

Section 4(f) Workshop

March 6, 2018
Boise, ID

Instructor:

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FHWA Resource Center

Agenda

- Welcome & Introductions
- Overview of Transportation Decisionmaking & Select Environmental Laws
 - NEPA, Section 106, & Section 4(f)
- Section 4(f) Applicability
 - Historic Sites
 - Parks, recreation areas, wildlife and waterfowl refuges
- Section 4(f) Use

Agenda (cont.)

- Finding of De Minimis Impacts
- Section 4(f) Programmatic Evaluations
- Individual Section 4(f) Evaluations
 - Feasible and Prudent Avoidance
 - All Possible Planning to Minimize Harm
 - Least Overall Harm Analysis
- Summary / Review
- Course Evaluations

Useful Resources

- FHWA website – fhwa.dot.gov
 - Environmental Review Toolkit
 - July 2012 Section 4(f) Policy Paper
- Interactive Section 4(f) training
 - www.section4f.com
- FHWA re:NEPA website
- AASHTO / CEE website

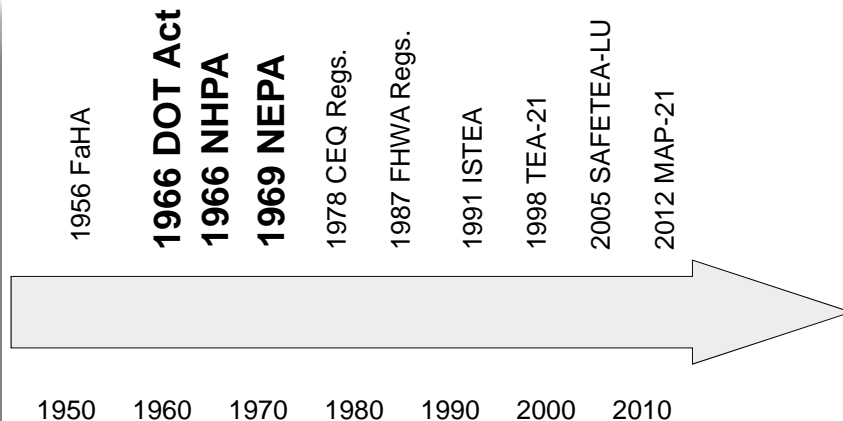
Introductions

- Name
- Employer / Job Description
- Section 4(f) Experience
- Questions / Discussion Items

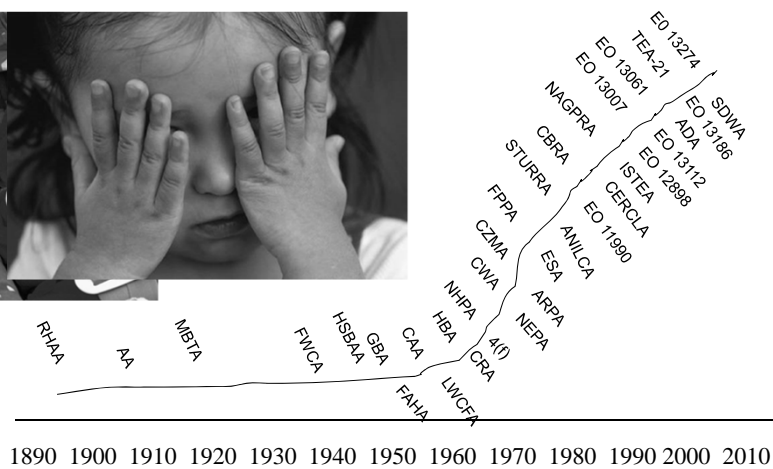


Overview of the Transportation Decisionmaking Process and NEPA, Section 106 and Section 4(f)

Evolution of Transportation Decisionmaking



Environmental Laws and EO's Affecting our Decisionmaking



Hierarchy

- Laws
- Regulations
- Other
 - Executive Orders
 - Policy
 - Guidance



National Environmental Policy Act of 1969 (NEPA)

National Environmental Policy Act of 1969 (NEPA)

- Declare a NATIONAL POLICY which will encourage a productive and enjoyable harmony between man and his environment ...
 - Decisionmaking framework
 - Consult with agencies & public
 - Disclosure
- NEPA applies to all Federal undertakings
- NEPA is a procedural statute

FHWA NEPA Regulations

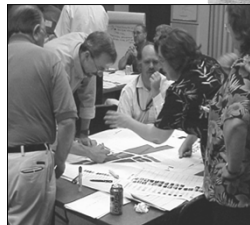
“Environmental Impact and Related
Procedures”

23 CFR Section 771

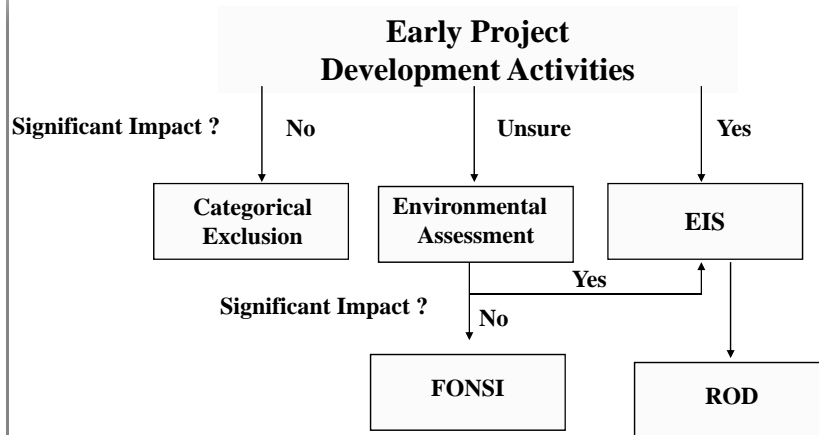


Essential Elements of FHWA NEPA Process

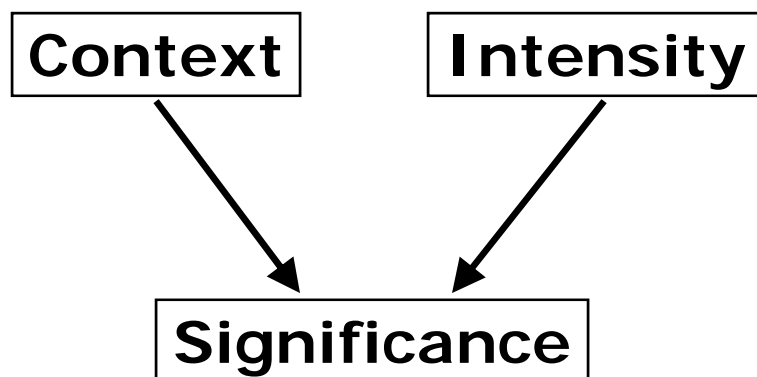
- Purpose and Need
- Alternatives
- Impacts
- Mitigation
- Public Involvement
- Interagency
Coordination
- Documentation



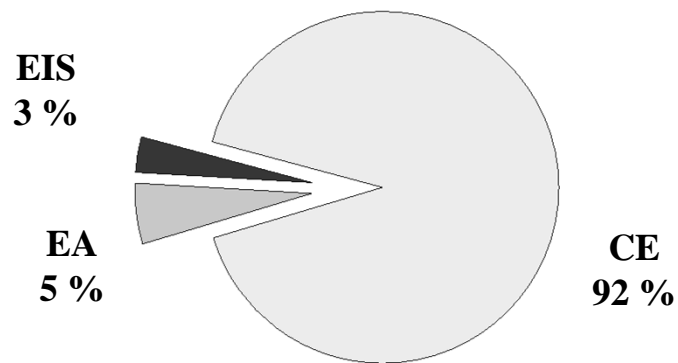
NEPA Process Options



NEPA Significance



Projects by Class of Action (FHWA-wide)



National Historic Preservation Act of 1966 (NHPA)

National Historic Preservation Act of 1966 (NHPA)

- Applies to all Federal undertakings
- Does not mandate preservation, but seeks to resolve conflicts via consultation process among stakeholders
- Participants
 - Federal agencies, Advisory Council on Historic Preservation, SHPO/THPO, tribes, other consulting parties
- ACHP Regulations – 36 CFR 800

Section 106 of NHPA



- Federal agencies must consider the effect of their undertakings prior to granting approval or funding

- Federal agencies must provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment



Section 106 Process

Step 1 – Initiate the Process

Step 2 – Identify Historic Resources

Step 3 – Apply Criteria of Adverse Effect

Step 4 – Resolution of Adverse Effects



What Makes a Site Historic?

Must meet National Register eligibility criteria

✓ 4 Eligibility Criteria



Must have integrity

✓ 7 Aspects of Integrity

Section 106 Effect Determinations

- No historic properties affected
- No adverse effect
- Adverse effect
 - An adverse effect occurs when an undertaking may alter, directly or indirectly, any of the “characteristics” of a historic property eligible for the NRHP in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling or association.

Resolving Adverse Effects

Resolving adverse effects means continued consultation to:



- Develop and evaluate alternatives or modifications to the undertaking
- Avoid, minimize, or mitigate the adverse effects

Memorandum of Agreement (MOA)

- Outcome of continued consultation to resolve adverse effects when agreement has been reached
- Specifies agreed upon alternatives and mitigation
- Identifies parties responsible for implementation
- Legally binding document

Section 4(f) of the 1966 DOT Act

Section 4(f) of the 1966 DOT Act

- From a highway project in San Antonio, TX through Brackenridge Park
- A law separate from NEPA, NHPA...
- Applies ONLY to the actions of DOT agencies
- Goal is total avoidance and preservation
- Historically, it has been a controversial and often challenged part of FHWA's project development process

Section 4(f) - The Law:

The Secretary 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, or land of a historic site of National, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction) **only if** -

49 U.S.C. 303

Only If -

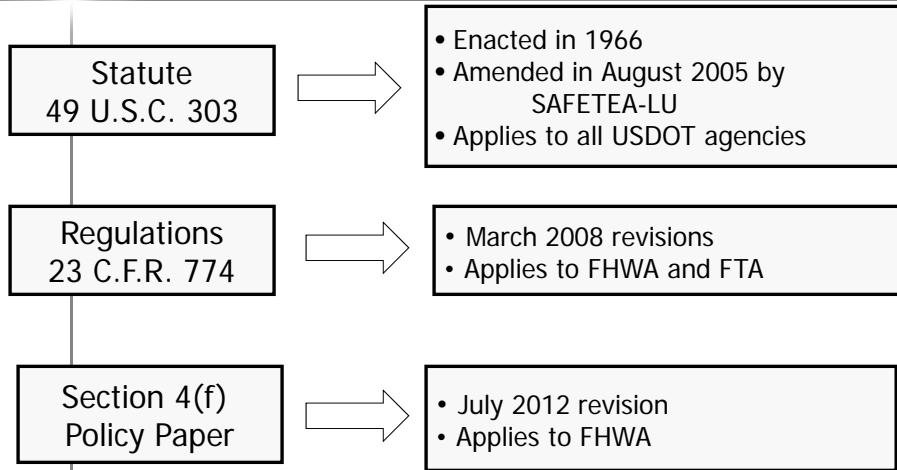
- there is no prudent and feasible alternative to using the land; and
- the program or project includes all possible planning to minimize harm to the ... Section 4(f) resource(s).
- Or, the FHWA makes a finding that the project has a de minimis impact on the Section 4 (f) resource.

