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   h. Trails
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4.4.13 Parks, Recreational Areas and Refuges

4.4.13.1 Introduction
This section provides guidance, procedures, and technical information specific to the NYSDOT for Section 4(f) evaluations regarding the parks, recreation lands, wildlife, and waterfowl refuges and Wild and Scenic Rivers (collectively referred to as “parks, recreational areas and refuges”) and all aspects of Section 6(f) properties that were acquired or developed with Land and Water Conservation funds. The federal government established the Land and Water Conservation Fund (LWCF) to increase the net quality of public, outdoor recreational space.

Alert!
Sections: 4(f), 6(f), 1010, National Heritage Area and State Heritage Areas must be satisfied prior to Design Approval. Municipal Parkland Alienation legislation must be enacted prior to project letting.

Guidance, procedures, and technical information specific to Section 4(f) evaluation for historic sites will be provided in TEM Section 4.4.12, Historic and Cultural Resources.

“Parkland and open space are two of New York State’s most valuable non-renewable resources that enhance the quality of life. These resources can no longer be viewed as islands but as systems that need to be connected to benefit both people and wildlife. The benefits derived from these efforts are far reaching – enhanced quality of life, increased tourism, improved health, protected ecosystems, and sustainability of our environment. Parks and open spaces are truly “important places” and must be protected”.¹

The transportation impacts that must be considered include those resulting from any action that causes the:
- “Use” of a Section 4(f) resource
- Conversion of parkland to non-parkland (Section 6(f) and Section 1010)

As described below Section 6(f), Section 4(f) and Section 1010 are separate processes, undertaken concurrently.

Alienation of parkland is addressed in this Section. The Department should be aware that when property is taken by means other than eminent domain, municipalities may be required to undergo alienation procedures. This may have an impact on project schedules.

Table 1: Applicability of Section 4(f) Parks, Recreation & Refuges by Threshold Criteria

<table>
<thead>
<tr>
<th>Regulation/Requirement</th>
<th>Applies</th>
<th>Does Not Apply</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 4(f) - Parks, Recreation Areas, Wildlife, Waterfowl Refuges</strong> <em>(for Historic Sites see 4.4.12)</em></td>
<td>Projects with USDOT involvement</td>
<td>Projects with no USDOT involvement</td>
</tr>
<tr>
<td></td>
<td>Section 4(f) resource(s) identified in project area</td>
<td>No Section 4(f) resource(s) identified in project area</td>
</tr>
<tr>
<td></td>
<td>Must meet <strong>all</strong> the following:</td>
<td>Resource is any of the following:</td>
</tr>
<tr>
<td></td>
<td>• publicly owned,</td>
<td>• privately owned,</td>
</tr>
<tr>
<td></td>
<td>• open to the public,</td>
<td>• not open to the public,</td>
</tr>
<tr>
<td></td>
<td>• major purpose is as a 4(f) resource (recreational function or role as a refuge) and</td>
<td>• determined not to serve a significant recreational function or role as a refuge.</td>
</tr>
<tr>
<td></td>
<td>• properties have national, state or local significance</td>
<td>• It has been determined the resource is not significant.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>“Use” of a Section 4(f) Resource</th>
<th>No “use” of a Section 4(f) Resource</th>
<th>100% state funded projects</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 6(f) - Parkland and Recreational Facilities</strong></td>
<td>All projects regardless of funding source</td>
<td>No Section 6(f) resources identified in project area</td>
</tr>
<tr>
<td></td>
<td>Section 6(f) resource(s) identified in project area</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Any activity proposed within the boundaries of the Section 6(f) resource(s).</td>
<td></td>
</tr>
<tr>
<td><strong>Section 1010 – City &amp; Urban Area Parks and Recreational Facilities</strong></td>
<td>All projects regardless of funding source</td>
<td>No Section 1010 resource(s) identified in project area</td>
</tr>
<tr>
<td></td>
<td>Section 1010 resource(s) identified in project area</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Any activity proposed within the boundaries of the Section 1010 resource(s).</td>
<td></td>
</tr>
<tr>
<td><strong>Municipal Parkland and Alienation – Municipal Parks and Recreational Facilities</strong></td>
<td>Property not acquired through EDPL</td>
<td>Property acquired through EDPL</td>
</tr>
<tr>
<td></td>
<td>All projects regardless of funding source</td>
<td>National or State owned parkland (under jurisdiction of DEC, OPRHP, ORDA, etc.)</td>
</tr>
<tr>
<td></td>
<td>Municipally owned Parks and Recreational Areas</td>
<td>Wildlife and Waterfowl Refuges (regardless the ownership)</td>
</tr>
</tbody>
</table>
Alert!
NYSDOT projects that are 100% state funded still must comply with Section 106 if Section 6(f) properties are impacted, since the LWCF is a federal assisted grant program. The NPS would be the lead Federal agency for compliance with Section 106. However, a Section 4(f) analysis would not be needed.

4.4.13.2 Section Objectives

This section provides guidance and procedures for compliance with federal, state and local regulations for parks, recreational areas and refuges. After reviewing this document, the project staff will be able to integrate parkland into the decision making process, and to the maximum extent practicable, minimize or avoid adverse impacts.

4.4.13.3 NYSDOT Policy

It is NYSDOT’s policy, in its programs, procedures, and operations, to preserve and protect New York State parkland to the extent practicable and feasible. During the development of transportation projects the Department will give appropriate consideration to alternatives that avoid or lessen adverse impacts to parkland.

4.4.13.4 Legal Basis

4.4.13.4.1 Section 4(f) - Parks, Recreation Areas, Wildlife and Waterfowl Refuges

A. Section 18(a) of the Federal-Aid Highway Act of 1968 (23 USC §138) (collectively referenced as Section 4(f)) applies to publicly owned parks, recreation areas, wildlife or waterfowl refuges, and publicly or privately owned significant historic sites.

B. Section 4(f) – Department of Transportation Act of 1966, (49 USC §303)(c) Section 4(f) prohibits the U.S. Secretary of Transportation from approving any project that “uses” land from public parks and recreation lands, wildlife and waterfowl refuges, and historic sites if there is a feasible and prudent alternative to the use. The NYSDOT consults primarily with the FHWA and or the FTA in carrying out the Section 4(f) process.

C. National Wild and Scenic Rivers Act (WSRA) (16 USC § 1271 et seq. and 36 CFR 297.3) United States’ rivers that possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values are preserved under the WSRA (in their free-flowing condition and are not dammed or otherwise impeded). See TEM section 4.4.3 Wild, Scenic and Recreational Rivers, for additional information.

D. Part 666: Regulation For Administration and Management Of The Wild, Scenic and Recreational Rivers System In New York State Excepting Private Land In The Adirondack Park (Statutory authority: Environmental Conservation Law, Article 15, Title 27). The purpose of the Wild, Scenic and Recreational Rivers System Act is to institute a State wild, scenic and recreational rivers system within New York. It is the policy of the State that designated rivers of the State and their immediate environs possessing these characteristics shall be preserved in a free-flowing condition and shall be protected for the benefit and
enjoyment of present and future generations. See TEM section 4.4.3 Wild, Scenic and Recreational Rivers, for additional information.

E. National Wildlife Refuge System Administration Act (Pub. L. 89-669, 80 Stat. 926) provides for the conservation, protection, and propagation of native species of fish and wildlife, including migratory birds threatened with extinction. The act consolidates the authorities relating to the administration by the Secretary of the Interior of the National Wildlife Refuge System.

F. The National Trails System Act - (P.L. 90-543, as amended) (also found in United States Code, Volume 16, Sections 1241-1251) created a series of National trails "to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation." Specifically, the Act authorized four types of trails: the National Scenic Trails, National Recreation Trails, (including National Water Trails), National Historic Trails and connecting-and-side trails.

4.4.13.4.2 Section 6(f), Land and Water Conservation Fund Act (LWCF) of 1965
The LWCF State Assistance Program was established by the LWCF Act of 1965 (Section 6, Land and Water Conservation Fund Act of 1965, as amended; Public Law 88-578; 54 USC § 200301 et seq.) (36 CFR §59.3) to provide matching grants to States for the acquisition and development of public outdoor recreation sites and facilities. Lands acquired and/or developed with LWCF’s are considered public parks or recreation areas and are, therefore, also subject to the requirements of Section 4(f).

4.4.13.4.3 Municipal Parkland and Alienation
Eminent Domain Procedure Law and various rulings under NYS case law. See Appendix A

Eminent Domain Procedure Law

NYSDOT asserts that the State, as sovereign, may acquire municipal parkland for public highway purposes by eminent domain without the need for special State legislative alienation authorization. While State alienation legislation would eliminate any notion that the State’s acquisition is inconsistent with the Public Trust Doctrine regarding lands dedicated to public use, NYSDOT can assert that if the acquisition is by the State for state purposes, alienation legislation is not needed since the Eminent Domain Procedure Law (EDPL) trumps any inconsistent requirements of other statutes or common law. See Appendices A.12 & A.13 Eminent Domain Procedure Law §§705 and 104.

4.4.13.4.4 Urban Park and Recreation Recovery Act (UPARR) Section 1010 of the Urban Park and Recreation Recovery Act of 1978, Public Law 95-625 (54 USC§§ 200501 to 200511) is a federal matching grant program administered by the NPS to provide funding for the rehabilitation of deteriorating parks and recreational facilities in cities and urban areas similar in intent to the LWCF. Congress has not appropriated funds for new UPARR grants since Fiscal Year 2002. The UPARR program carries the same provisions and parallels the Section 6(f) conversion procedures.
4.4.13.4.5 National and State Heritage Areas

A. *National Heritage Area Act of 2006, 16 USC 461*  National Heritage Areas (NHA) are designated by Congress as places where natural, cultural, and historic resources combine to form a cohesive, nationally important landscape. Through their resources, NHAs tell nationally important stories that celebrate our nation's diverse heritage. NHAs are lived-in landscapes. Consequently, NHA entities collaborate with communities to determine how to make heritage relevant to local interests and needs. See the following link for more information on NHAs: [http://www.cr.nps.gov/heritageareas/](http://www.cr.nps.gov/heritageareas/)

B. *The New York State Heritage Areas System Act (Title G, Articles 31, 33 and 35)* of the New York State Parks, Recreation and Historic Preservation Law (PRHPL). The New York State Heritage Area System (formally known as the Urban Cultural Park System) was created by state legislation in 1982 with the combined goals of preservation, recreation, inspiration, education and economic development. NY State Heritage Areas are places that reflect the cultural themes of the State’s development including the unique qualities of geography, history and culture. In 1994, the Legislature recognized the merit of the program by amending legislation to add regional heritage areas and renaming it the New York State Heritage Areas System. The system now includes 20 heritage areas and corridors encompassing more than 20 communities in 27 counties. See the following link for more information on State Heritage Areas: [http://nysparks.com/historic-preservation/heritage-areas.aspx](http://nysparks.com/historic-preservation/heritage-areas.aspx)

4.4.13.4.6 Other Related Regulations

A. *The National Register of Natural Landmarks (NNL) (16 USC 461-467) (36 CFR §62)*

A NNL is an area designated by the Secretary of the Interior as being of National significance to the United States because it is an outstanding example of major biological and geological features found within the boundaries of the United States, its Territories or on the Outer Continental Shelf. Such designation does not change the ownership of an area, but one of the objectives of the NNL program is that owners and federal, state and local government agencies will take the designation into account when making planning or other future land use decisions. See the following link for more information on NHLs: [http://www.nature.nps.gov/nnl/](http://www.nature.nps.gov/nnl/)

NYSDOT should consider the existence and location of designated NNLs in the planning process and when assessing the effects of their activities on the environment under 102(2)(C) of the National Environmental Policy Act (NEPA) (42 USC 4321) and SEQRA Section 15.14(d)(7). Other than consideration under NEPA and SEQRA, NNLs are afforded no other special protection.

For an up-to-date list of NNLs in New York, visit the NPS NNL website: [http://www.nature.nps.gov/nnl/state.cfm?State=NY](http://www.nature.nps.gov/nnl/state.cfm?State=NY)

Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties eligible for or listed on the National Register of Historic Places. The Section 106 process must be applied to the Section 6(f) protected area being considered for conversion as well as the acquisition and development of the replacement parkland. Consult with the NYSDOT Regional Cultural Resource Coordinator for guidance on the NYSDOT’s established Section 106 procedures.

Significant historic sites, publicly or privately owned, can be identified as Section 4(f) resources. Guidance, procedures, and technical information related to historic sites are addressed in TEM Section 4.4.12, Historic and Cultural Resources

C. **National Environmental Policy Act of 1969 (NEPA)**, 42 USC §4321 through 4370(f)

A United States environmental law that established national policy promoting the enhancement of the environment and also established the President's Council on Environmental Quality (CEQ). NEPA sets up procedural requirements for all federal government agencies to prepare environmental assessments (EAs) and environmental impact statements (EISs). NEPA's procedural requirements apply to all federal agencies in the executive branch.

D. **State Environmental Quality Review Act (SEQRA)**, 17 NYCRR 15.14(d)(5), (6) & (7)(vii).

New York's State Environmental Quality Review Act (SEQR) requires all state and local government agencies to consider environmental impacts equally with social and economic factors during discretionary decision-making. This means these agencies must assess the environmental significance of all actions they have discretion to approve, fund or directly undertake. SEQR requires the agencies to balance the environmental impacts with social and economic factors when deciding to approve or undertake an "Action".

### 4.4.13.5 General Methodology Analysis and Evaluation

Any park, trail system, wildlife refuge or area in which recreational uses have been noted should be assessed for applicability of Section 4(f), Section 6(f), and Section 1010 early in the process and be revisited as the scope of the work changes.

Identification of areas to be assessed may occur through a combination of: screening with GIS or other mapping, field visits, planning documents or studies, and meetings with local officials or property owners.

Because Section 4(f) and 6(f) must be resolved prior to design approval, early coordination with officials with jurisdiction regarding the significance of the resource and the scope of NYSDOT impact to the resource, is essential.

Regardless of Section 4(f), 6(f), or 1010 applicability, NYSDOT designers should consider the impacts of any work on public recreation as part of context sensitive design.
4.4.13.5.1 Section 4(f) - Parks, Recreation Areas and Refuges

Section 4(f) applies to two categories of resources:
1. Publicly owned public parks, recreation areas, and wildlife or waterfowl refuges; and
2. Significant historic sites, regardless of whether they are publicly or privately owned.

TEM Section 4.4.13 discusses the 4(f) requirements related to:
- Parks and recreational areas of national, state, or local significance that are both publicly owned and open to the public, and
- Publicly owned wildlife and waterfowl refuges of national, state, or local significance that are open to the public to the extent that public access does not interfere with the primary purpose of the refuge.

Alert!
Some public parks, recreation areas and refuges are also historic properties either listed or eligible for listing on the NR. See Section 4.4.12.

A. Applicability of Section 4(f) - Parks, Recreation Areas and Refuges

<table>
<thead>
<tr>
<th>SCOPE</th>
<th>ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>STEP 1</td>
<td>Does Section 4(f) apply to the project? Identify whether the project will be funded by FHWA, FTA or FRA.</td>
</tr>
</tbody>
</table>

Section 4(f) is a federal requirement which applies only to programs, policies and activities undertaken by the US Department of Transportation (USDOT) (generally the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), Federal Rail Administration (FRA), etc.).

An approval is needed if the project uses Federal funding. An approval also may be needed for others reasons, even when Federal funding is not involved—for example, when a project requires FHWA approval for a change in access to the Interstate System.

Section 774.9(a) of the Section 4(f) regulations requires early consideration of Section 4(f) properties during the environmental review process. According to the statute, “The potential use of land from a Section 4(f) resource shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study”. The “as early as practicable” standard leaves the FHWA and FTA with considerable discretion, but it does signify that there should be some consideration of Section 4(f) properties when alternatives are developed.
All Section 4(f) properties should be identified as early as practicable in the planning and project development process in order that complete avoidance of the protected resources can be given full and fair consideration (See 23 CFR 774.9(a)).

B. Identification of Section 4(f) Properties

<table>
<thead>
<tr>
<th>SCOPING</th>
<th>ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STEP 2</strong></td>
<td><em>Identify any Section 4(f) properties in the immediate vicinity.</em></td>
</tr>
</tbody>
</table>

Section 4(f) applies to any “publicly owned land” of a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance.” See 49 USC §303(c). This definition actually contains four distinct qualifications: designation & purpose, public ownership, public availability, and significance. The Officials with Jurisdiction and FHWA should be consulted regarding these qualifications.

Each qualification has been interpreted and explained by FHWA and FTA in regulations and guidance. See appendix A & D. Key points are summarized below.

1. **Designation and Purpose** - According to FHWA’s Policy Paper (2011), a property is considered a park, recreation area, or refuge if meets two requirements:
   - It is officially designated as such, and
   - The “officials with jurisdiction” (OWJ) determine that one of resource’s major purposes and functions is to serve as a park, recreation area, or refuge. In some cases multiple parties may be involved. Management plans or other official forms of documentation (if available and up to date) that detail how the property is used or functions are critical in determining the property’s major purpose. In the absence of such plans the lead DOT agency must examine how the property is
being managed. The FHWA and FTA rely on the views of the official with jurisdiction, but the final decision as to park, recreation, or refuge status rests with the FHWA or FTA.

On some public lands, occasional or incidental park, recreation, or refuge activities may occur. These secondary activities do not constitute “primary purpose” within the context of Section 4(f).

![Image of bike trails]

**Figure 1:** Bike Trails are not Section 4(f) resources if their major purpose is for transportation use.

2. **Public Ownership** - Parks, recreation areas and refuges are considered “publicly owned” if they are owned by a federal, state, or local government agency. Ownership can be through fee simple acquisition, easement, or a long-term lease agreement. Determining ownership status sometimes requires a search of property records.

Section 4(f) requirements apply only to the publicly owned portions of parks, recreation areas and refuges. Therefore, if a park includes private in-holdings, the requirements of Section 4(f) would not apply to those privately owned in-holdings. Conversely, if privately owned lands are subject to an easement that makes them available for public use, those lands can be considered “publicly owned” for purposes of Section 4(f).

When private institutions, organizations, or individuals own parks, **recreational areas** or refuges, Section 4(f) does not apply, even if such areas are open to the public. However, if a governmental body has a permanent proprietary interest in the land (such as a permanent easement, or in some circumstances, a long-term lease), FHWA will determine on a case-by-case basis whether the particular property should be considered publicly owned and, thus, if Section 4(f) applies.
Figure 2: Rt. 9P, the Saratoga Lake Marine Park (southeast corner of the bridge) is publicly owned and subject to Section 4(f), the other Marinas in the picture may be privately owned and although open to the public they would not be Section 4(f) properties. (Source - Google maps)

When a publicly owned property is managed for multiple uses, including non-recreational/refuge and recreational and/or refuge purposes, Section 4(f) may apply to only the recreational and/or refuge portions of the property. The recreation areas are identified through review of a management plan and/or coordination with the officials with jurisdiction over the property. Examples of such properties include National or State Forests that may have functions such as timber management or general conservation in addition to park, recreation, or refuge purposes; and National Refuges.

- NY has one National Forest – the Finger Lakes National Forest in Cayuga County.
- See DEC’s web site for a list of NY State Forests
- National Wildlife Refuges in New York State include:
  o Amagansett National Wildlife Refuge
  o Conscience Point National Wildlife Refuge
  o Elizabeth A. Morton National Wildlife Refuge
  o Iroquois National Wildlife Refuge
  o Montezuma National Wildlife Refuge
  o Oyster Bay National Wildlife Refuge
  o Seatuck National Wildlife Refuge
Shawangunk Grasslands National Wildlife Refuge
- Target Rock National Wildlife Refuge
- Wertheim National Wildlife Refuge

Federally recognized Indian Nations/Tribes are sovereign nations and the land owned by them is not considered publicly owned within the meaning of Section 4(f). Therefore, Section 4(f) does not automatically apply to tribal land. In situations where it is determined that the property or resource owned by a Tribal Government or within an Indian Reservation functions as a significant public park, recreational area, or wildlife and waterfowl refuge (which is open to the general public), or is eligible for the NR, the land would be considered Section 4(f) resource.

