



# United States Department of the Interior

## NATIONAL PARK SERVICE

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IN REPLY REFER TO:

### Director's Order # 87D: Non-NPS Roads

Approved

  
Director, National Park Service

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### **A. PURPOSE AND BACKGROUND**

This Director's Order replaces and supercedes all previous guidance and memoranda, including the Director's memorandum of November 30, 1998, regarding state and local non-NPS Federal-aid roads and highways.

1. Purpose of Director's Order. The purpose of this Director's Order is to set forth NPS policies and procedures for responding to requests we receive for use of national park lands for non-NPS highway projects that are partially or fully funded under Title 23 of the United States Code. The kinds of projects covered are those built by a state or other Department of Transportation (DOT), and include Interstate highways, bridges, railroad highway crossings, drainage structures, signs, guard rails and protective structures, and other road-related improvements.
2. The National Highway System. Congress has established a National Highway System to serve the nation's national defense, commerce and industry, and interstate and interregional travel needs. This system is sometimes referred to as the Federal-aid system, which receives funding under 23 U.S.C. 101 and 23 U.S.C. 103.

3. Policy to Preserve Public Park Lands. Congress has emphasized the importance of constructing and reconstructing the Federal-aid highway system to bring all the system's roads up to standards and to increase the safety of the system, and has authorized the Secretary of Transportation to appropriate Federal lands for highway purposes. Congress has also established, in section 4(f) of the Department of Transportation Act of 1969 (23 U.S.C. 138), a 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."

In support of this policy, section 4(f) prohibits the Secretary of Transportation from approving "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..., or any land from an historic site of national, State, or local significance...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." Section 4(f) applies to all NPS lands requested for rights-of-way for highway purposes that would use funds obtained under Title 23. The Federal Highway Administration (FHWA) administers provisions of Section 4(f) on projects or programs related to roadways under this provision of law for the Secretary of Transportation.

4. Effects on National Parks. When DOTs at the Federal, state, and local levels study the need for new roads or the improvement of existing roads, they occasionally identify as an alternative a route that would use national park lands. When this happens, it becomes necessary for the Department of the Interior (DOI), to concur with the DOT's findings pursuant to Section 4(f) of the Department of Transportation Act that (a) there is no feasible and prudent alternative; and (b) all possible planning has taken place to minimize harm to the park. In most cases, DOI relies on the NPS to draft its response to DOT's Section 4(f) findings. However, it should be understood that DOI retains actual concurrence authority.

5. Related references. Reference Manual 87D will provide a description of roads not covered under this Director's Order, as well as expanded explanations, procedures, and exhibits. Additional guidance on transportation-related issues will be provided in Director's Order #87A: Park Roads and Parkways, #87B: Alternative Transportation Systems, and #87C: Transportation System Funding. Also see section 9.2.1 of NPS *Management Policies*.

## **B. SUMMARY OF MAJOR ACTIONS AND TIME FRAMES**

All NEPA and 4(f) compliance activities and, if applicable, a transportation conformity analysis, are done at the beginning of the process, as soon as the DOT identifies the need for Federal land. Only after all compliance activities have been done -- and approvals received -- should the DOT write to FHWA, who then formally notifies NPS about the request for land. The formal notification includes all compliance and sign-off documents.

Once the formal request has been received, 23 U.S.C. 317 allows the NPS 4 months from the date of notification to reply to the FHWA request for land. The NPS may deny the request upon finding, in writing, that it is "contrary to the public interest or inconsistent with the purposes for

which such land or materials have been reserved.” Otherwise, the NPS may agree to the transfer under conditions deemed necessary for adequate protection and utilization of the land.

The law provides that, if the NPS fails to respond within the 4-month period, the FHWA may acquire the easement without further action by the NPS. Note, however, that this notification and subsequent 4-month limitation is well into the sequence, and after all NEPA and 4(f) (and, if applicable, National Historic Preservation Act (NHPA) Section 106 compliance, and transportation air conformity requirements per Section 176(c) of the Clean Air Act, as amended) are completed and signed-off. By the time the NPS receives such notification, there should be a need merely for a “letter” that ensures the conditions needed by the NPS to protect the resources are in the draft deed. A denial based on NEPA, 4(f), Section 106, or air conformity concerns -- and the FHWA sign-off on that denial -- should have happened well before an “official request” was sent. (See a more detailed account of this process in Section F below, and in RM-87D.)

