

Division, APP-600, 800 Independence Avenue, SW., Washington, DC 20591. Federal Aviation Administration, Western-Pacific Region, Airports Division, Room 3012, 15000 Aviation Boulevard, Hawthorne, California 90261.

Mike Covalt, Airport Manager, City of Flagstaff, Flagstaff Pulliam Airport, 6200 South Pulliam Drive, Flagstaff, Arizona 86001.

Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Hawthorne, California, on April 7, 2005.

Mia Paredes Ratcliff,

Acting Manager, Airports Division, AWP-600, Western-Pacific Region.

[FR Doc. 05-7828 Filed 4-19-05; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE-2005-23]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before May 5, 2005.

ADDRESSES: You may submit comments (identified by DOT DMS Docket Number FAA-200X-XXXXX) by any of the following methods:

- Web Site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.
- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tim Adams (202) 267-8033, Sandy Buchanan-Sumter (202) 267-7271, Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on April 12, 2005.

Anthony F. Fazio,
Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA-2004-19468.

Petitioner: Flight Level Aviation, Inc.

Section of 14 CFR Affected: 14 CFR 61.56(i)(1).

Description of Relief Sought: To allow Flight Level Aviation, Inc., to use a flight simulator or flight training device that is not used in accordance with an approved course conducted by a training center certificated under part 142 of this chapter.

[FR Doc. 05-7825 Filed 4-19-05; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2002-13290]

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

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: The FHWA is issuing this approved final nationwide programmatic Section 4(f) evaluation (programmatic evaluation) for use in certain Federal (Federal-aid or Federal Lands Highway) transportation improvement projects where the use of publicly owned property from a Section 4(f) park, recreation area, or wildlife and waterfowl refuge or property from a historic site results in a net benefit to the Section 4(f) property. The application of this programmatic evaluation is intended to promote environmental stewardship by encouraging the development of measures that enhance Section 4(f) properties and to streamline the Section 4(f) process by reducing the time it takes to prepare, review and circulate a draft and final individual Section 4(f) Evaluation (individual evaluation) that documents compliance with Section 4(f) requirements. This programmatic evaluation provides a procedural option for demonstrating compliance with the statutory requirements of Section 4(f) and is an addition to the existing nationwide programmatic evaluations, all of which remain in effect. This programmatic evaluation can be applied to specific project situations that fit the criteria contained in the *Applicability* section. To fully realize the streamlining benefits of this programmatic evaluation, the FHWA and the Applicant (defined later) are encouraged to initiate coordination with the official(s) with jurisdiction (defined later) over a Section 4(f) property as early as possible and practicable to facilitate the assessment of benefits and harm to a Section 4(f) property.

EFFECTIVE DATE: April 20, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Lamar S. Smith, Office of Project Development and Environmental Review, HEPE, (202) 366-8994 and Ms. Diane Mobley, Office of the Chief Counsel, HCC-30, (202) 366-1366. FHWA office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays. The offices are located at 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at <http://www.archives.gov> and the Government Printing Office's Web site at <http://www.gpo.gov>

www.access.gpo.gov. An electronic version of the programmatic evaluation may be downloaded at the FHWA Web site: <http://www.environment.fhwa.dot.gov/guidebook/gbwhatsnew.htm>.

Contents of Preamble

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Background on the Nationwide Section 4(f) Evaluation and Determination

The FTA initially anticipated participating in this proposed programmatic evaluation as reflected in the draft Nationwide Section 4(f) Evaluation and Proposed Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property published at 67 FR 77551, on December 18, 2002. The FTA currently utilizes no programmatic evaluation and relies on individual evaluations to satisfy the requirements of Section 4(f) for transit projects that use Section 4(f) properties. Upon further transit program and policy review, the FTA has elected not to participate in this programmatic evaluation and will continue to perform individual Section 4(f) evaluations in all cases.

Proposed federally funded highway projects that would use property from significant publicly owned public parks, recreation areas, or wildlife and waterfowl refuges or from significant historic sites are subject to Section 4(f) of the U.S. Department of Transportation Act of 1966 (Public Law 89-670, 80 Stat. 931, October 15, 1966), a provision now codified in title 49, United States Code, Section 303. Section 4(f) prohibits such use unless the FHWA determines that: (1) There is no feasible and prudent avoidance alternative; and (2) that the project includes all possible planning to minimize harm to the Section 4(f) property. These efforts are normally documented in an individual evaluation or one of four existing nationwide programmatic evaluations. For some FHWA projects, it may be possible to utilize one or more programmatic evaluations that were developed for specific circumstances.¹

Court decisions, particularly in the 1970s, resulted in strict interpretations of Section 4(f) requirements. Many of these early decisions resulted from large projects that impacted Section 4(f) properties during the peak of Interstate highway construction and expansion. In recent years, however, some courts have provided a more flexible interpretation, responding to the reduction in the severity of impacts and a transportation program that is currently focused more on system preservation and modernization than on expansion.

Programmatic evaluations reduce the processing time and effort necessary to document the analysis and illustrate that the Section 4(f) requirements have been met. Each of the programmatic evaluations contains specific and limiting applicability criteria and findings. For projects that do not meet the specified applicability criteria, the FHWA must prepare and circulate for comment, a draft individual evaluation, which is subject to internal legal sufficiency review prior to approval and circulation of a final individual Section 4(f) evaluation.

Description of Action

This programmatic evaluation facilitates compliance with Section 4(f) requirements for those situations in which there is agreement among the FHWA, the Applicant and the official(s) with jurisdiction over the Section 4(f) property that the transportation use of Section 4(f) property, the measures to minimize harm and the mitigation incorporated into the project will result in a net benefit to the Section 4(f) property. If an agreement on net benefit cannot be reached among the FHWA, the Applicant and the official(s) with jurisdiction over the Section 4(f) property, then this programmatic evaluation cannot be used. This programmatic evaluation may be used, when applicable, for a project of any

With Minor Involvements With Public Parks, Recreational Lands, and Wildlife and Waterfowl Refuges, Issued December 23, 1986, Published in **Federal Register**, August 19, 1987, and can be found at 52 FR 31111.

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites, Issued December 23, 1986, Published in **Federal Register**, August 19, 1987, and can be found at 52 FR 31118. Department of Transportation, Federal Highway Administration—Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges, Issued July 5, 1983, Published in **Federal Register**, August 22, 1983, and can be found at 48 FR 38135.

Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects, FHWA Memorandum, May 23, 1977, and can be found at <http://www.environment.fhwa.dot.gov/projdev/4fbikeways.htm>.

class of action as defined in 23 CFR 771.115 of the FHWA Environmental Impact and Related Procedures (National Environmental Policy Act (NEPA) regulations).

Why Issue a New Nationwide Programmatic Section 4(f) Evaluation?

Individual evaluations are approved after extensive internal review and interagency coordination. The internal process consists of a review of both a draft and final evaluation by the FHWA Division Office and, in some cases, the FHWA Headquarters Office. In addition, each final individual evaluation undergoes a separate review by the FHWA Office of Chief Counsel to ensure legal sufficiency. Interagency coordination is undertaken on all individual evaluations with the official(s) with jurisdiction over the Section 4(f) property and with the DOI. A draft individual Section 4(f) evaluation is provided for coordination and comment for a minimum of 45 days and a final individual Section 4(f) evaluation is prepared to support the FHWA Section 4(f) determination. In addition, the U.S. Departments of Agriculture (USDA) and Housing and Urban Development (HUD) are consulted on those projects involving a Section 4(f) property for which they have program responsibilities.

The process associated with individual evaluation documentation, review and consultation is time consuming. The process is appropriate for projects that have the potential to substantially impair, through use, the activities, features or attributes that qualify the property for Section 4(f) protection. For other projects, where the use of Section 4(f) property is minor and/or does not result in a substantial impairment of specific qualities that make a property eligible for Section 4(f) protection, the project is still subject to the same thorough and time-consuming process of evaluation, unless it qualifies for a simplified review under one of the existing programmatic evaluations. This programmatic evaluation is intended to address those projects where there is agreement among the FHWA, the Applicant and the official(s) with jurisdiction that, (1) a use of property does not result in a substantial impairment; (2) the project includes all possible planning to minimize harm, including mitigation; and (3) that the cumulative result is an overall improvement and enhancement of the Section 4(f) property.

