

Title: Section 4(f) Evaluations
Date: August 2016
SOP No.: 18
Issued by the Office of Planning and Environment (TPE)

## 1. **Purpose**

This document provides guidance to clarify FTA roles and responsibilities, recommend timing of Section 4(f) processes in conjunction with the National Environmental Policy Act (NEPA), and improve understanding of the Section 4(f) process.

The regulations at 23 CFR part 774 implement 23 U.S.C. § 138 and 49 U.S.C. § 303, which were originally enacted as Section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as “Section 4(f).”

## 2. **Applicability/Scope**

**Project applicability.** Section 4(f) applies to any Department of Transportation (DOT)-funded project regardless of the NEPA class of action (categorical exclusion [CE], environmental assessment [EA], or environmental impact statement [EIS]), or the timing of the discovery of the Section 4(f) property. A Section 4(f) analysis is required for DOT actions undergoing NEPA analysis and documentation if properties protected by Section 4(f) would be ‘used’, as defined in 23 CFR 774.17 (see Section 4.3, below); however, a Section 4(f) analysis may also be required for construction activities post NEPA when there are either late discoveries or late designations of properties protected by Section 4(f) (see 23 CFR 774.9(e) and 11(f) as well as the Federal Highway Administration (FHWA) Policy Paper, Question and Answer 26A and B).

**Properties protected.** Section 4(f) applies to:

- Historic properties that are either listed, or are eligible for listing on, the National Register of Historic Places (NRHP) regardless of ownership, including archaeological sites that are important for preservation in place (Section 4(f) does not apply to archaeological sites that are important for data recovery, whether data recovery is performed or not);
- Significant\* publicly owned parks and recreation areas that are also open to the public; and
- Significant\* publicly owned wildlife or waterfowl refuges whether they are open to the public or not.

*\*Significance for parks, recreation areas, and wildlife/waterfowl refuges is determined by the official with jurisdiction. When the official with jurisdiction determines that a park, recreation area, or wildlife and waterfowl refuge is not significant, FTA reviews the determination for reasonableness per 23 CFR 774.11(c). In the absence of a significance determination by the official with jurisdiction, FTA assumes the resource is significant.*

### **3. Responsibilities**

**FTA responsibilities.** It is solely FTA's responsibility to make Section 4(f) determinations. The FTA Regional Administrator is responsible for making findings under Section 4(f) for projects within that region. FTA regional staff, in consultation with appropriate headquarters staff, is responsible for working with grant applicants to ensure the preparation of legally sufficient Section 4(f) analyses and that the process is properly documented in the environmental project file. FTA regional staff should be familiar with the Section 4(f) regulations at 23 CFR part 774 and the FHWA Section 4(f) Policy Paper.

Where FTA regional staff is considering a constructive use determination, they must consult with headquarters TPE-30 staff prior to publication of a Section 4(f) analysis to ensure consistency across the agency on the constructive use determinations.

Regional Counsel must review all Section 4(f) approvals under §§774.3(a) and 774.3(c) (i.e., use of Section 4(f) properties) for legal sufficiency.

**Grant applicants.** Grant applicants are responsible for preparing Section 4(f) analyses. Grant applicants can conduct most of the local consultation required for a Section 4(f) analysis, such as coordination with local parks departments. But any coordination and findings that can be used in Section 4(f) associated with Federal laws, such as Section 106 of the National Historic Preservation Act (NHPA), or that requires involvement from other Federal agencies, such as use of Federal lands, should be managed by FTA regional staff. FTA regional staff is responsible for ensuring that all documentation of coordination (meeting minutes, correspondence, etc.) is included in the Administrative Record for the project. Grant applicants may not make any Section 4(f) determinations.

Historic properties are treated differently in the Section 4(f) regulations than non-historic properties and the different agency roles and responsibilities for each type of property are discussed below:

#### ***Official(s) with jurisdiction for historic properties:***

**State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officer (THPO).** The SHPO is an official with jurisdiction for Section 4(f) properties that are eligible for or listed on the NRHP except when a Tribal Historic Preservation Officer (THPO) is an official with jurisdiction (see discussion below). The SHPO has no role in making Section 4(f) determinations, and only serves as an official for consultation.

**Tribal Historic Preservation Officer (THPO).** A THPO is an official with jurisdiction for Section 4(f) properties located on tribal lands if the tribe has assumed the responsibilities of the SHPO, as provided for in the NHPA. If the historic property is located on tribal land but the tribe has not assumed the responsibilities of the SHPO, as provided for in the NHPA, then the representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO (See 36 CFR 800.2 and the FHWA Section 4(f) Policy Paper, Question/ Answer 9, Officials with Jurisdiction, Consultation and Decisionmaking to determine when the THPO is considered an official with jurisdiction.). Like the SHPO, the THPO has no role in making Section 4(f) determinations, and only serves as an official for consultation when appropriate, as discussed above.

**Advisory Council on Historic Preservation (ACHP).** When the ACHP is participating in the Section 106 process as a consulting party, the agency is an official with jurisdiction for Section 4(f) properties that

are eligible for, or listed on, the NRHP. Like the SHPO/THPO, the ACHP has no role in making Section 4(f) determinations, and only serves as an official for consultation when serving as an official with jurisdiction (refer to 23 CFR 774.5, 36 CFR 800.2 and the FHWA Section 4(f) Policy Paper, Question/Answer #9 to determine when ACHP is an official for consultation).

