

Live Webinar: Practical Tips on Compliance with Section 4(f)

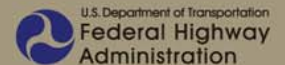
March 23, 2010
1:00pm to 2:30pm EDT



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- **Section 4(f)**
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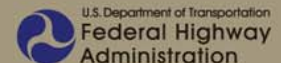
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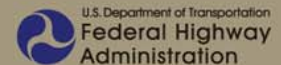
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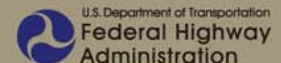
Section 4(f) Handbook

- Published in May 2009
- Advisory Group included:
 - Lamar Smith - FHWA
 - Dave Gamble - FHWA
 - Diane Mobley - FHWA
 - Mary Ann Naber - FHWA
 - Owen Lindauer - FHWA
 - Joe Ossi - FTA
 - Liz Zelasko - FTA
 - Tim Hill – Ohio DOT
 - Gail D'Avino – Georgia DOT
 - Carol Legard - ACHP



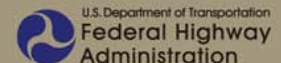
Today's Webinar

- Presentation: "Practical Tips for Compliance with Section 4(f)"
 - Bill Malley, Perkins Coie LLP
- Section 4(f) Q&A Session with FHWA
 - Moderator: Bill Malley
 - FHWA Panelists:
 - Dave Gamble, FHWA Resource Center
 - Lamar Smith, FHWA Resource Center
 - Diane Mobley, FHWA Chief Counsel's Office



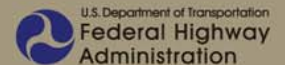
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Presentation: Practical Tips on Compliance with Section 4(f)

Bill Malley
PERKINS COIE LLP

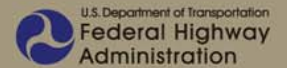


What this presentation covers

- Basics of Section 4(f)
 - A quick review ...
- Key Terms and Concepts
 - Delve into the regulations, with an emphasis on post-SAFETEA-LU changes.
- Practical Tips
 - Specific suggestions for ways to improve 4(f) documentation and decision-making



Basics of Section 4(f)



Laws, Regulations, Guidance

Statute
49 U.S.C. 303

- Amended in August 2005 by SAFETEA-LU
- Applies to all USDOT agencies

Regulations
23 C.F.R. 774

- Issued in March 2008
- Applies to FHWA and FTA

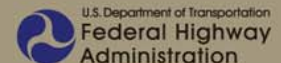
Section 4(f)
Policy Paper

- Issued in March 2005 (pre-SAFETEA-LU)
- Applies to FHWA

Programmatic
4(f) Evaluations

- Five programmatic evaluations
- First issued in 1977; most recent in March 2005
- Apply only to FHWA actions

