PART 2, CHAPTER 13

SECTION 4(f) RESOURCES

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PART 2, CHAPTER 13

SECTION 4(f) RESOURCES

13.1 OVERVIEW

13.1.1 Legislative Intent: Background and Guidance

The United States Congress created ***Section 4(f)*** in 1966, ***49 U.S.C. § 1653(f)***, as a part of the ***Department of Transportation (DOT) Act*** in order to enhance the protection of park and recreation lands, wildlife and waterfowl refuges, and historic sites during the planning and development of transportation facilities. In 1966, the Congress also added a similar provision to ***Title 23 United States Code*** (***U.S.C.***) ***§138*** for the Federal-aid Highway Program. As a result, ***Section 4(f)*** only applies to agencies within the U.S. Department of Transportation (USDOT), that is, the Federal Highway Administration (FHWA), the Federal Aviation Administration (FAA), the Federal Transit Administration (FTA), and the Federal Railroad Administration (FRA).

This chapter guides Florida Department of Transportation (FDOT) environmental practitioners through the analysis and documentation standards established to meet and document the substantive findings required by ***Section 4(f)*** statutes before using lands protected by ***Section 4(f)*** for any USDOT funded project. Each agency of the USDOT complies with ***Section 4(f)*** somewhat differently as a result of the different forms of transportation the agency oversees. Because the vast majority of FDOT's projects which involve ***Section 4(f)*** protected properties are either funded or approved by FHWA, this chapter focuses primarily on the processes associated with the development of highway projects. This chapter also provides the background, requirements, and procedures that have been developed by the USDOT (primarily FHWA and FTA), the federal courts, and state departments of transportation environmental specialists from across the United States. The legislative and legal history of ***Section 4(f)*** is important for practitioners to understand because the administrative record required to show compliance with the law has been developed in great part as a result of numerous court decisions based upon the expressed intent of the law.

For the purposes of this chapter, the Lead Federal Agency is presumed to be FHWA. However, since ***Section 4(f)*** applies to all agencies of the USDOT occasions may arise in which ***Section 4(f)*** will apply to a particular project due to the involvement of an agency other than FHWA. For situations involving a different lead agency of USDOT, contact the FDOT ***Section 4(f)*** Coordinator at the State Environmental Management Office (SEMO) and work with the officials of the lead transportation agency. Regardless of which agency of the USDOT leads, the basic requirements for ***Section 4(f)*** are the same, although the nature of alternatives analyzed may vary. Coordination in such cases is done through USDOT's lead agency for each particular project.

Unlike many other environmental laws, Congress established ***Section 4(f)*** as a substantive law rather than a procedural one. This means that prior to the approval for the use of land that is protected by ***Section 4(f)***, the law requires specific findings.

Section 4(f) does not allow agencies of the USDOT to use land from protected properties unless they show that there are no feasible and prudent alternatives to using the property and that such use, when it does occur, includes all possible planning to minimize harm to the resource. Furthermore, in situations where there are no feasible and prudent avoidance alternatives and there are two or more alternatives requiring the use of ***Section 4(f)*** property, the USDOT may select only the alternative which results in the least overall harm.

Utilizing the standards established in the law as expressed by the Congress, the United States Supreme Court ruled that the Congressional intent of ***Section 4(f)*** was to establish a preservation preference for the property types listed in the law [***Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402** (**1971**)]. This court case established that FHWA's project documents provide an analysis supporting the substantive requirements set forth in the law.

In 2005, Congress passed the ***Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)***. In ***Section 6009*** of ***SAFETEA-LU***, which amended both ***23 U.S.C. § 138*** and ***49 U.S.C. § 303*** (see ***Figure 13-1*** for the text of ***49 U.S.C. § 303***), Congress made several changes to existing ***Section 4(f)*** requirements. First, Congress added a provision that created an additional method for approving the use of ***Section 4(f)*** properties when the impact(s) to these properties are so minor they can be considered *de minimis*. The term *de minimis* is a Latin phrase that, for legal purposes, means "of minimum importance" or "trifling." In terms of ***Section 4(f)***, it refers to an impact that is so small, minuscule, or tiny that the law will not consider it. For example, the acquisition of a non-functioning, quarter-acre of a 1,000 acre park is considered *de minimis*. The proposed action technically uses land from the park, but the effects of the use on the remaining parcel are too small to have any consequences on the continued functioning of the park. Under this new provision, once the USDOT determines that a transportation use of ***Section 4(f)*** property results in only a *de minimis* impact, analysis of avoidance alternatives is not required and the ***Section 4(f)*** evaluation process is complete.

In addition to the *de minimis* provisions, Congress directed the USDOT to revise its ***Section 4(f)*** regulations to clarify the application of the feasible and prudent standard and provide greater guidance for determining "least overall harm." In March 2008, FHWA and FTA issued a joint regulation at 23 Codeof Federal Regulations (CFR) Part 774 (***23 CFR Part 774)***, which incorporates guidance for *de minimis* findings and clarifies the prudent and feasible standard.

Section 6007 of ***SAFETEA-LU*** exempts the bulk of the Eisenhower Interstate Highway System from consideration as a historic resource under ***Section 4(f)*** of the ***DOT Act of 1966,*** as amended. The current FHWA ***Section 4(f) Policy Paper*** (***FHWA, 2012***) includes these provisions. In a related measure, the Advisory Council on Historic Preservation (ACHP) adopted an exemption from the effects analysis required under ***Section 106*** of the ***National Historic Preservation Act of 1966 (NHPA)***, as amended, to the majority of the Interstate Highway System on March 10, 2005. See ***Part 2, Chapter 12, Archaeological and Historical Resources*** for the details of this exemption. ***Part 2 Chapter 12, Archaeological and Historical Resources*** also contains a list of post-1945

common bridges which remain subject to the requirements of sections 4(f) and 106. The remainder of the post-1945 concrete and steel bridges as described in ***Part 2 Chapter 12, Archaeological and Historical Resources*** are exempted from individual consideration under ***Sections 106 and 4(f)***.

The instruction provided in this chapter has come from numerous FHWA guidance papers such as the current FHWA ***Section 4(f) Policy Paper*** (***FHWA, 2012***), the ***Section 4(f)*** regulations at ***23 CFR Part 774***, ***Section 4(f)***, and related publications in the ***Federal Register (FR)***, as well as many other appropriate resources. For a listing of the sources used to develop this chapter, see ***Section 13.5*** and the **FDOT** ***Section 4(f) References web page***. The ***FHWA Technical Advisory, T6640.8A***, ***Guidance for Preparing and Processing Environmental and Section 4(f) Documents*** (October 30, 1987) remains unchanged, although it is applied far more flexibly.

13.1.2 Definitions

Below is a listing of common key terms that are used in ***Section 4(f)***, and definitions for these key terms.

Term	Definition
All Possible Planning (23 CFR § 774.17)	All possible planning means that all reasonable measures identified in the ***Section 4(f)*** evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.
Constructive Use (23 CFR § 774.15)	A type of indirect use in which a transportation project's proximity impacts (as opposed to direct impacts) are so severe that the protected activities, features, or attributes that qualify a resource for protection under ***Section 4(f)*** are substantially impaired. Examples include excessive noise level increases, diminished aesthetic features, ecological intrusions, and other indirect impacts to the resource's environment or utility. Constructive Use determinations can only occur when there is no direct use of the protected property. Determinations that a constructive use is occurring cannot be made without the participation of Federal Highway Administration's (FHWA) Headquarters.
de minimis Impact (23 CFR § 774.17)	For historic sites, *de minimis* impact means that FHWA has determined, in accordance with ***36 CFR Part 800*** that no historic property is affected by the project or that the project will have "no adverse effect" on the historic property being used within the meaning of ***Section 4(f)***. For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact finding is appropriate when the use of the protected property is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under ***Section 4(f)***.

Extraordinary Magnitude (23 CFR § 774.17)	A reference to exceedingly high costs or other objectionable factors associated with a project alternative, extraordinary magnitude characterizes the impacts to ***Section 4(f)*** or non-***Section 4(f)*** properties as beyond what is acceptable in light of the statute's preservationist purposes.
Feasible and Prudent (23 CFR § 774.17)	A feasible and prudent avoidance alternative avoids using ***Section 4(f)*** property and does not present unique problems, unusual factors, or other severe problems of a magnitude that substantially outweighs the importance of protecting the ***Section 4(f)*** property. An alternative is not feasible if it cannot be built as a matter of sound engineering judgment. An alternative is not prudent if: • It compromises the project to a degree that is unreasonable to proceed with the project in light of its stated purpose and need; • It results in unacceptable safety or operational problems. • After reasonable mitigation, it still causes: 1. Severe social, economic, or environmental impacts; 2. Severe disruption to established communities; 3. Severe disproportionate impacts to minority or low income populations; or 4. Severe impacts to environmental resources protected under other federal statutes; • It results in additional construction, maintenance, or operational cost of an extraordinary magnitude; • It causes other unique problems or unusual factor; or, • It involves multiple factors listed above, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.
Late Designation (23 CFR § 774.13(2)(c))	The designation of park, recreation land, wildlife or waterfowl refuge, or historic site that is made (or determination of significance changed) late in the transportation project development process. With the exception of the treatment of archeological sites, the project may proceed without consideration of ***Section 4(f)*** when the property was acquired for transportation purposes prior to the change in designation and if an adequate effort was made to identify properties protected by ***Section 4(f)*** prior to acquisition. If it is reasonably foreseeable, however, that a property would be determined eligible for the National Register of Historic Places (NRHP) prior to the start of construction, it should be treated as a historic site and a ***Section 4(f)*** property.

Legal Sufficiency Review	A review by FHWA's Office of Chief Counsel required for Final Environmental Impact Statements (FEISs) (***23 CFR § 771.125(b))*** and final ***Section 4(f)*** evaluations (***23 CFR § 774.7(d***)). The purpose of the review is to ensure that ***Section 4(f)*** and the ***National Environmental Policy Act (NEPA)*** requirements have been met and are legally defensible. A legal sufficiency review is not a technical review; rather, it is a review of ***Section 4(f)*** and ***NEPA*** documentation and compliance efforts, and an attempt to make sure that these efforts correspond with the law.
Minimization (23 CFR § 774.3(c)(2) and § 774.17)	Minimization involves measures developed during the planning and project development phase of a project to reduce impacts to a resource. Minimization measures could include alignment shifts, a commitment to off-season construction, replacement of land or facilities, restoration, or landscaping or certain aesthetic treatments.
Mitigation Activities	Mitigation activities are actions taken to reduce the impacts of adverse effects to property, which are designed to either undo or make up for an effect that the action has upon a protected property. There are situations in which a mitigation action can be taken to reduce or minimize the harm to a resource or a community.
National Environmental Policy Act (NEPA) (43 U.S.C. § 4321)	The ***National Environmental Policy Act of 1969 (NEPA)*** is considered to be the basic "National Charter" for protection of the environment. ***NEPA*** requires that, to the extent possible, the policies, regulations, and laws of the Federal Government be interpreted and administered in accordance with the protection goals of the law. It also requires federal agencies to use an interdisciplinary approach in planning and decision-making for actions that impact the environment.
Official with Jurisdiction	The legal representative of the agency owning or administering the resource, unless the agency has delegated or relinquished this authority via formal agreement. For historic properties, the official with jurisdiction is the State or Tribal Historic Preservation Officer. Some ***Section 4(f)*** properties, such as an historic park, may have multiple officials with jurisdiction.
Primary Purpose	Primary purpose(s) of a property relates to the property's function and management plan. In order to determine a land's primary purpose(s), a project sponsor will have to consult with the officials with jurisdiction and review its master plan (if available) to determine if the purpose is explicitly stated or how it is intended

	to be managed. The primary purpose(s) of the property apply to the whole property and not just the portion being used except in the cases where the property is established to fulfill varying functions as with State and National Forests.
Policy Paper	FHWA's ***Section 4(f) Policy Paper*** ***(FHWA, 2012)*** explains how ***Section 4(f)*** applies in general and to specific situations where properties meeting the ***Section 4(f)*** criteria may be involved. It is based on court decisions, experience, and on policies developed by FHWA and U.S. Department of Transportation over the years. The ***Section 4(f) Policy Paper*** serves as a guide for ***Section 4(f)*** compliance in common project situations often encountered by FHWA, state DOT, and other transportation partners.
Prudent	(See Feasible and Prudent)
Public Easement	A public easement includes any interest, right of access or control of a land that is owned by a private entity or a public agency. In the case of transportation easements, these provide the FDOT certain right of access or control for public transportation purposes. In the case of easements on private property for recreational, refuge, conservation, and etc. uses, these easements may create a public proprietary interest in the land for the purpose identified in the easement. The terms of the easement should be examined to determine if ***Section 4(f)*** applies to the property.
Publicly Owned	Property that is owned by a government authority via either fee simple ownership or permanent easement. In some cases, private lands that are leased by government authorities may also be considered publicly owned for the purpose of ***Section 4(f)***, depending upon the terms of the lease (e.g., length, cancellation clauses).
Public Visitation	Refers to the openness of a park, recreation area, waterfowl or refuge to the general public. If the general public is permitted visitation at any time to significant, publicly owned parks and recreational areas, the properties are protected by ***Section 4(f)***. ***Section 4(f)*** does not apply when visitation is permitted to a select group of the public, such as restricted recreational areas established on military bases for the sole use of the military personnel and their dependents or those on college campuses where the users must be students of the college. However,

	public access may be restricted to properties protecting refuge habitat or species and still be protected by ***Section 4(f)***.
Real Property	Land and any improvements thereto, including but not limited to, fee interests, easements, air or access rights, and the rights to control the use or leasehold interest of the property.
Section 4(f)	Refers to the original section within the ***U.S. DOT Act of 1966***, which provided for consideration of the protection of park and recreation lands, wildlife and waterfowl refuges, and 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 U.S. DOT and is implemented by the FHWA and the Federal Transit Administration (FTA) through ***23 CFR Part 774*** and continues to be referred to as "Section 4(f)" matters, even though this section does not exist anymore in the new codification, in order to avoid confusion.
Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 *et seq.*)	Established in same year as ***Section 4(f)*** (1966) and requires the head of federal agencies to consider the effects of proposed federally funded, permitted, or approved undertakings on significant historic properties in the planning and delivery of federal undertakings. Also requires that the head of the federal agency consult with, and provide an opportunity for comment on, the effects of the proposed undertaking on historic properties from the Advisory Council on Historic Preservation and appropriate consulting parties.
Section 6(f) of The Land and Water Conservation Fund Act (LWCFA) (36 CFR § 59.3)	Passed by Congress in 1965, the Act established the Land and Water Conservation Fund, a matching assistance program that provides grants that pay half the acquisition and development cost of outdoor recreation sites and facilities. ***Section 6(f)*** of the Act prohibits the conversion of property acquired or developed with these grants to a non-recreational purpose without the approval of the U.S. Department of the Interior (DOI's) National Park Service (NPS). The U. S. DOI must ensure that replacement lands of equal value, location, and usefulness are provided as a condition of such conversions. Consequently, where conversions of ***Section 6(f)*** lands are proposed for highway projects, project sponsors must provide replacement lands.
Significant	Significant means that in comparing the availability and function of the resource with the recreational, park, and refuge objectives of the community, the resource in question plays an important

(23 CFR § 774.11(c))	role in meeting those objectives. If a determination from the official with jurisdiction cannot be obtained, the ***Section 4(f)*** land will be presumed to be significant. All determinations (whether stated or presumed) are subject to review by FHWA for reasonableness.
Substantially Impaired (23 CFR § 774.15(a))	Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished. Generally, this means that the value of the resource, in terms of its ***Section 4(f)*** purpose and significance, will be meaningfully reduced or lost.
Temporary Occupancy (23 CFR § 774.13(d))	A temporary occupancy of land is a use of ***Section 4(f)*** protected land for construction related or associated activities which are not permanent and which generally last either less than or equals the time of construction of a transportation or FDOT project. It is most commonly associated with equipment storage areas, erosion control features, or other construction-related. Temporary occupancies can occur at sites located out of the immediate project vicinity as well as alongside the project such lands used for haul roads.
Trails	For the purposes of ***Section 4(f)***, “trails” refers to any shared use path such as sidewalks, bike paths, hiking trails, pedestrian paths, equestrian facilities, or other facilities intended for use by off-road vehicles such as all-terrain vehicles or snowmobiles.
Unique Problems	Unique problems are present when there are unusual factors, or when the costs or community disruption reach extraordinary magnitude.
Use (23 CFR § 774.17)	Generally, "use" of land within the meaning of ***Section 4(f)*** occurs when a USDOT approved project or program: (1) permanently incorporates land from a ***Section 4(f)*** site into a transportation facility, (2) requires a temporary occupancy of land from a ***Section 4(f)*** protected property that is adverse in terms of the preservationist purposes of ***Section 4(f)***, or (3) the proximity impacts 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.

13.2 PROCESS

When a proposed transportation project requires the use of land from public parks, recreation areas, wildlife and waterfowl refuges, and/or historic sites, unless the use is *de minimis*, the transportation agency must show that: (1) there is no feasible and prudent alternative to that use, and (2) the proposed project includes all possible planning to minimize harm to the protected property. In addition in cases where there is no feasible and prudent alternative that avoids the use of ***Section 4(f)*** properties, and there is more than one alternative using ***Section 4(f)*** property, the alternative chosen must be the alternative which result in the least overall harm in light of the law's preservationist purpose.

Figure 13-2 provides a flow chart of the overall process used to make decisions for compliance with ***Section 4(f)***. ***Section 4(f)*** requires certain substantive findings that apply to different, interrelated decisions made at various points in the ***Section 4(f)*** and project development process which, in turn, depends upon:

(1) the functions and features of the properties being used,

(2) the character and impacts of the use of the properties by the project,

(3) the overall purpose of the project and general environmental considerations of the project area, and

(4) the types of ***Section 4(f)*** approvals required

There are two determinations required by ***Section 4(f)***. The first is the determination of applicability of ***Section 4(f)*** to the project and properties and, if applicable, the second is determining and demonstrating the specific findings required by the appropriate ***Section 4(f)*** approval option.

Deciding whether a project will have a "use" of a property protected by ***Section 4(f)*** also involves two findings. The first involves determining if a property qualifies as one of the ***Section 4(f)*** site types and the second requires determining if the proposed project and its associated activities or effects entail a "use" of the protected property as defined in ***Section 4(f)***. These two decisions are completed through a ***Section 4(f)*** Determination of Applicability (DOA) generally conducted in coordination with FHWA. Although FHWA makes all formal decisions on the applicability of ***Section 4(f)***, there are times when the applicability/non-applicability of ***Section 4(f)*** is relatively obvious (see ***Section 13.3.1.3***). Since the analysis to reach these findings range from simple confirmations of land acquisition to complex reviews of easements and lease agreements, the level of detail and the method of presenting information to FHWA to determine the applicability of ***Section 4(f)*** varies. However, in all cases the District should document the applicability/non-applicability of ***Section 4(f)*** along with the rationale for the determination. The District provides this information to FHWA in order to reach or document the ***Section 4(f)*** applicability determination.

Once FHWA has determined that ***Section 4(f)*** applies to a particular action and property, then the use of that property must be approved by FHWA. This approval is through either

a ***Section 4(f)*** *de minimis* finding (see ***Section 13.3.2.1***) or a ***Section 4(f)*** evaluation (see ***Section 13.3.2.2*** and ***Section 13.3.2.3***).

