property. This exception is limited to situations where the official with jurisdiction over the resource agrees that a minor, temporary occupancy of Section 4(f) property will not result in any permanent adverse impacts and will not interfere with the protected activities, features, or attributes of the property, the property will be fully restored, and the ownership of the property will not change. This exception, which has been part of the Section 4(f) regulation since 1991, is founded on the FHWA and FTA's belief that the statute's preservation purpose is met when the Section 4(f) land, though temporarily occupied, is not permanently incorporated into a transportation facility and is returned to the same or better condition than it was found, with the consent of the official with jurisdiction over the Section 4(f) resource. Some construction-related activities taking place on Section 4(f) property may be so minor in scope and duration that its continued preservation is in no way impeded. Using publicly owned land for construction easements can result in less disruption to the surrounding community and often may result in an enhancement of the protected resource, such as landscaping, installation of new play equipment, or other improvement following construction.

A commenter asked whether a temporary occupancy not falling within this exception could be treated as a use with *de minimis* impact if the Section 4(f) land would be fully restored after construction. The answer is yes, a temporary occupancy that is determined to be a Section 4(f) use may qualify for a *de minimis* impact determination by the Administration if the requirements for such determination are met. This circumstance would arise when one or more of the criteria for the temporary-occupancy exception are not met, but the requirements for a *de minimis* impact determination are met. *De minimis* impact determinations related to temporary occupancies are addressed in more detail in the joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005.

One comment asserted that excepting "temporary" occupancies of land from the provisions of Section 4(f) would be problematic for "megaprojects" (usually defined as projects with a total estimated cost of more than $500 million) whose construction period might stretch over a decade or more. Another commenter expressed the opinion that occupation of Section 4(f) properties during such projects should not be considered "temporary" even if the occupancy period is less than the total time needed for construction. We agree that in some circumstances a very long-term occupancy of Section 4(f) properties, even if shorter in duration than the total time it takes to construct a particular project, could be contrary to the preservation purpose of Section 4(f) and, therefore, constitute a use. However, we did not change the relevant text ("[d]uration must be temporary, *i.e.*, less than the time needed for construction of the project") because the regulation imposes several other stringent conditions that would be difficult to satisfy in the case of a long-term occupancy. These other stringent conditions include the requirement that the occupancy not interfere with the activities, features, and attributes that qualify the property for Section 4(f) protection, and that the official with jurisdiction over the Section 4(f) property concur in its being occupied for this period of time.

Another commenter recommended elimination of the conditions for the "temporary occupancy" of land. These conditions, the commenter argues, create a major burden for determining whether the temporary-occupancy exception applies. Another comment recommended changing the wording in paragraph 774.13(d)(1) from "less than the time needed for construction" to "no greater than the time needed for construction." This change would allow the temporary occupancy of land to continue for the entire duration of construction. After carefully considering all of the comments, we decided that no change to the proposed language of paragraph 774.13(d) was warranted. If an applicant finds the exception burdensome, a traditional Section 4(f) evaluation, programmatic evaluation, or a *de minimis* impact determination are potentially available options. The paragraph is unchanged from the provision that has been in effect since 1991 and has not been controversial, and it strikes a reasonable balance between protecting Section 4(f) resources and advancing transportation projects.

Other comments recommended revising paragraph 774.13(d)(3). One proposed adding the word "significant" to modify the word "interference," and another suggested deleting the words "either a temporary or" so that only permanent interference would be a concern. We considered these comments, but decided not to make any changes. The appropriate question is not whether an interference with the protected activities, features, or attributes of a Section 4(f) property is significant, but whether the interference, taken together with the requirements of the other criteria in this exception, constitutes a use of Section 4(f) property. The duration of the interference is but one of several criteria that must be satisfied in order for the exception to apply. The criteria must be addressed in consultation with the official(s) with jurisdiction to determine if the temporary-occupancy exception is appropriate. The official with jurisdiction over the property is in the best position to determine whether the temporary occupancy would interfere inappropriately with any of the protected activities, features, or attributes of the property.

Several comments asked for clarification as to whether the condition of a Section 4(f) property after the temporary occupancy must be identical to the condition prior to the temporary occupancy, and one comment proposed an addition to the regulatory text to address the issue. One comment further requested that the regulation state that the restoration after a temporary occupancy must focus on the "protected features, activities, or attributes" of the site. We believe that the proposed text, which states that the land must be "returned to a condition at least as good as that which existed prior to the project" already provides the flexibility requested by these comments. The regulation does not require that the property be restored to a condition identical to its pre-occupancy condition. Often the official(s) with jurisdiction have plans to improve the property in some way and prefer to have the property restored in a manner that is consistent with those plans rather than returning to its pre-occupancy condition. Further, in light of the preservation purpose of Section 4(f), the focus of the restoration should certainly be on the protected features, activities, and attributes that make the property eligible for Section 4(f) protection. Because the proposed regulatory text already covers the issues raised by the comments, we did not make the requested changes.

- Paragraph 774.13(e)—Paragraph 774.13(e) is an exception for park roads and parkway projects under FHWA's Federal Lands Highway Program, 23 U.S.C. 204. Projects under this program are expressly excepted from Section 4(f) requirements within the Section 4(f) statute itself. Several comments were received on this exception. One comment recommended deleting "in accordance with" and substituting the statutory term "under." We agree, and modified the final rule accordingly. Another comment, repeated by several commenters, urged that the exception be

deleted, because parkways should be designed and routed so as to minimize damage to parks, and applying Section 4(f) would ensure that such planning occurs. We agree that park roads and parkways should be carefully designed and routed, and note that the FHWA's program funding these roads is jointly administered with the National Park Service pursuant to an interagency agreement that protects park values. However, by its own terms, the statutory language of Section 4(f) explicitly states that it does not apply to projects "for a park road or a parkway under section 204" of Title 23, United States Code. 49 U.S.C. 303(c); 23 U.S.C. 138(a). Therefore, the Administration is not required to apply Section 4(f) to these projects.

• Paragraph 774.13(f)—Paragraph 774.13(f) is an exception for certain trails, paths, sidewalks, bikeways, and other recreational facilities designed primarily for non-motorized vehicles [all of which are referred to collectively as "trails" in the remainder of the discussion of paragraph 774.13(f)]. Such trails generally serve recreational purposes and therefore represent the kind of resource that Section 4(f) was enacted to protect. When the Administration funds the construction or maintenance of trails, the application of Section 4(f), including the consideration of avoiding the Section 4(f) property, would not advance the preservation purpose of the statute.

One comment was received specifically concerning the construction of Recreational Trail projects. The Recreational Trails Program is an FHWA program that benefits recreation by making funds available to the States to develop and maintain recreational trails and trail-related facilities for both non-motorized and motorized recreational trail uses. The statute authorizing the Recreational Trails program (23 U.S.C. 206) limits the circumstances under which trails for motorized vehicles can be constructed and requires that States give consideration to project proposals that benefit the natural environment or that mitigate and minimize the impact to the natural environment. In addition, these projects must comply with NEPA. The comment notes that recreational trails for all-terrain-vehicles (ATVs) and motorcycles can cause significant damage to park properties. The FHWA and FTA acknowledge the validity of this comment, but the authorizing statute at 23 U.S.C. 206(h)(2) specifically excepts Recreational Trail projects from Section 4(f) because they are intended to enhance recreational opportunities. Thus, the FHWA and FTA have no discretion to apply Section 4(f) to these projects.