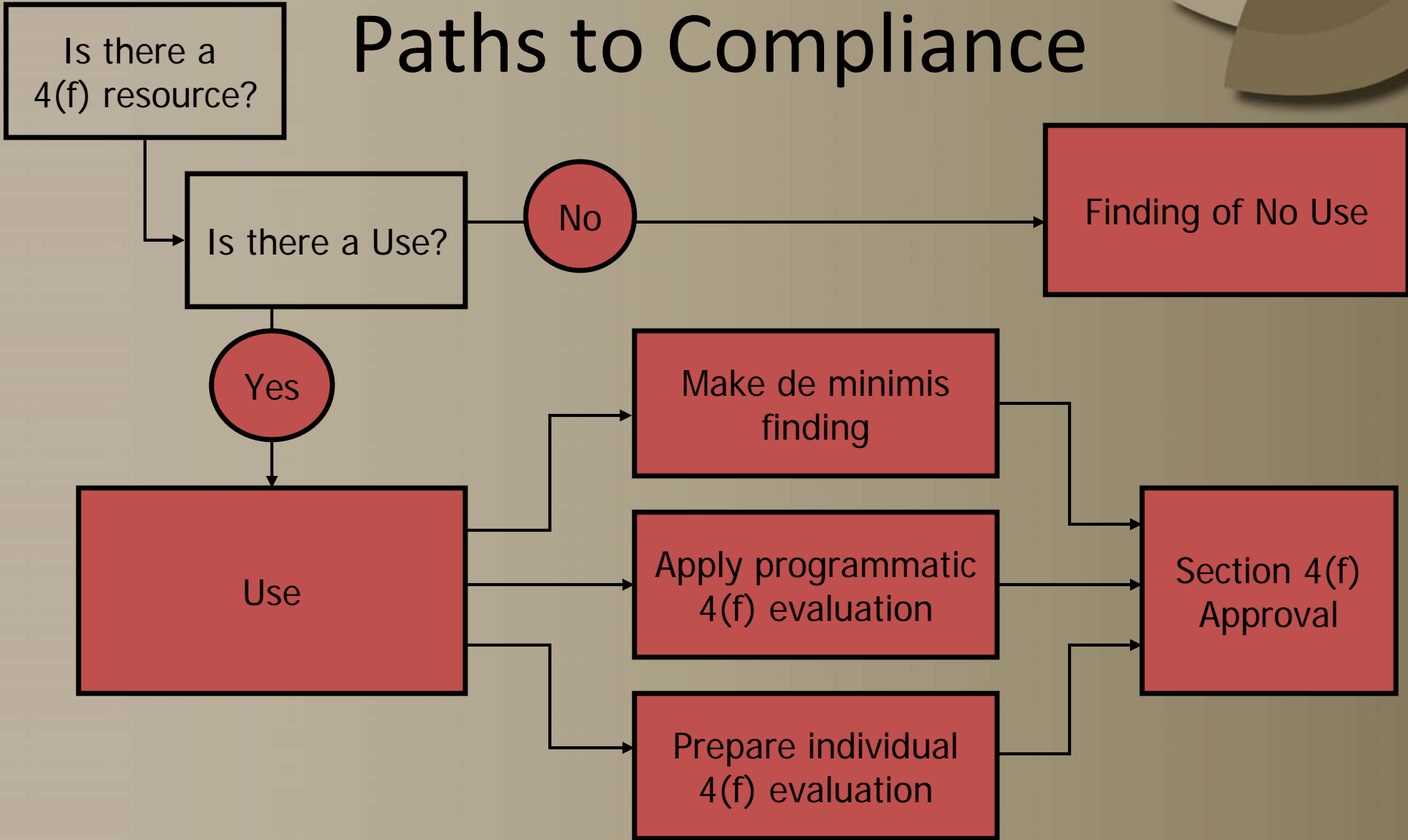
For copies of these documents, see the FHWA 4(f) website:
<http://www.environment.fhwa.dot.gov/4f/index.asp>



Section 4(f) in a Nutshell

- 49 USC 303(c):
 - Prohibits USDOT from approving the "use" of a 4(f) property for a transportation project unless USDOT makes a finding that:
 - There is no "feasible and prudent" alternative that avoids the use of 4(f) properties.
 - The project includes "all possible planning" to minimize harm to 4(f) properties.
- 49 USC 303(d):
 - Allows USDOT to approve the use of a 4(f) property by finding that the use will have "de minimis impact"
 - Includes slightly different requirements for:
 - Parks, recreation areas, refuges
 - Historic sites

Paths to Compliance



Section 4(f)

Key Terms and Concepts

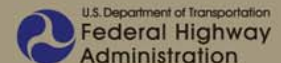


Key Terms and Concepts

- "Section 4(f) property"
- "Use" (including direct, temporary, constructive)
- "De minimis impact"
- "Section 4(f) evaluation"
- "Avoidance alternative"
- "Feasible and prudent"
- "Least-harm analysis"
- "All possible planning to minimize harm"
- "Programmatic 4(f) evaluation"

"Section 4(f) Property"

- **Parks, Recreation Areas, Refuges**
 - Must be "publicly owned" (could be an easement)
 - Must be "open to the public" (except refuges)
 - Must be "significant" (which is presumed)
- **Historic Sites**
 - May be publicly or privately owned
 - Must be "significant"
 - Significant means any site listed in, or eligible for, the National Register of Historic Places



"Use"

- **"Permanent incorporation of land"**
 - Permanent direct impact – a physical taking of land within boundary of 4(f) property.
- **"Temporary occupancy"**
 - Direct impacts that occur only during construction and do not result in permanent adverse impacts
- **"Constructive use"**
 - Noise, visual, or atmospheric impacts, if severe enough to result in "substantial impairment" of the protected attributes of the resource