### **C. AUTHORITIES**

Authority to issue this Director’s Order is found in 16 U.S.C. 1-4 (National Park Service Organic Act), and delegations of authority found in Part 245 of the Department of the Interior Manual.

Other key statutory provisions are:

- 23 U.S.C 317, which authorizes the FHWA to appropriate Federal lands that are necessary for the right-of-way of any Federal-aid highway, or as a source of materials for the construction or maintenance of such highway, unless it would be contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved.
- 23 U.S.C. 107(d), which authorizes the FHWA to make arrangements with Federal agencies having jurisdiction over lands or interests owned by the United States to give rights-of-way to DOTs whenever such rights-of-way are required for the Interstate System. Federal agencies are directed to cooperate with the FHWA.
- 23 U.S.C. 138, which is titled “Preservation of Park Land” and codifies Section 4(f) of the DOT Act of 1969. This section applies to both of the sections above, and requires FHWA to determine that (1) there is no feasible and prudent alternative, and (2) such program or project includes all possible planning to minimize harm.

Individual parks within the national park system may also have park-specific legislation that governs the decision-making process for highway rights-of-way within the park. In addition, this policy does not supercede more general legislative direction or implementing regulations that may pertain, for example, to the Alaska National Interest Lands Conservation Act (ANILCA).

### **D. OPERATIONAL POLICIES**

1. The NPS will participate early in all transportation planning studies and planning processes with state and local governments, Federal agencies, and regional planning bodies and citizen groups. Superintendents must take an active role in overall community and transportation

planning activities to educate all parties about the NPS mandate to protect park resources. NPS involvement, including that of superintendents in such planning activities, shall not constitute concurrent planning within the context of Section 4(f).

2. All lands within the national park system are considered nationally significant for 4(f) purposes. The DOI will not grant any request to route a state or local road through park land, or to increase the size of a right-of-way for an existing road, unless the NPS first agrees with the FHWA's determination that (a) there is no feasible and prudent alternative, and (b) all possible planning has taken place to minimize harm to the park. No NPS representative is authorized to designate all or any portion of the lands comprising a unit of the national park system necessary for a proposed highway project as anything except nationally significant.

3. Even if the NPS/DOI concurs with the FHWA's affirmative findings on 2 (a) and (b) above, it will not grant a request if it determines that the proposal is (c) contrary to the public interest, or (d) inconsistent with the purposes for which such land or materials have been reserved. In making an affirmative finding under (c) and (d), the NPS/DOI will take into account (among other things), the prohibitions against impairment of park resources and values, and whether the proposal would:

- Cause unacceptable adverse impacts to park resources and values; and
- Cause health and safety risks to visitors or park staff.

4. Any request for NPS land for highway purposes will require all environmental and cultural compliance to be completed and agreed to prior to the NPS receiving a formal request for land from FHWA for highway purposes. Should the FHWA (or DOT) request a transfer of NPS land prior to conducting an environmental analysis, the NPS response should be that it will not make a decision until the agreed upon environmental analysis is complete.

5. Should the conditions of paragraphs 2 and 3 above be met, and a decision made to grant the transfer of park land, the Highway Easement Deed (HED) will be the document used for this purpose. The HED is required by the NPS for all new roads and for widening existing roads where appropriate, and is the final step when there is agreement to allow use of NPS land for highway purposes. Any instruments other than the HED that have been used in the past to authorize roads in national park areas will be converted to HEDs at the earliest opportunity.

6. The decision by the NPS to grant or deny the requested transfer of land will be communicated to the FHWA by a Letter of Consent or Denial only after all relevant environmental evaluation and analysis has been completed, to support not only the actions of the FHWA, but also the actions of the NPS.

7. Other important policy considerations applicable to transportation systems are contained in sections 9.2 and 9.2.1 of *NPS Management Policies*.

## **E. DELEGATION OF AUTHORITY**

Regional directors are delegated limited authority, which cannot be re-delegated, to approve:

- Letters of Denial listing the park's objections and the reasons for them.
- Letters of Consent for HEDs to the FHWA Division Administrator in the state in which the project is located.
- Conversion to HEDs of existing special use permits authorizing use of park lands for Federal-aid Projects.
- Renewals of existing HEDs, when appropriate.
- Amendments to existing HEDs.

Regional directors will apply the criteria listed in D.3 above, comply with the applicable policies in *NPS Management Policies*, and consider the recommendations of the superintendent of the affected park, before taking action.