Several comments sought other types of clarification concerning trails. The FHWA and FTA have several longstanding, common-sense policies regarding trails which are articulated in the FHWA's Section 4(f) Policy Paper.[6] First, Section 4(f) does not apply to trails that are designated as part of the local transportation system. The reason for this policy is that such trails are not primarily recreational in nature, even though, like most transportation facilities, they may occasionally be used by the public for recreational purposes. A related long-standing FHWA and FTA policy from FHWA's Section 4(f) Policy Paper is that Section 4(f) does not apply to a permanent trail within a transportation corridor if the trail is not limited to a specific location within the right-of-way and the continuity of the trail is maintained following a change to the highway or transit guideway.[7] For example, an FHWA-funded project would widen a 5-mile stretch of roadway that has a parallel sidewalk within its right-of-way. The sidewalk, which is used primarily for recreation, is not tied to any specific location within the right-of-way through an easement, permit, memorandum of agreement, or other legal document. As part of the widening project, the sidewalk would be relocated several hundred feet from its current location, for the length of the project. All existing connections with intersecting sidewalks and paths would be maintained in the new location. The trail exception in paragraph 774.13(f) would apply to this sidewalk. In this example, the preservation purpose of Section 4(f) would not be advanced by requiring a search for alternatives that avoid moving the sidewalk. A third long-standing FHWA and FTA policy on trails concerns Section 7 of the National Trail Systems Act, 16 U.S.C. 1246(g). The National Trail Systems Act includes an exception to Section 4(f) compliance for any segment of a National Scenic Trails and National Historic Trails that is not on or eligible for the National Register. In order to clarify the application of Section 4(f) to trails, the three FHWA and FTA policies described above were incorporated into the final rule in paragraph 774.13(f).

One commenter asked that the trails exception specify that Section 4(f) does not apply to trails that are located within a transportation corridor by permission of the transportation agency, regardless whether the trail is permanent or temporary. We see no basis for incorporating this suggestion into the final rule. Permanent trails within the transportation right-of-way would be covered by the exception in paragraph 774.13(f)(3) if the trail is not limited to a specific location with the right-of-way, and if the continuity of the trail is maintained after the project. Temporary trails within transportation corridors are already adequately covered by paragraph 774.11(h).

• Paragraph 774.13(g)—Paragraph 774.13(g) is the exception for transportation enhancement projects and mitigation activities. The transportation enhancement activities (TEAs) listed in 23 U.S.C. 101(a)(35) that are eligible for certain FHWA funds include several activities that are intended to enhance Section 4(f) properties. Such TEAs must therefore use the Section 4(f) property, and avoidance of the property would be inconsistent with the authorizing statute in this case. Also, this exception is consistent with past FHWA and FTA practice and caselaw. A use of Section 4(f) property under the statute has long been considered to include only adverse uses—uses that harm or diminish the resource that the statute seeks to protect. Accordingly, this exception is limited to situations in which the official 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).

Two comments were received on the exception for transportation enhancement projects and mitigation activities. One comment suggested that recreational facilities that have previously been improved with transportation enhancement funds should not be subject to Section 4(f). We see no legal basis for incorporating this suggestion into the final rule. The purpose of Section 4(f) is the preservation of Section 4(f) property without regard to the past history of the property. A transportation enhancement project may create, add to, or enhance the Section 4(f) activities, features, or attributes of a Section 4(f) property. The result would be an improved Section 4(f) resource more deserving of Section 4(f) protection not less deserving. That Section 4(f) property would have to be afforded Section 4(f) protection in any subsequent transportation project that might use it.

The other commenter believed this paragraph contradicts a statement in FHWA's "Section 4(f) Policy Paper"

[6] "Section 4(f) Policy Paper," March 1, 2005, Question 14. See *http://environment.fhwa.dot.gov/projdev/4fpolicy.htm.*

[7] "Section 4(f) Policy Paper," March 1, 2005, Question 14. See *http://environment.fhwa.dot.gov/projdev/4fpolicy.htm.*

involving a TEA that does not incorporate land from the Section 4(f) property into a transportation facility. The statement from the "Section 4(f) Policy Paper" cited by the commenter is from Question and Answer (Q&A) 24A. That Q&A illustrates two possible scenarios in which transportation enhancement funds are used for the construction of a walkway or bike path, one scenario resulting in a Section 4(f) use and one not resulting in a Section 4(f) use. The commenter suggested that the written concurrence of the officials with jurisdiction should not be needed for the latter scenario, since no Section 4(f) use would occur. The comment does not appear to suggest that coordination with the officials with jurisdiction would not be necessary at all, but rather it suggests that the required written concurrence of those officials in the second scenario would be unnecessary. Certainly, thorough coordination with the officials with jurisdiction over any Section 4(f) property involved in a project has been a fundamental principle in complying with Section 4(f). When a TEA or mitigation activity is proposed on a Section 4(f) property, the Administration must ensure that the resultant effect on the property is, in the view of the officials with jurisdiction over the property, acceptable and consistent with the officials' existing and planned use of that property. Such coordination and assurances are needed even in situations where no transfer of property to a transportation use is anticipated. While the ultimate decision on whether a Section 4(f) use occurs always rests with the Administration, documentation of the views of the officials with jurisdiction over the Section 4(f) property is needed in the administrative record. Accordingly, the requirement for the written concurrence of the officials with jurisdiction was not removed from the final rule, though the text was revised for greater clarity.

• NPRM Paragraph 774.13(i)—The FHWA and FTA proposed a Section 4(f) exception for the new FTA program that funds "Alternative Transportation in Parks and Public Lands" (49 U.S.C. 5320). Avoidance of parks and public lands seems inconsistent with a program authorized by Congress specifically to provide transportation facilities in parks and public lands. Nevertheless, several comments were strongly opposed to this exception, and none favored it. Considering the lack of support for the proposed exception and the lack of an explicit statutory basis for the exception, we removed it from the final rule.

Section 774.15 Constructive Use

This section addresses the concept of the constructive use of Section 4(f) property, which can only occur where there is no actual physical taking of the property. One comment asserted that the proposed constructive use regulation is "much more extensive than what exists now." Aside from reorganizing the content, the NPRM only proposed adding to two of the existing examples of when a constructive use occurs, a minor change from the current regulation. Many other comments were received suggesting additional examples, deletions, modifications, and clarifications regarding constructive use. One general comment was that, to improve the readability of the regulation, the definition of constructive use and the list of examples of circumstances not constituting constructive use should be consolidated in Section 774.15, which already contained the bulk of the provisions related to constructive use. We agree and have accordingly moved the definition of constructive use to paragraph 774.15(a) and the list of examples to paragraph 774.15(f). Another comment suggested breaking the several different but related provisions of NPRM paragraph 774.15(a) into separate paragraphs. Briefly, these provisions are: that a traditional Section 4(f) evaluation process is appropriate when there is a constructive use; that the Administration's determination that there is no constructive use need not be documented; and that a constructive use determination will be based on certain specified analyses. We agree that separating these provisions would improve the clarity and readability of the rule, so the final rule addresses these issues in three paragraphs designated (b), (c) and (d), respectively.

