

February 3, 2012

United States Department of Transportation
Dockets Management Facility
Room W12-140
1200 New Jersey Avenue, SE
Washington, D.C. 20590
Docket No: FHWA-2011-0125

Re: Section 4(f) Draft Policy Paper

On behalf of the 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer comments on the Federal Highway Administration's (FHWA's) 4(f) draft policy paper referenced in a notice published January 4 in the *Federal Register*.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs.

As stated in the January 4 Federal Register notice, the FHWA draft policy paper incorporates the changes required by the "Safe, Accountable, Flexible and Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU). ARTBA members undertake a variety of activities that are directly impacted by regulations concerning parks, recreation areas, wildlife and waterfowl refuges, and historic sites which are the subject of Section 4(f) of the Department of Transportation Act of 1966 (4(f)). ARTBA first offered comments in late 2006 regarding the implementation of FHWA's 4(f) regulations and is pleased to be able to respond to FHWA's subsequently issued draft policy paper.

Section 4(f) comes into play when a transportation project affects an area that is classified as a park, recreation area, wildlife refuge or historic site. Under 4(f), if a transportation project will affect one of these types of areas, a determination must be made that no "feasible or prudent" alternative exists to the project.

FHWA's policy paper addresses a number of issues specifically raised by ARTBA during FHWA's prior 4(f) rulemaking process initiated in 2006. Among these are:

- **A “de-minimis” standard for impacting 4(f) properties:** ARTBA is encouraged by the discussion of a “de minimis” standard in the policy paper. A “de minimis” standard properly recognizes that there is a level of impact below which there is not enough significant harm to the land involved to delay or stop transportation improvements. Also, a “de-minimis” standard properly recognizes that not all 4(f) properties are of the same historic or ecological significance. While some properties may need to be protected at all costs, there are others which, as the proposed rule states, are of “less significance” or “likely to be destroyed or developed by their owner. Recognizing this allows a proper amount of flexibility that helps to ensure 4(f) regulations protect those areas that truly do need protecting while not unnecessarily impeding transportation projects.

One area of concern, however, is the assertion in the draft policy paper that when a “de-minimis” finding is made on a decision which would not otherwise require public comment, that an opportunity for comment must be opened. This is self-defeating. While ARTBA is supportive of an open and involved transportation review and approval process, it does not make sense that a decision which would have otherwise not required public comment must open itself to comments simply because a “de minimis” finding has been reached. The goal of a de-minimis standard is to reduce delay in instances where there are no discernable effects to 4(f) properties. Adding additional bureaucratic hurdles would prevent this goal by increasing delay in situations where there are no impacts for the public to comment on.

- **Defining “prudent and feasible” alternatives:** In the 2006 rulemaking on implementing SAFETEA-LU’s 4(f) provisions, FHWA laid out seven specific factors for defining the “feasibility and prudence” of alternatives to transportation projects. If potential alternatives fail to meet this criteria laid out by FHWA, the original proposal is allowed to proceed. The draft FHWA policy paper discusses how each of these factors should be applied and also correctly notes that any alternatives should only be considered if they serve previously identified traffic needs as well as the original proposed project.

ARTBA appreciates the breadth of factors laid out by FHWA and feels that they attempts to encompass many of the conditions which could render an alternative not “feasible and prudent.” This is a valuable improvement to the transportation planning process in that it could help to limit the range of alternatives presented when a 4(f) property is impacted to only those alternatives which are realistic counter-options to the particular transportation project being developed.

ARTBA continues to be concerned, however, with the assertion made in FHWA’s 2006 rule that the balancing performed in determining how to address possible impacts on 4(f) properties “must be done with ‘a thumb on the scale’ in favor of the section 4(f) property” and that in order to find an alternative not feasible or prudent “the problems associated with avoiding the 4(f) property would always have to be severe in nature and not easily mitigated.” Implementation of the proposed rule in this manner would negate the flexibility afforded by the “feasible and prudent” definition described above. It also strays beyond the language of SAFETEA-LU and taints what is otherwise a balanced regulatory proposal. The intent of SAFETEA-LU was to clarify the 4(f) process by

developing a definition for the “feasible and prudent” standard, not to influence the outcomes of 4(f) decision-making.

Thus, ARTBA urges FHWA to amend its draft policy paper to ensure there are not attempts to “tip the scales” in this manner, but rather encourage individual circumstances to be applied to the definition of “feasible and prudent” in order to reach an appropriate decision.

On a different note, the draft policy paper encourages the use of alternatives analyses which have already occurred in the transportation planning process. Integration of transportation planning with subsequent project reviews is something ARTBA has long advocated. This simple step will help to reduce delay by eliminating duplicative tasks and taking advantage of work already done earlier in the process.

- **Recognition that transportation facilities should not be mistakenly considered as historic:** The draft policy paper states “FHWA’s interpretation is that the Congress clearly did not intend to restrict the rehabilitation, repair or improvement” of transportation improvements that would have otherwise been considered as “historic.” ARTBA wholeheartedly agrees and previously submitted comments to FHWA on this issue in 2005. As ARTBA said at the time, “While no group is more aware of the historic and cultural significance of the nation’s Interstate Highway System than the transportation construction industry, we also believe it is imperative that necessary improvements to the functionality of the system not become bogged down in gratuitous or redundant reviews.” ARTBA thanks FHWA for recognizing the necessary balance historic preservation and maintaining a working transportation system in the draft policy paper.

ARTBA appreciates the opportunity to comment on this important draft policy paper and looks forward to continuing to work with FHWA to improve and clarify the application of 4(f) to transportation improvements.

Sincerely,



T. Peter Ruane
President & C.E.O