

9. Section 4(f) and 6(f)

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Chapter Abbreviations/Acronyms

ACHP – Advisory Council on Historic Preservation
CE – Categorical Exclusion
CFR – Code of Federal Regulations
COA – Class of Action
DNR – Alaska Department of Natural Resources
DOT&PF – Department of Transportation & Public Facilities
FHWA – Federal Highway Administration
FONSI – Finding of No Significant Impact
FTA – Federal Transit Administration

MOU – Memorandum of Understanding
NEPA – National Environmental Policy Act
NPS – National Park Service
NRHP – National Register of Historic Places
REM – Regional Environmental Manager
SAFETEA-LU – Safe, Accountable, Flexible, Efficient Transportation Equity Act; a Legacy for Users
SHPO – State Historic Preservation Officer
USC – United States Code
USDOT – US Department of Transportation

9.1. Overview

Section 4(f) [[23 USC 138](#)] relates to a provision in the U.S. Code that prevents the Secretary of the United States Department of Transportation (USDOT) from approving any program or project that requires the use of land from a significant publicly owned public park, recreation area or wildlife and waterfowl refuge or any significant historic site unless:

- there is no feasible and prudent alternative to the use of such land and the action includes all possible planning to minimize harm to the park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use; *or*
- the use is found to result in only a *de minimis* impact.

Section 4(f) is one of the most stringent national environmental protection laws. It was enacted as part of the *Department of Transportation Act of 1966* to protect significant publicly owned public parks, recreation areas and wildlife and waterfowl refuges as well as historic sites of national, state or local significance from conversion to transportation uses. Section 4(f) only applies to USDOT agencies.

Congress added the *de minimis* provision in 2005 as part of the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* ([SAFETEA-LU](#)) in an effort to streamline the Section 4(f) process.

The Section 4(f) regulations are located at [23 CFR 774](#). The FHWA “[Section 4\(f\) Policy Paper, July 20, 2012](#)” is highly recommended reading for further guidance on Section 4(f).

9.1.1. Applying Section 4(f) at DOT&PF

The DOT&PF has assumed responsibility for approving certain categorical exclusions (CEs) through a CE Assignment MOU (6004 MOU) with the FHWA Alaska Division (see Chapter 2).

For assigned projects, DOT&PF is responsible for determining whether Section 4(f) applies and, if so, what approval option is appropriate. The state has not been assigned the authority to approve Individual Section 4(f) Evaluations (see Section 9.8).

The potential for a Section 4(f) use must be analyzed in all situations where project activities are on, or adjacent to, a Section 4(f) resource. In these circumstances, documentation of the Section 4(f) consultation is required.

Section 4(f) Process Outline

Federal regulations and DOT&PF procedures dictate the process by which the Section 4(f) analysis for a project occurs. The steps in this process are outlined below:

1. **Identify resources:** Determine whether Section 4(f) applies to a property that is in, or adjacent to, the project area.
2. **Determine whether use will occur:** Determine whether the project activities will include a Section 4(f) use. Determine whether an exception to requiring a 4(f) approval applies.
3. **Select approval option:** If a Section 4(f) use may occur, determine what type of analysis and approval is appropriate: *de minimis* impact finding, Programmatic 4(f) Evaluation, or Individual 4(f) Evaluation. Identify whether Section 6(f) applies.
4. **Conduct analysis:** Conduct Section 4(f) analysis, publish public notices, consult with Official with Jurisdiction, and create documentation with the appropriate approval option, as applicable.
5. **Approval:** Circulate, review and approve Section 4(f) documentation.

The steps required to complete the Section 4(f) project will vary and are determined in consultation between the Regional Environmental Manager (REM) and the Statewide NEPA Manager.

9.1.2. Section 4(f) Responsibilities

Identify resources and determine whether use will occur:

The Environmental Analyst for the project is responsible for preparing the information required to determine whether Section 4(f) resources are present and whether a use will occur.

The REM must consult with the Statewide NEPA Manager before continuing further with Section 4(f) project work. For example, this consultation is required *before* DOT&PF consults with the Official with Jurisdiction over a Section 4(f) resource.

the REM utilizes the information prepared by the Environmental Analyst to begin consultation with the Statewide NEPA Manager regarding:

- What Section 4(f) properties are in, or adjacent to, the project area.
- Whether a Section 4(f) use will occur.
- Which type of Section 4(f) approval option should be pursued (*de minimis* impact finding, Programmatic, Individual), if there is a Section 4(f) use.

The REM's consultation must include enough information for the Statewide NEPA Manager to determine whether or not Section 4(f) is applicable to the property and whether a Section 4(f) use would occur (see Section 9.4). The Statewide NEPA Manager is responsible for determining whether Section 4(f) applies to a property and whether a use will occur.

Select approval option: The Statewide NEPA Manager will determine whether an exception to the requirement for Section 4(f) approval applies to the project (see Section 9.4.2), as well as identify the Official with Jurisdiction for the project, as necessary. If Section 4(f) is applicable to the property, the Statewide NEPA Manager will determine the type of Section 4(f) approval required.

If an Individual Section 4(f) evaluation is required, the project is ineligible for 6004 assignment and it will require a new Class of Action determination (see Chapter 2). The Statewide NEPA Manager will notify the REM and FHWA of the excluded project.

