

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

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8.1. Introduction

Section 4(f) is a federal environmental protection statute specific to U.S. Department of Transportation (USDOT) projects. This statute prohibits using land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, or historic sites for transportation projects unless specific criteria are satisfied.

Section 4(f) refers to the original section within the U.S. Department of Transportation Act of 1966 which established the requirement for consideration of park and recreational lands, wildlife and waterfowl refuges, and historic sites in transportation project development. The law, now codified in [49 USC 303](#) and [23 USC 138](#), is implemented by the Federal Highway Administration (FHWA) through the regulation [23 Code of Federal Regulations \(CFR\) 774](#).

The Alaska Department of Transportation and Public Facilities (DOT&PF) has assumed the FHWA's responsibility for Section 4(f) approvals under the National Environmental Policy Act (NEPA) Assignment Program Memorandum of Understanding ([MOU](#)) between FHWA and DOT&PF. Because FHWA's Section 4(f) approval has been assigned by FHWA, and assumed by DOT&PF, the term "Administration" must be read as "DOT&PF" in the Section 4(f) requirements of the FHWA regulations. These regulations ([23 CFR 774.3](#)) state:

The Administration may not approve the use, as defined in §774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

- (a) The Administration determines that:

- (1) There is no feasible and prudent avoidance alternative, as defined in §774.17, to the use of land from the property; and
 - (2) The action includes all possible planning, as defined in §774.17, to minimize harm to the property resulting from such use; or
- (b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in §774.17, on the property.

This chapter defines specific terms and describes the process of documenting any proposed use of property protected under Section 4(f). Useful tools to supplement the information in this chapter are the FHWA [Section 4\(f\) Policy Paper](#) and [FHWA Environmental Review Toolkit](#).

This chapter covers four main topics:

- Section 4(f) Applicability (Section 8.3)
- Identification of Section 4(f) Properties (Section 8.4)
- Determining Section 4(f) Use of Land (Section 8.5)
- Process and Documentation for Section 4(f) Approval (Section 8.6)

This chapter also briefly addresses a related section of another law, the Land and Water Conservation Fund (LWCF) Act of 1965. This law provides for federal funding of outdoor recreation areas and facilities. Lands that have benefitted from the LWCF are virtually always subject to Section 4(f). Section 6(f) of the LWCF Act includes a provision that any park or recreation area funded through the Act cannot be converted to other uses, including transportation use, unless replaced with an equivalent outdoor recreation area. Section 6(f) is addressed in Section 8.7.

8.2. Key Definitions

Definitions for key terms applicable to FHWA Section 4(f) implementation regulations are found at [23 CFR 774.17](#). References to "Administration" must be read

as “DOT&PF” since Section 4(f) approval authority has been assigned by FHWA to DOT&PF. The following definitions provide foundational knowledge for understanding this chapter:

Section 4(f) property: Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national State, or local significance.

[See also Section 8.4.1.]

Use: Except as set forth in [§§774.11 and 774.13](#), a “use” of Section 4(f) property occurs:

- (1) When land is permanently incorporated into a transportation facility;
- (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d); or
- (3) When there is a constructive use of a Section 4(f) property as determined by the criteria in §774.15.

[See also Section 8.5.]

Official(s) with Jurisdiction:

- (1) In the case of historic properties, the official with jurisdiction is the SHPO [State Historic Preservation Officer] for the State wherein the property is located or, if the property is located on tribal land, the THPO [Tribal Historic Preservation Officer]. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act [NHPA], then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP [Advisory Council on Historic Preservation] is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

- (2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.
- (3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

***de minimis* impact:**

- (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have “no adverse effect” on the historic property in question.
- (2) For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

[See further discussion in Section 8.6.1.]

Feasible and prudent avoidance alternative:

- (1) A feasible and prudent avoidance alternative avoids using 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 purpose of the statute.
- (2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

- (3) An alternative is not prudent if:
- (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
 - (ii) It results in unacceptable safety or operational problems;
 - (iii) After reasonable mitigation, it still causes:
 - (A) Severe social, economic, or environmental impacts;
 - (B) Severe disruption to established communities;
 - (C) Severe disproportionate impacts to minority or low income populations; or
 - (D) Severe impacts to environmental resources protected under other Federal statutes;
 - (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
 - (v) It causes other unique problems or unusual factors; or
 - (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

[See further discussion in Section **Error!**
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All possible planning: All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

- (1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining

property or to mitigate the adverse impacts of the project in other ways.

- (2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.
- (3) In evaluating the reasonableness of measures to minimize harm under §774.3(a)(2), the Administration will consider the preservation purpose of the statute and:
 - (i) The views of the official(s) with jurisdiction over the Section 4(f) property;
 - (ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with §771.105(d) of this chapter; and
 - (iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.
- (4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under §774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under §774.3(b).
- (5) A *de minimis* impact determination under §774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

[See further discussion in Section 8.6.5.]

8.3. Section 4(f) Applicability

DOT&PF is responsible for determining whether Section 4(f) applies and, if so, what approval option is appropriate. 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, consultation with the NEPA Program

Manager and documentation of the Section 4(f) consultation is required.

It is important to identify publicly owned parks, recreation areas, wildlife and waterfowl refuges, and historic sites early in project development. Determining whether proposed project activities would constitute a use of Section 4(f) properties should begin as soon as possible thereafter. If a Section 4(f) use may occur, it is essential to alert the project manager and preliminary design personnel of the need to begin looking for engineering solutions to either avoid Section 4(f) use or seek a *de minimis* impact solution. If it is possible to avoid use of any Section 4(f) property, the entire process in this chapter can be bypassed, likely with a no use determination, which may save considerable project time and funds.

8.3.1. 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 properties:** Determine whether Section 4(f) applies to a property that is in, or adjacent to, the project area (See Section 8.4). This step may require consultation with official with jurisdiction (OWJ).
2. **Determine whether use will occur:** Determine whether the project activities will result in a Section 4(f) use. Determine whether an exception to requiring a Section 4(f) approval applies (See Section 8.5)
3. **Select approval option:** If a Section 4(f) use may occur and an exception does not apply, determine what type of analysis and approval is appropriate: *de minimis* impact finding, Programmatic 4(f) Evaluation, or Individual 4(f) Evaluation (See Section 8.6). Identify whether Section 6(f) applies (See Section 8.7).
4. **Conduct analysis:** Conduct and document Section 4(f) analysis appropriate for the approval option, publish public notices as applicable and consult with OWJ.
5. **Approval:** Circulate, review, and approve Section 4(f) documentation.

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

and the NEPA Program Manager. Steps 1 through 3 are completed through early consultation with the NEPA Program Manager. Steps 4 and 5 are completed only when the NEPA Program Manager determines that a Section 4(f) approval is required.

8.3.2. Section 4(f) Consultation

The Environmental Impact Analyst is responsible for the analysis of whether Section 4(f) properties other than National Register of Historic Places (NRHP) eligible properties are present and whether a Section 4(f) use will occur. The presence of NRHP-eligible properties is the result of the Section 106 process. If there are no Section 4(f) properties present, the Environmental Impact Analyst can document this in the environmental document and project file, and no further documentation is needed.

