Section 4(f): Analyzing Differing Interpretations
and
Examining Proposals for Reform

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"We shall never cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time."
--T.S. Eliot[1]

I. INTRODUCTION

Since its passage in 1966, § 4(f) of the Department of Transportation (DOT) Act of 1966[2] has been the subject of considerable debate within the transportation and environmental communities. Section 4(f) was enacted during a time of growing awareness and concern on the part of the public and its elected representatives in preserving the environment and important historic sites from encroachment by and possible destruction due to the growth of the transportation system.[3] It declared that "[i]t is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."[4] The section goes on to note that transportation programs and projects that require the use of protected lands shall not be approved unless "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm" to

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[1] Quotes of T.S. Eliot, The Quotations Page, *available at* http://www.quotationspage.com/search.php3?Author-T.+S.+Eliot&file=other (last visited Aug. 8, 2004).

[2] 49 U.S.C. § 1653(f) (1976).

[3] *See e.g.*, Highway Existence: -- 100 Years and Beyond: A Peaceful Campaign of Progress and Reform: The Federal Highway Administration at 100, *available at* http://www.fhwa.dot.gov/infrastructure/rw93.htm (last visited Aug. 8, 2004) [hereinafter FHWA History].

[4] 49 U.S.C. § 303(a) (2004). Note--for simplicity, this paper will generically refer to these types of lands as "protected" lands.

these types of lands.[5] Although there is little continuing debate as to the virtues of the broad policy set forth by § 4(f), there has been much disagreement and discussion within the affected legal and policy communities as to the exact meaning, application, and reach of this important provision of law.[6]

Section 4(f) has also produced a considerable body of case law as the court system has wrestled with many of the same issues debated within the environmental and transportation policy communities, including the law's scope and application.[7] This section also spawned the seminal administrative law case of *Citizens to Preserve Overton Park v. Volpe*[8] -- a case that is still viewed as a touchstone for the interpretation of federal administrative law and environmental and transportation law and policy[9]. While the interpretations rendered by the judicial system have not, as of yet, translated into changes to the original statutory and regulatory scheme of § 4(f), several legislative proposals are currently pending that would do precisely that--change the scope and application of § 4(f).[10]

The case law and policy debates on § 4(f) over the years have posed or raised a number of questions and issues. For example: Why would such a seemingly beneficial policy of preventing harm to some of the nation's most important lands, properties and resources be the subject of such intense debate? And, if changes were

[5] 49 U.S.C. § 303(c)(1,2).

[6] *See e.g., infra* Part V.

[7] *See e.g., infra* Part III.

[8] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[9] *See e.g.,* JERRY MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM CASES AND MATERIALS (1992) at 708-718.

[10] *See infra* Part V.

to be made to § 4(f), what impacts would be created? What should the law be as to the protection of environmental resources and historic properties when confronted with the challenges of a growing population and an expanding highway and road network designed to help accommodate this growing population? These are the questions that have been asked, debated and discussed for nearly forty years. On the eve of the first substantial change to § 4(f) via the transportation reauthorization bill[11] that is currently winding its way through Congress, it is important to review these questions and seek answers that might help guide the transportation and environmental communities through the next forty years of § 4(f)'s existence.

This discussion seeks to provide those answers to these questions. Part II begins with a review of the history of § 4(f), examining the past in order to illuminate a future path or paths. The discussion then turns to an analysis of the judicial, administrative and legislative interpretations of § 4(f). Part III focuses on the differing interpretations taken by the Supreme Court and certain federal courts of appeals. Part IV reviews actions and interpretations taken by the DOT, as well as recent Bush administration actions concerning § 4(f). Following this line of inquiry, the discussion next proceeds in Part V with an analysis of key legislative proposals of the two most recent Congresses that have been offered in response to, or because of, the complex and occasionally controversial history that enshrouds this section of the

[11] *See* Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, S. 1072, 108th Cong. (2003); Transportation Equity Act: A Legacy for Users, H.R. 3550, 108th Cong. (2003). These bills provide for the multi-year authorization of federal highway and transit programs and projects. They are also the main legislative vehicles for the reauthorization of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178 (1998), the programs of which expired on September 30 2004. TEA-21 has been extended six times by Congress, and the current extension expires on May 31, 2004. *See* Surface Transportation Extension Act, Part V, H.R. 5183, 108th Cong. (2004). This combined legislative process is commonly known as the transportation bill reauthorization and/or TEA-21 reauthorization.

law. Finally, the discussion concludes in Part VI with an examination of the possibilities for the future of § 4(f).

II. FROM WHERE WE STARTED -- THE HISTORY OF § 4(f)

What today is commonly known operationally and in practice as "§ 4(f)"[12] is the result of several evolutionary legislative developments. Section 4(f) "represented the first major legislative victory, apart from water resource development programs, in the battle of conservationists for control of pubic works projects."[13] This victory, however, was not absolute and not without its critics as the case law and subsequent legislative developments discussed below will note.

A. Federal Aid Highway Act of 1966 -- "Consideration of Alternatives"

The opening move in the development of what has become known as § 4(f) originated with an amendment to the Federal-Aid Highway Act of 1966[14] offered by Senator Ralph Yarborough (D-TX).[15] This amendment was offered largely in response to a proposal by the Texas Department of Highways to build a road through the Brackenridge Park in San Antonio and was an effort to place limitations on state

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[12] *See e.g.*,The Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003, Section-by Section Analysis, *available at* http://www.fhwa.dot.gov/reauthorization/safetea_analysis.pdf (last viewed Aug. 8, 2004) [hereinafter SAFETA DOT Analysis]. "Former § 4(f) was originally enacted as part of the Department of Transportation Act of 1966 and is now codified at 49 U.S.C. 303, but is still commonly referred to as "§ 4(f)". *Id.* at 26.

[13] Oscar S. Gray, *Section 4(f) of the Department of Transportation Act*, 32 MD. L. REV. 327 (1973).

[14] This bill has been codified at 23 U.S.C. § 101 et. seq. (2004). *See also* Pub. L. No. 89-574.

[15] *Id.* at 333-34. Senator Yarborough served on the Labor and Public Welfare Committee. *See* Biography of Senator Ralph Webster Yarborough, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=Y000006 (last visited Aug. 2, 2004).

departments of transportation when building highways that required the taking of parklands.[16] This amendment ultimately was approved by the Senate and incorporated with a modification into the final conference report for the Federal-Aid Highways Act of 1966.[17] The text of the provision as included in the conference report is the following:

> It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under § 105 of this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land to minimize any harm to such park or site resulting from such use.[18]

This final conference report language, now codified at 23 U.S.C. § 138, incorporated one significant change from the original Yarborough amendment approved by the Senate. Senator Yarborough's amendment originally included a requirement that the Secretary of Transportation not approve any project using a protected land unless there was no "feasible alternative to the use of such land."[19] As can be seen in the above conference report language, this language was deleted, and language requiring a "consideration of alternatives" was added instead.[20] Explanatory

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[16] *Id.*

[17] *Id.* at 335. *See also* CONFERENCE REPORT ON FEDERAL-AID HIGHWAY ACT OF 1966, H. RPT. NO. 1903, 89th Cong., 2d Sess. (1966) [hereinafter 1966 Conference Report]

[18] *Id.* This language was subsequently codified at 23 U.S.C. § 138.

[19] See Gray, *supra* note 13, at 334 *citing* 112 CONG. REC. 17448 (1966).

[20] *Id.* at 335. *See also* 1966 Conference Report, *supra* note 17.

conference report language specifically noted that "[t]he requirement that there be no feasible alternative to the use of the land for highway purposes has been deleted and there has been added the requirement that the planning must include consideration of alternatives to the use of this land for highway purposes."[21]

B. Department of Transportation Act of 1966 -- "Feasible and Prudent Alternatives"

Concurrent with congressional consideration and passage of the Federal-Aid Highway Act of 1966, Congress also considered legislation to create and establish the DOT.[22] This legislation consolidated, for the first time, the major transportation modal administrations and agencies responsible for aviation, highways, railroads, motor carrier safety, the Coast Guard, and the Saint Lawrence Seaway.[23] In creating this new cabinet-level department, Congress sought to not only establish the formal structures that would govern the day-to-day operations of the department and its new constituent administrations, but also to outline broad principles that would apply to the entire DOT.[24]

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[21] 1966 Conference Report, *supra* note 17, at 11-12.

[22] Gray, *supra* note 13, at 334-35. *See* Department of Transportation Act of Oct. 25, 1966, Pub. L. No. 89-670, 80 Stat. 931. (1966).

[23] Gray, *supra* note 13, at 329

[24] *Id.* at 328-329. The modal agencies created by the Department of Transportation Act of 1966 included the following: the Federal Aviation Administration, the Federal Railroad Administration, and the Federal Highway Administration. "Other organizations transferred to DOT included the Coast Guard, from Treasury; the Bureau of Public Roads (BPR), from Commerce to the new FHWA; and the Saint Lawrence Seaway Development Corporation." *Id.* at 329.

Among the general principles that Congress added to the DOT Act of 1966 were two sections--§§ 2(a) and (b)(2), Declaration of Purpose and § 4(f).[25] These two provisions, along with the Yarborough Amendment described above, were later to become what is now commonly known within the transportation and environmental law practice areas as "§ 4(f)."[26] Section 2(a) of the DOT Act of 1966 states the following:

> The Congress hereby declares that the general welfare, the economic growth and stability of the Nation and its security require the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith and with other national objectives, *including the efficient utilization and conservation of the Nation's resources* (emphasis added).[27]

§ 2(b)(2) notes the following:

> It is hereby declared to be the national policy that special efforts should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.[28]

The Senate Committee on Government Operations, one of the committees charged with creating the DOT, also issued a committee report to accompany S. 3010, the Senate's bill to establish the DOT. In this report, the committee noted that § 4(f) and the policy statements in § 2 "are designed to insure that in planning highways, railroad rights-of-way, airports and other transportation facilities, care will be taken, to the maximum extent possible, not to interfere with or disturb established

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[25] *See* CONFERENCE REPORT OF THE DEPARTMENT OF TRANSPORTATION ACT OF 1966, H. RPT. NO. 2236, 89th Cong., 2d Sess. (1966) [hereinafter DOT Act Conference Report]

[26] *See e.g.*, SHERRY HUTT ET. AL., CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES at 15 (2004).

[27] DOT Act Conference Report, *supra* note 25, at § 2(a).

[28] *Id.* at § 2(b)(2).

recreational facilities and refuges."[29] This statement by using the language "to the maximum extent possible" implies that the Secretary, while being directed to apply a rigorous approach when evaluating § 4(f) protected lands, is also allowed to temper that approach with pragmatism i.e., he or she must protect the lands but in doing so must only approve an approach that is "possible" or workable.

1. Conference Report Language -- § 4(f)

The conference report for the DOT Act goes on to describe other broad guiding principles for DOT. In § 4, several general provisions are articulated that apply to DOT and are not specific to any one modal administration.[30] Among these general provisions is § 4(f) that, as enacted as part of the DOT Act of 1966, stated the following:

> The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that includes measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[31]

This conference report language was the result of the conferees adopting a substitute amendment that made minor, but significant, changes to the original Senate language

[29] S. REP. NO. 1659, 89th Cong., 2d Sess., at 6 (1966).

[30] DOT Act Conference Report, *supra* note 25, at § 4(f).

[31] *Id.* This language has been subsequently codified at 49 U.S.C. § 303 (2004).

of S. 3010 as amended.[32] Most notable of these changes was the addition of the words "and prudent" after "feasible."[33] The impact of these additions will be explored in more detail below.

2. Conference Report Debate -- § 4(f)

During the House's floor consideration of the conference report, there was discussion by some Members of Congress who raised concerns about the scope and reach of § 4(f). Congressman Kluczynski (D-IL) noted that while he generally supported the bill, he "sound[ed] a word of caution in interpreting § 4(f)."[34] He argued that the "protection of our parks, open spaces, historic sites, fish and game habitats, and the other natural resources with which our Nation is so richly endowed is of the utmost importance and urgency, but not to the total exclusion of other considerations."[35] In fact, to provide disproportionate protections to these "protected" resources "would result in as many inequities as justifying transportation plans merely on the basis of economy or efficiency."[36] He continued his observations by identifying some of the "other considerations" that should be taken into account when reviewing the efficacy of a particular transportation project. These other considerations "would include the integrity of neighborhoods, the displacement of

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[32] *Id.* "The conference substitute amendment adopts the Senate amendment language except for adding the words "and prudent" after the word "feasible." *Id.*

[33] *Id.*

[34] 112 CONG. REC. 26651 (daily ed. Oct. 13, 1966) (statement of Rep. Kluczynski on the DOT Act Conference Report).

[35] *Id.*

[36] *Id.*

people and businesses, and the protection of schools, and churches and the myriad of other social and human values we find in our communities."[37] As will be noted in more detail below, these "other considerations" have formed the basis of many present-day concerns regarding the application of this section. Congressman Kluczynski, in fact, anticipated many of the issues that have arisen in litigation and in policy debates since the passage of this provision.

Also joining Congressman Kluczynski in his concerns about § 4(f) was his fellow Illinois congressional delegation colleague, Congressman Rostenkowski, who would later go on to lead the influential House Ways and Means Committee. Mr. Rostenkowski, while supportive of the inclusion of § 4(f) in the bill, reiterated concerns that were originally raised during debate on the Yarborough Amendment to the Federal Highway Act.[38] "Fear was expressed," Congressman Rostenkowski noted, "that the [Yarborough] amendment might be misinterpreted to mean the preservation of natural and manmade resources would be the overriding consideration in highway construction."[39] Rostenkowski made clear that his support for this provision was contingent upon the inclusion of guidelines that required the Secretary of Transportation to consider the feasibility and prudence of alternatives to use protected lands and also to use "all possible planning to minimize harm" to the lands protected by the section. These guidelines provide both protection to the lands

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[37] *Id.* Congressman Kluczynski ultimately did support the bill because he believed the planning requirements and insertion of the word "prudent" as a modifier for the types of alternatives that must be considered made § 4(f) "workable and effective." Nevertheless, the "word of caution" that he raised regarding this section remains valid particularly as it relates to the "other considerations" he believed must be accounted for when conducting an analysis under this section.

[38] *Id.*

[39] *Id.*

identified in the section and also give the Secretary a measure of discretion in his or her review process. This measure of discretion was important to Congressman Rostenkowski, and he specifically noted that he wanted "the Record to show… that it is not the intent of Congress to tie the Secretary's hands."[40] Congressman Rostenkowski's statements, along with those of Congressman Kluczynski, provide a key foundation for the interpretation of § 4 (f).

In order to further illustrate his concerns, Congressman Rostenkowski offered up several examples of situations in which the application of § 4(f) to real-life situations might prove problematic.[41] He envisioned situations where the Secretary might have to "choose between preserving a wildlife refuge or saving human lives by a highway improvement" or choose "between using public parkland or displacing hundreds of families.[42] Therefore, to ensure that these types of Hobbesian choices could be avoided to the maximum extent possible, Congressman Rostenkowksi argued that "[Congress] should memorialize the Secretary to give full consideration to the preservation of public lands, but not at the expense of human lives and human welfare."[43] With these concerns articulated, Congressman Rostenkowski offered his support for the provision and the conference report, believing that the language would adequately address his concerns.