The terms of a “conservation easement” on private land should be carefully examined to determine if Section 4(f) applies to the property. Factors to consider include, but are not limited to, the views of the official(s) with jurisdiction (OWJ), the purpose of the easement, the term of the easement, degree of public access to the property, how the property is to be managed and by whom, what parties obtained the easement (public agency or non-public group), termination clauses, and what restrictions the easement places on the property owner's use of the easement area. Questions on whether or not an easement conveys Section 4(f) status to a property should be referred to the FHWA Division Office.

A lease agreement between a private landowner and a governmental body may constitute a proprietary interest in the land for purposes of Section 4(f). Generally, under a long term lease to a governmental body, such land may be considered to be “publicly owned” land and if the property is being managed by the governmental body as a significant public park, recreation area, or wildlife and waterfowl refuge then a use of the property will be subject to the requirements of Section 4(f). Such lease agreements should be examined on a case-by-case basis with consideration of such factors as the term of the lease, the understanding of the parties to the lease, the existence of a cancellation clause, and how long the lease has been in place. Questions on whether or not the leasehold constitutes public ownership should be referred to the FHWA Division Office.

3. Public Availability – Parks and recreation areas must be accessible to the general public. This means that the general public is permitted to visit the property at any time during its normal operating hours. This requirement is distinct from the public ownership requirement.

In the case of parks and recreation areas, FHWA and FTA have concluded that the resources must be “open to the public” in order for them to be protected under Section 4(f). Thus, school playgrounds—which are publicly owned and clearly are recreational in nature—are considered Section 4(f) properties only if they are open to the general public after school hours.

Entrance or user fees, commonly associated with many eligible Section 4(f) properties (E.g. State & National Parks, publicly owned ski areas, historic sites, etc) do not affect
the Section 4(f) applicability. For example: Publicly owned ski areas often have fees. Nonetheless, they are considered Section 4(f) properties when open to the public and determined to be significant.

Refuges have a mandate to protect habitat and species. Public access might interfere with the purpose of the refuge. In these cases, the property should be examined by the FHWA Division Office to verify that the primary purpose of the property is for wildlife and waterfowl refuge activities and not for other non-Section 4(f) activities, and that the restrictions on public access are limited to measures necessary to protect refuge habitat or species. If so, then the property is subject to Section 4(f) notwithstanding the access restriction.

4. **Significance** – Publicly owned parks, recreation areas and refuges are considered significant unless the official with jurisdiction (OWJ) specifically finds the entire property to be insignificant (23C.F.R § 774.11(c)). Significance means that the property in question plays an important role in fulfilling the objectives of the managing authority. The significance requirement is usually met for publicly owned parks, recreation areas and refuges.

The determination of significance is made by the OWJ, but is subject to an independent evaluation by the FHWA for reasonableness. Management plans or other official forms of documentation regarding the land, if available and up-to-date, are important for determining significance and should be obtained from the OWJ(s) and retained in the project file (and if appropriate, in the Design Approval Document (DAD)). If a determination from the official(s) with jurisdiction cannot be obtained, and a management plan is not available or does not address the significance of the property, FHWA will presume the property to be significant. If FHWA’s determination contradicts and overrides that of the OWJ, note their reason in the project file and discuss it in the environmental documentation.

**Figure 3:** Entire Park must be considered when determining significance.
5. Resource Types with Special Considerations - For certain resources it is unclear whether the four criteria described above are met. Below is a list of resource types with special considerations (adapted from FHWA’s Policy Paper). The list is not exhaustive. After reading the list, if you are still uncertain whether a given property meets the four criteria, consult with FHWA.

a. Bodies of Water - Section 4(f) applies to bodies of water, or portions thereof, which are contained within the boundaries of a park, recreation area, refuge, or historic site to which Section 4(f) otherwise applies.

When bodies of water are not contained within the boundaries of a park, recreation area, refuge, or historic site, they might still be considered 4(f) resources. For example, lakes are sometimes subject to multiple, even conflicting, activities and do not readily fit into one category. Section 4(f) applies to those portions of publicly owned lakes and/or adjacent publicly owned lands that function primarily for park, recreation, or refuge purposes. Section 4(f) does not apply to those areas which function primarily for other purposes or where recreational activities occur on incidental, secondary, occasional or dispersed basis. An example of a “dispersed” activity is a lake where swimming is allowed anywhere in a lake but there is no designated public swimming facility or area.

b. Wild and Scenic Rivers (WSR) - Within National Wild and Scenic Rivers system there are wild, scenic and recreational designations. A single river can be classified as having separate or combined wild, scenic and recreation areas along the entire river. The designation of a river under the WSRA does not in itself invoke Section 4(f). In determining whether Section 4(f) is applicable to these rivers, NYSDOT will examine:

- how the river is designated,
- how the river is being used and
- the management plan over that portion of the river.

For example: If a river is designated as wild but is not being used as or designated under a management plan as a park, recreation area, or refuge and is not a historic site, then Section 4(f) would not apply.

Section 4(f) does not apply to potential WSRs (“inventory rivers”) and adjoining lands. Privately owned lands in a WSR corridor are not subject to Section 4(f), except for significant historic and archeological sites when important for preservation in place.

Where the management plan does not identify specific functions, or where there is no plan, NYSDOT must consult further with the official with jurisdiction (OWJ) prior to making the Section 4(f) determination. For those portions of a WSR to which Section 4(f) applies, the OWJ are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State
administered, federally designated rivers the OWJ include both the State agency designated by the respective Governor and the Secretary of the Interior.

c. **New York State’s Wild, Scenic and Recreational Rivers System Act** - Federally funded projects may be subject to the requirements of Section 4(f) when they are within the boundaries of a designated Wild, Scenic or Recreational River, or within the corridor of the river that requires the “use” of publicly owned parks, recreational areas, or historic sites. In determining whether Section 4(f) is applicable to these portions of the river corridor, NYSDOT will examine:
   1. how the river is designated,
   2. how the river is being used and
   3. the management plan over that portion of the river.

If a Project Manager is not certain whether a designated river segment is subject to Section 4(f), they should consult with the river administering agency.

d. **Cemeteries** - Cemeteries would only be considered Section 4(f) properties if they are determined to be on or eligible for the National Register of Historic Places (NR) as historic sites.

e. **Fairgrounds** - Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g. stock car races, horse racing, county or state fairs), rather than as parks or recreational areas. When fairgrounds are open to the public and function primarily for public recreation Section 4(f) applies only to those portions of land determined significant for park or recreational purposes, unless they are on or eligible for the NR as historic sites.

![Figure 4: Franklin County Fairgrounds, Malone, NY](image)

f. **Golf Courses** - Section 4(f) applies to golf courses that are owned, operated and managed by a public agency for the primary purpose of public recreation and determined to be significant. Section 4(f) does not apply to privately owned and operated golf courses even when they are open to the general public. Golf courses
that are owned by a public agency but managed and operated by a private entity may still be subject to Section 4(f) requirements.

The fact that greens-fees or reservations (tee times) are required by the facility does not alter the Section 4(f) applicability, as long as the standards of public ownership, public access and significance are met.

Some golf courses are also historic sites. If a golf course is on or eligible for listing in the NR, then the Section 4(f) requirement for public ownership and public access will not apply.

Military golf courses are publicly owned (by the Federal Government) but are not typically open to the public at large. Because the recreational use of these facilities is limited to active duty and retired military personnel, family, and guests they are not considered to be public recreational areas and are not subject to the requirements of Section 4(f), unless they are significant historic sites.

g. **Museums, Aquariums, and Zoos** - Publicly owned museums, aquariums, and zoos are not normally considered parks, recreational areas or refuges and are therefore not subject to Section 4(f), unless they are significant historic sites.

They may also provide park or recreational opportunities and will need to be evaluated on a case-by-case basis to determine if the primary purpose of the resource is to serve as a significant park or recreation area in which case Section 4(f) would apply.

h. **Park roads and parkways projects funded under FHWA's Federal Lands Highway Program** - Park roads and parkways projects funded under FHWA's Federal Lands Highway Program, 23 USC § 204, are exempt from Section 4(f) requirements within the Section 4(f) statute itself and by 23 CFR 774.13(e).

A park road is “a public road, including a bridge built primarily for pedestrian use, but with capacity for use by emergency vehicles, that is located within, or provides access to, an area in the National Park System with title and maintenance responsibilities vested in the United States” and a parkway is a road “authorized by Act of Congress on lands to which title is vested in the United States” (23 USC § 101(a)).

i. **Planned Section 4(f) Properties** - Requirements of Section 4(f) apply to publicly owned properties planned for park, recreation area, or wildlife refuge and waterfowl refuge purposes, even though they are not presently functioning as such. Section 4(f) applies when the land is presently publicly owned and the public agency that owns the property has formally designated (e.g. master plan) and determined it to be significant. An expression of interest or desire is not sufficient.
j. **Scenic Byways** - The designation of a road as a scenic byway is not intended to create a park or recreation area within the meaning of Section 4(f). The reconstruction, rehabilitation, or relocation of a publicly-owned scenic byway would not trigger Section 4(f) unless they are identified as historic sites that have been determined to be eligible for or listed on the National Register, in which case see TEM Section 4.4.12.

NY State’s historic sites that are also Scenic Byways are:

- Palisades Scenic Byway
  - From George Washington Bridge north to Queensboro Circle, east to Bear Mountain Bridge and west to NY Rte. 293
- Portions of the Taconic State Parkway, Columbia, Dutchess, Putnam, and Westchester Co.
  - From Kensico Dam Plaza north to I-90
- Jones Beach Parkway System, Long Island
  - Includes Ocean, Wantagh, Meadowbrook, Bay, and Loop Parkways, Towns of Hempstead and Oyster Bay, Nassau Co.
- Robert Moses State Causeway, Islip, Suffolk Co.
- Bethpage State Parkway, Oyster Bay, Nassau Co.
- Bronx River Parkway, Westchester Co. Section
- Portions of the Great Lakes Seaway Trail
  - Includes the Lake Ontario State Parkway from Lake Avenue in the City of Rochester, Monroe Co. to NY 18/Lakeside Beach State Park

k. **School Playgrounds** - While the **primary purpose** of public school playgrounds is generally for structured physical education classes and recreation for students, these properties **may also serve significant public recreational purposes and therefore may be subject to Section 4(f) requirements**. When a public school playground serves only school activities and functions, the playground is not subject to Section 4(f). When a public school playground is open to the public and serves either organized or substantial walk-on recreational purposes that are determined to be significant, it will be subject to the requirements of Section 4(f). The actual function of the playground is the determining factor in these circumstances. Documentation should be obtained from the officials with jurisdiction (OWJ) over the facility stating whether or not the playground is of local significance for recreational purposes.

There may be more than one OWJ over a school playground. A school official is considered to be the official with jurisdiction of the land during school activities. However, in some cases a school board may have authorized another public agency (e.g., the city park and recreation department) to control the facilities after school hours. In such cases, the public agency with authority to control the playground would be considered an OWJ with regard to any after-hours use of the playground. The FHWA is responsible for determining which official or officials have jurisdiction over a playground.

The term **playground** refers to the area of the school property developed and/or used for public park or recreation purposes such as baseball diamonds, soccer fields, tennis...
courts, track and field facilities, and other features such as jungle gyms or swing sets. This can also include open space or practice fields if those areas serve a park or recreation function. Section 4(f) would apply to the playground areas only and not the entire campus, unless the school and campus are also significant historic sites.

Figure 5: This school playground is not a Section 4(f) property as it is fenced in and locked up during non-school hours.

1. **Temporary Recreational Occupancy or Use of Highway Rights-of-Way** - FHWA must comply with 23 CFR 774.11(h) when determining the applicability of Section 4(f) to non-park properties that are temporarily functioning for recreation purposes. In situations where NYSDOT land owned is designated for future transportation purposes (including highway rights-of-way) is temporarily occupied or being used for either authorized or unauthorized recreational purposes such as camping or hiking, Section 4(f) does not apply.

   For authorized temporary occupancy of transportation rights-of-way for park or recreation purposes, it is advisable to make clear in a limited occupancy permit, with a reversionary clause that no long-term right is created and the park or recreational activity is a temporary one that will cease once completion of the highway or transportation project resumes.

m. **Shared Use Paths and Trails** – “Shared use paths” used primarily for transportation and considered an integral part of the local transportation system are not subject to the requirements of Section 4(f). When it is determined during consultation that the primary purpose of the shared use path is recreation (e.g. stated in a management plan), the requirements of Section 4(f) do apply.

   Publicly owned “Trails” function primarily for recreation and are subject to Section 4(f) requirements. Section 4(f) generally does not apply to trails on privately owned
land including land under public easement and designated as scenic or recreational trails. However, because Section 4(f) could apply if an existing public easement permits public access for recreational purposes, FHWA should be consulted regarding the applicability of these lands.

Specific trail designations that may have 4(f) implications are described below.

- **The National Trails System Act** permits the designation of scenic, historic, and recreation trails - National Scenic Trails (other than the Continental Divide National Scenic Trail) and National Recreation Trails that are on publicly owned recreation land are subject to Section 4(f), provided the trail physically exists on the ground thereby enabling active recreational use. National Water Trails are a subset of National Recreational Trails and are discussed separately.

National Historic Trails "follow as closely as possible and practicable the original trails or routes of travel of national historical significance." National Historic Trails are exempt from Section 4(f). However, they may include trail segments (including similar components such as trail buffers or other adjacent sites that were acquired to complement the trails) that are on or eligible for the NR are subject to Section 4(f) (See TEM Section 4.4.12).

In New York, the following Trails are designated under the National Trail System Act:
  - North Country National Scenic Trail (Regions 1, 2,3,4,5 & 6) [http://www.nps.gov/noco/index.htm](http://www.nps.gov/noco/index.htm)
  - Washington-Rochambeau Revolutionary Route National Historic Trail (Region 8) [http://www.nps.gov/waro/index.htm](http://www.nps.gov/waro/index.htm)

- **National Water Trails System**
  The National Water Trails System is a recently designated subset of the National Recreational Trails and must meet the same requirements in order for 4(f) to be applicable (on publically owned recreation land and provided the trail physically exists). A local management entity is designated for each trail, while the National Park Service (NPS) Rivers, Trails, and Conservation Assistance Program (RTCA) is the primary administrator.

There are two Water Trails designated by the Secretary of the Interior within New York State: The Hudson River Greenway Water Trail and the Bronx River Blueway. To check the current designated trails visit: [http://www.nps.gov/WaterTrails/Trail](http://www.nps.gov/WaterTrails/Trail)
  - Hudson River Greenway Water Trail
The Hudson River Greenway Water Trail is in Regions 1, 8, and 11. The water trail includes a 256-mile stretch of the Hudson River from Lake Champlain to Manhattan. It includes 94 designated access sites, wildlife marshes, islands, historic sites, cities, downtowns, and hiking trails and is locally managed by the Hudson River Valley Greenway. 
http://www.hudsongreenway.ny.gov/trailsandscenicbyways/watertrail.aspx

- **Bronx River Blueway**
  The Bronx River Blueway is in NYSDOT Region 11. It passes directly through the New York Botanical gardens, the Bronx River Forest, cityscapes, and the Bronx Zoo and offers a variety of recreational and cultural opportunities and events. The Bronx River Blueway extends for 8 miles, from Shoelace Park near 219th Street to Soundview Park at the estuary to Long Island Sound. It is managed by City of New York Parks and Recreation and the Bronx River Alliance.
  http://watertrails.nps.gov/WaterTrails/Trail/Info/33

- **Recreational Trails Program (RTP)**
  The RTP is an assistance program of the FHWA. RTP provides funds to the States to develop and maintain recreational trails and trail-related facilities for both non-motorized and motorized recreational trail uses. Trail-related projects funded under the Recreational Trails Program (RTP) are exempt from the requirements of Section 4(f) by statute. The exemption is limited to Section 4(f) and does not apply to other environmental requirements, such as NEPA or the NHPA. The Recreational Trails Program Project Database lists most RTP projects funded from 1993 through the most recent grant year. The Coalition for Recreational Trails (CRT) compiled this database from information supplied by State Trail Administrator at NYSOPRHP. Consult the administrator if the trail shown in the database has additional funding source. Other funding sources may trigger 4(f) and exclude them from the RTP 4(f) exemption.

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2 Please note that the Hudson River Greenway was formed by NYS under the Hudson River Valley Greenway Act of 1991 and while it manages the Water Trail, also includes broader areas of interest.
C. Assessing “Use” of Section 4(f) Properties

Alert!
Before an alternative involving the “use” of a Section 4(f) resource can be selected, avoidance alternatives and minimization measures must be considered. As soon as a potential Section 4(f) use is identified, avoidance alternatives should be considered (whether in scoping or preliminary design). Avoidance alternatives will be discussed in Section D.

Once Section 4(f) properties have been identified in the study area, it is necessary to determine if they would be used by any alternative being carried forward for detailed study. A “use” of Section 4(f) property as defined in 23 CFR 774.17 occurs when:

- Land is permanently incorporated into a transportation facility;
- There is a temporary occupancy of land that is adverse and does not meet the Section 4(f) conditions under 23 CFR 774.13(d); or
- There is a constructive use of a Section 4(f) property; or
- The project includes other considerations as described in Appendix I.

⚠️- Incorporate All Possible Planning
Do not substitute similar terminology such as “affected”, “impacted”, or “encroached upon” in describing when a use occurs, as this may cause confusion or misunderstanding. Remember the type of use, if any, must be assessed and documented for each Section 4(f) resource.

In making any finding of use involving Section 4(f) properties, it is necessary to have up to date right-of-way information and clearly defined property boundaries for the Section 4(f) properties. For publicly owned parks, recreation areas and refuges, the boundary of the Section 4(f) resource is generally determined by the property ownership boundary.

Exceptions and Determinations that there is No Use
There are specific instances of involvement with 4(f) properties that are not considered use and these are listed as exceptions in 23 CFR 774.13. All supporting documentation must be included in the project file (and if appropriate, in the DAD). This documentation includes letters from the official with jurisdiction (OWJ) and descriptions of why the particular exclusion applies.

Types of Use under Section 4(f) (adapted from FHWA’s Policy Paper)

1. **Permanent Incorporation:**
   Land is considered permanently incorporated when it is taken out of recreational use and put into transportation use. This occurs when it has been purchased as right-of-way or sufficient property interests have otherwise been acquired for the purpose of project implementation. For example, a permanent easement required for the purpose of project construction or that grants a future right of access onto a Section 4(f) resource, such as for the purpose of routine maintenance, would be considered a permanent incorporation of land into a transportation facility. This is considered a “direct use”.

2. **Temporary Occupancy:**
   Temporary occupancy, as defined by Section 4(f), includes but is not limited to, right-of-entry, project construction, a temporary easement, or other short-term arrangement involving a Section 4(f) resource. Temporary occupancy may or may not result in a use. Conditions must be evaluated on a case-by-case basis to determine whether or not a particular activity constitutes use of a Section 4(f) resource.

   A temporary occupancy **will constitute a Section 4(f) “use”** when any of the conditions below, adapted from 23 CFR 774.13(d), are met:
   a. Duration of occupancy is not “temporary” (e.g. is equal to, or greater than, the time needed for project construction),
   b. There will be a change in land ownership;
   c. Scope of the work is not minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) resource are not minimal;
   d. There are anticipated permanent adverse physical impacts, or there will be interference\(^3\) with the protected activities, features, or attributes of the resource, on either a temporary or permanent basis;

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\(^3\) Interference should consider the primary overall purpose of the Section 4(f) resource determination. Working off season or when the property is not open to the public usually would not interfere with its primary purpose. (E.g. warm water fishing access or an outdoor pool in the winter, outdoor skating rink)
e. The land being used cannot be fully restored, i.e., the resource cannot be returned to a condition which is at least as good as that which existed prior to the project; and

A temporary occupancy will not constitute a “use” when none of the above conditions apply. However, the agreement of the OWJ and FHWA must be obtained. Document these agreements and no further processing is required.

**Alert!**
For the remainder of this section, the term temporary occupancy will be used to mean a temporary occupancy which constitutes a “use” of Section 4(f) resource. This is considered a “direct use”.

In those cases where a temporary occupancy constitutes a use of Section 4(f) resource and the de minimis impact criteria are also met, a de minimis impact finding may be made. De minimis impact findings should not be made in temporary occupancy situations that do not constitute a use of Section 4(f) resource. This is discussed further in Section E.

**Tip:**
Temporary occupancies may be considered a Section 4(f) use if the land is subject to temporary or permanent adverse changes, such as contour alterations, removal of mature trees and other vegetation, or disruption of facilities or activities on the resource.

