

SUCCESSES IN STEWARDSHIP



Back to the Basics: Section 4(f) & 23 CFR 774 Updates

There is a great need to preserve public lands, parks, recreational sites, and historic sites across the United States so that future generations can enjoy these areas. Since the mid-1960s, Federal transportation policy, including the U.S. Department of Transportation (DOT) Act of 1966, has reflected an effort to preserve such sites. Section 4(f) of the U.S. DOT Act of 1966 mandates that departmental agencies, including the Federal Highway Administration (FHWA), avoid or minimize harm to publicly owned park and recreational lands, wildlife and waterfowl refuges, and publicly or privately owned historic sites considered to have national, State, or local significance in the development of transportation projects. Section 4(f) applies only to projects that receive funding from, or require approval by, U.S. DOT agencies. Over the past 50 years, several changes have been made to Section 4(f), although none have reduced the preservation purpose of the statute. The most recent changes affecting Section 4(f) became effective on November 18, 2018, and include several updates with the aim of accelerating the process for compliance with Section 4(f). This newsletter provides a brief overview of the fundamental requirements of Section 4(f), addresses some common issues practitioners face in interpreting Section 4(f), and explains how the recent changes effect Section 4(f) analysis

Determining Use

Use of a Section 4(f) property occurs when:

- Land is permanently incorporated into a transportation project;
- There is a temporary occupancy of land that is adverse to the statute's preservation purpose; or
- There is a constructive use, which is when proximity impacts are so significant that any protected uses, features, or attributes of a property are substantially impacted.



U.S. Department of Transportation
Federal Highway Administration

When Does Section 4(f) Apply?

FHWA must first determine if there are any publicly owned public parks and recreation areas, waterfowl and wildlife refuges, or historic sites considered to have national, State, or local significance in the project area. If there are 4(f) protected resources in the project area, then FHWA must determine if the proposed project will “use” any of these resources. If FHWA determines that there is “no use” of the 4(f) resources there is no need to complete a Section 4(f) evaluation. “Use” in the context of Section 4(f) is defined in 23 CFR 774.17 and includes situations where land is permanently incorporated into a transportation facility, there is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute’s preservationist purposes, or there is a constructive use of a Section 4(f) property (see side box).

If there is a use, FHWA must then choose one of three approval options to comply with Section 4(f):

- Determine that the impacts are *de minimis*;
- Prepare a programmatic Section 4(f) evaluation; or
- Prepare an individual Section 4(f) evaluation.

What Is a *de minimis* Impact?

In 2005, Section 4(f) was amended to simplify the approval process for projects with a *de minimis* impact, which involves the use of Section 4(f) property that is generally minor in nature. For historic properties, a *de minimis* impact is one that results in a Section 106 determination of “no adverse effect” or “no historic properties affected.” This type of *de minimis* impact determination requires agency coordination with the officials having jurisdiction over the Section 4(f) property and opportunities for public involvement. For publicly owned recreation areas, public parks, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the activities, features, or attributes of the property. When determining whether the use is *de minimis*, FHWA should consider the net effect on the resource taking into account any avoidance, minimization, mitigation, or enhancement measures included in the project. The [Environmental Review Toolkit’s Section 4\(f\) Tutorial](#) provides more information on determining *de minimis* impacts.



Under Section 4(f) requirements, historic sites, such as the Dalton House in Newburyport, Massachusetts, cannot be used for an FHWA project unless there is no prudent and feasible alternative.

Photo credit: Massachusetts Historical Commission



Programmatic Section 4(f) Evaluations

Programmatic Section 4(f) evaluations can be used for certain types of highway projects and specific uses. The primary advantage of a programmatic evaluation is that it saves time. Unlike an individual evaluation, a programmatic evaluation does not require a draft, comment period, or circulation, because its framework and basic approach have already been agreed upon by the U.S. Department of the Interior (DOI). Therefore, a programmatic evaluation is usually approved much faster than an individual evaluation.

