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Table of Contents

INTRODUCTION

Purpose 1

Important Points 2

SECTION 4(f) EVALUATION

Section 4(f) Format and Approval 4

Alternative Analysis 4

Feasible and Prudent Standard 5

Examples of the Alternative Selection Process 6

Measures to Minimize Harm and Mitigation 7

Coordination 8

Programmatic Section 4(f) Evaluations 8

SECTION 4(f) APPLICABILITY

1) Use of Resources 10

A. Use
B. Constructive Use
C. Temporary Occupancy

2) Public Parks, Public Recreation Areas and Wildlife and Waterfowl Refuges..... 11

A. Publicly Owned Park, Recreation Area or Wildlife and Waterfowl Refuge
B. Significant Park, Recreation Area, or Wildlife and Waterfowl Refuge
C. Public Access
D. Easements and Lease Agreements

3) Historic Sites 13

A. Section 4(f) Significance
B. Section 106 Adverse Effect and Section 4(f) Use
C. Historic Districts
D. Historic Property Boundary
E. National Historic Landmarks

4) Historic Bridges, Highways and Other Transportation Facilities 15

A. Historic Bridges and Highways
B. Historic Bridge Replacement
C. Donations of Historic Bridges
D. Other Historic Transportation Facilities

5) Archeological Resources 16

A. General Applicability
B. Sites Discovered During Construction
C. Archeological Districts

6) Public Multiple-Use Land Holdings 17

7) Late Designation of 4(f) Resources 17

8) Wild and Scenic Rivers 17

A. Designated Wild and Scenic Rivers
B. Rivers Under Study

9) Fairgrounds 18

10) School Playgrounds 19

11) Golf Courses 19

A. Public Golf Courses
B. Military Golf Courses

12) User or Entrance Fees 19

13) Bodies of Water 20

14) Trails 20

A. National Trails System Act
B. Trails on Private Land
C. Trials on Highway Rights-of-Way
D. Recreational Trails Program

15) Bikeways 21

16) Joint Development (Park with Highway Corridor) 21

17) Planned 4(f) Resources 22

18) Temporary Recreational Occupancy or Uses of Highway Rights-of-Way 22

19) Tunneling 22

20) Wildlife and Waterfowl Refuges 23

A. 4(f) Wildlife and Waterfowl Refuges
B. Conservation Easements

21) Air Rights 23

22) Non-Transportation Use of 4(f) Resources 23

23) Scenic Byways 24

24) Transportation Enhancement Projects 24

A. General Applicability
B. Creation of Future 4(f) Resources

25) Museums, Aquariums and Zoos 26

26) Tribal Lands and Indian Reservations 26

27) Traditional Cultural Properties 26

28) Cemeteries 26

A. General Applicability
B. Other Lands with Human Remains

29) Section 4(f) Evaluations in Tiered NEPA documents 27

30) Department of the Interior Handbook on Departmental Review of Section 4(f) Evaluations (2002) 27

APPENDIX A

Analysis of Case Law 28

APPENDIX B

Section 4(f) Evaluation Diagram 35

INTRODUCTION

Section 4(f) was created when the United States Department of Transportation (USDOT) was formed in 1966. It was initially codified at 49 U.S.C. 1653(f) (Section 4(f) of the USDOT Act of 1966) and only applies to USDOT agencies. Later that year, 23 U.S.C. 138 was added with somewhat different language, which applied only to the highway program. In 1983, Section 1653(f) was reworded without substantive change and recodified at 49 U.S.C. 303. In their final forms, these two statutes have no real practical distinction and are still commonly referred to as Section 4(f):

> *"It is hereby declared to be the national policy 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 Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project (other than any project for a park road or parkway under section 204 of this title) which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas."*
>
> *23 U.S.C. 138*

The Federal Highway Administration (FHWA) originally issued the *Section 4(f) Policy Paper* in September 1987. There was a minor amendment in 1989 adding two additional questions and answers. This 2005 paper provides updated comprehensive guidance on when and how to apply the provisions of Section 4(f) on FHWA projects that propose to use 4(f) land or resources. The information presented in this paper is not regulatory, but is the official policy of FHWA on the applicability of Section 4(f) to various types of land and resources and other Section 4(f) related issues. The paper creates no private right of action and its guidance is not judicially binding on the FHWA.

Previous versions of this policy paper are no longer applicable. This issuance also rescinds the November 15, 1989, *Memorandum: Alternatives Selection Process for Projects Involving Section 4(f) of the DOT Act*, signed by Ali Sevin, Director of the Office of Environmental Policy, and by the creation of Question and Answer 24, supersedes the August 22, 1994, *Interim Guidance on Applying Section 4(f) On Transportation Enhancement Projects and National Recreation Trails*.

Purpose of this Paper

This paper explains how Section 4(f) applies generally and to specific situations where resources meeting the Section 4(f) criteria may be involved. It is based on court decisions, experience and on policies developed by FHWA and USDOT over the years. This paper serves as a guide for the applicability of Section 4(f) for common project situations often encountered by FHWA Division Offices, State Departments of Transportation and other partners.

For specific projects that do not completely fit the situations or parameters described in this paper, it is advisable to contact the FHWA Division Office. In turn, the Division Office may contact the Washington Headquarters' Office of Project Development and Environmental Review, the Resource Center Environmental Technical Service Team, and/or the Office of the Chief Counsel. For more information on Section 4(f) refer to the Environmental Guidebook (www.environment.fhwa.dot.gov/guidebook/index.htm) and the FHWA Re: NEPA Community of Practice (http://nepa.fhwa.dot.gov).

Important Points

At the outset, a few important points about Section 4(f) must be understood.

- **Section 4(f) Authority and Responsibility:** Section 4(f) applies only to the actions of agencies within the USDOT. While other agencies may have an interest in Section 4(f), the agencies within the USDOT are responsible for applicability determinations, evaluations, findings and overall compliance.

- **Section 4(f) Applicability:** Section 4(f) applies to any significant publicly owned public park, recreation area, or wildlife and waterfowl refuge and any land from an historic site of national, state or local significance.

- **Public Ownership and Public Access Criteria:** Section 4(f) applies to significant publicly owned public parks and recreational areas that are open to the public, and to significant publicly owned wildlife and waterfowl refuges, irrespective of whether these areas are open to the public or not, since the "major purpose" of a refuge may make it necessary for the resource manager to limit public access. When private institutions, organizations or individuals own parks, recreational areas or wildlife and waterfowl refuges, Section 4(f) does not apply to these properties, even if such areas are open to the public. If a governmental body has a permanent proprietary interest in the land (such as fee ownership or easement), it is considered "publicly owned" and thus, Section 4(f) may be applicable. Section 4(f) also applies to all historic sites of national, state or local significance, whether or not these sites are publicly owned or open to the public. Except in unusual circumstances, only historic properties on or eligible for inclusion on the National Register of Historic Places are protected under Section 4(f).

- **Significance Criteria:** A publicly owned park, recreation area or wildlife and waterfowl refuge must be a "significant" resource for Section 4(f) to apply. Pursuant to 23 C.F.R. 771.135 (c), 4(f) resources are presumed to be significant unless the official having jurisdiction over the site concludes that the entire site is not significant. Even if this is done, FHWA must make an independent evaluation to assure that the official's finding of significance or non-significance is reasonable.

- **Feasible and Prudent Criteria:** Numerous legal decisions on Section 4(f) have resulted in a USDOT policy that findings of "no feasible and prudent alternatives" and "all possible planning to minimize harm", must be well documented and supported. A feasible alternative is an alternative that is possible to engineer, design and build. The leading United States Supreme Court case, commonly known as Overton Park, (Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)), held that to find that an alternative (that avoids a 4(f) resource) is not "prudent" one must find that there are unique problems or unusual factors involved with the use of such alternatives. This means that the cost, social, economic and environmental impacts, and/or community disruption resulting from such alternatives reach extraordinary magnitudes. One can use a totality of these circumstances to establish that these unique problems, unusual factors or other impacts reach extraordinary magnitudes. FHWA has incorporated this decision into existing regulations found at 23 C.F.R. 771.135(a)(2).

- **Documentation and Coordination:** The statute does not require the preparation, distribution or circulation of any written document. The statute also does not contain a public comment element. Other than the U.S. Departments of the Interior, Housing and Urban Development and

Agriculture, the statute also does not require or establish any procedures for coordinating with either other agencies or the public. USDOT has developed departmental requirements for documenting Section 4(f) decisions. For example, the requirements of DOT Order 5610.1C and its predecessors have been incorporated into FHWA regulations. FHWA developed procedures for the preparation, circulation and coordination of Section 4(f) documents in two places; 23 Code of Federal Regulations (C.F.R.) Section 771.135, and FHWA's *Technical Advisory, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents: T 6640.8A.* Both of these sources of information are available at the FHWA NEPA Project Development Website: www.environment.fhwa.dot.gov/projdev/index.htm.

Two purposes of a written Section 4(f) evaluation are to establish an administrative record and to ensure that FHWA has followed the regulatory and statutory requirements. The administrative record is the agency's written record that memorializes the basis for determining that there is no feasible and prudent alternative to the use of the 4(f) resource and demonstrates that FHWA used all possible planning and measures to minimize harm. Likewise, when circulated with the NEPA document, it permits FHWA to obtain comments on avoidance alternatives and measures to minimize harm.

If a Section 4(f) evaluation is legally challenged, it is reviewed in accordance with the Administrative Procedure Act (APA) that provides judicial deference to USDOT actions. Under the APA, the agency's action must be upheld unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law (5 U.S.C. 706 (2)(A)). The court will review the administrative record to determine whether FHWA complied with the elements of Section 4(f). If an inadequate administrative record is prepared, the court will lack the required Section 4(f) elements to review and, therefore, will be unable to defer to it (this is even truer if no Section 4(f) Evaluation is prepared). While agency decisions are entitled to a presumption of regularity and courts are not empowered to substitute their judgment for that of the agency, courts will carefully review whether the agency followed the applicable requirements.

Therefore, the administrative record should contain the following essential information:

1) The applicability or non-applicability of Section 4(f) to a property used by a project;
2) The coordination efforts with the officials having jurisdiction over or administering the land (relative to significance of the land, primary use of the land, mitigation measures, etc.);
3) The location and design alternatives that would avoid the use altogether or minimize the use and harm to the 4(f) land;
4) Analysis of impacts of avoidance and Section 4(f) use alternatives; and
5) All measures to minimize harm, such as design variations, landscaping and other mitigation.

The Section 4(f) analysis process is diagramed in Appendix B.

- **Other Laws and Requirements**: There are often concurrent requirements of other Federal agencies when 4(f) lands are involved in highway projects.[1] It should be noted that Section 4(f) has requirements that are independent from obligations found in these other authorities. In the instance where more than one Federal law is applicable to the 4(f) resource, just because the requirements of one law have been complied with, does not necessarily mean that Section 4(f) is

[1] Examples include: Compatibility determinations for the use of lands in the National Wildlife Refuge System and the National Park System, consistency determinations for the use of public lands managed by the Bureau of Land Management, determinations of direct and adverse effects for Wild and Scenic Rivers under the jurisdiction of such agencies as the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, and Forest Service, and approval of land conversions covered by the Federal-aid in Fish Restoration and the Federal-Aid in Wildlife Restoration Acts (the Dingell-Johnson and Pittman-Robertson Acts), the Recreational Demonstration Projects and the Federal Property and Administrative Service (Surplus Property) Acts, and Section 6(f) of the Land and Water Conservation Fund Act.

also satisfied. FHWA must demonstrate compliance with all the different requirements of applicable law in addition to its Section 4(f) responsibility.

Project mitigation required by other substantive laws can help FHWA satisfy the requirement that a project include all possible planning to minimize harm to a 4(f) resource if it is used. A good example of this is the terms of the Memorandum of Agreement (MOA) with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) when an historic property is adversely affected (under Section 106 of the National Historic Preservation Act) by a FHWA project. Nevertheless, if more reasonable measures to minimize harm to the 4(f) resource can be taken, simply complying with another statutes mitigation measures is not enough.

SECTION 4(f) EVALUATION

When a project proposes to use resources protected by Section 4(f), a Section 4(f) evaluation must be prepared. The following information provides guidance on the key areas of a Section 4(f) evaluation.

Section 4(f) Evaluation Format and Approval

The Section 4(f) evaluation may be developed and processed as a stand-alone document, as in the case of a categorical exclusion (CE) determination, or incorporated into an environmental assessment (EA) or environmental impact statement (EIS) as a separate section of those documents. The format and content for these evaluation documents are addressed in the FHWA *Technical Advisory T 6640.8a, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents, October 30, 1987* (www.environment.fhwa.dot.gov/projdev/impTA6640.htm).

The FHWA Division Office or the Federal Lands Highway Division approves all Section 4(f) evaluations. Prior to Division Office approval, all final Section 4(f) evaluations must undergo legal sufficiency review in accordance with 23 C.F.R. 771.135(k). It is advisable and strongly recommended that the Division Office provide copies of the administrative or pre-draft Section 4(f) evaluation to the appropriate legal staff for preliminary review instead of submitting only the pre-final evaluation for legal sufficiency review.

Alternatives Analysis

The intent of the Section 4(f) statute and the policy of the USDOT is to avoid the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites as part of a project, unless there is no feasible and prudent alternative to the use of such land.[2] In order to demonstrate that there is no feasible and prudent alternative to the use of 4(f) land, the evaluation must address both location alternatives and design shifts that totally avoid the 4(f) land. As noted before, supporting information must demonstrate that there are unique problems or unusual factors involved with the alternatives that avoid the use of 4(f) land, such as findings that these alternatives result in costs, environmental impacts or community disruption of extraordinary magnitudes. Likewise, design shifts that cannot totally avoid use but that minimize the impact, must also be employed unless they are not feasible and prudent.

