



U.S. Department  
of Transportation  
Federal Highway  
Administration

# Memorandum

Subject: Applicability of Section 4(f) to Wetlands  
under Easement to the U.S. Fish and  
Wildlife Service

Date: MAY 03 1983

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

Reply to  
Attn. of: HEV-11

To: Mr. Morris C. Reinhardt  
HEP-08 Regional Federal Highway Administrator  
Denver, Colorado

The following is an explanation of the reasons why Section 4(f) applies to wetlands under easement to the U.S. Fish and Wildlife Service. Three points are addressed in making this determination. First, whether these easements constitute public ownership. Secondly, whether wildlife refuges must be open to public use or access to be protected by Section 4(f). Finally, whether these protected wetlands are wildlife and waterfowl refuges.

Although not owned in fee simple, two factors in these easements result in a public ownership determination. "Publically owned" does not have to be ownership in fee to qualify for Section 4(f) protection. The U.S. Fish and Wildlife Service exercises control, although not complete control, over the activities allowed on the subject property to a sufficient degree to assure that it will be available for wildlife habitat. Also, and more importantly, these easements are in perpetuity. The permanence of these easements and the control over the property clearly indicate a degree of ownership. Where the easements are short-term or revokable, Section 4(f) may not apply. The application of Section 4(f) protection would have to be determined on a case-by-case basis.

We recognize that access to these wetlands by the public can be controlled by the private landowner and that the landowner still has nearly full use of the land. However, the term "public" when applied to parks and recreation areas refers to public purposes and benefit as well as public access and use. Public access and use are not essential for wildlife refuges provided there is some public purpose or benefit served. It is generally held that "public" wildlife refuges need only be for public purpose or benefit to qualify for Section 4(f) protection, provided there is at least partial ownership by some level of government.

The final question is whether these wetlands under easement are wildlife and waterfowl refuges. These easements have been acquired by the Department of the Interior under the authority of the amended Migratory Bird Hunting Stamp Act. As defined in 50 CFR 25.12, "Waterfowl production area means any wetland

or pothole acquired pursuant to . . . the amended Migratory Bird Hunting Stamp Act . . . and administered by the U.S. Fish and Wildlife Service as part of the National Wildlife Refuge System." While birds may not be protected from in-season hunting within the wetland easement areas, such areas are still considered a refuge because of their primary purpose. Public Law 89-669, Section 4(d), states "The Secretary is authorized . . . to . . . permit the use of any area within the (National Wildlife Refuge) System for any purpose, including but not limited to hunting, fishing, public recreation . . . whenever . . . such uses are compatible with the major purposes for which such areas were established . . . ." The purpose of the easements is to protect the nesting, resting, feeding and habitat areas of certain migratory birds for the reproduction and maintenance of the species.

It is our conclusion that the subject wetlands are publicly owned wildlife refuges administered for public benefit. Therefore, Section 4(f) protection must be applied to these properties.

We hope the above information explains the reasoning behind this determination.

A handwritten signature in black ink, reading "Hunter M. Rupert". The signature is written in a cursive, flowing style with a large initial 'H' and 'R'.