3. Constructive Use:
FHWA must comply with 23 CFR 774.15 to determine if a constructive use of a Section 4(f) resource occurs. Constructive uses are indirect impacts. These are rare cases, only possible in the absence of a permanent incorporation of land or temporary occupancy and require early consultation with FHWA. When a constructive use determination seems likely, the FHWA Division Office is required to consult with FHWA Headquarters and Counsel before the determination is finalized.

**Alert!**
Constructive use most often occurs as result of noise or visual impacts.

Constructive use occurs when, after incorporation of impact mitigation, the proximity impacts of a project on an adjacent or near-by Section 4(f) resource are so severe that the activities, features, or attributes that qualify the resource for protection under Section 4(f) are substantially impaired. Substantial impairment occurs when the protected activities, features, or attributes of the Section 4(f) resource are diminished to the extent that the value of the resource, in terms of its Section 4(f) purpose and significance, will be meaningfully (noticeably) reduced or lost. At a national level, FHWA considers the issue of constructive
use very carefully; substantial impairment is a strict standard and a finding of constructive use is rare.

Proximity impacts must be evaluated for each Section 4(f) property on each project alternative. The impact evaluation shall address the following:

- The facilities, functions, and/or activities potentially affected
- Access
- Visual impacts
- Noise
- Vibration
- Vegetation
- Wildlife
- Air quality
- Water quality

For example: A road widening adjacent to an outside amphitheatre when projected traffic noise levels interfere with performances could affect the attributes for the Section 4(f) resource and would be considered a “constructive” use.

**Tip:**
The assessment of *each* Section 4(f) resource results in only one type of “use”. For example: when a permanent incorporation of a Section 4(f) resource occurs, the indirect and proximity impacts are discussed as part of the overall evaluation, but this is not also advanced as a “constructive use”.

The degree of impact and impairment must be determined in consultation with the OWJ. When a potential constructive use can be reduced to less than a substantial impairment by mitigation measures, there will be no constructive use and Section 4(f) will not apply unless there are other Section 4(f) uses of that resource.

The Section 4(f) regulations identify specific project situations where constructive use would and would not occur (e.g. noise impacts, viewsheds, aesthetics, vibration, etc.). The analysis of proximity impacts and potential constructive use will be documented in the project file (and a summary included in the DAD). Documentation of a finding of *no constructive use* should apply the legal standards and terminology used in 23 CFR 774.15, *Constructive Use Determinations*.

*A de minimis impact finding is inappropriate when a project results in a constructive use.* This is because *a de minimis* impact finding can only be made when the transportation use does not adversely (substantially) affect the qualifying activities, features, or attributes of a resource (See 23 CFR 774.3(b) and the definition of *de minimis* impact in 774.17).
4. Other Considerations

A wide range of unique situations may also result in a use of a Section 4(f) resource. These are referred to broadly as "Other Considerations" and are discussed in more detail in Appendix I.

- Joint Development
- Air Rights/Tunneling
- Temporary Recreational Occupancy
- Late Discovery
- Late Designation

- Mitigation Activities
- Boat Access Ramps
- Trails
- Transportation Enhancement Projects

D. Avoidance & Minimization

Avoidance alternatives and minimization measures must be considered before an alternative involving the use of a Section 4(f) resource can be selected.

Alert!
For *de minimis* impacts, mitigation measures should be taken into account in making the determination.

1. Avoidance

Avoidance alternatives are those that do not result in any use of Section 4(f) properties while meeting the defined project needs. Avoidance alternatives should consider minor alignment shifts, reduced cross-sections, retaining structures, modifications to the project and so forth.

*The avoidance alternative must be selected if it is determined to be feasible and prudent.* A feasible and prudent avoidance alternative avoids using Section 4(f) resource and does not cause other problems (environmental issues) that outweigh the importance of protecting the Section 4(f) resource. Consider the relative value of the resource when assessing the importance of protecting the Section 4(f) resource.

Avoidance alternatives that are eliminated from detailed study should be discussed in the Section 4(f) evaluation with a clear explanation of why they are not feasible and prudent. When the alternatives under consideration “use” land from one or more Section 4(f) properties, alternatives that avoid each of the properties must be developed and evaluated.

TIP:
Care should be taken to demonstrate consistent application of design standards throughout the project. For example, it would make no sense to propose the use of a reduced median width and narrower shoulders to minimize impacts to a wetland, while failing to apply the same logic to protect a Section 4(f) municipal park.
The regulations 23 CFR 774.17 set out factors to consider in determining whether an avoidance alternative is feasible and prudent:

1. An alternative is not \textit{feasible} if it cannot be built as a matter of sound engineering judgment.

2. An alternative is not \textit{prudent} if it is unreasonable to proceed because:
   a. It compromises the stated purpose and need of the project;
   b. It results in unacceptable safety or operational problems;
   c. After reasonable mitigation, it still causes:
      i. Severe social, economic, or environmental impacts;
      ii. Severe disruption to established communities;
      iii. Severe disproportionate impacts to minority or low income populations; or
      iv. Severe impacts to environmental resources protected under other Federal statutes;
   d. It results in additional construction, maintenance, or operational cost of an \textit{extraordinary magnitude};
   e. It causes other unique problems or unusual factors; or
   f. It involves multiple factors listed above, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

Unique problems may include unacceptable social, economic or environmental impacts; serious community disruption; unacceptable safety or geometric problems; or excessive construction costs. An accumulation of these problems (as opposed to a single factor) may be a sufficient reason to use a Section 4(f) resource, but only if the problems are truly unique.

Excessive cost alone will not necessarily prevent an alternative from being considered \textit{prudent}.

Example: Considering a “tunnel” alternative may result in a determination of not prudent based on environmental, cost and construction impacts.

A determination of an alternative's feasibility and prudence must take into account not only the impacts to Section 4(f) properties, but also the impacts to non-Section 4(f) properties, as well as the importance of the need for the project itself. Impacts associated with one alternative must also be compared to the impacts associated with other alternatives. This process is critical for determining whether an avoidance alternative is feasible and prudent. Other factors, such as the demographic nature of impacted neighborhoods, historic status, or even density of development may influence a different conclusion. For instance, an avoidance alternative that requires a smaller number of displacements, but a greater percentage of homes from a minority community, may not be considered feasible and prudent when compared with an alternative that uses Section 4(f) resource but requires fewer overall displacements from non-minority communities.
2. Minimization

Once it has been determined that no feasible and prudent avoidance alternative exists, minimization efforts should be pursued. Minimization entails measures to reduce the impact to Section 4(f) properties for all remaining alternatives. Minimization measures could in some cases change the “use” determination. Minimization of harm may entail both alternative design modifications that reduce the amount of Section 4(f) property used and mitigation measures that compensate for residual impacts. Minimization measures should be determined through consultation with the OWJ.

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**Five Levels of Determination**

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>No 4(f)</td>
<td>No impacts to an existing 4(f) property OR property is not subject to 4(f)</td>
</tr>
<tr>
<td>“No Use”</td>
<td>No incorporation of land from a 4(f) property into a transportation facility</td>
</tr>
<tr>
<td><em>de minimis</em></td>
<td>“Use” but because of avoidance, minimization, or mitigation, there is no adverse effect on the attributes or functions of the 4(f) property</td>
</tr>
<tr>
<td>Programmatic Evaluation</td>
<td>Minor “Use” of a 4(f) property that meets criteria established by FHWA</td>
</tr>
<tr>
<td>Individual Evaluation</td>
<td>“Use” of a 4(f) property that does not meet Programmatic Evaluation Criteria</td>
</tr>
</tbody>
</table>

*Figure 6: FHWA training module graphic*
E. Evaluation and Determinations

The term “Section 4(f) evaluation” refers to a document “prepared to support the granting of a Section 4(f) approval under Section 774.3 (a)”.

While the Department prepares the documentation necessary for FHWA to make a Section 4(f) approval, the actual approval action is the FHWA's responsibility. The three approval options set out in 23 CFR 774.3 are:

1. **De minimis** finding
2. Section 4(f) programmatic evaluations
3. Individual Section 4(f) evaluation

See 4.4.13.7.1E for guidance regarding appropriate documentation of these determinations.

1. **Determination of a de minimis Impact to Section 4(f) Parks, Recreation Areas and Refuges**

### STEP 4.a

**Assess whether any/all of the Section 4(f) uses are de minimis.**

- **Document & send to appropriate official/agency for approval. No further analysis required unless there are changes that affect the 4(f) properties.**
  - Yes: End of Process
  - No: For Historic Sites see FHWA 2011 Letter

- **Would the project have no more than a de minimis impact?**
  - Yes:
    - Document & send to appropriate official/agency for approval (23 CFR 774.3(b) & 7(b))
    - Yes: End of Process
  - No:
    - Prepare 4(f) evaluation (23 CFR 774.3(a), 5(a), 7(a)
    - End of Process

**- Incorporate All Possible Planning**
A *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation or enhancement measures), results in a determination that the transportation “use” would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under Section 4(f). 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.

When *de minimis* is applicable it should be the first choice, since an avoidance alternatives analysis applying the feasible and prudent standard is not required for *de minimis* uses.

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**Alert!**
The definition of *de minimis* is different for historic sites than it is for park, recreation, and wildlife and waterfowl refuges. See Section 4.4.12.

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A *de minimis* impact determination may be made for a permanent incorporation or temporary occupancy of Section 4(f) resource.

For parks, recreation areas and refuges, a use is considered *de minimis* when it is determined that:

- The net impact of the transportation “use” of the resource, with avoidance, minimization, or mitigation incorporated, would not adversely affect the activities, features and attributes that qualify the resource for protection under Section 4(f),
- The OWJ over the resource agree, in writing, that the use will not adversely affect the features and attributes of the resource, and they are informed by the FHWA or FTA of their intent to make a *de minimis* finding based on that agreement, and
- The public has been provided an opportunity to review and comment on the effects of the project on the protected activities, features, and attributes of the Section 4(f) resource.

The public must be informed of the *de minimis* determination and given an opportunity to comment on the decision. The public notice and opportunity for comment as well as the concurrence for a *de minimis* impact determination may be combined with similar actions undertaken as part of the NEPA process. The 4(f) resource should be identified in the combined NEPA/4(f) public notice.

---

**Alert!**
If a proposed action does not normally require public involvement, such as for certain minor projects covered by a categorical exclusion, an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided. This may be part of a public meeting or another form of public involvement (e.g. newsletter, city council meeting or project open house).
A *de minimis* impact determination is a finding. It is not an evaluation of alternatives and no avoidance or feasible and prudent avoidance alternative analysis is required. The definition of all possible planning in 23 CFR 774.17 explains that a *de minimis* impact determination does not require the traditional second step of including all possible planning to minimize harm because avoidance, minimization, mitigation, or enhancement measures are included as part of the determination.

FHWA makes the *de minimis* determination based on a review of the project documentation provided by NYSDOT. This is accomplished through approval of a Design Approval Document (DAD), or separately, in which case, the FHWA Area Engineer would approve the *de minimis* determination. See 4.4.13.7E for guidance regarding appropriate documentation of this determination.

For example: A playground at a public park should be distinguished from parking facilities. While a minor but adverse effect on the playground is not considered a *de minimis* impact under Section 4(f), an encroachment on the parking lot may be deemed *de minimis*, as long as the public's ability to access and use the site is not reduced.

---

**STEP 4.b**

*Check to see whether one of the Programmatic Section 4(f) Evaluations applies.*

<table>
<thead>
<tr>
<th>Select this alternative</th>
<th>Is there a prudent and feasible avoidance alternative? (23 CFR 774.17)</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Document &amp; send to FHWA for approval.</td>
<td>If more than one alternative, select alternative with the least overall harm. (23 CFR 774.17)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

⚠️- Incorporate All Possible Planning

---

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

There are five (5) nationwide programmatic evaluations:
- Transportation Projects That Have a Net Benefit,
- Independent Walkway and Bikeways Construction Projects
- Use of Historic Bridges; (discussed in Section 4.4.12)
- Minor Involvement with Historic Sites; (discussed in Section 4.4.12) and
- Minor Involvement with Parks, Recreation Areas, and Waterfowl and Wildlife Refuges;

Links to the programmatic evaluations can be found on the [Nationwide Section 4(f) Programmatic Evaluations page](#) on the FHWA website.
The Nationwide Programmatic Section 4(f) Evaluations are a time-saving procedural option that were developed for Section 4(f) use situations that tend to occur frequently and are minor. They provide the capability to make determinations on projects having minor impacts on Section 4(f) properties. For each programmatic evaluation, a Section 4(f) evaluation was written for the generic situation and published in the Federal Register for review and comment. A legal sufficiency review was conducted for the evaluations, comments were addressed, and the programmatic was approved. When applying a particular Section 4(f) programmatic evaluation to a specific project, it is only necessary to show that the criteria of the programmatic evaluation are met for your project.

Programmatic evaluations can be nationwide, region-wide, or statewide. The development of any programmatic evaluation, including region-wide and statewide, must be coordinated with the FHWA. For example, New York State has a statewide 4(f) programmatic for Canal Bridges concerning their historic 4(f) processing.

Programmatic Section 4(f) evaluations are neither a form of automatic compliance with the statute nor a waiver of it. As such, an avoidance alternatives analysis applying the feasible and prudent standard is still required for each of the Section 4(f) programmatic evaluations. The evaluations can save time because a project-specific 45-day review and comment period (US Department of Interior or other external agency review) and a FHWA legal sufficiency review are not required. The level of analysis and effort required to prepare a programmatic evaluation is usually equivalent to a Section 4(f) Evaluation.

NYSDOT staff must contact the FHWA Area Engineer to discuss whether a Nationwide Section 4(f) Programmatic Evaluation applies. Approval for programmatic evaluations that are integrated in a NEPA document (EA or EIS) will occur upon FHWA’s approval of the accompanying DAD. If the NEPA determination is a categorical exclusion, FHWA must approve the use of the programmatic evaluation separately. A copy of the programmatic’s negative declaration/ Section 4(f) statement (which is located on the Nationwide Section 4(f) Programmatic Evaluations page) should be placed in the DAD and/or the individual project file. An approval letter from the OWJ is required and should be included in the DAD and/or individual project file. The programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

See 4.4.13.7.1E for guidance regarding appropriate documentation of this determination.

a) Independent Bikeway or Walkway Construction Projects – This programmatic only applies to stand-alone bikeway or walkway projects that impact recreation and park areas for active recreation and open space. This means highway construction projects which provide bicycle or pedestrian facilities in contrast to a project whose primary purpose is to serve motorized vehicles. This programmatic does not require a consideration of avoidance alternatives and cannot be used for projects being processed with an EIS. The OWJ 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.

b) **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. This programmatic evaluation **cannot be used for projects being processed with an EIS**. The public park, recreation lands, or wildlife and waterfowl refuge must be located adjacent to the state highway. Such projects include:
- 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 projects that impair the intended use of the remaining Section 4(f) land.

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

c) **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 Net Benefits programmatic evaluation can be used with all NEPA processing options. The Official with Jurisdiction (OWJ) over the Section 4(f) lands must agree, in writing, with the impact assessment and the proposed mitigation.

A "net benefit" is achieved when the project, with mitigation, results in an overall enhancement of the Section 4(f) resource when compared to present condition of the 4(f) resource, do nothing alternative, and avoidance alternatives. A project does not achieve a
"net benefit" if it will result in a substantial diminishment of the function or value that made the property eligible for Section 4(f) protection.

When there are uses that are not *de minimis* or one or more of the programmatic evaluations do not apply, then an individual Section 4(f) evaluation must be prepared.

### STEP 4.c

**Complete an individual Section 4(f) evaluation.**

- Select this alternative
- Is there a prudent and feasible avoidance alternative? (23 CFR 774.17)
- If more than one alternative, select alternative with the least overall harm (23 CFR 774.2(c)).
- Prepare 4(f) evaluation (23 CFR 774.3(a), 5(a), 7 & 9)
- Document & send to FHWA for approval. No further analysis required unless there are changes that affect the 4(f) properties.
- End of Process

- Incorporate All Possible Planning

### 3. Individual Project Section 4(f) Evaluations

An individual Section 4(f) evaluation must be completed if the use results in a greater than *de minimis* impact and a programmatic Section 4(f) evaluation cannot be applied (23 CFR 774.3). The individual Section 4(f) evaluation documents the evaluation of the proposed use of Section 4(f) properties for all alternatives. The individual Section 4(f) evaluation requires two findings:

- That there is **no feasible and prudent alternative** that completely avoids the use of Section 4(f) resource; and
- That the project includes **all possible planning** to minimize harm to the Section 4(f) resource resulting from the transportation use (See 23 CFR 774.3(a)(1) and (2)).

See 4.4.13.7.1E for guidance regarding appropriate documentation of this determination.

### STEP 4.c.1

**Make and document a Feasible and Prudent Finding.**

- **Feasible and Prudent Finding:**
  - Determine whether a feasible and prudent avoidance alternative exists.
  - Identify a reasonable range of project alternatives, including those that avoid using Section 4(f) resource. The no-action or no-build alternative is an avoidance alternative that should always be included in the analysis.
2) Determine, for each potential avoidance alternative, whether avoiding the Section 4(f) resource(s) is feasible and prudent. The Section 4(f) regulations specify how FHWA is to determine whether a potential avoidance alternative is feasible and prudent in 23 CFR 774.17. In order to determine whether there are other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) resource, both the feasibility and the prudence of each potential avoidance alternative must be considered.

3) Determine if a potential avoidance alternative is prudent. An alternative is not prudent if:
   - The alternative doesn't address the purpose and need of the project
   - It results in unacceptable safety or operational problems
   - After mitigation, an alternative still causes severe social, economic, or environmental impacts (e.g. disruption to established communities or disproportionate impacts to minority or low-income populations)
   - It results in additional construction, maintenance, or operational costs of extraordinary magnitude
   - It causes other unique problems or unusual factors
   - It involves multiple factors that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

The prudence determination involves an analysis that applies each of the six factors, if applicable, to the potential avoidance alternative. If a factor is not applicable FHWA recommends simply noting that fact in the analysis.

If there is a feasible and prudent avoidance alternative the Department must select it, document and send to FHWA for approval. No further analysis is needed unless there is a change to the project that results in a use of 4(f) resource.

| STEP 4.c.2 | Make and document a finding of all possible planning to minimize harm. |

b. Least Overall Harm
   If multiple alternatives under consideration result in use of Section 4(f) resource and no feasible and prudent avoidance alternatives exist, the alternative that will cause the least overall harm (after factoring in mitigation measures) must be selected. The least overall harm is determined by balancing the following factors:
   - The ability to mitigate adverse impacts to each Section 4(f) resource (including any measures that result in benefits to the resource);
   - The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) resource for protection;
   - The relative significance of each Section 4(f) resource;
   - The views of the official(s) with jurisdiction over each Section 4(f) resource;
   - The degree to which each alternative meets the purpose and need for the project;
• After reasonable mitigation, the magnitude of any adverse impacts to properties not protected by Section 4(f); and
• Substantial differences in costs among the alternatives.

The alternative selected must include all possible planning to minimize harm as determined through consultation with the official(s) with jurisdiction. Such minimization measures may include (but are not limited to) the following:
• minor alignment adjustments or shifts
• a commitment to off-season construction (no construction on recreational facilities during high use periods)
• reduction of design speed
• retaining walls
• narrowing of typical sections

When considering minimization measures, be sure to note that not all uses of a Section 4(f) resource are necessarily equal. Impacts may vary according to a number of factors, including the following:
• size of use
• location of use
• severity of use
• function of the portion used
• function of the remaining land after use and mitigation

These factors determine the level of impact on a resource. Again, the selected alternative must be the one that causes the least overall harm to Section 4(f) resource. Size of the impact could be less important than the specific location of an impact.

For example: If one alternative catches the edge of a Section 4(f) resource and another bisects it, assuming all other factors are equal, then the one on the edge must be selected. The decision must be made in coordination with the OWJ.

Not all Section 4(f) resources are equal. Considering the function of each Section 4(f) resource, comparing impacts, and applying reasonable minimization approaches to help minimize harm in light of the balancing factors should determine which alternative is considered the most appropriate. For example: if a project may either impact a portion of a 4(f) resource with open space or with a baseball field, assuming all other factors are equal, the alternative impacting the open space must be selected. The decision must be made in coordination with the OWJ(s).

Any de minimis impacts are unlikely to be significant differentiating factors between alternatives in the least overall harm analysis because the net harm resulting from any de minimis impacts is negligible.

