

CHAPTER VI - SECTION 4(f)

1.0 Overview

Section 4(f) dates to 1966 and the creation of the US Department of Transportation (USDOT). Initially codified in 49 United States Code (USC) 1653(f) (Section 4(f) of the USDOT Act of 1966), it was re-codified in 1983 in 49 USC 303, though the provision is still commonly referred to as “Section 4(f).” All USDOT agencies must comply with its requirements. The Section 4(f) regulations can be found in 23 CFR 774. FHWA’s policy paper can be found at <http://www.environment.fhwa.dot.gov/projdev/4fpolicy.asp>.

Section 4(f) expressly prohibits USDOT agencies from using land from significant publicly owned parks, recreation areas, wildlife & waterfowl refuges or any significant historic site unless there is no prudent or feasible alternative to that use. The use of land includes:

- Purchase of right-of-way,
- Permanent incorporation of 4(f) property into a transportation facility,
- Temporary easements that impact 4(f) functions, or
- Constructive use that substantially impairs 4(f) activities.

A Section 4(f) Evaluation may be prepared as part of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), allowing the preparer to reference other chapters in the National Environmental Policy Act (NEPA) document (e.g., Purpose and Need) or it may be developed as a stand-alone document, especially if the project will be covered with a Categorical Exclusion (CE) determination.

2.0 Applicability

Section 4(f) provisions apply to significant publicly owned parks, recreation areas, wildlife & waterfowl refuges as well as significant historic sites. The official having jurisdiction over the resource indicates whether or not the resource is significant. However, the USDOT agency makes the final applicability determination.

2.1 Significant publicly owned parks, recreation areas, wildlife & waterfowl refuges

The official (federal, state or local) having jurisdiction over the property must have officially designated the property as such and determined that one of its major purposes and functions is for park, recreation or as a refuge. For multiple use properties, the function of the area being impacted by the proposed project must be evaluated with the officials having jurisdiction. While all park, recreation and refuge properties should be considered during NEPA, only those that are publicly owned are given consideration under Section 4(f).

2.1.1 Significant public parks and recreation areas

The official with jurisdiction also must indicate that the facility plays a significant role in meeting the community’s objectives with regard to park and recreation opportunities. Significant public parks and recreation areas must be open to the general public during normal operating hours to

be subject to the provisions of Section 4(f). An example where Georgia Department of Transportation (GDOT) projects occasionally impact publicly owned recreation lands that may or may not be subject to Section 4(f) considerations are public school playgrounds. Generally, if the playground is open to the general public after hours, it is given consideration under Section 4(f). Those playgrounds that restrict use to school hours by school children are not subject to the provisions of Section 4(f). Also, for a golf course to be subject to Section 4(f), it must be publicly owned.

2.1.2 Significant wildlife and waterfowl refuges

Similarly, the official with jurisdiction must indicate that the property plays a significant role in meeting their refuge objectives. However, unlike parks and recreation facilities, refuges do not need to be open to the public to be afforded protection under Section 4(f).

2.2 Significant historic sites

Properties currently listed in or eligible for listing in the National Register of Historic Places (NR), following consultation with the State Historic Preservation Officer (SHPO) (the official having jurisdiction), are subject to the provisions of Section 4(f). The USDOT agency official can determine that locally significant historic sites are also subject to Section 4(f).

2.2.1 Archaeological sites

Archaeological sites that are listed in or eligible for listing in the NR and that warrant preservation in place are protected under Section 4(f). This includes sites discovered during construction.

2.2.3 Historic districts

Section 4(f) applies to the use of properties within a historic district that are either individually eligible for listing in the NR or those that contribute to its eligibility. Unless an element within a historic district has been determined to be non-contributing, it is assumed that it contributes to the district's historic significance. If the proposed use of a non-contributing element results in an adverse effect to the district, further consideration should be given to whether or not the proposed action substantially impairs the features or attributes that contribute to its NR eligibility and thus results in a constructive use of the historic district.

2.3 Major Exceptions

Federal regulation (23 CFR 774.13) identifies a number of situations in which Section 4(f) is not applicable. What follows is a discussion of the most frequently encountered exceptions. For a complete list of situations in which Section 4(f) does not apply, the reader may consult 23 CFR 774.13.

2.3.1 Archeological sites not worthy of preservation in place

Section 4(f) does not apply to archaeological sites that, after consultation with the SHPO, have been determined to be important mainly for what can be learned from data recovery and have minimal value for preservation in place. Before FHWA determines that the use of land from an archaeological site is not subject to evaluation under Section 4(f), the SHPO must be consulted and not object to the proposed finding.