"De Minimis Impact"

- **New method for approving a "use".**
 - Authorized in 2005 amendments to Section 4(f)
 - Does not require analysis of avoidance alternatives
 - Implemented in guidance and now in regulations
- ***De minimis* finding can be made if:**
 - The use would have "no adverse effect" on protected attributes of 4(f) property, and:
 - For historic sites – SHPO concurs, within 106 process
 - For parks, etc – official with jurisdiction concurs, after an opportunity for public review and comment

From 23 CFR Part 774.17:

De minimis impact.

(1) For **historic sites**, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have **“no adverse effect”** on the historic property in question.

(2) For **parks, recreation areas, and wildlife and waterfowl refuges**, a *de minimis* impact is one that **will not adversely affect** the features, attributes, or activities qualifying the property for protection under Section 4(f).



"De Minimis Impact"

- **A de minimis impact is one type of use**
 - It's a use, just a really small one.
 - It requires a 4(f) approval.
- **If a use is *not* de minimis, what do you call it?**
 - No term for this in the regulations
 - Some terms that have been used:
 - "Non-de minimis use"
 - "Greater than de minimis use"

"De Minimis Impact"

- A de minimis impact finding can be made for a temporary occupancy.
 - 23 CFR 774.13(f) – temporary occupancy is *not a use* if five criteria are met.
 - But what if those criteria are not met?
 - Temporary occupancy is a use.
 - But that use could be de minimis.
 - See FHWA/FTA De Minimis Guidance, 12/13/05



"De Minimis Impact"

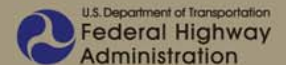
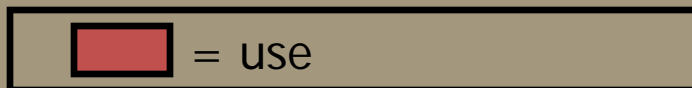
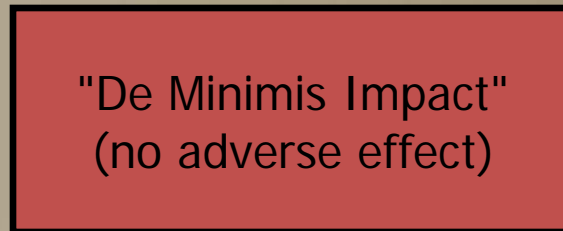
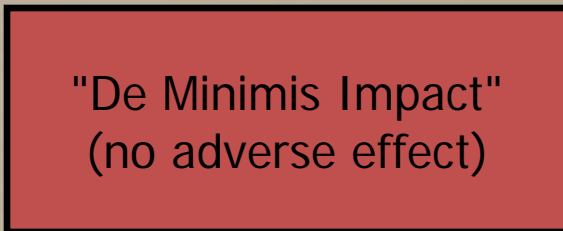
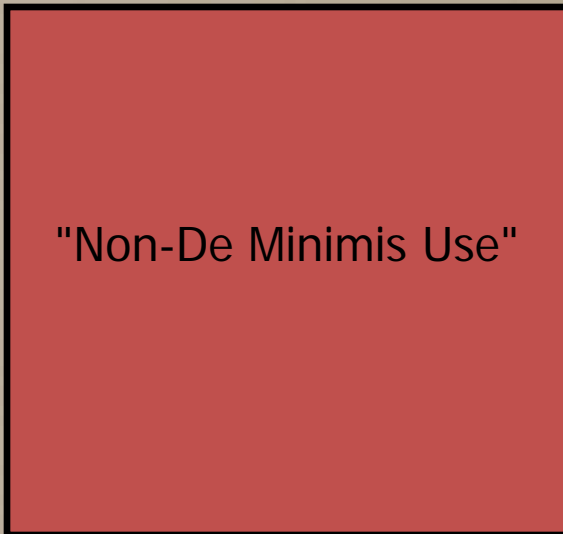
- A de minimis impact finding cannot be made for a constructive use.
 - By definition, a constructive use involves a "substantial impairment"
 - Substantial impairment ≠ de minimis.
 - Therefore, de minimis finding cannot be made for a constructive use.
 - See FHWA/FTA De Minimis Guidance, 12/13/05