Several comments asked that various terms be defined, including "not substantial enough to constitute a constructive use," "substantially impair the activities, features, and attributes," and "substantially diminish." We did not define these terms in the final rule because the words are all used with their common English meanings. The terms will be applied to a variety of fact situations, and narrowing the meaning of any of the terms would limit its applicability to particular fact situations that cannot be anticipated now. In addition, these terms are not new—the same terminology is used in the current regulation, and it has not been controversial or problematic. Additional guidance on the meaning of these terms can be found in FHWA's "Section 4(f) Policy Paper."

Another general comment proposed adding a paragraph to the final rule to clarify that a finding of "adverse effect" under Section 106 of the National Historic Preservation Act (NHPA) does not automatically equate to constructive use under Section 4(f), nor does an adverse effect create a presumption of a constructive use. We agree that the threshold for constructive use under Section 4(f) has generally been higher than the threshold for finding an adverse effect under Section 106 of the NHPA. However, we believe that making this distinction in the Section 4(f) regulation would be inappropriate because the NHPA is an entirely separate statute with its own implementing regulation promulgated by another Federal agency.

Comments on specific paragraphs within Section 774.15 are discussed in order below.

• Paragraph 774.15(a)—Paragraph 774.15(a) contains the definition of "constructive use." The definition was moved here from NPRM Section 774.17 as discussed above.

One comment asked for the word "permanently" to be added to the definition, so that a constructive use could not occur if the substantial impairment is only temporary. We did not adopt this proposal because some "temporary" impacts (for example, the construction impacts of a major, complex project) may last for many years. In addition, we think that the duration of the impacts can already be considered under the existing definition. A constructive use occurs when the proximity impacts are so severe as to substantially diminish the activities, features, or attributes that qualify the property for protection. The duration of a proximity impact is one factor that should be considered in determining if the protected activities, features, or attributes would be substantially diminished.

Another commenter asked that the last sentence of the definition be deleted, as it purportedly discourages findings of constructive use. The sentence says "substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished." An identical sentence appears in the current regulation. We carefully considered this comment, but decided to keep the sentence. It helps to explain what is meant by "substantial impairment." In addition, we believe that the concept of constructive use has been correctly applied since the promulgation of the constructive-use provision in 1991. Findings that a project constructively uses a Section 4(f)

property have been appropriately rare, because, by definition, there is no physical taking of property in these situations, and because the FHWA and FTA support the mitigation of proximity impacts on Section 4(f) properties to the point that a substantial impairment of the protected activities, features or attributes does not often occur.

• Paragraphs 774.15(b), (c), and (d)—A number of comments were received on the constructive-use requirements in paragraphs 774.15(b), (c), and (d), which are separated into distinct paragraphs in the final rule, as previously discussed. Each comment proposed an alternative re-wording purported to explain more clearly how a constructive use should be evaluated or to clarify that a constructive use determination is not required for each nearby Section 4(f) property. These provisions have been in place since 1991 and we think that they are clear and are being applied consistently. Therefore, we decided to adopt only one proposed re-wording and that is in paragraph 774.15(c). The provision was clarified to convey our intent to avoid excessive documentation regarding determinations of no constructive use, and not to avoid determining whether or not a constructive use exists. Paragraph (c) now reads: "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." The same commenter also requested a change to require "substantial evidence" as the basis for a constructive use finding. We considered the comment but decided not to make the change because it would introduce a new term that provides little added value. The Administration may decide that a constructive use determination is inappropriate if the evidence of substantial impairment is inadequate.

Another comment expressed concern with the inclusion of the phrase "to the extent it reasonably can" in paragraph 774.15(d), related to basing a determination of constructive use on consultation with the official(s) with jurisdiction over the Section 4(f) property. The FHWA and FTA agree that a determination of constructive use should always be based upon the factors identified, so the phrase "to the extent it reasonably can" was removed from the final rule.

Two comments expressed an opinion that paragraph 774.15(d)(2) would invite a great deal of inappropriate and irrelevant speculation about what might or could occur to Section 4(f) properties in the future if a project were not built. One suggested that we strike the last sentence, which states "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." We disagree and have decided not to make the suggested change. First, the language proposed in the NPRM is not new, and we have not proposed any substantive change from current regulation or practice. We have no reason to believe, based on our experience with Section 4(f) and constructive use, that this consideration, taken together with other considerations, is an invitation to "speculate" about an owner's future plans regarding a Section 4(f) property. To the contrary, the provision requires an appropriate and relevant consideration that must be grounded in facts. Examples of the basis for reasonable expectations of future impacts include, in appropriate situations: discussions with the property owner, zoning applications, analysis of local development trends, and the existence of conservation easements or other legal protections to preserve the protected features, activities, and attributes of the property. The consideration of reasonably foreseeable non-project impacts is both appropriate and relevant to the decision of whether or not the proximity impacts of the project will cause a substantial impairment of the protected features, activities, or attributes of a Section 4(f) property. Also, including this information in the analysis could be beneficial to the resource by highlighting reasonably foreseeable impacts not caused by the transportation project because it would inform the State or local governmental authorities who are the best position to consider protective actions that are not within the power of the Administration.

• Paragraph 774.15(e)—Comments were received on the list of examples of situations in which a constructive use is presumed to occur. One comment asked for definitions of, and a method to measure, many phrases in the paragraph such as "substantially interferes with use and enjoyment of a noise-sensitive facility," "substantially diminish the utility of the building," and "substantially reduces the wildlife use." These words are all used with their plain English meanings, and they generally describe situations that require judgment and are not conducive to standardized quantitative analysis. The relevant phrase must be applied to a particular set of facts to provide context. For example, one would need to know how a particular noise-sensitive facility is used by the public and what the layout and design of the facility is in order to make a reasonable judgment whether a proposed transportation project would "substantially interfere with use and enjoyment" of that noise-sensitive facility. We did not make any changes to the regulation in response to this comment.

Another comment suggested removing the examples from the regulation in favor of including or expanding the examples in the FHWA's "Section 4(f) Policy Paper." This comment expressed the view that the examples have the potential to lead to more frequent findings that proximity impacts constitute constructive uses. The FHWA and FTA considered this comment but have decided to retain the examples in the Section 4(f) regulation, where they have been codified since 1991 and have not resulted in the problems envisioned by the commenter. Illustrating the concept of constructive use through practical examples has facilitated the application of the concept in fact situations not represented in the examples.

Another comment asked for a clarification that the list of examples in which a noise impact would be considered a constructive use is not an exhaustive list. We agree and restructured the paragraph in the final rule to clarify that these are simply illustrative examples of constructive use and not an exhaustive list. The reorganization of the paragraph also makes the examples easier to follow by separating them into subparagraphs.

Two additional comments specifically focused on the examples of constructive use due to noise. One comment suggested that campgrounds should not be considered Section 4(f) properties because they are essentially multiple use areas. We disagree with this conclusion and therefore reject the suggestion. The FHWA and FTA have always considered publicly owned campgrounds to be recreational areas covered by Section 4(f), and this position is supported by case law. Another commenter suggested that an example be added to clarify that the provision applies not only to man-made facilities such as campgrounds, but also to natural areas where the protection of natural sounds is important. We agree that some Section 4(f) properties may include natural features emitting sounds that are enjoyed by humans, such as the enjoyment of listening to a babbling

brook. When such features are a significant and officially recognized attribute of a park, then the Administration should consider whether the noise increase attributable to the highway or transit project would substantially diminish the continued enjoyment of the natural feature. However, we did not add this example to the regulation because the regulation is necessarily applied on a case-by-case basis and there are already four examples of a constructive use due to noise increases. Another substantially similar example is not desirable, as this narrow distinction can be adequately covered in future FHWA and FTA Section 4(f) guidance.

