

Federal Highway Administration, DOT

§ 771.135

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 activities; 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]

§ 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 requirements.

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 requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA approval of the appropriate NEPA document will constitute its finding of compliance with the report requirements of 23 U.S.C. 128.

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

(a)(1) The Administration may not approve the use of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl

refuge, or any significant historic site unless a determination is made that:

(i) There is no feasible and prudent alternative to the use of land from the property; and

(ii) The action includes all possible planning to minimize harm to the property resulting from such use.

(2) 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.

(b) The Administration will determine the application of section 4(f). Any use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.

(c) Consideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire site is not significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant. The Administration will review the significance determination 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 purposes. The determination as to which lands so function or are so designated, and the significance of those lands, shall be made by the officials having jurisdiction over the lands. The Administration will review this determination to assure its reasonableness. The determination of significance shall apply to the entire area of such park, recreation, or wildlife and waterfowl refuge sites.

(e) In determining the application of section 4(f) to historic sites, the Administration, in cooperation with the

applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on or eligible for the National Register of Historic Places (National Register). The section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of section 4(f) is otherwise appropriate.

(f) The Administration may determine that section 4(f) requirements do not apply to restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) 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 SHPO and the Advisory Council on Historic Preservation (ACHP) have been consulted and have not objected to the Administration finding in paragraph (f)(1) of this section.

(g)(1) 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 paragraph (g)(2) of this section. Where section 4(f) applies to archeological sites discovered during construction, the section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

(2) Section 4(f) does not apply to archeological sites where the Administration, after consultation with the SHPO and the ACHP, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the Administration decides, with agreement of the SHPO and, where applicable, the ACHP not to recover the resource.

(h) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites are sometimes

made and determinations of significance changed late in the development of a proposed action. With the exception of the treatment of archeological resources in paragraph (g) of this section, the Administration may permit a project to proceed without consideration under section 4(f) if the property interest in the section 4(f) lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by section 4(f) prior to acquisition.

(i) The evaluations of alternatives to avoid the use of section 4(f) land and of possible measures to minimize harm to such lands shall be developed by the applicant in cooperation with the Administration. This information should be presented in the draft EIS, EA, or, for a project classified as a CE in a separate document. The section 4(f) evaluation shall be provided for coordination and comment to the officials having jurisdiction over the section 4(f) property and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. A minimum of 45 days shall be established by the Administration for receipt of comments. Uses of section 4(f) land covered by a programmatic section 4(f) evaluation shall be documented and coordinated as specified in the programmatic section 4(f) evaluation.

(j) When adequate support exists for a section 4(f) determination, the discussion in the final EIS, FONSI, or separate section 4(f) evaluation shall specifically address:

(1) The reasons why the alternatives to avoid a section 4(f) property are not feasible and prudent; and

(2) All measures which will be taken to minimize harm to the section 4(f) property.

(k) The final Section 4(f) evaluation will be reviewed for legal sufficiency.

(l) For actions processed with EISs, the Administration will make the section 4(f) approval either in its approval of the final EIS or in the ROD. Where the section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its section

4(f) approval in the ROD. Actions requiring the use of section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notified by the Administration of section 4(f) approval. For these actions, any required section 4(f) approval will be documented separately.

(m) Circulation of a separate section 4(f) evaluation will be required when:

(1) A proposed modification of the alignment or design would require the use of section 4(f) property after the CE, FONSI, draft EIS, or final EIS has been processed;

(2) The Administration determines, after processing the CE, FONSI, draft EIS, or final EIS that section 4(f) applies to a property;

(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) land used, a substantial increase in the adverse impacts to section 4(f) land, or a substantial reduction in mitigation measures; or

(4) Another agency is the lead agency for the NEPA process, unless another DOT element is preparing the section 4(f) evaluation.

(n) If the Administration determines under §771.135(m) or otherwise, that section 4(f) is applicable after the CE, FONSI, or final EIS has been processed, the decision to prepare and circulate a section 4(f) evaluation will not necessarily require the preparation of a new or supplemental environmental document. Where a separately circulated section 4(f) evaluation is prepared, such evaluation does not necessarily:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activities; for any activity not affected by the section 4(f) evaluation.

(o) An analysis required by section 4(f) may involve different levels of detail where the section 4(f) involvement is addressed in a tiered EIS.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the section

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

(2) A section 4(f) approval made when additional design details are available will include a determination that:

(i) The preliminary section 4(f) determination made pursuant to paragraph (o)(1) of this section is still valid; and

(ii) The criteria of paragraph (a) of this section have been met.

(p) *Use.* (1) Except as set forth in paragraphs (f), (g)(2), and (h) of this section, "use" (in paragraph (a)(1) of this section) occurs:

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

(ii) When there is a temporary occupancy of land that is adverse in terms of the statute's preservationist purposes as determined by the criteria in paragraph (p)(7) of this section; or

(iii) When there is a constructive use of land.

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

(3) The Administration is not required to determine that there is no constructive use. However, such a determination could be made at the discretion of the Administration.

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

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

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

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

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

(v) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with

the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes.

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

(i) Compliance with the requirements of section 106 of the National Historic Preservation Act and 36 CFR part 800 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register of Historic Places, results in an agreement of "no effect" or "no adverse effect";

(ii) The projected traffic noise levels of the proposed highway project do not exceed the FHWA noise abatement criteria as contained in Table 1, 23 CFR part 772, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria in the FTA guidelines;

(iii) The projected noise levels exceed the relevant threshold in paragraph (p)(5)(ii) 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);

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

(v) There are impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resource are concurrently planned or developed. Examples

of such concurrent planning or development include, but are not limited to:

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

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

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

(vii) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario;

(viii) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or

(ix) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.

(6) When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following:

(i) Identification of the current activities, features, or attributes of a resource qualified for protection under section 4(f) and which may be sensitive to proximity impacts;

(ii) An analysis of the proximity impacts of the proposed project on the section 4(f) resource. 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;

(iii) Consultation, on the above identification and analysis, with the Federal, State, or local officials having ju-

risdiction over the park, recreation area, refuge, or historic site.

(7) A temporary occupancy of land is so minimal that it does not constitute a use within the meaning of section 4(f) when the following conditions are satisfied:

(i) 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;

(ii) Scope of the work must be minor, *i.e.*, both the nature and the magnitude of the changes to the section 4(f) resource are minimal;

(iii) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis;

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

(v) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 56 FR 13279, Apr. 1, 1991; 57 FR 12411, Apr. 10, 1992; 70 FR 24470, May 9, 2005]

EFFECTIVE DATE NOTE: At 73 FR 13395, Mar. 12, 2008, § 771.135 was removed, effective Apr. 11, 2008.

§ 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 significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government 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.