



# Environmental Handbook

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## U.S. Department of Transportation Act: Section 4(f)

This handbook describes procedures and requirements for complying with Section 4(f) of the U.S. Department of Transportation Act, which involves the transportation use of parks, recreation areas, wildlife and waterfowl refuges, and historic sites.

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## 1.0 Introduction

This handbook outlines the process steps necessary to comply with Section 4(f) of the U.S. Department of Transportation Act (U.S. DOT Act). While this federal statute applies to all U.S. Department of Transportation (USDOT) agencies, the information in this handbook is primarily focused on the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) regulations, policies, and guidance explained in the 2012 FHWA [Section 4\(f\) Policy Paper](#), which was developed jointly by FHWA and FTA. Ultimate decision-making responsibility and approval of Section 4(f) compliance lies with the USDOT agency with jurisdiction over the project.

The FAA guidance for complying with Section 4(f) is contained in FAA [Order 1050.1E](#) and the [Environmental Desk Reference for Airport Actions](#). Practitioners should consult with the FAA regarding any additional procedural and documentation requirements required for Section 4(f) compliance. For Federal Railroad Administration (FRA) projects, practitioners should consult with FRA and the Procedures for Considering Environmental Impacts ([49 FR 28545](#) and [49 CFR 260.35](#)).

If any discrepancy arises between the 2012 FHWA Policy Paper and the Section 4(f) regulation, the regulation takes precedence. If any discrepancy arises between the FHWA guidance and the Texas Department of Transportation (TxDOT) guidance, the FHWA guidance takes precedence.

Both the Parks and Wildlife Code (PWC) Chapter 26 and Section 6(f) of the Land and Water Conservation Fund Act (LWCF Act) can affect the Section 4(f) timing. Refer to the [Environmental Compliance Toolkits](#) for compliance procedures and requirements for impacts to properties protected by Chapter 26 and Section 6(f).

### 1.1 TxDOT Section 4(f) Policy

TxDOT's policy is to adhere to U.S. DOT Act Section 4(f) and to the same policies, procedures, and standards outlined by the 2012 FHWA policy paper for projects that trigger Section 4(f).

### 1.2 Important Definitions

While a comprehensive set of definitions for terms used in this handbook is located in the Glossary (Section 16), brief definitions for the following terms also are provided here to provide context for the subsequent discussion.

**Protected Properties** – Section 4(f) applies to the following two categories of resources.

- Publicly owned, significant and accessible parks, recreation areas, and wildlife and waterfowl refuges
- Significant historic and archeological sites, regardless of whether they are publicly or privately owned

Under the statute and in this handbook, these protected resources are often referred to as Section 4(f) properties.

**Impacts and Effects** – Section 4(f) refers to a transportation project-related impact to a Section 4(f) protected property as a “use.” The term use has a very specific meaning and is defined in [23 CFR 774.17](#) as a physical take of land from a protected property (temporary occupancy or permanent incorporation) or an action that substantially impairs the protected features, activities, or attributes of the Section 4(f) property.

### 1.3 Responsible Party

The project sponsor is responsible for developing an analysis and maintaining documentation supporting any statements and evaluations.

When Section 4(f) properties include parks, recreation areas, or refuges, consultation with officials with jurisdiction (OWJ) also may be a responsibility of the project sponsor.

When Section 4(f) properties are historic sites, consultation with the OWJ is carried out by TxDOT's Environmental Affairs (ENV) Division.

TxDOT is responsible for approving Section 4(f) determinations.

### 1.4 Applicable Project Types

Section 4(f) applies to all USDOT projects that require approval of a USDOT agency.

Transportation projects that do not require the approval of a USDOT agency are not subject to the requirements of Section 4(f). For example, many highway projects are implemented through state or local funds and do not involve changes to interstate access points or other approval or involvement sufficient to constitute the USDOT control over the project. Section 4(f) does not apply to these projects.

### 1.5 Critical Sequencing

Efforts to identify publicly owned and accessible parks, recreation areas, wildlife and waterfowl refuges, and historic sites regardless of ownership and accessibility should begin at the onset of project development. Efforts to determine whether proposed project activities constitute a use of Section 4(f) protected properties should begin once it is determined that temporary or permanent incorporations or constructive use of land would be required. It is critical to alert project managers of the need to begin looking for engineering solutions to either avoid impacts or seek a *de minimis* impact determination through consultation with the OWJ.

### 1.6 Helpful Suggestions

The intent of the Section 4(f) statute and the FHWA/TxDOT policy is to avoid the use of Section 4(f) property or reduce project impacts to a level where the impacts are *de minimis*. If a *de minimis* impact determination is inappropriate and there is a feasible and prudent alternative that addresses the project purpose and need without a use of Section 4(f) property, it must be chosen. If a Section 4(f) property is in the project area but a use of the Section 4(f) property can be avoided, then the Section 4(f) alternatives analysis and review process is unnecessary. Not all of the guidance in this handbook will apply to every transportation project, so use discretion and consult with the USDOT agency with jurisdiction over the project whenever necessary. In the case of a FHWA project, consult with the department delegate.

### 1.7 Additional Resources

- [AASHTO Practitioners Handbook](#) 11, Complying with Section 4(f) of the U.S. Department of Transportation Act, May 2009
- FAA [Order 1050.1E](#)
- FAA [Environmental Desk Reference for Airport Actions](#)
- 2012 FHWA [Section 4\(f\) Policy Paper](#)

## 2.0 Regulatory Overview

Section 4(f) of the 1966 U.S. DOT Act is codified in the United States Code (USC) in [23 USC 138](#) and [49 USC 303](#). The act requires special consideration to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The statute also requires USDOT to seek comments from the OWJ over the resource and in some cases to consult with the U.S. Department of Interior and other federal agencies before making any decisions (49 USC 303(a),(b)). FHWA and FTA adopted rules, codified in [23 CFR 774](#), to implement the regulations of 23 USC 138 and 49 USC 303. The [Section 4\(f\) Compliance Process](#) flow chart illustrates the Section 4(f) Compliance Process.

### 2.1 Substantive Protection, Not Just Procedural

Section 4(f) prohibits certain types of decisions even if all the appropriate procedures have been followed. This type of law is known as a substantive requirement because it focuses on the substance of an agency's decision and includes an obligation to make a specific finding or determination. Substantive laws can block an agency from taking action, regardless of how thoroughly the action has been studied or vetted with resource agencies and the public.

### 2.2 Four Paths to Compliance

There are four possible paths to substantive compliance with Section 4(f) for a transportation project. No matter which compliance path is followed any analysis and consultative efforts with the OWJ should be retained in the project file. The following compliance paths are ordered from the level of least to most adverse impact.

- **No Properties Present Determination ([23 CFR 774.5\(c\)](#))** – TxDOT policy requires that all parks, recreation areas, wildlife and waterfowl refuges be designated as such and that all potential Section 4(f) properties (including historic sites) are determined significant through consultation with the OWJ. If it is determined that the property is not designated, significant, or excepted, then Section 4(f) does not apply. Consultation with the OWJ must be kept in the project file.
- **No Use Determination ([2012 FHWA Policy Paper](#))** – After consultation with the OWJ, the department delegate can determine that a project will not use any Section 4(f) properties. In some cases, this determination is straightforward and requires little documentation. A determination of no use requires analysis to determine whether an exception applies to the project activities and/or whether the project will use a Section 4(f) property through an exception checklist.
- **De Minimis Impact Determination ([23 CFR 774.3\(b\)](#))** – TxDOT can determine that the project impacts on one or more Section 4(f) properties will be *de minimis*. A *de minimis* impact determination is not an exemption from or exception to Section 4(f); it is an authorization of an impact that is so minor as to merit disregard and does not require an analysis to determine if there is a feasible and prudent avoidance alternative. A *de minimis* impact determination is made on a property-by-property basis, not for a project as a whole. Therefore, several separate *de minimis* impact determinations could be needed for a single project. A *de minimis* checklist must be completed and approved as part of the analysis.
- **Least Overall Harm Alternative Determination ([23 CFR 774.3\(c\)](#))** – TxDOT can approve an adverse use of a Section 4(f) property if there is no feasible and prudent avoidance alternative. However, TxDOT must select the alternative determined to do the least overall harm, as a result of all possible planning to minimize harm through consultation with the OWJ and resource

agencies. TxDOT cannot select a least overall harm alternative until the project sponsor conducts an alternative analysis and submits a draft Section 4(f) evaluation for review.