## **F. EARLY COORDINATION**

The FHWA is the Federal agency charged by law to coordinate these actions and will be instrumental in (1) preparing (along with others) the environmental and Section 4(f) analysis under NEPA and related environmental laws; and (2) ensuring that mitigation and conditions that are agreed to by the NPS and the DOT are incorporated into project plans, specifications, and construction, if a project is approved. (For a more detailed explanation, see RM-87D.)

The request to use NPS land for Federal-aid highway projects typically involves three agencies: (1) the state or local DOT requesting use of park lands; (2) the NPS; and (3) the FHWA. (Other agencies may also be involved. For example, if the land has historic significance or includes historic resources, the Advisory Council on Historic Preservation and the appropriate State Historic Preservation Officer also should be included.) It is advantageous that all three agencies establish an early cooperative working relationship so that project proposals can be coordinated to consider a 4(f) determination, and ensure mutual understanding of the provisions governing the requirements for use of park lands.

## **G. SEQUENCE OF EVENTS**

The following are the major steps involved in requests to transfer lands for highway purposes. These steps assume that the NPS has entered into the initial planning and environmental analysis process at the earliest possible stage of the project. NPS involvement should start when the State DOT/FHWA begins looking at the possibility of any activity that may impact NPS lands.

1. Initial Notification. This step is usually very informal at one or more first-round meetings.
  - The DOT informs the FHWA project contact person of the proposed use of NPS lands.
  - The FHWA, with the DOT, immediately invites the NPS to a joint meeting to discuss the proposed use of NPS land. At this meeting, DOT gives as full a description as possible of

what is being requested.

- If the initial information provided by DOT from this meeting indicates that the request would not meet the standards in 23 U.S.C. 317 (i.e., the project is clearly inconsistent with the purposes for which the park was established, or would obviously cause impairment or derogation of park resources or values), and additional consultation would not result in development of satisfactory alternatives, then the park should so indicate at the meeting. This should be followed by a letter of summary denial, sent by the regional director, listing the park's objections and the reasons for them. Evidence of the contrary public interest or inconsistency of the proposed transportation activity with the purposes for which the park was established can be determined through an examination of the park's enabling legislation, general management plan, or other related documents.
- If the initial information is not sufficient to make a decision, the process continues to the 4(f) and NEPA evaluation stage detailed below.
- Note that if the highway project involves an Interstate Highway, 23 U.S.C. 107(d) applies, rather than 23 U.S.C. 317. 23 U.S.C. 138 (commonly referred to as 4(f)) applies in either case.

2. Preliminary Evaluation Prior to Official Request. This is the stage where most, if not all, of the compliance and 4(f) evaluations are done, and the process switches from informal to more formal.

- If the initial request does not result in a summary denial, then the FHWA, in consultation with the NPS, prepares a draft of the required 4(f) evaluation described in 23 CFR 771.135 (see RM-87D). Note that 4(f) and other evaluations and environmental compliance is completed prior to any official submission of a request for NPS lands by FHWA. Note also that the Department's official review of section 4(f) and NEPA compliance documents is managed by the Department of the Interior's Office of Environmental Policy and Compliance (OEPC), under 51 DM 7. The NPS is generally designated as lead bureau for the Department in these matters. In that role, the NPS receives other bureau comments on certain 4(f) and NEPA documents, and consolidates them into the Departmental comments, which are signed by the Director, OEPC.
- If the NPS disagrees with the 4(f) evaluation, then the NPS should meet with FHWA to discuss the reasons for such disagreement. This should be followed by a letter of denial of the project, sent by the regional director, listing the park's objections and the reasons for them. If the NPS agrees with the 4(f) evaluation, then the process continues on to the environmental (and cultural, if applicable) evaluations.
- With the NPS as a joint lead or cooperating agency, the DOT and FHWA prepare an environmental analysis as required under NEPA and related laws for public review and comment (including NHPA Section 106 evaluations and Clean Air Act Section 176(c) transportation conformity requirements). Note that these processes are also completed prior to FHWA's official submission of a request for NPS lands.