There are five programmatic evaluations:

- **Independent Bikeway or Walkway Construction Projects**
- **Use of Historic Bridges**
- **Minor Involvements with Historic Sites**
- **Minor Involvements with Parks, Recreation Lands, and Wildlife and Waterfowl Refuges**
- **Net Benefit to a Section 4(f) Property**

A programmatic Section 4(f) evaluation can be used for an independent bikeway or walkway construction project, like these people using a bike and walking path in urban Washington, DC.

Photo credit: Adobe Stock



A programmatic Section 4(f) evaluation can be used for projects with minor involvement of wildlife refuges, like the Wichita Mountains Wildlife Refuge in Oklahoma.

Photo credit: US Fish and Wildlife Service



A programmatic Section 4(f) evaluation can be used for projects involving use of a historic bridge that is part of the transportation system, like the Yaquina Bay Bridge in Oregon.

Photo credit: Adobe Stock

Since the creation of the *de minimis* impact finding in 2005, the two programmatic evaluations related to minor involvements are no longer commonly used. *De minimis* often has broader applicability and is the favored path to Section 4(f) approval for these types of projects. Currently, the two most frequently used programmatic evaluations are the Net Benefit to a Section 4(f) Property and Use of Historic Bridges programmatic evaluations.

Currently, the Net Benefit to a Section 4(f) Property programmatic evaluation is not used as often as it could be. One of the differences between it and a *de minimis* finding is that a proposed project does not have to result in no harm to a resource, as long as it results in an overall net benefit to the resource when compared with the “do nothing” or avoidance alternatives. This, along with the consideration of a substantial missed opportunity to benefit the resource as part of the prudence determination, may allow an alternative to be advanced that would not be possible using the traditional individual Section 4(f) evaluation approach. Division Offices and State DOTs should further examine and consider using the Net Benefit Programmatic Evaluation, and seek involvement of the FHWA Office of Project Development and Environmental Review or Resource Center environment experts to determine if this approach is appropriate for their project.

The historic bridges covered by the Use of Historic Bridges programmatic evaluation are unique because they are historic, yet also part of either a Federal-aid highway system or a State or local highway system that has continued to evolve over the years. Even though these structures are

on or eligible for inclusion on the National Register of Historic Places (NRHP), they must perform as an integral part of a modern transportation system. When they do not or cannot, they must be rehabilitated or replaced in order to assure public safety while maintaining system continuity and integrity. For the Use of Historic Bridges programmatic Section 4(f) evaluation, a proposed action “uses” a bridge that is on the NRHP (or eligible for inclusion) when the action will impair the historic integrity of the bridge either by rehabilitation or demolition. Rehabilitation that does not impair the historic integrity of the bridge as determined by procedures implementing the National Historic Preservation Act (NHPA) of 1966 is not subject to Section 4(f).

Additional information on Section 4(f) programmatic evaluations can be found in the [Section 4\(f\) Tutorial](#), [FHWA’s Section 4\(f\) Policy Paper](#), and in the [Environmental Review Toolkit](#).

Individual Section 4(f) Evaluations

An individual Section 4(f) evaluation is used to approve the non-*de minimis* or non-programmatic use of a 4(f) property. Individual evaluations must demonstrate that there are no feasible and prudent avoidance alternatives to using the resource and must receive a finding of legal sufficiency.

As new processes emerge and changes are made to regulations, individual Section 4(f) evaluations are becoming less frequent. State DOTs or Division Offices that are considering processing an individual evaluation should consult their Division Offices/Resource Center and legal counsel early in the evaluation process to ensure they are proceeding appropriately instead of waiting to involve them at the end of the process when seeking a legal sufficiency finding.

What Is a Least-Harm Analysis?

A least-harm analysis is required in an individual Section 4(f) evaluation when more than one alternative uses a Section 4(f) resource. The least-harm analysis is used to select the alternative that causes the least overall harm in light of the statute’s preservationist purpose. As part of this analysis, factors must be considered and weighed against one another, and ultimately the alternative that causes the least overall harm must be chosen.

