
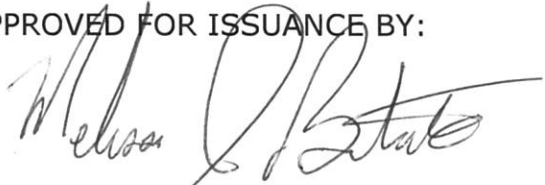


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<p><b>SUBJECT:</b></p> <p>Publication 349 Section 4(f)/Section 2002 Handbook January 2018</p>		
<p><b>INFORMATION AND SPECIAL INSTRUCTIONS:</b></p> <p>This handbook has been prepared as a guidance document for use in understanding the requirements of a Section 4 (f)/Section 2002 analysis and Section 4(f)/Section 2002 documentation. The handbook is based on the regulations governing Section 4(f) and Section 2002, Section 4(f) policies and Section 4(f) case law interpretations to date.</p> <p>This handbook is the primary source for downloading the Section 4(f) forms used to document nonapplicability/no use, temporary occupancy, de minimis, and programmatic section 4(f) evaluations.</p>		
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***Pennsylvania Department  
Of Transportation***

***Section 4(f)/Section 2002 Handbook***

***Publication No. 349***

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## ACRONYMS

CHP	Advisory Council on Historic Preservation
PE	Area of Potential Effect
ASHTO	American Association of State Highway and Transportation Officials
BOPD	Bureau of Project Delivery
CE	Categorical Exclusion
CEES	Categorical Exclusion Expert System
CFR	Code of Federal Regulations
CRP	Cultural Resources Professional
dba	Decibel
DCNR	Department of Conservation and Natural Resources
DOI	Department of Interior
EA	Environmental Assessment
ECMTS	Environmental Commitments and Mitigation Tracking System
EIS	Environmental Impact Statement
EO	Executive Order
EPDS	Environmental Policy and Development Section
FAA	Federal Aviation Administration
FAQ	Frequently Asked Questions
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impacts
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
HDTS	Highway Design and Technology Section
HUD	Housing and Urban Development
LEDPA	Least Environmentally Damaging Practicable Alternative
LOA	Letter of Agreement
LWCF	Land and Water Conservation Fund
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPS	National Park Service
NR	National Register
NRHP	National Register of Historic Places
PA	Programmatic Agreement <i>or</i> Pennsylvania
PennDOT	Pennsylvania Department of Transportation
PFBC	Pennsylvania Fish and Boat Commission
PGC	Pennsylvania Game Commission
PHMC	Pennsylvania Historical and Museum Commission
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SHPO	State Historic Preservation Officer
SLO	State Liaison Officer
THPO	Tribal Historic Preservation Officer
USC	United States Code
USDA	United States Department of Agriculture
USDOT	United States Department of Transportation
WSR	Wild and Scenic Rivers

# Preface

Over the years, the application of the requirements contained in Section 4(f) of the U.S. Department of Transportation Act of 1966 (49 U.S.C. §303(c)) has been the subject of debate. Section 4(f) is an area of law that has undergone, and continues to undergo, interpretation through litigation and regulatory changes. As such, the requirements for a Section 4(f) Evaluation can vary on a case-by-case basis depending on the facts of the situation and current case law interpretations. The provisions in Section 6009 of the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) clarified factors to consider and standards to apply in determining when an avoidance alternative is feasible and prudent, and factors to consider in selecting a project alternative when all alternatives use Section 4(f) property. The provisions also established procedures for determining when a Section 4(f) use is “*de minimis*” (negligible, or a trifle). In response to the SAFETEA-LU provisions, Section 4(f) was removed from the Federal Highway Administration’s (FHWA’s) National Environmental Policy Act (NEPA) implementing regulations (23 CFR Part 771) and included as a new separate Section 4(f) rulemaking (23 CFR Part 774). In 2012, FHWA issued an updated Section 4(f) Policy Paper to provide more insight on FHWA’s Section 4(f) implementing regulations (23 CFR Part 774). Section 2002 of the Administrative Code of 1929 (71 P.S. §512), contains the state counterpart to Section 4(f). It applies to both federally- and state-funded transportation projects. This provision of state law is sometimes called “PA Act 120” in reference to the 1970 legislative act that created it.

This Handbook has been prepared as a guidance document for use in understanding the requirements of a Section 4(f)/Section 2002 analysis and Section 4(f)/Section 2002 documentation. The Handbook is based on the regulations governing Section 4(f) and Section 2002, Section 4(f) policies and Section 4(f) case law interpretations to date.

This Handbook presents commonly encountered situations for projects, provides links to additional information, and has instructions for completing Section 4(f) documentation. The facts of each situation involving Section 4(f)/Section 2002 properties will vary, and therefore, need to be considered on a case-by-case basis by FHWA (and the Pennsylvania Department of Transportation (PennDOT) Office of Chief Counsel for projects with no Federal involvement).

**This Handbook is for guidance and informational purposes only; it is not regulatory.**

## Chapter 1: Background and Overview of Section 4(f) and Section 2002

In Pennsylvania, there are both federal and state laws that govern the use of land from publicly owned parks, recreation areas, refuges, and historic sites for transportation projects. For projects with federal funding or another federal action, Section 4(f) applies. For Pennsylvania Department of Transportation (PennDOT) transportation projects in Pennsylvania, Section 2002 of the Administrative Code of 1929 (sometimes called “PA Act 120”) applies.

### Section 4(f)

#### Background

Section 4(f) was enacted as Section 4(f) of the U.S. Department of Transportation Act of 1966. It was originally set forth in 49 U.S.C. §1653(f). In January 1983, as part of an overall recodification of the Act, Section 4(f) was amended and codified in 49 U.S.C. §303. Similar language is contained at 23 U.S.C. §138, which has been interpreted the same as 49 U.S.C. §303. The Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) incorporated Section 4(f) into their National Environmental Policy Act (NEPA) regulations at 23 CFR §771.135. The provisions in Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, amended the original Section 4(f) legislation at 23 USC §138 and 49 USC §303, and directed a new rulemaking to clarify the Section 4(f) process. SAFETEA-LU simplified the processing and approval of projects that have only *de minimis* (negligible) impacts on lands protected by Section 4(f) and clarified the factors to be considered and standards to be applied in determining when an avoidance alternative is feasible and prudent. In response to SAFETEA-LU, Section 4(f) was removed from 23 CFR Part 771 and is now found at [23 CFR Part 774](#).

<b>Law:</b>	Section 4(f) of the U.S. Department of Transportation Act of 1966 23 U.S.C. § 138 49 U.S.C. § 303
<b>FHWA Regulations:</b>	<a href="#">23 CFR Part 774</a>
<b>FHWA Policy:</b>	<a href="#">Section 4(f) Policy Paper</a>

#### Applicability

**Section 4(f) applies only to agencies within the U.S. Department of Transportation (U.S. DOT)**, such as FHWA, FTA, the Federal Aviation Administration (FAA), and the Federal Railroad Administration (FRA).

**Section 4(f) only applies to those projects that involve a U.S. DOT action such as federal-aid funding or Point of Access approval.**

## Intent

49 U.S.C. § 303(a) states “*It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.*”

The U.S. Secretary of Transportation may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or land from an historic site of national, state, or local significance (as determined by the Federal, state, or local officials having jurisdiction over the park, recreation area, refuge, or site) only if:

- There is no prudent and feasible alternative to using that land; *and*
- The program or project includes all possible planning to minimize harm to the public park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.”

Or

- The use, including any measures to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) will have a *de minimis* impact on the property.

## Section 2002 / Pennsylvania Act 120

### Background

Section 2002 of the Administrative Code of 1929 defines the powers and duties held by PennDOT. Section 2002 was amended in 1970 requiring, in part, the following:

*No highway, transit line, highway interchange, airport, or other transportation corridor or facility, shall be built or expanded in such a way as to use any land from any recreation area, wildlife and/or waterfowl refuge, historic site, State forest land, State game land, wilderness area or public park unless (i) there is no feasible and prudent alternative to the use of such land, and (ii) such corridor or facility is planned and constructed so as to minimize harm to such recreation area, wildlife and/or waterfowl refuge, historic site, State forest land, State game land, wilderness area, or public park.*

Pennsylvania (PA) Act 120 created a state counterpart to Section 4(f) which was codified in Section 2002 of the Administrative Code of 1929.

<b>Law:</b>	Act 120 of 1970, P.L. 356; Section 2002 of the Administrative Code of 1929 (71 PS § 512)
-------------	--

### Applicability

Section 2002 applies to **all** PennDOT transportation projects involving the construction or expansion of a highway, transit line, highway interchange, airport or other transportation corridor or facility.

**For transportation projects that have federal aid, or require U.S. DOT action, the Section 4(f) process and its documentation fulfills the requirements of Section 2002.** However, for projects that are 100 percent State-funded, and do not require a U.S. DOT action, the requirements of Section 2002/PA Act 120 must still be met.

## Chapter 2: Elements of the Section 4(f) Process

There are several elements to the Section 4(f) process. (See **Figure 1 on page 2-3, Section 4(f)/Section 2002 Process Flow Chart.**) First, Section 4(f) properties must be identified. If Section 4(f) properties are present, then the impacts of the project on those properties must be determined. Dependent on the type of use, further analysis is required that looks at total avoidance alternatives, minimization, and mitigation. Coordination with the official(s) with jurisdiction over a Section 4(f) property is essential. Documentation is an important element of the Section 4(f) process – ensuring that appropriate and thorough identification, analysis, and coordination was performed to support the Section 4(f) findings.

The following paragraphs and subsequent chapters discuss each of the elements of the Section 4(f) process in further detail.

**Identification of Section 4(f) Properties:** In order to know whether Section 4(f) must be addressed in a project, Section 4(f) properties need to be identified within the project area. This should be done as early as possible in the transportation project development process in order that avoidance of the protected resources can be given full and fair consideration. Section 4(f) applies to publicly owned parks, recreation areas, and wildlife and waterfowl refuges as well as historic sites that are individually eligible or listed in the *National Register of Historic Places* at the local, state, or national level of significance. Section 4(f) boundaries must be clearly defined. **More specific criteria for the identification of Section 4(f) properties and exemptions are discussed within Chapter 3.**

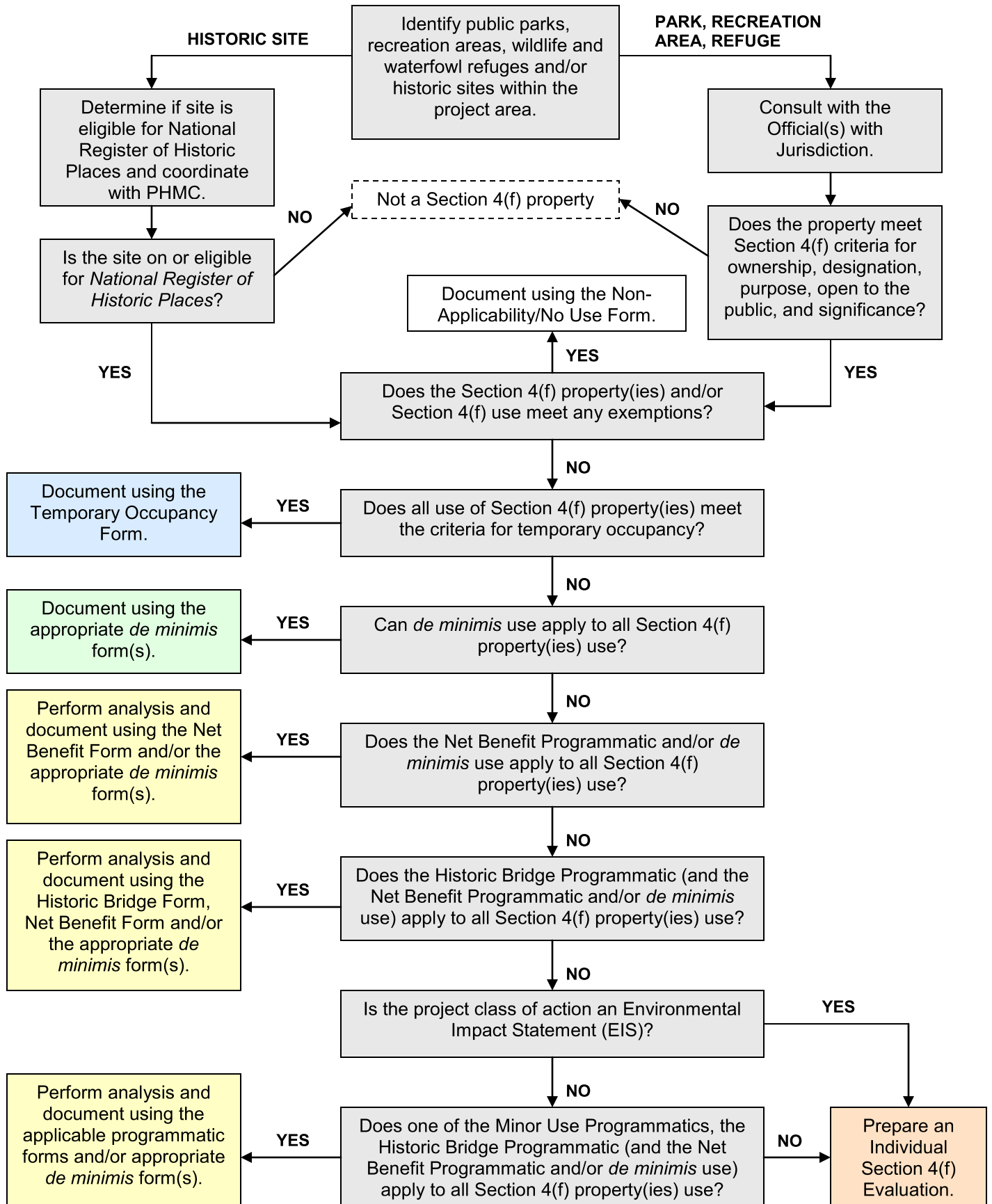
**Determination of Section 4(f) Use:** If Section 4(f) properties have been identified in a project area, determination must be made of whether there is a Section 4(f) use of the property. If there is permanent acquisition of property from within the Section 4(f) property boundary or a permanent easement, there is an actual Section 4(f) use. If that actual use is negligible and does not adversely affect the activities, features, and attributes of the Section 4(f) property, it may be a *de minimis* use. If there is only temporary encroachment of a Section 4(f) property for the project (e.g. construction easements), there may be a temporary occupancy if the situation meets all of the criteria outlined in the regulations for a temporary occupancy. If the project does not require land or permanent easement of a Section 4(f) property but creates such severe proximity impacts that the project would substantially impair the activities, features, and attributes of the Section 4(f) property, then there could be constructive use of a Section 4(f) property, although extremely rare. **Refer to Chapter 4 for guidance on determining Section 4(f) use.**

**Section 4(f) Analysis:** After the proposed Section 4(f) use for a project is determined, further analysis may be required depending on the Section 4(f) use. Under the Section 4(f) analysis, FHWA may only issue an approval for funding or other authorization (e.g. point of access approval, NEPA approval) if FHWA finds that there is no prudent and feasible alternative to using that land and that all possible planning to minimize harm to the Section 4(f) property resulting from the use has been incorporated, or the use, including any measures to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) will have a *de minimis* (negligible) impact on the property. If a use of a Section 4(f) property is *de minimis*, no alternatives analysis is required. An alternatives analysis is required for all other actual Section 4(f) uses. If a total avoidance alternative exists that is feasible to construct and prudent (meets the needs of project without causing other impacts of an extraordinary magnitude), then the total avoidance alternative must be selected. If a feasible and prudent total avoidance alternative does not exist, then the project must include all possible planning to minimize harm to the Section 4(f) property, meaning incorporating minimization and mitigation. As part of an individual Section 4(f) evaluation, a least overall harm analysis is performed to determine which alternative results in the least

overall harm to Section 4(f) property and other resources in the project area. **Chapter 5 provides a detailed discussion on how to perform the Section 4(f) analysis.**

**Coordination and Documentation:** An essential part of the Section 4(f) process is coordination. This includes coordination with the official(s) with jurisdiction over a Section 4(f) property, FHWA, the public (in cases of *de minimis* use of a park/recreation area/refuge and applying the Net Benefit Programmatic Agreement), federal agencies (U.S. Department of Interior (DOI) and U.S. Department of Agriculture (USDA), and U.S. Department of Health and Human Development (HUD) when required), etc. This coordination may be on-going through the Section 4(f) process and/or occur during documentation and approval. Section 4(f) documentation requirements are dictated by the type(s) of Section 4(f) use. PennDOT and the FHWA Pennsylvania Division Office have developed forms to assist in the documentation of non-applicability/no use, temporary occupancy, *de minimis* use, and Section 4(f) uses that meet the criteria of four nationwide programmatic Section 4(f) evaluations. If *de minimis* and the programmatic cannot be applied to all the Section 4(f) uses on a project, an individual Section 4(f) evaluation must be prepared. **Refer to Chapters 6 and 7 for specific guidance on coordination and how to prepare Section 4(f) documentation.**

# FIGURE 1: SECTION 4(f)/SECTION 2002 PROCESS FLOW CHART



Remember to consider proximity impacts to Section 4(f) properties – if severe, consult with FHWA regarding constructive use.

## Chapter 3: Identifying Section 4(f) Properties

The first step in Section 4(f) analysis is to identify Section 4(f) properties within a project area. Section 4(f) properties should be identified as early as possible in the transportation project development process in order that avoidance of the protected resources can be given full and fair consideration ([23 CFR § 774.11](#)).

Section 4(f) properties fall into three principal categories:

- **Publicly owned public parks, recreation areas, and wildlife and waterfowl refuges**
- **Parts of public multi-use properties which are significant for park, recreation area, wildlife and waterfowl refuge purposes**
- **Historic sites**

Within each of these categories, there are specific criteria that a property must meet in order to be considered a Section 4(f) property. This chapter discusses how to identify the various types of Section 4(f) properties.

For projects requiring a U.S. DOT action (funding, NEPA approval, point of access approval, or other actions), **FHWA makes the final decision on applicability of Section 4(f) to the above listed types of properties**. For projects without federal involvement, PennDOT Office of Chief Counsel has the final decision on property applicability for Section 2002.

### Parks, Recreation Areas, and Wildlife and Waterfowl Refuges

Parks, recreation areas, or wildlife and waterfowl refuges are Section 4(f) properties only if particular criteria are met. Each of these criteria have been interpreted and explained in regulation and guidance. **The subsections that follow provide additional details on each of these criteria:**

- **Public Ownership.** The property is publicly owned through fee simple ownership, a public easement, or a long-term lease agreement.
- **Designation.** The property is designated as a public park, recreation area, or wildlife and waterfowl refuge.
- **Major Purpose.** The major purpose of the property is for recreation activities or wildlife and waterfowl refuge.
- **Open to the Public.** The property must be open to the general public. (Refuges are the exception; they do not have to be open to the public.)
- **Significance.** The property serves a major recreational role. (Determined by the official with jurisdiction.)

**[Section 4\(f\) Policy Paper:](#)** refer to questions under #1, *Public Parks, Recreation Areas and Wildlife and Waterfowl Refuges*, for further guidance on the identification of these properties.

**Official(s) with Jurisdiction:** For parks, recreational areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction is the official(s) of the agency owning or administering the land. (See [\*Section 4\(f\) Policy Paper\*](#) Question 9A, *Who are the officials with jurisdiction for a park, recreation area, or wildlife refuge and what are their role in determining Section 4(f) applicability?*)

**Boundary:** If a property is determined to be a Section 4(f) park, recreation area or refuge, then the entire official property boundary is the Section 4(f) boundary. For example, Section 4(f) does not just apply to sections of a property that contain recreation facilities. The boundary for a township park is the entire park property, as defined in township mapping, deeds, etc. Look for possible Section 4(f) properties early in project development using GIS, online deed information, etc., preferable prior to scoping a project.

**NOTE:** FHWA makes the final decision on whether a resource qualifies as a Section 4(f) property.

## Public Ownership

A Section 4(f) property can be publicly owned through fee simple ownership, a public easement, or a long-term lease agreement.

- Properties owned by government agencies or public institutions are considered publicly owned.
- Public easements for Section 4(f) purposes and properties leased to public agencies, depending on the lease terms e.g., period of time covered by the lease and any cancellation clauses, may also meet the definition of publicly owned. Lease agreements must reflect long-term intent for property to remain in recreational or refuge use to be considered a Section 4(f) property.
- Land owned by private institutions (including non-profit organizations) or individuals and used as a park, recreation area, or wildlife/waterfowl refuge is not considered Section 4(f) property.

**Example:** The Sierra Club owns land that is open to the public for recreational activities.

**Determination:** While serving a recreational purpose and being open to the public, the property is not publicly owned and would not be considered a Section 4(f) property.

**Example:** A corporation owns a large amount of property. It leases 20 acres to the local municipality for use as ball fields (soccer and baseball).

**Determination:** If the lease is long-term, Section 4(f) could apply to the ball fields, given the property meets the other Section 4(f) criteria (fields open to everyone, etc.). If the lease terminates at the whim of the corporation, Section 4(f) may not apply. If there are any questions regarding the terms of a lease, consult with PennDOT Office of Chief Counsel and ultimately FHWA on this determination.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA’s responses to the following questions related to public ownership:

Question 1A: When is publicly owned land considered to be a park, recreation area or wildlife and waterfowl refuge?

Question 1B: Can an easement or other encumbrance on private property result in that property being subject to Section 4(f)?

Question 1C: When does a lease agreement with a governmental body constitute public ownership?

## Designation

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. Designation occurs when the federal, state, or local official(s) with jurisdiction over the land have made a written designation that the land either (1) represents a park, recreation area, or wildlife and waterfowl refuge, or (2) one of its major purposes or functions is for park, recreation, or refuge purposes.

Publicly owned property that has been designated as a public park in the municipality's preliminary planning documents or comprehensive plans is considered to be a Section 4(f) property.

### Official with Jurisdiction:

For parks, recreational areas, and wildlife refuges, the Official with Jurisdiction is the official(s) of the agency owning or administering the land

**Example:** Land was donated to a municipality by a developer to be used as open space or a park.

**Determination:** This property would not be Section 4(f) property unless the municipality officially designates the property as a park and/or indicates their intent in their comprehensive plan or planning document to eventually develop it into a park or recreation site.

**National Recreational Trails:** Trails that are officially designated as National Recreational Trails can be found on <http://www.americantrails.org/nationalrecreationtrails/>. Trails on this list are designated and serves a major recreational purpose. Not all of these trails are located on publicly owned land, so only National Recreational Trails on publicly owned land are considered Section 4(f) properties.

**State Game Lands:** Section 2002 of the Administrative Code of 1929 specifically lists State Game Lands as one of the resources to be avoided, if possible. Although afforded protection under Section 2002, State Game Lands are technically considered multi-use properties under Section 4(f). State game lands qualify as a multi-use facility for recreational activities, designated by law “...to create and maintain public hunting and furtaking, game or wildlife propagation areas, farms or facilities for the propagation of game or wildlife, special preserves as provided for in this title or other uses incidental to hunting, furtaking and game or wildlife resource management” (34 Pa. C.S. 722). Portions of state game lands may qualify as a refuge (See [Section 4\(f\) Policy Paper Question 1E, What is a wildlife and waterfowl refuge for purposes of Section 4\(f\)?](#)) where the sole purpose, according to the state game land’s management plan, is for the propagation of game and non-game wildlife. However, based on the requirements of Section 2002, state game lands will be treated in their entirety for recreational purposes.

In Pennsylvania, they are identified as Section 4(f)/Section 2002 properties to avoid the preparation of two separate evaluations.

**Water trails:** Water trails that have been officially designated as such by the Pennsylvania Fish and Boat Commission (PFBC) are treated as Section 4(f) properties in Pennsylvania. PFBC designation provides documentation of the recreational function being significant and designated. Refer to the [PFBC's water trails website](#) for the most up-to-date water trail designations.

**NOTE:** Although not all water trails are necessarily publicly owned, the FHWA PA Division and PennDOT have agreed to treat these all as Section 4(f) to simplify the process due to the difficulty of determining ownership of the waters of the state.

**Pennsylvania Scenic Rivers and Federal Wild and Scenic Rivers:** A waterway designated as a wild or scenic river would only be treated as a Section 4(f) property if it also was designated as a PFBC water trail, or is documented as managed for recreation in the wild and scenic river management plan so its recreational function is documented as being significant and designated.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's responses to the following questions related to Wild and Scenic Rivers:

Question 21B: Are Wild and Scenic Rivers (WSR) subject to Section 4(f)?

Question 21C: Does Section 4(f) apply to potential WSR corridors and adjoining lands under study (pursuant to Section 5(a) of the WSRA)?

Question 21D: Who are the Officials with Jurisdiction for WSRs?

**Islands in navigable rivers or streams:** In accordance with the [Governor's Executive Order \(EO\) #1990-7](#) dated October 17, 1990, "islands in navigable rivers or in streams declared by law to be public highways" may be Section 4(f) properties. The EO provides that if an island has never passed into private ownership, the island is owned by the Commonwealth. The Pennsylvania Department of Conservation and Natural Resources (DCNR) has administrative jurisdiction over islands that are owned by the Commonwealth, but may bestow jurisdiction to the Pennsylvania Game Commission or the PFBC. The EO states that the islands "provide critical habitats for wildlife and plants, offer exceptional opportunities for public recreation, and possess important aesthetic values." If the proposed project involves using an island owned by the Commonwealth, coordination with the official with jurisdiction will be required to determine if Section 4(f) applies.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's response to the following question related to wildlife and waterfowl refuges:

Question 1E: What is a wildlife and waterfowl refuge for purposes of Section 4(f)?

The [Section 4\(f\) Policy Paper](#) discusses the applicability of Section 4(f) to specific types of resources. Refer to FHWA's response to questions regarding **trails and shared paths** (Question 15), **golf courses** (Questions 18A and 18B), **museums, aquariums and zoos** (Question 19), **fairgrounds** (Question 20), and **scenic byways** (Question 22).

## Major Purpose

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In order to qualify as a Section 4(f) property, the park, recreation area, or refuge property in question must serve a major recreational or refuge purpose. Incidental, secondary, occasional, or dispersed recreational activities do not constitute a major purpose. Just because a property is designated as a park does not guarantee that it serves a major recreation purpose. If there are no visitors and noticeable recreational activities, it may not qualify as a Section 4(f) property.

**Example:** A small piece of property is officially designated as a park by a local municipality but contains no recreational amenities/facilities. The property is fairly steep, wooded, and the undergrowth is a tangle of vines, greenbrier, and poison ivy. Local residents essentially do not use the property.

**Determination:** Since the recreational use appears to be incidental or dispersed at best, it would not be considered a Section 4(f) property. Consult with FHWA for an official determination in these situations.

## Open to the Public

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In addition to being publicly owned, to qualify as a Section 4(f) property, the general public must be permitted visitation at any time when the publicly owned park or recreation area is open.

Section 4(f) does not apply when visitation is permitted to only a select group and not the general public at large. Select groups could include, but are not limited to, residents of a public housing project; military and their dependents; organized sports teams/leagues; and students, faculty, and alumni of a school, college, or university.

**Example:** A military golf course is publicly owned, but tee times are restricted to military personnel and their guests.

**Determination:** This property would *not* be considered to be a Section 4(f) property:

**Example:** A ball field on school property is fenced and locked. The field is restricted to use by the school teams.

**Determination:** This property would *not* be considered to be a Section 4(f) property: School properties are considered multiple use properties since they are managed with different components. See the Public Multi-Use Properties section for an example of when a recreational portion of a school property would be considered Section 4(f).

**Example:** A county park is closed from dusk to dawn.

**Determination:** To be considered “open to the public”, there can be some restrictions of hours that normal use is permitted.

**Example:** A township keeps the gated tennis courts in its township park locked. To use the tennis courts, people must get the key at the township office across the street.

**Determination:** The park’s tennis courts are still “open to the public” as long as anyone in the public can retrieve the key and be allowed to use the courts.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's response to *Question 16, Does the charging of an entry fee or user fee affect Section 4(f) eligibility?*

**What if there is a fee?** A fee may be charged for visitation as long as that fee is reasonable. For example, a municipal golf course charging a fee that is in range with normal golf fees would be considered a Section 4(f) property.

**EXCEPTION:** An exception to the public visitation criteria is afforded for **wildlife and waterfowl refuges** where visitation is restricted to protect sensitive species habitat, nesting season, etc.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's response to the following question related to the Section 4(f) parks and recreation areas being open to the public:

Question 1D: Are significant publicly owned parks and recreation areas that are not open to the general public subject to the requirements of Section 4(f)?

## Significance

The "significance" of a publicly owned public park, recreation area, or wildlife and waterfowl refuge is assessed by the official(s) with jurisdiction over the land.

Significance means that in comparing the availability and function of the recreation area, park, or wildlife and waterfowl refuge area with the recreational, park, and refuge objectives of that community, the land in question plays an important role in meeting those objectives. For any public park, recreation area, or wildlife and waterfowl refuge, the significance determination must consider the significance of the *entire* property and not just the portion of the property being used/impacted by the proposed project.

For certain types of Section 4(f) lands, more than one agency may have jurisdiction over the property. In these situations, additional information on significance from all parties involved in the administration of the land is needed.

If information from the official(s) with jurisdiction cannot be obtained, the Section 4(f) land will be presumed to be significant. All significance determinations are subject to review by FHWA for reasonableness. (PennDOT reviews significance determinations in the absence of FHWA involvement.)