Another comment suggested rewording the example in paragraph 774.15(e)(2) as follows: "the location of a proposed transportation facility in such proximity that it substantially obstructs or completely eliminates the primary view * * *" The FHWA and FTA decided not to make the proposed change. In some circumstances a substantial impairment could result from a partial obstruction or partial elimination of the primary view of a historic building, depending on the criteria that makes the property eligible for the National Register.

Another comment on this paragraph referred to the noise abatement criteria in FHWA's noise regulation (23 CFR part 772), and expressed the opinion that, for certain types of properties there may be more appropriate measures of noise and unwanted sounds than those used in the noise regulation. The comment suggested that the FHWA and FTA consult with the National Park Service office working on "Soundscapes" for further information. This comment and suggestion were discussed with FHWA highway noise experts, and the FHWA and FTA considered the views of the National Park Service office, as suggested. However, we have concluded that the suggestion is beyond the scope of this rulemaking because it concerns an entirely separate part of Title 23, Code of Federal Regulations, which was not proposed for revision in the NPRM.

Another commenter suggested that the noise threshold for constructive use should be specified as 57 dBA (Category A, Table 1 in 23 CFR part 772). We disagree that a single threshold can be specified due to the varied purposes and functions of different types of Section 4(f) property. The appropriate noise abatement criteria will depend on the activity category of the particular Section 4(f) property. When a Section 4(f) property is determined to be covered under Activity Category A in Table 1 of 23 CFR part 772, then the applicable noise abatement criteria would include the 57 dBA threshold. Examples of Section 4(f) resources covered under Category A are those for which a quiet setting is essential to their continued function, such as an amphitheater or the gardens of an historic monastery. The vast majority of Section 4(f) properties will not fall under Category A. Regardless of which Category the Administration deems applicable to the Section 4(f) property, a constructive use occurs when the relevant noise criteria cannot be met, if the resulting noise substantially impairs the protected activities, features, and attributes of the Section 4(f) property.

Several comments focused on the example of constructive use due to substantial impairment of aesthetic features. One comment asked that the final rule clarify that for visual and aesthetic effects to constitute a constructive use of an architecturally significant historic property, the site would have to derive its value in substantial part due to its setting. We did not adopt this comment. Historic buildings that are significant due to their architecture, do not as a rule, rely upon their setting. The language proposed ("[locating] a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building") captures the more important criteria—the views of such a building available to the public.

Another comment suggested adding "qualifying wild and scenic rivers" to this paragraph. The Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287, sets forth those rivers in the United States designated as part of the Wild and Scenic River System. Within the System there are wild, scenic, and recreational designations. In determining whether Section 4(f) is applicable to a particular river within the System, one must look at the ownership of the river, how the river is designated, how the river is being used, and the management plan for the relevant portion of the river. Only if the river is publicly owned and is designated as a recreational river under the Wild and Scenic Rivers Act or is designated in the management plan for the river as serving a Section 4(f) purpose would it be considered a Section 4(f) property. A single river may be divided into segments that are separately classified as wild, scenic, or recreational. Only those segments that are classified as serving a purpose protected by Section 4(f), such as recreation, would be subject to Section 4(f). The designation of a river under the Wild and Scenic Rivers Act does not, by itself, impart the protections of Section 4(f). Section 4(f) protections are imparted only if the section of the river used by the proposed project fits one or more of the categories of properties protected by Section 4(f). For example, if a river is included in the System and is designated as "wild," but is not being used as, or is not designated under a management plan as, a park, recreation area, wildlife or waterfowl refuge and is not an historic site, then Section 4(f) would not apply. In light of these complexities, we believe that simply adding the phrase "qualifying wild and scenic river" could cause confusion and create the potential for the misapplication of Section 4(f). Accordingly, the FHWA and FTA decline to adopt the proposed language. However, we have clarified the applicability of Section 4(f) to Wild and Scenic Rivers by adding paragraph (g) to Section 774.11, which states: "Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as or are designated in a management plan as a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act must be satisfied, independent of the Section 4(f) approval." This language is consistent with long standing FHWA and FTA policy presented in the FHWA's "Section 4(f) Policy Paper."

Several comments were received on the example of a constructive use due to vibration impacts. One commenter noted with approval that the proposed language apparently only considered the vibration impacts of operating a transportation project and not the construction impacts. Another commenter had the opposite view, and proposed that construction impacts be added to the regulation, along with other edits for clarity. We agree that severe construction vibration can substantially impair the use of a Section 4(f) property in the same way as severe operational vibrations. The final rule clarifies that vibration due to construction should be considered, and that vibration should be considered for any mode of transportation project to which this rule applies. Also in the same sentence, we replaced "affect the structural integrity of" with the simpler and clearer "physically damage." Another comment on this section suggested that repair of damage should be mandatory, and that irreparable vibration damage should be considered a use. The comment proposed adding at

the end of the sentence, "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 site must be returned to a condition which is at least as good as that which existed prior to the project." We clarified the intent of this paragraph with language similar to what was proposed.

• Paragraph 774.15(f)—Many comments were received on paragraph 774.15(f), which provides examples of proximity impacts that are not severe enough to constitute a constructive use. Several comments asserted that the regulation would be easier to use if this list were moved to Section 774.15, Constructive Use, so that all examples regarding possible constructive uses are in one place. We agree, and moved NPRM paragraph 774.13(e) into paragraph 774.15(f) in this final rule. One general comment was that the list should be deleted for fear that the Administration will apply the paragraph as if it were an inclusive list of all possible proximity impacts that are not constructive uses. This fear is unfounded because the language, "examples include," makes it clear that the list is not all-inclusive. Another comment asked that the examples indicate the requirement that an EA or EIS be prepared. The issue of which NEPA document to prepare depends on whether there are significant impacts expected and is addressed in 23 CFR Part 771. The issue is outside the scope of this regulation. Several comments on this paragraph requested clarification that an adverse effect under Section 106 is not automatically a Section 4(f) constructive use. We agree with this comment. The FHWA "Section 4(f) Policy Paper," Question 3B, explains that if a project does not physically take (permanently incorporate) historic property but the project causes an adverse effect under Section 106, then one should consider whether the proximity impacts of the project constitute a constructive use. We did not, however, feel that this nuance needed clarification within the regulation itself.

Several comments suggested modifying or deleting the last sentence in paragraph 774.15(f)(4), which disallows the use of a late-designation exception where a historic property is close to, but less than, 50 years of age. In the case of a constructive use, the late-designation exception says that a constructive use does not occur if a property has been acquired for transportation purposes after adequate effort to identify Section 4(f) resources or if the project location has been established in a final environmental document, and the property is subsequently designated as a Section 4(f) property or is determined to be significant. One commenter points out that the sentence proposed for modification or deletion perpetuates the false assumption that properties over 50 years old are automatically eligible for the National Register. Another commenter states that the provision is confusing because there is no parallel in Section 106, and the sentence could be read to effectively extend Section 4(f) protections to properties that are not necessarily historically significant under Section 106. The FHWA and FTA agree that this sentence could be confusing and have modified the sentence in question to clarify that 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.