The Universe of Uses

Permanent Incorporation
of Land

Temporary Occupancy

Constructive Use



"Section 4(f) Evaluation"

- **Individual Section 4(f) evaluation**
 - An analysis prepared as the basis for approving a *non-de minimis* use of a 4(f) property.
 - Must include:
 - No prudent and feasible avoidance alternative
 - Least-harm analysis
 - All possible planning to minimize harm

"Avoidance Alternative"

- **"Avoidance" means total avoidance.**
 - Alternative that avoids one 4(f) property, but uses another, is not an avoidance alternative.
 - Example:
 - Route A uses a historic farm.
 - Route B avoids the historic farm, but uses a park.
 - *Route B is not a "avoidance alternative" as that term is used in FHWA/FTA's Section 4(f) regulations.*

"Feasible and Prudent"

- **Defined by Supreme Court in *Overton Park*:**
 - **Feasible:** can be built as a matter of sound engineering
 - **Prudent:** does not have costs or impacts of "extraordinary magnitude"
- **FHWA/FTA interpretation:**
 - Can consider multiple factors when evaluating prudence
 - Note: The 2008 regulations are more specific than 2005 policy paper.



FHWA 4(f) Policy Paper

An alternative may be rejected as not prudent for any of the following reasons:

1. It does not meet the project purpose and need,
2. It involves extraordinary operational or safety problems,
3. There are unique problems or truly unusual factors present with it,
4. It results in unacceptable and severe adverse social, economic or other environmental impacts,
5. It would cause extraordinary community disruption,
6. It has additional construction costs of an extraordinary magnitude, or

There is an accumulation of factors that collectively, rather than individually, have adverse impacts that present unique problems or reach extraordinary magnitudes.



FHWA/FTA 4(f) Regulations

From 23 C.F.R. 774.17:

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.

"Feasible and Prudent"

- **2008 FHWA/FTA Regulations**
 - SAFETEA-LU directed FHWA/FTA to issue regulations clarifying prudent/feasible standard
 - 2008 regulations made two key clarifications:
 - Prudent/feasible standard should be applied only when evaluating "avoidance alternatives"
 - Value of 4(f) resource can be considered when determining whether avoidance is prudent
 - Creates a "sliding scale" for determining prudence



From 23 C.F.R. 774.17:

Feasible and prudent avoidance alternative. (1) A feasible and prudent avoidance alternative **avoids using Section 4(f) property** and does not cause other severe problems of a magnitude that **substantially outweighs the importance of protecting the Section 4(f) property**. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the **relative value of the resource to the preservation purpose of the statute**.



"Least-Harm Analysis"

- Method for selecting among alternatives if there are no prudent and feasible avoidance alternatives.
- **Pre-2008**
 - Lack of clarity in regulations and Policy Paper
 - Common practice: compare harm to 4(f) resources
- **2008 FHWA/FTA Regulations**
 - Requires balancing of multiple factors to determine which alternative causes "least overall harm" - not just to 4(f)
 - Lists specific factors relevant to this determination



From 23 C.F.R. 774.3:

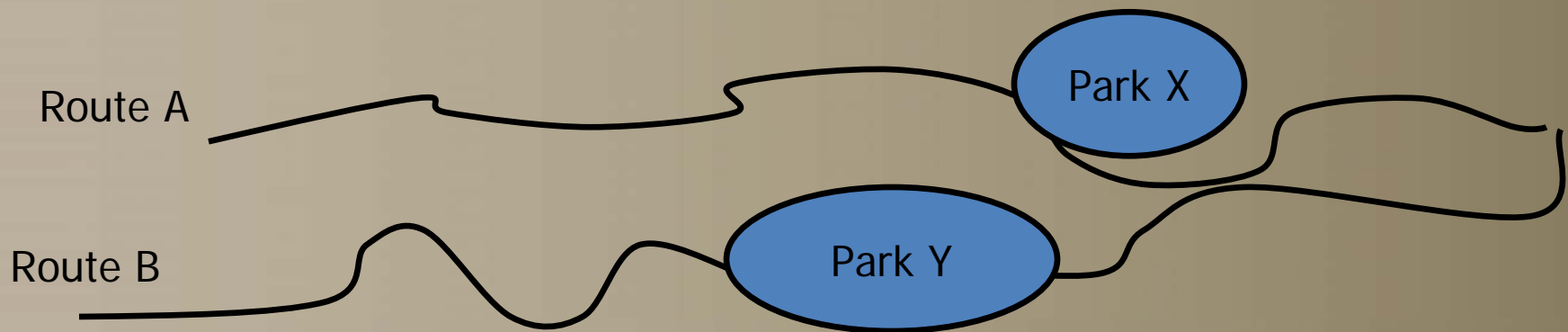
- (c) If ... there is no feasible and prudent avoidance alternative, then the Administration **may approve**, from among the remaining alternatives that use Section 4(f) property, **only the alternative** that:
- (1) Causes the **least overall harm** in light of the statute's preservation purpose. The 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.