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's response to *Question 1D, Are significant publicly owned parks and recreation areas that are not open to the general public subject to the requirements of Section 4(f)?*

## Public Multi-Use Properties

If publicly owned lands are administered under statutes permitting management for multiple uses, and are actually managed for multiple uses, Section 4(f) may apply to at least parts of that property. **For properties being managed for multiple uses, Section 4(f) only applies to those portions that function as or are designated in the management plans of the administering agency as being for significant**

**park, recreation, or wildlife and waterfowl refuge purposes.** The general public must be permitted visitation at any time that the facility is open.

**Examples of multi-use properties include:**

- **State forests**
- **Federal forests**
- **School grounds**
- **Military properties**

**How to determine what portions are or are not Section 4(f)?** Contact the official(s) with jurisdiction over the lands and discuss recreational management. Look for an official management plan and any mapping that exists that outlines recreational areas within the property. The official with jurisdiction will make the determination as to which portions of their land are significant park, recreation, or wildlife and waterfowl refuge areas. FHWA will review this determination to assure its reasonableness. **Section 4(f) does not apply to areas of multiple-use lands that function primarily for purposes not protected by Section 4(f).**

For publicly owned multi-use properties that do not have management plans (or where existing management plans are not current), Section 4(f) applies to those areas that function primarily for Section 4(f) purposes. Determine these areas through consultation with the official(s) with jurisdiction and document discussions through meeting minutes and delineations on mapping. FHWA has the final call on Section 4(f) applicability of multi-use properties.

**Example:** A substantial acreage of state forest land exists in the project area. The official with jurisdiction (DCNR) has a management plan for the property. A portion of the property is designated in the plan for recreational use and has ball fields, benches, and picnic tables. A separate area contains a lake with a beach and swimming area. These two recreation areas are connected by a short hiking trail. The recreation areas and hiking trail are open to the general public, and are considered significant recreational facilities by the DCNR officials. The remaining portions of the property are designated in the management plan for timbering.

**Determination:** The ball fields, picnic area, trail, and swim area would fall under Section 4(f) jurisdiction; the timbering areas would not.

**Example:** A public elementary school property contains an area with a playground, basketball courts, and an athletic field. None of the recreational amenities are gated. Families from the surrounding neighborhood take their children to use the playground in the evenings, weekends, and during the summer. Teens play pick-up basketball games on the courts. A local youth soccer team practices on the field.

**Determination:** Those recreational components of the school property would likely be considered Section 4(f) because they meet the criteria (publicly owned, open to the public, etc.). The school building and other non-recreational areas of the school property would not be considered Section 4(f).

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA’s response to the following questions related to Section 4(f) multi-use properties:

Question 4: Are multi-use public land holdings (e.g., National Forests, State Forests, Bureau of Land Management lands) subject to the requirements of Section 4(f)?

Question 14: Are publicly owned school playgrounds subject to the requirements of Section 4(f)?

## Historic Sites

Section 4(f) applies to historic sites that are individually eligible or listed in the *National Register of Historic Places*. Historic sites are evaluated and determined eligible for listing in accordance with the requirements and criteria in Section 106 of the National Historic Preservation Act of 1966. Unlike parks, recreation areas, and refuges, it does not matter if a historic site is publicly owned or open to the public. Historic sites are also afforded Section 4(f) status if they are a contributing element in a *National Register* eligible or listed historic district.

Pursuant to [23 CFR § 774.11\(e\)](#), historic sites must be identified in cooperation with the official(s) with jurisdiction. For historic sites, the official with jurisdiction is the State Historic Preservation Officer (SHPO), and/or the Tribal Historic Preservation Officer (THPO). In Pennsylvania, the SHPO is within the Pennsylvania Historical and Museum Commission (PHMC). Because there are no tribal lands in Pennsylvania, the SHPO will always be the official with jurisdiction for historic sites.

**Official with Jurisdiction:**  
For historic sites, the Official with Jurisdiction is the State Historic Preservation Officer (SHPO). (Refer to [Section 4\(f\) Policy Paper](#) Question 9B)

**Boundary:** The Section 4(f) boundary for a historic site is its historic boundary as determined during the Section 106 Process. The historic boundary may or may not coincide with the property boundary/tax parcel.

**Historic Districts:** Section 4(f) applies to historic districts that are eligible or listed in the *National Register*. Within the boundary of the historic district, contributing elements should be identified in consultation with the SHPO since Section 4(f) only applies to contributing elements. Contributing elements can be properties or objects such as a town square clock or a slate sidewalk.

**[Section 4\(f\) Policy Paper](#):** refer to questions under #2, *Historic Sites*, for further guidance on the identification of these properties and when there are unusual circumstances. FHWA has the final call on whether a historic property is significant.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA’s response to *Question 2B, How does Section 4(f) apply in historic districts that are on or eligible for the National Register?*

**Archaeological resources:** Archaeological resources determined eligible for listing or listed on the *National Register* may be considered Section 4(f) properties. Those sites that are determined by FHWA, through consultation with the SHPO, to be eligible and to be important for preservation in place must be treated as Section 4(f) properties. Section 4(f) does not apply to archaeological sites that are determined

to be important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. Because most archaeological sites in Pennsylvania fall into this second category, **Section 4(f) does not usually apply to archaeological sites.**

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's responses to Questions 3A through 3C related to archaeological resources.

**National Historic Landmarks:** Section 4(f) applies to National Historic Landmarks, which are designated by the Secretary of the U.S. Department of Interior. Communication with FHWA is automatically triggered if any National Historic Landmarks are identified within the Area of Potential Effect (APE) for a project through the Section 106 Process. FHWA notifies the Advisory Council on Historic Preservation (ACHP) and provides ACHP with a project description and a statement of the potential for effect to the National Historic Landmark. ACHP will determine what level of involvement it will have in the project based upon the information provided.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's responses to *Question 2E, How are National Historic Landmarks (NHL) treated under Section 4(f)?*

## Historic Eligibility Determination

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Historic and archaeological sites are identified using the Determination of Eligibility phase of the Section 106 process. Section 106 of the National Historic Preservation Act (16 U.S.C. §470f) involves consideration of the effects of Federal projects on historic and archaeological resources. Section 106 requires coordination with the SHPO. Properties 50 years or older are evaluated to determine whether the properties meet one of the four following eligibility criteria *and* maintain integrity:

- Criterion A: Association with significant historic events and broad patterns of history
- Criterion B: Association with significant persons
- Criterion C: Architectural, design, or artistic significance
- Criterion D: Archaeological significance

In accordance with the Section 106 Programmatic Agreement between PennDOT, FHWA, and the SHPO, it is the role of the PennDOT Cultural Resource Professionals (CRPs) to make eligibility determinations. (See *Chapter VII* of PennDOT's [Cultural Resources Handbook \(Publication 689\)](#).) A report (or form) is prepared and submitted to the SHPO identifying the historic properties within a project's APE that have been determined to be *National Register* eligible or that are already listed, and identifying the boundaries for each property. For projects within historic districts, contributing and non-contributing elements should be identified within the project's APE. If the SHPO concurs with the eligibility determinations, the properties are then considered to be historic properties for purposes of both Section 106 and Section 4(f).

**Historic Boundaries:** It is important that the boundary guidelines, which are contained at *National Register* Bulletin 21, U.S. Department of the Interior, National Park Service, be carefully followed during the determination of eligibility. Although using the tax parcel boundaries is generally acceptable as a *National Register* standard, there may be other boundaries (either larger or smaller) that might be more appropriate/precise in defining the historic or archaeological site, which would meet the boundary guidelines requirements. The boundaries of an historic or archaeological resource are key to determining whether the property is used (a Section 4(f) use) by one of the project alternatives.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's response to *Question 2B: How does Section 4(f) apply in historic districts that are on or eligible for the National Register?*

If the SHPO does not agree with FHWA's determination, PennDOT (working through FHWA), FHWA, or the SHPO, can elevate the process to the Keeper of the *National Register* (Department of Interior) to make the formal determination of eligibility. (For 100% State-funded projects not requiring any U.S. DOT actions, PennDOT or the SHPO makes the request to the Keeper.)

**Once agreement is received from the SHPO (or a formal determination is made by the Keeper), a property is considered an historic property for purposes of Section 106 and Section 4(f).** Although the eligibility determinations made in the Section 106 process serve as input to the Section 4(f) process by identifying the *National Register* eligible or listed historic and archaeological Section 4(f) properties, the Section 106 and Section 4(f) processes are separate processes dictated by separate laws and regulations.

The [Section 4\(f\) Policy Paper](#) discusses the applicability of specific types of resources. Refer to FHWA's response to question regarding **scenic byways** (Question 22) and **cemeteries** (Questions 23A and 23B).

**NOTE:** If anticipating a historic property in scoping that would require identification and evaluation, be sure that the documentation is clear about the following: (1) boundaries; (2) if a historic district that all contributing and non-contributing elements near the project are delineated; and, (3) whether the property is a transportation facility.

## Exceptions

As outlined in [23 CFR § 774.13](#), Section 4(f) **does not apply** to the following projects/situations:

- **The restoration, rehabilitation, or maintenance of transportation facilities that are listed in or eligible for listing in the *National Register* if**
  - 1) FHWA determines that the facility's historic qualities that caused it to be on or eligible for the *National Register* will not be adversely affected; and
  - 2) The official(s) with jurisdiction have been consulted and have not objected to the finding.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's response to *Question 8A: How does Section 4(f) apply to historic transportation facilities?*

- **The interstate system is exempt for Section 4(f) consideration**, with the exception of those elements formally identified by FHWA as having national or exceptional historic significance. The [Final List of National and Exceptionally Significant Features of the Federal Highway System](#) is available on FHWA's website. In Pennsylvania, there are five elements that are exceptions to the interstate exemption and Section 4(f) may apply. They include:
  - 1) The Fort Pitt Bridge and Tunnel,
  - 2) I-376 Mileposts 3 to 10 (Parkway West),
  - 3) The Pennsylvania Turnpike from Carlisle to Irwin,
  - 4) The Ben Franklin Bridge, and
  - 5) The Walt Whitman Bridge.
- **Archaeological sites** that are determined by FHWA, through consultation with the SHPO, to be important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. Most archaeological sites in Pennsylvania fall into this category; therefore, Section 4(f) does not usually apply to archaeological sites. Note that many archaeological sites that are left in place do not warrant preservation in place. An example of a site warranting preservation in place is a Native American burial mound, more commonly encountered in the western U.S. states.
- **Certain trails, paths, bikeways, and sidewalks** where:
  - 1) The trail-related project is funded under the Recreational Trails Program (23 U.S.C. 206(h)(2));
  - 2) The trail is a National Historic Trail designated under the National Trails System Act (with the exception of segments that are historic sites) (16 U.S.C. 1241-1251);
  - 3) The trail/path/bikeway/sidewalk occupies a transportation facility right-of-way and can be maintained somewhere within that right-of-way; or
  - 4) The trail/path/bikeway/sidewalk is part of the local transportation system and functions primarily for transportation.
- **Transportation enhancement projects and mitigation activities** where:
  - 1) The use of the 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for section 4(f) protection, and
  - 2) The officials with jurisdiction over the 4(f) property agree in writing that the project is solely for such preservation/enhancement.

Refer to the [Section 4\(f\) Policy Paper](#) for FHWA's response to **Questions 17A, 17B, and 17C** regarding transportation enhancement projects.

## Chapter 4: Determining Section 4(f) Use

When there are one or more Section 4(f) properties within a project area, the next step is to determine whether any of the identified Section 4(f) properties are "used" by the project. **To make this determination, the following must be known:**

- Section 4(f) property boundaries (see *Chapter 2*)
- Preliminary engineering for the proposed project, including right-of-way boundaries and location of any necessary permanent and/or temporary easements

A "use" can occur either as an **actual use** or as a **constructive use**.

An **actual use** of Section 4(f) property occurs:

- When property from a Section 4(f) site is **permanently acquired** (fee simple or permanent easement) **and permanently incorporated** into a transportation project; or
- When there is **temporary occupancy of land** (i.e., construction access areas, detours, temporary bridges, etc.) **that is adverse** in terms of preserving the integrity of the Section 4(f) property. (See [23 CFR § 774.13\(d\)](#) for circumstances under which a temporary occupancy would not be considered a use.)

A **constructive use** ([23 CFR § 774.15](#)) of Section 4(f) property occurs:

- When the **proximity impacts** of a transportation project on a Section 4(f) property, without acquisition of land from that property, are so great that the characteristics which qualify the property as a Section 4(f) property are **substantially impaired**.

Actual use and constructive use are further discussed in the sections below.

*For more information regarding Section 4(f) use, refer to Section 3.2 and Questions 7 and 8 of the [Section 4\(f\) Policy Paper](#). Also refer to [23 CFR § 774.15](#) (constructive use) and [23 CFR § 774.17](#) (definition of use).*

### Actual Use

There are two types of **actual use**:

- (1) When land from within the boundary of a Section 4(f) property is **permanently incorporated** into a transportation project, or
- (2) When there is a **temporary occupancy** of Section 4(f) property which results in an adverse effect upon the property in terms of the preservation purposes of Section 4(f), or what makes the Section 4(f) property significant. Under certain circumstances, an actual use can be considered a **de minimis use** (discussed later in this chapter).

### Permanent Incorporation

The **permanent** incorporation of Section 4(f) property for transportation purposes takes place when any amount of an identified Section 4(f) property is incorporated into a proposed transportation project. This

occurs when a portion of the Section 4(f) property is either purchased outright as transportation right-of-way or when property interest, such as a permanent easement for maintenance, is acquired. If there is any size of permanent incorporation, there is an actual use of Section 4(f) property.

**NOTE: Historic Districts:** When non-contributing elements have been identified within the boundary of a historic district and a project requires use of land from a non-contributing element, then there is no Section 4(f) use.

## Temporary Occupancy

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The second type of actual use is the **temporary occupancy** of Section 4(f) property **that is adverse** in terms of the statute's preservationist purposes of preserving the integrity of the Section 4(f) property.

FHWA regulations ([23 CFR § 774.13\(d\)](#)) specifically state that if **all** the following conditions are met, that such a temporary occupancy is an **exception** to the requirements of Section 4(f):

- The duration of the use is temporary (i.e., less than the construction period) and there is no change in the ownership of the land;
- The scope of the work is minor, i.e. both the nature and the magnitude of the changes to the Section 4(f) property are minimal;
- There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis;
- The land being used is fully restored to a condition equal to or better than that which existed prior to the project;
- There is a written agreement with the appropriate Federal, state, or local official(s) with jurisdiction over the property regarding the conditions listed above. (For historic and archaeological sites, written agreement would come from the SHPO.

**If one or more of the conditions above is not met, the temporary occupancy is not an exception and there is an actual use of the Section 4(f) property.**

**NOTE:** Most of the time, Section 106 coordination has occurred prior to identifying areas where temporary construction easements may be needed. **If a temporary construction easement is needed within a historic Section 4(f) property and this was not part of the initial project description provided to the SHPO, then additional coordination with the SHPO is required to meet the last bullet above for temporary occupancy.**

**Example:** A project involved the replacement of a bridge in a historic district. Although no land needs to be acquired from any contributing elements in the historic district, a temporary construction easement is needed in order for a large crane to sit in the parking lot of a contributing element of the district for three days.

- The duration of the use is temporary (*three days*), and there is no change in the ownership of the land;
- The scope of the work is minor, i.e. both the nature and the magnitude of the changes to the Section 4(f) property are minimal (*crane sitting on parking lot*);
- There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis (*crane will not be located near the historic structure, only sit on its parking lot*);
- The land being used is fully restored to a condition equal to or better than that which existed prior to the project (*don't expect to damage parking lot, but if there are damages, PennDOT will restore its condition*);
- There is a written agreement with the appropriate Federal, state, or local official(s) with jurisdiction over the property regarding the conditions listed above. (*This temporary construction easement had not been discussed during prior SHPO coordination, so additional coordination with the SHPO was conducted to obtain their written agreement to the above bullet points.*)

**Example:** A roadway project will require a temporary construction easement of a portion of a township park for staging of construction materials and equipment. There are no recreational amenities within this particular area of the park, but it is nicely landscaped with shrubs and flower beds along the road.

- The duration of the use is temporary (*will be used for a large portion of the duration of the project, but shorter than the entire construction time*), and there is no change in the ownership of the land;
- The scope of the work is minor, i.e. both the nature and the magnitude of the changes to the Section 4(f) property are minimal (*staging of construction materials and equipment*);
- There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis (*there are no recreational amenities in this portion of the park*);
- The land being used is fully restored to a condition equal to or better than that which existed prior to the project (*PennDOT will provide for the replacement of impacted shrubs, flowers and grass*);
- There is a written agreement with the appropriate Federal, state, or local official(s) with jurisdiction over the property regarding the conditions listed above. (*The township agreed in writing that they agree with the above items in an email to the PennDOT project manager.*)

**Example:** A project involved the replacement of a bridge adjacent to a small municipal park. Although no land needs to be acquired from the park, a temporary construction easement is needed in order for a large crane to sit on grassy park property for approximately two weeks. There is currently playground equipment sitting in the corner of the park where crane placement is needed. The crane will sit only feet from the playground. Because of its close proximity to the crane, the playground area will be fenced off as a safety precaution while the crane is positioned in the park.

- The duration of the use is temporary (*two weeks*), and there is no change in the ownership of the land;
- The scope of the work is minor, i.e. both the nature and the magnitude of the changes to the Section 4(f) property are minimal (*crane sitting on grass*);
- There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis (*This requirement cannot be met since the playground area will be closed for approximately two weeks*);
- The land being used is fully restored to a condition equal to or better than that which existed prior to the project (*PennDOT will replant grass as needed*);
- There is a written agreement with the appropriate Federal, state, or local official(s) with jurisdiction over the property regarding the conditions listed above. (*Because of the safety concerns and temporary closure of the playground area, the municipality cannot agree to a Section 4(f) temporary occupancy*)

This example would result in an actual use, most likely *a de minimis*. (See the next section on *de minimis* use.)

**Water Trails:** As discussed in *Chapter 3*, water trails designated by the PFBC are treated as Section 4(f) properties in Pennsylvania. Often, when a project crosses a water trail, the temporary occupancy conditions can be met, and there is no Section 4(f) use. Typically, this is because there may be work on a bridge within the water, such as with a temporary causeway, or restrictions on boaters passing underneath a construction site on a bridge. If recreational users are unable to use the water trail on a temporary or permanent basis, then temporary occupancy can not apply. In those instances, the Section 4(f) use would likely be *de minimis*. (See the *De Minimis Use* section on page 4-5.) In some cases, if the waterway is primarily used for kayaks and canoes and portaging is possible around the project, then the trail would be considered still usable. If all of the bulleted requirements of 23 CFR § 774.13(d) listed on page 4-2 cannot be met, a Section 4(f) use would result. In many cases, *de minimis* would then be applicable (see next section).

**NOTE:** When a temporary causeway is constructed, or where the path of the trail is affected (temporarily closed, altered, etc), the use of **aids to navigation (ATON)** should be considered in coordination with the PFBC to ensure the safety of recreational boaters.

**Wild and Scenic Rivers:** Temporary occupancy can occur similar to water trails for those portions with recreational designation and function.

**NOTE:** Often, a temporary occupancy that results in an actual use can be considered *de minimis*. (See the next section for a discussion of *de minimis*.)

## ***De Minimis* Use**

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When an actual use is identified, consider whether that use is *de minimis*.

Black's Law Dictionary (8th ed. 1999) defines “*de minimis*” as 1) Trifling, minimal, 2) (of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case, and 3) *De Minimis Non Curat Lex*, *The law does not concern itself with trifles*.

According to [23 CFR § 774.17](#), a *de minimis* use is a use that would not adversely affect the features, attributes or qualities that qualify the property for protection under Section 4(f).

The *de minimis* impact criteria can be applied to all projects regardless of the NEPA documentation processing option being undertaken (Environmental Impact Statement (EIS), Environmental Assessment (EA), Categorical Exclusion (CE)). (See Question 13 of the [Section 4\(f\) Policy Paper](#).)

*De minimis* determinations are made after taking into account reasonable measures to minimize harm (such as any avoidance, minimization, mitigation or enhancement measures). In other words, a *de minimis* determination is made for the net impacts to a Section 4(f) property.

**NOTE: A *de minimis* Section 4(f) use is still a Section 4(f) use, not an exemption.** Section 4(f) analysis and documentation must still be completed. The primary difference between a *de minimis* use and a non-*de minimis* use is that once consideration of reasonable measures to minimize harm (such as avoidance, minimization, and mitigation or enhancement measures) are completed as part of the *de minimis* finding, an analysis of avoidance alternatives, and assessment as to whether those avoidance alternatives are feasible and prudent, is not required for *de minimis* uses.

**NOTE:** The Section 4(f) concept of *de minimis* is called No Adverse Use under Section 2002.

### ***De Minimis* for Historic Sites**

The criteria for a *de minimis* use of an historic site were defined in SAFETEA-LU Section 6009(a) and [23 CFR § 774.5\(b\)\(1\)](#). (Also see Question 12 of the [Section 4\(f\) Policy Paper](#).) These criteria include:

#### **1. No Adverse Effect or No Historic Properties Affected Effect Determination**

In order to apply *de minimis*, Section 106 of the National Historic Preservation Act determinations of no adverse effect or no historic properties affected with the concurrence of the SHPO, and the ACHP if participating in the Section 106 consultation is required. PennDOT's Section 106 Programmatic Agreement (PA) delegates this authority to the CRPs.

When a project is anticipated to have a Section 4(f) use of an historic site, early Section 106 coordination is advised. This coordination should include district CRPs, environmental staff, and project designers considering the possibility of incorporating measures into the project design that could offset impacts to the historic site so a no adverse effect (or no historic properties affected) determination might be made. If a no adverse effect determination can be made based on a commitment that particular design elements will be incorporated into the project, or if a no historic properties affected determination can be made, the *de minimis* finding can be used.

**NOTE:** There is a special circumstance, agreed upon by the SHPO on March 27, 2017 in response to a March 24, 2017 FHWA letter, where there can be two separate effect findings for two contributing properties (one being a bridge) of a historic district. This would be in cases where replacement of a contributing bridge is proposed, and additional right-of-way is required from another contributing property. If that additional use of the historic district via the adjacent contributing property does not, by itself, adversely affect the district, then *de minimis* applies to the use of that contributing property. See **Chapter 6** for guidance on using the ***Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Historic Properties Form*** and the ***Nationwide/Programmatic Section 4(f) Evaluation for Projects that Necessitate the Use of Historic Bridges Form***. See case study #7 in **Chapter 10** for an example of when this special circumstance applies.

### **Notification of Intent to Make a *De Minimis* Finding**

The SHPO and ACHP, if participating in the Section 106 consultation, is informed of FHWA's intent to make a *de minimis* impact finding based on their written concurrence in the Section 106 determination. In Pennsylvania, the SHPO provided a letter, dated March 1, 2006, documenting their written understanding that FHWA will make a *de minimis* finding for historic sites where PennDOT makes a Section 106 effects determination of no adverse effect or no historic properties affected through its PA. On March 27, 2017, the SHPO reconfirmed this understanding by signing a [March 24, 2017 letter](#) from FHWA. **Therefore, individual notices of the intent to apply the *de minimis* finding for historic sites are not required in Pennsylvania.** In the unlikely event that the ACHP is involved in a project where *de minimis* is applicable, send ACHP a letter notifying them of the intent to apply *de minimis*.

### **2. Consulting Party Coordination**

FHWA must consider the views of any consulting parties participating in the Section 106 consultation. Coordination with identified consulting parties is required to gather the views of those consulting parties. This can be done through the Section 106 consulting process via a number of venues including Project PATH, public meetings, public officials meetings, telephone calls, mailings, etc. as deemed appropriate. The Section 106 process is often conducted prior to Section 4(f) since eligibility and effects are determined before Section 4(f) properties are identified and use is analyzed. Coordinate with the district CRP.

**NOTE:** For *de minimis* findings on historic sites, Section 4(f) does not require public notice or opportunity for public review and comment. Only consultation with the consulting parties as part of the Section 106 process is required.

### **De Minimis for Publicly Owned Parks, Recreation Areas, and Wildlife and Waterfowl Refuges**

The criteria for a *de minimis* use of a park, recreation area, and/or wildlife and waterfowl refuge are defined in SAFETEA-LU Section 6009(a) and [23 CFR § 774.5\(b\)\(2\)](#). These criteria include:

#### **1. Project Does Not Adversely Affect the Activities, Features, and Attributes that Qualify the Property for Protection Under Section 4(f)**

The transportation use of the Section 4(f) property, together with any reasonable measures to minimize harm incorporated into the project, does not adversely affect the activities, features, and attributes that

qualify the property for protection under Section 4(f). Reasonable measures to minimize harm (such as avoidance, minimization, mitigation or enhancement measures) should be taken into account before the *de minimis* determination is made.

**NOTE:** There is no acreage use threshold for *de minimis* use. The use could be 0.01% of the total park or 20% or more. *De minimis* is based on whether the use adversely affects the activities, features, and attributes that qualify the property for protection under Section 4(f).

## **2. Public Notification and Comment**

The public must be afforded an opportunity to review and comment on the effects of the project on the protected activities, features, and attributes of the Section 4(f) property. This must be done before the official(s) with jurisdiction agree in writing, that the project will not adversely affect the “activities, features, and attributes” of the property. This allows public comments to be considered prior to making that final determination.

The PennDOT district, in coordination with FHWA, conducts the public notification activity. There are several methods that can be used to inform the public and gather comment on park/recreation area/refuge impacts. These could include, but are not limited to, providing/gathering information at a public meeting or public officials meeting, posting information at the park/recreation area, public notices in local papers, etc. In many cases, the public involvement requirements related to the NEPA document/process will be sufficient to satisfy the requirements for the *de minimis* finding. In order for this to satisfy the *de minimis* finding requirement, there must be a specific request for input on how the proposed project impacts the activities, features, and attributes of the Section 4(f) property. For those actions that do not routinely require public review and comment (such as certain CEs or re-evaluations), a separate public notice and opportunity for review/comment is required. In these cases, the type/level of public involvement should be commensurate with the type and location of the Section 4(f) property(s), impacts, and public interest. (See Section 3.3.1 and Question 11 of the [Section 4\(f\) Policy Paper](#).) See the [PennDOT Public Involvement Handbook](#) (Publication No. 295) for additional guidance.

## **3. Notification of Intent and Concurrence from Official(s) with Jurisdiction of De Minimis Finding**

The official(s) with jurisdiction over the park, recreation area or refuge property are informed of FHWA's intent to make the *de minimis* impact finding, and must then provide written concurrence that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f).

Once public input has been considered, the official(s) with jurisdiction should be notified of the intent to make a *de minimis* finding. They must then concur in writing that the project will not adversely affect the “activities, features, and attributes” of the property. Written concurrence can be on the *de minimis* form (see **Chapter 6**) or in a letter signed by the official with jurisdiction.

**NOTE:** The notification of the intent to make a *de minimis* finding can be done at any time. The official(s) with jurisdiction's written concurrence must occur after public input is received.

**De Minimis Example:** A project requires acquisition of a corner piece of a municipal park, including removal of the existing playground. The park includes other facilities, such as a soccer field, two baseball fields, and a picnic area. The existing playground equipment is old and in need of major repair or replacement. There is room close to the picnic area to move the existing playground equipment or put in new equipment. After coordination with the municipality, (official with jurisdiction), it is agreed that the impact will be mitigated by providing new improved playground equipment and locating it adjacent to the picnic area. Parking and park access will not be affected. The public is then notified of the process through presentations at the municipal park, recreation board meetings, and the municipality monthly board meetings. Based on the impact and the proposed mitigation, the use of the park and its current activities/features will be maintained/preserved; therefore PennDOT submits a letter to the official(s) with jurisdiction indicating their intent to make a *de minimis* finding. Requests for particular playground equipment were incorporated into the mitigation. After receipt of public input, the municipality provided a letter stating that they agree that there will be no adverse effect to the activities, features, and attributes of the park.

**NOTE:** If the Section 4(f) property with the *de minimis* use is game lands and the game land bank is to be utilized, the Pennsylvania Game Commission (PGC) must sign the *de minimis* form as the Official with Jurisdiction. The date of that signature is the date for debiting credits from the bank. The PGC will not accept a separate letter if the bank is being used as mitigation.

## Net Benefit

Another type of actual use is net benefit. Based on the concept developed for the [Nationwide Programmatic Section 4\(f\) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4\(f\) Property \(Chapter 6\)](#), a “net benefit” is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project result in an overall enhancement of the Section 4(f) property when compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property, considering the activities, features and attributes that qualify the property for Section 4(f) protection. 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. The official with jurisdiction over the Section 4(f) property must agree with the net benefit determination in writing for net benefit to apply.

See *Chapter 6* for more information regarding net benefit.

## Constructive Use

Even activities that do not require actual physical incorporation of land from Section 4(f) properties are governed by Section 4(f) if the activities create sufficiently serious **proximity impacts** that would **substantially impair** the value of the site in terms of its prior significance and enjoyment.

**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).** Proximity impacts can include noise, access, visual/aesthetic, and vibration impacts. The determination of substantial impairment should be made in consultation with the official(s) with jurisdiction over the property. However, FHWA Headquarters, is the final decision-maker on whether there is a constructive use of a Section 4(f) property.

FHWA's regulations at [23 CFR § 774.15](#) provide some specific situations where constructive use does and does not occur.

**NOTE:** Due to the nature of its definition, constructive use is **rarely** determined to occur.

**A constructive use does not occur when:**

- Compliance with the requirements of Section 106 of the National Historic Preservation Act and its regulations (36 CFR § 800) for proximity impacts of the proposed action on a site listed in or eligible for listing in the *National Register* results in an agreement of "No Historic Properties Affected" or "No Adverse Effect".

