

# AASHTO PRACTITIONER'S HANDBOOK

# 11

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## COMPLYING WITH SECTION 4(f) OF THE U.S. DOT ACT

This handbook is intended to assist practitioners in managing all aspects of compliance with Section 4(f) of the U.S. Department of Transportation Act. Section 4(f) is a Federal law that protects public parks, recreation areas, wildlife and waterfowl refuges, and significant historic sites.

Issues covered in this handbook include:

- Considering Section 4(f) before the NEPA process begins;
- Scoping potential Section 4(f) issues;
- Identifying and evaluating Section 4(f) properties;
- Making determinations of *de minimis* impact;
- Determining whether there is a "use" of Section 4(f) properties;
- Developing and evaluating avoidance alternatives under the "feasible and prudent" standard;
- Choosing among alternatives that use Section 4(f) properties;
- Incorporating "all possible planning" to minimize harm to Section 4(f) properties;
- Using Section 4(f) programmatic evaluations;
- Coordinating with other agencies and stakeholders; and
- Documenting Section 4(f) analysis and conclusions.

The Center for Environmental Excellence by AASHTO produces the Practitioners Handbooks. The handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

Each handbook is developed by the Center in cooperation with an advisory group that includes representatives of the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), State departments of transportation, and other agencies as appropriate.

The handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each handbook includes:

- A background briefing;
- Key issues to consider; and
- Practical tips for achieving compliance.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>



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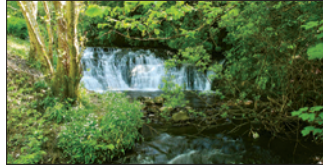


American Association of State Highway and Transportation Officials

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# Overview



Section 4(f) was enacted in 1966 as part of the U.S. Department of Transportation (U.S. DOT) Act, which established the U.S. DOT. It is now codified in 49 U.S.C. § 303(c); essentially identical language also appears in 23 C.F.R. § 138. Section 4(f) applies to all agencies within U.S. DOT.

Section 4(f) protects significant publicly owned public parks, recreation areas, and wildlife and waterfowl refuges, as well as significant historic sites, whether they are publicly or privately owned. Section 4(f) is a key safeguard for these resources, but compliance is often difficult and can become a cause of delay in the environmental review process. It has been described by courts as one of the nation's most stringent environmental laws.

Under Section 4(f), the term “use” has a specific meaning. A use occurs when a project permanently incorporates land from a Section 4(f) property, even if the amount of land used is very small. In addition, a use can result from a temporary occupancy of land within a Section 4(f) property, if that temporary occupancy meets certain criteria. A use also can result from proximity effects—noise, visual, etc.—that substantially impair the protected features of the property. A use that results from proximity effects is known as a “constructive use.”

Historically, Section 4(f) has prohibited the U.S. DOT from approving the “use” of Section 4(f) properties unless U.S. DOT makes two findings: 1) that there is no feasible and prudent alternative that avoids the use of Section 4(f) properties, and 2) that the project incorporates all possible planning to minimize the harm that results from the use of those resources. Section 4(f) requires the U.S. DOT to seek comments from the U.S. Department of the Interior (and in some cases other agencies) before making these findings.

In 2005, as part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Congress amended Section 4(f) to provide an alternative method of approving the use of protected resources where the impact is *de minimis*. The *de minimis* impact determination provides the basis for U.S. DOT to approve the minor use of a Section 4(f) property without identifying and evaluating avoidance alternatives—thus streamlining the approval process.

In SAFETEA-LU, Congress also directed U.S. DOT to revise its Section 4(f) regulations to clarify the application of the “feasible and prudent” standard. In March 2008, FHWA and FTA complied with this requirement by issuing new Section 4(f) regulations. The revised regulations clarified the “feasible and prudent” standard and also updated many other aspects of the regulations, including the standards for choosing among alternatives that all use Section 4(f) properties—commonly known as the “least overall harm” test. The new regulations were also codified, for the first time, in a stand-alone section of the regulations—23 C.F.R. Part 774.

These recent legislative and regulatory changes present new opportunities to streamline the Section 4(f) decision-making process. But they also contain new definitions and new legal standards that must be carefully considered when preparing Section 4(f) documentation.

This handbook is intended to help practitioners take advantage of the flexibility afforded by the recent changes to Section 4(f) while ensuring that all requirements are met. It addresses the full range of Section 4(f) compliance options, including individual Section 4(f) evaluations, *de minimis* impact determinations, and programmatic Section 4(f) evaluations.

## Background Briefing

**Applies Only to U.S. DOT.** Section 4(f) applies to all agencies within the U.S. DOT, including FHWA and FTA. Transportation projects that do not require the approval of a U.S. DOT agency are not subject to the requirements of Section 4(f). For example, many highway projects are implemented with state or local funds and do not involve changes to Interstate access points or other approval or involvement sufficient to constitute FHWA or FTA “control” over the project. Section 4(f) does not apply to these projects.

**Protects Parks, Recreation Areas, Refuges, and Historic Sites.** Section 4(f) applies to two categories of resources: 1) publicly owned public parks, recreation areas, and wildlife or waterfowl refuges; and 2) significant historic sites, regardless of whether they are publicly or privately owned. The Section 4(f) regulations have clarified several key points regarding the types of resources that are protected by Section 4(f), such as their application to “multiple-use” lands and archeological sites. The FHWA’s Section 4(f) Policy Paper, which FTA also follows, provides additional direction regarding a long list of specific resource types, including historic roads, recreational trails, school playgrounds, fairgrounds, golf courses, water bodies, bikeways, cemeteries, zoos, and tribal lands.

**Substantive Protection, Not Just Procedural.** Many environmental laws, including the National Environmental Policy Act (NEPA), are procedural: that is, they establish procedures that must be followed before a decision is made. Section 4(f) is different: it actually prohibits certain types of decisions from being made at all. This type of law is known as a substantive requirement because it focuses on the substance of an agency’s decision and includes an obligation to make a specific finding or determination. Substantive laws can block an agency from taking an action, regardless of how thoroughly the action has been studied.

**Four Paths to Compliance.** In general, there are four possible paths to compliance with Section 4(f) for a transportation project that requires FHWA or FTA approval:

- **Finding of No Use.** FHWA or FTA can determine that the project will not use any Section 4(f) properties. In some cases, this finding is straightforward and requires little if any documentation. In others, a finding of “no use” requires detailed analysis to determine whether Section 4(f) applies to a property and/or whether the project will use that property. This analysis should be included in the project file and summarized in the NEPA document.
- **De Minimis Impact Determination.** FHWA or FTA can determine that the project’s impacts on one or more Section 4(f) properties will be *de minimis*. A *de minimis* impact determination is not an exemption from Section 4(f); it is an authorization for a minor use of a Section 4(f) property, without having to make a finding that there are no feasible and prudent avoidance alternatives. A *de minimis* impact determination is made on a property-by-property basis, not for a project as a whole. Therefore, several separate *de minimis* impact determinations could be made for a single project.
- **Reliance on a Programmatic Evaluation.** FHWA has issued five programmatic evaluations under Section 4(f); FTA has issued none. In general, programmatic evaluations are intended to be used for projects with relatively minor impacts to Section 4(f) properties. FHWA can apply a programmatic evaluation to an individual project without some of the process steps required for an individual Section 4(f) evaluation: a legal sufficiency review is not required, nor is there a need for 45-day review by the U.S. Department of the Interior. Therefore, the Section 4(f) approval usually can be granted more quickly with a programmatic evaluation than with an individual evaluation.
- **Individual Section 4(f) Evaluation.** FHWA and FTA can complete an individual Section 4(f) evaluation, which authorizes the use of one or more Section 4(f) properties. A Section 4(f) evaluation requires legal sufficiency review by the agency’s legal counsel, and generally is included as a separate chapter or appendix in the project’s NEPA document. It must include two findings: 1) that there is no feasible and prudent alternative that completely avoids the use of Section 4(f) property; and 2) that the project includes all possible planning to minimize harm to the Section 4(f) property resulting from the use.

**Legal Resources.** Compliance with Section 4(f) for highway and transit projects requires familiarity with the statute, regulations, key guidance documents, and programmatic evaluations. These include:

- **Statute.** Section 4(f) was enacted as part of the U.S. Department of Transportation Act of 1966, which established the U.S. DOT. The text of that section is now included, as amended, in 49 U.S.C. § 303(c); nearly identical language is included 23 U.S.C. § 138. There is no significant difference in wording between these sections. The term “Section 4(f)” is commonly used to refer to both 49 U.S.C. § 303(c) and 23 U.S.C. § 138.

- **Regulations.** FHWA and FTA have issued joint regulations implementing Section 4(f). For many years, the regulations were included in 23 C.F.R. Part 771, along with policies and procedures for implementing NEPA during the development of transportation projects. In March 2008, the Section 4(f) regulations were updated and moved to a stand-alone section. They are now codified at 23 C.F.R. Part 774.
- **Policy Paper.** FHWA has issued a Section 4(f) Policy Paper, which provides additional guidance on implementing Section 4(f) requirements. The policy paper was last updated in March 2005, before SAFETEA-LU was enacted. The policy paper is issued solely by FHWA. FTA has not adopted the policy paper, but does consider it when special situations arise (such as fairgrounds or school yards). The other U.S. DOT modal administrations (e.g., Federal Aviation Administration) have not adopted the FHWA/FTA regulations or the policy paper, but they may consider them as guidance in appropriate situations.
- **De Minimis Impacts Guidance.** In December 2005, FHWA and FTA issued a joint memorandum, “Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources.” This memorandum contained a series of questions and answers on the application of *de minimis* impact criteria (“*De minimis* FAQs”). Although it was issued prior to the March 2008 regulations, this 2005 guidance memorandum remains in effect.
- **Programmatic Evaluations.** FHWA has issued five programmatic evaluations under Section 4(f). These apply to: 1) use of historic bridges, 2) minor involvement with parks, recreation areas, or refuges, 3) minor involvement with historic sites, 4) independent walkway or bikeway construction, and 5) net benefit to the Section 4(f) property. FTA has not issued any Section 4(f) programmatic evaluations.

Links to all of these legal resource documents are available on the Center’s web site, <http://environment.transportation.org> in the Practitioner’s Handbook section under the “Reference Materials” for this handbook.

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## Key Issues to Consider

This section lists a series of issues to consider at each stage of preparing the environmental review process for a highway or transit project. This section can be used as a quick reference tool throughout the process, to make sure the right questions are being asked at the right time.

The headings in this section correspond to the headings in “Practical Tips” section below. The Practical Tips section contains more in-depth information on each of these topics. Some readers may wish to proceed directly to Practical Tips, and then scan this section afterwards as needed.

### 1. Before the NEPA Process Begins

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- If a transportation planning study is being undertaken, what information is available about Section 4(f) properties in the study area? How will this information be considered?
- If a new park, recreation area, or refuge is being planned, is there an opportunity to reserve a transportation corridor through that property through “joint planning”?

