

# Section 4(f) Training



FHWA Washington Division  
WSDOT Environmental Services Office  
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## Section 4(f) Training – FHWA Washington Division

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Section 1

Statutes

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From the U.S. Code Online via GPO Access  
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[Laws in effect as of January 7, 2003]

**49 USC Sec. 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) The Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible 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.

(Pub. L. 97-449, Jan. 12, 1983, 96 Stat. 2419; Pub. L. 100-17, title I, Sec. 133(d), Apr. 2, 1987, 101 Stat. 173.)

From the U.S. Code Online via GPO Access

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[Laws in effect as of January 7, 2003]

### **23 USC Sec 138. Preservation of parklands**

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. 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 the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project (other than any project for a park road or parkway under section 204 of this title) which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.

## Section 2

23 CFR 771.135, Section 4(f) Final Rule

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**§ 771.133**

1506.11) shall be referred to the Administration's headquarters for evaluation and decision after consultation with CEQ.

**§ 771.133 Compliance with other requirements.**

The final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA approval of the appropriate NEPA document will constitute its finding of compliance with the report requirements of 23 U.S.C. 128.

**§ 771.135 Section 4(f) (49 U.S.C. 303).**

(a)(l) The Administration may not approve the use of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site unless a determination is made that:

(i) There is no feasible and prudent alternative to the use of land from the property; and

(ii) The action includes all possible planning to minimize harm to the property resulting from such use.

(2) Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

(b) The Administration will determine the application of section 4(f). Any use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.

(c) Consideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction

over a park, recreation area or refuge determine that the entire site is not significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant. The Administration will review the significance determination to assure its reasonableness.

(d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl purposes. The determination as to which lands so function or are so designated, and the significance of those lands, shall be made by the officials having jurisdiction over the lands. The Administration will review this determination to assure its reasonableness. The determination of significance shall apply to the entire area of such park, recreation, or wildlife and waterfowl refuge sites.

(e) In determining the application of section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on or eligible for the National Register of Historic Places (National Register). The section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of section 4(f) is otherwise appropriate.

(f) The Administration may determine that section 4(f) requirements do not apply to restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, and

(2) The SHPO and the Advisory Council on Historic Preservation (ACHP) have been consulted and have not objected to the Administration finding in paragraph (f)(1) of this section.

(g)(1) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction except as set forth in paragraph (g)(2) of this section. Where section 4(f) applies to archeological sites discovered during construction, the section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

(2) Section 4(f) does not apply to archeological sites where the Administration, after consultation with the SHPO and the ACHP, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the Administration decides, with agreement of the SHPO and, where applicable, the ACHP not to recover the resource.

(h) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites are sometimes made and determinations of significance changed late in the development of a proposed action. With the exception of the treatment of archeological resources in paragraph (g) of this section, the Administration may permit a project to proceed without consideration under section 4(f) if the property interest in the section 4(f) lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by section 4(f) prior to acquisition.

(i) The evaluations of alternatives to avoid the use of section 4(f) land and of possible measures to minimize harm to such lands shall be developed by the applicant in cooperation with the Administration. This information should be presented in the draft EIS, EA, or, for a project classified as a CE in a separate document. The section 4(f) evaluation shall be provided for coordination and comment to the officials hav-

ing jurisdiction over the section 4(f) property and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. A minimum of 45 days shall be established by the Administration for receipt of comments. Uses of section 4(f) land covered by a programmatic section 4(f) evaluation shall be documented and coordinated as specified in the programmatic section 4(f) evaluation.

(j) When adequate support exists for a section 4(f) determination, the discussion in the final EIS, FONSI, or separate section 4(f) evaluation shall specifically address:

(1) The reasons why the alternatives to avoid a section 4(f) property are not feasible and prudent; and

(2) All measures which will be taken to minimize harm to the section 4(f) property.

(k) The final Section 4(f) evaluation will be reviewed for legal sufficiency.

(l) For actions processed with EISs, the Administration will make the section 4(f) approval either in its approval of the final EIS or in the ROD. Where the section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its section 4(f) approval in the ROD. Actions requiring the use of section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notified by the Administration of section 4(f) approval. For these actions, any required section 4(f) approval will be documented separately.

(m) Circulation of a separate section 4(f) evaluation will be required when:

(1) A proposed modification of the alignment or design would require the use of section 4(f) property after the CE, FONSI, draft EIS, or final EIS has been processed;

(2) The Administration determines, after processing the CE, FONSI, draft EIS, or final EIS that section 4(f) applies to a property;

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original section

4(f) approval) would result in a substantial increase in the amount of section 4(f) land used, a substantial increase in the adverse impacts to section 4(f) land, or a substantial reduction in mitigation measures; or

(4) Another agency is the lead agency for the NEPA process, unless another DOT element is preparing the section 4(f) evaluation.

(n) If the Administration determines under § 771.135(m) or otherwise, that section 4(f) is applicable after the CE, FONSI, or final EIS has been processed, the decision to prepare and circulate a section 4(f) evaluation will not necessarily require the preparation of a new or supplemental environmental document. Where a separately circulated section 4(f) evaluation is prepared, such evaluation does not necessarily:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activities; for any activity not affected by the section 4(f) evaluation.

(o) An analysis required by section 4(f) may involve different levels of detail where the section 4(f) involvement is addressed in a tiered EIS.

(1) When the first-tier, broad-scale 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) land 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 locations or alternatives for the action to avoid the use of section 4(f) land. This preliminary determination shall consider all possible planning to minimize harm to the extent that the level of detail available at the first-tier 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 first-tier EIS.

(2) A section 4(f) approval made when additional design details are available will include a determination that:

(i) The preliminary section 4(f) determination made pursuant to paragraph (o)(1) of this section is still valid; and

(ii) The criteria of paragraph (a) of this section have been met.

(p) *Use.* (1) Except as set forth in paragraphs (f), (g)(2), and (h) of this section, “use” (in paragraph (a)(1) of this section) occurs:

(i) When land is permanently incorporated into a transportation facility;

(ii) When there is a temporary occupancy of land that is adverse in terms of the statute’s preservationist purposes as determined by the criteria in paragraph (p)(7) of this section; or

(iii) When there is a constructive use of land.

(2) Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.

(3) The Administration is not required to determine that there is no constructive use. However, such a determination could be made at the discretion of the Administration.

(4) The Administration has reviewed the following situations and determined that a constructive use occurs when:

(i) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a resource protected by section 4(f), such as hearing the performances at an outdoor amphitheater, sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site’s significance, or enjoyment of an urban park where serenity and quiet are significant attributes;

(ii) The proximity of the proposed project substantially impairs esthetic features or attributes of a resource protected by section 4(f), where such features or attributes are considered important contributing elements to the value of the resource. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historic site which derives its value in substantial part due to its setting;

(iii) The project results in a restriction on access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;

(iv) The vibration impact from operation of the project substantially impairs the use of a section 4(f) resource, such as projected vibration levels from a rail transit project that are great enough to affect the structural integrity of a historic building or substantially diminish the utility of the building; or

(v) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes.

(5) The Administration has reviewed the following situations and determined that a constructive use does *not* occur when:

(i) Compliance with the requirements of section 106 of the National Historic Preservation Act and 36 CFR part 800 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register of Historic Places, results in an agreement of “no effect” or “no adverse effect”;

(ii) The projected traffic noise levels of the proposed highway project do not exceed the FHWA noise abatement criteria as contained in Table 1, 23 CFR part 772, or the projected operational noise levels of the proposed transit project do not exceed the noise

impact criteria in the UMTA guidelines;

(iii) The projected noise levels exceed the relevant threshold in paragraph (p)(5)(ii) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(iv) There are proximity impacts to a section 4(f) resource, but a governmental agency’s right-of-way acquisition, an applicant’s adoption of project location, or the Administration approval of a final environmental document, established the location for a proposed transportation project before the designation, establishment, or change in the significance of the resource. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency’s acquisition, adoption, or approval, and except for its age would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register;

(v) There are impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resource are concurrently planned or developed. Examples of such concurrent planning or development include, but are not limited to:

(A) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource, or

(B) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other;

(vi) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a resource for protection under section 4(f);

(vii) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario;

(viii) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or

(ix) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.

(6) When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following:

(i) Identification of the current activities, features, or attributes of a resource qualified for protection under section 4(f) and which may be sensitive to proximity impacts;

(ii) An analysis of the proximity impacts of the proposed project on the section 4(f) resource. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project;

(iii) Consultation, on the above identification and analysis, with the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site.

(7) A temporary occupancy of land is so minimal that it does not constitute a use within the meaning of section 4(f) when the following conditions are satisfied:

(i) 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;

(ii) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the section 4(f) resource are minimal;

(iii) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis;

(iv) The land being used must be fully restored, i.e., the resource must be returned to a condition which is at least

as good as that which existed prior to the project; and

(v) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 56 FR 13279, Apr. 1, 1991; 57 FR 12411, Apr. 10, 1992]

**§ 771.137 International actions.**

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of a foreign nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions which significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration shall coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

**PART 772—PROCEDURES FOR ABATEMENT OF HIGHWAY TRAFFIC NOISE AND CONSTRUCTION NOISE**

- Sec.
- 772.1 Purpose.
- 772.3 Noise standards.
- 772.5 Definitions.
- 772.7 Applicability.
- 772.9 Analysis of traffic noise impacts and abatement measures.
- 772.11 Noise abatement.
- 772.13 Federal participation.
- 772.15 Information for local officials.
- 772.17 Traffic noise prediction.
- 772.19 Construction noise.

TABLE 1 TO PART 772—NOISE ABATEMENT CRITERIA

APPENDIX A TO PART 772—NATIONAL REFERENCE ENERGY MEAN EMISSION LEVELS AS A FUNCTION OF SPEED

AUTHORITY: 23 U.S.C. 109(h), 109(i); 42 U.S.C. 4331, 4332; sec. 339(b), Pub. L. 104-59, 109 Stat. 568, 605; 49 CFR 1.48(b).

SOURCE: 47 FR 29654, July 8, 1982; 47 FR 33956, Aug. 5, 1982, unless otherwise noted.

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## Section 3

Excerpt from Technical Advisory T6640.8A  
Section 4(f) evaluations, format and content

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Excerpt from: <http://environment.fhwa.dot.gov/projdev/impTA6640.htm>

## **NEPA Implementation**

### **GUIDANCE FOR PREPARING AND PROCESSING ENVIRONMENTAL AND SECTION 4(F) DOCUMENTS**

**FHWA TECHNICAL ADVISORY**  
T 6640.8A  
October 30, 1987

## **IX. SECTION 4(f) EVALUATIONS--FORMAT AND CONTENT**

A Section 4(f) evaluation must be prepared for each location within a proposed project before the use of Section 4(f) land is approved (23 CFR 771.135(a)). For projects processed with an EIS or an EA/FONSI, the individual Section 4(f) evaluation should be included as a separate section of the document, and for projects processed as categorical exclusions, as a separate Section 4(f) evaluation document. Pertinent information from various sections of the EIS or EA/FONSI may be summarized in the Section 4(f) evaluation to reduce repetition. Where an issue on constructive use Section 4(f) arises and FHWA decides that Section 4(f) does not apply, the environmental document should contain sufficient analysis and information to demonstrate that the resource(s) is not substantially impaired.

The use of Section 4(f) land may involve concurrent requirements of other Federal agencies. Examples include consistency determinations for the use of public lands managed by the Bureau of Land Management, compatibility determinations for the use of land in the National Wildlife Refuge System and the National Park System, determinations of direct and adverse effects for Wild and Scenic Rivers, and approval of land conversions under Section 6(f) of the Land and Water Conservation Fund Act. The mitigation plan developed for the project should include measures which would satisfy the various requirements. For example, Section 6(f) directs the Department of the Interior (National Park Service) to assure that replacement lands of equal value, location, and usefulness are provided as conditions to approval of land conversions. Therefore, where a Section 6(f) land conversion is proposed for a highway project, replacement land will be necessary. Regardless of the mitigation proposed, the draft and final Section 4(f) evaluations should discuss the results of coordination with the public official having jurisdiction over the Section 4(f) land and document the National Park Service's position on the Section 6(f) land transfer, respectively.

### **A. Draft Section 4(f) Evaluation**

The following format and content are suggested. The listed information should be included in the Section 4(f) evaluation, as applicable.

#### **1. Proposed Action.**

Where a separate Section 4(f) evaluation is prepared, describe the proposed project and explain the purpose and need for the project.

#### **2. Section 4(f) Property.**

Describe each Section 4(f) resource which would be used by any alternative under consideration. The following information should be provided:

- (a) A detailed map or drawing of sufficient scale to identify the relationship of the alternatives to the Section 4(f) property.

(b) Size (acres or square feet) and location (maps or other exhibits such as photographs, sketches, etc.) of the affected Section 4(f) property.

(c) Ownership (city, county, State, etc.) and type of Section 4(f) property (park, recreation, historic, etc.).

(d) Function of or available activities on the property (ball playing, swimming, golfing, etc.).

(e) Description and location of all existing and planned facilities (ball diamonds, tennis courts, etc.).

(f) Access (pedestrian, vehicular) and usage (approximate number of users/visitors, etc.).

(g) Relationship to other similarly used lands in the vicinity.

(h) Applicable clauses affecting the ownership, such as lease, easement, covenants, restrictions, or conditions, including forfeiture.

(i) Unusual characteristics of the Section 4(f) property (flooding problems, terrain conditions, or other features) that either reduce or enhance the value of all or part of the property.

### **3. Impacts on the Section 4(f) Property(ies).**

Discuss the impacts on the Section 4(f) property for each alternative (e.g., amount of land to be used, facilities and functions affected, noise, air pollution, visual, etc.). Where an alternative (or alternatives) uses land from more than one Section 4(f) property, a summary table would be useful in comparing the various impacts of the alternative(s). Impacts (such as facilities and functions affected, noise, etc.) which can be quantified should be quantified. Other impacts (such as visual intrusion) which cannot be quantified should be described.

### **4. Avoidance Alternatives.**

Identify and evaluate location and design alternatives which would avoid the Section 4(f) property. Generally, this would include alternatives to either side of the property. Where an alternative would use land from more than one Section 4(f) property, the analysis needs to evaluate alternatives which avoid each and all properties (23 CFR 771.135(i)). The design alternatives should be in the immediate area of the property and consider minor alignment shifts, a reduced facility, retaining structures, etc. individually or in combination, as appropriate. Detailed discussions of alternatives in an EIS or EA need not be repeated in the Section 4(f) portion of the document, but should be referenced and summarized. However, when alternatives (avoiding Section 4(f) resources) have been eliminated from detailed study the discussion should also explain whether these alternatives are feasible and prudent and, if not, the reasons why.

### **5. Measures to Minimize Harm.**

Discuss all possible measures which are available to minimize the impacts of the proposed action on the Section 4(f) property(ies). Detailed discussions of mitigation measures in the EIS or EA may be referenced and appropriately summarized, rather than repeated.

## **6. Coordination.**

Discuss the results of preliminary coordination with the public official having jurisdiction over the Section 4(f) property and with regional (or local) offices of DOI and, as appropriate, the Regional Office of HUD and the Forest Supervisor of the affected National Forest. Generally, the coordination should include discussion of avoidance alternatives, impacts to the property, and measures to minimize harm. In addition, the coordination with the public official having jurisdiction should include, where necessary, a discussion of significance and primary use of the property.

Note: The conclusion that there are no feasible and prudent alternatives is not normally addressed at the draft Section 4(f) evaluation stage. Such conclusion is made only after the draft Section 4(f) evaluation has been circulated and coordinated and any identified issues adequately evaluated.

## **B. Final Section 4(f) Evaluation**

When the preferred alternative uses Section 4(f) land, the final Section 4(f) evaluation must contain (23 CFR 771.135(i) and (j)):

- (1) All the above information for a draft evaluation.
- (2) A discussion of the basis for concluding that there are no feasible and prudent alternatives to the use of the Section 4(f) land. The supporting information must demonstrate that "there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes" (23 CFR 771.135(a)(2)). This language should appear in the document together with the supporting information.
- (3) A discussion of the basis for concluding that the proposed action includes all possible planning to minimize harm to the Section 4(f) property. When there are no feasible and prudent alternatives which avoid the use of Section 4(f) land, the final Section 4(f) evaluation must demonstrate that the preferred alternative is a feasible and prudent alternative with the least harm on the Section 4(f) resources after considering mitigation to the Section 4(f) resources.
- (4) A summary of the appropriate formal coordination with the Headquarters Offices of DOI (and/or appropriate agency under that Department) and, as appropriate, the involved offices of USDA and HUD.
- (5) Copies of all formal coordination comments and a summary of other relevant Section 4(f) comments received an analysis and response to any questions raised. Where new alternatives or modifications to existing alternatives are identified and will not be given further consideration, the basis for dismissing these alternatives should be provided and supported by factual information. Where Section 6(f) land is involved, the National Park Service's position on the land transfer should be documented.

(6) Concluding statement as follows: "Based upon the above considerations, there is no feasible and prudent alternative to the use of land from the (identify Section 4(f) property) and the proposed action includes all possible planning to minimize harm to the (Section 4(f) property) resulting from such use."

## Section 4

Section 4(f) Policy Paper  
Revised March 1, 2005

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U.S. Department  
of Transportation  
**Federal Highway  
Administration**

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# FHWA Section 4(f) Policy Paper

**Office of Planning, Environment and Realty  
Project Development and Environmental Review**

**March 1, 2005**

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## INTRODUCTION

Section 4(f) was created when the United States Department of Transportation (USDOT) was formed in 1966. It was initially codified at 49 U.S.C. 1653(f) (Section 4(f) of the USDOT Act of 1966) and only applies to USDOT agencies. Later that year, 23 U.S.C. 138 was added with somewhat different language, which applied only to the highway program. In 1983, Section 1653(f) was reworded without substantive change and recodified at 49 U.S.C. 303. In their final forms, these two statutes have no real practical distinction and are still commonly referred to as Section 4(f):

*"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. 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 the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project (other than any project for a park road or parkway under section 204 of this title) which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas."*

23 U.S.C. 138

The Federal Highway Administration (FHWA) originally issued the *Section 4(f) Policy Paper* in September 1987. There was a minor amendment in 1989 adding two additional questions and answers. This 2005 paper provides updated comprehensive guidance on when and how to apply the provisions of Section 4(f) on FHWA projects that propose to use 4(f) land or resources. The information presented in this paper is not regulatory, but is the official policy of FHWA on the applicability of Section 4(f) to various types of land and resources and other Section 4(f) related issues. The paper creates no private right of action and its guidance is not judicially binding on the FHWA.

Previous versions of this policy paper are no longer applicable. This issuance also rescinds the November 15, 1989, *Memorandum: Alternatives Selection Process for Projects Involving Section 4(f) of the DOT Act*, signed by Ali Sevin, Director of the Office of Environmental Policy, and by the creation of Question and Answer 24, supersedes the August 22, 1994, *Interim Guidance on Applying Section 4(f) On Transportation Enhancement Projects and National Recreation Trails*.

### **Purpose of this Paper**

This paper explains how Section 4(f) applies generally and to specific situations where resources meeting the Section 4(f) criteria may be involved. It is based on court decisions, experience and on policies developed by FHWA and USDOT over the years. This paper serves as a guide for the applicability of Section 4(f) for common project situations often encountered by FHWA Division Offices, State Departments of Transportation and other partners.

For specific projects that do not completely fit the situations or parameters described in this paper, it is advisable to contact the FHWA Division Office. In turn, the Division Office may contact the Washington Headquarters' Office of Project Development and Environmental Review, the Resource Center Environmental Technical Service Team, and/or the Office of the Chief Counsel. For more information on Section 4(f) refer to the Environmental Guidebook ([www.environment.fhwa.dot.gov/guidebook/index.htm](http://www.environment.fhwa.dot.gov/guidebook/index.htm)) and the FHWA Re: NEPA Community of Practice (<http://nepa.fhwa.dot.gov>).

## Important Points

At the outset, a few important points about Section 4(f) must be understood.

- **Section 4(f) Authority and Responsibility:** Section 4(f) applies only to the actions of agencies within the USDOT. While other agencies may have an interest in Section 4(f), the agencies within the USDOT are responsible for applicability determinations, evaluations, findings and overall compliance.
- **Section 4(f) Applicability:** Section 4(f) applies to any significant publicly owned public park, recreation area, or wildlife and waterfowl refuge and any land from an historic site of national, state or local significance.
- **Public Ownership and Public Access Criteria:** Section 4(f) applies to significant publicly owned public parks and recreational areas that are open to the public, and to significant publicly owned wildlife and waterfowl refuges, irrespective of whether these areas are open to the public or not, since the "major purpose" of a refuge may make it necessary for the resource manager to limit public access. When private institutions, organizations or individuals own parks, recreational areas or wildlife and waterfowl refuges, Section 4(f) does not apply to these properties, even if such areas are open to the public. If a governmental body has a permanent proprietary interest in the land (such as fee ownership or easement), it is considered "publicly owned" and thus, Section 4(f) may be applicable. Section 4(f) also applies to all historic sites of national, state or local significance, whether or not these sites are publicly owned or open to the public. Except in unusual circumstances, only historic properties on or eligible for inclusion on the National Register of Historic Places are protected under Section 4(f).
- **Significance Criteria:** A publicly owned park, recreation area or wildlife and waterfowl refuge must be a "significant" resource for Section 4(f) to apply. Pursuant to 23 C.F.R. 771.135 (c), 4(f) resources are presumed to be significant unless the official having jurisdiction over the site concludes that the entire site is not significant. Even if this is done, FHWA must make an independent evaluation to assure that the official's finding of significance or non-significance is reasonable.
- **Feasible and Prudent Criteria:** Numerous legal decisions on Section 4(f) have resulted in a USDOT policy that findings of "no feasible and prudent alternatives" and "all possible planning to minimize harm", must be well documented and supported. A feasible alternative is an alternative that is possible to engineer, design and build. The leading United States Supreme Court case, commonly known as Overton Park, (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)), held that to find that an alternative (that avoids a 4(f) resource) is not "prudent" one must find that there are unique problems or unusual factors involved with the use of such alternatives. This means that the cost, social, economic and environmental impacts, and/or community disruption resulting from such alternatives reach extraordinary magnitudes. One can use a totality of these circumstances to establish that these unique problems, unusual factors or other impacts reach extraordinary magnitudes. FHWA has incorporated this decision into existing regulations found at 23 C.F.R. 771.135(a)(2).
- **Documentation and Coordination:** The statute does not require the preparation, distribution or circulation of any written document. The statute also does not contain a public comment element. Other than the U.S. Departments of the Interior, Housing and Urban Development and

Agriculture, the statute also does not require or establish any procedures for coordinating with either other agencies or the public. USDOT has developed departmental requirements for documenting Section 4(f) decisions. For example, the requirements of DOT Order 5610.1C and its predecessors have been incorporated into FHWA regulations. FHWA developed procedures for the preparation, circulation and coordination of Section 4(f) documents in two places; 23 Code of Federal Regulations (C.F.R.) Section 771.135, and FHWA's *Technical Advisory, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents: T 6640.8A*. Both of these sources of information are available at the FHWA NEPA Project Development Website: [www.environment.fhwa.dot.gov/projdev/index.htm](http://www.environment.fhwa.dot.gov/projdev/index.htm).

Two purposes of a written Section 4(f) evaluation are to establish an administrative record and to ensure that FHWA has followed the regulatory and statutory requirements. The administrative record is the agency's written record that memorializes the basis for determining that there is no feasible and prudent alternative to the use of the 4(f) resource and demonstrates that FHWA used all possible planning and measures to minimize harm. Likewise, when circulated with the NEPA document, it permits FHWA to obtain comments on avoidance alternatives and measures to minimize harm.

If a Section 4(f) evaluation is legally challenged, it is reviewed in accordance with the Administrative Procedure Act (APA) that provides judicial deference to USDOT actions. Under the APA, the agency's action must be upheld unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law (5 U.S.C. 706 (2)(A)). The court will review the administrative record to determine whether FHWA complied with the elements of Section 4(f). If an inadequate administrative record is prepared, the court will lack the required Section 4(f) elements to review and, therefore, will be unable to defer to it (this is even truer if no Section 4(f) Evaluation is prepared). While agency decisions are entitled to a presumption of regularity and courts are not empowered to substitute their judgment for that of the agency, courts will carefully review whether the agency followed the applicable requirements.

Therefore, the administrative record should contain the following essential information:

- 1) The applicability or non-applicability of Section 4(f) to a property used by a project;
- 2) The coordination efforts with the officials having jurisdiction over or administering the land (relative to significance of the land, primary use of the land, mitigation measures, etc.);
- 3) The location and design alternatives that would avoid the use altogether or minimize the use and harm to the 4(f) land;
- 4) Analysis of impacts of avoidance and Section 4(f) use alternatives; and
- 5) All measures to minimize harm, such as design variations, landscaping and other mitigation.

The Section 4(f) analysis process is diagramed in Appendix B.

- **Other Laws and Requirements:** There are often concurrent requirements of other Federal agencies when 4(f) lands are involved in highway projects.<sup>1</sup> It should be noted that Section 4(f) has requirements that are independent from obligations found in these other authorities. In the instance where more than one Federal law is applicable to the 4(f) resource, just because the requirements of one law have been complied with, does not necessarily mean that Section 4(f) is

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<sup>1</sup> Examples include: Compatibility determinations for the use of lands in the National Wildlife Refuge System and the National Park System, consistency determinations for the use of public lands managed by the Bureau of Land Management, determinations of direct and adverse effects for Wild and Scenic Rivers under the jurisdiction of such agencies as the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, and Forest Service, and approval of land conversions covered by the Federal-aid in Fish Restoration and the Federal-Aid in Wildlife Restoration Acts (the Dingell-Johnson and Pittman-Robertson Acts), the Recreational Demonstration Projects and the Federal Property and Administrative Service (Surplus Property) Acts, and Section 6(f) of the Land and Water Conservation Fund Act.

also satisfied. FHWA must demonstrate compliance with all the different requirements of applicable law in addition to its Section 4(f) responsibility.

Project mitigation required by other substantive laws can help FHWA satisfy the requirement that a project include all possible planning to minimize harm to a 4(f) resource if it is used. A good example of this is the terms of the Memorandum of Agreement (MOA) with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) when an historic property is adversely affected (under Section 106 of the National Historic Preservation Act) by a FHWA project. Nevertheless, if more reasonable measures to minimize harm to the 4(f) resource can be taken, simply complying with another statutes mitigation measures is not enough.

## **SECTION 4(f) EVALUATION**

When a project proposes to use resources protected by Section 4(f), a Section 4(f) evaluation must be prepared. The following information provides guidance on the key areas of a Section 4(f) evaluation.

### **Section 4(f) Evaluation Format and Approval**

The Section 4(f) evaluation may be developed and processed as a stand-alone document, as in the case of a categorical exclusion (CE) determination, or incorporated into an environmental assessment (EA) or environmental impact statement (EIS) as a separate section of those documents. The format and content for these evaluation documents are addressed in the FHWA *Technical Advisory T 6640.8a, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents, October 30, 1987* ([www.environment.fhwa.dot.gov/projdev/impTA6640.htm](http://www.environment.fhwa.dot.gov/projdev/impTA6640.htm)).

The FHWA Division Office or the Federal Lands Highway Division approves all Section 4(f) evaluations. Prior to Division Office approval, all final Section 4(f) evaluations must undergo legal sufficiency review in accordance with 23 C.F.R. 771.135(k). It is advisable and strongly recommended that the Division Office provide copies of the administrative or pre-draft Section 4(f) evaluation to the appropriate legal staff for preliminary review instead of submitting only the pre-final evaluation for legal sufficiency review.

### **Alternatives Analysis**

The intent of the Section 4(f) statute and the policy of the USDOT is to avoid the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites as part of a project, unless there is no feasible and prudent alternative to the use of such land.<sup>2</sup> In order to demonstrate that there is no feasible and prudent alternative to the use of 4(f) land, the evaluation must address both location alternatives and design shifts that totally avoid the 4(f) land. As noted before, supporting information must demonstrate that there are unique problems or unusual factors involved with the alternatives that avoid the use of 4(f) land, such as findings that these alternatives result in costs, environmental impacts or community disruption of extraordinary magnitudes. Likewise, design shifts that cannot totally avoid use but that minimize the impact, must also be employed unless they are not feasible and prudent.