**NOTE:** An "Adverse Effect" determination triggers an assessment of constructive use when no land is being acquired but does not automatically constitute a constructive use.

- The projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in [Table 1, 23 CFR § 772](#).
- The projected noise levels exceed the FHWA criteria noted in the previous bullet when existing noise levels are already high and the increase with the construction of the project is barely perceptible (3 dBA or less).
- There are proximity impacts (i.e., visual, noise, etc.) to a Section 4(f) property, but FHWA's approval of the final NEPA clearance document established the location for the proposed project before the designation, establishment, or change in the significance of the property. For example, a new roadway project is located in close proximity to a piece of land owned by the township. A short time after the project's Finding of No Significant Impacts (FONSI) was issued, the township established a park on that piece of land and constructed an amphitheater. Although there may now be proximity impacts to that park/amphitheater by the project, it cannot be a constructive use because the park was established after environmental clearance for the project was granted.
- Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a property for protection under Section 4(f).
- Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario.
- Change in accessibility will not substantially diminish the utilization of the Section 4(f) property.
- Vibration levels from the proposed construction activities are mitigated through advanced planning and monitoring of the activities to levels that do not cause a substantial impairment of the Section 4(f) property.

**A constructive use occurs when:**

- The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility within a Section 4(f) property, such as hearing

performances at an outdoor amphitheater, sleeping in the sleeping area of a campground, enjoyment of an historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, enjoyment of an urban park where serenity and quiet are significant attributes, or viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.

- The proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historic building, or substantially detracts from the setting of a Section 4(f) property which derives its value in substantial part due to its setting.
- The project results in a restriction of access that substantially diminishes the utility of a significant publicly owned park, recreation area, or an historic site.
- The vibration impact from operation of the project substantially impairs the use of a Section 4(f) property, such as vibration levels that are great enough to physically damage an historic building, or diminish its integrity (unless the damage is repaired/restored consistent with the Standards for the Treatment of Historic Properties).
- The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical cycle processes, or substantially reduces the wildlife use of a wildlife or waterfowl refuge.

### **Proximity Impacts/Constructive Use Analysis**

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If a constructive use assessment is necessary:

- Identify the project activities that may result in proximity impacts to a Section 4(f) property.
- Identify the functions, activities, and qualities of the Section 4(f) property, which qualify the resource for protection under section 4(f), that may be sensitive to proximity impacts.
- Analyze the proximity impacts on the Section 4(f) property. Quantify impacts such as noise, water runoff, etc. and qualify impacts such as visual intrusion, access, etc. If any of the proximity impacts will be mitigated, only the net impact must be considered in the analysis. The analysis should also consider the impacts that could reasonably be expected if the proposed project were not constructed, (e.g. noise and vibration impacts caused by projected no-build traffic).
- Consult with the Federal, state, or local official(s) with jurisdiction over the park, recreation area, wildlife and waterfowl refuge, historic site, or archaeological site regarding the identification and analysis of impacts.
- Determine if the proximity impacts, after mitigation, will substantially impair the function, value, etc. of the Section 4(f) property.

This analysis should be done, at a minimum, for any eligible or listed historic structure that is determined by FHWA to be adversely affected by an alternative and for any public park, recreation area, or wildlife and waterfowl refuge that is near the proposed alternative (where there is no land being acquired).

If a potential constructive use is identified for the proposed project, a request for a determination of Section 4(f) applicability should be completed in the form of a letter and provided to the FHWA Division

Office through the PennDOT Bureau of Project Delivery. This request should include the information listed in the bullet points above. This information will also be reviewed by PennDOT Office of Chief Counsel. If FHWA determines that there is a constructive use, the Draft Section 4(f) Evaluation must document this and be approved by FHWA Headquarters (through the FHWA Division Office) prior to circulation.

If a constructive use assessment is warranted and it is determined that there is no constructive use, compile the information and facts supporting this determination in a Proximity Impacts Analysis Report/Memorandum and include in the technical support data files for the project.

*For more information regarding constructive use, refer to Question 7A of the [Section 4\(f\) Policy Paper](#).*

## Chapter 5: Section 4(f) Analysis

The U.S. Secretary of Transportation may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or land from an historic site of national, state, or local significance (as determined by the Federal, state, or local officials having jurisdiction over the park, recreation area, refuge, or site) only if it is determined that:

- There is no feasible and prudent alternative to using that land; and
- The action includes all possible planning to minimize harm to the public park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Or

- The use, including any measures to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) will have a *de minimis* impact on the property.

This chapter discusses the analysis required in making determinations regarding feasible and prudent total avoidance alternatives, minimizing harm and/or determining that a use is *de minimis*. **The specifics of documenting the results of the Section 4(f) analysis are provided in Chapters 6 and 7.**

### Is the Use *De Minimis*?

If the use of a Section 4(f) property meets the *de minimis* criteria in **Chapter 4**, then FHWA can make a *de minimis* finding and approve the use of the property with no further alternatives analysis.

An alternatives analysis is not required for a *de minimis* use because measures to minimize harm (avoidance, minimization, mitigation, and/or enhancement measures) must already be taken into account in making the *de minimis* determination and the official with jurisdiction agrees with the *de minimis* finding.

Refer to **Chapter 6** for guidance on documenting *de minimis* uses.

### Analysis for Non-De Minimis Uses

CE projects typically do not involve multiple alternatives, but Section 4(f) may force the consideration of additional alternatives, as discussed below. Additionally, a well-written, thought out purpose and need on projects is essential for an effective Section 4(f) alternatives analysis.

The following analysis is required when a use is not *de minimis*:

1. **Identify and Evaluate Total Section 4(f) Avoidance Alternative(s):** If a Section 4(f) property is used by a proposed transportation alternative, FHWA must determine if a feasible and prudent alternative(s) to using the property exists. Look at possible alternatives that would not result in any actual uses of Section 4(f) property. The alternative also cannot result in proximity impacts to the magnitude of a constructive use. This total avoidance alternative must be selected if it is determined to be feasible and prudent.

2. **Identify and Evaluate Other Alternatives Considered:** All alternatives that were considered in the NEPA process, but that were not determined to be total Section 4(f) avoidance alternatives, are examined and a determination is made as to whether or not they: (1) can be constructed in accordance with sound engineering judgment, (2) address the project purpose and satisfy the project need(s), or (3) result in impacts of an extraordinary magnitude.

Alternatives that do not address the project purpose and need, or result in severe impacts to environmental resources compared with other alternatives under consideration, can be dismissed as unreasonable during the environmental review process. In accordance with the principles of Section 2002 of PA Act 120, these alternatives can also be dismissed as not feasible and prudent. Alternatives that cannot be constructed in accordance with sound engineering judgment, or do not address the project purpose and need, or that result in environmental impacts of an extraordinary nature should not be carried into the least overall harm assessment.

3. **Make an Assessment of Least Overall Harm:** When no feasible and prudent total Section 4(f) avoidance alternative exists, compare all remaining alternatives to determine which project alternative would result in the least overall harm. The least overall harm analysis includes shifts/design modifications to avoid the use of Section 4(f) properties, as well as all possible planning to minimize harm to those properties. These shifts/design modifications can be dismissed as not reasonable under the environmental review process and not feasible/prudent under Act 120, Section 2002. When multiple alternatives that use Section 4(f) property are still under consideration, FHWA developed seven factors to compare to assist in decision-making.

The following sections explain each step of the analysis in greater detail.

### Determination if an Alternative is Feasible and Prudent

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A “Feasible and prudent avoidance alternative” is defined at 23 CFR §774.17 as:

- (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.
- (2) An alternative is not **feasible** if it cannot be built as a matter of sound engineering judgment.
- (3) An alternative is not **prudent** if:
  - (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
  - (ii) It results in unacceptable safety or operational problems;
  - (iii) After reasonable mitigation, it still causes:
    - (A) Severe social, economic, or environmental impacts;
    - (B) Severe disruption to established communities;
    - (C) Severe disproportionate impacts to minority or low income populations; or
    - (D) Severe impacts to environmental resources protected under other Federal statutes;
  - (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

- (v) It causes other unique problems or unusual factors; or
- (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

**Feasible:** Modern technology is such that most engineering challenges can be overcome; therefore it is rare that an alternative can be shown to not be feasible. Engineering facts and figures will be required as documentation to support a statement indicating that an alternative is not feasible.

**Examples of alternatives that would be considered not feasible:**

- An alternative across a very large sinkhole where, for geotechnical reasons that can be documented, a stable road surface could not be constructed.
- An alternative cannot be constructed to meet current design criteria within its roadway classification and a design exception cannot be applied for documented reason(s). (Design Manual 2, Publication 13M)
- An alternative on an interstate for a new interchange is between two existing interchanges that does not allow for acceptable interstate interchange spacing of on and off ramps and weaving distances.

**Prudent:** An alternative is not prudent if it would not meet the project needs. Project needs are identified during planning and programming and refined at the beginning of NEPA. An alternative is also not prudent if it results in unacceptable safety or operational problems.

In addition, an alternative is not prudent if there are "truly unusual factors" present in a particular case, the cost or community disruption resulting from the alternative reaches "extraordinary magnitude", or the alternative presents severe or unique problems. A number of problems may collectively add up to make an alternative not prudent.

**Examples:** Scenarios of impacts of an extraordinary magnitude or impacts which result in truly unusual or unique problems are described below. These reasons must be characterized as truly unusual, or unique, or of an extraordinary magnitude (individually or collectively) and must substantially outweigh the importance of protecting the Section 4(f) property (e.g. the relative value of the property to the preservation goals of Section 4(f)):

- Based on the facts presented in the Section 4(f) document, the alternative would result in substantial adverse community impacts to adjacent homes, businesses, or other improved properties that are of an extraordinary magnitude;
- The new location would result in substantial adverse social, economic, or environmental impacts, including such impacts as extensive severing of productive agricultural lands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to wetlands or other sensitive natural areas;
- The new location would substantially increase costs or create engineering difficulties, such as an inability to achieve minimum design standards, or to meet requirements of various permitting agencies such as those involved with navigation, pollution, and the environment.

**Prudency Documentation:** In dismissing an alternative because it does not meet the project needs, it is not sufficient to state, "Alternative X does not meet the needs of safety improvements and congestion relief". Explain *how* this is known.

"Alternative X, a widening alternative, does not meet the need for safety improvement because it would not separate the mix of local and through traffic in the study area. It also would not meet the need of congestion relief as shown by the Level of Service (LOS) analysis, which indicates that even after widening from two to four lanes, the road would operate at LOS E/F in the design year."

If an alternative is determined not to be prudent because of impacts of an extraordinary magnitude, the facts to support this determination need to be presented.

"Alternative X would impact the nesting grounds of a Federally endangered bird, would displace 100 more homes than any other alternative, and would have 15 more acres of productive agricultural lands than any other alternative (one acre versus 16 acres)."

Case law does not give clear guidelines on specific quantities that constitute "impacts of an extraordinary magnitude". It is important to present as much supporting data as possible and to look at the data in the context of the overall project. Hard facts should be used in this discussion. Do not say "greater" impacts, or "substantial" impacts unless "greater" and "substantial" are quantified. As in the example above, "15 more acres of productive agricultural lands than any other alternative", put these numbers into context. Fifteen more acres if the comparison is one acre versus 16 acres is different than 15 more acres if the comparison is 200 acres versus 215 acres.

## Identification and Evaluation of Total Section 4(f) Avoidance Alternatives

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A total Section 4(f) avoidance alternative is an alternative that does not involve use of any Section 4(f) properties. **If a feasible and prudent total Section 4(f) avoidance alternative exists, it must be selected.** In order to dismiss a total Section 4(f) avoidance alternative, it must be shown that it is not feasible and prudent.

**NOTE:** Thorough documentation as to why an alternative is not feasible and prudent is key to preparing a legally sufficient Section 4(f) evaluation. Use factual, quantitative data in this documentation.

This can be done in the following ways:

- **Not Feasible** - An alternative is considered not feasible if it cannot be built as a matter of sound engineering judgment. (This is not often found to occur.)
- **Not Prudent** - An alternative is not prudent if any of the following are true:
  - It does not meet the project needs
  - It results in unacceptable safety or operational problems
  - It causes severe social, economic, or environmental impacts; severe disruption to established communities; severe disproportionate impacts to minority or low income populations; severe impacts to environmental resources protected under other Federal statutes; additional construction, maintenance, or operational costs; or other unique problems or unusual factors that individually or cumulatively cause unique problems or impacts of an extraordinary magnitude when compared to the value of the property and other alternatives.

Use environmental constraints/features mapping to identify total Section 4(f) avoidance alternatives. These alternatives should be developed (engineered) only to the point necessary to determine whether or not they are feasible and prudent. Clearly present the facts to support dismissing a total Section 4(f) avoidance alternative as not feasible and prudent.

**NOTE:** Total avoidance alternatives that could not/would not meet the project needs should not be developed in detail.

In general, a feasible and prudent total avoidance alternative does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. **When assessing the importance of protecting the Section 4(f) property, the relative value of the property to the preservation purpose of Section 4(f) is considered.**

**Example:** An historic building/property that has been condemned and has a history of a lack of maintenance may require a lesser standard under the feasible and prudent “test” because of the relative value of the resource to the preservation purpose of Section 4(f). The same could be said of a property that has approved development plans, because it would appear that the property would not be preserved in the future due to that development. On the other hand, an historic property that is the last example of its kind within a particular county may warrant a greater standard under the feasible and prudent test because of its value to the preservation purpose of Section 4(f).

**NOTE:** There may be instances where an alternative with a significant net benefit to a Section 4(f) property may be chosen over what, in other circumstances, would be a feasible and prudent total avoidance alternative. However, because avoiding would be a missed opportunity to benefit a Section 4(f) property, the total avoidance alternative would not be prudent. See **Chapter 6** for more information about the net benefit programmatic Section 4(f) evaluation. Consult with FHWA when considering this as an option for a project.

## Identification and Evaluation of Other Alternatives

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Identify and evaluate all alternatives that were considered in the NEPA process that are not total Section 4(f) avoidance alternatives when there are no feasible and prudent total avoidance alternatives. Evaluate each alternative to determine which alternatives can be constructed in accordance with sound engineering judgment, address the project purpose and need, and do not result in impacts of an extraordinary magnitude.

Those alternatives that cannot be constructed in accordance with sound engineering judgment, do not address project purpose and need, or result in impacts of an extraordinary magnitude can be dismissed as unreasonable during the environmental review process and as not feasible and prudent in accordance with the principles of Section 2002 of PA Act 120. These alternatives that can be dismissed do not need to be considered in the assessment of least overall harm. If an alternative cannot be constructed in a sound manner and/or does not meet the established needs of a project, then further analysis is unnecessary. Only those alternatives that can be constructed in accordance with sound engineering judgment and address the project purpose and need without resulting in impacts of an extraordinary magnitude would be carried forward and discussed in the assessment of least overall harm analysis.

Develop detailed documentation to demonstrate whether or not each alternative can be constructed in accordance with sound engineering judgment and addresses the project purpose and need without resulting in impacts of an extraordinary magnitude. In many cases, an alternative(s) may have been determined to not meet the project needs early in the transportation project development process. If this is

the case, the discussion should present facts to support that the project needs are not met and that the alternative is not reasonable (during the environmental review process) or prudent (Section 2002 of PA Act 120).

In other cases, an alternative may meet the projects needs and be constructible as a matter of sound engineering judgment, but may result in other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property, or results in impacts of an extraordinary magnitude. Facts demonstrating the severe problems and/or impacts of an extraordinary magnitude associated with an alternative need to be documented thoroughly.

## Assessment of Least Overall Harm

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Undertake an assessment of least overall harm if all alternatives for a proposed project use Section 4(f) properties and there is no feasible and prudent total Section 4(f) avoidance alternative. Dismiss alternatives that were determined to be unreasonable during the environmental review process and not feasible and prudent in accordance with the principles of Section 2002 of PA Act 120. Do not carry dismissed alternatives into the least overall harm assessment.

The assessment of least overall harm involves three activities:

- 1. Explore design modifications/alignment shifts to avoid the non-*de minimis* use of each individual Section 4(f) property for each alternative and determine whether these avoidance options are reasonable**

Examine design modifications/shifts to avoid the use of Section 4(f) properties for each non-*de minimis* use of a Section 4(f) property and determine whether or not these avoidance modifications/shifts are reasonable and feasible and prudent in accordance with the principles of Section 2002 of PA Act 120. Incorporate those that are reasonable, feasible and prudent into the design of the alternative; document and dismiss those that are not. Be sure to provide facts to support the determinations made.

*De minimis* uses do not require an evaluation of avoidance alternatives or shifts/modifications because the use was determined to be negligible.

**NOTE:** Do not dismiss a design modification/shift solely because it impacts other Section 4(f) properties. If this is the case, the modification/shift will need to be retained for comparison in the Least Overall Harm Assessment.

- 2. Examine all possible planning to minimize harm, including reasonable mitigation measures.**

Section 4(f) approval requires the consideration and documentation of all possible planning to minimize harm to a Section 4(f) property (23 CFR § 774.3(a)(2)). Look at each Section 4(f) property used and explore reasonable measures to further minimize harm or mitigate for adverse impacts and effects to the Section 4(f) properties.

Minimization and mitigation measures should be determined through consultation with the official(s) with jurisdiction.

These measures often include design modifications/shifts to minimize the use of the Section 4(f) property. These design modifications/shifts should be in the immediate vicinity of the property and can include retaining structures, minor alignment shifts, a reduced facility, combinations of the above items, or other

design features that would minimize the use as appropriate. In addition to design modifications, other minimization/mitigation measures for historic sites, public parks, recreation areas, and wildlife/waterfowl refuges can include (but are not limited to):

- **Mitigation of public parks, recreation areas, or wildlife or waterfowl refuges** may involve a replacement of land and/or facilities of comparable value and function, or monetary compensation to enhance the remaining land. There is no specific replacement land requirement for Section 4(f).
- **Mitigation of historic sites** usually consists of those measures necessary to compensate for the adverse effects to the historic integrity of the site as agreed to in accordance with the Section 106 process by FHWA, the SHPO, ACHP (if participating), and other consulting parties as appropriate. Those measures can include context sensitive solutions (CSS), recordation, public education/displays, or other items as appropriate.

One key to identifying and incorporating all possible planning to minimize harm is that the measures must be reasonable. Reasonable measures, as defined in 23 CFR § 774.117 should consider the preservation purpose of Section 4(f), along with:

- The views of the officials with jurisdiction;
- Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the 4(f) property and the benefits of the measure to the property; and
- Any impacts or benefits of the measures to communities or environmental resources outside of the 4(f) property.

**NOTE:** The cost of mitigation should be commensurate with the severity of the impact on the Section 4(f) property.

**NOTE:** Even if only one alternative is found to be reasonable as well as feasible and prudent in accordance with the principles of Section 2002 of PA Act 120, all possible planning to minimize harm must be evaluated and incorporated as part of the Least Overall Harm Assessment.

### **3. Compare all alternatives to determine which would result in the least overall harm.**

After design modifications/shifts to avoid each Section 4(f) property have been explored and all possible planning to minimize harm has been incorporated into the alternatives, compare the Section 4(f) uses of the alternatives along with impacts to other environmental resources to determine which alternative would result in the least overall harm.

FHWA developed seven factors to compare for determining least overall harm. These factors are set forth in 23 CFR § 774.3(c)(1).

The first four factors relate to the net harm each alternative would cause to Section 4(f) properties:

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 to the protected activities, features, or attributes that qualify each Section 4(f) property for protection

3. The relative significance of each Section 4(f) property
4. **The views of the official(s) with jurisdiction over each Section 4(f) property**

Consider both the number of Section 4(f) uses and the magnitude of the uses. For historic properties, consideration should be given to whether land is acquired from the property, or whether the actual structure is removed and how the integrity of the resource is affected. For parks, recreation areas, and wildlife and waterfowl refuges, the portion of the property taken, its existing function and the disruption to the purpose of the property should be considered along with the ability to replace the acquired property or disrupted function in an adjacent area or in close proximity. *De minimis* and net benefit uses (see **Chapter 6**) must be considered in the least overall harm assessment. Develop comparable mitigation measures when possible so alternatives can be compared fairly.

The remaining three factors of comparison developed by FHWA take non-Section 4(f) impacts and other issues with the alternatives under consideration as part of the least overall harm assessment:

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)
7. Substantial differences in costs among the alternatives

The purpose of these seven factors is to allow consideration of all relevant concerns to determine which alternative would cause the least overall harm while keeping Section 4(f)'s preservation purpose as an essential part of decision-making.

For additional guidance on performing least overall harm analysis, refer to Section 3.3.3.2 of the [Section 4\(f\) Policy Paper](#).

**NOTE:** See **Chapter 7** for a template table of how to document and compare the above bulleted items in an individual Section 4(f) evaluation.

**Example:** An alternative that takes property from a park and demolishes an eligible historic building may be selected over an alternative that takes property from the park, avoids the eligible historic building, but costs \$500,000 more, results in 25 additional residential displacements, two more acres of wetland impact, and five additional acres of productive agricultural land. The impacts would need to be documented and discussed, as well as put into proper context for the project (i.e., Is the 25 additional displacements two displacement versus 27 or 200 displacements versus 225?).

**Example:** Sliver takes from **two or three** historic properties may actually be determined to result in less harm than the removal of a ball field from **one** park property.

**NOTE:** *De minimis* uses, by nature, do not cause substantial impairment, or an “adverse effect” to the Section 4(f) property. A *de minimis* use should be considered negligible (almost neutral) when assessing harm to Section 4(f) properties. Uses resulting in a net benefit would enhance the Section 4(f) property, and therefore should be considered to have a positive effect on the resource when assessing least overall harm. Because a net benefit is weighed as a positive effect, it is possible that a shift that avoids a Section 4(f) use could result in more harm to that property than an alternative that uses the property, if that use is determined to have a net benefit.

## Chapter 6: Section 4(f)/Section 2002 Forms - Non-Applicability/No Use, Temporary Occupancy, *De Minimis*, and Programmatic Section 4(f) Evaluation Documentation

### Use of the PennDOT/FHWA PA Division Office Section 4(f)/Section 2002 Forms

This chapter outlines the procedures that PennDOT and the FHWA PA Division Office have implemented to reduce processing time and streamline documentation and approval for certain federal and/or state actions that involve Section 4(f) properties but do not require an individual Section 4(f) evaluation. PennDOT, with FHWA agreement, developed a series of forms to serve as Section 4(f) documentation for uses that:

- Require a temporary occupancy
- Are *de minimis*
- Meet the criteria of a programmatic Section 4(f) evaluation

Additionally, PennDOT provides a form to document when Section 4(f) does not apply or there is no use of a Section 4(f) property.

In entering into an agreement with FHWA to use the forms described in this chapter, PennDOT agreed to ensure compliance with 23 CFR Part 774, Section 4(f) (49 U.S.C. § 303) and all other applicable federal environmental and related requirements. Completed forms are reviewed and approved by FHWA.

The most current versions of the Section 4(f) forms are hyperlinked within this chapter.

**The forms are also used to satisfy the documentation requirements for Section 2002 (71 P.S. §512(a)(15)). The federal programmatic Section 4(f) evaluations discussed later in this chapter can be applied for state projects. The PDE of HDTs makes the applicability determinations and approvals for non-federal projects.**

Consult **Figure 1**, the *Section 4(f)/Section 2002 Process Flow Chart*, to guide documentation decision-making.

- If there is a situation where a property or project circumstance meets the criteria as an exception (23 CFR § 774.13), complete the [Section 4\(f\) Non-Applicability/No Use Form](#).
- If the use of Section 4(f) property meets the criteria for temporary occupancy (23 CFR § 774.13(d)), complete the [Determination of Section 4\(f\) Applicability Involving Temporary Occupancy Form](#).
- If a *de minimis* use applies to all Section 4(f) properties used by a project, then complete either the [Determination of Section 4\(f\) De Minimis Use/Section 2002 No Adverse Use of Public Parks, Recreation Areas, Wildlife and/or Waterfowl Refuges, State Forest Land, and State Game Land Form](#) and/or the [Determination of Section 4\(f\) De Minimis Use/Section 2002 No Adverse Use of Historic Properties Form](#), as appropriate. (See **Chapter 4** for *de minimis* criteria.)

- Are any of the programmatic Section 4(f) evaluations applicable to the project? The nationwide programmatic Section 4(f) evaluations can be used in place of an individual Section 4(f) evaluation where uses are considered minor. There are five nationwide programmatic Section 4(f) evaluations, and the following forms are available to document Section 4(f) uses that meet the specific criteria of a programmatic Section 4(f) evaluation, as appropriate:
  - [Nationwide/Programmatic Section 4\(f\) Evaluation for Transportation Projects that have Net Beneficial Use \(Net Benefit\) Form](#)
  - [Nationwide/Programmatic Section 4\(f\) Evaluation for Projects that Necessitate the Use of Historic Bridges Form](#)
  - [Nationwide/Programmatic Section 4\(f\) Evaluation for Minor Involvement with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges Form](#) (**Note: In most cases, de minimis should be applied instead of using this programmatic.**)
  - [Nationwide/Programmatic Section 4\(f\) Evaluation for Minor Involvement with Historic Sites Form](#) (**Note: In most cases, de minimis should be applied instead of using this programmatic.**)
  - [Section 4\(f\) Non-Applicability/No Use Form](#) to document independent bikeway or walkway projects.
- If Section 4(f) uses occur on multiple properties on the same project, a combination of the applicable forms listed in the bullets above may be used (non-applicability/no use, temporary occupancy, *de minimis*, programmatic Section 4(f) evaluation).
- All Section 4(f) forms related to the same project should be submitted at one time to the reviewers.
- If there is any Section 4(f) use on a project that does not meet the criteria of temporary occupancy, *de minimis*, or one of the programmatic Section 4(f) evaluations, then an **individual Section 4(f) evaluation** is required. If an individual Section 4(f) evaluation must be prepared, all Section 4(f) uses will be addressed in the individual Section 4(f) evaluation; none of the Section 4(f) forms would be used. (See **Chapter 7** for documentation guidance on individual Section 4(f) evaluations.)

Each section of this chapter discusses the criteria for the forms, and provides guidance on preparing and processing the forms.

**NOTE:** The amount of documentation required to support a Section 4(f) determination should be commensurate with the impacts of the action and the potential for public controversy. There is no absolute prescription for what or how much documentation should be included; however, some level of documentation is necessary in order to support the District's decision to the Highway Design and Technology Section (HDTs), FHWA, and/or the public.

### **Instructions Applicable to All Section 4(f) Forms**

**Project Description on the Form:** Provide a concise but thorough description of the proposed action. Provide enough information that form reviewers have a realistic snapshot of the project and its potential impacts to Section 4(f) properties.

**Identification of Section 4(f) Property(ies) on the Forms:** List and describe the Section 4(f) properties within the project area. Include photos and maps to show property location(s) in relation to the project limits, as appropriate.

For **historic sites**, include:

- The property's historic name
- A brief description of why the property is listed or eligible for listing (do not simply reference the Section 106 Criteria A, B, C, or D)
- The historic boundary, including a map
- A listing of contributing/non-contributing elements (important for historic districts)
- Any unusual characteristics of the Section 4(f) property that either reduce or enhance the value of all or part of the historic site (e.g., its location next to a heavily traveled roadway)
- Photos of the property
- Reference Section 106 eligibility documentation.

For **public parks, recreation areas, and wildlife and waterfowl refuges**, include:

- The ownership of the property (city, county, etc.)
- The major purpose of the property and the determination of significance made by the official(s) with jurisdiction
- Function of or available activities on the property (ball playing, swimming, golfing, etc.)
- Description and location of all existing and planned facilities (athletic fields, tennis courts, playgrounds, boat launches, trails, campsites, etc.)
- Description of access (pedestrian, vehicular, etc.)
- Approximate number of users/visitors
- Any unusual characteristics that either reduce or enhance the value of all or part of the property (e.g., a quiet, wooded setting of a campground)
- Photos of the property
- If the property is a multi-use property (state or federal forest lands, school property where a portion of the property contains ball fields/recreational fields open to the public, etc), discuss any management plans that exist and identify where the recreational activities or refuge areas are in relation to the property boundaries.
- If a management plan exists, identify key components

**Form Attachments:** The forms should include the following types of items as attachments, as appropriate, to complete the documentation and aid review of the form:

- Project location map
- Map of Section 4(f) property(ies) being discussed and other Section 4(f) properties in the project area
- Photos of the Section 4(f) property(ies)
- Project plan sheet to show impacts
- Public involvement information
- Correspondence with the official(s) with jurisdiction

See the specific forms for recommended attachments. Maps should be well labeled so Section 4(f) properties and their boundaries are clearly marked, as well as limits of project disturbance.

**Scoping Field Views:** When conducting such a field view with FHWA and the PDE from HDTS, the following types of information should be provided and/or discussed at the scoping field views to verify anticipated Section 4(f) determinations, research needed etc.:

<b>Mapping</b> <ul style="list-style-type: none"> <li>• USGS mapping</li> <li>• Project maps</li> <li>• Updated aerials</li> <li>• Engineering plans/concepts</li> <li>• Property/parcel boundary</li> </ul>	<b>Correspondence</b> <ul style="list-style-type: none"> <li>• Documentation by the CRP (including letters, forms, etc)</li> <li>• SHPO correspondence</li> <li>• Correspondence with regard to parks, recreational facilities, or wildlife and waterfowl refuges</li> <li>• Meeting minutes</li> <li>• E-mail</li> <li>• Telephone memoranda</li> <li>• Letter(s) from officials with jurisdiction</li> </ul>	<b>Other</b> <ul style="list-style-type: none"> <li>• Gauge level of public controversy on environmental grounds <ul style="list-style-type: none"> <li>○ Meeting summary reports</li> <li>○ News articles</li> <li>○ Petitions</li> </ul> </li> <li>• Conceptual alternatives analysis of feasible and prudent alternatives</li> <li>• Recreation or management plan</li> <li>• Engineering plans with staging areas denoted</li> </ul>
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Scoping is further detailed in Chapter 3 of PennDOT's [Design Manual 1B](#) (Publication 10B).

