

Section 4(f) Final Rule Fact Sheet

Background: Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109.59, amended existing Section 4(f) legislation at Section 138 of Title 23 and Section 303 of Title 49, United States Code, to simplify the processing and approval of projects that have only de minimis impacts on lands protected by Section 4(f). This is the first substantive revision of Section 4(f) legislation since the passage of the U.S. Department of Transportation Act of 1966.

SAFETEA-LU also, at 6009(c) required DOT to issue regulations that clarify the factors to be considered and the standards to be applied in determining feasibility and prudence of avoidance alternatives. The Federal Highway Administration and Federal Transit Administration initiated a Notice of Proposed Rulemaking (NPRM) to update the existing Code of Federal Regulations (23 CFR 771.135) pertaining to Section 4(f). This included revision to the current Section 4(f) regulations, in addition to incorporation of the Section 4(f) de minimis provision. The FHWA/FTA De Minimis Impact Guidance issued December 13, 2005 remains in effect.

The final rule modifies the procedures for granting Section 4(f) approvals in five ways:

1. Clarifies the factors to be considered and the standards to apply when determining if an alternative for avoiding the use of a Section 4(f) property is feasible and prudent;
2. Clarifies factors to be considered when selecting a project alternative in situations where all alternatives would use some Section 4(f) property;
3. Establishes procedures for determining that the use of a Section 4(f) property has a *de minimis* impact on the property;
4. Updates the regulation to recognize statutory and common-sense exceptions for uses that advance Section 4(f)'s preservation purpose, as well as the option of applying a programmatic Section 4(f) evaluation;
5. Moves the Section 4(f) regulation out of 23 CFR 771.135 to its own place in 23 CFR 774 with a reorganized structure that is easier to use.

774.3 Section 4(f) Approvals:

The Administration may not approve the use of a Section 4(f) property unless:

- no feasible and prudent avoidance alternative to use of land from property and;
- all possible planning to minimize harm to property; or
- • de minimis impact on property
- the project meets the requirements of one of the approved programmatic Section 4(f) evaluations
- all coordination requirements have been met

Feasible and Prudent Avoidance Alternative:

Feasible and Prudent Avoidance Alternative as defined in 774.17.

- Avoids the use of the Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is

appropriate to consider the relative value of the resource to the preservation of the statute.

- An alternative is not feasible if:
 - It cannot be built as a matter of sound engineering judgment.
- An alternative is not prudent if:
 - It results in unacceptable safety or operational problems;
 - Reasonable mitigation does not effectively address impacts;
 - It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
 - It causes other unique or unusual factors; or
 - It involves multiple factors listed above that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

Approval of Alternatives that use Section 4(f) property

When all alternatives result in the use of a Section 4(f) property and *if* there is no feasible and prudent avoidance alternative, *then* Administration *may approve only the alternative that* (emphasis added):

- causes the least overall harm given the statute's preservation purpose;
- determine least overall harm by balancing the following factors:
 - ability to mitigate adverse impacts to each Section 4(f) property (including those resulting in net benefits)
 - severity of remaining harm after mitigation to the protected activities, attributes, or features that qualify each property for Section 4(f) protection
 - significance of each Section 4(f) property
 - views of officials with jurisdiction over each Section 4(f) property
 - degree to which each alternative meets the purpose and need
 - magnitude of adverse impacts after reasonable mitigation
 - substantial difference in cost among alternatives

*Determination of de minimis Impacts:

De Minimis Impact as defined in 774.17. De minimis impact means:

- For historic sites, no historic property is affected by the project or the project will have "no adverse effect" on the historic property in question.
- For parks, recreation areas, and wildlife and waterfowl refuges, impacts will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

* See December 13, 2005 FHWA guidance memorandum: Guidance for determining De Minimis Impacts to Section 4(f) Resources.

Programmatic Section 4(f) Evaluations:

Programmatic Section (f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives. They cover a particular project only if specific conditions are met.

- The Administration may develop additional programmatic Section 4(f) evaluations as conditions warrant.

774.5 Section 4(f) Coordination:

Prior to making Section 4(f) approvals, the administration shall provide a minimum of 45 days for receipt of comments from officials with jurisdiction. If comments are not received within 15 days after the comment deadline, the administration may assume a lack of objection and proceed with the action.

- Coordination required prior to de minimis impact determinations
 - Historic Properties
 - Administration must receive written concurrence from SHPO, THPO, ACHP in finding of “no adverse effect” or no historic properties affected” in accordance with 36 CFR Part 800 before Administration can inform of intent to make a de minimis impact determination
 - Parks, Recreation Areas, & Wildlife and Waterfowl Refugees
 - public notice and opportunity for review and comment
 - officials with jurisdiction must be notified of Administration’s intent to make a de minimis impact determination, officials with jurisdiction must concur that project will not adversely affect what makes the Section 4(f) property eligible for protection

774.7 Section 4(f) Documentation:

- A Section (f) evaluation or a de minimis impact determination shall include sufficient information to demonstrate / support the finding and document that all required coordination has been completed.
- A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS.

774.9 Section 4(f) Timing:

- Potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

774.11 Section 4(f) Applicability:

Applicability separated into eight main subsections, including:

- Applicability of Section 4(f) to historic sites
- Interstate System and 4(f) applicability
- Applicability of Section 4(f) to archeological sites
- Applicability of Section 4(f) to Federal designated Wild & Scenic Rivers
- Applicability of Section 4(f) to property formally reserved for future transportation facility but temporarily being used as a Section 4(f) resource

774.13 Section 4(f) Exceptions:

Exceptions separated into seven main subsections, including:

- Restoration, rehabilitation, or maintenance of transportation facilities on or eligible for the National Register
- Archaeological sites that are on or eligible for the National Register
- Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of the proposed action
- Temporary occupancies of land
- Park road or parkway projects under 23 U.S.C. 204
- Certain trails, paths, bikeways, and sidewalks
- Transportation enhancement projects and mitigation activities

774.15 Section 4(f) Constructive Use Determinations:

Constructive use determinations separated into six main subsections, including:

- If a project results in constructive use of Section 4(f) property, the administration shall evaluate use in accordance with §774.3
- Documentation required related to constructive use
- Basis upon which Constructive Use Determination is made (identification, analysis of proximity impacts, consultation
- Situations when constructive use occurs
 - Interference with noise sensitive facility
 - Impairment of aesthetic features
 - Restriction of access
 - Vibration impact
 - Ecological intrusion
- Situations where constructive use does not occur
 - Compliance with the requirements of 36 CFR 800.5
 - FHWA Noise Abatement criteria
 - Projected noise level increases exceed relevant threshold , but are barely perceptible (3dBA or less)
 - Location of project established before designation, establishment, or change in the significance of the property
 - Combined proximity impacts do not substantially impair property
 - Proximity impacts mitigated to a condition equivalent, or better then which would occur if project not built
 - Change in accessibility does not substantially diminish utilization of the property
 - Vibration levels mitigated to levels that do not cause a substantial impairment to property

774.17 Section 4(f) Definitions:

Definitions contained in 23 U.S.C. 101(a) are applicable to this part. Additional definitions include Administration, All Possible Planning, De Minimis Impact, Feasible and Prudent Avoidance Alternative, & Use.