Section 4(f) evaluations can be either individual evaluations or programmatic evaluations. Individual evaluations have a two stages of review involving the preparation and circulation first of a ***Draft Section 4(f) Evaluation*** and then of a final ***Section 4(f)*** evaluation. In addition, all individual ***Section 4(f)*** evaluations must undergo a legal sufficiency review by FHWA. Programmatic evaluations can be approved by the FHWA Florida Division Administrator in the SEMO. There are five (5) nationwide programmatic evaluations that may be used in Florida. See ***Section 13.3.2.2*** or the FDOT ***Section 4(f)*** References web page for more information about programmatic evaluations.

Programmatic evaluations represent a very useful and time-saving option to preparing individual evaluations. The programmatic evaluations are based upon specific sets of criteria that have been coordinated with the relevant federal agencies. As a result, programmatic evaluations do not need circulation to other federal agencies unless a federal agency has a specific action to take related to the protected property (such as a National Park Service (NPS) approval of a land conversion under ***Section 6(f) of the Land and Water Fund Act)***. In addition, because the conditions and criteria for these evaluations have already received legal sufficiency review by FHWA, no additional legal sufficiency review is required. Therefore, the administrative review time for programmatic evaluations is far less than the administrative review time for individual evaluations.

When a ***Section 4(f)*** evaluation is required, the evaluation is prepared and submitted to the FHWA Florida Division Office for approval. If a programmatic evaluation is not appropriate, an individual ***Section 4(f)*** evaluation is prepared and processed as a draft and final ***Section 4(f)*** evaluation. In most situations, the Florida Division of FHWA will seek legal sufficiency reviews for either or both the draft and final ***Section 4(f)*** evaluations. Whenever possible, the draft ***Section 4(f)*** evaluation should be processed with the Environmental Assessment (EA) or Draft Environmental Impact Statement (DEIS), and the final ***Section 4(f)*** evaluation is processed with the Finding of No Significant Impact (FONSI) or the Final Environmental Impact Statement (FEIS).

The FHWA Administrator's approval of the final ***Section 4(f)*** evaluation is normally concurrent with the approval of the Environmental Document. An individual ***Section 4(f)*** evaluation for a project processed as a Type 2 Categorical Exclusion (Type 2 CE) is processed as a separate draft and final ***Section 4(f)*** evaluation. Since all alternatives remain viable until after the public hearing, the final evaluation should not be signed prior to the public hearing. For more detail on processing ***Section 4(f)*** evaluations and other ***Section 4(f)*** documents, please see ***Section 13.3.2***. The preparation and approval of programmatic evaluations must also be scheduled around the schedule established for the Environmental Document and the timing of the public hearing.

Numerous legal decisions on ***Section 4(f)*** have resulted in a USDOT policy such that conclusions on no feasible and prudent alternative and on measures to minimize harm must be well documented and supported. The United States Supreme Court, in the Overton Park case (***Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)***), ruled that determinations on no feasible and prudent alternative must find that there are

unique problems or unusual factors involved in the use of an alternative, or that the cost, environmental impacts, or community disruption resulting from such an alternative reach extraordinary magnitudes.

The project file is FDOT's written record that documents the basis for determining the applicability of ***Section 4(f)*** and, if there is a ***Section 4(f)*** use, the documentation of the approval option which is used (e.g., ***Section 4(f)*** *de minimis,* programmatic ***Section 4(f)***, and individual ***Section 4(f)*** evaluation documents). The importance of maintaining an appropriate record of decisions in regard to ***Section 4(f)*** compliance cannot be overstated. The project files must show that the required analysis was conducted prior to the agency approval to use land from the protected resource. In the ***Overton Park*** case, there was insufficient material and analysis to support the decision to use land from Overton Park, and therefore, the Court could not support the agency decision. In reaching this decision, the Court concluded that "…by enacting ***Section 4(f)***, Congress identified ***Section 4(f)*** properties (i.e., Public Parks, Recreational Areas, Wildlife and Waterfowl Refuges, and Historic Sites) for special consideration for preservation prior to approving using them for federally funded transportation projects."

13.3 PROCEDURE

The ***Section 4(f)*** statutes do not establish any particular processes or procedures for preparing ***Section 4(f)*** documents, for circulating them, or for coordinating them with other agencies. However, the FHWA has developed ***Section 4(f)*** procedures (at ***23 CFR Part 774*** and in the FHWA ***Technical Advisory T6640.8A***) for the preparation, circulation, and coordination of ***Section 4(f)*** documents. FHWA developed these procedures to: (1) ensure consistent and dependable administrative records of the basis for determining that there is no feasible and prudent alternative to proposed transportation actions, (2) obtain informed input from knowledgeable sources regarding all possible planning to minimize harm to protected resources, and (3) provide the analysis demonstrating that the selected alternative results in the least overall harm. For projects involving only a *de minimis* use of protected properties, the record created by this process demonstrates the basis upon which FHWA determines that the proposed transportation action results in minor impacts that do not affect the activities, features, and attributes qualifying the property for protection under ***Section 4(f)***.

Section 4(f) is a substantive law. This means the law outlines specific findings that must be made in order to support a decision rather than establishing a process to arrive at a reasonable decision. The purpose of the FHWA procedures as presented in this chapter, therefore, is to ensure that FDOT establishes an administrative record that supports the findings made in regard to compliance with ***Section 4(f)***.

13.3.1 Section 4(f) Applicability

The applicability of ***Section 4(f)*** is based upon a project's use of land from property that represents a significant publicly owned public park or recreation area, a waterfowl or wildlife refuge, or a historic property. Therefore, in order to determine the applicability of ***Section 4(f)***, not only must the property represent a ***Section 4(f)*** resource, but the project or undertaking must also "use" land from that property within the meaning of ***Section 4(f)***.

Because the specific situations vary widely, all ***Section 4(f)*** applicability determinations are made on a case-by-case basis.

Within FDOT's Efficient Transportation Decision Making (ETDM) process, certain projects qualify for screening through the Environmental Screening Tool (EST), (for more information on ETDM and qualifying projects for screening, please see the ***Efficient Transportation Decision Making Manual, Topic No. 650-000-002***) (***FDOT, 2015***). For projects not qualifying for screening, FDOT Environmental staff is able to screen the project against the geographic information contained in the EST in order to determine if the proposed project may involve ***Section 4(f)*** protected properties. In either case, an early identification of potential ***Section 4(f)*** protected properties can also be made.

With that knowledge, FDOT staff can engage jurisdictional agencies earlier and avoid unanticipated ***Section 4(f)*** involvements arising later in project development that could impact their project schedule or adjust the class of action for the project (see ***Part 1, Chapter 2, Federal Highway Administration Class of Action Determination*** for a discussion on environmental classes of action). More importantly, for both projects qualifying for screening and projects not qualifying for screening, the information contained in the geographic database is very helpful in identifying potential ***Section 4(f)*** issues to be aware of as the project advances. If a particular property obviously represents a significant public park, recreational area, wildlife or waterfowl refuge or historic resource, the district staff should develop a plan to avoid using the property or consult the official with jurisdiction early enough in the process to accommodate ***Section 4(f)*** requirements in a timely fashion.

The ***Section 4(f)*** statute specifies that ***Section 4(f)*** applies when a USDOT agency approves a transportation program or project that uses property from a ***Section 4(f)*** protected resource. Therefore, ***Section 4(f)*** applicability is limited to projects receiving USDOT funding, assistance, or approvals. In addition, there are three additional conditions that must all be true:

1. The project is a transportation project;
2. The project requires the use of land, as defined by ***Section 4(f)***, from a property protected by ***Section 4(f)***; and,
3. None of the regulatory applicability rules or exceptions applies (see ***23 CFR § 774.11*** and ***23 CFR § 774.13***).

Examples of situations where ***Section 4(f)*** would not apply include, but are not limited to:

1. A transportation project is being constructed solely using state or local funds and not requiring FHWA (or other USDOT agency) approval;
2. A project is intended to address a purpose that is unrelated to the movement of people, goods, and services from one place to another (i.e., a purpose that is not a transportation purpose);

3. A project is to be located adjacent to a ***Section 4(f)*** property, causing only minor proximity impacts to the ***Section 4(f)*** property (i.e., no constructive use);
4. A project will use land from a privately owned park, recreation area, or refuge; and,
5. There are no ***Section 4(f)*** protected properties located alongside or in proximity to the proposed transportation project.

There is a great deal of guidance available regarding how to determine applicability of ***Section 4(f)***. The information provided in ***Section 13.3.1.1*** and in the ***Section 4(f)*** References web page is intended for general guidance. For advice on specific situations or issues not covered below or in the questions and answers of Part II of the ***Section 4(f) Policy Paper (FHWA, 2012)***, contact the District Environmental Office, SEMO, or the environmental staff at the FHWA Florida Division Office.

13.3.1.1 Section 4(f) Resources

Section 4(f) resources can be divided into two categories: (1) publicly owned parks, recreation areas, and wildlife or waterfowl refuges, and (2) historic and archaeological sites. In order to be considered a ***Section 4(f)*** resource, a property must be officially designated for one of those purposes, be determined to function as such by the official with jurisdiction over the property, and be significant for that function. See ***Section 13.3.1.1.1*** and ***Section 13.3.1.1.2*** for discussions of significance, primary functions, and designations. In addition, publicly owned land that has been formally designated and determined to be significant for park, recreation area, wildlife refuge, or waterfowl refuge purposes represents a ***Section 4(f)*** resource even when it may not be functioning as such during project development (i.e., planned facilities).

Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites are sometimes made and determinations of significance changed late in the development of a proposed transportation action. With the exception of the treatment of archaeological resources, the FHWA may permit a project to proceed without consideration under ***Section 4(f)*** if the property interest in the ***Section 4(f)*** lands was acquired for transportation purposes prior to the designation or change in the determination of significance, as long as an adequate effort was made to identify properties protected by ***Section 4(f)*** prior to acquisition.

Section 4(f) applies to historic sites regardless of whether it is publicly or privately owned. However, ***Section 4(f)*** only applies to publicly owned parks, recreation areas, and wildlife and waterfowl refuges that are of national, state, or local significance. ***Section 4(f)*** does not apply to privately owned parks, recreation areas, and wildlife or waterfowl refuges even if such areas are open to the general public. If a government body has a proprietary interest in the land (such as fee ownership, drainage easement, or wetland easement), it can be considered "publicly owned." Furthermore, case law holds that land subject to a public easement in perpetuity can be considered to be publicly owned land for the purpose for which the easement exists. For example, if a public easement has been granted for public outdoor recreation and has been conveyed in perpetuity for a particular parcel of land, that land may represent a ***Section 4(f)*** protected property. Under special

circumstances, lease agreements may also constitute a proprietary interest in the land. Such lease agreements must be evaluated 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 other similar issues should be considered. Any questions on whether or not a leasehold or other temporary interest constitutes public ownership should be referred to the Florida Division of FHWA or FDOT ***Section 4(f)*** Coordinator in SEMO.

13.3.1.1.1 Public Parks, Recreation Areas, and Wildlife and Waterfowl Refuges

Publicly owned land is considered to be a park, recreation area, or wildlife and waterfowl refuge when the land has been officially designated as such by a federal, state, or local agency and the officials with jurisdiction over the land determine that its primary purpose is as a park, recreation area, or refuge. The “primary purpose” of the property is related to a property's function and to how it is intended to be managed (for example, as set forth in the property management plan). Incidental, secondary, occasional or dispersed activities similar to park, recreational or refuge activities do not constitute a primary purpose within the context of ***Section 4(f)***. Unauthorized activities, such as informal trails created by the public within or across a conservation area, should not be considered in the determination of ***Section 4(f)*** applicability.

If the general public is permitted visitation at any time to significant publicly owned parks and recreation areas, then the requirements of ***Section 4(f)*** apply. However, ***Section 4(f)*** does not apply when visitation is permitted to only a selected group and not the general public at large. Examples of such specific groups include residents of a public housing project; military and their dependents; students of a school; and students, faculty, and/or alumni of a college or university. Many wildlife and waterfowl refuges allow public access, while others may restrict public access to certain areas within the refuge or during certain times or seasons of the year for protection of habitat or species. In these cases, the property should be examined to verify that the primary purpose of the property is for wildlife or waterfowl refuge activities and not for other, non-***Section 4(f)*** protected activities.

There are some occasions when large tracts of publicly owned land or managed lands serve an array of different functions (State or National Forests, for example) and some of the functions are protected by ***Section 4(f)***, while other functions are not protected by ***Section 4(f)***. For additional information on the proper treatment of these types of resources, see ***Question Number 4, Public Multi-Use Land Holdings in Part II of the FHWA Section 4(f) Policy Paper*** (***FHWA, 2012***).

Usually, the officials with jurisdiction are the officials of the agency owning or administering (managing) the land. There may be instances where the agency authority has been delegated or relinquished its authority to another agency via an agreement. The FHWA and FDOT will review this agreement and determine which agency has authority on how the land will be used. If authority has been delegated/relinquished to another agency, that agency must be contacted to determine the primary purpose(s) of the land. After consultation, and in the absence of an official designation of purpose or function by

the official(s) with jurisdiction, the FHWA will base its decision on its own examination of actual functions that exist.

The final decision on applicability of ***Section 4(f)*** to a particular type of land is made by the FHWA. In reaching their decision, FHWA normally relies on the official(s) having jurisdiction over the land. As a result, the federal, state, or local officials having jurisdiction over the land also make the "significance" determinations on publicly owned land considered to be a park, recreation area, or wildlife or waterfowl refuge. For certain types of ***Section 4(f)*** lands, more than one agency may have jurisdiction over the site. A finding on significance from the local officials involved in the administration/management should be sought at all times. The significance determination must consider the significance of the entire property and not just the portion of the property being used for the project. The meaning of the term "significance" for purposes of ***Section 4(f)*** should be provided to the officials having jurisdiction as a part of the request for their statement.

> *Significance means that in comparing the availability and function of the recreation, park, or wildlife and waterfowl refuge area with the recreational, park, and refuge objectives of that community, the land in question plays an important role in meeting those objectives.*

If a determination from the official(s) with jurisdiction cannot be obtained, the ***Section 4(f)*** land will be presumed to be significant. When submitting significance determinations to FHWA without a statement of significance from the official(s) with jurisdiction, the District should provide the reasons that made the statement unnecessary or unobtainable. Examples of such a situation are: (1) the lack of a response from the official(s) with jurisdiction following specific requests from the District, (2) the resource was clearly designated as a park, recreation area, or refuge within an official management plan, (3) based upon function, signage, or location, the site is obviously a significant protected property type. For properties where the significance is in doubt or the property does not appear to be significant, a written statement regarding significance from the official(s) with jurisdiction is required. All determinations (whether stated or presumed) are subject to review by FHWA for reasonableness. In cases where FHWA's determination differs from and overrides the official(s) with jurisdiction's opinion, the reason for FHWA's determination should be documented in the project file and discussed in the Environmental Document for the proposed project.

13.3.1.1.2 Historic and Archaeological Resources

Section 4(f) also applies to significant historic and archaeological sites and districts. Normally, the sites considered as ***Section 4(f)*** resources must be either individually significant or a contributing element in a significant 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. In general, properties within the boundaries of a historic district are presumed to contribute unless they are determined by FHWA, in consultation with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), not to contribute. Pursuant to the ***NHPA,*** the FHWA, in cooperation with FDOT, consults with the SHPO and/or the appropriate THPOs and tribes that may attach religious and cultural significance to the

property and when appropriate, local officials, to determine whether a site is listed in or eligible for listing in the National Register of Historic Places (NRHP). At the time of this writing, only the Seminole Tribe of Florida has a THPO and tribal lands in Florida. Therefore, the Seminole THPO serves as the official with jurisdiction for historic properties on Seminole tribal lands. The Miccosukee Tribe of Indians of Florida have tribal lands in Florida but have not yet established a THPO. Therefore, the Florida SHPO serves as the THPO on Miccosukee lands. However, due to the special expertise of tribes in identifying and evaluating properties of religious or cultural importance to them, FHWA coordinates any ***Section 4(f)*** involvement occurring on tribal lands with the tribe. In case of doubt or disagreement between FHWA and the SHPO/THPO on the significance of a historic resource, or if so requested by the ACHP, FHWA requests a determination of eligibility from the Keeper of the NRHP (see ***Part 2, Chapter 12, Archaeological and Historical Resources***). Any other party with an interest in a project's effects to historic properties may also seek the involvement of the Keeper by asking the ACHP to request that the federal agency seek a determination of eligibility.

For purposes of ***Section 4(f)***, a historic or archaeological resource is significant if it is listed in or determined eligible for listing in the NRHP, or if the FHWA determines that the application of ***Section 4(f)*** is appropriate. If a historic site is determined not to be listed in or eligible for the NRHP, but an official (such as a mayor, president of the local historical society, etc.) formally provides information to indicate that the historic site is otherwise significant, the FHWA may apply ***Section 4(f)*** to that property. In the event that ***Section 4(f)*** is found not to be applicable, the District Office documents the basis for not applying ***Section 4(f)*** in the project file. Such documentation might include the reasons why the historic site was not eligible for the NRHP.

In the case of archaeological sites, ***Section 4(f)*** only applies to those sites that are in or eligible for inclusion in the NRHP and warrant preservation in place (including those discovered during construction). ***Section 4(f)*** does not apply if FHWA, after consultation with the SHPO/THPO, federally recognized Indian tribes (as appropriate), and the ACHP (if participating), 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), has minimal value for preservation in place, and the SHPO/THPO and ACHP (if participating) do not object to this determination. In cases where preservation in place is not warranted, the project documents should reflect the consultation and conclusions for the site in question.

For archaeological sites discovered during construction, where preservation of the resource in place is warranted, the ***Section 4(f)*** process is expedited. This is due to the fact that the U.S. Department of the Interior (DOI) has a responsibility to review individual ***Section 4(f)*** evaluations and is not usually a party to the ***Section 106*** process, any individual ***Section 4(f)*** evaluation must be provided to the U.S. DOI and any comments they provide will need to be within the shortened response period. In such cases, the evaluation of feasible and prudent alternatives takes into account the level of investment already made. The review process, including the consultation with other agencies, should be shortened, as appropriate, consistent with the process set forth in ***Section 106*** of the ***NHPA*** implementing regulations at ***36 CFR Part 800***. Further, this consultation should include Indian tribes that may attach religious and cultural significance to discovered sites.

When discoveries occur without prior planning, the ***Section 106*** regulations call for reasonable efforts to avoid, minimize, or mitigate project impacts for such sites and provide an expedited time frame for interested parties to reach resolution regarding treatment of the site (see ***Part 2, Chapter 12, Archaeological and Historical Resources***). As stated above, a decision to apply ***Section 4(f)*** to an archeological discovery during construction based on the determination that the site is important for more than the information it contains (that is, important for preservation in place) requires an expedited review of the ***Section 4(f)*** evaluation. As discussed in ***Section 13.1***, ***SAFETEA-LU*** exempted the bulk of the Eisenhower Interstate Highway System from the requirements of ***Section 106*** and ***Section 4(f)***. However, there are certain identified elements of the Interstate System that remain subject to these laws. A list of these elements and further explanation is provided in ***Part 2, Chapter 12, Archaeological and Historical Resources***.

13.3.1.2 “Use" under Section 4(f)

Use of a ***Section 4(f)*** property can occur either directly or indirectly (may also be referred to as a “constructive use”). For the purposes of ***Section 4(f)***, a "use" occurs:

Directly:

1. When land from a ***Section 4(f)*** site is permanently acquired and incorporated into a transportation project; or,

2. When there is a temporary occupancy of land from within a ***Section 4(f)*** site that is adverse in terms of the statute's preservationist purposes.

