

## **PART 2, CHAPTER 7**

### **SECTION 4(f) RESOURCES**

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## PART 2, CHAPTER 7

### SECTION 4(f) RESOURCES

#### 7.1 OVERVIEW

##### 7.1.1 Background and Guidance

Pursuant to **23 United States Code (U.S.C.) § 327** and the implementing Memorandum of Understanding (MOU) executed on December 14, 2016, the Florida Department of Transportation (FDOT) has assumed and the Federal Highway Administration (FHWA) has assigned its responsibilities under the **National Environmental Policy Act (NEPA)** for highway projects on the State Highway System (SHS) and Local Agency Program (LAP) projects off the SHS (**NEPA** Assignment). In general, FDOT's assumption includes all highway projects in Florida which source of federal funding comes from FHWA, or which constitute a federal action through FHWA. **NEPA** Assignment includes responsibility for environmental review, interagency consultation and other activities pertaining to the review or approval of **NEPA** actions. Consistent with law and the MOU, FDOT will be the Lead Federal Agency for highway projects with approval authority resting in the Office of Environmental Management (OEM).

This chapter outlines FDOT's procedures governing the use of land from publicly owned parks and recreation areas, wildlife and waterfowl refuges, and publicly or privately owned historic sites by Federal Aid Highway projects in the State of Florida. These requirements are currently codified at **23 U.S.C. § 138** and **49 U.S.C. § 303**. They originated in **Section 4(f)** of the **Department of Transportation Act of 1966 (Pub. L. 89-670, 80 Stat. 931)** and, as a result, practitioners commonly refer to this subject matter as **Section 4(f)**. The resource types listed in the law are referred to as **Section 4(f)** protected properties and the use of land from any one of these resources by a transportation project is referred to as a **Section 4(f)** use. **Section 4(f)** regulations only apply to the U.S. Department of Transportation (USDOT) and its agencies, i.e., FHWA, Federal Aviation Administration (FAA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA). FHWA and FTA adopted rules under **23 Code of Federal Regulations (CFR) Part 774** to implement the requirements of the federal statutes.

**Section 4(f)** requires USDOT agencies to make specific findings when a USDOT funded or approved transportation project requires the use of land from a **Section 4(f)** protected property. During the planning and development of transportation facilities being funded by FHWA or other agencies of the USDOT, FDOT may approve a transportation project 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 or archeological site of national, State, or local significance only when the following conditions are met:

- There are no feasible and prudent avoidance alternatives to the use of land; and

- 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 proposed use.

Or

- The use of the property will have a *de minimis* impact as defined in the statutes and regulations.

This chapter focuses on the processes associated with the development of highway projects funded by the FHWA that have the potential to “use” lands from any property designated or functioning as a **Section 4(f)** resource as set forth in the statutes and implementing regulations, including actions which, though not requiring the acquisition of lands from the property, could significantly impair the function of the property for its protected purposes (see [Figure 7-1](#)). Also, this chapter addresses the conversion of park and recreational properties funded wholly or in part under **Section 6(f)** of the **Land and Water Conservation Fund Act (LWCFA) (16 U.S.C. § 4601-4 et seq., 36 CFR § 59)**, as well as other federal and state encumbrances and requirements which may overlap with **Section 4(f)**.

FDOT is the Lead Agency for environmental review of FHWA funded highway projects in Florida. For transportation projects funded by the Office of Federal Lands Highway, FTA, FRA, or FAA, these agencies will act as the Lead Agency for **Section 4(f)** analysis. In these situations, the District will contact the OEM Project Delivery Coordinator (PDC) and work with the officials of the lead transportation agency. **Section 4(f)** processes, evaluations, and alternative analyses vary depending upon on the type of transportation project being developed. In addition, certain approval options are not available for projects which are not FHWA funded transportation projects. For example, the nationwide programmatic evaluations discussed in this chapter are not available to other agencies within the USDOT.

Regardless of which USDOT agency is the Lead Agency, the basic requirements set forth in the statutes for the approval of a project using **Section 4(f)** protected lands are the same.