"Least-Harm Analysis"

- **Example**

- Route A has only de minimis impacts – e.g., sliver take.
- Route B has non-de minimis impacts.
- Can you select B? If so, how?



"Least-Harm Analysis"

- In this example, your options are:
 - To select Route A, just make a finding of de minimis impact.
 - To select Route B:
 - Consider avoidance alternatives – e.g., a variation of A that does not involve any use of 4(f) property.
 - If there are no feasible and prudent avoidance alternatives, proceed to least-overall-harm test.
 - *Choose between Route A and Route B based on the least-overall harm test.*

"All Possible Planning to Minimize Harm"

- Duty to incorporate minimization and mitigation into project that uses 4(f) property.
- **Pre-2008**
 - Lack of clarity in regulations and Policy Paper about what "all possible" means.
- **2008 FHWA/FTA Regulations**
 - "All possible" means "all reasonable"
 - Cost must be a "reasonable public expenditure"
 - Measures agreed to in Section 106 process "normally" satisfy this requirement for historic sites



From 23 C.F.R. 774.17:

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

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to)

(2) With regard to historic sites, the measures **normally** serve to preserve the historic activities, features, or attributes of the site as agreed ... in accordance with the consultation process under 36 CFR part 800.

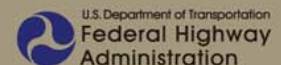
(3) In evaluating the reasonableness of measures to minimize harm ..., the Administration will consider the preservation purpose of the statute and:

(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...; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning **does not require analysis of feasible and prudent avoidance alternatives**, since such analysis will have already occurred ..., or is not necessary in the case of a *de minimis* impact determination under §774.3(b).

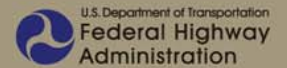


"Programmatic 4(f) Evaluation"

- **A simplified process for projects with minor impacts**
 - Approves a category of uses – e.g., projects with minor impacts on historic bridges
 - Once programmatic is approved, projects covered by it can be approved more quickly.
 - FHWA has issued five programmatic; FTA has none.
 - Including one for projects with "net benefits" to 4(f) resources.
- **Different from De Minimis**
 - Some require an alternatives analysis and finding of no prudent/feasible alternative and all possible planning
 - Only can be used in situations covered by the programmatic; de minimis has broader potential applicability.



Section 4(f) Practical Tips



Practical Tips

- Intended to help you:
 - Streamline compliance
 - Avoid surprises
 - Strengthen your documentation



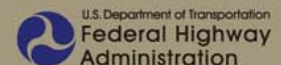
Practical Tips

- Identifying 4(f) Resources
- De Minimis Findings
- Avoidance
- Least Harm
- All Possible Planning
- Section 4(f) Documentation



Identifying 4(f) Resources

- **Scope of investigation**
 - Identify 4(f) resources throughout study area, not just along your alternatives
 - Why is this important?
 - Legal standards hinge on whether an alternative "avoids" all 4(f) resources
 - If you don't know what's out there, how can you know whether an alternative is truly an "avoidance alternative"?