### 3.0 Procedural Requirements

The procedural requirements outlined below were developed by TxDOT to help practitioners conduct a Section 4(f) analysis and prepare documentation in accordance with the jointly developed procedures from FHWA and FTA. These procedures are for the preparation, circulation, and coordination of Section 4(f) documents, as codified in [23 CFR 774](#). Once an area of potential impacts has been defined for the project, there are ten general steps to complying with the procedural requirements of Section 4(f). However, not every step will be required for every project. Proceed step by step through the process as indicated by one of the four compliance paths. For example, if there are no Section 4(f) properties present, then only Step One is necessary.

**Step One** – Determine if there are any potential Section 4(f) properties in the project area. If no potential Section 4(f) properties are present in the project area, prepare no properties present statement. If potential Section 4(f) properties are present based upon preliminary studies, prepare or update a constraints map to indicate the location and type of potential Section 4(f) properties. Identify any outstanding Section 4(f) compliance tasks and develop a project scope and schedule.

**Step Two** – Conduct necessary field investigations and obtain the views of the OWJ to identify and document any “significant” (2012 FHWA [Section 4\(f\) Policy Paper](#)) properties protected by or not exempted from Section 4(f). If potential properties are determined not to be significant or are exempted, prepare a no Section 4(f) properties present statement.

**Step Three** – Determine whether an exception to the Section 4(f) approval process applies, as described in [23 CFR 774.13](#).

**Step Four** – Determine whether the project activities would constitute a use of Section 4(f) property (including a constructive use) as defined in [23 CFR 774.15](#) and [774.17](#) or whether there will be an exception checklist with documentation.

**Step Five** – Conduct any necessary planning to minimize harm and consult with the OWJ and the public to determine if project impacts to Section 4(f) protected properties are *de minimis*, as defined in [23 CFR 774.3\(b\)](#) and [774.17](#). If impacts are *de minimis*, then complete a *de minimis* checklist with documentation.

**Step Six** – If you do not have an exception or *de minimis* finding, conduct an alternative analysis to determine if there is an avoidance alternative ([23 CFR 774.3\(a\)\(1\)](#)), and conduct all possible planning to minimize harm. If an avoidance alternative is unavailable, determine which alternative does the least overall harm, as described in [23 CFR 774.3\(c\)](#). Prepare a draft evaluation summarizing the analyses results, and submit it to the department delegate to finalize the selection of the least overall harm alternative.

**Step Seven** – Determine if a programmatic or individual Section 4(f) evaluation is applicable, in accordance with [23 CFR 774.3\(d\)](#). If a programmatic is appropriate, complete any consultation requirements with the OWJ and the public, as required by the applicable programmatic. If a programmatic evaluation is applicable, then complete a programmatic checklist with documentation. Individual evaluation will require a customized report in consultation with TxDOT Environmental Affairs.

**Step Eight** – Finalize the draft Section 4(f) evaluation (programmatic or individual) using TxDOT documentation standards.

**Step Nine** – Complete the appropriate review and approval process (programmatic or individual).

**Step Ten** – Summarize the results of the Section 4(f) findings ([23 CFR 774.7](#)), or return to Step 8 to make any necessary revisions.

### **4.0 Planning**

Section 4(f) places a substantial regulatory burden on USDOT transportation projects. It has been described as one of the nation's most stringent environmental laws, a difficult law to comply with, and a law requiring substantial planning and coordination efforts. Poor planning and a lack of collaboration among subject matter experts, design engineers, OWJs, and regulatory authorities often can cause a delay in the environmental review process. Before the National Environmental Policy Act (NEPA) process even begins, there are steps that can be taken to begin identifying and considering potential Section 4(f) issues. These early steps can reduce the risk of Section 4(f) related delays that commonly occur later during project development.

#### **4.1 Evaluating Risk**

Project planners should gather preliminary information to answer the following questions:

- Will the project require monies or permits from a USDOT agency (e.g. FTA or FAA)?
- Are there any Section 4(f) properties in or adjacent to the project area as defined in [23 CFR 774.11](#)?
- Is it anticipated that the project will require any physical take (a temporary occupancy or permanent incorporation) of Section 4(f) property?
- Is it anticipated that the project's proximity impacts, including constructive use impacts as defined in [23 CFR 774.15](#), will substantially impair a Section 4(f) property?

#### **4.2 Documentation of Section 4(f) Non-Applicability**

Because an approval by TxDOT is mandatory for each use of a Section 4(f) property, it is important to be able to produce a project specific statement supported by records in the project file (or in the environmental review document) to prove that Section 4(f) does not apply and that no approval is necessary. These statements are non-applicability statements and only require informal consultation with ENV supporting the statement before inclusion in the project file or environmental review document. Several tools are available in the [TxDOT Section 4\(f\) Toolkit](#) to help practitioners develop non-applicability statements.

#### **4.3 Constraints Mapping**

The transportation planning process can be substantially enhanced when environmental constraints, including the location of potential Section 4(f) properties, are illustrated on maps or project plans. The presence of a potential Section 4(f) property along a proposed build alternative can be and often provides decision-makers a reason for rejecting a build alternative under consideration during or prior to the environmental process. Including potential Section 4(f) properties on an environmental constraints map can facilitate productive discussions about avoidance alternatives with TxDOT, OWJ, resource agencies, and the public. When preparing a constraints map or project plan that includes a Section 4(f) property, illustrating the following items, including clear labels, is recommended.

- Boundaries of any potential Section 4(f) properties in the project area

- Location of every element contributing to the significance of each potential Section 4(f) property
- Locations and types of use and the area of the potential Section 4(f) property that will be impacted, measured and depicted in acres if known

### 4.4 Project Scoping

The Texas Administrative Code (TAC) requires that the department delegate and project sponsor jointly prepare a project scope ([43 TAC 2.44](#)). Based on the risk assessment (RA) and using the constraints data, stakeholders develop the project scope. The purpose of the project scope is to develop a plan for managing the risks, by identifying the following.

- Roles and responsibilities
- Resource needs
- Outstanding issues and tasks
- Time estimates and work schedule
- Documentation requirements and standards
- Mutually agreed upon methods and techniques for conducting and reporting the outcome of field investigations, engineering studies, and public involvement, as necessary

## 5.0 Applicable Property Types

Section 4(f) properties should be identified as early as practicable in the planning and development stages of a project in order to allow the complete avoidance of the protected resources to receive full and fair consideration ([23 CFR 774.9\(a\)](#)). Late discoveries and late designations of Section 4(f) properties subsequent to completion of environmental studies also may occur. Each situation must be assessed to determine if the change in Section 4(f) status results in a previously unidentified need for a Section 4(f) approval pursuant to [23 CFR 774.13\(c\)](#). The determination should be considered and documented, as appropriate, in any re-evaluation of the project.