### 2. Project Initiation and Scoping

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- What is the scope of the proposed project? Does the project scope satisfy FHWA and FTA requirements, including logical termini, independent utility, and not limiting consideration of alternatives?
- Does Section 4(f) apply to the project? For example, will the project be funded by FHWA or FTA? If not, is any other “approval” from FHWA or FTA required to construct or operate the facility?
- What are the known Section 4(f) properties in the study area? Have you checked with the Federal, state, and local parks agencies; the State Historic Preservation Office (SHPO); tribal governments and, if applicable, tribal historic preservation officers (THPO); and the local public school system?
- Do you have good mapping or electronic databases showing the boundaries of the Section 4(f) properties identified?

- What are the major unknowns regarding Section 4(f) properties? What information do you need to begin developing a reasonably complete picture of the Section 4(f) properties in the study area? For example, are there any unknowns regarding the significance, ownership status, or major purposes of this property?
- If Section 4(f) properties are present, how will that affect your range of alternatives? For example, will you need to expand your study area to include a broad enough range of avoidance and minimization alternatives?
- Has the project schedule taken into account the time needed to identify and evaluate Section 4(f) properties?
- What information about Section 4(f) properties will you have available during the initial development and screening of alternatives? Are there any specific Section 4(f) issues that need to be resolved *before* screening decisions are made?
- Within the project team, how will Section 4(f) issues be handled? For example, if the project involves complex Section 4(f) issues, will you be setting up a Section 4(f) team? Will you need the assistance of FHWA or FTA legal counsel, a Headquarters technical specialist, or the FHWA Resource Center?
- Does this project present good opportunities for mitigation and enhancement of Section 4(f) properties? Are there ways to leave the 4(f) properties “better than before” the project?

### **3. Identifying and Evaluating Section 4(f) Properties**

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#### ***Historic Properties***

- What is the extent of the “area of potential effects” (APE) that will be investigated for potential historic properties? Is the APE large enough to include areas that may need to be considered for potential avoidance alternatives in the Section 4(f) evaluation?
- As part of Section 106 consultation, when will historic properties be identified and evaluated for eligibility for the National Register? How does the schedule for Section 106 consultation relate to the key milestones in the Section 4(f) approval process?
- Is your Section 106 documentation adequate for purposes of your Section 4(f) analysis? For example, does your Section 106 documentation identify the significant activities, features, or attributes of the historic sites in the study area? Do you have boundary determinations for the historic sites? If there are historic districts, are the contributing and non-contributing properties/features identified?
- Are there potential historic sites in the APE that may become eligible pursuant to established National Register criteria before the project is completed? If so, are they protected under Section 4(f)?
- Are there any potentially large-scale historic sites in the study area? For example, rural historic districts or landscapes? Farmsteads with large boundaries? Battlefields? Are there any National Historic Landmarks?
- How and when will potential archeological resources be identified and evaluated to determine whether they are chiefly of value for preservation in place?
- Are there any eligibility or boundary issues that cannot be resolved with the SHPO/THPO and thus may be appropriate for submission to the Keeper of the National Register for a determination of eligibility? If so, when in the process will this occur?
- If the project involves a lengthy corridor or large land area, will you be using a phased approach to identification and evaluation of historic properties in Section 106 consultation? If so, how will the phased approach to Section 106 consultation take your Section 4(f) responsibilities into account?
- Are there any linear historic properties—e.g., canals or railroads—that extend beyond the boundaries of the study area? If so, what work is needed to determine the Section 4(f) status of those properties?
- Do you have good electronic mapping that shows the precise boundaries of historic sites? Is this information being provided to team members who are responsible for developing and evaluating alternatives?
- Have you considered the potential Section 4(f) status of properties that may need to be occupied temporarily during construction in your identification process?

## **Parks, Recreation Areas, and Refuges**

- What geographic area will be investigated for potential parks, recreation areas, and refuges? Is it large enough to include areas that may need to be considered for potential avoidance alternatives in the Section 4(f) evaluation?
- What are the readily identifiable parks, recreation areas, and/or refuges? Are these areas clearly mapped? What additional information is needed about these properties—e.g., regarding their significant features, activities, or attributes? Are they publicly owned and open to the public?
- Are there any significant unresolved issues regarding the Section 4(f) status of known resources in the study area? For example, are there questions concerning the precise boundaries? Private in-holdings that may not be subject to Section 4(f)? Reserved transportation corridors that are not subject to Section 4(f)?
- In addition to known sites, are there other publicly owned lands that need to be evaluated for potential Section 4(f) status? For example, does the study area include national forest lands that are managed for multiple use, including recreation? Does the study area include public school properties with recreational facilities that may have Section 4(f) status?
- To the extent that it can be ascertained, are there any privately owned lands that are subject to easements or other restrictions that could cause them to be considered “publicly owned” for purposes of Section 4(f)?
- Are there properties in the study area that are designated or planned for future parks?
- Have Section 6(f) (Land and Water Conservation Act) funds been used for acquisition of, or improvements to, the Section 4(f) property?
- Are there any recreational trails in the study area, including trails within or adjacent to highway rights-of-way? Do these trails meet the criteria for protection under Section 4(f)?
- Are there other properties in public ownership that the public uses for recreation?
- Are there any federally designated Wild and Scenic Rivers in the study area? Do they meet the criteria for protection under Section 4(f)?
- Do you have good electronic mapping showing all publicly owned lands (Federal, state, local, and tribal) in your study area?
- In your identification process, have you considered properties that may need to be occupied temporarily during construction?

## **4. Making “*De Minimis Impact*” Determinations**

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- Are there any uses of Section 4(f) property that might qualify for a *de minimis* impact determination? Can any alternatives be modified so that they might qualify for this finding?
- Are there any avoidance, mitigation, minimization, or enhancement measures that could help to support a *de minimis* impact determination?
- What documentation will be prepared to support *de minimis* impact determinations?
- What steps will be taken to coordinate with officials with jurisdiction regarding any proposed *de minimis* impact determinations? When and how will this be done? Does your state have a programmatic agreement with the SHPO/THPO that addresses *de minimis* consultation?
- Are there specific issues or concerns that might preclude officials with jurisdiction from concurring in a *de minimis* impact determination? How can those concerns be addressed?
- For non-historic properties, how will the public be given an opportunity to comment on any *de minimis* impact determinations?
- What is your fallback plan if a proposed *de minimis* impact determination ultimately is not made? What types of avoidance alternatives would need to be considered and how would this affect the project schedule?

## 5. Determining Whether There Is a “Use” of Section 4(f) Properties

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- Are there any alternatives that would result in a direct impact—a “use”—of land within a Section 4(f) property?
- Do you have the necessary information to determine that the use is or is not a *de minimis* impact?
- Are there any alternatives that would have temporary direct impacts on Section 4(f) property? Are the criteria for a “temporary occupancy” exception met?
- Are there any alternatives that would have proximity (audible, visual, atmospheric, access) impacts on a Section 4(f) property? Are the criteria for a “constructive use” met?
- Are there any exceptions that would preclude a finding of Section 4(f) use? For example, late designation? Park road or parkway projects? Certain trail projects? Transportation enhancement projects? (For a complete list, see Appendix B.)

## 6. Developing and Evaluating Avoidance Alternatives

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- Is the purpose and need statement clear enough to provide an adequate basis for evaluating the prudence of avoidance alternatives? What criteria will be used to determine whether an alternative meets the purpose and need? If the purpose and need contains multiple objectives, are the objectives equally important? When will the determination of prudence be made and how will it be documented?
- Do any of the alternatives under consideration completely avoid all Section 4(f) properties? If not, how could they be modified to achieve complete avoidance?
- If complete avoidance alternatives have substantial drawbacks, such as increased cost, impacts on other resources, or engineering challenges, can those drawbacks be reduced through additional engineering work? What can be done to make the avoidance alternatives better?
- What additional environmental data-gathering is needed to assess the potential Section 4(f) avoidance alternatives? For example, if a potential Section 4(f) avoidance alternative would impact wetlands, do you need additional information about the status of those wetlands?
- What additional traffic analysis is needed to assess the potential Section 4(f) avoidance alternatives? For example, to evaluate whether the avoidance alternative can meet the purpose and need, do you need to do an additional model run?
- At what points in the NEPA process will Section 4(f) avoidance alternatives be considered? Is this avoidance analysis being done early, as part of the scoping process? Will you be revisiting and updating this analysis as more detailed information is developed?
- How will the avoidance alternatives be documented? If specific avoidance alternatives are developed, will you be preparing mapping or other visual aids to show the general locations of the avoidance alternatives?
- If cost will be considered in evaluating the potential avoidance alternatives, what is the basis for the cost estimates? Are these cost estimates comparable to the cost estimates for other alternatives considered in the NEPA process? Are the cost estimates documented?
- Are the “feasible and prudent” factors consistently applied to each of the avoidance alternatives, with appropriate citations to the definition of “feasible and prudent avoidance alternative” in the Section 4(f) regulations (23 C.F.R. 774.17)?
- Do avoidance alternatives affect resources protected by other laws, such as Section 404 of the Clean Water Act? If so, how will Section 4(f) and Section 404 requirements be reconciled?
- Do avoidance alternatives affect other resources, such as residential or business properties, that are not protected by a specific law?

## 7. Choosing Among Alternatives That All Use Section 4(f) Properties

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- Have you adequately established that there truly are no feasible and prudent avoidance alternatives?
- Have you incorporated appropriate measures to minimize harm to Section 4(f) properties and to other resources in each of the alternatives that you will be comparing?
- What are the key factors that drive the decision among the alternatives? For example, are you choosing between one alternative that minimizes harm to Section 4(f) properties and another that minimizes harm to wetlands? How will you weigh these competing values?
- If each alternative would use several Section 4(f) properties, how will the least-harm analysis be organized? For example, would it be helpful to first conduct a least-harm analysis for individual resources in a specific location (e.g., alternatives to avoid a historic house) and then conduct a “global” least-harm analysis for two complete alternatives?
- Have the officials with jurisdiction had the opportunity to comment on a draft of this analysis? Are the responses to their comments documented?

## 8. Incorporating “All Possible Planning” to Minimize Harm to Section 4(f) Properties

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- Have appropriate measures to minimize harm been incorporated into the project for each Section 4(f) property that will be used by the selected alternative? Are these measures described in the NEPA document and/or the Section 4(f) evaluation?
- Does the documentation use language that conveys a firm commitment (actions that *will* be taken, or strategies that *will* be investigated) when describing mitigation measures?
- Have the officials with jurisdiction had the opportunity to comment on the proposed measures to minimize harm? Are the responses to their comments documented?

## 9. Using Programmatic Section 4(f) Evaluations

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- Is a programmatic Section 4(f) evaluation applicable? If a programmatic evaluation and a *de minimis* determination are both potentially applicable, which is preferable?

## 10. Coordination and Concurrence

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- Who are the “officials with jurisdiction” for the Section 4(f) properties that you have identified? How and when will you coordinate with those officials?
- In addition to the officials with jurisdiction, are there any stakeholders that have expressed a strong interest in the Section 4(f) properties? How and when do you intend to engage those stakeholders?
- Do you have a good working relationship with the officials with jurisdiction, such as the SHPO/THPO<sup>1</sup>? Do those officials have adequate staff resources to handle the workload associated with this project in a timely manner?