The Section 4(f) evaluation must address the purpose and need of the project. The need must be sufficiently explained and be consistent with the need set forth in any concurrent National Environmental Policy Act (NEPA) documentation. The Section 4(f) evaluation may reference the purpose and need included in a NEPA document, without reiteration, when the evaluation is included as a chapter of the document. Any alternative that is determined to not meet the need of the project, including the no-build alternative, is not a feasible and prudent alternative<sup>3</sup>. The evaluation must include this analysis.

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<sup>2</sup> "Significance" of one of these types of properties is presumed unless an official with jurisdiction determines that the entire site is not significant.

<sup>3</sup> Alaska Center for Environment v. Armbrister, 131 F.3d 1285, 1288 (9th Cir. 1987); Arizona Past and Future Foundation v. Lewis, 722 F.2d 1423, 1428 (9th Cir. 1983); Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 163 (4th Cir. 1990); Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 804 (7th Cir. 1987); Committee to Preserve Boomer Lake Park v. USDOT,

It is important to point out that the standard for evaluating alternatives under NEPA and the standard for evaluating alternatives under Section 4(f) are different. In general, under NEPA, FHWA can advance to detailed study any reasonable alternative, among a range of alternatives, as long as there is sufficient information that shows a well-reasoned decision to include that alternative. However, under Section 4(f), if there is a feasible and prudent alternative that avoids the use of a 4(f) resource, among alternatives that use a 4(f) resource, the alternative that must be selected is the one that avoids the 4(f) resource.

Likewise, the test under NEPA, to eliminate a reasonable alternative is based on a number of independent factors or a totality of cumulative factors. However, simply because under NEPA an alternative (that meets the purpose and need) is determined to be unreasonable, does not by definition, mean it is imprudent under the higher substantive test of Section 4(f). Therefore, it is possible for an alternative that was examined but dismissed during the preliminary NEPA alternative screening process to still be a feasible and prudent avoidance alternative under Section 4(f). In other words, there is more room to reject alternatives as unreasonable under NEPA than there is to find those same alternatives are imprudent under Section 4(f).

### **Feasible and Prudent Standard**

The first test under Section 4(f) is to determine which alternatives are feasible and prudent. An alternative is feasible if it is technically possible to design and build that alternative. The second part of the standard involves determining whether an alternative is prudent or not, which is more difficult to define.

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

Where sufficient analysis demonstrates that a particular alternative is not feasible and prudent, the analysis or consideration of that alternative as a viable alternative comes to an end. If all alternatives use land from 4(f) resources, then an analysis must be performed to determine which alternative results in the least overall harm to the 4(f) resources. If the net harm to 4(f) resources in all the alternatives is equal, then FHWA may select any one of them. In other words, if the project proposes to use similar amounts of similar 4(f) resources, there is no alternative that would cause the least overall harm. In either situation, it is essential that the agency having jurisdiction over the 4(f) resource be consulted.

It should be noted that the net harm analysis is governed by all the possible mitigation that could be done to minimize harm to the 4(f) resource. The net harm should be determined in consultation with the agency having jurisdiction over the resource or, in the case of historic sites, the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), as appropriate. By including mitigation, impacts on the 4(f) property could be reduced or eliminated. The alternative that results in the least net harm must be selected.

Not all uses of 4(f) resources have the same magnitude of impact and not all 4(f) resources have the same quality. A qualitative evaluation is required. For example, evaluation of the net impact should consider whether the use of the 4(f) property involves:

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4 F.3d 1543, 1550 (10th Cir. 1993); Druid Hills v. FHWA, 772 F.2d 700 (11<sup>th</sup> Cir. 1985); Ringsred v. Dole, 828 F.2d 1300, 1304 (8th Cir. 1987).

- 1) A large taking or a small taking in relation to the overall size of the resource, or
- 2) Shaving an edge of a property as opposed to cutting through its middle, or
- 3) Altering part of the land surrounding an historic building rather than removing the building itself, or
- 4) Examining the key features of the 4(f) resource, or
- 5) An unused portion of a park rather than a highly used portion.

When different alternatives propose to use different 4(f) resources, the importance of the resources must be considered. For example, three marginal acres of a large park may be less important than one acre of a smaller city park. To provide support for these complex evaluations, the officials with jurisdiction over the 4(f) resources should be consulted and their opinions memorialized in the administrative record.

As Congress gave 4(f) resources paramount importance, care should be taken to apply consistent standards throughout the length of any given project. For example, it would be inconsistent to accept a restricted roadway cross section in order to reduce the project costs or to gain a minimal safety benefit, when at other locations on the same project this restricted roadway cross section is rejected as unacceptable in order to avoid a park. This same concept should be applied between projects as well.

### **Examples of the Alternative Selection Process**

One of the most difficult areas of analysis is the evaluation of alternatives, and their impacts on both 4(f) and non-4(f) resources, and then deciding which alternative to select. Issues such as, what role does mitigation play in selecting alternatives, what to do if there are multiple 4(f) properties used and how other important resources in the project vicinity should be considered, make this area of analysis complex. It is essential to document the reasoning for dismissing an alternative as well as the reasoning for selecting an alternative. This documentation will become a key part of the administrative record. To address some of these scenarios, consider the following three project examples. Also, refer to the summary table on Page 7, following this discussion.

On project 1, Alternatives C and D are determined not to be feasible and prudent. While these alternatives may or may not use land from a 4(f) resource, it is immaterial since they simply cannot be built. Thus, no further analysis of C or D is warranted. Since Alternatives A and B are feasible and prudent and because B does not use land from a 4(f) resource, Alternative B must be selected. It is not necessary to determine the relative harm that Alternative A has on the 4(f) resources, because B is a feasible and prudent avoidance alternative.

On project 2, Alternatives C and D are determined not to be feasible and prudent. No further consideration need be given these alternatives. Of the remaining feasible and prudent alternatives, both Alternatives A and B use land from 4(f) resources. FHWA can approve only the feasible and prudent alternative that has the least overall harm to the 4(f) resource. Here, B must be selected since the harm to 4(f) resources is the least. When there are multiple alternatives that use a 4(f) resource, it should be noted that simply because an alternative uses more acreage, that might not be the greatest Section 4(f) use. In conclusion, to determine which alternative has the least harm, one should evaluate the importance of the 4(f) resource, the potential for mitigation and confer with the official(s) with jurisdiction over the 4(f) resource.

On project 3, all the build alternatives use 4(f) resources, such that there are no feasible and prudent alternatives that avoid the 4(f) resources. As all four alternatives use 4(f) land, one needs to evaluate the impacts both to 4(f) and non-4(f) resources to select the prudent and least overall harm alternative. Among the 4 alternatives, A and B have almost equal Section 4(f) net impacts but more impacts than Alternatives C and D, so neither A nor B can be selected. However, between Alternatives C and D, C has more Section 4(f) impacts than D. Therefore, usually one must choose Alternative D as illustrated in the example in project 2 above. There are times; however, that there will be additional important non-Section 4(f) environmental impacts that must go into the equation of what is the prudent alternative. If Alternative C has slightly higher Section 4(f) impacts than Alternative D, but there are additional important environmental impacts associated with Alternative D (that Alternative C does not have), it may be more prudent to choose Alternative C. Examples of non-4(f) resources could be an endangered species or

critical habitat being taken, CERCLA or superfund site problems, the elimination of valuable wetlands, and/or major environmental justice issues. In this instance, the prudent decision is the one that causes the overall least harm to all environmental resources, both 4(f) and non-4(f) resources. Section 4(f) plays a significant role in this decision-making process but in total, the prudent choice here is not the alternative that uses the least amount of 4(f) property. Therefore, Alternative C would be advanced. The courts have accepted this totality of impacts analysis<sup>4</sup>.

Project	Alternative	Feasible and Prudent Alternative?	Uses 4(f) Land?	Relative Net Harm to Section 4(f) Land After Mitigation
1	A	Yes	Yes	NA <sup>a</sup>
	B	Yes	No	None
	C	No	Yes (NA) <sup>b</sup>	NA
	D	No	No (NA) <sup>b</sup>	NA
2	A	Yes	Yes	Greater
	B	Yes	Yes	Lesser
	C	No	Yes (NA) <sup>b</sup>	NA <sup>b</sup>
	D	No	No (NA) <sup>b</sup>	NA <sup>b</sup>
3	A	(NA) <sup>c</sup>	Yes	Equal to B, but more than C or D
	B		Yes	Equal to A but more than C or D
	C		Yes	Harm to 4(f) greater than alt. D, but with less overall impacts to important resources
	D		Yes	Harm to 4(f) less but with more overall impacts

<sup>a</sup> In project 1, there is a feasible and prudent alternative, which does not use Section 4(f) protected property (Alt. B). Any alternative which uses Section 4(f) protected property must be eliminated from further consideration.

<sup>b</sup> Since this alternative is not feasible and prudent, it should be eliminated from further consideration. Whether Section 4(f) land is used and the relative harm to Section 4(f) protected properties are no longer relevant factors.

<sup>c</sup> Since all alternatives use 4 (f) resources, a prudent and feasible avoidance alternatives analysis is not required.

### Measures to Minimize Harm and Mitigation

In addition to determining that there are no feasible and prudent alternatives to avoid the use of 4(f) resources, the project approval process requires the consideration of “all possible planning to minimize harm” on the 4(f) resource. Minimization of harm entails both alternative design modifications that lessen the impact on 4(f) resources and mitigation measures that compensate for residual impacts. Minimization and mitigation measures should be determined through consultation with the official of the agency owning or administering the resource. Neither the Section 4(f) statute nor regulation requires the replacement of 4(f) resources used for highway projects, but this option is appropriate under 23 C.F.R. 710.509 as a mitigation measure for direct project impacts.

Mitigation measures involving public parks, recreation areas, or wildlife and waterfowl refuges may involve a replacement of land and/or facilities of comparable value and function, or monetary

<sup>4</sup> Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 163 (4th Cir. 1990); Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 805 (7th Cir. 1987); Louisiana Env. Society, Inc. v. Dole, 707 F.2d 116, 122 (5th Cir. 1983); Committee to Preserve Boomer Lake Park v. USDOT, 4 F.3d 1543, 1550 (10th Cir. 1993).

compensation, which could be used to enhance the remaining land. Mitigation of historic sites usually consists of those measures necessary to preserve the historic integrity of the site and agreed to in accordance with 36 C.F.R. Part 800, by FHWA, the State Historic Preservation Officer (SHPO) or the Tribal Historic Preservation Officer (THPO), and as appropriate, the Advisory Council on Historic Preservation (ACHP). In any case, the cost of mitigation should be a reasonable public expenditure in light of the severity of the impact on the 4(f) resource in accordance with 23 C.F.R. 771.105(d). Section 6(f) of the Land and Water Conservation Fund Act has its own mitigation requirements, but as noted before, these can be part of the 4(f) minimization requirement if the resource cannot be avoided<sup>5</sup>.

## **Coordination**

Preliminary coordination prior to the circulation of the draft Section 4(f) evaluation should be accomplished with the official(s) of the agency owning or administering the resource, the Department of Interior (DOI) and, as appropriate, the Departments of Agriculture (USDA) and Housing and Urban Development (HUD). The preliminary coordination with DOI and HUD should be either at the appropriate field office or at the regional level. The preliminary coordination with USDA should be with the appropriate National Forest Supervisor. There should be coordination with USDA whenever a project uses land from the National Forest System. Since the Housing and Urban Rural Recovery Act of 1983 repealed the use restrictions for the Neighborhood Facilities Program authorized by Title VII of the HUD Act of 1965 and the Open Space Program authorized by Title VII of the Housing Act of 1961, the number of instances where coordination with HUD should be accomplished has been substantially reduced. Coordination with HUD should occur whenever a project uses a 4(f) resource where HUD funding (other than the above) had been utilized.

If any issues are raised by these agencies resulting from the circulation of the draft Section 4(f) evaluation, follow up coordination must be undertaken to resolve the issues. In most cases the agency's response will indicate a contact point for the follow up coordination. However, case law indicates that if reasonable efforts to resolve the issues are not successful (one of these agencies is not satisfied with the way its concerns were addressed) and the issues were disclosed and received good-faith attention from the decision maker, FHWA has met the procedural obligation under Section 4(f) to consult with and obtain the agency's comments. Section 4(f) does not require more.

## **Programmatic Section 4(f) Evaluations**

As an alternative to preparing an individual Section 4(f) evaluation, FHWA may, in certain circumstances utilize a programmatic evaluation. Under a programmatic Section 4(f) evaluation, certain conditions are laid out such that, if a project meets the conditions it will satisfy the requirements of Section 4(f) that there is no feasible and prudent alternative and that the project includes all possible planning to minimize harm. These conditions generally 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) resource, adequate coordination with appropriate entities and the NEPA class of action. Programmatic Section 4(f) statements have certain elements in common; (1) they involve projects with typical and limited range of alternatives; and (2) the official having jurisdiction over the land agrees with the use evaluation and the proposed mitigation. Programmatic evaluations can be nationwide, region-wide, or statewide. The development of statewide or regional programmatic evaluations must be coordinated with the Office of Project Development and Environmental Review and the Office of Chief Counsel.

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<sup>5</sup> State and local governments often obtain grants through the Land and Water Conservation Fund Act to acquire or make improvements to parks and recreation areas. Section 6(f) of this Act prohibits the conversion of property acquired or developed with these grants to a non-recreational purpose without the approval of the Department of the Interior's (DOI) National Park Service. Section 6(f) directs DOI to assure that replacement lands of equal value, location and usefulness are provided as conditions to such conversions. Consequently, where conversions of Section 6(f) lands are proposed for highway projects, replacement lands will be necessary. Regardless of the mitigation proposed, the Section 4(f) evaluation should document the National Park Service's tentative position relative to Section 6(f) conversion.

There are currently four approved Nationwide Programmatic Section 4(f) Evaluations. These evaluations are found at the links provided below to the FHWA Environmental Guidebook and the Project Development Website:

- 1) Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges. This evaluation sets forth the basis for approval that there are no feasible and prudent alternatives to the use of certain historic bridge structures to be replaced or rehabilitated with Federal funds and that the projects include all possible planning to minimize harm resulting from such use.  
([www.environment.fhwa.dot.gov/guidebook/vol2/doc15j.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc15j.pdf) and [www.environment.fhwa.dot.gov/projdev/4fbridge.htm](http://www.environment.fhwa.dot.gov/projdev/4fbridge.htm))
- 2) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges. This programmatic evaluation is applicable for projects that improve existing highways and use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges that are adjacent to existing highways.  
([www.environment.fhwa.dot.gov/guidebook/vol2/doc15g.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc15g.pdf) and [www.environment.fhwa.dot.gov/projdev/4fmparks.htm](http://www.environment.fhwa.dot.gov/projdev/4fmparks.htm))
- 3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites. This programmatic evaluation has been prepared for projects that improve existing highways and use minor amounts of land (including non-historic improvements thereon) from historic sites that are adjacent to existing highways where the effect is determined not to be adverse.  
([www.environment.fhwa.dot.gov/guidebook/vol2/doc15e.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc15e.pdf) and [www.environment.fhwa.dot.gov/projdev/4fmhist.htm](http://www.environment.fhwa.dot.gov/projdev/4fmhist.htm))
- 4) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects. This 1977 negative declaration applies to bikeway and/or walkway projects that require the use of land from Section 4(f) resources.  
([www.environment.fhwa.dot.gov/guidebook/vol2/doc15m.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc15m.pdf) and [www.environment.fhwa.dot.gov/projdev/4fbikeways.htm](http://www.environment.fhwa.dot.gov/projdev/4fbikeways.htm))

The fact that these programmatic Section 4(f) evaluations are approved does not mean that these types of projects are exempt from or automatically comply with the requirements of Section 4(f). Section 4(f) does, in fact, apply to each of the types of projects addressed by these programmatic evaluations. Furthermore, the programmatic Section 4(f) does not relax the Section 4(f) standards of feasible and prudent and minimization of harm. The FHWA Division Administrator or Division Engineer is responsible for reviewing each individual project to determine that it meets the criteria and procedures of the specific programmatic Section 4(f) evaluation. The FHWA Division Administrator's or Division Engineer's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document, placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

Programmatic Section 4(f) evaluations streamline the documentation and approval process and amount of interagency coordination that is required for an individual Section 4(f) evaluation. Draft and final evaluations do not need to be prepared and FHWA legal sufficiency review is not required. Interagency coordination is required only with the official(s) with jurisdiction and not with DOI, USDA, or HUD (unless the Federal agency has a specific action to take, such as DOI approval of a conversion of land acquired using Land and Water Conservation Funds).

## Section 4(f) Applicability

The following questions and answers provide guidance on the applicability of Section 4(f) to various types of land, resources and project situations. The examples represent FHWA's policy on the situations most often encountered in the project development process. For advice on specific situations or issues not covered in this paper, the FHWA Division Office should be consulted, and if necessary the Division Office can contact the Washington Headquarters Office of Project Development and Environmental Review and/or the Office of the Chief Counsel. An analysis of Section 4(f) case law as it relates to many of the following situations and examples is included in Appendix A, for your information.

### 1. Use of Resources

**Question A:** What constitutes a "use" of land from a publicly owned public park, public recreation area, wildlife refuge and waterfowl refuge or historic site?

**Answer A:** Section 4(f) "use" is defined and addressed in the FHWA/FTA Regulations at 23 C.F.R. 771.135(p). A "use" occurs when:

- 1) Land from a 4(f) site is permanently incorporated into a transportation facility,
- 2) There is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute's preservationist purposes (23 C.F.R. 771.135(p)(7)), or
- 3) When there is a constructive use of land (23 C.F.R. 771.135(p)(2)).

Land will be considered permanently incorporated into a transportation project when it has been purchased as right-of-way or sufficient property interests have been otherwise acquired for the purpose of project implementation. For example, a "permanent easement" which is required for the purpose of project construction or that grants a future right of access onto 4(f) property, such as for the purpose of routine maintenance by the transportation agency, would be considered a permanent incorporation of land into a transportation facility.

Project activities involving the restoration, rehabilitation or maintenance of highways, bridges or other eligible transportation facilities (23 C.F.R. 771.135(f)) that are on or eligible for the National Register of Historic Places will not "use" land from these 4(f) resources when the project does not adversely effect (under Section 106 of the National Historic Preservation Act) the historic qualities of the facility for which it was determined eligible for the National Register of Historic Places, and the State Historic Preservation Officer has been consulted and does not object to the finding of no historic properties adversely affected (see also Question 4).

**Question B:** How is "constructive use" defined and determined?

**Answer B:** 23 C.F.R. 771.135(p) defines what a constructive use is. FHWA has identified certain project situations where a constructive use will occur and when a constructive use will not occur (see 23 C.F.R. 771.135(p)(4) and (5)). Constructive use is only possible in the absence of permanent incorporation or temporary occupancy of the type that constitutes a use of 4(f) land by a transportation project. Constructive use only occurs in those situations where, including mitigation, the proximity impacts of a project on the 4(f) property are so severe that the activities, features or attributes that qualify the property or resource for protection under Section 4(f) are substantially impaired. Substantial impairment occurs when the activities, features or attributes of the 4(f) property are substantially diminished (23 C.F.R. 771.135(p)(2)), which means that the value of the resource in terms of its Section 4(f) significance will be meaningfully reduced or lost. The degree of impact and impairment should be determined in consultation with the officials having jurisdiction over the resource.

An example of such an impact might be the traffic noise resulting from a new or improved highway facility proposed near an amphitheater that substantially interferes with the use and enjoyment of the noise-sensitive resource, and the conditions set forth in 23 C.F.R. 771.135(p) are satisfied. For additional information on noise, please refer to FHWA noise regulations at 23 C.F.R. 772.

Constructive use determinations will be rare<sup>6</sup>. The impacts outlined in 23 C.F.R. 771.135(p)(4), involving projects adjacent to or in the proximity of 4(f) resources should be carefully examined. If it is determined that the proximity impacts do not cause a substantial impairment, FHWA can reasonably conclude that there is no constructive use. FHWA has determined that certain impacts constitute a constructive use and that others do not (see 23 C.F.R. 771.135(p)(4) and (5)). Environmental documents should of course contain the analysis of any potential proximity effects and consider whether or not there is substantial impairment to a 4(f) resource. Except for responding to review comments in environmental documents, which specifically address constructive use, the term "constructive use" need not be used. Where a constructive use determination is likely, the FHWA Division Office must consult with the Headquarters Office of Project Development and Environmental Review during development of the preliminary-draft Section 4(f) evaluation.

**Question C:** When does temporary occupancy of a 4(f) resource result in a 4(f) use?

**Answer C:** In general, Section 4(f) does not apply to the temporary occupancy, including those resulting from a right-of-entry, construction, other temporary easements or short-term arrangements, of a significant publicly owned public park, recreation area or wildlife and waterfowl refuge, or any significant historic site where temporary occupancy of the land is so minimal that it does not constitute a use within the meaning of Section 4(f).

A temporary occupancy will not constitute a use of 4(f) resource when all of the conditions set forth in 23 C.F.R. 771.135(p)(7) are met:

- (1) Duration (of the occupancy) 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 4(f) resource are minimal;
- (3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purpose of the resource, on either a temporary or permanent basis;
- (4) The land being used must be fully restored, i.e., the resource 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 appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

In the situation where a project does not meet all of the above criteria, the temporary occupancy will be considered a use of the 4(f) resource and the appropriate Section 4(f) analysis will be required.

## **2. Public Parks, Public Recreation Areas and Wildlife and Waterfowl Refuges**

**Question A:** When is publicly owned land considered to be a park, recreation area or wildlife and waterfowl refuge and who makes this determination?

**Answer A:** Publicly owned land is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such by a Federal, State or local agency and the officials of these governmental entities, having jurisdiction over the land, determine that one of its major purposes and functions is for park, recreation or as a refuge. Incidental, secondary, occasional or dispersed park, recreational or refuge activities do not constitute a major purpose.

For the most part the "officials having jurisdiction" are the officials of the agency owning or administering the land. There may be instances where the agency owning or administering the land has delegated or

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<sup>6</sup> The FHWA's constructive use policy was formalized in regulation on April 1, 1991, with the addition of paragraph (p) to 23 C.F.R. 771.135. The November 12, 1985, memorandum from Mr. Ali F. Sevin, Director of the Office of Environmental Policy to the Regional Federal Highway Administrators is no longer applicable.

relinquished its authority to another agency, via an agreement on how some of its land will function or be managed. FHWA will review this agreement and determine which agency has authority on how the land functions. If the authority has been delegated or relinquished to another agency, that agency must be contacted to determine the major purpose(s) of the land. Management plans that address or officially designates the major purpose(s) of the property should be reviewed as part of this determination. After consultation, and in the absence of an official designation of purpose and function by the officials having jurisdiction, FHWA will base its decision on its own examination of the actual functions that exist.

The final decision on applicability of Section 4(f) to a particular property or type of land is made by FHWA. In reaching this decision, however, FHWA will rely on the official having jurisdiction over the resource to identify the kinds of activities and functions that take place, and that these activities constitute a major purpose. Documentation of the determination of non-applicability should be included in the environmental document or project record.

**Question B:** How should the significance of public parks, recreation areas and wildlife and waterfowl refuges be determined?

**Answer B:** "Significance" determinations, on publicly owned land considered to be parks, recreation areas or wildlife and waterfowl refuges, pursuant to Answer 2 A above, are made by the Federal, State, or local officials having jurisdiction over the land. As discussed above, the "officials having jurisdiction" are officials of the agency owning or administering the land. For certain types of 4(f) resources, more than one agency may have jurisdiction or interest in the property.

Except for certain multiple-use land holdings, discussed in Question 6, significance determinations must consider the entire property and not just the portion of the property proposed for use by the project. The meaning of the term "significance", for purposes of Section 4(f), should be explained to the officials having jurisdiction. Significance means that in comparing the availability and function of the park, recreational area or wildlife and waterfowl refuge, with the park, recreation or refuge objectives of the community or authority, the resource in question plays an important role in meeting those objectives. Management plans or other official forms of documentation regarding the land, if available and up-to-date, are important in this determination. If a determination from the official with jurisdiction cannot be obtained, and a management plan is not available or does not address significance of the 4(f) land, it will be presumed to be significant until FHWA reviews the determination and reaches a different conclusion. All determinations, whether stated or presumed, are subject to review by FHWA for reasonableness.

**Question C:** Are publicly owned parks and recreation areas, which are significant but not open to the public as a whole, subject to the requirements of Section 4(f)?

**Answer C:** The requirements of Section 4(f) would apply if the entire public park or public recreation area permits visitation by the general public at any time during the normal operating hours of the facility. Section 4(f) would not apply when visitation is permitted to only a select group and not the entire public. Examples of select groups include residents of a public housing project; military and their dependents (see also Question 11 B); students of a school; and students, faculty, and alumni of a college or university. FHWA does, however, strongly encourage the preservation of such parks and recreation areas; even though they may not be open to the general public.

It should be noted that wildlife and waterfowl refuges have not been included in this discussion. The statute uses the modifying term public to parks and recreation areas and, therefore, the "open to the public" requirement only applies to park and recreational area lands. Many wildlife and waterfowl refuges allow public access, while others may not, especially during certain times or seasons of the year. In these cases, the publicly owned resource should be examined by the FHWA Division Office to determine that the primary purpose of the property and resource is for wildlife or waterfowl refuge and not for other non-Section 4(f) activities (see also Question 20).

**Question D:** When does an easement or lease agreement with a governmental body constitute "public ownership"?

**Answer D:** Case law holds that land subject to a public easement in perpetuity can be considered publicly owned land for the purpose the easement exists. Under special circumstances, lease agreements may also constitute a permanent and proprietary interest in the land. Such lease agreements must be determined on a case-by-case basis and such factors as the term of the lease, the understanding of the parties to the lease, cancellation clauses and the like should be considered. Any questions on whether or not the leasehold or other interest constitutes public ownership should be referred to the Federal Highway Administration Division Office, and if necessary the FHWA Division Office should consult with the Washington Headquarters Office of Project Development and Environmental Review and the Office of the Chief Counsel.

### 3. Historic Sites

**Question A:** How is the significance (for Section 4(f) purposes) of historic sites determined?

**Answer A:** Pursuant to the National Historic Preservation Act (NHPA), the FHWA Federal Lands Highway Division (for Federal-lands projects) or FHWA Division in cooperation with the Applicant, i.e. State Department of Transportation (for Federal-aid projects) consults with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and if appropriate, with local officials to determine whether a site is on or eligible for the National Register of Historic Places. In case of doubt or disagreement between FHWA and the SHPO or THPO, a request for a determination of eligibility may be made to the Keeper of the National Register. A third party may also seek the involvement of the Keeper through the Advisory Council on Historic Preservation (ACHP) for a determination of eligibility,

For purposes of Section 4(f), an historic site is significant only if it is on or eligible for the National Register, unless FHWA determines that the application of Section 4(f) is otherwise appropriate. If an historic site is determined not to be on or eligible for the National Register, but an official (such as the Mayor, President of the local historic society, etc.) formally provides information to indicate that the historic site is of local significance, FHWA may determine that it is appropriate to apply Section 4(f) in that case. In the event that Section 4(f) is found inapplicable, the FHWA Division Office should document the basis for not applying Section 4(f). Such documentation might include the reasons why the historic site was not eligible for the National Register.

**Question B:** Does Section 4(f) apply when there is an adverse effect determination under the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) (36 C.F.R. 800.5)?

**Answer B:** FHWA's determination of adverse effect under 36 C.F.R. 800.5 ([www.achp.gov/work106.html](http://www.achp.gov/work106.html)) does not mean that Section 4(f) automatically applies, nor should it be presumed that the lack of an adverse effect finding (no historic properties adversely affected) means that Section 4(f) will not apply. When a project permanently incorporates land of an historic site, with or without an adverse affect, Section 4(f) applies. However, if a project does not physically take (permanently incorporate) historic property but causes an adverse effect, one must assess the proximity impacts of the project in terms of the potential for "constructive use" (see also Question 1 B). This analysis must determine if the proximity impact(s) will substantially impair the features or attributes that contribute to the National Register eligibility of the historic site or district. If there is no substantial impairment, notwithstanding an adverse effect determination, there is no constructive use and Section 4(f) requirements do not apply. Substantial impairment should be determined in consultation with the SHPO and/or THPO and thoroughly documented in the project record. The determination of Section 4(f) applicability is ultimately FHWA's decision.