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[40] *Id.*

[41] *Id.*

[42] *Id.* at 26651-52.

[43] *Id.* at 256652.

C. Federał Aid Highway Act of 1968

After passage and enactment of both the Yarborough Amendment to the Federal-Aid Highway Act of 1966 and § 4(f) of the DOT Act of 1966, it quickly became apparent that the slight variation between the two provisions--one applying only to the Federal Highway Administration (FHWA) (the Yarborough Amendment) and the other applying to the entire DOT, including the FHWA as well as other modal agencies (§ 4(f))--created confusion with state and local governments and in the transportation community.[44] The language of the Yarborough Amendment as codified did not include the "feasible and prudent alternatives" analysis required under § 4(f). As a result of this discrepancy and the cloud it cast over transportation projects, Congress revisited this issue in the Federal-Aid Highway Act of 1968.[45]

Initially, the House and Senate Public Works Committees[46] proposed to correct this discrepancy by "chang[ing] § 4(f) to read more like § 138."[47] This proposal was met with opposition by the environmental and preservationist communities[48] and necessitated a different approach by the conference committee in order to find an acceptable solution. The result was that "both § 4(f) of the DOT Act

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[44] § 4(f) Policy Paper, Federal Highway Administration (September 24, 1987, revised June 7, 1989), *available at* http://environment.fhwa.dot.gov/projdev/4fpolicy.htm [hereinafter 4(f) Policy Paper]. *See also* Gray, *supra* note 13, at 338.

[45] Gray, *supra* note 13, at 338.

[46] At the time, these two committees were the committees of authorizing jurisdiction. Today, the committees of primary jurisdiction over the FHWA and the DOT are the Senate Environment and Public Works Committee, the Senate Commerce, Science and Transportation Committee and the House Transportation and Infrastructure Committee.

[47] Gray, *supra* note 13, at 339.

[48] Gray, *supra* note 13, at 339. The environmental community was concerned that eliminating the "feasible and prudent alternatives" requirement in favor of a mere "consideration of alternatives" would water down the overall provision and result in more loss of protected lands.

and § 138 were amended so as to be identical to each other."[49] The resulting conference language as codified in 49 U.S.C. § 1653(f) (1970) is the following:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[50]

Essentially, the new language used § 4(f) as the base text and added a few new provisions.[51] First, § 2(b) of the DOT Act of 1966 was incorporated into the beginning as a statement of national policy. Second, the words "publicly owned" were inserted as a modifier for "land from a public park, recreation area, or wildlife and waterfowl refuge."[52] Finally, the lands protected by the section were to be of "national, State or local significance as determined by the Federal, State or local

[49] Gray, *supra* note 13, at 339-340.

[50] 49 U.S.C. § 1653(f).

[51] Gray, *supra* note 13, at 340.

[52] Note that the modifier "publicly owned" does not apply to historic sites. *See* Gray, *supra* note 13 at 340.

officials."[53] These changes ensured that the "feasible and prudent alternatives" language remained in effect--an issue of importance to the environmental community.

A review of the committee reports accompanying this legislation also reveals Congressional concern over the scope and application of § 4(f). House Report No. 1799 noted the following:

> This amendment of both relevant sections of law is intended to make it unmistakably clear that neither section constitutes a mandatory prohibition against the use of enumerated lands; but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated a local preference should be overturned on the basis of this authority.[54]

This clearly indicates that Congress did not necessarily intend that § 4(f) be strictly and stringently interpreted. In fact, the legislative history indicates a strong inclination for local decision-making. The legislative history also notes that § 4(f) should be applied with "wisdom and reason." As will be seen in the discussion below, this issue has been a source of contention and disagreement among some of the circuit courts of appeal.

D. Recodification of the DOT Act of 1983 and Amendment of 1987

Section 4(f) remained unchanged until, as part of an "overall recodification of the DOT Act, § 4(f) was amended and codified in 49 U.S.C. § 303."[55] This version of 4(f) remains in effect today with only one minor change occurring since this

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[53] *See* Gray, *supra* note 13 at 340.

[54] H. Rep. No. 1799, 90th Cong., 2d Sess., *reprinted in 1968 U.S. Code Cong. & Admin. News*, 3531, 3538.

[55] 4(f) Policy Paper, *supra* note 44, at 3.

recodification[56]. The language of § 4(f) currently in effect is codified at 49 U.S.C. § 303:

> (a) It is the policy of the United States Government that special effort be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.
> (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.
> (c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation areas or wildlife and waterfowl refuge, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, recreation areas refuge, or site) only if,
>
> (1) there is no prudent and feasible alternative to using that land; and
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> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuges or historic site resulting from the use.[57]

As can be seen upon comparison of the above language with the earlier versions, no substantial changes were made to § 4(f). In addition, as the FHWA noted, "[t]he legislative history of the 1983 recodification indicates that no substantive change was intended" to § 4(f).[58] Moreover, "because of familiarity with § 4(f) by thousands of Federal and state personnel, the Federal Highway Administration continues to refer to the requirements as § 4(f)".[59] Unfortunately, "§

[56] The only additional change made to § 4(f) since the 1983 recodification was a 1987 amendment. This amendment inserted in subsection (c) after "requiring the use" the following language: "(other than any project for a road or parkway under § 204 of title 23)". *See* 49 U.S.C. § 303 (2004); *See also* Pub. L. No. 100-17, Title I, § 133(d), 101 Stat. 173.

[57] 49 U.S.C. § 303.

[58] 4(f) Policy Paper, *supra* note 44, at 4.

[59] *Id.*

138 was not amended, so the wording in the two sections is once again different."[60] Nevertheless, 49 U.S.C. § 303 as recodified in 1983 and slightly modified in 1987 represents the current statutory treatment of § 4(f), and it is this current form that has been the subject of ongoing debate within the transportation and environmental communities.

III. EXPLORING THE JUDICIAL INTERPRETATIONS – A SPLIT AMONG THE CIRCUITS

Since its inception, § 4(f) has been the subject of debate and differing opinions as to its meaning and scope.[61] In fact, "[n]ext to the National Environmental Policy Act (NEPA), § 4(f) has been the most frequently litigated environmental statute in the Federal Highway program."[62] It has also been "the most frequent cause of court injunctions halting highway programs."[63] These many cases have helped define the landscape of § 4(f), and as will be seen in the discussion below, some facets of the section have been interpreted differently in certain circuits. The discussion below focuses, first, on the seminal § 4(f) Supreme Court case--*Citizens to Preserve Overton Park v. Volpe*[64]--and then turns to key, representative cases from several different U.S. Courts of Appeal that highlight the competing views on the scope and application of § 4 (f) taken by some circuits. As will be seen, these differing

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[60] *Id.*

[61] *See e.g.*, 4(f) Policy Paper, *supra* note 44, at 4.

[62] § 4(F) - INTRODUCTION: LEGAL OVERVIEW (2004), *available at* http://www.§4f.com/case_studies.htm (last visited June 11, 2004) (overview of § 4(f) legal issues).

[63] *Id.*

[64] *Overton Park*, 401 U.S. at 402.

viewpoints tend to fall primarily into one of two camps: (1) a more flexible, balanced approach; and (2) a more stringent and strict approach.

A. U.S. Supreme Court -- Citizens to Preserve Overton Park v. Volpe

Interestingly enough--despite the large volume of litigation involving § 4(f)--only one case concerning § 4(f) has been litigated before the Supreme Court.[65] This case, *Citizens to Preserve Overton Park v. Volpe*,[66] involved the review of a proposed highway project in Memphis, Tennessee.[67]

The plaintiffs/petitioners--a group of private citizens allied to stop the use of Overton Park for a highway--challenged the Secretary of Transportation's approval of a planned highway project that was to be routed through the park.[68] The citizens' group argued that the Secretary of Transportation (Secretary) did not properly meet his obligations under § 4(f). First, they alleged the Secretary did not produce a formal finding documenting his decision, thus making it difficult for the court to analyze and review the Secretary's decision.[69] Second, alternative routes that would not impact the park existed and these alternatives were both "feasible and prudent."[70] Third, and finally, the citizens argued that even if those alternatives were deemed not "feasible and prudent," "all possible" methods were not taken to minimize the highway's harm

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[65] *Id.*

[66] *Id.*.

[67] *Id.* at 406.

[68] *Id.*

[69] *Id.* at 408.

[70] *Id.*

to the park.[71] The Secretary argued that his approval of the project was based upon the fact that the route through the park was authorized by the Bureau of Public Roads in 1956 and also approved by local officials.[72] Affidavits attesting to the rationale of the Secretary in making his decision as well as indicating the independence with which he exercised his project approval discretion were introduced at the district court.[73]

Both the district court and the court of appeals ruled in favor of the Secretary and noted in their decisions that the Secretary did not need to make formal findings when approving the project and that his authority and discretion was broad.[74] The Supreme Court, in an opinion authored by Justice Marshall and joined by five of his brethren,[75] reversed the court of appeals and remanded for further proceedings.[76] The Court noted that while formal findings on the part of the Secretary were not required, additional evidence beyond that provided for in the affidavits was needed to support the Secretary's decision.[77] Therefore, the case was remanded to the district court for further investigation as to the Secretary's rationale in approving the project and his decision-making process.

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[71] *Id.*

[72] *Id.* at 406.

[73] *Id.* at 409. Opposing and contradicting affidavits were also filed by the citizens group.

[74] *Id.* at 409.

[75] *Id.* at 403. Justice Marshall was joined in his opinion by Chief Justice Burger and Justices Harlan, Stewart, White and Blackmun.

[76] *Id.* at 406.

[77] *Id.* at 409.

Overton Park, however, is notable in § 4(f) practice and lore for the statements made in the opinion's dicta.[78] It is these statements that have attributed much to the interpretation of § 4(f) and have also been the subject of discussion in some of the more recent federal decisions concerning § 4(f). Chief among the issues raised in *Overton Park's* dicta is the Court's statement that the Secretary may not approve a project that would result in "destruction of parkland" unless the alternative to using the parkland would itself pose "unique problems."[79]

The Court elaborates on what constitutes a "unique" problem. Factors regarding the alternatives to using parkland or other protected lands such as "cost, directness of route, and community disruption" are not considered to be unique according to the Court.[80] These types of factors were already taken into account when § 4(f) was enacted because "if Congress [had] intended these factors to be on an equal footing with the preservation of parkland there would have been no need for [§ 4(f)]."[81] In taking this position, the Court rejected the Secretary's contention that he should be able to "engage in a wide-ranging balancing of competing interests."[82] And, as will be seen below, some circuits have backed away from this outright rejection of a balancing test as it applies to determining whether no "feasible and

[78] In addition, the case is noteworthy in the administrative law field. *See e.g.*, Mashaw, *supra* note 9, at 708-718.

[79] *Overton Park*, 401 U.S. at 413.

[80] *Id.* at 411.

[81] *Id.* at 412.

[82] *Id.*

prudent" alternative exists to the use of protected lands.[83] Others circuits, however, have followed closely the dicta in *Overton Park* and required a clear showing that a "unique problem" with an alternative route justifies encroachment on a park or other protected land.[84]

B. Flexibility and Balance -- 7th, 4th and D.C. Circuits

The late 1960's and the 1970's represented a time of peak expansion of the interstate highway system.[85] It was a time when new roads and highways were being built in large numbers and a time when many were concerned that parks and historic areas would be lost or destroyed to the advance of the bulldozer and road builders.[86] It was precisely for these reasons and to address these concerns that § 4(f) was enacted.[87] However, as "[t]oday's highway program is oriented much more toward system preservation and modernization" rather than to system expansion, the "rigid rules for applying § 4(f)" are often out of step with real world practices.[88] Several circuit courts have reflected this notion in their decisions and have moved the § 4(f) jurisprudence away from the strict constructionist view espoused by *Overton Park.*

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[83] *See e.g.*, Eagle Found. v. Dole, 813 F.2d 798 (7th Cir. 1987); Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159 (4th Cir. 1990).

[84] *See e.g.*, La. Envtl. Soc'y v. Coleman, 537 F.2d 79 (5th Cir. 1976); Druid Hills Civic Assoc. v. FHWA, 772 F.2d 700 (11th Cir. 1985); Stop H-3 Assoc. v. Brinegar, 740 F.2d 1442 (9th Cir. 1984).

[85] *See e.g.*, FHWA History, *supra* note 3, at 10-13.

[86] *See e.g.*, SAFETEA DOT Analysis, *supra* note 12, at 27.

[87] *Id.*

[88] *Id.*

The following discussion analyzes several key and representative cases that have favored a more flexible and balanced interpretation and application of § 4(f).

1. Eagle Foundation v. Dole -- 7th Circuit

One of the seminal cases that helped define a newer approach to interpreting § 4(f) is *Eagle Foundation v. Dole*.[89] This case involved a challenge to a planned four-lane highway to connect Decatur, Springfield and Jacksonville, Illinois with Hannibal, Missouri.[90] This connection necessitated constructing a bridge to cross the Illinois River.[91] The plans for the bridge were controversial because its construction impacted both the Pike County Conservation Area,[92] parts of which serve as winter roosting spots for the bald eagle, as well as the Wade Farm, an historic farm dating to the 1840's that was also eligible for inclusion in the National Register for Historic Places.[93]

Due to the potential impacts that this transportation project posed to both a wildlife refuge and an historic place, § 4(f) was necessarily implicated. The plaintiffs/appellants--Eagle Foundation, Inc.[94]--"sought to block construction of the highway on the ground that… § 4(f) prohibited the construction as a substantive

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[89] *Eagle Found. v. Dole*, 813 F.2d 798 (7th Cir. 1987).

[90] *Id.* at 800.

[91] *Id.*

[92] "… the 862-acre Pike County Conservation Area (PCCA), which includes Napolean Hallow, was established to preserve wildlife, some to be watched and some to be hunted." *Id.* at 800.

[93] *Id.*

[94] Eagle Foundation, in addition to having an interest in any development in the PCCA that might disrupt the habitat of the bald eagles known to inhabit the area, also had a leasehold interest in the Wade Farm. *Id.* at 801.

manner."[95] The trial court held that the "Secretary [of Transportation] did not act arbitrarily or capriciously in concluding that… no other placement of the bridge across the Illinois River is 'feasible and prudent.'"[96] In addition, the trial court also held that the plans for the highway "minimize[d] the harm" to the protected property.[97] Thus, the Secretary was found to be in compliance with both prongs of § 4(f), and the court allowed the project to proceed even though it impacted § 4(f)-protected property because no other "feasible and prudent" alternative existed and any harms to the protected lands were minimized. Eagle Foundation, subsequently appealed this decision to the Seventh Circuit Court of Appeals.

Writing the opinion for the three judge panel, Judge Easterbrook upheld the district court's decision and provided a new interpretation of the views espoused in *Overton Park*. Easterbrook argued that the Secretary of Transportation should be given a fair amount of latitude in applying and interpreting the § 4(f) requirements.[98] More significantly, the decision in *Eagle Foundation* established the notion that the Secretary, in carrying out his or her responsibilities pursuant to § 4(f), should balance competing interests in determining what is "feasible and prudent."[99] This is a clear departure from the rigid interpretations voiced in *Overton Park*.[100]

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 804. "The statutory standard makes deferential review inevitable." *Id.*

[99] *Id.*

[100] *Cf. Overton Park*, 401 U.S. at 411. "… no such wide-ranging endeavor [referencing the Secretary's assertion that he be allowed to 'engage in a wide-ranging balancing of competing interests'] was intended [by Congress]" *Eagle Found.*, 813 F.2d at 798.