One comment suggested that in paragraph 774.15(f)(6) we include consultation on the appropriateness of any mitigation proposed for proximity impacts in order to ensure that the views of the officials with jurisdiction over the Section 4(f) property regarding the appropriateness of the mitigation and the resulting condition of the Section 4(f) property are considered. We agree, and have made this change. The provision now reads: "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."

Another comment requested that we revise this paragraph so that the analysis must include consideration of the condition of the Section 4(f) resource as it existed prior to construction of the transportation project, rather than the condition that would exist if the project were not built. We did not make this change because it is more appropriate to consider the true future no-action scenario than to invent a highly unlikely, hypothetical future in which current conditions are frozen in time. This approach is consistent with NEPA practice, in which the Administration compares the impacts expected under the future build alternatives to the expected future no-action scenario.

We received one comment on the example of a vibration impact not rising to the level of a constructive use of a Section 4(f) property. The comment suggested that the regulatory text should contain detailed, measurable limits for vibration levels based on guidance issued by FTA and guidance issued by the U.S. Bureau of Mines. (The FHWA does not have equivalent guidance on vibration.) The impact thresholds for vibration are presented in voluminous guidance that provides background on the complex science involved in their development and application. There are different vibration metrics whose appropriateness in a particular situation must be determined by acoustical experts. The background information that would be needed would be highly technical, voluminous, and difficult to properly present in the regulation. The FHWA and FTA does not agree with the notion that a single vibration threshold applicable in all situations could be specified in regulation and has therefore declined to do so.

Section 774.17 Definitions

A few comments stated that the definitions should be moved to the beginning of the regulation because the beginning is the more common location. The NPRM explained that the definitions were placed at the end because some of them are lengthy and complex. The final rule includes cross-references to the definitions at key points within the regulatory text. Therefore, we did not adopt the suggestion to move the definitions. Other comments proposed definitions for various words that appear only once in this regulation. Where we felt it was appropriate to add clarification in those instances, it was done where the term appears and not in the definitions section. For example, an explanation of "concurrent planning" was integrated into paragraph 774.11(i). One comment suggested combining the definitions of "all possible planning," "*de minimis* impact," and "feasible and prudent alternative" in a separate section of the regulation. We did not adopt this suggestion because it would not have improved a reader's understanding of these terms.

One commenter felt that including a definition of "transportation facility" would obviate the need for the exception for transportation enhancement activities. The idea likely behind this is that, with most transportation enhancement projects, there is no use of the Section 4(f) property by a transportation facility. The FHWA and FTA decided not to follow this suggestion because an explicit exception for transportation enhancement activities is more definitive and covers a broader range of possible transportation enhancement activities.

Many comments proposed additional definitions of various terms. These proposals were all carefully considered,

but in most cases were not adopted. Many of the proposed definitions are dependent on the context in which they are applied, and therefore do not lend themselves easily to definition. In other cases, the meaning of the term is obvious or the proposed definition is beyond the scope of this rulemaking. For example, we declined to include the definition for the NEPA term "significant impact on the environment," which is addressed in the NEPA regulations of the Council on Environmental Quality (CEQ). One comment recommended the addition of definitions for all of the following words and phrases: "Relative value," "matter of sound engineering judgment," "unreasonable to proceed," "severe safety or operation problems," "reasonable mitigation," "severe social, economic, or environmental impacts," "severe disruption to established communities," "severe disproportionate impacts to minority or low income populations," "severe impacts to environmental resources protected under other Federal statutes," "operational cost of an extraordinary magnitude," "unique problems," and "cumulatively cause unique problems or impacts of extraordinary magnitude." The FHWA and FTA decided that including definitions for these terms in this final rule was inappropriate or unnecessary as the terms are used in their plain English meaning and likely involve judgments that depend on the context of the specific project, location, and Section 4(f) property.

Comments on specific definitions within Section 774.17 are discussed in order below.

• "Administration"—One comment noted that SAFETEA–LU amended Sections 325, 326, and 327 of Title 23, United States Code to allow the FHWA (and in the case of Section 326, the FTA also) to assign certain specified environmental responsibilities to a State through a written memorandum of understanding (MOU) or agreement. Section 4(f) is one of the assignable responsibilities. When the FHWA or FTA enters into such MOU or agreement, the State will act in lieu of the FHWA or FTA for those responsibilities that are specified in this regulation as Administration responsibilities and that have been assigned to the State through the MOU or agreement. Therefore, the definition of "Administration" was extended to include a State that has been assigned responsibility for certain environmental requirements in accordance with 23 U.S.C. 325, 326, or 327, or other applicable law, to the extent that the required agreement between the State and FHWA or FTA allows the State to act in place of the FHWA or FTA on Section 4(f) matters.

• "All Possible Planning"—The NPRM proposed a definition of the statutory phrase "all possible planning" to minimize harm when a transportation project uses Section 4(f) property. A number of comments were received proposing various revisions to the regulatory language addressing "all possible planning" in the context of *de minimis* impact determinations. One commenter objected to the use of the word "obviates" because, in the commenter's opinion, it would imply that the Administration is not required to reduce impacts to the minimum level possible in the approval of a *de minimis* impact determination. Another commenter expressed a concern that paragraph (5) of this definition would relieve the Administration from any "independent obligation" to comply with the "all possible planning to minimize harm" requirement of Section 4(f) when the Administration makes a *de minimis* impact determination. According to this comment, the proposed regulatory text is inconsistent with SAFETEA–LU section 6009 which "explicitly retained" the "all possible planning" requirement with respect to projects with *de minimis* impact on non-historic Section 4(f) properties. Other comments suggested replacing the phrase "subsumes and obviates" with "eliminates" or "is presumed to satisfy" the requirement for all possible planning to minimize harm, in order to convey more clearly the idea that if a *de minimis* impact determination is made, then no separate minimization-of-harm finding is required.

The FHWA and FTA carefully considered these objections and alternative language proposals and has deleted the word "obviates," and has retained the word "subsumes" in response. The intent of the provision is not to eliminate the Administration's obligation to minimize harm to affected Section 4(f) properties, but rather to explain that, in a *de minimis* impact situation, the effort to reduce the impacts to *de minimis* levels and "all possible planning" to minimize harm are folded together into a single step. In other words, when a *de minimis* impact determination is approved, either the project already includes measure(s) to minimize harm to which the applicant is committed or the project will have such minor impacts on the Section 4(f) property that the harm to it is negligible without additional measures. The FHWA and FTA believe that the word "subsumes" articulates this intended meaning better than "presumed to satisfy."

Lastly, in the FHWA and FTA's view, paragraph (5) as revised is entirely consistent with the *de minimis* impact provision in SAFETEA–LU section 6009. Contrary to the commenter's interpretation, 49 U.S.C. 303(d)(1)(B), as amended by SAFETEA–LU, does not impose on the Administration an "independent obligation" to comply with the minimization of harm requirement of Section 4(f). Rather, the purpose of the provision is to ensure that the applicant anticipating a *de minimis* impact determination conducts "all possible planning" to minimize harm when developing and committing to "any avoidance, minimization, mitigation, or enhancement measures" necessary to reduce impacts to *de minimis* levels. Furthermore, paragraph (5) of this definition must be read in conjunction with paragraph 774.3(a)(2) which precisely tracks the statutory language regarding the inclusion of measures to minimize harm, and the definition of "*De Minimis* Impact" in Section 774.17, which is an impact that "will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f)."