As an example of a situation in which there is a Section 106 adverse effect but no Section 4(f) use, consider a transportation enhancement project where an abandoned National Register listed bus station

will be rehabilitated. Rehabilitation for public use will require consistency with the American with Disabilities Act (ADA). The incorporation of ramps or an elevator will meet the definition of an adverse effect, however, there is no permanent incorporation of land into a transportation facility and all parties agree that the rehabilitation will not substantially impair the property. Therefore, Section 4(f) would not apply.

An example of a Section 4(f) use without a Section 106 adverse effect involves a project on existing alignment, which proposes minor improvements at an intersection. To widen the roadway sufficiently, a small amount of property from an adjacent Section 106 property will be acquired, but the significance of the Section 106 resource is such that the SHPO concurs in FHWA's determination of no adverse effect. However, the use of the property will permanently incorporate property of the historic site into a transportation facility and Section 4(f) will apply. This project situation may be evaluated using the *Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites* ([www.environment.fhwa.dot.gov/guidebook/vol2/doc15e.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc15e.pdf)), as long as the class of action is not an EIS.

**Question C:** How does Section 4(f) apply in historic districts on or eligible for National Register?

**Answer C:** Within a National Register (NR) listed or eligible historic district, Section 4(f) applies to the use of those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. It must be noted generally, that properties within the bounds of an historic district are assumed to contribute, unless it is otherwise stated or they are determined not to be. For those properties that are not contributing elements of the district or individually significant, the property and the district as a whole must be carefully evaluated to determine whether or not it could be used without substantial impairment of the features or attributes that contribute to the NR eligibility of the historic district.

The proposed use of non-historic property within an historic district which results in an adverse effect under Section 106 of the NHPA will require further consideration to determine whether or not there may be a constructive use. If the use of a non-historic property or non-contributing element substantially impairs (see Question 2 B) the features or attributes that contribute to the NR eligibility of the historic district, then Section 4(f) would apply. In the absence of an adverse effect determination, Section 4(f) will not apply. Appropriate steps, including consultation with the SHPO and/or THPO, should be taken to establish and document that the property is not historic, that it does not contribute to the National Register eligibility of the historic district and its use would not substantially impair the historic district.

As an example, consider the situation where traffic signals are warranted in a National Register listed or eligible historic district. The locations of the mast arms and control box are severely limited because of the built-up nature of the district. Although no right-of-way will be acquired, it is consistent with the NHPA regulations that there will be an adverse effect on the historic district. However, it may be reasonably determined that no individually eligible property, contributing element, or the historic district as a whole will be substantially impaired; therefore Section 4(f) will not apply.

**Question D:** How should the boundaries of a property eligible for listing on the National Register be determined where a boundary has not been established?

**Answer D:** In this situation, FHWA makes the determination of an historic property's boundary under the regulations implementing Section 106 of the NHPA in consultation with the SHPO and/or the THPO. The identification of historic properties and the determination of boundaries should be undertaken with the assistance of qualified professionals during the very beginning stages of the NEPA process. This process requires the collection, evaluation and presentation of the information to document FHWA's determination of the property boundaries. The determination of eligibility, which would include boundaries of the site, rests with FHWA, but if SHPO, THPO, or other party disagrees with this determination it can

"appeal" FHWA's determination to the Keeper of the National Register in accordance with the provisions of the Section 106 process.

Selection of boundaries is a judgment based on the nature of the property's significance, integrity, setting and landscape features, functions and research value. Most boundary determinations will take into account the modern legal boundaries, historic boundaries (identified in tax maps, deeds, or plats), natural features, cultural features and the distribution of resources as determined by survey and testing for subsurface resources. Legal property boundaries often coincide with the proposed or eligible historic site boundaries, but not always and, therefore, should be individually reviewed for reasonableness. The type of property at issue, be it a historic building, structure, object, site or district and its location in either urban, suburban or rural areas, will require the consideration of various and differing factors. These factors are set out in the *National Park Service Bulletin Defining Boundaries for National Register Properties*. This Bulletin and other information can be found at the following website: [www.cr.nps.gov/nr/publications/bulletins/boundaries](http://www.cr.nps.gov/nr/publications/bulletins/boundaries).

**Question E:** How are National Historic Landmarks treated under Section 4(f)?

**Answer E:** Section 4(f) requirements related to the potential use of a National Historic Landmark (NHL) designated by the Secretary of Interior are essentially the same as they are for any historic property determined under the Section 106 process. Section 110(f) of the NHPA outlines the specific actions that an Agency must take when NHL may be directly and adversely affected by an undertaking. Agencies must, "to the maximum extent possible ... minimize harm" to the NHL affected by an undertaking. While not expressly stated in the Section 4(f) statutory language or regulations, the importance and significance of the NHL should be considered in the FHWA's Section 4(f) analysis.

#### **4. Historic Bridges, Highways and Other Transportation Facilities**

**Question A:** How does Section 4(f) apply to historic bridges and highways?

**Answer A:** The Section 4(f) statute places restrictions on the use of land from historic sites for highway improvements but makes no mention of historic bridges or highways, which are already serving as transportation facilities. The Congress clearly did not intend to restrict the rehabilitation, repair or improvement of these facilities. FHWA, therefore, determined that Section 4(f) would apply only when an historic bridge or highway is demolished, or if the historic quality for which the facility was determined to be eligible for the National Register is adversely affected by the proposed improvement. The determination of adverse effect under 36 CFR 800.5 is made by FHWA in consultation with the SHPO and/or THPO. Where FHWA determines that the facility will not be adversely affected the SHPO/THPO must concur with the determination or FHWA must seek further input from the ACHP.

**Question B:** Will Section 4(f) apply to the replacement of an historic bridge that is left in place?

**Answer B:** Section 4(f) does not apply to the replacement of an historic bridge on new location when the historic bridge is left in its original location if its historic value will be maintained, and the proximity impacts of the new bridge do not result in a substantial impairment of the historic bridge. To satisfy the first requirement, FHWA requires the establishment of a mechanism of continued maintenance to avoid the circumstance of harm to the bridge due to neglect.

**Question C:** How do the requirements of Section 4(f) apply to donations pursuant to 23 U.S.C. 144(o) to a State, locality, or responsible private entity?

**Answer C:** 23 U.S.C. 144(o) is a separate requirement related to historic bridges when demolition is proposed. 23 U.S.C. 144(o)(4) requires the State that proposes to demolish an historic bridge for a replacement project using Federal funds (i.e. Section 144 bridge funds) to first make the bridge available for donation to a State, locality or a responsible private entity. This process is commonly known as

“marketing the historic bridge”. The State, locality or responsible entity that accepts the donation must enter into an agreement to maintain the bridge and the features that give it its historic significance, and assume all future legal and financial responsibility for the bridge. Therefore, Section 4(f) will not apply to the bridges that are donated according to requirements of 23 U.S.C. 144(o) as the bridge is not used in the transportation project. The exception found in 23 C.F.R. 771.135(f) also applies, given the maintenance agreement that is required under 23 U.S.C. 144(o).

If the bridge marketing effort is unsuccessful and the bridge is to be demolished, the evaluation must include the finding that there is no feasible and prudent alternative to the use and the project includes all possible planning to minimize harm.

Note: *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* ([www.environment.fhwa.dot.gov/guidebook/vol2/doc15j.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc15j.pdf)) may be used for projects that require the use of an historic bridge.

**Question D:** Does Section 4(f) apply to other historic transportation facilities?

**Answer D:** Yes, but in the case of restoration, rehabilitation or maintenance of historic transportation facilities (e.g. railroad stations and terminal buildings which are on or eligible for the National Register) Section 4(f) only applies when the facility will be adversely affected (36 C.F.R. 800.5) by the proposed improvement.

## 5. Archaeological Resources

**Question A:** When does Section 4(f) apply to archaeological sites?

**Answer A:** Section 4(f) applies to all archaeological sites that are on or eligible for inclusion on the National Register and that warrant preservation in place. This includes those sites discovered during construction. Section 4(f) does not apply if FHWA, after consultation with the SHPO and/or THPO, determines that the archaeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed not to recover the resource) and has minimal value for preservation in place (23 CFR 771.135(g)).

**Question B:** How are archeological sites discovered during construction of a project handled?

**Answer B:** For sites discovered during construction, where preservation of the resource in place is warranted, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take into account the level of investment already made. The review process, including the consultation with other agencies should be shortened, as appropriate. An October 19, 1980, *Memorandum of Understanding with the Heritage Conservation and Recreation Service* (now part of the National Park Service) provides emergency procedures for unanticipated cultural resources discovered during construction. The MOU is available in the FHWA Environmental Guidebook ([www.environment.fhwa.dot.gov/guidebook/vol2/doc10j.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc10j.pdf)). 36 C.F.R. 800.13 addresses the process for considering post-review discoveries under the Section 106 process.

**Question C:** How should the Section 4(f) requirements be applied to archaeological districts?

**Answer C:** Section 4(f) requirements apply to archeological districts in the same way as historic districts, but only where preservation in place is warranted. Section 4(f) would not apply if after consultation with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), FHWA determines that the project would occupy only a part of the archaeological district which is considered a non-contributing element of that district or that the project occupies only a part of the district which is important chiefly because of what can be learned by data recovery and has minimal value for

preservation in place. As with an historic district, if FHWA determines the project will result in an adverse effect on an archaeological district, which is significant for preservation in place, then FHWA must consider whether or not the project impacts will result in a "substantial impairment" and a constructive use determination is warranted.

## 6. Public Multiple-Use Land Holdings

**Question:** Are multiple-use public land holdings (e.g., National Forests, State Forests, Bureau of Land Management lands, etc.) subject to the requirements of Section 4(f)?

**Answer:** Section 4(f) applies to historic properties (those on or eligible for the National Register of Historic Places) located on these multiple-use land holdings and only to those portions of the lands which are designated by statute or identified in the management plans of the administering agency as being primarily for park, recreation, or wildlife and waterfowl refuge purposes, and determined to be significant for such purposes. For example, within a large multiple-use resource, like a National Forest, there can be areas that qualify as 4(f) property (e.g. a campground, picnic area, etc.) while other areas of the property function primarily for purposes other than park, recreation or refuges. Coordination with the official having jurisdiction and examination of the management plan for the area are necessary to determine Section 4(f) applicability.

For public land holdings, which do not have management plans or existing management plans are out-of-date, Section 4(f) applies to those areas that are publicly owned and function primarily for 4(f) purposes. Section 4(f) does not apply to areas of multiple-use lands which function primarily for purposes other than park, recreation or refuges such as for those areas that are used for timber sales or mineral extraction in National Forests.

## 7. Late Designation of 4(f) Resources

**Question:** Are properties in the highway right-of-way that are designated (as park and recreation lands, wildlife and waterfowl refuges, or historic sites) late in the development of a proposed project subject to the requirements of Section 4(f)?

**Answer:** Except for archaeological resources (including those discovered during construction), a project may proceed without consideration under Section 4(f) if that land was purchased for transportation purposes prior to the designation or prior to a change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to the acquisition. The adequacy of effort made to identify properties protected by Section 4(f) should consider the requirements and standards of adequacy that existed at the time of the search. Archaeological resources may be subject to the requirements of Section 4(f) in accordance with Question 5.

## 8. Wild and Scenic Rivers

**Question A:** Are Wild and Scenic Rivers (WSR) subject to Section 4(f)?

**Answer A:** A Wild and Scenic River (WSR) is defined as "a river and the adjacent area within the boundaries of a component of the National Wild and Scenic Rivers System (National System)", pursuant to Section 3(a) and 2(a)(ii) of the National Wild and Scenic Rivers Act (WSRA) (36 C.F.R. 297.3). Significant publicly owned public parks, recreation areas, or significant wildlife and waterfowl refuges and historic sites (on or eligible of the National Register of Historic Places) in a WSR corridor are subject to Section 4(f). Privately owned lands in a WSR corridor are not subject to Section 4(f), except for historic and archeological sites (see Question 5). Publicly owned lands not open to the general public (e.g., military bases and any other areas with similar restricted access) and whose primary purpose is other than 4(f) are not subject to Section 4(f).

Lands in WSR corridors managed for multiple purposes may or may not be subject to Section 4(f) requirements, depending on the manner in which they are administered by the managing agency (see also Question 6). WSRs are managed by four different Federal agencies, including the U.S. Forest Service, the National Park Service, the Fish and Wildlife Service and the Bureau of Land Management. Close examination of the management plan (as required by the WSRA) prior to any use of these lands for transportation purposes is necessary. Section 4(f) would apply to those portions of the land designated in a management plan for recreation or other 4(f) purposes as discussed above. Where the management plan does not identify specific functions, or where there is no plan, FHWA should consult further with the river-administering agency prior to making the Section 4(f) determination.

The WSRA sets forth those rivers in the United States, which are designated as part of the Wild and Scenic River System. Within this system there are wild, scenic and recreational designations. In determining whether Section 4(f) is applicable to these rivers, one must look at how the river is designated, how the river is being used and the management plan over that reach of the river. If the river is designated a recreational river under the Act or is a recreation resource under a management plan, then it would be a 4(f) resource. A single river can be classified as having separate wild, scenic and recreation areas along the entire river. The designation of a river under the WSRA does not in itself invoke Section 4(f) in the absence of 4(f) attributes and qualities. For example, if a river is included in the System and designated as “wild” but is not being used as or designated under a management plan as a park, recreation area, wildlife and waterfowl refuge and is not an historic site, then Section 4(f) would not apply.

Aspects of the FHWA program determined to be a water resources project are subject to Section 7 of the WSRA (16 U.S.C. 1271 et seq.) This requires the river-administering agency to make a determination as to whether there are “direct and adverse effects” to the values of a WSR or congressionally authorized study river. Although Section 7 of the WSRA generally results in more stringent control, Section 4(f) may also apply to bridges that cross a designated WSR.

**Question B:** Are potential rivers and adjoining lands under study (pursuant to Section 5(a) of the Wild and Scenic Rivers Act) 4(f) resources?

**Answer B:** No, unless they are significant publicly owned public parks, recreation areas, and refuges, or significant historic sites in a potential river corridor. However, such rivers are protected under Section 12(a)<sup>7</sup> of the WSRA, which directs all Federal departments and agencies to protect river values in addition to meeting their agency mission. Section 12(a) further recognizes that particular attention should be given to “timber harvesting, road construction, and similar activities, which might be contrary to the purposes of this Act.”

## 9. Fairgrounds

**Question:** Are publicly owned fairgrounds subject to the requirements of Section 4(f)?

**Answer:** Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g. stock car races, annual fairs, etc.), rather than recreation. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) only applies to those portions of land determined significant for recreational purposes.

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<sup>7</sup> “The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 2(a)(ii), 3(a), or 5(a), shall take such action respecting management policies, regulations, contracts, plans, affecting such lands, following the date of enactment of this sentence, as may be necessary to protect such rivers in accordance with the purposes of this Act.”

## 10. School Playgrounds

**Question:** Are publicly owned school playgrounds subject to the requirements of Section 4(f)?

**Answer:** While the primary purpose of public school playgrounds is for structured physical education classes and recreation for students, these properties may also serve significant public recreational purposes and as such, may be subject to Section 4(f) requirements. When a playground serves only school activities and functions, the playground is not considered subject to Section 4(f). However, when a public school playground is open to the public and serves either organized or substantial “walk-on” recreational purposes, it is subject to the requirements of Section 4(f) if the playground is determined to be significant for recreational purposes (see also Question 2 B). In determining the significance of the playground facilities, there may be more than one official having jurisdiction over the facility. A school official is considered to be the official having jurisdiction of the land during school activities. However, the school board may have authorized the city park and recreation department or a public organization to control the facilities after school hours. The actual function of the playground is the determining factor under these circumstances. Therefore, documentation should be obtained from the officials having jurisdiction over the facility stating whether or not the playground is of local significance for recreational purposes.

## 11. Golf Courses

**Question A:** Are public golf courses subject to Section 4(f), even when fees and reservations are required?

**Answer A:** The applicability of Section 4(f) to a golf course depends on the ownership of the golf course. There are generally three types of golf courses:

- 1) Publicly owned and open to the general public,
- 2) Privately owned and open to the general public and
- 3) Privately owned and for the use of members only.

Section 4(f) would apply only to those golf courses that are publicly owned, open to public and determined to be significant recreational areas (see also Question 2 B). The first type of golf course mentioned above includes those that are owned, operated and managed by a city, county or state for the primary purpose of public recreation. These golf courses meet the basic applicability requirements, as long as they are determined to be significant by the city, county or state official with jurisdiction and FHWA agrees with this determination.

Section 4(f) would not apply to the two types of privately owned and operated golf courses mentioned above, even if they are open to the general public.

The fact that greens-fees or reservations (tee times) are required by the facility does not alter the Section 4(f) applicability to the resource, as long as the standards of public ownership, public access and significance are met. See Question 12 for more information on entrance or user fees.

**Question B:** How are “military” golf courses treated under Section 4(f)?

**Answer B:** Military golf courses are a special type of recreational area. They are publicly owned (by the Federal Government) but are not typically open to the general public. Because the recreational use of these facilities is generally limited to military personnel and their families they are not considered to be public recreational areas and, therefore, Section 4(f) does not apply to them (see Question 2 C).

## 12. User or Entrance Fees

**Question:** Does the charging of an entry or user fee affect Section 4(f) eligibility?

**Answer:** Many eligible 4(f) properties require a fee to enter or use the facility such as State Parks, National Parks, publicly owned ski areas, historic sites and public golf courses. The assessment of a user fee is generally related to the operation and maintenance of the facility and does not in and of itself negate the property's status as a 4(f) resource. Therefore, it does not matter in the determination of Section 4(f) applicability whether or not a fee is charged, as long as the other criteria are satisfied.

Consider a public golf course as an example. As discussed in Question 11, greens-fees are usually if not always required, and these resources are considered 4(f) resources when they are open to the public and determined to be significant. The same rationale should be applied to other 4(f) resources and lands in which an entrance or user fee is required.

### **13. Bodies of Water**

**Question:** How does the Section 4(f) apply to publicly owned lakes and rivers?

**Answer:** Lakes are sometimes subject to multiple, even conflicting, activities and do not readily fit into one category or another. When lakes function for park, recreation, or refuge purposes, Section 4(f) would only apply to those portions of water which function primarily for those purposes. Section 4(f) does not apply to areas which function primarily for other purposes. In general, rivers are not subject to the requirements of Section 4(f). Rivers in the National Wild and Scenic Rivers System are subject to the requirements of Section 4(f) in accordance with Questions 8 A and 8 B. Those portions of publicly owned rivers, which are designated as recreational trails are subject to the requirements of Section 4(f). Of course Section 4(f) would also apply to lakes and rivers or portions thereof which are contained within the boundaries of parks, recreational areas, refuges, and historic sites to which Section 4(f) otherwise applies.

### **14. Trails**

**Question A:** The National Trails System Act permits the designation of scenic, historic and recreational trails. Are these trails or other designated scenic or recreational trails on publicly owned land subject to the requirements of Section 4(f)?

**Answer A:** Public Law 95-625 provides that, no land or site located along a designated national historic trail or along the Continental Divide National Scenic Trail shall be subject to the provisions of Section 4(f) of the Department of Transportation Act (49 U.S.C. 1653(f)) unless such land or site is deemed to be of historical significance under appropriate historical site criteria, such as those for the National Register of Historic Places. Only lands or sites adjacent to historic trails that are on or eligible for the National Register of Historic Places are subject to Section 4(f). Otherwise (pursuant to Public Law 95-625), national historic trails are exempt from Section 4(f).

**Question B:** Are trails on privately owned land, including land under public easement and designated as scenic or recreational trails subject to the requirements of Section 4(f)?

**Answer B:** Section 4(f) does not apply to trails on privately owned land. Section 4(f) could apply where a public easement that permits public access for recreational purposes exists. In any case, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated trails.

**Question C:** Are trails on highway rights-of-way, which are designated as scenic or recreational trails subject to the requirements of Section 4(f)?

**Answer C:** If the trail is simply described as occupying the rights-of-way of the highway and is not limited to any specific location within the right-of-way, a use of land would not occur provided that adjustments or

changes in the alignment of the highway or the trail would not substantially impair the continuity of the trail. In this regard, it would be helpful if all future designations including those made under the National Trails System Act describe the location of the trail only as generally in the right-of-way.

It should be noted that in Title 23, Section 109(m) precludes the approval of any project, which will result in the severance, or destruction of an existing major route for non-motorized transportation traffic unless such project provides a reasonable alternative route or such a route exists.

**Question D:** Does Section 4(f) apply to trails funded under the Recreational Trails Program (RTP)?

**Answer D:** No. The Recreational Trails Program (RTP)<sup>8</sup> is exempt from the requirements of 23 U.S.C. 138 and 49 U.S.C. 303. This allows the USDOT/FHWA to approve RTP projects which are located on land within publicly owned parks or recreation areas without requiring a waiver or other Section 4(f) documentation (23 U.S.C. 206 (h)(2)). The exemption is limited to Section 4(f) and does not apply to other environmental requirements, such as the National Environmental Policy Act (NEPA) or the National Historic Preservation Act (NHPA). More information on the Recreational Trails Program is available at [www.fhwa.dot.gov/environment/rectrails/index.htm](http://www.fhwa.dot.gov/environment/rectrails/index.htm).

## 15. Bikeways

**Question:** Do the requirements of Section 4(f) apply to bikeways?

**Answer:** If the publicly owned bikeway is primarily used for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply, since it is not a recreational area. Section 4(f) would apply to publicly owned bikeways (or portions thereof) designated or functioning primarily for recreation, unless the official having jurisdiction determines it is not significant for such purpose. During early consultation with the official with jurisdiction it should be determined whether or not a management plan exists that addresses the primary purpose of the bikeway in question.

However, as with recreational trails, if the bikeway is simply described as occupying the highway rights-of-way and is not limited to any specific location within that right-of-way, a use of land would not occur and Section 4(f) would not apply, provided adjustments or changes in the alignment of the highway or bikeway would not substantially impair the continuity of the bikeway. Just as with trails, Title 23 Section 109(m) precludes the approval of any project, which will result in the severance or destruction of an existing major route for non-motorized transportation traffic, unless such project provides a reasonable alternative route or such a route exists.

## 16. Joint Development (Park with Highway Corridor)

**Question:** When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the 4(f) resource is reserved for highway use prior to, or at the same time the 4(f) resource was established, do the requirements of Section 4(f) apply?

**Answer:** No, the requirements of Section 4(f) do not apply to the subsequent use of the reserved area for its intended highway purpose. This is because the land used for the highway project was reserved from and, therefore, has never been part of the protected 4(f) area. Nor is there a constructive use (23 C.F.R. 771.135(p)(5)(v)) of the 4(f) resource, since it was jointly planned with the highway project. The specific governmental action that must be taken to reserve a highway corridor from the 4(f) resource is a question of state law and local law, but evidence that the reservation was contemporaneous with or prior to the establishment of the 4(f) resource is always required. Subsequent statements of intent to construct a highway project within the 4(f) resource are not sufficient. All measures which have been taken to

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<sup>8</sup>In 1998, the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) replaced the National Recreational Trails Funding Program created by the Intermodal Surface Transportation Efficiency Act (ISTEA) with the Recreational /Trails Program (RTP).

jointly develop the highway and the park should be completely documented in the project records. To provide flexibility for the future highway project, state and local transportation agencies are advised to reserve wide corridors.

## 17. Planned 4(f) Resources

**Question:** Do the requirements of Section 4(f) apply to publicly owned properties "planned" for park, recreation area, wildlife refuge, or waterfowl refuge purposes even though they are not presently functioning as such?

**Answer:** Section 4(f) applies when the land is one of the enumerated types of publicly owned lands and the public agency that owns the property has formally designated and determined it to be significant for park, recreation area, wildlife and waterfowl refuge purposes. Evidence of formal designation would be the inclusion of the publicly owned land, and its function as a 4(f) resource, into a city or county Master Plan. A mere expression of interest or desire is not sufficient. When privately held properties of these types are formally designated into a Master Plan, Section 4(f) is not applicable. The key is whether the planned facility is presently publicly owned, formally designated and significant. When this is the case, Section 4(f) would apply.

## 18. Temporary Recreational Occupancy or Uses of Highway Rights-of-way

**Question:** Does Section 4(f) apply to temporary recreational uses of land owned by a State Department of Transportation or other Applicant and designated for transportation purposes?

**Answer:** In situations where land which is owned by a State DOT or other Applicant and designated for future transportation purposes (including highway rights-of-way) is temporarily occupied or being used for either authorized or unauthorized recreational purposes such as for a playground or a trail (bike, snowmobile, hiking, etc.) on property purchased as right-of-way, Section 4(f) does not apply. For authorized temporary occupancy of highway rights-of-way for park or recreation, it is advisable to make clear in a limited occupancy permit, with a reversionary clause that no long-term right is created and the park or recreational activity is a temporary one pending completion of the highway or transportation project.

Note: In one recent proposed transportation project, lands designated for transportation purposes and utilized for recreational uses pursuant to a revocable agreement granting temporary use, were found by a court to be 4(f) resources, but this case had unusual facts. Nevertheless, it is important to recognize this decision, even though it is contrary to FHWA policy (see Stewart Park and Reserve Coalition v. Slater, 352 F.3d 545 (2<sup>nd</sup> Cir. 2003), Appendix A, Question 18).

## 19. Tunneling

**Question:** Is tunneling under a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site subject to the requirements of Section 4(f)?

**Answer:** Section 4(f) would apply only if the tunneling:

- 1) Disturbs any archaeological sites on or eligible for the National Register of Historic Places which warrant preservation in place, or
- 2) Causes disruption which would permanently harm the purposes for which the park, recreation, wildlife or waterfowl refuge was established, or
- 3) Substantially impairs the historic values of the historic site.

## 20. Wildlife and Waterfowl Refuges

**Question A:** What is a wildlife or waterfowl refuge for purposes of Section 4(f)?

**Answer A:** The terms “wildlife refuge” and “waterfowl refuge” are not defined in the Section 4(f) law or in FHWA's regulations. However, in 1966, the same year Section 4(f) was passed; Congress also passed the National Wildlife Refuge System Act (NWRSA). The NWRSA defines these terms broadly focusing on the preservationist intent of the refuges. The FHWA has considered this in our implementation of Section 4(f) for refuges. For purposes of Section 4(f), a wildlife and waterfowl refuge is publicly owned land (including waters) where the major purpose of such land is the conservation, restoration, or management of endangered species, their habitat, and other wildlife and waterfowl resources. In determining the major purpose of the land, consideration must be given to the following: (1) the authority under which the land was acquired; (2) lands with special national or international designations; (3) the management plan for the land; and/or (4) whether the land has been officially designated by a Federal, State, or local agency having jurisdiction over the land, as an area for which its major purpose and function is the conservation restoration, or management of endangered species, their habitat or wildlife and waterfowl resources. Recreational activities, including hunting and fishing, are consistent with the broader species preservation.

Examples of properties that may function as wildlife or waterfowl refuges include: State or Federal wildlife management areas, a wildlife reserve, preserve or sanctuary, and waterfowl production areas, including wetlands and uplands that are set aside (in a form of public ownership) for refuge purposes. The FHWA must consider the ownership, significance and major purpose of these properties in determining if Section 4(f) should apply. In making these determinations FHWA should review the existing management plans and consult with the Federal, State or local officials having jurisdiction over the property. In some cases, these types of properties will actually be multiple-use public land holdings of the type discussed in Question 6, and should be treated accordingly.

**Question B:** Are “conservation easements” acquired by the United States on private lands considered Section 4(f) wildlife and waterfowl refuges?

**Answer B:** Easements (a form of property ownership, see Question 2 D) acquired by the United States are subject to Section 4(f) as a wildlife and waterfowl refuges when they are part of the National Wildlife Refuge System. Other lands may be subject to Section 4(f) when they meet the definition and criteria specified in Answer A, above. In all cases, FHWA must consider the ownership, significance, and major purpose of these types of properties in determining if Section 4(f) should apply.

## 21. Air Rights

**Question:** Do the requirements of Section 4(f) apply to bridging over a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site?

**Answer:** Section 4(f) will apply if piers or other appurtenances are physically located in the park, recreation area, wildlife and waterfowl refuge, or significant historic property. Where the bridge will span the 4(f) resource entirely, the proximity impacts of the bridge on the 4(f) resource should be evaluated to determine if the placement of the bridge will result in a constructive use (see Question 1 B).