- At the close of the NEPA public review period, the NPS participates with the DOT and FHWA in a review of the public comments and the potential environmental and cultural impacts resulting from the proposed use of park land. If it is clear from the environmental analysis and public review comments that the proposed use would be inconsistent with the park's purposes and values, the NPS will so advise the FHWA through a letter of denial from the regional director, and the process is terminated.
  - If the final compliance analysis and public review do not result in a finding that the proposed use is inconsistent, the DOT should proceed in seeking approval and finalization of all compliance documents. Once all compliance documents have been approved, the DOT sends the proposal requesting use of NPS lands to the FHWA division administrator office for the state where the requested land is located.
3. Official Request by FHWA for NPS Land. At this stage most, if not all, compliance documents have been completed and approved. For the first time, the FHWA sends an “official” letter to the NPS requesting the land for highway purposes. Most, if not all, of the preliminary decisions have been made at this point, and the primary purpose should be to allow the NPS the opportunity to make a final check on the documentation, and edit the conditions in the draft Highway Easement Deed.
- The FHWA sends the request, together with copies of all executed and approved compliance documents to the appropriate NPS regional director requesting a letter of consent to, or denial of, the request.
  - The required 4-month period begins with receipt by the regional director of the request from FHWA. The regional director then consults with the appropriate park superintendent and responds to the request within the statutory deadline of 4 months. (See RM-87D for details.)
  - The park superintendent originates a letter of denial or consent, indicating either:
    - (a) Agreement to consent subject to terms, conditions and stipulations, to be placed in the HED; or
    - (b) Conditional denial, pending further consideration of possible modification of the proposed project that might be taken; or
    - (c) Denial with no chance of modification, specifying the reasons for denial.
  - The regional director signs the letter and returns it and the requesting package to the originating FHWA office.
  - If the NPS denies the request for transfer of NPS lands, the FHWA will so advise the DOT. The FHWA will cite the NPS reasons for such a ruling, and advise the DOT that the project cannot use the park lands as proposed.
  - If the NPS has agreed to the request for transfer of park lands, the FHWA will communicate this, including all conditions, stipulations, and modifications specified by the NPS in the

letter of consent to the DOT. The DOT will then prepare an HED in accordance with the terms and conditions specified in the NPS letter of consent.

4. The Highway Easement Deed. The recommended method of dealing with an HED is for the DOT and NPS to discuss what will be needed in step 2 above, then send a first draft to the NPS in step 3 above. That way, all three parties are familiar with its contents and final wording settled on more quickly.

- The DOT sends the draft HED to the FHWA and NPS for review. After review and approval by NPS, the FHWA signs the resulting document for the United States and sends it back to DOT.
- The DOT signs and records the deed in the appropriate municipal land records office.
- The DOT provides a copy of the signed and recorded deed to the NPS.

#### **H. CONDITIONS IN A HIGHWAY EASEMENT DEED**

A Letter of Consent signed by a regional director normally should require that at least two specific conditions be included in every HED: (1) a prohibition on “piggy-back” permits; and (2) a reversionary clause. Suggested language for, and explanations of, these and several other useful conditions may be found in RM-87D. There are also occasions when either the DOT road design, engineering, or construction style would cause practical, environmental, and/or esthetic value concerns with the NPS. While this situation might not arise very often, these instances should be handled on a case by case basis, with the NPS consulting with the FHWA to assure compliance where applicable.

Note that -- whether the Letter of Consent includes these clauses or not -- if the NPS consents to the request for land, the grant is for a non-exclusive easement to the DOT for HIGHWAY PURPOSES ONLY. The DOT cannot:

- Issue subsidiary permits for utilities within the highway right-of-way covered by the Deed;
- Allow any other construction such as houses or office buildings, or material storage areas unless specifically included within the request; or
- Approve requests to do anything on that portion of the roadway covered by the Deed other than for highway purposes.

Any new highway or road improvement requiring additional land will require an HED as described here. Any conversion of an existing instrument, such as a Special Use Permit, even though it does not involve use of undisturbed land not covered by the original permit, must also follow this procedure and meet the criteria in section D.3. Conversion from another instrument might, however, qualify for a NEPA and/or NHPA categorical exclusion.



Additional information on roads and highways in parks, including a discussion of categories of roads and those roads already in place prior to the park being created, is found in RM-87D.

This Director's Order applies to the limited circumstances described herein. Other transportation-related grants of rights-of-way or other uses must be approved using other applicable legal and administrative processes. Questions concerning the information contained in this document, or about other rights-of-way, should be directed to your regional environmental coordinator, regional special use coordinator and/or lands office for guidance.

-----*End of Director's Order*-----