• "Applicant"—One comment was received on the definition of applicant. The comment notes that while the definition provides for the applicant to work with the Administration to conduct environmental studies and prepare environmental documents, the definition does not provide for the applicant to help prepare decision documents and determinations. While an applicant may in some cases be asked to help prepare decision documents and determinations, the definition was not changed because the applicant does not always do so. In any case, all decisions and determinations required under Section 4(f) are ultimately the responsibility of the Administration, unless the applicant is a State that has been specifically assigned Section 4(f) authority under the aforementioned statutes providing for such assignment.

• "CE"—The proposed rule included definitions for the NEPA terms "EIS" and "EA," including cross-references to the FHWA and FTA's NEPA regulations. A definition and cross-reference for the NEPA term "CE" was added for consistency. The definition states: "*CE.* Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR § 1508.4 and § 771.117 of this title." When deciding whether to issue a CE from NEPA under

the FHWA and FTA NEPA regulations, FHWA and FTA take into account whether there are unusual circumstances.

• *"De Minimis Impact"*—Several comments asked that the proposed definition of *de minimis* impact be expanded not only to describe what a *de minimis* impact is, but also to prescribe the process for making a *de minimis* impact determination. The FHWA and FTA have considered these comments and decided that the definition of *de minimis* impact will not include the procedures for making *de minimis* impact determinations because the regulation describes the process and documentation in paragraphs 774.5(b) and 774.7(b), which are the more appropriate locations.

One comment requested that the definition address the transfer of lands in which there are Federal encumbrances under other statutes. The FHWA and FTA did not make this change because it is an issue unrelated to the definition and is addressed in paragraph 774.5(d). In addition, the joint FHWA/FTA "Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources," December 13, 2005, explains that Section 4(f) lands with other Federal encumbrances must address and comply with the requirements of the laws associated with those encumbrances.

One comment recommended the elimination of *de minimis* impact determinations from the final rule. The FHWA and FTA retained the option to grant Section 4(f) approvals via a *de minimis* impact determination because Congress amended Section 4(f) in 2005 to allow *de minimis* impact determinations. (SAFETEA–LU, Pub. L. 109–59, sec. 6009(a), 119 Stat. 1144 (2005)).

One comment recommended a change to the proposed language that would allow a temporary adverse effect to be treated as a *de minimis* impact. The FHWA and FTA decided not to include this change because temporary occupancy of Section 4(f) property is already dealt with under paragraph 774.13(d). The final rule provides the flexibility to appropriately address temporary adverse impacts, which may or may not be *de minimis*.

Several comments recommended changes to the definition of a *de minimis* impact for historic sites. One comment stated that the proposed definition of *de minimis* impact for historic sites did not adequately emphasize that the determination of "no adverse effect" or "no historic property affected" must be made in accordance with the requirements of the Section 106 regulation, including consultation. The FHWA and FTA agree and have reworded the definition to emphasize that the Administration must determine, in accordance with the Section 106 regulation, that there is no adverse effect or that no historic property is affected. Another comment recommended language that would allow adverse effects to contributing elements of a historic district to be considered a *de minimis* impact if the historic district, as a whole, is not adversely affected. The FHWA and FTA did not adopt this suggestion because Section 106 policy and regulations define how adverse effects to historic districts are to be considered.

• "EA"—One comment recommended deleting this definition from the regulation because it is defined in the CEQ's NEPA regulations. The proposed definition is consistent with the CEQ NEPA regulations and is necessary to provide consistency between the FHWA and FTA's Section 4(f) and NEPA regulations.

• "EIS"—One comment recommended deleting this definition from the regulation because it is defined in the CEQ's NEPA regulations. The proposed definition is consistent with NEPA and the CEQ NEPA regulations and is necessary to provide consistency between the FHWA and FTA's Section 4(f) and NEPA regulations. Another comment asked that this definition define the phrase "significant impacts on the environment." The concept of significant impacts is addressed by CEQ in its NEPA regulations and by various Federal courts in caselaw, and its definition is outside the scope of this rulemaking. The definition of EIS cross-references the NEPA regulations.

• "Feasible and Prudent Avoidance Alternative"—This definition was the primary impetus for this rulemaking. In section 6009(b) of SAFETEA–LU, Congress directed the U.S. DOT to "promulgate regulations that clarify the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives" to using Section 4(f) properties for transportation projects. Because these are fact-specific determinations, the NPRM proposed a definition that requires consideration of the totality of the circumstances and the relative significance of the Section 4(f) property. The definition proposed six factors that could support a determination that there is "no feasible and prudent avoidance alternative." A seventh factor is the accumulation of the other factors, and whether in combination the overall impact is severe.

This definition was the subject of the most comments of any proposed section of the NPRM. The views expressed varied drastically, and a wide variety of revisions were proposed. In general, comments opposed to the proposed definition feared that it was not stringent enough to protect Section 4(f) properties because it involves a balancing test. The definition provided in this final rule addresses this concern by adding the word "substantially" to clarify that the balancing test is weighted in favor of avoiding the use of Section 4(f) properties: "A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." Another general concern was that the U.S. Supreme Court rejected any type of balancing test in *Overton Park*. After careful consideration, the FHWA and FTA do not agree with this view. In *Overton Park*, the Court instructed that cost, directness of route, and community disruption should not be considered "on an equal footing with the preservation of parkland." 401 U.S. 402 at 412. The NPRM proposed to define a feasible and prudent avoidance alternative as one that "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation goals of the statute." This definition is consistent with the decision in *Overton Park* because it requires the Administration to take into consideration the importance of protecting the Section 4(f) property. Avoiding the Section 4(f) property is not on equal footing with other concerns but, as the NPRM noted, the consideration of avoidance alternatives must begin with a "thumb on the scale" on the side of avoiding the Section 4(f) property. 71 FR 42611, 42613 (2006). Therefore, the definition in this final rule is unchanged from that proposed in the NPRM except for the aforementioned addition of "substantial" and a change in reference to "preservation goals" to refer to the "preservation purpose" in order to emphasize that the statute itself in 49 U.S.C. 303(a) establishes as its purpose "that special effort should be made to preserve the natural beauty of the countryside and public parks and

recreation lands, wildlife and waterfowl refuges, and historic sites."

More specific comments and changes are addressed below. One comment opposed the requirement that balancing be performed with a "thumb on the scale" in favor of the Section 4(f) property. This comment also opposed the requirement that problems with an avoidance alternative be severe and not easily mitigated before that alternative may be rejected as one that is not prudent and feasible. The requirement that balancing be done with a thumb on the scale is at the very heart of *Overton Park*, the only U.S. Supreme Court case interpreting the application of Section 4(f) at this time. Further, in the conference report accompanying SAFETEA–LU, Congress made clear that the U.S. DOT must set forth factors to be considered and the standards to be applied when determining whether an avoidance alternative is prudent and feasible, and that the factors must adhere to the legal standard set forth in *Overton Park*. H.R. Rep. No. 109–203, at 1057–58 (Conf. Rep.).