## 22. Non-Transportation Use of 4(f) Resources

**Question:** Does the expenditure of Title 23 funds for mitigation or non-transportation activities on a 4(f) resource trigger the requirements of Section 4(f)?

**Answer:** No. Section 4(f) only applies where land is permanently incorporated into a transportation facility and when the primary purpose of the activity on the 4(f) resource is for transportation. If activities are proposed within a 4(f) resource solely for the protection, preservation, or enhancement of the resource and the official with jurisdiction has been consulted and concurs with this finding (in writing) then the provisions of Section 4(f) do not apply.

For example, consider the construction or improvement of any type of recreational facility in a park or recreation area (see Question 24) or the construction of a permanent structural erosion control feature, such as a detention basin. Where these activities are for the enhancement or protection of the 4(f) resource, do not permanently incorporate land into a transportation facility, do not appreciably change the use of the property and the officials having jurisdiction agree, Section 4(f) would not apply.

Another example involves the enhancement, rehabilitation or creation of wetland within a park or other 4(f) resource as part of the mitigation for a transportation project's wetland impacts. Where this work is consistent with the function of the existing park and considered an enhancement of the 4(f) resource by the official having jurisdiction, then Section 4(f) would not apply. In this case the 4(f) land is not permanently incorporated into the transportation facility, even though it is a part of the project as mitigation.

If activities funded with Title 23 funds result in a substantial change in the purpose, function or change the ownership from a 4(f) resource to transportation, then Section 4(f) will apply.

### **23. Scenic Byways**

**Question:** How does Section 4(f) apply to scenic byways?

**Answer:** The designation of a road as a scenic byway is not intended to create a park or recreation area within the meaning of 49 U.S.C. 303 or 23 U.S.C. 138. The improvement (reconstruction, rehabilitation, or relocation) of a publicly-owned scenic byway would not come under the purview of Section 4(f) unless the improvement was to otherwise use land from a protected resource.

### **24. Transportation Enhancement Projects**

**Question A:** How is Section 4(f) applied to transportation enhancement activity projects?

**Answer A:** A transportation enhancement activity (TEA) is one of twelve specific types of activities set forth by statute at 23 U.S.C. 101(a)(35). TEAs often involve the enhancement of, or improvement to, land that qualifies as a Section 4(f) protected resource. For a 4(f) resource to be used by a TEA, two things must occur, (1) the TEA must involve land of an existing 4(f) resource; and (2) there must be a use of that 4(f) resource as defined by 23 C.F.R. 771.135(p). Therefore, if a TEA permanently incorporates 4(f) land into a transportation facility then there is a use and Section 4(f) will apply.

The following TEAs have the greatest potential for Section 4(f) use:

- Facilities for pedestrians and bicycles
- Acquisition of scenic easements and scenic or historic sites
- Scenic or historic highway programs including tourist and welcome centers
- Historic preservation
- Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals)
- Preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian or bicycle trails)

Conversely, the TEAs below are less likely to be subject to Section 4(f):

- Safety and educational activities for pedestrians and bicyclists
- Landscaping or other scenic beautification
- Control and removal of outdoor advertising
- Archeological planning and research
- Environmental mitigation of highway runoff pollution, reduce vehicle-caused wildlife mortality, maintain habitat connectivity
- Establishment of transportation museums

In both categories above, the question of Section 4(f) use must be evaluated on a case-by-case basis.

To illustrate how Section 4(f) is applicable to a TEA, consider the following two scenarios involving a significant public park:

Scenario 1: A TEA project is proposed for the construction of a new pedestrian or bike facility within a public park. The purpose of the project is primarily to promote a mode of travel and requires a transfer of land from the officials with jurisdiction over the 4(f) resource to the State DOT or local transportation authority. Since this project would involve the “permanent incorporation of 4(f) land into a transportation facility” there is a use of 4(f) land and a Section 4(f) evaluation should be prepared. In this instance, *The Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects* ([www.environment.fhwa.dot.gov/guidebook/vol2/doc15m.pdf](http://www.environment.fhwa.dot.gov/guidebook/vol2/doc15m.pdf)) would likely apply, depending on the particular circumstances of the project.

Scenario 2: The purpose of a TEA project is to construct, rehabilitate, reconstruct or refurbish an already existing bike path or walkway within a public park. This project relates to surface transportation but the improvement is primarily intended to enhance the park. In this case there is no “permanent incorporation of 4(f) land into a transportation facility” and, therefore, no Section 4(f) use. A Section 4(f) evaluation does not need to be prepared.

Other TEA projects can involve existing transportation facilities such as highways, bridges, and buildings which are expected to have a useful life that is finite and therefore, continually require maintenance or rehabilitation. While 23 C.F.R. 771.135(f) may apply in certain instances, generally speaking, the rehabilitation of a highway, building or bridge relates to surface transportation but does not rise to the level of a Section 4(f) use (see also Question 4).

Archaeological planning and research projects that involve the potential use of a significant archeological property are covered by the provisions of 23 C.F.R. 771.135(g) (see Question 5). Other TEAs may be handled in accordance with this answer. In complex situations the FHWA Division Office should contact the Headquarters Office of Project Development and Environmental Review or the Office of the Chief Counsel for assistance.

Note: This answer supersedes the August 22, 1994; *Interim Guidance on Applying Section 4(f) On Transportation Enhancement Projects and National Recreational Trails*.

**Question B:** Is it possible for a TEA to create a 4(f) resource?

**Answer B:** To be eligible for transportation enhancement funding, a proposed activity must relate to surface transportation and not be solely for recreation or other purpose. Also, the development of parks, recreation areas, or wildlife and waterfowl refuges are not designated eligible TEAs. Thus, in most cases, the TEA by itself would not create a 4(f) resource, where one did not previously exist.

That being said, it is possible for transportation enhancement funds to enhance existing 4(f) resources, such as a bikeway or pedestrian facility that is constructed within a park. The use of TEA funds in this case would not alter the future Section 4(f) status of the park and may add Section 4(f) values that would

have to be considered in subsequent projects. See Question 22 for additional discussion of the use of transportation funds within a park or other 4(f) resource for non-transportation purposes.

For more information, see the *FHWA Final Guidance on Transportation Enhancement Activities*; December 17, 1999, and the TE Program Related Questions & Answers; August, 2002, found at the Transportation Enhancement Website ([www.fhwa.dot.gov/environment/te/index.htm](http://www.fhwa.dot.gov/environment/te/index.htm)).

## 25. Museums, Aquariums and Zoos?

**Question:** Does Section 4(f) apply to museums, aquariums and zoos?

**Answer:** Publicly owned museums or aquariums will not normally be considered parks, recreational areas, or wildlife and waterfowl refuges and are, therefore, not subject to Section 4(f) unless they are significant historic properties.

Publicly owned zoos on the other hand, should be evaluated on a case-by-case basis to determine the major purpose of these resources and if they are significant park and/or recreational resources. To the extent that these resources are considered to be significant park or recreational areas, or are significant historic properties, they will be treated as 4(f) resources.

## 26. Tribal Lands and Indian Reservations

**Question:** How are lands owned by Federally Recognized Tribes, and/or Indian Reservations treated for the purposes of Section 4(f)?

**Answer:** Federally recognized Indian Tribes are considered sovereign nations, therefore, lands owned by them are not considered to be “publicly owned” within the meaning of Section 4(f), nor open to the general public, and Section 4(f) does not automatically apply. However, in situations where it is determined that land or resources owned by a Tribal Government or on Indian Reservation functions as a significant park, recreational area (which are open to the general public), a wildlife and waterfowl refuge, or is eligible for the National Register of Historic Places, Section 4(f) would apply.

## 27. Traditional Cultural Properties

**Question:** Are lands that are considered to be traditional cultural properties subject to the provisions of Section 4(f)?

**Answer:** A traditional cultural property or TCP is defined in the 1990 National Register Bulletin # 38 generally as land that may be eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that; (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. Land referred to as a TCP is not automatically considered historic property, or treated differently from other historic property. A TCP must also meet the National Register criteria as a site, structure, building, district, or object to be eligible for Section 4(f) protection.

For those TCPs related to an Indian tribe, the Tribal Historic Preservation Officer (THPO) or tribal resource administrator should be consulted in determining whether the TCP is on or eligible for the National Register. For other TCPs the State Historic Preservation Officer (SHPO) should be consulted.

## 28. Cemeteries

**Question A:** Does Section 4(f) apply to cemeteries?

**Answer A:** Cemeteries would only be considered 4(f) properties if they are significant historic resources, i.e., determined to be on or eligible for the National Register of Historic Places.

**Question B:** Does Section 4(f) apply to other lands that contain human remains?

**Answer B:** Lands that contain human remains, such as graveyards, family burial plots, or Native American burial sites and those sites that contain Native American grave goods associated with burials, are not in and of themselves considered to be 4(f) resources. However, these types of lands may also be historic properties included on or eligible for inclusion in the National Register. These sites should not automatically be considered only as archeological resources as many will have value beyond what can be learned by data recovery. If these sites are National Register listed or eligible and also warrant preservation in place, Section 4(f) applies (see Question 5). For more information on the subject of historic cemeteries see, National Register Bulletin #41, *Guidelines for Evaluating and Registering Cemeteries and Burial Places*; 1992.

When conducting the Section 4(f) determination for lands that may be Native American burial sites or sites with significance to a Federally Recognized Tribe, consultation with appropriate representatives from the Federally Recognized Tribes with interest in the site is essential.

## **29. Section 4(f) Evaluations in Tiered NEPA Documents**

**Question:** How should Section 4(f) be handled in tiered NEPA documents?

**Answer:** This issue is addressed to some degree in 23 C.F.R. 771.135(o)(1). Because the project development process moves from a broad scale examination at the tier-one stage, to a more site specific evaluation in tier-two, does not relieve FHWA from its responsibility to consider feasible and prudent avoidance alternatives to the use of 4(f) resources at the tier-one stage. Where all alternatives in the second tier analysis use a 4(f) resource, it may be appropriate and necessary to reconsider the feasibility and prudence of an avoidance alternative that was eliminated during the tier-one evaluation phase.

## **30. Department of the Interior Handbook on Departmental Review of Section 4(f) Evaluations (2002)**

**Question:** What is the official status of the February 2002, *Handbook on Departmental Reviews of Section 4(f) Evaluations*, issued by the Department of the Interior, Office of Environmental Policy and Compliance?

**Answer:** Section 4(f) legislation (23 U.S.C. 138 and 49 U.S.C. 303) identifies the Department of Interior, as well as the Departments of Agriculture and Housing and Urban Development as having a role in Section 4(f) matters. The U.S. Department of Transportation (DOT) is required to consult and cooperate with these Departments in Section 4(f) program and project related matters.

The purpose of the Handbook is to provide guidance to the National Park Service (NPS), U.S. Fish and Wildlife Service (F&WS) and other designated lead bureaus in the preparation of DOI comments on Section 4(f) evaluations prepared by the DOT, pursuant to the authority granted in Titles 23 and 49. The Handbook is an official DOI document and includes departmental opinion related to the applicability of Section 4(f) to lands for which they have jurisdiction and authority. FHWA values the DOI's opinions related to the resources under their jurisdiction, and while the Handbook provides resource information for FHWA to consider, it is not the final authority on Section 4(f) determinations.

Official FHWA policy on the applicability of Section 4(f) to lands that fall within the jurisdiction of the DOI is contained within 23 C.F.R. 771.135 and this *Policy Paper*. FHWA is not legally bound by the Handbook, or the comments provided by the DOI or lead bureaus, however, every attempt should be made to reach agreement during project consultation. In some situations one of the bureaus may be an official having jurisdiction. When unresolved conflicts arise during coordination with the NPS, F&WS or other bureaus related to the applicability of Section 4(f) to certain types of land or resources, it may be necessary for the Division Office to contact the Office of Project Development and Environmental Review for assistance.

## APPENDIX A Analysis of Case Law

The following analysis provides brief legal notes and citations to some Section 4(f) cases that relate to the subject matter discussed in the question and answer section of the Section 4(f) Policy Paper. This section is provided for informational purposes and as background to the policy addressed in the question and answers. In some instances, case law does not address the specific example in the Policy Paper. Also, there are some examples that have had no case address the subject matter of the question. When you have specific legal questions or need legal advice about Section 4(f) applicability, please contact the Legal Staff of the Office of Chief Counsel within your geographic area. FHWA reserves the right to modify and update this appendix as case law becomes applicable.

### **1. Use of Resources**

**Question A:** What constitutes a “use” of land from a publicly owned public park, recreation area, wildlife refuge, and waterfowl refuge or historic site?

**Legal Note:** A number of cases have discussed “use” and “constructive use” and only a few are mentioned here. Several courts have held that the term “use” is to be construed broadly, not limited to the concept of physical taking, but includes areas that are significantly, adversely affected by the project. Adler v. Lewis, 675 F.2d 1085, 1092 (9<sup>th</sup> Cir. 1982); Concerned Citizens Alliance v. Slater, 176 F.3d 686 (3<sup>rd</sup> Cir. 1999). In Concerned Citizens, it was undisputed that the preferred alignment would “use” an historic district by sending through the district, resulting in visual, traffic, and noise and vibration impacts. The issue in that case was whether the preferred alternative would impose the least harm on the historic district.

In Brooks v. Volpe, 460 F.2d 1193 (9<sup>th</sup> Cir. 1972), the Court held that construction of a segment of Interstate Highway I-90 which would encircle campground areas would result in a “use” due to the indirect impacts to the campground under Section 4(f) expanding the physical use concept to what would later be called constructive use and codified in FHWA's regulations at 23 C.F.R. 771.135(p).

**Question B:** How is “constructive use” defined and determined?

**Legal Note:** Significant adverse indirect impacts, now called "substantial impairment" in FHWA's regulations, can result in a constructive use. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971). At the same time, not every change within park boundaries constitutes a “use” of Section 4(f) lands. Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987). No “use” occurs where an action will have only an insignificant effect on the existing use of protected lands. In Geer v. FHWA, 975 F. Supp. 47, 73 (D. Mass. 1997), the court upheld the FHWA's determination of no constructive use, which concluded that the noise and visual impacts were not significant given the existing urban context of the project and existing impacts under the no-build option.

In Davis v. Mineta, 302 F.3d 1104 (10<sup>th</sup> Cir. 2002), construction of a project that would substantially impair the aesthetic attributes associated with the Jordan River Parkway was subject to Section 4(f) due to the disruption of the natural setting and feeling of the Parkway. In that case, noise levels were expected to increase at least ten decibels in the parkway. In Conservation Soc'y of S. Vt. v. Sec'y of Transp., 443 F. Supp. 1320 (D. Vt. 1978), “close proximity” of the proposed highway project to the Lye Brook Wilderness area was deemed a “use” of publicly owned recreation land subject to Section 4(f).

The effects of noise can result in a constructive use. In Allison v. DOT, 908 F.2d 1024, 1028 (D.C. Cir. 1990), the court determined that the FAA erred in considering only the effect on humans using a Section 4(f) state park. However, the court ultimately found that there was no violation of Section 4(f) because the operation of the new airport would not result in a significant increase in the noise level over the level of the current facility. There was a similar result in Sierra Club v. United States Dep't of Transp., 753 F.2d 120 (D.C. Cir. 1985), in which the increase in cumulative noise from the new facility was found not to be significant.

More recently, in City of S. Pasadena v. Slater, 56 F. Supp. 2d 1106 (C.D. Cal. 1999), the plaintiffs argued that the 710 Freeway Project would constructively use historic sites by substantially impairing the aesthetic features or attributes of the sites. They argued that the proximity of the freeway to historic properties resulted in at least two forms of constructive use. First, to the extent that the overall setting of a property is an important contributing element to the historic value of the property, this attribute would be impaired. Second, they argued, the mere proximity of the freeway to the historic properties would result in additional impairments. The Defendant argued that setting was not a major aspect of the qualities that made these specific properties eligible for the National Register. The court found that this determination was simply a conclusion for which no analysis was offered. With regard to proximity, the project would come within 15 feet of an historic district. The court noted that other courts have found that there is a constructive use in situation where there is a greater distance between the project and the section 4(f) resource. (See, for example, Coalition Against Raised Expressways, Inc. v. Dole, 835 F.2d 803 (11<sup>th</sup> Cir 1988) (on-ramp within 43 feet of Section 4(f) structure is a constructive use); Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9<sup>th</sup> Cir. 1976) construction of six-lane controlled access highway passing within 100-200 feet of Section 4(f) resource is a constructive use). In City of S. Pasadena, the court found serious questions as to whether defendants abused their discretion in finding that the 710 Freeway Project would not result in any constructive uses of eligible historic resources.

**Question C:** When does temporary occupancy of a 4(f) resource result in a 4(f) use?

**Legal Note:** In Coalition On Sensible Transp. Inc. v. Dole, 642 F. Supp. 573, (D. D.C.1986) the project in Montgomery County, Maryland, proposed to widen 16 miles of Interstate 270. Among other violations, plaintiffs argued that the projects impacts to several parklands constituted a use under Section 4(f).

The Section 4(f) statement for this project examined 7 parks and conservation areas. In 4 of the 7 resources, temporary construction easements would be granted for grading and after construction was completed, would be regraded, revegetated and then returned for use as a parkland. The court found that, "the projects temporary impact upon parkland during the construction period does not amount to 'use' within the meaning of section 4(f)." 642 F. Supp. at 596.

Further, since the narrow strips of parkland were in close proximity to the existing highway, and the administrative record established that none of the land was being actively used by park authorities, the court determined that this project would not 'substantially impair the value' of parkland in this case. *Id.* The court also found that even if the project resulted in a Section 4(f) use, Section 4(f) would not have been violated.

(On appeal in Coalition on Sensible Transp. Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987), the Court affirmed the lower court's decision for other reasons. The Appeals Court reasoned that since there were other physical uses of other Section 4(f) resources in the project area, the question of temporary occupancy amounting to a use was not necessary).

**Practitioner's note:** The district court case is useful as an example where the temporary occupancy of parkland by a temporary construction easement did not result in a use under Section 4(f).

## 2. Public Parks, Public Recreation Areas, and Wildlife and Waterfowl Refuges

**Question A:** When is publicly owned land considered to be a park, recreation area, or wildlife and waterfowl refuge and who makes this determination?

**Legal Note:** In Kickapoo Valley Stewardship Ass'n. v. U.S. Dept. of Transp., 37 Fed. Appx. 810 (7<sup>th</sup> Cir. 2002) (unpublished), the Court held that Section 4(f) only applies to those lands formally classified as parks, recreation areas, wildlife and waterfowl refuges, or historic sites. The Kickapoo Valley Reserve property was originally planned for an Army Corps of Engineers flood-control project. The dam project was cancelled and an Act of Congress transferred the property to the State of Wisconsin. The legislation specified that the land was to "be preserved in a natural state and developed only to the extent necessary to enhance outdoor recreational and educational opportunities." The Court found that this legislative

language restricting use was not sufficient to designate the Reserve as Section 4(f) land. The Court further found that it was not arbitrary and capricious for USDOT to decide not to consider the Reserve as Section 4(f) land based on the multiple uses of the Reserve, including significant portions being used for agriculture.

In Stewart Park & Reserve Coalition v. Slater, 352 F.3d 545 (2<sup>nd</sup> Cir. 2003), the Court held that Section 4(f) contains no requirement that the public parklands to which it applies must be permanently designated as such. The Court determined that Section 4(f) applied, even though the public lands to be used in the project were originally acquired for transportation purposes (airport expansion and access). Although the land was never permanently designated as parklands, it was available to the public for use as park and recreational area for almost 30 years. (See also Legal Note in 18 of this Appendix)

**Question B:** How should the significance of public parks, recreation areas, and waterfowl and wildlife refuges be determined?

**Legal Note:** Land that is used as a public park is presumed significant for Section 4(f) purposes unless explicitly determined otherwise by the appropriate federal or local officials. Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4<sup>th</sup> Cir. 1972). FHWA reviews the state determination of significance of a public park for reasonableness. Concerned Citizens on I-90 v. Sec. of Transp., 641 F.2d 17 (1<sup>st</sup> Cir. 1981); Geer v. FHWA, 975 F. Supp. 47, 64 (D. Mass. 1997).

## 8. Wild and Scenic Rivers

**Question A:** Are Wild and Scenic Rivers (WSR) subject to Section 4(f)?

**Legal Note:** In Hells Canyon Pres. Council v. Jacoby, 9 F.Supp.2d 1216 (D. Or. 1998), the court found that a consistency determination supported FHWA's CE. Although that case did not involve a Section 4(f) analysis with respect to the river, the court's reliance on the consistency determination in concluding that there would be no significant impact on the wild and scenic river values should apply equally to a Section 4(f) constructive use analysis.

**Practitioner's Note:** When projects may have some arguable constructive use of publicly owned waters or on publicly-owned lands administered for Section 4(f) values, it generally will be helpful to obtain a written consistency determination from the river manager. Such consistency determination may prevent a "constructive use" determination.

## 10. School Playgrounds

**Question:** Are publicly owned school playgrounds subject to the requirements of Section 4(f)?

**Legal Note:** In Piedmont Env'tl. Council v. U.S. Dept. of Transp., 159 F.Supp.2d 260 (W.D. Va. 2001), aff'd in relevant part, 58 Fed. Appx. 20 (4<sup>th</sup> Cir. 2003), the court found that the taking of some land of one school for a bypass constituted Section 4(f) property but that the agency was not arbitrary and capricious in concluding that there were no other feasible and prudent alternatives than taking the land. The court further found that "[b]ecause the defendants concluded that the recreational facilities affected by the noise and visual impacts of the bypass were not noise-sensitive and that differences in elevation and the existing wood buffer would screen the bypass from view, see id. at 35, the Secretary was within the scope of his authority and did not arbitrarily and capriciously conclude that no constructive use would occur."

**Practitioner's Note:** There is both an actual and a constructive use of school property that should be considered. When the project will take a portion or all of school property open for recreational activity, than Section 4(f) must be considered. However, when the project simply comes near such property, the visual and auditory impacts should be analyzed. If the school property is not noise sensitive, then auditory concerns will not translate into a constructive use. If the visual impact can be shielded by vegetation or elevation differences, then visual concerns may not translate into a constructive use.

However, a thorough study of the effects on the school property provides needed support for a conclusion that there is no constructive use.

## 15. Bikeways

**Question:** Do the requirements of Section 4(f) apply to bikeways?

**Legal Note:** In Laguna Greenbelt, Inc. v. U.S. Dept. of Transp., 42 F.3d 517 (9<sup>th</sup> Cir. 1994) the court found that an overpass over a bike trail, a widening of an existing bridge over a bike trail, and the relocation of a bike path within the designated right-of-way for the bike path did not constitute either actual or constructive use of the respective trails.

Calio v. Pa. Dep't of Transp. (No. 00-2163, 3d Circuit, October 10, 2001). This litigation involved a Pennsylvania Department of Transportation (PennDOT) proposal to develop a stretch of abandoned railroad track in suburban Philadelphia as a bicycle and pedestrian trail, using funds from the Congestion Mitigation and Air Quality Improvement Program (CMAQ). 23 U.S.C. 104(b)(2) 217. The proposed trail is a non-National Highway System project subject to an exemption agreement entered into by FHWA and PennDOT in 1992. See 23 U.S.C. 106(b)(2) (1991).

The case involved a single issue: would the trail be used principally for transportation, rather than recreation purposes as required for projects funded from the CMAQ program? The District Court upheld FHWA's determination that the trail project would be principally for transportation, saying it was supported by the administrative record and neither arbitrary nor capricious. The appellate court, in a three-page decision, agreed. Although the Third Circuit decision may not be cited as precedent, the District Court's decision has been published. See Calio v. Pa. Dept. of Transp., 101 F.Supp. 2d 325 (E.D. Pa. 2000).

**Practitioner's Note:** If the project can be constructed so as to preserve the trail, then generally there will not be a "use" of the trail. Thus, an overpass or even the relocation of the trail within the trail's existing right-of-way may avoid a "use" of the trail. Even if a bike path has some recreational purposes, that does not mean it is not

## 16. Joint Development (Park with Highway Corridor)

**Question:** When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the 4(f) resource is reserved for highway use prior to, or at the same time the 4(f) resource was established, do the requirements of Section 4(f) apply?

**Legal Note:** In Sierra Club v. Dole, 948 F.2d 568 (9<sup>th</sup> Cir. 1991) the 9<sup>th</sup> Circuit reversed the district court's 1987 ruling that the Secretary had failed to comply with Section 4(f) by ruling that a planned bypass road constructively used the McNee Ranch Park. In 1984, the McNee Ranch State Park was transferred to the California Department of Parks and Recreation. This transfer deliberately set aside part of the land that was to form the park, due to the CalTrans belief that this set aside land might be necessary for a future bypass of an area commonly know as "Devil's Slide" on California State Highway Route 1. The Devil's Slide was a 600-foot section of Route 1 that repeatedly was closed due to landslides.

In 1986, the Secretary approved a Final Environmental Impact Statement for the Martini Creek Alternative, but this FEIS did not include a Section 4(f) evaluation for the McNee Ranch Park.

In the 9<sup>th</sup> Circuit, USDOT claimed there was extensive cooperation between CalTrans and the park planners throughout the process of park acquisition and the road alignment. The court also examined the legislative history of Section 4(f) and found Congressional reports that stood for the proposition that Congress thought that the joint planning of roads and parks was desirable.

Additionally, the court stated that,

“[w]here a park and a road are jointly planned on land which previously had neither park or road...no consensus is being upset. The community is not changing its mind about the type of park and road it would have, but is making the determination in the first instance. It is difficult to see how the road would significantly and adversely affect the park.” (948 F.2d 575)

Further, the 9<sup>th</sup> Circuit held that a road does not “constructively use” a park if the road and park were jointly planned. The court also emphasized that this is only applicable when there is constructive not actual use of a parkland.

## 17. Planned 4(f) Resources

**Question:** Do the requirements of Section 4(f) apply to publicly owned properties “planned” for park, recreation area, wildlife refuge, or waterfowl refuge purposes even though they are not presently functioning as such?

**Legal Note:** In Nat’l Wildlife Fed’n v. Coleman, 529 F.2d 359 (5<sup>th</sup> Cir. 1976) plaintiffs contended that FHWA violated Section 4(f) by failing to prepare a Section 4(f) statement for a section of I-10 that planned to transect the habitat of the Mississippi Sandhill Crane, bisect the eastern portion of a proposed refuge for the crane, and traverse Section 16 land held by the State of Mississippi in trust for the Jackson County School District.

The court determined that for Section 4(f) to apply to the lands at issue in this case, they must meet the following two-part test. First, the land to be used by the project must be publicly owned and second, the land must be from one of the enumerated types of publicly owned lands. The court found that the Section 16 land, although publicly owned, was never designated or administered as a wildlife refuge or any other Section 4(f) purpose notwithstanding the fact that the land was used by the Sandhill Crane as a sanctuary. In addition, the court found Section 4(f) was not applicable to the proposed wildlife refuge, because at the time the right of way for the project was acquired, and during the time the plans were approved, estimates and specifications were given, construction awards were given, and when construction began, the land was not publicly owned. A subsequent transfer of the land to the Fish and Wildlife Service did not make Section 4(f) applicable after the fact.

In Davis v. Mineta, 302 F.2d 1104 (10<sup>th</sup> Cir. 2002) two parks were planned within the area of potential effect as part of a highway project within the cities of Draper, Sandy and South Jordan in Salt Lake County, Utah. Here, the Jordan River Parkway was owned by two private landowners and partially by the Utah Department of Natural Resources, Division of Parks and Recreation. This land was designated as parkland on the South Jordan City Parks and Recreation Master Plan. The other property at issue was the Willow Creek Park. This park was planned in the Draper City Master Plan to be parkland but was owned by a private landowner. The 10<sup>th</sup> Circuit found that Willow Creek did not qualify as a Section 4(f) property, due to its private ownership, as did that portion of the Jordan River Parkway not owned by the State of Utah. However, that part which was owned by the State of Utah did qualify as Section 4(f) property due to its public holding.

## 18. Temporary Recreational Occupancy or Uses of Highway Rights-of-Way

**Question:** Does Section 4(f) apply to temporary recreational uses of land owned by a State Department of Transportation or other Applicant and designated for transportation purposes?