## 11. Section 4(f) Documentation

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- Will a “Section 4(f) evaluation” be needed? If so, where will it be included in the NEPA document?
- If a Section 4(f) evaluation is not prepared, what other documentation if any is needed to demonstrate compliance with Section 4(f)?
- What reviews will be conducted to make sure that your Section 4(f) documentation meets all of the applicable legal requirements?
- How will Section 4(f) compliance be addressed in your NEPA decision document, such as a Record of Decision, Finding of No Significant Impact, or Categorical Exclusion?

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<sup>1</sup> For projects on tribal lands, an Indian tribe can assume the functions of the SHPO. In those situations, the functions of a SHPO would be carried out by a THPO. This handbook refers to the SHPO/THPO in order to include those situations where consultation with a THPO is required.

## Practical Tips

This section of the handbook provides a more detailed overview of key regulatory requirements and specific suggestions for achieving Section 4(f) compliance. It is organized according to the steps of an environmental study. The headings in this section correspond to the headings in the “Key Issues to Consider” section above.

### 1 | Before the NEPA Process Begins

Before the NEPA process even begins, there are steps that an agency can take to begin identifying and considering potential Section 4(f) issues. These early steps can reduce the risk of Section 4(f)-related delays later during project development.<sup>2</sup>

**Considering Section 4(f) Properties in the Planning Process.** The transportation planning process includes consultation with a wide range of affected agencies and stakeholders. As part of this process, it can be useful to identify known or potential Section 4(f) properties at a scale appropriate for consideration in planning. For example, if there is a large-scale rural historic district, this information could be included in mapping provided to transportation planners, so that it can be taken into account—along with other factors—when identifying potential new transportation corridors.

**Reserving Transportation Corridors (Joint Planning).** The Section 4(f) regulations recognize that Section 4(f) does not apply to land that is specifically reserved for transportation purposes at the time a park, recreation area, or refuge is initially established. This practice is known as joint planning: if a transportation facility and park are jointly planned, then the transportation facility can be constructed without requiring a Section 4(f) approval. Transportation planners should be alert for opportunities for joint planning. Ideally, the project file should include documentation (preferably mapping) that clearly shows the location of the reserved corridor and confirms that it was established at the time the park was created. It is also desirable to include a broad enough corridor to allow for minor shifts in alignment during the NEPA process.

**Early Consideration of Mitigation Opportunities.** The transportation planning process requires consideration of potential environmental mitigation opportunities, which can include mitigation for impacts to Section 4(f) properties. In the planning process, these issues are considered on a broad scale, not at the level of detail expected in project development. Early consideration of mitigation (or enhancement) opportunities for Section 4(f) properties does not in any way lessen the need to consider avoidance alternatives; however, it can help to begin a dialogue with the officials with jurisdiction about their goals for the Section 4(f) property, such as land acquisition or facility improvements.

### 2 | Project Initiation and Scoping

#### Key Requirements

**Applicability of Section 4(f).** In general, Section 4(f) requirements apply to any project that requires the approval of a U.S. DOT agency, including FHWA and FTA. An approval is needed if the project uses Federal funding. An approval also may be needed for others reasons, even when Federal funding is not involved—for example, when a project requires FHWA approval for a change in access to the Interstate System. There are a few special circumstances under which Section 4(f) does not apply to a project that requires FHWA or FTA approval. For further information regarding applicability of Section 4(f), refer to the FHWA Section 4(f) Policy Paper.

**Project Scope/Segmentation Issues.** The principles that govern project scope for purposes of NEPA compliance also apply to Section 4(f): that is, the agency must ensure that the project has logical termini, has independent utility, and does not limit consideration of alternatives for reasonably foreseeable transportation projects. (23 C.F.R. 771.111(f)). If these requirements are not met, the project has been improperly segmented, which can constitute a violation of Section 4(f) as well as NEPA.

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<sup>2</sup> For a more information, refer to the Center's Practitioner's Handbook 10, “Using the Transportation Planning Process to Support the NEPA Process,” available on the Center's web site at <http://environment.transportation.org>.

**Purpose and Need.** The purpose and need, which is developed as part of the NEPA process, plays a key role in Section 4(f) decision-making as well. Under the Section 4(f) regulations, an alternative's ability to meet the purpose and need is relevant in two ways: 1) it is a factor to consider in determining whether an avoidance alternative is "prudent"; and 2) it is a factor to consider in determining which alternative causes "least overall harm." Therefore, a well-written and well-supported purpose and need can be crucial to Section 4(f) compliance.<sup>3</sup>

**Early Consideration.** Section 774.9(a) of the Section 4(f) regulations requires early consideration of Section 4(f) properties during the environmental review process, stating that "The 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." This standard—"as early as practicable"—leaves FHWA and FTA with considerable discretion, but it does signify that there should be some consideration of Section 4(f) properties when alternatives are developed.

**Tiering.** Section 774.7(e) addresses Section 4(f) compliance in the context of tiered NEPA studies. In tiered studies, a preliminary Section 4(f) evaluation typically is completed during the Tier 1 study, and a final Section 4(f) evaluation (or other appropriate documentation) is completed in each Tier 2 study. The regulations provide general direction regarding the issues to be addressed and findings to be made at each tier.

## Good Practices

- **Study Scope.** Consider the possibility that the project will "point a loaded gun" at Section 4(f) properties that lie beyond the termini of the project—for example, constructing a highway segment that ends just at the border of a park. If this situation exists, consider changing the scope of the project to include an adjacent segment. If the scope is not expanded, ensure that the project record clearly documents the justification for the project termini in a manner consistent with the criteria in FHWA/FTA regulations. See 23 C.F.R. § 771.111(f).
- **Purpose and Need.** Make sure the purpose and need is clearly defined and that appropriate measures are developed to determine whether (and how well) an alternative meets the purpose and need. Also, the Section 4(f) evaluation should be consistent with the rest of the NEPA document in the way it defines the purpose and need and the measures it uses to evaluate alternatives' ability to meet the purpose and need.
- **Project Study Area.** If Section 4(f) properties are known to be present, consider defining a project study area that is large enough to include potential Section 4(f) avoidance and minimization alternatives. If new avoidance or minimization alternatives are later developed, consider expanding the study area to include those alternatives. The fact that an alternative is "outside the study area" does not necessarily mean that it can be dismissed from consideration as an alternative for avoiding or minimizing harm to Section 4(f) properties.
- **Project Mapping.** Identify any known Section 4(f) properties on the project mapping that is used in developing alternatives. Where boundaries are known, they should be shown. Where only a general location is known, it should be indicated in some manner on the mapping. In geographic information systems (GIS) mapping, consider developing a separate "layer" that specifically corresponds to Section 4(f) properties, rather than lumping Section 4(f) properties with similar resources—e.g., private parklands—that are not protected by Section 4(f).
- **Research and Data Gathering.** Consider taking some initial steps to identify and assess potential Section 4(f) properties during the scoping stage. This approach may be appropriate, for example, when the study team is aware of potential Section 4(f) properties that could greatly influence the viability of certain alternatives.
- **Need for Section 4(f) Expertise.** If a project involves complex Section 4(f) issues, make sure the study team includes members with direct experience in preparing Section 4(f) evaluations. In such cases, the Section 4(f) team also should include legal counsel from FHWA or FTA and/or the project sponsor. If the Section 4(f) issues are unusually complex, consider setting up a separate, informal work group focused specifically on Section 4(f) issues.
- **Study Schedule.** The project schedule should take into account the requirements of Section 4(f), including the potential need to identify properties and to develop and consider avoidance and minimization alternatives—often a time-consuming exercise. It also should allow for FHWA or FTA to complete its legal sufficiency review for any individual Section 4(f) evaluation, if one will be needed.

<sup>3</sup> For a more information, refer to the Center's Practitioner's Handbook 7, "Defining the Purpose and Need and Determining the Range of Alternatives for Transportation Projects," available on the Center's web site at <http://environment.transportation.org>.

- **Tiering.** If a tiered study is being prepared, develop a strategy at the outset for addressing Section 4(f) requirements in Tier 1 as well as Tier 2. This strategy should focus on the decisions being made at each tier. The strategy should incorporate appropriate consideration of avoidance and minimization of Section 4(f) properties in the Tier 1 decision, and this consideration should be documented as part of the Tier 1 EIS.

### 3 | Identifying and Evaluating Section 4(f) Properties

#### Key Requirements

**Parks, Recreation Areas, and Refuges.** Section 4(f) applies to any “publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance.” See 49 U.S.C. § 303(c). This seemingly simple definition actually contains four distinct elements. Each one of these elements has been interpreted and explained by FHWA and FTA in regulations and guidance. Key points are summarized below.

- **Designation and Purpose.** According to FHWA’s Policy Paper, a property is considered a park, recreation area, or refuge if meets two requirements: 1) it is officially designated as such *and* 2) the officials with jurisdiction determine that one of its “major purposes and functions” is to serve as a park, recreation area, or refuge. FHWA and FTA generally rely on the views of the official with jurisdiction, but the final decision as to park, recreation, or refuge status rests with the FHWA or FTA.
- **Significance.** Publicly owned parks, recreation areas, and refuges are presumed to be significant, unless the official with jurisdiction specifically finds the *entire* property (e.g., the entire park) to be insignificant—which is rare. See 23 C.F.R. § 774.11(c). The significance requirement is usually met for publicly owned parks, recreation areas, and refuges.
- **Public Ownership.** Section 4(f) requirements apply only to the *publicly owned portions* of parks, recreation areas, and refuges. Therefore, if a park includes private in-holdings, the requirements of Section 4(f) would not apply to those privately owned parts of the park. In addition, if privately owned lands are subject to an easement that makes them available for public use, those lands can be considered “publicly owned” for purposes of Section 4(f). Determining ownership status sometimes requires a search of property records.
- **Open to the Public.** Section 4(f) applies to “public” parks, recreation areas, and refuges. This requirement is distinct from the requirement that these resources be publicly owned. In the case of parks and recreation areas, FHWA and FTA have concluded that the resources must be “open to the public” in order for them to be protected under Section 4(f). Thus, school playgrounds—which are publicly owned and clearly are recreational in nature—are considered Section 4(f) properties only if they are open to the general public after school hours. On the other hand, given the nature of wildlife refuges, FHWA and FTA have concluded that they can be protected under Section 4(f) even if they are not open to the general public.

**Historic Sites.** Section 4(f) applies to “land of a historic site of national, state, or local significance.” 49 U.S.C. § 303(c). FHWA and FTA have interpreted this language to mean that Section 4(f) applies only to historic sites that are listed in or eligible for the National Register of Historic Places, “unless the Administration determines that the application of section 4(f) is otherwise appropriate.” See 23 C.F.R. § 774.11(e)(1), which addresses the applicability of Section 4(f) to historic sites. Also see the definition of “historic site” in 23 C.F.R. § 774.17.