## Non-Applicability/No Use Form

### [Section 4\(f\) Non-Applicability/No Use Form](#)

#### When to Use the Form

FHWA has the ultimate authority to determine whether a property is a Section 4(f) property or not and whether or not a project uses a Section 4(f) property.

Complete the *Section 4(f) Non-Applicability/No Use Form* if any of the following situations apply (more than one can be applicable):

1. The project area includes a Section 4(f) property but results in no permanent incorporation or conversion of land into a transportation facility, no temporary occupancy, or does not result in a constructive use as determined by FHWA.

**Note: The form does not need to be completed for all Section 4(f) properties within the project area that are not used.** This form should be completed on a case-by-case basis to document that Section 4(f) was examined/considered when a use is possible or probable. The form does not need to be completed if it is clear that there would be no use. For example: a resource located a large distance from the actual impact, but still within the project area.

2. The project is a bike or walkway project sponsored by the officials with jurisdiction over the Section 4(f) property [Negative Declaration applies]. (See the *Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects* section later in this chapter for more information.)

3. The project involves permanent acquisition of land within the boundaries of a historic district, but the land to be used does not contribute to the characteristics that make the district eligible for the *National Register*, or has been determined to be part of a non-contributing element.
4. The project involves a multiple-use facility (state, federal, National Forest, large municipal-owned land, etc.) but does not impact an area that is managed for/functions specifically as a Section 4(f) property.
5. The project involves an aerial crossing of a Section 4(f) property, but it does not impact the qualifying characteristics of the property, or it does not result in the conversion of land into a transportation facility, such as placement of a bridge over a historic railroad yard.
6. The project involves activities within the existing transportation right-of-way and would not result in proximity impacts that would substantially impair the features, activities, or attributes that make the property eligible for protection under Section 4(f). For example, a project does not require any right-of-way from a historic resource, but under Section 106 has an adverse effect. Proximity impacts were examined but determined that they would not substantially impair the features, activities, or attributes that make the property eligible for the *National Register*.
7. The project involves underground activities such as tie-backs, horizontal borings, etc. and does not impact the qualifying characteristics of the Section 4(f) property or involve archaeology that warrants preservation in place.
8. The project involves the restoration, rehabilitation, or maintenance of transportation facilities that are on, or eligible for, the *National Register* and would not adversely affect the historic qualities of the facility that caused it to be on, or eligible, for listing.
9. The project involves a transportation enhancement or is a mitigation project where the use of the Section 4(f) property is solely for the purpose of preserving or enhancing the activities, features, or attributes that qualify the property for Section 4(f) protection.
10. The project involves improvements to the interstate system, but does not require the use of any interstate elements formally designated by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.
11. The project involves certain trails, paths, bikeways, and sidewalks where (1) the trail-related project is funded under the Recreational Trails Program (23 U.S.C. § 206(h)(2)); (2) the trail is a national historic trail designated under the National Trails System Act (with the exception of segments that are historic sites) (16 U.S.C. § 1241-1251); (3) the trail/path/bikeway/sidewalk occupies a transportation facility right-of-way and can be maintained somewhere within that right-of-way; or (4) the trail/path/bikeway/sidewalk is part of the local transportation system and functions primarily for transportation.

**Do not complete a *Non-Applicability/No Use Form* in conjunction with an individual Section 4(f) evaluation.** In the case where some Section 4(f) properties are used and some are not used within a project area/APE, where the undertaking would necessitate an individual section 4(f) evaluation, document the Section 4(f) uses and those Section 4(f) properties not used (avoided) in the individual Section 4(f) evaluation.

## Completing and Processing the Non-Applicability/No Use Form

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The *Section 4(f) Non-Applicability/No Use Form* is to be completed by district environmental staff and/or consultants working with a district on a project to document any of the 11 circumstances listed in the previous section. The form outlines the level of detail and appropriate documentation.

### Notes regarding form signatures:

- **Official with Jurisdiction** – Required for a determination of non-applicability section items #2-11. If the official with jurisdiction signs the form, have the district review the form contents prior. The official does not necessarily need to sign the form; other documentation such as letters or meeting minutes can be used in place of the signature as long as there is specific agreement that there is no Section 4(f) use of their property. Attach this correspondence to the form. For projects that fall under the Section 106 PA, or any subsequent similar agreement, a letter from the SHPO is not necessary.
- **FHWA** – Signature is optional. For Section 4(f) applicability decisions, PennDOT is advised to consult with FHWA if there is a questionable circumstance and seek signature approval. FHWA recognizes PennDOT's stewardship, training program, and integrity in making non-applicability decisions without the involvement of FHWA. **FHWA consultation or determination is not mandatory for all undertakings, and PennDOT can apply best professional judgment in making non-applicability decisions.**

If PennDOT decides Section 4(f) does not apply or that there is no use of a Section 4(f) property under the circumstances described in the previous section, the *Non-Applicability/No Use Form* can be completed, submitted to the HDTS for concurrence, and placed in the project file without FHWA signature. FHWA will continue to monitor Section 4(f) applicability decisions through the Independent Oversight Program as defined in the Stewardship and Oversight Agreement Procedures.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the Environmental Commitments and Mitigation Tracking System (ECMTS). For guidance on ECMTS, refer to Appendix T of PennDOT's [\*Design Manual 1X\*](#) (Publication 10X).

Place the completed/signed copy of the form in the project file. If a CE is being prepared for the project, attach the form to the CE within the CE Expert System (CEES). If an EA or EIS is being prepared, only reference the form within the document.

## Temporary Occupancy Form

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### [Determination of Section 4\(f\) Applicability Involving Temporary Occupancy Form](#)

#### **When to Use the Form**

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Use this form as documentation for projects that require **temporary occupancy** of a Section 4(f) property. See **Chapter 4** for temporary occupancy criteria under 23 CFR §774.13(d).

Consult with FHWA on Section 4(f) temporary occupancy decisions if there is a questionable circumstance.

**Water Trails:** As discussed in **Chapter 3**, PFBC-designated water trails are considered Section 4(f) properties. Often, when a project crosses a water trail, it is “temporarily occupied”. Document this in the *Temporary Occupancy Form* when the criteria are met. If a temporary causeway must be constructed, or where the path of the trail is affected (temporarily closed, altered, etc), aids to navigation (ATON) must be included in the project to ensure the safety of recreational boaters. If the requirements under 23 CFR §774.13(d) cannot be met, a Section 4(f) use would result, and the *Temporary Occupancy Form* cannot be used. See PennDOT’s “Aids to Navigation Standard Submission Process Guidance” (Chapter 10 of PennDOT’s [Design Manual Part 2](#) (Publication 13M)) for additional details regarding ATON plans. See the temporary occupancy section of **Chapter 4** for a discussion of when temporary occupancy applies to water trails.

**Federal Wild & Scenic Rivers:** Approach these waterways in a similar manner as water trails when considering whether temporary occupancy applies. See the temporary occupancy section **Chapter 4** for a discussion of when temporary occupancy applies to water trails.

**Construction of wetland or habitat banks/mitigation sites in parks or recreational areas (including State Game Lands):** Such sites often qualify as a temporary occupancy, because construction will be temporary and the resource will be returned to the same condition or better with the addition of the wetland/habitat bank/site.

**Do not complete the temporary occupancy form in conjunction with an actual Section 4(f) use on the same resource. In this case, the temporary occupancy form should not be completed. Rather, complete the other form or individual Section 4(f) evaluation as appropriate for the actual use and discuss the temporary occupancy as part of the documentation.**

#### **Completing and Processing the Temporary Occupancy Form**

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The form is to be completed by district environmental staff and/or consultants working with a district on a project to document any project circumstances that meet all of the Section 4(f) temporary occupancy criteria. The form outlines the level of detail and appropriate documentation necessary to support the determination.

**Brief Description of the Temporary Occupancy:** Provide the important specific information regarding the nature of the temporary occupancy. This information supports the documentation that the temporary occupancy meets the criteria.

### Applicability Determination:

1. Verify that each of the required **temporary occupancy criteria** apply to the project by checking the box for those items that are true for the project. **All items have to apply or temporary occupancy does not apply and the form cannot be used.**
2. Verify that the **official(s) with jurisdiction** agrees that the project meets the above criteria and that there is only a temporary occupancy of the Section 4(f) property. Written agreement is required, either by the official with jurisdiction signing the form or providing other written documentation (attach to the form). If the official is to sign the form itself, the district should review the contents of the form prior.
3. Indicate if the temporary occupancy involves a **PFBC water trail**, whether a temporary causeway will be constructed, and/or whether the path of the water trail will be affected in some manner (temporarily closed, altered, etc.). If the activities of the water trail can still be conducted despite the activities of the project, temporary occupancy can apply if PFBC, the official with jurisdiction, agrees. Obtain PFBC written agreement. Indicate if coordination has been conducted with PFBC regarding the need for an ATON plan. Explain this coordination and its outcome in the space provided. Attach appropriate PFBC correspondence to the form.

### Notes regarding form signatures:

- **Official(s) with Jurisdiction** – If the official with jurisdiction signs the form, have the district review the form contents prior. The official does not necessarily need to sign the form; other documentation such as letters or meeting minutes can be used in place of the signature as long as there is specific agreement that the temporary occupancy criteria are met. Attach this correspondence to the form. Documentation for the effects finding and posting with no objection by the SHPO or the SHPO's concurrence is acceptable with the No Effect or No Adverse Effect finding as long as the temporary occupancy was specifically described in the effects submission. **If a temporary construction easement was not identified at the time of the effects determination, separate coordination with the SHPO is needed for their written agreement with the Section 4(f) temporary occupancy. If the SHPO objects to the finding, then temporary occupancy cannot be used.**
- **FHWA** – Signature is optional. FHWA consultation or determination is not mandatory for all undertakings, and PennDOT can apply best professional judgment in making temporary occupancy decisions. Under these circumstances, signature by the PDE from HDTS should be obtained to complete the process.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the ECMTS. For guidance on ECMTS, refer to Appendix T of PennDOT's [Design Manual IX](#) (Publication 10X).

Place the completed/signed copy of the form in the project file. If a CE is being prepared for the project, attach the form to the CE within the CEES. If an EA or EIS is being prepared, only reference the form within the document.

### **Parks, Recreation Areas, and Refuges:**

[Determination of Section 4\(f\) De Minimis Use/Section 2002 No Adverse Use of Public Parks, Recreation Areas, Wildlife and/or Waterfowl Refuges, State Forest Land, and State Game Land Form](#)

### **Historic Properties:**

[Determination of Section 4\(f\) De Minimis Use/Section 2002 No Adverse Use of Historic Properties Form](#)

## **When to Use the Forms**

Complete the forms as documentation when a project has a *de minimis* use. See **Chapter 4** for guidance on determining *de minimis* use. Because the *de minimis* requirements are slightly different for parks, recreation areas, and refuges than for historic sites, two separate forms were developed.

Avoidance alternatives need not be examined if it is determined that a transportation project will have only a *de minimis* use on a Section 4(f) property. The *de minimis* use can be documented on the *De Minimis/No Adverse Use form*. Minimization, mitigation, and enhancement measures should be considered in making the *de minimis* determination.

**If an individual Section 4(f) evaluation is being prepared for a project, document all *de minimis* use(s) within that document; completion of forms is unnecessary.**

**NOTE:** If a single Section 4(f) property is both a park and historic site, use just the parks *de minimis* form and explain all requirements within that form. Add the effects determination and consulting party information within the form as appropriate.

**NOTE:** For projects involving the replacement of a historic bridge that contributes to a historic district and additional right-of-way is required from another property that contributes to the historic district, the *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Historic Properties Form* can be used in combination with the *Nationwide/Programmatic Section 4(f) Evaluation for Projects that Necessitate the Use of Historic Bridges Form* when the use of the adjacent contributing property within the district does not, by itself, adversely affect the district. In this situation, the Section 106 effect finding would describe this fact, and the *de minimis* form would be used for the minor property acquisition and the Bridge Programmatic would be used for the replacement of the contributing bridge. See the *de minimis* section of **Chapter 4** and case study #7 of **Chapter 10** for more discussion of this special circumstance.

## **Completing and Processing the De Minimis Use Forms**

The forms are to be completed by district environmental staff and/or consultants working with a district on a project to document Section 4(f) *de minimis* use. The forms each outline the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected and be specific as to the extent of the use of that property.

[Determination of Section 4\(f\) De Minimis Use/Section 2002 No Adverse Use of Public Parks, Recreation Areas, Wildlife and/or Waterfowl Refuges, State Forest Land, and State Game Land Form](#)

### Applicability Determination:

1. Provide the total acreage of the Section 4(f) property and describe the use of the land by the project. Note the specifics of both temporary and permanent property acquisition or easement. This is important for the context of the use.
2. Check the box to confirm your verification that the project does not adversely affect the activities, features, and attributes of the Section 4(f) property that qualifies it for protection under Section 4(f)/Section 2002. **If this is not true, do not check the box and *de minimis* cannot be applied for the project for this use.** Describe how the project's use of the Section 4(f) property will affect the qualities, activities and attributes which qualify it for protection. For example, in the specific location of the project within the property, are there any amenities? If so, how are they affected by the project? Does the project affect access to the property or parking facilities? If something is affected and is being mitigated in order to make a *de minimis* determination, include the details of this mitigation.
3. Verify that the public was given the opportunity to review and provide comment on the effect the project will have on the protected activities, features, and attributes of the Section 4(f) property. This public opportunity can be provided as part of the general project public involvement plan as long as the *de minimis* use is specifically highlighted in some way for review and comment. Separate public involvement is also acceptable and can be tailored to the population that typically would frequent the park, recreation area or refuge. Identify the mechanism used to reach the public and collect comments. Describe the input received. Include any notices, flyers, meeting minutes, comment letters, etc. related to this public involvement activity to this form as an attachment.
4. Verify that the official(s) with jurisdiction over the Section 4(f) property was informed of FHWA's/PennDOT's intent to make a *de minimis* finding. Note the method used to notify the official(s) with jurisdiction and attach any applicable correspondence (letter, email, meeting minutes, etc.).
5. Verify that the official(s) with jurisdiction over the Section 4(f) property agrees in writing that the use will not adversely affect the activities, features, or attributes of the park, recreation area or refuge. **This written concurrence is required in order to apply *de minimis*, and must be obtained after public input is gathered and the official(s) with jurisdiction is given a chance to review the feedback prior to making a final decision on *de minimis* concurrence.** Identify the specific person concurring and the date of the written concurrence. If the official with jurisdiction signs the form, have the district review the form contents prior. If the written concurrence is separate from signing the *de minimis* form, attach the concurrence to the form, noting the attachment reference on the form. A sample letter to provide to the official with jurisdiction to obtain written concurrence can be found [here](#).
6. If the use involves state game land, verify that the use is considered *de minimis* in accordance with the *Cooperative Interagency Agreement for Interdepartmental Land Transfer of State Game Lands*.
  - If a **State Game Land Bank** will be used, note how many acres will be debited from which specific bank and obtain PGC signature on the form for the bank's use. The date of that signature is the date for debiting credits from the bank. The PGC will not accept a separate letter if the bank is being used as mitigation. State Game Land Banks can only be used for mitigation purposes in cases when the use is *de minimis*, but they are not required to be used for mitigation when a use is *de minimis*.
  - If there will be **Interdepartmental Land Transfer**, obtain PGC signature.

7. Note whether Section 6(f), Project 70, Project 500, or another recreational grant applies to the Section 4(f) property. For more information, refer to PennDOT's [Section 6\(f\), Project 70, and Project 500 Guidance](#) (Publication 745).
8. Verify that an individual Section 4(f) evaluation was not needed for the project. If one is being prepared for another use of a Section 4(f) property, discuss the *de minimis* use in the individual Section 4(f) evaluation in place of preparing a separate form.

**Section 2002:** Consider and briefly summarize the impacts to other Section 2002 areas of concern that would occur if the use of the public park, recreation area, or refuge was avoided. Other Section 2002 areas of concern can include the following:

- |  |   |  |
|--|---|--|
| • Residential and neighborhood character and location                                      | • Fast, safe and efficient transportation   | • Engineering, right-of-way and construction costs of the project and related facilities                     |
| • Conservation including air, erosion, sedimentation, wildlife and general ecology of area | • Civil defenses  | • Maintenance and operating costs of the project and related facilities                                      |
| • Noise, and air and water pollution   | • Economic activity   | • Operation and use of existing transportation routes and programs during construction and after completion. |
| • Multiple use of space  | • employment  |  |
| • Replacement housing  | • Fire protection   |  |
| • Displacement of families and business  | • Public utilities  |  |
| • Aesthetics   | • Religious institutions  |  |
| • Public health and safety   | • Conduct and financing of government including the effect on the local tax base and social service costs |  |
|  | • Property values   |  |
|  | • Education, including the disruption of school district operations                                       |  |

**Notes regarding form signatures:**

- **Official(s) with Jurisdiction** – See #5 above.
- **FHWA** – Signature is required for all projects with federal involvement. If the project does not have federal involvement, the signature by the PDE from HDTS completes the process.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the ECMTS. For guidance on ECMTS, refer to Appendix T of PennDOT's [Design Manual 1X](#) (Publication 10X).

A complete and signed copy of the form should be placed in the project file. If a CE is being prepared for the project, attach the form to the CE within the CEES. If an EA or EIS is being prepared, only reference the form within the document.

**Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Historic Properties Form**

**Applicability Determination:**

1. Verify that the project results in a determination of “no adverse effect” or “no historic properties affected” for the historic property. This effect determination is defined by the Section 106 process; contact the CRP for determination information. Remember that any **temporary construction easements** must be identified as part of the effects determination. **If the project results in an adverse effect, *de minimis* cannot be applied to this Section 4(f) use.**
  - Note the effects determination.
  - Describe the use of the historic property by the project, including temporary and permanent acquisition. **If any specific design features or mitigation was used when making the effects determination, describe the design features or mitigation.**
2. Indicate whether the SHPO has agreed in writing with the effects determination.
  - If “Yes”, note the date of concurrence and attach the correspondence to the form.
  - ”Concurrence not required as per the Section 106 Delegation PA”
  - If “No”, the *de minimis* form cannot be used.
3. Verify that the views of consulting parties participating in the Section 106 consultation have been considered and attach any relevant correspondence.
4. Verify that an individual Section 4(f) evaluation was not needed for the project. If one is being prepared for another use of a Section 4(f) property, discuss the *de minimis* use in the individual Section 4(f) evaluation in place of preparing a separate form.

**Section 2002:** Consider and briefly summarize the impacts to other Section 2002 areas of concern that would occur if the use of the historic property was avoided. (For a detailed list of the areas of concern, see the Section 2002 section under the previous *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Public Parks, Recreation Areas, Wildlife and/or Waterfowl Refuges, State Forest Land, and State Game Land Form* section.)

**Note regarding form signatures:**

- **FHWA** – Signature is required for all projects with federal involvement. If the project does not have federal involvement, the signature by the PDE from HDTS completes the process.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the ECMTS. For guidance on ECMTS, refer to Appendix T of PennDOT’s [\*\*Design Manual 1X\*\*](#) (Publication 10X).

A complete and signed copy of the form should be placed in the project file. If a CE is being prepared for the project, attach the form to the CE within the CEES. If an EA or EIS is being prepared, only reference the form within the document.

## Programmatic Section 4(f) Evaluations and Forms

Programmatic Section 4(f) evaluations have been developed by FHWA over the years as a time-savings procedural option for certain minor uses of Section 4(f) property. These programmatic Section 4(f) evaluations were developed based on experience with certain types of projects. Five nationwide programmatic Section 4(f) evaluations exist:

- [Section 4\(f\) Statement and Determination for \*\*Independent Bikeway or Walkway Construction Projects\*\*](#) (Federal Highway Administration (FHWA), May 23, 1977)
- [Nationwide Programmatic Section 4\(f\) Evaluation and Approval for Transportation Projects That Have a \*\*Net Benefit\*\* to a Section 4\(f\) Property](#) (70 FR 20618, April 20, 2005)
- [Programmatic Section 4\(f\) Evaluation and Approval for FHWA Projects that Necessitate the Use of \*\*Historic Bridges\*\*](#) (48 FR 38139, August 22, 1983)
- [Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-Aided Highway Projects with \*\*Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges\*\*](#) (52 FR 31116, August 19, 1987)
- [Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-Aided Highway Projects with \*\*Minor Involvements with Historic Sites\*\*](#) (52 FR 31118, August 19, 1987)

**NOTE: In most cases, *de minimis* is applicable and should be used instead of either the Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges or the Minor Involvements with Historic Sites programmatic Section 4(f) evaluations.**

Programmatic Section 4(f) evaluations are essentially pre-approved evaluations as long as:

- The project facts match the programmatic Section 4(f) evaluation;
- The impacts are within the range specified in the programmatic Section 4(f) evaluation;
- The avoidance alternatives that are specified in the programmatic Section 4(f) evaluation have been evaluated;
- Agreements have been received in writing from the official(s) with jurisdiction; and
- All measures to minimize harm have been evaluated.

**The programmatic Section 4(f) evaluation does not relax Section 4(f) requirements.** The analysis and justification to use Section 4(f) properties is the same with the programmatic Section 4(f) evaluation as it is with an individual Section 4(f) evaluation. It still must be determined that:

- There is no feasible and prudent alternative to the use of Section 4(f) property, and
- The project includes all possible planning to minimize harm to the Section 4(f) property resulting from the use.

**The same analysis is required for programmatic Section 4(f) evaluations as is required for individual Section 4(f) evaluations:**

- The Section 4(f) properties still must be identified;

- The uses must be determined;
- Avoidance alternatives still must be evaluated to determine if they are feasible and prudent; and
- The impact to the Section 4(f) property still must be minimized (if not avoided).

**The primary differences in applying a programmatic Section 4(f) evaluation instead of conducting an individual Section 4(f) evaluation are in the documentation required and the approval process.**

- **In Pennsylvania, a programmatic Section 4(f) evaluation utilizes a structured form with supporting documentation.** Therefore, where appropriate, applying a programmatic Section 4(f) evaluation can save preparation and review time.
- **A programmatic Section 4(f) evaluation is approved by the FHWA Division; no legal sufficiency review is required.** An individual Section 4(f) evaluation is subject to a legal sufficiency review by FHWA's legal counsel for the Final Section 4(f) Evaluation.
- **Programmatic Section 4(f) evaluations do not go through a circulation and comment period.** Individual Section 4(f) evaluations (the Draft Section 4(f) Evaluations) are circulated for a 45-day comment period to the official(s) with jurisdiction, the U.S. Department of the Interior (DOI), and where applicable, the U.S. Department of Agriculture (USDA) and the U.S. Department of Housing and Urban Development (HUD).

**Development of a programmatic Section 4(f) evaluation generally involves the following process:**

- Identify Section 4(f) properties and whether any of these properties will be used by the project alternatives through project scoping.
- Coordinate with the official(s) with jurisdiction over the Section 4(f) property(s) used.
- Confirm with the FHWA Division Office that the programmatic Section 4(f) evaluation is applicable.
- Evaluate avoidance alternatives as required by the programmatic Section 4(f) evaluation guidelines and minimize impacts to the Section 4(f) properties where avoidance is not feasible and prudent.
- Receive required written agreement from the official(s) with jurisdiction over the Section 4(f) property(s) regarding the assessment of impacts to the Section 4(f) property(s) and the measures to minimize harm to the Section 4(f) property(s). This is usually accomplished by having the official with jurisdiction sign the form but can include other documentation such as a letter, email, meeting minutes, etc.
- Complete the appropriate programmatic Section 4(f) evaluation form and submit it to the FHWA Division Office for review and approval.
- Provide the approved programmatic Section 4(f) form to the official(s) with jurisdiction for informational purposes for these programmatic Section 4(f) evaluations :
  - Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges
  - Net Benefit.

The other three programmatic Section 4(f) evaluations do not require that documentation be provided to the official(s) with jurisdiction.

### **Notes Regarding Use of the Programmatic Section 4(f) Evaluation Forms**

- **Any of the programmatic Section 4(f) evaluation forms can be combined with the *De Minimis* Form and/or the Temporary Occupancy and Non-Applicability/No Use Forms** to serve as documentation on a project as long as one of the uses fulfills the criteria of a programmatic Section 4(f) evaluation, and the others meet the criteria for *de minimis* use, temporary occupancy or non-applicability.
- **If more than one Section 4(f) property is involved in a project, multiple programmatic Section 4(f) evaluation forms may be completed to address the circumstance.** A form should be completed for each resource covered under a separate programmatic Section 4(f) evaluation and submitted or presented together.
- **If the same programmatic Section 4(f) evaluation applies to multiple Section 4(f) properties, prepare a separate form for each Section 4(f) property.**
- **Whenever there is a use of at least one property that does not fall within a programmatic Section 4(f) evaluation, *de minimis* criteria, temporary occupancy or non-applicability, an individual Section 4(f) evaluation must be prepared.** The individual Section 4(f) evaluation discusses all Section 4(f) properties and uses of those properties.

The remainder of this chapter describes, in detail, the specifics regarding the applicability and required analysis, coordination and documentation for each of the five programmatic Section 4(f) evaluations and their forms.

## **Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects and the Non-Applicability/No Use Form**

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The [Negative Declaration/Section 4\(f\) Statement for Independent Bikeway or Walkway Construction Projects](#) is a FHWA programmatic Section 4(f) evaluation that can be applied to bikeway or walkway construction projects. These facilities are provided when bicycle or pedestrian traffic would have normally used a federal-aid highway route.

For this programmatic Section 4(f) evaluation to apply, the following must be true:

- The project requires the use of public recreation and park areas established and maintained primarily for active recreation, open space and similar purposes.
- All possible planning to minimize harm to the Section 4(f) property has been accomplished as approved by the official(s) with jurisdiction over the Section 4(f) property.
- The proposed bikeway or walkway construction project will not affect noise and air quality, or require the displacement of families or businesses.
- Any temporary water quality impacts will be mitigated by erosion control measures during construction.
- Visual impacts will be mitigated by integrating the project into the surrounding conditions.
- There should be no significant or adverse social or economic impacts.
- Recreational potential of the parks or recreational areas should be enhanced, as well as the bikeway or walkway providing an alternative mode of transportation.

The Independent Bikeway or Walkway Programmatic Section 4(f) Evaluation cannot be used under the following situations:

- The bikeway or walkway would require the use of critical habitat of endangered species.
- The use of land from a publicly owned wildlife or waterfowl refuge is required.
- The use of land from an historic site of national, state, or local significance is required.
- The project has major impacts, adverse effects, or controversy.

This programmatic Section 4(f) evaluation cannot be used for a project processed as an EIS.

The final decision on whether a proposed project is applicable is made by FHWA.

### **Documentation**

To document the applicability of this programmatic Section 4(f) evaluation, a copy of the [FHWA May 23, 1977 negative declaration/Section 4\(f\) statement](#), along with the approval letter from the official with jurisdiction, should be placed in the individual project file. A completed [Section 4\(f\) Non-Applicability/No Use Form](#) should also be completed and placed in the project file. (See the earlier section of this chapter for guidance on completing and processing the *Section 4(f) Non-Applicability/No Use Form*.) FHWA signature is not required.

**If the officials with jurisdiction over the Section 4(f) property also have jurisdiction over the project facility, there is no Section 4(f) use and no documentation is required.**

## Net Benefit Programmatic Section 4(f) Evaluation and Form

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The [Nationwide Programmatic Section 4\(f\) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4\(f\) Property](#) states that a “net benefit” is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project result in an overall enhancement of the Section 4(f) property. This overall enhancement is compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property. The present condition of the Section 4(f) property takes the activities, features and attributes that qualify the property for Section 4(f) protection into consideration. 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.

### **Applicability**

In order to qualify for a net benefit programmatic Section 4(f) evaluation, the following criteria must be satisfied:

- The proposed transportation project uses a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic site.
- The proposed project includes all appropriate measures to minimize harm and subsequent mitigation necessary to preserve and enhance those features and values of the property that originally qualified the property for Section 4(f) protection.
- For historic properties, the project does not require the major alteration of the characteristics that qualify the property for the *National Register* such that the property would no longer retain sufficient integrity to be considered eligible for listing. For archaeological properties, the project does not require the disturbance or removal of the archaeological resources that have been determined important for preservation in-place rather than for the information that can be obtained through data recovery. The determination of a major alteration or the importance to preserve in-place will be based on consultation consistent with Section 106.
- For historic properties, consistent with Section 106, there must be agreement reached amongst the SHPO and as appropriate, FHWA, and PennDOT on measures to minimize harm when there is a use of Section 4(f) property. These measures must be incorporated into the project.
- The official(s) with jurisdiction over the Section 4(f) property agree in writing with the assessment of the impacts; the proposed measures to minimize harm; and the mitigation necessary to preserve, rehabilitate, and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the Section 4(f) property.
- FHWA determines that the project facts match those set forth in the programmatic Section 4(f) evaluation. (For non-federal projects, the district environmental manager and the PDE of HDTs make the net benefit determination.)