Section 4(f) Processing Options

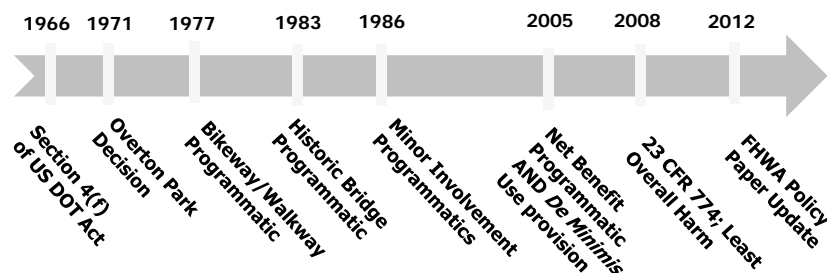


- Individual Section 4(f) Evaluation
- Programmatic Section 4(f) Evaluation
- Finding of de minimis impact

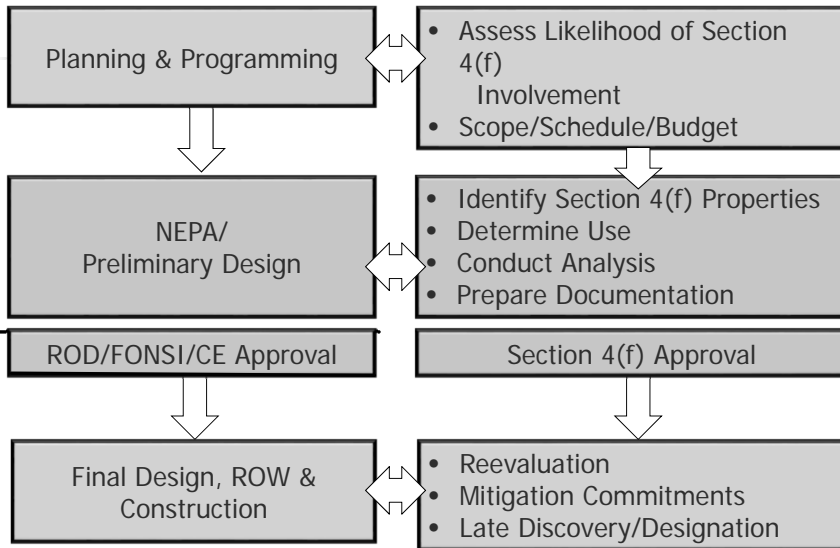
Section 4(f) Law, Regulation, and Guidance



The Evolution of Section 4(f) Compliance



Section 4(f) Role in Transportation Project Development



NEPA and Section 4(f)

NEPA is procedural

- Considers the process used to make the decision.
- No specific outcome required. In theory, any alternative can be selected.



Section 4(f) is substantive

- More than a process
- Requires a certain outcome / No F&P avoidance alternative

Section 106 and Section 4(f)

Section 106

- Preservation Legislation
- Applies to Federal undertakings
- Effect of undertaking
- 4(f) not integral to Section 106 process
- Considered in the NEPA process
- Requires consultation and possibly mitigation

Section 4(f)

- Preservation Legislation
- Applies to DOT actions only
- Use of property
- 106 is integral part of Section 4(f) compliance
- Considered in the NEPA process
- Requires avoidance, then all possible planning to minimize harm

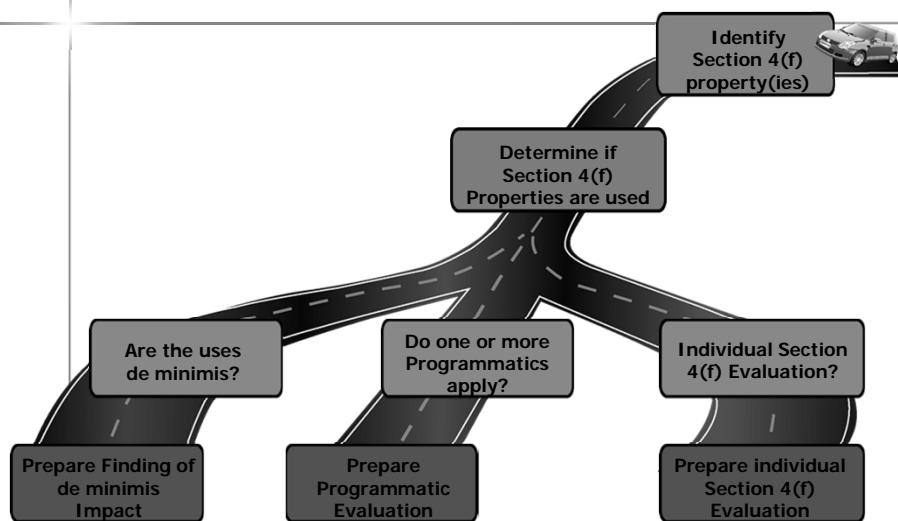
The significance of significant

- NEPA
- Section 106
- Section 4(f)



Questions and Additional Discussion

The Section 4(f) "Roadmap"



Applicability of Section 4(f)

Section 4(f) - The Law:

The Secretary 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, or land of a historic site of National, State, or local significance ...

49 U.S.C. 303

Section 4(f) - The Law:

The Secretary 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, or land of a historic site of National, State, or local significance ...**

49 U.S.C. 303

What are Section 4(f) Resources?

- Historic Sites

** (Public or private ownership)

- Parks

“ Parks+ ”

- Recreation Areas

- Wildlife & Waterfowl Refuges

** (Must be publicly-owned)

Historic Sites



Land of National, State or Local Significance

- public ownership not required
- on or eligible for the National Register, or
- locally significant

determined by FHWA when an Official provides adequate information to show a property is of local significance

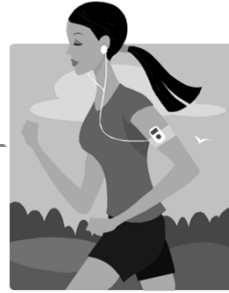
Official(s) with Jurisdiction for Historic Sites

- SHPO
- THPO
- ACHP sometimes (Appendix A – 36 CFR, Part 800)
- DOI/NPS – National Historic Landmarks



Parks+

- Publicly owned
- Open to the public
- Primary purpose
- Significant



Publicly Owned

- Fee simple ownership
- Public easement for Section 4(f) purposes
- Lease agreements
 - Terms of lease
 - Cancellation clause



Open to the Public



- Section 4(f) applies if entire public is permitted at any time (during regular hours)
- Section 4(f) does not apply if visitation is permitted to only select group and not the entire public

Primary Purpose



- Officially designated
- Officials with jurisdiction determine primary purpose is for 4(f) activities
- Incidental, secondary, dispersed or unauthorized activities do not constitute a primary purpose

Significance

- Parks, recreation areas, or refuges

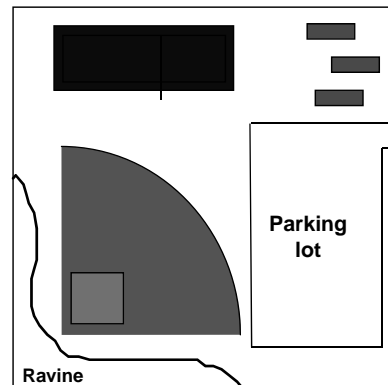
- In considering the availability and function of a resource with a community's park, recreation, or refuge objectives, the land in question plays an important role in meeting those objectives

- Historic sites

- on or eligible for listing on the NRHP

Significance

- In general, significance determinations apply to the entire resource, not just a particular portion of it.



Determining Significance of Section 4(f) Resource

Officials with Jurisdiction (OWJ)

- Parks, recreation areas, wildlife and waterfowl refuges
 - Officials of the agency or agencies that own or administer the property and who are empowered to represent the agency on matters related to the property

Determining Significance of Section 4(f) Resource (cont.)

- Request determination of significance from the officials with jurisdiction over the resource
- Resource is presumed significant in the absence of a determination
- FHWA is required to review the significance determination to assure its reasonableness
- Determinations are reviewable and reversible by FHWA

23 CFR 774.11(c)

Wildlife and Waterfowl Refuges

- Publicly owned
- Primary Purpose
 - National Wildlife Refuge System Administration Act of 1966
- Significance
- What about public use?



Multi-Use Properties

Examples:

- National & State Forests
- BLM Lands
- USACE Property
- Wildlife Management Areas



23 CFR 774.11(d)
Section 4(f) Policy Paper Q 4

Historic Districts

- Contributing elements
- Non-contributing elements

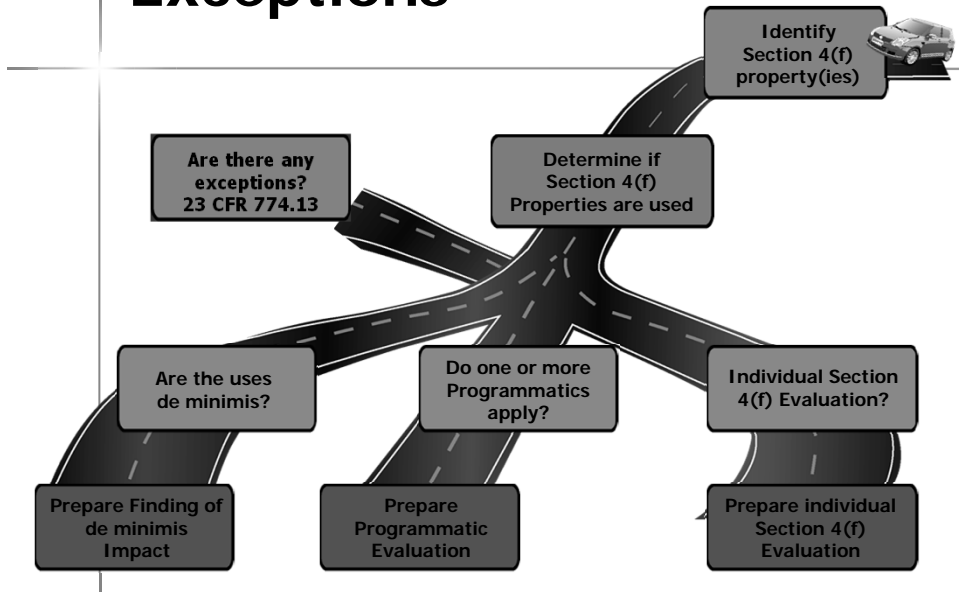


Interstate Exemption

- Interstate system is not to be considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate system formally identified by FHWA on the basis of national or exceptional historic significance.
- Examples – historic bridge or highly significant engineering feature

Does your State have any?

Exceptions



Exceptions – 23 CFR 774.13

- a) Restoration, Rehabilitation, or Maintenance of historic transportation facilities
- b) Archaeological sites
- c) Timing of designation of significance
- d) Temporary Occupancy
- e) Park Road or Parkway projects under 23 USC 204
- f) Trails, paths, bikeways, sidewalks
- g) Transportation Enhancement Projects and Mitigation Activities

- Add examples of exceptions language from other states

Questions and Additional Discussion

Section 4(f) Use

Section 4(f) Use of Land

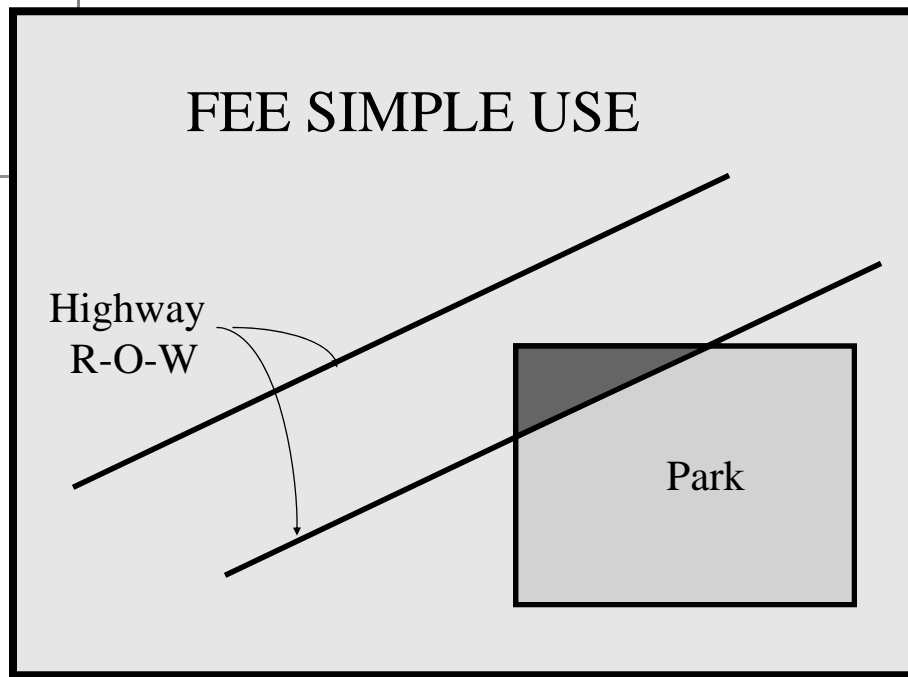
Use - a “use” of Section 4(f) property occurs:



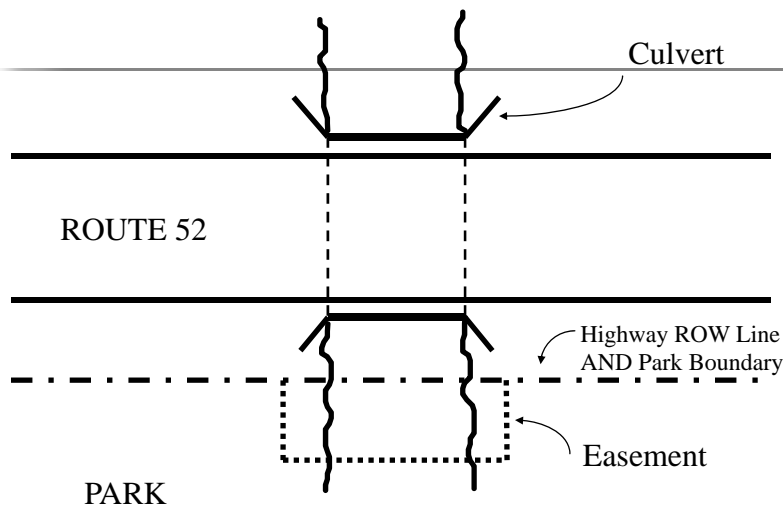
When land is permanently incorporated into a transportation facility;

When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d); or

When there is a constructive use of a Section 4(f) property as determined by the criteria in §774.15.