Conduct analysis: The Environmental Analyst and the REM, in consultation with the Statewide NEPA Manager, prepare the Section 4(f) analysis. The REM is responsible for reviewing and submitting this documentation to the Statewide NEPA Manager for approval. (See section 9.6 for preparing *de minimis* impact findings. See Section 9.7 for information on Programmatic 4(f) Evaluations.)

The Statewide NEPA Manager approves all external correspondence regarding Section 4(f). This includes newspaper public notices, online public notices, temporary occupancy agreements and letters to the Official with Jurisdiction, for example.

Regional environmental staff shall retain all internal and external correspondence regarding Section 4(f) applicability and consultations in the project file.

Approval: The Statewide NEPA Manager will review and approve *de minimis* impact findings and Programmatic Section 4(f) Evaluations for 6004 CEs.

9.2. Identifying Section 4(f) Properties

In order to be considered a Section 4(f) property a resource must function, or be designated, as a significant publicly owned park, recreation area, wildlife and waterfowl refuge or significant historic site [23 CFR 774.11(d)]. Refer to Section 9.4.3 regarding the coordination with the Official with Jurisdiction when determining whether Section 4(f) applies to a property.

9.2.1. Publicly Owned Public Parks, Recreation Areas and Wildlife and Waterfowl Refuges

Section 4(f) applies only to “publicly owned” parks, recreation areas and wildlife and waterfowl refuges [23 CFR 774.17]. Section 4(f) normally does not apply when parks, recreational areas and wildlife and waterfowl refuges are owned by private institutions and individuals, even if these areas are open to the public. A property can be considered publicly owned if a governmental body has a sufficient proprietary interest in the land.

Examples of governmental proprietary interest include fee ownership, drainage easement, conservation easement, public easement in perpetuity, and certain lease agreements. Coordinate with the Statewide NEPA Manager for questions on what constitutes public ownership.

Publicly owned land is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such [23 CFR 774.11(d)]. This designation occurs when the federal, state or local Official with Jurisdiction makes a written designation that the land either:

- is a park, recreation area, wildlife and waterfowl refuge; *or*
- its major function is for park, recreation or refuge purposes.

Incidental, secondary, occasional or dispersed recreational activities do not constitute a “major purpose.”

Official with Jurisdiction

In the case of publicly owned parks, recreation areas and wildlife and waterfowl refuges, the Officials with Jurisdiction are the officials of the agency (or agencies) that own or administer the property and who are empowered to represent the agency on matters related to the property [23 CFR 774.17].

Significance

Significance determinations of publicly owned land considered to be a park, recreation area, or wildlife and waterfowl refuge are made by the Official with Jurisdiction over the property [23 CFR 774.11(c)]. Management plans or other official forms of documentation regarding the land, if available and up-to-date, are important and should be obtained from the Official with Jurisdiction and retained in the project file. Properties are presumed to be significant unless the Official with Jurisdiction over the site concludes that the entire site is not significant. If a

determination from the Official with Jurisdiction cannot be obtained, and a management plan is not available or does not address the significance of the property, the property will be presumed to be significant.. Except for certain multiple-use land holdings, significance determinations are applicable to the entire property and not just to the portion of the property proposed for use by a project.

Public Multiple-Use Land Holdings

Where federal lands or other public land holdings (e.g., state forests) are administered under statutes permitting management for multiple uses and, in fact, are managed for multiple uses, Section 4(f) applies only to those portions that function for or are designated in the management plans of the administering agency as being for significant park, recreation or wildlife and waterfowl refuge purposes [[23 CFR 774.11\(d\)](#)].

9.2.2. Historic and Archaeological Sites

Section 4(f) applies to historic sites of national, state, or local significance in public or private ownership regardless of whether they are open to the public [[23 CFR 774.11\(e\)](#)].

In the case of archaeological sites, Section 4(f) only applies to those sites that are on or eligible for inclusion on the National Register of Historic Places (NRHP), including those discovered during construction [[23 CFR 774.11\(f\)](#)]. In the case of historic sites, the Section 4(f) requirements apply only to historic sites on or eligible for the National Register unless DOT&PF determines that the application of Section 4(f) is otherwise appropriate [[23 CFR 774.11\(e\)](#)]. Exceptions are listed in [23 CFR 774.13\(a\) and \(b\)](#) and Section 9.4.2.

Within a NHRP listed or eligible historic district, Section 4(f) applies to those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. Elements within the boundaries of a historic district are assumed to contribute, unless they are determined by DOT&PF, in consultation with the State Historic Preservation Officer (SHPO), not to contribute.

Official with Jurisdiction

In the case of historic sites that are on or eligible for inclusion on the NRHP, the Official with Jurisdiction are the SHPO, or, if the property is located on tribal land, the Tribal Historic Preservation Officer (THPO). When the Advisory Council on Historic Preservation (ACHP) is involved in consultation under Section 106, the ACHP is also an Official with Jurisdiction. When the Section 4(f) property is a National Historic Landmark (NHL), the designated official of the National Park Service is also an Official with Jurisdiction [[23 CFR 774.17](#)].

Significance

For purposes of Section 4(f), a historic site is significant only if it is on or eligible for the NRHP.

