Section 4(f) Requirements

Section 4(f) of the Department of Transportation Act of 1966 declares a national policy to “preserve the natural beauty of the countryside, public park and recreation land, wildlife and waterfowl refuges, and historic sites.” It is one of the most stringent and complex environmental laws related to transportation. As a result, Section 4(f) is also one of the most frequently litigated environmental statutes and the most common cause of court injunctions delaying projects (FHWA *Success in Stewardship* Newsletter, March 2008).

WSDOT’s policy is to follow the FHWA Section 4(f) guidance provided on their environmental web page. This manual summarizes that guidance for the more common types of projects.

Section 4(f) is a federal requirement and must be considered in any NEPA document involving any USDOT agency (FHWA, FTA, FRA, and FAA (see Section 457.06)). This work may be:

- Included in the EIS/EA and supported by appropriate documentation.
- Conducted separately and documented in an Individual Section 4(f) Evaluation.

FHWA and other USDOT agencies may not approve a transportation program or project that uses such properties unless:

- The use will have no more than de minimis impact.
- There is no feasible and prudent alternative and all possible planning has been done to minimize harm.

To secure federal approval and funding for transportation projects that use Section 4(f) properties, WSDOT must demonstrate that:

- There are unique problems or unusual factors that prohibit use of alternatives that avoid these properties.
- The cost of alternatives that avoid these properties is extraordinary.
- The social, economic and environmental impacts or community disruption resulting from an alternative that avoids Section 4(f) properties reach an extraordinary magnitude.
The law also protects Section 4(f) properties from proximity impacts that substantially diminish the use or value of the resource. Substantial proximity impacts are considered to be a “Constructive Use” even though the project does not actually intrude into the protected area. FHWA requires a Section 4(f) Evaluation be completed for proximity impacts. Such impacts may include:

- Noise
- Vibrations
- Aesthetics
- Access

457.02 Identifying a Section 4(f) Property

Section 4(f) applies to significant publicly owned public parks and recreation areas and wildlife and waterfowl refuges. Parks and recreation areas must be open to the public to qualify, but wildlife and waterfowl refuges may restrict access to preserve quality habitat. Privately owned properties may qualify for consideration under Section 4(f) if a government agency has a permanent interest in the land (such as an easement).

Publicly owned parks, recreation areas and wildlife and waterfowl refuges are assumed to be significant unless the public official with jurisdiction concludes that the entire site is not significant. FHWA must conduct an independent evaluation of the property and concur with the official’s decision.

Historic sites of national, state or local significance qualify as Section 4(f) properties regardless of ownership or public access. Historic sites must be on or eligible for inclusion on the National Register of Historic Places to be protected.

You are probably dealing with a Section 4(f) property if you impact a property that:

- Is publicly owned.
- Is listed on the National Register of Historic Places.
- Open to the public during normal hours of operation.
- Serves recreation activities (walking, hiking, bird watching, or organized sports) as a major purpose as stated in the area’s master plan (consultation with the officials with jurisdiction is required to confirm the property’s status).

457.03 Individual Section 4(f) Compliance

WSDOT policy requires Section 4(f) consideration in any NEPA document. However, not all NEPA actions require a full Section 4(f) evaluation. If the proposed project will not use Section 4(f) property, the NEPA document needs to document the research and explain that Section 4(f) does not apply. Right size your document to fit your project. Three approaches are typically used:

- An individual Section 4(f) Evaluation, which can be done as part of a NEPA EIS or separately in support of an EA or DCE.
- A programmatic Section 4(f) Evaluation in support of an EA or DCE.
- A determination is made that the project has de minimis impacts and officials with jurisdiction concur in writing.

The flowchart in Figure 457-1 shows the basic steps for a Section 4(f) Evaluation. Step by step guidance for how to complete this process is provided on the WSDOT Section 4(f) Guidance web page.
(1) **De Minimis Section 4(f) Evaluations**

In 2005, Section 6009(a) of the SAFETEA-LU Act allowed FHWA to streamline the Section 4(f) evaluation process for projects that have de minimis impacts. De minimis impacts are defined as impacts that will not adversely affect the features, attributes or activities that qualify the parks, recreation areas, or refuges for protection.