The Section 4(f) evaluation must address the purpose and need of the project. The need must be sufficiently explained and be consistent with the need set forth in any concurrent National Environmental Policy Act (NEPA) documentation. The Section 4(f) evaluation may reference the purpose and need included in a NEPA document, without reiteration, when the evaluation is included as a chapter of the document. Any alternative that is determined to not meet the need of the project, including the no-build alternative, is not a feasible and prudent alternative[3]. The evaluation must include this analysis.

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[2] "Significance" of one of these types of properties is presumed unless an official with jurisdiction determines that the entire site is not significant.

3 Alaska Center for Environment v. Armbrister, 131 F.3d 1285, 1288 (9th Cir. 1987); Arizona Past and Future Foundation v. Lewis, 722 F2d 1423, 1428 (9th Cir. 1983); Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 163 (4th Cir. 1990); Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 804 (7th Cir. 1987); Committee to Preserve Boomer Lake Park v. USDOT,

It is important to point out that the standard for evaluating alternatives under NEPA and the standard for evaluating alternatives under Section 4(f) are different. In general, under NEPA, FHWA can advance to detailed study any reasonable alternative, among a range of alternatives, as long as there is sufficient information that shows a well-reasoned decision to include that alternative. However, under Section 4(f), if there is a feasible and prudent alternative that avoids the use of a 4(f) resource, among alternatives that use a 4(f) resource, the alternative that must be selected is the one that avoids the 4(f) resource.

Likewise, the test under NEPA, to eliminate a reasonable alternative is based on a number of independent factors or a totality of cumulative factors. However, simply because under NEPA an alternative (that meets the purpose and need) is determined to be unreasonable, does not by definition, mean it is imprudent under the higher substantive test of Section 4(f). Therefore, it is possible for an alternative that was examined but dismissed during the preliminary NEPA alternative screening process to still be a feasible and prudent avoidance alternative under Section 4(f). In other words, there is more room to reject alternatives as unreasonable under NEPA than there is to find those same alternatives are imprudent under Section 4(f).

Feasible and Prudent Standard

The first test under Section 4(f) is to determine which alternatives are feasible and prudent. An alternative is feasible if it is technically possible to design and build that alternative. The second part of the standard involves determining whether an alternative is prudent or not, which is more difficult to define.

An alternative may be rejected as not prudent for any of the following reasons:

1) It does not meet the project purpose and need,
2) It involves extraordinary operational or safety problems,
3) There are unique problems or truly unusual factors present with it,
4) It results in unacceptable and severe adverse social, economic or other environmental impacts,
5) It would cause extraordinary community disruption,
6) It has additional construction costs of an extraordinary magnitude, or
7) There is an accumulation of factors that collectively, rather than individually, have adverse impacts that present unique problems or reach extraordinary magnitudes.

Where sufficient analysis demonstrates that a particular alternative is not feasible and prudent, the analysis or consideration of that alternative as a viable alternative comes to an end. If all alternatives use land from 4(f) resources, then an analysis must be performed to determine which alternative results in the least overall harm to the 4(f) resources. If the net harm to 4(f) resources in all the alternatives is equal, then FHWA may select any one of them. In other words, if the project proposes to use similar amounts of similar 4(f) resources, there is no alternative that would cause the least overall harm. In either situation, it is essential that the agency having jurisdiction over the 4(f) resource be consulted.

It should be noted that the net harm analysis is governed by all the possible mitigation that could be done to minimize harm to the 4(f) resource. The net harm should be determined in consultation with the agency having jurisdiction over the resource or, in the case of historic sites, the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), as appropriate. By including mitigation, impacts on the 4(f) property could be reduced or eliminated. The alternative that results in the least net harm must be selected.

Not all uses of 4(f) resources have the same magnitude of impact and not all 4(f) resources have the same quality. A qualitative evaluation is required. For example, evaluation of the net impact should consider whether the use of the 4(f) property involves:

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4 F.3d 1543, 1550 (10th Cir. 1993); Druid Hills v. FHWA, 772 F.2d 700 (11th Cir. 1985); Ringsred v. Dole, 828 F.2d 1300, 1304 (8th Cir. 1987).

1) A large taking or a small taking in relation to the overall size of the resource, or
2) Shaving an edge of a property as opposed to cutting through its middle, or
3) Altering part of the land surrounding an historic building rather than removing the building itself, or
4) Examining the key features of the 4(f) resource, or
5) An unused portion of a park rather than a highly used portion.

When different alternatives propose to use different 4(f) resources, the importance of the resources must be considered. For example, three marginal acres of a large park may be less important than one acre of a smaller city park. To provide support for these complex evaluations, the officials with jurisdiction over the 4(f) resources should be consulted and their opinions memorialized in the administrative record.

As Congress gave 4(f) resources paramount importance, care should be taken to apply consistent standards throughout the length of any given project. For example, it would be inconsistent to accept a restricted roadway cross section in order to reduce the project costs or to gain a minimal safety benefit, when at other locations on the same project this restricted roadway cross section is rejected as unacceptable in order to avoid a park. This same concept should be applied between projects as well.

Examples of the Alternative Selection Process

One of the most difficult areas of analysis is the evaluation of alternatives, and their impacts on both 4(f) and non-4(f) resources, and then deciding which alternative to select. Issues such as, what role does mitigation play in selecting alternatives, what to do if there are multiple 4(f) properties used and how other important resources in the project vicinity should be considered, make this area of analysis complex. It is essential to document the reasoning for dismissing an alternative as well as the reasoning for selecting an alternative. This documentation will become a key part of the administrative record. To address some of these scenarios, consider the following three project examples. Also, refer to the summary table on Page 7, following this discussion.

On project 1, Alternatives C and D are determined not to be feasible and prudent. While these alternatives may or may not use land from a 4(f) resource, it is immaterial since they simply cannot be built. Thus, no further analysis of C or D is warranted. Since Alternatives A and B are feasible and prudent and because B does not use land from a 4(f) resource, Alternative B must be selected. It is not necessary to determine the relative harm that Alternative A has on the 4(f) resources, because B is a feasible and prudent avoidance alternative.

On project 2, Alternatives C and D are determined not to be feasible and prudent. No further consideration need be given these alternatives. Of the remaining feasible and prudent alternatives, both Alternatives A and B use land from 4(f) resources. FHWA can approve only the feasible and prudent alternative that has the least overall harm to the 4(f) resource. Here, B must be selected since the harm to 4(f) resources is the least. When there are multiple alternatives that use a 4(f) resource, it should be noted that simply because an alternative uses more acreage, that might not be the greatest Section 4(f) use. In conclusion, to determine which alternative has the least harm, one should evaluate the importance of the 4(f) resource, the potential for mitigation and confer with the official(s) with jurisdiction over the 4(f) resource.

On project 3, all the build alternatives use 4(f) resources, such that there are no feasible and prudent alternatives that avoid the 4(f) resources. As all four alternatives use 4(f) land, one needs to evaluate the impacts both to 4(f) and non-4(f) resources to select the prudent and least overall harm alternative. Among the 4 alternatives, A and B have almost equal Section 4(f) net impacts but more impacts than Alternatives C and D, so neither A nor B can be selected. However, between Alternatives C and D, C has more Section 4(f) impacts than D. Therefore, usually one must choose Alternative D as illustrated in the example in project 2 above. There are times; however, that there will be additional important non-Section 4(f) environmental impacts that must go into the equation of what is the prudent alternative. If Alternative C has slightly higher Section 4(f) impacts than Alternative D, but there are additional important environmental impacts associated with Alternative D (that Alternative C does not have), it may be more prudent to choose Alternative C. Examples of non-4(f) resources could be an endangered species or

critical habitat being taken, CERCLA or superfund site problems, the elimination of valuable wetlands, and/or major environmental justice issues. In this instance, the prudent decision is the one that causes the overall least harm to all environmental resources, both 4(f) and non-4(f) resources. Section 4(f) plays a significant role in this decision-making process but in total, the prudent choice here is not the alternative that uses the least amount of 4(f) property. Therefore, Alternative C would be advanced. The courts have accepted this totality of impacts analysis[4].

Project	Alternative	Feasible and Prudent Alternative?	Uses 4(f) Land?	Relative Net Harm to Section 4(f) Land After Mitigation
1	A	Yes	Yes	NA[a]
	B	Yes	No	None
	C	No	Yes (NA)[b]	NA
	D	No	No (NA) [b]	NA
2	A	Yes	Yes	Greater
	B	Yes	Yes	Lesser
	C	No	Yes (NA) [b]	NA[b]
	D	No	No (NA) [b]	NA[b]
3	A	(NA)[c]	Yes	Equal to B, but more than C or D
	B		Yes	Equal to A but more than C or D
	C		Yes	Harm to 4(f) greater than alt. D, but with less overall impacts to important resources
	D		Yes	Harm to 4(f) less but with more overall impacts

[a] In project 1, there is a feasible and prudent alternative, which does not use Section 4(f) protected property (Alt. B). Any alternative which uses Section 4(f) protected property must be eliminated from further consideration.
[b] Since this alternative is not feasible and prudent, it should be eliminated from further consideration. Whether Section 4(f) land is used and the relative harm to Section 4(f) protected properties are no longer relevant factors.
[c] Since all alternatives use 4 (f) resources, a prudent and feasible avoidance alternatives analysis is not required.

Measures to Minimize Harm and Mitigation

In addition to determining that there are no feasible and prudent alternatives to avoid the use of 4(f) resources, the project approval process requires the consideration of "all possible planning to minimize harm" on the 4(f) resource. Minimization of harm entails both alternative design modifications that lessen the impact on 4(f) resources and mitigation measures that compensate for residual impacts. Minimization and mitigation measures should be determined through consultation with the official of the agency owning or administering the resource. Neither the Section 4(f) statute nor regulation requires the replacement of 4(f) resources used for highway projects, but this option is appropriate under 23 C.F.R. 710.509 as a mitigation measure for direct project impacts.

Mitigation measures involving public parks, recreation areas, or wildlife and waterfowl refuges may involve a replacement of land and/or facilities of comparable value and function, or monetary

[4] Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 163 (4th Cir. 1990); Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 805 (7th Cir. 1987); Louisiana Env. Society, Inc. v. Dole, 707 F.2d 116, 122 (5th Cir. 1983); Committee to Preserve Boomer Lake Park v. USDOT, 4 F.3d 1543, 1550 (10th Cir. 1993).

compensation, which could be used to enhance the remaining land. Mitigation of historic sites usually consists of those measures necessary to preserve the historic integrity of the site and agreed to in accordance with 36 C.F.R. Part 800, by FHWA, the State Historic Preservation Officer (SHPO) or the Tribal Historic Preservation Officer (THPO), and as appropriate, the Advisory Council on Historic Preservation (ACHP). In any case, the cost of mitigation should be a reasonable public expenditure in light of the severity of the impact on the 4(f) resource in accordance with 23 C.F.R. 771.105(d). Section 6(f) of the Land and Water Conservation Fund Act has its own mitigation requirements, but as noted before, these can be part of the 4(f) minimization requirement if the resource cannot be avoided[5].

Coordination

Preliminary coordination prior to the circulation of the draft Section 4(f) evaluation should be accomplished with the official(s) of the agency owning or administering the resource, the Department of Interior (DOI) and, as appropriate, the Departments of Agriculture (USDA) and Housing and Urban Development (HUD). The preliminary coordination with DOI and HUD should be either at the appropriate field office or at the regional level. The preliminary coordination with USDA should be with the appropriate National Forest Supervisor. There should be coordination with USDA whenever a project uses land from the National Forest System. Since the Housing and Urban Rural Recovery Act of 1983 repealed the use restrictions for the Neighborhood Facilities Program authorized by Title VII of the HUD Act of 1965 and the Open Space Program authorized by Title VII of the Housing Act of 1961, the number of instances where coordination with HUD should be accomplished has been substantially reduced. Coordination with HUD should occur whenever a project uses a 4(f) resource where HUD funding (other than the above) had been utilized.

If any issues are raised by these agencies resulting from the circulation of the draft Section 4(f) evaluation, follow up coordination must be undertaken to resolve the issues. In most cases the agency's response will indicate a contact point for the follow up coordination. However, case law indicates that if reasonable efforts to resolve the issues are not successful (one of these agencies is not satisfied with the way its concerns were addressed) and the issues were disclosed and received good-faith attention from the decision maker, FHWA has met the procedural obligation under Section 4(f) to consult with and obtain the agency's comments. Section 4(f) does not require more.

Programmatic Section 4(f) Evaluations

As an alternative to preparing an individual Section 4(f) evaluation, FHWA may, in certain circumstances utilize a programmatic evaluation. Under a programmatic Section 4(f) evaluation, certain conditions are laid out such that, if a project meets the conditions it will satisfy the requirements of Section 4(f) that there is no feasible and prudent alternative and that the project includes all possible planning to minimize harm. These conditions generally relate to the type of project, the severity of impacts to 4(f) property, the evaluation of alternatives, the establishment of a procedure for minimizing harm to the 4(f) resource, adequate coordination with appropriate entities and the NEPA class of action. Programmatic Section 4(f) statements have certain elements in common; (1) they involve projects with typical and limited range of alternatives; and (2) the official having jurisdiction over the land agrees with the use evaluation and the proposed mitigation. Programmatic evaluations can be nationwide, region-wide, or statewide. The development of statewide or regional programmatic evaluations must be coordinated with the Office of Project Development and Environmental Review and the Office of Chief Counsel.