The precise term that the NPRM proposed to define was "feasible and prudent alternative." In this final rule, the defined term was changed to "feasible and prudent avoidance alternative." This change was necessary to clarify that Section 4(f) directs the Administration to search for alternatives that avoid using Section 4(f) property. One comment had suggested that we clarify within the definition of "feasible and prudent alternative" that the feasible and prudent standard applies to all project alternatives, not only avoidance alternatives. Based on this and other comments we took a close look at the definition and the way in which the term "feasible and prudent alternative" was used throughout the NPRM. We found that there were instances in which the use of the term was inconsistent with the definition. This has been corrected throughout the final rule and the definition has been clarified as "feasible and prudent avoidance alternatives," as previously discussed. In responding to the comment, we point out that Section 4(f) itself speaks of a "feasible and prudent alternative to using that land", i.e., a feasible and prudent avoidance alternative. (49 U.S.C. 303(c)(1)). As a result, the concept of a feasible and prudent alternative is closely associated with the avoidance of Section 4(f) use.

Several comments suggested that the words "feasible" and "prudent" be split and defined separately in the final rule because the U.S. Supreme Court had discussed each term separately in *Overton Park*. Therefore, each word has "a separate and distinct meaning," which could become confused by combining them into "a single concept." The FHWA and FTA agree that the comment has merit, and have modified the definition to expand upon the meaning of each specific word in a separate paragraph within the definition of "feasible and prudent avoidance alternative." The two terms were not completely separated into distinct definitions because "feasible" and "prudent" are two factors that, when combined, constitute a single test. In other words, the key is not whether a particular avoidance alternative is feasible or prudent, but rather whether it is feasible and prudent. That being the case, the agencies believe the regulation should reflect this important link between the terms.

Several comments opposed designating "severe impacts to environmental resources protected under other Federal statutes" as a factor in determining prudence. One favored changing the language to require another Federal agency to formally deny a permit under another Federal law before this factor could be considered in rejecting an avoidance alternative. This change was not adopted because there is no indication that Congress intended the Administration to elevate Section 4(f) protection above all other environmental concerns. The FHWA and FTA believe that the factor proposed is a relevant concern for determining the prudence of an avoidance alternative and that the language proposed is adequate. Requiring an applicant to submit permit applications and obtain a formal denial when a regulatory agency has indicated its objections to an avoidance alternative would create additional process and delay that do not necessarily equate to better project development. In addition, there is substantial caselaw supporting the consideration of other environmental concerns.

One comment expressed concern that designating "additional construction, maintenance, or operational costs of an extraordinary magnitude" as a factor in determining prudence does not clarify the issue of how much money should be spent to avoid the use of Section 4(f) property. Other comments questioned the requirement that such costs be "of extraordinary magnitude." We understand that deciding what amount constitutes a reasonable public expenditure for avoiding the use of a Section 4(f) property may not be simple. Nevertheless, it is not appropriate to set a single dollar amount or even a percentage of total project cost as the threshold. The decision must take into account multiple factors including the type, function, and significance of the Section 4(f) property. Having multiple factors to weigh, of which cost is but one, should simplify the decision about the prudence of an avoidance alternative. If increased cost alone is the only downside to an avoidance alternative, the preservation purpose of Section 4(f) requires that the increased cost reach an extraordinary magnitude before it would outweigh the protection of Section 4(f) property. Merely a "substantial cost increase" is not enough.

One commenter recommended the deletion of the first two sentences of the definition of "feasible and prudent avoidance alternative" because the commenter felt that measuring the relative value of a Section 4(f) resource would be difficult and that the language is not consistent with paragraph 774.3(a). The FHWA and FTA decided not to delete these sentences because the regulation does not require the measurement of the relative value. Rather, it states that it is appropriate to consider the relative value of the Section 4(f) resource. Also, the FHWA and FTA do not agree that this definition is inconsistent with paragraph 774.3(a) and are following an explicit directive of Congress in providing a definition that elaborates on the meaning of that paragraph.

One comment advocated that a feasible-and-prudent determination should be based only upon whether the alternative causes an extraordinary level of disruption rather than balancing the relative value of the resource and the preservation purpose of the statute against the drawbacks of the avoidance alternative. The FHWA and FTA decided not to change the definition in response to this comment because we continue to believe that it is appropriate to consider the relative value of the Section 4(f) resource and other resources affected by an avoidance alternative in assessing the importance of protecting the Section 4(f) property.

Many comments questioned the proposed provision allowing the accumulation of multiple drawbacks to be considered cumulatively when assessing the prudence of an avoidance alternative. The FHWA and FTA decided to keep this provision because a substantial body of caselaw supports this approach, and because it allows for prudent transportation decisions that consider the totality of the circumstances surrounding each alternative. In some instances, such as where the Section 4(f) property is of relatively low significance, a series of

drawbacks associated with an avoidance alternative may cumulatively be so severe that it would not be prudent to reject the alternative using the low-quality Section 4(f) property.

Several comments expressed concern with the use of the word "severe" in the proposed definition for various reasons, while others supported this terminology. The FHWA and FTA proposed the term "severe" as a way to encompass in simpler language, while still providing stringent protection for Section 4(f) properties, the more complex and often confusing language used in Overton Park—i.e., "unique problems or unusual factors" and "extraordinary magnitude." There is case law support for the idea that the Supreme Court did not literally intend that those precise terms must be used. We have reviewed each instance, including the context, where the term "severe" was used in this definition, and decided to retain the term except in NPRM factor 3 (factor 2 in this final rule) which now states: "It results in unacceptable safety or operational problems." In this factor, the term "severe" was replaced with "unacceptable" to better reflect the Administration's knowledge of accepted standards and practices for designing safe and functional transportation projects. In the other instances, "severe" was retained for the reasons stated above.

One comment was concerned that factors i, ii, and vi in the NPRM's definition of "feasible and prudent" are subjective and unnecessary, and that they may be adequately represented in the other factors. This commenter suggested that these three factors be deleted or that guidance be issued as to how they will be applied and by whom. The factors will be applied by the Administration in a manner consistent with this final rule. Additional guidance will be issued in the future if necessary. The first of these factors, whether an alternative can "be built as a matter of sound engineering judgment," defines when an alternative is feasible. This language was first used by the U.S. Supreme Court in *Overton Park* to explain the meaning of "feasible," and was subsequently adopted verbatim by every U.S. Circuit Court that has considered the issue. The FHWA and FTA will leave this factor in the regulatory language because the conference report for SAFETEA–LU states that DOT must adhere to the legal standard set forth in *Overton Park* and this factor was so clearly articulated. Clarifying language was added to the final rule that makes clear the factor defines whether an avoidance alternative is "feasible". *See* H.R. Rep. No. 109–203, at 1057–58 (Conf. Rep.).

The second factor of concern to this commenter, whether a project can go forward in a way that meets its purpose and need, is at the heart of why the project is being built. For example, if a primary purpose of the project is to rectify a safety concern, it would not be prudent to choose an avoidance alternative that fails to address the safety issue. The FHWA and FTA will keep this factor because of its importance to meeting the transportation mission of the FHWA and FTA and the clear support in caselaw for eliminating alternatives that do not meet the transportation needs that the project is designed to fulfill. *See, e.g., City of Alexandria* v. *Slater*, 198 F.3d 862 (D.C. Cir. 1999).

The final factor of concern to this commenter, whether an avoidance alternative causes "unique problems or unusual factors," was included to ensure that the standard in the regulation is consistent with that set forth by the U.S. Supreme Court in *Overton Park*, which suggested that avoidance alternatives that "involve unique problems" could properly be rejected as not prudent.