Measures to avoid, minimize, or mitigate impacts or enhance the resource should be considered before the de minimis determination is made. FHWA makes the determination based on a review of the project documentation. Detail the work that was done to reach the de minimis determination in the NEPA document. Written concurrence from the officials with jurisdiction must be included in the document. The process for determining a de minimis impact is shown on the flowchart on the WSDOT Section 4(f) Guidance web page.

The public must be informed of the de minimis determination and given an opportunity to comment on the decision. This may be done as part of the NEPA process for and EA or EIS. If your project is a CE or a DCE it can be accomplished in a newsletter, city council meeting or project open house. Standard language must be included in this notice. A template for documenting public involvement at a city council meeting can be found on the WSDOT Section 4(f) Guidance web page.

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

FHWA developed five Programmatic Section 4(f) Evaluations that can be used to streamline the evaluation process. Using programmatics saves time by eliminating circulation of the draft, and by the completion of a legal sufficiency review and coordination with other federal agencies (DOI, USDA, and HUD). Coordination with the Official with Jurisdiction is still required. FHWA provides more detailed explanation of each of the Nationwide Section 4(f) Programmatic Evaluation categories on their web page. If the project impacts a Section 4(f) property and it does not qualify for a programmatic evaluation, then an individual Section 4(f) Evaluation must be completed.

The description and criteria for the five Programmatic Section 4(f) Evaluations are:

1. **Independent Walkway and Bikeways** – Only applies to independent bikeway or walkway projects that impact recreation and park areas for active recreation and open space. The official with jurisdiction over the Section 4(f) property must give his/her approval in writing that the project is acceptable and consistent with the designated use and that all possible planning to minimize harm has been done.

   This programmatic cannot be used if the project would require the use of:
   - Critical habitat of endangered species.
   - Land from a publicly owned wildlife or waterfowl refuge.
   - Land from a historical site of local, state or national significance.
   - Unusual circumstances such as major impacts, adverse effects or controversy.
Determining the Type of Section 4(f) Evaluation

**Figure 457-1**

1. **Is there any Section 4(f) property in the immediate vicinity?**
   - No: **Document this determination. No further analysis needed.**
   - Yes:
     - **Will a “use” of the Section 4(f) property be required?**
       - No: **Document this determination. No further analysis needed.**
       - Yes:
         - **Is the use a “constructive use”?**
           - No: **Document this determination. No further analysis needed.**
           - Yes:
             - **Would the transportation project have more than a de minimus impact?**
               - No: **Reconsider**
               - Yes: **Has all possible planning been included to minimize harm?**
                 - No: **Prepare programmatic or individual Section 4(f) Evaluation.**
                 - Yes: **Document and send to FHWA/FTA for approval. No further analysis needed.**

2. **Is there a feasible and prudent avoidance alternative?**
   - No: **Reconsider**
   - Yes: **Include all possible planning to minimize harm.**
2. **Historic Bridges** – Applies to bridges to be replaced or rehabilitated with Federal Funds. The bridge must be on or eligible for the National Register of Historic Places (NRHP). The FHWA Division Administrator concurs with the facts presented in the alternatives, findings and mitigation.

This programmatic **cannot** be used for construction of a highway in a new location.

3. **Minor Involvement With Historic Sites** – Applies when the project improves the operational characteristics, safety, and/or physical condition of the highway on the existing alignment. The historic site must be located adjacent to the existing highway to qualify for the programmatic. Such projects include:

- “4 R” work (resurfacing, restoration, rehabilitation and reconstruction).
- Safety improvements (shoulder widening and correction of substandard curves or intersections).
- Traffic operation improvements (signalization, channelization, turning and climbing lanes).
- Bicycle and pedestrian facilities as part of a larger project.
- Bridge replacements on the same alignment.
- Construction of additional lanes.

This programmatic **cannot** be used:

- For a project including removal or alteration of historic buildings, structures, or objects on the historic site.
- For a project requiring an EIS, unless the Section 4(f) impact is discovered after approval of the EIS.
- For a project that requires disturbance or removal of archaeological resources that are important to preserve in place. The State Historic Preservation Officer (SHPO) and/or the Advisory Council on Historic Preservation (ACHP) must concur in the determination.
- The impacts on the historic attributes of the property must be minor. Minor is narrowly defined as “no effect” or “no adverse effect” under Section 106 of the National Historic Preservation Act and **36 CFR 800**. The ACHP must not object to the “no effect” determination.

