

## § 773.107

participate in the program and solicit public comment by publishing the complete application of the State in accordance with the appropriate public notice law of the State. If allowed under State law, publishing a notice of availability of the application rather than the application itself may satisfy the requirements of this subparagraph so long as the complete application is 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

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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.

### 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

## Federal Highway Administration, DOT

## § 774.3

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)  
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 WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(F))

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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;