An understanding of the intent of this programmatic evaluation, applicability requirements and the meaning of net benefit is a prerequisite to agreement.

¹ Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects

Where conflict arises in reaching agreement with the official(s) with jurisdiction, the FHWA should assess the nature of the disagreement to determine whether it is procedural or substantive (related to the applicability criteria of the actual project action) before deciding not to use this programmatic evaluation. If substantive disagreement persists, then this programmatic evaluation cannot be used.

As established in this programmatic evaluation, the Administration will review the specific facts of a project, compare them to the applicability requirements of the programmatic evaluation and determine if it is applicable. When applicable, appropriate supporting documentation will be placed in the project file and/or referenced in the appropriate environmental document. Since this programmatic evaluation was reviewed and determined to be legally sufficient according to the requirements of 23 CFR 771.135(k), the utilization of this programmatic evaluation on specific projects will not require legal sufficiency review under 23 CFR 771.135(k). Similarly, interagency coordination is streamlined, as described in this programmatic evaluation, by consulting only with the official(s) with jurisdiction, and not with DOI, USDA, or HUD, except when those agencies have an official responsibility related to the property or where conversion of the 4(f) property to highway use is encumbered such that, specific subsequent agency action will be required (e.g., lands acquired with Land and Water Conservation Fund Act (LWCF) assistance, 16 U.S.C. 460l(8)(f)(3)). It is estimated that these streamlining steps will reduce processing and approval time for certain projects by 3 to 6 months. Of equal importance is the extent of internal review and interagency coordination, which will be commensurate with the severity of impacts and the potential for enhancement of the Section 4(f) property.

Actions Taken to Date

The draft Nationwide Section 4(f) Evaluation and Proposed Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property was published on December 18, 2002, at 67 FR 77551, requesting public and agency comment (FHWA Docket No. FHWA-2002-13290). The proposed programmatic evaluation was provided specifically to the DOI, the USDA, HUD and the Advisory Council on Historic Preservation (ACHP).

After careful analysis of all comments received, the FHWA has decided to finalize and approve this programmatic evaluation. Minor changes have been made in this final programmatic evaluation to add clarity and incorporate suggested improvements from insightful comments. This decision is based upon the belief that the programmatic evaluation will assure full compliance with the statute while enhancing Section 4(f) properties and reducing duplicative administrative processes for eligible projects. The decision is consistent with congressional streamlining initiatives.

Comments and Responses on the Draft Nationwide Programmatic Section 4(f) Evaluation

The following discussion is a summary of comments received on the draft programmatic evaluation. Responses are provided on how the FHWA considered and addressed the concerns and/or issues raised.

Comments were received from 18 entities, including Federal agencies, two national transportation organizations, one national environmental organization, eight State transportation agencies, one transit agency, two State resource agencies, and two private consulting firms. Commenters included the Department of the Interior (DOI), and the National Park Service (NPS), the American Highway Users Alliance (AHUA), the American Association of State Highway and Transportation Officials (AASHTO), the Sierra Club, the State of California Department of Transportation (CALTRANS), the Maryland State Highway Administration (MDSHA), the Pennsylvania Department of Transportation (PennDOT), the New York State Department of Transportation (NYSDOT), the Missouri Department of Transportation (MODOT), the Texas Department of Transportation (TXDOT), the Wisconsin Department of Transportation (WIDOT), the Washington State Department of Transportation (WSDOT), the Central Puget Sound Regional Transit Authority (Sound Transit), the State of Alabama Historical Commission (AHC), the Wyoming Game and Fish Department (WGF) through its Office of Federal Land Policy, Transportation Environmental Management Inc. (TEM) and the HR Green Company (HR Green). In addition, the FTA provided comments and recommendations for consideration prior to its decision not to be a participant in the programmatic evaluation.

Many comments were general in nature and are summarized and

addressed collectively under the following general comment headings: General Comments, Net Benefit, Official(s) with Jurisdiction, and Section 106 Integration. Many comments included recommendations related to a specific section of the programmatic evaluation which are addressed in the section-by-section analysis.

A number of the specific comments received, focused on the overall reform of Section 4(f) and suggested that this programmatic evaluation does not do enough to reform and streamline existing Section 4(f) requirements. All comments and recommendations have been read and considered by the FHWA. These concerns are beyond the scope of this effort and have not been addressed in this document.

General Comments

Comments received demonstrated a need for additional definition of terms used in the final programmatic evaluation. Definitions were added for: "Administration", "Applicant", "net-benefit" and "officials with jurisdiction."

"Administration" refers to the Federal Highway Administration, FHWA Division Administrator or Division Engineer.

"Applicant" refers to the State Highway Agency or State Department of Transportation, or local governmental agency acting through the State Highway Agency or State Department of Transportation.

A "net benefit" is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project results in an overall enhancement of the Section 4(f) property when compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property taking into consideration the activities, features and attributes that qualify the property for Section 4(f) protection. A project does not achieve a "net benefit" if it will result in a substantial diminishment of specific functions or values that made the property eligible for Section 4(f) protection.

"Official(s) with jurisdiction" over Section 4(f) property (typically) include: for a park, the Federal, State or local park authorities or agencies that own and/or manage the park; for a refuge, the Federal, State or local wildlife or waterfowl refuge owners and managers; and for historic sites, the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), whichever has jurisdiction under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f).

Many commenters expressed overall support for the programmatic evaluation. They generally recognized and noted the potential benefits of the programmatic evaluation in streamlining the procedural requirements of Section 4(f), such as reducing paperwork and internal review, while at the same time, encouraging enhancement of Section 4(f) properties and promoting environmental stewardship.

The guiding principle regarding the use of the programmatic evaluation is that there must be a "net benefit" to the Section 4(f) property. The ability of the FHWA, the Applicant and the official(s) with jurisdiction to reach agreement with respect to the impacts, measures to minimize harm, mitigation and that a net benefit will result is inherent in the decision of whether or not the programmatic evaluation is applicable. "Negotiations" in this regard, should be no more complicated or require skills other than those required for normal project development and Section 4(f) consultations related to impacts, measures to minimize harm and mitigation.

A situation where the necessary agreement or determination of applicability is substantially difficult to achieve or make may be an indication that an individual Section 4(f) evaluation is appropriate in that case. On the other hand, this situation may be an indication that one or more of the participants lack understanding of the intent of the programmatic evaluation or the individual applicability requirements. As stated above, an understanding of the intent of the applicability and net benefit requirements is a prerequisite to agreement. Where conflict arises in coordinating agreement with the officials with jurisdiction, the FHWA should assess the nature of the disagreement to see if it is procedural or substantive before deciding not to use this programmatic evaluation.

The FHWA is committed to providing additional guidance, if needed, on a case-by-case basis to ensure that misunderstanding about the intent of the programmatic evaluation is not an impediment to its use.

Although only a few comments received can be characterized as negative or in general opposition to this programmatic evaluation, many commenters requested clarification and/or refinement of the language used.

The Sierra Club generally objected to the programmatic evaluation because in its view, it contradicts judicial interpretations of Section 4(f), derails the regulatory safeguards and

circumvents the 4(f) mandate that special effort be taken to preserve the natural beauty of the countryside, public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Sierra Club also suggested that FHWA has provided no evidence that the new programmatic evaluation will result in any tangible benefits to areas currently protected under Section 4(f) and the streamlining approach may severely reduce the number of protected natural areas and historic sites.

This programmatic evaluation is not a waiver or relaxation of any of the Section 4(f) standards or judicial interpretations of the legislative requirements. All existing Section 4(f) legislative provisions remain intact. In addition, the use of the programmatic evaluation will allow an increase in environmental stewardship opportunities resulting in greater protection and enhancement of Section 4(f) protected properties.

