

Environmental Analysis

Section 4(f) – Overview

Applicability
Regulations, Guidance and Policy
Defining Use
Identifying Section 4(f) Uses
De Minimis Findings
Section 4(f) Evaluation
Alternatives Analysis

APPLICABILITY

Section 4(f) of the US Department of Transportation (USDOT) Act of 1966 applies to projects involving USDOT agencies, such as the Federal Highway Administration (FHWA). Essentially, all federal-aid projects need to consider Section 4(f).

Section 4(f) prohibits USDOT agencies from using land from the following resources:

- > Public parks and recreation areas;
- > Public wildlife and waterfowl refuges;
- > Public or private historic sites on or eligible for inclusion on the National Register of Historic Places (NRHP) as determined by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) for sites on tribal lands; and
- > Public or private archaeological sites on or eligible for inclusion on the NRHP that warrant preservation in place.

Section 4(f) provisions allow two major exceptions under which a use of land from a Section 4(f) resource is permissible:

- > The use would have no adverse effect on the resource, thus enabling FHWA to issue a *de minimis* finding; or
- > It can be demonstrated through a Section 4(f) Evaluation that there is no prudent and feasible alternative to the use, and the action includes all possible planning to minimize harm to the property from such use.

Figure 1 – How Section 4(f) Applies



REGULATIONS, GUIDANCE AND POLICY

Section 4(f) was initially codified in 49 United States Code (USC) 1653(f) (Section 4(f) of the USDOT Act of 1966). The provision was re-codified in 1983 in 49 USC 303, but it is commonly referred to as “Section 4(f)”.

All USDOT agencies must comply with Section 4(f) requirements. FHWA developed the Section 4(f) Policy Paper to aid its personnel in the consistent administration of Section 4(f):

Section 4(f) Policy Paper,
Federal Highway Administration, July 2012

DEFINING USE

Under Section 4(f), the term “use” has a very specific definition. Use is defined in 23 Cod of Federal Regulation (CFR) 774.17 and Question 7 in the Section 4(f) Policy Paper.

There are two forms of use that always constitute a Section 4(f) use:

- > The permanent incorporation of land into a transportation facility; and
- > Constructive use, which involves proximity impacts.

Permanent Incorporation of Land

The permanent incorporation of land from a Section 4(f) property into a transportation facility is always considered a Section 4(f) use. “Permanent incorporation” includes situations in which:

- > Land from a Section 4(f) resource is purchased outright for transportation right of way (ROW); or
- > A permanent easement is acquired allowing permanent access for transportation or maintenance purposes.

Constructive Use

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 a property for protection under Section 4(f) are substantially impaired.

One example of constructive use is the installation of a new bridge that spans a river and blocks access to a recreational trail running along the river. It may be entirely within the road’s ROW, but the trail is no long passable under the new bridge. The trail is substantially impaired, but no ROW or easement was taken from the trail.

Additionally, there are two scenarios where utilizing land from a protected resource may not constitute a “use” under Section 4(f) if certain conditions are met.

- > Temporary use; and
- > Use of historic transportation facilities.

Temporary Use

23 CFR 774.17 specifies that a temporary use for construction purposes (temporary easement) does not qualify as a Section 4(f) use if the following conditions apply:

- > 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 equal to that which existed prior to the project; and
- > There is documented agreement with the official with jurisdiction over the Section 4(f) resource regarding the above conditions.

If one or more of the above conditions cannot be met, then the property is considered to have a permanent incorporation use, even though the occupancy is temporary.

Use of Historic Transportation Resources

Uses of eligible or listed historic transportation resources (e.g., bridges, highways, railroads, and depots) are subject to Section 4(f) only if there is an adverse effect as determined by SHPO. An adverse effect impacts the integrity or intactness of the historic structure or its surroundings. Rehabilitation in accordance with 36 CFR 800.5(b) can avoid a finding of adverse effect.

IDENTIFYING SECTION 4(F) USES

When assessing whether there is use of a Section 4(f) property, the Environmental Analyst must have current information concerning the project, such as right-of-way (ROW) limits (including easements) and the boundaries for the Section 4(f) resources involved. Parks, recreation areas, and refuges generally have property boundaries defined by ownership.