If Section 4(f) properties are present, or if there is a question as to whether Section 4(f) applies to a particular property, then consultation with the NEPA Program Manager regarding applicability is required. The Environmental Impact Analyst prepares the information described below for each property, and provides it to the REM for consultation with the NEPA Program Manager. Prior to the consultation, it is helpful for the REM to discuss with the NEPA Program Manager what information may be necessary, including:

1. **Section 4(f) property identification**
 - a. **Description.** Include the location of all existing and planned activities, facilities, features, and attributes (e.g., baseball diamonds, tennis courts).
 - b. **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).
 - c. **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).

- d. **Property Function.** Include current and planned activities (e.g., baseball, swimming, tennis, golf).
 - e. **Access.** Access (e.g., pedestrian, vehicular) and usage (e.g., approximate number of users, visitors a year).
2. **Project Effect Discussion.** Discuss how the project will affect the property, including direct and indirect effects. Provide enough information to determine whether each type of Section 4(f) use may occur (permanent, adverse temporary occupancy, and constructive).
 3. **Section 106 Finding.** If the property is on or eligible for listing on the NRHP, discuss what Section 106 finding the Professionally Qualified Individual (PQI) determined applies to the project (i.e., no historic properties affected, no adverse effect, adverse effect) and provide the Section 106 finding concurrence from the SHPO or THPO.

The consultation with the NEPA Program Manager is required before continuing the Section 4(f) project work. For example, this consultation is required *before* DOT&PF consults with the OWJ over a Section 4(f) resource.

The consultation must include sufficient information for the NEPA Program Manager to determine:

- Whether Section 4(f) is applicable to the property.
- Whether a Section 4(f) use will occur, or an exception to a Section 4(f) approval applies.
- Which type of Section 4(f) approval option (*de minimis* impact finding, Programmatic Evaluation, Individual Evaluation) should be pursued, if there is a Section 4(f) use.

The NEPA Program Manager is responsible for making these determinations for each Section 4(f) property. Therefore, there may be multiple determinations for a project, depending on the number of properties.

Consultation Outcomes and Documentation

Consultation with the NEPA Program Manager must be done in writing via email for documentation purposes. Supporting documentation may be attached to the email as necessary.

Section 4(f) Does Not Apply: When the NEPA Program Manager determines that Section 4(f) does

not apply to a property, the determination will include the resource name and the reasons for the conclusion. The consultation email, including any supporting documentation, is attached to the environmental document and placed in the region project file. No further documentation is needed.

Section 4(f) No Use: When Section 4(f) applies to a property and the NEPA Program Manager determines that the project will not result in a use of that property, the consultation will conclude with the statement:

DOT&PF has determined that the proposed project will not use this Section 4(f) property. Therefore, the requirements of Section 4(f) do not apply.

The consultation email, including any supporting documentation, is attached to the environmental document and placed in the region project file. No further documentation is needed.

Exceptions to Section 4(f) Approval: When Section 4(f) applies to a property and the NEPA Program Manager determines that an exception to a Section 4(f) approval applies (See Section 8.5.2), additional coordination with the OWJ may be required. In this circumstance, the NEPA Program Manager will ask the region to obtain the required written concurrence or non-objection from the OWJ and forward it to the NEPA Program Manager to conclude the consultation. If no coordination with the OWJ is required, the NEPA Program Manager may approve the exception. The NEPA Program Manager consultation response regarding an exception to Section 4(f) approval will cite the appropriate exception and include the statement:

DOT&PF has determined that the proposed project meets an exception to a Section 4(f) approval. Therefore, the requirements of Section 4(f) do not apply.

All correspondence with the NEPA Program Manager and OWJ, including any supporting documentation, is attached to the environmental document and placed in the region project file. No further documentation is needed.

Section 4(f) Approvals: When Section 4(f) applies to a property and the NEPA Program Manager determines that a Section 4(f) approval is required for use of a Section 4(f) property, the NEPA Program Manager will identify the appropriate type of Section

4(f) approval in the consultation. The consultation correspondence is placed in the region project file.

Only after receiving this written determination should the appropriate Section 4(f) documentation be prepared. Each Section 4(f) approval type has a different process and documentation requirements, as described in the following sections:

- de minimis impact finding (Section 8.6.1)
- Programmatic Section 4(f) Evaluation (Section 8.6.2)
- Individual Section 4(f) Evaluation (Section 8.6.6)

The Section 4(f) approval process must be complete prior to approval of the environmental document.

8.4. Identification of Section 4(f) Properties

8.4.1. What is a Section 4(f) Property?

A Section 4(f) property is land designated as or functioning as a publicly owned park, publicly owned recreation area, publicly owned wildlife or waterfowl refuge, or a publicly or privately owned historic site.

To be protected by Section 4(f), the property must also have national, state, or local significance as determined by the OWJ. Rules for Section 4(f) protection are different for historic sites than for parks, recreation areas, and wildlife and waterfowl refuges. The applicability of Section 4(f) to a property is determined in accordance with [23 CFR 774.11](#) and as described below in Sections 8.4.2 and 8.4.3. If there is a question regarding applicability of Section 4(f) to a property, the NEPA Program Manager makes this determination during consultation (See Section 8.3).

8.4.2. Determining Section 4(f) Applicability for Parks, Recreation Areas, and Wildlife and Waterfowl Refuges ([23 CFR 774.11](#))

Section 4(f) protections apply to a park, recreation area, waterfowl refuge, or wildlife refuge when the property is:

1. Publicly owned
2. Generally open to the public
3. Significant as determined by the OWJ

FHWA [Section 4\(f\) Policy Paper](#) Section 3.1 and the “additional examples” (Questions 14-31) provide helpful information.

Publicly Owned: A park, recreation area, or wildlife and waterfowl refuge must be publicly owned to be protected by Section 4(f). Section 4(f) normally does not apply to parks, recreation areas, or wildlife and waterfowl refuges 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. In addition to fee simple title (ownership of all land rights), governmental proprietary interests that may be considered public ownership for the purposes of Section 4(f) include conservation easements, public easements in perpetuity, certain lease agreements, or government requirements that provide for public recreation. Determining whether Section 4(f) applies in these situations is very fact specific (See FHWA [Section 4\(f\) Policy Paper](#), Question 1A.). Coordinate with the NEPA Program Manager for project-specific questions about what constitutes public ownership.

Open to the Public: Section 4(f) applies only to parks, recreation areas, or wildlife and waterfowl refuges that are open to the general public. However, it is FHWA policy that refuges need not always be open to the general public, if management for the protection of wildlife closes all or a portion of the refuge. Similarly, parks that are open only during daytime hours generally qualify for Section 4(f) protection. However, publicly owned lands that are open to only a segment of the public, such as some military recreation lands, generally are not considered Section 4(f) properties. See FHWA [Section 4\(f\) Policy Paper](#), Section 3.1, note 6 for more information.