The SHPO must agree, in writing, with the impact assessment and the proposed mitigation.
4. **Minor Involvement With Parks, Recreation Areas, and Waterfowl and Wildlife Refuges** – Applies when the project improves the operational characteristics, safety, and/or physical condition of the highway on the existing alignment. The public park, recreation lands, or wildlife and waterfowl refuge must be located adjacent to the state highway. Such projects include:

- “4 R” work (resurfacing, restoration, rehabilitation and reconstruction).
- Safety improvements (shoulder widening and correction of substandard curves or intersections).
- Traffic operation improvements (signalization, channelization, turning and climbing lanes).
- Bicycle and pedestrian facilities as part of a larger project.
- Bridge replacements on the same alignment.
- Construction of additional lanes.

The total amount of land to be acquired from any site shall not exceed:

<table>
<thead>
<tr>
<th>Total Size of Section 4(f) Site</th>
<th>Maximum to Be Acquired</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; 10 acres</td>
<td>10 percent of site</td>
</tr>
<tr>
<td>10–100 acres</td>
<td>1 acre</td>
</tr>
<tr>
<td>&gt;100 acres</td>
<td>1 percent of site</td>
</tr>
</tbody>
</table>

This programmatic cannot be used:

- For construction of a highway in a new location.
- For a project that requires an EIS.
- For projects that impair the intended use of the remaining Section 4(f) land. The determination includes proximity impacts and is made by FHWA in concurrence with the officials with jurisdiction over the Section 4(f) property.

Impairment shall be documented. Show the size, use, and nature of the impairment. Document noise, air and water pollution, wildlife and habitat effect, aesthetic values, and other impacts deemed relevant.

Coordinate with the appropriate Federal Agency if the Section 4(f) property is encumbered by a Federal Interest. Ascertain the agency’s position on the land conversion or transfer. The programmatic does not apply if the agency objects. Federal Interest includes:

- Purchase or improvement with federal funds through the Land and Water Conservation Funds Act, Federal Aid in Fish Restoration Act (Dingle-Johnson Act), the Federal Aid in Wildlife Act (Pittman-Robertson Act).
- Former designation as federal surplus property.

The officials with jurisdiction over the Section 4(f) lands must agree, in writing, with the impact assessment and the proposed mitigation.

5. **Transportation Projects That Have a Net Benefit to a Section 4(f) Property** – Applies to federally assisted transportation improvement projects on existing or new alignments. The Administration and officials with jurisdiction will make the determination.
457.04 Cultural Resources May Be Protected Under Section 4(f)

A property containing significant cultural resources is considered a Section 4(f) property. Section 106 of the National Historic Preservation Act defines the process for determining the significance of a cultural resource. Therefore, completion of a Section 106 evaluation is an integral part of the Section 4(f) evaluation. Both laws mandate consideration of cultural resources, but here are some key differences you should be aware of:

- Section 4(f) requires a special effort be made to avoid the use of cultural resources by documenting that all possible planning was used to minimize harm. Section 106 requires consideration of the project effects on cultural resources.
- Section 4(f) applies only to agencies of the DOT. Section 106 applies to any federal agency.
- Section 4(f) applies to actual use or occupancy of the site. Section 106 involves assessment of adverse effect on the property. A direct correlation cannot be made between “use” and “effect.”
- The Section 106 process is integral to the Section 4(f) process when cultural resources are involved. The Section 4(f) process is not integral to the Section 106 process.
- The Section 4(f) process applies a more stringent analysis with respect to totally avoiding cultural resources than the Section 106 process.
- Archeological resources not considered important for preservation in place are not eligible for protection under Section 4(f).

457.05 Section 6(f) Conversion May Be Required

Section 4(f) properties purchased or improved with money from the Land and Water Conservation Fund (LWCF) require additional work. Coordination with the appropriate federal agency will be required. Section 6(f) of the LWCF Act prohibits the conversion of such properties to non-recreation uses without approval by the National Park Service (NPS) or their state designee. Therefore, a Section 6(f) analysis is an integral part of the Section 4(f) evaluation if the project must use land purchased or improved from the LWCF.

