

# Section 4(f) Final Rule

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# Why the New Rule?

- ❖ SAFETEA-LU directed the USDOT to issue regulations that clarify ...
  - ... the factors to be considered and the standards to be applied ...
  - ... in determining the feasibility and prudence of avoidance alternatives
- ❖ 1971 Citizens to Preserve Overton Park v. Volpe
  - Avoidance alternative must not cause ...
    - ... “uniquely different problems” or
    - ... “costs or community disruption of extraordinary magnitude”

# Making of the Final Rule

- ❖ NPRM issued July 27, 2006
- ❖ Comment period closed September 25, 2006
  - 37 responses from a variety of interests
- ❖ Final Rule published on March 12, 2008 and effective April 11, 2008
- ❖ **Technical correction** published June 3, 2008 and effective July 3, 2008

# The Final Rule - 23 CFR 774

774.1 – Purpose

774.3 – Section 4(f) Approvals

774.5 – Coordination

774.7 – Documentation

774.9 – Timing

774.11 – Applicability

774.13 – Exceptions

774.15 – Constructive Use Determinations

774.17 – Definitions

# 774.3 - Section 4(f) Approvals



# 774.3(b) *De Minimis* Impacts

## Historic Properties

SHPO or THPO concurs in writing with Section 106  
“no historic properties affected” or “no adverse effect”

## Parks, Recreation Areas, Refuges

Use after mitigation does not adversely affect the  
activities, features and attributes of 4(f) property

Official(s) with jurisdiction agree in writing

Opportunity for Public review and comment (via NEPA)

# 774.3(a) Individual Evaluations

## Step One: Try to Avoid

- Search for avoidance alternatives
- Determine if feasible and prudent
- If feasible and prudent, must select
  - If not and one use alternative, select
  - If multiple use alternatives, select the one with the least overall harm

## Step Two: Minimize the Harm

- New requirements for this step, located in 774.17
- Needed for the selected alternative only
- Must implement all reasonable measures

# Step 1 - Individual Evaluations

- ❖ Consider the views of officials with jurisdiction
- ❖ Consider relative value of the resource
- ❖ Apply 774.17 - Feasible and Prudent Avoidance Factors
  - Failure to meet purpose and need
  - Unacceptable safety or operational problems
  - Severe impacts to non-4(f) resources after reasonable mitigation
  - Extraordinary additional cost
  - Unique problems
  - Accumulation of problems

# Apply 774.3(c) Least Overall Harm

## ❖ Least Overall Harm Factors

1. Ability to mitigate adverse impacts to each 4(f) property
2. Relative severity of harm, after reasonable mitigation
3. Relative significance of each 4(f) property
4. Views of officials with jurisdiction
5. Degree that purpose and need is met
6. Magnitude of adverse impacts, after reasonable mitigation, to non-4(f) resources
7. Substantial differences in cost

\* June 3, 2008 Technical correction clarifies that rejected avoidance alternatives are not re-considered

# Step 2 - Individual Evaluations

- ❖ All Possible Planning to Minimize Harm:
  - Defined in 774.17
  - For selected alternative only
  - “All reasonable measures identified ... must be included in the project.”
  - No need to look at alternatives again
  - Must consult with the officials with jurisdiction
  - Take credit for all of your work

# Highlights

## ❖ 774.5 – Coordination

- 45-day minimum comment period, but can assume lack of objection if comments not received within 15 days of deadline
- *De Minimis* impact determinations
- Programmatic evaluations
- Where a federal encumbrance exists:
  - Determine applicable agency's position on use
  - Determine if other Federal requirements exist

## ❖ 774.7 - Tiered EISs

- 1<sup>st</sup> Tier – preliminary Section 4(f) approval - *de minimis* impacts or if avoidance alternative is feasible and prudent
- 2<sup>nd</sup> Tier – finalize Section 4(f) approval

# Highlights

## ❖ **774.11 – Applicability (new to the regulation)**

- Exemption of Interstate system
- Wild & Scenic Rivers
- Reserved transportation right-of-way that temporarily functions as a Section 4(f) property

## ❖ **774.13 – Exceptions**

- Certain historic transportation facilities
- Archeological sites valuable for data recovery
- Certain late designations
- Certain temporary occupancies
- Federal Lands' park roads & parkways
- Certain trails, paths, bikeways, sidewalks
- Certain transportation enhancement and mitigation projects

# Highlights

## ❖ 774.15 Constructive Use

- Allows consideration of likely future conditions absent the project
- New example: noise impact on wildlife viewing
- Additional direction on when vibration and ecological intrusions are a constructive use

## ❖ Final Rule (preamble) stresses the importance of the preservation purpose of statute ...

... preservation purpose must be given “proper weight” or “thumb on the scale” in favor of protecting the 4(f) properties

# Implementation Study

- ❖ 6009(c) Evaluation Study and reports to Congress requires looking at Section 4(f) changes for:
  - Efficiencies that may result
  - Post-construction effectiveness of impact mitigation and avoidance commitments
  - Quantity of projects with impacts that are considered *de minimis*, including ...
    - ... location, size, and cost of the projects
- ❖ Independent review by TRB committee of study plan, methodology, and associated conclusions

# Evaluation Areas

- ❖ Time and cost implications
- ❖ Impacts to 4(f) properties ...  
... including benefits and enhancements
- ❖ Impacts on transportation projects
- ❖ Institutional issues

# Preliminary Data

- ❖ 237 projects (53 with multiple findings)
  - Historic properties – 167 or 67%
  - Parks – 58 or 23%
  - Recreation areas – 21 or 8%
  - Wildlife refuges – 3 or 1%
- ❖ Class of Action
  - CE – 191 or 81%
  - EA – 36 or 15%
  - EIS – 4 or 2%
- ❖ Number of *de minimis* impact findings per project:
  - More than 1 finding – 53 projects
- ❖ 11 projects have completed construction