Or Indirectly:

3. When the impacts of a transportation project on a ***Section 4(f)*** site, without the acquisition of land from the ***Section 4(f)*** site (i.e., proximity impacts), are so great that the purposes for which the ***Section 4(f)*** site exists are substantially impaired (the courts normally refer to this as a constructive use).

13.3.1.2.1 Actual or Direct Use

The first and most common type of direct occurs when land from a ***Section 4(f)*** protected resource is permanently incorporated into a transportation facility. Normally, this happens when land from a ***Section 4(f)*** property is either purchased or incorporated into a project as transportation right of way (ROW) 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.

Direct use could include such activities as the expansion of a roadway or ROW into a ***Section 4(f)*** property. It can also include acquisition of an easement for the maintenance or operation of transportation or a transportation-related facility. Examples of such easements would include an FDOT-owned access road alongside a bridge structure to

provide a permanent right of entry for the maintenance of the bridge or a drainage easement for roadway water runoff into a detention pond.

A direct use of certain protected properties can occur even when there is no acquisition, permanent or temporary, of land, and all work will be completed within existing ROW. This situation is most common with alterations or relocation of recreational trails or facilities occupying a specified location within the ROW and with historic properties where the boundaries of the significant building, structure, site, object or district extends into the existing ROW. For more detail on this situation in regard to historic properties, see Part II, question 7D of the ***Section 4(f) Policy Paper*** (***FHWA, 2012***). In regard to recreational trails and other facilities, see Part II, Questions 15 and 27 of the ***Section 4(f) Policy Paper***.

When a transportation project involves alterations to or activities on historic transportation facilities such as bridges, highways, and railroad stations, there is no "use" of the property within the meaning of ***Section 4(f)*** provided that the historic qualities of the facility will not be adversely affected. Such determinations should be made only after the SHPO and the ACHP have been consulted pursuant to the requirements of ***Section 106*** of the ***NHPA*** and have not objected to the finding. (See Part II of the ***FHWA Section 4(f) Policy Paper*** question and answer 8, especially 8A ***(FHWA, 2012)***; the guidance in the ***Section 4(f)*** Resources web page for Programmatic Evaluations for Projects that use Historic Bridges; and finally, ***Part 2, Chapter 12, Archaeological and Historical Resources***, for additional information on this subject).

The second type of direct use identified in ***Section 13.3.1.2*** is generally referred to as a temporary occupancy. These temporary activities can trigger a ***Section 4(f)*** use when land from a ***Section 4(f)*** property is temporarily required for project construction-related activities and the activity is considered adverse in terms of the preservationist intent of the law. It is important to recognize that temporary activities can result in a ***Section 4(f)*** use of the land in order to properly address any potential involvements. These temporary occupancies are most commonly associated with equipment storage areas, erosion control features and other construction-related activities located on lands protected by ***Section 4(f)*** and they can occur at sites located out of the immediate project vicinity (such as haul roads and borrow pits) as well as alongside the project.

Per ***23 CFR § 774.13(d)***, temporary occupancies of protected properties do not constitute a "use" within the meaning of ***Section 4(f)*** if the following conditions are met:

1. The duration of the occupancy is temporary (less than the time needed for the construction of the project) and there is no change in the ownership of the land;

2. The scope of the work is minor (i.e., both the nature and the magnitude of the changes to the ***Section 4(f)*** resource are minimal);

3. There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;

4. The land being used is fully restored to a condition that is at least as good as that which existed prior to the project; and
5. There is documented, written agreement of the appropriate federal, state, or local official(s) having jurisdiction over the resource regarding the conditions listed above.

If these five conditions are met, the temporary occupancy does not constitute a use within the meaning of ***Section 4(f)***. If one or more conditions for the exception cannot be met, then the ***Section 4(f)*** property is considered to be used by the project even though the duration of on-site activities is not permanent. Documentation of the compliance with all five of the conditions must be provided to FHWA and retained in the project file. The basis upon which the determination was made must be communicated to the Design and Construction Offices in accordance with ***Part 2, Chapter 32, Commitments***. The commitments should be worded directly and clearly in subsequent documents so that no inadvertent use of a ***Section 4(f)*** property occurs during the construction of the project.

Assurances that documentation will eventually be obtained via subsequent negotiations is not acceptable; the written agreement must occur prior to the approval of the proposed occupancy. Extreme care should be exercised during Reevaluations to ensure that protected properties that were not being used by the project during the development of the PD&E documents but were later chosen for some form of temporary activity are identified as soon as possible so that sufficient time is available to meet the five conditions set forth above.

13.3.1.2.2 Constructive or Indirect Use

Constructive use of a ***Section 4(f)*** site occurs when a transportation project does not incorporate land from a ***Section 4(f)*** resource, but the impacts of the project to a ***Section 4(f)*** resource that is adjacent to or near the project are so severe that the protected activities, features, or attributes that qualify the property for protection under ***Section 4(f)*** are substantially impaired. Generally speaking, “substantially impaired” means that the value of the resource, in terms of its ***Section 4(f)*** purpose and significance, will be meaningfully reduced or lost as a result of the proposed undertaking. The degree of impairment is determined in consultation with the officials with jurisdiction over the resource. This evaluation of impacts includes any reduction of harm achieved through mitigation and minimization measures incorporated into the project to lessen its impacts on the protected resource. If the proposed mitigation measures reduce the proximity impacts below the substantial impairment threshold, then constructive use would not apply. The impacts analysis should also describe and consider any impacts that could be reasonably expected to occur even if the project is not built, since these impacts cannot be attributed to the proposed project.

Because of their rarity, situations that appear to present a potential for a constructive use should be examined carefully. FHWA determines when there is a constructive use of a nearby ***Section 4(f)*** property, but FHWA is not required to document each determination that a project would not result in a constructive use. However, such documentation may be prepared at the discretion of FHWA. If the project results in a constructive use of a

nearby ***Section 4(f)*** property, FHWA will evaluate that use as an individual ***Section 4(f)*** evaluation in accordance with ***23 CFR § 774.3(a)*** and ***(c)***.

When assessing the potential for ***Section 4(f)*** involvement, project development teams should always consider the proximity impacts of the project on surrounding parks, recreation areas, wildlife and waterfowl refuges, and historic sites. Constructive use ***Section 4(f)*** involvement is extremely rare, but it can occur. In most cases, inclusion of appropriate minimization, mitigation, and avoidance measures into the proposed action will ensure the avoidance of proximity impacts that could trigger a constructive use. The process for determining when a constructive use does or does not occur is outlined in ***23 CFR § 774.15*** and ***Section 3.2*** of the ***Section 4(f) Policy Paper*** (***FHWA, 2012***). A constructive use determination involves three interdependent and project-specific judgments:

1. Identification of the activities, features, or attributes of the ***Section 4(f)*** resource that may be sensitive to proximity impacts (for example, a noise-sensitive site or a site requiring unobstructed viewsheds).

2. Analysis of the proximity impacts on the ***Section 4(f)*** resource (such as, a change in access management which reduces access points to the protected property, removal of on-street parking in an urban setting where other parking opportunities are limited, or vibratory impacts associated with construction or operation of a highway facility). If any of the proximity impacts will be mitigated, only the net impact is considered in the analysis (such as noise walls to limit noise intrusion or the replanting of trees alongside a property to minimize a visual intrusion). How these net impacts are determined should be discussed as part of the analysis. The analysis should also describe and consider the impacts that could reasonably be expected if the proposed project were not built, since such impacts should not be attributed to the project (as when a road is widened to accommodate the rising level of truck traffic that will occur regardless of implementing the proposed project).

3. A determination as to whether these impacts substantially impair the function, or value of the ***Section 4(f)*** resource. This determination on impairment, as well as the identification and analysis considerations discussed above, is coordinated with the federal, state, or local officials having jurisdiction over the park, recreation area, wildlife or waterfowl refuge, or historic site.

In reviewing these three considerations, the project team will be able to determine whether or not there is a potential constructive use of the protected property. If it is concluded that the proximity effects do not cause a substantial impairment, FHWA can reasonably conclude that there is no constructive use. Whenever property sensitivities or project activities warrant a proximity impacts analysis, project documents must contain the analysis of proximity effects and whether there is substantial impairment to a ***Section 4(f)*** resource. Except for responding to review comments in Environmental Documents that specifically address constructive use, the term "constructive use" need not be used. Furthermore, FHWA is not required to determine that there is no constructive use. However, such a determination could be made at the discretion of FHWA. Where a

constructive use determination seems likely, the Division Office of FHWA consults with FHWA Headquarters Office of PD&E Review before the determination is finalized.

Whenever an FDOT District identifies a potential constructive use, the District notifies the ***Section 4(f)*** Coordinator at SEMO and, if appropriate, completes a request for a determination of ***Section 4(f)*** applicability and provides it to FHWA Division Office. In addition to the standard information discussed in ***Section 13.3.1.5***, a description of the activities, features, and attributes of the ***Section 4(f)*** property that may be sensitive to proximity impacts should be identified, delineated, and explained, and all project activities that may result in proximity impacts to those activities, features, and attributes should be identified and evaluated. The request should reflect the level and preliminary results of the consultations with the official with jurisdiction concerning the property, the impacts, and the minimization and mitigation options available. FHWA Division Office is required to consult with FHWA Headquarters Office of Project Development and Environmental Review to finalize a constructive use determination. Only FHWA may determine if any such impacts constitute a "substantial impairment" of the ***Section 4(f)*** resource.

In order to provide more direct guidance for this complex issue, FHWA reviewed a number of situations and determined the applicability or non-applicability of constructive use in those situations. These situations are set forth in ***23 CFR § 774.15(e) and (f)***. Where the issue of proximity impacts arises and one of these situations applies to the specific project situation being examined, reference the applicable example in the guidance and explain how it applies to the project circumstances discussed in the request.

Where an issue on constructive use arises and FHWA decides that ***Section 4(f)*** does not apply, the Environmental Document must contain sufficient analysis and information to demonstrate that the resource(s) will not be substantially impaired by the proposed project, along with the appropriate communications and comments from the official(s) with jurisdiction, FHWA, and FDOT project team. When a constructive use does occur, the approval process for the use will be processed through the development of an individual **Section 4(f)** evaluation.

13.3.1.3 Determination of Section 4(f) Applicability (DOA)

Section 4(f) is a frequent issue in litigation brought against transportation projects. This makes it essential to document the applicability or non-applicability of ***Section 4(f)*** in the project file. In most circumstances, the applicability or non-applicability of ***Section 4(f)*** to a particular project and property is apparent because most ***Section 4(f)*** uses arise from the permanent acquisition of land from a property that is recognizably a protected site. Therefore, when acquiring land from a functioning public park, city park or playground, a publicly marked and owned wildlife or waterfowl refuge, or a property listed on the NRHP, the applicability determination can be made with a simple communication such as an email or letter to FHWA. The communication should identify the status of the land and the amount of ROW required for the proposed project and include a project map which clearly shows the proposed project, its ROW requirements, and details the protected property and its boundaries. The District then documents this information in the project file and initiates the appropriate approval or evaluation process (see ***Section 13.3.2***).

A formal ***Section 4(f)*** determination of applicability is not needed for situations where ***Section 4(f)*** clearly will not apply to a project. Usually, this occurs when there are no ***Section 4(f)*** protected properties located in, alongside or in proximity to the proposed undertaking. If a project lies alongside a ***Section 4(f)*** property type and no acquisition of land on either a temporary or permanent basis from the protected resource is planned or needed for the project, ***Section 4(f)*** normally will not apply. Although it may be obvious during the PD&E phase of project development why ***Section 4(f)*** does not apply to a particular action alongside a protected property, the reason(s) it does not apply are still placed in the project files. During later phases of project development, if alterations to project design occur that alter the relationship between the proposed action and the protected property in a way that will necessitate seeking a ***Section 4(f)*** approval, the implications of these changes and the necessary evaluations triggered by such changes can then be immediately made clear to the project team.

When dealing with property boundaries and the meaning of use under ***Section 4(f)***, parks, recreation areas, and refuges normally have boundaries that coincide with legal property boundaries. This is not always the case with historic property boundaries. Therefore, if a significant historic or archeological property extends into the existing ROW, it is possible to have a direct use of that property without any acquisition of ROW. If a historic property occurs alongside the proposed project, carefully assess and confirm with the SHPO/THPO and the NRHP the boundaries of the historic property in order to avoid unnecessary and costly delays, as well as permit denials, later in project development and delivery. Ensure also that commitments to avoid any temporary construction activities within the boundaries of any type of ***Section 4(f)*** property are kept clear in the project design commitments and construction documents. These commitments should be included in a ***Project Commitment Record, Form No. 700-011-35***. See ***Part 2, Chapter 32, Commitments*** of the PD&E Manual. If a contractor inadvertently occupies a ***Section 4(f)*** property either knowingly or because they did not know it was a protected property, federal reimbursements may be jeopardized.

It is important to document (in the project file) the locations of existing and planned facilities that are known to be ***Section 4(f)*** protected properties or which may represent such properties and which are alongside or near the proposed undertaking. This is done so the requirements of ***Section 4(f)*** will be considered before adopting project changes that may require the use (either direct or constructive) of properties protected by ***Section 4(f)*** later in project development and delivery.

For situations where ***Section 4(f)*** obviously does or does not apply, a confirmation of this information needs to be included in the project files. In cases where it does not apply because there are simply no ***Section 4(f)*** protected properties in the vicinity of the project, this can be noted by FDOT in the project file. For situations in which there may be protected properties alongside or adjacent to the proposed project but from which no land is to be occupied or acquired and there is no potential for substantial impairment to the property, a confirmation communication with FHWA, as discussed earlier in this section, is retained in the project record.

The applicability or non-applicability of ***Section 4(f)*** to particular projects and for particular sites is not always obvious. Many of these less clear circumstances are discussed in the

Questions and Answers in ***Part II of the FHWA Section 4(f) Policy Paper*** (***FHWA, 2012***). These circumstances require a greater level of information and coordination with FHWA must occur and, therefore, a more formalized determination of applicability of ***Section 4(f)*** must be made and included in the project file.

In coordinating applicability of ***Section 4(f)*** for projects that are not directly using the protected property, it is important to determine if the resource is sensitive to proximity impacts and, if so, to identify the type of proximity impacts (e.g., noise, vibrations, access) to the property. If the protected property is not sensitive to such impacts, then simply notify FHWA of the existence of the property, the project's geographic relationship to the property, and a brief statement as to why it has been determined that there will be no use of the property within the meaning of ***Section 4(f)***. If the property appears to be sensitive to proximity impacts but those impacts do not rise to the level of substantial impairment, make certain to explain this information in the communication with FHWA. An example of this latter situation would be a public park that users access from on-street parking and the proposed project requires the removal of some of this parking. If enough on-street parking remains or if the removal of the parking is mitigated with alternate and equally effective parking to maintain sufficient access to the park, then the net impact of the proposed action will not substantially diminish the function of the protected property. Since the applicability of a constructive use to a ***Section 4(f)*** property is based upon net impacts rather than gross impacts, make sure to include any mitigation efforts that reduce the proximity impacts of the project to the property in question in the project file and in communications with FHWA.

Any commitments made to avoid using land from a ***Section 4(f)*** protected property must be followed and tracked in accordance with ***Part 2, Chapter 32, Commitments***.

13.3.1.4 Documenting the Section 4(f) Applicability

Over the years, SEMO and the Florida Division of FHWA have developed and refined a topical outline for a request for a DOA document for use in Florida. This DOA outline includes a number of items that must be clearly established in order to make an applicability determination and this determination, along with supporting documentation and findings, must be maintained in the project file.

Use the DOA format provided in ***Section 13.3.1.5*** with a certain flexibility because some issues may be clear and others less so. The request does not have to contain all eight (8) items listed in all situations, and the information can be conveyed to FHWA in a format that best suits the specifics of the situation.

The methods for providing the information for the determination are equally flexible. These include formal submission of electronic or paper submittals, as well as any form of meeting, in-person, remote conferencing, or computer-based meetings. In essence, the District provides the level of information appropriate to the level of detail and presentation format needed to make the applicability determination that is agreeable to FHWA and, if needed, the officials with jurisdiction. Informal coordination with FHWA, the District, and SEMO may be warranted to discuss how to handle projects with unique ***Section 4(f)*** protected resources. This coordination can help ensure the proper information is

collected and subsequently included in the project file and appropriate documents. Discussion with all the parties, including the official with jurisdiction may also be helpful. If subsequent questions or clarifications arise during discussions with the official with jurisdiction, FHWA, SEMO, the FDOT District, and in the case of certain Local Agency Program funded projects, the local project sponsors. The District appends this information to the original request, along with the subsequent determination.

Some items required to determine the applicability of ***Section 4(f)*** are basic and usually obvious, but there are times when these issues become complicated. For example, certain designations of property functions in regard to aquifer restoration lands or natural resources management areas are unclear when trying to determine if the property is protected by ***Section 4(f)***. In addition, public ownership of properties with lease restrictions often include deed transfers, public conservation easements, or other legal and proprietary restrictions that can complicate the issue of public proprietary interests. These kinds of issues, as well as many others, can sometimes require careful analysis to make a determination of applicability. The same is true for some of the issues surrounding whether or not a particular action involving a protected property constitutes a use within the meaning of ***Section 4(f)***. Contact the District, SEMO, or FHWA ***Section 4(f)*** specialists for assistance when complex issues arise. All applicability determinations, whether made as official requests or as notes to the files are documented in the project file, along with the relevant level of information as to why ***Section 4(f)*** was found to be applicable or not applicable. This can be as simple as stating that there are no ***Section 4(f)*** protected properties in the project area (such as on the ***Type 1 Categorical Exclusion Checklist*** for minor transportation projects) or stating that the proposed action is not a transportation action, such as a rehabilitation of a historic railroad car or a utilities repair activity located within transportation ROW, which is not associated with a transportation project.

The request for a determination of applicability should provide direct statements regarding the issues that are clear and then focus upon detailing the more complicated issues that make the applicability of ***Section 4(f)*** uncertain. However, it should first provide direct statements regarding the issues that are clear. For example, if the project requires ROW from a site that may or may not be protected by ***Section 4(f)***, the request should include a statement and map showing the ROW requirements. It should then address the more complicated issue of primary function, land ownership, or whatever other issues that require evaluation in order to reach a determination of whether or not the property represents a ***Section 4(f)*** resource.

If ***Section 4(f)*** is found not to be applicable, the documentation in the project file is important to validate the non-applicability of ***Section 4(f)***, and, at a minimum, the project file should include the following information, along with supporting documentation, as appropriate:

1. Identification of all potential ***Section 4(f)*** resources within the project area/vicinity, if any;

2. A statement that there will be no direct use (no temporary or permanent acquisition or occupation) of the potential ***Section 4(f)*** resource, or a statement indicating there are no resources protected by ***Section 4(f)***; and,

3. A statement that there will be no severe indirect impacts (no significant proximity impacts) on any resource protected by ***Section 4(f)***.

As the project advances through the design phase, another review should be conducted to ensure that the determination of non-applicability for ***Section 4(f)*** is still valid. For instance, if sufficient time has passed for the status of adjoining properties to have changed from not protected to protected by ***Section 4(f)*** or the scope of work for the project has changed (e.g., alignment shifts, drainage pond changes), the District must revisit the applicability of ***Section 4(f)*** for the project.