The determination of least overall harm will depend upon a comparison of the factors listed in the regulation, 23 CFR 774.3(c)(1). Identify which alternative has the least overall harm.
Document the methodology including discussions with FHWA and OWJ(s) within the individual evaluation.

F. Coordination with Official with Jurisdiction (OWJ)
The regulations require coordination with the OWJ for the following situations prior to Section 4(f) approval (recognizing that additional coordination may be required under other statutes or regulations):

- Prior to making approvals, (23 CFR 774.3(a));
- Determining least overall harm, (23 CFR 774.3(c));
- Applying certain programmatic Section 4(f) evaluations, (23 CFR 774.5(c));
- Applying Section 4(f) to properties that are subject to Federal encumbrances, (23 CFR 774.5(d));
- Determining if a resource is significant, (23 CFR 774.11(c));
- Determining application to multiple-use properties, (23 CFR 774.11(d));
- Determining constructive use, (23 CFR 774.15(d));
- Determining if proximity impacts will be mitigated to equivalent or better condition, (23 CFR 774.15(f)(6)); and
- Evaluating the reasonableness of measures to minimize harm, (23 CFR 774.3(a)(2) and 774.17).

G. Concurrence with Official with Jurisdiction (OWJ)
The regulations require written concurrence of the official(s) with jurisdiction in the following situations:

- Finding there are no adverse effects prior to making de minimis impact findings, (23 CFR 774.5(b));
- Applying the exception for temporary occupancies, (23 CFR 774.13(d)); and
- Applying the exception for transportation enhancement activities and mitigation activities, (23 CFR 774.13(g)).

H. Public Involvement
Section 4(f) requires public notice and public involvement for:

- De minimis determinations
- Net Benefit to a Section 4(f) Property (Programmatic Evaluation)
- Individual 4(f) finding

While mandated for these three findings, public involvement should be appropriate to the individual project and comply with Appendix 2 of the Project Development Manual (PDM). While there are no specific requirements as to what the public involvement must include, it should, at a minimum:

- provide the public with a published notice of the anticipated park, recreational resource or wildlife refuge “use”,
- the anticipated effects of the “use” on the activities, features, and/or attributes of the protected resource(s) and
- provide reasonable opportunity for public response.
If only written comments are being accepted, a minimum of 30 calendar days from publication of the notice must be provided to allow ample time for written comments to be received. If a public meeting is to be used for comment, published notice given before the meeting must be consistent with the Department’s Public Involvement Manual.

Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a DAD if the proposed 4(f) impacts and findings have been adequately disclosed. For those projects that do not otherwise require public involvement, it will be necessary to provide the public notice and opportunity to comment on any proposed impacts, avoidance, minimization, mitigation and enhancement activities related to the finding.

I. Mitigation
After all minimization efforts have been explored, mitigation measures are typically pursued. Mitigation entails measures to compensate for a Section 4(f) impact that cannot be avoided and should be developed in consultation with the official(s) with jurisdiction (OWJ). Mitigation may entail replacement of land and facilities of comparable value and function, monetary compensation that can be used to enhance the remaining property around a Section 4(f) resource, placement of vegetative buffers and screening of the project area, or documentation for educational or interpretive purposes. The cost of mitigation should be a reasonable public expenditure in light of the severity of the impact on the Section 4(f) resource.

Mitigation should be relevant to the impact and may include one or more of the following measures, as approved by the FHWA:

- Replacement of lands on which there is a Section 4(f) use with lands of at least comparable value, and of reasonably equivalent usefulness and location
- Replacement of facilities impacted by the project, including sidewalks, paths, benches, lights, trees, and other facilities
- Restoration and landscaping of disturbed areas
- Incorporation of design features and habitat features where necessary
- Payment of fair market value for the land
- Any additional measures recommended during consultation with the OWJ that are relevant to and commensurate with the impacts.

4.4.13.5.2 Section 6(f) - Parkland and Recreational Facilities
Reserved
4.4.13.5.3 Municipal Parkland and Alienation

Parkland “alienation” occurs when a municipality wishes to sell, lease, or discontinue municipal parkland. Parkland alienation applies to every municipal park in the State\(^4\), whether owned by a city, county, town, or village. OPRHP has laid out the process for parkland alienation in its handbook. In order to convey parkland to a non-public entity, or to use parkland for another purpose, the municipality must receive prior authorization from the State in the form of legislation enacted by the New York State Legislature and approved by the Governor. The bill by which the Legislature grants its authorization is commonly referred to as a ‘Parkland Alienation’ bill.

NYSDOT is not subject to the municipal parkland alienation process. This is based on established laws and doctrine as referenced in Appendix A. NYSDOT projects may, however, trigger alienation on the part of the municipality.

If NYSDOT’s project requires the purchase of municipal parkland not under the Eminent Domain Procedure Law (EDPL) a more detailed analysis is required. In this case the project would have the potential to alienate municipal parkland. Consultation with the OPRHP would be needed to determine if alienation legislation is necessary.

While NYSDOT is not subject to the process, we may be required to assist (and support) municipalities that must perform the process as triggered by our projects. It should be understood that this will have an impact on NYSDOT project schedule due to the length of time needed for pursuing legislative authorization in the alienation bill. The legislative authorization must be accomplished prior to design approval.

NYSDOT should consider the existence and location of municipal parklands in the planning process and when assessing the effects of its activities on the environment under 102(2)(C) of the National Environmental Policy Act (NEPA) (42 USC 4321) and SEQRA Section 15.14(d)(7). However, other than consideration under NEPA and SEQRA, Municipal Parklands are afforded no other special protection if they are not Section 4(f) or Section 6(f) resources. This should be evaluated in consultation with OPRHP and the municipality having jurisdiction over the parkland.

4.4.13.5.4 Section 1010

Reserved

\(^4\) Does not apply to state-owned parkland.
4.4.13.5.5. National and State Heritage Areas

The Department considers State and National Heritage Areas in relation to its activities and coordinates as necessary to ensure consistency with the Areas’ management plans.

Alert!
Resources of the State and National Heritage Areas that are eligible or listed on the National Register of Historic Places are also covered under Section 106 or Section 14.09 (See TEM Section 4.4.12 for additional information).

A. National Heritage Areas (NHA)
   1. General
   NHAs are designated by Congress as places where natural, cultural, and historic resources combine to form a cohesive, nationally important landscape. Section 4(f) may apply to the publically owned portions used for recreation of a designated national heritage area.

   See the following link for more information on NHAs, their management plans and appropriate OWJ: http://www.cr.nps.gov/heritageareas/

   In New York the following heritage areas are designated under the National Heritage Area Act:
   - The Champlain Valley National Heritage Area http://www.champlainvalleynhp.org/
   - Erie Canalway National Heritage Corridor http://www.eriecanalway.org/
   - Niagara Falls National Heritage Area http://www.nps.gov/nifa/index.htm

   The Department is a member of the organizations overseeing the Hudson River Valley National Heritage Corridor (both the Hudson River Valley Greenway Communities Council & Greenway Conservancy for the Hudson River Valley, Inc) and the Erie Canalway National Heritage Corridor Commission.

   While management plans are specific to each NHA, they generally will include:
   - a description of activities to be carried out by public and private organizations to protect the resources of the NHA;
   - an inventory of the natural, historic, cultural, or scenic resources of the NHA related to the nationally significant themes and events of the region that should be protected, enhanced, interpreted, managed, or developed;
   - recommendations for ways in which local, State, tribal, and Federal entities may best be coordinated, including the role of the National Park Service and other Federal agencies associated with the NHA.
In some cases the enacting legislation requires Federal agencies to consult and coordinate activities that may have an impact on a designated National Heritage Area with the Secretary of Interior and the local coordinating entity.

NHAs are neither National Park Service units nor any type of federally owned or managed land. They are created by Congress and are administered by state governments, non-profit organizations, public-private partnerships or private corporations. Each has its own authorizing legislation and set of unique resources, specific elements and goals. NHA entities support historic preservation, natural resource conservation, recreation, heritage tourism, and educational projects.

2. **Methodology**
   Coordination/consultation regarding NHA takes place at the federal level. The Region determines whether consultation is required and, if so, provides information to the Lead Federal Agency (usually FHWA) to complete the consultation.

<table>
<thead>
<tr>
<th>SCOPING</th>
<th>ACTION</th>
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</thead>
<tbody>
<tr>
<td><strong>STEP 1</strong></td>
<td>Determine whether the project falls within a NHA. <em>(If not, stop)</em></td>
</tr>
<tr>
<td><strong>STEP 2</strong></td>
<td>Determine if there is a federal action (funding or permit etc.) <em>(If no federal action, stop)</em></td>
</tr>
</tbody>
</table>

During Scoping
Review the National Heritage Areas to determine if one is present

Is the project in a National Heritage Area

YES

NO

Does the project have federal funding or a federal action

YES

NO

Document in the Project Documentation

End

Document in the Project Documentation

End

End
### B. New York State Heritage Areas (SHA)

#### 1. General

SHAs are state-local partnerships established to preserve and develop areas that have special significance to New York State. SHAs are places where unique qualities of geography, history and culture create a distinctive identity. They include 20 heritage areas and corridors encompassing more than 20 communities in 27 counties. See the following link for more information: [http://nysparks.com/grants/heritage-areas/default.aspx](http://nysparks.com/grants/heritage-areas/default.aspx)

Or go to [http://nysparks.com/historic-preservation/heritage-areas.aspx](http://nysparks.com/historic-preservation/heritage-areas.aspx) for a statewide map.

<table>
<thead>
<tr>
<th>PRELIMINARY DESIGN</th>
<th>ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STEP 3</strong></td>
<td>Verify federal action <em>(If no federal action, stop)</em></td>
</tr>
<tr>
<td><strong>STEP 4</strong></td>
<td>Review NHA Management Plan</td>
</tr>
<tr>
<td><strong>STEP 5</strong></td>
<td>If impacts to a National Heritage Area <strong>are likely</strong> to occur as a result of a project or undertaking, the Region should discuss the project with the Lead Federal Agency. <em>(If no impacts are likely, document in project file, stop)</em></td>
</tr>
<tr>
<td><strong>STEP 6</strong></td>
<td>Reach out to the OWJ <em>(identified in the Management Plan or enabling legislation)</em> to discuss the project</td>
</tr>
<tr>
<td><strong>STEP 7</strong></td>
<td>Determine whether the undertaking <strong>will</strong> have an impact on the NHA. <em>(If no impact; document in project file, stop)</em></td>
</tr>
<tr>
<td><strong>STEP 8</strong></td>
<td>Send the project information package to and discuss consultation with Lead Federal Agency</td>
</tr>
<tr>
<td><strong>STEP 9</strong></td>
<td>Lead Federal Agency consults with the Secretary of Interior and OWJ <em>(the Region may need to provide additional information for lead Federal Agency)</em></td>
</tr>
<tr>
<td><strong>STEP 10</strong></td>
<td>If necessary, NYSDOT modifies the project as a result of consultation</td>
</tr>
</tbody>
</table>
| **STEP 11**         | Get final approval from Lead Federal Agency. Include approval letter in DAD / Project Files. **-- End Process**  
*Note any stipulations for inclusion in contract documents* |
SHAs focus on four heritage goals:
- Preservation of significant resources
- Education that interprets lessons from the past
- Recreation and leisure activities
- Economic Revitalization for sustainable communities

Heritage Areas work closely on a local level with community groups, heritage organizations, government agencies, private developers and others. Statewide guidance is provided by:
- New York State Heritage Areas Advisory Council – an advisory body established by state legislation to advise and assist OPRHP in implementing state heritage area policy and programs. The Department is a member of the Advisory Council.
- New York Heritage Area Association – a non-profit organization that provides a forum for information exchange, support, and coordination among the Heritage Areas, a channel for communication with state officials, and a vehicle for advocacy and fund-raising.

2. **Methodology**

“Where there is an approved management plan [for a State Heritage Area] in effect, any state agency conducting, funding or approving activities directly affecting a heritage area shall consult with, cooperate with, and coordinate its activities with the office and the appropriate local government. Any such state agency shall conduct or support such activities in a manner which is, to the maximum extent practicable, consistent with the approved management plan and reviews to determine consistency of state proposed actions with individual management plans. The heritage area program shall be incorporated as part of the reviews of actions pursuant to the state environmental quality review act as provided in article eight of the environmental conservation law and the New York state historic preservation act of 1980.” (Parks, recreation and historic preservation Law § 35.07 (3))

<table>
<thead>
<tr>
<th>SCOPING</th>
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<tbody>
<tr>
<td><strong>STEP 1</strong></td>
<td>Determine whether the project falls within a SHA. (If not, stop)</td>
</tr>
<tr>
<td><strong>STEP 2</strong></td>
<td>Contact management entity (OWJ) identified at <a href="http://nysparks.com/grants/documents/HASContacts.pdf">http://nysparks.com/grants/documents/HASContacts.pdf</a> or OPRHP to determine if there is an Approved Management Plan. (If not, start consultation with OPRHP.)</td>
</tr>
<tr>
<td><strong>STEP 3</strong></td>
<td>Review Approved Management Plan. Will the activities proposed have a direct effect on the Heritage Area? (If not, document and stop)</td>
</tr>
</tbody>
</table>
The designation of a SHA does not in itself invoke Section 4(f). In determining whether Section 4(f) is applicable to these areas, NYSDOT will examine the approved management plan. The management plan of the specific heritage area identifies whether there is a 4(f) purpose. 4(f) review should address whether the undertaking is, to the maximum extent practicable, consistent with the approved management plan and proposed actions within the individual management plan. OPHRP and the management entity are the OWJs for 4(f).

The SHA process must be incorporated into the DAD/SEQRA documentation.

4.4.13.6 Interagency Coordination and Agreements

A Memorandum of Understanding has been established November 4, 2013 between the OPRHP and NYSDOT for “Advice and Technical Assistance Relating to Design, Construction, Reconstruction or Rehabilitation Work Performed on NYS Office of Parks, Recreation and Historic Preservation Facilities”. This agreement is used when OPRHP desires to secure assistance from NYSDOT to perform, administer and coordinate the design, construction, reconstruction or rehabilitation of certain OPRHP facilities performed under a NYSDOT contract or by NYSDOT’s own forces, but is funded by OPRHP. For these types of projects the OPRHP will be the lead agency and the entity responsible for complying with all applicable federal and state laws and regulations pertaining to environmental reviews which would include but not limited to: Section 6(f), Section 106, NEPA and SEQRA. 4(f) would not apply to the portions of a project where work is proposed under this MOU because the actions would not meet the definition of “use”. However, 4(f) should still be considered for the project as a whole if there is other involvement with the park.

See Section 4.4.12.6 for 4(f) for Historic Sites
4.4.13.7 Project Development and Construction Guidance

4.4.13.7.1 Section 4(f) - Parks, Recreation Areas and Refuges

All Section 4(f) properties should be identified as early as practicable in the planning and project development process in order that complete avoidance of the protected resources can be given full and fair consideration (See 23 CFR 774.9(a)). The “as early as practicable” standard leaves the FHWA and FTA with considerable discretion, but it does signify that there should be some consideration of Section 4(f) properties when alternatives are developed.

A. Scoping Phase:

During scoping, the 4(f) screening should take place and the initial coordination with FHWA and identification of the OWJ should occur. The results of the screening should be documented in the scoping document or project file.

Gather as much information as possible early in the process, even though it will inevitably be preliminary and incomplete. Identify potential Section 4(f) properties that may require more detailed investigation, especially those whose size or location suggest that they could be an important factor in the alternatives screening process.

Project Scoping Document

The following level of information should be included as part of the Project Scoping Document:

- Identify all potential Section 4(f) properties that will be included in the study area (include national forest lands that are managed for multiple uses, including recreation, designated Wild and Scenic Rivers, and public school properties with recreational facilities that may have Section 4(f) status).
- Map the boundaries of the Section 4(f) properties identified
- The study area described in the document must be broad enough to encompass a range of potential avoidance and minimization alternatives.
- Identify the additional information that is needed about these properties (e.g., concerns regarding precise boundaries, identification of significant features, activities, or attributes).
- Identify whether the properties are publicly owned and open to the public.
- Identify if there are reserved transportation corridors that are not subject to Section 4(f).
- Identify if there properties in the study area that are designated or planned for future parks.

Tip:

Identify if Section 6(f) (Land and Water Conservation Act) funds have been used for acquisition of, or improvements to, the Section 4(f) property.
B. Preliminary Design:
During preliminary design, potential impacts on all identified 4(f) properties are assessed for all alternatives. Coordination with FHWA and the OWJ continues. Documentation is prepared by the Department and submitted to FHWA for approval. Final approval is needed prior to progressing to final design.

Draft DAD
During the preparation of the DAD:
- Verify all information from IPP/Scoping stages.
- Be sure that no potential Section 4(f) property has been overlooked. Consider both potential proximity impacts and right of way takes.
- Determine how each alternative affects potential 4(f) property;
- Coordinate and consult with OWJ for each Section 4(f) Resource;
- Create a map, or drawing using ArcGIS, of sufficient scale to show the location of all existing and planned facilities.
  - Create a table that lists all of the information collected in for each property and reference it to the map.
- Prepare draft Section 4(f) evaluation if needed;

Final DAD
During the preparation of the final DAD/Section 4(f) evaluation:
- Include comments received after the circulation of the Draft Section 4(f) Evaluation and responses;
- Summarize all coordination and consultation (including any documentation concerning a "Constructive Use" by FHWA Headquarters);
- Prepare final Section 4(f) evaluation if needed;
- For individual 4(f) evaluations document that the preferred alternative has the least net impact on Section 4(f) resources.

There is no permit associated with Section 4(f) however, the Department may not proceed to final design without a formal determination by FHWA that:
1) There is no prudent and feasible alternative to the use of Section 4(f) resources, and
2) All possible planning has been taken to avoid the use of a 4(f) property or to minimize harm to any 4(f) property affected by the project.

C. Final Design:

It is important to incorporate into the contract documents all design modifications and measures to minimize harm to the Section 4(f) properties as approved by FHWA in the Section 4(f) document and/or DAD. Examples include: stockpiling of soils, keeping within Right of Way limits during construction, not interrupting recreational activities, etc.

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5 When OWJ is NYSOPRHP, direct correspondence to NYSOPRHP Headquarters, with copy to the Regional Parks Administrator(s) and Parks Manager(s). See Contacts.
If a decision has been made to acquire a Section 4(f) property, it is treated similarly to other types of new right-of-way.

**Late Discovery**
Late discovery refers to the discovery of a Section 4(f) resource after completion of the NEPA process (i.e. after Record of Decision/Finding of No Significant Impact/Categorical Exclusion completion). Reasons why this may occur include a lack of detailed ROW information during environmental studies, changes to the selected alternative during final design, or new information or discovery during construction.

When a late discovery occurs, timely coordination between the Department or project sponsor and FHWA is required. FHWA will determine if an individual, programmatic, or amended Section 4(f) evaluation is necessary. The findings of the coordination and documentation will be considered and may ultimately result in changes to the project design or construction plans.

**Alert!**
Late discovery of a 4(f) property will require a NEPA reevaluation. Late designation may require a NEPA reevaluation at the discretion of FHWA.

**Late Designation**
Late Designation refers to the change of a property's Section 4(f) status late in the development of a proposed project. The Department may proceed, after consultation with FHWA, without treating the property as a Section 4(f) resource if:

- The newly designated Section 4(f) property was acquired for transportation purposes prior to the change in designation and
- An adequate attempt was made to identify Section 4(f) properties.

Archeological sites, should be addressed according to the provisions discussed TEM Section 4.4.12.