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[5] State and local governments often obtain grants through the Land and Water Conservation Fund Act to acquire or make improvements to parks and recreation areas. Section 6(f) of this Act prohibits the conversion of property acquired or developed with these grants to a non-recreational purpose without the approval of the Department of the Interior's (DOI) National Park Service. Section 6(f) directs DOI to assure that replacement lands of equal value, location and usefulness are provided as conditions to such conversions. Consequently, where conversions of Section 6(f) lands are proposed for highway projects, replacement lands will be necessary. Regardless of the mitigation proposed, the Section 4(f) evaluation should document the National Park Service's tentative position relative to Section 6(f) conversion.

There are currently four approved Nationwide Programmatic Section 4(f) Evaluations. These evaluations are found at the links provided below to the FHWA Environmental Guidebook and the Project Development Website:

1) Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges. This evaluation sets forth the basis for approval that there are no feasible and prudent alternatives to the use of certain historic bridge structures to be replaced or rehabilitated with Federal funds and that the projects include all possible planning to minimize harm resulting from such use.
(www.environment.fhwa.dot.gov/guidebook/vol2/doc15j.pdf and www.environment.fhwa.dot.gov/projdev/4fbridge.htm)

2) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges. This programmatic evaluation is applicable for projects that improve existing highways and use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges that are adjacent to existing highways.
(www.environment.fhwa.dot.gov/guidebook/vol2/doc15g.pdf and www.environment.fhwa.dot.gov/projdev/4fmparks.htm)

3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites. This programmatic evaluation has been prepared for projects that improve existing highways and use minor amounts of land (including non-historic improvements thereon) from historic sites that are adjacent to existing highways where the effect is determined not to be adverse.
(www.environment.fhwa.dot.gov/guidebook/vol2/doc15e.pdf and www.environment.fhwa.dot.gov/projdev/4fmhist.htm)

4) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects. This 1977 negative declaration applies to bikeway and/or walkway projects that require the use of land from Section 4(f) resources.
(www.environment.fhwa.dot.gov/guidebook/vol2/doc15m.pdf and www.environment.fhwa.dot.gov/projdev/4fbikeways.htm)

The fact that these programmatic Section 4(f) evaluations are approved does not mean that these types of projects are exempt from or automatically comply with the requirements of Section 4(f). Section 4(f) does, in fact, apply to each of the types of projects addressed by these programmatic evaluations. Furthermore, the programmatic Section 4(f) does not relax the Section 4(f) standards of feasible and prudent and minimization of harm. The FHWA Division Administrator or Division Engineer is responsible for reviewing each individual project to determine that it meets the criteria and procedures of the specific programmatic Section 4(f) evaluation. The FHWA Division Administrator's or Division Engineer's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document, placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

Programmatic Section 4(f) evaluations streamline the documentation and approval process and amount of interagency coordination that is required for an individual Section 4(f) evaluation. Draft and final evaluations do not need to be prepared and FHWA legal sufficiency review is not required. Interagency coordination is required only with the official(s) with jurisdiction and not with DOI, USDA, or HUD (unless the Federal agency has a specific action to take, such as DOI approval of a conversion of land acquired using Land and Water Conservation Funds).

Section 4(f) Applicability

The following questions and answers provide guidance on the applicability of Section 4(f) to various types of land, resources and project situations. The examples represent FHWA's policy on the situations most often encountered in the project development process. For advice on specific situations or issues not covered in this paper, the FHWA Division Office should be consulted, and if necessary the Division Office can contact the Washington Headquarters Office of Project Development and Environmental Review and/or the Office of the Chief Counsel. An analysis of Section 4(f) case law as it relates to many of the following situations and examples is included in Appendix A, for your information.

1. Use of Resources

Question A: What constitutes a "use" of land from a publicly owned public park, public recreation area, wildlife refuge and waterfowl refuge or historic site?

Answer A: Section 4(f) "use" is defined and addressed in the FHWA/FTA Regulations at 23 C.F.R. 771.135(p). A "use" occurs when:

1) Land from a 4(f) site is permanently incorporated into a transportation facility,
2) There is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute's preservationist purposes (23 C.F.R. 771.135(p)(7)), or
3) When there is a constructive use of land (23 C.F.R. 771.135(p)(2)).

Land will be considered permanently incorporated into a transportation project when it has been purchased as right-of-way or sufficient property interests have been otherwise acquired for the purpose of project implementation. For example, a "permanent easement" which is required for the purpose of project construction or that grants a future right of access onto 4(f) property, such as for the purpose of routine maintenance by the transportation agency, would be considered a permanent incorporation of land into a transportation facility.

Project activities involving the restoration, rehabilitation or maintenance of highways, bridges or other eligible transportation facilities (23 C.F.R. 771.135(f)) that are on or eligible for the National Register of Historic Places will not "use" land from these 4(f) resources when the project does not adversely effect (under Section 106 of the National Historic Preservation Act) the historic qualities of the facility for which it was determined eligible for the National Register of Historic Places, and the State Historic Preservation Officer has been consulted and does not object to the finding of no historic properties adversely affected (see also Question 4).

Question B: How is "constructive use" defined and determined?

Answer B: 23 C.F.R. 771.135(p) defines what a constructive use is. FHWA has identified certain project situations where a constructive use will occur and when a constructive use will not occur (see 23 C.F.R. 771.135(p)(4) and (5)). Constructive use is only possible in the absence of permanent incorporation or temporary occupancy of the type that constitutes a use of 4(f) land by a transportation project. Constructive use only occurs in those situations where, including mitigation, the proximity impacts of a project on the 4(f) property are so severe that the activities, features or attributes that qualify the property or resource for protection under Section 4(f) are substantially impaired. Substantial impairment occurs when the activities, features or attributes of the 4(f) property are substantially diminished (23 C.F.R. 771.135(p)(2)), which means that the value of the resource in terms of its Section 4(f) significance will be meaningfully reduced or lost. The degree of impact and impairment should be determined in consultation with the officials having jurisdiction over the resource.

An example of such an impact might be the traffic noise resulting from a new or improved highway facility proposed near an amphitheater that substantially interferes with the use and enjoyment of the noise-sensitive resource, and the conditions set forth in 23 C.F.R. 771.135(p) are satisfied. For additional information on noise, please refer to FHWA noise regulations at 23 C.F.R. 772.

Constructive use determinations will be rare[6]. The impacts outlined in 23 C.F.R. 771.135(p)(4), involving projects adjacent to or in the proximity of 4(f) resources should be carefully examined. If it is determined that the proximity impacts do not cause a substantial impairment, FHWA can reasonably conclude that there is no constructive use. FHWA has determined that certain impacts constitute a constructive use and that others do not (see 23 C.F.R. 771.135(p)(4) and (5)). Environmental documents should of course contain the analysis of any potential proximity effects and consider whether or not there is substantial impairment to a 4(f) resource. Except for responding to review comments in environmental documents, which specifically address constructive use, the term "constructive use" need not be used. Where a constructive use determination is likely, the FHWA Division Office must consult with the Headquarters Office of Project Development and Environmental Review during development of the preliminary-draft Section 4(f) evaluation.

Question C: When does temporary occupancy of a 4(f) resource result in a 4(f) use?

Answer C: In general, Section 4(f) does not apply to the temporary occupancy, including those resulting from a right-of-entry, construction, other temporary easements or short-term arrangements, of a significant publicly owned public park, recreation area or wildlife and waterfowl refuge, or any significant historic site where temporary occupancy of the land is so minimal that it does not constitute a use within the meaning of Section 4(f).

A temporary occupancy will not constitute a use of 4(f) resource when all of the conditions set forth in 23 C.F.R. 771.135(p)(7) are met:

(1) Duration (of the occupancy) must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;
(2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the 4(f) resource are minimal;
(3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purpose of the resource, on either a temporary or permanent basis;
(4) The land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and
(5) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

In the situation where a project does not meet all of the above criteria, the temporary occupancy will be considered a use of the 4(f) resource and the appropriate Section 4(f) analysis will be required.

2. Public Parks, Public Recreation Areas and Wildlife and Waterfowl Refuges

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

Answer A: Publicly owned land is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such by a Federal, State or local agency and the officials of these governmental entities, having jurisdiction over the land, determine that one of its major purposes and functions is for park, recreation or as a refuge. Incidental, secondary, occasional or dispersed park, recreational or refuge activities do not constitute a major purpose.

For the most part the "officials having jurisdiction" are the officials of the agency owning or administering the land. There may be instances where the agency owning or administering the land has delegated or

[6] The FHWA's constructive use policy was formalized in regulation on April 1, 1991, with the addition of paragraph (p) to 23 C.F.R. 771.135. The November 12, 1985, memorandum from Mr. Ali F. Sevin, Director of the Office of Environmental Policy to the Regional Federal Highway Administrators is no longer applicable.

relinquished its authority to another agency, via an agreement on how some of its land will function or be managed. FHWA will review this agreement and determine which agency has authority on how the land functions. If the authority has been delegated or relinquished to another agency, that agency must be contacted to determine the major purpose(s) of the land. Management plans that address or officially designates the major purpose(s) of the property should be reviewed as part of this determination. After consultation, and in the absence of an official designation of purpose and function by the officials having jurisdiction, FHWA will base its decision on its own examination of the actual functions that exist.

The final decision on applicability of Section 4(f) to a particular property or type of land is made by FHWA. In reaching this decision, however, FHWA will rely on the official having jurisdiction over the resource to identify the kinds of activities and functions that take place, and that these activities constitute a major purpose. Documentation of the determination of non-applicability should be included in the environmental document or project record.

Question B: How should the significance of public parks, recreation areas and wildlife and waterfowl refuges be determined?

Answer B: "Significance" determinations, on publicly owned land considered to be parks, recreation areas or wildlife and waterfowl refuges, pursuant to Answer 2 A above, are made by the Federal, State, or local officials having jurisdiction over the land. As discussed above, the "officials having jurisdiction" are officials of the agency owning or administering the land. For certain types of 4(f) resources, more than one agency may have jurisdiction or interest in the property.

Except for certain multiple-use land holdings, discussed in Question 6, significance determinations must consider the entire property and not just the portion of the property proposed for use by the project. The meaning of the term "significance", for purposes of Section 4(f), should be explained to the officials having jurisdiction. Significance means that in comparing the availability and function of the park, recreational area or wildlife and waterfowl refuge, with the park, recreation or refuge objectives of the community or authority, the resource in question plays an important role in meeting those objectives. Management plans or other official forms of documentation regarding the land, if available and up-to-date, are important in this determination. If a determination from the official with jurisdiction cannot be obtained, and a management plan is not available or does not address significance of the 4(f) land, it will be presumed to be significant until FHWA reviews the determination and reaches a different conclusion. All determinations, whether stated or presumed, are subject to review by FHWA for reasonableness.

Question C: Are publicly owned parks and recreation areas, which are significant but not open to the public as a whole, subject to the requirements of Section 4(f)?

Answer C: The requirements of Section 4(f) would apply if the entire public park or public recreation area permits visitation by the general public at any time during the normal operating hours of the facility. Section 4(f) would not apply when visitation is permitted to only a select group and not the entire public. Examples of select groups include residents of a public housing project; military and their dependents (see also Question 11 B); students of a school; and students, faculty, and alumni of a college or university. FHWA does, however, strongly encourage the preservation of such parks and recreation areas; even though they may not be open to the general public.

It should be noted that wildlife and waterfowl refuges have not been included in this discussion. The statute uses the modifying term public to parks and recreation areas and, therefore, the "open to the public" requirement only applies to park and recreational area lands. Many wildlife and waterfowl refuges allow public access, while others may not, especially during certain times or seasons of the year. In these cases, the publicly owned resource should be examined by the FHWA Division Office to determine that the primary purpose of the property and resource is for wildlife or waterfowl refuge and not for other non-Section 4(f) activities (see also Question 20).

Question D: When does an easement or lease agreement with a governmental body constitute "public ownership"?

Answer D: Case law holds that land subject to a public easement in perpetuity can be considered publicly owned land for the purpose the easement exists. Under special circumstances, lease agreements may also constitute a permanent and proprietary interest in the land. Such lease agreements must be determined on a case-by-case basis and such factors as the term of the lease, the understanding of the parties to the lease, cancellation clauses and the like should be considered. Any questions on whether or not the leasehold or other interest constitutes public ownership should be referred to the Federal Highway Administration Division Office, and if necessary the FHWA Division Office should consult with the Washington Headquarters Office of Project Development and Environmental Review and the Office of the Chief Counsel.

3. Historic Sites

Question A: How is the significance (for Section 4(f) purposes) of historic sites determined?

Answer A: Pursuant to the National Historic Preservation Act (NHPA), the FHWA Federal Lands Highway Division (for Federal-lands projects) or FHWA Division in cooperation with the Applicant, i.e. State Department of Transportation (for Federal-aid projects) consults with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and if appropriate, with local officials to determine whether a site is on or eligible for the National Register of Historic Places. In case of doubt or disagreement between FHWA and the SHPO or THPO, a request for a determination of eligibility may be made to the Keeper of the National Register. A third party may also seek the involvement of the Keeper through the Advisory Council on Historic Preservation (ACHP) for a determination of eligibility,

For purposes of Section 4(f), an historic site is significant only if it is on or eligible for the National Register, unless FHWA determines that the application of Section 4(f) is otherwise appropriate. If an historic site is determined not to be on or eligible for the National Register, but an official (such as the Mayor, President of the local historic society, etc.) formally provides information to indicate that the historic site is of local significance, FHWA may determine that it is appropriate to apply Section 4(f) in that case. In the event that Section 4(f) is found inapplicable, the FHWA Division Office should document the basis for not applying Section 4(f). Such documentation might include the reasons why the historic site was not eligible for the National Register.

