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WASHINGTON, D. C. 20590

STATEMENT OF HERBERT F. DeSIMONE, ASSISTANT SECRETARY OF TRANSPORTATION
FOR ENVIRONMENT AND URBAN SYSTEMS, BEFORE THE SENATE COMMITTEE ON COMMERCE,
REGARDING S. 728, MONDAY, MAY 3, 1971.

Thank you very much Mr. Chairman. I am pleased to be here today to present the views of the Department of Transportation on S. 728.

This is my first opportunity to testify for the Department, and I am pleased that it is before the same Committee that confirmed my nomination. At that confirmation hearing, I explained to Senator Hart that my office had S. 728 under review and that I would shortly be able to assess its impact on the Department and our ability to protect the environment. We have completed our review, and I appreciate this opportunity to report to the Committee.

At my confirmation hearing, I said that I intended to be an advocate for the environment. I am here today to state the Department's total commitment to the purposes of this measure. As I shall show, it parallels, in a number of ways, the position we have already developed vis-a-vis environmental protection. As Secretary Volpe has often said, at the Department of Transportation environmental quality is a goal, not a constraint.

I am also an attorney, and as Attorney General of Rhode Island, I had considerable experience in the enforcement of statutes. Therefore, I also bring to you today the Department's recommendations for making this legislation more effective in fulfilling its objective--enhancing the quality of life in this nation.

Section 4(f) was written into the basic legislation that created the Department of Transportation in 1966. Thus the Department was one of the first agencies with a specific Congressional mandate in the environmental area. As you know, strong environmental protection provisions are now incorporated into other DOT statutes, such as section 16 of the Airport and Airway Development Act of 1970 and section 14 of the Urban Mass Transportation Assistance Act of 1970. In addition, many Departmental activities are subject to the provisions of the National Environmental Policy Act of 1969.

Secretary Volpe has assigned the responsibility of overseeing the Department's response to all of these environmental provisions, including section 4(f), to my office, that of the Assistant Secretary for Environment and Urban Systems. Since section 4(f) was a part of the Department's basic enabling Act and because it provides clear policy direction, the Secretary has always taken a strong personal interest in its application to Departmental programs. The Supreme Court, in its recent Overton Park decision, affirmed the need for a critical review of 4(f) cases by the Department. As an indication of his interest in section 4(f), the Secretary has retained in his office the final determination as to the administration of that section.

Since 1969, Secretary Volpe has decided on environmental grounds to withhold Federal funds or approval from several projects. In addition, in a number of other cases where there was no feasible and prudent

alternative to the taking of land covered by section 4(f), significant modifications were made to the projects to minimize any possible adverse impact.

With regard to S. 728, the Department of Transportation, as I have said, supports the concept of this amendment to section 4(f) of the DOT Act. This proposal would broaden the applicability of the section, but in a manner which is generally consistent with certain aspects of the Department's actual implementation of section 4(f). We do feel, however, that certain provisions of the legislation should be more tightly drawn in order to make them more effective.

Let me discuss, then, the specific changes in section 4(f) which we propose.

First, the bill would extend 4(f) applicability not only to projects which "use" land in protected categories, as at present, but also to any project which "has an adverse effect on the environment in" such protected lands. The Department does not object to broadening 4(f) protection beyond "use". The word "use" is subject to an extremely narrow reading, and may suggest that section 4(f) is intended to apply only to a direct taking of land. Situations can exist, however, where a transportation project does not require an actual taking of land in the physical sense, but would substantially interfere with the use to which that land is

dedicated. Such a situation could occur where a transportation facility is located adjacent to a protected area but does not require the taking of land from it. It would be consistent with the philosophy of section 4(f) to provide protection in such situations. The Department, in fact, has adopted this broader meaning in the past and this change would therefore conform to present Departmental criteria.