Section 4(f) applies mainly to the following types of properties ([23 USC 138\(a\)](#) and [49 USC 303\(a\)](#)).

- Parks and recreational areas of national, state, or local significance that are both publicly owned and open to the public
- Publicly owned wildlife and waterfowl refuges of national, state, or local significance that are open to the public to the extent that public access does not interfere with the primary purpose of the refuge
- Publicly or privately owned historic or archeological sites of national, state, local, or community significance regardless of whether they are open to the public

Some public parks, recreation areas, and wildlife and waterfowl refuges are also historic sites either listed or eligible for listing on the National Register of Historic Places (NRHP). In other cases, historic sites are located within the property boundaries of public parks, recreation areas, or wildlife and waterfowl refuges. When either of these situations exists and a project alternative proposes the use of land from the property, there will be more than one OWJ. FHWA provides guidance regarding the applicability of Section 4(f) to a variety of property types such as its application to multiple-use lands, archeological sites and districts, historic roads, recreational trails, school playgrounds, fairgrounds, golf courses, water bodies, bikeways, cemeteries, zoos, and tribal lands (2012 FHWA [Section 4\(f\) Policy Paper](#)). TxDOT provides similar guidance in the [TxDOT Section 4\(f\) Toolkit](#).

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

According to the 2012 FHWA [Section 4\(f\) Policy Paper](#), publicly owned land is considered a park, recreation area, or wildlife or waterfowl refuge when the following two circumstances are met.

- The land is officially designated as such by a federal, state, or local agency.
- The OWJ over the land determines that one of the property's primary purposes is and that it functions as a park, recreation area, or refuge.

A property's primary purpose relates to its primary function and its management. Unauthorized activities should not be considered as part of TxDOT's determination of Section 4(f) applicability. Incidental, secondary, and occasional uses or dispersed park, recreational, or refuge activities do not constitute a major purpose. The final decision on whether Section 4(f) applies to a particular resource or type of land is made by TxDOT, and documentation of the determination of the applicability or non-applicability should be included in the environmental review document or project file. For Section 4(f) to apply to a publicly owned and accessible park, recreational area, or wildlife or waterfowl refuge, a significant resource must be present for the property to be considered significant ([23 CFR 774.11\(c\)](#); 2012 FHWA [Section 4\(f\) Policy Paper](#)). A property is significant when the following two circumstances are met.

- The activities, features, and attributes of the property's primary purpose are designated as such by the community.
- The OWJ over the property agrees with the designation.

The meaning of the term significance, for the purposes of Section 4(f), should be explained to the OWJ if he or she is not familiar with Section 4(f). If a determination from the OWJ cannot be obtained, and a management plan is not available or does not address the significance of the property, the property will be presumed to be significant (2012 FHWA Section 4(f) Policy Paper).

### **5.2 Historic Sites**

For Section 4(f) purposes, the term "historic site" ([23 CFR 774.17](#)) includes any archeological or historic district, site, building, structure, object, or Traditional Cultural Property (TCP) listed in, or eligible for, the NRHP. Normally, historic sites are identified and their significance is determined during the process required under Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations ([36 CFR 800](#)).

Unless TxDOT determines that the application of Section 4(f) is otherwise appropriate, significance is determined at the local, state, or national level, regardless of whether or not the historic site is publicly owned or open to the public. The significance of a historic site is determined through coordination with the OWJ, which includes the State Historic Preservation Officer (SHPO) and/or the Tribal Historic Preservation Office (THPO), tribes that may attach religious and cultural significance to the property, and, when appropriate, local officials. In cases of doubt or disagreement between TxDOT and the SHPO and/or THPO or if requested by the Advisory Council on Historic Preservation (ACHP), the department delegate shall make a request for a determination of eligibility to the Keeper of the National Register ([36 CFR 800.4\(c\)\(2\)](#)).

As a rule, only archeological sites that warrant preservation in place, including sites discovered during construction, are protected by the Section 4(f) statute. Section 4(f) does not apply if the department delegate, after consultation with the SHPO and/or the THPO, determines that the archeological resource is important chiefly because of what can be learned by data recovery, even if it is agreed not to recover the data, and has minimal value for preservation in place ([23 CFR 774.13\(b\)\(1\)](#)).

Section 4(f) property boundaries, contributing features, and position in relationship to the transportation project area should be graphically depicted to assist engineers, planners, and OWJ regarding potential project impacts. The [TxDOT Section 4\(f\) Toolkit](#) provides additional information on how to document a property protected by Section 4(f).

### 6.0 Exemptions

The interstate highway system is exempt from being treated as a historic resource under Section 4(f), unless the U.S. Secretary of Transportation determines individual elements possess national or exceptional historic significance and should receive protection ([23 CFR 774.11\(e\)](#)). A list of interstate highway-related facilities in Texas determined historically significant by the Secretary of Transportation and therefore not exempt under Section 4(f) can be obtained from TxDOT Environmental Affairs. In addition, the Trinity River Floodplain was congressionally determined to be exempt from Section 4(f) requirements.

### 7.0 Exceptions

FHWA identified various exceptions to the requirements for approval, which are explained in [23 CFR 774.13](#). These exceptions should not be confused with *de minimis* impact determinations. If a project may qualify for an exception, refer to the statute and the [TxDOT Section 4\(f\) Toolkit](#) for more details, and consult with the department delegate. The following list of exceptions to the requirements of Section 4(f) contains examples that do not represent an exhaustive list.

- Minor road projects including restoration, rehabilitation, or maintenance of historic transportation facilities
- Archeological sites with minimal value for preservation in place
- Properties that are designated or determined to have significance late in the development of a proposed transportation projects
- Minimal temporary occupancies
- Federal park roads and parkways
- Certain trails, paths, bikeways, and sidewalks
- Transportation enhancement projects

### 8.0 Use Determinations

The following three types of use are determined through field investigations, engineering studies, and coordination with the OWJ conducted to establish the potential impacts of the proposed transportation project. When determining if there is a use of a Section 4(f) property, up-to-date right of way information and clearly defined property boundaries are necessary. The [TxDOT Section 4\(f\) Toolkit](#) has guidance on how to prepare supporting documentation.

#### 8.1 Temporary Occupancy

A “temporary occupancy” ([23 CFR 774.17](#)) is a use caused by a temporary incorporation of land for the purpose of project construction-related activities. Any situations not covered by the following conditions, qualifying the project for an exception ([23 CFR 774.13\(d\)](#)), constitute a use and require an

approval by FHWA (23 CFR 774.17). If one or more of the following conditions cannot be met, there is an use of Section 4(f) property even though the duration of the onsite activities is temporary.

- The occupation must be for less time than that needed for construction of the project.
- The ownership of the land must not change during the project.
- The scope of the work must be minor. For example, both the nature and the magnitude of the changes to the Section 4(f) property are minimal.
- There are no anticipated, permanent, physical, adverse impacts nor any temporary or permanent interference with the protected activities, features, or attributes of the property.
- The Section 4(f) property being used must be fully restored. In other words, the property must be returned to a condition at least as good as that which existed prior to the project.
- There must be documented agreement among all OWJ over the Section 4(f) property regarding the above conditions.

### ***8.2 Permanent Incorporation of Land***

A permanent incorporation of land, a common type of use, occurs “when land is permanently incorporated into a transportation facility” ([23 CFR 774.17](#)). A permanent incorporation of land occurs whenever there is any taking of land from within the boundary of a Section 4(f) property, even if the amount is small. For example, a permanent incorporation occurs when land from a Section 4(f) property is either purchased outright as transportation right of way or when the applicant for federal-aid funds has acquired a property interest that allows permanent access onto the property, such as a permanent easement for maintenance or other transportation-related purposes.