However, *Eagle Foundation* did not stop with the statement that the Secretary be allowed to engage in a balancing test to determine whether or not a project should be advanced given the § 4(f) requirements. In fact, it went further--directly taking issue with the Supreme Court's use of the word "unique" to describe those types of problems that are required to be proven in order to warrant or justify using a protected land for a highway project. Essentially, the *Eagle Foundation* court argued that if the Supreme Court really meant what it said regarding "unique" problems being required to be shown to justify the taking of a protected land for a highway project then there would be virtually no such situation in reality that would fit this description because these type of problems and situations are almost never unique, *i.e.,* almost never "one of a kind."[101] A review, according to the court, of the legislative intent of § 4(f), argues against "such an extreme position."[102]

The courtgoes on to state that "we cannot believe… the Supreme Court meant that if a risk or cost has been accepted, or an obstacle overcome, for any highway in the United States, then it always must be accepted or overcome in preference to the use of any § 4(f) lands…"[103] Indeed, all that is necessary for the Secretary to overcome the presumption against using § 4(f) lands is a "good," and prudent reason.[104] Once "the Secretary makes that hard decision, it must be respected."[105]

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[101] *Id.* In discussing the Supreme Court's requirement that a problem be "unique" in order to allow a highway project to take protected land, the court observed that "'[u]nique'" is a word without degree; a situation is unique (nonpareil, one of a kind) or it is not." *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 805.

[105] *Id.*

While this interpretation of the requirements of § 4(f) clearly redefines and reframes the scope and depth of § 4(f) review by both the Secretary and the courts, *Eagle Foundation* provides yet a further redefinition. In conducting a § 4(f) review and inquiry, the Secretary may take into account "everything important that matters."[106] Thus, a Secretary may approve a project even though it requires the taking and/or use of § 4(f) protected lands if "[a] cumulation of small problems" so warrants such action.[107] This reasoning would likely not withstand the rigid construction articulated by the *Overton Park* Court. However, "aggregate injuries," if sufficient, may even meet the threshold test of uniqueness as espoused by *Overton Park.*[108] In *Eagle Foundation*, the court cited a "two-volume study" as evidence of an accumulation of problems that justified routing the highway through otherwise protected lands.[109] This new gloss on *Overton Park* substantially enlarged the discretion of the Secretary when conducting a § 4(f) review. No longer would the Secretary be confined to a consideration of only large, "unique" problems when reviewing the efficacy of a highway project; now, "[e]ven a featherweight drawback may play some role."[110]

Related to the issue of considering aggregate problems and injuries is the issue of how searching should a § 4(f) review and inquiry be in terms of looking at these

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[106] *Id.*

[107] *Id.* The court also cited *Town of Fenton v. Dole*, 636 F.Supp. 557, 567 (N.D.N.Y.), *aff'd*, 792 F.2d 44 (2d Cir. 1986), to support this "cumulation" argument.

[108] *Id.*

[109] *Id.*

[110] *Id.*

alternatives and potential problems.[111] This is an issue that continues to vex highway and transportation planners and can often drive project costs up as reviews try to be all encompassing .[112] Rather than have the highway planners continue to "look at a few more" options, the court argued that the proper inquiry is "whether enough have been examined to permit a sound judgment that the study of additional variations is not worthwhile."[113] In the instant case, the court found that DOT "examined more than ten routes"[114] within a "ten by six mile area."[115] The court deemed this level and scope of review and analysis by the Secretary as sufficient.[116]

Finally, the court considered the issue of whether or not the Secretary approved a plan that minimized the harms to the § 4(f) protected lands.[117] As with its finding regarding the scope of review for alternatives, the court also found the Secretary took sufficient steps in approving a plan that would "minimize the harms" to the protected lands.[118] The court also noted that the requirement to "minimize the harms" should be viewed in the context of a broader "national interest" in protecting § 4(f) protected lands.[119] Therefore, taking and using a small amount of protected lands

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[111] *Id.* at 807.

[112] *See infra*, Part V.A.1

[113] *Eagle Found.*, 813 F.2d at 807.

[114] *Id.* at 805.

[115] *Id.* at 807.

[116] *Id.* at 808.

[117] *Id.* at 809-810.

[118] *Id.* at 810.

[119] *Id.*

may be justified if the alternative might mean "more total damage" to other protected lands.[120]

Eagle Foundation represented another piece in the increasingly fractured picture of what § 4(f) means in both the legal and the practical settings. The case, a victory for highway and transportation advocates, further widened the gap between the circuits over how to interpret § 4(f), as well as how to apply the principles of *Overton Park*. Indeed, for the first time since *Overton Park,* a U.S. Court of Appeals set forth a significant, new interpretation of *Overton Park*. Now, for projects in the Midwestern states of the Seventh Circuit (Indiana, Illinois, and Wisconsin), the Secretary of Transportation was provided with a broader discretion when exercising his or her judgment on transportation projects. The Secretary could now do the following: balance competing interests when determining whether or not an alternative might be “feasible and prudent”; consider an accumulation of problems in making the same determination; and take into account a broader national interest when signing off on steps to minimize harms to protected lands, the use or taking of which may be required to advance a transportation project. This interpretation altered the landscape surrounding § 4(f), and as will be seen below it caused other circuit courts to follow its lead.

2. Hickory Neighborhood Defense League v. Skinner -- 4th Circuit

Three years after *Eagle Foundation*, the Fourth Circuit Court of Appeals joined with the Seventh Circuit's interpretation of § 4(f). In *Hickory Neighborhood*

[120] *Id.*

Defense League v. Skinner,[121] the court considered a challenge to the Secretary of Transportation's approval of a highway widening project part of which required using property in an historic district.[122] The plaintiff-appellant, the Hickory Neighborhood Defense League, sought to enjoin this project on the grounds that the Secretary did not adhere to his responsibilities under § 4(f).[123] The district court rejected this challenge and found that the Secretary had complied with § 4(f).[124] This decision was appealed and the Fourth Circuit in *Hickory Neighborhood I*[125], remanded the case back to the district court for additional review on the question of whether "the Secretary determined that the alternatives to the widening of N.C. Highway 127 were not prudent in light of *Citizens to Preserve Overton Park, Inc. v. Volpe*."[126] Upon remand, the district court, again, found that the Secretary acted appropriately under § 4(f), and this decision was, again, appealed.[127]

In considering this second appeal, the Fourth Circuit followed the views espoused in *Eagle Foundation* and found that the Secretary had properly exercised his discretion under § 4(f). In reaching this decision, the court noted that the touchstone words used by the Supreme Court in *Overton Park*, namely the use of "unique" and "extraordinary" in describing those problems that justified approval of a project

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[121] Hickory Neighborhood Defense League v. Skinner II, 910 F.2d 159 (4th Cir. 1990).

[122] *Id.* at 161.

[123] *Id.*

[124] *Id.* at 162.

[125] Hickory Neighborhood Defense League v. Skinner 893, F.2d 58 (4th Cir. 1990).

[126] *Hickory Neighborhood*, 910 F.2d at 162.

[127] *Id.*

requiring the use of § 4(f) protected lands, were not to be substituted for the statutory term "prudent."[128] Thus, the Secretary need not "expressly indicate a finding of unique problems" as long as the "record amply supports [his or her] conclusion that… there were compelling reasons for rejecting the proposed alternatives as not prudent."[129]

The *Hickory Neighborhood* court also affirmed the "cumulation of problems" rationale as an independent or additional basis that a Secretary may cite in approving a project under § 4(f).[130] Again, this holding both affirms the reasoning articulated in *Eagle Foundation* and represents a further distancing from the standards set forth in *Overton Park.* It also further highlighted a growing split among the circuits as to how strictly § 4(f) should be interpreted and applied. By the time of *Hickory Neighborhood*, nearly 20 years had passed since *Overton Park* and in that time span numerous 4(f) cases had been litigated, with some courts such as those in *Eagle Foundation* and *Hickory Neighborhood* taking a more balanced, more pro-transportation view on § 4(f), while other courts, as the discussion below will indicate, adopted a more strict, more pro-environment and historic preservation viewpoint regarding § 4(f). The debate and the split continues.

3. Citizens Against Burlington, Inc. v. Busey -- D.C. Circuit

The Court of Appeals for the District of Columbia Circuit has addressed numerous § 4(f) issues over the years. In *Citizens Against Burlington, Inc. v. Busey*,

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[128] *Id.* at 162-63 *citing Eagle Found.* 813 F.2d 798, 804-05 (7th Cir 1987).

[129] *Hickory Neighborhood*, 910 F.2d at 163 (4th Cir. 1990).

[130] *Id. See also* discussion, *supra* at Part III.B.2.

the court reviewed a § 4(f) challenge to an airport expansion project in Toledo, Ohio alleging that noise impacts to the Oak Openings Preserve Metropark would be caused by the airport expansion.[131] The plaintiffs-appellants, a citizens' group formed in opposition to the project at issue, argued the expansion would "constructively 'use'" a campground in the Metropark by "subject[ing] the camp to nighttime noise of up to Ldn 75 decibels."[132] This argument was rejected by the district court, and Citizens Against Burlington appealed to the D.C. Circuit.[133]

In considering this constructive use argument, the court turned to *Overton Park* for guidance. Making a point to highlight the deferential standard of review that must be accorded to agency decision-makers under *Overton Park,* the court noted that if an agency's "decision was reasonable [then]… we are not entitled to displace its decision with our own or with anyone else's."[134] The key word, here, is "reasonable." The D.C. Circuit cited the Federal Aviation Administration's (FAA) findings as well as those of the district court and upheld the agency findings as appropriate and not in violation of § 4(f).[135] Thus, the court implicitly stated that it is "reasonable" for the FAA to conclude that the only alternative presented to the airport expansion was to expand an airport in Fort Wayne, Indiana and that alternative would be contrary to the

[131] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991).

[132] *Id.* at 203.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 203-04.

goals of this transportation project--"providing the Toledo area with a modern, effective cargo hub."[136]

The significance of this case with respect to § 4(f) jurisprudence is the court's restatement of the *Overton Park* deferential standard of review for agency decisions. This standard can, at times, be lost as courts wade into the intricacies of § 4(f) and literally fail to see the forest through the trees. Courts in § 4(f) cases are often called upon to interject their opinion or their own analysis as to which alignment or which alternative should be approved. *Citizens Against Burlington* stands as a reminder that "federal courts are neither empowered nor competent to micromanage strategies for saving the nation's parklands."[137] Rather, the federal agencies should be given deference by courts in reviewing their actions as the agencies are better equipped to apply laws such as § 4(f).

4. Sierra Club v. Dole -- D.C. Circuit

In the case of *Sierra Club v. Dole*[138], the D.C. Circuit evaluated a challenge to a plan to allow Boeing 737 jet airplanes to operate out of Jackson Hole Airport in Wyoming. One of the key issues this case examines is the threshold line that must be crossed in order for a use of protected lands to be deemed prohibited under § 4(f).[139]

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[136] *Id.* at 204.

[137] *Id.* at 205. This statement was made specifically in response to a request by the Citizens Against Burlington for "us to force the FAA to pinpoint the new campground's geographic coordinates." *Id.* However, the statement was part of a more general discussion by the court on the importance of being deferential to the decisions of the agencies. The court argued strongly that "Congress wanted the agencies, not the courts, to evaluate plans to reduce environmental damage." *Id.*

[138] Sierra Club v. Dole, 753 F.2d 120 (D.C. Cir. 1985).

[139] *See id.* at 129.

How significant must the use of protected lands be to trigger the requirements of § 4(f)? Since propeller planes were already operating out of the airport--and had been for over forty-five years--the case turned on whether or not the additional noise from the jet airplanes amounted to a "constructive use" of the nearby Grand Teton National Park. [140]

The court held that the additional noise did not constitute a use under § 4(f).[141] Citing legislative history, the court noted that "Congress gave no indication that [§ 4(f)] was intended to create ongoing review of relatively minor changes in the operational characteristics of an established transportation facility." In effect, the court recognized that certain exceptions might apply to § 4(f) and allowed for a degree of flexibility in how § 4(f) is administered. As the court noted, "[i]t can hardly be expected, once an airport has been in operation, that every change in flight scheduling or operations must be accompanied" by a § 4(f) evaluation. This approach makes common sense and any "contrary view of the statute would produce a blizzard of useless [§ 4(f)] statements."[142] If *Sierra Club v. Dole* represents one end of the § 4(f) spectrum, there is an equal and opposite end as the following discussion will explore.

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[140] *Id.*

[141] *Id.*

[142] *Id.*

C. Strict Interpretation -- 5th, 9th and 11th Circuits

While some circuits were busy putting their own different interpretations on *Overton Park*, other circuits were content not to stray from the *Overton* Park line of reasoning. These latter circuits chose a path supported by many in the environmental and historic preservation communities that seek to have a high bar established for any transportation project requiring the use of § 4(f) protected lands. The following discussion examines this path and the key cases from those circuits that have pursued such a course.

1. Louisiana Environmental Society v. Coleman – 5th Circuit

In one of the earlier cases litigated after *Overton Park*, the Fifth Circuit Court of Appeals considered a case in Louisiana involving the construction of a highway project through a recreational area known as Cross Lake.[143] In *Louisiana Environmental Society v. Coleman*, the plaintiff-appellant, Louisiana Environmental Society (LES), challenged the approval of a project by the Secretary as not being consistent with the criteria of § 4(f) and that the Secretary's findings were not supported by fact.[144] The district court denied this challenge and refused to issue a permanent injunction against the project setting up an appeal by LES and the subsequent decision by the Fifth Circuit.[145]

[143] *See* La. Envtl. Soc'y, Inc. v. Coleman, 537 F.2d 79, 81 (5th Cir. 1976).

[144] *Id.* at 81-82.

[145] *Id.* at 81.

Using the guideposts provided by *Overton Park*, the court considered three main questions that must be answered when reviewing a case under § 4(f).[146] First, "[c]ould [the Secretary] have reasonably believed that there was no substantial taking [of a recreational area]?"[147] Second, "[c]ould the Secretary have reasonably believed… that there were truly unusual factors?"[148] And, third, "[c]ould [the Secretary] have reasonably believed that the alternate routes presented unique problems?"[149] As the court indicated, "an affirmative answer to any [of these questions] would require dismissing the plaintiffs' attack on the Secretary's § 4(f) determination."[150]

These questions track closely to the analysis put forth in *Overton Park* and stand in contrast to the decisions in *Eagle Foundation* and *Hickory Neighborhood* that were to come some ten years or more later.[151] The court, in this case, was not yet ready to move away from the strict § 4 (f) interpretation established by *Overton Park*. In fact, it even added some additional gloss of its own. The Fifth Circuit noted that "the spirit of *Overton Park* is clearly to the effect that the statute is to be read broadly to protect greenlands."[152] Therefore, the court argued that even a minimal taking of protected lands for the purposes of advancing a transportation project is sufficient to

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[146] *Id.* at 84.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *See* discussion *supra* Part III.B.