Significant (as determined by OWJ ([49 USC 303\(c\)](#))): A resource that is clearly a Section 4(f) property, such as a designated state or national park or a national wildlife refuge, is generally presumed to be significant. Section 4(f) will not typically apply to a resource if the OWJ determines that the property, considered in its entirety, is not significant. Management plans regarding the land and its significance, if available and up to date, are important and should be reviewed. Only in cases where the significance of the property is in question is it necessary to consult with the OWJ to determine property significance. If a determination from the OWJ 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 lands,

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: Where public lands (e.g., state or national forests) are managed for multiple uses, Section 4(f) applies only to those portions that function for or are designated in the management plan as being for significant park, recreation, or wildlife and waterfowl refuge purposes. Incidental, secondary, occasional, or dispersed recreational activities do not constitute a major recreational purpose and should not result in a finding that Section 4(f) applies. Broad multiple-use management prescriptions or classifications that include management for recreation typically are not designated recreation areas and are not Section 4(f) properties. The OWJ determines whether a specific area of multiple-use land is a park, recreation area, or wildlife and waterfowl refuge and whether it is significant, but DOT&PF reviews any such determination to ensure it is reasonable. See also the FHWA [Section 4\(f\) Policy Paper](#), Question 4 for more information. The NEPA Program Manager approves any such review.

8.4.3. Determining Section 4(f) Applicability for Historic and Archaeological Sites (23 CFR 774.11) (23 CFR 774.17)

Section 4(f) applies to historic sites of national, state, or local significance. FHWA regulations ([23 CFR 774.17](#)) define “historic site” as follows:

For purposes of this part, the term “historic site” includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Historic properties are identified during the Section 106 process (See Chapter 10). Since the Section 106 process may result in the identification of previously unreported historic properties, and/or in determinations of eligibility for properties whose NRHP-eligibility status was unknown or has changed, it is completed prior to the Section 4(f) determination. The Section 106 process results in conclusions about the project’s effect on historic properties which may also be relevant for Section 4(f) purposes. Findings of Effect are categorized as No Historic Properties

Affected, No Historic Properties Adversely Affected; and Adverse Effect. Section 4(f) applies to historic sites regardless of public or private ownership and regardless of whether the property is open to the public. Section 4(f) also applies to archaeological sites discovered during construction unless exempted (See Section 8.5.2).

Significance: Significance typically is indicated through the Section 106 process (eligible for inclusion on the NRHP is presumed to mean significant). Section 4(f) applies only to historic properties on or eligible for the NRHP. In rare cases, DOT&PF may determine the application of Section 4(f) appropriate for a site which has been determined not eligible for the NRHP, when an official formally provides information to indicate that the historic site is of local significance, as described in FHWA [Section 4\(f\) Policy Paper](#), Question 2A.

Historic Districts: Within an historic district, Section 4(f) applies to those properties that contribute to the eligibility of the historic district, as well as to any individually eligible properties within the district. Elements within the boundaries of an historic district are assumed to contribute unless they have an official determination of eligibility as non-contributing. See FHWA [Section 4\(f\) Policy Paper](#), Question 2B for more information.

8.4.4. Situations Where Detailed Identification of Section 4(f) Properties is Not Required

On rare occasions, the detailed identification of Section 4(f) properties required by Section 8.3.2 may be omitted for projects that exclusively consist of activities with a very low probability of having a Section 4(f) use. Low risk projects are those that would not have a Section 4(f) use even if there is an identified resource adjacent to the project. This risk analysis will examine the nature of the activity (ex. pavement striping of an existing road, guardrail replacement, crack sealing, light bulb replacement, etc.) and the probability for that project to have a Section 4(f) use. Identification of each Section 4(f) resource adjacent to the project will not be required under these circumstances.

The determination that a project has a low probability to affect Section 4(f) properties and detailed identification of Section 4(f) properties is not required must be made by the NEPA Program Manager. The REM, in coordination with the Environmental Impact Analyst, should consult with the NEPA Program

Manager to determine applicability of this approach. The consultation must include sufficient information for the NEPA Program Manager to determine:

- Project activities have a very low probability of having a Section 4(f) use; and
- The project consists exclusively of very low probability activities.

Consultation with the NEPA Program Manager must be done in writing via email for documentation purposes. Supporting documentation may be attached to the email as necessary. The consultation email must be attached to the environmental document and placed in the region project file.

8.5. Determining Section 4(f) Use of Land

8.5.1. Types of Use

According to [23 CFR 774.17](#), use is defined as:

Except as set forth in §§774.11 and 774.13, a “use” of Section 4(f) property occurs:

- (1) When land is permanently incorporated into a transportation facility;
- (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d); or
- (3) When there is a Constructive Use of a Section 4(f) property as determined by the criteria in §774.15.

The project team, including the NEPA Program Manager, will discuss and determine early in project development whether a Section 4(f) use is likely to occur (Refer to Section 8.3).

A Section 4(f) property (e.g., a historic site) may not always have a previously identified property boundary and it may be necessary to establish a reasonable boundary through discussion with the OWJ. Efforts to define boundaries should begin as soon as it is determined likely that the property is protected by Section 4(f) and that it may not have a clear boundary. The REM or Environmental Impact Analyst is responsible for contacting the OWJ. For historic

Section 4(f) resources, the PQI, in coordination with the REM or Environmental Impact Analyst, is responsible for contacting the OWJ.

Permanent Incorporation. Permanent incorporation of land into a transportation facility occurs when all or a portion of a Section 4(f) property is acquired for a project. This can occur when DOT&PF will acquire all property rights (fee simple title) or a property interest that allows permanent access onto the property, such as a permanent easement for highway construction, maintenance, or other transportation-related purpose. See FHWA [Section 4\(f\) Policy Paper](#), Section 3.2 for more information.

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 purpose.¹ If the temporary occupancy of land satisfies the five conditions identified by FHWA regulations ([23 CFR 774.13\(d\)](#)), then the occupancy can be determined to be so minimal as to not constitute a use within the meaning of Section 4(f). If the project cannot meet these conditions, the temporary occupancy is adverse and constitutes a Section 4(f) property use. See Section 8.5.2(d).

Constructive Use ([23 CFR 774.15](#)). 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 activities, features, or attributes of the property are substantially impaired. The FHWA Section 4(f) Policy Paper ([Section 3.2](#)) states “As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance, will be meaningfully reduced or lost.”

A Constructive Use finding is quite rare, because “substantial impairment” of a Section 4(f) property based on proximity impacts such as noise, vibration, or changes in access is rare, and because mitigation measures may bring impact levels below a Constructive Use threshold. A Constructive Use finding requires an Individual Section 4(f) Evaluation. Per Part 3.2.8 of the NEPA Assignment Program MOU between FHWA and DOT&PF, consultation with FHWA is required when DOT&PF determines a

¹ Preservation purpose: “It is declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and

recreation lands, wildlife and waterfowl refuges, and historic sites” ([23 USC 138\(a\)](#)).

Constructive Use. The NEPA Program Manager undertakes the consultation with FHWA.

FHWA regulations outline the situations where the Administration has determined a Constructive Use occurs (23 CFR 774.15(e)) and does not occur ([23 CFR 774.15\(f\)](#)).

If it is determined that the proximity impacts do not cause substantial impairment, the Statewide Environmental Office (SEO) can reasonably conclude that there will be no constructive use. Consideration of proximity impacts and the potential for Constructive Use is documented in the consultation with the NEPA Program Manager or the Section 4(f) approval, as determined appropriate by the NEPA Program Manager. FHWA regulations ([23 CFR 774.15](#)) and FHWA [Section 4\(f\) Policy Paper](#) (Section 3.2 and Question 7) provide substantial additional information.