The requirement for a documented agreement of the resulting net benefit to a Section 4(f) property will safeguard the preservation provisions of Section 4(f) law by ensuring that there will be an enhancement of the functions and values that originally qualified the property for Section 4(f) protection. There is no less protection afforded by this programmatic evaluation than with an individual evaluation and its application will allow a more efficient process of the regulatory requirements.

The DOI was neutral regarding the advantages of the programmatic evaluation and recommended that FHWA expand on and clarify what "net benefits" to a Section 4(f) property means, especially with regard to resources under its jurisdiction. The DOI also noted that that without further clarification the programmatic may not satisfy the statutory mandate to consult with DOI on Section 4(f) issues. In response to this and other similar comments, we have clarified the definition of "net benefit" in the final programmatic.

The PennDOT commented that the programmatic would provide some time savings in processes but that it would be limited. The NYSDOT and the TEM offered similar comments regarding limited benefit, suggesting that the procedure for utilizing a programmatic evaluation is the same as that required for an individual evaluation.

The intent of this programmatic evaluation is to address administrative burden when it is in the interest of all parties involved to take an action where a use of Section 4(f) property will result in an enhancement of that property.

There may be a limited history of experience with this programmatic evaluation; however, there are many examples of "missed opportunities" to benefit or enhance an existing property where a transportation use was imminent.

This programmatic evaluation constitutes an approved evaluation for which the FHWA need only to demonstrate compliance with the criteria contained in the programmatic evaluation. The independent review by the DOI and the USDA or HUD official(s) of the draft and final individual Section 4(f) evaluations and the legal sufficiency review by the FHWA necessary for an individual evaluation are not required for this or other programmatic evaluations. In many instances the time necessary to conduct these regulatory internal reviews for individual Section 4(f) evaluations are not apparent to the parties not directly involved in the evaluation process. Procedurally, the time savings may be limited to 3 to 6 months in normal project development; however, the overall benefit is enough to encourage its use and will result in efforts that enhance Section 4(f) properties while avoiding some procedural steps.

The Sierra Club commented that the proposed changes do not "streamline" the Section 4(f) procedural requirements. As an example, the Sierra Club noted that the programmatic evaluation cannot be utilized if a feasible and prudent alternative exists and when a project has no prudent and feasible alternative, the agency with jurisdiction must agree to mitigation measures to ensure the proposed action results in a net benefit. The Sierra Club further opined that under this scenario, the programmatic evaluation expands FHWA's discretion and the review process, without full consideration of benefits or losses to Section 4(f) areas.

As stated above, the programmatic evaluation does not waive any of the existing Section 4(f) requirements including the determination that there are no feasible and prudent avoidance alternatives to the Section 4(f) use of the property, and that the project includes all possible measures to minimize harm to the Section 4(f) property. The savings that are being sought through use of the programmatic evaluation come from eliminating internal reviews within the FHWA and the case-by-case coordination with the DOI and other Federal agencies currently required for individual evaluations. Coordination, consultation and agreement with the officials with jurisdiction are essential components of compliance.

There is an important distinction to be made in understanding the programmatic evaluation and how the agreement of net benefit is reached, documented, and approved by the Administration. Comments received from the Sierra Club and others appear to have interpreted the FHWA as the "official with jurisdiction." This is not the case. For clarification, the definition of "official(s) with jurisdiction" was added to the final programmatic evaluation. The Sierra Club's concerns regarding the expansion of agency discretion are unfounded, given that the FHWA must reach an agreement with the official(s) with jurisdiction over the Section 4(f) property in order for the programmatic evaluation to apply. If anything, the role of the officials with jurisdiction is enhanced due to their required participation and agreement on achieving a net benefit.

The MDSHA and the AHC commented that the official(s) with jurisdiction over Section 4(f) property may be the SHPO or THPO and recommended changes to *Applicability*, Item Number 5 to denote that official(s) with jurisdiction may include the SHPO or THPO.

The definition of "officials with jurisdiction" has been clarified as to the role of the SHPO or THPO as the official in the case of historic properties. As previously noted, there may be instances where a Section 4(f) property has more than one official with jurisdiction.

The Sierra Club expressed concern that without a coherent set of criteria to measure the impact of the project on the Section 4(f) area itself, the proposed changes alter the FHWA's role in parkland and historic site preservation by placing undue weight on external factors.

The role of the FHWA throughout the history of Section 4(f) has been to protect and preserve specific defined properties. That role or responsibility does not change with this programmatic evaluation; indeed, protection of Section 4(f) properties is enhanced, by providing an incentive to improve the property and a less cumbersome mechanism when agreement on net benefit can be reached.

The FHWA retains the responsibility for determining the applicability of Section 4(f) and of this programmatic evaluation, which is dependent on agreement of net benefit. The FHWA will give deference to the official(s) with jurisdiction to assist in determining whether the project will "substantially diminish" the function or values for which Section 4(f) was found to be applicable to the property, and all

parties involved must reach agreement as to whether a proposed project will result in a "net benefit" to the property. If agreement is not reached, this programmatic evaluation will not apply.

The programmatic evaluation also does not include impact criteria as part of the applicability standards. This was done intentionally to allow the official(s) with jurisdiction, the FHWA and the Applicant flexibility in determining the measures appropriate to each individual property necessary to generate a net benefit. Deference is given to officials with jurisdiction, who have special expertise in the property, to determine positive outcomes where there will be a use of the property by a transportation project.

Through the review of all the comments, it was noted that some questions or confusion might be attributable to the inconsistent use of the terms Section 4(f) "land", "property" and "resource" throughout Section 4(f) regulations, guidance, documents and even the statute itself. For this final programmatic evaluation, the term "property" has been used as consistently as possible, when not quoted from or directly related to the language of an existing document.

Net Benefit

Several commenters asked for further clarification on what constitutes a "net benefit" and who makes that determination.

The DOI suggested that the term "net benefits" is subjective and could potentially lead to counterproductive proposals. DOI recommended that the definition of "net benefit" to Section 4(f) property be expanded and clarified.

Both the ACH and the MDSHA questioned how and by whom the determination of "net benefit" would be made. Several commenters also recommended that criteria be developed to ensure that people with knowledge about the property have key roles in the determination of net benefit.

There is a wide range of what will constitute a net benefit, which will vary depending on the property and the project situation. In other words, net benefit determination is property and project specific, rather than generally subjective, and the development of criteria would serve to restrict the ability to develop mutually agreeable net benefits. For this reason the FHWA, the Applicant and the official(s) with jurisdiction must work collaboratively to define and agree upon what is reasonable and required to achieve a net benefit to a particular Section 4(f) property, on a case-by-case basis. Each of the participants plays an important

role in this joint determination to ensure that individual resource experts will be involved. Net benefit is a joint decision, but it is only one of the prerequisites to application of this programmatic evaluation. Consistent with the responsibilities and authorities provided by Section 4(f) itself, the FHWA will determine whether the proposed action satisfies the applicability criteria for the use of this programmatic evaluation.

The AASHTO recognized one major difference in this programmatic evaluation compared to the existing programmatic evaluations related to historic properties considered under the National Historic Preservation Act. In some cases, this programmatic evaluation could apply where a Section 106 "adverse effect" finding has been made. The AASHTO, however, expressed some concern that it would apply only if the project had a net benefit on each individual historic property affected by the project and recommended that the programmatic evaluation allow the net "benefit" finding to be made for the project as whole rather than each individual property affected by a project. Similarly the NYSDOT recommended revising the net benefit finding to apply to the project as a whole, as a change more likely to promote environmental stewardship.

As noted earlier, this programmatic evaluation does not allow for the waiver or relaxation of existing Section 4(f) standards or the judicial interpretation of the legislative requirements. As such, each Section 4(f) protected property must continue to be considered individually as is currently required for any project or Section 4(f) evaluation. Generally speaking, impacts and benefits to individual Section 4(f) properties must be considered when applying the Applicability criteria. An individual Section 4(f) property, such as an historic district or park complex, might have multiple components. The net benefit must be achieved for an individual Section 4(f) property and for the functions and values that qualified that property for Section 4(f) protection. Although a historic district may experience a net benefit and be appropriately covered by this programmatic evaluation, each property within the historic district that is individually eligible for the National Register and is used by the project must be considered separately under this programmatic evaluation, if it applies, or in an individual Section 4(f) evaluation.