### ***8.3 Constructive Use***

A “constructive use” ([23 CFR 774.15](#)) occurs when the transportation project does not incorporate land from a Section 4(f) property, but the proximity impacts of the project are so severe that the protected activities, features, or attributes qualifying the property for protection under Section 4(f) are substantially impaired. The assessment for a constructive use should be based upon an impact that is directly attributable to the project under review, not the overall combined impacts to a Section 4(f) property from multiple sources over time. Since it is subjective, any determination of a constructive use must be coordinated TxDOT Environmental Affairs before it can be formalized. The following five situations are listed in 23 CFR 774.15(e) as a potential constructive use, and the situations not considered to be a constructive use are listed in 23 CFR 774.15(f).

- Noise Interference
- Proximity Impairments
- Access Restriction
- Vibration Impact
- Ecological Intrusion

## ***9.0 De Minimis Impact Determinations***

Once it has been determined that there will be a transportation use of a protected Section 4(f) property, the next step is to determine if the use qualifies for the *de minimis* impact determination compliance path.

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A *de minimis* impact determination is appropriate when the impacts resulting from a transportation use are so inconsequential as to merit disregard. If the use does not qualify as *de minimis* initially, measures to minimize harm can be incorporated. The *de minimis* impact criteria may be applied to any project, as appropriate, regardless of the type of environmental document required by the NEPA process described in the FHWA Impact and Related Procedures: Classes of Actions ([23 CFR 771.115](#)).

After completing the Section 4(f) *De Minimis Checklist* with documentation and it is approved by TxDOT Environmental Affairs, no further compliance activities are required. If the impacts of the transportation use are not reduced to a *de minimis* level, an alternative analysis, as described in the following section, is required.

### **9.1 Consultation with Officials with Jurisdiction**

In this compliance path, consultation with the OWJ is mandatory ([23 CFR 774.5\(b\)](#)). For a *de minimis* impact determination to be approved, the OWJ must concur that the project meets the criteria of a *de minimis* impact. He or she also must be notified of and not object to a *de minimis* impact determination based on that concurrence.

### **9.2 Public Involvement Requirements for Parks, Recreation Areas, and Refuges**

Before consulting with the OWJ over parks, recreation areas, or wildlife and waterfowl refuges, an opportunity for public review and comment also must be provided ([23 CFR 774.5\(b\)\(2\)\(i\), \(ii\)](#)). If a proposed action does not normally require public involvement, such as for certain minor projects covered by a categorical exclusion (CE), an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided. Any plan for providing a public notice and opportunity for public comment must comply with the procedural requirements of as outline in the [Environmental Handbook for Public Involvement](#).

### **9.3 Public Involvement Requirements for Historic Sites**

There is no Section 4(f) public involvement requirement for historic sites with regards to *de minimis* impact determinations under Section 4(f).

## **10.0 Alternative Analysis**

The intent of the Section 4(f) statute and the FHWA policy is to avoid and, where avoidance is not feasible and prudent, minimize the harm caused by the use of significant public parks, recreation areas, wildlife and waterfowl refuges, and historic sites by transportation projects. When assessing the importance of protecting a Section 4(f) property, it is important to consider the relative value of its resources to the preservation purpose of the statute ([23 CFR 774.17](#)). It is important to note that the analysis outlined here also can be used to fulfill the compliance requirements established in Chapter 26 of the PWC and Section 6(f) of the LWCF Act.

If a Section 4(f) property is present and an exception or *de minimis* determinations are inappropriate, an “alternative analysis” ([23 CFR 774.3\(a\) and \(c\)](#)) must be performed to determine if there is a feasible and prudent avoidance alternative. The project alternative that avoids one Section 4(f) property by using another Section 4(f) property is not an avoidance alternative. If there is no feasible and prudent avoidance alternative, then it is necessary to identify the feasible and prudent alternative that has the least net impact to the protected Section 4(f) property.

## **10.1 Identifying a Range of Alternatives**

The first step of conducting an alternative analysis is to identify a reasonable range of project alternatives, including those that avoid using Section 4(f) property (2012 FHWA [Section 4\(f\) Policy Paper](#)). Depending on the project context, the potential alternatives must include the following.

- No Action or No Build Alternative
- Location Alternatives
- Alternative Actions
- Alignment Shifts
- Design Changes

## **10.2 Feasible and Prudent Avoidance Analysis**

The second step of conducting the alternative analysis process is to determine if the identified reasonable alternatives are feasible then prudent. “A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property” ([23 CFR 774.17](#)). First, determine if a feasible and prudent avoidance alternative that meets the purpose and need of the project was identified. If available, this alternative must be selected by TxDOT, and the Section 4(f) evaluation process is complete. If there is no (or more than one) feasible and prudent alternative that avoids the use of a Section 4(f) property, a least overall harm analysis must be conducted.

## **10.3 All Possible Planning to Minimize Harm**

“All possible planning” ([23 CFR 774.17](#)) means that all reasonable measures identified in the Section 4(f) analysis to minimize harm or mitigate adverse effects was considered and documented, but all possible planning does not require an analysis of feasible and prudent avoidance alternatives, since such an analysis will have been conducted already. By including mitigation, impacts to the Section 4(f) property could be reduced or eliminated. It is TxDOT policy to develop comparable mitigation measures where possible; therefore, one alternative may not be over mitigated while another alternative for which comparable mitigation could be incorporated is under mitigated. In addition, the mitigation measures relied upon as part of the comparison should be incorporated into the selected alternative. Subsequent design or engineering work occurring after an alternative selection may require changes to the mitigation plans, and TxDOT may require revisions to previous mitigation commitments commensurate with the extent of the design changes, in accordance with [23 CFR 771.109\(b\)](#) and (d), [127\(b\)](#), [129](#), and [130](#).

For public parks, recreation areas, and wildlife and waterfowl refuges, the measures to minimize harm may include, but are not limited to, design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways. For historic sites, the measures to minimize harm normally serve to preserve the historic activities, features, or attributes of the site as agreed by TxDOT and the OWJ over the Section 4(f) resource, in accordance with the consultation process under 36 CFR 800. In evaluating the reasonableness of measures to minimize harm under [23 CFR 774.3\(a\)\(2\)](#), TxDOT will consider the preservation purpose of the statute and the following criteria.

- The views of the OWJ over the Section 4(f) property

- Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with [23 CFR 771.105\(d\)](#)
- Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property

### **10.4 Least Overall Harm Analysis**

This analysis is conducted to determine which of the potential feasible and prudent alternatives that use a Section 4(f) property has the net impact that results in the “least overall harm” in accordance with the factors listed in [23 CFR 774.3\(c\)\(1\)](#) and “includes all possible planning to minimize harm to Section 4(f) property” (23 CFR 774.3(c)(2)). Not all uses of Section 4(f) property have the same magnitude of impact, and not all Section 4(f) properties have the same quality; therefore, the least overall harm analysis is a qualitative analysis. TxDOT is responsible for selecting the alternative that does the least overall harm to a Section 4(f) property. If the net harm to the Section 4(f) properties in all the feasible and prudent alternatives is equal, TxDOT may select any one of them.

## **11.0 Section 4(f) Evaluations**

Once the alternative analysis is complete, the next step is to document the analysis results by preparing an evaluation. There are two types, or general classifications, of Section 4(f) evaluations: individual and programmatic evaluations. Both types are prepared in two phases (draft and final), require the same level of analysis and documentation, and must include the following two findings ([49 USC 303\(c\)](#) and [23 CFR 774.3\(a\)](#)).