If there is no permanent incorporation of a portion of Section 4(f) property, and no adverse temporary occupancy of Section 4(f) property, and no proximity impacts to Section 4(f) property, then the SEO can reasonably conclude that there will be no use of a Section 4(f) property. Documentation of SEO's determination of no use of a Section 4(f) property must be maintained in the project files as the determination of compliance with the requirements of Section 4(f).

8.5.2. Exceptions

There are several “exceptions to the requirement for Section 4(f) approval” listed at [23 CFR 774.13](#). These are reproduced in full below. References to “Administration” in the below reproduction of 23 CFR 774.13 must be read as “DOT&PF” since Section 4(f) approval authority has been assigned by FHWA to DOT&PF. The NEPA Program Manager makes the final decision regarding application of an exception to a specific project or alternative, as described in Section 8.3. These exceptions include:

- (a) The use of historic transportation facilities in certain circumstances:
 - (1) Common post-1945 concrete or steel bridges and culverts that are exempt from individual review under 54 U.S.C. 306108.
 - (2) Improvement of railroad or rail transit lines that are in use or were historically used for the transportation of goods or passengers,

including, but not limited to, maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement of railroad or rail transit line elements, except for:

- i) Stations;
 - ii) Bridges or tunnels on railroad lines that have been abandoned, or transit lines not in use, over which regular service has never operated, and that have not been railbanked or otherwise reserved for the transportation of goods or passengers; and
 - iii) Historic sites unrelated to the railroad or rail transit lines.
- (3) Maintenance, preservation, rehabilitation, operation, modernization, reconstruction, or replacement of historic transportation facilities, if the Administration concludes, as a result of the consultation under 36 CFR 800.5, that:
- i) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or this work achieves compliance with Section 106 through a program alternative under 36 CFR 800.14; and
 - ii) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion that the proposed work does not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or the Administration concludes this work achieves compliance with 54 U.S.C. 306108 (Section 106) through a program alternative under 36 CFR 800.14.
- (b) Archeological sites that are on or eligible for the National Register when:
- (1) The Administration concludes that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration decides, with agreement of the official(s)

with jurisdiction, not to recover the resource; and

- (2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.
 - (c) 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 a proposed action. With the exception of the treatment of archeological resources in §774.9(e), the Administration may permit a project to proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.
 - (d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:
 - (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 of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.
 - (e) Projects for the Federal lands transportation facilities described in 23 U.S.C. 101(a)(8).
 - (f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:
 - (1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);
 - (2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241-1251, with the exception of those trail segments that are historic sites as defined in §774.17;
 - (3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and
 - (4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.
 - (g) Transportation enhancement activities, transportation alternatives projects, and mitigation activities, where:
 - (1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and
 - (2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.
- Where stated above, certain exceptions require consultation with the OWJ, and may require the OWJ to agree in writing with the provisions of the exception to Section 4(f) approval. Consultation with the OWJ occurs only after the NEPA Program Manager agrees that the exception would apply and asks the region to obtain concurrence.

8.6. Process and Documentation for Section 4(f) Approval

When use of a Section 4(f) property is anticipated, every effort should be made to avoid or minimize that use. The extent of documentation, coordination, and time required for a Section 4(f) approval is commensurate with the extent of the use. This section addresses process and documentation for the various use approval options.

Section 4(f) evaluation and approval options include:

- *De minimis* impact finding
- Programmatic Section 4(f) evaluation
- Individual Section 4(f) evaluation

The fundamental differences between a *de minimis* impact finding and preparing a Programmatic or Individual Section 4(f) Evaluation are whether or not an avoidance alternatives analysis must be prepared and requirements for public notice and comment. An avoidance alternatives analysis is required for a Programmatic or Individual Section 4(f) Evaluation. An avoidance alternatives analysis is not required for a *de minimis* impact finding. A public notice and public comment period is required for an Individual Section 4(f) Evaluation, *de minimis* impact finding, or Programmatic Section 4(f) Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property.

The Section 4(f) process for a project is discussed in the NEPA document, and documentation attached as an appendix.

Roles and Responsibilities. If Section 4(f) properties are present, or if there is uncertainty regarding Section 4(f) applicability to a particular property, typical Section 4(f) documentation and approval process roles and responsibilities are as follows:

- The Environmental Impact Analyst prepares information (See Section 8.3) and approval recommendations for each property and provides it to the REM for consultation with the NEPA Program Manager.
- The REM reviews the documentation and recommends approvals to the NEPA Program Manager.
- The NEPA Program Manager:

- Reviews the documentation and provides overall guidance
- Makes applicability and use determinations
- Approves *de minimis* impact findings and Programmatic Section 4(f) evaluations
- The Statewide Environmental Program Manager approves Individual Section 4(f) evaluations.

The NEPA Assignment Program MOU (Part 3.2.5) requires the following language be included on the cover page of each Section 4(f) evaluation in a way that is conspicuous to the reader:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 USC 327 and a Memorandum of Understanding dated November 3, 2017 and executed by FHWA and DOT&PF.

8.6.1. De Minimis Impact Finding

“*De minimis* impact” is defined in Section 8.2, and at [23 CFR 774.17](#). A *de minimis* impact finding is documented on either the *Section 4(f) De Minimis Impact Finding Form for Parks, Recreation Areas, and Wildlife & Waterfowl Refuges*, or the *Section 4(f) De Minimis Impact Finding Form for Historic Sites*. Both forms are accessible from the SEO [Resources web page](#). When there are two or more properties with *de minimis* impacts, a separate *de minimis* impact finding is made for each property.

De Minimis Impact Finding for a Park, Recreation Area, or Wildlife and Waterfowl Refuge

A *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation, or enhancement measures) results in a determination that the project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or wildlife and/or waterfowl refuge for protection under Section 4(f).

The public must have the opportunity to review and comment on the effects of the project on the Section 4(f) property, after which the OWJ over the property must provide written concurrence [[23 CFR 774.5\(b\)\(2\)](#)].

Public Review and Comment ([23 CFR 774.5\(b\)\(2\)](#))

The public must have an opportunity to review and comment on the DOT&PF's intention to approve *de minimis* impacts findings for parks, recreation areas, and wildlife and waterfowl refuges. This public notice should be combined with other required NEPA process public notices, but at least a two week review and comment period is required for a proposed *de minimis* impact findings notice. However, if the Alaska Highway Preconstruction Manual's Public Involvement and Agency Coordination Chapter requires a longer period or additional processes, the more extensive process will be required. The public comment period must be completed prior to any concurrency by OWJ ((774.5(b)(2)(i)&(ii) and [49 USC 303\(d\)\(3\)\(A\)](#))

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

The public notice shall:

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 OWJ.
3. Note 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 USDOT Act of 1966.
4. Describe the potential impacts to the property.
5. Include the following language in a way that is conspicuous to the reader, per the requirement in the NEPA Assignment Program MOU (Part 3.2.5):

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by DOT&PF pursuant to 23 USC 327 and a Memorandum of

Understanding dated November 3, 2017 and executed by FHWA and DOT&PF.