Permanent & Temporary Easements



Temporary Easement Section 4(f) Would Not Apply If:

- ♦ Occupancy is of limited duration,
- ♦ Scope of work is minimal,
- ♦ No permanent adverse physical impacts,
- ♦ No interference with activities or purpose of the resource - temporary or permanent,
- ♦ Land is fully restored, and
- ♦ Officials with jurisdiction agree to it - IN WRITING

Constructive Use

- No actual incorporation of land
- Proximity impacts **substantially** impair the activities, features, or attributes that qualify a resource for Section 4(f) protection

Constructive Use

- Additional direction and examples now provided in 23 CFR 774.15(a-e)

- Noise
- Aesthetics
- Access restrictions
- Vibration
- Ecological intrusions



Constructive Use

Situations where constructive use does not occur:

- Section 106 compliance results in no effect or no adverse effect
- Noise abatement criteria thresholds not exceeded
- Difference in build vs. no-build noise levels barely perceptible
- Timing of actions / concurrent development
- Combined proximity impacts do not substantially impair
- Project impacts mitigated
- Minor changes in accessibility
- Vibration impacts mitigated / monitored

Exceptions – 23 CFR 774.13

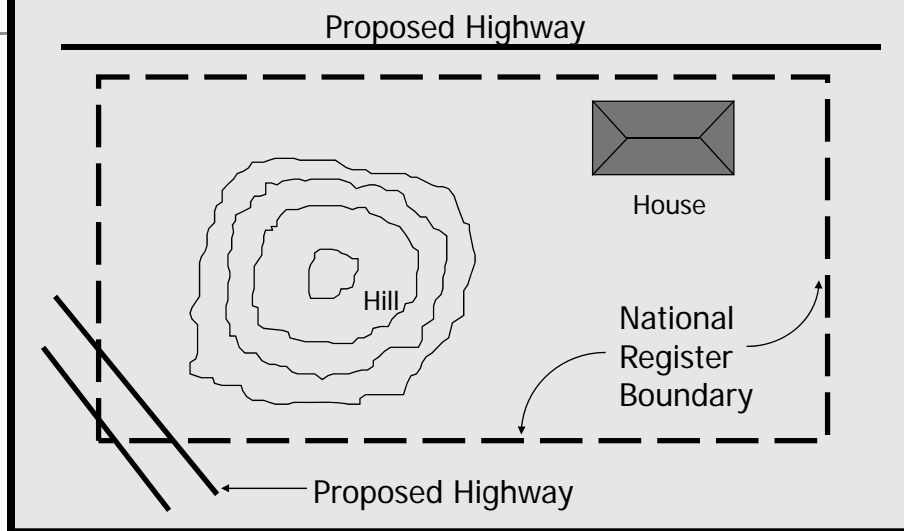
- a) Restoration, Rehabilitation, or Maintenance of historic transportation facilities
- b) Archaeological sites
- c) Late designation
- d) Temporary Occupancy
- e) Park Road or Parkway projects
- f) Trails, paths, bikeways, sidewalks
- g) Transportation Enhancement and Mitigation

Questions:

Does a Section 4(f) use of land always equate to a Section 106 adverse effect?

Does a Section 106 adverse effect determination always equate to a Section 4(f) use?

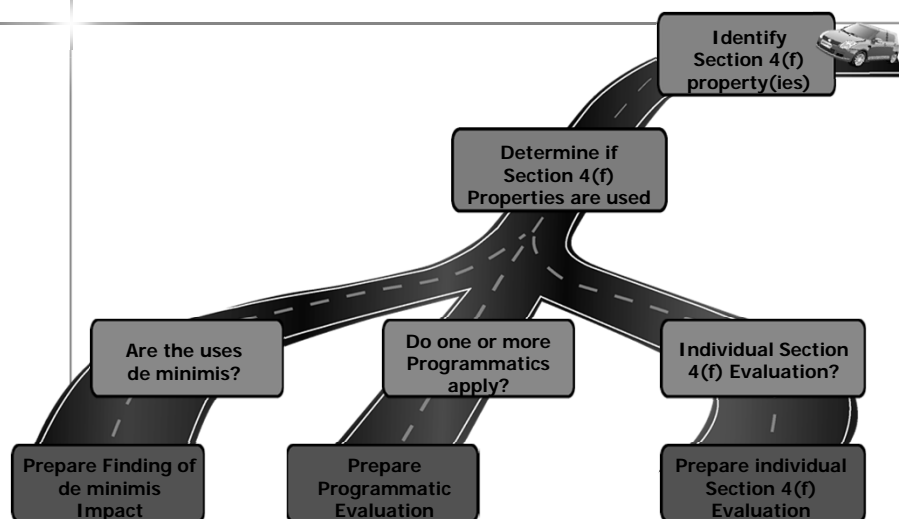
Section 106 Versus Section 4(f)

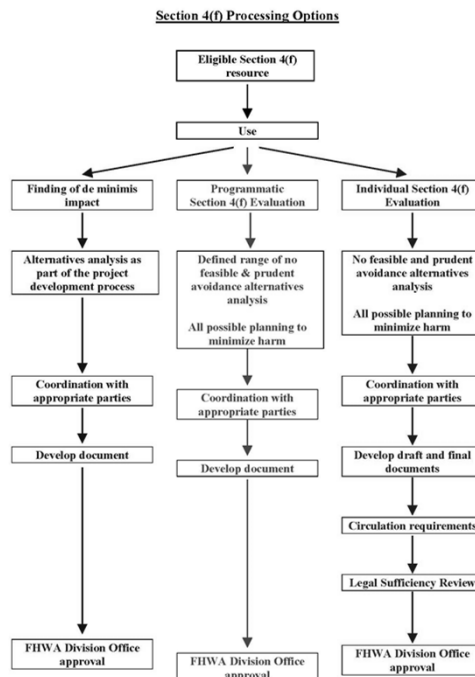


**Questions
and
Additional Discussion**

Section 4(f) Processing Options

The Section 4(f) "Roadmap"





Finding of de minimis Impact

- de minimis:
 - Latin for “of minimum importance” or “trifling”
 - From the judicial principal de minimis non curat
 - Trifling; of insufficient significance to warrant judicial or tax attention
 - “The law does not concern itself with trifles.”

Finding of de minimis Impact

- May be applied to any project
- De minimis impact findings are based on the degree of impact including any avoidance, minimization, and mitigation or enhancement measures included in the project
- No need to evaluate avoidance alternatives.
- Have different criteria / impact thresholds for parks+ and historic sites
- FHWA de minimis impact guidance issued on 12/13/05.
- Included in 23 CFR 774 regulations issued in 2008.
- Included in revised Section 4(f) policy paper issued in 2012.

Historic Sites – de minimis

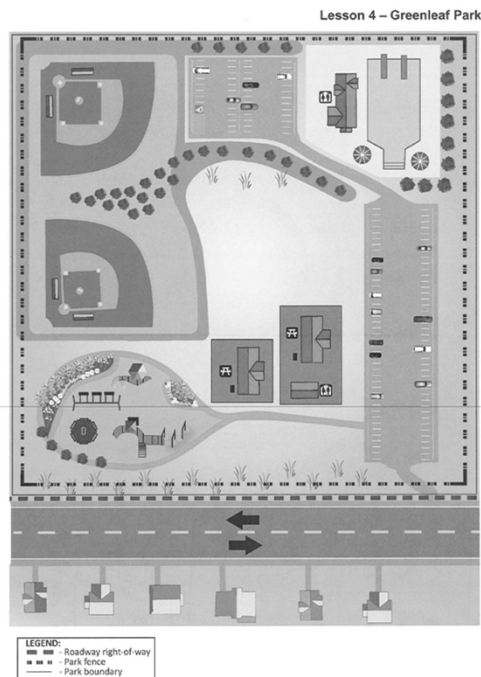
Section 4(f) requirements are satisfied if:

- Section 106 consultation process results in a determination of:
 - **No historic properties affected , or**
 - **No adverse effect**
- Written concurrence necessary from SHPO or THPO (and ACHP if participating)
- Lead agency has considered views of any consulting parties

Parks+ - de minimis

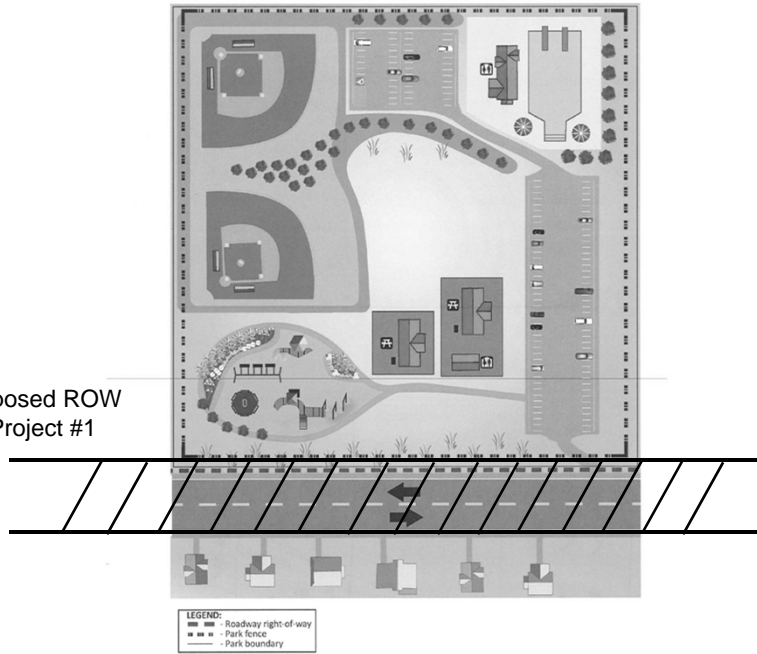
Section 4(f) requirements are satisfied if:

- Project does not adversely affect the activities, features, and attributes that qualify the resource for protection under Section 4(f)
- Written concurrence from officials with jurisdiction
- Public has been afforded an opportunity to review and comment



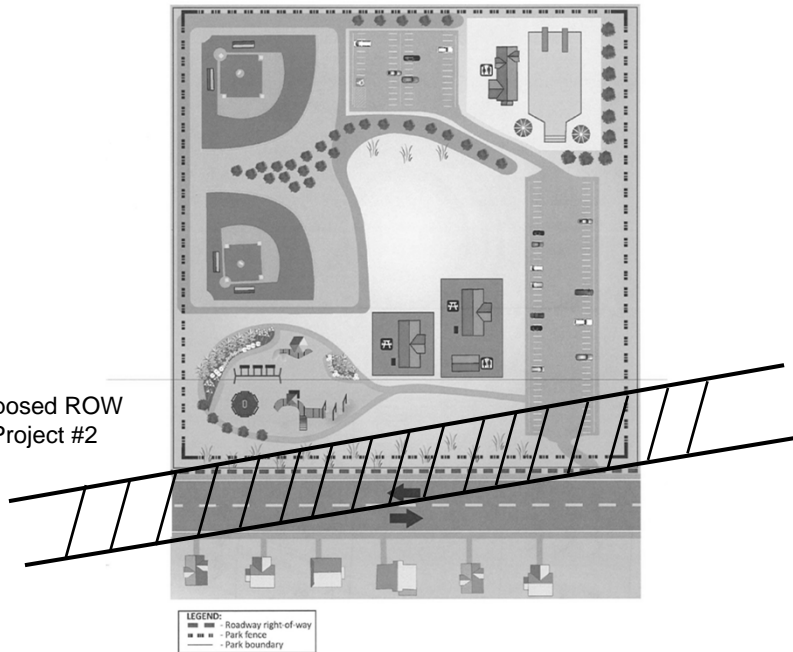
Lesson 4 – Greenleaf Park

Proposed ROW
for Project #1



Lesson 4 – Greenleaf Park

Proposed ROW
for Project #2





- De minimis is a use.
- Use of the 4f resource is minor.
- Consider net effect after mitigation.
- Findings made for each property.
- No avoidance alternatives analysis required.
- Most efficient compliance option, if appropriate.