**U.S. Department of Interior (DOI).** The Section 4(f) regulations afford the DOI the opportunity to review the Section 4(f) analysis where FTA is likely to issue a Section 4(f) approval (i.e., use of a Section 4(f) property, whether historic property or non-historic property). In addition, the National Park Service (NPS), an agency within the DOI, is an official with jurisdiction for Section 4(f) properties that are also National Historic Landmarks.

***Official(s) with jurisdiction for non-historic properties:***

**For parks, recreation areas and wildlife/waterfowl refuges** that qualify for protection under Section 4(f), FTA must coordinate with the official(s) of the agency or agencies that own or administer the property in question, and with staff who are empowered to represent the agency on matters related to the property. For parks/recreational areas, this will depend on the ownership of the park (e.g., relevant city or county). For wildlife/waterfowl refuge the official with jurisdiction may be the state department of natural resources, U.S. Fish and Wildlife Service, or other public agency.

**For Section 4(f) properties with Federal encumbrances** (e.g., easements or other use restrictions), FTA must coordinate with the appropriate Federal agency to ascertain its position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval. For example, when a project would use land of a national forest that qualifies for Section 4(f) protection, FTA must invite the U.S. Department of Agriculture, U.S. Forest Service to review the Section 4(f) evaluation and inform FTA whether other requirements apply.

#### **4. Standard Procedures**

Please refer to Attachment 1 for an overview of the Section 4(f) process.

While the following information is provided in a series of steps, there may be circumstances where a step-wise procedure is not followed in order to allow flexibility and efficiency in the process. For example, it is recommended that FTA regional staff discuss potential Section 4(f) 'uses' with the project sponsor/grantee and the official(s) with jurisdiction as early in the process as practicable so that avoidance, minimization, and mitigation measures can be incorporated into the project design, which may avoid the 'use' of Section 4(f) resources or may result in a *de minimis* determination. The process is flexible and should be tailored depending on project size and complexity for maximum efficiency while still meeting regulatory requirements.

- 4.1. Identify Section 4(f) properties in the vicinity of the project.** Per 23 CFR 774.9 and the FHWA Section 4(f) Policy Paper, Section 4(f) properties should be identified as early as practicable in the planning and project development process in order that complete avoidance of the protected properties remains a viable option for the project, if possible. Regional FTA staff should double-check information provided by the project sponsor/grantee and their consultants, either through site visits (if feasible), the National Register of Historic Places, state

databases, and other online tools such as NEPA Assist, Google Maps, Google Earth, topographic maps, etc.

The process that FTA routinely follows for Section 106 of the NHPA typically will identify the historic sites that may qualify for Section 4(f) protection (See 36 CFR part 800). Accordingly, that process should be initiated and potentially eligible properties identified early in project planning or development, so that FTA may determine whether Section 4(f) applies and whether feasible and prudent avoidance alternatives may exist (see 23 CFR 774.11(e)).

In identifying Section 4(f) properties other than historic properties, such as parks, recreation areas, and wildlife/waterfowl refuges, staff should be guided by the potential for Section 4(f) uses by the project. This will usually consist of an area directly used by the project and adjacent properties. These properties are often apparent on maps of the proposed project area (online maps, NEPA Assist, Google Earth, topographic map, etc.).

- 4.2. Identify the official(s) with jurisdiction for the Section 4(f) properties.** If there are properties identified that meet the criteria for protection under Section 4(f), FTA regional staff must identify the official(s) with jurisdiction of the resources as defined above. This is necessary for determination of applicability of Section 4(f) per 23 CFR 774.11 as well as for coordination and consultation requirements.

Per the FHWA Section 4(f) Policy Paper regarding Official(s) with Jurisdiction in instances where historic sites are either located within the property boundaries of parks, recreation areas, or wildlife/waterfowl refuges, or when historic sites also function as both a historic site and a public park, recreation area, or wildlife/waterfowl refuge:

“Some public parks, recreation areas, and wildlife and waterfowl refuges are also historic properties either listed or eligible for listing on the NRHP. In other cases, historic sites are located within the property boundaries of public parks, recreation areas, or wildlife and waterfowl refuges. When either of these situations exists and a project alternative proposes the use of land from the historic site there will be more than one official with jurisdiction. For historic sites the SHPO/THPO and ACHP if participating are officials with jurisdiction. Coordination will also be required with the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property, such as commenting on project impacts to the activities, features, or attributes of property and on proposed mitigation measures. For a NHL, the National Park Service is also an official with jurisdiction over that resource.”

- 4.3. Determine whether there is a use of a Section 4(f) property.** FTA regional staff must next determine if there is either a direct (permanent or temporary) or constructive “use” as defined in 23 CFR 774.17.

The question of “use”/applicability is not always immediately clear, especially in cases such as historic districts (see FHWA/FTA Policy Paper Q&A 7C) or multiple use properties such as national forests or wildlife management areas (see Policy Paper Q&A 4), etc. In these instances, the Policy Paper is an excellent resource to help determine the applicability of Section 4(f). Note that the determination as to whether there is a use/Section 4(f) applies (which is the sole responsibility of the FTA) relies on consultation with officials with jurisdiction who determine

significance of resources. The determination may also involve review of management plans or other documentation by FTA Regional Office staff to determine whether there would be a 'use' under Section 4(f).