- **Eligibility Criteria.** Eligibility for the National Register is evaluated based on four criteria. It is customary to identify the applicable National Register criteria when describing a historic site in a Section 4(f) evaluation. Identifying these criteria provides a starting point for understanding the significant features, activities, or attributes of the site. The criteria include:
  - Criterion A: association with significant historic events and broad patterns of history;
  - Criterion B: association with significant persons;
  - Criterion C: architectural, design, or artistic significance; and
  - Criterion D: archeological significance.

For the precise wording of these criteria, refer to the National Register's regulations, 36 C.F.R. § 60.4.<sup>4</sup> In addition to significance, a property also must possess "integrity" based on application of seven aspects used to assess the nature and degree of changes that may have occurred since the period of historic significance. For example, a property that has been extensively altered may lack integrity and thus be ineligible, despite possessing historic significance.

- **Use of Section 106 Process.** The Section 106 consultation process under the National Historic Preservation Act is used to identify historic sites that are listed in or eligible for the National Register. Under this process, eligibility findings typically are made by the Federal action agency (e.g., FHWA) in consultation with the SHPO/THPO and any tribe that attaches religious and cultural significance to the resource. Where there is a disagreement among these agencies regarding eligibility and that disagreement is not resolved, the Federal action agency can seek a "determination of eligibility" from the Keeper of the National Register, pursuant to 36 C.F.R. Part 63. The Keeper's decision on issues of eligibility (including boundaries) is final.
- **Inclusion of Prehistoric and Archeological Sites.** The term "historic site" as used in Section 4(f) includes all properties listed in or eligible for the National Register. Therefore, the term "historic site" as used in Section 4(f) includes properties from all time periods, including the prehistoric era (prior to written records) and it includes all types of resources, including archeological resources. However, the Section 4(f) regulations exempt archeological sites from Section 4(f) requirements except when the archeological sites warrant preservation in place. See 23 C.F.R. § 774.13(b). Therefore, archeological investigations for projects subject to Section 4(f) typically focus on determining whether the project area includes any archeological resources that warrant preservation in place.

**Special Rules and Exceptions.** The FHWA/FTA regulations and the FHWA Policy Paper have recognized a series of special rules and exceptions that govern the applicability of Section 4(f) to specific resources and circumstances. Practitioners should consult the regulations (especially Section 774.11 and 774.13) and the Section 4(f) Policy Paper to ensure that their determinations correctly reflect FHWA/FTA policies. See Appendix B for cross-references to applicable sections of the regulations and policy paper.

## **Good Practices**

- **Initial Assessment and Research.** Gather as much information as you can early in the process, even though it will inevitably be preliminary and incomplete. Identify potential Section 4(f) properties that may require more detailed investigation, especially those whose size or location suggest that they could be an important factor in the alternatives screening process. Consider taking steps to resolve the status of these resources early in the process.
- **Scope of Investigation.** For historic sites, the "area of potential effects" (APE) as defined in Section 106 consultation should be used. The justification for the APE and any changes in the APE should be documented. In general, the APE should include the area in which the alternatives could cause direct or proximity (noise, visual, atmospheric, access) impacts on historic sites. For parks, recreation areas, and refuges, the study team will need to make its own determination of the appropriate area for investigation. The same principles governing an APE would apply: the study area should include not only the areas that are directly impacted by the alternatives under consideration, but also nearby areas where proximity impacts could occur. If it is clear that avoidance alternatives will need to be considered, also assess potential Section 4(f) properties in the area impacted by those avoidance alternatives.
- **Boundary Determinations.** Boundaries play a crucial role in determining whether there is a use of Section 4(f) properties. Boundaries of historic sites, in particular, often require considerable research and analysis to determine. Boundaries of parks, recreation areas, and refuges also can be difficult to determine—for example, where a recreation area is part of a national forest that is managed for both recreational uses and non-recreational (e.g., logging) uses, or where there a public park includes both publicly and privately owned lands.
- **Significant Activities, Features, Attributes.** Document the important activities, features, and attributes of the Section 4(f) property. For example, are there specific views (to or from the property) that are integral to the integrity of the resource? Are there specific activities—e.g., picnicking—that contribute to the property's significance? In the context of a historic district, what are the contributing features and what are the non-contributing features?

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<sup>4</sup> For more information on making eligibility determinations and other aspects of the Section 106 process, refer to the Center's Practitioner's Handbook 6, "Consulting Under Section 106 of the National Historic Preservation Act," available on the Center's web site at <http://environment.transportation.org>.

- **Monitoring Changes in Status.** If there are changes in the condition of a resource during the NEPA process, or if a long period of time passes, it may be necessary to re-assess an eligibility finding. For example, property owners sometimes conduct renovation or expansion projects that impair the historic features of a home; these changes can lead to a finding that the property is no longer eligible. On the other hand, the passage of time can cause some properties to become old enough to meet the National Register eligibility criteria. Remain alert for these types of changes and update findings if needed during the NEPA process.
- **Documentation and Mapping.** Thoroughly document all stages of the process of identifying and evaluating Section 4(f) properties. The NEPA document itself should include basic descriptions, mapping, and photographs of key resources—those that are relevant to the comparison of detailed-study alternatives. Typically, this information is included in the main body of the EIS, but it could be included in an appendix to the EIS instead. Additional information needed to support the NEPA document should be included in the project file.

## 4 | Making *De Minimis* Impact Determinations

As described in the Background Briefing section above, FHWA and FTA have addressed the requirements for *de minimis* impact determinations in their Section 4(f) regulations (23 C.F.R. Part 774) and in a December 2005 guidance memorandum, which contained questions and answers on the application of *de minimis* impact criteria (“*De minimis* FAQs”).<sup>5</sup>

### Key Requirements

**Scope.** A *de minimis* impact determination is made separately for each Section 4(f) property, not for a project or alternative as a whole. This means that, if a study area includes several Section 4(f) properties, FHWA or FTA would evaluate *each* alternative with regard to *each* Section 4(f) property where there is the potential for a *de minimis* impact.

**Criteria.** Section 4(f) requires *de minimis* impact determinations to take into account “any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.” For example, if a project uses a portion of a park, but the project sponsor has committed to provide replacement parkland, the replacement parkland *must* be considered—along with the impacts on the park—when determining whether the impacts are *de minimis*. See 49 U.S.C. § 303(d)(1)(C). Please note that this provision does not impose any additional requirements to avoid, minimize, mitigate, or enhance; it simply says that, *if* these types of measures are incorporated into a project, they must be considered when making a *de minimis* impact determination.

**Not Allowed for Constructive Uses.** FHWA and FTA have determined that a constructive use can never be a *de minimis* impact, because a constructive use—by definition—involves a “substantial impairment” of the protected activities, features, or attributes of a Section 4(f) property, and such an impairment cannot be considered *de minimis*. See *De minimis* FAQs, Question G.

**Allowed for Temporary Occupancy.** FHWA and FTA have determined that a *de minimis* impact determination *can* be made for a temporary occupancy. The Section 4(f) regulations also include an “exception” for certain temporary occupancies “that are so minimal as to not constitute a use.” See 23 C.F.R. § 774.13(d). If the exception in Section 774.13(d) applies, there is no “use” and, therefore, there is no need for a *de minimis* impact determination. If that exception does *not* apply, the temporary occupancy is a “use” but still could be considered a *de minimis* impact. Therefore, when considering a temporary occupancy, practitioners should first determine whether an “exception” applies under Section 774.13(d); if so, document that the exception applies. If the exception does not apply, determine whether the criteria for a *de minimis* impact are met.

**Historic Sites.** For historic sites, a *de minimis* impact determination is based on findings made in the Section 106 consultation process. Specifically, a *de minimis* impact determination can be made if these conditions are met:

- FHWA or FTA has determined, through Section 106 consultation, that the project will have no adverse effect on the historic site;
- The State Historic Preservation Officer, or Tribal Historic Preservation Officer if applicable, has concurred in writing in FHWA’s or FTA’s finding of no adverse effect;

<sup>5</sup> This guidance is available on the Center’s web site, <http://environment.transportation.org>, Practitioner’s Handbooks section.

- The Advisory Council on Historic Preservation also has concurred in writing in FHWA's or FTA's finding of no adverse effect, if the Council is participating in the Section 106 consultation; and
- FHWA's or FTA's finding of no adverse effect has been developed in consultation with the consulting parties in the Section 106 process.

In their Section 4(f) *de minimis* guidance, FHWA and FTA have clarified that the SHPO/THPO and ACHP do not need to concur specifically in a *de minimis* impact determination, but they do need to be informed in writing of the consequences of their concurrence in a finding of no adverse effect—that is, it will be used as the basis for making a *de minimis* impact determination. See 23 C.F.R. § 774.5(b)(1)(ii).

**Parks, Recreation Areas, and Refuges.** For parks, recreation areas, and refuges, the statute prescribes a different process for making *de minimis* impact determinations. For these properties, a *de minimis* impact determination can be made if:

- FHWA or FTA has determined—after public notice and an opportunity for comment—that the project “will not adversely affect the activities, features, and attributes” that make the property eligible for protection under Section 4(f); and
- Following the opportunity for public comment, the “officials with jurisdiction” over the Section 4(f) property have concurred in FHWA or FTA's finding.

The official with jurisdiction is typically the public agency that owns or administers the Section 4(f) property—for example, a city parks department in the case of a city-owned park. FHWA's and FTA's guidance on *de minimis* impacts provides more detailed information on determining which official's concurrence is needed for a *de minimis* impact determination.

The requirement for a 45-day review by the U.S. Department of the Interior (U.S. DOI) applies to individual Section 4(f) determinations, but does not apply to *de minimis* determinations. (For more on the 45-day review requirement, see Practical Tips, *Coordination and Concurrence*, below.) Consultation with the U.S. DOI is required for *de minimis* determinations only if the U.S. DOI is the “official with jurisdiction” with regard to the Section 4(f) property for which the determination is being made. There are no specific requirements regarding the length of time provided for consultation with U.S. DOI when making a *de minimis* determination.

## Good Practices

- **Avoidance, Minimization, Mitigation, and Enhancement.** If a potential use is identified, look for ways to minimize that use by incorporating minimization, mitigation, and/or enhancement features into the alternative. For example, if a project takes land from a playground, there are a variety of ways to reduce or offset those impacts—for example, reconstructing and improving the playground on a smaller parcel; acquiring additional land that is contiguous to the park; or even acquiring replacement parkland elsewhere that serves the same community. But also remember that, if an impact is *de minimis*, it is not necessary to develop and consider avoidance alternatives.
- **Communication with SHPO/THPO.** For historic sites, make sure you have clearly informed the SHPO/THPO (in writing) that findings of “no adverse effect” made in the Section 106 process will be used as the basis for making “*de minimis* impact” determinations under Section 4(f). Some states have done this on a programmatic, rather than project, basis.
- **Concurrence Letters.** For parks, recreation areas, and refuges, make sure you obtain a clear written concurrence from the official with jurisdiction in the *de minimis* impact determination. The record must contain a concurrence letter or other appropriate documentation clearly showing that the official with jurisdiction has concurred that the use will not adversely affect the activities, features, and attributes of the property.
- **Officials with Jurisdiction.** Be careful in situations where two different governmental bodies each have some ownership and/or administration role in a park. For example, a park might be owned by a county but administered by a local government (or vice-versa). These situations require a judgment call to be made about which agency has jurisdiction. In some cases, FHWA or FTA will determine that two different agencies *both* have jurisdiction—in which case both would need to concur in the *de minimis* impact determination.
- **Public Review and Comment.** Make sure to allow an opportunity for public involvement, prior to making a final determination that an impact is *de minimis*. For historic sites, this requirement is met by engaging in Section 106 consultation

prior to reaching a finding of no adverse effect. For parks, recreation areas, and refuges, this requirement is typically met by providing an opportunity for comment on a NEPA document that includes proposed findings of *de minimis* impact. In general, these findings should be presented as “proposed” or “preliminary” when the NEPA document is made available for comment, and then finalized (or changed) following the receipt and review of comments. If the NEPA process does not include an opportunity for comment, a comment opportunity for the *de minimis* determination is still required and must be provided before the *de minimis* determination is made.