It is essential to maintain clear and open lines of communication with FHWA along with complete records in regard to ***Section 4(f)*** determinations and evaluations. When making determinations of ***Section 4(f)*** applicability for situations where ***Section 4(f)*** obviously does or does not apply, always document the decision and the rationale for the decision in the project file. Be certain to inform FHWA and, as necessary, confirm these determinations with them. In situations where the applicability is obvious and where it is confirmed or made by FHWA, the information used for these decisions usually can serve to help determine which ***Section 4(f)*** approval option should be pursued.

For projects where a request for a determination of applicability is prepared and submitted to FHWA, that material and the FHWA finding will constitute the primary documentation of the analysis supporting the determination that ***Section 4(f)*** does not apply. Therefore, for projects or situations that are contentious or where compliance with ***Section 4(f)*** is or could become a major issue during the course of project development or delivery, documenting the basis for the determination that ***Section 4(f)*** does or does not apply through the preparation and coordination of a formal request for a determination of applicability remains the best way to document and support the decision.

Whether ***Section 4(f)*** is determined not applicable on its face or through the submission of a request for a determination of applicability to FHWA, the following standard statements, as appropriate, are included in the Environmental Document along with the supporting information:

> *The proposed project will not use property from any resources protected by Section 4(f). Therefore, FHWA has determined that the Section 4(f) does not apply to the proposed project.*

For situations where an applicability determination for protected property needs to be made:

> *The proposed project will not use property from the [name of the property or properties] or any other resources protected by Section 4(f). Therefore, FHWA has determined Section 4(f) does not apply.*

13.3.1.5 Section 4(f) Determination of Applicability Format and Content

The format for DOA provided below is not proscriptive nor is it a specifically required document by the laws or regulations. However, as court cases have shown, the documentation the DOA creates is necessary for the project's administrative record. It is designed to include sufficient information for FHWA and FDOT to make the determination and to focus upon the issues that may be unclear or open to various interpretations.

The list of eight (8) issues below cover most questions related to determining whether ***Section 4(f)*** applies to a particular action or a specific property. If there is more than one possible ***Section 4(f)*** use, all the possible uses of ***Section 4(f)*** properties on all possible alternatives being studied belong in the same request for a DOA. This is not a requirement in circumstances that warrant separate submittals. For ease and efficiency, however, the Districts will want to keep the number of DOAs under separate covers minimal.

In preparing a ***Section 4(f)*** DOA to submit to FHWA on any FHWA funded or assisted project, the two main issues central to determining applicability: whether the land in question is protected by ***Section 4(f)*, and does the proposed undertaking entail a use of the land within the meaning of ***Section 4(f)***. The list below includes items that are always germane to making a determination of applicability, as well as issues that may not apply in certain circumstances. ***Section 4(f)*** never applies on projects that do not involve either the funding or assistance from an agency of the USDOT.

The following information, as appropriate, should be provided to the FHWA Division Office for a ***Section 4(f)*** DOA:

1. A detailed map or drawing of sufficient scale to identify the relationship of the alternatives to the ***Section 4(f)*** property. It is very important that this map clearly show the ROW requirements for the proposed project, the existing boundaries of the property in question, and/or any proposed temporary occupancies of that property. Make certain to differentiate between the proposed temporary occupations and permanent acquisitions.

2. Size (acres or square feet) and location maps or other exhibits such as photographs, sketches, etc. of the affected property. Include the amount of land being acquired for the permanent and/or temporary occupations.

3. Ownership (City, County, State, etc.) and managing entity of property in question, as well as the official with jurisdiction over the property for the purposes of ***Section 4(f)***.

4. Primary function of the property. Function(s) and location(s) (on a site map in relation to proposed project activities) and description of available activities, features, and attributes (both current and planned ones) that may qualify the property for protection under ***Section 4(f)***, including specific facilities (for example, ball playing, swimming, golfing, bird watching, tennis courts, playground

equipment, contributing historic elements and characteristics, hiking or canoeing trails, bird nesting areas, and water features).

5. Access (pedestrian, vehicular, parking lots, driveways, and entrance roads, as well as path and trail access) and usage (approximate number of users / visitors, etc.). If there is no access, note this in the submittal.

6. Relationship to other similarly used lands in the vicinity in order to: (1) clarify the determination of the significance of the property and (2) evaluate linkages and functions. If neither of these exists, note this in the submittal. Include the statement of significance from the official(s) with jurisdiction over the ***Section 4(f)*** property. The significance pertains to the entire ***Section 4(f)*** property and not on the area of the proposed use. If there is no statement of significance, provide applicable information from the management plan. If neither is available, state this and note that the property is presumed to be significant. As part of the submittal, applicable management plans or other planning documents must be referenced and should be included.

7. Applicable clause affecting the ownership, if any, such as lease, easement, covenants, restrictions, or conditions, including forfeiture. If there are none, then note this in the submittal.

8. Unusual characteristics of the ***Section 4(f)*** property (flooding problems, terrain conditions, or other features) that either reduce or enhance the value of all or part of the property or that provide opportunities for enhancement or mitigation.

When there is no direct use of a ***Section 4(f)*** property, it may be necessary to include an analysis of the proximity impacts of the proposed project (e.g., noise, access to the property, aesthetics) to certain protected properties in order to determine if the impact substantially impairs their protected functions. This can be done by identifying any attributes and/or features that are sensitive to proximity impacts. When needed, this effort should include a discussion and evaluation of project activities that may result in proximity impacts to the property. If the property is not sensitive to proximity impacts, state this and explain the reasons. Also, if the property is sensitive to proximity impacts, but the project does not create any such impacts, include a statement in the files or in the request for a determination to that effect. Include any minimization or mitigation efforts that may have a bearing on this determination (for example, in situations where on-street parking alongside a public park is being removed but a separate parking lot is being provided, the new parking will either improve the access to the resource or prevent the proximity impact from significantly damaging access to the property). In cases involving constructive use applicability, FHWA Division consults with FHWA Headquarters prior to making the determination. In situations where a proposed project may have proximity impacts and these impacts could rise to the level of substantial impairment, contact the SEMO ***Section 4(f)*** Coordinator or FHWA Division Office to establish the level of documentation and coordination needed.

The above information is used by FDOT and FHWA to document the applicability or non-applicability of ***Section 4(f)*** on a property. If FHWA determines that ***Section 4(f)*** is

applicable, then a ***Section 4(f)*** approval from FHWA will be needed (see ***Section 13.3.2***). If ***Section 4(f)*** is determined not to be applicable, the appropriate statement provided at the end of ***Section 13.3.1.4***, is included in the Environmental Document for the project.

13.3.2 Section 4(f) Approvals

Once FHWA has determined that the project will use ***Section 4(f)*** protected property, FHWA must determine whether it may approve the use as required by the law. FHWA (as well as the other agencies of USDOT) may not approve the use of land from a significant publicly owned public park, recreation area, wildlife or waterfowl refuge, or any significant historic site unless it determines that:

1. There is no feasible and prudent alternative to the use of land from the property; and,

2. The action includes all possible planning to minimize harm to the property resulting from such use; or,

3. The use of the property, including any measures to minimize harm, will have a *de minimis* impact.

As set forth in ***23 CFR § 774.3***, there are three methods available for FHWA to approve the use. These three methods are:

1. Preparing a *de minimis* impact determination;

2. Applying a programmatic ***Section 4(f)*** evaluation; or

3. Preparing an individual ***Section 4(f)*** evaluation.

Although all of these approval options require FDOT to prepare and provide the documentation for an FHWA (or other USDOT agency) approval, the *de minimis* option does not require the “no prudent and feasible alternative” and the “all possible planning to minimize harm” standards required for FHWA approval of the individual or programmatic evaluations.

13.3.2.1 The *de minimis* Section 4(f) Analysis

A *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation, or enhancement activities), results in either:

1. A determination that the proposed project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or wildlife or waterfowl refuge for protection under ***Section 4(f)***; or,

2. A ***Section 106*** finding of no historic properties affected for a proposed project or no adverse effect to historic properties.

For historic properties, the official with jurisdiction, the consulting parties and the public all reach their findings or state their opinions within the ***Section 106*** process and FHWA/FDOT documents these decisions in both the ***Section 106*** and ***Section 4(f)*** processes (see ***Part 2, Chapter 12, Archaeological and Historical Resources*** for a discussion of the ***Section 106*** process). For the other property types, the *de minimis* consultations, opportunities to comment, and the findings are reached utilizing the appropriate opportunities within the ***National Environmental Policy Act (NEPA)*** process. The final ***NEPA*** decision document for the project must include sufficient supporting documentation from the *de minimis* approval on the measures to minimize harm that were applied to the project by FHWA in order to make the *de minimis* impact determination as set forth in ***23 CFR § 774.7(b)***. A use of ***Section 4(f)*** property having a *de minimis* impact can be approved by FHWA without the need to develop and evaluate alternatives that would avoid using the ***Section 4(f)*** property. A *de minimis* impact determination may be made for a permanent incorporation or a temporary occupancy of ***Section 4(f)*** property but not for a constructive use.

A *de minimis* impact determination requires agency coordination and public involvement as specified in ***23 CFR § 774.5(b)***. The regulation has different requirements for this coordination and public involvement, depending upon the type of ***Section 4(f)*** property being used. For historic sites, the consulting parties identified in accordance with ***36 CFR Part 800*** must be afforded the opportunity to comment on the effects of the proposed project on historic resources. The official(s) with jurisdiction over the historic property (usually the SHPO or THPO) must be informed of the intent to make a *de minimis* impact determination and must concur in a finding of no adverse effect or no historic properties affected in accordance with ***36 CFR Part 800***. Compliance with ***36 CFR Part 800*** satisfies the public involvement and agency coordination requirements for *de minimis* impact findings for historic and archaeological properties.

An impact to a public park, recreation area, or wildlife and waterfowl refuge may be determined to be *de minimis* if the transportation use of the ***Section 4(f)*** property, including incorporation of any measure(s) to minimize harm, does not adversely affect the activities, features, or attributes that qualify the resource for protection under ***Section 4(f)***. The impacts of a transportation project on a park, recreation area, or wildlife or waterfowl refuge that qualifies for ***Section 4(f)*** protection may be determined to be *de minimis* if:

1. The transportation use of the ***Section 4(f)*** property, together with any impact avoidance, minimization, and mitigation or enhancement measures incorporated into the project, does not adversely affect the activities, features, or attributes that qualify the resource for protection under ***Section 4(f)***;

2. The public has been afforded an opportunity to review and comment on the effects of the project on the protected activities, features, or attributes of the ***Section 4(f)*** property; and,

3. The official(s) with jurisdiction over the property, after being informed of the public comments and FHWA's intent to make the *de minimis* impact finding, concur in writing that the project will not adversely affect the activities, features, or attributes

that qualify the property for protection under ***Section 4(f)*** (***23 CFR § 774.5(b)(2)*** and ***23 CFR § 774.17***).

The concurrence of the official(s) with jurisdiction that the protected activities, features, or attributes of the resource are not adversely affected must be in writing (***23 CFR § 774.5(b)(2)(ii)***). The written concurrence can be in the form of a signed letter on agency letterhead, signatures in concurrence blocks on transportation agency documents, and agreements provided via e-mail or other method deemed acceptable by the FHWA Division Administrator. Obtaining these agreements in writing and retaining them in the project file are consistent with effective practices related to preparing project administrative records.

For parks, recreation areas, or wildlife and waterfowl refuges, the official(s) with jurisdiction over the property must be informed of the intent to make a *de minimis* impact determination, after which an opportunity for public review and comment must be provided. After considering any comments received from the public, if the official(s) with jurisdiction concur(s) in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for ***Section 4(f)*** protection, then a *de minimis* impact determination can be finalized. The public notice and opportunity for comment and the concurrence for a *de minimis* impact determination may be combined with similar actions undertaken as part of the ***NEPA*** process. An opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided. In situations where this effort is not combined with the normal public involvement process (such as when the ***Section 4(f)*** involvement is discovered after the Environmental Document has been completed), special opportunities for providing the public an opportunity to comment must be provided. The opportunity for public input may be part of a public meeting, workshop, or other form of public involvement. The final determination or approval is made by the FHWA Division Administrator. The determination, along with the supporting documentation, is then retained as part of the project file.

A *de minimis* impact determination is a finding. Therefore, an evaluation for a feasible and prudent avoidance alternative analysis is not required. Additionally, the definition of all possible planning in ***23 CFR § 774.17*** explains that a *de minimis* impact determination does not require including an "all possible planning to minimize harm" analysis because avoidance, minimization, mitigation, and enhancement measures are included as part of the *de minimis* determination.

A *de minimis* impact determination must be supported with sufficient information included in the project file to demonstrate that the *de minimis* impact and coordination criteria have satisfied ***23 CFR § 774.7(b)***. The approval of a *de minimis* impact is documented in accordance with the documentation requirements in ***23 CFR § 774.7(f)***. These requirements may be satisfied by including the approval in the ***NEPA*** documentation, such as an EA, Environmental Impact Statement (EIS), Categorical Exclusion (CE) determination, Record of Decision (ROD), or FONSI, or in an individual ***Section 4(f)*** evaluation when one is prepared for a project. When an individual ***Section 4(f)*** evaluation is required for a project in which one or more *de minimis* impact determinations will also

be made, it is recommended that the individual ***Section 4(f)*** evaluation include the relevant documentation to support the proposed *de minimis* impact determination(s).

In partnership with the Florida Division of FHWA, FDOT SEMO developed a five-step procedure to obtain and document *de minimis* approvals. The activities associated with these steps vary depending upon the type of protected property. For example, the processes and results from identification of significant historic resources and the consultative nature of the ***Section 106*** process serve to fulfill the requirements for making a *de minimis* approval if FHWA and the SHPO/THPO have concurred on either a "no historic properties affected" or a "no adverse effects to historic properties" finding, as long as the SHPO/THPO was informed of FHWA intent to pursue a *de minimis* approval prior to SHPO/THPO concurrence with the ***Section 106*** findings on effects. The basic process is as follows:

1. Determine ***Section 4(f)*** applicability and assess total net impacts of the proposed project on the protected resource(s);

2. Initiate preliminary consultations with the official with jurisdiction and FHWA to identify the potential for meeting *de minimis* requirements. If applicable, inform the official with jurisdiction of the intent to pursue a *de minimis* ***Section 4(f)*** approval. For historic properties, this notification of intent should be included with the communication of the FHWA finding on effects and/or adverse effects under the ***Section 106*** process. FDOT, in cooperation with the Florida Division of FHWA and the staff at the Florida Department of State Division of Historical Resources (FDHR), has developed signature blocks for these letters, which include this notification to SHPO (see ***Part 2, Chapter 12, Archaeological and Historical Resources***). For the non-historic ***Section 4(f)*** properties, this notification will need to be in a separate communication to the official with jurisdiction and should inform the official with jurisdiction that FHWA and FDOT will provide an opportunity for public review and comment concerning the project effects on the protected activities, features, or attributes of the property.

3. Provide public notice and opportunity to comment concerning the project effects on the protected activities, features, or attributes of the property in question (note: for historic properties the appropriate level of public engagement occurs within the ***Section 106*** process: for other protected property types the public opportunity should be provided as part of FDOT's normal public involvement process);

4. Obtain written agreement from the official(s) with jurisdiction with the finding of:

    a. For historic properties (per ***36 CFR § 800.4*** *and* ***800.5(d)*** and ***23 CFR § 774.5(b) (ii)***), either:

        1. No adverse effect to the historic property in question; or,

        2. No effects to historic properties.

    b. For parks, recreation areas, and wildlife or waterfowl refuges (per ***23 CFR § 774.5 (b)(2)(ii)***), the project will not adversely affect the activities, features,

or attributes that make the property eligible for ***Section 4(f)*** protection (see ***Figure 13-3*** for a template for the concurrence letter to the official with jurisdiction).

5. Submit the formal request for a *de minimis* approval to FHWA for approval of the ***Section 4(f)*** use as *de minimis* per ***23 CFR § 774.3(b)***, along with the basis for the approval (see ***Figure 13-4*** for a template for the concurrence/signature page to FHWA for a *de minimis* approval/determination).

In general, when submitting the formal request for a *de minimis* impact determination, FDOT provides FHWA the following essential information, along with the appropriate analysis, and ensures the information is retained in the project files:

1. Applicability of ***Section 4(f)*** to the park, recreation, wildlife/waterfowl refuge, or historic property, and a description of the proposed use;

2. Records of public involvement or, as appropriate, ***Section 106*** consultation;

3. Results of coordination with the official(s) with jurisdiction;

4. Comments submitted during the coordination procedures required by ***23 CFR § 774.5***, and responses to the comments; and,

5. Avoidance, minimization, or mitigation measures that were relied upon to make the *de minimis* impact finding, as applicable. If none were needed, then this is stated and explained.

Once FHWA has approved the *de minimis* finding, the District documents it in the project file and includes it within the appropriate Environmental Document. Generally, for EAs, EISs, and some Type 2 CEs, FHWA will not issue its approval until after the public hearing because the public hearing represents the required opportunity for public comment. In these cases, it is necessary to report the basis on which a *de minimis* approval is expected. There are times when the *de minimis* finding involves a determination of effects to historic properties and the ***Section 106*** process, along with its associated public involvement efforts and effect findings, are completed prior to the public hearing. For these situations, consult with FHWA on how to best present the *de minimis* finding in the EA or DEIS. For Type 2 CEs, the *de minimis* record should be presented in a separate document or included as an attachment. A ***Section 4(f)*** approval is a separate action from the ***NEPA*** action, and therefore the title and the contents of any Environmental Document seeking a ***NEPA*** approval and a ***Section 4(f)*** approval include the type of ***Section 4(f)*** approval sought and the basis upon which this approval has either been proposed or made. If the ***Section 106*** finding is not completed until after the public hearing and the public hearing was utilized to complete the public involvement efforts associated with ***Section 106***, then process the *de minimis* finding according to the standard methods associated with COA. Normally, FHWA grants the **Section 4(f*) de minimis*** approval at the same time they grant Location and Design Concept Acceptance (LDCA) for Type 2 CEs. For EAs and EISs, FHWA approves the *de minimis* use in the FONSI and FEIS respectively.

If there is more than one ***Section 4(f)*** *de minimis* use associated with the proposed project, each of these uses must be presented separately in the appropriate Environmental Document. When a project includes a ***Section 4(f)*** *de minimis* use as well as a non-*de minimis* use of ***Section 4(f)*** protected properties, include the *de minimis* finding and associated materials in the ***Section 4(f)*** evaluation for the non-*de minimis* one.

13.3.2.1.1 Format of *de minimis* Requests and Approvals

One copy of the following checklist of items is submitted as part of a *de minimis* request package to FHWA. This list is not meant to be all inclusive. If there are other issues requiring consideration in order to determine the appropriateness of a *de minimis* approval, the District addresses them in the narrative of the request along with any other relevant information. This checklist is intended to expedite FHWA review and concurrence with *de minimis* findings. It should be placed behind the cover letter (see ***Figure 13-4***) and, as appropriate, it should be used as the table of contents. Make certain to note any items in the checklist that are not included in the package. Add a checkmark (or page number, if appropriate) in the blank space next to the items included in your submission. For any items that are not included, provide a Not Applicable (N/A) notation and a brief explanation for why the item is not included in the narrative of the request, when appropriate. Failure to include necessary items in the submittal may cause delays in review time and/or approval by FHWA.