**D. Construction:**
The impact to the Section 4(f) properties must be continuously monitored because onsite construction considerations may force modifications of commitments made previously. Any changes should be coordinated immediately with FHWA and the Official with Jurisdiction (OWJ) because those changes may require revisiting the Section 4(f) process and revision of documentation.
E. Documentation

1. General

<table>
<thead>
<tr>
<th>Table 3: Number of Documents needed for FHWA Section 4(f) coordination</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Document Type</strong></td>
</tr>
<tr>
<td>-------------------</td>
</tr>
<tr>
<td>Programmatic Section 4(f) Evaluations</td>
</tr>
<tr>
<td><em>De Minimis</em> Findings</td>
</tr>
<tr>
<td>See Appendix 3 of the PDM for distribution and copies required for both draft and final Individual Evaluations</td>
</tr>
</tbody>
</table>

The information needed for each type of 4(f) determination is listed in Table 4:

<table>
<thead>
<tr>
<th>Table 4: Section 4(f) Documentation for Parks, Recreational Areas &amp; Wildlife Refuges</th>
</tr>
</thead>
<tbody>
<tr>
<td>For all 4(f) Documentation include:</td>
</tr>
<tr>
<td>• Project Description</td>
</tr>
<tr>
<td>• Purpose and Need</td>
</tr>
<tr>
<td>• Description of the resource(s)</td>
</tr>
<tr>
<td>• Project mapping/photographs of the resource/property. If available, include plan sheets.</td>
</tr>
<tr>
<td>For “No Use” also include:</td>
</tr>
<tr>
<td>• Impacts</td>
</tr>
<tr>
<td>• Discussion of avoidance, mitigation techniques, measures to minimize harm, or enhancements</td>
</tr>
<tr>
<td>For Programmatic Evaluations also include:</td>
</tr>
<tr>
<td>• Alternatives Analysis (except Independent Walkway and Bikeway Projects)</td>
</tr>
<tr>
<td>For Individual Evaluations also include:</td>
</tr>
<tr>
<td>• Alternatives Analysis</td>
</tr>
</tbody>
</table>

| For “No Use” also include:                                                       |
|   • Concurrence from OWJ that impacts will not affect the overall functions or activities (signed OWJ letter) |
|   • Signed OWJ letter                                                            |
|   • Public Involvement Materials                                                 |

For Historic Sites See Section 4.4.12
Measures to Minimize Harm

Summary

Coordinate with LAB early on in the process – additional info. may be necessary

Coordinate with LAB early on in the process – additional info. may be necessary

Additional Notes:
- If you are proposing a detour, please be sure to include accurate mapping that shows the resource(s) and the detour.
- In the Resource description, include the size of the resource (in acres)
- In the Project description, include the amount of permanent and/or temporary right-of-way needed (in acres), if applicable
- Make sure the information provided matches the OWJ letter; otherwise the letter may require revision and re-signature by the OWJ.

2. Documentation- No 4(f) properties or “No Use”
Document the results of the Section 4(f) properties screening and whether any properties are impacted. All supporting documentation must be included in the project file. For determinations of “no use” this documentation includes letters from the official with jurisdiction and descriptions of why the particular exclusion applies. A summary statement must be included in the DAD and/or environmental checklist.

3. Documentation- De minimis Finding
The approval of a de minimis impact should be documented in the final project DAD and/or in an individual Section 4(f) evaluation when one is prepared for a project. This documentation will detail the work that was done to reach the de minimis determination.

Sufficient supporting documentation (i.e. letter, appendix, stand alone de minimis finding, etc.) should be part of the project file including:
- A description of the park(s), recreation area(s), or refuge(s) proposed to be used by the project including applicability of Section 4(f) to each.
- Use and impact(s) to the resources (for all alternatives and detours) including an explanation of why the use is de minimis
- Results of coordination with the official(s) with jurisdiction including the written concurrence from official(s) with jurisdiction.
- Any avoidance, minimization, and/or mitigation, measures that were relied upon to make the de minimis finding.
- Records of public involvement, or Section 106 consultation.
The public involvement requirements associated with specific DAD and process will, in most cases, be sufficient to satisfy the public notice and comment requirements for the *de minimis* impact finding (See 23 CFR 774.5(b)(2)). For those actions that do not routinely require public review and comment (e.g., certain categorical exclusions and re-evaluations) but for which a *de minimis* impact finding will be made, a separate public notice and opportunity for review and comment will be necessary. In these cases, appropriate public involvement should be based on the Public Involvement Manual, Appendix to Project Development Manual (PDM).

All comments received and responses thereto, should be documented in the same manner that other comments on the proposed action would be incorporated in the project file (or DAD, if appropriate). Where public involvement was initiated solely for the purpose of a *de minimis* impact finding, responses or replies to the public comments may not be required, depending on the substantive nature of the comments.

When an individual Section 4(f) evaluation is required for a project in which one or more *de minimis* impact determination(s) will also be made, include the relevant documentation to support the proposed *de minimis* impact determination(s) within the individual Section 4(f) evaluation.

**Alert!**

A *de minimis* impact finding can not be made for a project as a whole, when multiple Section 4(f) properties are involved.

**Example:** The project impacts a park to the north and a public playground to the south. The impacts on the park to the north trigger an individual evaluation for the project. FHWA determines the impact on the public playground to be *de minimis*. In this case the *de minimis* finding for the playground is included in the individual evaluation for the project.

*De minimis* impact findings must be made for the individual 4(f) resources when there are multiple resources present on a property. *De minimis* impact criteria and associated determination requirements are different for historic sites than for parks, recreation areas, and refuges.

When there are multiple resources for which *de minimis* impact findings are appropriate, the procedural requirements of Section 4(f) can and should be completed in a single process, document and circulation, so long as it is clear that distinct determinations are being made. Also in these cases, the written concurrence of the official(s) with jurisdiction may be provided for the project as a whole, so as long as the *de minimis* impacts findings have been made on an individual resource basis.
4. Documentation-Programmatic Evaluations

Approval for programmatic evaluations that are integrated in a NEPA document (EA or EIS) will occur upon FHWA’s approval of the accompanying DAD. If the NEPA determination is a categorical exclusion, FHWA must approve the use of the programmatic evaluation separately.

A copy of the programmatic’s negative declaration/ Section 4(f) statement (which is located on the Nationwide Section 4(f) Programmatic Evaluations page) should be placed in the DAD and/or the individual project file. An approval letter from the OWJ is required and is included in the DAD and/or individual project file.

The Net Benefit to a Section 4(f) Property (Programmatic Evaluation), specifically requires public notice and public involvement. For all other programmatic evaluations the appropriate public involvement is based on the project and follows the guidance found in the Public Involvement Manual, Appendix to Project Development Manual (PDM). Include a statement in the DAD that Section 4(f) compliance was satisfied by the applicable programmatic evaluation. Documentation required to apply a programmatic Section 4(f) evaluation must support that the specific programmatic criteria have been met and will be retained in the project file.

5. Documentation- Individual Finding

<table>
<thead>
<tr>
<th>Table 5: Individual Section 4(f) FHWA Document Review and Approval</th>
</tr>
</thead>
<tbody>
<tr>
<td>(not applicable to de minimis determinations or Programmatic 4(f) evaluations)</td>
</tr>
<tr>
<td>Documentation Steps</td>
</tr>
</tbody>
</table>
| Step 1 | The Region prepares the Draft Section 4(f) evaluation.  
- Identify 4(f) resources  
- Identify any “use”  
- Evaluate Avoidance Alternatives  
- Identify measures to minimize harm  
- *Note that consultation with resource owners and local jurisdictions is needed to identify resources and develop alternatives.*  
- Include documentation of any 4(f) resources with de minimis or programmatic evaluations | Prepared prior to draft DAD |
<p>| Step 2 | The Region sends document to FHWA Area Engineer and LAB for review and Comment | Request 14 day review period |</p>
<table>
<thead>
<tr>
<th>Step 3</th>
<th>Region resolves any comments from FHWA and LAB and sends updated draft evaluation to FHWA</th>
<th>Region should anticipate time for comment resolution in project schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 4</td>
<td>FHWA Area Engineer sends the draft Section 4(f) evaluation for 15-day FHWA Legal Sufficiency Review. FHWA Area Engineer sends comments to Region.</td>
<td>15 day review period</td>
</tr>
<tr>
<td>Step 5</td>
<td>Region resolves any legal comments and sends updated draft evaluation to FHWA</td>
<td>Region should anticipate time for comment resolution in project schedule</td>
</tr>
<tr>
<td>Step 6</td>
<td>FHWA Area Engineer signs Draft Section 4(f) document</td>
<td>Anticipate 5 days</td>
</tr>
</tbody>
</table>
| Step 7 | FHWA publishes the Draft Section 4(f) document and circulates to other Federal Agencies (DOI, NPS, HUD, AG) for 45-day minimum review.  
- This review is part of the normal 45 day review for a DEIS, but extends the 30 day public review for an EA to 45 days.  
- For CEs, the draft Section 4(f) evaluation is typically prepared as a separate document and may be distributed for the 45-day review and comment period independently or with the CE documentation attached. | 45 day review period; allow for additional processing time |
| Step 8 | FHWA sends any comments from public and Federal Agency reviews. Region resolves comments and adds concluding statements. Sends Final Section 4(f) evaluation to FHWA for final review. | Region should anticipate time for comment resolution in project schedule |
| Step 9 | FHWA Area Engineer sends the document for Final FHWA Legal Sufficiency Review | 30 day review period |
| Step 10 | Finalize statement in Record of Decision (ROD), Finding of No Significant Impact (FONSI) or CE. | Varies based on NEPA timeframes |
a) Proximity Impacts
Proximity impacts must be evaluated for each Section 4(f) property on each project alternative. The Draft Section 4(f) Evaluation must address all proximity impacts to determine whether they will substantially impair the qualities of the 4(f) property, resulting in constructive use. The substantial impairment test is applied after consideration of proposed mitigation measures. See constructive use methodology section for more information.

If there are no proximity impacts to Section 4(f) resources, the evaluation must state that conclusion.

b) Coordination of the Section 4(f) Evaluation
The draft Section 4(f) evaluation should be sent to:

- The officials having jurisdiction (OWJ) over the Section 4(f) property for coordination and comment and
- FHWA. They distribute it for review by:
  - The Department of the Interior and,
  - (if appropriate) The Department of Agriculture and/or the Department of Housing and Urban Development.
  - These outside agencies are given a 45-calendar-day review period.

The final Section 4(f) evaluation shall include a copy of the response received from the external agencies and the OWJ.

Department of the Interior
The approved draft Section 4(f) Evaluation shall be provided (as part of the draft EIS, environmental assessment, or in a separate document for projects classified as categorical exclusions) for coordination and comment. The Department of the Interior also receives copies of the final Section 4(f) Evaluation. Department of Interior review of the Section 4(f) Evaluation does not occur when using the Programmatic Section 4(f) Evaluation procedures.

Department of Agriculture
In addition to the Department of the Interior, the approved draft Section 4(f) evaluation shall be provided (as part of the draft EIS, environmental assessment, or in a separate document for projects classified as categorical exclusions) for coordination and comment to the Department of Agriculture when one of its subordinate bureaus is the official with jurisdiction (e.g.: Forest Service). Department of Agriculture review of the Section 4(f) Evaluation does not occur when using the Programmatic Section 4(f) Evaluation procedures.

Department of Housing and Urban Development
Coordination with HUD shall occur when a project uses land for which or on which HUD funding had been used, except for funding under the Neighborhood Facilities Program or the Open Space Program. Department of Housing and Urban Development review of the Section 4(f) Evaluation does not occur when using the Programmatic Section 4(f) Evaluation procedures.
c) General
The draft Section 4(f) evaluation provides all the information on the Section 4(f) properties, uses, alternatives analysis, and measures to minimize harm.

The draft Section 4(f) evaluation must be reviewed and approved by the FHWA Division Office to be made available to the officials with jurisdiction over the Section 4(f) property, the Department of the Interior, and where applicable, the Department of Housing and Urban Development and/or the Department of Agriculture. The draft Section 4(f) evaluation must be provided to these agencies for a minimum 45-day review and comment period.

Any comments received on the draft Section 4(f) evaluation should be addressed and a final Section 4(f) evaluation prepared.

It is not until the final Section 4(f) evaluation that concluding statements are added indicating that there is no feasible and prudent alternative to the use of Section 4(f) properties, all possible planning to minimize harm has been incorporated, and that a specific alternative is the alternative that would result in the least overall harm.

The final evaluation is provided to FHWA’s legal counsel for a second legal sufficiency review before it is included in the Record of Decision (ROD) or otherwise finalized. Legal sufficiency review is essentially an assessment of whether the Section 4(f) evaluation is legally sound and is likely to hold up in court should there be a legal action against the project.

d) Individual Section 4(f) Evaluation in DADs
Approval for evaluations that are integrated in a DAD will occur upon FHWA approval of the accompanying DAD. Documentation supporting a Section 4(f) approval will be included in the EIS, EA. For projects classified as a categorical exclusion the Section 4(f) approval will be a separate document. In rare cases, such as a late discovery, a 4(f) evaluation document can be completed separately from the DAD. In this case, a summary of the basis for the Section 4(f) approval must also be included in the Record of Decision.

For projects requiring an Environmental Assessment (EA), the draft Section 4(f) evaluation is provided for review and comment as part of the EA. Whereas the draft Section 4(f) evaluation has a minimum 45-day comment period, the required period of availability for an EA is 30 days. Where an EA involves Section 4(f) uses, a 45-day comment period may be provided to cover both regulatory requirements. The final rule issued on March 12, 2008, provides that if no response is received within 15 days following the end of the comment period the Department of Transportation “may assume lack of objection and proceed with the action”. The FONSI includes the final Section 4(f) Evaluation.

For projects requiring an Environmental Impact Statement (EIS), the draft Section 4(f) evaluation is typically provided for review and comment as an attachment to, or as a chapter of the Draft EIS (DEIS). If the DEIS included a preferred alternative, NYSDOT should

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7 4(f) evaluations included in the appendix of the DAD are considered integrated into the NEPA document.
complete the draft Section 4(f) Evaluation at the same time as the DEIS so that the final Section 4(f) Evaluation can be approved with the Final Environmental Impact Statement (FEIS). If the DEIS does not identify a preferred alternative, a revised draft Section 4(f) Evaluation should be included in the FEIS, and the final Section 4(f) Evaluation would be in the ROD.

Individual Section 4(f) evaluations that are included in a DAD are typically incorporated with the preliminary versions of that DAD and reviewed according to the NYSDOT Project Development process. This includes OOE (LAB) review of the EIS. After DQAB and OOE review the region sends the EIS to the FHWA Area Engineer. Once the Section 4(f) evaluation has undergone FHWA review, the Region resolves any comments from FHWA and sends an updated draft evaluation to FHWA. The Area Engineer submits the draft DAD and draft Section 4(f) evaluation to FHWA Legal Counsel for a 15-day legal review. The Region resolves any legal comments and sends updated draft DAD to FHWA. The FHWA legal review must be conducted prior to approval and external agency and public review.

**TIP:**
Note that an “Individual” Section 4(f) evaluation is considered a separate evaluation and needs separate approval from the overall NEPA process even though the documentation is included within the DADs.

e) **Section 4(f) in Tiered DADs [23 CFR 774.7(e)]**

In a tiered Environmental Impact Statement (EIS), the project development process moves from a broad scale examination at the first-tier stage to a more site specific evaluation in the second-tier stage. During the first-tier stage the detailed information necessary to complete the Section 4(f) approval may not be available. Even so, this does not relieve the FHWA from its responsibility to determine the possibility of making *de minimis* impact determinations or to consider alternatives that avoid the use of Section 4(f) properties during the first-tier stage. This analysis and documentation should address potential uses of Section 4(f) property for Tier I decisions.

**If sufficient information is available**, a preliminary Section 4(f) approval may be made at the first-tier stage as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and *prudent* avoidance alternatives. This preliminary approval must include all possible planning to minimize harm to the extent that the level of detail available at this stage allows (23 CFR 774.7(e)(1)). This planning may be limited to a commitment to ensure that opportunities to minimize harm at subsequent stages in the project development process have not been precluded by decisions made at the first-tier stage. Any preliminary Section 4(f) approvals must be incorporated into the first-tier EIS (23 CFR 774.7(e)(1)).

**If sufficient information is unavailable** during the first-tier stage, then the EIS may be completed without any preliminary Section 4(f) approvals. The documentation should state why no preliminary approval is possible during the first-tier stage and clearly explain the process that will be followed to complete Section 4(f) evaluations during subsequent tiers.
The extent to which a Section 4(f) approval (preliminary or final) anticipated to be made in a subsequent tier may have an effect on any decision made during the first-tier stage should be discussed. Schedules to complete Section 4(f) evaluations, if available, should also be reported.

Preliminary first-tier Section 4(f) approvals will be finalized in the second-tier CE, EA, final EIS, ROD or FONSI, as appropriate (See 23 CFR 774.7(e)(2)). If no new Section 4(f) use, other than a de minimis impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

FHWA is responsible for determining whether there is an appropriate level of detail to make a preliminary 4(f) determination and how compliance with this regulation can be achieved.

f) Separate Individual Section 4(f) Evaluations

There are circumstances when a Section 4(f) Evaluation is not included in a DAD and a separate Section 4(f) Evaluation is required. This occurs when a project is classified as a CE [23 CFR 774.7(f)], or may occur after the CE, FONSI, or ROD has been processed under the following conditions as outlined in 23 CFR 774.9(c):

1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or
2) FHWA determines that Section 4(f) applies to the use of a property; or
3) A proposed modification of the alignment, design, or measures to minimize harm (after the original Section 4(f) approval) would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

A separate Section 4(f) Evaluation should be a stand-alone document that provides enough information about the purpose and need and alternatives analysis so that reference to other documents is not required.

For CEs, the draft Section 4(f) evaluation is prepared as a separate document and may be distributed for the 45-day review and comment period independently or with the CE documentation attached. For CE projects, the approval of any 4(f) Evaluation is concurrent with the approval of the CE.

If it is determined after the CE, FONSI, or FEIS has been processed that a Section 4(f) evaluation is required; preparation and circulation of the Section 4(f) evaluation will not necessarily require the preparation of a new or supplemental DAD. In addition, the separate evaluation does not prevent the granting of new approvals, require the withdrawal of previous approvals, or require the suspension of project activities for any activity not affected by the Section 4(f) evaluation. FHWA will make the final decision as to what documentation is needed.
For the full Section 4(f) evaluations processed separate from DADs, the appropriate NYSDOT staff, and the FHWA Area Engineer review the preliminary draft evaluation. Upon completion of the FHWA review, the draft Section 4(f) evaluation is submitted to FHWA Legal Counsel for a 30-day review.

Following receipt of agency comments, the concluding statement is incorporated and the Section 4(f) evaluation is submitted to the FHWA Area Engineer for review and official legal sufficiency review. The final Section 4(f) document is signed by the FHWA. The final Section 4(f) Evaluation is submitted to the Department of the Interior for their information.

4.4.13.7.2 Section 6(f) - Parkland and Recreational Facilities
Reserved

4.4.13.7.3 Municipal Parkland and Alienation
While NYSDOT is not subject to the process, we may be required to assist (and support) municipalities that must perform the process as triggered by our projects. It should be understood that this will have an impact on NYSDOT project schedule due to the length of time needed for pursuing legislative authorization in the alienation bill. The legislative authorization must be accomplished prior to design approval.

NYSDOT should consider the existence and location of municipal parklands in the planning process and when assessing the effects of its activities on the environment under 102(2)(C) of the National Environmental Policy Act (NEPA) (42 USC 4321) and SEQRA Section 15.14(d)(7).

4.4.13.7.4 Section 1010 UPARR
Reserved

4.4.13.7.5 National and State Heritage Areas
There are no Heritage Area specific permits.

A. National Heritage Areas (NHA)
   • If no NHA present, this is documented in the Environmental Checklist/ project file
   • If a NHA is present, but there is no federal action (including funding or permitting),
     document this in the project file.
   • If a NHA is present, there is a federal action, and there is
     o no impact to the NHA, document this finding in the DAD.
     o an impact to the NHA, document all coordination and consultation, including
       final approval from the lead federal agency, in the DAD.
       ▪ Any stipulations included in the final approval must be carried into the
         contract documents.
B. New York State Heritage Area

- If no SHA present, this is documented in the Environmental Checklist/project file
- If a SHA is present, and there is
  - no direct effect to the SHA, document this finding in the DAD.
  - a direct effect to the SHA, document all coordination and consultation, including final approval from the OPRHP and OWJ, in the DAD.
    - Any stipulations included in the final approval must be carried into the contract documents.

4.4.13.8 Operations Guidance

Maintenance activities must comply with all applicable laws and regulations, and land use controls such as permits and permit conditions that may be prescribed. When in doubt, consult with the Official with Jurisdiction (OWJ), the FHWA (to determine whether 4(f) is applicable) and the Regional Maintenance Environmental Coordinator (MEC).