- **Need for Re-Concurrence.** If there are changes in an alternative after a *de minimis* impact determination has been made, it may be necessary to obtain a new concurrence letter from the officials with jurisdiction, and also provide a new opportunity for public review and comment. This is not always needed, but it should be kept in mind in situations where significant changes are made in a project.

## 5 | Determining Whether There Is a “Use” of Section 4(f) Properties

### Key Requirements

**Types of Use.** Section 4(f) applies to actions that “use” Section 4(f) properties. FHWA and FTA have recognized three types of uses of Section 4(f) land:

- **Permanent Incorporation of Land.** A “use” occurs when land is “permanently incorporated into a transportation facility.” (See 23 C.F.R. § 774.17). This is sometimes known as a “direct use,” but that term is not used in the Section 4(f) regulations or the FHWA Policy Paper. A permanent incorporation of land occurs when there is *any* taking of land from within the boundary of a Section 4(f)—even if the amount taken is small. If the amount of land is very small, a *de minimis* impact determination may be appropriate, as described above.
- **Temporary Occupancy.** Temporary impacts to a Section 4(f) property *may* trigger the application of Section 4(f). Section 774.13(d) in the Section 4(f) regulations defines five conditions that must be met in order to determine that a temporary occupancy does *not* rise to the level of being a use for purposes of Section 4(f).
  - 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) property regarding the above conditions.
- **Constructive Use.** A constructive use exists only if the proposed project’s proximity effects—noise, visual, atmospheric, or access—would “substantially impair” the protected features, activities, or attributes of the Section 4(f) property. A constructive use can occur only in the absence of permanent incorporation of land into a transportation facility. The FHWA and FTA regulations list several examples of situations that are presumed to result in a constructive use—for example, a noise impact that substantially interferes with performances at a nearby outdoor amphitheater. See 23 C.F.R. § 774.15(e). The regulations also list several examples of situations that are presumed not to result in a constructive use. An example would be when projected traffic noise levels near the amphitheater do not cause a “traffic noise impact” as defined in 23 C.F.R. Part 772. See 23 C.F.R. § 774.15(f). Adverse effects under Section 106 and constructive use (i.e., substantial impairment) under Section 4(f) are not equivalent. Adverse effects often occur when there is a change in the setting of the historic site that does not touch the historic site; an adverse effect does not necessarily “substantially impair” the protected features, activities, or attributes of the Section 4(f) property,

## Good Practices

- **Identifying Potential Uses.** Identify *potential* Section 4(f) uses based on available information early in project development. These judgments are preliminary and may change as alternatives are refined and more information is developed about Section 4(f) properties in the study area. Nonetheless, it is valuable to identify potential Section 4(f) uses as early as possible, so that Section 4(f) considerations can be taken into account in the initial development and screening of alternatives.
- **Refining Alternatives.** When a potential use is identified, consider ways to refine the alternative so that the use is avoided or minimized, including the potential to reduce or offset the impact to the level required for a *de minimis* impact determination. This does not mean that Section 4(f) uses should be avoided reflexively, or avoided at all costs. It means that the goal of avoiding Section 4(f) properties should be an integral part of the development of alternatives, from initial development of alternatives onward. When a “use” is identified and is not a *de minimis* impact, the next step should be to look for ways to avoid that use—as part of an ongoing process of refining alternatives.
- **Permanent Incorporation of Land.** Even a small encroachment on Section 4(f) property can be considered a permanent use. Moreover, a permanent use can occur even if fee title ownership is not acquired; acquiring a permanent easement would be considered permanent incorporation of land, if the easement is needed for construction or for future access to perform maintenance. To avoid overlooking a use, make sure to consider not only the major elements of the proposed project (e.g., mainline travel lanes) but also associated facilities (e.g., improvements to adjoining roads, or construction of new access roads).
- **Temporary Occupancy.** Be alert for potential temporary occupancies, which may not become apparent until detailed engineering plans have been developed. For example, a temporary occupancy could result from construction of an access road or other ancillary facilities used only during the construction phase. If such impacts are identified, first determine whether the temporary occupancy qualifies for an “exception” under the criteria listed in Section 774.13(d) of the Section 4(f) regulations. If the exception applies, there is no use. If an exception under Section 774.13(d) does not apply, it may still be possible to make a *de minimis* impact determination. See Practical Tip No. 4, above.
- **Constructive Uses.** Constructive uses are rare, but the need to consider the potential for a constructive use is not rare at all. When analyzing this issue, carefully review Section 774.15 in the Section 4(f) regulations. If a finding of constructive use is being considered, consultation with FHWA (or FTA) headquarters must be initiated by the FHWA Division Office (or FTA Region Office) regarding this potential finding. In addition, keep these specific points in mind:
  - For historic sites, a finding “no adverse effect” in the Section 106 process automatically means that there is no constructive use, according to the Section 4(f) regulations. No further analysis is needed in these situations.
  - When a finding of “adverse effect” is made in the Section 106 process, there may or may not be a constructive use. In these circumstances, analysis is usually needed to determine whether the criteria for a constructive use have been met. 23 C.F.R. § 774.15(d). This analysis should be thoroughly documented.
  - FHWA and FTA are not required to document each determination that a project will not result in a constructive use. 23 C.F.R. § 774.15(c). Nonetheless, it is good practice to develop documentation supporting these findings whenever there is a close call to be made, or substantial analysis of a potential constructive use has been done. If this documentation is voluminous, it can be included in the administrative record and just cross-referenced in the NEPA document.
  - Visuals play a key role in constructive use analyses, because they are better than text alone at giving the reader an understanding of the proximity impacts of a project. Consider including multiple depictions using various formats—e.g., plan sheets, cross-sections, aerial photos, photosimulations, or renderings. Also consider developing noise contours to show the portions of the resource that would experience increased noise levels and to what degree.
  - Make sure that the significant “activities, features, and attributes” of the Section 4(f) property are clearly identified before conducting a constructive use analysis. For example, a project may affect the viewshed of a park and increase the ambient noise levels. If the park involves recreational fields that are already surrounded by urban development, there may not be a constructive use. On the other hand, if the park includes an outdoor amphitheatre, there is greater potential that these impacts would be considered a constructive use.

- **Relationship to *De Minimis* Impact Determinations.** Remember that there must be a use of the Section 4(f) property for Section 4(f) to apply. In the case of a *de minimis* impact, there is still a “use” of a Section 4(f) property—it just happens to be a very minor use, which can be approved without an alternatives analysis or preparing an individual Section 4(f) evaluation. Therefore, the universe of Section 4(f) uses includes 1) uses with *de minimis* impacts, and 1) all other uses, which are sometimes referred to as “non-*de minimis* uses.”

## 6 | Developing and Evaluating Avoidance Alternatives

### Key Requirements

In an individual Section 4(f) evaluation, the first step is always consideration of avoidance alternatives. An avoidance alternative *must* be selected unless it is not “feasible and prudent.” This assessment must be based on the definition of “feasible and prudent avoidance alternative” in Section 774.17 of the FHWA/FTA regulations.

**Applicability.** As interpreted by FHWA and FTA in their revised Section 4(f) regulations, the “feasible and prudent” test applies *only* to avoidance alternatives. As discussed below, a completely different standard—the “least overall harm” standard—applies when choosing among alternatives that all use Section 4(f) property.

**Overall Approach.** An avoidance alternative is feasible and prudent if it “does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.” This is the core concept at the heart of the definition of feasible and prudent alternative. It embodies the holding of the Supreme Court’s famous decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), in which the Court explained that an alternative is imprudent if it causes impacts of “extraordinary magnitude” and involves “unique problems” or “unusual factors.”

**Ability to Consider Value of 4(f) Property.** The regulations state that, in evaluating the “importance of protecting the Section 4(f) resource,” it is appropriate to consider “the relative value of the resource to the preservation purpose of the statute.” FHWA and FTA have described this approach as a “sliding scale,” meaning that the magnitude of harm required to justify avoidance depends on the significance of the Section 4(f) property being avoided. They noted that:

[A] sliding scale approach to the magnitude of harm is proposed, because it is appropriate to consider the value of the individual Section 4(f) property in context. For example, some historic sites are significant beyond doubt and are permanently protected. Such properties should be protected absent extraordinary problems with the avoidance alternatives. Other historic sites of less significance, or which are likely to be legally destroyed or developed by their owner in the near future, may be outweighed by relatively less severe problems with the avoidance alternatives. [71 Fed. Reg. 42,613 (July 27, 2006)]

**Definition of “Feasibility.”** An alternative is *not* feasible “if it cannot be built as a matter of sound engineering judgment.” This definition of feasibility is unchanged from the previous regulations and is based directly on the Supreme Court’s *Overton Park* decision.

**Definition of “Prudence.”** The regulations do not provide a single, succinct definition of prudence. Instead, they list a series of findings that can support a finding that an alternative is imprudent. This approach allows a wide range of factors, singly or together, to support a finding of imprudence. The definition of “feasible and prudent avoidance alternative” in Section 774.17 provides the following direction for determining whether an alternative is prudent:

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.

**Relationship to Section 404 Requirements.** In some cases, the choice among alternatives requires decision-makers to reconcile the requirements of Section 4(f) with the requirements of other laws, such as Section 404 of the Clean Water Act. While both of these laws impose stringent mandates, neither one is absolute. Section 4(f) requires avoidance of parks and historic sites, except when there is no “prudent and feasible” avoidance alternative. Section 404 requires avoidance of “waters of the U.S.,” except when there is no “practicable” avoidance alternative or when the practicable avoidance alternative has “other significant adverse environmental consequences.” These legal standards do not support a simple, across-the-board rule that gives Section 4(f) properties precedence over Section 404 resources or vice-versa. Section 4(f) properties will take precedence in some cases, and Section 404 properties will take precedence in others. The determination about how to balance these requirements will involve case-by-case judgments by FHWA, which is responsible for Section 4(f), and the U.S. Army Corps of Engineers, which is responsible for Section 404.