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

Draft evaluations should not include any preferences or recommendations for the selection of the alternative that causes the least overall harm, otherwise known as the preferred alternative. A draft evaluation only functions as a record of the analysis results. The draft is submitted to TxDOT to be used by decision makers to select the preferred alternative.

Once TxDOT selects the preferred alternative, it is incorporated along with any comments from ENV. The difference between a programmatic and individual evaluation is how each is processed. For additional details concerning the review and approval of final drafts, refer to Section 15 and the [TxDOT Section 4\(f\) Toolkit](#).

If the proposed project involves a property protected by both Section 4(f) and Section 6(f) of the LWCF Act the compliance processes for the statutes are codependent. The final Section 4(f) approval cannot be granted until the final Section 6(f) approval is granted, and conducting the Section 4(f) alternatives analysis and preparing the draft Section 4(f) evaluation are key components of requesting Section 6(f) approval. This can be problematic for Section 4(f) compliance as approval to use a property protected by Section 6(f) is rarely granted even when the compliance process has been followed and all requirements have been addressed.

## **11.1 Individual Evaluations**

Once the preferred alternative has been incorporated into the draft Section 4(f) evaluation TxDOT ENV will submit the draft to the following organizations for review and comment.

- Office of General Counsel for a legal sufficiency review
- Federal agencies – U.S. Departments of Interior (USDOI), Agriculture (USDA), and Housing and Urban Development (USHUD) – regarding the selection of the least overall harm alternative and mitigation measures (49 USC 303(b) and 23 CFR 774.5(a))

In other words, the final evaluation is not technically complete until it has been circulated for comment and any comments have been incorporated. Additional information concerning the preparation of an individual evaluation can be found in the Documentation Section of this handbook (Section 14)) and online in the [TxDOT Section 4\(f\) Toolkit](#).

## **11.2 Programmatic Evaluations**

FHWA developed five programmatic agreements with the USDOI, USDA, and USHUD. No USDOT agency other than FHWA has adopted the use of these agreements, known as programmatic. Therefore the option to process a Section 4(f) evaluation with a programmatic is limited to FHWA projects. Programmatic allow the option to prepare a programmatic evaluation for certain types of minor uses as a substantial time saving procedural alternative to preparing individual evaluations ([23 CFR 774.3\(d\)](#)). Applying a programmatic does not eliminate the requirement to coordinate with the OWJ while conducting and documenting the alternatives analysis.

Using a programmatic saves time by eliminating the individual evaluation requirements for TxDOT to conduct a legal sufficiency and for the circulation of the draft document regarding the selection of the least overall harm alternative and mitigation measures. These requirements are eliminated because the programmatic were developed based on experience with many projects that have a common fact pattern from a Section 4(f) perspective. By applying the specific set of criteria derived from that experience – including project type, property type, and degree of use and impact – the evaluation of the avoidance alternatives is standardized and simplified.

Details concerning the application and appropriate use of these five programmatic are found on the [Nationwide Section 4\(f\) Programmatic Evaluations](#) webpage in the FHWA Environmental Review Toolkit.

- Independent Walkway and Bikeway Construction Projects
- Use of Historic Bridges
- Minor Impacts to Historic Sites
- Minor Impacts on Parks, Recreation Areas, or Refuges
- Projects Causing a Net Benefit to a Section 4(f) Property

The following programmatic may not be applied to projects where an environmental impacts statement (EIS) is being prepared.

- Minor Impacts to Historic Sites
- Minor Impacts on Parks, Recreation Areas, or Refuges

Additional information concerning the application of a programmatic and the review and approval of a programmatic evaluation can be found online in the [TxDOT Section 4\(f\) Toolkit](#).

## **12.0 Coordination with Officials with Jurisdiction**

Coordination with the OWJ plays an important role in helping TxDOT decision makers determine the best course of action to protect Section 4(f) properties. Coordination with the OWJ happens throughout the Section 4(f) Compliance Process as part of the effort to determine the significance of properties considered for Section 4(f) protection, the magnitude of project impacts to protected properties, and the appropriate level of mitigation. Section 4(f) regulations, codified in [23 CFR 774](#), require consultation with OWJ at several key points in the process. TxDOT recommends that all records of formal and informal consultation be kept in the project file.

### **12.1 Lack of Objection**

At times, the Section 4(f) regulations require a “lack of objection” from the OWJ ([23 CFR 774.5](#)). This requirement is designed to streamline the environmental process by eliminating the need to wait for the OWJ to respond to consultative efforts, while ensuring that an attempt to satisfy procedurally required consultation was made and that the OWJ was provided with the necessary information to make informed decisions concerning the property he or she administers.

### **12.2 Concurrence Requirements**

At times, the Section 4(f) regulations require the “concurrence” ([23 CFR 774.5](#)) of the OWJ. This requirement ensures that no substantive statutory requirements were overlooked. Concurrence from the OWJ is required for actions that minimize or mitigate impacts under the Section 4(f) statutes except when specified in regulation. Concurrence from the OWJ must be documented in the project file.

### **12.3 No Properties are Present**

It is essential to determine whether there are any Section 4(f) properties in each potential project area, and the following lists encompass every possible consultation requirement for the OWJ regarding the circumstances surrounding that determination.

For all types of Section 4(f) property, the following consultation could be required.

- Consultation concerning the late discovery and/or designation of Section 4(f) property
- If no significant properties are present, a statement from the OWJ agreeing that no significant properties are present

For potential parks, recreation areas, and wildlife and waterfowl refuges in the project area, the following consultation is required.

- Consultation showing efforts to determine whether parks, recreation areas, or wildlife and waterfowl refuges are:
  - designated as such
  - publicly owned
  - open to the public
  - significant

For historic properties, much of the consultation is conducted in accordance with the Section 106 of the NHPA, and it is not necessary to conduct the same consultation twice. Refer to the [Historic Resources Toolkit](#) for more details on the Section 106 review process as stipulated in [36 CFR 800](#)

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and the [FHWA and TxDOT Section 106 Programmatic Agreement](#). Since the results of the Section 106 consultation are integrated into compliance documentation for Section 4(f), it is important to ensure that copies of the Section 106 consultation are placed in the project file. When there are potential historic sites in the project area, the following consultation is required.

- Consultation showing the efforts to locate any properties in the project area that may be 50 years-of-age or older (Section 106 process)
- Consultation showing efforts to locate archeological sites that may be impacted by the project (Section 106 process)
- Consultation showing the efforts to determine if any potential historic properties are on or eligible for listing on the NRHP, which is how significance is determined (Section 106 process)
- Consultation concerning whether an exemption applies ([23 CFR 774.11\(e\)](#))

### ***12.4 No Section 4(f) Property Use***

Only transportation projects with Section 4(f) properties in the project area require consultation with the OWJ to determine the specifics concerning whether they will be used and to what extent that use is adverse. The following list explains the consultation requirements for each type of use and exception possible for every type of project.

For all types of Section 4(f) property, the following consultation could be required.