The programmatic Section 4(f) evaluation must clearly demonstrate that each of the above criteria was satisfied for the proposed project. **If an agreement on net benefit cannot be reached between FHWA and the official(s) with jurisdiction over the Section 4(f) property, the programmatic Section 4(f) evaluation cannot be used.**

FHWA will determine if the project meets the criteria of this programmatic Section 4(f) evaluation.

This programmatic Section 4(f) evaluation can be used for any class of action under NEPA (EIS, EA, or CE).

**Example:** A bridge is a contributing element to an historic district, and the proposed project involves removal of the bridge. Through coordination with the SHPO, mitigation for construction of the new bridge would include context sensitive design, and by doing so there is overall improvement and enhancement to the historic district. Therefore, the project would be considered to have a net benefit, and a net benefit programmatic Section 4(f) form would be completed.

**Example:** A pier for a new bridge project would be placed on an island (owned by the Commonwealth) that exists within the waterway. The island contains a wildlife refuge and a small beach. Neither of these resources is utilized often due to the difficulty of getting to the island. Due to the refuge and beach, this island is a Section 4(f) property. Mitigation measures including providing a pedestrian walkway from the bridge to the island and picnic tables at the beach were incorporated into the project. These measures would enhance the recreational opportunities, and therefore were considered to have a net benefit to the resource. As such, a net benefit programmatic Section 4(f) form was completed for this project.

### **Avoidance Alternatives to be Considered**

Even if the proposed project qualifies for a programmatic Section 4(f) evaluation for a net benefit to a Section 4(f) property, alternatives that avoid the use of the property must be evaluated. The following avoidance alternatives must be evaluated to determine if they are feasible and prudent:

- The do nothing (no-build) alternative;
- An alternative(s) to improve the highway facility without using the Section 4(f) property (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
- An alternative(s) to construct the highway facility at a new location without using the Section 4(f) property.

The programmatic Section 4(f) evaluation must demonstrate that each of the above alternatives was fully evaluated. If a feasible and prudent alternative exists which totally avoids the use of Section 4(f) properties, this alternative must be selected. In order to select the alternative that uses the Section 4(f) property(s), the do nothing alternative and the alternatives that do not use Section 4(f) properties, must be found not to be feasible and prudent. (See **Chapter 5** for guidance on feasible and prudent discussion.) In addition, for projects that qualify for the net benefit programmatic Section 4(f) evaluation, **an alternative can be found not prudent if it would result in a substantial missed opportunity to benefit a Section 4(f) property**. This concept stresses the importance of performing environmental stewardship whenever practicable.

### **Mitigation and Minimization of Harm to the Section 4(f) Properties**

Once it has been shown that the avoidance alternatives are not feasible and prudent and/or would result in a substantial missed opportunity to benefit the Section 4(f) property, consider all possible planning to minimize harm to the Section 4(f) property. Also consider subsequent reasonable mitigation measures necessary to preserve and enhance those features and values of the property that originally qualified it for Section 4(f) protection.

Coordination is needed with the official(s) with jurisdiction regarding mitigation to offset and enhance the features and values of the property, ultimately resulting in a net benefit. Agreement in writing is needed from the official(s) with jurisdiction.

If the proposed project involves the use of a historic or archaeological site (warranting preservation in place), the mitigation plan should include measures necessary to preserve the historic integrity of the property as agreed to by FHWA, the SHPO, and as appropriate, the ACHP in accordance with the Memorandum of Agreement (MOA), PA, or Letter of Agreement (LOA) developed during the Section 106 process.

### **Completing and Processing the Form**

#### ***Nationwide/Programmatic Section 4(f) Evaluation for Transportation Projects that have Net Beneficial Use (Net Benefit) Form***

The form is to be completed by district environmental staff and/or consultants working with a district on a project to document Section 4(f) net benefit use. The form outlines the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected and be specific as to the extent of the use of that property.

**Project Purpose and Needs:** Include the project's established purpose and needs. These are the same as what was defined for the NEPA process. Properly defined purpose and needs are important for the alternatives analysis later in the form.

### **Applicability Determination:**

1. Check the appropriate box(es) to note whether the Section 4(f) property is a publicly-owned park, recreation area, or refuge and/or historic property.

Describe the use of each Section 4(f) property:

- The specific location and size/magnitude of the net benefit use (attach a map or plan sheet)
  - Description of what the location of the Section 4(f) property is in that area, and how the project activity will interfere with any of the property's activities, features, and/or attributes. Include photos, maps, etc.
2. Verify this project and/or associated mitigation directly benefits the Section 4(f) property being used.
  3. Verify that an individual Section 4(f) evaluation was not needed for the project. If one is being prepared for another use of a Section 4(f) property, discuss the net benefit use in the individual Section 4(f) evaluation in place of preparing a separate form.

### **Parks, Recreation Areas, Wildlife and Waterfowl Refuges**

4. Verify that the project does not require major alterations of the features, attributes and activities that qualify the property for protection under Section 4(f). Describe what alterations will occur with the project.
5. Verify that all appropriate measures to minimize harm and mitigation to the Section 4(f) property (including its activities, features, and attributes qualifying it as a Section 4(f) property) have been incorporated into the project. List and describe the incorporated measures.
6. Verify that the official with jurisdiction agrees in writing that the proposed project (and associated mitigation) will result in a benefit to the Section 4(f) property. The official with jurisdiction can conditionally agree, meaning the agreement comes with stipulations. The agreement can be by signature of the form or otherwise in writing (attach to the form). If the official signs the form, the district should review the language of the form prior. A letter can be

provided to the official with jurisdiction to obtain written concurrence. The letter should describe the project, how it will be impacting the Section 4(f) property (including mitigation), and explain why the project impact is a net benefit to the property. Include a statement that the official with jurisdiction agrees that it is a net benefit to their property and include a signature and date line for the official. Request that the official with jurisdiction to review, sign and return the letter.

#### Historic Properties

7. *Structures or Above Ground Features:* Verify that the project does not require major alterations of the characteristics that qualify the property for the *National Register*. If the project would impact the property to the point that it no longer retains sufficient integrity to be considered eligible for listing, then the net benefit programmatic evaluation cannot be applied.
8. *Archaeology:* Verify that the project does not require the disturbance or removal of archaeological resources that have been determined important for preservation in-place. Only these types of resources can be considered Section 4(f) property, and the net benefit programmatic evaluation cannot be applied if they are disturbed or removed by a project.
9. Verify that the SHPO has concurred (or conditionally concurred) with a signed MOA, PA, or LOA, signature on the form, or other correspondence. This agreement must be in writing and specify that they agree to the project having a net benefit to the Section 4(f) property. Attach the MOA, PA, or LOA or other correspondence to the form.

**Alternatives Considered/Findings:** To apply the net benefit programmatic Section 4(f) evaluation, consider the following alternatives and verify that they are not feasible and prudent:

1. Do nothing (no-build) alternative
2. Avoidance alternative on new alignment
3. Build alternative modified to avoid use of a Section 4(f) property by using engineering design or transportation design techniques such as minor location shifts, changes in engineering design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures

Carefully consider each of these and verify which statements that follow each alternative are true in the case of the project. **A minimum of one statement for each alternative considered must be selected or the net benefit programmatic Section 4(f) evaluation cannot be applied.**

Following each alternative considered, provide a full explanation and evidence to support statements why the alternative does not meet the needs of the project, is not feasible, would result in impacts to other resources, etc. These findings need to be supported by circumstances, studies, and consultations on the proposed project. The facts to fully support these conclusions must be presented or be summarized and referenced in the form. A recitation of these conclusions without fully supporting them is not acceptable. Refer to technical files or studies where appropriate. The referenced materials should be included in the Technical Support Data files.

**Mitigation and Measures to Minimize Harm:** Check each specific type of mitigation measures that have been applied to the project. Provide more information as prompted. Provide detailed additional information regarding the mitigation measure and how it minimizes harm and enhances the Section 4(f) property. Why is this a net benefit to the Section 4(f) property?

Include all environmental commitments/mitigation on the last page of the form and in the applicable

NEPA document and the ECMTS. For guidance on ECMTS, refer to Appendix T of PennDOT's [\*Design Manual IX\*](#) (Publication 10X).

**Section 2002 Requirements:** Consider and briefly summarize the impacts to other Section 2002 areas of concern that would occur if the use of the historic property was avoided. (For a detailed list of the areas of concern, see the Section 2002 section under the previous *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Public Parks, Recreation Areas, Wildlife and/or Waterfowl Refuges, State Forest Land, and State Game Land Form* section.)

**Coordination:** Verify that the following is true for the project:

- The project has been coordinated with the official(s) with jurisdiction over the Section 4(f) property.
- If applicable, any land encumbered by other federal or state actions or coordination required with the federal and state agency responsible for the encumbrance (i.e. Section 6(f)/Project 70/Project 500, other recreational grants) has been completed.
- The official(s) with jurisdiction agrees that the project meets the requirements of the net benefit programmatic Section 4(f) evaluation. If the official with jurisdiction signs the form, have the district review the form contents prior.
- Required public involvement activities have occurred. If one or more public meetings or hearings were held for the project, the Section 4(f) use and proposed mitigation was communicated to the public.

Note whether there is significant public opposition to the proposed Section 4(f) use or mitigation to the Section 4(f) property. Describe the public comments received regarding Section 4(f) impacts.

**Notes regarding form signatures:**

- **Official(s) with Jurisdiction** – As noted in the bullet above, if the official with jurisdiction signs the form, have the district review the form contents prior.
- **FHWA** – Signature is required for projects with federal involvement. If the project does not have federal involvement, the signature by the PDE from HDTs completes the process.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the ECMTS.

A complete and signed copy of the form should be placed in the project file. If a CE is being prepared for the project, the form can be attached to the CE within the CEES. If an EA or EIS is being prepared, only reference the form within the document.

### **Historic Bridges Programmatic Section 4(f) Evaluation and Form**

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Under FHWA's policy, the restoration, rehabilitation, or maintenance of an historic bridge structure does not constitute a "use" under Section 4(f), and would not require a Section 4(f) evaluation if the following are true:

- (1) The proposed project would not adversely affect the historic qualities of the historic bridge structure that make it eligible for the *National Register*; and
- (2) The SHPO (and ACHP) has not objected to this finding.

However, if the proposed project impairs the historic integrity of the historic bridge structure resulting in an adverse effect under the Section 106 process, then a Section 4(f) evaluation must be performed for the proposed project. The [Programmatic Section 4\(f\) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges](#) exists for use on such projects.

**NOTE:** If a bridge is eligible under Criterion C for engineering significance, relocating the bridge can result in there not being a Section 4(f) use.

**NOTE:** This programmatic Section 4(f) evaluation can be used for bridges that are individually eligible and for those that simply contribute to a Historic District. (See [Section 4\(f\) Policy Paper Question 8D.](#))

### **Applicability**

In order to use the historic bridges programmatic Section 4(f) evaluation, all of the following criteria must be satisfied:

- The bridge is to be replaced or rehabilitated with federal funds
- The historic bridge structure is on or eligible for the *National Register*
- The bridge is not a National Historic Landmark
- FHWA determines that the facts of the project match those set forth in the sections of the programmatic agreement labeled "Alternatives, Findings and Mitigation". (It is the PDE of HDTs for non-federal projects.)
- Agreement among the FHWA, PennDOT, SHPO, and ACHP (if participating) has been reached through the Section 106 process —MOA, PA, or LOA

**NOTE: The historic bridge programmatic Section 4(f) evaluation can be applied to non-federally funded projects as well in Pennsylvania under Section 2002.** If the rest of the applicability criteria pertains to a project other than the funding, then utilize the form to process the Section 2002 use. For totally state funded projects, the PDE of HDTs oversees applicability.

**NOTE:** With respect to historic bridges that only contribute to a historic district, early coordination with the SHPO is recommended to determine whether the project can be designed to incorporate context sensitive solutions and other minimization and mitigation measures such that it would result in a finding of no adverse effect. If this Section 106 effect finding can be achieved, the project would qualify as a *de minimis* use. By applying the *de minimis* use finding, an avoidance alternatives analysis would not be required, streamlining the process.

### **Processing the Historic Bridges Programmatic Section 4(f) Evaluation Along with Other Uses on a Project:**

- If the project involves only a historic bridge and no other Section 4(f) properties, use the programmatic Section 4(f) evaluation for historic bridges.

- If the project has a historic bridge and another Section 4(f) property that falls under another programmatic Section 4(f) evaluation, *de minimis*, or temporary occupancy, use the form for historic bridges and an appropriate form for the other property.
- If, in addition to the qualifying historic bridge, the project involves a Section 4(f) property that does not fit another programmatic Section 4(f) evaluation, *de minimis*, or temporary occupancy, an individual Section 4(f) evaluation must be completed to cover all uses.

**NOTE:** For projects involving the replacement of a historic bridge that contributes to a historic district and additional right-of-way is required from another property that contributes to the historic district, the *Nationwide/Programmatic Section 4(f) Evaluation for Projects that Necessitate the Use of Historic Bridges Form* can be completed for the use of the bridge portion of the historic district. This can be done when the additional use of the adjacent contributing property does not, by itself, adversely affect the district. In these cases, a separate effect finding would be made and the *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Historic Properties Form* would also be completed for the use of the adjacent contributing property. See the *de minimis* section of **Chapter 4** and case study #7 of **Chapter 10** for more discussion of this special circumstance.

### **Avoidance Alternatives to be Considered**

For the programmatic Section 4(f) evaluation for a historic bridge structure, alternatives that avoid the use of the historic bridge structure must be evaluated. The following avoidance alternatives must be evaluated to determine if they are feasible and prudent:

- The do nothing/no-build alternative;
- An alternative(s) to construct a new structure at a different location without affecting the historic integrity of the structure; and
- An alternative(s) to rehabilitate the historic bridge without affecting the historic integrity of the structure.

The programmatic Section 4(f) evaluation form must reflect that each of the above alternatives were fully evaluated. If a feasible and prudent alternative exists which totally avoids the use of Section 4(f) properties, this alternative must be selected (assuming the use is not *de minimis* or results in a net benefit).

The following findings regarding each of the above alternatives need to be made, or the programmatic Section 4(f) evaluation does not apply to the project:

- a. The **do nothing/no-build alternative** must not be feasible and prudent based on one or more of the following reasons:
  - Maintenance — The do nothing/no-build alternative does not correct the situation that causes the bridge to be considered structurally deficient or deteriorated. These deficiencies can lead to sudden collapse and potential injury or loss of life. Normal maintenance is not considered adequate to cope with the situation.
  - Safety — The do nothing/no-build alternative does not correct the situation that causes the bridge to be considered deficient. Because of these deficiencies, the bridge poses

serious and unacceptable safety hazards to the traveling public or places intolerable restriction on transport and travel.

- Other – Appropriate if there is a reasoning that does not fit into the maintenance or safety categories above.
- b. The **alternative(s) to construct a new structure at a different location** without affecting the historic integrity of the structure must not be feasible and prudent based on one or more of the following reasons:
- Terrain — The present bridge structure has already been located at the only feasible and prudent site, i.e., a gap in the land form, the narrowest point of the river canyon, etc. To build a new bridge at another site will result in extraordinary bridge and approach engineering and construction difficulty or costs, or extraordinary disruption to established traffic patterns.
  - Severe Social, Economic, or Environmental Effects — Building a new bridge away from the present site would result in severe social, economic, or environmental impacts that substantially outweigh the importance of protecting the Section 4(f) property. Such impacts include extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, and access and damage to wetlands of an extensive nature. These reasons may individually or cumulatively weigh heavily against relocation to a new site.
  - Engineering and Economy — Where difficulty associated with the new location is less extreme than those encountered above, a new site would not be feasible and prudent where cost and engineering difficulties reach extraordinary magnitude. Factors supporting this conclusion include significantly increased roadway and structure costs, serious foundation problems, or extreme difficulty in reaching the new site with construction equipment. Additional design and safety factors to be considered include an ability to achieve minimum design standards or to meet requirements of various permitting agencies such as those involved with navigation, pollution, and the environment.
  - Preservation of the Old Bridge — It is not feasible and prudent to preserve the existing bridge, even if a new bridge were to be built at a new location. This could occur when the historic bridge is beyond rehabilitation for a transportation or an alternative use, when no responsible party can be located to maintain and preserve the bridge, or when a permitting authority requires the removal or demolition of the old bridge.
- c. The **alternative(s) to rehabilitate the historic bridge without affecting the historic integrity** of the structure must not be feasible and prudent based on one or more of the following reasons:
- Structurally Deficient — The bridge is so structurally deficient that it cannot be rehabilitated to meet minimum acceptable load requirements without affecting the historic integrity of the bridge.
  - Geometric Deficiencies — The bridge has serious geometric deficiencies and cannot be altered to meet the minimum requirements of the highway system on which it is located without affecting the historic integrity of the bridge. Flexibility in the application of the American Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised as permitted in 23 CFR 625 during the analysis of this alternative.

These findings need to be supported by circumstances, studies, and consultations on the proposed project. The programmatic Section 4(f) evaluation form needs to include the applicable findings and the factual support for these findings. References to technical files or studies may be made on the form where appropriate. When a feasibility analysis or individual assessment report is available under Section 106, which discusses the ability of the bridge to be rehabilitated, the information regarding rehabilitation should be referenced.

#### **Minimization of Harm to the Section 4(f) Property**

Once it is determined that avoidance of the historic bridge is not feasible and prudent, minimization must be considered. Minimization of harm is complete for bridges that are being rehabilitated or replaced when the following are satisfied:

- When the bridge is rehabilitated, the historic integrity of the bridge is preserved, to the greatest extent possible, consistent with unavoidable transportation needs, safety, and load requirements.
- When integrity is affected, or the bridge structure is moved or demolished, CRPs arrange for documentation of the bridge by suitable means as developed through consultation with the SHPO and ACHP (if participating).
- The proposed project's mitigation plan includes reasonable measures necessary to minimize harm to the historic bridge structure as agreed to by FHWA, the SHPO, and as appropriate the ACHP in accordance with the Section 106 process (36 CFR Part 800).
- For bridges that are to be replaced and the existing bridge is made available for an alternative use, a responsible party must agree to maintain and preserve the bridge.

#### **Completing and Processing the Form**

<b><u><a href="#">Nationwide/Programmatic Section 4(f) Evaluation for Projects that Necessitate the Use of Historic Bridges Form</a></u></b>
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The form is to be completed by district environmental staff and/or consultants working with a district on a project to document Section 4(f) use of historic bridges. The form specifies the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected, be specific as to the use of that property, and fully document the alternatives analysis.

**Project Purpose and Needs:** Include the project's established purpose and needs. These are the same as what was defined for the NEPA process. Properly defined purpose and needs are important for the alternatives analysis later in the form.

**Applicability Determination:** Verify that all of the following:

1. The bridge will be replaced or rehabilitated.
2. The project requires the use of a historic bridge that is eligible or listed.
3. The bridge is not a National Historic Landmark.
4. An MOA, PA, or LOA has been executed.
5. There are no additional Section 4(f) uses that would require an individual Section 4(f) evaluation.
6. Note other Section 4(f) uses and the form(s) prepared to address those uses.

7. If there are other Section 4(f) properties in the project area not being used by the project, list them and attach a map.

**Alternatives Considered/Findings:** Verify that the following alternatives have been examined and indicate the reasons as to why the following are not feasible and prudent, being specific and explaining with facts and data:

1. The do nothing alternative
2. Constructing a bridge on a new location/alignment or parallel to the old bridge without using the old bridge
3. Rehabilitation of the existing bridge

**Measures to Minimize Harm:**

1. Verify that at least one of the required measures to minimize harm were included in the project and explain how the measure(s) was incorporated.
2. Verify that measures to minimize harm documented in the MOA, PA, or LOA have been incorporated in the project or are included as environmental commitments.

**Note regarding form signatures:**

- **FHWA** – Signature is required for projects with federal involvement. If the project does not have federal involvement, the signature by the PDE from HDTs completes the process.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the ECMTS.

A complete and signed copy of the form should be placed in the project file. If a CE is being prepared for the project, the form can be attached to the CE within the CEES. If an EA or EIS is being prepared, only reference the form within the document.

## **Minor Use of Parks, Recreation Areas, and Refuges Programmatic Section 4(f) Evaluation and Form**

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There are two minor use programmatic Section 4(f) evaluations – one for parks, recreational areas, and refuges and one for historic sites (next section).

**In most cases, a project that would qualify for the minor use of parks programmatic Section 4(f) evaluation could also qualify as a *de minimis* use. Apply *de minimis* whenever possible. If this programmatic Section 4(f) evaluation is to be used in place of *de minimis*, consult with EPDS and/or FHWA.**

### **Applicability**

To qualify for either of the two minor use programmatic Section 4(f) evaluations, a proposed project must be designed to improve the operational characteristics, safety, and/or physical condition of an existing highway facility. A proposed project must be on essentially the same alignment.

The following types of improvements are examples of improvements that qualify for the minor use programmatic Section 4(f) evaluations:

- "4R" work (resurfacing, restoration, rehabilitation, and reconstruction);
- Safety improvements, such as shoulder widening and correction of substandard curves and intersections;
- Traffic operation improvements, such as signalization, channelization, and turning or climbing lanes;
- Bicycle and pedestrian facilities;
- Bridge replacements on essentially the existing alignment; and
- The construction of additional lanes along an existing alignment.

**A minor use programmatic Section 4(f) evaluation cannot be used if:**

- The proposed project involves the construction of a highway at a new location; or
- The proposed project requires preparation of an EIS under NEPA.

**NOTE:** The two minor use programmatic Section 4(f) evaluations **cannot** be used if the project is on **new location** or requires preparation of an **EIS**.

**To qualify for this programmatic Section 4(f) evaluation, the following criteria must all be satisfied:**

- The public park, recreation lands, or wildlife and waterfowl refuge that is impacted must be located adjacent to the existing highway.
- The amount of land taken from the Section 4(f) property may not exceed the following amounts:

<b>Size of Section 4(f) Property</b>	<b>Maximum that can be acquired</b>
< 10 acres	10% of Property
10-100 acres	1 acre
> 100 acres	1% of Property

- The proposed project's proximity impacts on the remaining Section 4(f) property cannot substantially impair the intended use of the property. These proximity impacts would include, but are not necessarily limited to, noise, air, water quality, wildlife and habitat effects, and esthetic values and/or other relevant factors. This determination regarding the impairment of the Section 4(f) property's intended use must be made by FHWA in coordination with PennDOT and the official(s) with jurisdiction over the Section 4(f) property. The programmatic Section 4(f) evaluation form should include details on the proximity impacts to the remaining Section 4(f) property.

The official(s) with jurisdiction over the Section 4(f) property must agree, in writing, (1) with the assessment of the impacts on the Section 4(f) property; and (2) on the mitigation for the Section 4(f)

property.

**NOTE:** If the Section 4(f) property also involves land that was purchased or improved by funds from the Land and Water Conservation Fund (LWCF), Section 6(f) coordination is required with DCNR, PFBC, PGC, and NPS as appropriate. (See PennDOT's [Section 6\(f\), Project 70, and Project 500 Guidance \(Publication 745\)](#)). To apply this minor use programmatic Section 4(f) evaluation, the Section 6(f) authorities' position on land acquisition and or transfer must be obtained. If there is an objection to this land conversion or transfer, the programmatic Section 4(f) evaluation cannot be used.

**NOTE:** This programmatic Section 4(f) evaluation can be applied to projects without federal funding or involvement. In those cases, the PDE of HDTS oversees their applicability, not FHWA.

### **Avoidance Alternatives to be Considered**

The following avoidance alternatives must be evaluated to determine if they are feasible and prudent avoidance alternatives:

- The do nothing/no build alternative;
- An alternative(s) to improve the highway without using the Section 4(f) property (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
- An alternative(s) to construct an improved facility at a new location without using the Section 4(f) property.

### **Minimization of Harm to the Section 4(f) Property**

Once it has been determined that there are no feasible and prudent alternatives that would avoid the Section 4(f) use(s), consideration must be given to measures that would minimize harm, and reasonable measures must be incorporated into the project.

One or more of the following mitigation measures can be considered as mitigation, if determined to be reasonable and appropriate, for the proposed project:

- Payment of the fair market value of the land taken or improvements to the remaining Section 4(f) site equal to the fair market value of the land taken.
- Replacement of facilities impacted by the project such as sidewalks, paths, benches, lights, trees, and other facilities.
- Restoration and landscaping of disturbed areas.
- Incorporation of design features and habitat features where necessary that will not adversely affect the safety of the highway.
  - Examples of design features: reduction in right-of-way width, modifications to the roadway section, retaining walls, curb and gutter sections, and minor alignment shifts.
  - Examples of habitat features: construction of new or the enhancement of existing wetlands or other special habitat types.

- Replacement of lands used with lands of reasonably equivalent usefulness and location and of at least comparable value.
- Additional or alternative mitigation measures as determined necessary based on consultation with the official(s) with jurisdiction.

### **Completing and Processing the Form**

#### ***Nationwide/Programmatic Section 4(f) Evaluation for Minor Involvement with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges Form***

The form is to be completed by district environmental staff and/or consultants working with a district on a project to document minor uses of parks, recreation areas, and refuges which meet the criteria of the programmatic Section 4(f) evaluation discussed above. The form outlines the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected, be specific as to the use of that property, and fully document the alternatives analysis.

**Project Purpose and Needs:** Include the project's established purpose and needs. These are the same as what was defined for the NEPA process. Properly defined purpose and needs are important for the alternatives analysis later in the form.

#### **Applicability Determination:**

1. Identify the scope of the project work as one or more of those identified to apply the programmatic Section 4(f) evaluation.
2. Verify that the other required criteria (as previously noted above in the applicability section) are all true.
3. Verify that the official with jurisdiction has agreed that the project meets the criteria of the programmatic Section 4(f) evaluation. If the official with jurisdiction signs the form, have the district review the form contents prior.
4. Note the specific size of the Section 4(f) property, the amount of permanent acquisition, and any amount of land to be returned. Calculate the net gain or loss.
5. From the information described in #4, indicate which category the use falls into. If none of them apply, the programmatic Section 4(f) evaluation is not applicable to the project.
6. Consideration of proximity impacts is important. (See **Chapter 4** for more information about the proximity impact analysis.) Consult with FHWA if there are proximity impacts that would substantially impair the Section 4(f) property's activities, features, and/or attributes.
7. Verify that the official with jurisdiction agrees in writing with the assessment of impacts and proposed mitigation. If the official with jurisdiction signs the form, have the district review the form contents prior.
8. Note whether Section 6(f), Project 70, Project 500, or another recreational grant applies to the Section 4(f) property. For more information regarding these, refer to PennDOT's [Section 6\(f\), Project 70, and Project 500 Guidance \(Publication 745\)](#).
9. Verify that an Individual Section 4(f) Evaluation was not needed for the project. If one is being prepared for another use of a Section 4(f) property, discuss the minor use in the Individual Section 4(f) Evaluation in place of preparing a separate form.

**Alternatives Considered/Findings:** As required in the programmatic Section 4(f) evaluation, document in the form that the following alternatives have been examined and indicate and discuss why they are not feasible and prudent:

1. The do nothing/no build alternative;
2. Avoidance alternative(s) through roadway design or transportation management system techniques (that improve the highway without using the Section 4(f) property). (These can include, but are not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
3. Avoidance alternative(s) on new alignment (to construct an improved facility at a new location without using the Section 4(f) property).

**NOTE:** If a feasible and prudent alternative exists which totally avoids the use of Section 4(f) properties, this alternative must be selected (assuming the use is not *de minimis* or results in a net benefit).

In order to select the alternative that uses the Section 4(f) property(s), the do nothing/no-build alternative and the alternative(s) that does not use Section 4(f) properties must be found not to be feasible and prudent. (See **Chapter 5**.)

- This can be based on the alternative not being buildable as a matter of sound engineering judgment, not meeting the project needs, or on a cost or environmental impact of extraordinary magnitude or resulting in truly unusual or unique problems when compared with the proposed use of the Section 4(f) property(s) and the value of the Section 4(f) property.
- These findings need to be supported by circumstances, studies, and consultations on the proposed project. The facts to fully support these conclusions must be presented or be summarized and referenced on the form. Making conclusions without fully supporting them is not permissible. Include the applicable findings and the factual support for these findings. Make references to technical files or studies on the form where appropriate. The referenced materials should be included in the project file.

**Section 2002:** Consider and briefly summarize the impacts to other Section 2002 areas of concern that would occur if the use of the Section 4(f) property was avoided. (For a detailed list of the areas of concern, see the Section 2002 section under the previous *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Public Parks, Recreation Areas, Wildlife and/or Waterfowl Refuges, State Forest Land, and State Game Land Form* section.)

**Measures to Minimize Harm:** Verify that one or more of the following mitigation measures can be considered as mitigation, if determined to be reasonable and appropriate, for the proposed project:

- Payment of the fair market value of the land taken or improvements to the remaining Section 4(f) site equal to the fair market value of the land taken.
- Replacement of facilities impacted by the project such as sidewalks, paths, benches, lights, trees, and other facilities.
- Restoration and landscaping of disturbed areas.
- Incorporation of design features and habitat features where necessary that will not adversely affect the safety of the highway.

- Examples of design features: reduction in right-of-way width, modifications to the roadway section, retaining walls, curb and gutter sections, and minor alignment shifts.
- Examples of habitat features: construction of new or the enhancement of existing wetlands or other special habitat types.
- Replacement of lands used with lands of reasonably equivalent usefulness and location and of at least comparable value.
- Additional or alternative mitigation measures as determined necessary based on consultation with the official(s) with jurisdiction.