[152] 537 F.2d 79, 84

trigger the requirements of § 4(f).[153] Any other interpretation of the requirements of § 4(f) would "permit an initial appraisal of whether the use was substantial, [and]… would infuse consideration of elements (such as the degree of harm to the park, animal life, environment, etc.) which Congress did not want considered when it said, if there is another way take it."[154] This interpretation, again, contrasts sharply with the balancing approach offered by *Eagle Foundation* and its progeny.

In examining if "unusual factors" might warrant the use of §4(f) protected lands, the court delineated several points of analysis to guide DOT's § 4(f) review process. Most notably, the court stated that "§ 4(f)(1) requires that each 'alternative to the use' of the parkland must be found to be either infeasible or imprudent before the Secretary can approve the use of parkland."[155] In addition, "[a]n alternate route which uses any part of park is not an alternative to use of the park."[156] Thus, in this case, the court held that the Secretary's review of the alternatives was incomplete and "did not make the requisite testing of the various routes to determine how to keep harm to the lake to a minimum."[157] These additional analytical requirements expanded the alternative review process that the Secretary must undertake pursuant to § 4(f) and, again, raised the bar to project development and construction requiring the use of parkland.

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[153] *Id.* The court noted that "*Overton Park* [did not] enunciate any sort of substantial taking threshold for the applicability of § 4(f)." *Id.*

[154] *Id.*

[155] *Id.* at 85.

[156] *Id. citing* Finish Allatoona's Interstate Right, Inc. v. Brinegar, 484 F.2d 638 (5th Cir. 1973) and Citizens to Preserve Foster Park v. Volpe, 466 F. 2d 991 (7th Cir. 1972).

[157] *La. Envtl. Soc'y*, 537 F.2d at 84. In the case of the Cross Lake project, eight different alternatives were reviewed, some of which involved only minimal use of the parkland.

On the issue of what constitutes a "unique" problem that would justify the taking or use of a § 4(f) protected land, the Fifth Circuit added to the *Overton Park* definition by noting that a long time delay is not a "unique" problem.[158] This is a substantial enlargement of the *Overton Park* definition because in this particular case the lower court had found that proceeding with an alternative route that did not use a protected land would add ten additional years to the project.[159] Even a delay as substantial as a decade was insufficient to rise to the status of "unique." The court observed that "[i]f time is the penalty, it cannot be turned into an exception which justifies noncompliance."[160]

Overall, the Fifth Circuit's decision in *Louisiana Environmental Society* both affirms and expands *Overton Park.* It rejects the notion that a protected property taking must be "substantial" in order to activate § 4(f) requirements. The decision denies the use of a balancing test that may justify building a project even though it uses or takes a § 4(f) protected land. It also simultaneously expands the alternatives analysis review to ensure that no alternatives are considered that even minimally require the use of a protected land. Finally, the court's opinion dismisses the argument that a lengthy delay--even one as long as a decade--constitutes a "unique" problem--the presence of which would allow the project to go forward even if it used protected property.

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[158] *Id.* at 85.

[159] *Id.*

[160] *Id.*

2. Stop H-3 Association v. Dole -- 9th Circuit

The Ninth Circuit Court of Appeals, in *Stop H-3 Association v. Dole*[161] took its turn at tackling § 4(f) issues, and like the court in *Louisiana Environmental Society*, it too affirmed *Overton Park* and also offered its own additional views on the scope of § 4(f). *Stop H-3* involved a § 4(f) challenge by three environmental and community groups[162] to a planned Interstate highway project that required the taking and use of land from "two public parklands: (1) Ho'omaluhia Park, a major regional park; and (2) Pali Golf Course Park, one of Oahu's most challenging and heavily used public golf courses."[163] After having their challenges turned aside by the district court, the groups appealed to the Ninth Circuit.[164]

Following *Overton Park*, the court ultimately reversed the district court's affirmation of the Secretary's decision to approve the H-3 highway project and remanded the case for further proceedings.[165] The court noted that "the requirements of § 4(f) are stringent."[166] It also reaffirmed the views of *Overton Park* regarding "unique problems." Specifically, the court noted that the dislocation of a church, four businesses, thirty-one residences, increased noise, air and visual pollution, and higher costs were all insufficient to rise to the standard of "unique" problems requiring the

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[161] Stop H-3 Assoc. v. Dole, 740 F.2d 1442 (9th Cir. 1984).

[162] Stop H-3 Association and Life of the Land--two non-profit organizations "chartered for the purpose of opposing the construction of H-3 and Hui Malama Aina O Ko'olau, an unincorporated association formed 'to protect the Hawaiian people, the Hawaiian lifestyle, and the land from destruction.'" *Id.* at 1446.

[163] *Id.* at 1447-48.

[164] *Id.* at 1446.

[165] *Id.* at 1458.

[166] *Id.* at 1447.

approval of an alignment that would prevent such problems *i.e.*, an alignment using parklands.[167] In addition, the court declined to rule on a "totality of circumstances" theory argued at the trial court as justification for approving the alignment requiring the use of parklands because "even when amalgamated [the reasons] do not satisfy the *Overton Park* standards."[168]

While *Stop H-3* is important for its affirmation of *Overton Park*, it is also important for its commentary on two additional issues that often arise in § 4(f) litigation: (1) how to weigh safety issues in the context of "unique" problems[169] and (2) how to review "no build" alternatives.[170] The court's observations on these issues, again, raised the "stringent" *Overton Park* standards. And, according to some, they have substantially interfered with the "cooperative federalism" model that governs modern transportation project construction.[171]

On the issue of safety considerations, the court stated that "since they so directly involve human life, warrant extremely close scrutiny when determining whether such considerations satisfy the *Overton Park* standards."[172] While "[n]either a court nor an agency should weigh lightly the potential risk to human life an alternative might pose," the court was also concerned that "undue deference" to such considerations might turn such inquiry into a "talisman" that might be cited in every §

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[167] *Id.* at 1451.

[168] *Id.* at 1451.

[169] *See id.* at 1452.

[170] *See id.* at 1455.

[171] *See id.* (Wallace, J. concurring).

[172] *Stop H-3 Assoc.*, 740 F.2d at 1452.

4(f) case to ensure approval or non-approval of a project or alternative depending on the desired outcome.[173] In the end, the court determined that even safety considerations need to be "truly unusual factors" or "unique problems" in order to justify the rejection of a non-parkland alternative.[174] Here, the Secretary argued that safety considerations justified rejection of the alignment that did not use parkland.[175] These considerations included more complex traffic movements and more dangerous and confusing ramp curves and interchanges that were associated with the non-parkland alignment.[176] The court ruled, in this case, that the record was insufficient to determine whether such safety issues were "unique."[177] Nevertheless, the court's pronouncement that even safety considerations must be of the "unique" or extraordinary variety in order to merit the rejection of an alternative that does not use protected lands is a considerable and additional hurdle for future projects to meet.

Turning to another matter that can often arise in § 4(f) litigation--reviewing a "no build" alternative--the court again strictly interpreted § 4(f) and established a stringent requirement for reviewing alternatives.[178] The court stated that "[t]he mere fact that a 'need" for a highway has been 'established' does not prove that not to build the highway would be 'imprudent' under *Overton Park*."[179] This statement makes it

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[173] *Id.* at 1452-53.

[174] *Id.* at 1453.

[175] *Id.* at 1452-53.

[176] *Id.* at 1453.

[177] *Id.*

[178] *Id.* at 1455.

[179] *Id.*

more difficult to dismiss or discount a no-build alternative. By citing *Overton Park*, the court applied the "truly unusual factors" and "unique problems" criteria that must be shown in order to reject an alternative.[180] Moreover, "increased congestion or commuter delays" were deemed to be not "so unusual or extraordinary that the No Build [sic] alternative must be rendered imprudent."[181] Thus, the court implies almost a presumption for the no build alternative, since congestion and commuter delays are often key factors in support of building a new highway. In this particular case, the court ultimately held that the record did not adequately support a finding that the no build alternative was imprudent.[182]

It should be noted with respect to the no build alternative discussion, that Judge Wallace dissented on this issue. He argued that by insisting on a determination as to the efficacy of a no build alternative, the court was "confusing the purposes" of § 4(f). Section 4(f) was not enacted as a threshold test on whether or not to build a project, rather "Congress intended [§ 4(f)] to regulate which way a government constructed a project."[183] The position of the majority opinion on this issue "improperly interferes with the cooperative system" of highway building.[184]

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[180] *Id.*

[181] *Id.* at 1456.

[182] *Id.* at 1457.

[183] *Id.* at 1468. Judge Wallace maintained that "[o]ther laws such as NEPA [the National Environmental Policy Act] guide that first choice and include consideration of complete No Build alternatives." *Id.*

[184] *Id.* The cooperative system refers to the joint federal, state and local role in transportation project development.

3. Druid Hills Civic Association v. Federal Highway Administration -- 11th Circuit

In *Druid Hills Civic Association v. Federal Highway Administration*, the 11th Circuit Court of Appeals evaluated a proposed highway project in Atlanta, Georgia part of which would impact the Druid Hills Historic District.[185] The plaintiff-appellant, the Druid Hills Civic Association, argued that the project was barred under § 4(f).[186] The district court had denied an earlier motion to enjoin the construction of the project.[187]

As with the previous cases, in fact as with virtually every § 4(f) case litigated after *Overton Park*, its principles have served as a guide for the court.[188] The court restated many of the views espoused in the *LES* and *Stop H-3* cases.[189] In particular, it noted that "[a]n alternate route that also impacts upon parks and historic sites is not an 'alternative to the use' of such property."[190] The court also made clear that there are "no exceptions to the requirement that there be no prudent alternatives to the use of parks and historic sites before the Secretary can approve a project using protected properties."[191] Again, this "no exceptions" language speaks to the stringency with which some circuits, such as the 11th Circuit, have applied to § 4(f) cases.

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[185] Druid Hills Civic Assoc. v. FHWA, 772 F.2d 700, 704 (11th Cir. 1985).

[186] *Id.*

[187] *Id.* at 708.

[188] *See id.* at 714.

[189] *See id.* at 714-15.

[190] *Id.* at 715 *citing La. Envtl. Soc'y*, 537 F.2d at 85.

[191] *Druid Hills Civic Assoc.*, 772 F.2d at 716.

In the end, the court remanded the case to the Secretary so that additional and more adequate findings could be made as to the issue of whether the chosen alignment properly comported with § 4(f) requirements.[192] In its directive to the Secretary, the court noted that the review should "address the quantity of harm that will accrue to the park or historic site and the nature of that harm, *e.g.*, visual impact or physical taking." The court continued on to note that "[i]t will not suffice to simply state that an alternative route would affect 4(f) properties without providing some rational, documented basis for such a conclusion." Such thorough, stringency is the "command of *Overton Park* and *LES II* and we are not free to ignore that directive."[193]

IV. EXPLORING THE EXECUTIVE BRANCH INTERPRETATIONS

The Department of Transportation, the FHWA and DOT's other modal administrations, obviously, carefully scrutinize the judicial interpretations of § 4(f) to assist them with their own application of § 4(f). Over the years, DOT has issued several guidance and policy documents to help explain, interpret and contribute to the understanding of § 4(f).[194] It has also promulgated regulations[195] regarding this section, as well as established a nationwide § 4(f) permit program.[196] The discussion

[192] *Id.* at 718.

[193] *Id.* at 719.

[194] *See generally* 4(f) Policy Paper, *supra* note 44.

[195] *See* Section 4(f), 23 C.F.R. § 771.135 (2004).

[196] 52 Fed. Reg. 31,111 (1987).

below will review the key DOT regulations, guidance documents, and programs that serve to help implement the directives of § 4(f).

A. Section 4(f) Regulations

In the 1980's, DOT issued a regulation that provides additional substantive details and procedural guidance on § 4(f).[197] One of the main substantive provisions included in the regulations is essentially a restatement of *Overton Park* principles noting the following that the "Administration" may not approve a project that uses protected lands unless "there are unique problems or unusual factors involved" with such use or if "the cost, social, economic, and environmental impacts, or community disruption" of such use rises to "extraordinary magnitudes."[198] However, the regulations do stipulate that some uses may not invoke § 4(f) protections. For example, if the site being used is "not significant" based on a determination by officials who have jurisdiction over the park, recreation area or refuge, then § 4(f) review is not required.[199] Also, the regulations recognize that certain "restoration, rehabilitation, or maintenance" activities of transportation facilities that are on the National Register of Historic Places are not subject to § 4(f).[200] Although, the regulations provide for some flexibility, they have not yet adopted some of the

[197] *See* 23 C.F.R. § 771.135

[198] 23 C.F.R. 771.135(a)(2).

[199] *Id.* at 771.135(c).

[200] *Id.* at 771.135(f).

broader, more balanced approaches discussed in such cases as *Eagle Foundation* and *Hickory Neighborhood.*[201]

In addition to an enunciation of the procedural requirements to be followed when reviewing transportation projects under § 4(f), the regulations devote considerable attention to defining and discussing the definition of "use" of a park, recreation area, refuge, or historic area.[202] The regulations state that a "use" occurs when one of the following occurs: "land is permanently incorporated into a transportation facility;" "a temporary occupancy of land [occurs] that is adverse in terms of the statute's preservationist purposes;" or when there is a "constructive use of land."[203] The term "constructive use" is further defined as a use that "does not incorporate land from a § 4(f) resource, but… [whose] impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under § 4(f) are substantially impaired."[204] Several examples of constructive uses that trigger § 4(f) requirements, as well as examples of activities that are not subject to § 4(f), are also provided in the regulations.[205] As would be expected, the above definitions and the examples tend to track the body of § 4(f) case law.

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[201] *Compare Eagle Found*., 813 F.2d 798 and *Hickory Neighborhood*, 910 F.2d 159 (the courts discussed a more flexible balancing approach in evaluating transportation projects under § 4(f)). *See also supra* Part III.B.1-2.

[202] *See* 23 C.F.R. 771.135(p).

[203] *Id.* at 771.135(p)(i-iii).

[204] *Id.* at 771.135(p)(2).

[205] *See id.* at 771.135(p)(4-7).

B. Section 4(f) Policy Paper

In addition to promulgating § 4(f) regulations, the FHWA also issued a detailed policy paper that is often cited in § 4(f) cases.[206] This policy paper serves as a reference document for § 4(f), and the stated purpose of the paper is to delineate FHWA's policy positions that it adopted as a result of "court interpretations and many years of project-by-project applications."[207] It should be noted that this paper "addresses only the programs and activities administered by FHWA."[208] Nevertheless, it presents a useful (although legally non-binding) compendium of § 4(f) information.

The policy paper cites the *Overton Park* "unique problems" standard that must be adhered to when reviewing a project alternative in light of § 4(f).[209] In general, the policy paper also closely follows the regulations. However, it does differ from the regulations in one significant manner. The policy paper recognizes an important gloss to the strict *Overton Park* standard--the "cumulation of problems" approach that was articulated in *Eagle Foundation*.[210] The paper specifically notes the following:

> When making a finding that an alternative is not feasible and prudent, it is not necessary to show that any single factor presents unique problems. Adverse factors such as environmental impacts, safety and geometric problems, decreased traffic service, increased costs, and any other factors may be considered collectively.[211]

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[206] *See* 4(f) Policy Paper, *supra* note 44. This paper was issued on September 24, 1987 and then re-issued as a revised edition on June 7, 1989.

[207] *Id.* at 5.

[208] *Id.*

[209] *Id.* at 6.

[210] *Id. See also Eagle Found.*, 813 F.2d 798.

