

§ 773.107

made reasonably available to the public for inspection and copying, and

(ii) copies of all comments received shall be submitted with the application. The State should summarize the comments received, and note changes, if any, that were made in the application in response to public comments.

(c) The application shall be signed by the Governor or the head of the State agency having primary jurisdiction over highway matters. The application must also identify a point of contact for questions regarding the application. Applications may be submitted in electronic format.

§ 773.107 Application approval.

If a State DOT's application is approved, then the State DOT will be invited to enter into a written Memorandum of Understanding (MOU) with the FHWA, as provided in 23 U.S.C. 327. None of FHWA's responsibilities under NEPA or other environmental laws may be assumed by the State DOT prior to execution of the MOU.

§ 773.108 Application amendments.

(a) After a State DOT submits its application to the FHWA, but prior to the execution of a MOU, the State DOT may amend its application at any time to request additional highway projects, classes of highway projects, or more environmental responsibilities. However, prior to making any such amendments, the State DOT must provide notice and solicit public comments with respect to the intended amendments. In submitting the amendment to the FHWA, the State DOT must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

(b) A State DOT may amend its application no earlier than one year after a MOU has been executed to request additional highway projects, classes of highway projects, or more environmental responsibilities. However, prior to making any such amendments, the State DOT must provide notice and solicit public comments with respect to the intended amendments. In submitting the amendment to the FHWA, the State DOT must provide copies of all comments received and note the

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changes, if any, that were made in response to the comments.

APPENDIX A TO PART 773—FHWA ENVIRONMENTAL RESPONSIBILITIES THAT MAY BE ASSIGNED UNDER SECTION 6005

Federal Procedures

National Environmental Policy Act (NEPA), 42 U.S.C. 4321–43351.

FHWA Environmental Regulations at 23 CFR Part 771, 772 and 777

CEQ Regulations at 40 CFR 1500–1508

Clean Air Act, 42 U.S.C. 7401–7671(q). *Any determinations that do not involve conformity.*

Noise

Compliance with the noise regulations at 23 CFR part 772

Wildlife

Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–1544, and Section 1536 Marine Mammal Protection Act, 16 U.S.C. 1361

Anadromous Fish Conservation Act, 16 U.S.C. 757(a)–757(g)

Fish and Wildlife Coordination Act, 16 U.S.C. 661–667(d)

Migratory Bird Treaty Act, 16 U.S.C. 703–712
Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 *et seq.*

Historic and Cultural Resources

Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470(f) *et seq.*

Archeological Resources Protection Act of 1977, 16 U.S.C. 470(aa)–11

Archeological and Historic Preservation Act, 16 U.S.C. 469–469(c)

Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001–3013

Social and Economic Impacts

American Indian Religious Freedom Act, 42 U.S.C. 1996

Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209

Water Resources and Wetlands

Clean Water Act, 33 U.S.C. 1251–1377

Section 404

Section 401

Section 319

Coastal Barrier Resources Act, 16 U.S.C. 3501–3510

Coastal Zone Management Act, 16 U.S.C. 1451–1465

Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)–300(j)(6)

Federal Highway Administration, DOT

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Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403
Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931
TEA-21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11)
Flood Disaster Protection Act, 42 U.S.C. 4001–4128

Parklands

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303
Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604

Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675
Superfund Amendments and Reauthorization Act of 1986 (SARA)
Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992(k)

Executive Orders Relating to Highway Projects

E.O. 11990 Protection of Wetlands
E.O. 11988 Floodplain Management
E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
E.O. 13112 Invasive Species

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

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- 774.15 Constructive use determinations.
- 774.17 Definitions.

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.

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

§ 774.1 Purpose.

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

Act of 1966 and are still commonly referred to as “Section 4(f).”

§ 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, from among the remaining alternatives that use Section 4(f) property, only the alternative that:

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

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

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

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

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

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

(vi) After reasonable mitigation, the magnitude of any adverse impacts to