2.3.2 Historic transportation facilities

Historic transportation facilities, e.g., bridges, highways, railroads, depots, that are listed in or eligible for listing in the NR are subject to the provisions of Section 4(f) only if the project results in an adverse effect to the resource. The regulations implementing Section 106, specifically 36 CFR 800.5(b), note that rehabilitation work done in accordance with the Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" can avoid a finding of adverse effect.

2.3.3 Non-contributing elements of historic districts

Section 4(f) is applicable to the use of properties within a historic district only if the project results in an adverse effect to the district or to an individually eligible property within the district. A no adverse effect determination for a district is made by the SHPO when the property being used does not contribute to the district's NR eligibility.

2.3.4 Temporary use

Federal regulation (23 CFR 774.13) notes that Section 4(f) does not apply to temporary occupancies/temporary easements if the following conditions are met:

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

2.4 De minimis

The current transportation bill, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), states that the requirements of Section 4(f) will be considered to be satisfied if the Section 4(f) protected resource will not be adversely affected by the proposed action. If a *de minimis* finding is made, GDOT has met all requirements under Section 4(f) for that resource, and an analysis of avoidance alternatives is not required. *De minimis* findings must reference 23 CFR 774.3(b).

For historic properties, the Section 106 consultation must result in a finding of no adverse effect and the SHPO must acknowledge that FHWA will be utilizing the *de minimis* provision. The cover letter transmitting the Assessment of Effects (AOE) prepared for the Section 106 consultation will request the SHPO's acknowledgement.

For public parks, recreation areas, wildlife & waterfowl refuges, the official with jurisdiction over the property must concur that the proposed action will not adversely affect the activities, features, and attributes of the property that qualify it for protection under 4(f). Public notice and

an opportunity for public review and comment must be provided prior to FHWA making a *de minimis* finding for a public park, recreation area, wildlife or waterfowl refuge.

It is important to note that although the requirements of Section 4(f) are satisfied when a *de minimis* finding is made, Section 4(f) is still applicable to the use of the resource. For this reason, projects involving *de minimis* determinations, like all projects involving Section 4(f) determinations, are excluded from the Programmatic Categorical Exclusion (PCE) Agreement.

3.0 Alternatives analysis

Section 4(f) prohibits the use of land from a protected resource unless it can be shown that there is no prudent or feasible alternative to that use. If Section 4(f) is applicable to the use of a resource and if *de minimis* does not apply, a Section 4(f) Evaluation must be prepared to demonstrate that no prudent and feasible alternative to the use of the resource exists. Numerous legal decisions on Section 4(f) have established substantive standards for the prudent and feasibility test that are very high. Thus, a Section 4(f) Evaluation must be rigorous and systematic.

During the analysis, if an alternative that does not use Section 4(f) land is found to be prudent and feasible, it must be selected.

An alternative is feasible if it can be designed and built. Thus most alternatives are feasible. Determining whether or not an alternative is prudent, whether or not it makes sense, is more difficult. 23. CFR 774.17 notes that an alternative may be rejected as not prudent for the following reasons:

- It compromises the project to the degree that it does not meet its purpose and need;
- It results in unacceptable safety or operational problems;
- It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
- It causes other unique problems or unusual factors;
- After reasonable mitigation, it still causes:
 - Severe social, economic, or environmental impacts;
 - Severe disruption to established communities;
 - Severe disproportionate impacts to minority or low income populations;
- An accumulation of factors, as opposed to an individual factor, which result in adverse impacts, present unique problems or reach extraordinary magnitude.

The Section 4(f) regulations, effective in April 2008, allow consideration of the value of the Section 4(f) resource when determining whether an alternative is prudent. The regulations establish a sliding scale where the severity of problems resulting from avoiding is evaluated in light of the significance of the protected resource. Thus more severe problems must exist to justify rejecting an avoidance alternative for a highly significant Section 4(f) resource; less severe problems may justify rejecting an avoidance alternative of a less significant Section 4(f) resource or one that is likely to be torn down by a private owner.

3.1 Avoidance alternatives

The project team must fully evaluate alternatives that avoid the use of Section 4(f) land. For the purposes of this analysis, *de minimis* impacts do not need to be considered further in the avoidance discussion. Traditionally, the Evaluation will analyze the impacts associated with:

- The No-build alternative,
- Widening to the opposite side of the highway (if applicable),
- New location alignment, and
- Reducing the scope of the project.