[211] 4(f) Policy Paper, *supra* note 44.

This difference between the regulations and the policy paper reflects a split of sorts within the DOT and further contributes to the confusion and debate among some about the true scope and application of § 4(f).

C. Nationwide § 4(f) Evaluations and Approvals

While no statutory changes have been made to § 4(f) since the 1983 and 1987 recodifications and modifications, one significant development did occur in how the FHWA implements its responsibilities under § 4(f). In 1987, FHWA issued guidelines that allowed for the "expedited approval of those federally-aided highway projects having 'minor involvement' with historic sites, public parks, recreations lands, and wildlife and waterfowl refuges."[212] These guidelines are similar to other "nationwide" permit programs used by the Army Corps of Engineers and other agencies in the implementation of the Clean Water Act[213] and allow agencies a degree of efficiency in carrying out regulatory mandates. If a particular project or program meets the conditions spelled out by the FHWA, then that project or program is deemed to be in compliance with the requirements of § 4(f).[214] For example, in determining whether a project qualifies for a nationwide permit, the FHWA will

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[212] *Federal Highway Administration Adopts Expedited Approval Process for Highway Projects Having "Minor Involvement" with Historic Sites*, 6 Preservation Law Reporter Nos. 1 & 2, at 1002, (Spring/Summer 1987) *citing* 52 Fed. Reg. 31,111 (1987).

[213] *See* 33 U.S.C. § 404 (2004). This section of the Clean Water Act establishes requirements for the creation of a permitting program for the discharge of dredged or fill materials into waters of the United States. For a general overview on the permitting process under the Clean Water Act *see* Section 404 of the Clean Water Act: An Overview, *available at* http://www.epa.gov/owow/wetlands/facts/fact10.html (last visited Aug. 8, 2004).

[214] 6 Preservation Law Reporter Nos. 1 & 2, at 1002.

examine conditions that "relate to the type of project, the severity of impacts to § 4(f) property, the evaluation of alternatives, the establishment of a procedure for minimizing harm to the § 4(f) property and adequate coordination with appropriate entities."[215] In effect, the FHWA will conduct a balancing test for the approval of a nationwide permit.

The FHWA has approved nationwide programmatic evaluations for projects in four major areas: "1. Independent Walkway and Bikeways Construction Projects; 2. Historic Bridges; 3. Minor Involvements with Historic Sites; and 4. Minor Involvements with Parks, Recreation Areas and Waterfowl and Wildlife Refuges."[216] The FHWA is quick to note that qualifying for one of the programmatic evaluations "does not relax the § 4(f) standards, *i.e.*, it is just as difficult to justify using § 4(f) land with a programmatic § 4(f) evaluation as it is with an individual § 4(f) evaluation."[217] Despite this declaration, these programmatic guidelines, at their inception, were controversial and viewed as a potential erosion of the protections afforded by § 4(f).[218] However, this view is not universally held, with many in the transportation community viewing such guidelines as a responsible and efficient

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[215] 4(f) Policy Paper, *supra* note 44, at 10.

[216] Nationwide Section 4(f) Programmatic Evaluations, *available at* http://environment.fhwa.dot.gov/projdev/4fnspeval.htm. (last visited Aug. 8, 2004).

[217] 4(f) Policy Paper, *supra* note 44, at 10.

[218] *Id.* "The National Trust for Historic Preservation opposed adoption of the expedited procedures, finding that they improperly redefined and diluted federal law, which had been enacted to ensure protection of historic and environmentally sensitive properties from ill-conceived federal actions. The National Trust and six national environmental organizations submitted comments on December 18, 1986, urging Secretary of Transportation Elizabeth H. Dole to reconsider approval of the guidelines. The organizations joining the National Trust included the Sierra Club, the National Parks and Conservation Association, the National Wildlife Federation, Rails-to-Trails Conservancy, the National Association of Railroad Passengers, and the Environmental Policy Institute." *Id.*

method for ensuring compliance with § 4(f). And, since the guidelines specifically do not relax the scope or application of § 4(f), some may argue that § 4(f) is still too stringently interpreted and implemented.

D. Executive Order 13274 -- Environmental Stewardship and Transportation Infrastructure Project Reviews

Responding to pressure from the transportation community as well as recognizing a need to expedite the environmental review process, President George W. Bush issued Executive Order 13274 on September 18, 2002 aimed at streamlining the transportation project review process.[219] This executive order directed agencies to "take appropriate actions… to promote environmental stewardship in the Nation's transportation system and expedite environmental reviews of high-priority transportation infrastructure projects."[220] In addition, the order called on the Secretary of Transportation to "implement administrative, policy, and procedural mechanisms that enable each agency… to conduct environmental reviews [and]… to ensure completion of such reviews in a timely and environmentally responsible manner."[221]

The order also required the Secretary to "designate" a list of "high-priority transportation infrastructure projects that should receive expedited agency

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[219] Exec. Order No. 13274, 67 Fed. Reg. 184 (Sept. 23, 2002). *See also* J.L. Laws, *Bush Orders DOT to Streamline Environmental Reviews of Transportation Projects*, E&E Daily (Sept. 19, 2002) *available at* http://www.eenews.net/EEDaily/searcharchive/test_search-display.cgi?q=transportation+streamlin.

[220] Exec. Order 13274 § 1.

[221] *Id.* at § 2(a).

reviews,"[222] and to establish a "Transportation Infrastructure Streamlining Task Force" to assist with streamlining efforts, review projects, and "identify and promote policies."[223] It should be noted that the order made no substantive changes to § 4(f), but the order was clearly aimed at easing the review process within the confines of existing law.[224] To that extent, its direct impact on § 4(f) is difficult to determine. However, like the legislative actions that are detailed below (particularly those occurring in the 107th and 108th Congresses), the executive order was important in framing the § 4(f) debate and in advancing the broader issue of the need for reforms of the environmental review processes. The efforts directed by the executive order also proved to be successful according to the DOT.[225] This success also helped build the case that environmental streamlining initiatives make sense and should be expanded, thus setting the stage for the transportation reauthorization process that is discussed in more detail below.[226]

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[222] *Id.* at § 2(c).

[223] *Id.* at § 3.

[224] *See id.* The order repeatedly notes that actions taken with respect to the order be "in compliance with applicable law" or "consistent with available resources and applicable laws." *Id.* at §§ 3 and 2(c). *See also* i*d.* at § 6. "This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person." *Id.*

[225] Amy Phillips, *Officials Say Year-Old Effort to Streamline Transportation Projects Considered a Success*, Daily Report for Executives (BNA) No. 185, at A-11 (Sept. 24., 2003). "[F]our of the thirteen projects designated for priority attention under the executive order now are moving forward." *Id.*

[226] *Id.*

E. Bush Administration TEA-21 Reauthorization Proposal

The most recent Bush Administration response to § 4(f) came as part of its comprehensive legislative proposal to reauthorize TEA-21.[227] The Administration's TEA-21 reauthorization proposal, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 (known as SAFETEA), served as a starting point for the reauthorization debate. It established broad transportation policy principles important to the Administration, as well as details on how to effectuate those policies.[228] The House and Senate committees of jurisdiction received the Administration proposal and used it as a reference point during the drafting stages for their own TEA-21 reauthorization proposals.[229]

Indicating the importance that the Administration placed on § 4(f) reform, the SAFETEA proposal included a separate and specific section dedicated to § 4(f) reform. It proposed, essentially an entirely new § 4(f):

> **SEC. 1604. "SECTION 4(f)" POLICY ON LANDS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES.**
>
> Section 303 of title 49, United States Code, is amended to read as follows:
>
> **"§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites**
>
> "(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

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[227] Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003, *available at* http://www.fhwa.dot.gov/reauthorization/safetea_bill.htm (last visited Aug. 8, 2004) [hereinafter President's Bill]. *See also supra* footnote 11 for additional information on TEA-21 reauthorization.

[228] *Id.*

[229] The Senate introduced the President's TEA-21 reauthorization proposal as the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003, S. 1072, 108th Cong. (2003) on May 15, 2003. This bill became the vehicle for later Senate proceedings. The House introduced the President's proposal as the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003, H.R. 2088, 108th Cong. (2003) on May 14, 2003. This bill was later supplanted by H.R. 3550 which was to become the vehicle for the House's consideration of TEA-21 reauthorization.

"(b) The Secretary of Transportation shall cooperate and consult, when appropriate, with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

"(c)(1) The Secretary of Transportation may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of a historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge or site) only if--

"(A) there is no feasible and prudent alternative to using that land, and

"(B) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

"(2) In making approvals under this subsection, the Secretary shall apply the following standards:

"(A) The Secretary may eliminate an alternative as infeasible if the Secretary finds that the alternative cannot be implemented as a matter of sound engineering.

"(B) The Secretary shall consider the following when determining whether it would be prudent to avoid the use of land of a resource subject to preservation under this section:

"(i) The relative significance of the land of the resource being protected.

"(ii) The views of the official or officials with jurisdiction over the land.

"(iii) The relative severity of the adverse effects on the protected activities, attributes, or features that qualify a resource for protection.

"(iv) The ability to mitigate adverse effects.

"(v) The magnitude of the adverse effects that would result from the selection of an alternative that avoids the use of the land of the resource.

"(C) A mitigation measure or mitigation alternative under paragraph (c)(1)(B) of this section is possible if it is feasible and prudent. In evaluating the feasibility and prudence of a mitigation measure or mitigation alternative under paragraph (c)(1)(B) of this section, the Secretary shall be governed by the standards of paragraphs (c)(2)(A) and (B) of this subsection.

"(d) The requirements of this section do not apply to--

"(1) a project for a park road, parkway, or refuge road under section 204 of title 23; or

"(2) a highway project on land administered by an agency of the Federal government, when the purpose of the project is to serve or enhance the values for which the land would otherwise be protected under this section, as jointly determined by the Secretary of Transportation and the head of the appropriate Federal land managing agency.

"(e) The requirements of this section are deemed to be satisfied where the treatment of an historic site (other than a National Historic Landmark) has been agreed upon in accordance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470f). The Secretary, in consultation with the Advisory Council on Historic Preservation, shall develop administrative procedures to review the implementation of this subsection to ensure that the objectives of the National Historic Preservation Act are being met.

"(f)(1) The Secretary may approve a request by a State to provide funds made available under chapter 1 of title 23, United States Code, to a State historic preservation office, Tribal historic preservation office, or to the Advisory Council on Historic Preservation to provide the resources necessary to expedite the historic preservation review and consultation process under section 303 of title 49 and under section 470f of title 16, United States Code.

"(2) The Secretary shall encourage States to provide such funding to State historic preservation officers, Tribal historic preservation officers of the Advisory Council on Historic Preservation where the investment of such funds will accelerate completion of a project or classes of projects or programs by reducing delays in historic preservation review and consultation.

"(3) Such requests under paragraph (1) shall be approved only for the additional amounts that the Secretary determines are necessary for a State historic preservation office, Tribal historic preservation office, or the Advisory Council on Historic Preservation to expedite the review and consultation process and only where the Secretary determines that such additional amounts will permit completion of the historic preservation process in less than the time customarily required for such process."[230]

The Administration's new § 4(f) proposal is notable in a number of respects. Although it does not do away with the "feasible and prudent" requirements that have been a part of § 4(f) since its inception, it does adopt a veritable balancing test similar

[230] President's Bill, *supra* note 227 at § 1604.

to the approaches articulated in *Eagle Foundation* and its progeny.[231] It also allows for § 106 of the National Historic Preservation Act[232] to be used in place of § 4(f) requirements for historic sites. Finally, the Secretary is authorized to provide funds to state historic preservation agencies to speed up the completion of reviews. The major thrust of these provisions is to provide flexibility to the Secretary and provide him or her with a menu of options to consider and use when evaluating a project under § 4(f) principles.

Draft explanatory report language accompanying the SAFETEA proposal also provides additional, key details on the Administration proposal.[233] The explanatory language notes that the new § 4(f) language "would facilitate the [§ 4(f) evaluation] process by taking into consideration court decisions affecting the applicability of '§ 4(f)' and codifying those factors that would more efficiently allow a prudent decision."[234] As justification for making these proposed changes, the Administration notes that the current highway program has shifted away from new construction and development and toward "system preservation and modernization, in which existing facilities are the focus."[235]

The SAFETEA report also notes that "[t]he rigid rules for applying '§ 4(f)' spawned from the early court decisions [and] are often an awkward fit for the majority of situations faced today, where consequences to '§ 4(f)' properties are

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[231] *Compare Eagle Found*., 813 F.2d 798. *See also* SAFETEA DOT Analysis, *supra* note 12.

[232] National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (2000).

[233] SAFETEA DOT Analysis, *supra* note 12, at 27

[234] *Id.*

[235] *Id.*

usually not as extreme."[236] The Administration also cited cases such as *Eagle Foundation* and *Hickory Neighborhood* as examples of "some later court decisions [that] injected greater flexibility in interpreting '§ 4(f).'"[237] It also referred to other cases that have not been as flexible in their interpretation of § 4(f).[238] These differences in approaches and interpretations among some of the circuit courts of appeal has caused a "disparity" that "has made it difficult to find a workable national standard to use in reaching determinations of whether an alternative is prudent and feasible."[239] Therefore, according to SAFETEA, a reform of § 4(f) is needed "to establish more national uniformity, and [to be] consistent with the changed impacts of the highway program."[240]

V. EXPLORING RECENT LEGISLATIVE ACTIONS

Against the backdrop of over forty years of judicial and administrative interpretation, actions during recent sessions of Congress have increasingly focused their attention to § 4(f), with many influential committee leaders calling for reform.[241] The following discussion examines the recent legislative actions regarding § 4(f) with a specific emphasis on the developments that have occurred in 2003 and 2004 during

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[236] *Id.*

[237] *Id.*

[238] *Id.* at 28.

[239] *Id.*

[240] *Id.*

[241] *See e.g.*, Brian Friel, *Pave or Preserve?*, Nat'l J. No. 50, at 3732-33 (Dec. 13, 2003). Section 4(f) reform is supported by Senator Inhofe (R-OK), Chairman of the Senate Environment and Public Works Committee, and by Representative Don Young (R-AK), Chairman of the House Transportation and Infrastructure Committee. These committees have primary jurisdiction over § 4(f).

the protracted and continuing reauthorization of the Transportation Equity Act for the 21st Century (TEA-21). As will be seen, the calls for reform of the § 4(f) requirements have been bipartisan. Additional support for change has also come from many in the transportation community, while many in the environmental and preservation communities have lined up to oppose these reform efforts.[242]

A. H.R. 5455--ExPDITE ACT

During the 107th Congress, as the House and Senate began the initial TEA-21 reauthorization process, Chairman Don Young (R-AK) of the House Transportation and Infrastructure Committee launched one of the first dedicated efforts aimed at "streamlining" the environmental review processes that govern transportation projects.[243] This effort included the introduction of legislation, the Expediting Project Delivery To Improve Transportation and the Environment Act (ExPDITE), aimed at streamlining highway and transit projects, as well as a hearing[244] on issues and problems with the current environmental review processes for transportation projects. These actions helped lay the groundwork for later, more specific actions regarding § 4(f) during TEA-21 reauthorization.

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[242] *See e.g., id.* at 3732-36.