- Consultation conducted to establish the potential impacts of the proposed transportation project activities and the severity of those impacts
- Consultation concerning the application of an exception to Section 4(f) protection for projects impacting properties that are designated or determined to have significance late in the development of a proposed action ([23 CFR 774.13\(c\)](#))
- Consultation concerning whether a project is eligible for the application of an exception for Section 4(f) protection for a temporary occupancy that is so minimal as to not constitute a use ([23 CFR 774.13\(d\)](#))
- Consultation concerning the application of an exception to Section 4(f) protection for federal park roads or parkway projects under [23 USC 204](#) ([23 CFR 774.13\(d\)](#))
- Consultation concerning the application of an exception to Section 4(f) protection for projects impacting certain trails, paths, bikeways, and sidewalks that meet the criteria outlined in [23 CFR 774.13\(f\)](#)
- Consultation concerning the identification of resources sensitive to a constructive use ([23 CFR 774.15\(d\)\(1\)](#)) and the analysis ([23 CFR 774.15\(d\)\(2\)](#)) of a transportation project's potential impacts to those resources ([23 CFR 774.15\(d\)\(3\)](#))
- Consultation concerning a determination that the proximity impacts of a potential constructive use will be mitigated to a condition equivalent to or better than that which would occur if the project were not built ([23 CFR 774.15\(f\)\(6\)](#))
- Written agreement that a transportation enhancement project and mitigation activities qualify for an exception from Section 4(f) protection because the use of the property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection in ([23 CFR 774.13\(g\)](#))

- Notification and a lack of objection for the application of an exception to Section 4(f) protection for minor projects including restoration, rehabilitation, or maintenance of historic transportation facilities ([23 CFR 774.13\(a\)\(2\)](#))

There are no specific consultation requirements for parks, recreation areas, and wildlife and waterfowl refuges in the project area.

When archeological sites of minimal value for preservation in place are present in the project area and it is appropriate to apply an exception to Section 4(f) protection, notification and a lack of objection to applying the exception are required ([23 CFR 774.13\(b\)\(2\)](#)).

### ***12.5 De Minimis Impact Determinations***

The following lists include possible consultation requirement for consulting the OWJ and/or the public concerning the different situations where consultation is necessary for determining if a transportation project impact is *de minimis*.

For parks, recreation areas, and wildlife and waterfowl refuges, the following consultation is necessary for *de minimis* impact determinations.

- Written concurrence agreeing with the determination that the project will not adversely affect the activities, features, or attributes that make the property significant and eligible for Section 4(f) protection
- Notification that the written concurrence with the determination the activities, features, and attributes qualifying the property for Section 4(f) protection will be the basis for a *de minimis* impact determination

### ***12.6 Alternative Analysis and Selection***

This list includes the consultation requirements for conducting an analysis to find either a feasible and prudent avoidance alternative or the alternative that causes the least net harm.

- Consultation showing whether or not a feasible and prudent avoidance alternative exists
- Consultation showing that all possible planning was incorporated into the alternative analyzed
- TxDOT's response to the analysis results, including the selection of the least overall harm alternative.

#### ***12.6.1 Programmatic Evaluations***

The application of a programmatic to a project with a use of Section 4(f) property shall be coordinated as specified in the applicable programmatic for the property and use type, and all coordination required by the project specific programmatic should be retained in the project file.

#### ***12.6.2 Individual Evaluations***

Prior to making any Section 4(f) approvals, TxDOT shall provide the Section 4(f) evaluation for coordination and comment to the following:

- OGC for legal sufficiency review
- The OWJ over the resource
- The USDOJ and, as appropriate, to the USDA and USHUD

After requesting coordination from the OWJ and the appropriate resource agencies and waiting 60 days, TxDOT may assume a lack of objection and proceed with the actions ([23 CFR 774.5\(a\)](#)).

## **13.0 Public Participation**

### **13.1 De Minimis Impact Evaluations**

Transportation statute and FHWA regulations, as codified in [23 CFR 774.5](#), require that the OWJ, consulting parties, and public be notified and given the opportunity to comment on *de minimis* impact determinations prior to the decision to proceed with the action. Prior to TxDOT ENV making a *de minimis* impact determination, the following coordination is required for the following types of projects.

#### **Historic Property Projects**

The consulting parties identified in [36 CFR 800](#) must be consulted, but public notice and comment beyond that required by 36 CFR 800 is not required.

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

Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the resource must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

For those actions that do not routinely require public review and comment under the NEPA, like CEs and certain NEPA reevaluations, a separate public notice and an opportunity for review and comment will be necessary for a *de minimis* impact determination. In these situations, the public notice and opportunity for review and comment should be based on the specifics of the situation and be commensurate with the type and location of the Section 4(f) resource, impacts, and public interest.

### **13.2 Programmatic Evaluations**

#### **Historic Property Projects**

The consulting parties identified in [36 CFR 800](#) must be consulted, but public notice and comment beyond that required by 36 CFR 800 is not required.

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

Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the resource must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

For those actions that do not routinely require public review and comment under the NEPA, like CEs and certain NEPA reevaluations, a separate public notice and an opportunity for review and comment will be necessary for a programmatic impact determination. In these situations, the public notice and opportunity for review and comment should be based on the specifics of the situation and be commensurate with the type and location of the Section 4(f) resource, impacts, and public interest.

While programmatic evaluations do require coordination with the OWJ over the Section 4(f) property, coordination with the USDOJ, USDA, and USHUD is not required, unless the net benefit programmatic is used to process the approval.

### **13.3 Individual Evaluations**

#### **Historic Property Projects**

The consulting parties identified in [36 CFR 800](#) must be consulted, but public notice and comment beyond that required by 36 CFR 800 is not required.

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

Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the resource must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

For those actions that do not routinely require public review and comment under the NEPA, like CEs and certain NEPA reevaluations, a separate public notice and an opportunity for review and comment will be necessary for a programmatic impact determination. In these situations, the public notice and opportunity for review and comment should be based on the specifics of the situation and be commensurate with the type and location of the Section 4(f) resource, impacts, and public interest.

Section 4(f) of the U.S. DOT Act requires coordination with OGC, the OWJ over the Section 4(f) property, USDOJ, and, as appropriate, USDA and USHUD for Individual Evaluation for both historic properties and parks, recreation areas, and wildlife and waterfowl refuges.

The comment period is a minimum of 45 days. If comments are not received within 15 days after the comment deadline, TxDOT may assume a lack of objection and proceed with the action ([23 CFR 774.5\(a\)](#)).

## **14.0 Documentation**

The Section 4(f) statute ([23 USC 138](#) and [49 USC 303](#)) does not require the preparation, distribution, or circulation of any written document, but, as codified in [23 CFR 774.7\(a\)](#) and (b), TxDOT mandates the use of procedures that require the preparation, circulation, and coordination of Section 4(f) documents. The documentation of all Section 4(f) consultation, coordination, determinations, and approvals is intended to establish a record of compliance with the regulatory process. Documentation also provides evidence that the substantive requirements were met.

Section 4(f) documentation and processing requirements vary depending on the type of Section 4(f) property used and the type of the use. However, all situations that involve a Section 4(f) property will necessitate some degree of documentation. The various types of Section 4(f) projects documentation are found online based on their respective documentation standards in the [TxDOT Section 4\(f\) Toolkit](#).

### **14.1 Project File**

The project file is the written record documenting the basis for determining that there are no Section 4(f) properties present in the project area, there is no use of a Section 4(f) property, an impact is *de minimis*, there is no feasible and prudent avoidance alternative to the use of the Section 4(f) property that meets the purpose and need of the project, or efforts to perform all possible planning to minimize harm were made in accordance with all the appropriate statutes and regulations.

### 14.1.1 All Project Types

For all project approval types, the project file always should contain the following essential information.