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 OWJ 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 NEPA Program Manager.
4. **Written concurrence:** The region prepares the required *de minimis* documentation including compilation of comments received and draft responses for NEPA Program Manager review prior to requesting written concurrence from the OWJ that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f) and that they are aware of DOT&PF's intent to make a *de minimis* impact finding. OWJ concurrence may occur on the *de minimis* Impact Finding form after the public notice period has ended.
5. **Approval:** The completed Section 4(f) *de minimis* Impact Finding form and supporting documentation are signed by the REM. In order for the NEPA Program Manager to approve the *de minimis* impact finding, the public notice period must be complete and the OWJ must have concurred in writing.

De Minimis Finding for A Historic Site

De minimis impacts on historic sites are based upon the finding of either "no adverse effect" or "no historic properties affected" in compliance with Section 106 regulations ([36 CFR 800](#)).

SHPO and Public Review and Comment ([23 CFR 774.5\(b\)\(1\)](#))

For a *de minimis* impact finding for historic sites, the Section 4(f) public notice and comment period is satisfied by compliance with [36 CFR 800](#). The Environmental Impact Analyst, REM, and project manager must work closely with a DOT&PF PQI for historic site identification and Section 106 findings.

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

- The consulting parties identified in accordance with 36 CFR part 800 must have been consulted.
- 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 may be done within the Section 106 findings letter. The following parties may also require notification, depending on their involvement with the project:
 - THPO (or Tribal representative if no THPO)
 - ACHP (when ACHP is participating in Section 106 process)
 - National Park Service (NPS) (when a National Historic Landmark is involved)
- The pertinent SHPO or THPO must have concurred with the Section 106 finding in writing (and the ACHP must provide written concurrence if they are participating in the Section 106 process)

Process

1. **Identify:** Determine whether there are any historic sites, through the Section 106 process. 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 must be 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 NEPA Program Manager.

8.6.2. Programmatic Section 4(f) Evaluation [\(23 CFR 774.3\)](#)

A Programmatic Section 4(f) Evaluation is a time-saving procedural alternative to preparing an Individual Section 4(f) Evaluation, but can only be used under certain circumstances, as outlined in the

five Nationwide Programmatic Section 4(f) Evaluations below. FHWA's online [Environmental Review Toolkit](#) is a useful resource for this topic. The REM consults with the NEPA Program Manager to determine if this is appropriate.

The approved *Programmatic Section 4(f) Evaluation* Forms are available on the [SEO website](#) to document the Programmatic Section 4(f) approval. Prompts within the forms help the Environmental Impact Analyst and REM through the analysis process. In addition to the information in this chapter, the FHWA Section 4(f) regulations ([23 CFR 774](#)) and FHWA [Section 4\(f\) Policy Paper](#) should be consulted during preparation of a Programmatic Section 4(f) Evaluation. The [SEO forms](#) are based on the five Nationwide Programmatic Section 4(f) Evaluations available for use:

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, and must explicitly document the basis for determining that the project meets the applicability criteria. All possible planning to minimize harm (including, but not limited to, mitigation measures) must be incorporated into the proposed action. This is determined through consultation with the OWJ over the Section 4(f) resource and must be documented in the region project file.

Programmatic Section 4(f) Evaluations require consideration of the same steps found in an Individual

Section 4(f) Evaluation, including consideration of “feasible and prudent avoidance alternatives” and “all possible planning” to minimize harm (as defined in Section 8.2) and may require an assessment of least overall harm, discussed below and in Section 8.6.4.

Public Involvement for Programmatic Evaluations.

The only programmatic evaluation that identifies public involvement requirements is the Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property Programmatic Evaluation; however, typically public involvement associated with Section 106 or NEPA provides opportunities for public input on the Section 4(f) Evaluation. This programmatic evaluation requires public involvement consistent with FHWA’s NEPA public involvement requirements at [23 CFR 771.111](#). A Draft Section 4(f) evaluation may be part of an EA or Draft EIS, as applicable, and may be released for review and comment as part of the NEPA document. If there is no NEPA public involvement, the public involvement requirement will be satisfied by public notice and at least a two week review and comment period. However, if the Alaska Highway Preconstruction Manual’s Public Involvement and Agency Coordination Chapter requires a longer period or additional processes, the more extensive process will be required.

Programmatic Section 4(f) Evaluation Approval Process

The Environmental Impact Analyst and REM complete the programmatic evaluation form, in consultation with the NEPA Program Manager. Consultation with the OWJ is required for Programmatic Evaluations.

The REM certifies the Section 4(f) Evaluation to recommend its approval. The NEPA Program Manager determines that a project meets the criteria and procedures of the specific Programmatic Section 4(f) Evaluation and approves the evaluation. If agreement of the OWJ is required, final approval by the NEPA Program Manager occurs after such agreement is secured in writing.

8.6.3. Feasible and Prudent Alternatives

Unless the use of a Section 4(f) property is determined to have a *de minimis* impact, DOT&PF must determine that no feasible and prudent avoidance alternative exists before approving the use of such land ([23 CFR 774.3](#)). Feasible and prudent avoidance alternatives are those that avoid using any

Section 4(f) property and do not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property ([23 CFR 774.17](#)) (Part 3.3.3.1, FHWA [Section 4\(f\) Policy Paper](#)).

To determine whether a feasible and prudent avoidance alternative exists, it is necessary to first identify a reasonable range of project alternatives including those that avoid using Section 4(f) property. The no-action or no-build alternative should be included in the reasonable range of project alternatives as it is also an avoidance alternative. Reasonable alternatives that meet the purpose and need of the project should be considered. Potential avoidance alternatives may include one or more of the following:

- 1) **Location Alternatives** - Re-routing of the entire project along a different alignment
- 2) **Alternative Actions** - Another mode of transportation (rail transit or bus service), or another action that does not involve construction (implementation of transportation management systems)
- 3) **Alignment Shifts** - Re-routing of a portion of the project to a different alignment to avoid a specific resource
- 4) **Design Changes** - A modification of the proposed design in a manner that would avoid impacts (reducing the proposed median width, construction of a retaining wall, or incorporation of design exceptions)

The goal is to identify alternatives that would not use any Section 4(f) property. A determination of a *de minimis* impact for a specific Section 4(f) property may be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*. (Part 3.3.3.1, FHWA [Section 4\(f\) Policy Paper](#))

Once the potential avoidance alternative(s) have been identified, then it is necessary to determine whether avoiding the Section 4(f) property is feasible and prudent for each potential avoidance alternative. Both the feasibility and the prudence of each potential avoidance alternative must be considered in order to determine whether there are other severe problems of a magnitude that

substantially outweighs the importance of protecting the Section 4(f) property.

A Feasible and prudent avoidance alternative is defined by [23 CFR 774.17](#) as:

- (1) A feasible and prudent avoidance alternative avoids using 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 purpose of the statute.
- (2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.
- (3) An alternative is not prudent if:
 - (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
 - (ii) It results in unacceptable safety or operational problems;
 - (iii) After reasonable mitigation, it still causes:
 - (A) Severe social, economic, or environmental impacts;
 - (B) Severe disruption to established communities;
 - (C) Severe disproportionate impacts to minority or low income populations; or
 - (D) Severe impacts to environmental resources protected under other Federal statutes;
 - (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
 - (v) It causes other unique problems or unusual factors; or

- (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

Documentation of the process used to identify, develop, analyze and eliminate potential avoidance alternatives is required, and all efforts to avoid the Section 4(f) property(ies) should be described. This description should clearly explain the process that occurred and its results. It is appropriate to maintain detailed information in the project file with a summary in the Section 4(f) evaluation. The information may be contained in a technical report that is summarized and referenced in the Section 4(f) evaluation. The discussion must be organized within the Section 4(f) evaluation in a manner that allows the reader to understand the full range of potential avoidance alternatives identified, and the process by which potential avoidance alternatives were identified and analyzed for feasibility and prudence.