There can be impacts to the functions and values of the Section 4(f) property,

but these impacts cannot reach a level of “substantial diminishment” as determined by the FHWA. This determination will be made in consultation with the official(s) with jurisdiction. For instance, there may be general agreement among the FHWA, the Applicant and the official(s) with jurisdiction that an overall enhancement to a Section 4(f) property is achievable. However, if the official with jurisdiction believes that the functions and values that made the property eligible for Section 4(f) protection will be substantially diminished upon completion of the project, then the FHWA must find that the programmatic evaluation is not applicable and that the protected property requires the preparation of an individual Section 4(f) evaluation.

The AASHTO recommended that the net benefit finding take into account the likely future condition of the historic property if the transportation project is not implemented, *e.g.*, the potential for demolition of the historic property by a private landowner.

The revised definition of net benefit included in the final programmatic evaluation addresses this comment, in part. This determination relies on a comparison of Section 4(f) functions and values of the property without the transportation project and use to determine net benefit.

The WIDOT commented that agreements on what constitutes “net benefit” could be difficult to reach among the stakeholders involved.

The WIDOT recognized the potential difficulties that may occur when working out the details sufficiently enough that all officials with jurisdiction are satisfied that a net benefit will result. Because the range of what constitutes a net benefit will vary from property to property, by the official(s) with jurisdiction, and by the policies of both the FHWA and the Applicant, creative measures used to achieve net benefits on a project level should be developed and shared with the larger environmental and transportation community in the form of “Best Practices.” The flexibility inherent within the language of the programmatic evaluation provides official(s) with jurisdiction an opportunity and incentive to participate in efforts that maintain and achieve benefits to Section 4(f) properties under their protection. The Applicant and the FHWA are encouraged to communicate the beneficial qualities of the programmatic evaluation with the official(s) with jurisdiction in order to maximize its potential benefit to the Section 4(f) property.

Several commenters noted that the use of the term “net benefit” is inconsistent throughout the programmatic evaluation. It was unclear whether there merely needs to be a net benefit, or does the project have to preserve, rehabilitate, enhance, and have a net benefit. It was further noted that in some situations, it would be difficult to argue that the project does all four even though it may have an overall net benefit.

From these comments and others, the FHWA recognizes the need to clarify the term “net benefit.” Therefore, as noted above, the definition of net benefit has been modified and simplified for consistency in the final programmatic evaluation. This definition clarifies that the resulting Section 4(f) functions and values of the property are “better,” overall, than if the project did not use the Section 4(f) property. The “net benefit” determination may be based on a number of approaches to mitigate and minimize harm as long as there is an overall enhancement or betterment from the future do-nothing or avoidance condition.

As previously discussed, further instruction has been provided in this programmatic evaluation on how the net benefit is determined and by whom it is determined.

The NPS expressed concern with the definition of “net benefit” and objected to the inclusion of the “substantial diminishment” requirement without providing standards for measuring what is or is not substantial.

The subjectivity of individual values and functions of a significant Section 4(f) property demonstrate the variability of impacts, mitigation, and net benefits, thus, providing guidance or strict criteria on this determination may be viewed as overly prescriptive. There is similar subjectivity and context in determining “substantial diminishment.” For these reasons, it is important to consider the insight of the official(s) with jurisdiction when it comes to deciding “net benefit” and/or “substantial diminishment” and the officials with jurisdiction are in the best position to assist in these determinations. Therefore, some deference should be given to the officials with jurisdiction when determining if the project will “substantially diminish” the activities, features or attributes that qualify the property for Section 4(f) protection. And this determination is essential to deciding if there is a “net benefit.” If agreement on net benefit cannot be reached, this programmatic evaluation will not apply to the property.

Officials With Jurisdiction

Addressing park, recreational, wildlife and waterfowl resources and cultural, historic, and tribal properties within a single nationwide programmatic evaluation has created some confusion when discussing coordination with appropriate individuals or official(s) with jurisdiction. Several comments were received that reflect a general concern about the definition and intended role of the official(s) with jurisdiction.

For example, the AHC asked that the programmatic evaluation clarify who has official jurisdiction over Section 4(f) property and whether it must take the SHPO’s advice into consideration.

A substantial effort has been made to clarify language in the final programmatic evaluation. Consistent with existing Section 4(f) regulations and guidance, whichever of the SHPO and/or THPO has responsibility under the Section 106 regulations is considered the official with jurisdiction over an historic property. The FHWA must seek and consider the opinion of the SHPO when determining effect under the Section 106 regulations and would likewise, under Section 4(f), seek the opinion of the SHPO as an official with jurisdiction when determining whether a net benefit will result from the Section 4(f) use of an historic site. In an example of an historic park owned by a municipality that was purchased with funding from the Land and Water Conservation Funds Act, the officials with jurisdiction would be the municipal parks department and the SHPO. All officials with jurisdiction must agree with a net benefit determination to a Section 4(f) property for this programmatic evaluation to apply. Coordination with the NPS would also be required in this case, relative to its responsibilities under the LWCFA, to assist in determining appropriate and acceptable mitigation for the project’s Section 4(f) use.

Section 106 Integration

Several commenters expressed a desire to improve the integration of Section 4(f) requirements with those of the Section 106 process. The NYSDOT commented that the programmatic evaluation would do little or nothing to streamline the Section 4(f) process with respect to an historic property. The TEM recommended that the programmatic evaluation “adopt” the conclusion of the Section 106 process such that, if a project has been found to have no effect, no adverse effect, or results in a MOU that addresses adverse effects, it should

be exempt from Section 4(f) requirements on that basis.

The current laws and regulations continue to apply. The FHWA has, to the extent consistent with both laws, combined the common elements of the two processes for this programmatic evaluation. Much of the coordination required, the assessment of impacts, and mitigation is basically the same whether intended to comply with NEPA, Section 106 or Section 4(f). An integrated approach that satisfies multiple requirements is consistent with existing FHWA policy to use the NEPA process as the "umbrella" under which all environmental and related laws and regulations are addressed. It is within the unique requirements of Section 4(f) that this programmatic evaluation will provide relief in the preparation of a single evaluation rather than a draft and a final, the elimination of certain internal FHWA reviews, and the elimination of project-by-project review by the DOI and the USDA, and the HUD, all of which are now required for an individual Section 4(f) evaluation.

Section-by-Section Analysis

Revisions were made to several sections of the programmatic evaluation based upon either suggestions or comments received. The substantive changes not discussed above are considered in this Section-by-Section Analysis.

Preamble

In response to comments, the Preamble has been revised to improve its consistency with the main body of the programmatic evaluation and to respond to the comments received.

Examples

Several comments were received on the examples provided in the draft to illustrate application and implementation of the programmatic evaluation. These examples have been rewritten to provide further clarity on the use of the programmatic evaluation.

The TXDOT commented on the example of a renovated historic railroad station with the opinion that such renovation, if completed in compliance with the Secretary of Interior's Standards and Guidelines, should result in a "no adverse effect" determination, and thus, no 4(f) analysis would be required.

In specific instances, where the purpose of a project was to improve an existing transportation facility, the observation of the TXDOT would be correct (as provided in 23 CFR 771.135(f)). However, for situations not covered by 23 CFR 771.135(f), the

FHWA's determination of "no adverse effect," as defined by the regulations implementing the NHPA, and its subsequent concurrence by the SHPO, would not necessarily eliminate the need for a Section 4(f) evaluation. The programmatic evaluation provides additional flexibility in addressing adverse impacts and Section 106 "adverse effects" to historic property, where, notwithstanding these impacts, there results an overall enhancement of the Section 4(f) property. In the example cited above, if the Applicant or the FHWA developed plans to renovate the historic railroad station in such a way that the functions and values of the station were enhanced yet the design still did not meet the Secretary of Interior's Standards and Guidelines (e.g., due to changes necessary to comply with the Americans with Disabilities Act), the project might still qualify for this programmatic evaluation. The example has been rewritten for clarity.