9.3. Section 4(f) Use

A use occurs under Section 4(f) in three instances [[23 CFR 774.17](#)]:

- permanent incorporation into a transportation facility
- adverse temporary occupancy
- constructive use

9.3.1. Permanent Incorporation into a Transportation Facility

A Section 4(f) use occurs when land from a Section 4(f) property is permanently incorporated into a transportation facility. This occurs when land from a Section 4(f) property is either purchased as transportation right of way or when a property interest is acquired that allows permanent access onto the property such as a permanent easement for maintenance or other transportation-related purpose (see FHWA “[Section 4\(f\) Policy Paper, July 20, 2012](#)”).

9.3.2. Adverse Temporary Occupancy

A Section 4(f) use occurs when there is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute’s preservation purposes.

Temporary occupancy does *not* constitute a Section 4(f) use if the following conditions are met [[23 CFR 774.13\(d\)](#)]:

1. duration must be temporary, i.e., less than the time needed for construction of the project and there should be no change in ownership of the land;
2. scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal;
3. there are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features or attributes of the property, on either a temporary or permanent basis;
4. the land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and
5. there must be documented agreement from the Official with Jurisdiction over the Section 4(f) resource regarding the above conditions.

9.3.3. Constructive Use

A constructive use occurs when a transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features or attributes that qualify the property for protection under Section 4(f) are substantially impaired [[23 CFR 774.15\(a\)](#)]. Substantial impairment occurs only when the protected activities, features or attributes of the resource are substantially diminished.

Note that a constructive use requires an Individual Section 4(f) Evaluation and would exclude the project from 6004 assignment. Refer to Section 9.5 for a detailed discussion of constructive use analysis.

9.4. Section 4(f) Applicability

The applicability of Section 4(f) to a property will be determined in accordance with [23 CFR 774.11](#).

9.4.1. Applicability Consultation

Section 4(f) has been a frequent issue when projects are litigated. Therefore, it is essential to document the applicability or non-applicability of Section 4(f) to a property. The Section 4(f) consultation must be documented and included in the project file.

The REM and the Statewide NEPA Manager should discuss the amount of information required to determine what Section 4(f) properties exist and whether there will be a Section 4(f) use.

Examples of some of the required information include:

1. **Description.** Include the location of all existing and planned project activities, facilities, features, and attributes (e.g., baseball diamonds, tennis courts).
2. **Detailed Map of Property.** The map or drawing should be of sufficient scale to identify the relationship of the project activities to the property. Determine the property boundary, size (i.e., acres, square feet) and location of the affected property (e.g., maps, photographs, sketches).
3. **Ownership and Property Type.** Ownership (e.g., city, borough, state), type of property (e.g., park, recreation, refuge, historic), and applicable information relating to the ownership of the land (e.g., lease, easement, covenants, restrictions, conditions, including forfeiture).
4. **Property Function.** Include current and planned activities (e.g., baseball, swimming, tennis, golf).
5. **Access.** Access (e.g., pedestrian, vehicular) and usage (e.g., approximate number of users, visitors a year).

6. **Project Effect Discussion.** Discuss how the project will affect the property, including direct and indirect effects. This information will be used to determine whether each type of Section 4(f) use may occur (permanent, adverse temporary occupancy, and constructive).
7. **Section 106 Finding.** If the property is on or eligible for listing on the NRHP, discuss what Section 106 finding the Professionally Qualified Individual determined applies to the project (i.e., no historic properties affected, no adverse effect, adverse effect).

The REM and the Statewide NEPA Manager will work together to determine what information is required and the level of detail that is necessary to support decisions on Section 4(f) applicability and use. The amount of information required will vary based on the complexity of the project and the project's possible impacts to Section 4(f) resources.

Section 4(f) is Not Applicable

If the Statewide NEPA Manager determines that Section 4(f) is not applicable to the property or no Section 4(f) use will occur, insert the following statement in the environmental document:

“The proposed project will not use any Section 4(f) property. DOT&PF has determined that Section 4(f) does not apply.”

Section 4(f) is Applicable

If the Statewide NEPA Manager determines that a Section 4(f) use will occur, then a Section 4(f) analysis and approval may need to be prepared. The information provided in the applicability consultation can be used to document the decision of which type of Section 4(f) approval option is required (*de minimis impact finding*, Programmatic, Individual).

9.4.2. Exceptions

There are various exceptions to the requirement for Section 4(f) approval in [23 CFR 774.13](#). The Statewide NEPA Manager will make the final decision on whether an exception applies.

These exceptions include the following [see [23 CFR 774.13](#)]:

1. Restoration, rehabilitation or maintenance of transportation facilities that are on or eligible for the NRHP, with conditions.
2. Certain archeological sites that are on or eligible for the NRHP, with conditions. *
3. Late designations of park and recreation lands, wildlife and waterfowl refuges and historic sites, in some circumstances.
4. Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f), with conditions. *
5. Park road or parkway projects under 23 U.S.C. 204 .
6. Certain trails, paths, bikeways and sidewalks.
7. Certain transportation enhancement projects and mitigation activities. *

The exceptions listed with (*) may require the Official with Jurisdiction to agree in writing with the provisions of the exception to Section 4(f) approval.

9.4.3. Consultation with the “Official with Jurisdiction”

The Official with Jurisdiction is the legal representative at the agency owning or administering the Section 4(f) property, unless the agency has delegated or relinquished this authority via formal agreement.