1. _____ Map(s) of sufficient scale to show the relationship of the proposed action to the ***Section 4(f)*** property. At minimum, this should include:

    a. Property lines of the resource or historic property boundaries for significant historic and archaeological resources.

    b. Proposed and existing ROW.

    c. Facilities, features, and other functional areas (including access points and types of access) associated with the purpose, use, and character of the protected property (both man-made and natural) that qualify the property for protection under ***Section 4(f)***.

    d. The relationship between the proposed acquisition from the resource to the protected features and activity areas.

    e. Any proposed areas of temporary occupancy for the purposes of constructing the project or maintaining access for the proposed undertaking (for example, equipment staging areas, haul roads, temporary easements).

    f. Photographs that may be needed to illustrate certain characteristics of the property.

    g. Depending on the size and scale of the property and the undertaking, maps and figures of various scales needed to fully show the relationships.

h. The location and nature of any other ***Section 4(f)*** involvements the project has or may have. Include other important community and environmental considerations and locations that either have influenced or may influence project design. Include a narrative of these involvements as an appendix to the document. Include additional maps as needed. Provide sufficient summaries of these resources to communicate the relationship these other resources have to the proposed actions involving the resource subject to this *de minimis* request. If the resource is described or discussed in another document, also reference that document.

2. _____ The type of property (park, refuge, historic, etc.); ownership; identification of the official(s) with jurisdiction over the property, and, if applicable, the number of users; and identification of other laws that apply to the property, such as ***Section 106*** of the ***NHPA***, ***Section 6(f)*** of the ***Land and Water Conservation Fund Act***, ***Section 7*** of the ***Wild and Scenic Rivers Act***, and so forth.

3. _____ The total acreage of the protected property and the amount of acreage proposed for temporary and/or permanent occupation or acquisition.

4. _____ A listing and description of the protected activities, features, or attributes that qualify the property for protection under ***Section 4(f)***. Use photographs as appropriate to illustrate the activities, features, or attributes.

   a. For historic properties, this information can be found in the site information material normally provided in or along with the ***Cultural Resources Assessment Survey (CRAS) Report***, such as the Florida site file, NRHP nomination form, the site narrative in the report, or the letters specifying the historic significance findings provided by the Districts, SHPO/THPO, the Native American Tribes, FHWA, and other appropriate ***Section 106*** consulting parties. Generally, the activities, features, or attributes for historic properties are the site characteristics, features, and setting that contribute to its historical significance.

   b. For non-historic properties, the management plan and property map(s) should be reviewed for any activities, features, and attributes associated with the protected purpose(s) of the property that may be impacted by the acquisition/occupation of the protected property and its conversion into a transportation facility. With or without a management plan, the official with jurisdiction must be included in the identification of the activities, features, or attributes for the property and FDOT staff should visit the site to review and confirm the status of these activities, features, or attributes.

5. _____ Describe any unusual characteristics of the property's features and facilities which either reduce or enhance the value of the portions of the property within or alongside the proposed acquisition/occupation that may have a bearing on evaluating the net impacts of the proposed project on the activities, features, or attributes of the protected property. For example, ball

fields that are subject to frequent flooding, a swing set designed specifically for younger children, a historic property where surrounding landscape features and setting are important aspects of its historical value, or a wildlife refuge where the protected animals frequently migrate to and from the refuge. Photographs may be needed to illustrate some of these.

6. _____ A discussion of all the impacts, both temporary and permanent, that may diminish or enhance the activities, features, or attributes that qualify the property for protection under ***Section 4(f)***.

7. _____ Presentation of any proposed minimization, avoidance, enhancement, and/or mitigation measures incorporated into the proposed project lessening the impacts of the project to the protected property as a whole and to the protected activities, features, or attributes of the property. Photographs and plan sheets may be needed to illustrate the proposal and how the impacts have been minimized or how the property has been enhanced. A statement regarding how the measures included to minimize harm to the property diminish the project impacts sufficiently to meet the *de minimis* threshold of either: (1) an impact that will not adversely affect the property or (2) an impact that will not adversely affect the activities, features, or attributes qualifying the property for protection under ***Section 4(f)***. In cases where the project, as proposed, meets this threshold without any additional minimization or mitigation of harm, this should be stated.

   a. For historic properties, this material will be included in the documents, findings, and commitments contained in the correspondences between FHWA, FDOT, and SHPO/THPO related to compliance with ***Section 106*** of the ***NHPA***. If there are meeting minutes that form part of this determination, ensure that these meeting minutes and the concurrences with these meeting minutes are recorded in the project files. The record should also include the comments (if any) from the other consulting parties identified during the ***Section 106*** process.

   b. For non-historic properties, this information will be contained in the meeting minutes and correspondences as appropriate between FHWA, FDOT, and the official(s) with jurisdiction. As stated above, meeting minutes used to document determinations and decisions should be approved by all participating parties and placed into the project files.

8. _____ Include the notification to the official with jurisdiction over the resource that FHWA may pursue a *de minimis* approval option for the use of the protected property under ***Section 4(f)***. Note that in the case of pursuing a *de minimis* approval for parks, recreation areas, and wildlife and waterfowl refuges, this notification must be completed prior to providing the public opportunity to comment on the effects of the proposed project on the activities, features, or attributes of the protected property. In addition, the notification to the official with jurisdiction over these non-historic resources should inform that

official that FHWA will be offering the public an opportunity to comment on this matter.

9. _____ Description of efforts to provide the public an opportunity to comment on the effects of the proposed project on the activities, features, or attributes of the ***Section 4(f)*** resource, along with the related public responses. Include the date and associated correspondence with FHWA's agreement with the approach used. For historic properties, the public opportunity to comment occurs within the ***Section 106*** process and requires no separate actions for the purposes of a *de minimis* document approval. However, provide any of the public comments related to ***Section 106*** effects findings for the project, if any. If there were none, state this.

10. _____ *A copy of the written communication to the official with jurisdiction over the ***Section 4(f)*** resource that if they concur with an FHWA finding of: (1) either a ***Section 106*** finding of "No Effects on Historic Properties" or "No Adverse Effect" to the historic property in question or (2) that the proposed project will not adversely affect the activities, features, or attributes qualifying the park, recreation area, or wildlife or waterfowl refuge for protection under ***Section 4(f)***, then FHWA may pursue a *de minimis* approval option for the use of the protected property.

11. _____ *The communication in which SHPO/THPO concurs with an FHWA finding of "No Historic Properties Affected" or "No Adverse Effects" to the relevant historic property or in which the official with jurisdiction over a non-historic ***Section 4(f)*** property concurs with a finding that the proposed project will not adversely affect the activities, features, or attributes of the property. The project record must show that the official with jurisdiction was provided the public comments, if any, which the public made concerning the effects of the proposed project on the activities, features, or attributes of the protected property.

*Under normal circumstances, items 10 and 11 are contained in the same letter.

Once FHWA issues a written determination that a *de minimis* approval is appropriate for the use of the protected property, this determination should be retained in the project files. If the determination occurs concurrently with the Environmental Document approval, then the signature/cover page (***Figure 13-4***) should be altered appropriately prior to submission to FHWA.

13.3.2.1.2 Documentation of *de minimis* Approvals

When completing a *de minimis* approval, the following information must be included in the project file. Most of this information should be contained within the submission made for the *de minimis* finding or determination sent to FHWA.

1. Applicability or non-applicability of ***Section 4(f)*** to the park, recreation, refuge, or historic property proposed to be used by the project;

2. Whether or not there is a use of ***Section 4(f)*** property (include a description of the applicability of ***Section 4(f)***);

3. Records of related public involvement, or ***Section 106*** consultation;

4. Results of coordination with the officials with jurisdiction;

5. Comments submitted during the coordination procedures required by ***23 CFR § 774.5***, and responses to the comments;

6. The avoidance, minimization or mitigation measures that were relied upon to make the *de minimis* impact finding; and

7. The *de minimis* approval.

13.3.2.2 Programmatic Section 4(f) Evaluations

Programmatic ***Section 4(f)*** evaluations are prepared for certain minor uses of ***Section 4(f)*** property that meet specific criteria. If a project meets the criteria, it will satisfy the requirements of ***Section 4(f)*** that there is no feasible and prudent alternative and that all possible planning to minimize harm to the ***Section 4(f)*** property resulting from the transportation use has been completed. The conditions vary among the programmatic types, and generally relate to: (1) the type of project or ***Section 4(f)*** property, (2) the degree of use and impact to the ***Section 4(f)*** property, (3) the evaluation of avoidance alternatives, (4) the establishment of a procedure for minimizing harm to the ***Section 4(f)*** property, and (5) adequate coordination with appropriate entities. To promote efficiency, the development of any programmatic evaluation should be coordinated with FHWA Division Office.

There are five (5) nationwide programmatic ***Section 4(f) evaluations***:

1. Independent Walkways or Bikeway Construction Projects

2. Historic Bridges

3. Minor Involvements with Historic Sites

4. Minor Involvements with Parks, Recreation Areas, and Waterfowl and Wildlife Refuges

5. Net Benefits to a ***Section 4(f)*** Property

Programmatic ***Section 4(f)*** evaluations may only be applied to projects meeting the applicability criteria. How the project meets the applicability criteria, as well as the required findings and conclusions, must be documented in the programmatic evaluation prepared for the proposed use of the protected property. Each of these five programmatic evaluations has different required criteria and findings. The evaluation document created must therefore be fashioned in accordance with the specific programmatic evaluation being fulfilled. As specified in the programmatic evaluations, the requirements to assess

whether there is a feasible and prudent avoidance alternative and that the project includes all possible planning to minimize harm to the protected resource still apply. The necessary information supporting the applicability of the programmatic evaluation, how it meets the criteria, and its findings are developed and circulated under a separate cover (except when otherwise appropriate) as a programmatic ***Section 4(f)*** evaluation, and retained in the project file.

The criteria and findings for each of these programmatic evaluations have been reviewed by the appropriate federal agencies, and for legal sufficiency, by FHWA. Therefore, they normally will not require an individual legal sufficiency review from FHWA Headquarters, Resource Centers, nor a review from U.S. DOI, U.S. Department of Agriculture (USDA), or U.S. Department of Housing and Urban Development (HUD), unless one of these agencies is the agency with jurisdiction or oversight over the property. There may be times, however, where a federal agency will need to review the ***Section 4(f)*** materials when they have a separate action to take or approve related to the property protected by ***Section 4(f)*** (see ***23 CFR § 774.5(d)*** or ***Section 13.4***).

FHWA Division Administrator is responsible for ensuring that each individual project meets the criteria and procedures of these programmatic ***Section 4(f)*** evaluations. For this reason, FDOT must clearly document the required items. The written analysis and determinations will be combined in a single document and placed in the public record, and must be made available to the public as appropriate.

The applicability criteria, alternative findings, discussion of least overall harm, and measures to minimize harm for the five different programmatic ***Section 4(f)*** evaluations are included in FDOT's ***Section 4(f) References web page***, along with several sample tables of contents for the various evaluations.

13.3.2.2.1 Coordination

In early stages of project development, each project requires direct coordination with the federal, state, and/or local agency official(s) having jurisdiction over the ***Section 4(f)*** property. For non-federal ***Section 4(f)*** properties, such as state or local properties, the District must determine, or request the official(s) with jurisdiction to identify, any federal encumbrances that may apply to the protected property. When encumbrances exist, the District is required to coordinate with the federal agency responsible for the encumbrance. Compliance and coordination related to any concurrent requirements should be noted and discussed in the appropriate section of the ***NEPA*** document for the project.

Copies of the programmatic evaluations must be offered to the official(s) with jurisdiction over the ***Section 4(f)*** property and to other interested parties, or upon request. This is part of the normal ***NEPA*** project documentation and distribution.

13.3.2.2.2 Public Involvement

Projects with ***Section 4(f)*** use must include appropriate public involvement activities that are consistent with the specific requirements of ***23 CFR § 771.111*** and ***Part 1, Chapter 11, Public Involvement*** for early coordination, public involvement, and project

development. For a project where one or more public meetings or hearings are held, information on the proposed use of the ***Section 4(f)*** property must be communicated at the public meeting(s) or hearing(s). In the case of the Net Benefit programmatic evaluation, a public involvement opportunity is specifically required for the approval of the document. Therefore, in circumstances where the net benefit use of the ***Section 4(f)*** property was not addressed during the normal public involvement effort, a separate public involvement effort addressing the ***Section 4(f)*** use of the property must be provided.

13.3.2.2.3 Format and Contents of Programmatic Section 4(f) Evaluations

After it has been determined that a programmatic ***Section 4(f)*** evaluation is appropriate, an evaluation addressing the applicability criteria must be completed. FDOT and FHWA follow the established formats and contents for each programmatic type of evaluation as specified in the ***FR***. Once the evaluation is completed, it is provided to FHWA for comments and approval.

For Type 2 CE projects, the programmatic ***Section 4(f)*** evaluation is prepared and submitted to FHWA at the same time as the COA determination (***Part 1, Chapter 5, Type 2 Categorical Exclusion***). The public hearing, if required, must be held prior to submittal of the COA determination and the programmatic ***Section 4(f)*** evaluation. Since all ***Section 4(f)*** alternatives remain viable until after the public hearing, these two actions must parallel each other.

For projects processed as an EA or EIS, the programmatic ***Section 4(f)*** evaluation is also submitted independently of EA and DEIS, but after the public hearing. In these cases, the EA or DEIS will contain the following standard statement:

> *"The Section 4(f) requirement for [name of Section 4(f) resource] will be complied with by applying a nationwide evaluation in accordance with [name the appropriate Nationwide Programmatic Section 4(f) evaluation]."*

Two of the five nationwide programmatic ***Section 4(f)*** evaluations are specifically excluded from use in projects requiring the preparation of an EIS, unless the use of ***Section 4(f)*** lands is discovered after the approval of FEIS. These two programmatic ***Section 4(f)*** evaluations are for projects: (1) having minor involvement with public parks, recreation areas, and wildlife and waterfowl refuges and (2) having minor involvements with historic sites. For these projects, an individual ***Section 4(f)*** evaluation must be prepared and incorporated into EIS.

For programmatic ***Section 4(f)*** evaluations concerning Historic Bridges or having Net Benefits, which involve the preparation of an EIS, the same processing as that outlined for EA is followed.

The programmatic evaluation for independent walkways and bikeway projects cannot be used for projects "…where there are unusual circumstances [such as] major impacts, adverse effects, or controversy." Since the criteria for this programmatic evaluation excludes situations where significant impacts may be anticipated, it is highly unlikely that

either an EA with FONSI or an EIS could ever be associated with this activity. Furthermore, this programmatic evaluation is established as a negative declaration and only applies to independent bikeway or walkway construction projects that require the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes. The basis for determining its applicability is documented and provided along with the appropriate COA determination or document.

13.3.2.2.4 Submission of Programmatic Section 4(f) Evaluations

Three copies of the programmatic ***Section 4(f)*** evaluation are sent to the FHWA Division Office. FDOT is utilizing electronic media for the submittal to FHWA. The FHWA will either concur with the evaluation or return comments to the District and to the SEMO. The District makes appropriate revisions and returns three revised copies to FHWA. Upon concurrence, FHWA will return one signed copy to the District to be maintained in the project file and one signed copy to the official with jurisdiction. At its discretion, FHWA may return two signed copies to the District for the District to provide the copy to the official with jurisdiction (see ***Figure 13-5*** for an example transmittal letter for a programmatic ***Section 4(f)*** evaluation to FHWA).

The approval processes for the programmatic evaluations can vary, so the appropriate approval process must be followed before the project can incorporate land from the protected properties. See FDOT's ***Section 4(f) References web page*** for the specific programmatic evaluation being developed.

13.3.2.2.5 Documentation of Programmatic Section 4(f) Evaluations in Project Files

When completing a programmatic ***Section 4(f)*** evaluation, the following information must be included in the project file. Much of this material will be contained in the programmatic evaluation. If any of this material is in separate correspondences or as part of the ***NEPA*** document, these should be referenced and cited appropriately.

1. Applicability or non-applicability of ***Section 4(f)*** to the park, recreation, refuge or historic property proposed to be used by the project;

2. Whether or not there is a use of ***Section 4(f)*** property (including a description of the use);

3. Records of public involvement, if any;

4. Results of coordination with the official(s) with jurisdiction; and

5. Documentation of the specific requirements of the programmatic evaluation that is being applied.

13.3.2.3 Individual Section 4(f) Evaluations

An individual ***Section 4(f)*** evaluation must be completed when a project requires a use of ***Section 4(f)*** property results in a greater than *de minimis* impact and a programmatic ***Section 4(f)*** evaluation does not apply to the situation (***23 CFR § 774.3***). The individual ***Section 4(f)*** evaluation documents the analyses of the proposed use of ***Section 4(f)*** properties for all alternatives within a project area. The individual ***Section 4(f)*** evaluation must result in the following two findings:

1. There is no feasible and prudent alternative that completely avoids the use of ***Section 4(f)*** property; and

2. The project includes all possible planning to minimize harm to the ***Section 4(f)*** property resulting from the transportation use (see ***23 CFR § 774.3(a))***.

Individual ***Section 4(f)*** evaluations must include sufficient analysis and supporting documentation to demonstrate that there is no feasible and prudent avoidance alternative and must summarize the results of all possible planning to minimize harm. When there is no feasible and prudent avoidance alternative and there are two or more alternatives that use lands protected by ***Section 4(f)***, a least overall harm analysis must be included in the individual ***Section 4(f)*** evaluation (***23 CFR § 774.7(c))***.

Individual ***Section 4(f)*** evaluations are processed in two stages: draft and final. Draft evaluations are circulated to U.S. DOI and to the official(s) with jurisdiction over the protected property for review and comment. The public may review and comment on a draft evaluation during the ***NEPA*** process in conjunction with FDOT's public involvement process. When a project is processed as a Type 2 CE, the ***Section 4(f)*** individual evaluation must be circulated independently to U.S. DOI and the officials with jurisdiction over the protected property. In all cases, draft ***Section 4(f)*** evaluations are subject to FHWA legal sufficiency review prior to approval (***23 CFR § 774.7(d)***).

A ***Section 4(f)*** individual evaluation must be prepared and circulated for each location within a proposed project that involves the use of land from a protected property before the use of ***Section 4(f)*** land can be approved. For projects processed with an EIS or an EA with FONSI, the individual ***Section 4(f)*** evaluation is included as a separate section of the document; and for projects processed as Type 2 CEs, the ***Section 4(f)*** individual evaluation is prepared and circulated as a separate document. When included as part of an EIS or an EA with FONSI, the ***Section 4(f)*** evaluation summarizes pertinent information from various sections of the EIS or EA with FONSI in order to reduce repetition. However, when summarizing this information, the evaluation and application of the material in the ***Section 4(f)*** evaluation must meet the stricter requirements of ***Section 4(f)*** rather than the "hard look" determination that may have been used in the other sections of the EA with FONSI or EIS.

The evaluation of alternatives to avoid the use of ***Section 4(f)*** land and of possible measures to minimize harm to such lands is developed by FDOT in cooperation with FHWA. The draft ***Section 4(f)*** evaluation is provided for coordination and comment to the official(s) with jurisdiction over the ***Section 4(f)*** property and to U.S. DOI and, as

appropriate, to USDA and HUD. A minimum of 45 days has been established by FHWA for comments.