The MDSHA commented on the example where a Section 106 adverse effect determination was rendered; that it was not clear how the programmatic evaluation could be applied as the official with jurisdiction would be contradicting itself by agreeing that the action had a beneficial effect.

This result would depend upon the enhancement and mitigation provided and, in the end, how the officials with jurisdiction view the results of that mitigation and enhancement. The FHWA may determine that a project has an adverse effect as defined in the Section 106 regulation on a particular function or value of a Section 4(f) property, but for the programmatic evaluation to apply there cannot be a "substantial diminishment" of the activities, features, and attributes that qualify the property for Section 4(f) protection. Not every adverse effect rises to the level of substantial diminishment. For instance, the removal or moving of one contributing component of a historic district may result in an improvement to the access or continuity of the overall property. An example would be the creation of a pedestrian promenade within the historic district that recreates a lost element of the district and improves its economic vitality. Additionally, the Section 106 process does not consider the future doing nothing alternative, yet within this programmatic evaluation the future doing nothing is considered when determining net benefit. Therefore, the SHPO, without conflict, may concur with an adverse effect determination under Section 106, but may agree that the proposed project has a net benefit and

will not result in substantial diminishment of the property under this programmatic evaluation.

When the FHWA utilizes this programmatic evaluation, documentation should be requested from the official(s) with jurisdiction that a net benefit will result from implementation of the project and that there is no substantial diminishment of protected activities, features or attributes of the protected property. This agreement may be incorporated into the Section 106 Agreement or other correspondence related to the Section 106 consultation process where the Section 4(f) protected property is historic, however, it should be clear that the Section 4(f) related request is separate and distinct from Section 106 consultation. If a historic property also meets other Section 4(f) criteria (*i.e.*, historic park) and there are multiple officials with jurisdiction, they also have a role in determining net benefit.

In response to the comments received concerning needed guidance and in recognition of the need to further clarify the intended use of this programmatic evaluation, the examples from the draft were rewritten and new examples were added.

Introduction

Referring to the last sentence of the Introduction, the NPS commented that the listing of these few programs in the proposed programmatic evaluation might lead to the incorrect interpretation that the list is all-inclusive rather than a sampling.

Not to mislead any intending user of the programmatic evaluation, the partial listing has been removed and the portion of the all-inclusive discussion stating, "any other applicable Federal environmental requirements" was retained.

Applicability

The WIDOT commented that the proposed programmatic evaluation is limited in its scope and will apply only to a small subset of projects.

Initially, utilization of the programmatic evaluation may be limited, but over time it is anticipated that it will have increased use as Applicants, the official(s) with jurisdiction, and the FHWA learn how to incorporate actions beneficial to Section 4(f) properties into transportation projects and realize the reduction in regulatory and internal review times that will result from the application of this programmatic evaluation.

The TXDOT and others requested clarification of language found in

Applicability, Item Numbers 4 and 5, which contain discussions of the roles of "all parties" and "other appropriate parties." It was suggested that this be clarified to avoid the appearance of subjectively defining these categories on a case-by-case basis and recommend referencing Section 106 language for "consulting parties."

The concern expressed in this comment is recognized and the recommendation has been adopted in part. The language has been reworded to eliminate "other appropriate parties." This change respects the distinction between Section 4(f) and 36 CFR part 800.

The NPS commented that the success of existing "minor involvement" programmatic Section 4(f) evaluations has been due to the following factors, (1) they are restricted to improvements on essentially the existing alignment, (2) the maximum acreage limitations are defined, and (3) they do not apply to projects for which an EIS is prepared.

The essence of this programmatic evaluation is distinct from the existing "minor uses" programmatic evaluations in that its application is dependent on a resulting positive outcome instead of a minor use. For this reason its application is appropriate and allowable in conjunction with both existing and new alignments. The maximum-acreage-allowable criterion was specified in the programmatic evaluation for minor uses of parks, recreation areas and wildlife and waterfowl refuges to assist in defining minor use in spatial terms. The amount of property used is not an appropriate factor in determining the net benefit and may inappropriately limit application of this evaluation in some cases. Therefore, the application of this programmatic will remain the same so as not to reduce its potential effectiveness and application.

Since this programmatic evaluation can provide the impetus necessary to develop creative measures of avoidance, minimization, and enhancement for impacts to protected Section 4(f) properties, it is appropriate for use with all environmental class of actions, including EISs, in which the applicability criteria is satisfied.

The NPS and DOI noted that the programmatic evaluation does not clearly define the role of agencies holding a contractual or real estate interest in the subject property.

We do not believe it is necessary to specify a criterion that singles out the NPS or any other agency in determining applicability of the programmatic evaluation. Such an encumbrance would not be affected by FHWA's Section 4(f) determination. Where the

NPS or another agency has the "last word", under another statute, that responsibility remains intact. A sentence was added to the final programmatic evaluation requiring coordination with the appropriate agency, where such encumbrances exist, to clarify the process.

For Section 4(f) properties, other than privately owned historic resources, the FHWA and the Applicant shall pursue with due diligence, during early stages of project development, determination of whether or not the property in question received a LWCFA grant. If the Applicant or the FHWA have concerns about whether a park area might have received a LWCF grant they should contact one of the National Park Service field offices or State Agency, as listed in the "Contact List" on the following Web site: <http://www.nps.gov/ncrc/programs/lwcf/protect.html>.

Administrators have databases of grant-assisted sites that will help them to determine whether Fund protections apply; also some States have their own grant programs that afford similar protection. Additional information and addresses for National Park Service Offices and State Liaison Officers for the Land and Water Conservation Fund can be found at the following Web site: <http://www.nps.gov/ncrc/programs/lwcf/protect.html>.

The NEPA documentation, project file or Section 4(f) documentation shall include evidence of the determination.

The DOI suggested that "National Historic Landmarks" should be explicitly identified as National Register eligible property and that additional stipulations to address situations that involve National Natural Landmarks be added.

Since there is no distinction between National Historic Landmarks and other National Register eligible properties where Section 4(f) is concerned, the draft language is retained. Also, the programmatic evaluation would apply to those National Natural Landmarks that met the statutory definition of a Section 4(f) protected property.

The NPS also expressed concern that the FHWA will have the "sole responsibility" for determining whether a public park area will receive a net benefit. The programmatic evaluation requires the FHWA to reach agreement with the officials with jurisdiction; therefore, FHWA will never have the "sole responsibility" for determining net benefit.

As stated above, the language in the final programmatic evaluation addresses the concerns of the NPS. If agreement is not reached among the FHWA, the Applicant and official(s) with

jurisdiction, then the programmatic evaluation cannot be used. If, for example, the NPS requires full replacement of federally encumbered property pursuant to LWCFA, then that obligation will continue to require at least full replacement of the impacted land as determined under that statute whether or not there is a net benefit finding. This holds true for any necessary provision, whether Federal or State, that relates to the impacts of a Section 4(f) property. This is why early consultation and input from all appropriate official(s) with jurisdiction is necessary and required.

The MDSHA commented on an apparent discrepancy between one of the examples and the *Applicability* section. The MDSHA notes that the *Applicability* section states that the programmatic evaluation may be applied if, among other things, the project does not require the demolition or major alteration of the characteristics that qualify the property for the NRHP. Yet the example of the reconstructed, deteriorated historic feature was deemed appropriate, even given the adverse effect determination.

Changes have been made to the *Applicability* section to address this concern. Additionally, the example has been rewritten for clarity. There is no discrepancy as the example is for a reconstruction of a contributing element, which the SHPO, as the official with jurisdiction, deems to be a net benefit to the property when compared to the do-nothing alternative, which leaves the wall in a deteriorated condition. Even though the FHWA could determine and the SHPO concur that the removal and reconstruction of the wall would be an adverse effect under Section 106, the SHPO or THPO could find that the project results in an overall benefit. The programmatic evaluation allows for impacts of some of the functions and/or values of the property as long as there is a collective improvement and there is no substantial diminishment to those functions and values that originally qualified the property for protection.