It is also important during this time to determine the use of archaeological resources and if they warrant preservation in place, as determined by consultation with official(s) with jurisdiction. If the archaeological resource should be preserved in place then this determination should be documented and avoidance alternatives or alternatives to incorporate into the project should be developed.

If FTA determines that the project would not "use" properties protected by Section 4(f), there is no need to issue an official "no use" determination. This determination could be documented in the Administrative Record, and generally should be documented in the environmental document where appropriate. For example, there is no need to document every potential constructive use (per 23 CFR 774.15(c)) and there is no need to document a "no use" determination if there was not an actual potential use of a Section 4(f) property by the FTA action (i.e., there is no need to document every 'park' located a half mile from a proposed project and document the fact that there would be no Section 4(f) "use"). In addition, documentation of these determinations will vary. For CEs at 23 CFR 771.118(c), there is no "environmental document", per se, so if there is a determination of "no use", this could be documented in the project record (Please refer to the relevant SOP for documentation requirements for each type of environmental document).

Where there is a constructive use, which is extremely rare for transit projects, the Section 4(f) evaluation must discuss the impact on the protected property and how the impact substantially impairs the features, attributes, or activities that qualify the resource for Section 4(f) protection. Note that an "adverse effect" under Section 106 for a historic resource does not necessarily mean that there is a "constructive use" under Section 4(f). The adverse effect would have to substantially impair a feature, attribute, or activity of the historic resource that qualified it as eligible for listing on the NRHP to be considered a constructive use. For example, a historic resource that is eligible for the NRHP based on its architecture would not have a constructive use solely due to adverse noise impact.

**4.4. Determine whether the physical incorporation of Section 4(f) land into the transportation project qualifies as a *de minimis* impact.** After considering avoidance, minimization, mitigation, and enhancement measures, and after the required coordination process described in 23 CFR 774.5(b), FTA may determine that a use will result in only a *de minimis* impact to a Section 4(f) resource. *De minimis* is defined in 23 CFR 774.17. Such a finding completes the Section 4(f) process. Documentation of the *de minimis* determination must be included in the project's administrative record and documented in the environmental document, as appropriate.

The definition of *de minimis* impact and the consultation requirements differ between historic sites and parks, recreation, and wildlife/waterfowl refuges. These differences are described in detail in the FTA/FHWA Section 4(f) Policy Paper.

For *de minimis* impact findings for parks, recreation areas, or wildlife/waterfowl refuges, an opportunity for public review and comment concerning the potential effects on the protected features, attributes, or activities of the property must be provided. Per the FHWA Section 4(f) Policy Paper:

“The public involvement requirements associated with specific NEPA document and process will, in most cases, be sufficient to satisfy the public notice and comment requirements for the *de minimis* impact finding (See 23 CFR 774.5(b)(2)).”

In general, the public notice and comment process related to *de minimis* impact findings will be accomplished through the State DOT's approved public involvement process (See 23 CFR 771.111(h)(1)). However, for those actions that do not routinely require public review and comment (e.g., certain categorical exclusions and re-evaluations) but for which a *de minimis* impact finding will be made, a separate public notice and opportunity for review and comment will be necessary. In these cases, appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of the Section 4(f) property, the impacts, and public interest. Possible methods of public involvement are many and include newspaper advertisements, public meetings, public hearings, notices posted on bulletin boards (for properties open to the public), project websites, newsletters, and placement of notices or documents at public libraries. All comments received and responses thereto, should be documented in the same manner that other comments on the proposed action would be incorporated in the project file. Where public involvement was initiated solely for the purpose of a *de minimis* impact finding, responses or replies to the public comments may not be required, depending on the substantive nature of the comments. All comments and responses should be documented, as appropriate, in the project file.”

For *de minimis* findings for historic properties, the public notice and comment required by 36 CFR part 800 is sufficient.

Unlike full Section 4(f) evaluations, coordination with DOI is not required for *de minimis* impact findings.

- 4.5. Determine whether a Section 4(f) exemption applies.** Section 774.13 of Title 23, CFR, describes several exemptions from Section 4(f) approval. In such circumstances, FTA regional staff should coordinate with the project sponsor/grantee to ensure that all appropriate supporting documentation is included in the project administrative record and adequately described in the environmental document (please refer to the relevant SOP for each environmental document type for information on adequacy of documentation for that class of action). This documentation should include items such as letters from the official with jurisdiction or descriptions of why the particular exclusion applies.
- 4.6. Identify whether there are feasible and prudent avoidance alternatives to each use of a Section 4(f) property.** Identify whether there are alternatives to the use of a particular Section 4(f) property that would avoid using any Section 4(f) properties (avoidance alternatives). If a feasible and prudent avoidance alternative (defined at 23 CFR 774.17) exists, it must be chosen over alternative that use Section 4(f) properties.

For any potential avoidance alternative that is rejected because it is not feasible and prudent, documentation must clearly identify the factor(s) in the regulation that make it infeasible or imprudent. In this instance, the evaluation only needs to focus on the factor(s) that make the avoidance alternative infeasible and imprudent, and there is no need to discuss all factors listed in the consideration feasibility and prudence listed in part 774.17. For example, if an avoidance alternative is not feasible and prudent because it results in unacceptable safety or operational problems, then information clearly identifying how that alternative would result in unacceptable safety or operational problems must be included in the evaluation, and there is no need to discuss any of the other factors unless they add to the justification that the alternative would be infeasible or imprudent.