The ***Section 4(f)*** individual evaluation must address locational alternatives and design modifications that avoid the ***Section 4(f)*** property. When considering alignment shifts and design changes, it is important to keep in mind the range of allowable configurations and design parameters for roadway elements and different types of roadway typical sections These guidelines are contained within FDOT's ***Plans Preparation Manual, Topic No. 625-000-007*** (***FDOT, 2014***) and/or the ***Green Book***, also titled ***A Policy on the Geometric Design of Highway and Streets,*** published by the American Association of State Highway and Transportation Officials (AASHTO) (6th edition, 2011). Supporting information must demonstrate that the alternatives to using property protected under ***Section 4(f)*** result in unique problems. Unique problems are present when there are truly unusual factors or when the costs or community disruption reach extraordinary magnitude.

13.3.2.3.1 Section 4(f) Analysis

The intent of the ***Section 4(f)*** laws is to avoid and, where avoidance is not feasible and prudent, to minimize the use of significant public parks, recreation areas, wildlife and waterfowl refuges, and historic sites by federally assisted transportation projects. An Individual ***Section 4(f)*** requires the development on an avoidance alternative which is an alternative that does not require the use of any ***Section 4(f)*** property, including the no build alternative. Feasible and prudent avoidance alternatives are those that avoid using any ***Section 4(f)*** property and do not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the ***Section 4(f)*** property (***23 CFR § 774.17***).

13.3.2.3.1.1 Developing Avoidance Alternatives

In order to meet the substantive requirement of ***Section 4(f)***, FDOT and FHWA must apply a flexible approach to meeting the transportation purposes of the proposed project without using any ***Section 4(f)*** protected properties. This requires the development of a reasonable range of project alternatives and design options that avoid using ***Section 4(f)*** protected properties (including the no build as an avoidance alternative). The earlier screenings of alternatives such as those occurring during planning, the Alternative Corridor Evaluation (ACE) process, or in overall project development, represent a part of this effort. However, additional alternatives may be needed if the planning studies and the early or pre-***NEPA*** processes did not identify ***Section 4(f)*** properties or take into account the more stringent requirements of ***Section 4(f)***. If alternatives avoiding ***Section 4(f)*** resources were eliminated during the earlier phases of project development for reasons unrelated to ***Section 4(f)***, such as other impacts or to meet the desired project purpose and need, they may need to be reconsidered using the substantive standards set forth in ***Section 4(f)*** law. For this same reason, it is often necessary to develop and analyze new alternatives and/or new variations of alternatives rejected in the earlier analyses. In identifying other avoidance alternatives, FDOT should consider all reasonable alternatives that address the purpose and need of the project, keeping in mind the substantive requirements of ***Section 4(f)***. Potential alternatives to avoid the use of

Section 4(f) property may include one or more of the following, depending on project context:

1. **Location Alternatives**: A location alternative refers to the re-routing of the entire project along a different alignment.

2. **Alternative Actions**: An alternative action could be a different mode of transportation, such as rail transit or bus service, or some other action that does not involve construction, such as the implementation of transportation management systems or similar measures.

3. **Alignment Shifts**: An alignment shift is the re-routing of a portion of the project to a different alignment to avoid a specific resource.

4. **Design Changes**: A design change is a modification of the proposed design in a manner that would avoid impacts (or the acquisition of land from protected properties), such as reducing the planned median width, building a retaining wall, or incorporating design exceptions.

For the purposes of this analysis, *de minimis* uses of ***Section 4(f)*** property are not considered avoidance alternatives.

13.3.2.3.1.2 The Feasible and Prudent Standard

Once potential avoidance alternative(s) have been identified, each potential avoidance option is evaluated to determine if avoiding the ***Section 4(f)*** property is feasible and prudent. When making determinations of feasibility and prudence, do not de-emphasize the importance of protecting the ***Section 4(f)*** property. However, it is appropriate to consider the relative value of the resource when determining the importance of protecting the property in light of the preservation purpose of the statute.

The regulations state that a potential avoidance alternative is not feasible if it cannot be built as a matter of sound engineering judgment (***23 CFR § 774.17***). When an alternative is determined to be not feasible, the particular engineering challenge present in that alternative is documented in the project files, along with a reasonable and understandable explanation.

The feasible and prudent avoidance alternative definition also sets standards for determining if a potential avoidance alternative is prudent. An alternative is not prudent if one of the following six factors apply:

1. It compromises the project to a degree that it is unreasonable to proceed in light of the project's stated purpose and need (i.e., the alternative does not address the purpose and need of the project);

2. It results in unacceptable safety or operational problems;

3. After reasonable mitigation, it still causes:

a. severe social, economic, or environmental impacts;

b. severe disruption to established communities;

c. severe or disproportionate impacts to minority or low-income populations; or,

d. severe impacts to environmental resources protected under other statutes;

4. It results in additional construction, maintenance, or operational costs of extraordinary magnitude;

5. It causes other unique problems or unusual factors; or,

6. It involves multiple factors as outlined above that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

As with many other environmental laws, ***Section 4(f)*** requires balancing efforts to ensure due consideration is given to various options and alternatives while meeting the preservationist intent of the statute. For example, when developing mitigation measures for different alternatives that use ***Section 4(f)*** protected properties, it is required to ensure that the mitigation measures are comparable in order not to arbitrarily skew the analysis in favor or one alternative over another. Likewise, when applying variances or exceptions to standard project design criteria in order to avoid using a ***Section 4(f)*** property, it is not acceptable to apply variances or exceptions inconsistently, such as adopting a narrower roadway width in one location to avoid ROW costs while rejecting a narrower roadway width to avoid a public park.

The supporting information provided in the evaluation must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts or community disruption resulting from such alternatives reach extraordinary magnitudes.

13.3.2.3.1.3 The Least Overall Harm Analysis

If the alternatives review identifies no feasible and prudent avoidance alternative to the use of land from a protected property and there are two (2) or more alternatives that involve the use of ***Section 4(f)*** property, then FHWA must seek the alternative with the least overall harm. FHWA bases this least overall harm determination on the preservation purpose and intent of ***49 U.S.C. § 303*** and ***23 U.S.C. § 138***, the statutes that establish ***Section 4(f)***. The implementing regulations at ***23 CFR § 774.3(c)(1)*** identify seven (7) factors that FHWA uses to determine the alternative with the least overall harm. These considerations are divided into two groups, the first four (4) relate to the net harm each alternative would have on the protected property, and the last three (3) are used to identify any substantial problems associated with the remaining alternatives on issues beyond ***Section 4(f)***. This least overall harm analysis is required whenever there are two or more alternatives under consideration that use ***Section 4(f)*** property. The seven factors FHWA must weigh are as follows:

1. The ability to mitigate adverse impacts on each ***Section 4(f)*** property (including any that result in benefits to the property);
2. The relative severity of the remaining harm, after mitigation, to the protected activities, features, or attributes that qualify each ***Section 4(f)*** property for protection;
3. The relative significance of each ***Section 4(f)*** property;
4. The views of the officials with jurisdiction over each ***Section 4(f)*** property;
5. The degree to which each alternative meets the purpose and need for the project;
6. After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by ***Section 4(f)***; and,
7. Substantial differences in costs among the alternatives.

By balancing these seven (7) factors, FDOT and FHWA analyze all the concerns relevant to determining which alternative would cause the least overall harm in light of the statute's preservation purpose. It may be possible that FDOT and FHWA would determine that a serious problem identified in items five (5) through seven (7) outweighs a relatively minor net harm to a ***Section 4(f)*** property. The least overall harm determination also provides a way to compare and select between alternatives that would use different types of ***Section 4(f)*** properties when competing assessments of significance and harm are provided by the officials with jurisdiction over each property. In evaluating the degree of harm to ***Section 4(f)*** properties, FHWA is also required by the regulations to consider views expressed by the official(s) with jurisdiction.

The evaluation explains how the seven factors were compared to determine the least overall harm alternative. The draft evaluation identifies the various impacts to the different ***Section 4(f)*** properties and describes the relative differences of the alternatives in regard to non-***Section 4(f)*** issues, such as the extent to which each alternative meets the project purpose and need. The details concerning these impacts should include both objective, quantifiable impacts and the qualitative, more subjective assessments. As appropriate, a preliminary assessment of how the alternatives compare to one another may also be included. When this is done, evaluation matrices or tables provide a good visual representation to document the comparison of the alternatives to each other based on the seven factors discussed in this section. Further, the use of project aerials and other exhibits helps to outline differences in the various alternatives.

13.3.2.3.1.4 The All Possible Planning to Minimize Harm Requirement

If the alternative selected uses land from a ***Section 4(f)*** property, the statute and the regulations require that this alternative incorporate all possible planning to minimize harm. "All possible planning," as defined in ***23 CFR § 774.17***, means that all reasonable measures identified in the ***Section 4(f)*** evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project and that these measures are

determined through consultation with the official of the agency owning or administering the land or, for historic properties, through the ***Section 106*** consultation process.

Minimization of harm may entail alternative design modifications that reduce the amount of ***Section 4(f)*** property used or features impacted, as well as other mitigation measures that compensate for the remaining impacts. Mitigation measures involving public parks, recreation areas, or wildlife or waterfowl refuges may involve replacement of land and/or facilities of comparable value and function, or monetary compensation to enhance the remaining land. Even though the statute does not require the replacement of ***Section 4(f)*** property for transportation projects, it might be the most straightforward means for minimizing harm to these resources. Mitigation for historic sites usually consists of those measures necessary to preserve or protect the historic integrity of the site that have been agreed upon by FHWA, SHPO/THPO, and other consulting parties.

13.3.2.3.2 Format, Contents, and Processing for Draft Section 4(f) Evaluations

The ***Draft Section 4(f) Evaluation*** provides the preliminary analyses and comparisons of project alternatives that avoid ***Section 4(f)*** property and, as appropriate, the alternatives using ***Section 4(f)*** property for a least overall harm analysis. The draft evaluation incorporates potential impacts to ***Section 4(f)*** resources along with other sensitive environmental, economic, and social impacts associated with these alternatives. In addition, it must include preliminary identifications of avoidance, minimization, and mitigation opportunities related to each of the ***Section 4(f)*** uses and the general environmental, social, and economic impacts on resources not protected by ***Section 4(f)***. This information is used to address the "all possible planning to minimize harm" requirement, and for projects with two or more alternatives using ***Section 4(f)*** property, the information helps inform the required least overall harm analysis. As appropriate, this document should reference relevant information in the project's ***NEPA*** document or provide a description of the project, purpose and need, coordination with the officials with jurisdiction, and mitigation. The draft evaluation does not identify the final selected alternative nor does it make the final feasible and prudent determinations; these discussions are reserved for the ***Final Section 4(f) Evaluation***. FHWA's procedures regarding the preparation and circulation of ***Section 4(f)*** documents are contained in ***23 CFR § 774.5*** and ***FHWA's Technical Advisory 6640.8a, Guidance for Preparing and Processing of Environmental*** and ***Section 4(f) Documents*** (October 1987).

Because the organizational structure of individual ***Section 4(f)*** evaluations may vary depending on such things as COA for the project, the number of protected properties, the number of alternatives using ***Section 4(f)*** property, it is more important to focus on the content and record of this evaluation than on the order of its presentation. However, the order or presentation must flow logically through the ***Section 4(f)*** process. The table of contents provided below presents a basic guide for preparing ***Draft Section 4(f) Evaluations*** rather than a required format. However, when varying from the outlined contents set forth below, the preparer must be aware of the reasons they are diverging from the guide.

When processing an individual evaluation with an EA with FONSI or an EIS, the ***Section 4(f)*** information should be included in the Environmental Document. Therefore, rather than repeating all the pertinent information from locations in the Environmental Document, this material should be referenced, summarized, and placed in the context and narrative of the ***Section 4(f)*** evaluation. For the purposes of ***Section 4(f)***, ensure that the discussion of alternatives, alignments, and associated project activities are evaluated according to the standards required for ***Section 4(f)*** rather than the less rigorous standard set forth in ***NEPA*** or many other environmental laws. When developing avoidance alternatives, be aware that alternatives dismissed earlier in planning or in project development, may need to be brought back and weighed under the stricter standards of ***Section 4(f)***. In addition, include analysis reflecting that all reasonable measures to minimize harm to the ***Section 4(f)*** protected property are addressed directly in the narrative of the ***Section 4(f)*** evaluation. The information provided in a ***Draft Section 4(f) Evaluation*** document is generally organized in the following manner:

1. **Introduction**

   The introduction includes a brief description and overview of the ***Section 4(f)*** requirements with reference to the laws and the regulations. This section introduces the project name and the names of the protected sites and their locations. For a draft evaluation submitted as part of an EA or EIS, the introduction will be concerned primarily with the overview and description of the law and the purpose of the draft evaluation, since the names of the protected properties, as well as their locations, along with basic project information, will have been discussed in the Environmental Document.

2. **Description of Proposed Action**

   For a separate ***Section 4(f)*** evaluation (those not submitted as part of an EA or EIS), describe the proposed project alternatives and explain the purpose and need for the project. For an evaluation submitted with an EIS or EA, briefly summarize and reference the section of the ***NEPA*** document that contains additional detail about the project area and proposed alternatives. Regardless of whether the evaluation is a separate document or not, differentiate between the avoidance alternatives and the alternatives that use ***Section 4(f)*** protected properties.

3. **Description of Section 4(f) Properties**

   This portion of the ***Draft Section 4(f) Evaluation*** should describe each ***Section 4(f)*** property that would be subject to a use by any alternative under consideration. Be sure to include reference to the letter or communication that provides the determination of ***Section 4(f)*** applicability. For projects where ***Section 4(f)*** applicability was recorded as a note to the file or any of the less formal methods, include the information that supported the applicability decision and cite the appropriate document in the draft evaluation. The information in this section is essentially the same as the information described for the submission of a DOA (see ***Section 13.3.1.4***), and should include, as applicable:

a. Type of ***Section 4(f)*** property: Publicly owned park, recreation area, wildlife or waterfowl refuge, or historic site.

b. Ownership of the property: For parks, recreation areas, and wildlife and waterfowl refuges, indicate the public entity that owns and/or is responsible for the management and operation of the facility (city, county, state, federal). For historic sites, indicate whether the site is public or private, the type of site it is, and the status of the property's eligibility for the NRHP, as well as the criteria under which it is eligible or listed.

c. Existing clauses affecting the ownership, such as leases, easements, covenants, restrictions, or conditions, including forfeiture.

d. Primary function of the property and, where applicable, available recreational activities, including when the facility is open, to whom it is open, and whether any fees are required.

e. Location (e.g., maps, photographs, sketches) and size (indicating the boundaries and acres and/or square feet) of the affected ***Section 4(f)*** property.

f. Detailed maps, aerial photographs, or drawings of sufficient scale to identify the relationship of the project alignment, corridor, or locational alternatives to the ***Section 4(f)*** property and its functional or character-defining features or facilities, as well as its surroundings.

g. Description and locations of all existing and planned facilities (such as ball diamonds or tennis courts).

h. Access, both the locations of access points (entrance ways, parking areas, trails into, and so on) as well as types of access (such as bicycle, pedestrian, vehicular, etc.) and the usage (e.g., approximate number of users/visitors) and hours of use.

i. Relationship to other similarly used lands in the vicinity and potential effects that a change in the ***Section 4(f)*** property may have on these other lands.

j. Characteristics of the ***Section 4(f)*** property (flooding issues, terrain conditions, or other features) that either reduce or enhance the value of all or part of the property.

4. Description of Use and Impacts on the Section 4(f) Property

This section of the ***Draft Section 4(f) Evaluation*** should discuss each alternative's impact on each ***Section 4(f)*** property (that is, the amount of land to be used, facilities and functions affected, noise, visual effects, access alterations, and so forth). If an alternative requires additional temporary impacts during construction, discuss those as well. If one or more alternatives use land from one or more ***Section 4(f)*** properties, it is usually helpful to develop a summary table that

compares the various impacts. Always include maps or drawings to illustrate the various project alternatives and their relationships to the protected property and the activities, features, and attributes that qualify the property for protection under ***Section 4(f)***.

Quantify measurable impacts such as noise and affected functions whenever possible. Impacts that cannot be quantified, such as visual intrusions, should be described and explained in relation to the purposes, features, and functions of the ***Section 4(f)*** property.

5. **Avoidance Alternatives**

A ***Draft Section 4(f) Evaluation*** must demonstrate that avoidance alternatives to the project under consideration have been evaluated. Specifically, the evaluation must include a discussion that will ultimately serve as a basis for a determination as to whether or not an avoidance alternative is feasible and prudent in the final evaluation.

A final determination that no feasible and prudent avoidance alternatives exist is not made until after the ***Draft Section 4(f) Evaluation*** has been circulated to the appropriate agencies and all issues have been suitably evaluated. An alternative that was considered for the proposed action when entering the evaluation process may not prove to be the best alternative for meeting all the goals of the project as the evaluation proceeds. The final determination will be made in the ***Final Section 4(f) Evaluation***, ROD, or FONSI.

This discussion of feasible and prudent avoidance must comply with the regulatory criteria located in the definition of "feasible and prudent avoidance alternative" in ***23 CFR § 774.17***. These criteria specify that an alternative is not feasible if it cannot be built as a matter of sound engineering judgment, and that an alternative is not prudent if, on balance, it meets the six factors listed in ***Section 13.3.2.3.1.2***.

If it appears that the final evaluation may conclude that there is no avoidance alternative that is feasible and prudent, then the draft evaluation should also provide a preliminary least overall harm analysis when more than one of the remaining alternatives under consideration uses ***Section 4(f)*** property. This is done by comparing and contrasting the alternatives under consideration in terms of the seven factors specified in ***23 CFR § 774.3(c)*** and in ***Section 13.3.2.3.1.3***. FHWA can only approve the alternative that is found to cause the least overall harm after consideration of these factors. The information used to analyze least overall harm may be provided in the draft evaluation, but the decision on which alternative results in least overall harm is not included in the draft evaluation. Because that decision cannot be made until the public and other agencies have had the opportunity to comment, that alternative is identified and documented in the ***Final Section 4(f) Evaluation***. FHWA and FDOT may only identify the preferred alternative in the ***Final Section 4(f) Evaluation***.

6. Minimization and Mitigation of Harm

The draft evaluation addresses all possible measures to minimize harm for every alternative using ***Section 4(f)*** lands and for each impact to a ***Section 4(f)*** property. For example, if multiple public parks are affected, a separate discussion of each park, detailing how impacts will be minimized for each alternative using land from that park, is needed. For parks, recreation areas, and wildlife and waterfowl refuges, measures to minimize harm may include such things as design modifications or design goals, replacement of land or facilities of comparable value and function, monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways, etc.

For historic sites, measures to minimize harm normally serve to preserve the activities, features, or attributes associated with the historical value of the site as agreed to within the ***Section 106*** consultation process.

All mitigation measures require appropriate documentation and coordination between FHWA, FDOT, the project sponsor, and the official(s) with jurisdiction. In the case of historic properties, these include SHPO or, on tribal lands of tribes with a THPO, that particular THPO. In certain situations, there may be other appropriate parties involved in the coordination. For example, involvement with a National Historic Landmark (NHL) requires coordination with the National Park Service (NPS) and ACHP (for more detail on consultation related to historic properties, see ***Part 2, Chapter 12, Archaeological and Historical Resources***). For coordination on park, recreation, or refuge lands under U.S. DOI jurisdiction, the officials with jurisdiction would include a representative of the relevant federal agency.