While Section 6(f) and Section 4(f) often apply to the same resources they are parts of different laws and there are some key differences:

- Section 4(f) applies only to programs and policies undertaken by the DOT. Section 6(f) applies to programs and policies of any federal agency.
- Section 4(f) allows more flexible mitigation opportunities. Section 6(f) requires that impacted resources be replaced with lands of equal value, location and usefulness.
- Section 6(f) can apply on fully state funded projects where no federal nexus exists.

More detailed guidance for Section 6(f) conversions may be found in Chapter 450.
457.06 **Section 4(f) Requirements May Differ for Other Federal Agencies**

Section 4(f) is a federal requirement and must be considered in any NEPA document involving any USDOT agency (FHWA, FTA, FRA, and FAA).

Different federal agencies have different documentation and procedural requirements for NEPA. If your project has a federal nexus with more than one federal agency, it is critically important to meet with your lead agencies and determine how to proceed. In some cases the federal agencies may agree to co-lead the project. In others, one agency may serve as lead and the other as a cooperating agency. The exact requirement will vary depending on the nature of the project and individual circumstances. This decision must be made early in the process to ensure approval of your environmental document. Common examples of projects that require coordination with more than one federal agency are:

- An FHWA funded project that crosses National Forest Lands.
- A project that receives both FHWA and FTA funding.
- Any highway project involving FRA and FAA.

457.07 **Procedures for Completing a Section 4(f) Analysis**

The procedures and tools that can be found the WSDOT Section 4(f) Guidance web page include:

- A process flowchart.
- Links to FHWA’s Technical guidance.
- Discipline Report Checklist.
- How to describe a Section 4(f) Property.
- Required wording for Final Section 4(f) Analysis.
- Document distribution requirements.
- Links to Section 6(f) requirements.

457.08 **Section 4(f) and Related Statutes**

- **Section 4(f) of the Department of Transportation Act 1966**
- **Section 106 of the National Historic Preservation Act 1966**
- **Section 6(f) of the Land and Water Conservation Fund Act 1965**

457.09 **Abbreviations and Acronyms**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>FHWA</td>
<td>Federal Highway Administration</td>
</tr>
<tr>
<td>FTA</td>
<td>Federal Transit Administration</td>
</tr>
<tr>
<td>FRA</td>
<td>Federal Railroad Administration</td>
</tr>
<tr>
<td>FAA</td>
<td>Federal Aviation Administration</td>
</tr>
<tr>
<td>NRHP</td>
<td>National Register of Historic Places</td>
</tr>
<tr>
<td>SAFETEA-LU</td>
<td>Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users</td>
</tr>
<tr>
<td>USDOT</td>
<td>United States Department of Transportation</td>
</tr>
<tr>
<td>SHPO</td>
<td>State Historic Preservation Officer</td>
</tr>
<tr>
<td>THPO</td>
<td>Tribal Historic Preservation Officer</td>
</tr>
</tbody>
</table>
457.10  **Glossary**

**All Possible Planning** – All reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects.

**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. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

**De minimis Impact** – For historic sites, de minimis impact means that the appropriate administering agency has determined, in accordance with 36 CFR 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. 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).

**Feasible and Prudent Avoidance Alternative** – 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.

**Historic Site (Section 4(f))** – Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places. 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.

**Officials With Jurisdiction** – As defined in 23 CFR 774.17, officials of the agency that owns or administers the property in question. For historic sites, the SHPO or THPO may serve as the official with jurisdiction.

**Programmatic Section 4(f) Evaluations** – Can be used in place of individual evaluations for highway projects where uses are considered minor. To date there are five programmatic evaluations that have been approved for use nationwide. See Section 457.03 of this chapter for criteria.

**Section 4(f) Property** – A publicly owned park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance. Also includes historic sites of national, state or local significance.

**Use** – “Use” of a Section 4(f) property occurs:
- When land is permanently incorporated into a transportation facility.
- When a temporary occupancy of land has an adverse impact on the resource that the park, recreation area, refuge or historic site was created to protect.
- When there is a constructive use of the property.