#### Notes regarding form signatures:

- **Official(s) with Jurisdiction** – As noted earlier under #7, if the official with jurisdiction signs the form, have the district review the form contents prior.
- **FHWA** – Signature is required for projects with federal involvement. If the project does not have federal involvement, the signature by the PDE from HDTs completes the process.

**NOTE:** State Game Land Banks can only be used for mitigation purposes when the use is *de minimis*. The minor parks programmatic Section 4(f) evaluation can be applied for the minor use of state game lands, but it is recommended that the *de minimis* form be used whenever possible/applicable.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the ECMTS.

A complete and signed copy of the form should be placed in the project file. If a CE is being prepared for the project, the form can be attached to the CE within the CEES. If an EA is being prepared, only reference the form within the document. PennDOT will provide a copy of the approved form to the officials with jurisdiction over the Section 4(f) property and to other parties upon request.

#### Minor Use of Historic Sites Programmatic Section 4(f) Evaluation and Form

There are two minor use programmatic Section 4(f) evaluations – one for historic sites and one for parks, recreational areas, and refuges and (previous section).

**Any project which qualifies for the minor use of historic sites programmatic Section 4(f) evaluation would also qualify as a *de minimis* use. Apply *de minimis* whenever possible. If this programmatic Section 4(f) evaluation is to be used in place of *de minimis*, consult with EPDS and/or FHWA.**

#### Applicability

To qualify for either of the two minor use programmatic Section 4(f) evaluations, a proposed project must be designed to improve the operational characteristics, safety, and/or physical condition of an existing highway facility. A proposed project must be on essentially the same alignment.

The following types of improvements are examples of improvements that qualify for the minor amounts programmatic Section 4(f) evaluations:

- "4R" work (resurfacing, restoration, rehabilitation, and reconstruction);
- Safety improvements, such as shoulder widening and correction of substandard curves and intersections;
- Traffic operation improvements, such as signalization, channelization, and turning or climbing lanes;
- Bicycle and pedestrian facilities;
- Bridge replacements on essentially the existing alignment; and
- The construction of additional lanes along an existing alignment.

**A minor use programmatic Section 4(f) evaluation cannot be used if:**

- The proposed project involves the construction of a highway at a new location; or
- The proposed project requires preparation of an EIS under NEPA.

**NOTE:** The two minor amounts programmatic Section 4(f) evaluations **cannot** be used if the project is on **new location** or requires preparation of an **EIS**.

**To qualify for this programmatic Section 4(f) evaluation, the following criteria regarding the nature of the property acquisition from the historic or archaeological site impacted must all be satisfied:**

- The historic or archaeological site must be listed in or be eligible for listing in the *National Register* in accordance with the Section 106 process.
- The historic or archaeological site which is impacted must be located adjacent to the existing highway.
- The proposed project cannot require the removal or alteration of historic buildings, structures, or objects on the historic site.
- The project does not require the disturbance or removal of archaeological resources that are important to preserve in place.
- The SHPO must agree in writing that the impact on the Section 4(f) site is a minor impact. A minor impact is defined as either a "no historic property affected" or "no adverse effect" finding under Section 106. Concurrence is not required as per the Section 106 PA, so the effect finding and posting is sufficient as long as the SHPO does not object.
- The SHPO must agree in writing, (1) with the assessment of the impacts on the historic or archaeological site; and (2) on the mitigation for the historic or archaeological site.

**NOTE:** This programmatic Section 4(f) evaluation can be applied to historic districts when impacts to its contributing elements are minor (i.e. "no adverse effect" or "no historic properties affected"), and the involvement is limited to the use of land, and does not require the removal or alteration of historic buildings, structures, or objects.

**NOTE:** Both the minor use of historic sites programmatic Section 4(f) evaluation and the *de minimis* use finding require a “no adverse effect” or “no historic properties affected” finding. In addition, the *de minimis* use finding requires agreement (in writing) by the official(s) with jurisdiction on the *de minimis* finding. Any project which qualifies for the minor use of historic sites programmatic Section 4(f) evaluation would also qualify as a *de minimis* use. There is an advantage to applying *de minimis* use when applicable because it does not require an alternatives analysis.

### **Avoidance Alternatives to be Considered**

The following avoidance alternatives must be evaluated to determine if they are feasible and prudent avoidance alternatives:

- The do nothing/no build alternative;
- An alternative(s) to improve the highway without using the Section 4(f) property (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
- An alternative(s) to construct an improved facility at a new location without using the Section 4(f) property.

### **Minimization of Harm to the Section 4(f) Property**

Once it has been determined that there are no feasible and prudent alternatives that would avoid the Section 4(f) use(s), consideration must be given to measures that would minimize harm, and reasonable measures must be incorporated into the project. The project mitigation should include measures necessary to preserve the historic integrity of the property as agreed to by FHWA, the SHPO, and as appropriate, the ACHP in accordance with Section 106.

### **Completing and Processing the Form**

#### **[Nationwide/Programmatic Section 4\(f\) Evaluation for Minor Involvement with Historic Sites Form](#)**

The form is to be completed by district environmental staff and/or consultants working with a district on a project to document minor uses of historic sites which meet the criteria of the programmatic Section 4(f) evaluation discussed above. The form outlines the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected, be specific as to the use of that property, and fully document the alternatives analysis.

**Project Purpose and Needs:** Include the project’s established purpose and needs. These are the same as what was defined for the NEPA process. Properly defined purpose and needs are important for the alternatives analysis later in the form.

#### **Applicability Determination:**

1. Identify the scope of the project work as one or more of those identified to apply the programmatic Section 4(f) evaluation.
- 2-5. Verify that the other required criteria (as previously noted above in the applicability section) are all true.

6. Verify that an individual Section 4(f) evaluation was not needed for the project. If one is being prepared for another use of a Section 4(f) property, discuss the minor use in the individual Section 4(f) evaluation in place of preparing a separate form.

**Alternatives Considered/Findings:** As required in the programmatic Section 4(f) evaluation, document in the form that the following alternatives have been examined and indicate and discuss why they are not feasible and prudent:

1. The do nothing/no build alternative;
2. Avoidance alternative(s) through roadway design or transportation management system techniques (that improve the highway without using the Section 4(f) property). (These can include, but are not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
3. Avoidance alternative(s) on new alignment (to construct an improved facility at a new location without using the Section 4(f) property).

**NOTE:** If a feasible and prudent alternative exists which totally avoids the use of Section 4(f) properties, this alternative must be selected (assuming the use is not *de minimis* or results in a net benefit).

In order to select the alternative that uses the Section 4(f) property(s), the do nothing/no-build alternative and the alternative(s) that does not use Section 4(f) properties must be found not to be feasible and prudent. (See **Chapter 5**.)

- This can be based on the alternative not being buildable as a matter of sound engineering judgment, not meeting the project needs, or on a cost or environmental impact of extraordinary magnitude or resulting in truly unusual or unique problems when compared with the proposed use of the Section 4(f) property(s) and the value of the Section 4(f) property.
- These findings need to be supported by circumstances, studies, and consultations on the proposed project. The facts to fully support these conclusions must be presented or be summarized and referenced on the form. Making conclusions without fully supporting them is not permissible. Include the applicable findings and the factual support for these findings. Make references to technical files or studies on the form where appropriate. The referenced materials should be included in the project file.

**Section 2002:** Consider and briefly summarize the impacts to other Section 2002 areas of concern that would occur if the use of the Section 4(f) property was avoided. (For a detailed list of the areas of concerned, see the Section 2002 section under the previous *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Public Parks, Recreation Areas, Wildlife and/or Waterfowl Refuges, State Forest Land, and State Game Land Form* section.)

**Measures to Minimize Harm:** Verify that the project includes all measures to minimize harm and describe the project's minimization and mitigation measures. Confirm that the Section 106 process is concluded.

**Note regarding form signatures:**

- **FHWA** – Signature is required for projects with federal involvement. If the project does not have federal involvement, the signature by the PDE from HDTS completes the process.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document and the ECMTS.

A complete and signed copy of the form should be placed in the project file. If a CE is being prepared for the project, the form can be attached to the CE within the CEES. If an EA is being prepared, only reference the form within the document.

## Chapter 7: Individual Section 4(f) Evaluations

Section 4(f) analysis should occur prior to the actual preparation of an individual Section 4(f) evaluation. The evaluation itself is purely the written document to support the analysis and decision making that has already occurred. As soon as Section 4(f) properties are identified within a project area, look to avoid then minimize use to those properties. If use cannot be avoided or if the use is not *de minimis*, a temporary occupancy or fall under the criteria of one of the nationwide Section 4(f) programmatic evaluations, prepare an individual Section 4(f) evaluation (or a Section 2002 evaluation).

### Individual Section 4(f) Evaluation Content

FHWA's Technical Advisory, [T6640.8A](#) (October 30, 1987), provides a suggested format for Section 4(f) evaluations. On September 22, 1997, the PennDOT Office of Chief Counsel sent a letter to FHWA requesting modification of the format for Section 4(f) evaluations. On March 23, 1998, FHWA [responded](#) to PennDOT, agreeing with the proposed format with a few minor modifications. **The format presented in this handbook is consistent with the format agreed upon by Office of Chief Counsel and FHWA and should be used for all individual Section 4(f) evaluations in Pennsylvania and is also applicable for Section 2002 evaluation requirements.**

**Use the following outline to prepare an individual Section 4(f) evaluation:**

- I. Introduction/Description of Proposed Action
- II. Project Purpose and Need
- III. Identification and Description of the Section 4(f) Properties
- IV. Alternatives Analysis
  - A. Identification and Evaluation of Alternatives That Totally Avoid All Section 4(f) Properties
  - B. Identification and Evaluation of Other Alternatives Considered
  - C. Assessment of Least Overall Harm
    1. Shifts/Design Modifications to Avoid the Use of Section 4(f) Properties
    2. All Possible Planning to Minimize Harm to Section 4(f) Properties
    3. Determination of Which Alternative Results in Least Overall Harm
- V. Coordination with Officials with Jurisdiction over the Section 4(f) Properties
- VI. Conclusion (Only Included in the Final Section 4(f) Evaluation)

**NOTE:** Every project is unique, and there may be situations where slight deviation from this outline is appropriate. Discuss any outline deviations with FHWA and PennDOT Office of Chief Counsel prior to preparation of the Draft Section 4(f) Evaluation. This will facilitate review and help avoid unnecessary comments and revisions.

Details regarding the content of each of the sections within the Section 4(f) evaluation are provided below.

## I. Introduction/Description of Proposed Action

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When preparing this introduction section of the Section 4(f) evaluation:

- Identify the project area
- Describe the proposed action in general terms. The specific alternatives (especially the preferred alternative) should not be described at this point.
- Identify the agencies involved in the project.
- Summarize the history of the project.

## II. Project Purpose and Need

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This section identifies the project purpose and needs. Summarize the facts that led to the determination that transportation problems exist. The needs and purpose statement should be consistent with those developed and included in the project's NEPA documentation.

**NOTE:** Alternatives and avoidance alternatives/shifts that do not meet the project needs were determined to be unreasonable during the environmental review process and not prudent under Act 120, Section 2002 and can be dismissed. Therefore, a strong, clearly written purpose and need is important to the Section 4(f) evaluation. Refer to PennDOT's [\*Needs Study Handbook\*](#) (Publication 319) for guidance on developing purpose and need.

## III. Identification and Description of the Section 4(f) Properties

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This section of the Section 4(f) evaluation serves two purposes. First, identify all Section 4(f) properties within the project area. Second, provide a detailed description of the Section 4(f) properties used by the proposed project alternatives or used by shifts to avoid specific properties. It is important to know why these properties qualify as Section 4(f) properties, as well as what they look like, where their boundaries are located, and what they contain.

**Identification of all Section 4(f) properties within the project area.** Briefly list and provide a map of the Section 4(f) properties within the project area. For large/complex projects, such as EISs and some EA projects, the project area is often large, and contains a vast number of Section 4(f) properties. For these projects, generate a broad-brush project area map illustrating the location of all of the known Section 4(f) properties within the study area. The purpose of this map is to depict the known location of Section 4(f) properties in the study area.

**Descriptions of the Section 4(f) properties used by one (or more) of the proposed alternatives or avoidance shifts.** The historic sites described should include those located within the project area that are listed, or eligible for listing, in the *National Register of Historic Places*. Also describe all Section 4(f) public parks, recreation areas, and wildlife and waterfowl refuges. Describe Section 4(f) properties and all types of uses, even if the use would be *de minimis* or could result in a net benefit. Include a map of the locations of the Section 4(f) properties in relation to the project's alternatives and other project area features. Describe in detail the Section 4(f) property, including the following information:

- **Historic Sites:** Much of the following information results from the Section 106 process. Coordinate with the CRP to obtain this information to include:

- The historic name of the site
  - Why the property is eligible for listing (do not simply reference the Section 106 Criteria A, B, C, or D)
  - The site's historic boundary, access, structures or elements of the site, and include a map of the site's elements, if appropriate
  - For historic districts, any contributing and non-contributing elements (if they have been identified)
  - Any unusual characteristics of the Section 4(f) property that either reduce or enhance the value of all or part of the historic site (e.g., its location next to a heavily traveled roadway).
  - Photographs of the site
  - References to Section 106 eligibility documentation.
- **Public Parks/Recreation Areas/Wildlife and Waterfowl Refuges:**
    - The ownership of the property (city, county, etc.)
    - The major purpose of the property, a description of significance and correspondence with the official(s) with jurisdiction of the property regarding significance where appropriate
    - Function of, or available activities on, the property (ball playing, swimming, golfing, etc.)
    - Description and location of all existing and planned facilities (ball diamonds, tennis courts, etc.). Include a map identifying facilities, if appropriate.
    - Description of access (pedestrian, vehicular, etc.)
    - Approximate number of users/visitors
    - Fees associated with the use of the property
    - Public access limitations
    - Any unusual characteristics that either reduce or enhance the value of all or part of the property
    - Photographs of the property
    - If the property is a multi-use property (state or federal forest lands, school property where a portion of the property contains ball fields/recreational fields open to the public, etc), discuss any management plans that exist and identify where the recreational activities or refuge areas are in relation to the property boundaries.
    - If a management plan exists, identify key components









#### IV. Alternatives Analysis

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The Alternatives Analysis is the most critical part of the Section 4(f) evaluation. The theory of the analysis is discussed in **Chapter 5**, but this section provides guidance on how to document this analysis in an individual Section 4(f) evaluation. The first step in the alternatives analysis is to examine whether a feasible and prudent total avoidance alternative exists. If there is a feasible and prudent total avoidance alternative, it must be selected. If a feasible and prudent total avoidance alternative does not exist, an alternatives analysis and assessment of least overall harm must be performed.

As an optional lead in to the alternatives analysis section, list all alternatives that are considered in the Section 4(f) evaluation and indicate: (A) which are total Section 4(f) avoidance alternatives; (B) which of the total avoidance alternatives were dismissed as not feasible and prudent; (C) which other alternatives were dismissed as unreasonable during the environmental review process and not feasible/prudent under Act 120 Section 2002; and (D) which other alternatives were carried forward into the Section 4(f) least overall harm analysis. This outlines the alternatives analysis section for the reader. An example of this would be to include a graphic similar to **Figure 2**.

**NOTE:** If there is a preferred alternative that totally avoids the actual and constructive use of Section 4(f) properties, a Section 4(f) evaluation may not necessarily need to be prepared. If a Section 4(f) evaluation is not prepared for the project, a statement should be included in the NEPA document explaining why a Section 4(f) evaluation was not prepared for the project.

<b>Figure 2: Section 4(f) Alternatives Analysis Summary (Example)</b>				
	<b>Preliminary Analysis</b>	<b>Detailed Analysis</b>	<b>Least Overall Harm Analysis</b>	<b>Reason for Dismissal and/or Least Overall Harm Analysis</b>
<b>Total Avoidance Alternatives</b>				
No Build				Dismissed – did not meet the project needs (appears not prudent)
CMS				Dismissed – did not meet the project needs (appears not prudent)
Transit				Dismissed – did not meet the project needs (appears not prudent)
Widen existing				Dismissed – did not meet the project needs (appears not prudent)
<b>Other Alternatives</b>				
New Alt A				Dismissed – impacts of an extraordinary magnitude (determined to be unreasonable (during the environmental review process) and not prudent(Act 120))
New Alt B				Carried to least overall harm, appears to result in more harm than Alt C Mod (conclusion to be made in Final Section 4(f) Evaluation only)
New Alt C				Dismissed – impacts of an extraordinary magnitude (determined to be unreasonable (during the environmental review process) and not prudent (Act 120))
New Alt C Mod				Appears to be least overall harm alternative (conclusion to be made in Final Section 4(f) Evaluation only)

Organize the flow of discussion in the Alternatives Analysis section as follows (each is discussed further below):

1. **Identification and Evaluation of Alternatives That Totally Avoid All Section 4(f) Properties:** Discussion of the total avoidance alternatives
2. **Identification and Evaluation of Other Alternatives Considered:** Discussion of all of the remaining alternatives. Alternatives that do not meet the project needs or that are determined to result in excessive impacts and/or costs compared to the other alternatives would be dismissed if they were determined to be unreasonable during the environmental review process and not prudent under Act 120, Section 2002, and therefore not carried forward and considered in the Assessment of Least Overall Harm section. For EIS and some EA projects, two additional subsections can be included:
  1. *Alternatives Considered Prior to Detailed Alternatives Analysis*
  2. *Alternatives that were Studied in Detail*
3. **Assessment of Least Overall Harm:** Examination of avoidance/minimization shifts, evaluation of mitigation measures, and comparison of Section 4(f) uses of the various alternatives.

#### **A. Identification and Evaluation of Alternatives That Totally Avoid All Section 4(f) Properties**

Identify and describe in detail the location and design of any alternative that totally avoids the use (actual and constructive) of all Section 4(f) properties. Determine whether any of these alternatives are feasible and prudent. See *Chapter 5* for more information regarding determining if an alternative is feasible and prudent.

- **If a feasible and prudent total Section 4(f) avoidance alternative exists, it must be selected.** If there is more than one feasible and prudent total Section 4(f) avoidance alternative, select one of these alternatives for the project.
- If one or more alternatives that totally avoid Section 4(f) properties are identified, but these alternatives are not feasible and prudent, explain in detail as to why they are not feasible and prudent.

**Draft Section 4(f) Evaluation:** Present facts supporting that the total Section 4(f) avoidance is not feasible and prudent. Make a statement of opinion in the Draft Section 4(f) Evaluation, e.g. it does not appear, based on the facts, that the total avoidance alternative is feasible and prudent.

**Final Section 4(f) Evaluation:** Again present facts supporting that the total Section 4(f) avoidance alternative is not feasible and prudent. Include a concluding statement of determination that there is no feasible and prudent total Section 4(f) avoidance alternative.

#### **B. Identification and Evaluation of Other Alternatives Considered**

In this subsection, discuss all alternatives that were considered in the NEPA process but are not total Section 4(f) avoidance alternatives. The goal of this subsection is to identify which of these alternatives were determined to be reasonable during the environmental review process and feasible and prudent under Act 120, Section 2002.

Those alternatives that were determined to be unreasonable during the environmental review process and not feasible and prudent under Act 120, Section 2002 are eliminated and not carried into the “Assessment of Least Overall Harm” subsection of the Section 4(f) evaluation.

**Describe each alternative:** Include:

**NOTE:** For EISs, the number of alternatives studied is generally substantial. A multitude of preliminary alternatives (TSM, mass transit, upgrades, widenings, off-line alignments, and combinations of these) are analyzed early on, and many are dismissed early in the process. Others move forward into the detailed alternatives analysis where they are refined, and in many cases options are evaluated which may develop into new alternatives. Because of the complexity of the alternatives development for EISs and more complex EAs, it is suggested that the “Identification and Evaluation of Other Alternatives Considered” subsection of the Section 4(f) evaluation be divided into two subheadings:

- a. Alternatives Considered Prior to Detailed Alternatives Analysis*
- b. Alternatives That Were Studied in Detail*

- Type of alternative (TSM, mass transit, upgrade, new alignment, etc.)
- Beginning and end points
- Typical section (if appropriate)
- Number of lanes with widths and shoulders
- Location of interchanges
- Any other pertinent design features

**Discuss the Section 4(f) uses associated with each alternative:** Analyze and document the Section 4(f) uses associated with all alternatives considered. Discuss both actual, and where appropriate, constructive uses. (See **Chapter 4** for more information about Section 4(f) use.)

- **Identify the actual uses of Section 4(f) properties.** Discuss the amount of land to be used, facilities and functions affected, noise, air quality impacts, visual effects, etc.
  - Some impacts can be quantified while others will need qualitative explanation.
  - If the actual use is considered *de minimis*, explain how it meets the criteria.
  - For projects where alternatives use land from more than one Section 4(f) property, develop a summary table to compare the various impacts of the alternatives.
  - Section 106 effects determinations can be utilized in some respects for discussion purposes in this section. Remember that an adverse effect in Section 106 does not necessarily equal a Section 4(f) use unless there is actual acquisition of property. The effects information can be important in Section 4(f) when applying *de minimis* and looking at how the acquisition of property affects the historic integrity of a property. (See **Chapter 9** for more information regarding the interaction of Section 106 and Section 4(f).)
- **Identify any proximity impacts that rise to the level of a constructive use.** Although highly unusual, remember to always consider how a project will cause proximity impacts to Section 4(f) properties in the area. (See **Chapter 4** for further discussion on constructive use.)

**Determine whether or not each alternative can be engineered to be built, meets the project needs, or would result in excessive impacts and/or costs compared to the other alternatives:** Once the alternative is described, present detailed facts that demonstrate whether or not the alternative is constructible according to sound engineering judgment, meets the project needs, results in environmental impacts that reach an extraordinary magnitude, or some combination of the above. State whether the alternative was determined to be reasonable during the environmental review process and feasible and prudent under Act 120, Section 2002.

In many cases, an alternative will have been shown early in the transportation project development process to not meet the project needs. If this is the case, the discussion should present the same facts as discussed as part of the NEPA documentation to support that the project needs are not met.

**Example:** "An LOS analysis was performed and the alternative to widen the route from two to four lanes would still result in a LOS E on the route in the design year, thereby not meeting the project needs of providing a LOS D or better."

In other cases, an alternative may meet the project needs, but may not be constructible as a matter of sound engineering judgment. Describe the facts supporting that conclusion.

**Example:** "A study was done to determine where a new interchange could be located on a stretch of interstate. The design manual states that two miles of spacing is required between rural interchanges. Based on this design requirement, it is determined that a new interchange cannot be constructed between the two existing interchanges, which are 3.2 miles apart." Based on engineering facts, the alternative cannot be built in accordance with sound engineering judgment.

Additionally, an alternative may meet the projects needs and be constructible as a matter of sound engineering judgment, but may result in other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property, or impacts of an extraordinary magnitude. Describe the facts in detail supporting that that conclusion.

**Example:** "Alternative X would impact the nesting grounds of a federally endangered bird, would displace 100 more homes than any other alternative, and would have the greatest impact on productive agricultural lands (15 more acres than any other alternative)." Note that the case law does not give clear guidelines on how much impact constitutes "impacts of an extraordinary magnitude." Present as much supporting data as possible and put the data in the context of the overall project. Use hard facts in this discussion. Do not say "greater" impacts or "substantial" impacts unless "greater" and "substantial" are quantified. For example, "100 more homes than any other alternative" or "15 more acres of productive agricultural land than any other alternative".

An alternative that does not satisfy the project needs, cannot be engineered, or results in impacts of an extraordinary magnitude would not be considered further because the alternative would not be a reasonable alternative during the environmental review process and would not be a prudent and feasible alternative under Act 120, Section 2002. This alternative(s) would not be carried into the least overall harm analysis.

### **C. Assessment of Least Overall Harm**

Carry all alternatives that are were determined to be reasonable during the environmental review process and feasible and prudent under Act 120, Section 2002 from the "Identification and Evaluation of Other Alternatives Considered" section into this section for further analysis. This section compares the

alternatives that use Section 4(f) properties, and identifies the reasonable, feasible, and prudent alternative that results in the least overall harm.

Include an introductory paragraph identifying the alternatives still under consideration. Refer back to the “Identification and Evaluation of Other Alternatives Considered” section where the alternatives were described along with their uses of Section 4(f) properties.

### 1. Shifts/Design Modifications to Avoid the Use of Section 4(f) Properties

Discuss measures available for each alternative to **avoid** each non-*de minimis* use of a Section 4(f) property. This would include minor alignment shifts and design modifications such as retaining walls, steepened slopes, etc. Include a discussion of whether the design modification is or is not reasonable and feasible and prudent under Act 120, Section 2002.

**NOTE:** Once consideration of reasonable measures to minimize harm (such as any avoidance, minimization, and mitigation or enhancement measures) are completed as part of the *de minimis* finding, an analysis of avoidance alternatives is not required. Therefore, *de minimis* uses should be cited in this subsection, indicating that because they are *de minimis*, avoidance shifts/modifications do not have to be analyzed. The official with jurisdiction must agree in writing to the *de minimis* finding.

If there are one or more reasonable, feasible and prudent design modifications that avoid the use of a Section 4(f) property, incorporate one of these design modifications into the alternative. If none of the design modifications are reasonable and feasible and prudent under Act 120, Section 2002, document the reasons why they are not. Present facts to support that a particular shift or design modification is not feasible and prudent.

**NOTE:** When evaluating design shifts/modifications for reasonableness and prudence/feasibility, identify a common point from which the original alternative and any shifts/modifications diverge and a common point at which they rejoin. The impacts can then be assessed/compared between those common points, assessing the difference between the shift/modification and the original alignment.

**NOTE:** Remember that a statement of opinion based on the facts presented can be made in the draft Section 4(f) evaluation regarding the reasonableness and prudence/feasibility of specific shifts or design modifications; but the final conclusion that there is no feasible and prudent alternative to the use of a Section 4(f) property(s) is included in the Final Section 4(f) Evaluation.

### 2. All Possible Planning to Minimize Harm to Section 4(f) Properties

If there are no reasonable, feasible and prudent design modifications that would avoid Section 4(f) properties, incorporate **all possible planning to minimize harm** to the Section 4(f) properties.

Incorporate all reasonable minimization/mitigation measures into the alternative. These measures should include strategies such as minor alignment shifts to reduce impacts, retaining structures, reducing the transportation facility size, noise walls, landscaping, replacement of park land, mitigation measures identified during the Section 106 process, and other items that minimize harm to the Section 4(f) properties.

**NOTE:** Minimization measures and mitigation are considered in making the *de minimis* finding. If measures to minimize harm have been discussed in the “Identification and Evaluation of Other Alternatives Considered” section for *de minimis* uses, that section can be referenced, otherwise, discussion of the measures to minimize harm must be provided here.

When considering minimization and mitigation measures, determine whether any of the Section 4(f) uses would result in a **net benefit** to that resource. If so, this should be stated, explaining the reasoning behind the net benefit determination. In order to result in a net benefit, the official(s) with jurisdiction must agree in writing, that the use:

- Does not result in a substantial impairment of the activities, features, and attributes of the resource
- Includes all possible planning to minimize harm, including mitigation
- Results in an overall improvement or enhancement of the Section 4(f) property when compared to the future do nothing or avoidance alternative(s).

### 3. Determination of Which Alternative Results in Least Overall Harm

At this point, every effort has been made to avoid, minimize, and mitigate Section 4(f) impacts for each Section 4(f) property on each alternative. All reasonable, feasible and prudent design modifications to avoid Section 4(f) properties have been incorporated into the alternatives. Additionally, reasonable minimization and mitigation measures have been incorporated and consultation with the official(s) with jurisdiction has been conducted. Compare these alternatives to determine which results in the least overall harm in light of the statute's preservation purpose.

Consider the following seven factors set forth in 23 CFR § 774.3(c)(1) concerning the alternatives remaining under consideration;

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 harm to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
3. The relative significance of each Section 4(f) property; and
4. The views of the 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. The magnitude of any adverse impacts to resources not protected by Section 4(f); and
7. Substantial differences in costs among the alternatives.

Factors 5, 6, and 7 address and compare any substantial problems with any of the alternatives on issues and impacts beyond Section 4(f). When comparing the alternatives under the first four factors, develop comparable mitigation measures when possible. Do not skew analysis and over-mitigate one alternative over another alternative when the same mitigation could apply to both.

**NOTE: *De minimis* uses and uses that result in a net benefit** should be included in the final Least Overall Harm Assessment.

***De minimis* uses**, by nature, do not cause substantial impairment, or an “adverse effect” to the Section 4(f) property. As such, a *de minimis* use should be considered almost negligible (“a trifle”) when assessing harm to Section 4(f) properties.

**Uses resulting in a net benefit** would enhance the Section 4(f) property, and therefore should be considered to have a positive effect on the resource when assessing least overall harm. Because a net benefit is weighed as a positive effect, it is possible that a shift that avoids a Section 4(f) use could result in more harm to that property than an alternative that uses the property, if that use is determined to have a net benefit.

Balance the seven factors, four of which concern the degree of harm to Section 4(f) properties, to consider all relevant concerns to determine which alternative would cause the least overall harm. Through this balancing of factors, it could be that a serious problem identified in factors 5 through 7 outweighs relatively minor net harm to a Section 4(f) property. The least overall harm determination also provides a means to compare and select among alternatives that would use different types of Section 4(f) properties. Not all Section 4(f) use is equal depending on the significance of, and harm to, the property. In evaluating the degree of harm to Section 4(f) properties, consider the views expressed by the official(s) with jurisdiction over each Section 4(f) property. FHWA ultimately can make its own independent judgment about the relative value of those properties in instances where there are conflicting assessments, or where the official(s) with jurisdiction decline to provide any input.