### *“Feasible and Prudent” Applies Only to Complete Avoidance Alternatives*

In the new Section 4(f) regulations, issued in March 2008, **FHWA and FTA have clarified that the “feasible and prudent” standard applies only to avoidance alternatives.** It does not apply when choosing among alternatives that all use Section 4(f) properties.

For example, consider a situation where FHWA has developed three alternatives in the vicinity of a historic farm. Alternative A avoids the farm. Alternatives B and C both use the historic farm, but in different ways; their uses of the farm are not *de minimis*. In this example, Alternative A is an “avoidance alternative” and therefore must be selected if it is feasible and prudent. If Alternative A is not feasible and prudent, FHWA must choose between Alternatives B and C, both of which use the historic farm. When choosing between two alternatives that both use a Section 4(f) property, FHWA must choose the alternative that causes the “least overall harm” based on the criteria listed in Section 774.3(c). This “least overall harm” determination does not involve a finding as to feasibility and prudence of Alternatives B and C. In other words, FHWA would not select Alternative C based on a finding that Alternative B is imprudent. If Alternative C is selected, that decision would be based on a finding that Alternative C causes “least overall harm.”

The key point is this: under the new Section 4(f) regulations, **FHWA and FTA do not make a finding of feasibility and prudence with regard to alternatives that use Section 4(f) properties.** Instead, the agencies apply the “least overall harm” standard when choosing among alternatives that all use one or more Section 4(f) properties. For some practitioners, this will be a change from previous practices. Review documentation carefully to ensure that the “feasible and prudent” test is applied only to alternatives that completely avoid Section 4(f) properties.

## Good Practices

- **Applying the Prudence Factors.** Systematically review the prudence factors when evaluating the prudence of an avoidance alternative. When drafting a Section 4(f) evaluation, include specific reference to the prudence factors, with citations to the regulations. Make sure that the prudence factors are applied evenhandedly.
- **Role of Purpose and Need.** If an alternative is rejected because it does not meet the purpose and need, make sure you have a clear, articulated basis for making that judgment. Be consistent with the evaluation criteria or performance measures used during the alternatives screening process to assess the ability of alternatives to meet the purpose and need. In the case of a purpose and need that includes transportation goals as well as other goals, it may be appropriate to give more weight to the transportation elements of the purpose and need if a clearly articulated rationale exists for doing so. In other cases, needs such as economic development or national security might be given more weight.
- **Value of the Resource.** Describe the Section 4(f) property that is being avoided, including any characteristics of the resources that might be relevant in weighing the prudence of an avoidance alternative. Remember that what is prudent in one situation may not be prudent in another. For example, it may be prudent to take “x” homes to avoid use of a historic farm that is in pristine condition and protected from development; it may not be prudent to take the same number of homes to avoid a strip be taken from the edge of an historic site that already abuts a nearby development, is privately owned, and is not subject to an easement protecting it from alteration or demolition.
- **Consideration of Alternatives Eliminated in Screening.** Consider alternatives that were eliminated during the alternatives screening process as part of your analysis of avoidance alternatives. In many cases, alternatives eliminated in screening can be readily dismissed from consideration in the Section 4(f) evaluation because a finding has been made that they do not meet the purpose and need. Alternatives eliminated for other reasons—e.g., greater impacts or cost—may require more in-depth consideration in the Section 4(f) evaluation. If the record does not support a finding that those alternatives are imprudent, additional investigations may be needed. In some cases, alternatives eliminated during the screening process could be considered prudent alternatives for avoiding Section 4(f) properties. If that happens, those alternatives would have to be brought back into the study for full consideration.
- **Consideration of New Variations.** Do not assume that the alternatives studied in the NEPA document are necessarily sufficient to satisfy Section 4(f)’s mandate to consider avoidance alternatives. In some cases, it may be necessary to develop and analyze new alternatives, or new variations on existing alternatives, as part of the Section 4(f) evaluation. In general, these additional alternatives or variations on alternatives can be documented solely in the Section 4(f) evaluation, rather than being analyzed throughout the NEPA document.
- **Scale of Analysis.** The feasible-and-prudent test can be applied at different scales of decision-making on a single project.
  - *Individual Section 4(f) properties.* Agencies often need to consider a series of design options or modifications to alternatives that would avoid a specific property—for example, a particular park or historic site. These design options or modifications are sometimes called “sub-alternatives.” This analysis typically will include two or more alignments passing through, around, and in some situations even under or over the property. The feasible-and-prudent test should be applied in choosing among alternatives at this scale.
  - *Project-Wide.* Agencies also need to consider “end-to-end” avoidance alternatives for an entire project. These alternatives may each need to avoid several Section 4(f) properties. The feasible-and-prudent test also can be applied at this scale.
- **Documentation.** Thoroughly document efforts to avoid impacts on Section 4(f) properties, even when those efforts occurred as part of an iterative process of refining alternatives. Documenting these efforts will help to demonstrate in the record that the agency has seriously considered and fully complied with the mandates of Section 4(f).

## Can an Alternative with De Minimis Impacts Be Considered an “Avoidance Alternative”?

As used in the Section 4(f) regulations and Section 4(f) Policy Paper, the term “avoidance alternative” refers to an alternative that completely avoids the use of Section 4(f) properties. An alternative that has *de minimis* impacts does not completely avoid the use of Section 4(f) properties, because a *de minimis* impact is considered a type of use. **Therefore, an alternative that has *de minimis* impacts would not be considered an “avoidance alternative.”**

The importance of this distinction can best be explained with a hypothetical scenario involving two alternatives, A and B. Alternative A has impacts on several Section 4(f) properties, but all of those impacts are *de minimis*. Alternative B also has impacts on several Section 4(f) properties, but those impacts are not *de minimis* and cannot be reduced to *de minimis*.

In this example, the U.S. DOT agency clearly could approve Alternative A by making the necessary *de minimis* determinations for that alternative. But what about Alternative B? In order to approve Alternative B, the agency would first need to determine whether there are any feasible and prudent avoidance alternatives. As noted above, Alternative A would not be considered an “avoidance alternative” because it involves the use (albeit *de minimis*) of Section 4(f) properties. Therefore, before approving Alternative B, the agency would need to consider complete avoidance alternatives for Alternative B—for example, modifying Alternative B to avoid each of the uses of Section 4(f) property. The agency would then need to determine if those avoidance alternatives are feasible and prudent.

If the agency determines that there are no feasible and prudent avoidance alternatives for Alternative B, and wishes to approve Alternative B, it would then need to apply the “least overall harm” test under Section 774.3(c)(1). At this step, the agency would compare Alternatives A and B (and any other remaining alternatives) based on the “least overall harm” criteria as defined in Section 774.3(c)(1). The agency could approve Alternative B if it determined, based on those criteria, that Alternative B is the alternative that causes “least overall harm.” Alternative B could have “least overall harm,” even if it has greater impacts to Section 4(f) properties, because a range of factors are considered when determining which alternative causes the least overall harm.

## 7 | Choosing Among Alternatives That All Use Section 4(f) Properties

### Key Requirements

**“Least Overall Harm” Requirement.** When there is no feasible and prudent avoidance alternative, FHWA or FTA must select an alternative from among those that use Section 4(f) properties. This decision is governed by Section 774.3(c), which states that the agency must select the alternative that “causes the least overall harm in light of the statute’s preservationist purpose.”

**Seven Factors to Consider.** Section 774.3(c)(1) requires a “balancing” of seven factors when determining which alternative causes the “least overall harm”:

The least overall harm is determined by balancing the following factors:

- 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.

### **Good Practices**

- **Using the Correct Legal Standard.** Alternatives that use Section 4(f) properties should *not* be evaluated based on feasibility and prudence. Rather, they should be compared with one another to determine which alternative causes “least overall harm.” This will require a change in approach, or at least wording, as compared to documentation that was prepared prior to the adoption of the new Section 4(f) regulations in March 2008.
- **Considering the Seven Factors.** The “least overall harm” standard includes, but is not solely limited to, consideration of harm to Section 4(f) properties. It is a broad standard that requires consideration of seven factors. It is good practice to consider all seven factors systematically when applying the least-harm test. There may be occasions where the “least-harm” alternative can be identified without a systematic review of all seven factors. For example, if there is an overwhelming difference in one area (e.g., Section 4(f) impacts), and it is evident that the alternatives are similar in other regards, it may be possible to identify the least-harm alternative with a brief discussion.
- **Role of Purpose and Need.** The issue of purpose and need is considered in the least-harm test, but in a somewhat different way than in the assessment of “feasible and prudent” avoidance alternatives. One of the factors considered in the least-harm test is “the degree to which each alternative meets the purpose and need for the project.” See 23 C.F.R. 774.3(c)(1)(v). This standard focuses on the *degree to which* an alternative meets the purpose and need. Therefore, if an alternative meets the project purpose and need *but to a lesser extent than other alternatives*, that factor can be considered along with others in deciding to eliminate that alternative based on the least-harm test. In addition, make sure your consideration of purpose and need is consistent with the evaluation criteria or performance measures used during the alternatives screening process to assess the ability of alternatives to meet the purpose and need.
- **Scale of “Least-Overall Harm” Analysis.** As with the feasible-and-prudent test, the least-overall harm test can be applied at different scales of alternative selection on a single project:
  - *Individual Section 4(f) properties.* Agencies often need to consider a series of sub-alternatives for minimizing harm to a specific property—for example, a particular park or historic site. This analysis typically will include two or more alignments passing through, around, and in some situations even under or over the property. The least-overall harm test can be applied in choosing among sub-alternatives at this scale.
  - *Project-Wide.* Agencies also need to consider “end to end” alternatives for an entire project. These alternatives may each include impacts to several Section 4(f) properties, even after attempts have been made to avoid and minimize those impacts. The least-harm test also can be applied at this scale.

## **8 | Incorporating “All Possible Planning” to Minimize Harm to Section 4(f) Properties**

### **Key Requirements**

**“All Possible Planning” Generally Means “All Reasonable”.** Section 4(f) requires a finding that the selected alternative include “all possible planning” to minimize harm to Section 4(f) properties. The term “all possible planning” is defined in Section 774.17. The definition is lengthy, but the basic concept is that a project must include documented consideration of all *reasonable* measures identified for minimizing and mitigating impacts to Section 4(f) properties that are used by the project.

**Reasonableness Factors.** The definition of “all possible planning” in Section 774.17 lists factors to consider in determining which minimization and mitigation measures are reasonable:

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.