Enough analysis must be completed, and documented, to demonstrate whether or not an alternative is prudent and feasible. As noted, the regulations allow the consideration of the relative importance of the Section 4(f) protected resource in determining whether an alternative is prudent. Once the conclusion is reached that an alternative is not prudent and feasible, its consideration ends.

3.2 Minimization of harm

If the analysis concludes that a prudent and feasible alternative that avoids the use of Section 4(f) land does not exist, further consideration must be given to minimizing harm to each Section 4(f) resource. Minimization of harm includes both design changes that lessen the impact as well as mitigation measures that compensate for any remaining impacts. The official with jurisdiction over the resource must be consulted while considering minimization and mitigation efforts.

Mitigation of historic resource impacts generally are memorialized in the Memorandum of Agreement (MOA) prepared during the Section 106 process. Mitigation of impacts to public parks, recreation areas, or wildlife or waterfowl refuges may include the replacement of land or facilities of comparable value and function, or monetary compensation that could be used to improve the remaining land.

3.3 Least overall harm

If all prudent and feasible alternatives use land from Section 4(f) resources, an evaluation to determine which alternative results in the least overall harm to Section 4(f) resources must be conducted. Minimization and mitigation measures will be included in the least overall harm analysis. *The alternative resulting in the least overall harm must be selected.* This determination should not only consider impacts to the Section 4(f) resources but also the alternative's ability to meet the purpose and need, impacts to non-Section 4(f) resources and "substantial differences in cost" among the alternatives (see 23 CFR 774.3(c)).

A qualitative analysis is required since not all uses of Section 4(f) resources have the same magnitude of impact and not all Section 4(f) resources have the same quality. According to the FHWA Section 4(f) guidance paper, the evaluation of the net impact should consider whether the use of land involves:

- A large or small taking in relation to the overall size of the resource, or
- Shaving an edge of a property as opposed to cutting through its middle, or

- Altering part of the land surrounding a historic building rather than removing the building itself, or
- Examining key features of the Section 4(f) resource, or
- An unused portion of a park rather than a highly used portion.

When different prudent and feasible alternatives propose the use of different Section 4(f) resources, the importance of the resources must be considered. The FHWA policy paper compares the use of three marginal acres from a large park versus one acre from a small city park. The officials with jurisdiction over the Section 4(f) resource must be consulted and their opinions recorded in the administrative record.

4.0 Preparing a Section 4(f) Evaluation

The FHWA Section 4(f) policy paper notes that the written Section 4(f) Evaluation establishes an administrative record and ensures that FHWA has followed all regulatory and statutory requirements. The administrative record establishes, in writing, the basis for concluding that there is no prudent or feasible alternative to the use of Section 4(f) land and that all minimization of harm occurred.

A Section 4(f) Evaluation must include:

- Purpose and Need (if Evaluation is not embedded in an EA or EIS),
- Project description (if Evaluation is not embedded in an EA or EIS),
- Applicability or non-applicability of Section 4(f) to a property used by the project,
- Description of the Section 4(f) resource(s), including:
 - General description
 - Location
 - Boundary
 - Size
 - Maps or drawings
 - Ownership
 - Function
 - Description and location of existing and planned facilities
 - Access and usage
 - Relationship to other similar lands nearby
 - Unusual characteristics
- Impacts on Section 4(f) resource(s) for each alternative (including amount of land to be used),
- Avoidance alternatives that do not impact any Section 4(f) resource with a finding as whether or not they are prudent and feasible (*de minimis* impacts are not subject to this analysis),
- Measures to minimize harm (including those measure[s] adopted and those considered but not adopted),
- Coordination.

If an Individual Section 4(f) Evaluation is being prepared, the final Section 4(f) Evaluation will include a “finding of no feasible and prudent alternatives.”

5.0 Processing/circulating a Section 4(f) Evaluation

There are two types of Section 4(f) Evaluations, Individual and Programmatic.

5.1 Individual Section 4(f) Evaluation

An Individual Section 4(f) Evaluation requires both a draft and a final evaluation. The process for obtaining approval of an Individual Section 4(f) Evaluation involves the following:

- Prior to circulating the draft evaluation
 - Preliminary coordination with the official of the agency owning or administering the resource;
 - For projects using land from the National Forest System, preliminary coordination with the US Department of Agriculture through the appropriate National Forest Supervisor;
 - For projects using a 4(f) resource where Housing and Urban Development (HUD) funds have been used, discuss with FHWA as to whether or not preliminary coordination with HUD is required.
- Once FHWA has approved the draft Section 4(f) Evaluation
 - Coordination with Department of Interior (DOI) and others;
 - Submit two copies to HUD (FHWA will prepare the transmittal letter);
 - 45-day comment period (from date of receipt);
 - If DOI does not respond within 15 days of the comment deadline, FHWA "may assume a lack of objection and proceed with the action."
 - Pre-review by FHWA Chief Counsel.
- Final Section 4(f) Evaluation
 - Legal sufficiency determination by FHWA Chief Counsel;
 - Review and approval by FHWA;
 - Submit two copies to HUD.