Even if all of the alternatives use a Section 4(f) property, there is still a duty to try to avoid the individual Section 4(f) properties within each alternative. (Part 3.3.3.1, FHWA [Section 4\(f\) Policy Paper](#))

8.6.4. Alternative with Least Overall Harm (FHWA [Section 4\(f\) Policy Paper](#))

If there is no feasible and prudent avoidance alternative, DOT&PF may then approve the alternative that causes the least overall harm in light of Section 4(f)'s preservation purpose. If the assessment of overall harm finds that two or more alternatives are substantially equal, DOT&PF can approve any of those alternatives. This analysis of alternative with least overall harm is required when multiple alternatives that use Section 4(f) property remain under consideration.

To determine which of the alternatives would cause the least overall harm, the seven factors set forth in [23 CFR 774.3\(c\)\(1\)](#) must be considered:

- (i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
- (ii) The relative severity of the remaining harm, after mitigation, to the protected activities,

attributes, or features that qualify each Section 4(f) property for protection;

- (iii) The relative significance of each Section 4(f) property;
- (iv) The views of the official(s) with jurisdiction over each Section 4(f) property;
- (v) The degree to which each alternative meets the purpose and need for the project;
- (vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
- (vii) Substantial differences in costs among the alternatives.

Through consideration of these seven factors, DOT&PF may determine that a serious problem as identified in factors (v) through (vii) outweighs relatively minor net harm to a Section 4(f) property. The least overall harm determination provides DOT&PF with a way to compare and select between alternatives that would use different types of Section 4(f) properties when competing assessments of significance and harm are provided by the officials with jurisdiction over the impacted properties. In evaluating the degree of harm to Section 4(f) properties, DOT&PF is required by the regulations to consider any views expressed by the OWJ over each Section 4(f) property. If an OWJ states that all resources within that official's jurisdiction are of equal value, FHWA may still determine that the resources have different value if such a determination is supported by information in the project file. Also, if the OWJ(s) over two different properties provide conflicting assessments of the relative value of those properties, FHWA should consider the officials' views but then make its own independent judgment about the relative value of those properties. Similarly, if the OWJ(s) decline to provide any input at all regarding the relative value of the affected properties, FHWA should make its own independent judgment about the relative value of those properties.

DOT&PF is required to demonstrate how the seven factors were compared to determine the least overall harm alternative (See [23 CFR 774.7\(c\)](#)). The draft Section 4(f) evaluation will disclose the various impacts to the different Section 4(f) properties and the relative differences among alternatives regarding non-Section 4(f) issues, including the extent to which each alternative

meets the project purpose and need. The disclosure of impacts should include both objective, quantifiable impacts and qualitative measures that provide a more subjective assessment of harm. Preliminary assessment of how the alternatives compare to one another may also be included. After circulation of the draft Section 4(f) evaluation in accordance with [23 CFR 774.5\(a\)](#), FHWA will consider comments received on the evaluation and finalize the comparison of all factors listed in [23 CFR 774.3\(c\)\(1\)](#) for all the alternatives. The analysis and identification of the alternative that has the overall least harm must be documented in the final Section 4(f) evaluation (See [23 CFR 774.7\(c\)](#)). In especially complicated projects, the final approval to use the Section 4(f) property may be made in the decision document (ROD or FONSI).

8.6.5. All Possible Planning to Minimize Harm

Once it has been determined that there are no feasible and prudent alternatives to avoid the use of Section 4(f) property, the project approval process for an individual Section 4(f) evaluation requires the consideration and documentation of all possible planning to minimize harm to Section 4(f) property (See [23 CFR 774.3\(a\)\(2\)](#)). *All possible planning*, defined in [23 CFR 774.17](#), means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project. All possible planning to minimize harm does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1).

Minimization of harm may entail both alternative design modifications that reduce the amount of Section 4(f) property used and mitigation measures that compensate for residual impacts. Minimization and mitigation measures should be determined through consultation with the OWJ(s). These include the SHPO and/or THPO for historic properties or officials owning or administering the resource for other types of Section 4(f) properties. (FHWA [Section 4\(f\) Policy Paper](#))

8.6.6. Individual Section 4(f) Evaluation

DOT&PF must prepare an Individual Section 4(f) Evaluation if the NEPA Program Manager has determined the following:

There will be a Section 4(f) use of a property and

- (1) No exceptions to the requirement for Section 4(f) approval apply,
- (2) A *de minimis* impact finding is not appropriate, and
- (3) None of the Programmatic Section 4(f) Evaluations are appropriate.

Individual Section 4(f) Evaluations must include sufficient analysis and supporting documentation to demonstrate that there is no feasible and prudent avoidance alternative. They must also summarize the results of all possible planning to minimize harm ([23 CFR 774.7\(a\)](#)).

Individual Section 4(f) Evaluations are prepared in two distinct stages: Draft and Final. The purpose of the Draft Individual Section 4(f) Evaluation is to discuss the information that will ultimately support a decision made in the final evaluation. The Final Individual Section 4(f) Evaluation must document the analysis and identification of the alternative that has the least overall harm in light of the statute's preservation purpose. If the analysis concludes that there is no feasible and prudent alternative, then DOT&PF may approve, from among the alternatives that use Section 4(f) property, only the alternative that causes the least overall harm.

Coordination ([23 CFR 774.5\(a\)](#))

The FHWA [Section 4\(f\) Policy Paper](#) recommends that preliminary coordination with the OWJ(s), Department of the Interior, and as appropriate with the Department of Agriculture and Department of Housing and Urban Development should occur before the circulation of the Draft Individual Section 4(f) Evaluation and that follow-up coordination *must* occur to address issues that are raised during review of the draft evaluation. Coordination must occur and be documented before the Final Individual Section 4(f) Evaluation can be approved. An analysis and response to comments received must be included. A minimum of 45 days shall be provided for receipt of comments.

Draft Individual Section 4(f) Evaluation

The following information is required for a Draft Individual Section 4(f) Evaluation ([23 CFR 774.7](#)). Depending on the specific circumstances of the project and the Section 4(f) properties, the order of this information may change, but the content is still required:

- **Description of the proposed project**, including an explanation for the proposed project purpose and need. Purpose and need information is required when identifying a potential avoidance alternative for consideration as a feasible and prudent avoidance alternative.
- **Description of each Section 4(f) property** that would be used by any of the alternatives under consideration, including property size; location; ownership; function; activities; features; attributes; relationship to other similar lands in the vicinity; if there are any leases or other ownership agreements; unusual characteristics; and a map or maps.

For historic properties, this information could be extracted from Determinations of Eligibility. Some or all of this information may already have been collected for determining the applicability of Section 4(f), as described in Section 8.4.3.