**4.7. If there are no feasible and prudent avoidance alternatives, (1) identify all possible planning to minimize harm and (2) conduct a least overall harm analysis.** Minimization and mitigation should be considered as early in the process as practicable in coordination with the project sponsor/grantee and official(s) with jurisdiction over resources protected by Section 4(f). Regional staff must ensure that the Section 4(f) evaluation describes how the project includes all reasonable measures to minimize harm or mitigate for adverse impacts and effects, according to the requirements found in the definition of ‘all possible planning’ at 23 CFR 774.17.

If no feasible and prudent alternatives exist that would avoid using Section 4(f) properties, the alternative with the least overall harm must be selected. All seven factors in 23 CFR 774.3(c)(1) must be addressed in the determination of the alternative with least overall harm. The FHWA Section 4(f) Policy Paper, section 3.3.3.2, also addresses the analysis of least overall harm including cases where two or more alternatives are substantially equal in the assessment of least overall harm. FTA regional staff should review these resources for development of the least overall harm analysis and documentation.

**4.8. Review by DOI and/or any federal agency with an encumbrance.** The draft document must be sent to the DOI and any entities with jurisdiction over a Section 4(f) resource included in the evaluation, when applicable (Refer to “Section 3, Responsibilities” for a discussion of the agencies that must review the Section 4(f) evaluation as well as the FHWA Section 4(f) Policy Paper, Q/A 9 A-G). DOI is given a 45 calendar-day review period, and other agencies with jurisdiction should be afforded an appropriate time period for review. FTA regional staff shall transmit a letter including a notation of the 45-day review period for the document to DOI and the appropriate review period for any other federal agency with an encumbrance. Per 23 CFR 774.5(a), “If comments are not received within 15 days after the comment deadline, [FTA] may assume a lack of objection and proceed with the action.” The final evaluation shall include a copy of the response(s) received from the other agency/agencies, or note lack of response.

**4.9. Legal sufficiency review.** FTA Regional Counsel should be consulted to determine their preference for review of the Draft Section 4(f) evaluation. However, per 23 CFR 774.7(d), “[FTA] shall review all Section 4(f) approvals under §§774.3(a) and 774.3(c) for legal sufficiency.”

**4.10. Approval of Section 4(f) analysis.** Final approval for evaluations that are integrated in an environmental document will generally occur upon FTA approval of the FTA decision document for that environmental review process – in the record of decision (ROD), finding of no significant

impact (FONSI), or categorical exclusion (CE). However, the regulation at 23 CFR 774.7 does allow for flexibility.

- For Section 4(f) evaluations processed as part of an EIS process, the draft Section 4(f) evaluation is usually included in the draft EIS and the final EIS/ROD contains the final Section 4(f) evaluation. The ROD explicitly makes or confirms the Section 4(f) finding. Attachment 1 shows the timing of Section 4(f) Evaluations with FEIS/ROD.
- For Section 4(f) evaluations processed as part of an EA, the draft Section 4(f) evaluation is usually included in the EA and the FONSI includes the final Section 4(f) evaluation. The FONSI explicitly makes or confirms the Section 4(f) finding.
- For Section 4(f) evaluations in CEs, the approval of any Section 4(f) evaluation is concurrent with the approval of the CE.

**4.11. Programmatic Section 4(f) evaluations.** FTA currently does not have any approved Programmatic Section 4(f) Evaluation processes in place, but will be developing these in the near future, and this SOP will be updated to reflect this as another potential process for establishing compliance with Section 4(f) at that time.

FHWA Section 4(f) Programmatic Evaluations do not apply to FTA.

**4.12. Section 4(f) documentation.** Attachment 2 includes an annotated outline for the Section 4(f) evaluation.

The Section 4(f) evaluation should be integrated into the environmental document, but may be prepared as a stand-alone document if necessary.

- **Incorporation into the environmental document.**
  - The Section 4(f) evaluation should be evaluated independently in the document and be a separate section, chapter, or appendix entitled “Section 4(f) Evaluation” – i.e., it should not be combined with Section 106, Section 6(f), or other parklands analysis, but should be referenced in those chapters, as appropriate.
  - Section 4(f) evaluations that are included in environmental documents are typically incorporated and reviewed internally with the preliminary version of the environmental document.
- **Separate from the environmental document.** There are circumstances when a Section 4(f) evaluation cannot be included in an environmental document and a separate evaluation is required. For example, a separate Section 4(f) evaluation would be done for a project approved as a CE or may be necessary in the event of discovery of a Section 4(f) resource after completion of an environmental document. In these cases, the evaluation should be a stand-alone document that provides enough information about the purpose and need and alternatives analyzed, as appropriate, so that reference to other documents is not required. A separate Section 4(f) evaluation is required when the project is classified as a CE, per 23 CFR 774.7(f), or after the CE, FONSI, or ROD has been processed under the following conditions, per 23 CFR 774.9(c), except as provided in 23 CFR 774.13:



- A proposed modification of the alignment or design would require the use of a Section 4(f) resource; or
- FTA determines that Section 4(f) applies to the use of a property; or
- A proposed modification of the alignment, design, or measure(s) to minimize harm (after the original Section 4(f) approval) would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measure to minimize harm.