Questions and Additional Discussion

Programmatic Section 4(f) Evaluations



Programmatic Approaches



- NEPA
- ESA
- Section 106
- Section 4(f)

- Others?

Programmatic Section 4(f) Evaluations

- Not exemptions from Section 4(f) requirements
- May result in time savings
- No DOI coordination or legal sufficiency
- Flexible procedures (w/Division)
- Generally minor 4(f) use only
- Agreement essential

Nationwide Section 4(f) Programmatic Evaluations Comparison Chart – 7/12/13

	Independent Bikeway or Walkway Projects	Use of Historic Bridges	Minor Involvement with Parks, Recreation Lands, and Wildlife and Waterfowl Refuges	Minor Involvement with Historic Sites	Transportation Projects that have a Net Benefit to a Section 4(f) Property
Date Enacted	5/23/77	7/5/83	12/23/86	12/23/86	4/20/05
Project Type	Independent bikeway or walkway project, not incidental activities of a highway project.	Rehabilitation or replacement of historic bridges.	Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.	Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.	Any type of project on existing or new alignment regardless of NEPA document type.
Resource Applicability	Parks or recreation areas.	Historic bridges that are not a National Historic Landmark.	Parks, recreation lands, and wildlife and waterfowl refuges that are adjacent to the existing facility.	Historic sites that are adjacent to the existing facility.	All Section 4(f) resources.
Impact threshold	No significant impacts (No displacements, minimal water quality impacts, etc.)	If bridge can be rehabilitated without affecting the historic integrity, Section 4(f) does not apply. If the bridge is to be demolished and/or replaced, Section 4(f) applies.	The amount of property that may be acquired / used is limited as specified in the PA. May not be used for projects processed with an EIS.	<ul style="list-style-type: none"> Project may not remove or alter historic buildings, structures or objects, or archaeological resources important for preservation in place. Project must result in a no effect or no adverse effect determination via the Section 106 process. May not be used for projects processed with an EIS. 	<ul style="list-style-type: none"> No impact limits, but project results in an overall enhancement to the resource. For historic resources the project doesn't necessarily require a no effect or no adverse effect determination, but property remains eligible for NRHP.
Alternatives Analysis	1. FHWA makes a determination that there is no feasible and prudent alternative to the use of Section 4(f) lands.	1. Do nothing. 2. Build a new structure at a different location without affecting the historic integrity of the historic bridge. 3. Rehabilitate the historic bridge without affecting the historic integrity of the historic bridge.	1. Do nothing. 2. Improve the highway without using the adjacent Section 4(f) resource. 3. Build an improved facility on new location without using the adjacent Section 4(f) resource.	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.	1. Do nothing. 2. Improve the transportation facility in a manner that addresses the project's P&N without using the Section 4(f) property. 3. Build the transportation facility at a location that does not require use of the Section 4(f) property.
Coordination and Concurrence Requirements	Official with jurisdiction concurs in writing that project is acceptable and consistent with designated use of property.	If replacement is proposed, the bridge must be made available for an alternative use. SHPO concurs in writing with assessment of impacts and proposed mitigation.	Official with jurisdiction concurs in writing with assessment of impacts and proposed mitigation.	SHPO concurs in writing with assessment of impacts and proposed mitigation.	Official with jurisdiction or SHPO concurs in writing with assessment of impacts and proposed mitigation. For projects with one or more public meetings or hearings, information on the proposed use of the Section 4(f) resources shall be communicated to the public.

Use of Historic Bridges (7/5/83)

- For projects that impair historic integrity of NR listed/eligible bridges by rehabilitation or replacement
- Bridge is not a National Historic Landmark



Use of Historic Bridges (cont.)

- Must examine “do nothing,” new location, and rehabilitation alternatives
- No use if rehabilitate and historic integrity is maintained
- Mitigation agreed to via §106 process
- Replacement projects must make bridge available for an alternative use



Net Benefit to a Section 4(f) Property (4/20/05)

- Applies to all 4(f) Resources
- Applies to projects that will result in a net benefit to the 4(f) Resource
- Projects may be on existing or new alignments
- Applies to any project regardless of class of action under NEPA

“Net Benefit”

- 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 to 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,...

Applicability

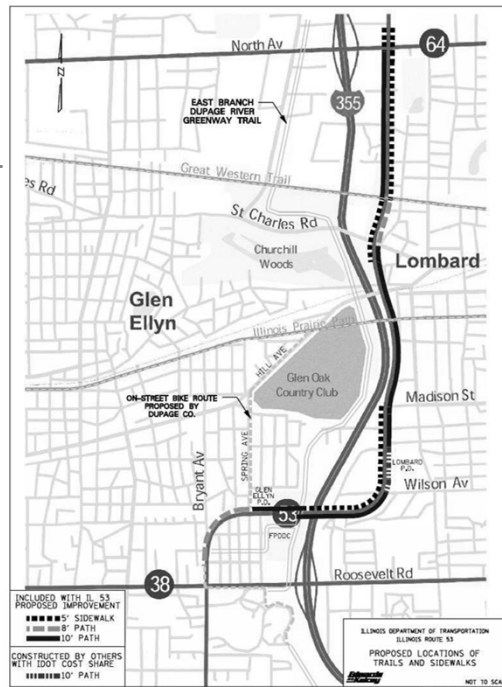
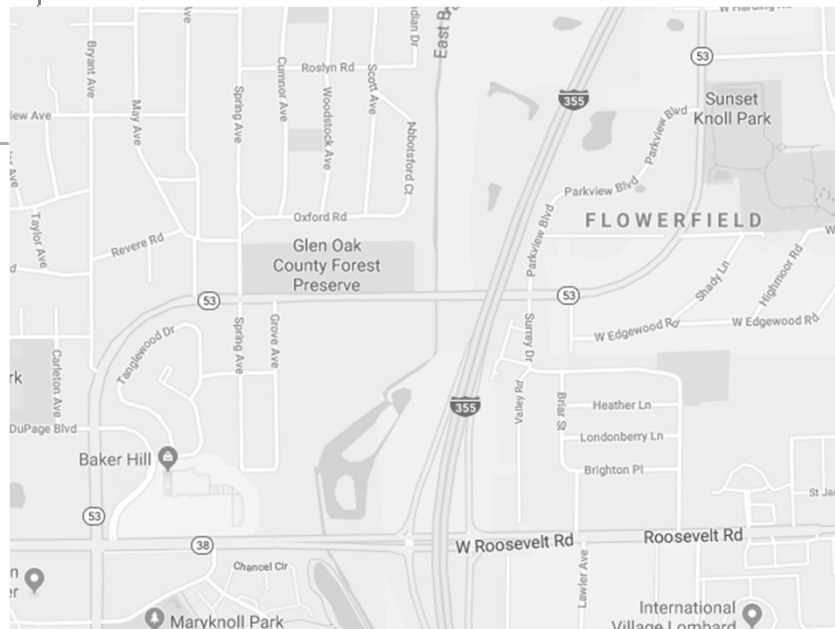
- The project uses a Section 4(f) resource
- The project includes all measures to minimize harm and subsequent mitigation
- Historic properties remain eligible for the NRHP and the SHPO is in agreement
- The officials with jurisdiction over the resource agree in writing to the proposed actions and mitigation

Impact Threshold

- No impact limits, but project results in an overall enhancement to the resource.
- For historic resources, the project doesn't require a no adverse effect determination, but the property remains eligible for the NRHP.

Alternatives

- Do Nothing
- Improve the transportation facility in a manner that addresses the project purpose and need without a use of the Section 4(f) property
- Build the transportation facility at a new location that does not require use of the Section 4(f) property







Section 4(f) Net Benefit



**Questions
and
Additional Discussion**

**Individual
Section 4(f)
Evaluations**

Section 4(f) - The Law:

The Secretary 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, or land of a historic site of National, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction) **only if** -

Only If -

- there is no prudent and feasible alternative to using the land; and
- the program or project includes all possible planning to minimize harm to the ... Section 4(f) resource(s).

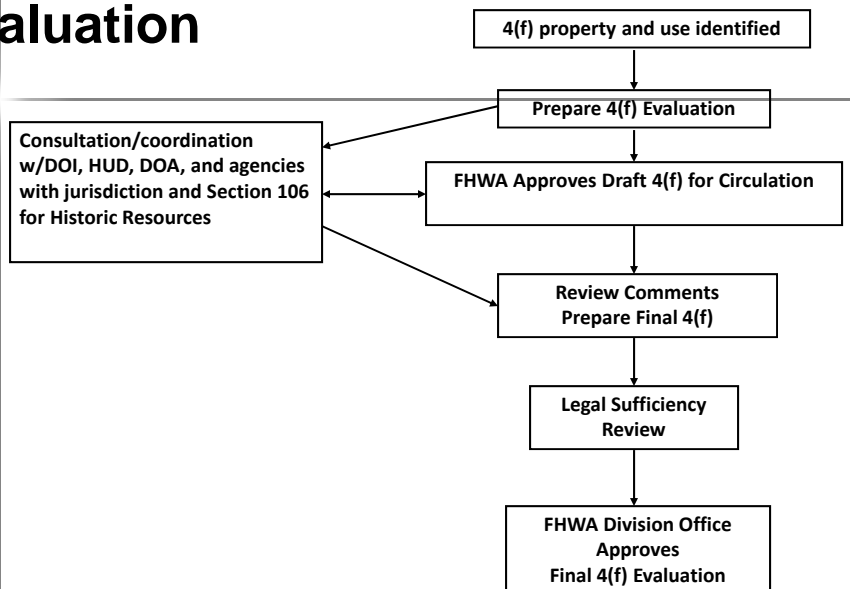
Individual Section 4(f) Evaluation

An analysis prepared as the basis for approving a non-de minimis or non-programmatic use of a Section 4(f) property.