- **Description of the uses of the Section 4(f) property** or properties by any alternative under consideration. This section should be sufficiently detailed, including what type of use occurs (land that is permanently incorporated into the transportation facility), whether one of the five criteria for temporary occupancy cannot be met, or whether a Constructive Use occurs (See Section 8.5.1). It is also important to discuss the degree of use, including whether any of the property's activities, facilities, or attributes are affected and how. Both permanent and temporary uses should be discussed. Quantify as many impacts as possible, such as noise, visual, or access. Maps and graphics are desirable, since this information will be reviewed by people who are not familiar with the project area.

For historic properties, the [Section 106 Determination of Effect](#) can be one source of this information, but care should be taken not to directly substitute Determination of Effect language for description of Section 4(f) use, since different criteria are used in the two different laws.

- **Identification and evaluation of avoidance alternatives** that would avoid the Section 4(f) property. See Section 8.6.3.

Each avoidance alternative should be evaluated to determine feasibility and prudence. Do not state

that the avoidance alternatives are not feasible and prudent in the draft document.

- **Discussion of measures to minimize harm to the Section 4(f) Property.** Discuss all possible planning for measures that are available to minimize the impacts on the property. Document all efforts undertaken even if they seem relatively minor. Summarize and refer readers to the main body of the environmental document as appropriate. *All possible planning* means all reasonable measures identified in the Draft Individual Section 4(f) Evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project ([23 CFR 774.17](#) *All Possible Planning* definition). The following should also be documented:
 - The views of the OWJ(s) regarding the planning measures to minimize harm or mitigate impacts
 - Whether the cost of any mitigation measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and considering the benefits of the proposed mitigation measures
 - Any impacts or benefits of proposed mitigation measures to communities or environmental resources outside of the Section 4(f) property
- **Development of preliminary least overall harm analysis.** Least overall harm entails balancing the harm to the Section 4(f) property with other impacts and costs. More detail about least overall harm analyses are included in the Final Individual Section 4(f) Evaluation section, below. For the Draft Section 4(f) Evaluation, this information is included, but no conclusions are drawn.
- **Coordination.** Draft Individual 4(f) Evaluations must be circulated to the U.S. Department of the Interior (DOI) and shared with the OWJ(s), including Consulting Parties (for historic properties). Describe the results of meetings and correspondence with the OWJ(s) over the Section 4(f) property. For recreational properties, this includes the Parks Manager for the agency who owns the land. For historic properties, this includes the SHPO and Consulting Parties.

Final Individual Section 4(f) Evaluation

The Final Individual Section 4(f) Evaluation must contain:

- **All of the information included in the Draft Individual Section 4(f) Evaluation**, but modified as necessary to reflect responses to any comments received during the circulation of the Draft Individual Section 4(f) Evaluation.
- **Basis for concluding that there are no feasible and prudent alternatives.** Remember that *the feasible and prudent standard applies only to avoidance alternatives*. It does not apply when choosing among alternatives that use a Section 4(f) property.

If no feasible and prudent avoidance alternatives exist, then there are two options:

- If only one alternative that uses a Section 4(f) property remains under consideration, document all possible planning to minimize harm.
- If two or more alternatives that both use one or more Section 4(f) properties remain under consideration, document the least overall harm analysis.
- **Least Overall Harm Analysis and Concluding Statement.** This section must be included in the Final Individual Section 4(f) Evaluation if the analysis in the preceding section concludes that there is no feasible and prudent avoidance alternative, and there are two or more alternatives that use a Section 4(f) property.

If there is no feasible and prudent alternative to avoid harm to the Section 4(f) property, then only the alternative that causes the least overall harm in light of the statute's preservation purpose can be chosen. To determine which of the alternatives causes the least overall harm, compare and consider the seven factors listed below. These factors involve balancing competing and conflicting considerations—some of the factors may weigh in favor of an alternative, while other factors may weigh against it ([23 CFR 774.3\(c\)\(1\)](#)):

 - Ability to mitigate adverse impacts to each Section 4(f) property

- Relative severity of the remaining harm, after mitigation, to the protected activities and attributes or features
- Relative significance of each Section 4(f) property
- Views of the officials with jurisdiction over each Section 4(f) property
- Degree to which each alternative meets the purpose and need
- After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f)
- Substantial differences in costs among alternatives

The identification of the alternative that has the least overall harm must be documented in the Final Individual Section 4(f) analysis.

Include the concluding statement in the Final Individual Section 4(f) Evaluation and the final NEPA decision document (Finding of No Significant Impact or Record of Decision) only. The concluding statement should:

- Describe the basis for concluding that the proposed action or preferred alternative includes all possible planning to minimize harm to the Section 4(f) property.
- Provide an appropriate summary of the formal coordination with the headquarters office of DOI and, as appropriate, the involved offices of the U.S. Department of Agriculture and the U.S. Department of Housing and Urban Development (HUD).

The following language should be included in the concluding statement:

“Based on the above considerations, there is no feasible and prudent alternative to the use of land from [name the Section 4(f) property(ies)]. The proposed action includes all possible planning to minimize harm to [name the Section 4(f) property(ies)] resulting from such use and causes the least overall harm in light of the statute’s preservation purpose.”

- **Document coordination with the official with jurisdiction over the property**—the DOI and, as appropriate, the U.S. Department of Agriculture (for National Forest System Lands) and HUD (property for which HUD funding was used). Note: The DOI has 45 days to respond; if the DOI does not reply within 45 days, then you must wait another 15 days before proceeding without their comments; [23 CFR 774.5\(a\)](#).
- The focus of this section of the manual is on coordination with these agencies regarding Section 4(f), not coordination with them in general. Coordination with these agencies is the responsibility of DOT&PF as assigned by the FHWA. The FHWA [Section 4\(f\) Policy Paper](#) recommends that preliminary coordination with these agencies should occur before the circulation of the Draft Individual Section 4(f) Evaluation and that follow-up coordination *must* occur to address issues that are raised during review of the draft evaluation. Coordination must occur and be documented before the Final Individual Section 4(f) Evaluation can be approved. An analysis and response to comments received must be included.
- Document coordination on:
 - Significance of the property
 - Primary purpose of the land
 - Proposed use and impacts
 - Proposed measures to avoid and/or minimize harm

Legal Sufficiency Review

As required by FHWA regulations at [23 CFR 774.7\(d\)](#), the Final Individual Section 4(f) Evaluation shall be reviewed for legal sufficiency. This is accomplished by the Alaska Department of Law (LAW) before the evaluation is approved. Legal sufficiency review consists of the following steps:

- The SEO will submit the Final Individual Section 4(f) Evaluation to LAW.
- LAW will prepare and submit to SEO written comments/suggestions, as appropriate, to improve the document's legal defensibility (these comments would be protected by attorney-client privilege and would not be shared outside of DOT&PF).

- The reviewing attorney will be available to discuss resolution of comments/suggestions with the SEO and the region.
- Once LAW is satisfied that its comments/suggestions have been addressed to the maximum extent reasonably practicable, LAW will provide the SEO with written documentation that the legal sufficiency review is complete.
- The Statewide Environmental Program Manager will not approve the Final Individual Section 4(f) Evaluation before receiving written documentation that the legal sufficiency review is complete.

