

SECTION 4(f) OVERVIEW

WHAT IS SECTION 4(f)?

Since the mid-1960s, federal transportation policy has reflected an effort to preserve publicly owned public parks and recreation areas, waterfowl and wildlife refuges, and publicly and privately owned historic sites considered to have national, state or local significance. The U.S. Department of Transportation Act of 1966 included a provision to protect these resources and is known as Section 4(f). Section 4(f) only applies to agencies within the US Department of Transportation, including FHWA.

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

Does Section 106 of the National Historic Preservation Act duplicate Section 4(f)?

Like Section 4(f), Section 106 of the National Historic Preservation Act (NHPA) of 1966 also mandates consideration of a project's effect on historic sites. Because of their similarities, the relationship between Sections 4(f) and 106 is sometimes a source of confusion. But it is important to remember that they are two different laws with different requirements for compliance that are most efficiently addressed in a coordinated approach.

The most important **connection** between the two statutes is that the Section 106 process is generally the method by which historic properties are identified that would be subject to consideration under Section 4(f). The results of the identification step under Section 106 - including the eligibility of the resource for listing on the NRHP, the delineation of NRHP boundaries, and the identification of contributing and non-contributing elements within the boundary of a historic district—are a critical part of determining the applicability of Section 4(f).

The most important **difference** between the two statutes is the way each of them measures impacts to historic sites. Whereas Section 106 is concerned with adverse effects, Section 4(f) is concerned with use. The two terms are not interchangeable and an *adverse effect* determination under Section 106 does not automatically equate to a Section 4(f) use of the property.

Use: "Use" occurs with a U.S. DOT approved project or program (1) when land from a Section 4(f) site is permanently incorporated into a transportation facility; (2) when there is a temporary occupancy of land that is adverse in terms of the statute's preservationist purposes, or (3) when the proximity impact of the transportation project on the Section 4(f) site, without acquisition of land, are so great that the purposes for which the Section 4(f) site exists are substantially impaired.

Adverse Effect: An adverse effect occurs when a project may directly or indirectly diminish the integrity of an historic property by altering any of the characteristics that qualify that property for National Register inclusion. Examples of adverse effects include: Physical destruction or damage; Alteration inconsistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties; Relocation of the property; Change in the character of the property's use or setting; Introduction of incompatible visual, atmospheric, or audible elements; Neglect and deterioration; Transfer, lease, or sale out of federal control without adequate preservation restrictions.

Section 4(f) refers to the original section within the U.S. Department of Transportation Act of 1966 which provided for consideration of publicly owned park and recreation lands, wildlife and waterfowl refuges, and privately and publicly owned historic sites during transportation project development. The law, now codified in 49 U.S.C. §303 and 23 U.S.C. §138, applies only to the U.S. Department of Transportation (U.S. DOT) and its agencies. FHWA's regulations for complying with Section 4(f) are contained in 23 Code of Federal Regulations (CFR) 774.

When is Section 4(f) a consideration?

Section 4(f) applies to projects that receive funding from or require approval by an agency of the U.S. DOT. Therefore, for this project, Section 4(f) requirements are only applicable to the FHWA actions if proposed action may convert Section 4(f) land to a transportation use.

What is a Section 4(f) property?

Section 4(f) protects the following resources: publicly owned park and recreation areas that are open to the general public, publicly owned wildlife and waterfowl refuges, and public or privately owned historic sites. The term historic sites includes prehistoric and historic districts, sites, buildings, structures or objects listed in, or eligible for, the National Register of Historic Places.

Both Jackson Park and the Midway Plaisance are considered Section 4(f) properties, both as a publicly owned park and recreational area open to the general public and as a historic property.

WHAT DOES SECTION 4(f) REQUIRE?

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

Use of a Section 4(f) property occurs: (1) when land is permanently incorporated into a transportation project; (2) when there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose; or (3) when there is a constructive use (a project's proximity impacts are so severe that the protected activities, features, or attributes of a property are substantially impaired).

What is "feasible"?

An alternative is feasible if it can be constructed as a matter of sound engineering.

What is "prudent"?

An avoidance alternative is prudent if it meets the definition in 23 CFR 774.17, which includes, among other factors, assessing safety or operational problems; how well project purpose and need are met; the severity of social, economic, or environmental impacts; and the severity of impacts to environmental resources protected under other Federal statutes, among other factors.

Impacts to Section 4(f) lands

When multiple alternatives use Section 4(f) property and the evaluation of avoidance alternatives concludes that there is no feasible and prudent avoidance alternative, then FHWA may approve, from the remaining alternatives that use Section 4(f) property, only the alternative that causes the least overall harm in light of the preservation purpose of the statute. 23 CFR 774.3(c) includes a list of factors to consider in making this determination of least overall harm. These factors include the ability to mitigate adverse impacts to Section 4(f) property; the relative severity of remaining harm, after mitigation, to Section 4(f) property; the views of the officials with jurisdiction; and the relative significance of each Section 4(f) property. Other factors include the degree to which alternatives meet the project purpose and need, substantial differences in cost, and impacts to other resources (i.e. non Section 4(f) resources).

Who does FHWA coordinate with when a Section 4(f) property is "used" by a transportation project?

FHWA regulations require coordination with the "Official with Jurisdiction" (OWJ) over the Section 4(f) resource. Because Jackson Park and the Midway Plaisance are considered Section 4(f) properties because of their importance as historic properties and public parks, there are two OWJs for these properties. The Illinois State Historic Preservation Officer is the OWJ representing the Section 4(f) resources as a historic property while the Chicago Parks Department is the OWJ representing the Section 4(f) resources as publicly owned parks. FHWA will coordinate with both OWJs during the Section 4(f) compliance process.

What is the role of the public in the Section 4(f) Review Process?

If the FHWA intends to make a *de minimis* impact determination, then FHWA is required to coordinate with the officials having jurisdiction over the Section 4(f) property and provide for opportunities for public review and comment on the effects of the project on the protected activities, features, and attributes of the Section 4(f) resource.

If an individual Section 4(f) evaluation is required, the evaluation will be included as a subsection of the Environmental Assessment (EA) or Environmental Impact Statement (EIS), which is made available for public review and comment.

Who makes the Section 4(f) decision for highway projects?

The FHWA is responsible for making decisions related to Section 4(f) compliance at the project level after consulting with the appropriate officials with jurisdiction. These decisions include whether Section 4(f) applies to a property, whether a use will occur, whether a *de minimis* impact determination may be made, an assessment of each alternative's impacts to Section 4(f) properties, and determining whether the law allows the selection of an alternative for implementation.

Section 4(f) Review Process