The Statewide NEPA Manager, in consultation with the REM, will identify the Official with Jurisdiction for the Section 4(f) resource. There may be multiple Officials with Jurisdiction in circumstances where a Section 4(f) property is owned or administered by multiple entities.

The Section 4(f) regulations [[23 CFR 774](#)] require the involvement of the Official with Jurisdiction in several circumstances, as detailed below. The Official with Jurisdiction may be unaware of the requirements of Section 4(f) and may benefit from a summary of the requirements. DOT&PF may provide the Official with Jurisdiction a template or concurrence letter for signature to document the Section 4(f) decision.

The REM must coordinate with the Statewide NEPA Manager regarding the documentation that is required to comply with Section 4(f) requirements when communicating with the Official with Jurisdiction .

Coordination

The regulations require coordination with the Official with Jurisdiction for the following situations prior to Section 4(f) approval (recognizing that additional coordination may be required under other statutes or regulations):

- Prior to making approvals, (23 CFR 774.3(a));
- Determining least overall harm, (23 CFR 774.3(c));
- Applying certain programmatic Section 4(f) evaluations, (23 CFR 774.5(c));
- Applying Section 4(f) to properties that are subject to Federal encumbrances, (23 CFR 774.5(d));
- Applying Section 4(f) to archeological sites discovered during construction, (23 CFR 774.9(e));
- Determining if a property is significant, (23 CFR 774.11(c));
- Determining application to multiple-use properties, (23 CFR 774.11(d));
- Determining applicability of Section 4(f) to historic sites, (23 CFR 774.11(e));
- Determining constructive use, (23 CFR 774.15(d));
- Determining if proximity impacts will be mitigated to equivalent or better condition, (23 CFR 774.15(f)(6)); and
- Evaluating the reasonableness of measures to minimize harm, (23 CFR 774.3(a)(2) and 774.17).

Lack of Objection

The regulations require a finding that the Official(s) with Jurisdiction have been consulted and “have not objected” in the following situations:

- When applying the exception for restoration, rehabilitation, or maintenance of historic transportation facilities, (23 CFR 774.13(a)); and
- When applying the exception for archeological sites of minimal value for preservation in place. (23 CFR 774.13(b)(2)).

Concurrence

The regulations require written concurrence of the Official with Jurisdiction in the following situations:

- Finding there are no adverse effects prior to making *de minimis* impact findings, (23 CFR 774.5(b));
- Applying the exception for temporary occupancies, (23 CFR 774.13(d)); and
- Applying the exception for transportation enhancement activities and mitigation activities, (23 CFR 774.13(g)).

Refer to the July 20, 2012, “[Section 4\(f\) Policy Paper](#)” for more guidance on consultation with the Official with Jurisdiction.

9.4.4. Approval Option Selection

For any project that will use a Section 4(f) resource, the Statewide NEPA Manager in consultation with the REM must determine the appropriate level of Section 4(f) documentation necessary for the project as one of the following:

- *de minimis* impact finding (see Section 9.6),
- Programmatic Section 4(f) Evaluation (see Section 9.7), or
- Individual Section 4(f) Evaluation (see Section 9.8).

The FHWA “[Section 4\(f\) Policy Paper](#)” and the [FHWA Environmental Guidebook](#) provide comprehensive guidance on when and how to apply the provisions of Section 4(f) on highway projects that use Section 4(f) land or resources.

9.5. Constructive Use Analysis

For most 6004 projects, the likelihood of a constructive use occurring is low. However, when direct effects are determined not to cause a use, still consider indirect effects to analyze whether a project will result in a Section 4(f) constructive use.

When analyzing the potential for a constructive use, the degree of impairment should be determined in consultation between the REM, the Statewide NEPA Manager, and, in some cases, the Official with Jurisdiction over the resource. The Statewide NEPA Manager will determine whether the project will result in a constructive use.

Base a constructive use determination upon the following [\[23 CFR 774.15\(d\)\]](#):

- identification of the current activities, features or attributes of the property that qualify it for protection under Section 4(f) and that may be sensitive to proximity impacts;
- an analysis of the proximity effects of the proposed project on the Section 4(f) property. If any of the proximity impacts will be mitigated, only the net impacts need be considered in this analysis. The analysis should also describe and consider the impacts that could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project; and
- consultation with the Official with Jurisdiction over the Section 4(f) property.

If a project results in a constructive use of a Section 4(f) property, consult with the Statewide NEPA Manager regarding project assignability to the 6004 Program.

9.5.1. Constructive Use Occurrence

A constructive use generally occurs when one or more of the following conditions exist:

Noise Interference. The projected noise level increase attributable to the project will substantially interfere with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f) [\[23 CFR 774.15\(e\)\(1\)\]](#).

Aesthetic Impairment. The proximity of the proposed project will substantially impair aesthetic features or attributes of a property protected by Section 4(f), when these features or attributes are considered important contributing elements to the value of the property [\[23 CFR 774.15\(e\)\(2\)\]](#).

Access Restriction. The project results in a restriction of access that substantially diminishes the utility of a significant publicly owned park, recreation area or an historic site [\[23 CFR 774.15\(e\)\(3\)\]](#).

Vibration Impact. The vibration impact from construction or operation of the project substantially impairs the use of a Section 4(f) property [\[23 CFR 774.15\(e\)\(4\)\]](#).

