Section 4(f) at a Glance

What is Section 4(f)? Section 4(f) refers to the original section within the U.S. Department of Transportation Act of 1966 which established the requirement for consideration of park and recreational lands, wildlife and waterfowl refuges, and historic sites in transportation project development. The law, now codified in 49 U.S.C. §303 and 23 U.S.C. §138, is implemented by the Federal Highway Administration (FHWA) through the regulation 23 CFR 774.

When does Section 4(f) apply? Section 4(f) applies to projects that receive funding from or require approval by an agency of the U.S. Department of Transportation. Section 4(f) is considered by many to be a complex law.

What does Section 4(f) require? Before approving a project that uses Section 4(f) property, FHWA must either (1) determine that the impacts are de minimis (see discussion below), or (2) undertake a Section 4(f) Evaluation. If the Section 4(f) Evaluation identifies a feasible and prudent alternative that completely avoids Section 4(f) properties, it must be selected. If there is no feasible and prudent alternative that avoids all Section 4(f) properties, FHWA has some discretion in selecting the alternative that causes the least overall harm (see discussion below). FHWA must also find that all possible planning to minimize harm to the Section 4(f) property has occurred.

What are Section 4(f) properties? Section 4(f) properties include publicly owned public parks, recreation areas, and wildlife or waterfowl refuges, or any publicly or privately owned historic site listed or eligible for listing on the National Register of Historic Places.

What is a use? Use of a Section 4(f) property occurs: (1) when land is permanently incorporated into a transportation facility; or (2) when there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose; or (3) when there is a constructive use (a project's proximity impacts are so severe that the protected activities, features, or attributes of a property are substantially impaired). The regulation lists various exceptions and limitations applicable to this general definition.

What is a de minimis impact? For publicly owned public parks, recreation areas, and wildlife and waterfowl refuges, a de minimis impact is one that will not adversely affect the activities, features, or attributes of the property. For historic sites, a de minimis impact means that FHWA has determined (in accordance with 36 CFR Part 800) that either no historic property is affected by the project or that the project will have "no adverse effect" on the historic property. A de minimis impact determination does not require analysis to determine if avoidance alternatives are feasible and prudent, but consideration of avoidance, minimization, mitigation or enhancement measures should occur. There are certain minimum coordination steps that are also necessary.

What is feasible? An alternative is feasible if it can be constructed as a matter of sound engineering. Typically, alternatives that are studied in a draft environmental impact statement or environmental assessment are feasible; otherwise they would not have been carried forward for detailed study.

What is prudent? An alternative is prudent if it meets the test in 23 CFR 774.17, which includes factors assessing safety or operational problems; how well project purpose and need are met; the severity of social, economic, or environmental impacts; and the severity of impacts to environmental resources protected under other Federal statutes. FHWA’s evaluation of these factors begins with a "thumb on the scale" in favor of protecting Section 4(f) property, and takes the relative value of the Section 4(f) property into account.

What is least overall harm? If the analysis of avoidance alternatives concludes that there is no feasible and prudent avoidance alternative, then the FHWA may only approve the alternative that causes the least overall harm to the Section 4(f) property. 23 CFR 774.3(c) includes a list of factors to consider in making this determination of least overall harm. These factors include the ability to mitigate adverse impacts to Section 4(f) property; the relative severity of remaining harm, after mitigation, to Section 4(f) property; and the relative significance of each Section 4(f) property. For instance, will the project alternatives result in edge takes of a park or will they cut through the middle? How will
activities, features, or attributes of the 4(f) property be affected by various alternatives and to what degree? If alternatives are determined to cause "substantially equal" harm to Section 4(f) property, then FHWA may choose any one.

**Does Section 106 of the National Historic Preservation Act duplicate Section 4(f)?** Though enacted by Congress on the same day in 1966, they are two different requirements. There is some overlap when historic properties are involved. A key difference is Section 106 is essentially a consultative procedural requirement, while Section 4(f) precludes project approval if the specific findings can not be made.

**Who makes the 4(f) decision for highway projects?** The FHWA is ultimately responsible for making all decisions related to Section 4(f) compliance. These include whether Section 4(f) applies to a property, whether a use will occur, whether a de minimis impact determination may be made, assessment of each alternative’s impacts to Section 4(f) properties, and determining whether the law allows the selection of a particular alternative after consulting with the appropriate officials with jurisdiction.