Identifying 4(f) Resources

- **Mapping**

- Create a "Section 4(f) layer" in your GIS mapping
- Not just layers that generally correspond to 4(f) – e.g., "parks" or "public land" or "historic sites"
- Why?
 - Again, the concept of avoidance is central to the regulations, and is interpreted to mean total avoidance
 - Set up your GIS to allow for quick assessment of each alternative's potential impacts to 4(f) resources
 - "Force the issue" within your team – *what's out there, and what are the boundaries?*

Identifying 4(f) Resources

- **Special situations**

- When a question of applicability comes up, ask "*Does the Policy Paper address it*"?
 - See Appendix C to the Handbook for a complete list.
- FHWA's regulations and policy paper address dozens of special situations – e.g., trails, golf courses, school playgrounds, late discovery
- May not give you a definitive answer, but it is the essential starting point.



Identifying 4(f) Resources

- **Section 106 consultation**
 - Front-load Section 106 work to identify and evaluate eligibility of historic properties.
 - Get the information you need for 4(f) analysis
 - Boundaries
 - Significant features, activities, attributes
 - Contributing features in historic districts
 - Think outside the box
 - *"Could this subdivision be considered a historic district?"*
 - *"What's changed since this property was last evaluated?"*

De Minimis Findings

- **Reducing impacts to de minimis level**
 - For each potential use, ask "can we reduce this impact to make it de minimis"?
 - Engage officials with jurisdiction for ideas about how to reach a de minimis finding
 - Remember that *mitigation and enhancement* measures can support a de minimis finding
 - Example: replacement parkland
- **Concurrence letters**
 - Make sure concurrence is truly concurrence; be careful if you're negotiating wording with officials with jurisdiction

Avoidance

- ***Creating avoidance alternatives***
 - "There are no avoidance alternatives"
 - Is that really true?
 - *What would it take to avoid?*
 - Tunnel? Going outside study area?
 - Articulate the alternative, then apply the standard
 - Is it feasible?
 - Is it prudent?
 - If not, why not? Give your reasons.

Avoidance

- **Alternatives screening process**

- *Don't eliminate alternatives that use 4(f) resources just because avoidance alternatives are available.*
- Why?
 - Information available during screening is almost always incomplete. Additional 4(f) resources may be identified.
 - Alternatives that seem to avoid may actually use 4(f) resources, once all 4(f) resources are fully identified
 - The "least overall harm" test may allow you to select an alternative that initially seemed unselectable.

Least-Harm Analysis

- **Determining "least overall harm"**
 - *Apply the seven factors listed in the regulations.*
 - *Include factual support for your findings.*
 - *Cite the regulations.*
- **Revisit, review, update**
 - Remember, it's a *comparative* analysis
 - Be alert for new information that could change the results of your least-harm analysis
 - Example: cost increases for your preferred alternative

All Possible Planning

- **Improving the selected alternative**
 - Just because you've picked the least-harm alternative doesn't necessarily mean you're done.
 - You still have to ensure that it includes all possible planning to minimize harm.
 - Consider each 4(f) resource, and ask: What are we doing to minimize harm to this specific resource?
 - Be clear about your commitments.
 - FHWA is *relying on those commitments* as the basis for demonstrating compliance with 4(f).



Documentation

- **Organization**

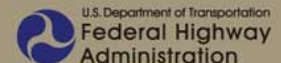
- When you have multiple alternative and multiple 4(f) properties, apply 4(f) standards at two levels:

- **Individual 4(f) property**

- Consider ways to avoid *each* 4(f) property along *each* alternative
- Consider potential for de minimis findings for *each* property
- Consider alternative to minimize harm for *each* property
- Often involves multiple "options" along each alternative

- **Global comparison of alternatives**

- Is there any "end to end" alternative that completely avoids?
- If not, which of them causes "least overall harm"?

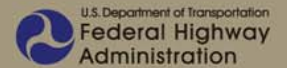


Documentation

- **Readability**

- If it's thorough, it's going to be lengthy.
- It won't be a joy to read, and that's OK.
- Touchstones of good 4(f) documentation:
 - Thoroughness
 - Logical structure
 - Proper use of 4(f) terminology
 - Support for factual assertions
 - Good visuals to complement the text
 - Summary of findings

Questions and Answers



Q&A

- Moderator: Bill Malley
- FHWA Panelists:
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 - Lamar Smith, FHWA Resource Center
 - Diane Mobley, FHWA Chief Counsel's Office
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