For historic properties, the NRHP boundary (or proposed NRHP boundary for eligible properties) should clearly define the edges of the resources and whether features are contributing or noncontributing and lie inside or outside of the boundary. The proposed boundary for these eligible resources must be agreed to by the SHPO.

DE MINIMIS FINDINGS

When there is a Section 4(f) use, the requirements of Section 4(f) can be satisfied without conducting a Section 4(f) Evaluation if a *de minimis* finding can be made by FHWA. *De minimis* findings require that the use in question not adversely affect the features, attributes, or activities that qualify parks, historic sites, recreation areas, or refuges for protection. Before FHWA can make a *de minimis* finding, the official with jurisdiction over the Section 4(f) property must acknowledge that the impacts are minimal and not adverse. SHPO is the official with jurisdiction over historic properties.

It is important to note that a *de minimis* finding is made only when there is a Section 4(f) use, such as the permanent incorporation of land or constructive use. If a *de minimis* finding is made, GDOT has met all requirements under Section 4(f) for that resource, and a Section 4(f) Evaluation of avoidance and minimization alternatives is not required. *De minimis* findings must reference 23 CFR 774.3(b).

SECTION 4(F) EVALUATION

Unless the use of the Section 4(f) property is determined to have a *de minimis* impact, a Section 4(f) Evaluation must be prepared and approved by FHWA. This evaluation must demonstrate that no feasible and prudent alternative exists that avoids greater than *de minimis* uses of Section 4(f) properties (23 CFR 774.3). Numerous legal decisions on Section 4(f) have established substantive standards for the prudent and feasibility test that are very high. Any approval of a Section 4(f) Evaluation is subject to legal sufficiency review by the Office of Chief Counsel of FHWA.

A Section 4(f) Evaluation may be prepared as part of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). It may reference other parts in the National Environmental Policy Act (NEPA) document (e.g., Need & Purpose), or it may be developed as a stand-alone document. It is typically a separate document if the project will be processed by a Categorical Exclusion (CE) determination, with the Section 4(f) Evaluation submittal and FHWA approval preceding the CE submittal.

ALTERNATIVES ANALYSIS

A central component to the Section 4(f) Evaluation is the Alternatives Analysis. The project team must fully evaluate alternatives that avoid greater than *de minimis* uses of Section 4(f) properties. An alternative with a *de minimis* use of a Section 4(f) property is considered an avoidance alternative, and no additional evaluation is necessary for alternatives that involve *de minimis* uses. The Section 4(f) policy paper outlines in detail the Alternatives Analysis. If an alternative, which avoids greater than *de minimis* uses of Section 4(f) properties, is found to be prudent and feasible, it must be selected.

Where a use of Section 4(f) property cannot be avoided, USDOT may approve only the alternative that causes the least overall harm, which is determined by balancing various factors as described in 23 CFR 774.3(c).

For the purposes of this analysis, *de minimis* impacts do not need to be considered in the avoidance discussion.

Typically, 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.

The Alternatives Analysis must be completed and documented to the extent that it demonstrates whether an alternative is prudent and feasible.

Definitions for Alternatives Analysis

The following terms are critical to the Section 4(f) Evaluation's Alternatives Analysis.

Avoidance Alternative

The avoidance alternative is one that would not require the use of any Section 4(f) property.

Feasible and Prudent

Feasible and prudent describes avoidance alternatives that avoid using any Section 4(f) property *and* do not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. The property's value, relative to the project and other important considerations along the corridor, should be considered as part of the feasible and prudent determination (adapted from 23 CFR 774.17).

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 (defined in 23 CFR 774.17).

Least Overall Harm

If there is no feasible and prudent avoidance alternative, then the alternative that advances must cause the "least overall harm" which is determined by a comparison of seven factors in 23 CFR 774.3(c)(1). As described by the policy paper, these include:

1. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
2. 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;
3. The relative significance of each Section 4(f) property; and
4. The views of the officials with jurisdiction over each Section 4(f) property;
5. The degree to which each alternative meets the purpose and need for the project;
6. After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
7. Substantial differences in costs among the alternatives.

Avoidance alternatives that have been considered but ruled out for not meeting the project's Need & Purpose would not advance to the least overall harm analysis.

Guidebook Revision History

Revision Description	Relevant Sections	Revision Date
Initial Publication	All	5/22/2019
Revision Table Added	Last Page	9/21/2020
Updated Hyperlink Button		4/23/2021