– Must include:

- No prudent and feasible avoidance alternative analysis
- All possible planning to minimize harm
- And possibly, a least harm analysis

Individual Section 4(f) Evaluation



"Avoidance Alternative"

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

Avoidance Alternatives

- No Build Alternative
- Alternative modes
- Alternative locations
- Alignment shifts
- Design modifications
- Alternatives considered in Planning or NEPA

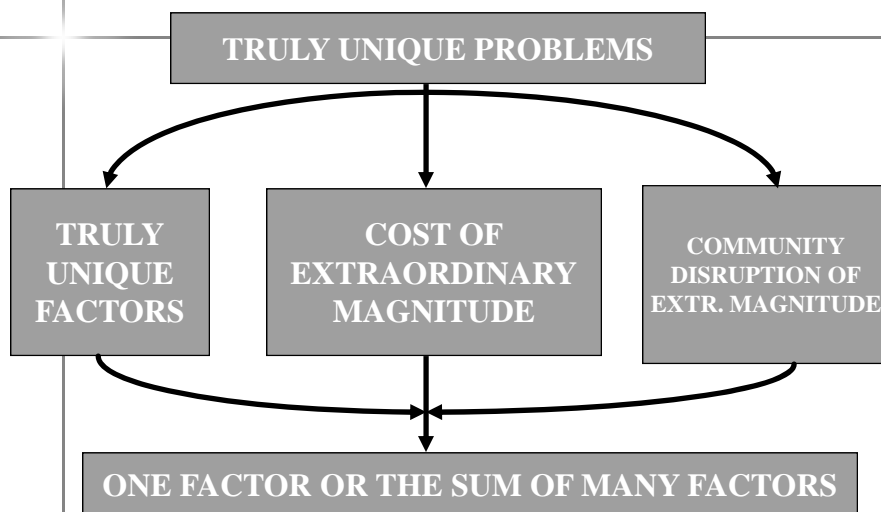
23 CFR 774.17
Section 4(f) Policy Paper Sec 3.3.3.1

Feasible & Prudent

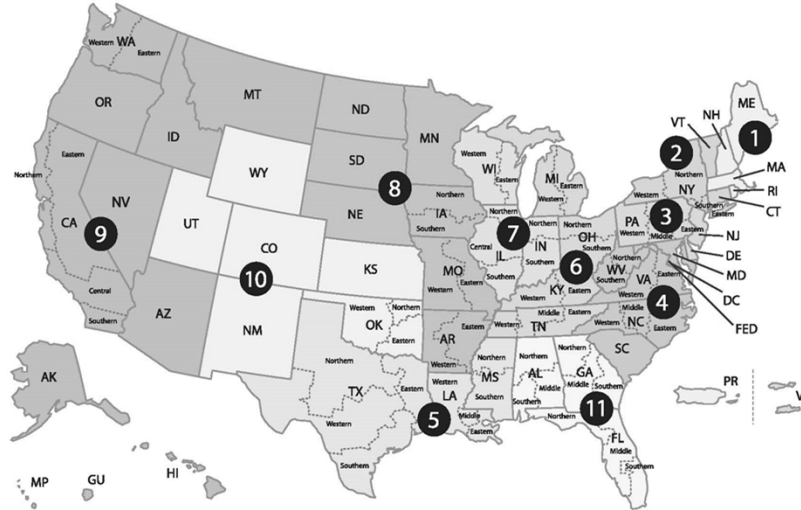
- Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402 (1971)

The Supreme Court established a high standard for the "prudent and feasible" statutory language

**IF AN ALTERNATIVE IS NOT FEASIBLE AND PRUDENT,
IT MUST CREATE**



Geographic Boundaries of United States Courts of Appeals and United States District Courts



We would avoid this:



And impact
whatever was on
the on the other
side of the road.



Clarification of Feasible & Prudent Standard

- SAFETEA-LU required FHWA/FTA to issue regulations to clarify the factors to be considered and the standards to be applied when determining whether avoidance alternatives are feasible & prudent



Feasible & Prudent



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

23 CFR 774.17

Clarification of Feasible & Prudent Standard

— An alternative is not feasible if it cannot be built as a matter of sound engineering judgment. —

23 CFR 774.17



An alternative is not prudent if:

1. It compromises the project to the degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
2. It results in unacceptable safety or operations problems;
3. After reasonable mitigation it still causes:
 - A. Severe social, economic, or environmental impacts;
 - B. Severe disruption to established communities
 - C. Severe disproportionate impacts to minority or low income populations
4. It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
5. It causes other unique problems or unusual factors; or
6. It involves multiple factors that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude

Things to consider:

- Nature and quality of Section 4(f) resources may be considered (not all are equal)
- Effect of project on Section 4(f) resources may be considered (not all are equal)
- Consider the net effect on Section 4(f) resources after factoring in mitigation

Things to consider: (part 2)

- Purpose and Need of the project
- Constructability / design exceptions
- Context of project impacts and cost
- Do not rely solely on costs
- Provide facts to support conclusions

**Questions
and
Additional Discussion**

All Possible Planning to Minimize Harm

Section 4(f) - The Law:

The Secretary 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, or land of a historic site of National, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction) **only if** -

Only If -

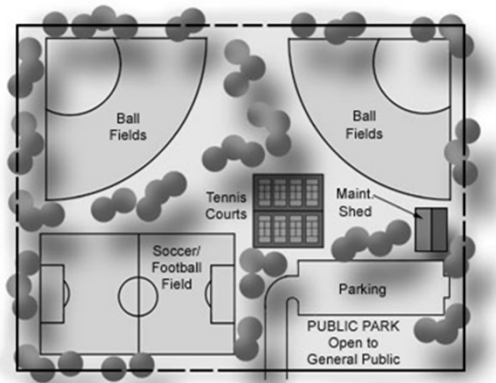
- there is no prudent and feasible alternative to using the land; and
- the program or project includes all possible planning to minimize harm to the ... Section 4(f) resource(s).

All Possible Planning to Minimize Harm

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

23 CFR 774.17

Minimization of Harm



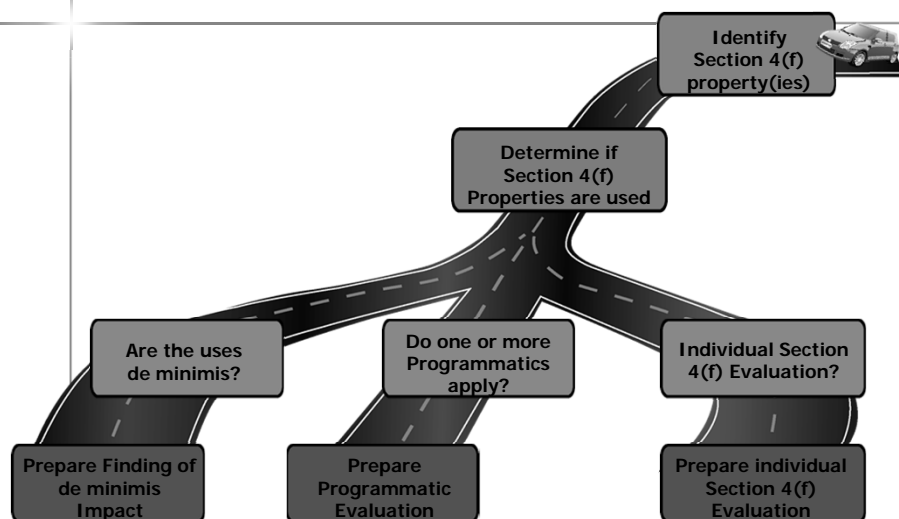
- Size of the take
- Location of the take
- Severity of the take
- Function of the land taken

Minimization of Harm

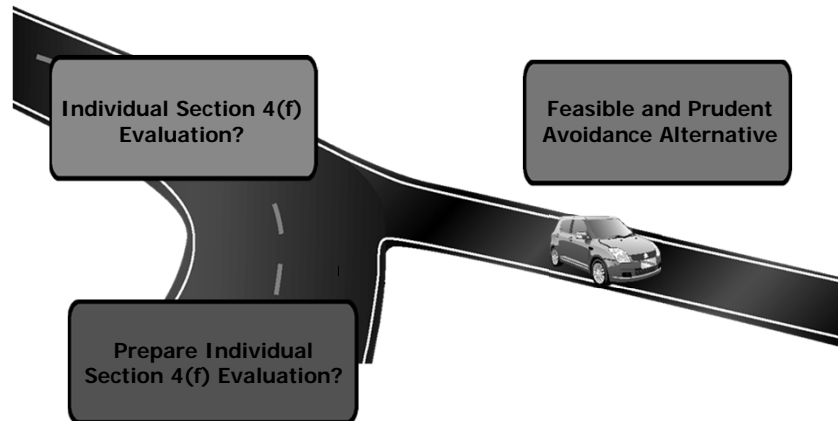
- Design modifications
- Replacement land
- Replacement, or enhancement, of functions or facilities
- Monetary compensation
- Section 106 MOA stipulations
- ...be open to creative or innovative ideas
- Consult with OWJ

Questions and Additional Discussion

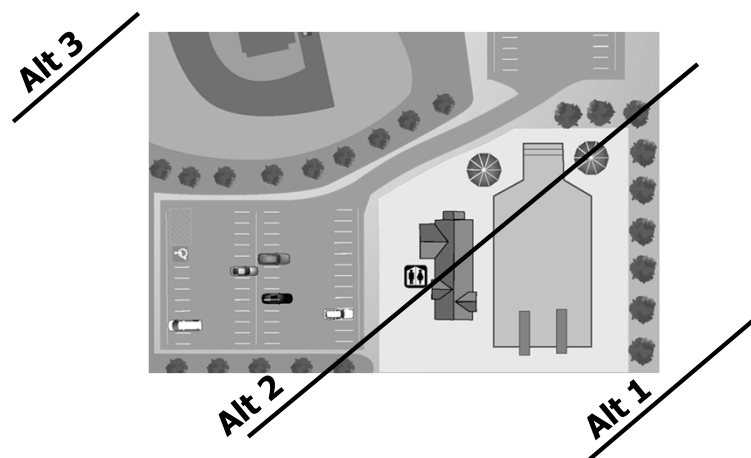
The Section 4(f) "Roadmap"



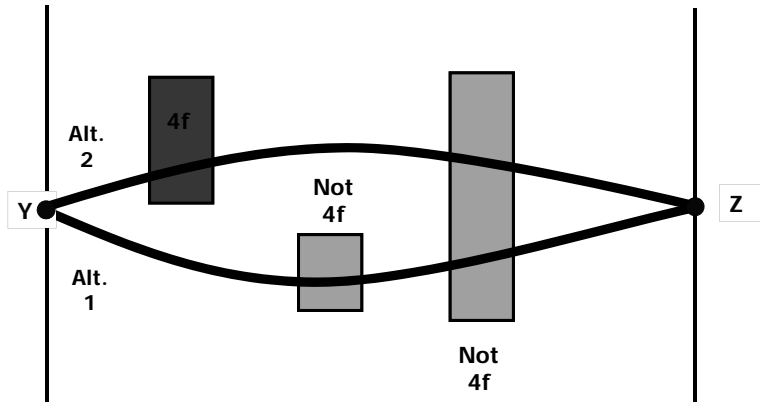
If F&P avoidance alternative is identified...



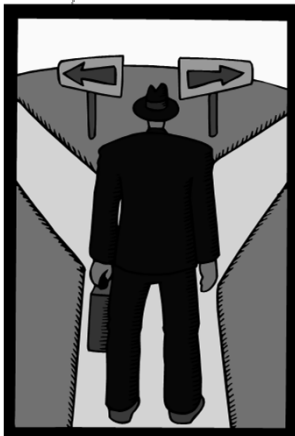
F&P avoidance alternatives



F & P Avoidance Alternatives

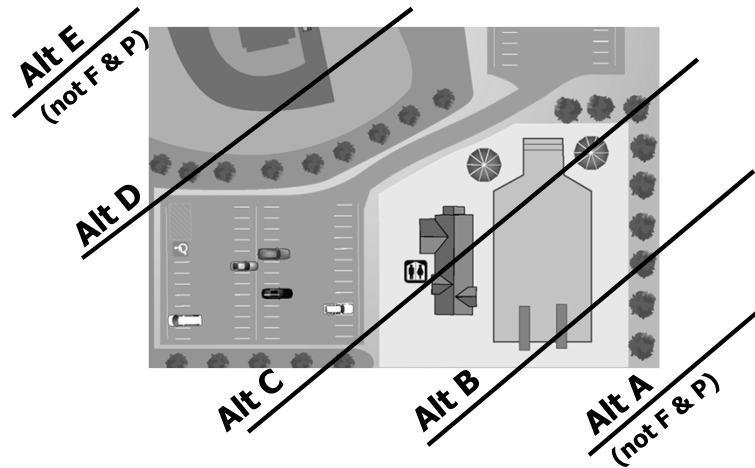


Question

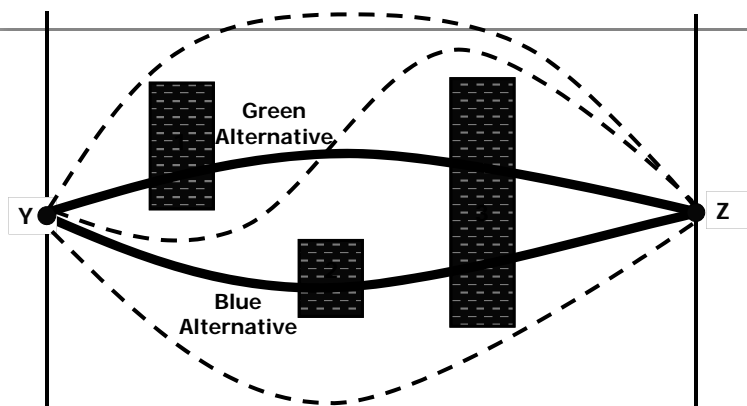


What do you do if there are no feasible and prudent avoidance alternatives and all your alternatives impact Section 4(f) resources?