Preparation of a separate Section 4(f) evaluation after the CE, FONSI, or FEIS will not necessarily require the preparation of a new or supplemental environmental document. The need for a supplemental environmental document is determined through the re-evaluation process (see SOP No. 17 Re-evaluations and Supplementals). In addition, the separate evaluation does not prevent the granting of new approvals, require the withdrawal of previous approvals, or require the suspension of project activities for any activity not affected by the Section 4(f) evaluation.

For full Section 4(f) evaluations processed separate from environmental documents, the Regional FTA Office reviews the preliminary draft for approval as described above. The draft Section 4(f) evaluation is then forwarded to the U.S. DOI and any entities with jurisdiction over a Section 4(f) resource and circulated to the USDA and/or HUD, as appropriate.

**4.13. Section 4(f) in tiered environmental documents.** When a Tier I EIS is prepared, the detailed information necessary to complete the Section 4(f) evaluation may not be available at that stage in the development of the action. In such cases, an evaluation should be made on the potential impacts that a proposed action will have on Section 4(f) properties and whether those impacts could have a bearing on the decision to be made.


A preliminary determination may be made at this time as to whether there are feasible and prudent alternatives that avoid the use of Section 4(f) properties. This preliminary determination must consider all possible planning to minimize harm to the extent that the level of detail available at the Tier I EIS stage allows. It is recognized that such planning at this stage will normally be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary determination is then incorporated into the Tier I EIS document.

FTA regional staff are responsible for determining whether there is an appropriate level of detail to make a preliminary Section 4(f) determination and how compliance with this regulation can be achieved.

## 5. References

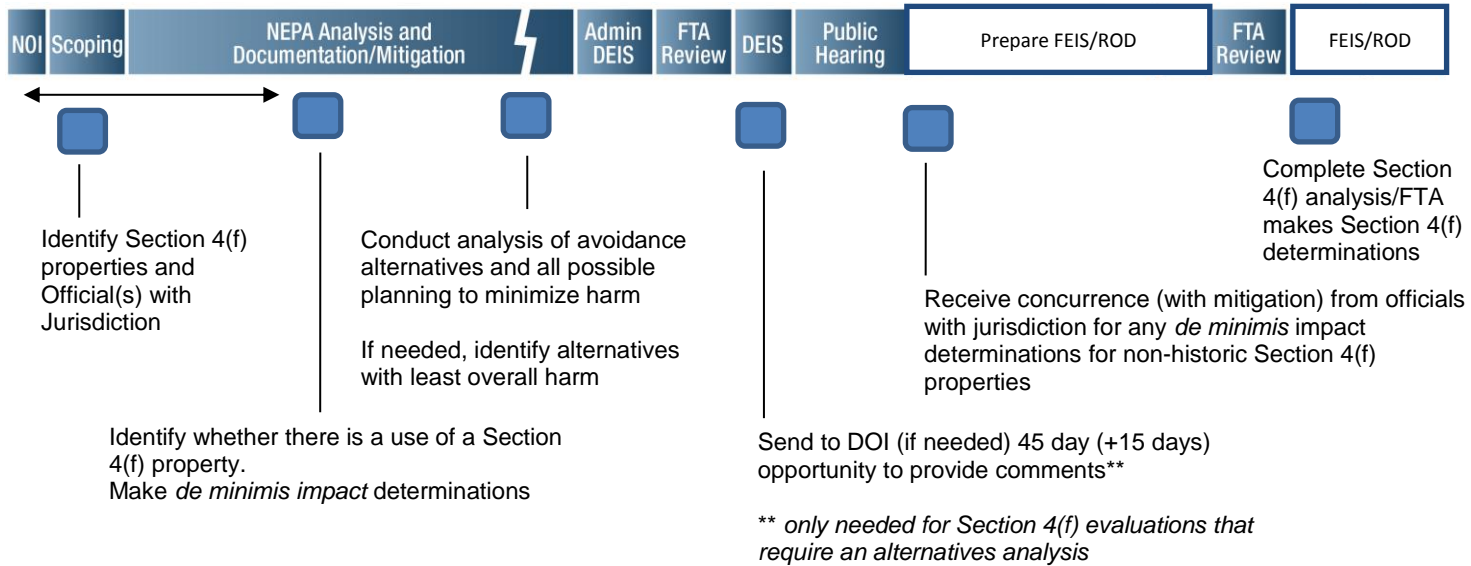
- Section 4(f) regulations, [23 CFR 774](#) (see also Preservation of Parklands, [23 U.S.C. § 138](#) and Policy on Lands, Wildlife and Waterfowl Refuges and Historic Sites, [49 U.S.C. § 303](#))
- [National Historic Preservation Act](#) and Section 106 regulations: [36 CFR part 800](#)
- FTA's Environmental Impact and Related Procedures, [23 CFR part 771](#)
- [FHWA Policy Paper](#) (adopted by FTA per [FTA November 9, 2012 Memo](#))

- SOP No. 17, Re-evaluations and Supplementals

APPROVAL:   
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Christopher S. Van Wyk  
Director, Office of Environmental Programs

DATE: 8/11/2016

**Attachment 1 – Section 4(f) Process**



## Attachment 2 – Section 4(f) annotated outline

[Note: This attachment is a sample annotated outline of how the evaluation could be framed. Notes are included in brackets and bolded smaller font, such as this, throughout this document. Sample language that could be used in the Section 4(f) evaluation is included in *italics*. This outline suggests ways of presenting information, but is not prescriptive. Any format that clearly provides sufficient supporting documentation to demonstrate why there is no feasible and prudent alternative to the use of Section 4(f)-protected properties and summarizes the results of all possible planning to minimize harm to the Section 4(f) property (as required by 23 CFR 774.7) is acceptable. Please also note that not all sections listed below are appropriate for every Section 4(f) evaluation. Only applicable sections should be included in the evaluation (for example, if there is no *de minimis* determination, there is no need for a section discussing *de minimis* and why it is not used on the project.