## **Good Practices**

- **“Minimizing Harm” Can Include Mitigation.** As defined in the Section 4(f) regulations, the term “minimize harm” as used in Section 4(f) includes measures “to minimize harm or mitigate for adverse impacts and effects.” Thus, the concept of “minimizing harm” includes mitigation, in the sense of actions to compensate for impacts, not just measures to reduce impacts of the project itself. It is important to note that there is no requirement to mitigate for parkland at a certain ratio. The concept of “all possible planning” to minimize harm is a broad, inclusive concept that includes both minimization and mitigation, but leaves some flexibility for FHWA and FTA to determine the appropriate combination for each project.
- **Focus on Reasonableness.** The term “all possible planning,” on its own, might seem to imply that measures to minimize or mitigate impacts must be included unless they are literally impossible to implement. This is not FHWA’s and FTA’s interpretation. The regulations instead adopt a reasonableness standard: as defined in Section 774.17, “all possible planning” includes “all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects.” Therefore, practitioners should apply a reasonableness standard when deciding what mitigation measures to include in a project.
- **Incorporating Minimization into All Alternatives.** Measures to minimize harm should be incorporated into alternatives as they are developed, just as avoidance opportunities also should be considered as alternatives are developed. Including appropriate minimization measures into the alternatives will help to ensure that the least-harm comparison is fully informed and even-handed. For example, if two alternatives are being compared to determine which causes the least overall harm, the comparison could be skewed if no efforts had been made to minimize Section 4(f) impacts of one of those alternatives.
- **Ensuring the Preferred Alternative Minimizes Harm.** Once the least-harm analysis has been completed, and a single alternative has been identified as the preferred, the “all possible planning” requirement should be considered again to ensure that the preferred alternative includes “all possible planning” to minimize harm to each Section 4(f) property that is used by the project. The requirement to incorporate “all possible planning” will likely require more definite decisions to be made about minimization and mitigation than would be required by NEPA. FHWA/FTA’s Section 4(f) approval should include a determination that all possible planning to minimize harm has occurred.

## **9 | Using Programmatic Section 4(f) Evaluations**

### **Key Requirements**

**Overview.** Section 774.3(d) of the Section 4(f) regulations describes programmatic evaluations as a “time-saving procedural alternative to preparing individual Section 4(f) evaluations...for certain minor uses of Section 4(f) property.” FHWA has issued programmatic evaluations that apply to five situations: 1) projects that use historic bridges, 2) projects with minor impacts on parks, recreation areas, or refuges, 3) projects with minor impacts on historic sites, 4) projects involving independent walkway or bikeway construction, and 5) projects causing a “net benefit” to a Section 4(f) property. FTA has issued none. FHWA or FTA

may issue additional programmatic evaluations in accordance with Section 774.3(d). The five existing programmatic approvals all remain in effect, and may be used by FHWA as an alternative to making *de minimis* impact determinations.

**Comparison to *De Minimis* Impact Determinations.** In general, programmatic evaluations and *de minimis* impact determinations serve a similar purpose: they each provide a streamlined process for satisfying Section 4(f) when a project has minor impacts on a Section 4(f) property and the officials with jurisdiction agree with the proposed use and any mitigation. However, there are some importance differences. Most importantly, the programmatic evaluations (with one exception) require a finding that there is no feasible and prudent avoidance alternative and that the project includes all possible planning to minimize harm.<sup>6</sup> A *de minimis* impact determination does not require these findings; therefore, it often can be approved more quickly. However, there may be situations in which a programmatic evaluation is faster. A case-by-case judgment is needed regarding the appropriate method for achieving compliance with Section 4(f).

**Key Conditions.** A programmatic evaluation defines specific conditions under which FHWA or FTA can determine that there is no feasible and prudent alternative and that the project includes all possible planning to minimize harm. As stated in the FHWA Policy Paper, “[t]hese conditions relate to the type of project, the severity of impacts to 4(f) property, the evaluation of alternatives, the establishment of a procedure for minimizing harm to the 4(f) property, adequate coordination with appropriate entities, and the NEPA class of action.”

**Initial Issuance.** Before a programmatic evaluation is initially issued by FHWA or FTA, a draft must be reviewed by FHWA’s or FTA’s Office of Chief Counsel for legal sufficiency as well as the FHWA Headquarters Office or FTA Headquarters Office, which will coordinate with the Department of Interior and other agencies, as necessary. The proposed programmatic evaluation is then published in the Federal Register and comments are solicited. After comments are reviewed, a final version of the programmatic evaluation is published in the Federal Register.

**Application to Individual Projects.** Once a programmatic evaluation has been issued, each FHWA Division Office or FTA Regional Office can determine on its own whether to apply the programmatic evaluation to an individual project that satisfies the conditions for that programmatic evaluation. It is not necessary to obtain headquarters approval or legal sufficiency review each time a programmatic evaluation is applied. Therefore, as a practical matter, the programmatic evaluations enable FHWA Division Offices or FTA Regional Offices to approve the use of Section 4(f) properties without the need for the same level of process that is required for an individual Section 4(f) evaluation. The time savings for a particular project will vary depending on which programmatic evaluation is being applied to the project.

**Documentation.** The Section 4(f) Policy Paper requires the FHWA Division Offices to ensure that the project file contains adequate documentation supporting any findings made under a programmatic evaluation. For example, if FHWA is determining that a project meets the conditions for the historic bridges programmatic evaluation, the record should show that FHWA has made each of the findings required in that programmatic evaluation, and the findings must be supported with appropriate documentation in the record. FTA currently has not issued any programmatic evaluations. If FTA develops programmatic Section 4(f) evaluations in the future, the FTA Regional Offices would have the same documentation responsibilities.

## ***Good Practices***

**Deciding on Programmatic vs. *De minimis*.** Consider the possibility of making a *de minimis* impact determination rather than applying a programmatic evaluation. In general, if impacts are small enough to qualify for a programmatic evaluation, there is a good chance that a *de minimis* impact determination can be made. The *de minimis* impact determination usually requires less documentation because it does not involve an analysis of avoidance alternatives and does not require a finding that there are no feasible and prudent alternatives.

**Meeting Avoidance Requirements.** Remember that a programmatic evaluation does not exempt a project from Section 4(f), nor does it eliminate the need for an avoidance analysis and incorporation of all reasonable measures to minimize harm. The programmatic evaluation just defines the types of avoidance alternatives and minimization measures that typically need to be

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<sup>6</sup> Four of the five programmatic Section 4(f) evaluations require consideration of avoidance alternatives. These are the evaluations for: 1) Historic Bridges; 2) Minor Involvements with Historic Sites; 3) Minor Involvements with Parks, Recreation Areas, and Waterfowl and Wildlife Refuges; and 4) Net Benefits to a Section 4(f) Property. The only programmatic evaluation that does not require consideration of avoidance alternatives is the one for Independent Walkway and Bikeway Construction Projects.

considered for a specific type of project. For example, with a project that involves replacement of a historic bridge, the agency still must demonstrate that there are no feasible and prudent alternatives that avoid the need to replace the historic bridge.<sup>7</sup>

**Ensuring Legal Sufficiency.** A legal sufficiency review is not required to apply a programmatic evaluation to a project, which is one of the reasons that they usually can be completed faster than an individual Section 4(f) evaluation. Nonetheless, they do involve the same basic legal standards—and the same potential for legal challenge—that exist with an individual Section 4(f) evaluation. Even if a programmatic evaluation applies, practitioners should make sure to include thorough documentation.

## 10 | Coordination and Concurrence

### Key Requirements

**“Officials with Jurisdiction”.** Section 774.17 defines the term “officials with jurisdiction.” In general, the official with jurisdiction over historic resources is the State Historic Preservation Officer (SHPO). Where project impacts may occur on tribal land, the official with jurisdiction is the Tribal Historic Preservation Officer (THPO) or designated tribal representative. In some cases, the Advisory Council on Historic Preservation (ACHP), and the National Park Service may have also have a role in the process. For parks, recreation areas, and refuges, the official with jurisdiction is typically the agency that owns and administers that resource—for example, the U.S. Fish and Wildlife Service in the case of a wildlife refuge, or the National Park Service in the case of a national park. In some cases, there may be two or more agencies that share jurisdiction over a park or other resource. For further information, see the definition of this term in 23 C.F.R. § 774.17.

**Coordination and Concurrence Requirements.** The Section 4(f) regulations require coordination and/or concurrence with the “officials with jurisdiction” in a variety of circumstances. The specific requirements depend on the Section 4(f) findings that are being made. For ease of reference, these requirements are summarized in Appendix C to this Handbook.

**Review by U.S. Department of the Interior.** The Section 4(f) regulations require a draft Section 4(f) evaluation to be provided to the U.S. DOI (and in some cases other agencies) for at least a 45-day comment period. See 23 C.F.R. § 774.5(a). The U.S. DOI issues its comments through the Office of the Secretary of the Interior. These comments typically are included with a comprehensive U.S. DOI comment letter for a project. The U.S. DOI’s comments are not binding, but generally are given substantial weight by the U.S. DOT in its decision-making. The regulations allow the FHWA or FTA to “assume a lack of objection and proceed with the action” if comments are not received from the U.S. DOI within 15 days after the comment deadline. The U.S. DOI maintains its own Section 4(f) handbook. The U.S. DOI handbook is that agency’s internal guidance and is not binding on FHWA or FTA.<sup>8</sup>

### Good Practices

**Identifying the Officials with Jurisdiction.** When initially evaluating Section 4(f) properties, specifically identify the agency or agencies that are the “officials with jurisdiction” for each resource. Identifying these agencies early in the process will help to avoid later misunderstandings or confusion as to which agencies must be consulted with regard to each Section 4(f) property. If it is unclear which agency or agencies should be considered the “official(s) with jurisdiction,” consult with the FHWA Division Office or FTA Regional Office to resolve this issue.

**Satisfying Coordination and Concurrence Requirements.** Review the coordination and concurrence requirements in Appendix C and make sure they are satisfied at each stage of the Section 4(f) decision-making process. Document that coordination has occurred, by including correspondence, meeting minutes, or other records of the coordination in the project file. It is a good practice to make sure these coordination records include a full date (including the year), and the names and job title of all involved.

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<sup>7</sup> As noted in the preceding footnote, this finding is not required under the programmatic Section 4(f) evaluation for Independent Walkway and Bikeway Construction projects.

<sup>8</sup> U.S. Department of the Interior, “Handbook on Departmental Review of Section 4(f) Evaluations” (Oct. 2003). A link to this document is available on the Center’s web site, <http://environment.transportation.org>, in the Practitioner’s Handbooks section under the “Resource Materials” for this handbook.

**Presuming Lack of Objection.** Maintain accurate records (e.g., delivery receipts) showing when a Section 4(f) evaluation was received by U.S. DOI. Follow up with U.S. DOI as the 45-day comment deadline (or other applicable deadline) is approaching or after it has passed. If comments are not received within 15 days after the deadline, inform U.S. DOI that the agency (FHWA or FTA) has presumed concurrence and decided to proceed with the project. Maintain a record of these communications to show that the requirements of the regulations have been met.

## 11 | Section 4(f) Documentation

### Key Requirements

**“Section 4(f) Evaluation”.** The term “Section 4(f) evaluation” refers to a document “prepared to support the granting of a Section 4(f) approval under Section 774.3(a)”. An approval under Section 774.3(a) is based on a finding that 1) there is no feasible and prudent avoidance alternative and 2) the project includes all possible planning to minimize harm. The term “Section 4(f) evaluation” is *not* used to refer to documents that solely contain 1) a finding that Section 4(f) does not apply, or 2) a *de minimis* impact determination. Thus, a “Section 4(f) evaluation” is a specific type of Section 4(f) document. The regulations do not prescribe a specific format for a Section 4(f) evaluation, but they do require it to include “sufficient supporting documentation” for each finding that it contains. See 23 C.F.R. § 774.7(a), (b).