- If there are no properties present, a statement that there are no Section 4(f) properties present in the proposed project area (2012 FHWA [Section 4\(f\) Policy Paper](#))
- If there are properties present, a textual and graphic description of the Section 4(f) property boundaries, significant features, and position in relationship to the transportation project area
- For historic and archeological sites, a statement of significance documenting that the property is eligible for or listed in the NRHP or exempted in accordance with [23 CFR 774.11\(e\)\(2\)](#) (2012 FHWA [Section 4\(f\) Policy Paper](#))
- For parks, recreation areas, and refuges, documentation that the property's primary purpose based upon activities, features, or attributes of the property and it functions as a public park, recreation area, or refuge (2012 FHWA [Section 4\(f\) Policy Paper](#))
- For parks, recreation areas, and refuges, results of coordination with the OWJ documenting if properties are publicly owned, accessible to the public, and considered significant.
- If the OWJ determines that a potential Section 4(f) property is not significant, a statement indicating that the property is not significant is required and an e-mail or letter from the OWJ with its non-significance determination must be added to the project file.
- If there are Section 4(f) properties present but there is no use of a Section 4(f) property, a statement indicating there is no use of Section 4(f) property as defined in [23 CFR 774.17](#)
- Documentation stating whether or not the property or the use qualify for an exception to Section 4(f) applies ([23 CFR 774.13](#))
- A statement indicating the type of use (a temporary occupancy, permanent incorporation, or constructive use) and the nature of impacts to the Section 4(f) property per [23 CFR 774.13\(d\)](#) and [774.17](#)

### 14.1.2 De Minimis Determinations

For *de minimis* approvals, the project file always should contain the following essential information in addition to the information required for all projects ([23 CFR 774.7\(b\)](#)).

- Completed and TxDOT ENV approved *De Minimis* Section 4(f) Checklist with required attached documentation.

### 14.1.3 Programmatic Evaluations

For programmatic evaluation approvals, the project file always should contain the following information in addition to the information required for all projects.

- Completed and TxDOT ENV approved Programmatic Section 4(f) Checklist with required attached documentation.

### 14.1.4 Individual Evaluations

For individual evaluation approvals, the project file always should contain the following essential information in addition to the information required for all projects.

- Documentation of the results of the analysis to determine which potential alternatives are feasible and prudent
- Documentation supporting the absence of a feasible and prudent avoidance alternative
- Documentation and coordination with the OWJ showing that all possible planning to minimize harm including impact avoidance, minimization, and mitigation or enhancement measures have been conducted ([23 CFR 774.7\(a\)](#))
- Documentation of the results of the least overall harm alternative analysis for each feasible and prudent alternative
- Documentation of the results of the consultation with TxDOT ENV and their selection of the alternative with the least overall harm ([23 CFR 774.7\(c\)](#))
- For Section 4(f) properties also protected by Section 6(f) of the LWCF Act, a record of the approval of a conversion request proposal issued by the National Park Service
- Documentation of the results of consultation with the USDOJ and, as appropriate, the USDA and USHUD

### ***14.2 Relationship to NEPA Documents***

Determinations and findings regarding the outcome of Section 4(f) compliance efforts are typically included in the NEPA document or in the documentation supporting that a project is a categorical exclusion. As CEs do not require an environmental review document, Section 4(f) evaluations (exceptions and *de minimis*) often function as standalone checklists with required, attached documentation. When included in an environmental review document, Section 4(f) evaluations may function as a separate chapter. Tools to assist project sponsors in preparing legally sufficient responses to Section 4(f) requirements are available online in the [TXDOT Section 4\(f\) Toolkit](#).

If the final environmental impact statement (FEIS) includes identification of the preferred alternative, the regulations allow the option to include the Section 4(f) approval in the FEIS instead of the Record of Decision (ROD). However, when the Section 4(f) approval is included in the FEIS, the basis for that approval still must be summarized in the ROD ([23 CFR 774.9\(b\)](#)).

If a new Section 4(f) resource is identified after the NEPA decision, a separate Section 4(f) evaluation may be prepared or included as a chapter in the NEPA document. Preparation of a separate Section 4(f) evaluation does not necessarily require the supplementation of a previously completed NEPA document ([23 CFR 774.9\(c\),\(d\)](#)), although supplementation may be done if the Section 4(f) evaluation includes the conclusion that there is an avoidance alternative available that was not selected in the previous final NEPA decision document.

## **15.0 Review and Approval Process**

While the writing of Section 4(f) documents can be done under the direction of the project sponsor, the process for the review and approval of Section 4(f) documents is handled by the department delegate. TxDOT ENV is the department delegate for reviewing and approving Section 4(f) documentation and findings. For additional details on review requirements and procedures, refer the review standards, guidance, and procedures available online in the [TXDOT Section 4\(f\) Toolkit](#).

### **15.1 Legal Sufficiency Reviews**

A legal sufficiency review is required for all individual evaluations. A legal sufficiency review is not required when a Section 4(f) use is approved based solely on a *de minimis* impact determination, where a programmatic is applied, or when TxDOT determines that Section 4(f) does not apply. TxDOT may choose, at their discretion, to conduct a legal sufficiency review of any project ([23 CFR 774.7\(d\)](#)). A procedure to assist project sponsors to prepare Section 4(f) documents for legal sufficiency reviews is available online in the [TxDOT Section 4\(f\) Toolkit](#).

### **15.2 De Minimis Impact Determination Review and Approval**

A *de minimis* impact determination is approved by TxDOT ENV initially as part of the compliance process. The final approval occurs when the *de minimis* impact determination is approved as a part of the NEPA document in which it is included.

If no NEPA document is required, the project sponsor will prepare the required checklist and documentation and submit it to TxDOT ENV for review and approval. TxDOT ENV is the approval authority for all *de minimis* impact findings; therefore, TxDOT ENV reviews the documentation and the project file and approves the determination. If approved, TxDOT ENV will notify the project sponsor of the *de minimis* impact determination finding (23 CFR 774.9(b)). If TxDOT ENV does not approve, the project must be reworked and submitted for approval again, or a different type of Section 4(f) approval must be pursued.

### **15.3 Programmatic Evaluation Review and Approval**

The benefit of a programmatic evaluation approval is that the review process prior to approval is much shorter than the review process for an individual evaluation. The project sponsor submits the draft programmatic evaluation, which must follow TxDOT documentation standards, to TxDOT ENV for review and approval. However, before submitting the draft document for review, it is important for the project sponsor to ensure the at any Chapter 26 of the Parks and Wildlife Code and Section 6(f) of the Land and Water Conservation Fund Act (LWCF Act) requirements have been addressed, as no Section 4(f) approval will be granted until these requirements have been addressed. If necessary, the department delegate will return the draft with comments that must be addressed. TxDOT ENV will issue a formal approval.

### **15.4 Individual Evaluation Review and Approval**

First, the draft individual evaluation is reviewed by TxDOT ENV and OGC for technical completeness, and the project sponsors incorporate any comments. Next, TxDOT ENV sends the draft to the U.S. Department of Interior (USDOL) for review and comment. After the evaluation is reviewed by the USDOL and their comments are incorporated into the final evaluation, the draft is finalized and it is sent back to OGC for a legal sufficiency review, which is required for all individual evaluations. For some Section 4(f) evaluations, coordination with the U.S. Department of Agriculture (USDA) and the U.S. Department of Housing and Urban Development (USHUD) is required. After the legal sufficiency review is complete, the final individual evaluation approval is given with the NEPA decision (CE, Finding of No Significant Impact (FONSI), or ROD).

## **16.0 Glossary**

**All Possible Planning** [23 CFR 774.17](#) – This refers to all the reasonable measures identified in the Section 4(f) compliance process to minimize harm or mitigate for adverse impacts and effects.

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**Constructive Use Determinations** [23 CFR 774.15](#) – A constructive use occurs when a transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a property for protection under Section 4(f) are substantially impaired.