Ecological Intrusion. The ecological intrusion of the project substantially diminishes the value of wildlife habitat in an adjacent wildlife and waterfowl refuge, substantially interferes with access to a wildlife or waterfowl refuge when such access is necessary for established wildlife migration or critical life cycle processes or substantially reduces the wildlife use of a wildlife and waterfowl refuge [[23 CFR 774.15\(e\)\(5\)](#)].

9.5.2. No Constructive Use

A constructive use *does not* occur under the following circumstances:

“No Historic Properties Affected” or “No Adverse Effect” Finding. Compliance with the requirements of [36 CFR 800.5](#) for proximity impacts of the proposed action on a site listed on or eligible for the NRHP results in a finding of “No Historic Properties Affected” or “No Adverse Effect” [[23 CFR 774.15\(f\)\(1\)](#)].

Noise Levels Do Not Exceed Abatement/Impact Criteria. The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in [Table 1](#) of 23 CFR Part 772 or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria for a Section 4(f) activity in the Federal Transit Authority (FTA) guidelines for transit noise and vibration impact assessment [[23 CFR 774.15\(f\)\(2\)](#)].

Negligible Increase in Noise Levels. The projected noise levels exceed the relevant threshold in Item 2 above because of high existing noise, but the increase in projected noise levels if the project is constructed, when compared to the projected noise levels if the project is not built, is barely perceptible (i.e., 3 dBA or less) [[23 CFR 774.15\(f\)\(3\)](#)].

Project Location Established Prior to 4(f) Designation of Resource. There are proximity impacts to a Section 4(f) property, but a governmental agency’s right of way acquisition or adoption of project location or approval of a final environmental document, established the location for a proposed transportation project before the designation, establishment or change in the significance of the property. However, if it is reasonably foreseeable that a property would qualify as eligible for the NRHP prior to the start of construction, then the property should be treated as an historic site for the purposes of Section 4(f) [[23 CFR 774.15\(f\)\(4\)](#)].

No Substantial Impairment. Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features or attributes that qualify a property for protection under Section 4(f) [[23 CFR 774.15\(f\)\(5\)](#)].

Mitigated Impacts. Proximity impacts will be mitigated to a condition equivalent to or better than, that which would occur if the project was not built, as determined after consultation with the Official with Jurisdiction [[23 CFR 774.15\(f\)\(6\)](#)].

Use Not Substantially Diminished. Change in accessibility will not substantially diminish the use of the Section 4(f) property [[23 CFR 774.15\(f\)\(7\)](#)].

Vibration Levels Mitigated. Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of protected activities, features or attributes of the Section 4(f) resource [[23 CFR 774.15\(f\)\(8\)](#)].

9.5.3. Process

After consultation with the Statewide NEPA Manager, if more analysis is required to determine whether a constructive use will occur, the following process applies: :

1. **Identify:** Recognize that a constructive use may occur.
2. **Identify Functions:** Identify the functions, activities and qualities of the Section 4(f) resource that may be sensitive to proximity impacts.
3. **Analyze:** Analyze the proximity impacts on the Section 4(f) resource. Quantify impacts (e.g., noise, water runoff) that can be quantified. Other proximity impacts (e.g., visual intrusion, access) that lend themselves to qualitative analysis should be qualified. If any of the proximity impacts will be mitigated,

only the net loss must be considered in the analysis. The analysis should also describe and consider the impacts that could reasonably be expected if the proposed project were not built since these impacts should not be attributed to the project.

4. **Determine Substantial Impairment:** Determine if the proximity impacts substantially impair the protected activities, features, or attributes that qualify the property for protection under Section 4(f). This determination on impairment should be coordinated with the Official with Jurisdiction over the park, recreation area, refuge or historic site.

9.6. *De minimis* Impact Finding

The Statewide NEPA Manager may determine that the project results in a *de minimis* impact on a property. This determination is made after consideration of any impact avoidance, minimization and mitigation or enhancement measures, and agency and public input. This decision must be made in consultation with and requires written documentation from the Official with Jurisdiction over the Section 4(f) property.

9.6.1. Application of *de minimis* Impact Findings

In situations where there are multiple Section 4(f) resources, a proposed *de minimis* impact finding is made separately for each Section 4(f) property, as applicable.

The *de minimis* impact finding is based on the degree or level of impact on the 4(f) resource, including any avoidance, minimization, mitigation or enhancement measures that are included in the project to address the Section 4(f) use.

A *de minimis* finding can be made for the permanent use of a Section 4(f) resource, if all of the *de minimis* criteria are met.

A *de minimis* finding can be made for an adverse temporary occupancy of a Section 4(f) property, if applicable, when the project does not already meet temporary occupancy exception criteria [[23 CFR 774.13\(d\)](#)].

A *de minimis* finding *cannot* be made for a constructive use of a Section 4(f) property. A constructive use, by definition, involves impacts where the protected activities, features and attributes would be substantially impaired.

It is important to note that there are different requirements for processing a *de minimis* impact finding for historic sites and parks, recreation areas and wildlife and waterfowl refuges, as described in [23 CFR 774.17](#).

The appropriate Section 4(f) *de minimis* Impact Finding Forms are available on the [Statewide Environmental Office](#) website.