On the other hand, it is our view that the application of section 4(f) to projects which have "an adverse effect on the environment in" the protected categories of land is overly broad, and might be counterproductive. Even a slight increase in noise or air pollution can legally be considered an "adverse effect", but neither necessarily diminishes the value of the affected land to its users. Thus, if section 4(f) is to be broadened to cover adverse effects as well as actual use, we believe that it should be made only applicable to projects which have an adverse effect on protected land, significant enough to impair the usefulness of that land for its current or intended purpose. We believe, therefore, that the word "significant" should be placed before the phrase "adverse effect". Without this qualification, it is my judgment that the provision will be simply unworkable. Uncertainty about its proper interpretation could produce serious and costly disruptions in transportation planning, with the public bearing the brunt of the delay and expense. We support the

broadening of section 4(f) and we hope it will be broadened in a way that permits us to implement it effectively and meaningfully.

The bill would also eliminate the need for the protected land to be publicly owned. In your statement in the Congressional Record of February 10, 1971, Mr. Chairman, you point out that private groups have purchased land for preservation as wildlife or waterfowl refuges and that these lands should be protected. The Department agrees wholeheartedly with extending 4(f) to cover privately owned wildlife or waterfowl refuges. However, application of the provision to privately owned parks and recreation areas may lead to difficulties in implementing it unless further definitional guidance is given. If the bill is adopted in its present form, all private facilities of this nature would be protected. These would include private golf courses, private country clubs, and other private recreation facilities--even one's own back yard--which serve no bona fide public purpose. I do not believe that this is what should be intended. We would suggest, therefore, that any park or recreation land protected by 4(f) be publicly owned, or be held by a corporation or individual and dedicated in perpetuity to public use or held in reserve for preservation as a protected area.

The bill would also add "water resource areas" to the protected categories of land. Several examples of such areas are mentioned in your statement about the bill, Mr. Chairman. The Department supports this change since water resource areas used for recreation, waterways, navigable waters,

estuaries, and reservoirs are precious and often irreplaceable resources. A more precise definition of the kinds of water resource areas to be protected is necessary, however, since the category would be quite broad if public ownership were not required. Further, it is not clear what kind of protection should be afforded waterways. Should any use of such areas be prohibited, or just those projects which would endanger or interfere with the water resource area? My staff would be pleased to work with the Committee staff in developing guidelines or further defining the issue.

This legislation would also eliminate the provisions with respect to the determination of "significance" by an appropriate governmental body. The language in the current statute is somewhat ambiguous and we believe it should be altered. Some governmental body must be called upon, however, to pass on the worth of the area to the community. We are now considering this problem and will report back to the Committee shortly.

We would also recommend that the requirement that all "possible measures to minimize harm" be taken, be changed to read "all prudent measures". We believe that the "all-possible" criterion virtually defies meaningful implementation. It quickly becomes purely hortatory, and its actual impact is thereby diminished. Because neither we, nor the States, nor even the courts, have been able to read clear meaning into the "all-possible" standard, I do not believe it has served the public well. I urge the Committee to adopt the language recommended by the Department so that it can be clearly interpreted and firmly implemented and enforced.

Additionally, there are a number of other technical comments that we have regarding the bill. Wildlife and waterfowl "refuges" under the legislation would be changed to wildlife and waterfowl "areas". We have no objection to this change, but again definitional guidance is necessary in implementation because refuge implies an officially designated and identifiable site. Would an official or unofficial designation as a wildlife or waterfowl area be required, or would they include any place that migrating birds generally nest or feed? Again, my staff would be pleased to work with Committee staff in resolving this issue.

The bill also implies that the amended provisions would apply to all projects approved after August 23, 1968. I don't believe this retroactive application of these standards is really what is meant. I am sure we all realize how disruptive they would be of numerous already approved projects.

I also have several additional technical comments which I would like to submit to the Committee by letter for the record.

I would like, Mr. Chairman, to make one additional point. I am convinced that we can--and must--make our transportation projects compatible with our environment. Section 4(f) is one of our primary tools in accomplishing this end, and its amendment in the form I have suggested will make it even more effective in preserving for the people the natural resources and historic sites which mean so much to us all.

This concludes my prepared statement Mr. Chairman, I would now be happy to answer any questions that the Committee may have.