No F&P avoidance alternatives



No F&P Avoidance Alternatives



Least Overall Harm

Required when:

- Avoidance alternatives are determined to be not feasible & prudent
- Analyzing more than one alternative that uses Section 4(f) resource(s)
- Alternatives involve Section 4(f) use(s) that are greater than de minimis or programmatic

Least Overall Harm

- If the analysis concludes that there are no feasible and prudent avoidance alternatives, then FHWA may approve from among the remaining alternatives that use Section 4(f) property, only the alternative that causes the least overall harm in light of the statute's preservationist purpose.

23 CFR 774.3(c)

Least Overall Harm Factors:

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

1. Ability to mitigate adverse impacts to each 4(f) property
2. Relative severity of remaining harm to each 4(f) property after mitigation
3. Relative significance of each 4(f) property
4. Views of officials with jurisdiction
5. Degree to which alternative meets P&N
6. Magnitude of adverse impact to non-4(f) sites
7. Substantial differences in cost among alternatives

23 CFR 774.3(c)(1)

Least Overall Harm Factors:

Factors 1-4:

1. Ability to mitigate adverse impacts to each 4(f) property
2. Relative severity of remaining harm to each 4(f) property after mitigation
3. Relative significance of each 4(f) property
4. Views of officials with jurisdiction

23 CFR 774.3(c)(1)

Least Overall Harm Factors:

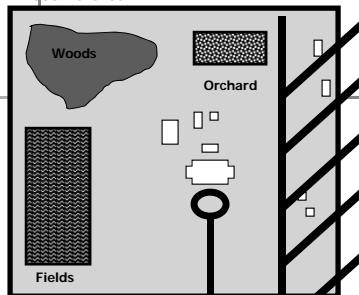
Factors 5-7:

5. Degree to which alternative meets P&N
6. Magnitude of adverse impact to non-4(f) sites
7. Substantial differences in cost among alternatives

23 CFR 774.3(c)(1)

Least Overall Harm

Historic Site

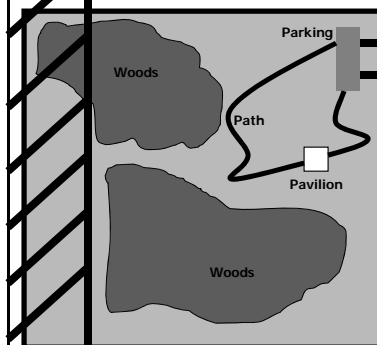


Estate of notable community founder, politician & Revolutionary War hero; historic integrity largely intact; several historic events occurred onsite; listed on National Register of Historic Places; National & local historic organizations oppose alternative that would impact site.

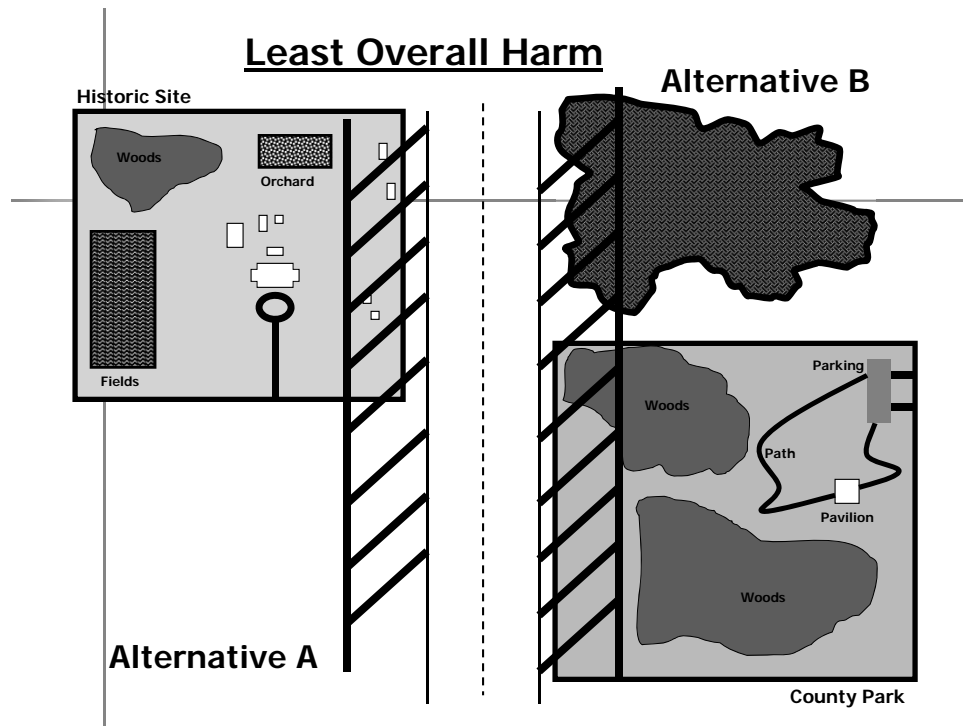
Alternative A

Alternative B

Park established in the 1960s to preserve rural character of area & complement nearby historic site; mostly passive recreation.



County Park



Section 4(f) Process

Analysis of feasibility and prudence
of avoidance alternatives

23 CFR 774.17

versus

Analysis of least overall harm
23 CFR 774.3(c)

Individual Section 4(f) Evaluation Outline

- Project Description
- Purpose & Need
- Description of Section 4(f) Property(ies)
- Alternatives Analysis
 - Section 4(f) Uses
 - Avoidance Alternatives
 - Minimization of Harm
 - Assessment of Least Overall Harm (if needed)
- Coordination with OWJ
- Appendices

Individual Section 4(f) Evaluation Process

- Draft Individual Section 4(f) Evaluation
- 45-day comment period
- Public Hearing (possibly)
- Final Section 4(f) Evaluation
- Legal sufficiency review
- Final Individual Section 4(f) approval

Section 4(f) Approval Options

- *De minimis* Impact Determination
 - Property by property
 - No avoidance alternatives analysis
- Programmatic Section 4(f) Evaluation
 - Applicability criteria specified (all must be met)
 - Avoidance alternatives analysis
- Individual Section 4(f) Evaluation
 - Avoidance alternatives analysis



Choosing a Section 4(f) Approval Option

- Alternative A – No Section 4(f) uses
- Alternative B – Uses one Section 4(f) property; use is *de minimis*

Alternative A

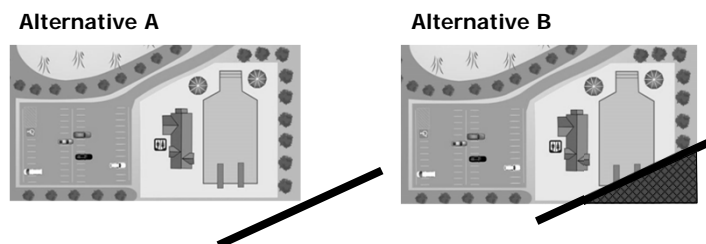


Alternative B



Choosing a Section 4(f) Approval Option

- Alternative A – No Section 4(f) uses
- Alternative B – Uses one Section 4(f) property; use is greater-than *de minimis*



Choosing a Section 4(f) Approval Option

Case Studies

- Which alternative(s) can you select?
- What Section 4(f) approval option would you use?
- Create a Matrix
- Record Assumptions
- Explain your approach

	Alt A	Alt B
Resources		

LOH Factors		

Questions and Additional Discussion

Contact info:

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FHWA Resource Center
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Electronic Code of Federal Regulations

e-CFR data is current as of February 23, 2018

[Title 23](#) → [Chapter I](#) → [Subchapter H](#) → [Part 774](#)

PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(f))

Contents

[§774.1](#) Purpose.
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[§774.9](#) Timing.
[§774.11](#) Applicability.
[§774.13](#) Exceptions.
[§774.15](#) Constructive use determinations.
[§774.17](#) Definitions.

AUTHORITY: 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

SOURCE: 73 FR 13395, Mar. 12, 2008, unless otherwise noted.

§774.1 Purpose.

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

§774.3 Section 4(f) approvals.

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

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in §774.17, to the use of land from the property; and

(2) The action includes all possible planning, as defined in §774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in §774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Administration may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that:

(1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:

(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

(ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;

(iii) The relative significance of each Section 4(f) property;

(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in §774.17, to minimize harm to Section 4(f) property.

(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives.¹ An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met

¹FHWA has issued five programmatic Section 4(f) evaluations: (1) Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property; (2) Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites; (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites; (4) Historic Bridges; Programmatic Section 4(f) Evaluation and Approval; and (5) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.

(1) The determination whether a programmatic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as specified in the applicable programmatic Section 4(f) evaluation.

(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the FEDERAL REGISTER for comment prior to being finalized. New or revised programmatic Section 4(f)

evaluations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

(e) The coordination requirements in §774.5 must be completed before the Administration may make Section 4(f) approvals under this section. Requirements for the documentation and timing of Section 4(f) approvals are located in §§774.7 and 774.9, respectively.

[73 FR 13395, Mar. 12, 2008, as amended at 73 FR 31610, June 3, 2008]

§774.5 Coordination.

(a) Prior to making Section 4(f) approvals under §774.3(a), the Section 4(f) evaluation shall be provided for coordination and comment to the official(s) with jurisdiction over the Section 4(f) resource and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. The Administration shall provide a minimum of 45 days for receipt of comments. If comments are not received within 15 days after the comment deadline, the Administration may assume a lack of objection and proceed with the action.

(b) Prior to making *de minimis* impact determinations under §774.3(b), the following coordination shall be undertaken:

(1) For historic properties:

(i) The consulting parties identified in accordance with 36 CFR part 800 must be consulted; and

(ii) The Administration must receive written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of “no adverse effect” or “no historic properties affected” in accordance with 36 CFR part 800. The Administration shall inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of “no adverse effect” or “no historic properties affected.”

(iii) Public notice and comment, beyond that required by 36 CFR part 800, is not required.

(2) For parks, recreation areas, and wildlife and waterfowl refuges:

(i) Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

(ii) The Administration shall inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding. Following an opportunity for public review and comment as described in paragraph (b)(2)(i) of this section, the official(s) with jurisdiction over the Section 4(f) resource must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection. This concurrence may be combined with other comments on the project provided by the official(s).

(c) The application of a programmatic Section 4(f) evaluation to the use of a specific Section 4(f) property under §774.3(d)(1) shall be coordinated as specified in the applicable programmatic Section 4(f) evaluation.

(d) When Federal encumbrances on Section 4(f) property are identified, coordination with the appropriate Federal agency is required to ascertain the agency's position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval.

§774.7 Documentation.

(a) A Section 4(f) evaluation prepared under §774.3(a) shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property.

(b) A *de minimis* impact determination under §774.3(b) shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are *de minimis* as defined in §774.17; and that the coordination required in §774.5(b) has been completed.

(c) If there is no feasible and prudent avoidance alternative the Administration may approve only the alternative that causes the least overall harm in accordance with §774.3(c). This analysis must be documented in the Section 4(f) evaluation.

(d) The Administration shall review all Section 4(f) approvals under §§774.3(a) and 774.3(c) for legal sufficiency.

(e) A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS under §771.111(g) of this chapter.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the Section 4(f) approval may not be available at that stage in the development of the action. In such cases, the documentation should address the potential impacts that a proposed action will have on Section 4(f) property and whether those impacts could have a bearing on the decision to be made. A preliminary Section 4(f) approval may be made at this time as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This preliminary approval shall include 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 may 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 Section 4(f) approval is then incorporated into the first-tier EIS.