7. Coordination

The Coordination section in the ***Draft Section 4(f) Evaluation*** should discuss the results of coordination with the following parties:

a. Official(s) with jurisdiction over the ***Section 4(f)*** property

b. Regional (or local) offices of the U.S. DOI

c. Regional Office of HUD's Department and the Forest Supervisor of the affected national forest (as appropriate)

Generally, the coordination would have included a discussion of avoidance alternatives, impacts and minimization of impacts to the property, and mitigation measures. In addition, coordination with the public official(s) with jurisdiction should include, where necessary, a discussion of significance and primary function(s) of the property. The coordination section of the evaluation should reflect outcomes of these efforts, as well as the associated correspondences and associated agreements.

8. Concluding Statement

The following standard statement is used for a conclusion in the ***Draft Section 4(f) Evaluation***:

> *"Upon final alternative selection the provisions of Section 4(f) and 36 CFR Part 800 (if appropriate) will be fully satisfied."*

13.3.2.3.3 Submission of Draft Individual Section 4(f) Evaluation

Six copies of the ***Draft Section 4(f) Individual Evaluation*** are forwarded to FHWA Division Office for review and approval (see ***Figure 13-6*** for the sample transmittal letter for a ***Draft Section 4(f) Evaluation***). FHWA Division Office will submit the ***Draft Section 4(f) Evaluation*** to the program area specialist and their legal office at FHWA Resource Center for substantive and legal sufficiency reviews. FHWA requires a legal sufficiency review of all individual ***Section 4(f)*** evaluations. Once FHWA has approved the ***Draft Section 4(f) Evaluation*** for circulation, it must go to the official with jurisdiction and any other appropriate parties for review and comment, including U.S. DOI. FHWA and FDOT are utilizing electronic media for its submission of the document if the recipients will accept it electronically.

Except when a particular agency of U.S DOI has a specific review action to take (such as the NPS does for a land conversion approval under ***Section 6(f)*** of the ***Land and Water Conservation Fund Act*** (***LWCFA***), all copies of the ***Draft Section 4(f) Evaluation*** required for U.S. DOI review should be sent to the Director of the Office of Environmental Policy and Compliance (OEPC) at the following address:

Director, Office of Environmental Policy and Compliance
U.S. Department of the Interior
1849 C Street, NW (MS2462)
Washington, DC 20240

To help ensure a more timely response from the U.S. DOI, provide an email address for the submission of comments. Furthermore, U.S. DOI accepts digital media on any of the common electronic data storage media such as email, CDs or DVDs. In addition, provide the URL for review documents placed on the Internet. When the documents are submitted in hard copies to U.S. DOI Headquarters, twelve copies of the ***Draft Section 4(f) Evaluation*** are required for coordination.

In addition to coordination with U.S. DOI, ***Draft Section 4(f) Individual Evaluations*** must be coordinated with the official(s) having jurisdiction over the ***Section 4(f)*** property, and with HUD and USDA where these agencies have an interest in or jurisdiction over the affected ***Section 4(f)*** resource (***23 CFR Part 774***). The point of coordination for HUD is the appropriate Regional Office, and for USDA, it is the Forest Supervisor of the affected National Forest. One copy should be provided to the official(s) with jurisdiction and two copies should be submitted to HUD and USDA when coordination is required.

While the regulation does not always stipulate that these issues be resolved successfully, if any of these agencies raise issues during coordination, the District should follow-up with

those agencies. The regulation requires follow-up coordination. While the regulation does require reasonable efforts and good-faith attention by decision makers.

13.3.2.3.4 Format, Contents, and Processing for Final Section 4(f) Individual Evaluations

The purpose of the ***Final Individual Section 4(f) Evaluation*** is to: (1) document the basis for why there is no feasible or prudent alternative that completely avoids all ***Section 4(f)*** properties, (2) substantiate and record the finding that among the alternatives which use ***Section 4(f)*** property, the preferred alternative results in the least overall harm in accordance with ***23 CFR § 774.7(c)***, (3) show the inclusion of all possible planning to minimize harm to the ***Section 4(f)*** property resulting from the transportation use, and (4) record and consider the continuing coordination and comments from the agencies such as the official with jurisdiction, U.S. DOI, USDA, and HUD, following the circulation of the ***Draft Section 4(f) Evaluation*** (see ***23 CFR § 774.5***).

Therefore, when the preferred alternative uses ***Section 4(f)*** land, the ***Final Section 4(f) Evaluation*** must contain the following items, as outlined in ***23 CFR § 774.3***:

1. All of the information from the ***Draft Section 4(f) Evaluation***.

2. A discussion of the basis for demonstrating why there is no feasible and prudent alternative to the use of the ***Section 4(f)*** land. The supporting information must demonstrate that after reasonable mitigation the avoidance alternative(s) still causes other severe problems of a magnitude that substantially outweighs the importance of protecting the ***Section 4(f)*** property. This language should appear in the document together with the supporting information.

3. A discussion of the basis for concluding that the proposed action includes all possible planning to minimize harm to the ***Section 4(f)*** property. When there is no feasible and prudent alternative that avoids the use of ***Section 4(f)*** land, the ***Final Section 4(f) Evaluation*** must demonstrate that the preferred alternative is the one that causes the least overall harm in accordance with ***23 CFR § 774.3(c)*** (see also, ***23 CFR § 774.7(c))***.

4. A summary of the appropriate formal coordination with the Headquarters Office of U.S. DOI (and/or appropriate agency under that Department) and, as appropriate, the offices of USDA and HUD.

5. Copies of all formal coordination comments and a summary of other relevant ***Section 4(f)*** comments received, including those of the agency official having jurisdiction over the resource, and an analysis and response to any questions raised. Where new alternatives or modifications to existing alternatives are identified and will not be given further consideration, the basis for dismissing these alternatives should be provided and supported by factual information. Where ***Section 6(f)*** land is involved, NPS's position on the land transfer should be documented.

6. The following standard statement is used for a conclusion:

   Based upon the above considerations, there is no feasible and prudent alternative to the use of land from the [identify Section 4(f) property] and the proposed action includes all possible planning to minimize harm to the [Section 4(f) property] and the least overall harm in light of the statute's preservation purpose resulting from such use.

13.3.2.3.5 Submission of Final Section 4(f) Evaluation

After completion of the circulation period and the public hearing, six copies of the ***Final Section 4(f) Evaluation*** are submitted to the FHWA Division Office and one copy is forwarded to the SEMO unless FDOT/FHWA is utilizing electronic media for its submission to the U.S. DOI as outlined in the U.S. DOI's ***Environmental Review Memorandum No. ERM 13-2 (U.S. DOI, 2013)*** (see ***Figure 13-7*** for a sample transmittal letter for ***Final Section 4(f) Evaluation***). If the ***Section 4(f)*** evaluation is processed separately or as part of an EA with FONSI or an FEIS, the U.S. DOI should receive six copies of the ***Final Section 4(f) Evaluation*** for information. In addition to coordination with U.S. DOI, ***Final Section 4(f) Evaluations*** must be coordinated with the officials having jurisdiction over the ***Section 4(f)*** property, as well as the HUD and the USDA where these agencies have an interest in or jurisdiction over the affected ***Section 4(f)*** resource (***23 CFR § 774.5(a))***. The point of contact for HUD is the appropriate Regional Office and for USDA, the Forest Supervisor of the affected National Forest. One copy should be provided to the officials with jurisdiction and two copies should be submitted to HUD and USDA when coordination is required. The FHWA Division will forward the ***Final Section 4(f) Evaluation*** to the Regional Office for legal sufficiency review and approval.

For actions processed with an EIS, the FHWA will make the ***Section 4(f)*** approval either in its approval of the FEIS or in the ROD. Where the ***Section 4(f)*** approval is documented in FEIS, FHWA will summarize the basis for its ***Section 4(f)*** approval in the ROD. Actions requiring the use of ***Section 4(f)*** property, and proposed to be processed with a FONSI or classified as a Type 2 CE, cannot proceed until notified of ***Section 4(f)*** approval by FHWA. For projects processed as a FONSI, the FONSI will include a summary of the basis for its ***Section 4(f)*** approval. For projects classified as a Type 2 CE, the required approval for a ***Section 4(f)*** evaluation is documented separately. After the approval, FHWA Division Office will return one (1) signed copy to the District and one (1) signed copy to SEMO. The District will then distribute copies to the agencies that received the ***Draft Section 4(f) Evaluation*** for their review. After thirty (30) days, FHWA may grant LDCA.

13.3.2.3.6 Project File Documentation

For individual ***Section 4(f)*** evaluations, the following information must be included in the District project file either as part of the ***Section 4(f)*** evaluation or as part of the PD&E Study:

1. Applicability or non-applicability of ***Section 4(f)*** to the park, recreation, refuge or historic property proposed to be used by the project;

2. Whether or not there is a use of ***Section 4(f)*** property;
3. Activities, features, and attributes of the ***Section 4(f)*** property;
4. Analysis of the impacts to the ***Section 4(f)*** property;
5. Records of public involvement;
6. Results of coordination with the officials with jurisdiction;
7. Alternatives considered to avoid using the ***Section 4(f)*** property, including analysis of the impacts caused by avoiding the ***Section 4(f)*** property;
8. A least overall harm analysis, if appropriate;
9. All measures undertaken to minimize harm to the ***Section 4(f)*** property; and
10. Comments submitted during the coordination procedures required by ***23 CFR § 774.5*** and responses to the comments.

13.3.3 Legal Sufficiency

Legal sufficiency review is required for all individual ***Section 4(f)*** evaluations. The importance of developing legally sufficient ***Section 4(f)*** evaluations cannot be underestimated given its litigation history and potential to impact projects through issuance of injunctions. As such it is critical to develop a well-documented record to support findings of no feasible and prudent alternative, and when appropriate, the alternative having the least overall harm, and to demonstrate all possible planning to minimize harm.

FHWA policies developed as a result of court rulings require that all ***Section 4(f)*** evaluations receive legal review and concurrence by the FHWA's Chief Counsel Office.

13.3.4 Section 4(f) Following PD&E

13.3.4.1 Commitment Compliance

Project commitments, including the alternatives and design set forth in the approved Environmental Document, are carried forward into the design, ROW, and construction phases of project delivery. Any changes to overall project design or to the design in the proximity of sites protected by ***Section 4(f)*** and to locations of proposed construction-related activities must be reevaluated in accordance with ***23 CFR Part 774*** and ***Part 1, Chapter 13, Reevaluations***. The commitments and required coordination are updated per ***Part 2, Chapter 32, Commitments***, and documented in the Commitment Status section of the ***Reevaluation Form***.

Commitments developed under ***Section 4(f)*** and for all other associated federal and state laws governing the treatment or consideration of these properties must be recorded in the Environmental Document and on the ***Project Commitment Record, Form No. 700-011-***

35. The commitments are transmitted to the Design and Construction Offices to be included in the contract documents. If the commitment also occurs in the permit conditions, it will need to be addressed through that process as well. Tracking project commitments must follow ***Procedure No. 700-011-035, Project Commitment Tracking***.

If either Design or Construction cannot meet a commitment, they must inform the District Environmental Office as soon as they are aware so that the District Environmental Office can inform the appropriate consulting parties and re-initiate the consultation. As a result, District staffs involved in all phases of project delivery must review the commitments made to avoid, minimize, and mitigate effects to ***Section 4(f)*** protected properties. This requires an understanding of the preliminary design decisions in the vicinity of properties protected by ***Section 4(f)***, as well as the commitments specific to particular activities or treatments for each of these properties considered or used by the proposed project prior to the submission of final ROW plans. A field visit with FHWA and the agency official(s) having jurisdiction over ***Section 4(f)*** protected properties, and/or other parties as appropriate, to confirm areas or impacts that must be avoided during construction, is required prior to finalizing the contract design plans if such identification is called for in the project commitments.

13.3.4.2 Reevaluations

Subsequent reevaluations must include, in their Commitment Status Sections, discussions on the implementation of commitments made in compliance with ***Section 4(f)*** of the ***U.S. Department of Transportation Act of 1966, as amended***. If there are changes to the applicability of ***Section 4(f)***, or the relationships of the proposed action to properties protected under ***Section 4(f)***, or to the commitments made to the official(s) with jurisdiction in compliance with ***Section 4(f)***, these will need to be addressed during those subsequent phases of the project development process.

The circulation of a separate ***Section 4(f)*** approval following PD&E is required when:

1. A proposed modification of the alignment or design would require the use of a ***Section 4(f)*** property after CE, FONSI, or ROD has been processed; or

2. The FHWA determines, after processing the CE, FONSI, or ROD that ***Section 4(f)*** applies to a property; or

3. A proposed modification of the alignment, design, or measure(s) to minimize harm (after the original ***Section 4(f)*** approval) would result in a substantial increase in the amount of ***Section 4(f)*** land used, a substantial increase in the adverse impacts to ***Section 4(f)*** land, or a substantial reduction in mitigation measures.

When FHWA determines that ***Section 4(f)*** is applicable after the CE, FONSI, or FEIS has been processed, the decision to prepare and circulate a ***Section 4(f)*** does not automatically mean that a new or supplemental Environmental Document must be prepared.

If a new or supplemental ***NEPA*** document is required (see ***23 CFR §130***), then it should include the documentation supporting the separate ***Section 4(f)*** approval. Where a

separate ***Section 4(f)*** approval is required, any activity not directly affected by the separate ***Section 4(f)*** approval can proceed during the analysis.

13.3.4.3 Late Designations and Late Discovery

There are times when the determinations of significance for, or designations of ***Section 4(f)*** properties occur late in project development. In these cases, FHWA must comply with the exemptions in ***23 CFR § 774.13(c)*** when determining if a ***Section 4(f)*** approval is necessary to use a late-designated property. Except for archaeological resources, including those discovered during construction (see below), 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 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 that existed at the time of the search (See Question 26 of the ***Section 4(f) Policy Paper*** at the FDOT ***Section 4(f)*** References web page for more information).

In the case of archaeological sites discovered during construction (i.e., late discovery), construction activities in the area of the discovery must be halted and FHWA must determine if a Section approval is necessary or if an exception applies under ***23 CFR § 774.13(c)***. Where preservation in place is warranted and a ***Section 4(f)*** approval will be required, 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 consistent with the process set forth in ***Section 106*** of the NHPA regulations and should include Indian tribes that may attach religious and cultural significance to sites discovered.

Discoveries may be addressed prior to construction in agreement documents that set forth procedures that plan for subsequent discoveries. When discoveries occur without prior planning, the ***Section 106*** regulation calls for reasonable efforts to avoid, minimize, or mitigate such sites and provides an expedited timeframe for interested parties to reach resolution regarding treatment of the site (see ***Part 2, Chapter 12, Historic and Archaeological Resources***). A decision to apply ***Section 4(f)***, based on the outcome of the ***Section 106*** process, to an archeological discovery during construction would trigger an expedited ***Section 4(f)*** evaluation. Because the U.S. DOI has a responsibility to review individual ***Section 4(f)*** evaluations and is not usually a party to the ***Section 106*** process, the U.S. DOI should be notified and any comments they provide considered within a shortened response period.

13.4 CONCURRENT REQUIREMENTS

There are often concurrent requirements of other federal agencies when ***Section 4(f)*** lands are involved with highway projects. Examples of such concurrent requirements 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 NPS Bureau of Land Management (BLM); 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 (USFWS), NPS, BLM, and U.S. Forest Service (USFS); and approval of land conversions covered by the ***Federal-aid in Sport Fish Restoration Act*** and the ***Federal-Aid in Wildlife Restoration Act*** (the ***Dingell-Johnson Act*** and ***Pittman-Robertson Act***, respectively); the Recreational Demonstration Areas Program under ***Title II of the National Industrial Recovery Act (NIRA) of June 16, 1933***; the Federal Lands to Parks Program; the Historic Surplus Property Program; and ***Section 6(f)*** of the ***Land and Water Conservation Fund Act***. There also exists a host of similar such laws on the state and local levels where previous funding may have been tied to existing land function. Though these latter laws may not apply to FHWA, they may apply to FDOT or the state or local manager of the property being used.

13.4.1 Coordination of Concurrent Requirements with Section 4(f) Requirements

The avoidance, minimization, and mitigation plans developed for the project should include measures that would satisfy the requirements for these concurrent approvals and consultations as well as for ***Section 4(f)*** approval. When federal lands which are needed for highway projects are not subject to ***Section 4(f)***, there is still a need for close coordination with the federal agency that has approval authority over the conversion of land in order to develop a mitigation plan that would satisfy any other requirements for a land transfer. Any federal encumbrances or restrictions on land conversions must be met even when there is no USDOT funding or approval.

Regardless of a particular agency's role in ***Section 4(f)***, its role in the concurrent law must be included in the analysis and coordination required. In some instances concurrent requirements my involve agencies that may otherwise not be consulted directly under ***Section 4(f)***. For example, for programmatic evaluations, FHWA will not normally provide the ***Section 4(f)*** evaluation to U.S. DOI. However, if U.S. DOI must make a finding under a concurrent law, then the programmatic evaluation will be provided for their review. Timing approvals can be somewhat difficult for certain laws. Under ***Section 7*** of the ***Wild and Scenic Rivers Act***, for example, a greater level of design for the proposed project may be needed to reach a finding of no direct and adverse effects to the Outstanding River Values of the designated river than is needed to determine use under ***Section 4(f)***. For cases where there are concurrent requirements, the appropriate state or federal officials should be approached as early possible.

13.4.2 Compliance with Section 6(f) of the Land and Water Conservation Fund Act

State and local governments often obtain grants through the ***Land and Water Conservation Fund Act Land and Water Conservation Fund Act of 1965 (16 U.S.C. §§ 460l-5 through 460l-7 and 4601-11)*** 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 NPS. Furthermore, the statute directs the NPS 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)*** land are proposed for highway projects, replacement lands will be necessary. Importantly, ***Section 6(f)*** applies to all transportation projects involving such a conversion whether or not federal funding is being utilized for the project. Normally, any federally funded transportation project requiring the conversion of recreational or park land covered by ***Section 6(f)*** will also involve ***Section 4(f)***. The coordination and agreements entered into as part of completing FDOT's ***Section 6(f)*** responsibilities, therefore, should be reflected in the ***Section 4(f)*** evaluation or approval. Regardless of the mitigation proposed, the ***Section 4(f)*** evaluation or *de minimis* approval should document NPS's tentative position relative to the ***Section 6(f)*** conversion. The NPS oversees compliance with ***Section 6(f)*** through the regulations at ***36 CFR Part 59***. In addition, all ***Section 6(f)*** coordination must include the Florida Department of Environmental Protection (DEP), Land and Recreation Grants Section. This coordination, along with DEP's position regarding the ***Section 6(f)*** conversion, will be documented in the ***Section 4(f)*** evaluation.

13.4.2.1 Section 6(f) for Non-Federal-aid Transportation Improvements

For non-federal-aid projects requiring the preparation of a State Environmental Impact Report (SEIR), a ***Section 6(f) Land Replacement Plan***, as discussed below, is required if ***Land and Water Conservation Fund Act*** (LWCFA) funding was used in improving the public outdoor recreational resource. The District develops the plan in cooperation with the ***Section 6(f)*** property owner and coordinates the ***Section 6(f) Land Replacement Plan*** with the DEP for concurrence. In some cases, it may be advisable to obtain a binding agreement concerning the ***Section 6(f) Land Replacement Plan***. Once the DEP concurs with the plan, the District submits the plan directly to the National Park Service (NPS) of U.S. DOI for their concurrence. The District must work with NPS, DEP, and the ***Section 6(f)*** land owner to resolve any comments. Upon concurrence with the plan by the NPS, the District incorporates the plan into the SEIR. Be aware that ***Section 6(f)*** may also apply to projects considered as Non-major State Actions (NMSAs). For these types of projects, the ***Section 6(f)*** report will be processed as a separate document.