Question B: Does Section 4(f) apply when there is an adverse effect determination under the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) (36 C.F.R. 800.5)?

Answer B: FHWA's determination of adverse effect under 36 C.F.R. 800.5 (www.achp.gov/work106.html) does not mean that Section 4(f) automatically applies, nor should it be presumed that the lack of an adverse effect finding (no historic properties adversely affected) means that Section 4(f) will not apply. When a project permanently incorporates land of an historic site, with or without an adverse affect, Section 4(f) applies. However, if a project does not physically take (permanently incorporate) historic property but causes an adverse effect, one must assess the proximity impacts of the project in terms of the potential for "constructive use" (see also Question 1 B). This analysis must determine if the proximity impact(s) will substantially impair the features or attributes that contribute to the National Register eligibility of the historic site or district. If there is no substantial impairment, notwithstanding an adverse effect determination, there is no constructive use and Section 4(f) requirements do not apply. Substantial impairment should be determined in consultation with the SHPO and/or THPO and thoroughly documented in the project record. The determination of Section 4(f) applicability is ultimately FHWA's decision.

As an example of a situation in which there is a Section 106 adverse effect but no Section 4(f) use, consider a transportation enhancement project where an abandoned National Register listed bus station

will be rehabilitated. Rehabilitation for public use will require consistency with the American with Disabilities Act (ADA). The incorporation of ramps or an elevator will meet the definition of an adverse effect, however, there is no permanent incorporation of land into a transportation facility and all parties agree that the rehabilitation will not substantially impair the property. Therefore, Section 4(f) would not apply.

An example of a Section 4(f) use without a Section 106 adverse effect involves a project on existing alignment, which proposes minor improvements at an intersection. To widen the roadway sufficiently, a small amount of property from an adjacent Section 106 property will be acquired, but the significance of the Section 106 resource is such that the SHPO concurs in FHWA's determination of no adverse effect. However, the use of the property will permanently incorporate property of the historic site into a transportation facility and Section 4(f) will apply. This project situation may be evaluated using the *Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites* (www.environment.fhwa.dot.gov/guidebook/vol2/doc15e.pdf), as long as the class of action is not an EIS.

Question C: How does Section 4(f) apply in historic districts on or eligible for National Register?

Answer C: Within a National Register (NR) listed or eligible historic district, Section 4(f) applies to the use of those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. It must be noted generally, that properties within the bounds of an historic district are assumed to contribute, unless it is otherwise stated or they are determined not to be. For those properties that are not contributing elements of the district or individually significant, the property and the district as a whole must be carefully evaluated to determine whether or not it could be used without substantial impairment of the features or attributes that contribute to the NR eligibility of the historic district.

The proposed use of non-historic property within an historic district which results in an adverse effect under Section 106 of the NHPA will require further consideration to determine whether or not there may be a constructive use. If the use of a non-historic property or non-contributing element substantially impairs (see Question 2 B) the features or attributes that contribute to the NR eligibility of the historic district, then Section 4(f) would apply. In the absence of an adverse effect determination, Section 4(f) will not apply. Appropriate steps, including consultation with the SHPO and/or THPO, should be taken to establish and document that the property is not historic, that it does not contribute to the National Register eligibility of the historic district and its use would not substantially impair the historic district.

As an example, consider the situation where traffic signals are warranted in a National Register listed or eligible historic district. The locations of the mast arms and control box are severely limited because of the built-up nature of the district. Although no right-of-way will be acquired, it is consistent with the NHPA regulations that there will be an adverse effect on the historic district. However, it may be reasonably determined that no individually eligible property, contributing element, or the historic district as a whole will be substantially impaired; therefore Section 4(f) will not apply.

Question D: How should the boundaries of a property eligible for listing on the National Register be determined where a boundary has not been established?

Answer D: In this situation, FHWA makes the determination of an historic property's boundary under the regulations implementing Section 106 of the NHPA in consultation with the SHPO and/or the THPO. The identification of historic properties and the determination of boundaries should be undertaken with the assistance of qualified professionals during the very beginning stages of the NEPA process. This process requires the collection, evaluation and presentation of the information to document FHWA's determination of the property boundaries. The determination of eligibility, which would include boundaries of the site, rests with FHWA, but if SHPO, THPO, or other party disagrees with this determination it can

"appeal" FHWA's determination to the Keeper of the National Register in accordance with the provisions of the Section 106 process.

Selection of boundaries is a judgment based on the nature of the property's significance, integrity, setting and landscape features, functions and research value. Most boundary determinations will take into account the modern legal boundaries, historic boundaries (identified in tax maps, deeds, or plats), natural features, cultural features and the distribution of resources as determined by survey and testing for subsurface resources. Legal property boundaries often coincide with the proposed or eligible historic site boundaries, but not always and, therefore, should be individually reviewed for reasonableness. The type of property at issue, be it a historic building, structure, object, site or district and its location in either urban, suburban or rural areas, will require the consideration of various and differing factors. These factors are set out in the *National Park Service Bulletin Defining Boundaries for National Register Properties*. This Bulletin and other information can be found at the following website: www.cr.nps.gov/nr/publications/bulletins/boundaries.

Question E: How are National Historic Landmarks treated under Section 4(f)?

Answer E: Section 4(f) requirements related to the potential use of a National Historic Landmark (NHL) designated by the Secretary of Interior are essentially the same as they are for any historic property determined under the Section 106 process. Section 110(f) of the NHPA outlines the specific actions that an Agency must take when NHL may be directly and adversely affected by an undertaking. Agencies must, "to the maximum extent possible ... minimize harm" to the NHL affected by an undertaking. While not expressly stated in the Section 4(f) statutory language or regulations, the importance and significance of the NHL should be considered in the FHWA's Section 4(f) analysis.

4. Historic Bridges, Highways and Other Transportation Facilities

Question A: How does Section 4(f) apply to historic bridges and highways?

Answer A: The Section 4(f) statute places restrictions on the use of land from historic sites for highway improvements but makes no mention of historic bridges or highways, which are already serving as transportation facilities. The Congress clearly did not intend to restrict the rehabilitation, repair or improvement of these facilities. FHWA, therefore, determined that Section 4(f) would apply only when an historic bridge or highway is demolished, or if the historic quality for which the facility was determined to be eligible for the National Register is adversely affected by the proposed improvement. The determination of adverse effect under 36 CFR 800.5 is made by FHWA in consultation with the SHPO and/or THPO. Where FHWA determines that the facility will not be adversely affected the SHPO/THPO must concur with the determination or FHWA must seek further input from the ACHP.

Question B: Will Section 4(f) apply to the replacement of an historic bridge that is left in place?

Answer B: Section 4(f) does not apply to the replacement of an historic bridge on new location when the historic bridge is left in its original location if its historic value will be maintained, and the proximity impacts of the new bridge do not result in a substantial impairment of the historic bridge. To satisfy the first requirement, FHWA requires the establishment of a mechanism of continued maintenance to avoid the circumstance of harm to the bridge due to neglect.

Question C: How do the requirements of Section 4(f) apply to donations pursuant to 23 U.S.C. 144(o) to a State, locality, or responsible private entity?

Answer C: 23 U.S.C. 144(o) is a separate requirement related to historic bridges when demolition is proposed. 23 U.S.C. 144(o)(4) requires the State that proposes to demolish an historic bridge for a replacement project using Federal funds (i.e. Section 144 bridge funds) to first make the bridge available for donation to a State, locality or a responsible private entity. This process is commonly known as

"marketing the historic bridge". The State, locality or responsible entity that accepts the donation must enter into an agreement to maintain the bridge and the features that give it its historic significance, and assume all future legal and financial responsibility for the bridge. Therefore, Section 4(f) will not apply to the bridges that are donated according to requirements of 23 U.S.C. 144(o) as the bridge is not used in the transportation project. The exception found in 23 C.F.R. 771.135(f) also applies, given the maintenance agreement that is required under 23 U.S.C. 144(o).

If the bridge marketing effort is unsuccessful and the bridge is to be demolished, the evaluation must include the finding that there is no feasible and prudent alternative to the use and the project includes all possible planning to minimize harm.

Note: *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* (www.environment.fhwa.dot.gov/guidebook/vol2/doc15j.pdf) may be used for projects that require the use of an historic bridge.

Question D: Does Section 4(f) apply to other historic transportation facilities?

Answer D: Yes, but in the case of restoration, rehabilitation or maintenance of historic transportation facilities (e.g. railroad stations and terminal buildings which are on or eligible for the National Register) Section 4(f) only applies when the facility will be adversely affected (36 C.F.R. 800.5) by the proposed improvement.

5. Archaeological Resources

Question A: When does Section 4(f) apply to archaeological sites?

Answer A: Section 4(f) applies to all archaeological sites that are on or eligible for inclusion on the National Register and that warrant preservation in place. This includes those sites discovered during construction. Section 4(f) does not apply if FHWA, after consultation with the SHPO and/or THPO, determines that the archaeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed not to recover the resource) and has minimal value for preservation in place (23 CFR 771.135(g)).

Question B: How are archeological sites discovered during construction of a project handled?

Answer B: For sites discovered during construction, where preservation of the resource in place is warranted, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take into account the level of investment already made. The review process, including the consultation with other agencies should be shortened, as appropriate. An October 19, 1980, *Memorandum of Understanding with the Heritage Conservation and Recreation Service* (now part of the National Park Service) provides emergency procedures for unanticipated cultural resources discovered during construction. The MOU is available in the FHWA Environmental Guidebook (www.environment.fhwa.dot.gov/guidebook/vol2/doc10j.pdf). 36 C.F.R. 800.13 addresses the process for considering post-review discoveries under the Section 106 process.

Question C: How should the Section 4(f) requirements be applied to archaeological districts?

Answer C: Section 4(f) requirements apply to archeological districts in the same way as historic districts, but only where preservation in place is warranted. Section 4(f) would not apply if after consultation with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), FHWA determines that the project would occupy only a part of the archaeological district which is considered a non-contributing element of that district or that the project occupies only a part of the district which is important chiefly because of what can be learned by data recovery and has minimal value for

preservation in place. As with an historic district, if FHWA determines the project will result in an adverse effect on an archaeological district, which is significant for preservation in place, then FHWA must consider whether or not the project impacts will result in a "substantial impairment" and a constructive use determination is warranted.

6. Public Multiple-Use Land Holdings

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

Answer: Section 4(f) applies to historic properties (those on or eligible for the National Register of Historic Places) located on these multiple-use land holdings and only to those portions of the lands which are designated by statute or identified in the management plans of the administering agency as being primarily for park, recreation, or wildlife and waterfowl refuge purposes, and determined to be significant for such purposes. For example, within a large multiple-use resource, like a National Forest, there can be areas that qualify as 4(f) property (e.g. a campground, picnic area, etc.) while other areas of the property function primarily for purposes other than park, recreation or refuges. Coordination with the official having jurisdiction and examination of the management plan for the area are necessary to determine Section 4(f) applicability.

For public land holdings, which do not have management plans or existing management plans are out-of-date, Section 4(f) applies to those areas that are publicly owned and function primarily for 4(f) purposes. Section 4(f) does not apply to areas of multiple-use lands which function primarily for purposes other than park, recreation or refuges such as for those areas that are used for timber sales or mineral extraction in National Forests.

7. Late Designation of 4(f) Resources

Question: Are properties in the highway right-of-way that are designated (as park and recreation lands, wildlife and waterfowl refuges, or historic sites) late in the development of a proposed project subject to the requirements of Section 4(f)?

Answer: Except for archaeological resources (including those discovered during construction), 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. The adequacy of effort made to identify properties protected by Section 4(f) should consider the requirements and standards of adequacy that existed at the time of the search. Archaeological resources may be subject to the requirements of Section 4(f) in accordance with Question 5.

8. Wild and Scenic Rivers

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

Answer A: A Wild and Scenic River (WSR) is defined as “a river and the adjacent area within the boundaries of a component of the National Wild and Scenic Rivers System (National System)”, pursuant to Section 3(a) and 2(a)(ii) of the National Wild and Scenic Rivers Act (WSRA) (36 C.F.R. 297.3). Significant publicly owned public parks, recreation areas, or significant wildlife and waterfowl refuges and historic sites (on or eligible of the National Register of Historic Places) in a WSR corridor are subject to Section 4(f). Privately owned lands in a WSR corridor are not subject to Section 4(f), except for historic and archeological sites (see Question 5). Publicly owned lands not open to the general public (e.g., military bases and any other areas with similar restricted access) and whose primary purpose is other than 4(f) are not subject to Section 4(f).

Lands in WSR corridors managed for multiple purposes may or may not be subject to Section 4(f) requirements, depending on the manner in which they are administered by the managing agency (see also Question 6). WSRs are managed by four different Federal agencies, including the U.S. Forest Service, the National Park Service, the Fish and Wildlife Service and the Bureau of Land Management. Close examination of the management plan (as required by the WSRA) prior to any use of these lands for transportation purposes is necessary. Section 4(f) would apply to those portions of the land designated in a management plan for recreation or other 4(f) purposes as discussed above. Where the management plan does not identify specific functions, or where there is no plan, FHWA should consult further with the river-administering agency prior to making the Section 4(f) determination.