- "FONSI"—No comments were received on the proposed definition of "FONSI" and it is unchanged in this final rule.
- "Historic Site"—One comment noted that the NPRM seemed to use the terms "historic site" and "historic property" interchangeably and suggested that only one be used and that a definition would be helpful. This final rule consistently uses the statutory term "historic site" and a definition of "historic site" was added to distinguish the term as it is used under Section 4(f) from its use under other statutes. The definition added is consistent with current FHWA and FTA policy and the National Historic Preservation Act. The definition states: "*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—One comment stated that the rule fails to provide clear guidance on the instances in which coordination with, or concurrence of, the officials with jurisdiction is required. The final rule requires coordination with the official(s) with jurisdiction at the following points:

(1) Prior to making Section 4(f) approvals under paragraphs 774.3(a) and 774.5(a);

(2) When determining the least overall harm under paragraph 774.3(c);

(3) When applying certain programmatic Section 4(f) evaluations under paragraph 774.5(c);

(4) When applying Section 4(f) to properties subject to Federal encumbrances under paragraph 774.5(d);

(5) When applying Section 4(f) to archeological sites discovered during construction under paragraph 774.9(e);

(6) When determining if a Section 4(f) property is significant under paragraph 774.11(c);

(7) When determining the application of Section 4(f) to multiple use properties under paragraph 774.11(d);

(8) When determining the applicability of Section 4(f) to historic sites under paragraph 774.11(e);

(9) When determining if there is a constructive use under paragraph 774.15(d);

(10) When determining if proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built under paragraph 774.15(f)(6); and

(11) When evaluating the reasonableness of measure to minimize harm under paragraph 774.3(a)(2) and Section 774.17.

The final rule published today requires the concurrence of the official(s) with jurisdiction at the following points:

(1) When finding that there are no adverse effects prior to making *de minimis* impact determinations under paragraph 774.5(b);

(2) When applying the exception for restoration, rehabilitation, or maintenance of historic transportation facilities under paragraph 774.13(a);

(3) When applying the exception for archeological sites of minimal value for preservation in place under paragraph 774.13(b);

(4) When applying the exception for temporary occupancies under paragraph 774.13(d); and

(5) When applying the exception for transportation enhancement projects and mitigation activities under paragraph 774.13(g).

The FHWA and FTA gave careful consideration to the statutory language in determining the appropriate role of other agencies within the procedures for granting Section 4(f) approvals. The statute requires consultation with the U.S. Departments of Agriculture, Housing and Urban Development, and

the Interior, but the ultimate responsibility for approving, or not approving, the use of Section 4(f) property is entrusted to the Administration. Although no other coordination is expressly required by the statute, the FHWA and FTA have decided to require consultation or concurrence at the points listed above with all officials with jurisdiction over the impacted properties in order to ensure that Section 4(f) approvals are granted only after careful consideration of all relevant facts.

One comment questioned the role that designated Tribal Historic Preservation Officers (THPOs) have in the Section 4(f) process. A THPO has jurisdiction over historic sites located on tribal land and is therefore an official with jurisdiction over such historic sites. When a project affects a historic site on tribal land, a recognized THPO would be acting in place of the SHPO, not in addition to the SHPO. However, if in this case the tribe in question has no officially recognized THPO, then the SHPO would be an official with jurisdiction in addition to a representative of the tribal government.

Applicants should be mindful of the interest that many tribes hold in properties of religious and cultural significance off tribal lands. Although the final rule does not designate the THPO as an official with jurisdiction over historic properties located off tribal lands, all interested tribes should be identified and consulted under the National Historic Preservation Act. The National Historic Preservation Act calls for the agency official to acknowledge the special expertise of tribes in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to the tribe.

One comment noted that the definition of "official(s) with jurisdiction" is unclear in the case of federally designated Wild and Scenic Rivers. Suggested language was provided. We agree that this point should be clarified, and have added a Paragraph (c) to the definition of "Official(s) with Jurisdiction" that states: "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." Paragraph 774.11(g) explains how Section 4(f) applies to designated Wild and Scenic Rivers, and portions thereof.

- "ROD"—No comments were received on this definition and it is unchanged in this final rule.
- "Section 4(f) Evaluation"—A definition was added for this term to clarify that a Section 4(f) Evaluation is the documentation prepared to evidence the consideration of feasible and prudent avoidance alternatives when the impacts to a Section 4(f) property resulting from its use are not *de minimis*. The documentation may be a stand-alone document or part of a NEPA document, and it may rely upon information contained in technical studies.
- "Section 4(f) Property"—A definition was added that incorporates the statutory language.
- "Use"—One comment recommended that the definition of "use" be changed to clarify that a permanent use occurs when land is acquired for permanent incorporation into a transportation facility. The FHWA and FTA believe the proposed definition, which has been a part of the Section 4(f) regulations for many years, is clear as written and has not been the subject of controversy or confusion in the past. Therefore, the FHWA and FTA decline to make the suggested change.

Rulemaking Analyses and Notices

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

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

Regulatory Flexibility Act

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

Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism)

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

Executive Order 12372 (Intergovernmental Review)

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

Paperwork Reduction Act

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

information requirements for the purposes of the PRA.

National Environmental Policy Act

This rule will not have any effect on the quality of the environment under the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and is categorically excluded under 23 CFR 771.117(c)(20). The rule is intended to lessen adverse environmental impacts by standardizing and clarifying compliance for Section 4(f), including the incorporation of clear direction to take into account the overall harm of each alternative.

Executive Order 12630 (Taking of Private Property)

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 13175 (Tribal Consultation)

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

Executive Order 13211 (Energy Effects)

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

Privacy Act

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

Regulation Identification Number

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

List of Subjects

23 CFR Part 771

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

23 CFR Part 774

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

49 CFR Part 622

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

Issued on: March 4, 2008.

James D. Ray,

Federal Highway Administrator, Acting Administrator.

James S. Simpson,

Federal Transit Administrator.

■ For the reasons set forth in the preamble, and under the authority of 23 U.S.C. 103(c), 109, 138, and 49 U.S.C. 303, and the delegations of authority at 49 CFR 1.48(b) and 1.51, the FHWA and FTA hereby amend Chapter I of Title 23 and Chapter VI of Title 49, Code of Federal Regulations, as set forth below:

Title 23—Highways

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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

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

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

§ 771.127 Record of decision.

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

* * * * *

§ 771.135 [Removed]

■ 3. Remove § 771.135.

■ 4. Add part 774 to read as follows:

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

Sec.

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

§ 774.1 Purpose.

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

§ 774.3 Section 4(f) approvals.

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 measures) 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 Administration may approve 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 magnitude 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. Programmatic 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 programmatic 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 Agriculture, 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) evaluations 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.

[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 Agriculture 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 Administration 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 ascertain the agency's position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval.

§ 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 Administration 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 functions 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 transportation 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 development by the entity with jurisdiction or ownership 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 maintenance 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 conditions must be satisfied:

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

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

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

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

(5) There must be documented agreement of the official(s) with jurisdiction over the 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 Administration 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 identification 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 construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of protected activities, features, or attributes of the Section 4(f) property.

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

All 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; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.

(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 cumulative 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 pursuant 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 magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation 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 environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority 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 extraordinary 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.

Federal Transit Administration

Title 49—Transportation

CHAPTER VI—FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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

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

■ 6. Revise § 622.101 to read as follows:

Subpart A—Environmental Procedures

§ 622.101 Cross-reference to procedures.

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

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