Generally, maintenance activities are not subject to Sections 4(f), 6(f) and/or 1010, because they take place within the right of way (ROW). Certain activities within the ROW, however, may potentially affect adjacent parks and recreational properties. For example, work on culverts or bridges may temporarily block access to a park or recreational area and potentially trigger 4(f), 6(f) and/or 1010.

Outside the ROW, the Department may need to perform activities within a park or recreational property (such as follow-up maintenance of a wetland mitigation site). Such activities would not trigger a 4(f) process or evaluation (though it is possible that 6(f) might be triggered). If there is a maintenance agreement for the Department to do work within one of these properties, section 4(f) and 6(f) would not be triggered. If a maintenance jurisdictional agreement was put in place as part of the 4(f) or 6(f) process during design, the operations themselves would not trigger further involvement.

When Operations has the lead in a Department contract, follow all procedures described herein.

4.4.13.8.1 Section 4(f) - Parks, Recreation Areas and Refuges

Emergencies

For emergencies, ultimate funding is typically uncertain and/or can change after the fact. Therefore, it is appropriate to proceed as if Section 4(f) will apply. The first concern is responding to immediate threats to human health or safety, or immediate threats to valuable natural resources. Compliance with environmental laws, including Section 4(f), is considered later. The FHWA may participate in the costs of repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of (1) natural disasters or (2) catastrophic failures from an external cause. The Emergency Relief (ER) Program, (23 USC § 125), supplements the commitment of resources by States, their political subdivisions, or other Federal agencies to help pay for unusually heavy expenses resulting from extraordinary
conditions. As FHWA retains discretionary control over whether to fund projects under this program, Section 4(f) applies to all ER funding decisions.

The general sequence of events following the emergency is:

- Restore essential service. State and local highway agencies are empowered to respond immediately, which includes beginning emergency repairs to restore essential traffic service and to prevent further damage to Federal-aid highway facilities. **Section 4(f) compliance is not required at this stage.**
- Governor's proclamation
- Preliminary notification
- Acknowledgement
- Damage assessments
- Formal state request
- FHWA Division Administrator's finding (i.e.: approval of use of ER funds)
- Implementation of projects. **This is where Section 4(f) compliance occurs.**

Under the ER Program, repairs are categorized either as “emergency” or “permanent.” Emergency repairs are made during and immediately following a disaster to restore essential traffic, to minimize the extent of damage, or to protect the remaining facilities. Permanent repairs to restore the highway to its pre-disaster condition normally occur after the emergency repairs have been completed.

Section 4(f) compliance occurs during the “implementation of projects” stage for both emergency repairs and permanent repairs. For emergency repairs, Section 4(f) compliance is undertaken after the emergency repairs have been completed. For permanent repairs, Section 4(f) compliance is undertaken as part of the normal **NEPA** project development process, just as it would be for any other type of Federal-aid or Federal lands project (i.e. it must be completed prior to the authorization of right-of-way and construction).

**4.4.13.8.2 Section 6(f) and Section 1010 - Parkland and Recreational Facilities**

**Emergencies**

Under Section 6(f) and Section 1010, there are no provisions for emergency situations. In the event of emergencies that have the potential to affect Section 6(f) and Section 1010 parklands, consult with the Regional MEC, the OPRHP, the OWJ and proceed with the processes herein.

**4.4.13.8.3 Municipal Parkland and Alienation**

Not applicable to operations or emergency situations
4.4.13.8.4 National and State Heritage Areas

Operations
While it is not likely that routine maintenance activities would impact a National Heritage Area or affect a State Heritage Area, the MEC should determine this on a case by case basis. When Operations has the lead in a Department contract, follow all procedures described herein.

Emergencies
There are no provisions for emergency situations. In the event of emergencies that have the potential to affect a Heritage Area, the Regional MEC should consult with FHWA, OPRHP, and OWJs and proceed with the processes herein.
### 4.13.9 Flowchart

1. Section 4(f) - Parks, Recreation Areas and Refuges

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**Alert!**

* Some properties might have multiple Section 4(f) applicability (for instance, a park might also be historic and have a trail running through it). Each of those elements must be considered in the evaluation – both TEM 4.4.12 and 4.4.13 would apply.

---

**Legend:**

- Scoping
- Scoping and Preliminary Design
- Preliminary Design

---

**TEM Section 4.4.13**

**Section 4(f) Parks and Recreational Areas**

**Document in project file:** End of process

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**Is it a Historic Site?**

- Yes: Document in project file, End of process

**Is it a permanent incorporation or temporary occupancy with adverse impacts?**

- Yes: Document & send to appropriate official for approval. No further analysis required unless there are changes that affect the 4(f) properties.

**Is it a "Constructive" Use?**

- Yes: See page XX

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**Is area publicly owned and accessible, functioning as a 4(f) property and considered significant?**

- Yes: Document in project file, End of process

---

**Denotes "Apply all possible planning to minimize harm"**

---

**End of Process**
4.4.13.9.2 Section 6(f) Parks and Recreational Areas

Reserved
4.4.13.9.3 Municipal Parkland Alienation Flow Chart

Alert!
The enactment of municipal parkland alienation legislation can be complex and time consuming. For this reason it is advisable for a municipality to begin work on an alienation proposal as early as possible, even in the months before a legislative session starts.

Municipality determines whether the proposed action is an alienation of parkland

Is there an option(s) to avoid using parkland

Engage the public

Notify the Office of Parks, Recreation and Historic Preservation

Determine if State or Federal funding has been allocated to the park

Complete the Parkland Alienation Municipal Information Form

Document in Project File End of Process

NO

YES

Contact the Municipality's State Legislative Sponsor

Draft legislation for Parkland Alienation

Conduct a SEQR review of the alienation action

Pass a Municipal Home Rule Request.

Sponsor introduces bill for vote in Senate and Assembly

Begin when NYSDOT project triggers purchase of parkland property and Eminent Domain is not used.

See 4.4.13.5.3
4.4.13.9.4 Section 1010 UPARR Flowchart

Reserved
4.4.13.9.4 National Heritage Area Process

During Scoping
Review the National Heritage Areas to determine if one is present

Is the project in or affect a National Heritage Area

YES

NO

No coordination required Document in the Project Documentation End

Does the project have federal funding or a federal action

YES

NO

Document in the Project documentation End

Will the undertaking have an impact on a designated National Heritage Area

YES

NO

Consult with lead Federal entity.

If necessary modify the project according to Consultation Get final approval from lead Federal Agency Document in the Project file Include any mitigation in the contract documents

End

Lead Federal Agency Coordinates with the Secretary of Interior and OWI

Legend

Scoping
Preliminary Design
Final Design
4.4.13.9.4 NYS State Heritage Area System Process

During Scoping
Review the State Heritage Areas to determine if one is present

Is the project in or affect a State Heritage Area

Review the Heritage Area’s Management Plan

Will the undertaking have an impact on a designated State Heritage Area

Consult with NYS Office of Parks, Recreation and Historic Preservation and Managing entity

If necessary modify the project according to Consultation

Get final approval from NYS OPRHP

Document in the Project file

Include any mitigation in the contract documents

End

Document in the Project Documentation

End

No coordination required

NO

End
4.4.13.10 Local Projects Guidance
The Procedures for Locally Administered Federally Aided Projects (PLAFAP) chapter 7 is the basis for Environmental Compliance generally on local projects. In addition, sponsors of projects must follow the specific procedures stated in this document to ensure compliance with the appropriate regulations. All correspondence, coordination and documentation must be done in consultation with the NYSDOT Regional Local Project Liaison (RLPL).

The RLPL will assist in the coordination with the Officials with Jurisdiction (OWJ), OPRHP, and NPS. Regional environmental staff may provide local sponsors with support and/or quality assurances upon request.

4.4.13.10.1 Section 4(f) - Parks, Recreation Areas and Refuges
The project sponsor, or their consultant, is responsible for the providing all information and documentation regarding proposed use.

4.4.13.10.2 Section 6(f) – Parks and Recreational Areas
The project sponsor, or their consultant, is responsible for the parkland screening assessment as well as providing all the required documentation depending on the non-conversion/conversion type.

NYSDOT is responsible as the primary recipient of federal assistance, for assuring compliance with LWCF requirements and for substitution of replacement parkland. NYSDOT may have to assist or deny funding if a local project sponsor is unable to replace converted parkland.

4.4.13.10.3 Municipal Parkland and Alienation
Local Sponsors are subject to the Parkland Alienation process if they will not be acquiring the property through the EDPL.

4.4.13.10.4 Section 1010 UPARR
Proceed as per 6(f).

4.4.13.10.5 National and State Heritage Areas
The project sponsor, or their consultant, is responsible for the screening/assessment as well as providing all the required documentation to facilitate the coordination required in the Heritage Area’s management plan.
4.4.13.11 Appendices

A. Legal Citation

Section 4(f) Laws and Regulations

- Section 18(a) of the Federal-Aid Highway Act of 1968 (23 USC §138)

- Section 4(f) of the Department of Transportation Act of 1966, recodified in 1983 to Title 49 USC Section 303

- Section 4(f) of the Department of Transportation Act of 1966; Title 49 USC Section 303 – similar provision added to Title 23 USC Section 138 which applies only to the Federal-Aid Highway Program (1968)

- Final Rule on Section 4(f) moved the Section 4(f) regulation to 23 CFR 774 (March 2008). http://edocket.access.gpo.gov/2008/E8-4596.htm

- Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(f) (23 CFR Part774) (March 2008)
  http://www.gpo.gov/fdsys/pkg/CFR-2011-title23-vol1/pdf/CFR-2011-title23-vol1-sec774-1.pdf The purpose of 23 CFR 774 is to implement 23 USC 138 and 49 USC 303 which were originally enacted as Section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as “Section 4(f).

- Technical Correction to Final Rule on Section 4(f) (June 2008)
  23 USC § 138: Preservation of Parklands

- FHWA Section 4(f) Nationwide Programmatic:
  1. Independent Bikeway or Walkway Construction Projects, May 23, 1977
  2. Federally-aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges, December 23, 1986
  3. Programmatic Section 4(f) Evaluation Procedures for Projects that have a Net Benefit to Section 4(f) Properties, April 20, 2005
Section 6(f) Laws and Regulations


Municipal Parkland Alienation

- New York Eminent Domain Procedures Law § 705. This section specifically states that in respect to inconsistent laws, EDPL “shall be controlling” in spite of any other provision of law in respect to the acquisition of real property. http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EDP705$$@TXEDP0705+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=27726785+&TARGET=VIEW

- New York Eminent Domain Procedures Law §104. This specific section states that the EDPL applies to all acquisitions by eminent domain of real property within the state of New York. http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$EDP104$$@TXEDP0104+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=27726785+&TARGET=VIEW


- New York Environmental Conservation Law §§52.0907, 54-0903(4)(a) and 56-0309(12). http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@LLENV+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=19795513+&TARGET=VIEW

- New York Public Lands Law §§ 2-a, 21, 24, 25, 27, 30-a and 75. http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@LLPBL+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=11693376+&TARGET=VIEW

- The reason for State legislative approval requirement is that, as explained by the Court of Appeals in Friends of Van Cortlandt Park v. City of New York, 95 NY 2d. 623 (2002), “…parkland is impressed with a public trust, requiring legislative approval before it can
be alienated or used for an extended period for non-park purposes [citations omitted].

At 630.

- Grayson v. Town of Huntington, 133 Misc 2d 1064, 545 N.Y.S 3d 633. In this case, the court allowed a taking of parkland for non-park use because the statutory authority for such derogated common law that prohibited such. Additionally, the action was allowed under the guise “that a special statute which is in conflict with a general act covering the same subject matter controls the case and repeals the general statute insofar as the special act applies, so long as no contrary intention is clearly indicated”. Id. at 1071.

- In Matter of County of Cortland a taking was completed under Highway Law and was thus overturned because EDPL §705 controlled, as court held, “provisions that are inconsistent with the EDPL must give way to that statute”. 2010 NY Slip Op 3513, 2.

- In Biz-Biz Corp. v. State of New York, a notice of acquisition done pursuant to EDPL instead of the Court of Claims Act was proper due to the superseding authority of EDPL §705. 2006 NY Slip Op 3827, 29 A.D.3d 720, 815 N.Y.S.2d 252.

- Property was upheld because when there is a conflict between two statutes, the N.Y. Em. Dom. Proc. Law provisions control. 293 A.D.2d 560; 740 N.Y.S. 2d 43.

- Commissioner of Transportation v. V.A.S.T. Res., Inc. In a dispute over inconsistency between the EDPL and Real Property Actions and Proceedings Law, the EDPL was found to be controlling. 146 Misc. 2d 157; 549 N.Y.S.2d 602.

Section 1010 Laws and Regulations


Heritage Areas

- State Heritage Areas - The New York State Heritage Areas System Act (Title G, Articles 31, 33 and 35) of the New York State Parks, Recreation and Historic Preservation Law


- 114 Stat. 2763a–302 Public Law 106–554—Appendix D - The Erie Canalway National Heritage Corridor

- Celebrating America’s Heritage Act 2006 – Niagara Falls National Heritage Area

Historic

- National Natural Landmarks – 16 USC 461-467. 36 CFR 62

NEPA/SEQRA

- National Environmental Policy Act of 1969 (NEPA) 42 USC §4321 through 4370(f)
- State Environmental Quality Review Act (SEQRA) [17 NYCRR 15.14(d)(5), (6) & (7)(vii)]

National Trails

- *National Trails System Act United States Code, Volume 16, Sections 1241-1251;* instituted a national system of recreation, scenic and historic trails

Wild, Scenic & Recreational Rivers

- *National Wild and Scenic Rivers Act (WSRA) (16 USC § 1271 et seq. and 36 CFR 297.3)*
- *Section 4(f) Involvement- Wild and Scenic Rivers May 26, 1981 Policy Memo*
- *Section 4(f) Involvement- Wild and Scenic Rivers June 6, 1978 Policy Memo*

Wildlife Refuge


B. Scope of Services

Designers should review the [base scope of services](#) and adapt it, as necessary, to reflect the needs of the specific project.
C. Definitions

Section 4(f) - Parks, Recreation Areas and Refuges

Acronyms:

ACHP - Advisory Council on Historic Preservation
CE - Categorical Exclusion
CFR - Code of Federal Regulations
CRC - Cultural Resource Coordinator
DAD - Design Approval Document
DOI - Department of the Interior
EIS - Environmental Impact Statement
EA - Environmental Assessment
FHWA - Federal Highway Administration
FONSI - Finding of No Significant Impact
FTA - Federal Transit Authority – USDOT
NEPA - National Environmental Policy Act
NHL - National Historic Landmark
NHPA - National Historic Preservation Act
NPS – National Park Service
NR - National Register of Historic Places
NYSDOT - The New York State Department of Transportation
OPRHP - New York State Office of Parks, Recreation and Historic Preservation
OWJ – Officials with jurisdiction
RTP - Recreational Trails Program
ROD - Record of Decision
SHPO - State Historic Preservation Office
TAP - Transportation Alternatives Program
TCP - Traditional Cultural Place
TEA - Transportation Enhancement Activity
THPO - Tribal Historic Preservation Officer
USC - United States Code
WSR - Wild and Scenic River

Alienation (Municipal Parkland) - The conveyance, sale or lease of municipal parklands or recreational facilities to another entity or the use of parkland by the municipality for non-park purpose, or restricting to local residents the use of recreational facilities previously open to all persons requiring the authorization of the State Legislature.
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. All possible planning to minimize harm does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under §774.3(a)(1).

Constructive “Use” under Section 4(f) - involves no actual physical use of the Section 4(f) property via permanent incorporation of land or a temporary occupancy of land into a transportation facility. A constructive use occurs when the proximity impacts of a proposed project adjacent to, or nearby, a Section 4(f) property result in substantial impairment to the property's activities, features, or attributes that qualify the property for protection under Section 4(f). As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance, will be meaningfully reduced or lost. The types of impacts that may qualify as constructive use, such as increased noise levels that would substantially interfere with the use of a noise sensitive feature such as a campground or outdoor amphitheater, are addressed in 23 CFR 774.15. A project's proximity to a Section 4(f) property is not in itself an impact that results in constructive use. Also, the assessment for constructive use should be based upon the impact that is directly attributable to the project under review, not the overall combined impacts to a Section 4(f) property from multiple sources over time.

Conversion under Section 6(f) - changing Section 6(f) parkland to a use other than public outdoor recreation.

De minimis finding under Section 4(f) – A de minimis impact is one that, after taking into account all measures to minimize harm would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under Section 4(f). In other words, a de minimis impact determination is made for the net impact on the Section 4(f) property. See section 4.4.13.5.1.E.1.

Design Approval Document - The DAD is the NEPA compliance document for NYSDOT.

Eminent Domain Procedure Law (EDPL) – Eminent domain is the governmental power to appropriate private property for public use. This law provides the exclusive procedures for eminent domain in New York State.

Extraordinary Magnitude – is a reference to exceedingly high costs, excessive complexity or other objectionable factors associated with a project alternative as determined in consultation with FHWA.

Feasible - can be built as a matter of sound engineering judgment.
“Feasible And Prudent Avoidance Alternative” under Section 4(f) - As defined in 23 CFR 774, a feasible and prudent avoidance alternative "avoids using any 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."

The “feasible and prudent” evaluation documents the considerations, consultations, and alternative studies supporting the conclusion that there are no feasible and prudent avoidance alternatives to the use of a 4(f) resource and that the proposed action includes all possible planning to minimize harm to the affected resource.

An in-holding is privately owned land inside the boundary of a national park, national forest, state park, or similar publicly owned, protected area. In-holdings result from private ownership of lands prior to the designation of the protected park or forest area, which then ends up grandfathered within the legally designated boundary.

Least overall harm – Once it is determined that there is no feasible and prudent avoidance alternative, “least overall harm” is a process of analyzing the remaining options to arrive at the alternative that best meets the statute's preservation purpose. FHWA determines which alternative has the least overall harm by balancing the factors found in 23 CFR 774.3(c).

LWCF: The Land and Water Conservation Fund – is a Federal program which provides money for the acquisition and development of parks, and conservation projects, include national, state and local facilities. Properties/resources funded by this program are known as “6(f)” properties.

Multiple-use lands – are publicly-owned lands managed for several types of uses (such as grazing, mining, recreation). Multiple-use public land holdings are often vast in size, and by definition these properties are comprised of multiple areas that serve different purposes. This generally applies to lands such as national forests, state forests, Bureau of Land Management lands, etc. When multiple use lands are involved, Section 4(f) will apply only to those portions of such lands which now function as, or are designated in an official management plan as being for significant 4(f) purposes.

For example, within a National Forest, there can be areas that qualify as Section 4(f) resources (e.g. campgrounds, trails, picnic areas) while other areas of the property function primarily for purposes other than park, recreation or a refuge such as timber sales or mineral extraction. Coordination with the official(s) with jurisdiction and examination of the management plan for the area will be necessary to determine if Section 4(f) should apply to an area of a multiple-use property that would be used by a transportation project.

For multiple-use public land holdings which either do not have formal management plans or when the existing formal management plan is out-of-date, FHWA will examine how the property functions and how it is being managed to determine Section 4(f) applicability for the various areas of the property. This review will include coordination with the official(s) with jurisdiction over the property.
Municipal Parks or Public Recreational Facilities (Municipal Parklands)-for “alienation” –

Are parklands dedicated by one of the following means:

- “Formal” municipal parkland dedication may be made by an official act by the governing municipal body, such as a passage or adoption of a formal resolution or local law.
- “Implied” dedication of municipal parkland occurs when the government considers the land to be parkland or the public has used it as a park. Dedication through “implementation” can also occur when the common and accepted use of the land is as a park.

Examples include: parks, open space, marinas, golf courses/driving ranges, bike paths, boat launches, swimming pools, beaches, bridal paths, playgrounds, recreational trails and winter sport facilities such as ski trails, ski practice slopes, toboggan slides, bobsled runs, and recreational trails.

No Use under Section 4(f) -There are specific instances of involvement with 4(f) properties that are not considered use and these are listed as exceptions in 23 CFR 774.13. In addition, when a 4(f) resource is present, but the project does not meet any of the conditions of “use” the conclusion is that the project has “no use”.

Officials With Jurisdiction (OWJ) – are the official(s) of an agency or agencies that own and/or administer the 4(f) resource in question and who are empowered to represent the agency on matters related to the property (23 CFR 774.17). There may be more than one OWJ for the same Section 4(f) property.

