

MEMORANDUM

Subject: Proposed Seaway Trail and Bikeway
Application of Section 4(f)

From: FOR: Chief, Environmental Programs Division
Washington, D.C.

To: Mr. John G. Bestgen, Jr.
Regional Federal Highway Administrator
Albany, New York

Date: March 7, 1983

Reply to
Attn. of: HEV-11

Attached for your information is a copy of a January 31 note from Mr. Joe Fromme (of the Department of the Interior (DOI)) to Mr. John Mladinov of the New York State Department of Transportation (DOT). Mr. Fromme's note suggests the execution of a programmatic Section 4(f) statement to prevent conflicts with future highway improvements on routes on which national trails have been established. We do not agree with such an approach and would strongly discourage any attempts by the DOI to prepare a programmatic Section 4(f) statement covering this subject.

Also attached is a legal opinion from Mr. Edward V. A. Kussy, Assistant Chief Counsel, concerning the application of Section 4(f) to the proposed designation of the Seaway, Trail and Bikeway under the National Trails System Act. We concur with Mr. Kussy's finding and suggest that you make this opinion available to the New York State DOT so that appropriate language can be written into the documentation for submission to the Secretary of the Interior. We believe that this approach is far more desirable from a program management point-of-view.

If we can be of further assistance, please call.

/Original Signed By/

Harter M. Rupert

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

January 31, 1983

NOTE

To: John Mladinov, NYS-DOT

Re: Seaway Trail and Section 4(f)

It was coincidental that your staff looked into the same questions that the National Park Service staff in Philadelphia raised with me:

1. Is there any law which can be cited in our Trail report to exempt from Section 4(f) a highway project involving a segment on which the Seaway Trail had been superimposed?
2. Need Section 4(f) have to apply to such a highway project or is there some possible way to circumvent it since this may be "distasteful" to the State and throw a monkeywrench into our negotiations?

Discussions: John, not only do I agree with Darrell Harp's opinion in his 12/13/82 memo to you, copy enclosed, but I hold that it's often easier and best to comply with a law than to spend hours trying to find a way around it or to fight plaintiffs in the future in a court suit. So.....

First, let's agree that any type of a Federal-aid highway project for a segment requiring use of the Seaway Trail triggers Section 4(f).

Now: How to comply with FHWA's Section 4(f) procedures.

Scenario 1: NYS-DOT and FHWA develop and circulate a 4(f) statement for each highway project. Ridiculous, time consuming, inefficient, paper producing, etc. The end result of mitigation measures should always be the same, i.e., trail continuity and usefulness would be restored and assured. Hence, let's punt this scenario.

Scenario 2: Handle Section 4(f) compliance in a Programmatic Section 4(f) Statement for any and all potential highway projects immediately after Secretary of the Interior designates it a National Recreation Trail. This single 4(f) statement, when approved, would apply from now to eternity. It is a classic example where a Programmatic Statement solution applies and FHWA (WASO) has used it for all Section 4(f) matters on the Great River Road along the Mississippi River from WI to LA. The procedure is cost effective, and efficient and is a one-time action.

And how can the Department of the Interior (DOI) help you and FHWA?

With your concurrence, DOI will promptly initiate the preparation for you of a propose draft Programmatic Section 4(f) statement. We foresee the document being about 3-4 pages of text plus maps showing those roads on which the Seaway Trail will have been superimposed. NYS-DOT and FHWA, in consultation with DOI, would then fine-tune the proposed draft 4(f) statement to everyone's mutual satisfaction. Estimated completion time: 4 -6 weeks during which time DOI will be finalizing the report to the Secretary of the Interior for designation of the Seaway Trail as a component of the National Trails System.

Immediately after the formal designation action, FHWA or NYS-DOT would circulate for comment the draft Section 4(f) statement. I can assure you of DOI concurrence. Under USDOT and FHWA procedures, the FHWA Regional Administrator could then approve the 4(f) statement. After that, NYS-DOT would have a green light for any and all highway projects which may involve lands on which the Seaway Trail had been superimposed.

John, I would hope to hear shortly of your favorable reaction to Scenario #2, and of the designation of the staff official with whom you desire us to coordinate this effort. However, if you have problems with this proposal, let's consult further.

Thank you.