Relating this back to the example at hand, even though the wall is considered an important function or value in determining Section 106 significance of the historic property, the reconstruction of the wall is neither considered a substantial diminishment nor a major alteration but rather an improvement over its existing condition, the anticipated condition of the future no-build and the condition of the historic site itself, thereby qualifying as a net benefit.

The MDSHA commented on *Applicability*, Item Number 4, and identified a perceived duplication of Section 106 and Section 4(f) efforts. The MDSHA asked whether an adverse effect on an historic property is obviated by a net benefit to the resource such that, there will not be a need for a Section 106 MOA. The CALTRANS added that the SHPO's or THPO's written determination of no adverse effect under Section 106 should suffice as evidence of written agreement under *Applicability*, Item Number 5 to eliminate the need for additional efforts on the part of the SHPO or THPO.

Where required by 36 CFR part 800, an MOA or Programmatic Agreement would be a prerequisite for Section 4(f) approval under this programmatic evaluation similar to the Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites and the Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges. The conditions and measures to achieve a net benefit may be established in the MOA. However, the MOA, or any additional or separate documentation, must clearly record that agreement has been reached among the officials with jurisdiction, the FHWA and the Applicant and all appropriate documentation must be retained for the project record consistent with NEPA project documentation retention practices and policies.

In summation, any written agreement developed as part of the Section 106 process can suffice for the *Applicability* criteria of this programmatic evaluation if such agreements (typically MOAs) include an agreement by the officials with jurisdiction that the project results in a net benefit to a protected Section 4(f) property. However, all the officials with jurisdiction may not want to be party to a Section 106 agreement and other Section 106 parties not necessarily the "officials with jurisdiction."

Regarding *Applicability*, Item Number 4, the AHC commented that "such measures" are "vague and weak" and recommended that this be a stronger, more specific statement.

The language in *Applicability*, Item Number 4 is consistent with existing programmatic evaluations and is retained with minor editorial changes in the final version. The language allows for flexibility that makes the programmatic evaluation as viable a procedural option as possible while being as responsive to the expert opinions of the official(s) with jurisdiction and the varied qualities of the properties they manage.

The NYSDOT commented on the "substantial diminishment" requirement related to determining "net benefit" in the *Applicability* section. It suggested that the requirement is contrary to the concept of "net benefit", weakens the concept and narrows the opportunity to effectively benefit the resource.

Programmatic evaluations by their nature are limited to projects that meet a specific set of facts and applicability requirements. A project that will result in a substantial diminishment of any of the functions or values that originally qualified the property for Section 4(f) protection should be evaluated using an individual evaluation. The wording of this programmatic evaluation is designed to ensure that a net benefit is achieved without substantial diminishment of the functions or values (features or attributes) that make the property eligible for Section 4(f) protection. Still, there is flexibility in determining what function or values are keys to the properties' eligibility for protection and what constitutes a substantial diminishment of those functions and values.

Alternatives

The AHC commented that it is difficult to discern how the programmatic evaluation helps the FHWA when it comes to its avoidance alternatives analysis and the PennDOT recognized that the programmatic evaluation limits the alternatives that must be analyzed and documented.

The PennDOT is correct; the avoidance alternatives that must be considered are all-inclusive. This approach is consistent with the existing programmatic evaluations.

The DOI suggested that the "Do Nothing Alternative" be replaced with the term "No Action Alternative," in accordance with NEPA guidance.

To avoid confusion, the term "Do Nothing Alternative" will be retained, as it is consistent with the other programmatic evaluations.

The PennDOT recommended that the "qualitative importance or value" of each Section 4(f) resource should be considered in determining whether or not an avoidance alternative is feasible and prudent. It further recommended that for historic properties, the condition and ownership should be considered as well.

The programmatic addresses those situations where the transportation use results in an overall enhancement of the property as agreed to by the official(s) with jurisdiction, the FHWA and the Applicant. The ability to benefit the property must be factored into the

feasible and prudent determination. The consideration of the avoidance alternative comes from the Section 4(f) statutory requirements, which have not changed. The Section 4(f) legislation addresses historic properties regardless of ownership of the property.

Findings

The DOI recommended revising the first sentence to indicate that to apply the programmatic evaluation to a project, the required no-action and avoidance alternatives must be found not feasible and prudent through a written determination.

The wording has been changed to reflect the comment.

The DOI suggested inserting the phrase "jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat," before the phrase "substantial damage to wetlands". The suggested language has been incorporated.

The NYSDOT commented on the proposed language, "An accumulation of these kinds of problems must be of extraordinary magnitude when compared to the proposed use of the Section 4(f) land to determine that (the avoidance) alternative is not feasible and prudent." It was suggested that this approach would seem more valid in the context of a full 4(f) evaluation where there is a net negative effect to a historic property, than in a programmatic evaluation context where the "net" effect is positive.

This language is consistent with existing Section 4(f) implementation policy and has been incorporated in essence. The first condition of Section 4(f) use is the determination that no feasible and prudent avoidance alternatives exist. The programmatic evaluation must include this determination in order to facilitate compliance with the statute and regulations. This programmatic evaluation identifies the variables that must be considered when making the determination of feasible and prudent. Application of this programmatic evaluation is optional and an individual evaluation may be prepared at the discretion of the Administration in those cases where it is appropriate.

The AHC asked about how the evidence of no feasible and prudent alternative will be collected and distributed.

Appropriate evidence that no feasible and prudent alternative to the use of Section 4(f) property exists must be a part of the FHWA's administrative record for the project. This supporting

information and determination will be documented in the appropriate NEPA document or project record consistent with current Section 4(f) policy, guidance and the requirements of this programmatic evaluation.

The AHC also asked about what would constitute a "substantial increase in cost" and suggested that we include an approximate figure or at least a percentage.

The FHWA, in consultation with the Applicant, will determine what is considered a substantial increase. The language is identical to that used in previous programmatic evaluations.

The AHC commented that Findings 2(e) seem to be intended to play one resource improvement against another's adverse effect.

The statement found in Findings 2(e) is not intended to play one property against another. The purpose of the statement is to give appropriate consideration and weight to the beneficial measures of the project when determining whether an alternative is prudent and feasible.

In regard to item number 2(e), the NPS questioned whether "a missed opportunity" to benefit a Section 4(f) property has any relevance in determining whether or not an alternative is feasible and prudent.

Section 4(f) established a two-fold emphasis for the Secretary of Transportation: to protect and to enhance significant resources identified for special consideration. To date, programmatic evaluations have focused on projects with minor impacts to these protected properties. This programmatic evaluation is designed to allow the FHWA, the Applicant and official(s) with jurisdiction over the Section 4(f) properties, to look for opportunities where transportation actions can enhance Section 4(f) properties, even where there is a use of some property. Because a net benefit on a property can only be determined when all parties agree, the programmatic evaluation will only be used when it is deemed appropriate and in the best interests of the protected property. To ensure that 2(e) is not abused or equated to a low bar, we included language to clarify that for a project to qualify for 2(e) there must be a substantial missed opportunity to benefit a Section 4(f) property.

Mitigation and Measures To Minimize Harm

Several commenters indicated a confusion regarding the wording of this section and offered suggestions. The principal reason is the combination of "Measures to Minimize Harm" and

"Mitigation Measures." When put together, commenters read it as "Measures to Minimize Harm and Measures to Minimize Mitigation". Obviously this is not the intent; however, to rectify this misunderstanding the language has been changed to read: "Mitigation and Measures to Minimize Harm." Although, measures to minimize harm are considered mitigation, this language is consistent with the Section 4(f) statute.

Coordination

The NPS recommended that the programmatic evaluation require that all projects be coordinated with the appropriate DOI bureaus.

As noted earlier, for those projects where an agency or bureau of DOI is an official with jurisdiction, or where the LWCFA applies, coordination will be necessary as a procedure in meeting the applicability requirements and approval of this programmatic evaluation.