**Legal Note:** In Collin County, Tex. v. Homeowners Ass’n For Values Essential to Neighborhoods (HAVEN) 716 F. Supp. 953 (N.D. Texas 1989) HAVEN contended that certain lands should have been viewed as Section 4(f) properties in the Section 4(f) evaluation in the Final Environmental Impact Statement. In this case, the properties at issue were acquired by Dallas County from a private party in 1973 for use as highway right-of-way. Under an agreement between the City of Carrollton and Dallas County, the right-of-way was being used for recreation. Plaintiffs countered that Section 4(f) is inapplicable to temporary uses of highway rights-of-way for recreational activities.

The court concluded that FHWA did not err when the Section 4(f) evaluation determined that these properties were not Section 4(f) resources. Reasoning,

“The properties in this case were acquired from a private owner by Dallas County for right-of-way purposes; they are being used temporarily as a park. Simply because they have an interim use does not change their character: they were purchased as rights-of-way and they will be used as rights-of-way.” 716 F. Supp. at 972

A recent decision, known as the Stewart Airport Case, undercuts the position that land acquired for transportation use cannot become a Section 4(f) resource by permissive interim use. Stewart Park and Reserve Coalition Inc. v. Slater, 352 F.3d 545 (2nd Cir. 2003).

The case involves approximately 1200 acres of some approximately 8600 acres of land acquired for airport use. The proposed use of the 1200 acres was for construction for airport access and highway improvements. The land at issue was never designated as a parkland, but was managed by the state as such, until its use was required for airport and transportation purposes. The airport land was initially an Air Force base and was transferred to the state for use as a commercial airport. The state acquired the adjacent approximate 8600 acres in the 70's for use as airport expansion land and uses consistent with airport use, as per FAA regulations. These lands also included buffer lands. At issue was whether Section 4(f) applied to these adjacent lands.

The state entered into a revocable agreement with the New York State Department of Environmental Conservation to manage the land until needed for airport use. The terms of the formal revocable agreement stated that the agreement could be terminated upon 60 days notice of the land becoming necessary for airport use. The land was managed and used for recreational purposes during the entire agreement period, until the time it became necessary for transportation purposes.

The court held that 30 years of uninterrupted contiguous use of public recreational uses of this land, regardless of the revocable agreement and that fact the lands were originally acquired for transportation purposes, nonetheless, constituted Section 4(f) protected land. Further, the statutory language does not condition protection of land on being permanently designated as such. Additionally, 30 years of use entitled the land in question to Section 4(f) protection as the uninterrupted period could not be characterized as interim.

## 21. Air Rights

**Question:** Do the requirements of Section 4(f) apply to bridging over a publicly owned park, recreation area, wildlife refuge, waterfowl refuge, or historic site?

**Legal Note:** In Citizens for the Scenic Severn River Bridge Inc. v. Skinner, 802 F. Supp 1325 (D. Md. 1991) citizens and opponents of a bridge construction project sought to enjoin state and federal officials from proceeding with construction of a bridge across the Severn River in Anne Arundel County, Maryland. Among other contentions, plaintiffs argued that use of the Severn River was not adequately considered in the Final Section 4(f) statement. However, in the Section 4(f) statement defendants concluded there would be a use of the river, which the court found to be a Section 4(f) resource. The use entailed placement of piers and pilings in the river, possible runoff and removal of the existing bridge. Further, the statement determined that any of the proposed alternatives would have used the river.

Coalition Against A Raised Expressway Inc. v. Dole, 835 F.2d 803 (11<sup>th</sup> Cir. 1988) examined the impacts of an elevated expressway on three Section 4(f) resources in the downtown area of Mobile, Alabama. At issue were a park, a railroad terminal and the city hall. Defendants argued that in light of the location of these properties in the downtown area, the impacts from the expressway would not be substantial so as to amount to a use of these properties. However, the court reasoned that,

“In addition to the noise and air pollution, the raised highway would impact on the protected sites by impairing the view. The highway would cut off the city hall's view of the river and the docks.

Conversely, it would reduce the view from the river of the city hall's architecture. For the park and the railroad terminal, the highway would replace the view of the downtown with the sight of the seventeen-foot concrete pillars holding up the freeway. In addition, the dirt and debris from an elevated freeway would lessen the beauty of the architecture itself.

While the elimination of the view, the increase in noise and air pollution, and the close location of the highway may not individually constitute a use; cumulatively they significantly impair the utility of the properties." 835 F.2d at 812

The court found that the elevated expressway constructively used these Section 4(f) resources.

## **22. Non-Transportation Use of 4(f) Resources**

**Question:** Does the expenditure of Title 23 funds for mitigation or non-transportation activities on a 4(f) resource trigger the requirements of Section 4(f)?

In National Trust for Historic Preservation v. Dole, 828 F.2d 776 (D.C. Cir. 1987), the court found that installing suicide prevention barriers on an historic bridge was not a *transportation program or project* and therefore Section 4(f) was not triggered. The court looked at the purpose of the project and found that since it was not a project to facilitate transportation - - the movement of vehicles, Section 4(f) did not apply.

### **Miscellaneous Section 4(f) Cases With Important Information**

For general guidance on the issue of whether or not an avoidance alternative is imprudent and, therefore, may be rejected, relevant case law is below:

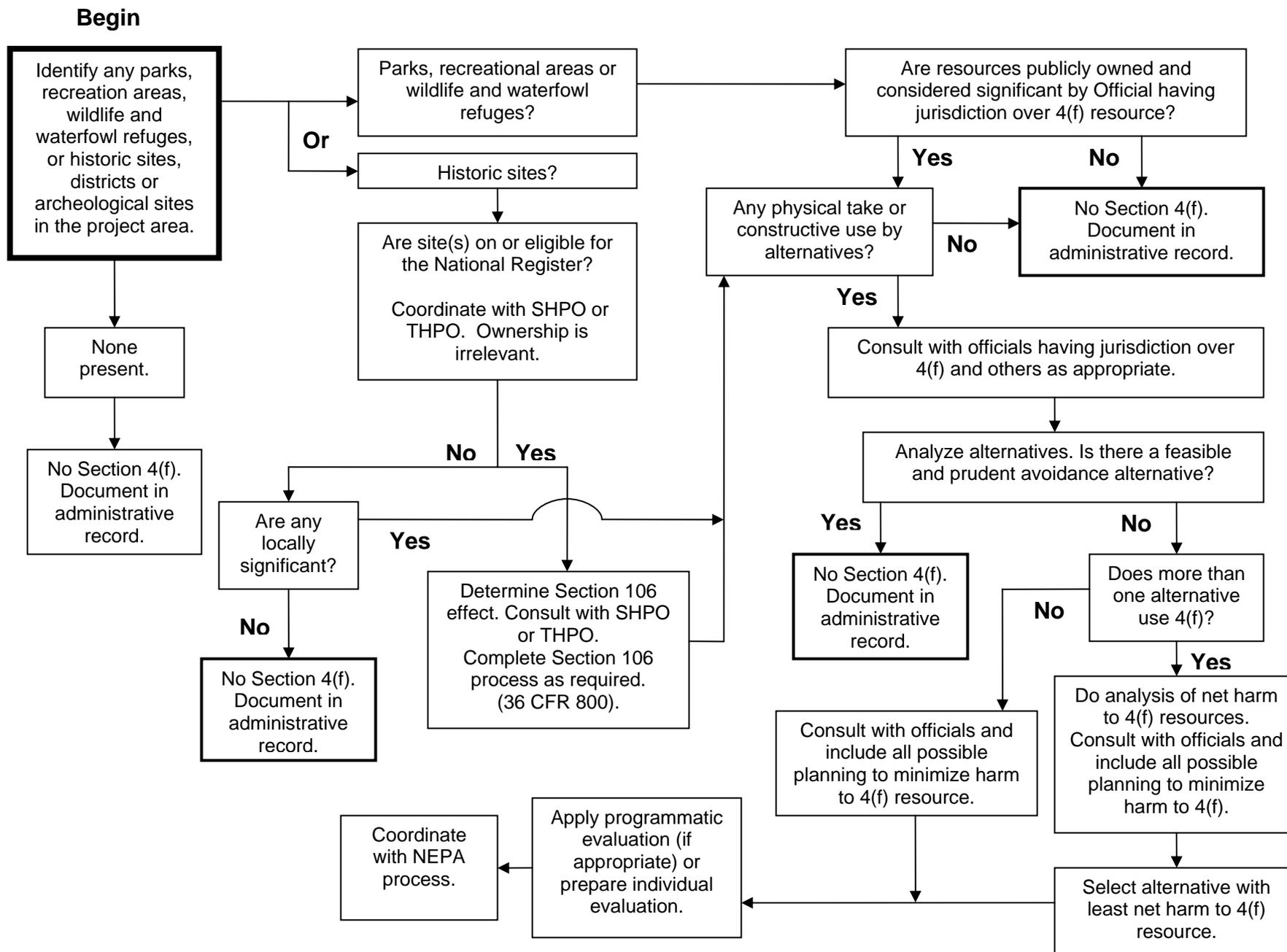
The Fifth, Ninth and Eleventh Circuit Courts of Appeals have employed a stricter standard in determining whether an alternative is imprudent than other Circuits. See, Louisiana Environmental Soviet v. Coleman, 537 F.2d 79 (5th Cir 1976); Stop H-3 Association v. Brinegar, 533 F.2d 434 (9th Cir. 1976); Druid Hills v. FHWA, 772 F.2d 700 (11th Cir. 1985).

Courts in the Fourth, Seventh and Tenth Circuits have interpreted the requirements less stringently. In these jurisdictions, a balancing test for determining whether an alternative is imprudent has been developed. Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 163 (4th Cir. 1990); Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 804 (7th Cir. 1987); Committee to Preserve Boomer Lake Park v. USDOT, 4 F.3d 1543, 1550 (10th Cir. 1993). In these jurisdictions the courts allow the Secretary to weigh the cumulative impacts of the avoidance alternative against the cumulative impacts of the non-avoidance alternative to reach a decision. The impacts to be compared in this type of analysis include other impacts in addition to the impacts on the Section 4(f) resource. The extent of harm that would be caused to the Section 4(f) resource if is not avoided would be taken into consideration under this test.

In the other Federal Circuits the case law is less clear. See Monroe County Council v. Adams, 566 F.2d 419 (2nd Cir. 1977) (employed a balancing test without stating it was doing so). The Eighth and the Third Circuits have recently adopted a more flexible standard for "prudent" but only for the limited purpose of determining whether an alternative that minimizes harm can be rejected as "imprudent." See, Bridgeton v. Slater, 212 F.3d 448 (8th Cir. 1999)(court refused to employ a rigid "least harm" test in an airport expansion case as this would conflict with Congressional mandate to facilitate airport expansion); Concerned Citizens Alliance v. Slater, 176 F.3d 686 (3rd Cir. 1999)(decision found that standard for "prudent and feasible" was not quite as high when applied to alternatives that minimized harm and granted the Secretary "slightly greater leeway" in eliminating options that minimized harm as imprudent).

When addressing the question of which standards apply in your state or district you should consult with the Office of the Chief Counsel's Legal Staff.

**APPENDIX B**  
**Section 4(f) Evaluation Diagram**



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## Section 5

### Section 4(f) Checklist

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# Draft Section 4(f) Evaluation

## General

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- ❑ Is the section 4(f) evaluation contained in a separate section, chapter, or appendix?
- ❑ For EISs, is the environmental document entitled "Draft Environmental Impact Statement and Section 4(f) Evaluation" on the EIS title page?
- ❑ For EAs, is it entitled "Draft Environmental Assessment and Section 4(f) Evaluation"?
- ❑ Does the title page include the citation: "Submitted Pursuant to 42 U.S.C. 4332(2)(c) and 49 U.S.C. 303"?
- ❑ Does the introduction to the section 4(f) evaluation include the following "boiler plate" description of section 4(f):

Section 4(f) of the Department of Transportation Act of 1966, codified in Federal law at 49 U.S.C. §303, declares that "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."

Section 4(f) specifies that "The Secretary [of Transportation] may approve a transportation program or project ... requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if –

- (1) there is no prudent and feasible 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."

Section 4(f) further requires consultation with the Department of the Interior and, as appropriate, the involved offices of the Departments of Agriculture and Housing and Urban Development in developing transportation projects and programs which use lands protected by section 4(f).

- ❑ Is "section 4(f)" listed in the EIS index with correct page numbers?

## Proposed Action

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- Are the proposed project and the project purpose and need briefly described with the corresponding EIS/EA text discussions properly referenced for additional information?

## Description of Section 4(f) Property(ies)

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- Does the description of **each** section 4(f) resource which would be used by any alternative include all of the applicable information outlined in Attachment A?

## Impacts on the Section 4(f) Property(ies)

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- Does the impact evaluation discussion address the following impacts on **each** section 4(f) property for **each** alternative?
  - the amount of land to be used?
  - the facilities, functions, and/or activities affected?
  - accessibility?
  - visual?
  - noise?
  - vegetation?
  - wildlife?
  - air quality?
  - water quality?
- If there is not an impact in one of the above areas, does the evaluation state such with adequate supportive information?
- Does the evaluation include an impact summary table when:
  - (1) more than one section 4(f) property is involved and
  - (2) such a table would be useful in comparing the various impacts of the alternatives?

## Alternatives

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- Does the section 4(f) evaluation of alternatives **identify** and **summarize** the alternatives addressed in the EIS/EA and include specific references to those discussions?

*Detailed discussions of alternatives in an EIS/EA do not need to be repeated in the section 4(f) portion of the document if they are identified and summarized with specific references to the EIS/EA discussions of alternatives.*

- ❑ Do both the section 4(f) evaluation and the EIS/EA discussion of alternatives include the same location alternatives?
- ❑ Are location alternatives and site-specific design variations which avoid section 4(f) property(ies) identified and evaluated?
- ❑ Does the section 4(f) evaluation of alternatives include at least one build alternative which avoids **each** and **all** section 4(f) resources  
*or*  
explain why there are not any such avoidance alternatives with adequate supportive information?

### **Measures to Minimize Harm**

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- ❑ Are all possible measures which are available to minimize the impacts to the section 4(f) property(ies) discussed?  
*Detailed discussions of mitigation measures in the EIS/EA may be referenced and appropriately summarized rather than repeated.*
- ❑ If the section 4(f) property includes lands or facilities developed under section 6(f) of the Land and Water Conservation Fund Act, does the mitigation discussion address the section 6(f) requirements? See Attachment C.

### **Other Park, Recreational Facilities, Wildlife Refuges, and Historic Properties Evaluated Relative to the Requirements of Section 4(f)**

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This section evaluates other park, recreational facilities, wildlife refuges, and historic sites in the project vicinity that do not involve a section 4(f) "use."

It needs to include the information outlined in Attachment B.

This discussion is necessary to explain why some resources or facilities are not protected by provisions of section 4(f) and to document that any proximity impacts to section 4(f) resources do not result in a constructive use.

## Coordination

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- Does the summary discussion of preliminary coordination with the public official having jurisdiction over the section 4(f) resource address the following:
  - avoidance alternatives,
  - impacts to the property, measures
  - to minimize harm,and where necessary,
  - the significance and primary use of the property?
  
- If section 6(f) lands are involved, does the summary discussion include preliminary coordination with the National Park Service Western Region Office?

## Final Section 4(f) Evaluation

- ❑ Is the information contained in the draft section 4(f) evaluation included in the final evaluation with appropriate revisions to reflect comments received on the draft document and any changed conditions, new information, or project refinements?
- ❑ Does the final evaluation provide the basis for concluding that there are no feasible and prudent alternatives to the use of section 4(f) land(s)?  
*The supporting information must demonstrate that "there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes" 23 CFR §771.135(a) (2).*
- ❑ Does the final evaluation provide the basis for concluding that the preferred alternative includes all possible planning to minimize harm to the section 4(f) property(ies)?
- ❑ Does the final evaluation demonstrate that the preferred alternative is the feasible and prudent alternative with the least harm on the section 4(f) resources after considering mitigation?
- ❑ Does the "Coordination Section" summarize the formal section 4(f) coordination with the Department of the Interior and, as appropriate, the involved offices of the Departments of Agriculture (usually the Forest Service) and Housing and Urban Development?
- ❑ Are copies of the section 4(f) comments included in the final evaluation, or if contained in the "Draft EIS Comment and Response Section," are they accurately referenced?
- ❑ Have each of the section 4(f) comments received a full and adequate response?  
*Where new alternatives or modifications to existing alternatives are identified and will not be given further consideration, the basis for dismissing the alternatives/modifications needs to be provided and supported by factual information.*
- ❑ Where section 6(f) land is involved, is the National Park Service's position on the land transfer summarized in the text and documented with a copy of an NPS letter?
- ❑ Does the final section 4(f) evaluation conclude with the following statement?

Based upon the above considerations, there is no feasible and prudent alternative to the use of land from the [name(s) of the section 4(f) property(ies)] and the proposed action includes all possible planning to minimize harm to the [names(s) of the section 4(f) property(ies)] resulting from such use.

## **EIS/EAs Without a Section 4(f) Use**

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All EISs (and EAs only if appropriate) need to include a subsection/subchapter within the Environmental Consequences section/chapter entitled:

Park, Recreational Facilities, Wildlife Refuges, and Historic Properties  
Evaluated Relative to the Requirements of Section 4(f)

that addresses the information outlined in Attachment B.

This discussion is necessary to explain why some resources or facilities are not protected by provisions of section 4(f) and to document that any proximity impacts to section 4(f) resources do not result in a constructive use.

## **Description of Section 4(f) Property(ies)**

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- ❑ A detailed map or drawing of sufficient scale to identify the relationship of the alternatives to the section 4(f) property.
- ❑ Size of the section 4(f) property (acres or square feet).
- ❑ Location of the section 4(f) property (maps or other exhibits such as photographs and/or sketches).
- ❑ Ownership (e.g., private, city, county, State, Federal agency).
- ❑ Type of section 4(f) property (e.g., park, recreation, historic).
- ❑ Available activities or function of the property (e.g., ball playing, swimming, golfing).
- ❑ Description and location of all existing and planned facilities (e.g., ball diamonds, tennis courts).
- ❑ Type of access to the property (e.g., pedestrian, vehicular).
- ❑ Usage of the section 4(f) resource (e.g., approximate number of users/visitors).
- ❑ Relationship to other similarly used lands in the vicinity.
- ❑ Applicable clauses affecting the ownership, such as lease, easement, covenants, restrictions, or conditions, including forfeiture.
- ❑ Unusual characteristics of the section 4(f) property that either reduce or enhance the value of all or part of the property (e.g., flooding problems, terrain conditions, or other features).
- ❑ If the section 4(f) property includes lands or facilities developed under section 6(f) of the Land and Water Conservation Fund Act, the description of the section 4(f) resource will need to indicate such. See Attachment C.

## **Park, Recreational Facilities, Wildlife Refuges, and Historic Properties Evaluated Relative to the Requirements of Section 4(f)**

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This section evaluates parks, recreational facilities, wildlife refuges, and historic sites in the project vicinity that do not involve a "use" of section 4(f) land. It describes each resource and then either:

- (1) explains why it is not protected by section 4(f), or
- (2) demonstrates that the proximity impacts do not rise to a level that substantially impairs the activities, features, or attributes that qualified the resource for protection under section 4(f).

All archaeological and historic sites within the section 106 area of potential effect (APE) and all public and private parks, recreational facilities, and wildlife refuges within approximately 0.8 km (one-half mile) of any of the project alternatives should be included. It is usually unlikely that such resources would be affected at greater distances; however, if there is an issue or question whether they would be affected, they should also be included.

- Does the introduction to this discussion include:
  - a listing of the parks, recreational facilities, wildlife refuges, and historic properties being addressed in this section?
  - if a section 4(f) resource type (i.e., a park, recreational facility, wildlife refuge, or historic property) does not exist in the project vicinity, does the discussion state such?
  - the following statement, edited as appropriate for the types of resources involved: The purpose of this discussion is to address section 4(f) requirements relative to other park, recreational facilities, wildlife refuges, and historical properties in the project vicinity. As indicated below, none of the alternatives under consideration result in a section 4(f) use of these other park, recreational, wildlife refuges, or historical resources. The discussion of each resource either documents
    - (1) why the resource is not protected by the provisions of section 4(f) or
    - (2) if it is protected by section 4(f), why none of the alternatives under consideration cause a section 4(f) use by
      - (a) permanently incorporating land into the project,
      - (b) by temporarily occupying land that is adverse to the preservationist purposes of section 4(f), or
      - (c) by constructively using land from the resource.
  
- Does the description of **each** resource include:
  - all of the applicable information outlined in Attachment A?
  - documentation of whether it is or is not protected by the provisions of section 4(f)?
  
- For each of the resources protected by section 4(f), does the impact evaluation:
  - address the following for **each** alternative:
    - the facilities, functions, and/or activities potentially affected?

- accessibility?
  - visual?
  - noise?
  - vegetation?
  - wildlife?
  - air quality?
  - water quality?
- conclude, based on the above discussion, whether any of the alternatives under consideration would cause a section 4(f) use?
- If there is not an impact in one of the above areas, does the evaluation state such with adequate supportive information?
- Concluding discussions of section 4(f) **must not use** phrases such as "therefore, section 4(f) does not apply." Section 4(f) is applicable to all US Department of Transportation actions. **Rather, use:**
  - "Therefore, the provisions of section 4(f) are not triggered,"
  - "Therefore, the provisions of section 4(f) do not come into play,"

*or*

  - "The proposed project ['preferred alternative' for final evaluations] will not cause a constructive use of [name of section 4(f) resource] because the proximity impacts will not substantially impair the protected activities, features, or attributes of [type of resource, e.g., park, historic site, future park]."

## **Section 6 (f)**

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Section 6(f) of the Land and Water Conservation Fund Act directs the Department of the Interior (National Park Service) to assure that replacement lands of equal value, location, and usefulness are provided as conditions to their approval of the section 6(f) land conversion. Therefore, where a section 6(f) land conversion is proposed, replacement land will be necessary. Regardless of the mitigation proposed, the draft and final section 4(f) evaluations need to document the National Park Service's position on the section 6(f) land transfer.

## Section 6

### Nationwide Programmatic

Summary of programmatic criteria for first four programmatic (from 2001 Section 4(f) workshop by FHWA Resource Center)

#### Programmatic:

- Bikeways and Walkways, 1977
- Minor Use of Public Parks,  
Recreation Lands  
Wildlife/Waterfowl Refuges, 1986
- Minor Use of Historic Sites, 1986
- Minor Use of Historic Bridges, 1983
- Net Benefit to a Section 4(f)  
Property, 2005

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## PROGRAMMATIC 4(f)s

Use only if:

- improvements are essentially on the same location,
- the section 4(f) resource is adjacent to the existing highway

Saves:

- coordination time with Department of Interior
- review time since no legal sufficiency review required

### 1. **Bikeway or Pedestrian Walkway Negative Declaration** - May 23, 1977

Criteria: Independent project needs land from an established recreation/park.  
Not applicable if endangered species, historic sites or wildlife/waterfowl refuge exists in area.

Documented agreement reached with those who have jurisdiction over the resource.

### 2. **Minor involvement with public parks, recreation lands, and wildlife and waterfowl refuges** - August 19, 1987

Criteria:

- if size is less than 10 acres, can use 10% of area (1 acre max)
- If size is 10-100 acres, can use 1 acre
- If greater than 100 acres, can use 1%

Not applicable if there is a NEPA EIS prepared for the project (except in the case of a late discovery of a 4(f) resource after the EIS is complete).

Document agreement reached with those who have jurisdiction over the resource

### 3. **Minor involvement with historic sites** - August 19, 1987

Criteria: minor involvement with significant historic sites with a "no effect" or "no adverse effect" determination under section 106

Not applicable if there is a NEPA EIS prepared for the project (except in the case of a late discovery of a 4(f) resource after the EIS is complete).

Document agreement reached among FHWA, SHPO and ACHP under section 106.

### 4. **Use of historic bridges (demolish or replacement)** - August 22, 1983

Criteria: Bridge is not a National Historic Landmark. Must have considered other alternatives and rejected as unreasonable. No build, building a new structure at new location without affecting old bridge and rehabilitating without affecting historic integrity of old bridge.

Document agreement reached among FHWA, SHPO and ACHP under section 106.




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### Section 4(f)

#### [Nationwide Section 4\(f\) Programmatic Evaluations](#)

#### *Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects*

#### Background

There is a growing interest in bicycling and walking for commuting, for recreation, and for other trip purposes. Where this activity occurs on high-speed roadways, both safety and efficiency can be impaired because of the mixture of motorized and nonmotorized modes of travel. Construction of bikeways or pedestrian walkways can promote safety and will assist in retaining the motor vehicle carrying capacity of the highway while enhancing bicycle capacity.

The United States Congress recognized the importance of bicycle and pedestrian travel by including special provisions for these modes in the Federal-Aid Highway Act of 1973, Public Law 93-87. Section 124 of this Act (amended Title 23, U.S. Code, by adding Section 217) contained the following principal provisions:

(1) Federal funds available for the construction of preferential facilities to serve pedestrians and bicyclists are those apportioned in accordance with paragraphs (1), (2), (3), and (6) of Section 104(b), 23 U.S.C., and those authorized for Forest highways, Forest development roads and trails, public land development roads and trails, park roads and trails, parkways, Indian reservation roads, and public land highways.

(2) Not more than \$40 million (amended to \$45 million by Section 134 of the Federal-Aid Highway Act of 1976) apportioned in any fiscal year for purposes described in the preceding paragraph may be obligated for bicycle projects and pedestrian walkways.

(3) No State shall obligate more than \$2 million (amended to \$2.5 million by Section 134 of the Federal-Aid Highway Act of 1976) of Federal-aid funds for such projects in any fiscal year.

(4) Such projects shall be located and designed pursuant to an overall plan which will provide due consideration for safety and contiguous routes.

The funding limitations described in (2) and (3) above are applicable only to independent bikeway or walkway construction projects.

#### Project Description

Independent bikeway or walkway construction projects are those highway construction projects which provide bicycle or pedestrian facilities in contrast to a project whose primary purpose is to serve motorized vehicles. The requirements for qualification of proposed bikeway or walkway facilities as independent bikeway or walkway construction projects are contained in Volume 6, Chapter 1, Section 1, Subsection 1, of the Federal-Aid Highway Program Manual \* *(the Federal -aid Highway Program Manuals were replaced by the Federal-aid Program Guide which includes selected verbatim sections of the CFR)*, codified as Part 652 of Chapter 1 of Title 23 of the Code of Federal Regulations (CFR).

The bikeways and walkways will be designed and constructed in a manner suitable to the site conditions and the anticipated extent of usage. In general, a bikeway will be designed with an alignment and profile suitable for bicycle use with a surface that will be reasonably durable that incorporates drainage as necessary, and that is of a width appropriate for the planned one-way or two-way use.

The facilities will be accessible to the users or will form a segment located and designed pursuant to an overall plan.

Projects may include the acquisition of land outside the right-of-way, provided the facility will accommodate traffic which would have normally used a Federal-aid highway route, disregarding any legal prohibitions on the use of the route by cyclists or pedestrians.

It is required that a public agency be responsible for maintenance of the federally funded bikeway or walkway. No motorized vehicles will be permitted on the facilities except those for maintenance purposes and snowmobiles where state or local regulations permit.

### **Application**

This negative declaration/preliminary Section 4(f) document is only applicable for independent bikeway or walkway construction projects which require the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes. Additionally, this document is applicable only when the official having specific jurisdiction over the Section 4(f) property has given his approval in writing that the project is acceptable and consistent with the designated use of the property and that all possible planning to minimize harm has been accomplished in the location and design of the bikeway or walkway facility. This document does not apply if the project would require the use of critical habitat of endangered species.

This document does not cover the use of any land from a publicly owned wildlife or waterfowl refuge or any land from a historic site of national, State, or local significance. It also does not cover those projects where there are unusual circumstances (major impacts, adverse effects, or controversy). A separate Section 4 (f) statement and environmental document must be prepared in these categories.

This document does not cover bicycle or pedestrian facilities that are incidental items of construction in conjunction with highway improvements having the primary purpose of serving motor vehicular traffic.

### **Summary**

The primary purpose for the development of independent bikeway and walkway projects is to provide a facility for traffic which would have normally used a Federal-aid highway route. In some cases, the bikeway and walkway projects can serve a dual function by also providing for recreational use. Where this situation occurs, artificially routing a bikeway or walkway around a compatible park area is not a prudent

alternative because it would decrease the recreational value of the bikeway or walkway.