8.7. Section 6(f) and Other Federal Grant Programs ([23 CFR 774.5\(d\)](#))

In some circumstances, Section 4(f) properties are protected under Section 6(f) of the LWCF Act or other federal grant programs. FHWA's Section 4(f) regulations acknowledge these issues and require coordination with the appropriate federal agency.

8.7.1. Land and Water Conservation Fund Act, Section 6(f)

The LWCF Act of 1965 is Public Law 88-578, as amended ([Chapter 2003 in 54 USC](#)). Its accompanying regulations are at [36 CFR 59](#). The Act states:

No property acquired or developed with assistance under this section shall, without the approval of the Secretary [of the Interior], be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if the Secretary finds it to be in accord with the then-existing comprehensive statewide outdoor recreation plan and only upon such conditions as the Secretary deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location ([54 USC 200305\(f\)\(3\)](#)).

When outdoor recreation land is proposed for conversion, the law and regulations set out a process between individual states and the U.S. government, and formal communication is between these two entities. The NPS is the agency that represents the

federal government. The Alaska Division of Parks and Outdoor Recreation (DPOR) represents the state. By regulation ([36 CFR 59.3\(b\)](#)), communication from the applicant (DOT&PF) with the NPS about Section 6(f) goes through DPOR. The NPS provides substantial information about Section 6(f) in its [Land and Water Conservation Fund State Assistance Program manual](#).

Section 6(f) and Section 4(f) are separate laws, and their requirements will be completed separately. Among other differences, Section 6(f) is distinguished from Section 4(f) in that it applies to any project involving a conversion of Section 6(f) property, whether or not the project uses federal funding or requires USDOT approval. However, when a transportation project is federally funded and requires the conversion of recreation or park property covered by Section 6(f), the project also is likely to involve Section 4(f).

Identification and Coordination

Early in project development, if there is park or recreational land in the project area, the Environmental Impact Analyst consults with the DPOR Grants Administrator to inquire about the presence of Section 6(f) property. If such property exists, the Grants Administrator can provide maps and further information about the portion of the part or facility encumbered by Section 6(f) grant conditions. If Land and Water Conservation funds were used to purchase all or part of the property or to make improvements to the property, then Section 6(f) may apply to any use of the property, even if the funds were used for an improvement in a discrete area of the property unaffected by the project.

Land Replacement Requirement

During the preliminary design and environmental phase, the REM or designee consults with the Grants Administrator of the Section 6(f) property to identify replacement property of equal value, location, and usefulness. DOT&PF then prepares a land replacement plan demonstrating that the Section 6(f) replacement property is acceptable to the land manager and meets nine substantive prerequisites in regulations ([36 CFR 59.3](#)). The plan includes any conditions agreed to by both parties.

According to the regulations, with few exceptions "once the conversion has been approved, replacement property should be immediately acquired" ([36 CFR 59.3\(c\)](#)). NPS will not approve conversion until all NEPA and Section 4(f) requirements, if appropriate,

have been satisfied ([36 CFR 59.3\(b\)\(6\)&\(7\)](#)). If the project is funded through a USDOT agency and if the property has been determined to be a Section 4(f) property as well as a Section 6(f) property, the Section 4(f) and Section 6(f) requirements intersect.

Depending on the project, the convergence of the approvals may mean the Section 4(f) analysis is dependent upon the outcome of the Section 6(f) conversion agreement, and both requirements will need to be completed simultaneously. Because of the 6(f) requirement to immediately acquire the replacement property, DOT&PF may need to complete advance acquisition of the replacement property before opening the project's right-of-way phase or may need to use state funds for the purchase. When a Section 6(f) property is identified, it is essential to immediately consult with the DOT&PF Right-of-Way Chief and NEPA Program Manager regarding the requirements of Section 6(f). The REM or designee coordinates early with DPOR in the property conversion transaction to avoid project delays.

Assuming that Section 4(f) has been found to apply to a Section 6(f) property, all other Section 4(f) requirements apply. For example, DOT&PF must avoid the 6(f) property unless there is no feasible and prudent avoidance alternative or DOT&PF finds the impact to be a *de minimis* impact. The Section 6(f) plan and conversion agreement typically will contribute to Section 4(f) findings, such as *de minimis* impact and "all possible planning" findings. Therefore, the Section 6(f) agreement typically is documented also as part of the Section 4(f) approval.

8.7.2. Other Federal Grant Programs

Other federal grant programs or lands with federal encumbrances may have their own requirements relating to converting property to a different use. Section 4(f) regulations at [23 CFR 774.5\(d\)](#) state that, when such encumbrances are identified, coordination with the appropriate federal agency is required in part to determine if any requirements may apply to converting the property to a different function. Regardless of whether a transportation project is federally funded, any such conversion requirement may apply. If a conversion requirement does apply, it must be satisfied whether or not a Section 4(f) approval is needed. The most obvious grant programs are:

- Federal Aid in Wildlife Restoration Act, as amended, also known as the Pittman-Robertson Act (16 USC 669). The act can provide funding for "wildlife-associated recreation," such as trails, target ranges, and observation blinds.
- Federal Aid in Sport Fish Restoration Act, as amended, also known as the Dingell-Johnson Act (16 USC 777 et seq). The act can provide for funding of boating/fishing access.

Administrative requirements of both laws are in DOI regulations at [50 CFR 80](#).

These programs are managed by the U.S. Fish and Wildlife Service through its [Wildlife & Sport Fish Restoration Program](#), which allocates funds to states. On the state side, the funds are managed by the Alaska Department of Fish and Game.

The regulations at 50 CFR 80.14(b) state that, when real property passes from management control of the State fish and wildlife agency, control must be restored or the property must be replaced using non-Federal funds not derived from (fishing or hunting) license revenues. For documenting a replacement agreement for property that would be converted to non-fish or -wildlife use, it is recommended that the Environmental Impact Analyst or REM consult with the Alaska Department of Fish and Game's Sport Fish Division or Wildlife Conservation Division.

Technical Appendix

Resources available for acquiring an understanding of Section 4(f) include:

- The law, as amended, presented in U.S. Code: [49 USC 303](#) and [23 USC 138](#).
- FHWA Section 4(f) regulations: [23 CFR 774](#).
- FHWA [Section 4\(f\) Policy Paper](#) (July 20, 2012)—essential reading for further guidance on Section 4(f), with multiple examples.
- FHWA [Section 4\(f\) Tutorial](#)—ten key topics explained.
- DOT&PF Statewide Environmental Office [Section 4\(f\) web page](#)—with further information links and forms to use in documenting Section 4(f) use.

Resources available for an understanding of Section 6(f) and other federal recreation grants include:

- Section 6(f) law, as amend, presented in U.S. Code: [54 USC \(Section 2003\)](#).
- Section 6(f) regulations: [36 CFR 59](#)
- [Federal Aid in Wildlife Restoration Act](#), as amended, also known as the Pittman-Robertson Act ([16 USC 669-669i](#)).
- [Federal Aid in Sport Fish Restoration Act](#), as amended, also known as the Dingell-Johnson Act ([16 USC 777 et seq](#)).
- Department of the Interior regulations for the wildlife and sport fish restoration acts: [50 CFR 80](#)
- U.S. Fish and Wildlife Service guidance: [Wildlife & Sport Fish Restoration Program](#).