Another comment questioned the statement regarding the need for the FHWA to coordinate with the United States Coast Guard (USCG) before applying the programmatic evaluation to projects requiring a Section 9 Bridge permit.

When the proposed programmatic evaluation was issued, the USCG was still a part of the USDOT and therefore it had Section 4(f) responsibilities. Since that time, the USCG has been relocated to the U.S. Department of Homeland Security, eliminating its Section 4(f) responsibility. However, the USCG still has responsibility related to issuance of Section 9 Bridge permits. Wording has been changed to remove coordination with the USCG relative to Section 4(f) compliance.

The WIDOT noted that the constructive consultation of transportation officials, the officials with jurisdiction and resource agency staff is encouraged.

Consultation is not only encouraged, it is required. For this programmatic evaluation to be successful, good coordination and consultation are imperative.

Public Involvement

There were no substantive comments regarding this section and no changes have been made.

Approval Procedure

The AHC asked, relative to the last sentence of Item Number 6, if the Advisory Council on Historic Preservation agreed to review all programmatic evaluations.

The last sentence in Item Number 6 of the *Approval Procedures* in the draft programmatic should have been a separate paragraph. The purpose of the statement in the draft was to indicate that the ACHP and other agencies had been given the opportunity to review and comment on the draft. Furthermore, the FHWA consulted with the ACHP, the DOI and the NPS prior to finalizing the programmatic evaluation. To avoid confusion, this statement has been removed from the final programmatic evaluation.

Examples of Intended Use

One example of a net benefit to a historic property would be the reconstruction of a deteriorated or lost historic feature (such as a rock wall or auxiliary building) where mitigation related to Section 106 consultation includes the reconstruction of the feature in a slightly different location because of the design requirements of a needed improvement to the adjacent transportation facility. Consultation pursuant to Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) would likely result in an "adverse effect" determination. However, the SHPO, the FHWA, and the Applicant all agree that the reconstruction would enhance those qualities for which the property was determined eligible, even with the removal and replacement of the historically associated feature. In this case, the existing FHWA Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites would not be applicable, but if SHPO, as the official with jurisdiction, agrees that the impacts do not reach a level of substantial diminishment, the FHWA may determine that this programmatic evaluation would be applicable if the evaluation finds that the use of the property is prudent.

A second example involves a partial or even total relocation of a Section 4(f) property (such as a community park) to a location within the community that would have a greater value and use to that community. In this case, the existing nationwide minor use programmatic could not be used because the take of land would exceed the limitation included in it and would impair the use of the remaining Section 4(f) land. Again, this programmatic evaluation would be applicable if the officials with jurisdiction agree that the partial (or total) relocation would be a net benefit to the park and that the relocation does not result in the substantial diminishment of the activities, feature or attributes for which

the park is protected under Section 4(f). For instance, this programmatic evaluation can apply where the officials with jurisdiction identify a net benefit due to existing inadequate or unsafe access conditions to a park which presently minimizes the use of the park and the partial relocation can provide safe access; or in a situation where a park has minimal public use due to changes in adjacent land use and where the officials with jurisdiction agree that the total relocation will be of greater park or recreational value to the community.

A final example is the rehabilitation of an historic railroad station to maintain its major historic elements and to permit its continued use as a historic transportation facility. In some cases, such rehabilitation, even with considerable sensitivity to the historic character of the resource, cannot be accomplished without a Section 106 adverse effect determination, and neither the regulatory provision at 23 CFR 771.135(f) related to historic transportation facilities nor the historic site programmatic could be used. The adverse effect may be caused, for example, by modifications to provide access for the disabled or by interior reconfiguration to provide retail space to keep the station economically viable as a transportation facility. The SHPO, as the official with jurisdiction, may concur with the FHWA determination of "adverse effect," but may also recognize the net benefits of the restoration of the station and the assurance of its continued use may greatly outweigh the adverse effect, *i.e.*, not substantially diminish the qualities for which the property was determined eligible.

There will be situations when this programmatic evaluation would not apply. For example, the owner of an individually eligible historic building has abandoned the building so that it is likely to continue to deteriorate. The transportation agency proposes to demolish the building for a transportation improvement, and agrees to record the building in accordance with the standards set by the Historic American Building Survey (HABS) prior to its demolition. In the project design year (20 years hence) without the project, the building may be effectively demolished through neglect. In the design year of the project, the building will be demolished but a record of the building will be made. Although having the record of the demolished building is an improvement over not having such a record, it is not a net benefit to the resource, as the resource will no longer exist. Therefore, this programmatic evaluation would not apply because it

requires that there be a resource to which a net benefit would result. In this case, an individual Section 4(f) evaluation would be needed. On the other hand, if the same abandoned historic building (contributing component) lies within a large commercial historic district, where the officials with jurisdiction (*i.e.*, the SHPO) concur with an "adverse effect" determination pursuant to Section 106 consultation, but determine that the removal of the building with appropriate mitigation will have a net benefit to the historic district as the use of the resource (historic district) by the transportation project will improve access or parking which will likely improve the economic viability of the majority of the historic district, thus determining that the use will not rise to the level of "substantial diminishment" of the qualities of the resource. In such a situation, this programmatic evaluation might be applied.

The FHWA recognizes and appreciates the effort of all parties who provided comments for consideration in the development and finalization of this programmatic evaluation.

Authority: 49 U.S.C. 303; 23 U.S.C. 138; 49 CFR 1.48.

Issued on: April 13, 2005.

Mary E. Peters,

Federal Highway Administrator.

The text of the FHWA Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property is as follows:

U.S. Department of Transportation
Federal Highway Administration
(FHWA)
FINAL

Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property

This nationwide programmatic Section 4(f) evaluation (programmatic evaluation) has been prepared for certain federally assisted transportation improvement projects on existing or new alignments that will use property of a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic property, which in the view of the Administration and official(s) with jurisdiction over the Section 4(f) property, the use of the Section 4(f) property will result in a net benefit to the Section 4(f) property. Definitions: "Administration" refers to the Federal Highway Division Administrator or Division Engineer (as appropriate).

"Applicant" refers to a State Highway Agency or State Department of

Transportation, local governmental agency acting through the State Highway Agency or State Department of Transportation.

A "net benefit" is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project results in an overall enhancement of the Section 4(f) property when compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property, considering the activities, features and attributes that qualify the property for Section 4(f) protection. A project does not achieve a "net benefit" if it will result in a substantial diminishment of the function or value that made the property eligible for Section 4(f) protection.

"Official(s) with jurisdiction" over Section 4(f) property (typically) include: for a park, the Federal, State or local park authorities or agencies that own and/or manage the park; for a refuge, the Federal, State or local wildlife or waterfowl refuge owners and managers; and for historic sites, the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), whichever has jurisdiction under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f).

Applicability

The Administration is responsible for review of each transportation project for which this programmatic evaluation is contemplated to determine that it meets the criteria and procedures of this programmatic evaluation. The information and determination will be included in the applicable National Environmental Policy Act (NEPA) documentation and administrative record. This programmatic evaluation will not change any existing procedures for NEPA compliance, public involvement, or any other applicable Federal environmental requirement.

This programmatic evaluation satisfies the requirements of Section 4(f) for projects meeting the applicability criteria listed below. An individual Section 4(f) evaluation will not need to be prepared for such projects:

1. The proposed transportation project uses a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic site.
2. The proposed project includes all appropriate measures to minimize harm and subsequent mitigation necessary to preserve and enhance those features and values of the property that originally qualified the property for Section 4(f) protection.
3. For historic properties, the project does not require the major alteration of

the characteristics that qualify the property for the National Register of Historic Places (NRHP) such that the property would no longer retain sufficient integrity to be considered eligible for listing. For archeological properties, the project does not require the disturbance or removal of the archaeological resources that have been determined important for preservation in-place rather than for the information that can be obtained through data recovery. The determination of a major alteration or the importance to preserve in-place will be based on consultation consistent with 36 CFR part 800.