13.4.2.2 Section 6(f) for Federal-aid Transportation Improvements

As a part of the ***Section 4(f)*** evaluation, the District must determine ownership of the property and whether or not the ***Section 4(f)*** resource was purchased or some improvement made to the property using ***LWCFA*** funds. Once it has been determined that ***LWCFA*** funds were used to purchase or improve the property, then ***Section 6(f)*** of the Act applies.

The District, in cooperation with the local government landowner, must identify replacement land of equal value, location, and usefulness before a transfer of property under ***Section 6(f)*** can occur. Upon identification of such land(s), the District and the local government must develop a written plan as part of the ***Section 4(f)*** mitigation, which demonstrates that the ***Section 6(f)*** replacement land is acceptable to the local government entity. The plan must also include any special conditions, mutually agreed to by both parties to bring about equal value, location, and usefulness in the replacement land as required under ***Section 6(f)***.

Upon agreement with the plan by the District and the local government, the District submits the ***Section 6(f) Land Replacement Plan*** to DEP for concurrence. DEP may comment on the plan resolving any issues. Upon acceptance of the plan by DEP, a letter concurring in the ***Section 6(f) Land Replacement Plan*** will be sent by DEP to the District, with a copy to the local government. There may be times when the plan has to be approved by the NPS prior to DEP's acceptance of the plan. In those cases, the District coordinates the plan with both NPS and DEP. The District then discusses the ***Section 6(f)*** property and the plan, as mitigation, in the ***Section 4(f)*** evaluation. The plan and DEP concurrence letter should be incorporated into an Appendix of the ***Section 4(f)*** evaluation. Except in cases where NPS concurrence with the plan has been incorporated into the ***Section 4(f)*** evaluation or in a *de minimis* approval, the coordination with NPS will occur during the processing of the ***Draft and Final Section 4(f) Evaluations***.

For *de minimis* approvals, the local official and DEP, as appropriate, must concur in writing with the land replacement plan and the determination that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under ***Section 4(f)***. The *de minimis* approval by FHWA, along with the land replacement plan, should then be incorporated in the appropriate environmental decision-making document, or, as necessary, in a separate *de minimis* determination.

For programmatic ***Section 4(f)*** evaluations, the ***Section 6(f)*** issue is to be resolved prior to processing the programmatic ***Section 4(f)*** evaluation. In this case, the District works directly with NPS and FHWA to obtain concurrence in the ***Section 6(f) Land Replacement Plan***. The results of this coordination effort is documented in the appendix of the programmatic ***Section 4(f)*** evaluation and submitted to FHWA for approval. If NPS objects to the conversion or transfer of the land under ***Section 6(f)***, then an individual ***Section 4(f)*** evaluation must be prepared.

For individual ***Section 4(f)*** evaluations, the normal process is followed. The ***Draft Section 4(f) Evaluation*** is sent to U.S. DOI and NPS for review as part of the normal ***Section 4(f)*** process. At that time, NPS comments or concurs on the ***Section 6(f)*** issue as a normal part of the ***Section 4(f)*** process. The District resolves any ***Section 6(f)*** comments received on the ***Draft Section 4(f) Evaluation*** with NPS, DEP, and the local government, as required, and amends the ***Final Section 4(f) Evaluation*** accordingly. This may require modifying the ***Section 6(f) Land Replacement Plan***. Agreement among all parties is documented in the ***Final Section 4(f) Evaluation*** prior to FHWA approval. Copies of the approved ***Final Section 4(f) Evaluation*** are sent to U.S. DOI, NPS, DEP, and the local government entity for their use during ROW acquisition phase.

13.4.2.3 Section 6(f) Conversion

The conversion of the ***Section 6(f)*** land to transportation ROW and the acquisition of the replacement land occur during the ROW acquisition phase. Subsequent reevaluations must include, in their Mitigation Status and Commitment Compliance Sections, status discussions on the implementation of the ***Section 6(f) Land Replacement Plan***. Coordination with DEP and the NPS must occur to assure their cooperation in the land conversion transaction. Provide each agency with a copy of the ***Section 4(f)*** *de minimis*

approval, ***Section 4(f)*** evaluation, or the SEIR, all of which should incorporate the ***Section 6(f) Land Replacement Plan***.

DEP and NPS will not permit the conversion of ***Section 6(f)*** land to occur until the replacement property has been fully acquired and is available to serve the public outdoor recreational uses of the ***Section 6(f)*** property it is meant to replace. Therefore, the acquisition or conversion of the ***Section 6(f)*** land cannot take place until after the replacement land has been purchased and integrated into the recreational facility involved. Be aware that because the functional replacement must occur prior to the conversion of the ***Section 6(f)*** property, it is imperative to contact FDOT's ROW and Work Program offices and inform them of the requirements of ***Section 6(f)*** once it is known that ***Section 6(f)*** land is required for the project. This sequence may require an advance acquisition of the replacement land prior to opening the project's ROW phase or it may require a use of state funds for the mitigation. It is therefore important that ROW's Office participates in the development of the ***Section 6(f) Land Replacement Plan*** and the Work Program Office participates in the funds programming effort. Failure to implement the agreed upon ***Section 6(f) Land Replacement Plan*** will cause delays in subsequent project development and implementation.

13.5 REFERENCES

23 Code of Federal Regulations (CFR) § 772. Procedures for Abatement of Highway Traffic Noise and Construction Noise. http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title23/23cfr772_main_02.tpl

23 CFR § 774. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(f)). http://www.ecfr.gov/cgi-bin/text-idx?SID=4f91939fd3bdbfac5337b83a3b2bc4f4&mc=true&node=pt23.1.774&rgn=div5

36 CFR § 59. Land and Water Conservation Fund Program of Assistance to States; Post-Completion Compliance Responsibilities. http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title36/36cfr59_main_02.tpl

36 CFR § 800. Protection of Historic Properties. http://www.ecfr.gov/cgi-bin/text-idx?SID=73f131392733d51d9fac5541174d6102&mc=true&node=pt36.3.800&rgn=div5

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Dingell-Johnson (Sport Fish Restoration) Act (16 U.S.C. § 777, et seq.) 1950, as amended by the Deficit Reduction and Control Act of 1984 (Pub. L. 98-369). https://www.gpo.gov/fdsys/pkg/USCODE-2014-title16/html/USCODE-2014-title16-chap10B.htm

Federal Highway Administration (FHWA), 1977. Negative Declaration / Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects. https://www.environment.fhwa.dot.gov/4f/4fbikeways.asp

FHWA, 1986a. 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. December 23, 1986. https://www.environment.fhwa.dot.gov/4f/4fmparks.asp

FHWA, 1986b. Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvement with Historic Sites. December 23, 1986. https://www.environment.fhwa.dot.gov/4f/4fmhist.asp

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FHWA, 1991. Federal Aid Policy Guide, Transmittal 1, 23-31. December 9, 1991. https://www.fhwa.dot.gov/legsregs/directives/fapgtoc.htm

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Florida Department of Transportation. Section 4(f) References web page. http://www.dot.state.fl.us/emo/pubs/4(f)/Section4f.shtm

Florida Department of Transportation (FDOT), 2014. Plans Preparation Manual, Topic 625-000-007, January 2013, revised January 1, 2014, http://www.dot.state.fl.us/rddesign/PPMManual/2016PPM.shtm

FDOT 2015. Efficient Transportation Decision Making Manual, Topic No. 650-000-002, December 2015, http://www.dot.state.fl.us/emo/pubs/etdm/etdmmanual.shtm

FDOT, 2015. Standard Specifications for Road and Bridge Construction, http://www.dot.state.fl.us/programmanagement/Implemented/SpecBooks/July2015/Files/715eBook.pdf

Land and Water Conservation Fund Act of 1965 (LWCFA). http://www.nps.gov/parkhistory/online_books/anps/anps_6c.htm

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347. https://www.gpo.gov/fdsys/pkg/USCODE-2014-title42/pdf/USCODE-2014-title42-chap55.pdf

National Historic Preservation Act (NHPA) of 1966, as amended, 54 U.S.C. § 300101 *et seq.* http://www.achp.gov/nhpa.html

National Industrial Recovery Act (NIRA) of June 16, 1933

Pittman-Robertson Act of 1937 (Federal-Aid in Wildlife Restoration Act). https://www.gpo.gov/fdsys/pkg/USCODE-2014-title16/html/USCODE-2014-title16-chap5B.htm

U.S. Department of the Interior (U.S. DOI), 2013. Environmental Review Memorandum No. ERM 13-2: Electronic Distribution of Environmental Review Assignments. https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/ERM_13-2.pdf

U.S. Supreme Court, 1971. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402. https://supreme.justia.com/cases/federal/us/401/402/case.html

13.6 HISTORY

05/22/1998

49 U.S.C. § 303. Policy on lands, wildlife and waterfowl refuges, and historic sites.

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) 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 lands crossed by transportation activities or facilities.

(c) Approval of Programs and Projects. Subject to subsection (d), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if:

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De Minimis Impacts.

(1) Requirements.

(A) Requirements for historic sites. The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a *de minimis* impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges. The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a *de minimis* impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

Figure 13-1 Title 49 U.S.C. § 303

(C) Criteria. In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites. With respect to historic sites, the Secretary may make a finding of *de minimis* impact only if:

(A) the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470(f)), that:

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable state historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges.—With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of *de minimis* impact only if

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

Figure 13-1 Title 49 U.S.C. § 303 (Page 2 of 2)

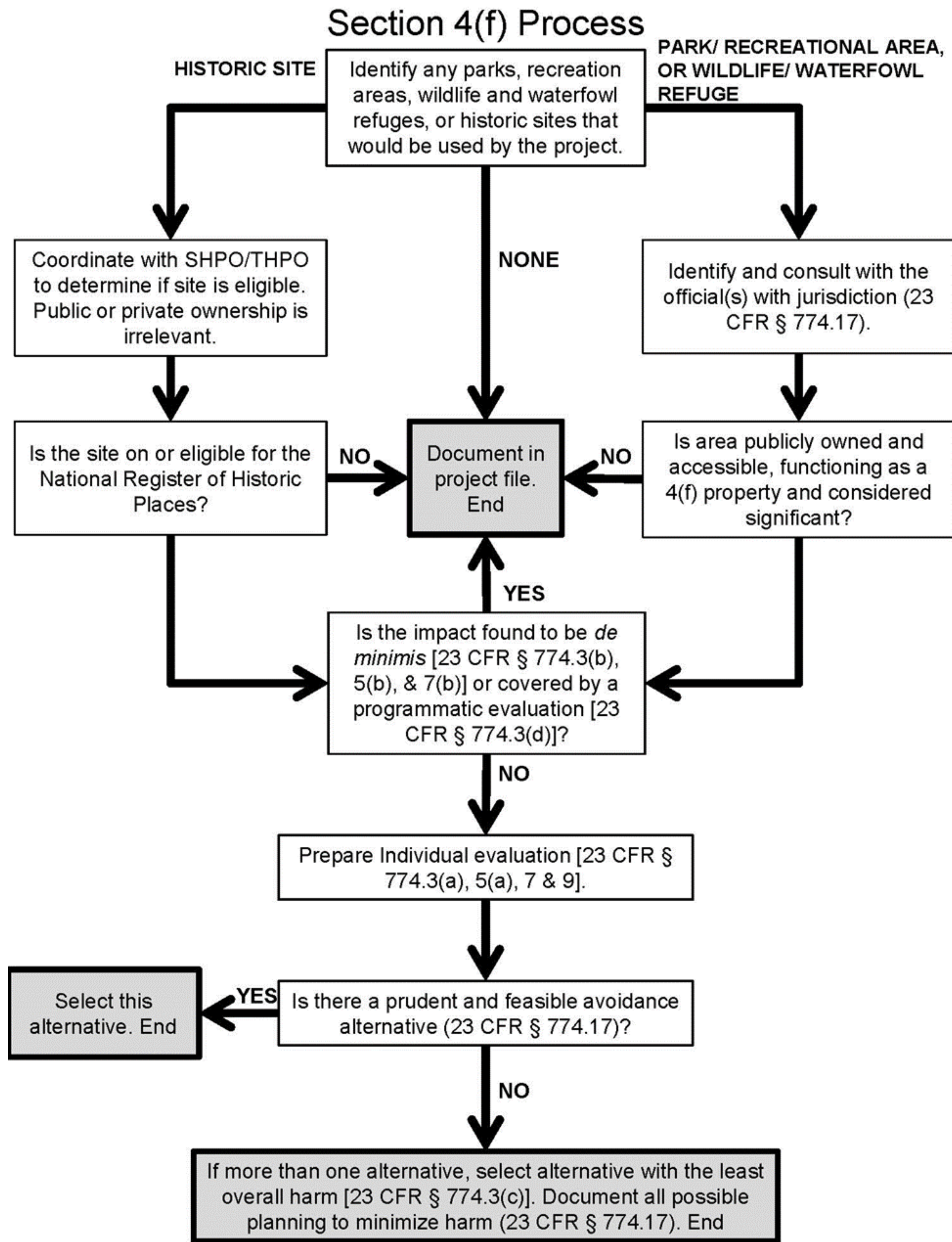

Figure 13-2 Section 4(f) Process Flow Chart

FDOT Letterhead/FHWA Letterhead (as appropriate) **and** District (if applicable)
Date
Official with Jurisdiction's Name and Title
Organization
Address
ATTN (if appropriate)
Re: Property Name
Project Designation
Request for opinion on impacts of project on property

Dear Mr./Ms.:

Explanation of project and its relationship to the protected property and the surrounding area (and other resources, as appropriate). Reference to earlier discussions concerning the matter. Discuss Section 4(f) very generally and that we are seeking to pursue a *de minimis* approval for the use of the property and what the criteria for this are (make sure to reference net impact). Reference other laws applicable to this resource and, as appropriate, surrounding resources, and related resources in the immediate area.

Description of the AFAs of the property and description of impacts to these specifically and to the property in general. Discuss measures taken to minimize and/or mitigate these impacts. Reference portions of property, if any, which have been eliminated from taking or being impacted as a result of earlier discussion or other considerations.

Discuss enhancements and improvements to the property, if any, which have been incorporated into the proposed undertaking and discuss any requests the official with jurisdiction has made for particular mitigations or enhancements as applicable. Describe the opportunity for public comment and the general results of that effort.

Provide opinion and rationale for “no adverse effects to the AFA” of the property by the proposed undertaking and request concurrence from the official with jurisdiction and state that if they (the official with jurisdiction) concurs with this finding, then FHWA may determine the impacts to be *de minimis* per 23 CFR Part 774.

Include Signature block for official with jurisdiction’s opinion/concurrence with the offered findings.

Sincerely,

Typed Name, Title

cc: FHWA
SEMO

Figure 13-3 Transmittal Letter from FDOT/FHWA to Official with Jurisdiction (for *de minimis* submittal)

FDOT Letterhead and District (if applicable)
Official, Title
Address
Date
Division Administrator
Federal Highway Administration
3500 Financial Plaza, Suite 400
Tallahassee, Florida 32312
Re: Request for a *de minimis* determination/approval
Financial Management Number: XXXXXX-X
Federal Aid Project Number: X-XXX(X)-X
Limits: Any County, Florida
Protected Property:
Official with Jurisdiction over the property:

Dear Mr./Ms:

The attached information is being submitted to request a Section 4(f) *de minimis* determination *(change determination to approval for stand-alone de minimis approvals)* for the proposed use of the PROPERTY NAME by the above referenced project. This information is being provided pursuant to 49 U.S.C. § 303 and in accordance with the provisions of 23 CFR Part 774.

THEREFORE:

Based upon considerations contained in the attached documents, it is determined that the use of the above referenced property results in only *de minimis* impacts to the protected resource.

CONCURRENCE:

(Change "Concurrence" to "Approval" for stand-alone de minimis approvals. Also, note standardized language used for de minimis approvals and determinations for when submitting a de minimis recommendation for approval with EAs, DEISs, FONSIs, or FEISs.)

By: ______________________________

On: _____/_____/_____

Division Administrator

Federal Highway Administration

Figure 13-4 Cover/Signature Page to FHWA for *de minimis* Determination/Finding/Approval Jurisdiction

FDOT Letterhead and District (if applicable)
Official, Title
Address
Date
Division Administrator
Federal Highway Administration
3500 Financial Plaza, Suite 400
Tallahassee, Florida 32312
Attention: (FHWA Transportation Engineer)

Dear Mr./Ms.:

Subject: Programmatic Section 4(f) Evaluation

Financial Management Number: XXXXXX-X

Federal Aid Project Number: X-XXX(X)-X

Limits: Any County, Florida

Enclosed are three (3) copies of the Programmatic Section 4(f) Evaluation for the subject project as required by 23 U.S.C. § 138 and 49 U.S.C. § 303 and in partial compliance with National Environmental Policy Act of 1969, as amended (*as well as… [list any other appropriate laws as necessary as based upon the resources and impacts]).*

Please advise us of your actions so that we may proceed with the project.

Sincerely,

Name

District Environmental Management Engineer

Enclosures XX/XXX

Figure 13-5 Example Transmittal Letter to FHWA for Programmatic Section 4(f) Evaluations

FDOT Letterhead **and** District (if applicable)
DATE
Official, Title
Address
Division Administrator
Federal Highway Administration
3500 Financial Plaza, Suite 400
Tallahassee, Florida 32312
Attention: (FHWA Transportation Engineer)

Dear Mr./Ms.:

Subject: Draft Section 4(f) Evaluation

Financial Management Number: XXXXXXXX-X-XX-XX

Federal Aid Project Number: X-XXX(X)-X

Limits: Any County, Florida

Enclosed are six (6) copies of the Draft Individual Section 4(f) Evaluation for the subject project as required by 23 U.S.C. § 138 and 49 U.S.C. § 303 and in partial compliance with National Environmental Policy Act of 1969, as amended (*as well as… [list any other appropriate laws as necessary as based upon the resources and impacts]).*

Please advise us of your actions so that we may proceed with the project.

Sincerely,

Name

District Environmental Management Engineer

XX/XXX

Enclosures

cc:

Figure 13-6 Sample Transmittal Letter to FHWA for Draft Section 4(f) Evaluation

FDOT Letterhead **and** District (if applicable)
DATE
Official, Title
Address
Division Administrator
Federal Highway Administration
3500 Financial Plaza, Suite 400
Tallahassee, Florida 32312
Attention: (FHWA Transportation Engineer)

Dear Mr./Ms.:

Subject: Final Section 4(f) Evaluation

Financial Management Number: XXXXXXXX-X-XX-XX

Federal Aid Project Number: X-XXX(X)-X

Limits: Any County, Florida

Enclosed are six (6) copies of the Final Section 4(f) Evaluation for the subject project as 23 U.S.C. § 138 and 49 U.S.C. § 303 and in partial compliance with National Environmental Policy Act of 1969, as amended (*as well as… [list any other appropriate laws as necessary as based upon the resources and impacts]).*

Please advise us of your actions so that we may proceed with the project.

Sincerely,

Name

District Environmental Management Engineer

XX/XXX

Enclosures

cc:

Figure 13-7 Sample Transmittal Letter to FHWA for Final Section 4(f) Evaluation