9.6.2. Publicly Owned Parks, Recreation Areas and Wildlife and Waterfowl Refuges – *de minimis*

De minimis impacts on publicly owned parks, recreation areas and wildlife and waterfowl refuges are defined as those that do not adversely affect the activities, features and attributes of the Section 4(f) resource. The activities, features and attributes of the Section 4(f) resource must be considered when identifying *de minimis* impacts.

The public must have the opportunity to review and comment on the effects of the project on the Section 4(f) resource, after which the Official with Jurisdiction over the property must provide written concurrence [[23 CFR 774.5\(b\)](#)].

Public Review and Comment

The public must have an opportunity to review and comment on the DOT&PF's intention to approve the *de minimis* impacts findings for parks, recreation areas, and wildlife and waterfowl refuges [[23 CFR 774.5\(b\)\(2\)](#)]. This public notice may be combined with other public notices required as part of the NEPA process. A 30 day review and comment period is required for all proposed *de minimis* impact findings notices. Draft *de minimis* impact finding forms do not need to be made available for public review.

All public notices for a proposed *de minimis* impact finding must include the information described below, including combined NEPA / Section 4(f) notices. The Statewide NEPA Manager must approve all Section 4(f) public notices prior to publication.

The public notice should:

1. State in the heading “Notice of Proposed *de minimis* Section 4(f) Finding” along with the project name and number.
2. Discuss that the DOT&PF intends to make a finding that the proposed project will not adversely affect the activities, features and attributes of the Section 4(f) property after consideration of impact avoidance, minimization, and mitigation or enhancement measures and consultation with the Official with Jurisdiction.
3. Mention that the DOT&PF is requesting public comments on an intended *de minimis* Section 4(f) Impact Finding for the proposed project and identify the property that is protected under Section 4(f) of the Department of Transportation Act of 1966.

Templates for *de minimis* impact finding public notices are available from the Statewide Environmental Office; contact the Statewide NEPA Manager.

Process

1. **Identify:** Determine whether the project’s impacts may have a *de minimis* impact on the Section 4(f) property that is a publicly owned park, recreation area, or wildlife and waterfowl refuge.
2. **Official with Jurisdiction consultation:** Contact the Official with Jurisdiction to determine whether there is agreement regarding the project’s effects on the property.
3. **Public Notice:** Publish public notice in newspapers of record. The REM prepares and issues the public notice upon approval from the Statewide NEPA Manager.
4. **Written concurrence:** Obtain written concurrence on the *de minimis* impact finding. This may occur on the *de minimis* Impact Finding form. The REM and Environmental Analyst develop the required documentation. The NEPA Manager reviews the *de minimis* documentation prior to its transmittal to the Official with Jurisdiction.
5. **Approval:** The completed *de minimis* impact finding form and supporting documentation are signed by the REM. The Official with Jurisdiction must concur with the finding before the Statewide NEPA Manager can approve the finding. For *de minimis* impact finding cannot be approved until after the public notice period is complete.

9.6.3. Historic Sites – *de minimis*

De minimis impacts on historic sites rely on the determination of either “no adverse effect” or “no historic properties affected” in compliance with Section 106 regulations ([36 CFR 800](#)).

SHPO Review and Comment

For a *de minimis* impact finding for historic sites, no separate Section 4(f) public notice and comment is necessary beyond what is required for the Section 106 process (36 CFR 800) [[23 CFR 774.5\(b\)\(1\)\(iii\)](#)].

For the Statewide NEPA Manager to approve a *de minimis* impact finding for a historic site:

- The pertinent SHPO or THPO must concur with the Section 106 determination in writing (and ACHP must provide written concurrence if they are participating in the Section 106 process and if a National Historic Landmark is involved the National Park Service will be a part of the process), and
- The DOT&PF must have notified the SHPO of their intent to issue a *de minimis* impact finding based on their Section 106 concurrence. This can be done within the Findings Letter. Notification may also need

to be provided to a THPO and/or ACHP and/or the National Park Service depending on their involvement with the project.

Process

1. **Identify:** Determine whether the project's impacts may have a *de minimis* impact on the Section 4(f) property that is a historic site.
2. **Section 106 Finding and *de minimis* Concurrence:** SHPO/THPO must concur with a finding of either "no adverse effect" or "no historic properties affected" in compliance with Section 106 regulations; **and** SHPO/THPO was notified of DOT&PF's intent to issue a *de minimis* impact finding based on the Section 106 finding concurrence.
3. **Approval:** The completed *de minimis* impact finding form and supporting documentation are signed by the REM and approved by the Statewide NEPA Manager.

9.7. Programmatic Section 4(f) Evaluation

A Programmatic Section 4(f) Evaluation is a time-saving procedural alternative to preparing an Individual Section 4(f) Evaluation [[23 CFR 774.3\(d\)](#)]. If a project meets programmatic evaluation conditions then it may be approved with no additional circulation and comment period for the Department of Interior and no legal sufficiency review. The REM consults with the Statewide NEPA Manager to determine if this is appropriate.

The approved *Programmatic Section 4(f) Evaluation* Forms are available on the [Statewide Environmental Office website](#).