The written approval of the official having specific jurisdiction over the Section 4(f) property and construction authorization by FHWA will confirm that all possible planning to minimize harm has been accomplished in the location and design of the bikeway or walkway facility.

Noise and air quality will not be affected by bicycles. There would be increase in the noise level if snowmobiles are permitted. However, this would likely occur at a time when other uses of the recreational facilities will be minimal.

Temporary impacts on water quality will be minimal. Erosion control measures will be used through the construction period. A certain amount of land will be removed from other uses. The type of land and uses will vary from project to project. However, due to the narrow crosssection of the bikeways and walkways, a minimal amount of land will be required for the individual projects. The projects will be blended into the existing terrain to reduce any visual impacts.

Displacement of families and businesses will not be required.

No significant adverse social or economic impacts are anticipated. There will be beneficial impacts such as the enhancement of the recreational potential of the parks and the provision of an alternate mode of transportation for the commuter.

### **Comments and Coordination**

A draft of this negative declaration/Section 4(f) statement was published in the *Federal Register* (42 F.R. 15394), March 21, 1977, inviting interested persons to comment. The majority of the letters received were favorable and recommended approval of the document.

The document was also circulated to the Departments of the Interior (DOI), Housing and Urban Development (HUD), and Agriculture. Comments were received from DOI and HUD and are included in the appendix along with our responses.

Individual projects will be coordinated at the earliest feasible time with all responsible local officials, including the State Outdoor Recreation Liaison Officer. The use of properties acquired or developed with Federal monies from the Land and Water Conservation Fund will also be coordinated with the Bureau of Outdoor Recreation of DOI.

If HUD Community Development Block Grant Funds are used in conjunction with Federal Highway Administration Funds, HUD environmental review procedures set forth in 24 CFR, Section 58, are applicable.

### **Determination**

Based on the above and on the scope of these bikeway and walkway projects, it is determined that they will not have a significant effect upon the quality of the human environment. It is also our determination that (1) there is no feasible and prudent alternative to the use of Section 4(f) lands, and (2) the conditions for approval will insure that the bikeway proposals will include all possible planning to minimize harm resulting from such use.

Date: May 23, 1977 /Original signed by/ Les Lamm For William M. Cox Federal Highway Administrator

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## APPENDIX

(Letter)United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

In reply refer to: (ER-77/105)

MAR 21, 1977

Dear Mr. Lash:

This is in response to your February, 1977 request for the Department of the Interior comments on the proposed Negative Declaration/Section 4(f) statement for Independent Bikeway or Walkway Construction Projects.

We are pleased that the proposed document responds to a number of the comments made in our letter of June 25, 1976, on the Bikeway Demonstration Program. We note that the present document is not applicable to the use of land from a publicly owned wildlife or waterfowl refuge or any land from a historic site, nor is it applicable if the project would require the use of critical habitat of endangered species. We note further that the document applies only to the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes.

We concur with these limitations on the application of the proposed Negative Declaration/Section 4(f) statement. However, we wish to again express our opinion that the proposed document not be applicable to: (1)

1. Significant wetlands;
2. Unique ecological areas set aside for the preservation, interpretation, or scientific study of plant and animal communities, e.g., Registered Natural Landmarks and Registered Environmental Education Landmarks.
3. Play areas for small children (tot lots, etc.); and
4. Small park areas where the bikeway or walkway may use a significant portion of the available space (vest-pocket parks, etc.,).

We are also pleased that the document makes provision for early coordination with all responsible local officials, including the State Outdoor Recreation Liaison Officer, and the Bureau of Outdoor Recreation (BOR) when Land and Water Conservation Fund grants are involved. We suggest, however, that you may wish to coordinate all projects of this type with the appropriate Regional Office of BOR for the technical assistance they can provide on bikeways and walkways. (2)

According to our calculations, a funding level of \$45,000,000 for these bikeways and walkways would amount to somewhere between 1,800 and 4,500 miles of trail per year. This would directly remove from all other use (including use by flora and fauna) roughly 1,000 to 6,800 acres per year. This impact should be addressed in the proposed negative declaration. (3)

Thank you for the opportunity to review this proposed document.

Sincerely yours, /original signed by/ (unknown) Deputy Assistant Secretary of the Interior (at the time)

---

Mr. Michael Lash  
Director of Environmental Policy  
U.S. Department of Transportation  
Federal Highway Administration  
Washington, D. C. 20590

Responses to the Department of the Interior  
Letter of March 21, 1977

(1) We believe the Application section is adequate to cover those cases where there are unusual circumstances such as major impacts or adverse effects. The key point is that the official having specific jurisdiction over the Section 4(f) property has to agree that the project is acceptable and consistent with the designated use of the property, and that the location and design have been accomplished in a manner that will not cause harm to the property.

(2) The FHWA Division Administrator and the local officials will have the option of requesting additional coordination with the Bureau of Outdoor Recreation on all bikeway and walkway projects.

(3) The use of land for the bikeways and walkways has been addressed in the Summary section. However, it should be understood that this document is for individual projects and was not prepared to address the impacts of the entire bikeway program.

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(Letter) DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410

FEB 15 1977

Office of the Assistant Secretary  
For community Planning and Development (CSR)

Mr. Michael Lash  
Director of Environmental Policy  
Department of Transportation  
Federal Highway Administration  
Nassif Building - Room 3234  
Washington, D. C. 20590

Dear Mr. Lash:

Thank you for providing this Office with the opportunity to review and comment on the proposed draft negative declaration/Section 4(f) for the construction of independent bikeways and pedestrian walkways. While your negative declaration proposal will reduce processing time, we propose for your consideration the following recommendations:

1. Under the caption **Application** insert the following before the last sentence in the first paragraph: The project must be in accord with a unified and officially coordinated program for the development of open space land as part of local and area wide comprehensive planning. (1)

2. Under the caption **Application** add the following to the second paragraph: If unusual natural or manmade conditions exist in the proposed project area which might be deleteriously affected by the proposed bikeway or pedestrian walkway, then a Section 4(f) and an environmental impact statement shall be prepared for the project. (2)

3. Under the caption **Coordination**, second paragraph add the following: If HUD Community Development Block Grant (CDBG) funds are used by applicants in conjunction with Section 124 funds, HUD environmental review procedures set forth in 24 CFR Section 58 are, applicable. The CDBG program permits the use of funds for the construction of certain public works in conjunction with recreational purposes. (3)

Sincerely yours, /Original signed by/ Richard H. Brown Director, Office of Environmental Quality

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### **Responses to the Department of Housing and Urban Development Letter of February 15, 1977**

- (1) We do not believe it is necessary to add this sentence to the Application section since this is already a Federal-aid qualification requirement. (See 23 CFR, Part 652.)
- (2) This provision has been added to the Application section.
- (3) The Coordination section has been expanded to include this situation.

This page last modified on March 10, 2004

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## Section 4(f)

### [Nationwide Section 4\(f\) Programmatic Evaluations](#)

#### ***Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges***

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects. (Note: a similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of land from historic sites).

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

### **Applicability**

This programmatic Section 4(f) evaluation may be applied by FHWA only to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation, and reconstruction), safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment; and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on a new location.
2. The Section 4(f) lands are publicly owned public parks, recreation lands, or wildlife and waterfowl refuges located adjacent to the existing highway.
3. The amount and location of the land to be used shall not impair the use of the

remaining Section 4(f) land, in whole or in part, for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented in relation to the size, use, and/or other characteristics deemed relevant.

The total amount of land to be acquired from any Section 4(f) site shall not exceed the values in the following Table:

Total Size of Section 4(f) Site Maximum to Be Acquired	
< 10 acres	10 percent of site
10 acres - 100 acres	1 acre
> 100 acres	1 percent of site

4. The proximity impacts of the project on the remaining Section 4(f) land shall not impair the use of such land for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented with regard to noise, air and water pollution, wildlife and habitat effects, aesthetic values, and/or other impacts deemed relevant.
5. The officials having jurisdiction over the Section 4(f) lands must agree, in writing, with the assessment of the impacts of the proposed project on, and the proposed mitigation for, the Section 4(f) lands.
6. For projects using land from a site purchased or improved with funds under the Land and Water Conservation Fund Act, the Federal Aid in Fish Restoration Act (Dingell-Johnson Act), the Federal Aid in Wildlife Act (Pittman-Robertson Act), or similar laws, or the lands are otherwise encumbered with a Federal interest (e.g., former Federal surplus property), coordination with the appropriate Federal agency is required to ascertain the agency's position on the land conversion or transfer. The programmatic Section 4(f) evaluation does not apply if the agency objects to the land conversion or transfer.
7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4(f) lands is discovered after the approval of the final EIS. Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

### **Alternatives**

The following alternatives avoid any use of the public park land, recreational area, or wildlife and waterfowl refuge:

1. Do nothing.
2. Improve the highway without using the adjacent public park, recreational land, or wildlife and waterfowl refuge.
3. Build an improved facility on new location without using the public park, recreation land, or wildlife or waterfowl refuge.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

## Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. **Do Nothing Alternative.** The Do Nothing Alternative is not feasible and prudent because: (a) it would not correct existing or projected capacity deficiencies; or (b) it would not correct existing safety hazards; or (c) it would not correct existing deteriorated conditions and maintenance problems; and (d) not providing such correction would constitute a cost or community impact of extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.
2. **Improvement without Using the Adjacent Section 4(f) Lands.** It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in: (a) substantial adverse community impacts to adjacent homes, businesses or other improved properties; or (b) substantially increased roadway or structure cost; or (c) unique engineering, traffic, maintenance, or safety problems; or (d) substantial adverse social, economic, or environmental impacts; or (e) the project not meeting identified transportation needs; and (f) the impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.
3. **Alternatives on New Location.** It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because (a) the new location would not solve existing transportation, safety, or maintenance problems; or (b) the new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established patterns, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) lands or (c) the new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); and (d) such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

## Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. This has occurred when the officials having jurisdiction over the Section 4(f) property have agreed, in writing, with the assessment of impacts resulting from the use of the Section 4(f) property and with the mitigation measures to be provided. Mitigation measures shall include one or more of the following:

1. Replacement of lands used with lands of reasonably equivalent usefulness and location and of at least comparable value.

2. Replacement of facilities impacted by the project including sidewalks, paths, benches, lights, trees, and other facilities.
3. Restoration and landscaping of disturbed areas.
4. Incorporation of design features (e.g., reduction in right-of-way width, modifications to the roadway section, retaining walls, curb and gutter sections, and minor alignment shifts); and habitat features (e.g., construction of new, or enhancement of existing, wetlands or other special habitat types); where necessary to reduce or minimize impacts to the Section 4(f) property. Such features should be designed in a manner that will not adversely affect the safety of the highway facility. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during such design.
5. Payment of the fair market value of the land and improvements taken or improvements to the remaining Section 4(f) site equal to the fair market value of the land and improvements taken.
6. Such additional or alternative mitigation measures as may be determined necessary based on consultation with, the officials having jurisdiction over the parkland, recreation area, or wildlife or waterfowl refuge.

If the project uses Section 4(f) lands that are encumbered with a Federal interest (see **Applicability**), coordination is required with the appropriate agency to ascertain what special measures to minimize harm, or other requirements, may be necessary under that agency's regulations. To the extent possible, commitments to accomplish such special measures and/or requirements shall be included in the project record.

### Coordination

Each project will require coordination in the early stages of project development with the Federal, state and/or local agency officials having jurisdiction over the Section 4(f) lands. In the case of non-Federal Section 4(f) lands, the official with jurisdiction will be asked to identify any Federal encumbrances. Where such encumbrances exist coordination will be required with the Federal agency responsible for the encumbrance.

For the interests of the Department of Interior, Federal agency coordination will be initiated with the Regional Directors of the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Reclamation; the State Directors of the Bureau of Land Management, and the Area Directors of the Bureau of Indian Affairs. In the case of Indian lands, there will also be coordination with appropriate Indian Tribal officials.

Before applying this programmatic evaluation to projects requiring an individual bridge permit the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

Copies of the final written analysis and determinations required under this programmatic Section 4(f) evaluation shall be provided to the officials having jurisdiction over the involved Section 4(f) area and to other parties upon request.

### Approval Procedure

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;
3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of the publicly owned public park, recreation area, or wildlife or waterfowl refuge) are clearly applicable to

- the project;
4. Determined that the project complies with the Measures to Minimize Harm section of this document;
  5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;
  6. Assured that the measures to minimize harm will be incorporated in the project; and
  7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on: 12/23/86 Approved: /Original Signed By/ Ali F. Sevin Office of Environmental Policy Federal Highway Administration

This page last modified on March 10, 2004

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### Section 4(f)

#### [Nationwide Section 4\(f\) Programmatic Evaluations](#)

##### ***Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites***

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of land (including non-historic improvements thereon) from historic sites that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects. (Note a similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges).

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

#### **Applicability**

This programmatic Section 4(f) evaluation may be applied by FHWA only to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation and reconstruction); safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment, and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on a new location.
2. The historic site involved is located adjacent to the existing highway.
3. The project does not require the removal or alteration of historic buildings, structures or objects on the historic site.
4. The project does not require the disturbance or removal of archeological resources that are important to preserve in place rather than to remove for

archeological research. The determination of the importance to preserve in place will be based on consultation with the State Historic Preservation Officer (SHPO) and, if appropriate, the Advisory Council on Historic Preservation (ACHP).

5. The impact on the Section 4(f) site resulting from the use of the land must be considered minor. The word minor is narrowly defined as having either a "no effect" or "no adverse effect" (when applying the requirements of Section 206 of the National Historic Preservation Act and 36 CFR Part 800) on the qualities which qualified the site for listing or eligibility on the National Register of Historic Places. The ACHP must not object to the determination of "no adverse effect."
6. The SHPO must agree, in writing, with the assessment of impacts of the proposed project on and the proposed mitigation for the historic sites.
7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4 (f) lands is discovered after the approval of the final EIS.

Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

### Alternatives

The following alternatives avoid any use of the historic site.

1. Do nothing.
2. Improve the highway without using the adjacent historic site.
3. Build an improved facility on new location without using the historic site.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

### Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. **Do Nothing Alternative.** The Do Nothing Alternative is not feasible and prudent because: (a) it would not correct existing or projected capacity deficiencies or (b) it would not correct existing safety hazards; or (c) it would not correct existing deteriorated conditions and maintenance problems; **and** (d) not providing such correction would constitute a cost or community impact of extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.
2. **Improvement without Using the Adjacent Section 4(f) Lands.** It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in: (a) substantial adverse community impacts to adjacent homes, businesses or other improved properties; **or** (b) substantially increased roadway or structure cost; **or** (c) unique engineering, traffic, maintenance, or safety problems, **or** (d) substantial

adverse social, economic, or environmental impacts; or (e) the project not meeting identified transportation needs; and (f) the impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American Association (page 4) of State Highway and Transportation officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

3. **Alternatives on New Location.** It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because (a) the new location would not solve existing transportation safety or maintenance problems; **or** (b) the new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) lands); or (c) the new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); **and** (d) such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

### Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. Measures to minimize harm will consist of those measures necessary to preserve the historic integrity of the site and agreed to, in accordance with 36 CFR Part 800 by the FHWA, the SHPO, and as appropriate, the ACHP.

### Coordination

The use of this programmatic evaluation and approval is conditioned upon the satisfactory completion of coordination with the SHPO, the ACHP, and interested persons as called for in 36 CFR Part 800. Coordination with interested persons, such as the local government, the property owner, a local historical society, or an Indian tribe, can facilitate in the evaluation of the historic resource values and mitigation proposals and is therefore highly encouraged.

For historic sites encumbered with Federal interests, coordination is required with the Federal agencies responsible for the encumbrances.

Before applying this programmatic evaluation to projects requiring an individual bridge permit, the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

### Approval Procedure

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;

3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of land from or non-historic improvements on the historic site) are clearly applicable to the project;
4. Determined that the project complies with the Measures to Minimize Harm section of this document;
5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;
6. Assured that the measures to minimize harm will be incorporated in the project; and
7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on: 12/23/1986 Approved: /Original Signed By/ Ali F. Sevin, Director Office of Environmental Policy Federal Highway Administration

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## Section 4(f)

### [Nationwide Section 4\(f\) Programmatic Evaluations](#)

#### ***Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges***

This statement sets forth the basis for a programmatic Section 4(f) approval that there are no feasible and prudent alternatives to the use of certain historic bridge structures to be replaced or rehabilitated with Federal funds and that the projects include all possible planning to minimize harm resulting from such use. This approval is made Pursuant to Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303, and Section 18(a) of the Federal-Aid Highway Act of 1968 23 U.S.C. 138.

### Use

The historic bridges covered by this programmatic Section 4(f) evaluation are unique because they are historic, yet also part of either a Federal-aid highway system or a state or local highway system that has continued to evolve over the years. Even though these structures are on or eligible for inclusion on the National Register of Historic Places, they must perform as an integral part of a modern transportation system. When they do not or cannot, they must be rehabilitated or replaced in order to assure public safety while maintaining system continuity and integrity. For the purpose of this programmatic Section 4(f) evaluation, a proposed action will "use" a bridge that is on or eligible for inclusion on the National Register of Historic Places when the action will impair the historic integrity of the bridge either by rehabilitation or demolition. Rehabilitation that does not impair the historic integrity of the bridge as determined by procedures implementing the national Historic Preservation Act of 1966, as amended (FHWA), is not subject to Section 4(f).

### Applicability

This programmatic Section 4(f) evaluation may be applied by the Federal Highway Administration (FHWA) to projects which meet the following criteria:

1. The bridge is to be replaced or rehabilitated with Federal funds.
2. The project will require the use of a historic bridge structure which is on or is eligible for listing on the National Register of Historic Places.
3. The bridge is not a National Historic Landmark.
4. The FHWA Division Administrator determines that the facts of the project match those set forth in the sections of this document labeled Alternatives, Findings, and Mitigation.
5. Agreement among the FHWA, the State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP) has been reached through procedures pursuant to Section 106 of the NHPA.

## Alternatives

The following alternatives avoid any use of the historic bridge:

1. Do nothing.
2. Build a new structure at a different location without affecting the historic integrity of the old bridge, as determined by procedures implementing the NHPA.
3. Rehabilitate the historic bridge without affecting the historic integrity of the structure, as determined by procedures implementing the NHPA.

This list is intended to be **all-inclusive**. The programmatic Section 4(f) evaluation does not apply if a reasonable alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated and it must further demonstrate that all applicability criteria listed above were met before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

## Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. **Do Nothing.** The do nothing alternative has been studied. The do nothing alternative ignores the basic transportation need. For the following reasons this alternative is not feasible and prudent:

- a. Maintenance - The do nothing alternative does not correct the situation that causes the bridge to be considered structurally deficient or deteriorated. These deficiencies can lead to sudden collapse and potential injury or loss of life. Normal maintenance is not considered adequate to cope with the situation.

- b. Safety - The do nothing alternative does not correct the situation that causes the bridge to be considered deficient.

Because of these deficiencies the bridge poses serious and unacceptable safety hazards to the traveling public or places intolerable restriction on transport and travel.

2. **Build on New Location Without Using the Old Bridge.** Investigations have been conducted to construct a bridge on a new location or parallel to the old bridge (allowing for a one- way couplet), but, for one or more of the following reasons, this alternative is not feasible and prudent:

- a. Terrain - The present bridge structure has already been located at the only feasible and prudent site, i.e., a gap in the land form, the narrowest point of the river canyon, etc. To build a new bridge at another site will result in extraordinary bridge and approach engineering and construction difficulty or costs or extraordinary disruption to established traffic patterns.

- b. Adverse Social , Economic, or Environmental Effects - Building a new bridge away from the present site would result in social, economic, or environmental impact of extraordinary magnitude. Such impacts as extensive severing of productive farmlands, displacement of a significant number of families or businesses, serious disruption of established travel patterns, and access and damage to wetlands may individually or cumulatively weigh heavily against relocation to a new site.

c. Engineering and Economy - Where difficulty associated with the new location is less extreme than those encountered above, a new site would not be feasible and prudent where cost and engineering difficulties reach extraordinary magnitude. Factors supporting this conclusion include significantly increased roadway and structure costs, serious foundation problems, or extreme difficulty in reaching the new site with construction equipment. Additional design and safety factors to be considered include an ability to achieve minimum design standards or to meet requirements of various permitting agencies such as those involved with navigation, pollution, and the environment.

d. Preservation of Old Bridge - It is not feasible and prudent to preserve the existing bridge, even if a new bridge were to be built at a new location. This could occur when the historic bridge is beyond rehabilitation for a transportation or an alternative use, when no responsible party can be located to maintain and preserve the bridge, or when a permitting authority, such as the Coast Guard requires removal or demolition of the old bridge.

3. **Rehabilitation Without Affecting the Historic Integrity of the Bridge.**

Studies have been conducted of rehabilitation measures, but, for one or more of the following reasons, this alternative is not feasible and prudent:

a. The bridge is so structurally deficient that it cannot be rehabilitated to meet minimum acceptable load requirements without affecting the historic integrity of the bridge.

b. The bridge is seriously deficient geometrically and cannot be widened to meet the minimum required capacity of the highway system on which it is located without affecting the historic integrity of the bridge. Flexibility in the application of the American Association of State Highway and Transportation Officials geometric standards should be exercised as permitted in 23 CFR Part 625 during the analysis of this alternative.

### Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. This has occurred when:

1. For bridges that are to be rehabilitated, the historic integrity of the bridge is preserved, to the greatest extent possible, consistent with unavoidable transportation needs, safety, and load requirements;
2. For bridges that are to be rehabilitated to the point that the historic integrity is affected or that are to be moved or demolished, the FHWA ensures that, in accordance with the Historic American Engineering Record (HAER) standards, or other suitable means developed through consultation, fully adequate records are made of the bridge;
3. For bridges that are to be replaced, the existing bridge is made available for an alternative use, provided a responsible party agrees to maintain and preserve the bridge; and
4. For bridges that are adversely affected, agreement among the SHPO, ACHP, and FHWA is reached through the Section 106 process of the NHPA on measures to minimize harm and those measures are incorporated into the project. This programmatic Section 4(f) evaluation does not apply to projects where such an agreement cannot be reached.

### Procedures

This programmatic Section 4(f) evaluation applies only when the FHWA Division Administrator:

1. Determines that the project meets the applicability criteria set forth above;
2. Determines that all of the alternatives set forth in the Findings section have been fully evaluated;
3. Determines that use of the findings in this document that there are no feasible and prudent alternatives to the use of the historic bridge is clearly applicable;
4. Determines that the project complies with the Measures to Minimize Harm section of this document;
5. Assures that implementation of the measures to minimize harm is completed; and
6. Documents the project file that the programmatic Section 4(f) evaluation applies to the project on which it is to be used.

### Coordination

Pursuant to Section 4(f), this statement has been coordinated with the Departments of the Interior, Agriculture, and Housing and Urban Development.

Issued on: July 5, 1983 Approved: /Original Signed By/ Ali F. Sevin, Director Office of Environmental Policy Federal Highway Administration

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### Section 4(f)

#### [Nationwide Section 4\(f\) Programmatic Evaluations](#)

#### ***Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property***

This nationwide programmatic Section 4(f) evaluation (programmatic evaluation) has been prepared for certain federally assisted transportation improvement projects on existing or new alignments that will use property of a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic property, which in the view of the Administration and official(s) with jurisdiction over the Section 4(f) property, the use of the Section 4(f) property will result in a net benefit to the Section 4(f) property.

#### **Definitions:**

"Administration" refers to the Federal Highway Division Administrator or Division Engineer (as appropriate).

"Applicant" refers to a State Highway Agency or State Department of Transportation, local governmental agency acting through the State Highway Agency or State Department of Transportation.

A "net benefit" is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project results in an overall enhancement of the Section 4(f) property when compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property, considering the activities, features and attributes that qualify the property for Section 4(f) protection. A project does not achieve a "net benefit" if it will result in a substantial diminishment of the function or value that made the property eligible for Section 4(f) protection.

"Official(s) with jurisdiction" over Section 4(f) property (typically) include: for a park, the Federal, State or local park authorities or agencies that own and/or manage the park; for a refuge, the Federal, State or local wildlife or waterfowl refuge owners and managers; and for historic sites, the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), whichever has jurisdiction under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f).

#### **Applicability**

The Administration is responsible for review of each transportation project for which this programmatic evaluation is contemplated to determine that it meets the criteria and procedures of this programmatic evaluation. The information and determination will be included in the applicable National Environmental Policy Act (NEPA) documentation and administrative record. This programmatic evaluation will not change any existing procedures for NEPA compliance,

public involvement, or any other applicable Federal environmental requirement.

This programmatic evaluation satisfies the requirements of Section 4(f) for projects meeting the applicability criteria listed below. An individual Section 4(f) evaluation will not need to be prepared for such projects:

1. The proposed transportation project uses a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic site.
2. The proposed project includes all appropriate measures to minimize harm and subsequent mitigation necessary to preserve and enhance those features and values of the property that originally qualified the property for Section 4(f) protection.
3. For historic properties, the project does not require the major alteration of the characteristics that qualify the property for the National Register of Historic Places (NRHP) such that the property would no longer retain sufficient integrity to be considered eligible for listing. For archeological properties, the project does not require the disturbance or removal of the archaeological resources that have been determined important for preservation in-place rather than for the information that can be obtained through data recovery. The determination of a major alteration or the importance to preserve in-place will be based on consultation consistent with 36 CFR part 800.
4. For historic properties, consistent with 36 CFR part 800, there must be agreement reached amongst the SHPO and/or THPO, as appropriate, the FHWA and the Applicant on measures to minimize harm when there is a use of Section 4(f) property. Such measures must be incorporated into the project.
5. The official(s) with jurisdiction over the Section 4(f) property agree in writing with the assessment of the impacts; the proposed measures to minimize harm; and the mitigation necessary to preserve, rehabilitate and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the Section 4(f) property.
6. The Administration determines that the project facts match those set forth in the Applicability, Alternatives, Findings, Mitigation and Measures to Minimize Harm, Coordination, and Public Involvement sections of this programmatic evaluation.

This programmatic evaluation can be applied to any project regardless of class of action under NEPA.

### **Alternatives**

To demonstrate that there are no feasible and prudent alternatives to the use of Section 4(f) property, the programmatic evaluation analysis must address alternatives that avoid the Section 4(f) property. The following alternatives avoid the use of the Section 4(f) property:

1. Do nothing.
2. Improve the transportation facility in a manner that addresses the project's purpose and need without a use of the Section 4(f) property.
3. Build the transportation facility at a location that does not require use of the Section 4(f) property.

This list is intended to be all-inclusive. The programmatic evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the Administration can conclude that the programmatic evaluation can be applied to the project.

### **Findings**

For this programmatic evaluation to be utilized on a project there must be a finding, given the present condition of the Section 4(f) property, that the do-nothing and avoidance alternatives

described in the Alternatives section above are not feasible and prudent. The findings (1, 2, and 3. below) must be supported by the circumstances, studies, consultations, and other relevant information and included in the administrative record for the project. This supporting information and determination will be documented in the appropriate NEPA document and/or project record consistent with current Section 4(f) policy and guidance.

To support the finding, adverse factors associated with the no-build and avoidance alternatives, such as environmental impacts, safety and geometric problems, decreased transportation service, increased costs, and any other factors may be considered collectively. One or an accumulation of these kinds of factors must be of extraordinary magnitude when compared to the proposed use of the Section 4(f) property to determine that an alternative is not feasible and prudent. The net impact of the do-nothing or build alternatives must also consider the function and value of the Section 4(f) property before and after project implementation as well as the physical and/or functional relationship of the Section 4(f) property to the surrounding area or community.

1. Do-Nothing Alternative.  
The Do-Nothing Alternative is not feasible and prudent because it would neither address nor correct the transportation need cited as the NEPA purpose and need, which necessitated the proposed project.
2. Improve the transportation facility in a manner that addresses purpose and need without use of the Section 4(f) property.

It is not feasible and prudent to avoid Section 4(f) property by using engineering design or transportation system management techniques, such as minor location shifts, changes in engineering design standards, use of retaining walls and/or other structures and traffic diversions or other traffic management measures if implementing such measures would result in any of the following:

- a. Substantial adverse community impacts to adjacent homes, businesses or other improved properties; or
- b. Substantially increased transportation facility or structure cost; or
- c. Unique engineering, traffic, maintenance or safety problems; or
- d. Substantial adverse social, economic or environmental impacts; or
- e. A substantial missed opportunity to benefit a Section 4(f) property; or
- f. Identified transportation needs not being met; and
- g. Impacts, costs or problems would be truly unusual, unique or of extraordinary magnitude when compared with the proposed use of Section 4(f) property after taking into account measures to minimize harm and mitigate for adverse uses, and enhance the functions and value of the Section 4(f) property.