Note, in the least-harm analysis phase, all factors relevant to the decision must be listed. Factors include, but are not limited to:

- The significance of the property in question;
- The ability to mitigate adverse impacts on Section 4(f) property;
- The degree to which the alternative meets the purpose and need for the project;
- Cost differences between the alternative options available; and
- Impacts to other types of non-Section 4(f) protected properties.

Connections between Section 4(f) & Other Statutes

Often, additional regulations must be complied with when undertaking transportation projects involving construction and renovations to Section 4(f) properties. Depending on the location, there will likely be State and local ordinances and laws that must be followed, and there are also other Federal regulations that apply.

Section 106

[Section 106](#) of the NHPA of 1966 requires Federal agencies to take into account the effects of their undertakings on historic properties, which include any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the NRHP. Section 106 and Section 4(f) are similar in that they both mandate consideration of historic sites in the planning of a Federal undertaking. Despite their similarities, the two statutes have some key differences. Section 106 requires agencies to consider the effect of their undertaking, while Section 4(f) requires agencies to prove there is no feasible and prudent avoidance alternative to using the resource. Another important distinction is that Section 106 considers project effects on “historic properties,” while Section 4(f) considers whether there is use of “historic properties.” A Section 106 finding of adverse effect is not necessarily equivalent to a Section 4(f) “use.”

Section 6(f)

Section 6(f) of the Land and Water Conservation Fund Act (LWCFA) prohibits the conversion of property acquired or developed with LWCFA grants for uses other than public outdoor recreation without the approval of the DOI’s National Park Service (NPS) or delegated agency. Like Section 106, Section 6(f) is a separate requirement that can have a bearing on Section 4(f) analysis and coordination. Section 6(f) conversions require replacement land of equal value and usefulness, which may or may not be the same as the Section 4(f) minimization of harm considerations. When dealing with Section 4(f) parks and recreation areas, it is critical to determine if the properties were acquired or improved with LWCFA funds, and, if so, the specifics of the improvements or property acquisition.

Changes to 23 CFR 774 Section 4(f) Regulations

New changes to the [23 CFR 774](#) Section 4(f) regulations became effective on November 18, 2018. [The Moving Ahead for Progress in the 21st Century \(MAP-21\) Act](#) and the [Fixing America’s Surface Transportation \(FAST\) Act](#) contain new requirements that must be met to comply with the National Environmental Policy Act (NEPA) and Section 4(f). Specifically, the changes apply to environmental reviews where the Federal Railroad Administration (FRA) is the lead agency and when historic bridges are a part of the transportation projects.

The changes to 23 CFR 774 help expedite the processing of Section 4(f) evaluations through several mechanisms:

- The new language added to 23 CFR 774.13 clarifies when exceptions to the requirements for a Section 4(f) approval apply.
- The changes reduce Section 4(f)'s requirements for common post-1945 bridge types and historic railroad and rail transit lines.
- The use of common concrete and steel bridges and culverts built post-1945 that are also exempt from individual review under Section 106 is now exempt from Section 4(f).
- Finally, the changes allow for the maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and/or replacement of historic transportation facilities (railroad or rail transit lines), as long as this does not affect the historic qualities of the facility that caused it to be on or eligible for the NRHP, and if the official(s) with jurisdiction do not object.

What Is the Impact of the 23 CFR 774 Changes?

The changes made to 23 CFR 774 are expected to accelerate environmental reviews of Section 4(f) properties. In the long term, these updates may also allow for easier maintenance and upkeep of various types of transportation infrastructure across the United States, which could yield positive economic, societal, and community impacts.

Additional Resources

- [Environmental Review Toolkit](#)
- [Advisory Council on Historic Preservation \(ACHP\) website](#)

Successes in Stewardship is a Federal Highway Administration newsletter highlighting current environmental streamlining and stewardship practices from around the country. [Click here](#) to subscribe, or call 617-494-2129 for more information.

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