There are five Nationwide Programmatic Section 4(f) Evaluations:

1. [Programmatic Section 4\(f\) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges.](#)
2. [Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.](#)
3. [Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites.](#)
4. [Section 4\(f\) Statement and Determination for Independent Bikeway or Walkway Construction Projects.](#)
5. [Section 4\(f\) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4\(f\) Property.](#)

These Programmatic Section 4(f) Evaluations apply only to projects meeting the applicability criteria stipulated in each programmatic evaluation. Therefore, the Programmatic Section 4(f) Evaluation must explicitly document the basis for determining that the project meets the applicability criteria.

9.7.1. Alternatives Analysis

The fundamental difference between a *de minimis* impact finding and preparing a Programmatic or Individual Section 4(f) Evaluation is in whether or not you must prepare an avoidance alternatives analysis. A *de minimis* impact finding does not require an avoidance alternatives analysis. A Programmatic or Individual Section 4(f) Evaluation does require an avoidance alternatives analysis.

Feasible and Prudent Alternatives

An alternatives analysis determines if there are feasible and prudent alternatives to the use of a Section 4(f) resource(s), so it must address new location alternatives and design shifts that avoid the Section 4(f) resource(s). An alternative is *feasible* if it is technically possible to design and build the alternative. An alternative may be

rejected as not *prudent* for any of the reasons listed in [23 CFR 774.17](#). For more information on the concept of prudent and feasible, see the [FHWA Section 4\(f\) Policy Paper](#).

When a particular avoidance alternative is demonstrated to be not feasible and prudent, the analysis of that alternative ends. The level of analysis required differs from project to project and from alternative to alternative.

Least Overall Harm

If multiple alternatives are under consideration in the NEPA process and each uses Section 4(f) resources, and it is determined that no prudent and feasible avoidance alternative exists, then an analysis must be performed to determine which alternative results in the least overall harm. Note that the least overall harm analysis requires balancing seven factors [[23 CFR 774.3\(c\)](#)]:

1. Ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
2. Relative severity of remaining harm to each Section 4(f) property after mitigation;
3. Relative significance of each Section 4(f) property;
4. Views of Official with Jurisdiction;
5. Degree to which each alternative meets the purpose and need for the project;
6. Magnitude of any adverse impacts to resources not protected by Section 4(f); and
7. Substantial differences in costs among the alternatives.

All possible planning to minimize harm (including, but not limited to, mitigation measures) must be incorporated into the proposed action [[23 CFR 774.3\(a\)\(2\)](#)]. This is determined through consultation with the Official with Jurisdiction over the Section 4(f) resource and must be documented in the project file.

9.7.2. Process

Analysis

Consultation with the Statewide NEPA manager must occur to determine that a Programmatic Evaluation is the appropriate approval option for the project.

The Environmental Analyst and REM develop the programmatic evaluation, in consultation with the Statewide NEPA Program Manager, project team, and Official with Jurisdiction, as appropriate.

Programmatic evaluations include an alternatives analysis, identification of measures to minimize harm, and confirmation that all programmatic evaluation criteria have been met. The *Programmatic Section 4(f) Evaluation* Forms are available on the [Statewide Environmental Office website](#).

Approval

The Statewide NEPA Manager determines that a project meets the criteria and procedures of the specific Programmatic Section 4(f) Evaluation and approves the Evaluation. This is done after the Official with Jurisdiction agrees in writing with the completed programmatic evaluation and the REM signs the Evaluation.

9.7.3. Public Comment for Programmatic Evaluations

The only programmatic evaluation that outlines public comment requirements is the “Net Benefit” programmatic ([Section 4\(f\) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4\(f\) Property](#)).

This programmatic evaluation requires public involvement activities that are consistent with the specific requirements of [23 CFR 771.111](#). Communicate information on the proposed use of the Section 4(f) property at a public meeting or hearing, if required.

The other programmatic evaluations do not specifically address any public comment requirements. Therefore, the standard NEPA public involvement process applies, including compliance with [23 CFR 771.111](#).

9.8. Individual Section 4(f) Evaluations

The state has not been assigned the authority to approve Individual Section 4(f) Evaluations under the 6004 MOU.

If the Statewide NEPA Manager determines, in consultation with the REM, that an Individual Section 4(f) Evaluation is required for the project, then the project will no longer be assignable to DOT&PF under the 6004 MOU.

In such cases, complete a new Class of Action form to remove the project from assignment (see Chapter 2). Then process the project using the *Alaska FHWA Program Environmental Procedures Manual*.

9.9. Section 6(f) and other Federal Grant Programs

In some circumstances, properties protected under Section 4(f) are also subject to protection under Section 6(f). State agencies and local governments may obtain grants through the *Land and Water Conservation Fund Act* [[36 CFR 59](#)] and other non-U.S. DOT federal grant-in-aid programs such as the *Federal Aid in Fish Restoration Act* (Dingell Johnson Act), the *Federal Aid in Wildlife Act* (Pittman-Robertson Act) or other similar laws.

These programs generally apply to grants that are available to acquire or make improvements to parks and recreation areas.

The Environmental Analyst or REM, in consultation with the Statewide NEPA Manager, should determine through discussions with the Official with Jurisdiction if any federal requirements apply to the property relating to previously received grant money or other types of federal encumbrances.

9.9.1. Section 6(f) Process

Section 6(f) of the Land and Water Conservation Fund Act specifically prohibits the conversion of property acquired or developed with these grants into a non-recreational purpose without the approval of the Department of the Interior's National Park Service (NPS). Section 6(f) directs the NPS to assure that replacement property of equal value, location and usefulness are provided as conditions to such conversions.