**Relationship to NEPA Documents.** When an EIS or EA is prepared, the Section 4(f) evaluation should be included in the Draft EIS or the EA. When a CE is prepared, the Section 4(f) evaluation should be included in a separate document. See 23 C.F.R. § 774.7(f). The Section 4(f) approval is issued after FHWA or FTA has considered any comments on the Section 4(f) evaluation. The Section 4(f) approval is typically included in the NEPA decision document (ROD, FONSI, or CE). When an EIS is prepared, the regulations also provide the option of including the Section 4(f) approval in the Final EIS (instead of the ROD), but when that is done, the basis for that approval still must be summarized in the ROD. 23 C.F.R. § 774.9(b). If new Section 4(f) issues arise after the NEPA approval has been granted, a “separate Section 4(f) evaluation” can be prepared. Preparation of a separate Section 4(f) evaluation does not necessarily require supplementation of a previously completed NEPA document. See 23 C.F.R. § 774.9(c), (d).

**Legal Sufficiency Reviews.** Legal sufficiency review is required for all Section 4(f) evaluations (as defined above). See 23 C.F.R. § 774.7(d). Legal sufficiency review is not required when a Section 4(f) use is being approved based solely on *de minimis* impact determinations, nor is it required for situations where a programmatic evaluation is being applied, or where the agency has determined that Section 4(f) does not apply. FHWA or FTA may choose, at their discretion, to conduct a legal sufficiency review for any project.

### Good Practices

**Documenting Applicability Determinations.** Whether or not a Section 4(f) approval is proposed, the project record should document any investigations that have been completed to identify and assess potential Section 4(f) properties. Specifically, the NEPA document or another report in the project record should identify 1) the area investigated for potential Section 4(f) properties, 2) resources evaluated to assess the applicability of Section 4(f), and 3) findings regarding applicability or non-applicability of Section 4(f) to those resources.

**Describing Section 4(f) Properties.** Include a description of each Section 4(f) property in the study area, with mapping and/or photographs for each. When a use is proposed, or a constructive use is being evaluated, include a thorough description of the “activities, features, or attributes” that make the property eligible for protection under Section 4(f). If the Section 4(f) property is located within the boundaries of a historic district, distinguish between contributing and non-contributing properties.

**Considering Avoidance Alternatives.** Document each of the avoidance alternatives that was considered when preparing an individual Section 4(f) evaluation, including those considered and dismissed in the alternatives screening process. If a potential avoidance alternative does not fully avoid all Section 4(f) properties, consider ways to modify that alternative to achieve complete avoidance. Seemingly extreme changes, such as tunneling or major re-routing, may be appropriate to consider. Include maps or other visual aids to depict, at least in general terms, the locations of the avoidance alternatives that have been considered.

**Demonstrating Consideration of Relevant Criteria.** The Section 4(f) regulations list specific criteria to consider in making findings regarding the prudence and feasibility of avoidance alternatives, the alternative that causes least overall harm, and the inclusion of all possible planning to minimize harm. When making any of these findings, closely follow the criteria specified in the regulations. Include specific cross-references to the criteria to demonstrate that the required criteria have been considered.

**Making Constructive Use Findings.** It is a good practice to document consideration of the potential constructive uses, so it is clear that this issue has not been overlooked. In some cases, this issue can be addressed very simply, but in other cases, more extensive analysis may be needed. For example, if a project results in an “adverse effect” on a historic site (as determined in Section 106 consultation), it may be necessary to analyze the potential for a constructive use. For some projects, there are numerous adverse-effect findings, so the analysis of constructive use may be lengthy. These findings can be included in an appendix and summarized in the main Section 4(f) document. In all cases, findings regarding the potential for a constructive use should carefully track the procedures and criteria in Section 774.15 of the Section 4(f) regulations and must be coordinated with FHWA or FTA headquarters.

**Tracking Commitments.** Develop a commitments tracking checklist, database, or other method to ensure that the commitments made in the Section 4(f) approval are followed during construction. For example, it is important to ensure that design plans specifically identify the location of any resources (e.g., historic sites) that must be avoided during construction. Other steps to ensure compliance with commitments could include: designating an environmental monitor, conducting training programs for construction contractors, and maintaining ongoing coordination with officials with jurisdiction over the Section 4(f) properties. Also consider adopting procedures to ensure that the Section 4(f) properties continue to be protected during maintenance and operations, after construction has been completed.

**Title Page/Cover.** Include the words “Section 4(f) Evaluation” and a citation to the Section 4(f) statute on the title page and cover of the NEPA document when the document includes an individual Section 4(f) evaluation, *de minimis* impact determinations, and/or a finding that a programmatic evaluation is applicable.

## Appendix A—Text of Section 4(f)

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49 U.S.C. § 303

### § 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

- a) It is the policy of the United States Government 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.
- b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.
- c) Approval of programs and projects. Subject to subsection (d), the Secretary may approve a transportation program or project requiring the use (other than any project for a park road or parkway under section 204 of title 23) of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of a historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—
  - 1) there is no feasible and prudent alternative to using that land; and
  - 2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.
- d) *De minimis* impacts.
  - 1) Requirements.
    - A) Requirements for historic sites. The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph 2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a *de minimis* impact on the area.
    - B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges. The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph 3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a *de minimis* impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph 3) shall not include an alternatives analysis.
    - C) Criteria. In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.
  - 2) Historic sites. With respect to historic sites, the Secretary may make a finding of *de minimis* impact only if—
    - A) the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that—
      - i) the transportation program or project will have no adverse effect on the historic site; or
      - ii) there will be no historic properties affected by the transportation program or project;
    - B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and
    - C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).
  - 3) Parks, recreation areas, and wildlife or waterfowl refuges. With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of *de minimis* impact only if—
    - A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and
    - B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

## Appendix B—Special Rules and Exceptions for Section 4(f) Applicability Findings

PROPERTY TYPE OR CIRCUMSTANCE	FHWA/FTA 4(f) Regulations (March 2008)	FHWA 4(f) Policy Paper (March 2005)
Historic bridges and roads, and other historic transportation facilities (e.g., train stations)	774.13(a)	Question 4
Interstate highways (subject to legislative exemption)	774.11(e)(2)	
Archeological resources	774.11(f), 774.13(b)	Question 5
Public “multiple-use” lands (e.g., national forests)	774.11(d)	Question 6
Late-designated resources	774.13(c)	Question 7
Rivers designated under Wild and Scenic Rivers Act	774.11(g)	Question 8
Fairgrounds		Question 9
School playgrounds		Question 10
Golf courses		Question 11
Bodies of water (lakes, rivers, etc.)		Question 12
Facilities that require user fees		Question 13
Trails, bikeways, paths, sidewalks	774.13(f)	Question 14, 15
Parks jointly developed with highways	774.11(i)	Question 16
Future parks		Question 17
Parks temporarily occupying property that is formally reserved as transportation right-of-way	774.11(h)	Question 18
Projects tunneling under or built over (e.g., bridging) Section 4(f) properties		Question 19, 21
Public lands that function as refuges, but are not designated as such		Question 20-A
Private lands subject to conservation easements		Question 20-B
Non-transportation use of a 4(f) property—e.g., constructing recreational facility in a park		Question 22
Scenic byways		Question 23
“Transportation Enhancement” projects	774.13(g)	Question 24
Museums, aquariums, and zoos		Question 25
Tribal lands, Indian reservations, and traditional cultural properties		Question 26, 27
Cemeteries		Question 28
Temporary occupancies that do not result in “use”	774.13(d)	

### Coordination Requirements

The Section 4(f) regulations require coordination with the official(s) with jurisdiction at the following points:

- Prior to making Section 4(f) approvals under paragraphs 774.3(a) and 774.5(a);
- When determining the least overall harm under paragraph 774.3(c);
- When applying certain programmatic Section 4(f) evaluations under paragraph 774.5(c);
- When applying Section 4(f) to properties subject to Federal encumbrances under paragraph 774.5(d);
- When applying Section 4(f) to archeological sites discovered during construction under paragraph 774.9(e);
- When determining if a Section 4(f) property is significant under paragraph 774.11(c);
- When determining the application of Section 4(f) to multiple use properties under paragraph 774.11(d);
- When determining the applicability of Section 4(f) to historic sites under paragraph 774.11(e);
- When determining if there is a constructive use under paragraph 774.15(d);
- When determining if proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built under paragraph 774.15(f)(6); and
- When evaluating the reasonableness of measure to minimize harm under paragraph 774.3(a)(2) and Section 774.17.

### Concurrence Requirements

The Section 4(f) regulations require the concurrence of the official(s) with jurisdiction at the following points:

- When finding that there are no adverse effects prior to making *de minimis* impact determinations under paragraph 774.5(b);
- When applying the exception for restoration, rehabilitation, or maintenance of historic transportation facilities under paragraph 774.13(a);
- When applying the exception for archeological sites of minimal value for preservation in place under paragraph 774.13(b); (Note: the regulations do not actually require concurrence; they require that the official(s) with jurisdiction “have been consulted and have not objected” to this finding).
- When applying the exception for temporary occupancies under paragraph 774.13(d); and
- When applying the exception for transportation enhancement projects and mitigation activities under paragraph 774.13(g).

Source: Preamble to final Section 4(f) regulations, 73 Fed. Reg. 13,393 (March 12, 2008).

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## Reference Materials

Statutes, regulations, and guidance documents cited in this Handbook, along with additional materials and sample documents, are available on the Center for Environmental Excellence by AASHTO web site: <http://environment.transportation.org>.

The Center for Environmental Excellence's Technical Experts are available to provide strategic environmental and focused environmental management technical advice. For more information on the Center Technical Assistance Program (CTAP), please visit: [http://environment.transportation.org/center/tech\\_experts](http://environment.transportation.org/center/tech_experts).

## ADDITIONAL RESOURCES

PRACTITIONER'S HANDBOOKS AVAILABLE FROM THE CENTER FOR ENVIRONMENTAL EXCELLENCE BY AASHTO:

- 01 Maintaining a Project File and Preparing an Administrative Record for a NEPA Study
- 02 Responding to Comments on an Environmental Impact Statement
- 03 Managing the NEPA Process for Toll Lanes and Toll Roads
- 04 Tracking Compliance with Environmental Commitments/Use of Environmental Monitors
- 05 Utilizing Community Advisory Committees for NEPA Studies
- 06 Consulting Under Section 106 of the National Historic Preservation Act
- 07 Defining the Purpose and Need and Determining the Range of Alternatives for Transportation Projects
- 08 Developing and Implementing an Environmental Management System in a State Department of Transportation
- 09 Using the SAFETEA-LU Environmental Review Process (23 U.S.C. § 139)
- 10 Using the Transportation Planning Process to Support the NEPA Process
- 11 Complying with Section 4(f) of the U.S. DOT Act

For additional Practitioner's Handbooks, please visit the Center for Environmental Excellence by AASHTO web site at: <http://environment.transportation.org>

Comments on the Practitioner's Handbooks may be submitted to:  
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