/Original Signed by/

Joe Fromme
Senior Environmental Review Officer
Officer of Environmental Project Review

Enclosure

December 13, 1982

PROPOSAL THAT DOT SPONSOR THE SEAWAY TRAIL AS A
NATIONAL RECREATIONAL TRAIL

Darrell W. Harp, Ofc. of Legal Affairs, Rm. 509, Bldg. 5

J. K. Mladinov, Ofc. of Commissioner, Rm. 501, Bldg. 5

cc: D. H. Fasser, Landscape, Rm 407, Bldg. 5

This is in response to your request that this office provide you with advice as to the possible legal sequences which might arise out of DOT's sponsoring 330 plus miles of State highway now designated as the Seaway Trail as a "national recreational trail."

Section 342-e of the Highway Law designates those highways which are to be known as the "Seaway Trail" and provides that the Commissioner shall adequately sign the trail. The designation of certain State highways as constituting the Seaway Trail has no further consequence with respect to federal law, e.g., 4(f) and 6(f).

We believe that the issue involved in the designation of the Seaway Trail as a national recreational trail, is whether such designation would trigger the 4(f) requirements for any federally-funded work on that segment of the State highway system. 4(f) protection and requirements apply to "publicly owned recreation areas of significance." The highway system certainly would be publicly owned. The issues would be whether the Seaway Trail constitutes a recreation area and whether that recreation area was of "significance."

The establishment of a national recreational trail system is provided for in 16 U.S.C. 1243. The criteria to establish trails are provided in 16 U.S.C. 1241. The statutory criteria provide that the trail system's purpose is to promote public access to travel within, and enjoyment and appreciation of "open air, outdoor areas" of the nation. There is authority for the Secretary of Interior or the Secretary of Agriculture to establish supplemental criteria. The Secretary of Interior has established supplemental criteria relating to national recreational trails. One of the criteria established by the Secretary of Interior gives us particular concern. That particular criterion reads as follows:

The trail administrator must submit a trail management plan covering such items as fire protection, maintenance, police surveillance, rules and regulations and other related matters. Although a trail's primary purpose should be for outdoor recreation use, other uses, such as power lines, sheep driveways, logging road operations, etc., may be permitted if

they would not substantially interfere with the nature and purpose of the trail.

Because of the basic purposes of the national recreational trail system and the above quoted management criterion, we believe that the designation of the Seaway Trail as a national recreational trail would be likely to qualify those State highways making up the Seaway Trail as a "recreation area" for the purposes of 4(f). We also believe that it would be very difficult for the Commissioner, as the official with jurisdiction under 4(f), to determine that the recreation area was not "significant."

In reaching the above conclusion, we have reviewed the relevant reported cases dealing with 4(f) issues. There are no cases on point and, therefore, our opinion represents what we consider to be the probable consequence of the designation of the Seaway Train as a national recreational trail.

We should add that it may seem to strain logic somewhat to conclude that 330 plus miles of State highway could come to be considered a 4(f) protected recreation area. However, this conclusion flows directly from what in our opinion would be the inappropriate classification of a portion of the State highway system as a national recreational trail.

MEMORANDUM

Subject: Proposed Seaway Trail and Bikeway
Application of Section 4(f)

From: Assistant Chief Counsel
Right-of-Way and Environmental Law

To: Mr. Harter M. Rupert
Chief, Environmental Review Branch

Date: March 1, 1983

Reply to
Attn. of: HCC-40

This is in response to your recent inquiry concerning a proposed Seaway Trail and bikeway, that would be designated, pursuant to the National Trails System Act (16 U.S.C. 1241 et seq.), as a national recreational trail within existing State highway right-of-way in New York. You have asked whether such a facility would be covered by section 4(f). There is no doubt that this facility if designated pursuant to the National Trails System Act, would be primarily for outdoor recreational use since that is the purpose and intent of that act.

However, Section 4(f) is applicable only when a proposed program or project "requires the use" of any 4(f) land. So long as the proposed trail is simply described as occupying the right-of-way of the State highway and is not limited any specific location within that right-of-way, and the continuous use of the trail is not significantly affected, it is our opinion that future adjustments or changes in the alignment of the highway or the trail within the right-of-way would not affect the use of the land occupied by the trail so as to trigger application of Section 4(f). In this regard it would be helpful if the designation made under the National Trails System Act acknowledges that the exact location of the proposed trail may be adjusted within the highway right-of-way.

If the proposed trail were ever severed or excluded from some portion of the right-of-way, however, Section 4(f) would be fully applicable.

/Original Signed by/

Edward V. A. Kussy