There may be instances where the agency owning or administering the land has delegated or relinquished its authority to another agency, via an agreement on how some of its land will function or be managed. The FHWA will review the agreement and determine which agency has authority on how the land functions.

Permanent Incorporation under Section 4(f) – This form of use is when land is permanently incorporated into a transportation facility. This occurs when land from a Section 4(f) property is either purchased outright as transportation right-of-way or when the applicant for Federal-aid funds has acquired a property interest that allows permanent access onto the property such as a permanent easement for maintenance or other transportation-related purpose.

Primary purpose under Section 4(f) - is related to a property's primary function and how it is intended to be managed. Incidental, secondary, occasional or dispersed activities similar to park, recreational or refuge activities do not constitute a primary purpose within the context of Section 4(f). Unauthorized activities, such as ad hoc trails created by the public within a conservation area, are not considered as part of the determination of Section 4(f) applicability.

In determining the primary purpose of the land, consideration should be given to:

A. The authority under which the land was acquired;
B. Lands with special national or international designations;
C. The management plan for the land; and,
D. Whether the land has been officially designated, by a Federal, State, or local agency with jurisdiction over the land, as an area whose primary purpose and function is one of those preserved under Section 4(f).

**Prudent** - a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measures to the property. The Section 4(f) regulations describe a method to test whether an alternative will be “not prudent”.

**Public Trust Doctrine** - is a legal concept which provides that parks, open space, waterways, shorelines, and other natural resources should be preserved for public enjoyment.

**Publicly owned land** - is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such by a Federal, State or local agency, and the officials with jurisdiction over the land determine that its primary purpose is as a park, recreation area, or refuge.

**Recovery Action Program Plan** - serves both as a guide to local action planning and as a statement of a community’s commitment to the revitalization goals of the UPARR program [54 USCS § 200504]. The program plan is for UPARR funded projects and is parallel to the SCORP for Section 6(f) proposals.

**Recreational areas** - include formal and informal facilities, including after-school public use of school playgrounds and recreational facilities. FHWA has determined that Section 4(f) does not apply to the National Recreational Trails Program.

**School Playground** - is defined as an area of school property developed and/or used for public park or recreation purposes. 4(f) applies to the playground area, not the entire campus. Examples include:
- Baseball Diamonds
- Soccer Fields
- Tennis Courts
- Track and Field Facilities
- Jungle Gyms or Swing Sets

**SCORP: State Comprehensive Outdoor Recreation Plan** - a comprehensive document prepared every 5 years by OPRHP under the LWCF program which surveys recreation facilities used to determine grant awards and serves as both a status report and an overall guide for recreation resource planning, development and preservation.

**Section 4(f)** - the Section of the Department of Transportation Act, 49 USC 303 and 23 USC 138, that permits the use of land for a transportation project from a significant publicly owned public park, recreational area, wildlife or waterfowl refuge area or significant historic site only when the Federal Highway Administration had determined that (1) there is no feasible and prudent alternative to such use, and (2) the project includes all possible planning to minimize harm to the parkland resulting from such use.
Section 6(f) - the provision of the LWCF Act, [54 USC 200305 (f) (3)], which prohibits the conversion of parkland acquired or developed with LWCF assistance to other than a public outdoor recreation use without the approval of the NPS.

Section 1010 - the provision of the Urban Park and Recreation Recovery Act (UPARR) of 1978, Public Law 95-625 (54 USC §§ 200501 to 200511) is a federal matching grant program administered by the NPS which provided funding for the rehabilitation of deteriorating parks and recreational facilities in cities and urban areas similar in intent to the LWCF. 54 USC § 200507 prohibits conversion to other than “public recreation use”.

Shared Use Paths – A path for non-motorized users physically separated from motorized vehicular traffic by an open space or barrier. Non-motorized users may include bicyclists, pedestrians, skaters, wheelchair users, and joggers.

Significant – within Section 4(f), means that in comparing the availability and function of the park, recreation area or wildlife and waterfowl refuge, with the park, recreation or refuge objectives of the agency, community or authority, the property in question plays an important role in meeting those objectives. Except for certain multiple-use land holdings significance determinations are applicable to the entire property and not just to the portion of the property proposed for use by a project.

Temporary occupancy under Section 4(f) - results when a Section 4(f) property, in whole or in part, is only required for project construction-related activities and will not be permanently incorporated into a transportation facility. Section 23 CFR 774.13(d) provides the conditions under which “temporary occupancies of land…are so minimal as to not constitute a use within the meaning of Section 4(f).” See Section 5.1.C.2 of this section for additional information.

Trail - a thoroughfare or track across land, water or snow, used for designated recreational purposes such as:

- pedestrian activities, including wheelchair use;
- skating or skateboarding;
- equestrian activities, including carriage driving;
- non-motorized snow trail activities, including skiing;
- bicycling or use of other human powered vehicles;
- aquatic or water activities; and
- motorized vehicular activities, including all terrain vehicle riding, motorcycling, snowmobiling, or use of other off road motorized vehicles.

Use for the purposes of Section 4(f) - A “use” of Section 4(f) property as defined in 23 CFR 774.17 occurs when:

- Land is permanently incorporated into a transportation facility;
- There is a temporary occupancy of land that is adverse and does not meet the Section 4(f) conditions under 23 CFR 774.13(d); or
- There is a constructive use of a Section 4(f) property; or
- The project includes other considerations as described in Appendix I.

See 4.4.13.5.1.C for additional details.
Wildlife and waterfowl refuge for purposes of Section 4(f) – include any significant publicly owned public property (including waters) where the primary purpose of such land is the conservation, restoration, or management of wildlife and waterfowl resources (including, but not limited to, endangered species and their habitat). For purposes of Section 4(f), National Wildlife Refuges are always considered wildlife and waterfowl refuges by FHWA in administering Section 4(f); therefore no individual determination of their Section 4(f) status is necessary.

Many refuge-type properties permit recreational activities that are generally considered not to conflict with species conservation, such as trails, wildlife observation and picnicking. Other activities, such as educational programs, hunting, and fishing, may also be allowed when the activity is consistent with the broader species conservation goals for the property.

Examples of properties that may function as wildlife and waterfowl refuges for purposes of Section 4(f) include: State or Federal wildlife management areas, a wildlife reserve, preserve or sanctuary; and waterfowl production areas including wetlands and uplands that are permanently set aside (in a form of public ownership) primarily for refuge purposes.

While a property owned by a State or local government has been the beneficiary of a Federal grant program in support of hunting, fishing, and related resource conservation, this does not automatically confer Section 4(f) status. The terms of such grants should be considered when determining if the property should be treated as a wildlife and waterfowl refuge for purposes of Section 4(f).

Sites purchased as mitigation for transportation projects (e.g., for endangered species or wetlands) can be considered refuges for purposes of Section 4(f) if the mitigation sites meet all of the applicable criteria for Section 4(f) status as a refuge, including public ownership, significance, and functioning primarily as a refuge.
D. References/Technical Documents

Section 4(f) Policy and Guidance

Guidance to project applicants on the preparation and processing of environmental and Section 4(f) documents.

2. **National Parks – National Trails System**

Guidance on preparing Section 4(f) evaluations.

Guidance contains a series of questions and answers on the application of *de minimis* impact criteria.

Handbook addresses the full range of Section 4(f) compliance options, including individual Section 4(f) evaluations, *de minimis* impact determinations, and programmatic Section 4(f) evaluations.

This tutorial is based on one developed in 2006 by the Maryland State Highway Administration. This version was substantially updated to reflect the changes brought about under SAFETEA-LU, the new 23 CFR 774 regulations, and to apply to a national audience.

Section 4(f) Programmatic Evaluations and Agreements
The Programmatic Section 4(f) evaluations listed below are time-saving procedural alternatives to preparing individual Section 4(f) evaluations for certain minor uses of Section 4(f) property.


   http://environment.fhwa.dot.gov/4f/4fnetbenefits.asp

10. *Proposed Seaway Trail and Bikeway - Application of Section 4(f), FHWA (March 7, 1983)*

**Section 6(f) Policy and Guidance**

    Manual serves as a basic reference for the administrative procedures and requirements for the Land and Water Conservation Fund program by the Department of Interior, National Park Service (NPS).

    Handbook outlines the “alienation” and “conversion” and the legal requirements needed in New York. Used in conjunction with the above referenced NPS Manual.

**Municipal Parkland Alienation Policy and Guidance**

    Handbook outlines the “alienation” process and the legal requirements in New York.
E. Contacts

NYSDOT Contact
Call the Landscape Architecture Bureau at (518) 457 5672 or see LAB IntraDOT Site for current contacts.

Scenic Byways Contact
Scenic Byways Coordinator, Mark Woods, (518) 457-6277 mark.woods@dot.ny.gov
The NYSDOT Scenic Byways website

New York State Department of Environmental Conservation

For Wild, Scenic and Recreational Rivers:
DEC Division of Fish, Wildlife and Marine Resources
625 Broadway
Albany, New York 12233-4756
518-402-8853

For NY State Forests:
NYSDEC
Division of Lands and Forests
Bureau of State Land Mgmt
625 Broadway
Albany, NY 12233-4255
518-402-9428

For Wildlife Management Areas:
NYSDEC
Bureau of Wildlife
625 Broadway
Albany, NY 12233-4755
518-402-8924

New York State Office of Parks, Recreation and Historic Preservation

For 4(f) State Parklands Impacts:
Joe Grimaldi, 518-486-2930, Joseph.grimaldi@parks.ny.gov
Regional Parks Offices

For State Heritage Areas

For Section 1010:
Joe Grimaldi, 518-486-2930, Joseph.grimaldi@parks.ny.gov
Regional Parks Offices
For 6(f) questions:
Alternative State Liaison Officer, Joe Grimaldi, 518-486-2930,
Joseph.grimaldi@parks.ny.gov
OPRHP Regional Grants Representative(s): http://nysparks.com/grants/contact.aspx

For Recreational Trails Program (RTP):
RTP Administrator, Nancy Stoner, 518-486-2699; nancy.stoner@parks.ny.gov
New York State Office of Parks, Recreation, and Historic Preservation
Planning Bureau, Albany, NY 12238.
• Colleen LaFarr, Grants In Aid Program Assistant, 518-474-8477
collen.lafarr@parks.ny.gov
• Beatrice Gamache, Grants Administrator ,518-473-3321,
beatrice.gamache@parks.ny.gov

Federal Highway Administration (FHWA)
New York Division Office
Planning and Program Development
Leo W. O'Brien Federal Building, Suite 719
Clinton Avenue & North Pearl Street, Albany, NY 12207
(518) 431-4125
(518) 431-4121 (fax)

For FHWA’s Federal Lands Highway Program,
Office of Federal Lands Highway
Eastern Federal Lands Highway Division:
21400 Ridgetop Circle
Sterling, Virginia 20166
(703) 404-6201
Kevin Rose: Kevin.Rose@dot.gov

Department of the Interior

For Refuges
United States Fish and Wildlife Service

For National Water Trail System
National Park Service
F. Sample Statements

1. Section 4(f) - Parks, Recreation Areas and Refuges

   a) Section 4(f) No Involvement

      - The proposed project is 100% State funded, therefore Section 4(f) does not apply.

         OR

      - The proposed project has no involvement with USDOT. This section does not apply.

         OR

      - There are no resources/properties protected under Section 4(f) of the USDOT Act, in
        or adjacent to the project area. No further action is required under this section.

         OR

      - Section 4(f) properties have been identified nearby [insert names, types]. The
        proposed project does not involve work in or adjacent to the/ these Section 4(f)
        property(ies). No further consideration is required.

         OR

      - The proposed project is located adjacent to [fill in property name], a significant
        publicly-owned park [insert type of property]. However, the project will not affect
        the park and a Section 4(f) evaluation is not required.

         OR

      - Possible Section 4(f) properties were identified [insert names, types]. After
        consultation with the ___ [insert official with jurisdiction] and FHWA [or other lead
        federal agency], it was determined that the resource was Not a 4(f) property/
        temporary use/ no impact to the 4(f) resource. Coordination regarding this is
        included in the appendix. No further consideration is required.

   b) Section 4(f) de minimis Impact Determination

      - The (project name) will not adversely affect the activities, features, or attributes of
        the section 4(f) property discussed below. The ___ officials with jurisdiction over the
        section 4(f) property has provided written concurrence with these finding. Therefore
        (FTA / FHWA) has found that the following impacts on [identify section 4(f)
        property] qualify as de minimis because they do not adversely affect the activities,
        features, or attributes qualifying the property for protection under 23 CFR 774.17 (de
        minimis impact). Concurrence letters are included as an attachment to this
document. [The document should then provide a summary of impacts for each 4(f) resource].

The findings of de minimis impact for parks, recreation areas and refuges were made available for review and comment by the public (during the DEIS comment period in / through a public notice/ during public information meetings/EDPL hearings). Coordination regarding this is included in the appendix.

- [for letters requesting concurrence] The New York State Department of Transportation's Region (X) requests that the Federal Highway Administration, acting on behalf of the United States Department of Transportation, determine that the land use reclassification meets the criteria for a de minimis 4(f) finding. This request is based on the minimal impacts on (name) Park, the positive benefits from the final revisions described in (XXX), and the concurring letter of support from the (name –City, County, other) officials with jurisdiction of (name) Park.

c) Section 4(f) Programmatic Evaluation

- Park a publicly owned park, lies within the proposed project area. The project activities meet the criteria for a Programmatic Section 4(f) Evaluation for [Minor Involvements with Parks, Recreation Areas and Waterfowl and Wildlife Refuges OR Transportation Projects That Have a Net Benefit to a Section 4(f) Property OR Independent Bikeway or Walkway Construction Projects.] There is no other prudent and feasible alternative to the use of this land. A Programmatic 4(f) evaluation has been prepared and is included in Appendix ---, along with related correspondence.

d) Section 4(f) Individual Evaluation

For use in DADs when NOT an EA/ EIS (refer to Section 4(f) outline in Appendix H for EA/ EIS)

- [Name of Resource], a [type of resource], lies within the proposed project area. The project activities within the property include:
  o land to be permanently incorporated into a transportation facility AND/OR
  o a temporary occupancy of land that is adverse in terms of the statute’s preservationist purposes AND/OR
  o a constructive use of the [Resource]

There is no other prudent and feasible alternative to the use of this land. The proposed action includes all possible planning to minimize harm to [Name of Resource]. An Individual 4(f) evaluation is required and is included in Appendix ---

OR

- The proposed project involves a use in a section 4(f) property, [insert property name]. A separate 4(f) document has been prepared. It includes the findings that (1) there is no feasible and prudent alternative to the use of land from the property, and (2) the action includes all possible planning to minimize harm to the property resulting in
such use. The 4(f) document is included in Appendix --, along with related correspondence.

e) Tier 2 EIS Sample

“This section identifies and describes Section 4(f) properties located within or adjacent to the Corridor that could be impacted by the proposed alternatives. This section discusses public parks, recreation areas and refuges, public or private historic properties that are listed or eligible for inclusion in the NRHP, and public or private archaeological sites that are listed or eligible for inclusion in the NRHP and warrant preservation in place.

In accordance with 23 CFR 774.11(c), consideration under Section 4(f) is not required when the Owner with Jurisdiction (OWJ) over a publicly owned park, recreation area, or wildlife or waterfowl refuge determines that the property in its entirety is not significant. In the absence of this determination, the property is assumed to be significant. None of the properties discussed in this Section 4(f) evaluation were deemed not significant by their OWJ.

4.4.1 Parks, Recreation Areas and Refuges
Section 4(f) applies to parks, recreation areas and refuges of national, state, or local significance that are both publicly owned and open to the public. These include areas of publicly owned open space that is designated for recreation, as well as trails and bicycle facilities. This section addresses public parks, recreation areas and refuges located within or adjacent to the Corridor. Section 4(f) requires consideration of proximity impacts on Section 4(f) properties where no physical use occurs. For public parks, recreation areas and refuges, FHWA identified potential constructive use due to proximity impacts as changes to access, visual, and noise levels since these have the potential to result in substantial impairment to the property's activities, features, or attributes that qualify it for protection under Section 4(f). Therefore, public parks, recreation areas and refuges located within 0.25 miles of the edge of the Corridor footprint were included in the Section 4(f) analysis, while public parks, recreation areas and refuges outside of that boundary were excluded because there would be no appreciable changes to access, visual, or noise level at this distance. The noise analysis can be referenced in Section 3.6 and Appendix M. A different methodology was used to determine potential proximity impacts to grassland birds at Midewin National Tallgrass Prairie, as discussed in Section 4.5.3.2.

4.4.1.1 Identification of Existing Public Parks, Recreation Areas and Refuges
Community and regional plans for existing public parks, recreation areas and refuges within the Study Area were initially examined to determine the locations of facilities that may be within or adjacent to the Corridor. Figure 4-1 shows the locations of all facilities designated for these uses within the Study Area and the Corridor. Based on these plans, FHWA then determined that there are two existing recreation areas located within the Corridor (the Des Plaines State Fish and Wildlife Area [DPSFWA] and the Wauponsee Glacial Trail), and one existing recreation area located within 0.25 mile of the edge of
the Corridor footprint (the Midewin National Tallgrass Prairie). Table 4-1 summarizes the ownership, location, and designated recreational uses of these facilities.

Bobcat Field, a city-owned facility that is leased by the Wilmington Bobcats youth football organization, is within the footprint of Alternatives 1 and 2. The field is not open to the community as a park, and the gates are locked except during football-related activity. The recreation area was determined by the FHWA to not be a Section 4(f) resource because it is not open for public use. Currently the Wilmington Bobcats are the only organization that uses the area year round by leasing it from the City of Wilmington.

The following sections provide more detailed information on these three Section 4(f) facilities (excluding Bobcat Field, which is not a Section 4(f) resource), including their history and designated recreational uses.

4.5.1.1 Direct Use Evaluation of the Des Plaines State Fish and Wildlife Area
The DPSFWA is not located within the footprints of Alternatives 1, 2, and 3 or Design Options 1-6, and no land from the DPSFWA would be acquired as right-of-way, either temporary or permanent, for any of the alternatives or design options. Figure 4-5 shows the location of the DPSFWA with respect to Alternatives 1, 2, and 3. Design Options 1-6 are not proximate to the DPSFWA. Thus, none of the alternatives or design options will require direct use of the DPSFWA.

4.5.1.2 Direct Use Evaluation of the Midewin National Tallgrass Prairie
The Midewin National Tallgrass Prairie is not located within the footprints of Alternatives 1, 2, and 3 or Design Options 1-6, and no land from the Midewin National Tallgrass Prairie would be acquired as right-of-way, either temporary or permanent into any of the alternatives or design options. Figure 4-6 through Figure 4-10 show the location of the Midewin National Tallgrass Prairie with respect to Alternatives 1, 2, and 3 as well as Design Options 1-6. Thus, none of the alternatives or design options will require direct use of the Midewin National Tallgrass Prairie.

4.5.1.3 Direct Use Evaluation of the Wauponsee Glacial Trail
The Wauponsee Glacial Trail is located within the footprints of Alternatives 1, 2, and 3, and each alternative would require the acquisition of right-of-way for the incorporation of land from the Wauponsee Glacial Trail into the project. Figure 4-11 shows the location of the existing Wauponsee Glacial Trail with respect to Alternatives 1, 2, and 3. Design Options 1-6 are not proximate to the Wauponsee Glacial Trail and would not require a direct use of the trail. All three alternatives would cross the Wauponsee Glacial Trail on the north side of Symerton, Illinois. Since all three alternatives have the same footprint in this location, they would all result in identical uses for the trail. The Wauponsee Glacial Trail crossing by Alternatives 1, 2, and 3 is unavoidable due to its length through the Study Area and general southwest-northeast orientation. The crossing would occur approximately 375 feet north of an access location to the trail. None of the six design options related to IL-53 would result in a use of the trail. Based on this information, FHWA has concluded that the project will require a direct use of the Wauponsee Glacial Trail. FHWA has proposed making a de minimis impact determination based on the
measures planned to minimize harm, which are described in Section 4.6, Preliminary De Minimis Impact Determination for the Wauponsee Glacial Trail.”

f) Section 4(f) Public Notice

Alert!
Public Notice: (standard language should be used for both formal public notices and informal notices such as newsletters, etc.)