The WSRA sets forth those rivers in the United States, which are designated as part of the Wild and Scenic River System. Within this system there are wild, scenic and recreational designations. In determining whether Section 4(f) is applicable to these rivers, one must look at how the river is designated, how the river is being used and the management plan over that reach of the river. If the river is designated a recreational river under the Act or is a recreation resource under a management plan, then it would be a 4(f) resource. A single river can be classified as having separate wild, scenic and recreation areas along the entire river. The designation of a river under the WSRA does not in itself invoke Section 4(f) in the absence of 4(f) attributes and qualities. For example, if a river is included in the System and designated as "wild" but is not being used as or designated under a management plan as a park, recreation area, wildlife and waterfowl refuge and is not an historic site, then Section 4(f) would not apply.

Aspects of the FHWA program determined to be a water resources project are subject to Section 7 of the WSRA (16 U.S.C. 1271 et seq.) This requires the river-administering agency to make a determination as to whether there are "direct and adverse effects" to the values of a WSR or congressionally authorized study river. Although Section 7 of the WSRA generally results in more stringent control, Section 4(f) may also apply to bridges that cross a designated WSR.

Question B: Are potential rivers and adjoining lands under study (pursuant to Section 5(a) of the Wild and Scenic Rivers Act) 4(f) resources?

Answer B: No, unless they are significant publicly owned public parks, recreation areas, and refuges, or significant historic sites in a potential river corridor. However, such rivers are protected under Section 12(a)[7] of the WSRA, which directs all Federal departments and agencies to protect river values in addition to meeting their agency mission. Section 12(a) further recognizes that particular attention should be given to "timber harvesting, road construction, and similar activities, which might be contrary to the purposes of this Act."

9. Fairgrounds

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

Answer: Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g. stock car races, annual fairs, etc.), rather than recreation. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) only applies to those portions of land determined significant for recreational purposes.

[7] "The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 2(a)(ii), 3(a), or 5(a), shall take such action respecting management policies, regulations, contracts, plans, affecting such lands, following the date of enactment of this sentence, as may be necessary to protect such rivers in accordance with the purposes of this Act."

10. School Playgrounds

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

Answer: While the primary purpose of public school playgrounds is for structured physical education classes and recreation for students, these properties may also serve significant public recreational purposes and as such, may be subject to Section 4(f) requirements. When a playground serves only school activities and functions, the playground is not considered subject to Section 4(f). However, when a public school playground is open to the public and serves either organized or substantial "walk-on" recreational purposes, it is subject to the requirements of Section 4(f) if the playground is determined to be significant for recreational purposes (see also Question 2 B). In determining the significance of the playground facilities, there may be more than one official having jurisdiction over the facility. A school official is considered to be the official having jurisdiction of the land during school activities. However, the school board may have authorized the city park and recreation department or a public organization to control the facilities after school hours. The actual function of the playground is the determining factor under these circumstances. Therefore, documentation should be obtained from the officials having jurisdiction over the facility stating whether or not the playground is of local significance for recreational purposes.

11. Golf Courses

Question A: Are public golf courses subject to Section 4(f), even when fees and reservations are required?

Answer A: The applicability of Section 4(f) to a golf course depends on the ownership of the golf course. There are generally three types of golf courses:

1) Publicly owned and open to the general public,
2) Privately owned and open to the general public and
3) Privately owned and for the use of members only.

Section 4(f) would apply only to those golf courses that are publicly owned, open to public and determined to be significant recreational areas (see also Question 2 B). The first type of golf course mentioned above includes those that are owned, operated and managed by a city, county or state for the primary purpose of public recreation. These golf courses meet the basic applicability requirements, as long as they are determined to be significant by the city, county or state official with jurisdiction and FHWA agrees with this determination.

Section 4(f) would not apply to the two types of privately owned and operated golf courses mentioned above, even if they are open to the general public.

The fact that greens-fees or reservations (tee times) are required by the facility does not alter the Section 4(f) applicability to the resource, as long as the standards of public ownership, public access and significance are met. See Question 12 for more information on entrance or user fees.

Question B: How are "military" golf courses treated under Section 4(f)?

Answer B: Military golf courses are a special type of recreational area. They are publicly owned (by the Federal Government) but are not typically open to the general public. Because the recreational use of these facilities is generally limited to military personnel and their families they are not considered to be public recreational areas and, therefore, Section 4(f) does not apply to them (see Question 2 C).

12. User or Entrance Fees

Question: Does the charging of an entry or user fee affect Section 4(f) eligibility?

Answer: Many eligible 4(f) properties require a fee to enter or use the facility such as State Parks, National Parks, publicly owned ski areas, historic sites and public golf courses. The assessment of a user fee is generally related to the operation and maintenance of the facility and does not in and of itself negate the property's status as a 4(f) resource. Therefore, it does not matter in the determination of Section 4(f) applicability whether or not a fee is charged, as long as the other criteria are satisfied.

Consider a public golf course as an example. As discussed in Question 11, greens-fees are usually if not always required, and these resources are considered 4(f) resources when they are open to the public and determined to be significant. The same rationale should be applied to other 4(f) resources and lands in which an entrance or user fee is required.

13. Bodies of Water

Question: How does the Section 4(f) apply to publicly owned lakes and rivers?

Answer: Lakes are sometimes subject to multiple, even conflicting, activities and do not readily fit into one category or another. When lakes function for park, recreation, or refuge purposes, Section 4(f) would only apply to those portions of water which function primarily for those purposes. Section 4(f) does not apply to areas which function primarily for other purposes. In general, rivers are not subject to the requirements of Section 4(f). Rivers in the National Wild and Scenic Rivers System are subject to the requirements of Section 4(f) in accordance with Questions 8 A and 8 B. Those portions of publicly owned rivers, which are designated as recreational trails are subject to the requirements of Section 4(f). Of course Section 4(f) would also apply to lakes and rivers or portions thereof which are contained within the boundaries of parks, recreational areas, refuges, and historic sites to which Section 4(f) otherwise applies.

14. Trails

Question A: The National Trails System Act permits the designation of scenic, historic and recreational trails. Are these trails or other designated scenic or recreational trails on publicly owned land subject to the requirements of Section 4(f)?

Answer A: Public Law 95-625 provides that, no land or site located along a designated national historic trail or along the Continental Divide National Scenic Trail shall be subject to the provisions of Section 4(f) of the Department of Transportation Act (49 U.S.C. 1653(f)) unless such land or site is deemed to be of historical significance under appropriate historical site criteria, such as those for the National Register of Historic Places. Only lands or sites adjacent to historic trails that are on or eligible for the National Register of Historic Places are subject to Section 4(f). Otherwise (pursuant to Public Law 95-625), national historic trails are exempt from Section 4(f).

Question B: Are trails on privately owned land, including land under public easement and designated as scenic or recreational trails subject to the requirements of Section 4(f)?

Answer B: Section 4(f) does not apply to trails on privately owned land. Section 4(f) could apply where a public easement that permits public access for recreational purposes exists. In any case, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated trails.

Question C: Are trails on highway rights-of-way, which are designated as scenic or recreational trails subject to the requirements of Section 4(f)?

Answer C: If the trail is simply described as occupying the rights-of-way of the highway and is not limited to any specific location within the right-of-way, a use of land would not occur provided that adjustments or

changes in the alignment of the highway or the trail would not substantially impair the continuity of the trail. In this regard, it would be helpful if all future designations including those made under the National Trails System Act describe the location of the trail only as generally in the right-of-way.

It should be noted that in Title 23, Section 109(m) precludes the approval of any project, which will result in the severance, or destruction of an existing major route for non-motorized transportation traffic unless such project provides a reasonable alternative route or such a route exists.

Question D: Does Section 4(f) apply to trails funded under the Recreational Trails Program (RTP)?

Answer D: No. The Recreational Trails Program (RTP)[8] is exempt from the requirements of 23 U.S.C. 138 and 49 U.S.C. 303. This allows the USDOT/FHWA to approve RTP projects which are located on land within publicly owned parks or recreation areas without requiring a waiver or other Section 4(f) documentation (23 U.S.C. 206 (h)(2)). The exemption is limited to Section 4(f) and does not apply to other environmental requirements, such as the National Environmental Policy Act (NEPA) or the National Historic Preservation Act (NHPA). More information on the Recreational Trails Program is available at www.fhwa.dot.gov/environment/rectrails/index.htm.

15. Bikeways

Question: Do the requirements of Section 4(f) apply to bikeways?

Answer: If the publicly owned bikeway is primarily used for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply, since it is not a recreational area. Section 4(f) would apply to publicly owned bikeways (or portions thereof) designated or functioning primarily for recreation, unless the official having jurisdiction determines it is not significant for such purpose. During early consultation with the official with jurisdiction it should be determined whether or not a management plan exists that addresses the primary purpose of the bikeway in question.

However, as with recreational trails, if the bikeway is simply described as occupying the highway rights-of-way and is not limited to any specific location within that right-of-way, a use of land would not occur and Section 4(f) would not apply, provided adjustments or changes in the alignment of the highway or bikeway would not substantially impair the continuity of the bikeway. Just as with trails, Title 23 Section 109(m) precludes the approval of any project, which will result in the severance or destruction of an existing major route for non-motorized transportation traffic, unless such project provides a reasonable alternative route or such a route exists.

16. Joint Development (Park with Highway Corridor)

Question: When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the 4(f) resource is reserved for highway use prior to, or at the same time the 4(f) resource was established, do the requirements of Section 4(f) apply?

Answer: No, the requirements of Section 4(f) do not apply to the subsequent use of the reserved area for its intended highway purpose. This is because the land used for the highway project was reserved from and, therefore, has never been part of the protected 4(f) area. Nor is there a constructive use (23 C.F.R. 771.135(p)(5)(v)) of the 4(f) resource, since it was jointly planned with the highway project. The specific governmental action that must be taken to reserve a highway corridor from the 4(f) resource is a question of state law and local law, but evidence that the reservation was contemporaneous with or prior to the establishment of the 4(f) resource is always required. Subsequent statements of intent to construct a highway project within the 4(f) resource are not sufficient. All measures which have been taken to

[8] In 1998, the Transportation Equity Act for the 21st Century (TEA-21) replaced the National Recreational Trails Funding Program created by the Intermodal Surface Transportation Efficiency Act (ISTEA) with the Recreational /Trails Program (RTP).

jointly develop the highway and the park should be completely documented in the project records. To provide flexibility for the future highway project, state and local transportation agencies are advised to reserve wide corridors.

17. Planned 4(f) Resources

Question: Do the requirements of Section 4(f) apply to publicly owned properties "planned" for park, recreation area, wildlife refuge, or waterfowl refuge purposes even though they are not presently functioning as such?

Answer: Section 4(f) applies when the land is one of the enumerated types of publicly owned lands and the public agency that owns the property has formally designated and determined it to be significant for park, recreation area, wildlife and waterfowl refuge purposes. Evidence of formal designation would be the inclusion of the publicly owned land, and its function as a 4(f) resource, into a city or county Master Plan. A mere expression of interest or desire is not sufficient. When privately held properties of these types are formally designated into a Master Plan, Section 4(f) is not applicable. The key is whether the planned facility is presently publicly owned, formally designated and significant. When this is the case, Section 4(f) would apply.

18. Temporary Recreational Occupancy or Uses of Highway Rights-of-way

Question: Does Section 4(f) apply to temporary recreational uses of land owned by a State Department of Transportation or other Applicant and designated for transportation purposes?

Answer: In situations where land which is owned by a State DOT or other Applicant and designated for future transportation purposes (including highway rights-of-way) is temporarily occupied or being used for either authorized or unauthorized recreational purposes such as for a playground or a trail (bike, snowmobile, hiking, etc.) on property purchased as right-of-way, Section 4(f) does not apply. For authorized temporary occupancy of highway rights-of-way for park or recreation, it is advisable to make clear in a limited occupancy permit, with a reversionary clause that no long-term right is created and the park or recreational activity is a temporary one pending completion of the highway or transportation project.

Note: In one recent proposed transportation project, lands designated for transportation purposes and utilized for recreational uses pursuant to a revocable agreement granting temporary use, were found by a court to be 4(f) resources, but this case had unusual facts. Nevertheless, it is important to recognize this decision, even though it is contrary to FHWA policy (see Stewart Park and Reserve Coalition v. Slater, 352 F.3d 545 (2nd Cir. 2003), Appendix A, Question 18).

19. Tunneling

Question: Is tunneling under a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site subject to the requirements of Section 4(f)?

Answer: Section 4(f) would apply only if the tunneling:

1) Disturbs any archaeological sites on or eligible for the National Register of Historic Places which warrant preservation in place, or
2) Causes disruption which would permanently harm the purposes for which the park, recreation, wildlife or waterfowl refuge was established, or
3) Substantially impairs the historic values of the historic site.

20. Wildlife and Waterfowl Refuges

Question A: What is a wildlife or waterfowl refuge for purposes of Section 4(f)?