Section 6(f) applies to all transportation projects involving a conversion of Section 6(f) protected property, whether or not federal funding is being used for the project. Normally, any federally funded transportation project requiring the conversion of recreational or park property covered by Section 6(f) will also involve Section 4(f).

Identification and Coordination

As a part of the Section 4(f) evaluation or *de minimis* impact finding, determine who owns the property and if the Section 4(f) resource was purchased or any improvements made using Land and Water Conservation funds. If Land and Water Conservation funds were used to purchase the property or make any improvements, then Section 6(f) applies.

Coordination with the DNR Grants Administrator must occur during the processing of the Section 4(f) evaluation or *de minimis* impact finding. The Alaska DNR Division of Parks and Outdoor Recreation Grants Administrator conducts the Section 6(f) coordination with NPS and state agencies as appropriate.

The Section 4(f) evaluation or *de minimis* impact finding must incorporate the coordination and agreements entered into as part of completing Section 6(f) responsibilities; however, formal Section 6(f) approval of conversion typically occurs following Section 4(f) approval.

Land Replacement

The conversion of the Section 6(f) property into transportation right of way and the acquisition of the replacement property occur during the right of way acquisition phase.

Work with the manager of the Section 6(f) property to identify replacement property of equal value, location and usefulness. When this is accomplished, the DOT&PF must write a Land Replacement Plan as part of the Section 4(f) mitigation, demonstrating that the Section 6(f) replacement property is acceptable to the manager of the Section 6(f) property. The plan must also include any special conditions mutually agreed to by both parties to ensure the replacement property is equal in value, location and usefulness as the converted property, as required under Section 6(f).

DNR will not permit the conversion of Section 6(f) property to occur until DOT&PF has fully acquired the replacement property and it is available to serve the public outdoor recreational uses of the Section 6(f) property it is meant to replace.

Because the functional replacement must occur before the conversion of the Section 6(f) property, it is imperative to coordinate with the DOT&PF Right of Way Chief and inform them of the requirements of Section 6(f) once it is known that Section 6(f) property is required for the project.

This sequence may require an advance acquisition of the replacement property before opening the project's right of way phase or it may require a use of State funds for the mitigation. Coordinate with DNR in the property conversion transaction to avoid project delays.

Documentation

The Environmental Analyst will discuss the Section 6(f) property and the replacement plan in either the Programmatic Section 4(f) Evaluation or *de minimis* impact finding.

The REM should work with the DNR Grants Administrator to obtain concurrence with the Section 6(f) Land Replacement Plan. Document the results of this coordination effort in an appendix of either the Programmatic Section 4(f) Evaluation or *de minimis* impact finding.

Concurrence from the DNR Grants Administrator must be obtained before public review and comment is started for either a Programmatic Section 4(f) Evaluation (if applicable) or *de minimis* impact finding.

A discussion of the implementation of the Section 6(f) Land Replacement Plan should be included in all re-evaluations of the environmental document.

9.9.2. Other Federal Grant Programs

Other federal grant programs may have similar or other requirements relating to converting property to a different use. These requirements are independent of the Section 4(f) requirements and must be satisfied during the project development process through coordination with the Official with Jurisdiction. Document all correspondence and agreements relating to consideration of federal grant programs and retain a copy in the project file.

9.10. Additional Resources

Federal Highway Administration, July 20, 2012, "[Section 4\(f\) Policy Paper.](#)"

Federal Highway Administration, "[Section 4\(f\) Tutorial.](#)"

Federal Register, April 20, 2005, FR Vol. 70, No. 75, 20618-20630, "[Final Nationwide Programmatic Section 4\(f\) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4\(f\) Property.](#)"

Federal Highway Administration, "[Nationwide Section 4\(f\) Programmatic Evaluations.](#)"

[23 CFR 774](#), *Parks, Recreation Areas, Wildlife and Waterfowl Refuges and Historic Sites.*

US Department of Transportation, Federal Highway Administration, October 30, 1987, "[Guidance For Preparing and Processing Environmental and Section 4\(f\) Documents.](#)" *FHWA Technical Advisory T6640.8A.*

US Department of Transportation, Federal Highway Administration, May 23, 1977, "[Section 4\(f\) Statement and Determination for Independent Bikeway or Walkway Construction Projects.](#)"

US Department of Transportation, Federal Highway Administration, December 23, 1986, “[Final Nationwide Section 4\(f\) Evaluation and Approval For Federally-Aided Highway Projects With Minor Involvements With Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.](#)”

US Department of Transportation, Federal Highway Administration, December 23, 1986, “[Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-aided Highway Projects with Minor Involvement with Historic Sites.](#)”

US Department of Transportation, Federal Highway Administration, July 5, 1983, “[Historic Bridges, Programmatic Section 4\(f\) Evaluation and Approval.](#)”

US Department of Transportation, Federal Highway Administration, August 22, 1994, “[Interim Guidance on Applying Section 4\(f\) on Transportation Enhancement Projects and National Recreational Trails Projects.](#)”

[36 CFR 59](#), *Land and Water Conservation Fund Program of Assistance to States [6(f)]; Post-Completion Compliance Responsibilities.*

National Park Service, “[Land & Water Conservation Fund \[6\(f\)\], Compliance Responsibilities and Legal Protection.](#)”