Explain how the seven factors were compared to determine the least overall harm alternative. (See 23 CFR § 774.7(c).) Discuss the various impacts to the different Section 4(f) properties and begin the balancing process. Note the relative differences among alternatives regarding non-Section 4(f) issues such as the extent to which each alternative meets the project purpose and need. The discussion of impacts should include both objective, quantifiable impacts and qualitative measures to provide a more complete assessment of harm.

An effective tool to help compare alternatives is with the use of a table. See **Table 1** for a comparison table template. This table should provide all the concise facts for each of the seven comparison factors and support statements and the conclusion of which alternative would result in the least overall harm. If all alternatives use the same Section 4(f) properties, one can just say “same for all alternatives.” In the comparison column, if there is a clear difference between the alternatives, state so and note why. If one alternative is not better than another for that comparison factor, note that this is the case.

**NOTE:** The content of the least overall harm assessment will vary from project to project since every project situation is different. Utilize the basic framework of **Table 1** to clearly demonstrate and highlight the differences in the seven comparison factors. **The comparison of the seven factors supports the decision determining which alternative results in the least overall harm.** Additional information can be added to the text of the evaluation to further explain the weighing and balancing of these factors. A bulleted version of the factors by alternative in place of a table is another format to present and discuss the comparison.

- **Draft Section 4(f) Evaluation:** Preliminary assessment of how the alternatives compare to one another may also be included.
- **Final Section 4(f) Evaluation:** After circulation of the Draft Section 4(f) Evaluation, consider comments received on the evaluation and finalize the comparison of all factors for all the alternatives. The analysis and identification of the alternative that has the least overall harm must be documented in the Final Section 4(f) Evaluation. In especially complicated projects, the final approval to use the Section 4(f) property may be made in the decision document (ROD or FONSI).

**Section conclusion:** In the Draft Section 4(f) Evaluation, conclude the least overall harm section with a paragraph that states which alternative “appears” to be the least overall harm alternative and explain why based on the discussion contained within the assessment of least overall harm table.

Table 1: Template, Assessment of Least Overall Harm				
Factors for Determining Least Overall Harm	Alternative X	Alternative Y	Alternative Z	Comparison
Impacts to Section 4(f) properties	Provide a concise summary of each alternative's impacts to Section 4(f) properties, noting acres of use, structures and/or facilities taken or affected.			
1. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property)	Note how and to what extent adverse impacts can be mitigated for each Section 4(f) property used for all alternatives.			
2. What is the relative severity of the harm to the protected activities, attributes, or features that qualify each Section 4(f) property for protection?	Provide a concise summary of each alternative's impacts to Section 4(f) properties, noting acres of use, structures and/or facilities taken or affected.			
3. What is the relative significance of each Section 4(f) property?	Discuss the significance of each of the Section 4(f) properties used by the project. Not all Section 4(f) properties are created equal in their value.			
4. What is the view of the official(s) with jurisdiction over each Section 4(f) property?	If the official(s) with jurisdiction have expressed an opinion regarding the use of their Section 4(f) properties and/or whether they prefer one alternative over another, state so here.			
5. What is the degree to which each alternative meets the purpose and need for the project?	Not all alternatives meet a project's purpose and need to the same extent. If there are differences in the degree that one meets purpose and need more than another, note the differences here.			

6. What is the magnitude of any adverse impacts to the resources not protected by Section 4(f)?	<p><i>If an alternative would result in adverse impacts to non-Section 4(f) properties, note those impacts and their magnitude here. These other impacts can be factored into the discussion of least overall harm.</i></p>			
7. What are the differences in costs among the alternatives?	<p><i>Provide a cost estimate for each of the alternatives. If there is a significant cost difference between alternatives, this can be used as a factor to support the least overall harm conclusion.</i></p>			

## V. Coordination with the Officials with Jurisdiction over the Section 4(f) Properties

Summarize the coordination efforts with the official(s) with jurisdiction over the Section 4(f) properties. In the Draft Section 4(f) Evaluation include emails, phone calls, meetings, letters, and other correspondence generated in identifying the Section 4(f) properties as well as identifying *de minimis* uses and/or those uses resulting in a net benefit in an appendix. The Final Section 4(f) Evaluation would additionally include comments received from the officials with jurisdiction during the circulation period and correspondence generated in resolving any issues.

## VI. Conclusion (Only included in the Final Section 4(f) Evaluation)

This section should conclude whether there is a feasible and prudent alternative to the use of Section 4(f) property (a feasible and prudent total Section 4(f) avoidance alternative). If there is no feasible and prudent alternative which avoids all Section 4(f) properties, conclude that a particular alternative is the alternative that results in the least overall harm, and that it incorporates all possible planning to minimize harm based on the previous discussion in the evaluation.

**NOTE:** The Draft Section 4(f) Evaluation includes facts supporting whether or not a particular avoidance alternative or design modification would, or would not, be reasonable, feasible or prudent and makes a statement for each alternative and modification whether the alternative appears to be reasonable, feasible and prudent. The final conclusions that "there is no feasible and prudent alternative to the use of Section 4(f) properties and that Alternative XXX incorporates all possible planning to minimize harm" are only outright stated the Final Section 4(f) Evaluation.

## Appendix

Include copies of the correspondence from the official(s) with jurisdiction over the Section 4(f) properties (i.e., the SHPO, park authority, municipality, etc.) in the appendix of the Draft Section 4(f) Evaluation. Also, include a copy of the draft or executed MOA, if applicable. Include in the appendix of the Final Section 4(f) Evaluation all formal comments received on the Draft Section 4(f) Evaluation from the official(s) with jurisdiction over the Section 4(f) properties, Department of the Interior (DOI), U.S. Department of Agriculture (USDA), and the Department of Housing and Urban Development (HUD), if

applicable. In addition, include any information regarding public involvement, and/or consulting party and Section 106 coordination relative to final decisions on conditions of eligibility and effect. This is particularly important to support a *de minimis* finding. The signed, final MOA/PA/LOA must be included in the Final 4(f) Evaluation.

## Technical Support Data Files

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Maintain all background information used to develop the Individual Section 4(f) Evaluation in the project's technical support data file.

**Proximity Impacts Analysis:** If constructive use is evaluated for one or more resources, and found not to occur, include the information that led to this conclusion in the technical support data files. (See **Chapter 4** for more information about proximity impacts and constructive use.) This documentation can be a memorandum to the file, or a report. Provide FHWA and the Office of Chief Counsel this documentation along with the pre-draft Section 4(f) evaluation for their review.

## Individual Section 4(f) Evaluation Circulation and Approval Process

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For individual Section 4(f) evaluations, prepare both a **Draft Section 4(f) Evaluation** and a **Final Section 4(f) Evaluation**.

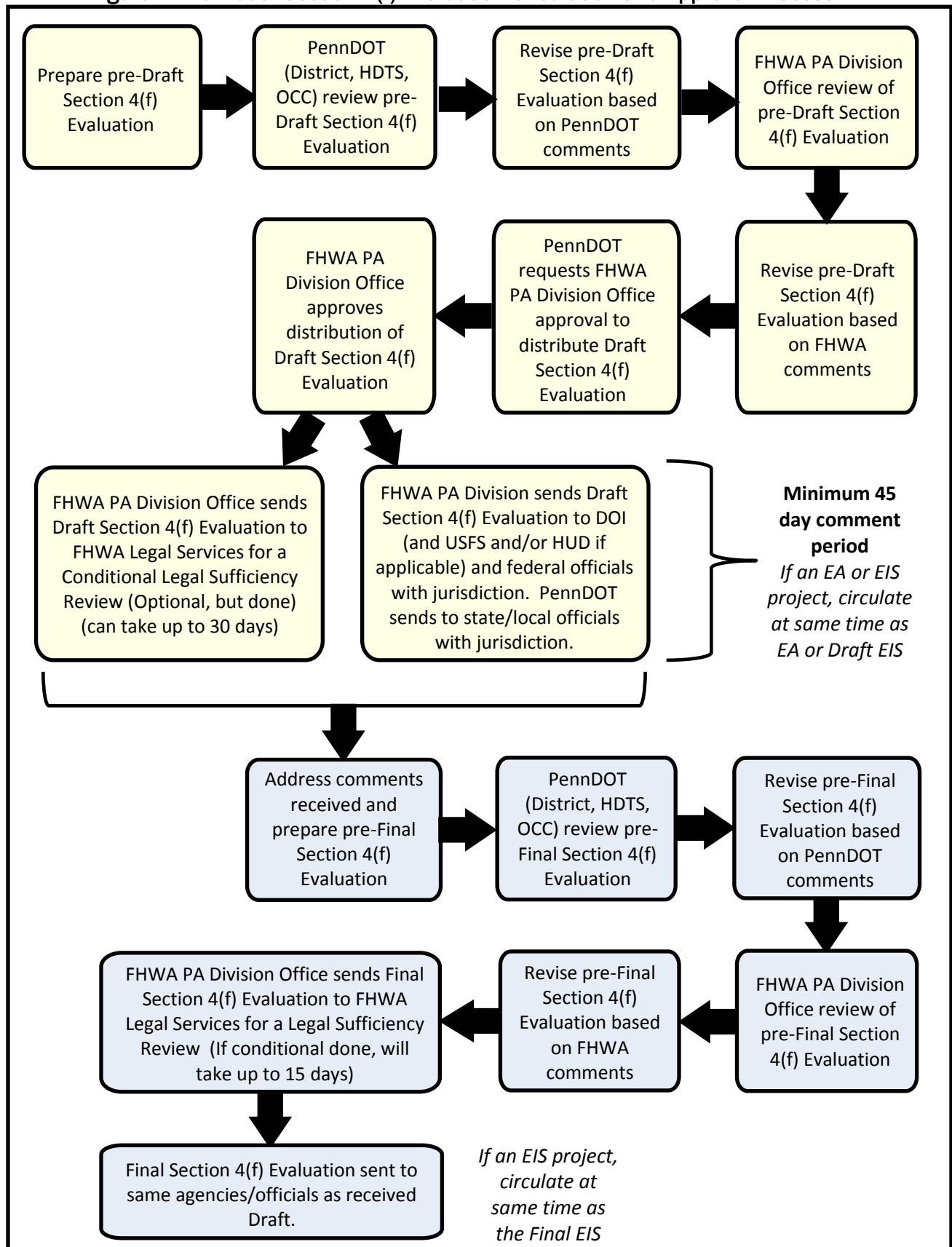
**In Pennsylvania, PennDOT and FHWA have agreed that the Draft Section 4(f) Evaluation will be included as a separate document bound together with the Draft EIS or EA.** For projects classified as CEs, the Draft Section 4(f) Evaluation will be prepared as a separate document.

Over the years, FHWA and PennDOT have worked together to facilitate the NEPA and Section 4(f) circulation and approval processes for the sake of efficiency. The following sections discuss the typical procedures for circulation and approval of Section 4(f) evaluations for each of the three NEPA processing options. The process is summarized in **Figure 2**.

**NOTE: For projects that do not have federal aid or require a USDOT action, only Section 2002 applies.**

1. The district submits the Section 2002 evaluation to the Project Delivery Engineer (PDE) in HDTs of the Bureau of Project Delivery for review. Individual Section 2002 evaluations are also reviewed by Office of Chief Counsel.
2. Comments from the PDE and Office of Chief Counsel, if requested, are addressed by the district and incorporated into the Section 2002 evaluation. The district resubmits the Section 2002 evaluation to the PDE for approval.
3. Upon approval by the Director of the Bureau of Project Delivery, the document (Section 2002 evaluation, and possibly the jointly prepared environmental document) is transmitted to the [Act 120 agencies](#) for a 30-day review period.
4. The Secretary of Transportation must then make the appropriate finding, which is published in the *Pennsylvania Bulletin*. HDTs coordinates this effort.

Figure 2. Individual Section 4(f) Evaluation Circulation and Approval Process



## Individual Section 4(f) Evaluation and a CE

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### Draft Section 4(f) Evaluation

**Pre-Draft Section 4(f) Evaluation Development and Review:** For projects classified as CEs, prepare the Draft Section 4(f) Evaluation as a separate document. A pre-draft Section 4(f) evaluation would undergo several levels of review at the PennDOT district, the PDE in HDTs, and Office of Chief Counsel before going to the FHWA PA Division Office for review. Provide FHWA with both a hard copy and an electronic copy for review.

**Conditional Legal Sufficiency Review (Optional, but done):** The FHWA PA Division Office has elected to forward all Draft Section 4(f) Evaluations to FHWA Legal Services for conditional legal sufficiency review as part of the Every Day Counts Initiative. This is done during the Draft Section 4(f) Evaluation circulation. Conditional legal sufficiency can take up to 30 days, but receipt of FHWA Legal Services' preliminary perspective early in the process guarantees that the legal sufficiency review of the Final Section 4(f) Evaluation will be done in 15 days instead of the traditional 30 days.

**Draft Section 4(f) Evaluation Circulation:** After all comments received on the pre-draft Section 4(f) evaluation are addressed, the Draft Section 4(f) Evaluation would be provided to the FHWA PA Division Office with a request for approval to distribute the document. Following approval by the FHWA PA Division Office, send the draft Section 4(f) evaluation to the following agencies/officials for a minimum **45-day comment period** (FHWA is responsible for sending the evaluation to Federal agencies and FHWA legal services, and PennDOT is responsible for sending the evaluation to state and local agencies/entities. Both FHWA and PennDOT should copy each other on the distributions.):

- FHWA Legal Services (Conditional legal sufficiency)
- All official(s) with jurisdiction over Section 4(f) properties used by the project;
- U.S. DOI (Washington Headquarters Office);
- USDA (Forest Supervisor) (only provided if National Forest Lands are involved); and
- HUD (Regional Office) (only provided if the project uses land for/on which HUD funding was utilized).

DOI has requested that they be provided with one paper copy and an electronic version (CD or FTP link). Consult with FHWA regarding copies to other agencies and to the official(s) with jurisdiction.

**NOTE:** The policy of the department and FHWA PA Division Office is to not send the Section 4(f) evaluation to parties beyond those required.

**NOTE:** The FHWA PA Division Office and PennDOT should copy each other on the letters when the Draft Section 4(f) Evaluation is circulated.

**Comments received on the Draft Section 4(f) Evaluation:** Comments received on the Draft Section 4(f) Evaluation during the comment period must be addressed. Coordinate with the DOI, USDA, HUD, or

any of the official(s) with jurisdiction over the Section 4(f) properties who submit comments to resolve the issues they identify. Take reasonable efforts to resolve the issues identified in comments:

- Examine the issues
- Study and discuss with the agency making the comments options/actions to resolve the issues
- Implement those options/actions that are reasonable/practicable

FHWA will make the final determination as to whether all reasonable efforts were made to address comments.

### **Final Section 4(f) Evaluation**

A paper copy of the Final Section 4(f) Evaluation is provided to FHWA Legal Services through the FHWA PA Division Office for formal **legal sufficiency review**. This review is guaranteed to be done in 15 days. The determination of legal sufficiency from FHWA Legal Services is needed before final CE approval. Information on how to incorporate the Section 4(f) evaluation with the CEE in the CE Expert System is provided in the system's FAQs. Provide the Final Section 4(f) Evaluation to the same agencies and official(s) with jurisdiction that received the Draft Section 4(f) Evaluation.

### **Individual Section 4(f) Evaluation and an EA**

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#### **Draft Section 4(f) Evaluation**

Include the Draft Section 4(f) Evaluation as a separate document bound into the EA as an "EA/Draft Section 4(f) Evaluation."

A pre-draft Section 4(f) evaluation and "draft" of the EA (there is no official Draft EA document) undergo several levels of review at the PennDOT district, the PDE in HDTS, and Office of Chief Counsel before going to the FHWA PA Division Office for review. Provide FHWA with both a hard copy and an electronic copy for review. At the discretion of PennDOT, FHWA may be involved in the review of the pre-draft documents, but this is not mandatory.

**Conditional Legal Sufficiency Review (Optional, but done):** The FHWA PA Division Office has elected to forward all pre-draft Section 4(f) evaluations for EA projects to FHWA Legal Services for conditional legal sufficiency review as part of the Every Day Counts Initiative. This is done previous to the EA/Draft Section 4(f) Evaluation circulation. Conditional legal sufficiency can take up to 30 days, but receipt of FHWA Legal Services' preliminary perspective early in the process guarantees that the legal sufficiency review of the Final Section 4(f) Evaluation will be done in 15 days instead of the traditional 30 days.

**EA/Draft Section 4(f) Evaluation Circulation:** After all comments received on the draft version of the EA/Draft Section 4(f) Evaluation are addressed, HDTS provides the EA/Draft Section 4(f) Evaluation to the FHWA PA Division Office with a request for approval to advertise the EA for availability for public review and comment.

Following approval of availability by the FHWA PA Division Office, the EA/Draft Section 4(f) Evaluation is provided to:

- Appropriate agencies/persons required for an EA;
- All official(s) with jurisdiction over Section 4(f) properties used by the project;

- U.S. DOI (Washington Headquarters Office);
- USDA (Forest Supervisor) (only provided if National Forest Lands are involved); and
- HUD (Regional Office) (only provided if the project uses land for/on which HUD funding was utilized).

DOI has requested that they be provided with one paper copy and an electronic version (CD or FTP link). Consult with FHWA regarding copies to other agencies and to the official(s) with jurisdiction.

The availability/comment period for an EA, as required by the NEPA implementing regulations (23 CFR § 771.119) is 30 days; however, a comment period of 45 days is required for Section 4(f) evaluations. In accordance with the public involvement and public hearing procedures in Pennsylvania, **make the EA/Draft Section 4(f) Evaluation availability period to comment 45 days** for all parties to address the requirements of both regulations when a Section 4(f) Evaluation is involved.

**NOTE:** Section 4(f) regulations state who shall receive the Section 4(f) Evaluation. In cases when a draft individual Section 4(f) evaluation is circulated with an EA document, responding to comments received by others in those cases that are specific to the Section 4(f) evaluation is not required.

**Comments received on the EA/Draft Section 4(f) Evaluation:** Comments received on the EA/Draft Section 4(f) Evaluation during the comment period must be addressed. Coordinate with the DOI, USDA, HUD, or any of the official(s) with jurisdiction over the Section 4(f) properties who submit comments to resolve the issues they identify. Take reasonable efforts to resolve the issues identified in comments:

- Examine the issues
- Study and discuss with the agency making the comments options/actions to resolve the issues
- Implement those options/actions that are reasonable/practicable

FHWA will make the final determination as to whether all reasonable efforts were made to address comments.

### **Final Section 4(f) Evaluation**

A paper copy Final Section 4(f) Evaluation must be provided to FHWA Legal Services through the FHWA PA Division Office for a **legal sufficiency review**. This review is guaranteed to be done in 15 days. The determination of legal sufficiency from FHWA Legal Services is needed before the Finding of No Significant Impact (FONSI) is issued. Provide the Final Section 4(f) Evaluation to the same agencies and official(s) with jurisdiction that received the Draft Section 4(f) Evaluation.

## **Individual Section 4(f) Evaluation and an EIS**

### **Draft Section 4(f) Evaluation**

The Draft Section 4(f) Evaluation is included as a separate document bound into the Draft EIS as a "Draft EIS/Draft Section 4(f) Evaluation."

Typically, a Pre-Draft EIS/Pre-Draft Section 4(f) Evaluation goes through several levels of review at the PennDOT district, Central Office, Office of Chief Counsel, and the FHWA PA Division Office. The PDE in HDTs will review the pre-draft Section 4(f) evaluation on behalf of Central Office. Provide

FHWA with both a hard copy and an electronic copy for review. At the discretion of PennDOT, FHWA may be involved in the review of the Pre-Draft EIS/Pre-Draft Section 4(f) Evaluation, but this is not mandatory.

**Conditional Legal Sufficiency Review (Optional, but done):** The FHWA PA Division Office has elected to forward all pre-draft Section 4(f) evaluations for EIS projects to FHWA Legal Services for conditional legal sufficiency review as part of the Every Day Counts Initiative. This is done previous to the EIS/Draft Section 4(f) Evaluation circulation. Conditional legal sufficiency can take up to 30 days, but receipt of FHWA Legal Services' preliminary perspective early in the process guarantees that the legal sufficiency review of the Final Section 4(f) Evaluation will be done in 15 days instead of the traditional 30 days.

**Draft EIS/Draft Section 4(f) Evaluation Circulation:** After all comments received on the Pre-Draft EIS/Pre-Draft Section 4(f) Evaluation are addressed, the BOPD, HDTs will provide the FHWA Division office the Draft EIS/Draft Section 4(f) Evaluation with a request to circulate the document. Following approval by the FHWA Division, the Draft EIS/Draft Section 4(f) Evaluation is circulated. Both Draft EISs and Draft Section 4(f) Evaluations require a minimum 45-day comment period. The Draft EIS/Draft Section 4(f) Evaluation is circulated for at least 45 days to all appropriate agencies and persons required for an EIS, and to all agencies with jurisdiction over the Section 4(f) properties, DOI (Washington), and if applicable, USDA and HUD. DOI has requested that they be provided with one paper copy and an electronic version (CD or FTP link). FHWA Headquarters receives appropriate copies of the document in keeping with EIS circulation procedures.

**NOTE:** Section 4(f) regulations state who shall receive the Section 4(f) Evaluation. In cases when a draft (and final in cases of an FEIS) individual Section 4(f) evaluation is circulated with a DEIS/FEIS in accordance with the NEPA document, responding to comments received by others in those cases that are specific to the Section 4(f) evaluation is not required.

**Comments received on the Draft EIS/Draft Section 4(f) Evaluation:** Comments received on the Draft EIS/Draft Section 4(f) Evaluation during the comment period must be addressed. Comments received on the EA/Draft Section 4(f) Evaluation must be addressed. Coordinate with the DOI, USDA, HUD, or any of the official(s) with jurisdiction over the Section 4(f) properties who submit comments to resolve the issues they identify. Take reasonable efforts to resolve the issues identified in comments:

- Examine the issues
- Study and discuss with the agency making the comments options/actions to resolve the issues
- Implement those options/actions that are reasonable/practicable

FHWA will make the final determination as to whether all reasonable efforts were made to address comments.

### **Final Section 4(f) Evaluation**

Comments on the Draft Section 4(f) Evaluation are addressed in the Final Section 4(f) Evaluation, which is bound into the Final EIS. The Final EIS/Final Section 4(f) Evaluation is provided to FHWA Legal

**NOTE:** FHWA Headquarters has delegated approval authority for EISs and Draft Section 4(f) Evaluations to the FHWA PA Division Office. A legal sufficiency review of the Final Section 4(f) Evaluation by FHWA Headquarters is still required. Additionally, Section 4(f) evaluations that include a constructive use would require FHWA Headquarters review. The FHWA PA Division Office may also elect to request FHWA Headquarters review at their discretion.

Services through the FHWA PA Division Office for a **legal sufficiency review**, prior to making the Final EIS/Final Section 4(f) Evaluation available. This review is guaranteed to be done in 15 days.

Distribution of the Final EIS/Final Section 4(f) Evaluation is similar to the Draft EIS/Draft Section 4(f) Evaluation. The final Section 4(f) approval is documented in the ROD.

## Chapter 8: Late Discovery of Section 4(f) Properties/Uses

Discovery of a Section 4(f) property and/or Section 4(f) use can occur in project development after Section 4(f) coordination/approval and NEPA approval have been granted.

A late discovery situation could be the result of the following scenarios:

- **New use of a previously avoided Section 4(f) property** - There is a proposed modification of the project alignment or design that would require use of a Section 4(f) property not previously used.
- **New identification of a Section 4(f) property that will be used by the project** - There is a determination that Section 4(f) now applies to a property previously not considered Section 4(f) and there is a use of that property. Sometimes a property can be overlooked despite good faith efforts to identify all Section 4(f) properties in a project area. New information may be learned late in project development that would change a decision regarding applicability of Section 4(f) to a specific property. (For example, it could be learned during right-of-way acquisition that a privately-owned property has a lease agreement with a public entity satisfying the “publicly-owned” criteria for Section 4(f) applicability.)
- **A more substantial use of a Section 4(f) property** - A proposed modification of the alignment, design, or measures to minimize harm 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.

If any of the above situations occurs late in the project development process (after the NEPA decision/Section 4(f) finding has been made), a separate Section 4(f) approval is required (23 CFR §774.9(c)). Any project activity not directly affected by the separate Section 4(f) approval can proceed during this analysis. (See Question 26B of the [Section 4\(f\) Policy Paper](#).)

If a late Section 4(f) discovery is made, prepare the applicable documentation for the Section 4(f) use. (See **Chapter 5** for guidance on analyzing the Section 4(f) use, and see **Chapters 6 and 7** for guidance on Section 4(f) documentation options.) **Be aware that a late discovery Section 4(f) use can affect the project’s schedule.** Some of the analysis and processing requirements involve elements that take time to conduct. For example, to apply *de minimis* to a park, an appropriate level of public involvement must be conducted and the official with jurisdiction must concur in writing. For a historic site, Section 106 effects must have been determined in order to apply *de minimis*. If an individual Section 4(f) evaluation must be prepared, there are required review times that cannot be expedited (45-day availability for a Draft Section 4(f) Evaluation followed by preparation of a Final Section 4(f) Evaluation and a legal sufficiency review by FHWA Legal Services).

The need for a separate Section 4(f) analysis and approval for late discoveries of Section 4(f) properties and/or use will not necessarily require the preparation of a new or supplemental NEPA document. Re-evaluate the NEPA document and decision to determine whether a supplemental NEPA document is needed. (See [PennDOT Design Manual 1B \(Publication 10B\)](#) for more information regarding re-evaluations.)

**NOTE:** Mitigation commitments for Section 4(f) properties should include any avoidance measures. This avoidance should be carried through to construction contracts. If there is use of the property, Section 4(f) late discovery procedures will be followed before they are allowed to occupy the property.

**Late Designation of Section 4(f) Properties:** A late designation is different from a late discovery. A late designation is a property that is designated and meets the criteria of being a Section 4(f) property after the transportation project has begun. What if a property in the transportation right-of-way is designated as a park, recreation area, wildlife and waterfowl refuge, or historic site late in the development of a proposed project? Would Section 4(f) be applicable? A project may proceed without consideration under Section 4(f) if that land was purchased for transportation purposes prior to the designation or prior to a change in the determination of significance, and if an adequate effort was made to identify properties protected by Section 4(f) prior to the acquisition. (See 23 CFR § 774.13(c) and Question 26A of the [\*Section 4\(f\) Policy Paper\*](#).)

## Chapter 9: How Does Section 4(f) Relate to Other Environmental Requirements?

Section 4(f) is one law among a number of laws governing the protection of environmental resources (e.g., wetlands, streams, productive agricultural lands, threatened and endangered species, community impacts, environmental justice, etc.) that must be satisfied during project development and in reaching a decision under NEPA.

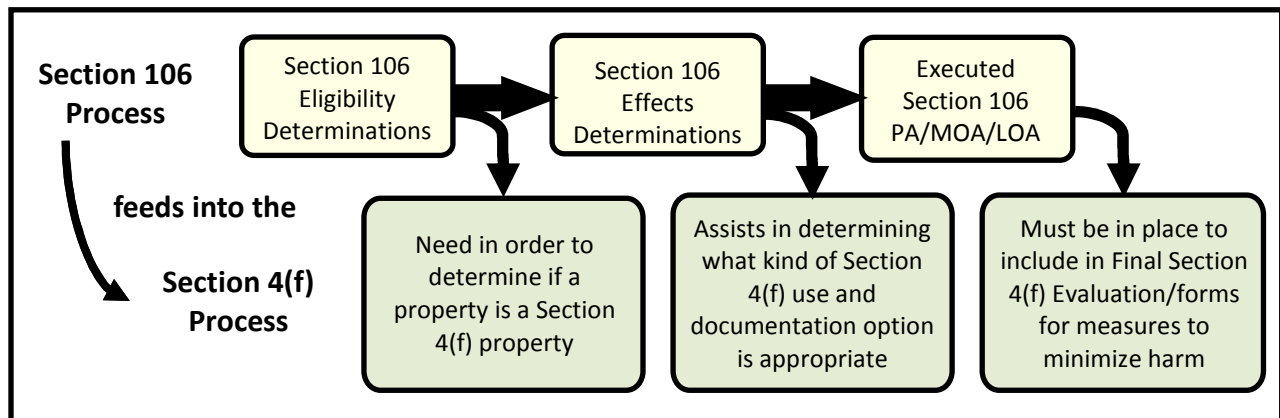
The following are the laws with a direct relationship to, or interaction with, Section 4(f):

- During project development, Section 4(f) relies on aspects of the **Section 106 process** for identification and use analysis purposes for historic sites. Mitigation for historic Section 4(f) properties most often results from the Section 106 process.
- For a Section 4(f) park and recreational area, **Section 6(f) of the Land and Water Conservation Fund Act** can also apply if Land and Water Conservation Fund (LWCF) grants were used to purchase land or supply amenities to a property. Section 4(f) and Section 6(f) require separate coordination due to the nature of their governing laws but both can be applicable to the same property.
- If a **Section 404 permit** is required for a project, a 404(b)(1) alternatives analysis is performed to determine the Least Environmentally Damaging Practicable Alternative (LEDPA) for impacts to wetlands. If the LEDPA is not the same alternative as the Least Overall Harm alternative under the Section 4(f) process then a conflict exists between regulations that must be resolved. Ultimately, only one alternative can be selected for a project, so if required alternatives analyses for different laws results in selection of different alternatives, there is a problem that must be resolved through agency coordination and dispute resolution, if necessary.