Example 1:

NOTICE OF AVAILABILITY OF DRAFT DAD

The New York State Department of Transportation (NYSDOT) is developing design studies to rehabilitate a highway culvert on NY Route xx, xx St. over xx Creek in the City of xxx, xxx County. Design plans for the project have been developed by the Department after coordination with Federal, State and Local agencies. A Draft Initial Project Proposal/Final Design Report (IPP/FDR) has been prepared which assesses the project’s effect on the quality of the human environment in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA) and the State Environmental Quality Review Act (SEQR).

In addition, this notice represents compliance with Section 4(f) of the United States Department of Transportation Act of 1966, and a de minimis finding for the use of public parkland in the City of xxx. The Veteran’s Memorial Park and Niawanda Park are owned by the City of xxx and Isle View Park is owned by the County of xxx. Copies of the Draft IPP/FDR are available for comment and review during business hours at the offices of New York State Department of Transportation, at [address or website] and City of __ Public Library, [address]. The document will be available for comment and review until June 30, 2014. Further information may be obtained from the NYSDOT by contacting xxx

Example 2:

P.I.N. xxxx
Project Title
Right of Way Acquisition and Concurrent Use and Occupancy and de minimis finding under Section 4(f)
Town of xx, xx County
Date

Section 4(f) de minimis legal notice for public involvement and solicitation of public comments on additional proposed right of way acquisition

The New York State Department of Transportation is undertaking a federally-funded project to replace the xx Bridge over the xx Canal in the Town of xx, xx County on a similar alignment using staged construction. The bridge will be widened to three lanes to accommodate the staged construction and future travel volumes. The objectives of this project are to replace the bridge,
which has approached the end of its useful service life, in a cost effective manner. The approved
design will replace the bridge with a precast box culvert and the existing abutments will be
utilized to retain the earth and eliminate the need to excavate the stone blocks and lay back the
earth required for a bridge replacement. This project is being progressed as a Categorical
Exclusion with documentation in accordance with the National Environmental Policy Act
(NEPA) as defined in 23 CFR, Part 771.117(c) and as a Non-Type II Determination of No
Significant Effect (DONSE) Action in accordance with the State Environmental Quality Review
Act (SEQR) as defined in 17 NYCRR, Part 15.

The project will require acquisition by the New York State Department of Transportation
(NYSDOT) of a small area of New York State (NYS) Parks Land both to accommodate the
impacts of this project and to formalize the existing road’s occupation of NYS Park lands which
has been undocumented since the existing bridge was constructed.

Section 4(f) of the United States Department of Transportation Act of 1966 protects publicly-
owned parks and recreation areas, wildlife and waterfowl refuges, and historic properties. It
also requires transportation agencies such as NYSDOT to consider all measures to avoid and
minimize the use of those types of facilities; unless there are no feasible and prudent alternatives.
The parcel contains a publicly-owned recreational facility open to the public for use which
qualifies it for consideration and protections under Section 4(f).

XX Street will be widened to the west, impacting NYS Park Land during construction activities
on the east and west side of the bridge. A total of 2,345.2 sq. meters (25,244 sq. ft.) of NYS Park
Land will be impacted and converted with a Concurrent Use & Occupancy Map filed by
NYSDOT right of way for this work. The existing canal trail will be realigned to the north
approximately 15 meters which will provide for a safer crossing for pedestrians across xx Street
away from the busy intersection to the south. NYSDOT has informed the Office of Parks,
Recreation and Historic Preservation of the need for this action.

Comments received will be shared with the Office of Parks, Recreation and Historic
Preservation and Federal Highway Administration to allow the Federal Highway Administration
to make an impact finding. The public may submit their written comments on this additional
property acquisition and potential Section 4(f) de minimis involvement with the project to the
attention of XXXX, Regional Design Engineer, NYSDOT Region [address]. Comments will be
received for a period of two (2) weeks from the date of this notice.

2. Section 6(f) Parks and Recreational Facilities

 Reserved

3. Municipal Parkland and Alienation

- Municipal Parkland Alienation is not required
OR

- Municipal Parkland Alienation is required and has been completed by the municipality

4. Section 1010 UPARR

Reserved

5. National and State Heritage Areas

a) National Heritage Areas Program

- There is no federal action (funding or permit), therefore no consideration regarding National Heritage Areas are required.

OR

- The proposed project is not located in areas identified as National Heritage Areas.

OR

- The proposed project is located in [insert property name] National Heritage Area and after reviewing the management plan, it has been determined that there is no potential impact and no further consideration is required.

OR

- The proposed project is located in [insert property name] National Heritage Area and after reviewing the management plan, it has been determined that there is a potential impact. An information package was prepared and submitted to [lead federal agency] for coordination with the Secretary of Interior and the [OWJ]. Documentation on the consultation, lead federal agency concurrence, a consistency statement and any changes made to the project as a result of consultation are included in the appendix.

b) State Heritage Area Program

- The proposed project is not located in areas identified as State Heritage Areas.

OR

- The proposed project is located in (name) State Heritage Area. The name of Administering Body has been contacted, and the approved Heritage Area Management Plan has been reviewed, and the project is consistent with the goals identified for the area. Correspondence regarding this is included in the appendix.
The proposed project is located in (name) State Heritage Area. There is no approved Heritage Area Management Plan therefore no further consideration under State Heritage Area is required. [If the portion of the State Heritage area is also protected under another regulation (such as 4(f) or Section 14.09) reference that section in this paragraph]

G. Sample Memos/Letter

Reserved
H. Individual Section 4(f) Evaluation Outline

For categorical exclusion projects requiring a Draft and Final Section 4(f) Evaluation, FHWA requires that the Section 4(f) Evaluations be contained in separate documents from the Design Reports. The separate Section 4(f) document shall have a separate title sheet (see PDM Exhibit 7-6) signed by the Deputy Chief Engineer, NYSDOT and FHWA Division Administrator.

Below is an outline for a 4(f) individual evaluation. It provides the author with general topic areas and recommendations to be tailored to your specific project needs. Required sections are in bold text. Other sections may be useful to the reviewer to explain the project context and should be included as appropriate.

I. Introduction
   The evaluation should include the following brief introduction:
   
   A. A brief description of Proposed Action that identifies:
      1. The program or project purpose and need.
      2. The program or project-level alternatives under consideration.
      3. The Federal (USDOT) involvement (funding, permit) which requires 4(f) evaluation.

II. Applicability of Section 4(f)
   
   Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property(ies) within the project area.
   
   A. A general vicinity map.
   B. Type of property(ies) (recreation, historic, etc.) and the ownership (city, county, state, etc.).
   C. Summary statement of applicability to each property.

III. Description of Section 4(f) Properties
   
   Include a description of each Section 4(f) property that includes activities, features, and attributes of the Section 4(f) property:
   
   A. A detailed map or drawing of sufficient scale to identify the relationship of the alternatives to the Section 4(f) property(ies) and showing which of the properties or portions of the properties (if any) were acquired or developed with financial assistance from the Land and Water Conservation Fund.
   B. Size (acres or square feet) and location (maps, sketches, etc.) of the affected Section 4(f) property(ies).
   C. Function of or available activities on the property(ies) (swimming, golfing, baseball, etc.) [For parks, recreation areas and refuges].
   D. Description and location of all existing and planned facilities (tennis courts, baseball diamonds, etc.).
   E. Access (pedestrian, vehicular) and usage (approximate number of users/visitors, etc.).
   F. Relationship to other similarly used lands in the vicinity, including any parks, recreation areas and refuges, or historic sites that are not Section 4(f) property(ies).
G. Applicable clauses affecting the ownership, such as lease, easement, covenants, restrictions, or conditions, including forfeiture [for parks, recreation areas and refuges].
H. Unusual characteristics (flooding problems, terrain conditions, or other features) that either reduce or enhance the value of all or part of the property(ies).
I. Any history of concurrent planning or development of the proposed transportation project and the Section 4(f) property.

IV. Impacts to Section 4(f) Properties
The evaluation should **identify and analyze the impacts** of each build alternative on each Section 4(f) property* (quantified where possible and summarized in a comparative manner, such as in a table) as a result of direct use (or **constructive use***) of the Section 4(f) property:

A. **Identify whether or not there is a use.**
B. The amount of Section 4(f) property to be used (in acres or square feet).
C. The facilities, functions, activities, features, or attributes affected (include map).
D. Access***
E. Visual impact***
F. Air quality***
G. Noise (quantified)***
H. Water***
I. Land use in the vicinity, including any impacts of growth induced by the project***

*Include documentation of any 4(f) resources with de minimis or programmatic evaluation.
**All **constructive use** determinations must be discussed with FHWA Division Office, who will consult with FHWA HQ.
***Any discussion of these types of impact should include a conclusion about whether the impact substantially impairs the qualities or functions that qualify the property for Section 4(f) protection.

V. Avoidance Alternatives
**Discuss alternatives considered to avoid using Section 4(f) property(ies), including analysis of the impacts caused by avoiding the Section 4(f) property(ies).**
- Discuss whether there are design alternative(s) [including alternatives previously dismissed] that would not require the use of any Section 4(f) property(ies), and
- Provide an evaluation of each alternative’s **feasibility and prudence** (include analysis of other impacts caused by avoiding the Section 4(f) property).
- Include a definitive statement of whether there are no **feasible and prudent avoidance alternatives**.

VI. Measures to Minimize Harm
If the analysis in Section V (Avoidance) indicates that there are no **feasible and prudent avoidance alternatives**, then the evaluation should demonstrate that the project includes **all possible planning to minimize harm to the Section 4(f) property** by describing:
- All of the **prudent** measures that will be included in the project to minimize harm,
B. The most prudent alternative that will cause the least overall harm analysis including the following factors:
   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 (summarize consultation with OWJ related to significance);
   4. The views of the official(s) 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. Extraordinary magnitude in differences in costs among the alternatives.

VII. Mitigation
The evaluation should identify and describe any additional measures (not included in avoidance or minimization as discussed in above sections) to offset specified impacts of each alternative on each Section 4(f) property:
   A. Compensating for the impact
      1. For each Section 4(f) property, take into consideration the views of OWJ and identify any compensatory mitigation measures that are prudent.
      2. For each Section 6(f) resource, identify any measures that will allow the affected property to be replaced with other recreation properties of at least equal fair market and of reasonably equivalent usefulness and location.
   B. Enhancement. For each Section 4(f) properties, taking into consideration the views of OWJ and identify any enhancement measures that are prudent.
   C. Other measures. For each Section 4(f) properties, taking into consideration the views of OWJ, discuss any additional creative approaches to the mitigation of adverse effects.

VIII. Coordination
A Section 4(f) evaluation should include a summary of any comments received (letters, etc., included in an appendix to the evaluation) throughout the process (include any comments on the draft Section 4(f) evaluation):
   1. Records of public involvement including public notice, comments from the public and any responses to public
   2. Results of coordination with the officials with jurisdiction;
   3. Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments; (Include comments from: Washington D.C. office of the Department of Interior; Regional or local offices of the Department of Agriculture; Regional office of the Department of Housing and Urban Development, as appropriate).
IX. Conclusion
A draft Section 4(f) evaluation may include a tentative conclusion (for coordination and comment) that demonstrates:

A. There are no feasible and prudent avoidance alternatives -- OR
B. The project includes all possible planning to minimize harm to the Section 4(f) property(ies.) -- OR
C. The project will comply with other related laws including Section 6(f) of the Land and Water Conservation Fund Act (if applicable).
D. The document includes a summary of the reasons for this conclusion based on the information provided in the “Mitigation”, “Avoidance Alternatives”, “Measures to Minimize Harm”, and “Coordination” sections above.

A final Section 4(f) Evaluation conclusion includes the information above as well as:

A. The results of the internal legal sufficiency review.
B. The following statement, “Based upon the above considerations, there is no feasible and prudent alternative to the use of land from the (identify Section 4(f) property) and the proposed action includes all possible planning to minimize harm to the (Section 4(f) property) resulting from such use.”

Executive Summary
(Required for the body of the document if the evaluation will be as an appendix to an EA or EIS)

Summarize the analysis done and conclusions reached. The summary should be in layman terms and include enough detail so that it can be included in the EA or EIS with only minor modification.

The Executive Summary should match the outline of the complete Section 4(f) Evaluation and include a synopsis of each section. Executive Summaries should not be a repetition of the nuances and full discussion but rather highlight the key factors for decision making.
I. Other Considerations

Some of these situations may be characterized as use, per se, while others may not. This section introduces you to the ones you’re most likely to encounter:

- Joint Development
- Air Rights/Tunneling
- Temporary
- Recreational Occupancy
- Late Discovery
- Late Designation
- Mitigation Activities
- Boat Access Ramps
- Trails
- Transportation Enhancement Projects

Note: The list of Other Considerations described in this section is not exhaustive, so be aware that you could come across one that is not discussed here. All scenarios should be examined on a case-by-case basis. The final decision rests with the FHWA on all matters regarding applicability of Section 4(f).

a. Joint Development

Joint development involves setting aside or reserving land for future transportation purposes while at the same time planning for a park, recreational area, or refuge. Section 4(f) does not apply when documentation demonstrates that the area in question was reserved for transportation purposes before or at the same time that the adjacent portions were designated as a park, recreational area or refuge property. For example, a highway project may be planned for the area prior to the designation of a refuge in the same area. The absence of such documentation and coordination may result in application of Section 4(f) to the area that had been reserved for transportation purposes. A master plan for the park indicating access roads would be a form of documentation.

If the Department elects to allow park, recreation, or refuge activities to occur during the interim between the designation of the land and the advancement of the transportation project, it is advisable to document the decision in a formal permit to clarify that Section 4(f) does not apply. The permit should include specific terms of limitation (see Temporary Recreational Occupancy of Highway Right-of-Way discussion below).

b. Air Rights/Tunneling

Air rights, under Section 4(f), typically refer to areas associated with an elevated structure such as a bridge or ramp in the vicinity of a Section 4(f) property. A Section 4(f) use does not occur unless the structure’s piers, abutments, or other appurtenances are physically located on the Section 4(f) property requiring permanent incorporation. When the structure completely spans the Section 4(f) property, it would not typically result in a Section 4(f) use; however, its proximity (including vertical clearance) must be evaluated to determine if there is a substantial impairment to the property resulting in a constructive use. An example of a potential constructive use would be substantial impairment to the utility of a trail resulting from severely restricted vertical clearance.
Tunneling under a Section 4(f) property will result in a Section 4(f) use only if one or more of the following conditions are met:

- Archeological sites that warrant preservation in place are adversely affected;
- There is permanent harm to the purposes for which the park, recreation area, or refuge was established;
- There is substantial impairment to the integrity of a historic site; or,
- The exception for temporary occupancy is not met.

c. Temporary Recreational Occupancy of Highway Right-of-Way

Temporary recreational occupancy of highway ROW involves land formally reserved for a future highway ROW that temporarily functions for park, recreational, or refuge purposes. Sometimes park, recreational, or refuge facilities will occur, with or without authorization, within a ROW. In either case, Section 4(f) does not apply.

If the Department considers allowing an authorized use of the ROW, it is advisable to include in any limited occupancy permit reversionary clauses that make it clear any park, recreational, or refuge activities are interim and that no long-term right or public expectation to occupy the transportation ROW has been created. Documentation should make it clear that any non-transportation activity on the reserved ROW will cease once the land is required for completion of the transportation project.

d. Late Discovery

Late discovery refers to the discovery of a Section 4(f) resource after completion of the NEPA process (i.e. after Record of Decision/Finding of No Significant Impact/Categorical Exclusion completion). Reasons why this may occur include a lack of detailed ROW information during environmental studies, changes to the selected alternative during final design, or new information or discovery during construction.

When a late discovery occurs, timely coordination between the Department or project sponsor and FHWA is required. FHWA will determine if an individual, programmatic, or amended Section 4(f) evaluation is necessary. The findings of the coordination and documentation will be considered and may ultimately result in changes to the project design or construction plans.

e. Late Designation

Late Designation refers to the change of a property's Section 4(f) status late in the development of a proposed project. The Department may proceed, after consultation with FHWA, without treating the property as a Section 4(f) resource if:

- the newly designated Section 4(f) property was acquired for transportation purposes prior to the change in designation and
- an adequate attempt was made to identify Section 4(f) properties.

Archeological sites, should be addressed according to the provisions discussed TEM Section 4.4.12.
f. **Project Mitigation Activities within Section 4(f) Properties**

In some cases, project mitigation activities for impacts caused by projects (e.g. storm water, wetlands, etc.) are proposed within the boundaries of a Section 4(f) property and would constitute a use. For example, wetland mitigation for project impacts may be proposed to be sited in an urban park because there is no other available space.

In contrast, if the mitigation on Section 4(f) property is solely for the purpose of preserving or enhancing that property (for the purposes of mitigating the project’s 4(f) use), then a Section 4(f) use does not occur. The official(s) with jurisdiction over the property must concur in writing with this assessment. FHWA’s decision should be documented in the DAD. For example, if a project proposes the use of a small area in a public golf course, and the OWJ requests an enhancement (mitigation) by re-building the drainage adjacent to the pond within the golf course, then that enhancement on that pond is NOT an additional use of the 4(f) property.

g. **Boat Access Ramp**

When an access ramp is constructed as part of a project to construct a new bridge or to reconstruct, replace, repair, or alter an existing bridge on a Federal-aid system, FHWA's longstanding policy is that Section 4(f) approval is not necessary for the access ramp and public boat launching area. This policy was jointly developed by FHWA and the U.S. DOI in response to the enactment of section 147 of the Federal-Aid Highways Act of 1976 (Pub. L. 94-280 (HR 8235) May 5, 1976). Section 147 of the Federal Aid Highway Act of 1976 provides for the construction of access ramps to public boat launching areas adjacent to bridges being built or reconstructed on Federal highways. These ramps may be on public lands adjacent to the highway ROW or within the highway ROW. The FHWA and the Department of the Interior (DOI) have agreed that it would be contrary to this provision to search for **feasible** and **prudent** alternatives that would avoid construction of such ramps on public lands when the officials with jurisdiction have been consulted and are in agreement with the placement. Consequently, Section 4(f) does not apply to construction of boat access ramps in such instances. Section 4(f) would apply to bridge construction that requires acquisition of land from a Section 4(f) property in order to complete the bridge. In short, transportation projects involving the construction of boat access ramps may involve Section 4(f) use; however, the construction of boat access ramps does not, in itself, generally constitute use. Such ramps must provide direct access to a public boat launching area adjacent to the highway. This policy only applies to the access ramp and public boat launching area; any other use of Section 4(f) property for the project will require Section 4(f) approval.

h. **Trails**

Trails which are part of the local transportation system and that function primarily for transportation purposes are not subject to Section 4(f). Trails that occupy part of a transportation facility ROW but are not limited to a specific location within that ROW are not subject to Section 4(f) so long as the continuity of the trail is maintained. Trail-related projects funded under the Recreational Trails Program are exempt from Section 4(f). See additional information under **Resource Types with Special Considerations**.
i. **Transportation Enhancement Program**

If an activity is one of the eligible activities provided for in the **Transportation Enhancement Program**, then a Section 4(f) use does not occur.

A transportation enhancement activity (TEA) is one of the specific types of activities set forth by statute at 23 USC § 101(a)(35). TEAs are explicitly covered by the exception in 23 CFR 774.13(g) when:

- the work is solely for the purpose of preserving or enhancing an activity, feature or attribute that qualified the property for Section 4(f) protection, and
- the official(s) with jurisdiction over the Section 4(f) property must concur in writing that 4(f) is not applicable.

Example 1: A TEA proposed to construct a new bicycle/pedestrian path within a public park. The primarily purpose is to enhance the park, although it ties into the surface transportation system. This would qualify as an exception for Section 4(f) approval assuming the official(s) with jurisdiction agree in writing that the TEA provides for enhancement of the bicycle/pedestrian activities within the park. There is no 4(f) use.

Example 2: In contrast to Example 1, a TEA is proposed for construction of a new bicycle/pedestrian facility. The primary purpose of the project is to promote a non-motorized mode of travel for commuters even though some recreational use of the facility is likely to occur. This TEA involves the permanent incorporation of Section 4(f) parkland into a transportation facility. There is a use of Section 4(f) land and the appropriate Section 4(f) evaluation and documentation would be required.

Other TEAs that involve acquisition of scenic or historic easements, or historic sites, often result in ultimate ownership and management of the facility by a non-transportation entity (such as a tourism bureau or historical society). Even though Federal-aid transportation funds may be used to acquire a 4(f) resource, if a non-transportation entity ultimately will own and manage it, then the TEA would qualify as an exception for Section 4(f) approval.