Flexibility in the use of applicable design standards is encouraged during the analysis of these feasible and prudent alternatives.

3. Build a new facility at a new location without a use of the Section 4(f) property. It is not feasible and prudent to avoid Section 4(f) property by constructing at a new location if:
  - a. The new location would not address or correct the problems cited as the NEPA purpose and need, which necessitated the proposed project; or
  - b. The new location would result in substantial adverse social, economic or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of community cohesion, jeopardize the continued existence of any endangered or threatened species or resulting in the destruction or adverse modification of their designated critical habitat, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) properties); or
  - c. The new location would substantially increase costs or cause substantial engineering difficulties (such as an inability to achieve minimum design standards

or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, or the environment); and

- d. Such problems, impacts, costs, or difficulties would be truly unusual or unique or of extraordinary magnitude when compared with the proposed use of the Section 4 (f) property after taking into account proposed measures to minimize harm, mitigation for adverse use, and the enhancement of the Section 4(f) property's functions and value.

Flexibility in the use of applicable design standards is encouraged during the analysis of feasible and prudent alternatives.

### **Mitigation and Measures To Minimize Harm**

This programmatic evaluation and approval may be used only for projects where the Administration, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm, includes appropriate mitigation measures, and that the official(s) with jurisdiction agree in writing.

### **Coordination**

In early stages of project development, each project will require coordination with the Federal, State, and/or local agency official(s) with jurisdiction over the Section 4(f) property. For non-Federal Section 4(f) properties, i.e., State or local properties, the official(s) with jurisdiction will be asked to identify any Federal encumbrances. When encumbrances exist, coordination will be required with the Federal agency responsible for such encumbrances.

Copies of the final written report required under this programmatic evaluation shall be offered to the official(s) with jurisdiction over the Section 4(f) property, to other interested parties as part of the normal NEPA project documentation distribution practices and policies or upon request.

### **Public Involvement**

The project shall include public involvement activities that are consistent with the specific requirements of 23 CFR 771.111, Early coordination, public involvement and project development. For a project where one or more public meetings or hearings are held, information on the proposed use of the Section 4(f) property shall be communicated at the public meeting(s) or hearing(s).

### **Approval Procedure**

This programmatic evaluation approval applies only after the Administration has:

1. Determined that the project meets the applicability criteria set forth in Applicability section;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;
3. Determined that the findings in the programmatic evaluation (which conclude that the alternative recommended is the only feasible and prudent alternative) result in a clear net benefit to the Section 4(f) property;
4. Determined that the project complies with the Mitigation and Measures to Minimize Harm section of this document;
5. Determined that the coordination and public involvement efforts required by this programmatic evaluation have been successfully completed and necessary written agreements have been obtained; and
6. Documented the information that clearly identifies the basis for the above determinations and assurances.

[FR Doc. 05-7812 Filed 4-19-05; 8:45 am]

BILLING CODE 4910-22-P

For additional information, view the Preamble on the Federal Register's website  
<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-7812.htm>.

This page last modified on April 28, 2005

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United States Department of Transportation - **Federal Highway Administration**

## Section 7

### Section 6(f) Information and Regulations

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<b>NCRC</b>	<b>LAND &amp; WATER CONSERVATION FUND</b>												
<ul style="list-style-type: none"> <li>state &amp; federal sides</li> <li>exemplary projects</li> <li>grants</li> <li>planning projects</li> <li>compliance responsibilities &amp; legal protection</li> <li>history</li> <li>publications &amp; forms</li> <li>contact list</li> <li>funding status</li> <li>LWCF Manual (1991)</li> <li>land &amp; water home</li> </ul>	 <p style="text-align: center; font-style: italic;">places to play ... places to grow ... places to dream ... <b>places that matter</b></p> <hr/> <h2 style="text-align: center;">Post-Completion Compliance - <u>Legal Protection</u></h2> <hr/> <h3 style="text-align: center;">Post-Completion Compliance Responsibilities</h3> <p>Post-completion compliance responsibilities apply to each area or facility for which Land and Water Conservation Fund assistance is obtained, regardless of the extent of program participation in the assisted area or facility and consistent with the contractual agreement between National Park Service and the State.</p> <p>The State is responsible for compliance and enforcement of these provisions for both State and locally sponsored projects. Responsibilities cited in <b>Title 36, Part 59</b> in the <b>U.S. Code of Federal Regulations</b> apply to the area described on the 6(f)(3) boundary map and/or as described in other project documentation approved by the Department of the Interior.</p> <p><b>TITLE 36, CHAPTER 1, PART 59 - Land and Water Conservation Fund Program of Assistance to States; Post-Completion Compliance Responsibilities:</b></p> <table style="margin-left: auto; margin-right: auto;"> <tr> <td style="text-align: center;"></td> <td style="text-align: center;"><a href="#">36 CFR 59.1</a></td> <td><b>Applicability</b></td> </tr> <tr> <td style="text-align: center;"></td> <td style="text-align: center;"><a href="#">36 CFR 59.2</a></td> <td><b>Information Collection</b></td> </tr> <tr> <td style="text-align: center;"></td> <td style="text-align: center;"><a href="#">36 CFR 59.3</a></td> <td><b>Conversion Requirements</b></td> </tr> <tr> <td style="text-align: center;"></td> <td style="text-align: center;"><a href="#">36 CFR 59.4</a></td> <td><b>Residency Requirements</b></td> </tr> </table> <p style="text-align: center; margin-top: 20px;"><i>You can also read more about post-completion compliance responsibilities in the <a href="#">LWCF Stewardship booklet</a></i></p> <hr/> <h3 style="text-align: center;">Legal Protection for Grant-Assisted Recreation Sites</h3> <p><b>Section 6(f)(3) of the LWCF Act</b></p> <p>Section 6(f)(3) of the LWCF Act contains strong provisions to protect Federal</p>		<a href="#">36 CFR 59.1</a>	<b>Applicability</b>		<a href="#">36 CFR 59.2</a>	<b>Information Collection</b>		<a href="#">36 CFR 59.3</a>	<b>Conversion Requirements</b>		<a href="#">36 CFR 59.4</a>	<b>Residency Requirements</b>
	<a href="#">36 CFR 59.1</a>	<b>Applicability</b>											
	<a href="#">36 CFR 59.2</a>	<b>Information Collection</b>											
	<a href="#">36 CFR 59.3</a>	<b>Conversion Requirements</b>											
	<a href="#">36 CFR 59.4</a>	<b>Residency Requirements</b>											
													

investments and the quality of assisted resources. The law is firm but flexible. It recognizes the likelihood that changes in land use or development may make some assisted areas obsolete over time, particularly in rapidly changing urban areas. At the same time, the law discourages casual "discards" of park and recreation facilities by ensuring that changes or "conversions from recreation use" will bear a cost - a cost that assures taxpayers that investments in the "national recreation estate" will not be squandered. The LWCF Act contains a clear and common sense provision to protect grant-assisted areas from conversions.

SEC. 6(f)(3) No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

This "anti-conversion" requirement applies to all parks and other sites that have been the subject of Land and Water grants of any type, whether for acquisition of parkland, development or rehabilitation of facilities. In many cases, even a relatively small LWCF grant (e.g., for development of a picnic shelter) in a park of hundreds or even thousands of acres provides anti-conversion protection to the entire park site.

To ensure the continued effectiveness of Section 6(f)(3) protection, several management tools have been developed to monitor and correct changes in assisted sites from year to year. For example, the NPS requires on-site inspections of all grant-assisted areas and facilities at least once in every five years most of which are conducted by cooperating state agencies.

Another important tool to ensure good communication between grantors and grantees is the "6(f)(3) project boundary map." With each application, the grantee submits a dated project boundary map showing the park area to be covered by Section 6(f)(3) anti-conversion protections. This map need not be a formal survey document, but it contains enough site-specific information to serve several purposes:

- it ensures that both the grantee and the administering agency agree on the proper boundaries of the covered site at the time of project approval;
- it provides location, size indicators and a picture of key facilities and landmarks to help later project inspectors better identify and evaluate the site.

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Sometimes the protective provisions of LWCF grants result in "win-win" solutions to the problems of changing parks and changing communities. An example of this is Shoreline Park in Long Beach, California.

After using a sizable LWCF grant for basic development of the 20 acre park, the community felt that the park was not meeting its full potential. It was decided to replace the park with a commercial aquarium, amphitheater and shopping mall, and to build a new community park elsewhere in the neighborhood. National Park Service and the State worked closely with Long Beach. Within a short time, a new 24 acre site was identified.

Shoreline Park never succeeded in meeting its usage goals, because of reduced population in the downtown areas. Thanks to common sense replacement provisions, the park site will effectively be relocated and Long Beach residents will be able to enjoy new recreation opportunities as well as a viable tourist and convention site that will aid downtown economic recovery.

The conversion was approved, with the result that the "anti-conversion" mandate of the law, instead of being a negative, helped bring business leaders and community park users together for an improved Science Center AND an entirely new public recreation opportunity in the form of the riverfront park.

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**If you have concerns about threats to a park area that you think might have received a LWCF grant, contact one of the National Park Service field offices or your State Agency, as listed in the "Contact List." Administrators have databases of grant-assisted sites that will help them to determine whether Fund protections apply; also some States have their own grant programs that afford similar protection.**

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For contact addresses and numbers, see:

[Contact List](#)

Rivers, Trails & Conservation Assistance	Land & Water Conservation Fund	National Trails System
Partnership Wild & Scenic Rivers	Urban Park & Recreation Recovery	Federal Lands to Parks
Webmaster	Last Modified 3-09-04	
ParkNet	U.S. Department of the Interior	FOIA
	Privacy	Disclaimer
		FirstGov

**§ 51.103**

preference by operation of law, the Director will permit the concessioner to exercise a renewal preference for the contract subject to and in accordance with the otherwise applicable right of preference terms and conditions of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus. The Director, similarly, will permit any holder of a 1965 Act concession contract that a court of competent jurisdiction determines in a final order is entitled to a renewal preference, for any reason, to exercise a right of preference in accordance with the otherwise applicable requirements of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus.

**§ 51.103 Severability.**

A determination that any provision of this part is unlawful will not affect the validity of the remaining provisions.

**Subpart M—Information Collection**

**§ 51.104 Have information collection procedures been followed?**

(a) The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The information collection for submission of proposals in response to concession prospectuses contained in this part have been approved by the Office of Management and Budget as required by 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024-0125, extended through May 30, 2000. An information collection for proposed transfers of concession operations is covered by OMB Approval No. 1024-0126 effective through August 31, 2002.

(b) The public reporting burden for the collection of information for the purpose of preparing a proposal in response to a contract solicitation is estimated to average 480 hours per proposal for large authorizations and 240 hours per proposal for small authorizations. The public reporting burden for

the collection of information for the purpose of requesting approval of a sale or transfer of a concession operation is estimated to be 80 hours. Please send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Officer, National Park Service, 1849 C Street, Washington, DC 20240; and to the Attention: Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

(c) Additional reporting and record-keeping requirements were identified in subpart F regarding appeal of a preferred offeror determination, subpart G regarding leasehold surrender interest and in subpart K regarding record-keeping that are not covered under OMB approval. An emergency information collection request to cover these requirements has been prepared and submitted to OMB for approvals. These additional information collection requirements will not be implemented until OMB approves the emergency request. The Director will publish a FEDERAL REGISTER notice when OMB has approved these requirements.

**PART 59—LAND AND WATER CONSERVATION FUND PROGRAM OF ASSISTANCE TO STATES; POST-COMPLETION COMPLIANCE RESPONSIBILITIES**

Sec.

- 59.1 Applicability.
- 59.2 Information collection.
- 59.3 Conversion requirements.
- 59.4 Residency requirements.
- 59.5-59.6 [Reserved]

AUTHORITY: Sec. 6, L&WCF Act of 1965 as amended; Pub. L. 88-578; 78 Stat. 897; 16 U.S.C. 4601-4 *et seq.*

SOURCE: 51 FR 34184, Sept. 25, 1986, unless otherwise noted.

**§ 59.1 Applicability.**

These post-completion responsibilities apply to each area or facility for which Land and Water Conservation Fund (L&WCF) assistance is obtained, regardless of the extent of participation of the program in the assisted area

or facility and consistent with the contractual agreement between NPS and the State. Responsibility for compliance and enforcement of these provisions rests with the State for both State and locally sponsored projects. The responsibilities cited herein are applicable to the area depicted or otherwise described on the 6(f)(3) boundary map and/or as described in other project documentation approved by the Department of the Interior. In many instances, this mutually agreed to area exceeds that actually receiving L&WCF assistance so as to assure the protection of a viable recreation entity. For leased sites assisted under L&WCF, compliance with post-completion requirements of the grant ceases following lease expiration unless the grant agreement calls for some other arrangement.

#### § 59.2 Information collection.

The information collection requirements contained in § 59.3 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024-0047. The information is being collected to determine whether to approve a project sponsor's request to convert an assisted site or facility to other than public outdoor recreation uses. The information will be used to assure that the requirements of section 6(f)(3) of the L&WCF Act would be met should the proposed conversion be implemented. Response is required in order to obtain the benefit of Department of the Interior approval.

#### § 59.3 Conversion requirements.

(a) *Background and legal requirements.* Section 6(f)(3) of the L&WCF Act is the cornerstone of Federal compliance efforts to ensure that the Federal investments in L&WCF assistance are being maintained in public outdoor recreation use. This section of the Act assures that once an area has been funded with L&WCF assistance, it is continually maintained in public recreation use unless NPS approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value.

(b) *Prerequisites for conversion approval.* Requests from the project spon-

sor for permission to convert L&WCF assisted properties in whole or in part to other than public outdoor recreation uses must be submitted by the State Liaison Officer to the appropriate NPS Regional Director in writing. NPS will consider conversion requests if the following prerequisites have been met:

(1) All practical alternatives to the proposed conversion have been evaluated.

(2) The fair market value of the property to be converted has been established and the property proposed for substitution is of at least equal fair market value as established by an approved appraisal (prepared in accordance with uniform Federal appraisal standards) excluding the value of structures or facilities that will not serve a recreation purpose.

(3) The property proposed for replacement is of reasonably equivalent usefulness and location as that being converted. Dependent upon the situation and at the discretion of the Regional Director, the replacement property need not provide identical recreation experiences or be located at the same site, provided it is in a reasonably equivalent location. Generally, the replacement property should be administered by the same political jurisdiction as the converted property. NPS will consider State requests to change the project sponsor when it is determined that a different political jurisdiction can better carry out the objectives of the original project agreement. Equivalent usefulness and location will be determined based on the following criteria:

(i) Property to be converted must be evaluated in order to determine what recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation resources and opportunities available. The property being proposed for substitution must then be evaluated in a similar manner to determine if it will meet recreation needs which are at least like in magnitude and impact to the user community as the converted site. This criterion is applicable in the consideration of all conversion requests with the exception of those where wetlands are proposed as replacement property. Wetland areas and interests therein

which have been identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan shall be considered to be of reasonably equivalent usefulness with the property proposed for conversion regardless of the nature of the property proposed for conversion.

(ii) Replacement property need not necessarily be directly adjacent to or close by the converted site. This policy provides the administrative flexibility to determine location recognizing that the property should meet existing public outdoor recreation needs. While generally this will involve the selection of a site serving the same community(ies) or area as the converted site, there may be exceptions. For example, if property being converted is in an area undergoing major demographic change and the area has no existing or anticipated future need for outdoor recreation, then the project sponsor should seek to locate the substitute area in another location within the jurisdiction. Should a local project sponsor be unable to replace converted property, the State would be responsible, as the primary recipient of Federal assistance, for assuring compliance with these regulations and the substitution of replacement property.

(iii) The acquisition of one parcel of land may be used in satisfaction of several approved conversions.

(4) The property proposed for substitution meets the eligibility requirements for L&WCF assisted acquisition. The replacement property must constitute or be part of a viable recreation area. Unless *each* of the following additional conditions is met, land currently in public ownership, including that which is owned by another public agency, may not be used as replacement land for land acquired as part of an L&WCF project:

(i) The land was not acquired by the sponsor or selling agency for recreation.

(ii) The land has not been dedicated or managed for recreational purposes while in public ownership.

(iii) No Federal assistance was provided in the original acquisition unless the assistance was provided under a program expressly authorized to match or supplement L&WCF assistance.

(iv) Where the project sponsor acquires the land from another public agency, the selling agency must be required by law to receive payment for the land so acquired.

In the case of development projects for which the State match was not derived from the cost of the purchase or value of a donation of the land to be converted, but from the value of the development itself, public land which has not been dedicated or managed for recreation/conservation use may be used as replacement land even if this land is transferred from one public agency to another without cost.

(5) In the case of assisted sites which are partially rather than wholly converted, the impact of the converted portion on the remainder shall be considered. If such a conversion is approved, the unconverted area must remain recreationally viable or be replaced as well.

(6) All necessary coordination with other Federal agencies has been satisfactorily accomplished including, for example, compliance with section 4(f) of the Department of Transportation Act of 1966.

(7) The guidelines for environmental evaluation have been satisfactorily completed and considered by NPS during its review of the proposed 6(f)(3) action. In cases where the proposed conversion arises from another Federal action, final review of the State's proposal shall not occur until the NPS Regional office is assured that all environmental review requirements related to that other action have been met.

(8) State intergovernmental clearinghouse review procedures have been adhered to if the proposed conversion and substitution constitute significant changes to the original Land and Water Conservation Fund project.

(9) The proposed conversion and substitution are in accord with the Statewide Comprehensive Outdoor Recreation Plan (SCORP) and/or equivalent recreation plans.

(c) *Amendments for conversion.* All conversions require amendments to the original project agreements. Therefore, amendment requests should be submitted concurrently with conversion requests or at such time as all details of the conversion have been worked out

with NPS. Section 6(f)(3) project boundary maps shall be submitted with the amendment request to identify the changes to the original area caused by the proposed conversion and to establish a new project area pursuant to the substitution. Once the conversion has been approved, replacement property should be immediately acquired. Exceptions to this rule would occur only when it is not possible for replacement property to be identified prior to the State's request for a conversion. In such cases, an express commitment to satisfy section 6(f)(3) substitution requirements within a specified period, normally not to exceed one year following conversion approval, must be received from the State. This commitment will be in the form of an amendment to the grant agreement.

(d) *Obsolete facilities.* Recipients are not required to continue operation of a particular facility beyond its useful life. However, when a facility is declared obsolete, the site must nonetheless be maintained for public outdoor recreation following discontinuance of the assisted facility. Failure to so maintain is considered to be a conversion. Requests regarding changes from a L&WCF funded facility to another otherwise eligible facility at the same site that significantly contravene the original plans for the area must be made in writing to the Regional Director. NPS approval must be obtained prior to the occurrence of the change. NPS approval is not necessarily required, however, for each and every facility use change. Rather, a project area should be viewed in the context of overall use and should be monitored in this context. A change from a baseball field to a football field, for example, would not require NPS approval. A change from a swimming pool with substantial recreational development to a less intense area of limited development such as a passive park, or vice versa, would, however, require NPS review and approval. To assure that facility changes do not significantly contravene the original project agreement, NPS shall be notified by the State of all proposed changes in advance of their occurrence. A primary NPS consideration in the review of requests for changes in use will be the consistency

of the proposal with the Statewide Comprehensive Outdoor Recreation Plan and/or equivalent recreation plans. Changes to other than public outdoor recreation use require NPS approval and the substitution of replacement land in accordance with section 6(f)(3) of the L&WCF Act and paragraphs (a) through (c) of this section.

[51 FR 34184, Sept. 25, 1986, as amended at 52 FR 22747, June 15, 1987]

#### § 59.4 Residency requirements.

(a) *Background.* Section 6(f)(8) of the L&WCF Act prohibits discrimination on the basis of residence, including preferential reservation or membership systems, except to the extent that reasonable differences in admission and other fees may be maintained on such basis. This prohibition applies to both regularly scheduled and special events. The general provisions regarding non-discrimination at sites assisted under Interior programs and, thereby, all other recreation facilities managed by a project sponsor, are covered in 43 CFR part 17 which implements the provisions of Title VI of the Civil Rights Act of 1964 for the Department.

(b) *Policy.* There shall be no discrimination for L&WCF assisted programs and services on the basis of residence, except in reasonable fee differentials. Post-completion compliance responsibilities of the recipient should continue to ensure that discrimination on the basis of residency is not occurring.

(c) *Fees.* Fees charged to nonresidents cannot exceed twice that charged to residents. Where there is no charge for residents but a fee is charged to nonresidents, nonresident fees cannot exceed fees charged for residents at comparable State or local public facilities. Reservation, membership, or annual permit systems available to residents must also be available to nonresidents and the period of availability must be the same for both residents and nonresidents. Recipients are prohibited from providing residents the option of purchasing annual or daily permits while at the same time restricting nonresidents to the purchase of annual permits only. These provisions apply only to the approved 6(f)(3) areas applicable to the recipient. Nonresident

fishing and hunting license fees are excluded from these requirements.

§§ 59.5–59.6 [Reserved]

**PART 60—NATIONAL REGISTER OF HISTORIC PLACES**

Sec.

- 60.1 Authorization and expansion of the National Register.
- 60.2 Effects of listing under Federal law.
- 60.3 Definitions.
- 60.4 Criteria for evaluation.
- 60.5 Nomination forms and information collection.
- 60.6 Nominations by the State Historic Preservation Officer under approved State Historic Preservation programs.
- 60.7–60.8 [Reserved]
- 60.9 Nominations by Federal agencies.
- 60.10 Concurrent State and Federal nominations.
- 60.11 Requests for nominations.
- 60.12 Nomination appeals.
- 60.13 Publication in the FEDERAL REGISTER and other NPS notification.
- 60.14 Changes and revisions to properties listed in the National Register.
- 60.15 Removing properties from the National Register.

AUTHORITY: National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 *et seq.*, and E.O. 11593.

SOURCE: 46 FR 56187, Nov. 16, 1981, unless otherwise noted.

**§ 60.1 Authorization and expansion of the National Register.**

(a) The National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C. 470 *et seq.*, as amended, authorizes the Secretary of the Interior to expand and maintain a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture. The regulations herein set forth the procedural requirements for listing properties on the National Register.

(b) Properties are added to the National Register through the following processes.

(1) Those Acts of Congress and Executive orders which create historic areas of the National Park System administered by the National Park Service, all or portions of which may be determined to be of historic significance consistent with the intent of Congress;

(2) Properties declared by the Secretary of the Interior to be of national significance and designated as National Historic Landmarks;

(3) Nominations prepared under approved State Historic Preservation Programs, submitted by the State Historic Preservation Officer and approved by the NPS;

(4) Nominations from any person or local government (only if such property is located in a State with no approved State Historic Preservation Program) approved by the NPS and;

(5) Nominations of Federal properties prepared by Federal agencies, submitted by the Federal Preservation Officer and approved by NPS.

**§ 60.2 Effects of listing under Federal law.**

The National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment. Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property.

(a) The National Register was designed to be and is administered as a planning tool. Federal agencies undertaking a project having an effect on a listed or eligible property must provide the Advisory Council on Historic Preservation a reasonable opportunity to comment pursuant to section 106 of the National Historic Preservation Act of 1966, as amended. The Council has adopted procedures concerning, *inter alia*, their commenting responsibility in 36 CFR part 800. Having complied with this procedural requirement the Federal agency may adopt any course of action it believes is appropriate. While the Advisory Council comments must be taken into account and integrated into the decisionmaking process, program decisions rest with the agency implementing the undertaking.

(b) Listing in the National Register also makes property owners eligible to be considered for Federal grants-in-aid for historic preservation.

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**Apply Criteria**

**Choose Map Criteria:**

Background

Area Type

**Choose Project Criteria:**

Status

Theme  Grant Program

Administrative contracts

Aquatic Lands Enhancement

Boating Facilities Program

Boating Infrastructure Grant

All

BIG - Tier1

BIG - Tier2

Bond Program

All

BONDS

Family Forest Fish Passage Pr

All

FFFPP-Admin

Reset
 Zoom In
 Zoom Out
 Recenter

**External Links:**

Map Services

**Criteria selected:**

#	Sponsor	Project Name	Project #	Type	Status
<b>Adams County</b>					
1	Othello Parks & Recreation	<a href="#">Kiwanis Park</a>	79-028	Development	Completed
<b>Asotin County</b>					
2	County of Asotin	<a href="#">Snake River Path Renovation</a>	03-1053	Development	In Progress
3	Dept of Fish & Wildlife	<a href="#">Grande Ronde &amp; Snake River</a>	73-610	Acquisition	Completed
4	Dept of Fish & Wildlife	<a href="#">Statewide Water Access Stage 1 (17 sites)</a>	68-603	Acquisition	Completed
5	Dept of Fish & Wildlife	<a href="#">Tippett Ranch</a>	75-600	Acquisition	Completed
<b>Benton County</b>					
6	Dept of Fish & Wildlife	<a href="#">Statewide Water Access Stage 1 (17 sites)</a>	68-603	Acquisition	Completed
7	Kennewick Parks & Rec Dept	<a href="#">Columbia Park</a>	66-001	Development	Completed
8	Kennewick Parks & Rec Dept	<a href="#">Sacagawea Heritage Trail</a>	04-1113	Development	In Progress
9	Kennewick Parks & Rec Dept	<a href="#">Swimming Pool Renovation</a>	86-066	Development	Completed
10	Kennewick Parks & Rec Dept	<a href="#">Vista Park 2</a>	84-050	Development	Completed
11	Richland Parks & Recreation	<a href="#">Prout Pool</a>	80-032	Development	Completed
<b>Chelan County</b>					
12	Cashmere Parks & Rec Dept	<a href="#">Outdoor Pool</a>	79-020	Development	Completed

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## Section 8

### Slides

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# Section 4(f) Training

May 2005

Presented by:

Sharon P. Love, P.E.  
Environmental Program Manager  
FHWA Washington Division

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## Today's Agenda

- ❖ Context for the Section 4(f) process
- ❖ Basics of Section 4(f)
- ❖ Section 4(f) resources / properties and applicability criteria
- ❖ Use and impact (use vs. impact)
- ❖ Examples of 4(f) resource applicability
- ❖ Feasible and prudent avoidance
- ❖ Minimization of harm and mitigation
- ❖ Evaluation and documentation

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## Section 303 Title 49

The secretary may approve projects requiring the use of publicly owned land of a public park, recreation area, or wildlife/waterfowl refuge, or land of a historic site of national, state, or local significance (as determined by the officials with jurisdiction) only if-

- 1) **There is no feasible and prudent alternative to such use, and**
- 2) **The project includes all possible planning to minimize harm**

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## Context

- ❖ Which came first ...  
... NEPA or Section 4(f)?
- ❖ Are you familiar with the FHWA/FTA transportation decisionmaking process?
- ❖ Have you heard of the umbrella approach to environmental compliance?

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## Section 4(f) Background

- ❖ From a proposed highway project impacts to Brackenridge Park in San Antonio, TX
- ❖ Provision of the DOT Act of 1966
- ❖ Feasible and prudent standard defined by the Overton Park court decision
- ❖ Implementation influenced by court decisions

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## Section 4(f) Basics

- ❖ Actions of US DOT Agencies - **ONLY**
- ❖ US DOT the resource / regulatory authority
- ❖ Requirements include:
  - Alternatives analysis
  - Avoidance, minimization, and compensation
  - Coordination and consultation
  - Documentation and process
  - Findings
- ❖ Procedural or substantive law?