Each of these regulations and its relationship to Section 4(f) is discussed in more detail in the sections below.

### Section 106

Section 4(f) relies on the Section 106 process for (1) eligibility determinations for identifying Section 4(f) historic properties (2) effect determinations for assessing whether there is a *de minimis* use or constructive use, and (3) for mitigation/environmental commitments.



## Identification of Properties Listed or Eligible for the *National Register of Historic Places*

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Under the Section 4(f) regulations, historic properties listed in, or eligible for listing in, the *National Register of Historic Places* are Section 4(f) properties. Archaeological sites determined eligible for the *National Register*, and for which preservation in place is recommended, are also Section 4(f) properties. Archaeological sites not recommended for preservation in place (important for the information they contain) are not Section 4(f) properties; see **Chapter 3**. As part of the Section 106 process, PennDOT CRPs evaluate historic and archaeological properties 50 years or older to determine whether they meet at least one of the four different *National Register* eligibility criteria and if they maintain integrity. See Chapter VII (Identification and Evaluation) in PennDOT's [\*Cultural Resources Handbook\*](#) (Publication 689) for detailed guidance on how historic sites are identified.

The district CRP prepares documentation identifying the properties within a project's Area of Potential Effect (APE) that are being determined eligible for listing in, or are listed in, the *National Register*. The CRP provides the documentation to the SHPO. The documentation includes the identified boundaries of the historic or archaeological resources and may or may not identify contributing and non-contributing elements of historic districts in the area of the project. If the eligibility and boundary of a historic district had been previously determined, PennDOT and FHWA may want to revisit eligibility and establish a district's contributing and non-contributing elements.

**NOTE:** It is important to carefully follow the boundary guidelines (which are contained at *National Register* Bulletin 21, U.S. Department of the Interior, National Park Service) when determining eligibility. Although using the tax parcel boundaries may be appropriate in certain circumstances, there may be other boundaries (either larger or smaller) that might be more appropriate/precise in defining the historic or archaeological site, which would meet the boundary guidelines requirements.

An alternative is a use of a Section 4(f) resource even when it only uses a sliver of a property located within the historic resource's boundaries and does not take a structure. Therefore, establishing the appropriate boundaries of historic and archaeological resources based on proper eligibility criteria is a key component to the Section 4(f) process.

For example, using the tax parcel when it shows the property line extending to the centerline of the road is probably not appropriate. Perhaps there is a swale, fence or tree line that could be used instead, or the edge of shoulder or pavement could possibly be used.

If the SHPO does not agree with the eligibility determinations, PennDOT may request through FHWA that the Keeper of the *National Register* make the formal determination of eligibility. Once agreement is received from the SHPO or a formal determination is made by the Keeper that the property is eligible, the property is considered an historic or archaeological property for purposes of both Section 106 and Section 4(f).

**NOTE:** Section 4(f) does not apply to archaeological sites which are determined at the completion of the Section 106 process to be important chiefly because of what can be learned by data recovery and have minimal value for preservation in place.

## Section 106 Effects Determination

**The adverse effects determination under the Section 106 process does not equate to use under the Section 4(f) process.** It is possible to have a no historic properties affected or no adverse effect determination under Section 106 and still have a use under Section 4(f), although the Section 4(f) use would be a *de minimis* use. It is also possible to have an adverse effect determination under Section 106 without having a Section 4(f) use.

Under the Section 106 PA, effects finding are posted and SHPO concurrence is not provided unless specifically requested. The effects determination is the posting.

The effects determination under the Section 106 process plays a role in the Section 4(f) process when determining whether there is a *de minimis* or constructive use of a Section 4(f) property. This role is summarized in the following table:

	<i>Section 106 Effects Determination</i>		
	<b>No Historic Properties Affected</b>	<b>No Adverse Effect</b>	<b>Adverse Effect</b>
<b>Section 4(f) Property Acquired</b>	<i>De minimis</i> use	<i>De minimis</i> use	Actual use, not <i>de minimis</i>
<b>No Section 4(f) Property Acquired</b>	No use	No use	Possible constructive use, proximity impact analysis required

**Effects and *De Minimis* Use:** As discussed in **Chapter 4**, an actual Section 4(f) use of a historic resource (incorporation of property) is considered *de minimis* if FHWA makes a Section 106 determination of no adverse effect or no historic properties affected and the SHPO agrees (and ACHP, if participating in the Section 106 consultation). This concurrence on *de minimis* is understood and given by the SHPO when a Section 106 effects determination of no adverse effect or no historic properties affected is made. Views of any Section 106 consulting parties must also be considered.

**NOTE:** When a project is anticipated to have a Section 4(f) use of a historic resource, early Section 106 coordination is advised. This coordination should look at the possibility of incorporating measures into the project design that could offset impacts to the historic resource such that a No Adverse Effect determination might be made. If a No Adverse Effect determination can be made based on a commitment that particular design elements will be incorporated into the project, the *de minimis* finding can be used.

**De Minimis Example 1:** Constructed circa 1800, the Hemlock House is eligible for the *National Register* under Criterion C, as a good example of an early 19th century log farmhouse. The historic property includes 5 acres, and a total of 0.3 acre would be acquired for the roadway project. As per the Section 106 PA, a no adverse effect finding was made because the small use of the property occurs in the corner of the property that is furthest from the farmhouse, not diminishing the characteristics that qualify the property for inclusion in the *National Register*. Property is acquired, resulting in an actual use, but it is considered *de minimis* because of the Section 106 no adverse effect determination.

**De Minimis Example 2:** Sometimes design details can assist in resulting in a no adverse effect determination if they are considered at the time that a Section 106 effect determination is made. For example, a commitment that a new roadway would have a depressed profile where it crosses an historic property and include new plantings to screen the visual effect on the property could potentially result in a no adverse effect. Had those design details not been considered early on, the determination may have resulted as an adverse effect on that particular property.

**Effects and Constructive Use:** Constructive use occurs when there is no incorporation of land from a Section 4(f) property but the proximity impacts would result in a substantial impairment of the features and attributes that make the historic site eligible for the *National Register*. A historic Section 4(f) property in proximity to a proposed transportation project does not have to be analyzed for constructive use when the effects determination under Section 106 results in no historic properties affected or no adverse effect to the Section 4(f) property. If a Section 4(f) property has an adverse effect determination under Section 106, the property should be analyzed for constructive use under Section 4(f). Constructive use was discussed in detail in **Chapter 4**. Remember that the effect criteria under Section 106 are not the same as the criteria for determining constructive use, and that constructive uses are rarely determined to occur.

**NOTE:** An adverse effect determination under the Section 106 process does not automatically result in a constructive use. It only triggers the need to analyze the property for a constructive use.

**Effects and Historic Transportation Facilities:** Section 4(f) requirements do not apply to the restoration, rehabilitation, or maintenance of *National Register* eligible or listed transportation facilities if the Section 106 process concludes with a No Historic Properties Affected or No Adverse Effect determination. Some examples of transportation facilities where this would be applicable are historic bridges, national roadways, and those elements of the interstate system determined to be eligible.

**NOTE:** The interstate system and individual elements of the interstate system are not covered under Section 4(f) except for those elements formally designated by FHWA for national or exceptional historic significance. In Pennsylvania, there are five elements that are applicable to Section 4(f). See discussion in **Chapter 3**, and the [Final List of National and Exceptionally Significant Features of the Federal Highway System](#) is available on FHWA's website.

**NOTE:** If a proposed project impairs the historic integrity of the historic bridge structure resulting in an adverse effect under the Section 106 process, then a Section 4(f) evaluation must be performed for the proposed project. The [Programmatic Section 4\(f\) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges](#) exists for use on such projects. See **Chapter 6** for more information regarding this programmatic Section 4(f) evaluation.

**NOTE:** FHWA considers the relocation of a historic bridge to not be applicable to Section 4(f), provided that the state, locality or responsible entity that accepts the bridge enters into an agreement to maintain the bridge and the features that contribute to its historic significance. This entity would also assume all future legal and financial responsibility for the bridge. (See [Section 4\(f\) Policy Paper Question 8C, How do the requirements of Section 4\(f\) apply to donations of historic bridges to a State, locality, or responsible private entity?](#))

## Mitigation Measures

The Section 4(f) process requires the inclusion of all measures to minimize harm to Section 4(f) properties. Consider the mitigation measures developed in accordance with the Section 106 process when determining which alternative results in the least overall harm.

**NOTE:** Effects determinations under Section 106 could be used to help determine which alternative results in the least overall harm in the minimization phase of the Section 4(f) evaluation process. For example, two alternatives are being compared, and each would use land from one Section 4(f) property. In both cases, the property is an historic resource. Alternative A has an adverse effect and Alternative B has a no adverse effect (*de minimis* finding). It would logically follow that Alternative B would result in the least overall harm to Section 4(f) properties.

Remember, all mitigation measures are included in the least overall harm analysis, and impacts to other resources and mitigation measures for those resources are also taken into consideration in assessing least overall harm. Alternative A with an adverse effect could still be determined to be the least overall harm alternative if Alternative B with the no adverse effect has much more severe impacts to other environmental resources such as wetland/stream impacts, threatened and endangered species involvement, large numbers of residential and/or commercial displacements, environmental justice impacts, etc.

**NOTE:** Mitigation for the loss of a historic resource should be commensurate with the value of the resource.

## Section 6(f)

The Land and Water Conservation Fund (LWCF) Act of 1965 established a nationwide program to assist in preserving, developing, and assuring the availability of outdoor recreational resources. The program provides matching grants (up to 50%) to states and through states to local governments for the acquisition and development of public outdoor recreation sites and facilities. The LWCF program is administered by the National Park Service (NPS). The State Liaison Officer (SLO) for Pennsylvania is the Deputy Secretary for Conservation and Technical Services at DCNR. The SLO maintains the list of LWCF grants and what the grants were used to purchase/enhance.

A Section 6(f) property will many times also be a Section 4(f) property due to the nature of the type of park and recreation properties benefiting from LWCF money. Section 6(f) and Section 4(f) require different coordination and analysis, but it is beneficial for those conducting the coordination and analysis

to communicate. A Section 4(f) alternatives analysis may be also used for the Section 6(f) evaluation of alternatives to the Section 6(f) conversion.

NOTE: The mitigation for Section 6(f) can often be used as the mitigation for Section 4(f), so commitments should be coordinated between the two laws.

To use the [Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges](#), the Section 6(f) authorities' position on land acquisition and or transfer must be obtained. If there is an objection to this land conversion or transfer, the programmatic Section 4(f) evaluation cannot be used.

Refer to PennDOT's [Section 6\(f\), Project 70, and Project 500 Guidance](#) (Publication 745) for more information on Section 6(f) procedures.

## Section 404 Permit LEDPA and Other Environmental Alternatives Analyses

While NEPA requires that impacts to all resources be balanced together with engineering considerations, ability to meet needs, public input and agency consultation in reaching an informed decision on the alternative to be designed and constructed, other regulations require examination of avoidance alternatives and addressing specific criteria in making a determination.

If a Section 404 permit is required for a project, a 404(b)(1) alternatives analysis must be performed to determine the LEDPA for impacts to wetlands. Pennsylvania Acts 100 and 43 require evidence that there is no prudent and reasonable alternative to the conversion of productive agricultural lands for highway purposes before such lands can be condemned for project development. Section 7 of the Endangered Species Act requires consultation to seek ways to avoid jeopardizing the continued existence of federally threatened and endangered species and their habitats. Section 106 requires that consideration be given to the effects on historic and archaeological properties.

Section 4(f) requires that an alternative that avoids all Section 4(f) properties be selected unless this avoidance alternative is proven not to be feasible and prudent or the use would result in a *de minimis* impact. If no feasible and prudent total Section 4(f) avoidance alternative exists, the alternative resulting in least overall harm is the preferred alternative. This determination is made based on weighing and balancing seven factors which look at both harm to Section 4(f) properties, as well as big-picture impacts that would result from the project. (See **Chapter 5** for further discussion of the least overall harm analysis.) While the "thumb on the scale" looks at overall impacts to Section 4(f) impacts, least overall harm analysis is a balancing exercise. Those more adverse impacts to other resources outside of Section 4(f) can weigh into Section 4(f) decision making.

All of the above regulations and other federal, state and local regulations, as appropriate, must be considered in the development of alternatives to ensure that all regulatory requirements are met for a project. Only one alternative can be selected for a project, so agency coordination with the agencies with jurisdiction over the relevant resources should be conducted early and often so that input is received early and issues are resolved so an ultimate project decision is reached in accordance with all environmental laws.

If there is conflict despite early coordination, the district should contact EPDS to elevate coordination with the funded position for the appropriate resource agency. Also, engage FHWA to this potential conflict as early as possible to assist with discussions. If conflicts cannot be worked out, dispute resolution procedures exist for some laws and decisions, such as Section 404(q) of the Clean Water Act for dispute resolution procedures for Section 404 decisions.

## Chapter 10: Case Studies

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**Case Study 1:** Net benefit programmatic Section 4(f) evaluation applied to a use of a park

**Case Study 2:** Net benefit programmatic Section 4(f) evaluation applied to use of a historic district

**Case Study 3:** *De minimis* use of a historic site

**Case Study 4:** *De minimis* and a programmatic Section 4(f) evaluation

**Case Study 5:** Section 4(f) use of an island

**Case Study 6:** Section 4(f) use of a PFBC designated water trail

**Case Study 7:** Replacement of a bridge that contributes to a historic district that requires additional right-of-way from another contributing part of the historic district

**Case Study 8:** Restoration or rehab (or relocation) of a historic bridge would be exempt

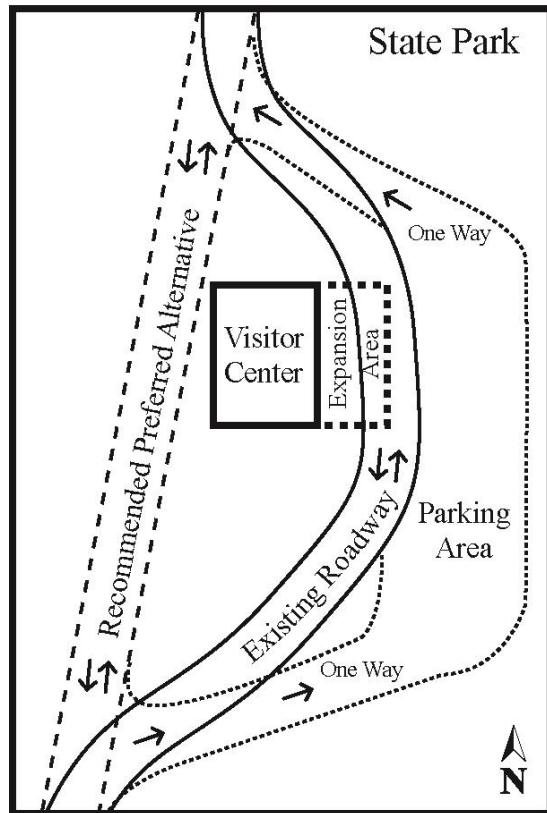
# Case Study 1

## Objectives

To gain an understanding of net benefit as it relates to a publicly owned park, recreation area, or wildlife or waterfowl refuge.

## Key Points

A state route through a heavily used, 500-acre state park does not meet current design criteria. The shoulders of the roadway are substandard and its vertical and horizontal geometry are poor. The road currently passes between the park's visitor center and the visitor center's parking lot. This means that visitors must use a pedestrian cross walk, which causes traffic back-ups. In order to bring the roadway up to current standards, and to improve safety for park visitors, the recommended preferred alternative would move the roadway to the opposite side of the visitor's center. Five acres of parkland right-of-way would be acquired from a wooded area of the park for the new roadway. Alternatives that would avoid the park property were analyzed and found not to be prudent and feasible. Park officials are very excited about the roadway relocation. It would allow them to expand their visitor's center to the east and improve the safety of the parking area and pedestrian access to the visitor center. As part of this project, PennDOT will ensure that proper access is maintained to the parking area. The visitor center and existing roadway would remain open through construction, maintaining park access. The park officials submitted a written letter stating that the project would result in a net benefit to the park because the project would improve vehicle and pedestrian access to the park, the safety of the pedestrian would be improved, and the visitor's center would be able to expand closer to the parking lot. The park officials also indicated in writing that the project would not result in the substantial diminishment of the activities, features, or attributes for which the park is protected under Section 4(f).



## Documentation

In this case the *Nationwide/Programmatic Section 4(f) for Transportation Projects that have Net Beneficial Use (Net Benefit)* Form should be completed. The park officials (official with jurisdiction) need to agree **in writing** that the project would result in a net benefit to the park. Also, it must be demonstrated that there is no feasible and prudent alternative to the use of the Section 4(f) property.

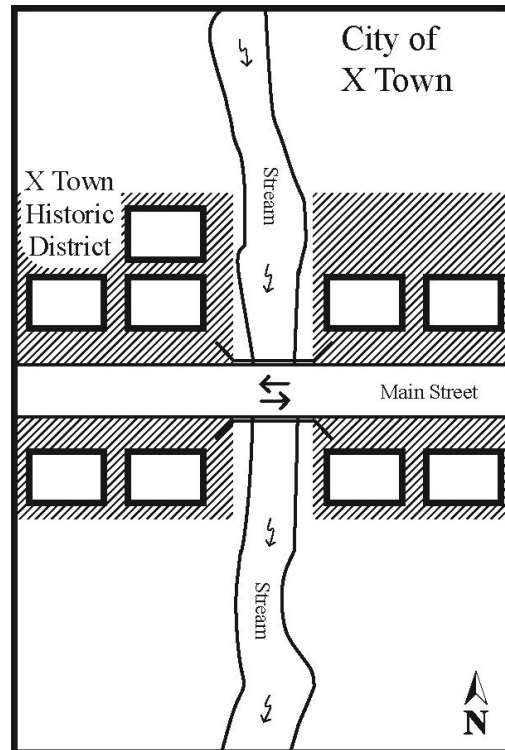
## Case Study 2

### Objectives

To gain an understanding of net benefit as it relates to a historic site (historic district).

### Key Points

A deteriorating bridge in the City of Xtown that does not meet current design criteria is slated to be replaced. The bridge is located on the main street of Xtown's downtown shopping district and is used by many pedestrians. The concrete box beam bridge was built in 1921 but has no distinguishable features and was determined ineligible for the *National Register*. The bridge however, is considered a contributing element to the Xtown Historic District. The bridge cannot be rehabilitated without losing its historic integrity as a contributing element to the Historic District. The new bridge is going to be placed on existing alignment and designed using sensitive features specific to the historical characteristics that the district is eligible for, such as historic lighting and concrete treatments. These features would complement the Historic District. A sidewalk will be included on the bridge. The SHPO has determined that removing the bridge would have an adverse effect on the Historic District under Section 106, but because the new bridge was designed with features that are sympathetic to and compatible with the Historic District, it would actually create a net benefit for the Historic District.



### Documentation

In this case the *Nationwide/Programmatic Section 4(f) for Transportation Projects that have Net Beneficial Use (Net Benefit)* Form should be completed. The SHPO (official with jurisdiction) needs to agree **in writing** that the project would result in a net benefit to the Xtown Historic District. Also, it must be demonstrated that there is no feasible and prudent alternative to the use of Section 4(f) property.

## Case Study 3

### Objectives

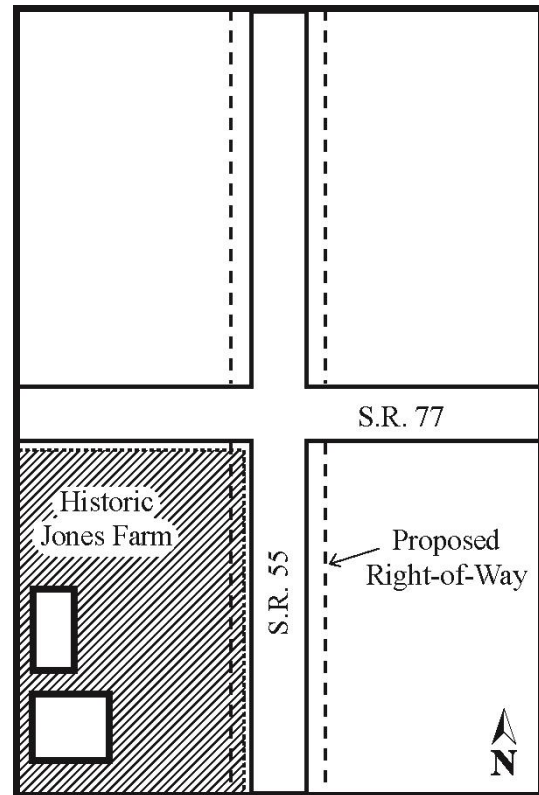
To gain an understanding of *de minimis* as it relates to a historic site.

### Key Points

The project is to improve the intersection of S.R. 55 and S.R. 77. Minimal new right-of-way will be acquired from the four quadrants of the intersection and along the north and south approaches of S.R. 55. The Jones Farm, a 400 acre National Register eligible property is adjacent to the southwest quadrant of the intersection. The project would acquire 0.5 acre from the historic farm property. In accordance with the Section 106 PA, a PennDOT CRP posted a no adverse effect finding on Project PATH, and no objection was made by the SHPO.

### Documentation

In this case the *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use* Form should be completed. The undertaking does not adversely affect the function/qualities of the Section 4(f)/2002 resource on a permanent or temporary basis and the SHPO (official with jurisdiction) have agreed that there is no adverse effect as a result of the project. Coordination must be undertaken with the consulting parties as part of the *de minimis* finding.



## Case Study 4

### Objectives

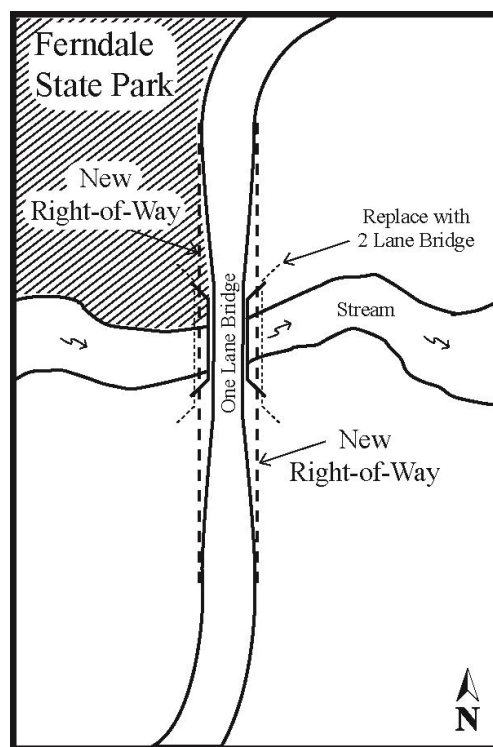
To gain an understanding of using both the *De Minimis* form and a nationwide programmatic Section 4(f) evaluation form.

### Key Points

A one-lane bridge was built in 1932 and is individually eligible for the *National Register*. This bridge needs to be replaced because of deterioration. The bridge will be replaced with a two lane structure, so some approach roadway work is necessary. PennDOT posted an adverse effect finding for the bridge on Project PATH; the SHPO has concurred. The northwest quadrant adjacent to the bridge is part of the 600-acre Ferndale State Park. The portion of the park located in the project area contains a portion of a popular hiking/biking trail. Approximately 0.7 acre of new permanent right-of-way will be acquired from the parkland, and the impacted trail will be relocated as part of the project. The park officials (official with jurisdiction) have agreed in writing that the project will not adversely affect the activities, features, or attributes that qualify the park for protection under Section 4(f).

### Documentation

In this case the *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use Form* should be completed for the park use. The undertaking will not adversely affect the activities, features, or attributes of the Section 4(f) property on a permanent or temporary basis and the park officials (official(s) with jurisdiction) have agreed **in writing**. The public was notified of the project by way of a notice in the local newspaper, and their comments were addressed. The *Nationwide/Programmatic Section 4(f) for Projects that Necessitate the Use of a Historic Bridge Form* should be completed for the use of the bridge. The net benefit Section 4(f) programmatic evaluation could not be used because this project would require the major alteration of the characteristics (i.e. demolition) that qualify the bridge for the *National Register* such that the property would no longer retain sufficient integrity to be considered eligible for listing.



## Case Study 5

### Objectives

To gain an understanding of where a Section 4(f) use could occur for an island within a stream and how that determination and documentation is performed.

### Key Points

A highway on new alignment is being considered to provide a bypass to a local town. One of the alternatives being studied would cross a river and would require placement of a pier on an island located in the center of the river. After performing research, it is determined that the island is not privately owned, and is therefore owned by the Commonwealth. The land is administered by DCNR, who allows camping on the island. The river is used by rafting companies and private boaters, who often camp on the island during multi-day boating trips. Based on this assessment, the island is publicly-owned, open to the public, and serves a major recreational function. As such, it is considered to be a Section 4(f) property. Placement of a pier on this property would result in an actual 4(f) use.

### Documentation

Documentation for this use would be highly dependent upon the specifics of the use. If the pier were placed in an area of the island where camping does not occur due to poor terrain, limited access, etc, it is possible that based on coordination with DCNR (the official with jurisdiction), the use could be *de minimis*. In order to be *de minimis*, public comment would need to be gathered and comments addressed, and DCNR would have to agree in writing that the use would not adversely affect the activities, features, and attributes that qualify the island for Section 4(f) protection. Under other circumstances, it is possible that if the construction of the bridge were done in such a way as to allow for improvements to the island and increased access to the island and its amenities, the project could result in a net benefit. Similar to the *de minimis* finding, this determination would require that DCNR agree in writing that the project resulted in net benefit. The final determination for both decisions would be made by FHWA. Because the project would require an EIS, it would not qualify for the minor use of parks programmatic. If it could not be determined that the impacts were *de minimis* or resulted in a net benefit, an individual Section 4(f) evaluation would need to be prepared.

## Case Study 6

### Objectives

To gain an understanding of temporary occupancy as it relates to a PFBC designated water trail.

### Key Points

A project crosses the Conodoquinet Creek Water Trail, which is on the PFBC designated water trail list. The structure is being replaced and requires that a temporary causeway must be constructed. Two scenarios are being considered. Under Scenario 1, the piers/abutments will be reconstructed on the same location. Under Scenario 2, the piers/abutments will be constructed on new alignment within the limits of the water trail.

### Documentation

Under Scenario 1, it is determined that the conditions under 23 CFR 774.13(d) will be met. As such, this project would result in a temporary occupancy that does not result in a Section 4(f) use. The temporary occupancy form should be completed.

Scenario 2 could result in a Section 4(f) use. Coordination with the PFBC should be conducted to determine the effect to the recreational use of the water trail. Consideration should be given to whether the use would be considered *de minimis* during this consultation. If the requirements for a *de minimis* finding can be met, the *de minimis* form should be completed.

**NOTE:** Where a temporary causeway is constructed, or where the path of the trail is affected (temporarily closed, altered, etc), the use of aids to navigation (ATON) should be considered in coordination with the PFBC to ensure the safety of recreational boaters. If the recreational function of the waterway cannot be maintained to a degree so as to meet the requirements under 23 CFR 774.13(d), a Section 4(f) use would result, and the temporary occupancy form cannot be used.

## Case Study 7

### Objectives

To gain an understanding of how to document and obtain Section 4(f) approval for circumstances where a bridge that is contributing to a historic district is being replaced and additional right-of-way from another contributing part of the district is required.

### Key Points

The Andersen Road Bridge is a single-span reinforced T-beam bridge that is not individually eligible for the *National Register* but is a contributing element to the Bergen Historic District, which is a *National Register* eligible historic district. Due to extreme deterioration, bridge replacement is being proposed. It was concluded that a bridge rehabilitation was not feasible and would still result in an adverse effect to the historic district. The northeast quadrant adjacent to the bridge is the Olsen House, a property that contributes to the historic district. Additional right-of-way from the Olsen House property is needed to accommodate the new bridge structure, but this additional use of the district does not by itself adversely affect the historic district. PennDOT posted an adverse effect finding for the historic district for the replacement of the bridge, which explains that the sliver take, in and of itself would have no adverse effect, but that removal of the contributing bridge would result in an Adverse Effect to the historic district.

### Documentation

The bridge replacement would be documented through use of the *Nationwide/Programmatic Section 4(f) Evaluation for Projects that Necessitate the Use of Historic Bridges Form*. (Refer to Question 8D in FHWA's [Section 4\(f\) Policy Paper](#) - *Can the Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges be applied to the replacement of a historic bridge or culvert that lacks individual distinction but is identified as a contributing element of a historic district that is on or eligible for listing on the NR?*)

Because the additional use of the district does not by itself adversely affect the historic district, the *Determination of Section 4(f) De Minimis Use/Section 2002 No Adverse Use of Historic Properties Form* would be used for documentation and approval of the sliver take.

## Case Study 8

### Objectives

To gain an understanding of when the restoration or rehab (or relocation) of a historic bridge would be exempt.

### Key Points

Sunnyside Bridge is eligible for listing on the *National Register*. To address structural deficiency issues, a rehabilitation is proposed. The rehabilitation can be done without adversely affecting its historic integrity (there is a no adverse effect finding).

### Documentation

The rehabilitation of an eligible or listed transportation facility (bridge) that would not adversely affect the facility is an exception to the requirement of Section 4(f) approval. (23 CFR 774.13(a)) To document this exception, the Non-Applicability/No Use Form was completed.