Please note that, at a minimum, the Section 4(f) evaluation should be its own separate chapter or section of the environmental document if not completed as a separate document. The Section 4(f) evaluation should not be split up to be included in the discussions of the properties protected by Section 4(f). In other words, the Section 4(f) evaluation should not be part of the historic resources chapter/section and the parks and recreation areas chapter/section. The Section 4(f) evaluation should be consolidated and be a separate chapter/section that is a Section 4(f) evaluation of the proposed project.]

## **Chapter X.0 Section 4(f) Evaluation**

[Note: If the Section 4(f) evaluation is included in the environmental document as its own chapter, formatting should be consistent with the rest of the document.]

**SAMPLE TEXT:** *This chapter provides documentation necessary to support determinations required to comply with the provisions of Section 4(f) of the Department of Transportation Act of 1966, as amended (23 CFR 774; codified in 49 U.S.C. 303 and generally referred to as “Section 4(f)”).*

*This Section 4(f) evaluation has been prepared in accordance with the joint FHWA/FTA regulations for Section 4(f) compliance codified in 23 CFR 774. [Note: Describe any additional guidance used in making this determination, such as the Section 4(f) Policy Paper]*

### **X.1 Introduction**

[Note: Very briefly introduce the proposed project in a paragraph or two, and then include a summary of the requirements of Section 4(f) either using the sample text below or similar summary.]

**SAMPLE TEXT:** *The proposed project described in this chapter may receive Federal funding through the Federal Transit Administration and would have a “use” of property protected by Section 4(f) as defined in 23 CFR 774.17 (see X.1(a) below). Therefore, documentation of compliance with Section 4(f) is required. Section 4(f) protects the following properties of national, state, or local significance:*

- *publicly owned, publicly accessible parklands and recreational lands;*
- *public wildlife/waterfowl refuges, regardless of public access; and*
- *historic sites, regardless of public or private ownership.*

*If parks, recreational areas, or refuges are determined not to be properties of national, state, or local significance by the official(s) with jurisdiction, and after review by FTA for reasonableness, then Section 4(f) protection generally does not apply. Absent a determination from the official with jurisdiction regarding the significance of these properties, FTA assumes that they are significant properties and applies the requirements of Section 4(f). Historic sites listed on, or eligible for listing on, the National Register of Historic Places (NRHP) are significant properties for Section 4(f) purposes.*

Section 4(f) specifies that FTA may only approve a transportation project that requires the use land from applicable properties as described above if:

- There is no prudent and feasible alternative to the use of that land and all possible planning to minimize harm due to the use has been included as part of the proposed project, or
- The Administration determines that the use of the property, including any measure(s) to minimize harm, will have a de minimis impact on the property, as defined in 23 CFR 774.17.

### **X.1(a) Section 4(f) “Use” Definitions**

**SAMPLE TEXT:** As defined in 23 CFR 774.17, the “use” of a protected Section 4(f) property occurs when any of the following conditions are met:

*Direct Use* – A direct use of a Section 4(f) property occurs when property is permanently incorporated into a proposed transportation project. This may occur as a result of partial or full acquisition of a fee simple interest, permanent easement, or temporary easement that exceeds regulatory limits.

*Temporary Use* – A temporary use of a Section 4(f) property occurs when there is a temporary occupancy of property that is considered adverse in terms of the preservation purposes of the Section 4(f) statute. A temporary occupancy of property does not constitute a use of a Section 4(f) resource when all of the following conditions are satisfied:

- Duration is less than the time needed for construction of the project and there is no change in ownership of the land;
- The nature and magnitude of the changes to the Section 4(f) property are minimal;
- There are no anticipated permanent adverse physical impacts, nor is there interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis;
- The land being used will be fully returned to a condition at least as good as that which existed prior to the project; and
- There is a documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

*Constructive Use* – A constructive use of a Section 4(f) property occurs when a transportation project does not incorporate land from the resource, but the proximity of the project results in impacts so severe that the protected activities, features, or attributes that qualify the resource for protection under Section 4(f) are substantially impaired (23 CFR 774.15)(emphasis added).

[Note: Constructive uses are very rare. Adverse Effects under Section 106 do not necessarily constitute a constructive use of a Section 4(f) property. In order for there to be a constructive use, the activity, feature, or attribute that qualifies the property for Section 4(f) protection has to be substantially impaired.]