**Department Delegate** – The department delegate is a TxDOT district, office, or division responsible for approving environmental review documents and other aspects of the state and FHWA environmental process conducted under [43 TAC 2.8](#) and the 2013 TxDOT FHWA MOU. Under the MOU the department delegate responsible for the approval of Section 4(f) findings and evaluations is the director of the Environmental Affairs division.

**De Minimis Impact** [23 CFR 774.17\(5\)](#) – When an impact is classified as *de minimis*, it means the appropriate administering agency determined that project impacts to the protected Section 4(f) property are minimal. For historic sites, for example, a *de minimis* impact determination means that either no historic property is affected by the project or that the project will have no adverse effect on the historic property in question in accordance with [36 CFR 800](#). For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact determination means that the features, attributes, or activities qualifying the property for protection under Section 4(f) will not be adversely affected.

**Exceptions** [23 CFR 774.13](#) – Section 4(f) regulations include provisions for various conditions excepting both project activities and types of properties from Section 4(f) protection. This excepts the project from Section 4(f) requirements and provides an abbreviated compliance path.

**Exemptions** [23 CFR 774.11\(e\)\(2\)](#) – An exemption is essentially a determination that certain classes of resources are not eligible for protection under the Section 4(f) statute. Interstate highway resources determined by the U.S Secretary of Transportation as not eligible for listing in the NRHP is the only type of property exempted in Texas.

**Feasible and Prudent Avoidance Alternative** [23 CFR 774.17](#) – A feasible and prudent avoidance alternative is a project alternative that may be built, does not use a Section 4(f) property, and does not cause any severe problems of a magnitude that substantially outweighs the importance of protecting a Section 4(f) property.

**Individual Evaluation** – An individual evaluation is a type of Section 4(f) evaluation that must be circulated to the Secretary of the Interior for comment and review before it can be approved. Individual evaluations are the only type of Section 4(f) documentation that is always subject to a TxDOT legal sufficiency review.

**Legal Sufficiency Review** [23 CFR 774.7\(d\)](#) – A legal sufficiency review is a review carried out by TxDOT to determine if an individual evaluation meets the minimum legal requirements and is ready for review by other federal agencies and the public. However, TxDOT may choose, at their discretion, to conduct a legal sufficiency review for any projects to which Section 4(f) applies.

**Net Benefit** [23 CFR 774.17](#) – A net benefit is achieved when the transportation use, the measures to minimize harm, and the mitigation incorporated into a project result in an overall enhancement of a Section 4(f) property. The enhanced resource(s) is compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property in order to consider the activities, features, and attributes qualifying the property for Section 4(f) protection. A project cannot achieve a net benefit if it results in the substantial diminishment of the function or value that made the property eligible for Section 4(f) protection.

**Official(s) with Jurisdiction** [23 CFR 774.17](#) –The OWJ is typically the agency that owns or administers the property in question. For historic and archeological resources, this is the SHPO. When project impacts may occur on tribal land, the OWJ is the THPO. In some cases, the ACHP and NPS may have a role in

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the process. For parks, recreation areas, and refuges, the OWJ is typically the agency that owns and administers that property. For example, the OWJ is the U.S. Fish and Wildlife Service (USFWS) in the case of wildlife refuges or the NPS in the case of a national park. In some cases, two or more agencies may share jurisdiction over a park or other property.

**Programmatic [23 CFR 774.3\(d\)](#)** – A programmatic, or programmatic agreement, can be applied to a Section 4(f) evaluation for certain minor uses of a Section 4(f) property, allowing the evaluation to be processed as a programmatic evaluation. Programmatic evaluations can be a time saving procedural alternative to preparing and processing an individual evaluation. To date, there are five programmatic evaluations approved for use nationwide, which were developed based on experience with many projects that have a common fact pattern from a Section 4(f) perspective. By applying the specific set of criteria from that experience – including project type, degree of use, and impact – the evaluation of avoidance alternatives is standardized and simplified. An approved programmatic may be relied upon to cover a particular project only if the project meets the specific conditions in that programmatic.

**Programmatic Evaluations [23 CFR 774.3\(d\)](#)** – A programmatic evaluation is a type of Section 4(f) evaluation that qualifies for processing with a programmatic. Section 4(f) evaluations processed with a programmatic generally take less time to be approved than individual evaluations. Programmatic evaluations do not require a legal sufficiency review and the programmatic used for processing the project approval eliminates many of the review circulation requirements, resulting in a time saving procedural alternative to preparing and processing an individual evaluation.

**Project Sponsor** – As defined by the [43 TAC 2.44](#), the project sponsor accepts the responsibility for preparing the environmental review document or documentation and performing any related tasks. A TxDOT district, division, office, region or a municipality, county, group of adjoining counties, regional mobility authority, local government corporation, or transportation corporation may be a project sponsor. Private entities and other types of local government entities may not serve as project sponsors.

**Section 4(f) Evaluation [23 CFR 774.3\(a\), \(b\)](#)** – The term Section 4(f) evaluation refers to a document “prepared to support the granting of a Section 4(f) approval under Section 774.3(a).” An approval under Section 774.3(a) is based on a finding that there is no feasible and prudent avoidance alternative and that the impact includes all possible planning to minimize harm. The term Section 4(f) evaluation is not used to refer to documents that solely contain a finding that a Section 4(f) does not apply or a *de minimis* impact determination. Thus a Section 4(f) evaluation is a specific type of Section 4(f) document. The regulations do not prescribe a specific format for a Section 4(f) evaluation, but they do require it to include “sufficient supporting documentation” for each finding that it contains.

**Section 4(f) Property [23 CFR 774.17](#)** – A publicly owned and accessible park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance all qualify as Section 4(f) properties. Any public or privately owned historic site of national, state, or local significance also qualifies. For additional details on what constitutes a Section 4(f) property, refer to the [TxDOT Section 4\(f\) Toolkit](#).

**Use [23 CFR 774.17](#)** – Under Section 4(f), the term use has a specific meaning. A use occurs when a project permanently incorporates land from a Section 4(f) property, even if the amount of land used is very small. In addition, a use can result from a temporary occupancy of land within a Section 4(f) property if that temporary occupancy meets certain criteria (2012 FHWA Section 4(f) Policy Paper). A use also can occur when a project’s proximity to a Section 4(f) property has the potential to substantially impair the protected features of that property, which is known as a constructive use.

## **17.0 Abbreviations and Acronyms**

ACHP	Advisory Council on Historic Preservation
CE	Categorical Exclusion
CFR	Code of Federal Regulations
EIS	Environmental Impact Statement
ENV	TxDOT's Environmental Affairs Division
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
LWCF	Land and Water Conservation Fund
LWCF Act	Land and Water Conservation Fund Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPS	National Park Service
NRHP	National Register of Historic Places
OGC	Office of General Council
OWJ	Official(s) with Jurisdiction
PWC	Parks and Wildlife Code
RA	Risk Assessment
ROD	Record of Decision
SHPO	State Historic Preservation Officer
TAC	Texas Administrative Code
TCP	Traditional Cultural Property
THPO	Tribal Historic Preservation Officer
TxDOT	Texas Department of Transportation
USC	United States Code
USDA	United States Department of Agriculture
USDOI	United States Department of Interior
USDOT	United States Department of Transportation
U.S. DOT Act	United States Department of Transportation Act
USFWS	United States Fish and Wildlife Service
USHUD	United States Department of Housing and Urban Development

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### Appendix A

The following table shows the revision history for this guidance document.

<b>Revision History</b>	
<b>Effective Date Month, Year</b>	<b>Reason for and Description of Change</b>
May 2015	Version 1 released