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## Section 4(f) References

- ❖ Legislation
  - 49 USC 303 (transportation)
  - 23 USC 138 (highways)
- ❖ Regulation
  - 23 CFR 771.135 (FHWA and FTA)
- ❖ Guidance
  - FHWA Policy Paper
  - Re:NEPA Community of Practice (<http://nepa.fhwa.dot.gov>)
  - [www.environment.fhwa.dot.gov](http://www.environment.fhwa.dot.gov)

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## Section 4(f) Web References

- ❖ CD and website ([www.section4f.com](http://www.section4f.com))
- ❖ FHWA HQ Section 4(f) Guidance Website <http://environment.fhwa.dot.gov/projdev/PDsec4f.htm>
- ❖ Section 4(f) Policy Paper (revised in March 2005) <http://environment.fhwa.dot.gov/projdev/4fpolicy.htm>
- ❖ Programmatic 4(f) Evaluations <http://environment.fhwa.dot.gov/projdev/4fnspeval.htm>

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## Section 303 Title 49

The secretary may approve projects requiring the use of publicly owned land of a public park, recreation area, or wildlife/waterfowl refuge, or land of a historic site of national, state, or local significance (as determined by the officials with jurisdiction) only if-

- 1) There is no feasible and prudent alternative to such use, and
- 2) The project includes all possible planning to minimize harm.

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### Section 4(f) Essentials

- ❖ Properties / resources ...
  - ... parks, recreation areas, wildlife and waterfowl refuges, and historic properties with qualities that satisfy specific criteria
- ❖ Not all parks, recreation areas, wildlife and waterfowl refuges, or historic properties are section 4(f) resources

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### Section 4(f) Essentials

- ❖ Use – incorporation of land
  - impacts do not always equate to use
- ❖ Section 4(f) standard (approval criteria)
  - no feasible and prudent avoidance alternatives
  - all possible planning to minimize harm
- ❖ Evaluation, coordination, documentation, review requirements, and findings

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### 4(f) Applicability Criteria

- ❖ Parks and recreation areas
  - Publicly owned
  - Public park
  - Major purpose for park or recreation
  - Significant resource

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### 4(f) Applicability Criteria

- ❖ Wildlife and waterfowl refuges
  - Publicly owned
  - Major purpose for refuge purposes
  - Significant property
- ❖ Historic property
  - On or eligible for National Register of Historic Places

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### Public Ownership

- ❖ Parks, recreation areas, and wildlife and waterfowl refuges
  - Fee simple ownership
  - Permanent easement
  - Temporary easement
  - Lease agreement
- ❖ Not a criteria for historic properties

Policy Paper - Q. 2A & 2D

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### Public Park

- ❖ Access to the resource
  - Entire public permitted access to park or recreation area (during normal operating hours)
  - Visitation is not limited to a select group(s)
- ❖ Not an absolute criteria for refuges

Policy Paper - Q. 2C

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## Major Purpose

- ❖ Primary function of the property ...  
... is for park, recreation, or refuge purposes or activities
- ❖ Activities are other than ...  
... incidental, secondary, occasional, or dispersed

Policy Paper – Q. 2A

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## 4(f) Significance

- ❖ Parks, recreation areas, wildlife and waterfowl refuges
  - Considers the availability and function of the resource in terms of the objectives of the agency with jurisdiction
  - The property/resource plays an important role in meeting those objectives

Policy Paper – Q. 2B

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## 4(f) Significance continued

- ❖ Parks, recreation areas, wildlife and waterfowl refuges
  - Determined by the officials with jurisdiction
  - Presumed significant in the absence of a determination
  - Subject to review by FHWA for reasonableness
  - **Applies to the entire property**

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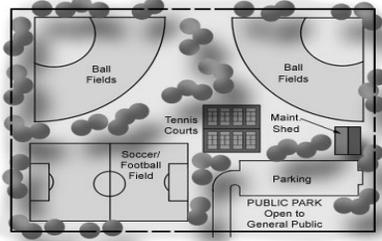
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## 4(f) Significance



A typical recreational resource -- a public park open to the public where the main purpose is recreation. The entire park -- including parking, maintenance facilities and recreational facilities -- must be considered as part of this significant Section 4(f) resource. • Be aware of two exceptions to this general rule

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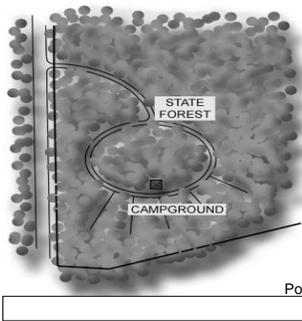
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## Public Multiple-Use Lands



Policy Paper Q. 6

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## 4(f) Historic Property

- ❖ Individual historic property
  - on or eligible for the National Register of Historic Places
- ❖ Archeological sites
  - National Register eligible and important for preservation in place
  - not significant for data recovery (information) only

23 CFR 771.135(e) Policy Paper Qs. 3A, 3B

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## Section 4(f) Applicability

- ❖ In historic districts, property that is
  - individually historic, integral to, or contributing element of the district
- ❖ Locally historic property
  - If determined by FHWA with appropriate and sufficient evidence
- ❖ National Historic Landmarks
  - treated the same way other historic properties are treated, but FHWA should consider their importance and significance.
- ❖ Traditional culture properties
  - on or eligible for the National Register
- ❖ Consultation with SHPO/THPO

23 CFR 771.135(e) Policy Paper Qs. 3A, 3C, 3D

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## 4(f) and 106 Relationship

- ❖ National Register eligibility necessary for 4(f) applicability of historic properties
- ❖ Adverse effect does not equal use
- ❖ Use is possible without adverse effect determination
- ❖ Section 106 MOA provides documentation of minimization of harm and of mitigation

Policy Paper - Q. 3B

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## Use

- ❖ Fee simple
- ❖ Permanent easement
- ❖ Temporary occupancy (in some cases)
- ❖ Constructive use

Policy Paper Q. 1A, 1B, 1C

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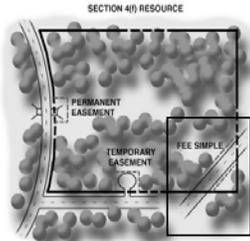
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## Fee Simple Use

- ❖ Acquisition of property for transportation purposes
- ❖ Conversion to highway or transit ROW (or other DOT need)



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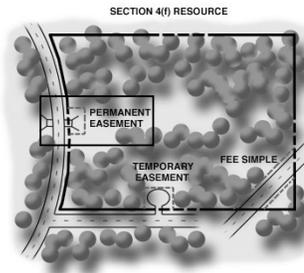
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## Permanent Easement



Policy Paper – Q. 1A

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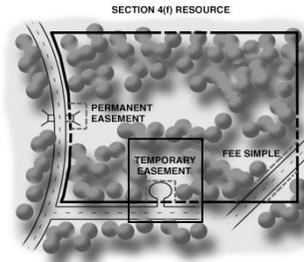
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## Temporary Easement



23 CFR 771.435(p)(1) & (p)(7)  
Policy Paper Qs. - 1A & 1C

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## Temporary Easement

- ❖ Does Not constitute use when:
  - Occupancy is of short duration  
... less than project construction
  - No change in ownership
  - No long-term or indefinite interests created
  - No temporary or permanent adverse change
  - Involves only a minor amount of land

23 CFR 771.135(p)(7)

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## Constructive Use

- ❖ No actual incorporation of land
- ❖ Proximity impacts of the project
- ❖ Use defined by **substantial impairment**  
... Activities, features, or attributes that qualify the resource for section 4(f) protection are **substantially diminished**

23 CFR 771.135(p)(2), Policy Paper Q. 1B

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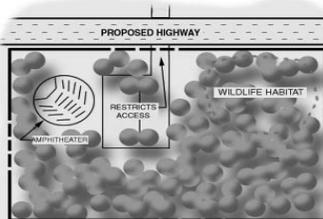
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## Constructive Use



23 CFR 771.135(p)(2)

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## Constructive Use

- ❖ Potential constructive use impacts
  - Noise impacts
  - Visual impacts
  - Access restrictions
  - Vibration
  - Ecological intrusion

23 CFR 771.135(p)(4)

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## No Constructive Use

- ❖ No historic properties affected / no adverse effect
- ❖ Noise abatement criteria not approached ...
- ❖ Timing of determination
- ❖ Concurrent development in area
- ❖ Combined impacts not substantially impair
- ❖ Impacts mitigated
- ❖ Minor changes in accessibility
- ❖ Vibration impacts are minor or mitigated

23 CFR 771.135(p)(4)

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## Section 4(f) Examples

Common situations and resources ...  
... FHWA's Section 4(f) Policy Paper

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## Historic Bridges and Highways

- ❖ Rehabilitation, repair, or improvement
  - No adverse effect - no 4(f) use
  - Adverse effect - 4(f) use
- ❖ Bridge donations (new alignment)
  - Historic integrity maintained - no 4(f) use
  - Historic integrity not maintained - 4(f) use
- ❖ Demolish bridge - 4(f) use

23 USC 144(o), 23 CFR 771.135(f)  
Policy Paper – Qs. 4A, 4B, 4C, 4D

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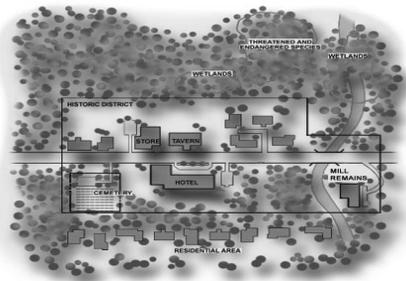
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## Historic Districts



Policy Paper – Q.3C

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## Public Multiple-Use Lands

- ❖ National Forests
- ❖ State Forests
- ❖ BLM lands
- ❖ Public schools
- ❖ Wildlife, game and conservation areas

Policy Paper – Q. 6

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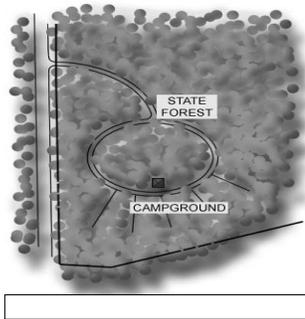
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## Public Multiple-Use Lands



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## Public Multiple-Use Lands

- ❖ 4(f) applies to historic properties
- ❖ Designated / included in management plan
  - 4(f) applies to park, recreation, or refuge activities
  - 4(f) does not apply to areas of non-4(f) function
- ❖ No management plan
  - 4(f) applies where primary function is for park, recreation, or refuge activity
  - No 4(f) where primary function is for other activities

23 CFR 771.135(d), Policy Paper - Q. 6

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## Bodies Of Water

- ❖ How does a highway project use a river or lake? What about ownership? Purpose?
- ❖ May require application of multiple use / primary function concept
- ❖ Rivers are generally not 4(f) except for:
  - Publicly owned recreational trails
  - Designated National Wild and Scenic Rivers

Policy Paper - Q. 13

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## Wild And Scenic Rivers

- ❖ Rivers under study - 4(f) does not apply
- ❖ Designated Rivers
  - Publicly owned - 4(f) applies
- ❖ Publicly owned land
  - 4(f) applies to recreation areas
    - Designated in plan
    - Actually in place (undesignated or no management plan)

Policy Paper – Qs. 8A & 8B

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## Public School Playgrounds

- ❖ 4(f) does not apply where:
  - Primary function for students PE and recess
  - Serves only school activities
  - No or little walk-on activity
- ❖ 4(f) applies where:
  - Significant organized recreational activities
  - Significant substantial walk-on activities

Policy Paper - Q. 10

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## Golf Courses

- ❖ Applicability of Section 4(f):
  - Publicly owned
  - Open to the general public
  - Determined to be a significant recreational area.

Policy Paper - Q. 11

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## Trails & Bikeways

- ❖ Recreational trails
  - Publicly owned - 4(f)
  - Privately owned - no 4(f)
- ❖ Bikeways - primary function
  - Transportation - no 4(f)
  - Recreation - 4(f)
- ❖ Historic trails identified in PL. 95-625 are exempt from 4(f)
- ❖ If a trail is simply described as being in the ROW, then relocation of it within the ROW is not a 4(f) use.

Policy Paper - Q. 14 & 15

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## Late Designation

- ❖ If land is acquired for transportation purpose prior to 4(f) designation or prior to change in significance and
- ❖ If adequate efforts were made to identify 4(f) property (requirements and standards that existed at time of study and analysis)

23 CFR 771.135(h) Policy Paper - Q. 7

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## “Planned” 4(f) Facilities

- ❖ Formally designated and
- ❖ Determined to be significant ...  
... for park, recreation, or refuge purposes

Policy Paper - Q. 17

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## Joint Development



Under joint development, the recreational resource maintains use of the facility for recreational purpose, including the portion reserved for some future transportation use. It is understood by the official with jurisdiction and the state transportation agency that the use of land may not be needed for years and until that time the land can be used for recreational or other purposes.

Policy Paper – Q. 16

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## Joint Development



The lined area shows a boundary of reserved land for future transportation use that an official with jurisdiction and state transportation agency would agree upon in the initial development of the recreational resource.

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## Occupancy of ROW

- ❖ Where undeveloped, vacant highway ROW, or preserved transportation corridor is used for other than transportation purposes
- ❖ Section 4(f) does not apply to either authorized or unauthorized occupancy of highway rights-of-way

Policy Paper – Q. 18

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## Wildlife Areas

- ❖ National wildlife refuges - 4(f) applies
- ❖ Wildlife management area -
  - 4(f) applies if primary function is for refuge purposes
  - Otherwise, apply multiple use concept

Policy Paper – Q. 20

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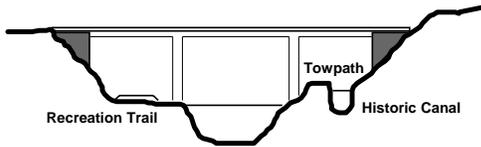
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## Air Rights - Bridging



Policy Paper – Q. 21

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## Trans. Enhancement Projects

1. Pedestrian and bicycle facilities
2. Pedestrian and bicycle safety and education activities
3. Acquisition of scenic or historic easements and sites
4. Scenic or historic highway programs, including tourist and welcome centers
5. Landscaping and scenic beautification
6. Historic preservation

Policy Paper Q. 24 A

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## Trans. Enhancement Projects

7. Rehabilitation and operation of historic transportation buildings, structures or facilities
8. Conversion of abandoned railway corridors to trails
9. Control and removal of outdoor advertising
10. Archeological planning and research
11. Environmental mitigation of runoff pollution, and provision of wildlife connectivity
12. Establishment of transportation museums

Policy Paper Q. 24 A

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## Transportation Enhancement Activities and Section 4(f)

### ❖ Examples

- A new bike trail in a park – Section 4(f) applies since it involves ‘permanent incorporation of 4(f) land into a transportation facility’.
- Restoration/improvement of a recreational facility or historical site – Section 4(f) does not apply.

Policy Paper Q. 24 A

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## Museums, Aquariums, and Zoos

- ❖ Publicly owned museums or aquariums
  - not subject to Section 4(f) unless they are significant historic properties.
- ❖ Publicly owned zoos
  - evaluated on a case-by-case basis

Policy Paper Q. 25

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## Tribal Lands and Indian Reservations

- ❖ Federally recognized Indian Tribes are sovereign nations, therefore, their are not "publicly owned", nor open to the general public, and Section 4(f) does not automatically apply.
- ❖ If land owned by a Tribal Government or on Indian Reservation functions as a significant park, recreational area (which are open to the general public), a wildlife and waterfowl refuge, or is eligible for the National Register of Historic Places, Section 4(f) would apply.

Policy Paper Q. 26

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## Traditional Cultural Properties

- ❖ Must be eligible for the National Register of Historic Places
- ❖ THPO or tribal cultural resources staff should be consulted if the TCP is tribal.

Policy Paper Q. 27

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## Cemeteries

- ❖ Not 4(f) resources unless eligible for the National Register of Historic Places
- ❖ If human remains are found in an archaeological site, need to consider if the site warrants preservation in place.

Policy Paper Q. 28

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### **Section 4(f) in Tiered NEPA Documents**

- ❖ Completion of tier 1 does not relieve FHWA of the responsibility to study an avoidance alternative in tier 2.

Policy Paper Q. 29

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### **LWCFA Section 6(f)**

- ❖ Land and Water Conservation Fund Act
  - Coordination and approval of NPS, DOI required
  - Replacement of property (NPS discretion)
  - Applies to locations where LWCFA funds were actually used, if determinable
  - Consult with LWCFA liaison – In Washington State this is the Interagency Committee for Outdoor Recreation

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**Break Time!**

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## Evaluation and Documentation

FHWA Technical Advisory  
T6640.8a

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### General Documentation Needs

- ❖ Resource applicability or non-applicability
  - public ownership, significance, major purpose
  - eligibility for the NR (historic properties)
- ❖ Avoidance alternatives
- ❖ Coordination
- ❖ Measures to minimize harm
- ❖ Mitigation
- ❖ Finding of no feasible and prudent and feasible avoidance alternatives and ...

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### 4(f) Evaluation / Documentation

- ❖ Project purpose and need
- ❖ 4(f) resources and properties (applicability)
- ❖ Use and impacts
- ❖ Alternatives considered, including **avoidance** and **minimization**
- ❖ Measures to minimize harm and mitigation
- ❖ Coordination - significance, impacts, mitigation, land conversions
- ❖ Finding of no feasible and prudent alternative

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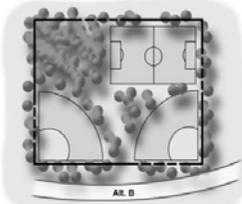
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## Avoidance and Minimization



Alternative B completely avoids the park and, therefore, may be considered an avoidance alternative. Impacts to additional resources, other than Section 4(f), must be considered in order to determine if the avoidance alternative is prudent.



Even though Alternative A does not impact any recreational elements, it is still considered a minimization alternative. Avoidance alternatives cannot impact any portion of the Section 4(f) resources.

Policy Paper – P. 4

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## Feasible / Prudent Avoidance

- ❖ Feasible – technically possible, constructible
- ❖ Prudent – reasonable, “does it makes sense?”
- ❖ Make the case:
  - alternative does not meet project purpose and need
  - excessive cost of construction
  - serious operational or safety problems
  - unacceptable social, economic and/or environmental impacts
  - excessive community disruption
  - combinations of the above

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## Feasible and Prudent

### Overton Park Decision

- ❖ Feasible and prudent alternatives do not create truly unique problems
- ❖ Truly Unique Factors:
  - cost of extraordinary magnitude
  - community disruption of extraordinary magnitude



23 CFR 771.135(a)(2)

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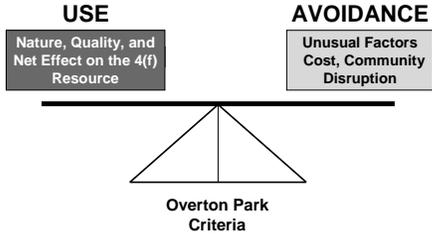
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## Feasible and Prudent Analysis (Balancing)




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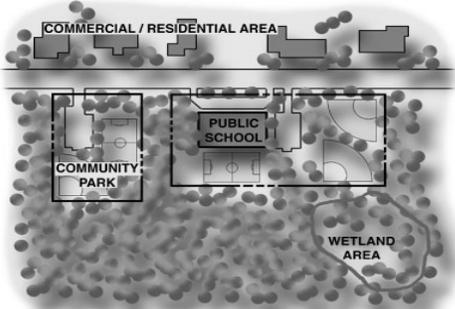
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Determining whether an avoidance alternative is feasible and prudent is not easy and at times involves detailed analysis of all of the resources affected by a proposed highway and NOT just the Section 4(f) resource.

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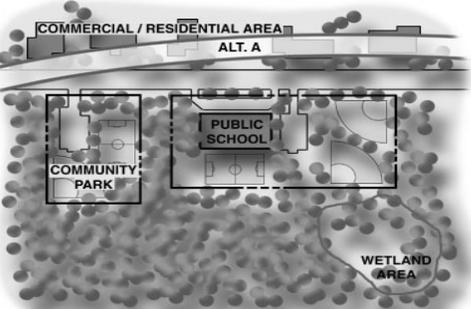
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This alternative proposes to impact several residences and commercial businesses as part of an effort to avoid Section 4(f) resources. Is this a viable avoidance alternative? To answer this, several factors must be considered, including the socioeconomic impacts to those resources and the surrounding community. This information is compared to other avoidance alternatives to determine Alternative A's viability.

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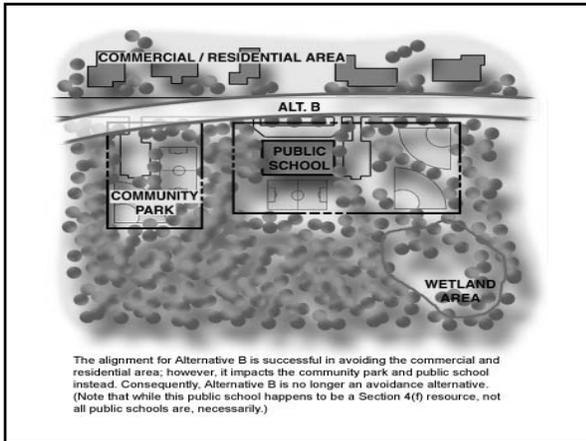
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The alignment for Alternative B is successful in avoiding the commercial and residential area; however, it impacts the community park and public school instead. Consequently, Alternative B is no longer an avoidance alternative. (Note that while this public school happens to be a Section 4(f) resource, not all public schools are, necessarily.)

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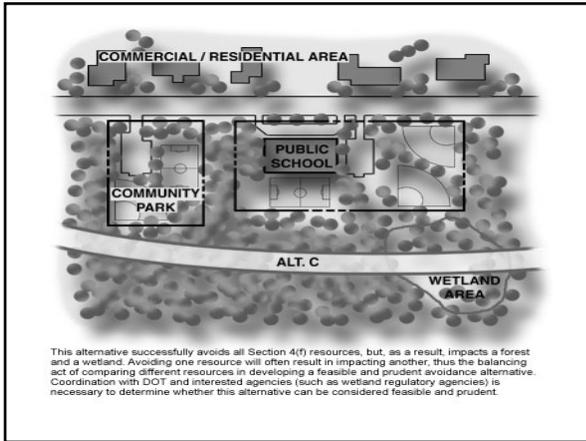
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This alternative successfully avoids all Section 4(f) resources, but, as a result, impacts a forest and a wetland. Avoiding one resource will often result in impacting another, thus the balancing act of comparing different resources in developing a feasible and prudent avoidance alternative. Coordination with DOT and interested agencies (such as wetland regulatory agencies) is necessary to determine whether this alternative can be considered feasible and prudent.

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### Consider the Net Impact

- ❖ Quality of the resource
- ❖ Size of use
- ❖ Location of use
- ❖ Severity use
- ❖ Function of portion used
- ❖ Remaining function of property after use

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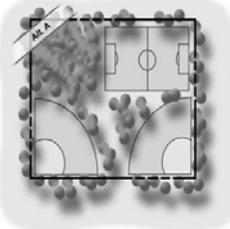
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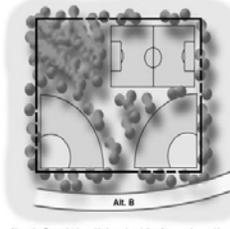
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## Alternative Analysis/Selection



Even though Alternative A does not impact any recreational elements, it is still considered a minimization alternative. Avoidance alternatives cannot impact any portion of the Section 4(f) resource.



Alternative B completely avoids the park and, therefore, may be considered an avoidance alternative. Impacts to additional resources, other than Section 4(f), must be considered in order to determine if the avoidance alternative is present.

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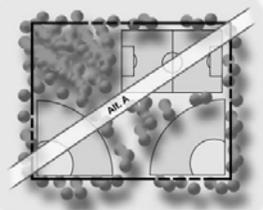
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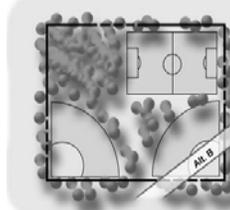
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## Alternative Selection



Alternative A traverses two recreational elements and a large section of the resource.



Alternative B traverses a smaller section of the park, but still impacts one of the recreational elements.

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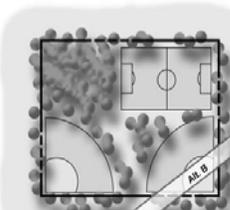
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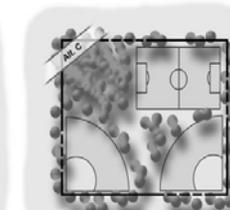
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## Alternative Selection



Alternative B traverses a smaller section of the park, but still impacts one of the recreational elements.



Alternative C extends through a smaller portion of the park and does not impact recreational elements. Based on this scenario, if there are no avoidance alternatives, Alternative C should be selected.

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## Rules to Alternative Selection

- ❖ If a feasible and prudent avoidance alternative is available
  - Stop there, you must select it
- ❖ If there are no feasible and prudent avoidance alternatives (all alternatives result in a use)
  - You must select the alternative that has the least harm to the 4(f) resource

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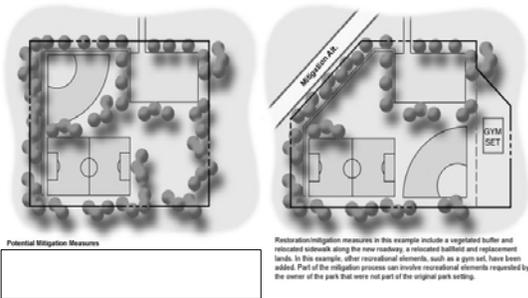
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## Potential Mitigation




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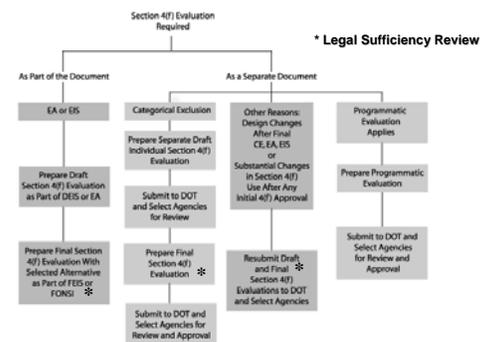
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## Evaluation Flowchart




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### **Programmatic 4(f) Evaluations**

- ❖ No exemptions of basic 4(f) requirements
- ❖ Optional, not required
- ❖ Documentation vs. document
- ❖ No DOI coordination or legal sufficiency
- ❖ Time savings
- ❖ Flexible procedures
- ❖ Generally minor 4(f) use
- ❖ Agreement with official with jurisdiction is essential

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### **Programmatic 4(f) Evaluations**

- ❖ Minor involvement with public parks, recreation areas, and wildlife and waterfowl refuges
- ❖ Minor involvement with historic sites
- ❖ Use of historic bridges
- ❖ Independent bikeway or walkway construction projects (1977 negative declaration)
- ❖ Net benefit to Section 4(f) Property (2005)

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### **Parts of a Programmatic**

- ❖ Applicability
- ❖ Alternatives
- ❖ Coordination
- ❖ Measures to minimize harm
- ❖ Findings
- ❖ Approval procedure

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### General Applicability

- ❖ Improvement is on essentially the same alignment
- ❖ 4(f) resource is adjacent to existing highway
- ❖ Use of lands or proximity impacts do not impair the use of the remaining land
- ❖ Limit on property taken (parks,...)
- ❖ Official(s) with jurisdiction must agree with assessment of impacts and mitigation measures

There are specific criteria for each programmatic

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### Applicability Continued

- ❖ Federal agency with an interest in the land does not object to land conversion or transfer
- ❖ Project does not remove or alter historic buildings, structures, or objects, or remove or disturb archeological resources that are important to preserve in place
- ❖ Section 106 determination of no adverse effect
- ❖ Generally does not apply to EIS projects

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### Programmatic Analysis

- ❖ Evaluate avoidance alternatives
  - Do nothing
  - Improve existing without using 4(f) land
  - Building on new location
- ❖ Coordination
  - Federal agencies with encumbrances
  - USCG coordination if a bridge permit is required

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## Programmatic Analysis

- ❖ Measures to minimize harm
  - Written agreement from Officials with jurisdiction
  - Based on agreement with the SHPO/THPO (and ACHP, if needed) via the Section 106 Process
- ❖ Findings
  - Information on alternatives and measures to minimize harm must support the specific findings of the programmatic evaluation

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## Approval / Documentation

- ❖ Once the FHWA Division Administrator or designee ...  
... finds that all of the criteria, procedures, etc. of the applicable programmatic have been satisfied
- ❖ Degree of documentation depends on State DOT and FHWA Division Office

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## For Further Assistance

For project-specific questions please start with your Region Environmental Office (or your Highways and Local Programs Area Engineer if you are a City or County) and your FHWA Area Engineer.

**Steve Yach**  
WSDOT ESO NEPA Specialist  
509-324-6132  
YachS@wsdot.wa.gov

**Sharon Love**  
Environmental Program Manager  
FHWA Washington Division  
360-753-9558  
Sharon.Love@fhwa.dot.gov

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