[243] *See e.g.*, Expediting Project Delivery to Improve Transportation and the Environment (ExPDITE) Act, H.R. 5455, 107th Cong. (2002).

[244] *H.R. 5455: Expediting Project Delivery to Improve Transportation and the Environment Act: Hearing Before the Subcomm. on Highways and Transit of the House Comm. on Transp. and Infrastructure*, 107th Cong. (Oct. 8, 2002), *available at* http://www.house.gov/transportation/highway/10-08-02/10-08-02memo.htm (last visited Aug. 8, 2004) [hereinafter, ExPDITE Hearing].

1. House Transportation and Infrastructure Committee Hearing

On October 8, 2002, the House Transportation and Infrastructure Committee held a hearing on Chairman Don Young's ExPDITE legislation. The hearing was conducted as part of the process to reauthorize TEA-21.[245] It included a variety of witnesses, representing a spectrum of interests, including the following: American Association of State Highway and Transportation Officials (AASHTO); American Road and Transportation Builders Association (ARTBA); American Public Transportation Association (APTA); American Highway Users Alliance; American Council of Engineering Companies; Tri-State Transportation Campaign; Environmental Defense; Defenders of Wildlife; Amalgamated Transit Union; and Natural Resources Defense Council (NRDC).[246]

From the witnesses presenting testimony, a strong endorsement for the ExPDITE bill and for reforming § 4(f) came from John Horsley, Executive Director of the AASHTO.[247] In his prepared statement, he noted that AASHTO views "§ 4(f) as one of the greatest causes of delay" in the development and construction of transportation projects.[248] He traced much of the problems with § 4(f) to the judicial interpretations that "have accumulated over the past 30 years as a result of dozens of court decisions," and he specifically singled out *Overton Park* as the source of much

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[245] *See* Memorandum from Chairman Don Young to the Members of the Subcomm. on Highways and Transit, 1 (Oct. 8, 2002), *available at* http://www.house.gov/transportation/highway/10-08-02/10-08-02memo.htm (last visited Aug. 8, 2004). The memo notes that "[t]his hearing is the sixteenth in a series on the reauthorization of the Transportation Equity Act for the 21st Century." *Id.*

[246] *Id.* at 3.

[247] ExPDITE Hearing (statement of John Horsley, Executive Director, Am. Assoc. of State Highway and Transp. Agencies) *available at* http://house.gov/transportation/highway/10-08-02/horsley.html at 7 (last visited Aug. 8, 2004) [hereinafter Horsley Statement].

[248] *Id.*

of the problems.[249] According to Horsley, the "extraordinary magnitude" and "unique problems" test championed by *Overton Park* has "converted § 4(f) into an extremely rigid and unyielding statute, which often leads to absurd results--where minor § 4(f) properties are protected at great expense, with little lasting benefit to the community or the environment."[250]

As an example of the type of problems, costs and delays that a rigidly-interpreted § 4(f) causes, Horsley cited a project in Kentucky that cost the state one million dollars in order to comply with the § 4(f) mandates.[251] In the Kentucky example, the state was required to account and mitigate for an historic farmhouse in order to proceed with a road project that required the taking of the farmhouse property.[252] In order to avoid the farmhouse, the state chose an alignment that required the taking of a modern house; both the farmhouse and the modern home were owned by the same person.[253] The owner of the modern house used the money from the state compensation that was paid to him in order to take the modern house and used it to demolish the historic farmhouse and ultimately move the modern house to the site of the historic farmhouse.[254] Thus, in the end, one of the sole purposes of §4(f)--preserving historic property--actually produced a result that destroyed historic

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[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.* at 8.

property.[255] This result, Horsley noted, is "not unique, [with] similar stories… repeated in every state across the country."[256]

In order to remedy these types of results, AASHTO argues that a legislative solution is needed.[257] It would be "impossible for FHWA--even if wanted to--to override the case law through a rulemaking."[258] The AASHTO position is that "only Congress has the power to get § 4(f) back on track and restore a degree of flexibility and common sense."[259]

Horsley articulated the AASHTO position on § 4(f) which "mirror[s] the elements of the ExPDITE bill."[260] Four main elements comprise the suggestions for reform.[261] They include the following: (1) allowing projects to qualify for a finding of no significant impact (FONSI)[262]; (2) "eliminat[ing] the concept of 'extraordinary magnitude' from the definition of prudence once and for all, and replace it with a more balanced and flexible definition;"[263] (3) allowing the "substitution of Section 106 consultation under the National Historic Preservation Act for § 4(f) compliance

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[255] *Id.*

[256] *Id.*

[257] *Id.* at 7.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.* at 8.

for historic properties;"[264] and (4) permitting an "exemption of the Interstate Highway System from treatment as a historic resource."[265]

Representatives of the ARTBA[266] and the APTA [267] echoed AASHTO's support for § 4(f) reform. ARTBA's statement at the hearing concentrated on the delays that § 4(f) compliance causes to transportation projects. In fact, according to a study cited by ARTBA, § 4(f) is "the most common reason" for project delays.[268] Another reason that ARTBA mentioned regarding § 4(f)'s rigidity is the fact that it "predates most other federal environmental laws" and, thus has not had the historical precedent and perspective from which some other, later environmental statutes have benefited.[269] APTA's statement also reiterated the positions of AASHTO and ARTBA.[270]

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[264] *Id.* The requirements of Section 106 of the National Historic Preservation Act are very similar to those of § 4(f) and "if the Section 106 process results in a conclusion that satisfies the State Historic Preservation Officer, and the federal Advisory Council on Historic Preservation if the Council is involved, then § 4(f) should be satisfied as a matter of law." *Id.* As AASHTO notes, such approach "would provide an incentive for a more collaborative, problem-solving approach to historic resources, while reducing the potential for bureaucratic wrangling and litigation over § 4(f) findings." *Id.*

[265] Such an exemption is necessary, according to AASHTO, because there are efforts underway to treat the Interstate Highway System as historic property, and this outcome would make improvements to the system subject to § 4(f). *Id.* If this were to happen, the necessary § 4(f) reviews "could generate new paperwork burdens for every project on the Interstate system." *Id.*

[266] *See* ExPDITE Hearing (statement of Brian Holmes, Executive Director, Maryland Contractors Assoc. on behalf of the Am. Road and Transp. Builders Assoc.) *available at* http://house.gov/transportation/highway/10-08-02/holmes.html (last visited Aug. 8, 2004) [hereinafter, Holmes Statement].

[267] *See* ExPDITE Hearing (statement of William Millar, President, Am. Public Transp. Assoc.) *available at* http://house.gov/transportation/highway/10-08-02/holmes.html (last visited Aug. 8, 2004) [hereinafter Millar Statement].

[268] Holmes Statement, *supra* note 265, at 4. A study by the National Cooperative Highway Research Program found that § 4(f) requirements were cited most often (66 %) as the culprit behind transportation project delays.

[269] *Id.* at 8.

[270] Millar Statement, *supra* note 266, at 5.

The pro-reform views, were, however, not the only views voiced during the hearing. Representatives from the environmental community uttered their own positions and criticisms of the ExPDITE legislation.[271] Speaking for the Defenders of Wildlife, William Snape, the organization's Vice President and Chief Counsel, took issue with the claims of AASHTO and others.[272] He cited studies concluding that reasons other than environmental regulations were often the cause for project delays.[273] Snape was also particularly concerned about §103 of the ExPDITE bill that proposed a number of changes to § 4(f) (see below for more detailed discussion on the bill's proposed changes).[274] On behalf of the Natural Resources Defense Council (NRDC), Deron Lovaas also presented testimony critical of proposals to reform § 4(f).[275] Like Snape, Lovaas offered information contrary to AASHTO's data regarding the causes of transportation project delays.[276] On the issue of § 4(f) reform, he noted that the ExPDITE legislation "stacks the deck in favor of the Secretary of Transportation's preferred projects by re-defining "prudent" and "feasible," thus hampering a search for alternatives."[277]

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[271] *See* ExPDITE Hearing, *supra* note 243.

[272] *See* ExPDITE Hearing (statement of William Snape, Vice President and Chief Counsel, Defenders of Wildlife) *available at* http://house.gov/transportation/highway/10-08-02/snape.html (last visited Aug. 8, 2004).

[273] *Id.* at 2. One study cited by Snape indicated the top reasons for project delay were "lack of funding or low priority," "local controversy," or "the inherent complexity of the project." *Id.*

[274] *Id.* at 3-4.

[275] ExPDITE Hearing (statement of Deron Lovaas, Deputy Director of the Smart Growth and Transportation Program, Natural Resources Defense Council) *available at* http://house.gov/transportation/highway/10-08-02/lovaas.html (last visited Aug. 8, 2004).

[276] *Id.* at 2.

[277] *Id.* at 3.

2. Bill Language

Upon introduction of H.R. 5455, Chairman Don Young (R-AK) talked about his primary reasons for introducing the bill. He observed that "[s]tudies have clearly outlined the problems associated with America's growing highway congestion crisis, which in 1999 alone, cost the nation $78 billion and led to the waste of 6.8 billion gallons of gas."[278] The problems to which Chairman Young referred were project delays--delays that, he argues, creates "social, economic and environmental problems throughout our nation."[279]

To tackle the problem of project delays, H.R. 5455 proposes a number of revisions to environmental law that affect transportation projects.[280] Specifically, in the area of § 4(f), the bill makes significant changes. First--and perhaps most significantly--it replaces the current statutory § 4(f) framework with a more flexible and balanced approach.[281] Section 103(c) of the bill rewrites the §4(f) requirements by mandating that "the Secretary shall not approve any transportation project… that has a significant impact on a protected resource."[282] "Significance of impact" is to be determined by

> comprehensively, taking into account (A) the value of the protected resource; (B) the value of the impacted land within the protected resource; (C) the nature and extent of the impact on the protected resource after mitigation,

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[278] U.S. House Committee on Transportation and Infrastructure, Press Release on the Introduction of Environmental Streamlining Legislation (September 26, 2002) *available at* http://www.house.gov/transportation/press/press2…/release362.htm (last visited Aug. 8, 2004).

[279] *Id.* at 1.

[280] *See generally* H.R. 5455.

[281] *See* H.R. 5455 § 103.

[282] *Id.* at § 103(c).

> measured both quantitatively and qualitatively and; (D) the views of the official with jurisdiction over the protected resource, and, in the case of private property, the views of the principal owner or owners of the property.[283]

This approach stands in sharp contrast to the *Overton Park* § 4(f) approach, as it specifically allows for a balancing of various issues and interests in making a determination as to whether a transportation project will impact a protected land.

The ExPDITE legislation also further attempts to streamline the approval of projects under § 4(f) by requiring the issuance of regulations "listing categories of projects that do not have the potential to cause significant impacts on protected resources."[284] This provision is similar to the nationwide programmatic evaluations described above[285] except that it appears to expand the type of categories eligible for such streamlined consideration. Again, the primary thrust of the ExPDITE legislation is to provide the Secretary with more flexibility and discretion to approve projects when considered against the totality of circumstances, and a categorical approval process furthers that goal.

This theme of flexibility also carries over to the provisions of ExPDITE that detail how project alternatives are to be evaluated.[286] If the Secretary finds that a proposed project will have a significant impact on a protected property, then he or she is required to "develop and evaluate alternatives, as part of the alternatives analysis for the NEPA process, if any, for avoiding, minimizing, and mitigating the impacts of

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[283] *Id.* at § 103(d)(2).

[284] *Id.* at § 103(d)(3).

[285] *See supra* Part IV.C.

[286] *Id.* at § 103(e).

the project."[287] This provision helps ensure the proposed project moves forward in a timely manner by linking its review to the NEPA process, thereby reducing overlap and redundant evaluations.

The bill also sets forth standards to guide the Secretary in evaluating and selecting alternatives.[288] Taking a cue from the current § 4(f) language, Section 103(f) states the Secretary may approve a project if:

> (1) there is no prudent and feasible alternative that would entirely avoid significant impacts on the protected resource; (2) there is no prudent and feasible alternative that would substantially reduce significant impacts on the protected resource when compared to the selected alternative; and (3) appropriate measures to minimize the harm to the protected resource have been incorporated into the selected alternative.[289]

The above language, however, differs significantly from current law. First, an alternative must "entirely avoid" significant impacts. Second, the "unique problems" standard is seemingly removed from the "prudent and feasible alternatives" consideration as the alternatives, now, need only "substantially reduce" impacts in order to be chosen. And, third, the "all possible planning" requirement under the minimization of harms subsection of § 4(f) is replaced by a less strenuous requirement to take "appropriate measures" to minimize harm.[290]

In an apparent attempt to address the "problems" of *Overton Park* mentioned by AASHTO and others, the bill prescribes specific factors that must be assessed

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[287] *Id.*

[288] *Id.* at § 103(f).

[289] *Id.* at § 103(f)(1-3).

[290] *Compare* 49 U.S.C § 303(c)(2).

when determining the feasibility and prudence of a particular alternative.[291] An alternative is not "feasible" if the "alternative cannot be implemented as a matter of sound engineering."[292] In addition, an alternative is deemed not "prudent" if "the Secretary finds that the drawbacks associated with that alternative clearly and substantially outweigh its benefits."[293] The ExPDITE bill underscores the need for balancing by directing the Secretary to "assess the benefits and drawbacks of the alternative as a whole, taking into account the alternative's ability to achieve the project's objectives, the environmental and other impacts of the alternative (including the impacts on protected resources), the cost of the alternative, and any other factors deemed relevant by the Secretary."[294] While the definition of "feasible" is clearly derived from *Overton Park*[295], the definition of "prudent" draws heavily from the balancing discussion in *Eagle Foundation*.[296] The drafters of ExPDITE have stitched together key elements from two cases that have offered differing interpretations on the scope of § 4(f) to produce a middle ground. They have also given the Secretary additional discretion by allowing him or her to take into account factors as "relevant" in determining a project's prudence.[297]

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[291] H.R. 5455 at § 103(g).

[292] *Id.* at § 103(g)(1).

[293] *Id.* at § 103(g)(2).

[294] *Id.*

[295] *See Overton Park*, 401 U.S. at 411. For a project to be "feasible," it must be found by the Secretary to be so "as a matter of sound engineering." *Id.*

[296] *See Eagle Found.*, 813 F.2d at 804. A review concerning a project's prudence, "calls for judgment, for balancing…" *Id.*

[297] *See* H.R. 5455 § 103(c)(2).

Finally, ExPDITE proposes one additional change to the § 4(f) review process, while also keeping--with minor modification--a key provision of § 4(f). In § 103(h), the bill allows compliance with § 106 of the National Historic Preservation Act to be substituted for compliance with the other provisions of H.R. 5455 when the protected property at issue is an historic property.[298] H.R. 5455, however, provides a key exception to the § 106 compliance substitution provision. Sections 103(i-j) of H.R. 5455 state that "any direct physical impact" or "any visual, audible, or atmospheric impact" by the proposed project on a national historic landmark will be deemed "adverse" to the landmark and shall not be approved by the Secretary.[299] The bill maintains the definition of protected properties (which it calls "protected resources") but with one minor modification.[300] Under the bill, historic properties are defined as those that are deemed historic under the National Historic Preservation Act[301], as opposed to "historic site[s] of national, state, or local significance (as determined by the Federal, state, or local officials having jurisdiction over the… site)."[302]

Therefore, the bill, by not substantially changing the definition of protected properties maintains the overall policy established by Congress in 1966 of protecting valuable parklands, wildlife refuges and historic sites from encroachment by

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[298] *Id.* at § 103(h). For reviews involving historic properties, § 106 of the National Historic Preservation Act is deemed to be equivalent and/or redundant to a traditional § 4(f) review. *See e.g.*, Horsley Statement, *supra* note 221, at 8.