Answer A: The terms "wildlife refuge" and "waterfowl refuge" are not defined in the Section 4(f) law or in FHWA's regulations. However, in 1966, the same year Section 4(f) was passed; Congress also passed the National Wildlife Refuge System Act (NWRSA). The NWRSA defines these terms broadly focusing on the preservationist intent of the refuges. The FHWA has considered this in our implementation of Section 4(f) for refuges. For purposes of Section 4(f), a wildlife and waterfowl refuge is publicly owned land (including waters) where the major purpose of such land is the conservation, restoration, or management of endangered species, their habitat, and other wildlife and waterfowl resources. In determining the major purpose of the land, consideration must be given to the following: (1) the authority under which the land was acquired; (2) lands with special national or international designations; (3) the management plan for the land; and/or (4) whether the land has been officially designated by a Federal, State, or local agency having jurisdiction over the land, as an area for which its major purpose and function is the conservation restoration, or management of endangered species, their habitat or wildlife and waterfowl resources. Recreational activities, including hunting and fishing, are consistent with the broader species preservation.

Examples of properties that <u>may</u> function as wildlife or waterfowl refuges include: State or Federal wildlife management areas, a wildlife reserve, preserve or sanctuary, and waterfowl production areas, including wetlands and uplands that are set aside (in a form of public ownership) for refuge purposes. The FHWA must consider the ownership, significance and major purpose of these properties in determining if Section 4(f) should apply. In making these determinations FHWA should review the existing management plans and consult with the Federal, State or local officials having jurisdiction over the property. In some cases, these types of properties will actually be multiple-use public land holdings of the type discussed in Question 6, and should be treated accordingly.

Question B: Are "conservation easements" acquired by the United States on private lands considered Section 4(f) wildlife and waterfowl refuges?

Answer B: Easements (a form of property ownership, see Question 2 D) acquired by the United States are subject to Section 4(f) as a wildlife and waterfowl refuges when they are part of the National Wildlife Refuge System. Other lands may be subject to Section 4(f) when they meet the definition and criteria specified in Answer A, above. In all cases, FHWA must consider the ownership, significance, and major purpose of these types of properties in determining if Section 4(f) should apply.

21. Air Rights

Question: Do the requirements of Section 4(f) apply to bridging over a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site?

Answer: Section 4(f) will apply if piers or other appurtenances are physically located in the park, recreation area, wildlife and waterfowl refuge, or significant historic property. Where the bridge will span the 4(f) resource entirely, the proximity impacts of the bridge on the 4(f) resource should evaluated to determine if the placement of the bridge will result in a constructive use (see Question 1 B).

22. Non-Transportation Use of 4(f) Resources

Question: Does the expenditure of Title 23 funds for mitigation or non-transportation activities on a 4(f) resource trigger the requirements of Section 4(f)?

Answer: No. Section 4(f) only applies where land is permanently incorporated into a transportation facility and when the primary purpose of the activity on the 4(f) resource is for transportation. If activities are proposed within a 4(f) resource solely for the protection, preservation, or enhancement of the resource and the official with jurisdiction has been consulted and concurs with this finding (in writing) then the provisions of Section 4(f) do not apply.

For example, consider the construction or improvement of any type of recreational facility in a park or recreation area (see Question 24) or the construction of a permanent structural erosion control feature, such as a detention basin. Where these activities are for the enhancement or protection of the 4(f) resource, do not permanently incorporate land into a transportation facility, do not appreciably change the use of the property and the officials having jurisdiction agree, Section 4(f) would not apply.

Another example involves the enhancement, rehabilitation or creation of wetland within a park or other 4(f) resource as part of the mitigation for a transportation project's wetland impacts. Where this work is consistent with the function of the existing park and considered an enhancement of the 4(f) resource by the official having jurisdiction, then Section 4(f) would not apply. In this case the 4(f) land is not permanently incorporated into the transportation facility, even though it is a part of the project as mitigation.

If activities funded with Title 23 funds result in a substantial change in the purpose, function or change the ownership from a 4(f) resource to transportation, then Section 4(f) will apply.

23. Scenic Byways

Question: How does Section 4(f) apply to scenic byways?

Answer: The designation of a road as a scenic byway is not intended to create a park or recreation area within the meaning of 49 U.S.C. 303 or 23 U.S.C. 138. The improvement (reconstruction, rehabilitation, or relocation) of a publicly-owned scenic byway would not come under the purview of Section 4(f) unless the improvement was to otherwise use land from a protected resource.

24. Transportation Enhancement Projects

Question A: How is Section 4(f) applied to transportation enhancement activity projects?

Answer A: A transportation enhancement activity (TEA) is one of twelve specific types of activities set forth by statute at 23 U.S.C. 101(a)(35). TEAs often involve the enhancement of, or improvement to, land that qualifies as a Section 4(f) protected resource. For a 4(f) resource to be used by a TEA, two things must occur, (1) the TEA must involve land of an existing 4(f) resource; and (2) there must be a use of that 4(f) resource as defined by 23 C.F.R. 771.135(p). Therefore, if a TEA permanently incorporates 4(f) land into a transportation facility then there is a use and Section 4(f) will apply.

The following TEAs have the greatest potential for Section 4(f) use:

- Facilities for pedestrians and bicycles
- Acquisition of scenic easements and scenic or historic sites
- Scenic or historic highway programs including tourist and welcome centers
- Historic preservation
- Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals)
- Preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian or bicycle trails)

Conversely, the TEAs below are less likely to be subject to Section 4(f):

- Safety and educational activities for pedestrians and bicyclists
- Landscaping or other scenic beautification
- Control and removal of outdoor advertising
- Archeological planning and research
- Environmental mitigation of highway runoff pollution, reduce vehicle-caused wildlife mortality, maintain habitat connectivity
- Establishment of transportation museums

In both categories above, the question of Section 4(f) use must be evaluated on a case-by-case basis.

To illustrate how Section 4(f) is applicable to a TEA, consider the following two scenarios involving a significant public park:

Scenario 1: A TEA project is proposed for the construction of a new pedestrian or bike facility within a public park. The purpose of the project is primarily to promote a mode of travel and requires a transfer of land from the officials with jurisdiction over the 4(f) resource to the State DOT or local transportation authority. Since this project would involve the "permanent incorporation of 4(f) land into a transportation facility" there is a use of 4(f) land and a Section 4(f) evaluation should be prepared. In this instance, *The Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects* (www.environment.fhwa.dot.gov/guidebook/vol2/doc15m.pdf) would likely apply, depending on the particular circumstances of the project.

Scenario 2: The purpose of a TEA project is to construct, rehabilitate, reconstruct or refurbish an already existing bike path or walkway within a public park. This project relates to surface transportation but the improvement is primarily intended to enhance the park. In this case there is no "permanent incorporation of 4(f) land into a transportation facility" and, therefore, no Section 4(f) use. A Section 4(f) evaluation does not need to be prepared.

Other TEA projects can involve existing transportation facilities such as highways, bridges, and buildings which are expected to have a useful life that is finite and therefore, continually require maintenance or rehabilitation. While 23 C.F.R. 771.135(f) may apply in certain instances, generally speaking, the rehabilitation of a highway, building or bridge relates to surface transportation but does not rise to the level of a Section 4(f) use (see also Question 4).

Archaeological planning and research projects that involve the potential use of a significant archeological property are covered by the provisions of 23 C.F.R. 771.135(g) (see Question 5). Other TEAs may be handled in accordance with this answer. In complex situations the FHWA Division Office should contact the Headquarters Office of Project Development and Environmental Review or the Office of the Chief Counsel for assistance.

Note: This answer supersedes the August 22, 1994; *Interim Guidance on Applying Section 4(f) On Transportation Enhancement Projects and National Recreational Trails.*

Question B: Is it possible for a TEA to create a 4(f) resource?

Answer B: To be eligible for transportation enhancement funding, a proposed activity must relate to surface transportation and not be solely for recreation or other purpose. Also, the development of parks, recreation areas, or wildlife and waterfowl refuges are not designated eligible TEAs. Thus, in most cases, the TEA by itself would not create a 4(f) resource, where one did not previously exist.

That being said, it is possible for transportation enhancement funds to enhance existing 4(f) resources, such as a bikeway or pedestrian facility that is constructed within a park. The use of TEA funds in this case would not alter the future Section 4(f) status of the park and may add Section 4(f) values that would

have to be considered in subsequent projects. See Question 22 for additional discussion of the use of transportation funds within a park or other 4(f) resource for non-transportation purposes.

For more information, see the *FHWA Final Guidance on Transportation Enhancement Activities;* December 17, 1999, and the TE Program Related Questions & Answers; August, 2002, found at the Transportation Enhancement Website (www.fhwa.dot.gov/environment/te/index.htm).

25. Museums, Aquariums and Zoos?

Question: Does Section 4(f) apply to museums, aquariums and zoos?

Answer: Publicly owned museums or aquariums will not normally be considered parks, recreational areas, or wildlife and waterfowl refuges and are, therefore, not subject to Section 4(f) unless they are significant historic properties.

Publicly owned zoos on the other hand, should be evaluated on a case-by-case basis to determine the major purpose of these resources and if they are significant park and/or recreational resources. To the extent that these resources are considered to be significant park or recreational areas, or are significant historic properties, they will be treated as 4(f) resources.

26. Tribal Lands and Indian Reservations

Question: How are lands owned by Federally Recognized Tribes, and/or Indian Reservations treated for the purposes of Section 4(f)?

Answer: Federally recognized Indian Tribes are considered sovereign nations, therefore, lands owned by them are not considered to be "publicly owned" within the meaning of Section 4(f), nor open to the general public, and Section 4(f) does not automatically apply. However, in situations where it is determined that land or resources owned by a Tribal Government or on Indian Reservation functions as a significant park, recreational area (which are open to the general public), a wildlife and waterfowl refuge, or is eligible for the National Register of Historic Places, Section 4(f) would apply.

27. Traditional Cultural Properties

Question: Are lands that are considered to be traditional cultural properties subject to the provisions of Section 4(f)?

Answer: A traditional cultural property or TCP is defined in the 1990 National Register Bulletin # 38 generally as land that <u>may</u> be eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that; (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. Land referred to as a TCP is not automatically considered historic property, or treated differently from other historic property. A TCP must also meet the National Register criteria as a site, structure, building, district, or object to be eligible for Section 4(f) protection.

For those TCPs related to an Indian tribe, the Tribal Historic Preservation Officer (THPO) or tribal resource administrator should be consulted in determining whether the TCP is on or eligible for the National Register. For other TCPs the State Historic Preservation Officer (SHPO) should be consulted.

28. Cemeteries

Question A: Does Section 4(f) apply to cemeteries?

Answer A: Cemeteries would only be considered 4(f) properties if they are significant historic resources, i.e., determined to be on or eligible for the National Register of Historic Places.

Question B: Does Section 4(f) apply to other lands that contain human remains?

Answer B: Lands that contain human remains, such as graveyards, family burial plots, or Native American burial sites and those sites that contain Native American grave goods associated with burials, are not in and of themselves considered to be 4(f) resources. However, these types of lands may also be historic properties included on or eligible for inclusion in the National Register. These sites should not automatically be considered only as archeological resources as many will have value beyond what can be learned by data recovery. If these sites are National Register listed or eligible and also warrant preservation in place, Section 4(f) applies (see Question 5). For more information on the subject of historic cemeteries see, National Register Bulletin #41, *Guidelines for Evaluating and Registering Cemeteries and Burial Places*; 1992.

When conducting the Section 4(f) determination for lands that may be Native American burial sites or sites with significance to a Federally Recognized Tribe, consultation with appropriate representatives from the Federally Recognized Tribes with interest in the site is essential.

29. Section 4(f) Evaluations in Tiered NEPA Documents

Question: How should Section 4(f) be handled in tiered NEPA documents?

Answer: This issue is addressed to some degree in 23 C.F.R. 771.135(o)(1). Because the project development process moves from a broad scale examination at the tier-one stage, to a more site specific evaluation in tier-two, does not relieve FHWA from its responsibility to consider feasible and prudent avoidance alternatives to the use of 4(f) resources at the tier-one stage. Where all alternatives in the second tier analysis use a 4(f) resource, it may be appropriate and necessary to reconsider the feasibility and prudence of an avoidance alternative that was eliminated during the tier-one evaluation phase.

30. Department of the Interior Handbook on Departmental Review of Section 4(f) Evaluations (2002)

Question: What is the official status of the February 2002, *Handbook on Departmental Reviews of Section 4(f) Evaluations,* issued by the Department of the Interior, Office of Environmental Policy and Compliance?

Answer: Section 4(f) legislation (23 U.S.C. 138 and 49 U.S.C. 303) identifies the Department of Interior, as well as the Departments of Agriculture and Housing and Urban Development as having a role in Section 4(f) matters. The U.S. Department of Transportation (DOT) is required to consult and cooperate with these Departments in Section 4(f) program and project related matters.

The purpose of the Handbook is to provide guidance to the National Park Service (NPS), U.S. Fish and Wildlife Service (F&WS) and other designated lead bureaus in the preparation of DOI comments on Section 4(f) evaluations prepared by the DOT, pursuant to the authority granted in Titles 23 and 49. The Handbook is an official DOI document and includes departmental opinion related to the applicability of Section 4(f) to lands for which they have jurisdiction and authority. FHWA values the DOI's opinions related to the resources under their jurisdiction, and while the Handbook provides resource information for FHWA to consider, it is not the final authority on Section 4(f) determinations.

Official FHWA policy on the applicability of Section 4(f) to lands that fall within the jurisdiction of the DOI is contained within 23 C.F.R. 771.135 and this *Policy Paper*. FHWA is not legally bound by the Handbook, or the comments provided by the DOI or lead bureaus, however, every attempt should be made to reach agreement during project consultation. In some situations one of the bureaus may be an official having jurisdiction. When unresolved conflicts arise during coordination with the NPS, F&WS or other bureaus related to the applicability of Section 4(f) to certain types of land or resources, it may be necessary for the Division Office to contact the Office of Project Development and Environmental Review for assistance.