### **X.1(b) De minimis impacts**

**SAMPLE TEXT:** The requirements of Section 4(f) are satisfied with respect to a Section 4(f) resource if it is determined by the FTA that a transportation project would have only a “de minimis impact” on the Section 4(f) resource. The provision allows avoidance, minimization, mitigation, and enhancement measures to be considered in making the de minimis determination. The official(s) with jurisdiction over the resource must be notified of the Agency’s determination. 23 CFR 774.17 defines a de minimis impact as follows:

- *For parks, recreation areas, and wildlife/waterfowl refuges, a de minimis impact is one that would not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f), and the official with jurisdiction has concurred with this determination after there has been a chance for public review and comment [Note: For parks, recreation areas, and wildlife/waterfowl refuges, public notice and an opportunity for public review and comment concerning the effects on the protected features, attributes, or activities of the property must be provided. After this public review and comment, written concurrence on FTA's de minimis determination is required from the official with jurisdiction.];*
- *For historic sites, de minimis impact means that the FTA has determined, in accordance with 36 CFR part 800, that either no historic property is affected by the project, or the project would have "no adverse effect" on the property in question. The official with jurisdiction must be notified that the FTA intends to make a de minimis finding based on their concurrence with the "no adverse effect" determination under 36 CFR 800. This is usually done in the effect determination letter send to the official with jurisdiction for their concurrence.*

## **X.2 Description of the Project**

[Note: Enter project description here, including description of the Preferred Alternative (if known) and a very brief explanation of Purpose and Need. If the Section 4(f) evaluation is included as a chapter in the environmental document, refer to relevant sections for more detail. If the Section 4(f) evaluation is prepared as a separate document, more detail will be needed here.]

Briefly describe the process by which alternatives were developed, evaluated, and refined to become the preferred alternative (if already determined) under consideration in the environmental document. You may cite the Alternatives section of the document for more detailed description of the alternatives if the Section 4(f) evaluation is included as a chapter in the environmental document. If the Section 4(f) evaluation is prepared as a separate document, more detail will be needed here.]

## **X.3 Description of Section 4(f) Properties**

[Note: Identify historic properties, parklands, and/or other Section 4(f) properties that are within the APE. Describe and graphically represent the APE. Identify these properties as publicly or privately owned, as appropriate. You may briefly summarize the properties here, along with significance of the properties, and reference the relevant sections of the environmental document if the Section 4(f) evaluation is not prepared as a separate document. Include tables, maps, and graphics as necessary or refer to relevant sections of environmental document where these can be found. Include "use" determinations. Generally describe agency consultation and coordination and current document status.]

**SAMPLE TEXT:** *The following sections describe use of Section 4(f) properties. An assessment has been made as to whether any permanent or temporary occupancy of a property would occur and whether the proximity of the Project would cause any effects (such as access disruption, noise, vibration or aesthetic) that would substantially impair the features or attributes that qualify the resource for protection under Section 4(f) and, therefore, constitute a use.*

## **X.4 Use of Section 4(f) Properties**

[Note: Please review 774.11 Applicability and 774.13 Exceptions. These sections review the applicability to various properties and when exceptions might apply. Include some introductory language here that includes a general explanation of any exceptions or applicability provisions that potentially apply to the project, and a statement that the applicability of the provision or exception to particular properties will be discussed in the section with detailed information on each property below.]

## **X.4 (a) Historic Sites**

[Note: This section discusses the historic sites with potential Section 4(f) use. Suggest a table listing each historic Section 4(f) property and use determinations for each property; identification of Section 106 determinations for each historic resource; quantified impacts as appropriate; identification of any de minimis impact determinations and reference to the de minimis section of the evaluation. The following subheadings are suggested as ways to address this information, but are not required or exclusive. Please feel free to present the relevant information in any way that makes it clear to the reader:]

**Sample Table** [Note: This is only a suggestion. Any table that clearly illustrates the alternatives and information to the reader is acceptable]:

<b>Alternative</b>	<b>Section 4(f) Property Name</b>	<b>On/Adjacent to Alignment</b>	<b>Section 106 Effect Determination</b>	<b>Use (None, Direct, Temporary, or Constructive)</b>	<b><i>De minimis</i> (Yes/No)</b>
<b>Alt. A</b>					
(insert as needed)					
<b>Alt. B</b>					
<b>Alt. C</b>					

[Note: Include discussion of the actual use of the Section 4(f) property, including direct, temporary or constructive use determinations. For direct uses, describe the use for each alternative evaluated; for temporary uses, describe why the temporary use does not meet the exemption for temporary occupancy at 774.13(d); for constructive uses, which are extremely rare, the Section 4(f) evaluation must discuss the impact on the protected property and how the impacts substantially impair the features, attributes, or activities that qualify the resource for Section 4(f) protection.]

## **X.4 (b) Parkland, Recreational Areas, and/or Wildlife/Waterfowl Refuges**

[Note: Similar to the Historic Sites section, this section discusses parks, recreational areas, and/or wildlife or waterfowl refuges with potential Section 4(f) use. Describe the properties in detail, including a description of the coordination required for determining significance of the park, recreation area, and/or wildlife or waterfowl refuge per 774.11, and the use determinations for each property (direct, temporary, or constructive).