(2) The Section 4(f) approval will be finalized in the second-tier study. If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

(3) The final Section 4(f) approval may be made in the second-tier CE, EA, final EIS, ROD or FONSI.

(f) In accordance with §§771.105(a) and 771.133 of this chapter, the documentation supporting a Section 4(f) approval should be included in the EIS, EA, or for a project classified as a CE, in a separate document. If the Section 4(f) documentation cannot be included in the NEPA document, then it shall be

presented in a separate document. The Section 4(f) documentation shall be developed by the applicant in cooperation with the Administration.

§774.9 Timing.

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in 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 notification by the Administration of Section 4(f) approval.

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in §774.13, if:

(1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or

(2) The Administration determines that Section 4(f) applies to the use of a property; or

(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) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental NEPA document. If a new or supplemental NEPA document is also required under §771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with §771.130(f) of this chapter.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in §774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance 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.

§774.11 Applicability.

(a) The Administration will determine the applicability of Section 4(f) in accordance with this part.

(b) When another Federal agency is the Federal lead agency for the NEPA process, the Administration shall make any required Section 4(f) approvals unless the Federal lead agency is another U.S. DOT agency.

(c) Consideration under Section 4(f) is not required when the official(s) with jurisdiction over a park, recreation area, or wildlife and waterfowl refuge determine that the property, considered in its entirety, is not significant. In the absence of such a determination, the Section 4(f) property will be presumed to be significant. The Administration will review a determination that a park, recreation area, or wildlife and waterfowl refuge is not significant 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 refuge purposes. The determination of which lands so function or are so designated, and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource. The Administration will review this determination to assure its reasonableness.

(e) In determining the applicability of Section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the official(s) with jurisdiction to identify all properties on or eligible for the National Register of Historic Places (National Register). The Section 4(f) requirements apply to historic sites on or eligible for the National Register unless the Administration determines that an exception under §774.13 applies.

(1) The Section 4(f) requirements apply only to historic sites on or eligible for the National Register unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

(2) The Interstate System is not considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate System formally identified by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.

(f) 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 §774.13(b).

(g) Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as, or are designated in a management plan as, a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287, must be satisfied, independent of the Section 4(f) approval.

(h) When a property formally reserved for a future transportation facility temporarily functions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject the property to Section 4(f).

(i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in §774.17. Examples of such concurrent or joint planning or development include, but are not limited to:

(1) 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 facility and the Section 4(f) property; or

(2) Designation, donation, planning, or development of property by two or more governmental agencies with jurisdiction for the potential transportation facility and the Section 4(f) property, in consultation with each other.

§774.13 Exceptions.

The Administration has identified various exceptions to the requirement for Section 4(f) approval. These exceptions include, but are not limited to:

(a) Restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) The Administration concludes, as a result of the consultation under 36 CFR 800.5, that 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 official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(1) of this section.

(b) Archeological sites that are on or eligible for the National Register when:

(1) The Administration concludes that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and

(2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.

(c) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in §774.9(e), the Administration may permit a project to proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.

(d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:

(1) Duration must be temporary, *i.e.*, less than the time needed for construction of the project, and there should be no change in ownership of the land;

(2) Scope of the work must be minor, *i.e.*, both the nature and the magnitude of the changes to the Section 4(f) property are minimal;

(3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;

(4) The land being used must be fully restored, *i.e.*, the property must be returned to a condition which is at least as good as that which existed prior to the project; and

(5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

(e) Park road or parkway projects under 23 U.S.C. 204.

(f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

(1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);

(2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241-1251, with the exception of those trail segments that are historic sites as defined in §774.17;

(3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and

(4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.

(g) Transportation enhancement projects and mitigation activities, where:

(1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and

(2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

§774.15 Constructive use determinations.

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

(b) If the project results in a constructive use of a nearby Section 4(f) property, the Administration shall evaluate that use in accordance with §774.3(a).

(c) The Administration shall determine when there is a constructive use, but the Administration is not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property. However, such documentation may be prepared at the discretion of the Administration.

(d) When a constructive use determination is made, it will be based upon the following:

(1) Identification of the current activities, features, or attributes of the property which qualify for protection under Section 4(f) and which may be sensitive to proximity impacts;

(2) An analysis of the proximity impacts of the proposed project on the Section 4(f) property. 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; and

(3) Consultation, on the foregoing identification and analysis, with the official(s) with jurisdiction over the Section 4(f) property.

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

(1) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as:

(i) Hearing the performances at an outdoor amphitheater;

(ii) Sleeping in the sleeping area of a campground;

(iii) Enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance;

(iv) Enjoyment of an urban park where serenity and quiet are significant attributes; or

(v) Viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.

(2) The proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property. 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 Section 4(f) property which derives its value in substantial part due to its setting;

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

(4) The vibration impact from construction or operation of the project substantially impairs the use of a Section 4(f) property, such as projected vibration levels that are great enough to physically damage a historic building or substantially diminish the utility of the building, unless the damage is repaired and fully restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, *i.e.*, the integrity of the contributing features must be returned to a condition which is substantially similar to that which existed prior to the project; or

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

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

(1) Compliance with the requirements of 36 CFR 800.5 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register, results in an agreement of "no historic properties affected" or "no adverse effect;"

(2) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter, or the projected operational noise levels of the proposed transit project do not exceed the noise

impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment;

(3) The projected noise levels exceed the relevant threshold in paragraph (f)(2) 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);

(4) There are proximity impacts to a Section 4(f) property, but a governmental agency's right-of-way acquisition or adoption of project location, or the Administration's approval of a final environmental document, established the location for the proposed transportation project before the designation, establishment, or change in the significance of the property. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section; or

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

(6) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built, as determined after consultation with the official(s) with jurisdiction;

(7) Change in accessibility will not substantially diminish the utilization of the Section 4(f) property; or

(8) 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 protected activities, features, or attributes of the Section 4(f) property.

§774.17 Definitions.

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

Administration. The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

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

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

(2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under §774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with §771.105(d) of this chapter; and

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

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under §774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under §774.3(b).

(5) A *de minimis* impact determination under §774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

Applicant. The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein.

CE. Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and §771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

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

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

EA. Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500-1508 and §771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

EIS. Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500-1508, and §§771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

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

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

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

FONSI. Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and §771.121 of this chapter.

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

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

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

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

ROD. Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and §771.127 of this chapter.

Section 4(f) evaluation. Refers to the documentation prepared to support the granting of a Section 4(f) approval under §774.3(a), unless preceded by the word “programmatic.” A “programmatic Section 4(f) evaluation” is the documentation prepared pursuant to §774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

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

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

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

Section 4f Applicability

Which of the following resources are eligible Section 4f resources and which are not? (Be prepared to explain any assumptions you made.)

- 1. Johnson Farm** – The farm is privately owned. Coordination with the SHPO confirmed the farm was eligible for listing in the NRHP.
- 2. Jones Park** - This Park is owned by the county and open to the public. It has a playground, soccer fields, & tennis courts that are used regularly by local residents.
- 3. Woodward Academy** - The privately-owned school has a playground and a fitness trail that is used regularly by the surrounding community since it is the only recreation area in the county.
- 4. Black Forest** - The land is owned by Mega-Timber Inc (MTI), a private logging company. MTI has leased a portion of the land to the State Department of Natural Resources (DNR) since the early 1930's. There are picnic areas and hiking trails on this portion of the land, which are open to the public and managed by DNR. MTI harvests timber in other areas.
- 5. Future Park in Peach County** – Peach County owns 40 acres of land adjacent to Highway 66 and wants to develop it into a park since there are none in the area.
- 6. Natural Area behind Shoal Creek Subdivision** – Nearly 100 houses in the Shoal Creek neighborhood back up to the long-planned SR 32 connector. Right-of-way for the SR 32 connector was acquired by the State DOT over 20 years ago, but the road has never been built. In the interim, this preserved corridor has become some of the only green space left in the county. Over the years, swing sets and picnic tables have been placed in this wooded area by residents. The area is used regularly by the community and they consider it to be a significant recreation area.

Section 4f Use

Which of the following situations uses land from the eligible Section 4f resources and which do not? What additional questions would you ask and/or what additional information do you need to make a decision?

- 1. Main Street widening and multi-use trail project** – The State DOT proposes to add a center turn lane to Main Street. The project also includes a 10-foot wide multi-use trail to serve bicyclists and pedestrians travelling between the adjacent neighborhoods, Johnson Creek Elementary School, and Johnson Creek Park. The DOT will need to acquire a limited amount of ROW from 15 houses along the corridor, the school, and the park in order for the project to be constructed.
- 2. Replacement Bridge over Thursday Creek** – In order to stage construction for the SR 301 bridge replacement project over Thursday Creek, the State DOT wants to acquire a temporary easement in the Thursday Creek Recreation Area. The DOT proposes to use the area to construct a temporary bridge that will be removed once traffic can be placed on the new structure. The easement is in a natural area with no recreation facilities.
- 3. South Street widening** – Widening South Street will require acquisition of 3 acres of land from Founder's Park. Land acquisition does not affect any recreational resources, only the parking area.
- 4. City of Oakton Trail Project in Willow Park** – The city proposes to construct a multi-use trail in Willow Park. City DOT representatives believe the trail will enhance the park by connecting the various recreational amenities in the park to each other. The project will require 4.6 acres of parkland be converted to trail.
- 5. SR 10 Widening Project** – The State DOT proposes to add additional lanes to 10 miles of the existing 2-lane facility to address congestion. A popular recreation facility is located on both sides of the roadway about midway of the project, so ROW acquisition from the resource appears unavoidable. On weekends, cars park on the shoulder of the roadway in this area because the parking area for the recreation facility is not large enough. Preliminary designs indicate ROW acquisition in this area will impact the parking area and park officials feel this would have a negative impact on the park.

LEAST OVERALL HARM EXERCISES: - NO F&P AVOIDANCE ALTERNATIVES IDENTIFIED

Project 1:

- Alternative A uses a historic property and will result in the demolition of a contributing outbuilding; the use is greater-than *de minimis*
- Alternative A impacts 4 acres of forested wetland, relocates 1500' of stream and requires another 600' of new culverts, involves 43 residential displacements and 5 commercial displacements, 10 of the residential displacements are from within an EJ community.
- Alternative B uses two Section 4(f) properties; both uses are greater-than *de minimis* – a playground in a park will be taken and a privately-owned historic building will be demolished.
- Alternative B impacts 5 acres of emergent wetland, relocates 900' of stream and requires 700' of new culvert, involves 20 residential displacements and 7 commercial displacements, none of the residential displacements are from within an EJ community.

LEAST OVERALL HARM EXERCISES: - NO F&P AVOIDANCE ALTERNATIVES IDENTIFIED

Project 2:

- Alternative A uses two Section 4(f) properties, one use is *de minimis* – sliver of property from a historic property - and the other use is greater-than *de minimis* – ball field will be taken from a municipal park.
- Alternative A involves 37 residential displacements and 5 business displacements. The community is concerned with the disruption this alignment would potentially cause to their town life.
- Alternative A impacts less than a ½ acre of wetland and involves two stream culvert extensions of 50 feet each.
- Alternative B uses two Section 4(f) properties, both uses are greater-than *de minimis* – demolition of a historic building that is a contributing element within a historic district, and acquisition of a playground in its entirety.
- Alternative B involves one residential displacement and no business displacements. Two acres of wetland would be impacted along with 1200' feet of stream enclosure. The alternative would also cut a swath through a large forested area.