APPENDIX A
Analysis of Case Law

The following analysis provides brief legal notes and citations to some Section 4(f) cases that relate to the subject matter discussed in the question and answer section of the Section 4(f) Policy Paper. This section is provided for informational purposes and as background to the policy addressed in the question and answers. In some instances, case law does not address the specific example in the Policy Paper. Also, there are some examples that have had no case address the subject matter of the question. When you have specific legal questions or need legal advice about Section 4(f) applicability, please contact the Legal Staff of the Office of Chief Counsel within your geographic area. FHWA reserves the right to modify and update this appendix as case law becomes applicable.

1. Use of Resources

Question A: What constitutes a "use" of land from a publicly owned public park, recreation area, wildlife refuge, and waterfowl refuge or historic site?

Legal Note: A number of cases have discussed "use" and "constructive use" and only a few are mentioned here. Several courts have held that the term "use" is to be construed broadly, not limited to the concept of physical taking, but includes areas that are significantly, adversely affected by the project. Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1982); Concerned Citizens Alliance v. Slater, 176 F.3d 686 (3rd Cir. 1999). In Concerned Citizens, it was undisputed that the preferred alignment would "use" an historic district by sending through the district, resulting in visual, traffic, and noise and vibration impacts. The issue in that case was whether the preferred alternative would impose the least harm on the historic district.

In Brooks v. Volpe, 460 F.2d 1193 (9th Cir. 1972), the Court held that construction of a segment of Interstate Highway I-90 which would encircle campground areas would result in a "use" due to the indirect impacts to the campground under Section 4(f) expanding the physical use concept to what would later be called constructive use and codified in FHWA's regulations at 23 C.F.R. 771.135(p).

Question B: How is "constructive use" defined and determined?

Legal Note: Significant adverse indirect impacts, now called "substantial impairment" in FHWA's regulations, can result in a constructive use. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971). At the same time, not every change within park boundaries constitutes a "use" of Section 4(f) lands. Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987). No "use" occurs where an action will have only an insignificant effect on the existing use of protected lands. In Geer v. FHWA, 975 F. Supp. 47, 73 (D. Mass. 1997), the court upheld the FHWA's determination of no constructive use, which concluded that the noise and visual impacts were not significant given the existing urban context of the project and existing impacts under the no-build option.

In Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002), construction of a project that would substantially impair the aesthetic attributes associated with the Jordan River Parkway was subject to Section 4(f) due to the disruption of the natural setting and feeling of the Parkway. In that case, noise levels were expected to increase at least ten decibels in the parkway. In Conservation Soc'y of S. Vt. v. Sec'y of Transp., 443 F. Supp. 1320 (D. Vt. 1978), "close proximity" of the proposed highway project to the Lye Brook Wilderness area was deemed a "use" of publicly owned recreation land subject to Section 4(f).

The effects of noise can result in a constructive use. In Allison v. DOT, 908 F.2d 1024, 1028 (D.C. Cir. 1990), the court determined that the FAA erred in considering only the effect on humans using a Section 4(f) state park. However, the court ultimately found that there was no violation of Section 4(f) because the operation of the new airport would not result in a significant increase in the noise level over the level of the current facility. There was a similar result in Sierra Club v. United States Dep't of Transp., 753 F.2d 120 (D.C. Cir. 1985), in which the increase in cumulative noise from the new facility was found not to be significant.

More recently, in City of S. Pasadena v. Slater, 56 F. Supp. 2d 1106 (C.D. Cal. 1999), the plaintiffs argued that the 710 Freeway Project would constructively use historic sites by substantially impairing the aesthetic features or attributes of the sites. They argued that the proximity of the freeway to historic properties resulted in at least two forms of constructive use. First, to the extent that the overall setting of a property is an important contributing element to the historic value of the property, this attribute would be impaired. Second, they argued, the mere proximity of the freeway to the historic properties would result in additional impairments. The Defendant argued that setting was not a major aspect of the qualities that made these specific properties eligible for the National Register. The court found that this determination was simply a conclusion for which no analysis was offered. With regard to proximity, the project would come within 15 feet of an historic district. The court noted that other courts have found that there is a constructive use in situation where there is a greater distance between the project and the section 4(f) resource. (See, for example, Coalition Against Raised Expressways, Inc. v. Dole, 835 F.2d 803 (11th Cir 1988) (on-ramp within 43 feet of Section 4(f) structure is a constructive use); Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir. 1976) construction of six-lane controlled access highway passing within 100-200 feet of Section 4(f) resource is a constructive use). In City of S. Pasadena, the court found serious questions as to whether defendants abused their discretion in finding that the 710 Freeway Project would not result in any constructive uses of eligible historic resources.

Question C: When does temporary occupancy of a 4(f) resource result in a 4(f) use?

Legal Note: In Coalition On Sensible Transp. Inc. v. Dole, 642 F. Supp. 573, (D. D.C.1986) the project in Montgomery County, Maryland, proposed to widen 16 miles of Interstate 270. Among other violations, plaintiffs argued that the projects impacts to several parklands constituted a use under Section 4(f).

The Section 4(f) statement for this project examined 7 parks and conservation areas. In 4 of the 7 resources, temporary construction easements would be granted for grading and after construction was completed, would be regraded, revegetated and then returned for use as a parkland. The court found that, "the projects temporary impact upon parkland during the construction period does not amount to 'use' within the meaning of section 4(f)." 642 F. Supp. at 596.

Further, since the narrow strips of parkland were in close proximity to the existing highway, and the administrative record established that none of the land was being actively used by park authorities, the court determined that this project would not 'substantially impair the value' of parkland in this case. Id. The court also found that even if the project resulted in a Section 4(f) use, Section 4(f) would not have been violated.

(On appeal in Coalition on Sensible Transp. Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987), the Court affirmed the lower court's decision for other reasons. The Appeals Court reasoned that since there were other physical uses of other Section 4(f) resources in the project area, the question of temporary occupancy amounting to a use was not necessary).

Practitioner's note: The district court case is useful as an example where the temporary occupancy of parkland by a temporary construction easement did not result in a use under Section 4(f).

2. Public Parks, Public Recreation Areas, and Wildlife and Waterfowl Refuges

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

Legal Note: In Kickapoo Valley Stewardship Ass'n. v. U.S. Dept. of Transp., 37 Fed. Appx. 810 (7th Cir. 2002) (unpublished), the Court held that Section 4(f) only applies to those lands formally classified as parks, recreation areas, wildlife and waterfowl refuges, or historic sites. The Kickapoo Valley Reserve property was originally planned for an Army Corps of Engineers flood-control project. The dam project was cancelled and an Act of Congress transferred the property to the State of Wisconsin. The legislation specified that the land was to "be preserved in a natural state and developed only to the extent necessary to enhance outdoor recreational and educational opportunities." The Court found that this legislative

language restricting use was not sufficient to designate the Reserve as Section 4(f) land. The Court further found that it was not arbitrary and capricious for USDOT to decide not to consider the Reserve as Section 4(f) land based on the multiple uses of the Reserve, including significant portions being used for agriculture.

In Stewart Park & Reserve Coalition v. Slater, 352 F.3d 545 (2nd Cir. 2003), the Court held that Section 4(f) contains no requirement that the public parklands to which it applies must be permanently designated as such. The Court determined that Section 4(f) applied, even though the public lands to be used in the project were originally acquired for transportation purposes (airport expansion and access). Although the land was never permanently designated as parklands, it was available to the public for use as park and recreational area for almost 30 years. (See also Legal Note in 18 of this Appendix)

Question B: How should the significance of public parks, recreation areas, and waterfowl and wildlife refuges be determined?

Legal Note: Land that is used as a public park is presumed significant for Section 4(f) purposes unless explicitly determined otherwise by the appropriate federal or local officials. Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972). FHWA reviews the state determination of significance of a public park for reasonableness. Concerned Citizens on I-90 v. Sec. of Transp., 641 F.2d 17 (1st Cir. 1981); Geer v. FHWA, 975 F. Supp. 47, 64 (D. Mass. 1997).

8. Wild and Scenic Rivers

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

Legal Note: In Hells Canyon Pres. Council v. Jacoby, 9 F.Supp.2d 1216 (D. Or. 1998), the court found that a consistency determination supported FHWA's CE. Although that case did not involve a Section 4(f) analysis with respect to the river, the court's reliance on the consistency determination in concluding that there would be no significant impact on the wild and scenic river values should apply equally to a Section 4(f) constructive use analysis.

Practitioner's Note: When projects may have some arguable constructive use of publicly owned waters or on publicly-owned lands administered for Section 4(f) values, it generally will be helpful to obtain a written consistency determination from the river manager. Such consistency determination may prevent a "constructive use" determination.

10. School Playgrounds

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

Legal Note: In Piedmont Envtl. Council v. U.S. Dept. of Transp., 159 F.Supp.2d 260 (W.D. Va. 2001), aff'd in relevant part, 58 Fed. Appx. 20 (4th Cir. 2003), the court found that the taking of some land of one school for a bypass constituted Section 4(f) property but that the agency was not arbitrary and capricious in concluding that there were no other feasible and prudent alternatives than taking the land. The court further found that "[b]ecause the defendants concluded that the recreational facilities affected by the noise and visual impacts of the bypass were not noise-sensitive and that differences in elevation and the existing wood buffer would screen the bypass from view, see id. at 35, the Secretary was within the scope of his authority and did not arbitrarily and capriciously conclude that no constructive use would occur."

Practitioner's Note: There is both an actual and a constructive use of school property that should be considered. When the project will take a portion or all of school property open for recreational activity, than Section 4(f) must be considered. However, when the project simply comes near such property, the visual and auditory impacts should be analyzed. If the school property is not noise sensitive, then auditory concerns will not translate into a constructive use. If the visual impact can be shielded by vegetation or elevation differences, then visual concerns may not translate into a constructive use.

However, a thorough study of the effects on the school property provides needed support for a conclusion that there is no constructive use.

15. Bikeways

Question: Do the requirements of Section 4(f) apply to bikeways?

Legal Note: In Laguna Greenbelt, Inc. v. U.S. Dept. of Transp., 42 F.3d 517 (9th Cir. 1994) the court found that an overpass over a bike trail, a widening of an existing bridge over a bike trail, and the relocation of a bike path within the designated right-of-way for the bike path did not constitute either actual or constructive use of the respective trails.

Calio v. Pa. Dep't of Transp., (No. 00-2163, 3d Circuit, October 10, 2001). This litigation involved a Pennsylvania Department of Transportation (PennDOT) proposal to develop a stretch of abandoned railroad track in suburban Philadelphia as a bicycle and pedestrian trail, using funds from the Congestion Mitigation and Air Quality Improvement Program (CMAQ). 23 U.S.C. 104(b)(2) 217. The proposed trail is a non-National Highway System project subject to an exemption agreement entered into by FHWA and PennDOT in 1992. See 23 U.S.C. 106(b)(2) (1991).

The case involved a single issue: would the trail be used principally for transportation, rather than recreation purposes as required for projects funded from the CMAQ program? The District Court upheld FHWA's determination that the trail project would be principally for transportation, saying it was supported by the administrative record and neither arbitrary nor capricious. The appellate court, in a three-page decision, agreed. Although the Third Circuit decision may not be cited as precedent, the District Court's decision has been published. See Calio v. Pa. Dept. of Transp., 101 F.Supp. 2d 325 (E.D. Pa. 2000).

Practitioner's Note: If the project can be constructed so as to preserve the trail, then generally there will not be a "use" of the trail. Thus, an overpass or even the relocation of the trail within the trail's existing right-of-way may avoid a "use" of the trail. Even if a bike path has some recreational purposes, that does not mean it is not

16. Joint Development (Park with Highway Corridor)

Question: When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the 4(f) resource is reserved for highway use prior to, or at the same time the 4(f) resource was established, do the requirements of Section 4(f) apply?

Legal Note: In Sierra Club v. Dole, 948 F.2d 568 (9th Cir. 1991) the 9th Circuit reversed the district court's 1987 ruling that the Secretary had failed to comply with Section 4(f) by ruling that a planned bypass road constructively used the McNee Ranch Park. In 1984, the McNee Ranch State Park was transferred to the California Department of Parks and Recreation. This transfer deliberately set aside part of the land that was to form the park, due to the CalTrans belief that this set aside land might be necessary for a future bypass of an area commonly know as "Devil's Slide" on California State Highway Route 1. The Devil's Slide was a 600-foot section of Route 1 that repeatedly was closed due to landslides.

In 1986, the Secretary approved a Final Environmental Impact Statement for the Martini Creek Alternative, but this FEIS did not include a Section 4(f) evaluation for the McNee Ranch Park.

In the 9th Circuit, USDOT claimed there was extensive cooperation between CalTrans and the park planners throughout the process of park acquisition and the road alignment. The court also examined the legislative history of Section 4(f) and found Congressional reports that stood for the proposition that Congress thought that the joint planning of roads and parks was desirable.

Additionally, the court stated that,

> "[w]here a park and a road are jointly planned on land which previously had neither park or road…no consensus is being upset. The community is not changing its mind about the type of park and road it would have, but is making the determination in the first instance. It is difficult to see how the road would significantly and adversely affect the park." (948 F.2d 575)

Further, the 9th Circuit held that a road does not "constructively use" a park if the road and park were jointly planned. The court also emphasized that this is only applicable when there is constructive not actual use of a parkland.