[299] H.R. 5455 § 103(i-j).

[300] *Id.* at § 103(j)(3).

[301] *Id.* at §103(j)(3)(B).

[302] 49 U.S.C. § 303(c).

transportation projects. However, under the bill, the Secretary is now given the flexibility and balance that Members of Congress sought when originally enacting § 4(f).[303] Ultimately, the 107th Congress came to an end without H.R. 5455 moving forward beyond the hearing stage, but the principles it outlined were to play an important role in the reauthorization of TEA-21 as will be seen below.

B. S. 3031 -- MEGA Act

During the 107th Congress, the Senate also joined the debate on environmental streamlining with the introduction of S. 3031, the Maximum Economic Growth for America Through Environmental Streamlining Act (MEGA).[304] The bill's sponsor, Senator Max Baucus (D-MT), during the introduction of the bill, discussed the goal of the bill: provide for environmental streamlining.[305] Environmental streamlining is needed to "make the [environmental] permit and approval process work more smoothly and effectively"[306] The bill was introduced in large part due to Senator Baucus' frustration with the DOT's regulations that were promulgated as part of the requirements of TEA-21.[307] As Senator Baucus noted, "[t]hose regulations[308] were

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[303] *See supra* Part II.B.2.

[304] *See* Maximum Economic Growth for America Through Environmental Streamlining (MEGA) Act, S. 3031, 107th Cong. (2002).

[305] 148 CONG. REC. S9850 (daily ed. October 2, 2002) (statement of Sen. Baucus concerning the introduction of the MEGA Act).

[306] *Id.*

[307] *Id.*

[308] NEPA and Related Procedures for Transportation Decisionmaking, Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites, Notice of Proposed Rulemaking, 65 Fed. Reg. 33960 (May 25, 2000). The proposed rule was received with controversy and as a result was later withdrawn on September 20, 2002. *See* 67 Fed. Reg. 59225 (Sept. 20, 2002).

supposed to help the State DOT's get their jobs done better and more efficiently--not make their jobs harder."[309] The proposed regulations required by TEA-21 received a number of comments--many of which were negative, according to Baucus. Ultimately, Baucus noted, DOT "went back to the drawing board and we never heard from them again" through two different Administrations.[310]

While MEGA focuses primarily on "streamlining" the National Environmental Policy Act (NEPA) process, it also addresses § 4(f) issues.[311] Section 2(a) of the bill authorizes state environmental reviews in lieu of DOT reviews to meet the requirements of various environmental laws, including § 4(f). This provision, which is similar to the manner in which other environmental laws are administered (for example, the Clean Air Act)[312], allows individual states to assume responsibility for conducting the review process for certain projects provided the state can capably carry out such review.[313] The rationale behind this approach is that states will be able

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[309] 148 CONG. REC. S9850.

[310] *Id.*

[311] S. 3031 § 2(a). *See also* 148C ONG. REC. S9850. Senator Baucus discusses the three main purposes of MEGA. "First, the U.S. DOT needs to be the lead agency on at least two requirements, 'Purpose and Need' for a project and 'Scope of Alternatives.' This will make sure that any stalemates are resolved quickly. Second, we should allow States to take over the role of the U.S. DOT if they can meet certain requirements and if they choose to take on that role. This will eliminate another step of bureaucracy. Last, we must ensure that resource agencies act in a timely manner. When it comes time for an agency like Fish and Wildlife to assess the extent of damage (if any) to a wetlands or the Army Corps of Engineers to issue a permit, these agencies shouldn't be able to take years to make these decisions." *Id.*

[312] Clean Air Act, 42 U.S.C. § 7410 (2000).

[313] S. 3031 § 2(a).

to respond more nimbly to local needs and issues than the federal government, and can, therefore, more quickly move a project through the review process.[314]

The Senate Environment and Public Works Committee held a hearing on this bill and, as with the hearing on the House ExPDITE legislation, a variety of transportation groups were represented at the hearing.[315] Again, the testimony on behalf of AASHTO was pivotal and supportive of § 4(f) reforms.[316] AASHTO made it clear that § 4(f) reform must be addressed during TEA-21 reauthorization.[317] "The core problem with § 4(f)," AASHTO noted, "is a lack of flexibility, balance, and common sense." A stringently interpreted § 4(f) causes the DOT to be "in the position of protecting a minor historic property at the expense of other, more sensitive environmental resources or communities."[318] Moreover, such strict interpretations "undermine not only the credibility of individual decision-makers or agencies, but of the NEPA process as a whole."[319] In order to address these problems, AASHTO restated many of its positions that it articulated during the House ExPDITE hearing,

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[314] *See* 148 CONG. REC. S9850.

[315] *See* "Project Delivery and Environmental Stewardship": Progress on Environmental Streamlining Under TEA-21 *available at* http://epw.senate.gov/stm1_107.htm#09-19-02 (last visited Aug. 8, 2004).

[316] *See* "Project Delivery and Environmental Stewardship": Progress on Environmental Streamlining Under TEA-21 (statement of Am. Assoc. of State Highway and Transp. Agencies) *available at* http://epw.senate.gov/stm1_107.htm#09-19-02 (last visited Aug. 8, 2004) [hereinafter AASHTO Statement].

[317] *Id.* at 14.

[318] *Id.*

[319] *Id.*

namely that § 4(f) be amended to allow exemptions for "projects that have 'no significant impact' on § 4(f) lands."[320]

This hearing was important to advancing the concept of environmental streamlining. It also signaled that the issue of § 4(f) reform was receiving bipartisan support.[321] The bill and the hearing also helped set the stage for addressing the issue of § 4(f) reform in TEA-21 reauthorization--a legislative issue that was to rise to high prominence in the 108th Congress as will be seen next.

C. S. 1072 -- SAFETEA

The Senate, through the leadership of Senator James Inhofe (R-OK), Chairman of the Senate Environment and Public Works Committee, initiated the first serious congressional TEA-21 reauthorization efforts, with the introduction of S. 1072, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 on May 15, 2003.[322] This bill essentially served as a vehicle to introduce the Bush Administration's TEA-21 reauthorization proposal.[323] However, the introduced bill did not address the more controversial § 4(f) issues that were included in the President's SAFETEA version.[324]

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[320] *Id.*

[321] *See e.g.*, S. 3031. This bill was introduced by a Democrat and co-sponsored by five Republicans.

[322] S. 1072.

[323] *See generally*, S. 1072. *See also* Amy Phillips, *Senate Reauthorization Draft Offers Limited Delegation, Sidesteps 4(f) Reforms*, Daily Report for Executives (BNA) No. 212, at A-17 (November 3, 2003). *See also supra* Part IV.E.

[324] Phillips, *supra* note 323, at A-17.

The Senate Environment and Public Works Committee marked up S. 1072 on November 12, 2003 and reported it from the committee with amendment.[325] This committee-reported version, also was silent on specific § 4(f) reforms.[326] The Senate finally addressed the § 4(f) issues when it considered the bill on the floor in early February 2004.[327] Senator Voinovich (R-OH), a member of the Senate Subcommittee on Transportation and Infrastructure of the Committee on Environment and Public Works, offered an amendment during the floor debate that specifically addressed the issue of § 4(f) reforms.[328] Long a champion of § 4(f), Senator Voinovich offered this amendment as a compromise and the amendment was supported by the National Trust for Historic Preservation and the AASHTO.[329]

Senator Voinovich spoke at some length on his amendment, and he discussed the importance of reforming § 4(f). His amendment allowed for a *de minimis* exception to the provisions of § 4(f) for those transportation projects that have only minimal impacts on § 4(f) protected lands. It also provided an "incentive for projects' sponsors to incorporate environmentally protective measures into a project from the

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[325] *See* Bill Summary and Status for the 108th Congress--S.1072, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01072:@@@L&summ2=m& (last visited July 15, 2004).

[326] *See* S. 1072. The committee reported bill contains a number of environmental streamlining provisions, but does not include either the Bush Administration's § 4(f) reform proposals or other § 4(f) proposals.

[327] *See* 150 CONG. REC. S393 (daily ed. Feb. 3, 2004).

[328] *See* 150 CONG. REC. S643-45 (daily ed. Feb. 5, 2004) (statement of Sen. Voinovich concerning his § 4(f) amendment). *See also* 150 CONG. REC. S671-72 (daily ed. Feb. 5, 2004) (text of Senate Amendment 2271 offered by Senator Voinovich).

[329] *Id.* at S643.

beginning" so that § 4(f) lands can be protected more efficiently.[330] He acknowledged that these reforms are only a compromise and that "many groups would have preferred greater reform," presumably even Senator Voinovich himself.[331]

One of the primary reasons for offering the amendment was the need to harmonize disparate federal courts of appeals interpretations of § 4(f).[332] Senator Voinovich noted that "inconsistent interpretation of the *Overton* criteria …[justifies] a more balanced interpretation of [§ 4(f)'s] requirements."[333] Section 4(f), Senator Voinovich argued, has become "a lawyer's dream and a nightmare for the courts that have to interpret it and the States and U.S. Department of Transportation, which has to enforce the law."[334] This situation has resulted in "needless confusion, significant delays, and high cost for issues that defy common sense."[335]

To help illustrate his case for reform, Senator Voinovich offered several examples of situations in which § 4(f) either failed in its purpose of protecting parklands, wildlife refuges, or historic properties or resulted in greater cost or delay for the project at issue.[336] He cited a case in Ohio where—because of § 4(f) requirements—a highway had to be rerouted around a fifty-year old barn at a cost of

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[330] *Id.* at S644.

[331] *Id.*

[332] *Id.* at S643.

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.* at S643-44.

$100,000 and a delay of four months.[337] The irony behind this particular case was that the "barn fell down due to owner neglect a few years later."[338] In another example in Pennsylvania, he noted that § 4(f) requirements caused the destruction of a non-historic farm in order to save an adjacent historic farm that, itself, was later developed.[339] Senator Voinovich argued that his "amendment would at least have allowed the State preservation officer to make a balanced decision considering all of the information and alternatives," and therefore could have likely prevented the outcomes in the above examples.[340]

Senator Voinovich's amendment was ultimately incorporated into a larger "manager's amendment" offered by Chairman Inhofe.[341] The Senate adopted this amendment--Senate Amendment 2285--on February 12, 2004.[342] Senate Amendment 2285, incorporating Senator Voinovich's amendment, made a number of changes to existing § 4(f) law and policy. The text of Senate Amendment 2285 follows:

> **SEC. 1514. PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES.**
>
> (a) PROGRAMS AND PROJECTS WITH DE MINIMIS IMPACTS--
>
> (1) TITLE 23.--Section 138 of title 23, United States Code, is amended--
>
> (A) in the first sentence, by striking "It is hereby" and inserting the following:
>
> "(a) DECLARATION OF POLICY.--It is"; and

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[337] *Id.* at S643. Senator Voinovich noted that this case could be a harbinger of things to come because the age of the barn—fifty years—was the trigger for the § 4(f) review and ensuing mitigation efforts. He observed that "[s]oon, we won't be able to do any improvements because sidewalks will be fifty years old in this country." *Id.*

[338] *Id.*

[339] *Id.* at S644.

[340] *Id.*

[341] *See* 150 CONG. REC. S812 (daily ed. Feb. 10, 2004).

[342] *See* S.1072 Status, *supra* note 325.

(B) by adding at the end the following:

"(b) DE MINIMIS IMPACTS.--

"(1) REQUIREMENTS.

``(A) IN GENERAL.--The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) or (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

``(B) CRITERIA.--In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

``(2) HISTORIC SITES.--With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

``(A) the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that--

``(i) the transportation program or project will have no adverse effect on the historic site; or

``(ii) there will be no historic properties affected by the transportation program or project;

``(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation, if participating in the consultation); and

``(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

``(3) PARKS, RECREATION AREAS, AND WILDLIFE AND WATERFOWL REFUGES.--With respect to parks, recreation areas, and wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if--

``(A) the Secretary has determined, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (including public notice and opportunity for public review and comment), that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

``(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.".

(2) **TITLE 49**.--Section 303 of title 49, United States Code, is amended--

(A) by striking ``(c) The Secretary" and inserting the following:

``(c) APPROVAL OF PROGRAMS AND PROJECTS.--Subject to subsection (d), the Secretary"; and

(B) by adding at the end the following:

``(d) DE MINIMIS IMPACTS.--

``(1) REQUIREMENTS.--

``(A) IN GENERAL.--The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) or (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

``(B) CRITERIA .--In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

"(2) HISTORIC SITES.--With respect to historic sites, the Secretary may make a finding of de minimis impacts only if--

"(A) the Secretary has determined, in accordance with the consultation process required under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that--

``(i) the transportation program or project will have no adverse effect on the historic site; or

``(ii) there will be no historic properties affected by the transportation program or project;

``(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation, if participating in the consultation); and

``(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

``(3) PARKS, RECREATION AREAS, AND WILDLIFE AND WATERFOWL REFUGES.--With respect to parks, recreation areas, and wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if--

``(A) the Secretary has determined, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (including public notice and opportunity for public review and comment), that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

``(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.".

(b) CLARIFICATION OF EXISTING STANDARDS.--

(1) IN GENERAL.--Not later than 1 year after the date of enactment of this Act, the Secretary shall (in consultation with affected agencies and interested parties) promulgate regulations that clarify the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives under section 138 of title 23 and section 303 of title 49, United States Code.

(2) REQUIREMENTS.--The regulations--

(A) shall clarify the application of the legal standards to a variety of different types of transportation programs and projects depending on the circumstances of each case; and

(B) may include, as appropriate, examples to facilitate clear and consistent interpretation by agency decisionmakers.

(c) IMPLEMENTATION STUDY.--

(1) IN GENERAL.--The Secretary and the Transportation Research Board of the National Academy of Sciences shall jointly conduct a study on the implementation of this section and the amendments made by this section.

(2) COMPONENTS.--In conducting the study, the Secretary and the Transportation Research Board shall evaluate--

(A) the processes developed under this section and the amendments made by this section and the efficiencies that may result;

(B) the post-construction effectiveness of impact mitigation and avoidance commitments adopted as part of projects conducted under this section and the amendments made by this section; and

(C) the quantity of projects with impacts that are considered de minimis under this section and the amendments made by this section, including information on the location, size, and cost of the projects.

> (3) REPORT REQUIREMENT.--The Secretary and the Transportation Research Board shall prepare--
>
> (A) not earlier than the date that is 4 years after the date of enactment of this Act, a report on the results of the study conducted under this subsection; and
>
> (B) not later than September 30, 2009, an update on the report required under subparagraph (A).
>
> (4) REPORT RECIPIENTS.--The Secretary and the Transportation Research Board shall--
>
> (A) submit the report and update required under paragraph (3) to--
>
> (i) the appropriate committees of Congress;
>
> (ii) the Secretary of the Interior; and
>
> (iii) the Advisory Council on Historic Preservation; and
>
> (B) make the report and update available to the public.[343]

While this amendment does not fully adopt the broad-reform minded principles espoused in the Bush Administration's § 4(f) proposal, it does make a number of significant changes to § 4(f). It allows for a *de minimis* impacts exception for those projects that have only a minor effect on § 4(f) protected lands.[344] And, in making this *de minimis* determination, the Secretary of Transportation is directed to consider "any avoidance, minimization, mitigation, or enhancement measures" taken by the project.[345] This provision does provide the Secretary with a measure of flexibility when reviewing and evaluating projects. The DOT is also required to promulgate regulations "clarify[ing] the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives."[346] In addition,

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[343] S. 1072 § 1514. This section incorporates the Senate Amendment 2285's changes and additions to the original version of S. 1072.