LEAST OVERALL HARM EXERCISES: - NO F&P AVOIDANCE ALTERNATIVES IDENTIFIED

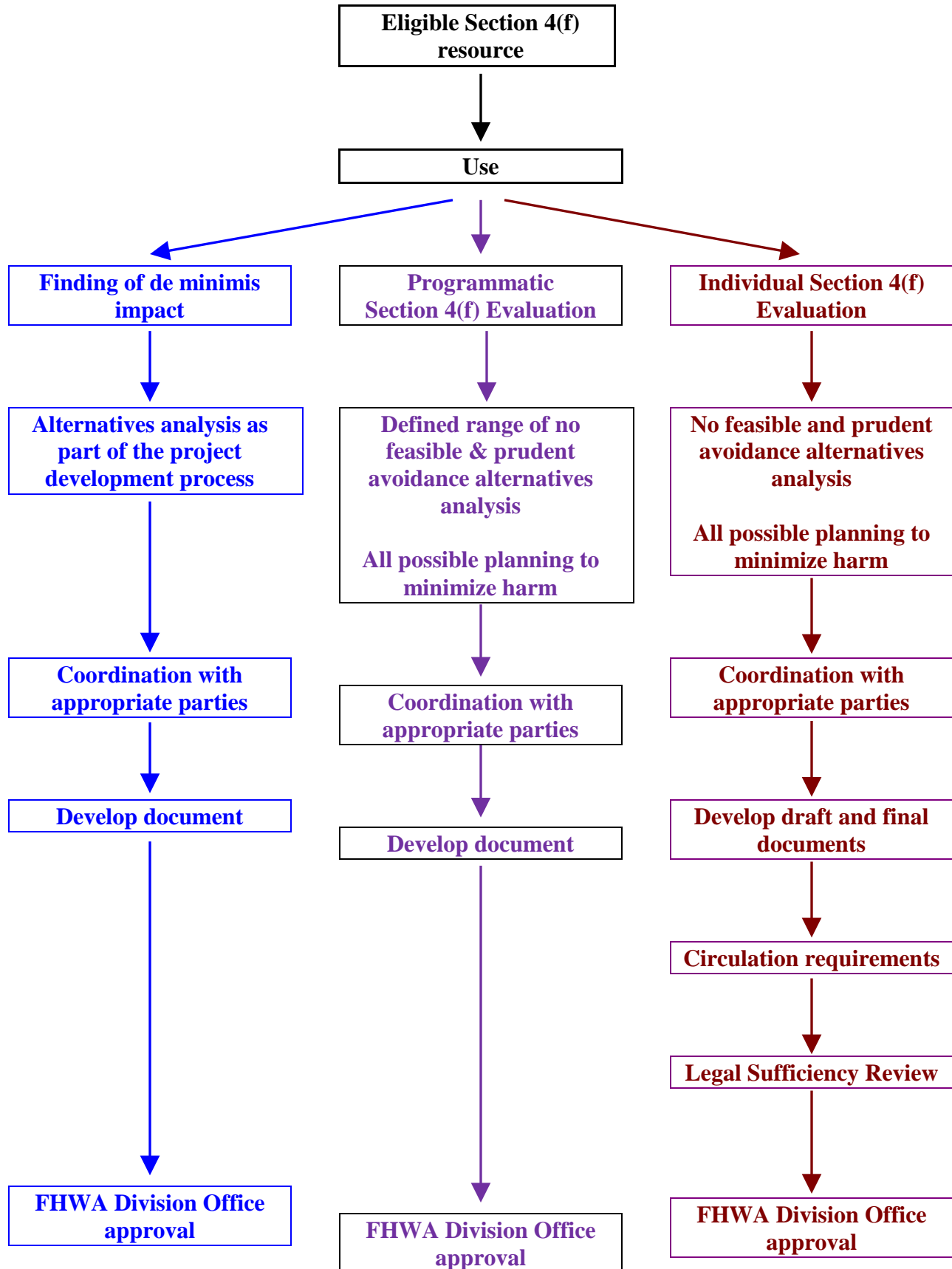
Project 3:

- Alternative A is a widening of a highway to the west.
- Alternative A will take land from a US Forest Service campground – use will be greater-than *de minimis*.
- Alternative A will also take land from a historic district in a silver-mining town that is National Register eligible, but will not result in the removal of any contributing elements to the district.
- Alternative A will impact a stream and associated wetlands that are the critical habitat of a federally-endangered minnow.

- Alternative B is widening to the east.
- Alternative B will take land from the historic district, and will require relocation of one historic building and partial demolition of the remains of a mining operation – both are contributing elements to the district. An adverse effect determination has been made and concurred with by the SHPO.
- Alternative B will also displace 10 businesses and two residences located outside of the district.

- Alternative C is symmetrical widening of the highway.
- Alternative C will take land from the US Forest Service campground but the impact of the use is *de minimis*.
- Alternative C will also take land from the historic district, but will only use non-contributing elements of the district.
- Alternative C will impact a stream and associated wetlands that are the critical habitat of a federally-endangered minnow.

Section 4(f) Processing Options



Nationwide Section 4(f) Programmatic Evaluations Comparison Chart – 7/12/13

	Independent Bikeway or Walkway Projects	Use of Historic Bridges	Minor Involvement with Parks, Recreation Lands, and Wildlife and Waterfowl Refuges	Minor Involvement with Historic Sites	Transportation Projects that have a Net Benefit to a Section 4(f) Property
Date Enacted	5/23/77	7/5/83	12/23/86	12/23/86	4/20/05
Project Type	Independent bikeway or walkway project, not incidental activities of a highway project.	Rehabilitation or replacement of historic bridges.	Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.	Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.	Any type of project on existing or new alignment regardless of NEPA document type.
Resource Applicability	Parks or recreation areas.	Historic bridges that are not a National Historic Landmark.	Parks, recreation lands, and wildlife and waterfowl refuges that are adjacent to the existing facility.	Historic sites that are adjacent to the existing facility.	All Section 4(f) resources.
Impact threshold	No significant impacts (No displacements, minimal water quality impacts, etc.)	If bridge can be rehabilitated without affecting the historic integrity, Section 4(f) does not apply. If the bridge is to be demolished and/or replaced, Section 4(f) applies.	The amount of property that may be acquired / used is limited as specified in the PA. May not be used for projects processed with an EIS.	<ul style="list-style-type: none"> Project may not remove or alter historic buildings, structures or objects, or archaeological resources important for preservation in place. Project must result in a no effect or no adverse effect determination via the Section 106 process. May not be used for projects processed with an EIS. 	<ul style="list-style-type: none"> No impact limits, but project results in an overall enhancement to the resource. For historic resources the project doesn't necessarily require a no effect or no adverse effect determination, but property remains eligible for NRHP.
Alternatives Analysis	1. FHWA makes a determination that there is no feasible and prudent alternative to the use of Section 4(f) lands.	<ol style="list-style-type: none"> Do nothing. Build a new structure at a different location without affecting the historic integrity of the historic bridge. Rehabilitate the historic bridge without affecting the historic integrity of the historic bridge. 	<ol style="list-style-type: none"> Do nothing. Improve the highway without using the adjacent Section 4(f) resource. Build an improved facility on new location without using the adjacent Section 4(f) resource. 	<ol style="list-style-type: none"> Do nothing. Improve the highway without using the adjacent historic site. Build an improved facility on new location without using the historic site. 	<ol style="list-style-type: none"> Do nothing. Improve the transportation facility in a manner that addresses the project's P&N without using the Section 4(f) property. Build the transportation facility at a location that does not require use of the Section 4(f) property.
Coordination and Concurrence Requirements	Official with jurisdiction concurs in writing that project is acceptable and consistent with designated use of property.	If replacement is proposed, the bridge must be made available for an alternative use. SHPO concurs in writing with assessment of impacts and proposed mitigation.	Official with jurisdiction concurs in writing with assessment of impacts and proposed mitigation.	SHPO concurs in writing with assessment of impacts and proposed mitigation.	<p>Official with jurisdiction or SHPO concurs in writing with assessment of impacts and proposed mitigation</p> <p>For projects with one or more public meetings or hearings, information on the proposed use of the Section 4(f) resources shall be communicated to the public.</p>

Content of an Individual Section 4(f) Evaluation

Project Description – This section should concisely describe the proposed project. As appropriate, reference the NEPA document/documentation (EIS, EA, CE).

Purpose and Need – This section should clearly describe the problems that the proposed project is seeking to solve. Since alternatives that do not address the project purpose and need are not “prudent,” a clear purpose and need can be critical to determining whether or not avoidance alternatives are feasible and prudent. The purpose and need discussion should be consistent with the purpose and need presented in the NEPA documentation. As appropriate, reference the NEPA document/documentation (EIS, EA, CE).

Description of Section 4(f) properties – This section should discuss the Section 4(f) properties within the project study area. For each property briefly describe:

- Type of property
- Size of property
- Ownership of the property
- Primary function(s) of the property - activities, features, attributes
- Location - provide maps, photographs, sketches...

Alternatives Analysis – This section describes the Section 4(f) uses, evaluates avoidance alternatives, describes measures to minimize harm, and when appropriate, analyzes which alternative results in the least overall harm.

Section 4(f) Use – This section should describe the uses of the Section 4(f) properties used by one or more of the project alternatives. Describe the uses for each alternative and provide mapping to show how each property would be used by each alternative. As appropriate, the NEPA document/documentation (EIS, EA, CE) can be referenced.

Avoidance Alternatives Analysis – This section must identify, describe and analyze the feasibility and prudence of the Section 4(f) avoidance alternatives. Documentation of the process used to identify, develop, analyze and eliminate potential avoidance alternatives is very important. The Section 4(f) evaluation should briefly describe the process. This description need not include every possible detail, but it should clearly explain the process that occurred and its results including facts that support the conclusion. The discussion may be organized within the Section 4(f) Evaluation in any manner that allows the reader to understand the full range of potential avoidance alternatives, the process by which potential avoidance alternatives were identified and analyzed for feasibility and prudence. Possible methods for organizing the discussion include a chronological discussion; a discussion organized geographically by project alternatives or project phases of construction; or by the type of Section 4(f) properties.

Measures to Minimize Harm – If there are no feasible and prudent avoidance alternatives, then measures to minimize harm (i.e., minimization and mitigation

measures) must be identified, analyzed and incorporated as appropriate into the alternatives.

Least Overall Harm Assessment – When there are no feasible and prudent avoidance alternatives, and multiple alternatives are under consideration and all involve use of Section 4(f) property(ies) then a Least Overall Harm assessment must be made and documented in this section.

For a Least Overall Harm discussion, explain how the seven factors were compared to determine the least overall harm alternative (23 CFR 774.7(c)). The Draft Section 4(f) Evaluation will disclose the various impacts to the different Section 4(f) properties thereby initiating the balancing process. It should also disclose the relative differences among alternatives regarding non-Section 4(f) issues such as environmental impacts, costs and the extent to which each alternative meets the project purpose and need. The disclosure of impacts should include both objective, quantifiable impacts and qualitative measures that provide a more subjective assessment of harm. Preliminary assessment of how the alternatives compare to one another may also be included in the Draft; the determination of which alternative results in the least overall harm should be made in the Final Section 4(f) Evaluation.

Coordination with Officials with Jurisdiction – This section should summarize the coordination efforts undertaken to engage the OWJs during the Section 4(f) analysis process. Although coordination is shown near the end of the document outline, this coordination occurs throughout the Section 4(f) process. Specific aspects of the OWJ coordination should be discussed at the appropriate points throughout the Section 4(f) document.

Appendices - The appendices of the Section 4(f) Evaluation should contain letters or other important materials that support the analysis. Examples would include copies of concurrence letters from the SHPO/THPO/ACHP, correspondence with other Officials with Jurisdiction, a map showing the recreational areas from a management plan, etc.

Project File – The Section 4(f) Evaluation document does not need to contain every piece of information and all the technical data. Detailed technical information can be summarized into the Section 4(f) Evaluation document and the more detailed information can be included in the project files or in technical reports. Make reference to this technical material and supporting technical documents in the Section 4(f) document. The more detailed, technical information can be provided upon request if individuals wish to see this information.

In general, the project file for an individual Section 4(f) Evaluation should contain the following information:

- Documentation of the applicability or non-applicability of Section 4(f) to the parks, recreation areas, refuges and/or historic property(ies) potentially used by the project
- Documentation of whether or not there is a use of Section 4(f) property(ies)
- Activities, features, and attributes of the Section 4(f) property(ies) potentially used
- Analysis of the impacts to the Section 4(f) property(ies)

- Record of public involvement
- Results of coordination with the Official(s) with Jurisdiction
- Alternatives considered to avoid using the Section 4(f) property(ies), including analysis of the impacts caused by avoiding the Section 4(f) property(ies)
- All measures undertaken to minimize harm to the Section 4(f) property(ies)
- A least overall harm analysis, if appropriate
- Comments submitted during the 45-day circulation period and responses to the comments
- Documentation of the legal sufficiency review