## **X.5 Alternatives Analysis**

[Note: Discuss feasible and prudent avoidance alternatives. Per the Policy Paper, "Any screening of alternatives that may have occurred during the transportation planning phase may be considered as well. It may be necessary, however, to look for additional alternatives if the planning studies and environmental review process did not identify Section 4(f) properties and take Section 4(f) into account (3.3.3.1)." If Section 4(f) avoidance alternatives were eliminated during the earlier phases of project development for reasons unrelated to Section 4(f) impacts or a failure to meet the project purpose and need, they may need to be reconsidered in the Section 4(f) process. In addition, it is often necessary to develop and analyze new alternatives or new variations of alternatives rejected for non-Section 4(f) reasons during the earlier phases. The information in this section could instead be included in the previous section directly following the description of the use of each resource.]

**Sample Table #2** [Note: another option for a potential table]:

	Alternative	Description	Area of Parkland Taken	Parkland Access Effects	Effects to Historic Resource A	Effects to Historic Resource B	Effects to Historic Resource C
Alternatives with minimum Section 4(f) Impacts (considered but rejected)	A	No Build	None	None	None		
	B	Rehabilitation	None	None	None		
	B Modified	Rehabilitation with modifications	Minor	Vehicular Access Eliminated	Adverse Effects		
	C	Tunnel	None	Vehicular Access Eliminated	Adverse Effect		
	D	New Alignment	None	None	Adverse Effect		
Alternatives considered for further evaluation	E	[Describe]	10.18 Acres	Modified, but Maintained	Adverse Effect		
	F	[Describe]	9.02 Acres	Modified, but Maintained	Adverse Effect		
	G	[Describe]	10.70 Acres	Modified, but Maintained	Adverse Effect		
	G1	[Describe]	9.02 Acres	Modified, but Maintained	Adverse Effect		
	G2	[Describe]	15.37 Acres	Modified, but Maintained	Adverse Effect		

**SAMPLE TEXT:** *The first three rejected alternatives do not meet the project purpose and need. All other alternatives do meet the project purpose and need, but the rejected alternatives have unacceptably high socioeconomic impacts. Additionally, alternative D has life-cycle costs of extraordinary magnitude compared to the alternatives considered for further evaluation.*



## **X.6 Measures to Minimize Harm**

[Note: Include information detailing measures to minimize harm to Section 4(f) properties].

## **X.7 De minimis Impacts**

[Note: Describe each de minimis impact determination, if any, and its status. Document all minimization or enhancement measures. Describe and reference all relevant correspondence (included in an appendix) from officials with jurisdiction/FTA.]

## **X.8 Coordination Activities**

[Note: Describe results of coordination with official(s) with jurisdiction over the Section 4(f) property and with any Federal agencies with jurisdiction over Section 4(f) properties related to this project.]

## **X.9 Least Overall Harm**

[Note: This section will only be included when there are several alternatives that are feasible and prudent that would each use Section 4(f) property but there is no feasible and prudent alternative that avoids the use of all Section 4(f)-protected properties. Often, there is a 'Preferred Alternative' that uses Section 4(f) property with no other feasible and prudent alternatives to avoid the use. In this case, there is no need for the overall least harm discussion.]

**Sample Text:** *Per 23 CFR 774.3(c)(1), in situations where all feasible and prudent alternatives use Section 4(f) properties, the Administration may approve only the alternative that causes the least overall harm in light of the statute's preservation purpose. The Administration determines the least overall harm by balancing the following factors:*

- *The ability to minimize and mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);*
- *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;*
- *The relative significance of each Section 4(f) property;*
- *The views of the official(s) with jurisdiction over each Section 4(f) property;*
- *The degree to which each alternative meets the Purpose and Need for the Project;*
- *After reasonable mitigation, the magnitude of any adverse impacts to properties not protected by Section 4(f); and*
- *Substantial differences in costs among the alternatives (23 CFR 774.3(c)(i)).*

[Note: Include information addressing the balancing of the above factors and how the determination of least overall harm was made.]

**Sample Text:** *Per 23 CFR 774.3(c)(2), the alternative selected must include all possible planning, as defined in 774.17, to minimize harm to Section 4(f) properties. [Note: Include information on all possible planning to minimize harm. There may have been further refinements/revisions after narrowing down alternatives in the least overall harm analysis, in which case you may detail these refinements here or may refer back to relevant section above for minimization discussion]*

**Sample table:** [Note: This is only a suggestion. Any table that clearly illustrates the alternatives and information to the reader is acceptable]:

Alternative	Displacements		Cost (\$M)	Stream Impacts (linear feet or crossings)	Wetland Impacts (acres or number)	Environmental Justice Communities	Uses of Section 4(f) Properties	Protected Species Habitat (acres/linear feet of streams)
	Commercial	Residential						
Alt. A								
Alt. B								
Alt. C								

**X.10 Determination of Section 4(f) Use**

Considering the foregoing discussion of the Project’s potential use of Section 4(f) properties, avoidance alternatives, and measures to minimize harm, there would be a use of [XX] Section 4(f) properties for the Build Alternative; there would be [XX] *de minimis* impacts; there would be an additional [XX] constructive uses; and there would be [XX] temporary uses (Tables [XXX]).

Based on the above considerations, there is no feasible and prudent avoidance alternative to the use of land from [identify the properties] and the [name the alternative] causes the least overall harm given the statute’s preservation purpose. The proposed action includes all possible planning to minimize harm resulting from the use of [name the properties]

**Appendices**

[Note: Include Appendices with relevant information like letters, comments, etc. – either in the appendix of the EA or EIS or appendix to the separate Section 4(f) evaluation, depending on how this is prepared.]