
By: _____ Date:_____

ILLINOIS STATE HISTORIC PRESERVATION OFFICER
Signed by Anne E. Haaker 6/9/09
By: _____ Date:_____

ILLINOIS DEPARTMENT OF TRANSPORTATION
Signed by Charles J. Ingersoll 6/9/09
By: _____ Date:_____