4. For historic properties, consistent with 36 CFR part 800, there must be agreement reached amongst the SHPO and/or THPO, as appropriate, the FHWA and the Applicant on measures to minimize harm when there is a use of Section 4(f) property. Such measures must be incorporated into the project.

5. The official(s) with jurisdiction over the Section 4(f) property agree in writing with the assessment of the impacts; the proposed measures to minimize harm; and the mitigation necessary to preserve, rehabilitate and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the Section 4(f) property.

6. The Administration determines that the project facts match those set forth in the Applicability, Alternatives, Findings, Mitigation and Measures to Minimize Harm, Coordination, and Public Involvement sections of this programmatic evaluation.

This programmatic evaluation can be applied to any project regardless of class of action under NEPA.

Alternatives

To demonstrate that there are no feasible and prudent alternatives to the use of Section 4(f) property, the programmatic evaluation analysis must address alternatives that avoid the Section 4(f) property. The following alternatives avoid the use of the Section 4(f) property:

1. Do nothing.
2. Improve the transportation facility in a manner that addresses the project's purpose and need without a use of the Section 4(f) property.
3. Build the transportation facility at a location that does not require use of the Section 4(f) property.

This list is intended to be all-inclusive. The programmatic evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully

evaluated before the Administration can conclude that the programmatic evaluation can be applied to the project.

Findings

For this programmatic evaluation to be utilized on a project there must be a finding, given the present condition of the Section 4(f) property, that the do-nothing and avoidance alternatives described in the Alternatives section above are not feasible and prudent. The findings (1, 2, and 3. below) must be supported by the circumstances, studies, consultations, and other relevant information and included in the administrative record for the project. This supporting information and determination will be documented in the appropriate NEPA document and/or project record consistent with current Section 4(f) policy and guidance.

To support the finding, adverse factors associated with the no-build and avoidance alternatives, such as environmental impacts, safety and geometric problems, decreased transportation service, increased costs, and any other factors may be considered collectively. One or an accumulation of these kinds of factors must be of extraordinary magnitude when compared to the proposed use of the Section 4(f) property to determine that an alternative is not feasible and prudent. The net impact of the do-nothing or build alternatives must also consider the function and value of the Section 4(f) property before and after project implementation as well as the physical and/or functional relationship of the Section 4(f) property to the surrounding area or community.

1. Do-Nothing Alternative.

The Do-Nothing Alternative is not feasible and prudent because it would neither address nor correct the transportation need cited as the NEPA purpose and need, which necessitated the proposed project.

2. Improve the transportation facility in a manner that addresses purpose and need without use of the Section 4(f) property.

It is not feasible and prudent to avoid Section 4(f) property by using engineering design or transportation system management techniques, such as minor location shifts, changes in engineering design standards, use of retaining walls and/or other structures and traffic diversions or other traffic management measures if implementing such measures would result in any of the following:

- (a) Substantial adverse community impacts to adjacent homes, businesses or other improved properties; or

(b) Substantially increased transportation facility or structure cost; or

(c) Unique engineering, traffic, maintenance or safety problems; or

(d) Substantial adverse social, economic or environmental impacts; or

(e) A substantial missed opportunity to benefit a Section 4(f) property; or

(f) Identified transportation needs not being met; and

(g) Impacts, costs or problems would be truly unusual, unique or of extraordinary magnitude when compared with the proposed use of Section 4(f) property after taking into account measures to minimize harm and mitigate for adverse uses, and enhance the functions and value of the Section 4(f) property.

Flexibility in the use of applicable design standards is encouraged during the analysis of these feasible and prudent alternatives.

3. Build a new facility at a new location without a use of the Section 4(f) property.

It is not feasible and prudent to avoid Section 4(f) property by constructing at a new location if:

(a) The new location would not address or correct the problems cited as the NEPA purpose and need, which necessitated the proposed project; or

(b) The new location would result in substantial adverse social, economic or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of community cohesion, jeopardize the continued existence of any endangered or threatened species or resulting in the destruction or adverse modification of their designated critical habitat, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) properties); or

(c) The new location would substantially increase costs or cause substantial engineering difficulties (such as an inability to achieve minimum design standards or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, or the environment); and

(d) Such problems, impacts, costs, or difficulties would be truly unusual or unique or of extraordinary magnitude when compared with the proposed use of the Section 4(f) property after taking into account proposed measures to minimize harm, mitigation for adverse use, and the enhancement of the Section 4(f) property's functions and value.

Flexibility in the use of applicable design standards is encouraged during the analysis of feasible and prudent alternatives.

Mitigation and Measures To Minimize Harm

This programmatic evaluation and approval may be used only for projects where the Administration, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm, includes appropriate mitigation measures, and that the official(s) with jurisdiction agree in writing.

Coordination

In early stages of project development, each project will require coordination with the Federal, State, and/or local agency official(s) with jurisdiction over the Section 4(f) property. For non-Federal Section 4(f) properties, *i.e.*, State or local properties, the official(s) with jurisdiction will be asked to identify any Federal encumbrances. When encumbrances exist, coordination will be required with the Federal agency responsible for such encumbrances.

Copies of the final written report required under this programmatic evaluation shall be offered to the official(s) with jurisdiction over the Section 4(f) property, to other interested parties as part of the normal NEPA project documentation distribution practices and policies or upon request.

Public Involvement

The project shall include public involvement activities that are consistent with the specific requirements of 23 CFR 771.111, Early coordination, public involvement and project development. For a project where one or more public meetings or hearings are held, information on the proposed use of the Section 4(f) property shall be communicated at the public meeting(s) or hearing(s).

Approval Procedure

This programmatic evaluation approval applies only after the Administration has:

1. Determined that the project meets the applicability criteria set forth in *Applicability* section;
2. Determined that all of the alternatives set forth in the *Findings* section have been fully evaluated;
3. Determined that the findings in the programmatic evaluation (which conclude that the alternative recommended is the only feasible and prudent alternative) result in a clear net benefit to the Section 4(f) property;

4. Determined that the project complies with the *Mitigation and Measures to Minimize Harm* section of this document;

5. Determined that the coordination and public involvement efforts required by this programmatic evaluation have been successfully completed and necessary written agreements have been obtained; and

6. Documented the information that clearly identifies the basis for the above determinations and assurances.

[FR Doc. 05-7812 Filed 4-19-05; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2005-20930 (PDA-31(F))]

Application by American Trucking Associations, Inc. for a Preemption Determination as to District of Columbia Requirements for Highway Routing of Certain Hazardous Materials

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), United States Department of Transportation (DOT).

ACTION: Public notice and invitation to comment.

SUMMARY: FMCSA invites interested parties to submit comments on an application by The American Trucking Associations, Inc. for an administrative determination as to whether Federal hazardous materials transportation law preempts highway routing requirements of the District of Columbia in restricting transportation of certain hazardous materials.

DATES: Comments received on or before June 6, 2005, and rebuttal comments received on or before July 19, 2005, will be considered before an administrative ruling is issued. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: You may submit comments, identified by DOT DMS Docket Number FMCSA-2005-20930, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1-202-493-2251.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001. Please submit three copies of written comments.

- *Hand Delivery:* Submit three copies of written comments to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Comments must refer to Docket Number FMCSA-2005-20930. All comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided. For detailed instructions on submitting comments, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document. For a summary of DOT's Privacy Act Statement or information on how to obtain a complete copy of DOT's Privacy Act Statement please see the "Privacy Act" heading of the **SUPPLEMENTARY INFORMATION** section.

Docket: For access to the docket to read the application or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. William Quade, Chief, Hazardous Materials Division (MC-ECH), (202) 366-2172; Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., *e.t.*, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation

A copy of each comment must also be sent to Richard Moskowitz, Assistant General Counsel, American Trucking Associations, 2200 Mill Road, Alexandria, VA 22314. Certification of sending a copy to Mr. Moskowitz must accompany your comments. (The following format is suggested: "I certify copies of this comment have been sent to Mr. Moskowitz at the address specified in the **Federal Register**.")

The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the DMS Web site. If you want us to notify you of receiving your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page displaying after receipt of on-line comments.