17. Planned 4(f) Resources

Question: Do the requirements of Section 4(f) apply to publicly owned properties "planned" for park, recreation area, wildlife refuge, or waterfowl refuge purposes even though they are not presently functioning as such?

Legal Note: In Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976) plaintiffs contended that FHWA violated Section 4(f) by failing to prepare a Section 4(f) statement for a section of I-10 that planned to transect the habitat of the Mississippi Sandhill Crane, bisect the eastern portion of a proposed refuge for the crane, and traverse Section 16 land held by the State of Mississippi in trust for the Jackson County School District.

The court determined that for Section 4(f) to apply to the lands at issue in this case, they must meet the following two-part test. First, the land to be used by the project must be publicly owned and second, the land must be from one of the enumerated types of publicly owned lands. The court found that the Section 16 land, although publicly owned, was never designated or administered as a wildlife refuge or any other Section 4(f) purpose notwithstanding the fact that the land was used by the Sandhill Crane as a sanctuary. In addition, the court found Section 4(f) was not applicable to the proposed wildlife refuge, because at the time the right of way for the project was acquired, and during the time the plans were approved, estimates and specifications were given, construction awards were given, and when construction began, the land was not publicly owned. A subsequent transfer of the land to the Fish and Wildlife Service did not make Section 4(f) applicable after the fact.

In Davis v. Mineta, 302 F.2d 1104 (10th Cir. 2002) two parks were planned within the area of potential effect as part of a highway project within the cities of Draper, Sandy and South Jordan in Salt Lake County, Utah. Here, the Jordon River Parkway was owned by two private landowners and partially by the Utah Department of Natural Resources, Division of Parks and Recreations. This land was designated as parkland on the South Jordan City Parks and Recreation Master Plan. The other property at issue was the Willow Creek Park. This park was planned in the Draper City Master Plan to be parkland but was owned by a private landowner. The 10th Circuit found that Willow Creek did not qualify as a Section 4(f) property, due to its private ownership, as did that portion of the Jordan River Parkway not owned by the State of Utah. However, that part which was owned by the State of Utah did qualify as Section 4(f) property due to its public holding.

18. Temporary Recreational Occupancy or Uses of Highway Rights-of-Way

Question: Does Section 4(f) apply to temporary recreational uses of land owned by a State Department of Transportation or other Applicant and designated for transportation purposes?

Legal Note: In Collin County, Tex. v. Homeowners Ass'n For Values Essential to Neighborhoods (HAVEN) 716 F. Supp. 953 (N.D. Texas 1989) HAVEN contended that certain lands should have been viewed as Section 4(f) properties in the Section 4(f) evaluation in the Final Environmental Impact Statement. In this case, the properties at issue were acquired by Dallas County from a private party in 1973 for use as highway right-of-way. Under an agreement between the City of Carrollton and Dallas County, the right-of-way was being used for recreation. Plaintiffs countered that Section 4(f) is inapplicable to temporary uses of highway rights-of-way for recreational activities.

The court concluded that FHWA did not err when the Section 4(f) evaluation determined that these properties were not Section 4(f) resources. Reasoning,

> "The properties in this case were acquired from a private owner by Dallas County for right-of-way purposes; they are being used temporarily as a park. Simply because they have an interim use does not change their character: they were purchased as rights-of-way and they will be used as rights-of-way." 716 F. Supp. at 972

A recent decision, known as the Stewart Airport Case, undercuts the position that land acquired for transportation use cannot become a Section 4(f) resource by permissive interim use. Stewart Park and Reserve Coalition Inc. v. Slater, 352 F.3d 545 (2nd Cir. 2003).

The case involves approximately 1200 acres of some approximately 8600 acres of land acquired for airport use. The proposed use of the 1200 acres was for construction for airport access and highway improvements. The land at issue was never designated as a parkland, but was managed by the state as such, until its use was required for airport and transportation purposes. The airport land was initially an Air Force base and was transferred to the state for use as a commercial airport. The state acquired the adjacent approximate 8600 acres in the 70's for use as airport expansion land and uses consistent with airport use, as per FAA regulations. These lands also included buffer lands. At issue was whether Section 4(f) applied to these adjacent lands.

The state entered into a revocable agreement with the New York State Department of Environmental Conservation to manage the land until needed for airport use. The terms of the formal revocable agreement stated that the agreement could be terminated upon 60 days notice of the land becoming necessary for airport use. The land was managed and used for recreational purposes during the entire agreement period, until the time it became necessary for transportation purposes.

The court held that 30 years of uninterrupted contiguous use of public recreational uses of this land, regardless of the revocable agreement and that fact the lands were originally acquired for transportation purposes, nonetheless, constituted Section 4(f) protected land. Further, the statutory language does not condition protection of land on being permanently designated as such. Additionally, 30 years of use entitled the land in question to Section 4(f) protection as the uninterrupted period could not be characterized as interim.

21. Air Rights

Question: Do the requirements of Section 4(f) apply to bridging over a publicly owned park, recreation area, wildlife refuge, waterfowl refuge, or historic site?

Legal Note: In Citizens for the Scenic Severn River Bridge Inc. v. Skinner, 802 F. Supp 1325 (D. Md. 1991) citizens and opponents of a bridge construction project sought to enjoin state and federal officials from proceeding with construction of a bridge across the Severn River in Anne Arundel County, Maryland. Among other contentions, plaintiffs argued that use of the Severn River was not adequately considered in the Final Section 4(f) statement. However, in the Section 4(f) statement defendants concluded there would be a use of the river, which the court found to be a Section 4(f) resource. The use entailed placement of piers and pilings in the river, possible runoff and removal of the existing bridge. Further, the statement determined that any of the proposed alternatives would have used the river.

Coalition Against A Raised Expressway Inc. v. Dole, 835 F.2d 803 (11th Cir. 1988) examined the impacts of an elevated expressway on three Section 4(f) resources in the downtown area of Mobile, Alabama. At issue were a park, a railroad terminal and the city hall. Defendants argued that in light of the location of these properties in the downtown area, the impacts from the expressway would not be substantial so as to amount to a use of these properties. However, the court reasoned that,

> "In addition to the noise and air pollution, the raised highway would impact on the protected sites by impairing the view. The highway would cut off the city hall's view of the river and the docks.

> Conversely, it would reduce the view from the river of the city hall's architecture. For the park and the railroad terminal, the highway would replace the view of the downtown with the sight of the seventeen-foot concrete pillars holding up the freeway. In addition, the dirt and debris from an elevated freeway would lessen the beauty of the architecture itself.
>
> While the elimination of the view, the increase in noise and air pollution, and the close location of the highway may not individually constitute a use; cumulatively they significantly impair the utility of the properties." 835 F.2d at 812

The court found that the elevated expressway constructively used these Section 4(f) resources.

22. Non-Transportation Use of 4(f) Resources

Question: Does the expenditure of Title 23 funds for mitigation or non-transportation activities on a 4(f) resource trigger the requirements of Section 4(f)?

In National Trust for Historic Preservation v. Dole, 828 F.2d 776 (D.C. Cir. 1987), the court found that installing suicide prevention barriers on an historic bridge was not a *transportation program or project* and therefore Section 4(f) was not triggered. The court looked at the purpose of the project and found that since it was not a project to facilitate transportation - - the movement of vehicles, Section 4(f) did not apply.

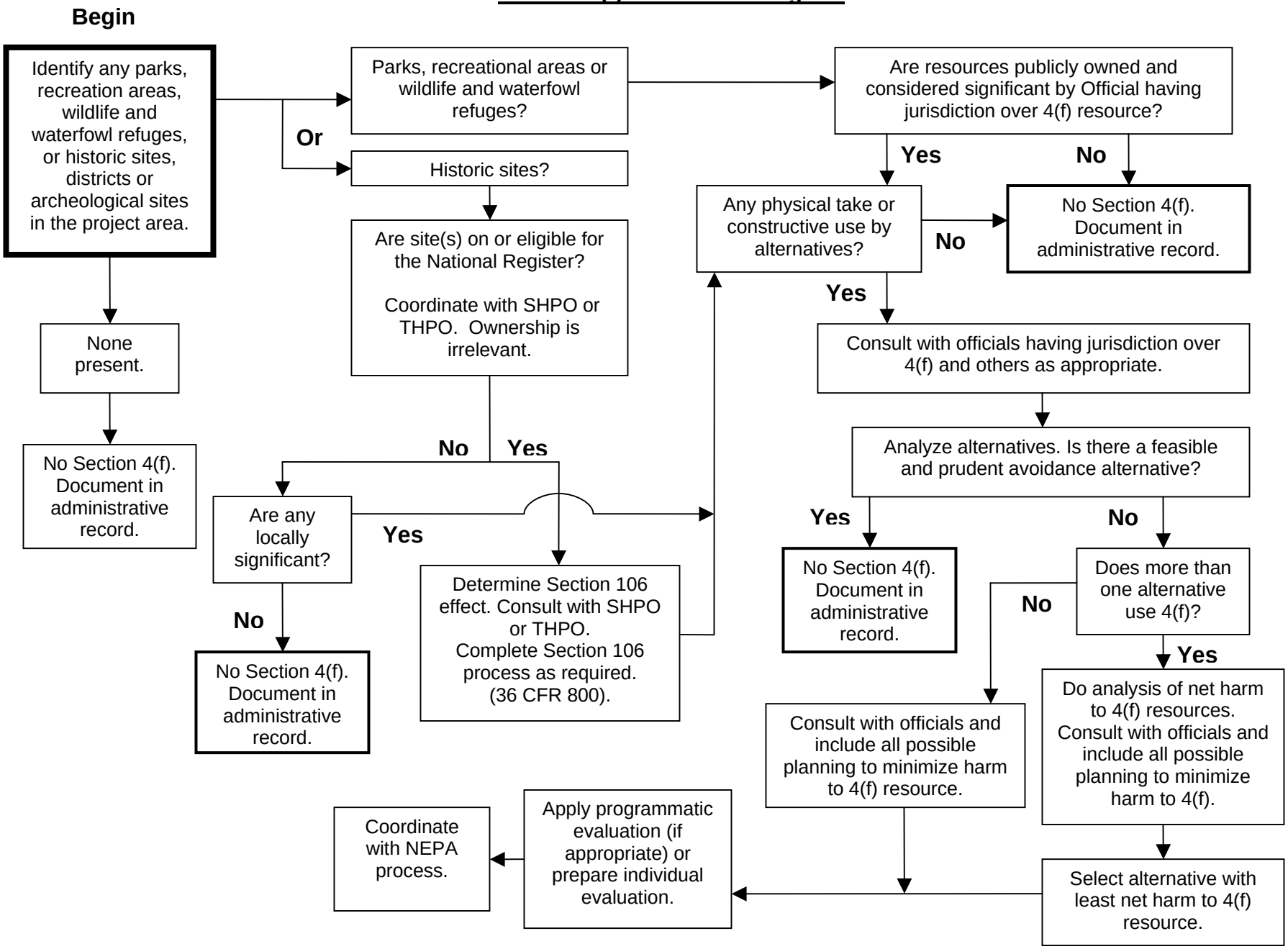
Miscellaneous Section 4(f) Cases With Important Information

For general guidance on the issue of whether or not an avoidance alternative is imprudent and, therefore, may be rejected, relevant case law is below:

The Fifth, Ninth and Eleventh Circuit Courts of Appeals have employed a stricter standard in determining whether an alternative is imprudent than other Circuits. See, Louisiana Environmental Soviet v. Coleman, 537 F.2d 79 (5th Cir 1976); Stop H-3 Association v. Brinegar, 533 F.2d 434 (9th Cir. 1976); Druid Hills v. FHWA, 772 F.2d 700 (11th Cir. 1985).

Courts in the Fourth, Seventh and Tenth Circuits have interpreted the requirements less stringently. In these jurisdictions, a balancing test for determining whether an alternative is imprudent has been developed. Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 163 (4th Cir. 1990); Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 804 (7th Cir. 1987); Committee to Preserve Boomer Lake Park v. USDOT, 4 F.3d 1543, 1550 (10th Cir. 1993). In these jurisdictions the courts allow the Secretary to weigh the cumulative impacts of the avoidance alternative against the cumulative impacts of the non-avoidance alternative to reach a decision. The impacts to be compared in this type of analysis include other impacts in addition to the impacts on the Section 4(f) resource. The extent of harm that would be caused to the Section 4(f) resource if is not avoided would be taken into consideration under this test.

In the other Federal Circuits the case law is less clear. See Monroe County Council v. Adams, 566 F.2d 419 (2nd Cir. 1977) (employed a balancing test without stating it was doing so). The Eighth and the Third Circuits have recently adopted a more flexible standard for "prudent" but only for the limited purpose of determining whether an alternative that minimizes harm can be rejected as "imprudent." See, Bridgeton v. Slater, 212 F.3d 448 (8th Cir. 1999)(court refused to employ a rigid "least harm" test in an airport expansion case as this would conflict with Congressional mandate to facilitate airport expansion); Concerned Citizens Alliance v. Slater, 176 F.3d 686 (3rd Cir. 1999)(decision found that standard for "prudent and feasible" was not quite as high when applied to alternatives that minimized harm and granted the Secretary "slightly greater leeway" in eliminating options that minimized harm as imprudent).

When addressing the question of which standards apply in your state or district you should consult with the Office of the Chief Counsel's Legal Staff.

APPENDIX B
Section 4(f) Evaluation Diagram