5.2 Programmatic Section 4(f) Evaluation

Programmatic Section 4(f) Evaluations have historically been used as an alternative to preparing an Individual Section 4(f) Evaluation, especially in situations where the use of a Section 4(f) property would not result in an adverse effect to the resource. However, the *de minimis* provision enacted in 2005 as part of SAFETEA-LU rendered all but one Programmatic Section 4(f) Evaluation virtually obsolete.

Although the FHWA Division Office has ultimate authority to determine if a Programmatic Section 4(f) Evaluation is applicable, these Evaluations have typically been restricted to projects that would improve the operational characteristics, safety, and/or physical condition of existing highways on essentially the same alignment. Compared to an Individual Section 4(f) Evaluation, a Programmatic Section 4(f) Evaluation has the virtue of saving time because higher-level review is not required and documentation is not formalized. However, compared to

the use of *de minimis*, a Programmatic Section 4(f) Evaluation is highly time consuming because it requires the same rigorous analysis of alternatives as an Individual Section 4(f) Evaluation.

The four Nationwide Programmatic Section 4(f) Evaluations that have been used in Georgia are:

- Minor use of [historic resources](#) (for those projects with a “No Adverse” Effect finding under Section 106),
 - Cannot be used for the construction of a new location highway,
 - Cannot be used in conjunction with the preparation of an EIS;
- [Minor use of park & recreation lands and wildlife & waterfowl refuges](#) for those projects using a minor amount of land [< 10 acres – 10 percent; 10 to 100 acres – 1 acre; > 100 acres – 1 percent];
 - Cannot be used for the construction of a new location highway,
 - Cannot be used in conjunction with the preparation of an EIS;
- [Historic bridges](#) (even those that are adversely affected),
 - Cannot be used if the affected bridge is designated a National Historic Landmark;
- [Net benefit](#).

Of these four evaluation types, the historic bridge evaluation retains the most currency because it can be applied in situations where *de minimis* is not applicable, i.e., when the Section 4(f) resource (bridge) would be adversely affected. Georgia DOT has conducted a historic bridge inventory and management plan. Each bridge (identified by its serial number) determined eligible for the NR was further studied for its preservation potential. The Programmatic Section 4(f) Evaluation must address issues raised in the management plan. At a minimum, alternatives must include

- No Build,
- Build a new structure on new location without affecting the historic bridge property, and
- Rehabilitation of old bridge without affecting its historic integrity

The Programmatic Section 4(f) approval is obtained when FHWA Division Office finds all criteria have been satisfied.

6.0 Consultant deliverables

If the Section 4(f) Evaluation is embedded in an EIS or EA, consultant deliverables noted in [Chapter III](#), Sections 6.1 and 6.3 will apply. If a Programmatic Section 4(f) Evaluation is included in a CE determination or reevaluation, consultant deliverables noted in [Chapter III](#), Section 6.2 and 6.3 will apply.

If a stand-alone Individual Section 4(f) Evaluation is being prepared, in conjunction with a CE or reevaluation, the consultant will submit four copies of the draft for review and submittal to FHWA, and a minimum of 13 copies of the approved draft for circulation. Three copies of the final will be submitted for review by GDOT; once GDOT has approved the final Individual 4(f) Evaluation, the consultant will deliver 4 copies for submittal to FHWA. Once FHWA has

approved the final Section 4(f) Evaluation, the consultant will deliver a minimum of 13 copies for circulation. The consultant should also submit an electronic copy.

No Section 4(f) Evaluations should be submitted in three-ring binders.

7.0 References and website

<http://www.environment.fhwa.dot.gov/guidebook/index.asp>

The Sections Entitled “Environmental Documentation” and “General Environmental Requirements” contain regulations, environmental flow charts, and the FHWA Technical Advisory on writing environmental NEPA, Section 4(f) documents, and Categorical Exclusions. The Section 4 (f) section includes information on Nationwide Programmatic Agreements for certain types of 4 (f) impacts.