[344] S. 1072 § 1514(a).

[345] S. 1072 § 1514(a)(1)(B).

[346] S. 1072 § 1514(b)

subsection (c) of the amendment directs a joint study on the implementation of this section to be undertaken by DOT and the Transportation Research Board of the National Academy of Sciences.[347]

The ranking member of the Senate Environment and Public Works Committee, Senator Jeffords (I-VT) spoke in support of the Voinovich § 4(f) amendment. In summarizing the need for, and provisions of, the amendment, he noted the following:

> An amendment to 4(f) is included in this legislation. The objective of this amendment is to allow transportation projects and programs to move forward more quickly, while maintaining the protections of 4(f). Those protections assure that there will be public notice and opportunity for public review and comment on proposed de minimis determinations for transportation projects, and that affected agencies will concur in the decision of the Secretary of Transportation that there will be no adverse impact on a historic site, recreation area, park, or wildlife or waterfowl refuge.[348]

The amendment, Senator Jeffords argued, will also encourage front-end consideration of mitigation measures and other environmental planning initiatives.[349] The provisions of the amendment, according to Senator Jeffords are "modest, common-sense" and "assure the transportation planners will consider the location of important habitat, wetlands and other natural resources at the earliest stages of planning for new

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[347] S. 1072 § 1514(c). This study is to be completed within four years after the date of enactment of the Act. *Id.* at § 1514(c)(3)(A). The study is required to include an evaluation of "(A) the processes developed under this section and the amendments made by this section and the efficiencies that may result; (B) the post-construction effectiveness of impact mitigation and avoidance commitments adopted as part of projects conducted under this section and the amendments made by this section; [and] (C) the quantity of projects with impacts that are considered de minimis under this section and the amendments made by this section, including information on the location, size, and cost of the projects." *Id.* at § 1514(c)(2)(A-C).

[348] 150 CONG. REC. S1265 (daily ed. Feb. 12, 2004).

[349] *Id.*

roads."[350] The effect of such early planning will be cost-savings for states and local departments of transportation, as well as better environmental protections.[351] The Inhofe amendment, with the Voinovich § 4(f) language, was ultimately adopted by the Senate on February 12, 2004, and S. 1072 was also approved on the same day by a vote of 76-21, with three Senators not voting.[352]

D. H.R. 3350 -- TEA-LU

While the Senate proceeded with S. 1072 as its offering in the TEA-21 reauthorization process, the House moved forward on a parallel track with the introduction of H.R. 3550, the Transportation Equity Act: A Legacy for Users (TEA-LU).[353] Unlike the Senate approach in S. 1072 as amended, TEA-LU focuses only on historic sites and remains silent on other protected lands such as parklands and wildlife refuges.[354] Section 6003 of TEA-LU states the following:

> **SEC. 6003. POLICY ON HISTORIC SITES.**
>
> (a) TITLE 49.--Section 303 of title 49, United States Code, is amended by adding at the end the following:
>
> "(d) SPECIAL RULES FOR HISTORIC SITES.--
>
> "(1) IN GENERAL- The requirements of this section are deemed to be satisfied in any case in which the treatment of a historic site has been agreed upon in accordance with section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and the

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[350] *Id.*

[351] *Id.* Senator Jeffords noted the following: "State and Federal agencies spend considerable time and money both protecting natural areas and building transportation infrastructure. Unfortunately, conservation and growth efforts often happen independently and then come into conflict during the permitting and construction phases of a transportation project. These investments need to be coordinated. If conservation efforts are taken into account at the earliest stages of transportation planning, both priorities can be realized, in less time and at less cost." *Id.*

[352] *Id.* Senators Kerry (D-MA), Edwards (D-NC) and Nelson (D-NE) did not vote.

[353] H.R. 3550. The bill was introduced on November 20, 2003.

[354] H.R. 3550, § 6003.

agreement includes a determination that the program or project will not have an adverse effect on the historic site.

`(2) LIMITATION ON APPLICABILITY- This subsection does not apply in any case in which the Advisory Council on Historic Preservation determines, concurrent with or prior to the conclusion of section 106 consultation, that allowing section 106 compliance to satisfy the requirements of this section would be inconsistent with the objectives of the National Historic Preservation Act. The Council shall make such a determination if petitioned to do so by a section 106 consulting party, unless the Council affirmatively finds that the views of the requesting party have been adequately considered and that section 106 compliance will adequately protect historic properties.

`(3) DEFINITIONS- In this subsection, the following definitions apply:

`(A) SECTION 106 CONSULTATION- The term `section 106 consultation' means the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f).

`(B) ADVERSE EFFECT- The term `adverse effect' means altering, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.'.

(b) Title 23- Section 138 of title 23, United States Code is amended--

(1) by inserting `(a) POLICY- ' before `It is'; and

(2) by striking `In carrying' and inserting the following:

`(c) STUDIES- In carrying'; and

(3) by inserting after subsection (a) (as designated by paragraph (1)) the following:

`(b) SPECIAL RULES FOR HISTORIC SITES-

`(1) IN GENERAL- The requirements of this section are deemed to be satisfied in any case in which the treatment of a historic site has been agreed upon in accordance with section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and the agreement includes a determination that the program or project will not have an adverse effect on the historic site.

`(2) LIMITATION ON APPLICABILITY- This subsection does not apply in any case in which the Advisory Council on Historic Preservation determines, concurrent with or prior to the conclusion of section 106 consultation, that allowing section 106 compliance to satisfy the requirements of this section would be inconsistent with the objectives of the National

> Historic Preservation Act. The Council shall make such a determination if petitioned to do so by a section 106 consulting party, unless the Council affirmatively finds that the views of the requesting party have been adequately considered and that section 106 compliance will adequately protect historic properties.
>
> `(3) DEFINITIONS- In this subsection, the following definitions apply:
>
> `(A) SECTION 106 CONSULTATION- The term `section 106 consultation' means the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f).
>
> `(B) ADVERSE EFFECT- The term `adverse effect' means altering, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.'.[355]

The House provision, by focusing only on historic sites, does not provide the broader flexibility sought by the Bush Administration and the Senate. Nevertheless, it does provide some "streamlining" to the § 4(f) program in terms of allowing compliance with the National Historic Preservation Act to be deemed as also in compliance with the provisions of § 4(f) as they relate to historic sites.[356] The House approved TEA-LU, with the § 4(f) amendment concerning historic sites, on April 2, 2004 by a vote of 357-65.[357]

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[355] 150 CONG. REC. H1845, H1960 (daily ed. Apr. 1, 2004). The section was included in a substitute amendment offered during House floor consideration of the bill.

[356] *See* H.R. 3550, § 6003.

[357] 150 CONG. REC. H2121-22 (daily ed. Apr. 2, 2004).

E. TEA-21 Reauthorization Conference Committee Consideration

Although the actions by the Senate and the House earlier this year regarding § 4(f) represented significant steps on the road to reform, the path ahead remains uncertain and not without potential obstacles. The House and Senate completed floor consideration of their bills by April 2004, yet, to date, differences between their respective bills have not been resolved by the House-Senate conference committee.[358] Although a number of non-controversial items have been addressed and resolved by the conference committee, debate over the bill's overall funding levels (an issue unrelated to § 4(f) reform) had caused the bill to remain stuck in the conference committee.[359] Resolution on the funding issues is necessary before the conference committee is expected to tackle thornier issues such as environmental streamlining and § 4(f) reform.[360] As Congress enters its summer recess period, prospects for resolving differences are unclear, with some commentators believing that it will be very difficult, if not impossible, to complete a bill before the November elections.[361]

VI. ARRIVING WHERE WE STARTED -- THE FUTURE OF § 4(f)

Given the current--stalled--status of the TEA-21 reauthorization effort, it is uncertain if § 4(f) reforms can be made in 2004.[362] The TEA-21 reauthorization

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[358] Isaiah J. Poole, *Another Roadblock for Transportation Conferees, Another Extension Clears*, CQ Today, at 3 (July 23, 2004).

[359] *Id.*

[360] *See e.g.*, Brian Stempeck, *House Highway Offers Goes Nowhere Fast; No Deal Before Recess*, Envtl. & Energy Daily, at 1 (July 23, 2004).

[361] *Id.*

[362] *Id.*

process also represents the most likely legislative vehicle for making changes to § 4(f), therefore, if this process is not completed during the 108th Congress, proponents for change will have to start the process anew in the 109th Congress. In addition, with the possibility of political changes in the House, Senate and/or the White House, the final path of § 4(f) reforms could also change if the process drags out into next year.

Indeed, the recent and current environment surrounding § 4(f) is unparalleled in the statute's history. For the first time since its creation in 1966, a concerted legislative and political effort is underway to reform § 4(f). How this effort evolves remains to be seen; however, the TEA-21 reauthorization process has forced, at the very least, a re-examination of a statute that has served as a key component of environmental and historic preservation law. And, given the bipartisan support for at least some changes to § 4(f)[363], it appears that change is in the future for § 4(f).

A. Possibilities for Change

With this backdrop in mind, it is useful to look at some of the possibilities for change that may exist for § 4(f). Many of these proposed changes seek a return to the principles of flexibility and balance denoted in the conference report floor debate on the original § 4(f). Among the many suggestions for reforming § 4(f), the following proposals have received the most attention:

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[363] *See supra* Part V.C.

- adopting a de minimis exception for projects that have an insignificant impact on § 4(f) protected lands;[364]
- expanding the current nationwide permits approach;[365]
- allowing the Secretary to engage in a balancing test when determining whether or not a proposed project will use or affect a § 4(f) protected land;[366]
- ensuring that maintenance of existing facilities does not trigger § 4(f) protections;[367]
- allowing compliance with Section 106 of the National Historic Preservation Act to satisfy § 4(f); and[368]
- permitting the states to take a more active and up-front role in the enforcement and application of § 4(f).[369]

B. Going Back to the Future

As the discussion above has revealed, these proposals for change bubbled up over many years--often as a response to court cases and/or specific projects. When analyzing the voluminous case law comprising § 4(f) jurisprudence, it is also useful to do so in the context of the original legislative history that accompanied the creation of § 4(f). Indeed, one of the best guides for determining what the future may hold is to

[364] *See supra* Part V.C.

[365] *See e.g., supra* Part V.A.

[366] *See e.g., supra* Part IV.E.

[367] *See e.g., supra* Part V.A.1. *See also supra* Part IV.C.

[368] *See e.g. supra* Part V.C.

[369] *See e.g., supra* Part V.B.

look to the past. To paraphrase T.S. Eliot, the result of exploration is often to arrive back from whence one came and to know it for the first time. In this case, that means turning back to the legislative history of § 4(f), so that we can "know" § 4(f) for the first time. Proponents for changing § 4(f) would be well-served to cite the statements made by Congressmen Kluczynski and Rostenkowski in 1966 during the debate of the DOT Act. Although, these statements are obviously (and some would argue, merely) legislative history, they are nevertheless prescient and persuasive as to the need to have flexibility and balance in the § 4(f) program. These statements also serve as the best evidence available as to how § 4(f) was viewed by those called upon to vote to approve or not approve it.

1. Restoring § 4(f)'s Legislative Roots

As discussed above, the legislative history concerning the original conference report that spawned the current § 4(f) is revealing.[370] Referencing the committee and other debate that took place during the development of the original § 4(f) language, Congressman Rostenkowski observed that "[i]t was made clear at the time that as desirable as parkland preservation might be, other important factors must be considered."[371] Congressman Rostenkowski could "easily forsee circumstances when it may be vital to use such [protected] lands."[372] He offered specific examples, "[f]or instance, if it became necessary to choose between preserving a wildlife refuge or saving human lives by a highway improvement, I do not think any of us would have

[370] *See supra* Part II.B.2.

[371] 112 CONG. REC. H26651 (daily ed. October 13, 1966) (statement of Rep. Rostenkowski).

[372] *Id.*

any doubt as to which choice should be made. Or if there were a choice between using public parkland or displacing hundreds of families, with the attendant burden imposed on them, I would want the Secretary to weigh his decision carefully, and not feel he was forced by the provision of the bill to disrupt the lives of hundreds of human beings."[373]

It is interesting to note that the statements of Congressmen Kluczynski and Rostenkowski are seldom cited or mentioned in the many cases and policy debates that have occurred since § 4(f)'s creation. This fact is even more interesting considering these statements represent the only substantive comments made by Members of Congress during the legislative debate on the conference report for the DOT Act of 1966. Surely, the current Congress and other policy and judicial decision-makers would benefit from a review of these statements. Efforts to change, re-examine, or reform § 4(f) should start first with an analysis of the early history of the creation of § 4(f).

2. Mending the Judicial Split

Much has happened in the transportation and environmental law and policy arenas since § 4(f) arrived on the scene nearly forty years ago. The case law interpreting the scope and application of § 4(f), over this time period, has not fully clarified the reach of § 4(f). Rather, the true meaning of § 4(f) has been made murky by the differing approaches that certain courts of appeals have adopted. In addition to reviewing the legislative history of § 4(f), it also is necessary to enact a clear statement on how § 4(f) should be interpreted, implemented and enforced. A clear

[373] *Id.* at H26651-52.

statement by Congress addressing the split among the circuits over the issue of how strictly § 4(f) should be interpreted would be of great benefit to all participants in the process--transportation planners and builders, environmentalists and historic preservationists.[374] Providing a resolution to this judicial split could be found in § 4(f)'s original legislative history--a history that suggests rigor but also balance and flexibility.[375]

The recent legislative efforts made by Senators Voinovich and Inhofe and Congressman Don Young and others reveal, perhaps, a possible new path for § 4(f). By allowing for flexibility in administering the § 4(f) process, this recent legislative approach might restore balance between the often competing, yet always intertwined, camps of the transportation planners and engineers and the environmentalists. Regardless of the outcome of the TEA-21 reauthorization process and whether or not it ultimately includes § 4(f) reform language along the lines of the recent Senate or House approaches, the issue of balancing these interests will not go away anytime soon. After nearly forty years, the moment for change has arrived, and it is unlikely that those Senators, Members of Congress, associations and other interested parties and advocates for change will retire from the field without at least partial resolution as to how § 4(f) should be interpreted and applied. The coming months will likely be the beginning of a new, more clarified, path for § 4(f) jurisprudence.

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[374] *See e.g.*, Statement of Administration Policy on H.R. 3550 - Transportation Equity Act: A Legacy for Users (Mar. 30, 2004), *available at* http://www.whitehouse.gov/omb/legislative/sap/108-2/hr3550sap-h.pdf. (last visited Aug. 8, 2004). "A clarification of the Section 4(f) definition of "prudent" is needed to forestall confusing standards applied unevenly by the Federal Courts of Appeals." *Id.* at 3.

[375] *See supra* Part II.B.2.