## 7.1.2 Definitions

**de minimis Impact (23 CFR § 774.17)** - For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that is minimal and 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)**, and the Official With Jurisdiction (OWJ) has concurred with this finding. For projects using land from historic properties, a *de minimis* impact finding means that OEM has determined, in accordance with **36 CFR Part 800**, that no historic property is affected by the project or that there is no adverse effect to the historic property in question and that the State Historic Preservation Officer (SHPO) or, as appropriate, the Tribal Historic Preservation Officer (THPO) has concurred with this determination.

**Feasible and prudent avoidance alternative (23 CFR § 774.17)** - An alternative that avoids using the **Section 4(f)** property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the **Section 4(f)** property.

**Officials with Jurisdiction (23 CFR § 774.17)** - The entities and individuals who own and/or administer the property are considered the OWJ.

- In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the OWJs are the officials of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.
- In the case of historic sites (including archaeological sites), the OWJ are the SHPO, or, if the property is located on tribal land, the THPO.
  - If the property is located on tribal land but the relevant Indian tribe has not assumed the responsibilities of the SHPO, then a representative designated by the tribe shall be recognized as an OWJ in addition to the SHPO.
  - When the Advisory Council on Historic Preservation (ACHP) is participating in consultation concerning a property under **Sections 110 or 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. § 470)**, the ACHP is considered a consulting party.
  - When the historic property is also a public park, recreation area, wildlife or waterfowl refuge, or is located within the boundaries of such lands, the OWJ for the historic site is the SHPO/THPO or, if participating, the ACHP. If the project uses land from both protected properties, coordination with the officials of the agencies that own or administer the property in question is required.
- When the **Section 4(f)** property is also a National Historic Landmark (NHL), the designated official of the National Park Service (NPS) is an OWJ over that resource for the purposes of **Section 4(f)**.

### **Significance -**

- For public parks, recreation areas, or wildlife and waterfowl refuges, significance means that in comparing the availability and function of the property in question to similar properties in the area, the resource plays an important role in meeting the park, recreational, or refuge objective of the community it serves. Except for certain multiple use land holdings, significance determinations apply to the entire property; not just to the portions being acquired for the transportation project. Significance determinations of these types of publicly owned lands are made by the OWJ over the property. In the absence of a determination by the OWJ, the property will be presumed to be significant for the purposes of **Section 4(f)** [see **23 CFR § 774.11** and **FHWA Section 4(f) Policy Paper**, Question 1A].

- For historic properties, significance normally means that the historic resource is either listed in or eligible for listing in the National Register of Historic Places (NRHP) in accordance with **36 CFR Part 63** (regulations for Determinations of Eligibility for Inclusion in the NRHP) or is otherwise determined significant by the Lead Federal Agency during the consultation process with the OWJs over the historic resource as required under **36 CFR Part 800** and **23 CFR Part 774** [see definition of historic site in **23 CFR § 774.17** and **FHWA Section 4(f) Policy Paper**, Question 2A].

**Use (23 CFR § 774.17)** - The “use” of a **Section 4(f)** resource occurs when a project:

- permanently incorporates land from a **Section 4(f)** property into a transportation facility; or
- requires a temporary occupancy of land within a **Section 4(f)** property that is adverse in terms of the statute’s preservation purpose [see criteria in **23 CFR § 774.13(d)** or the [FHWA Section 4\(f\) Policy Paper](#) Question 7]; or
- has proximity impacts that, while not incorporating land from a protected property and which includes all possible measure to minimize harm, still results in a substantial impairment of the activities, features, and attributes which qualify the property for protection under **Section 4(f)**. [i.e., constructive use (**23 CFR § 774.15**)].

## 7.2 SECTION 4(f) PROPERTIES AND EVALUATIONS

### 7.2.1 Substantive Requirements of Section 4(f)

**Section 4(f)** requires agencies of the USDOT to perform a substantive review as part of its decision-making process whenever approving a proposed project’s use of a protected property. Congress intended **Section 4(f)** to bar unnecessary conversions of the property types identified in the statutes into transportation facilities. This “preservationist intent” requires agencies of the USDOT to avoid the use of protected property whenever (1) there is a prudent and feasible alternative to this use or (2) the use of the property is so negligible as to represent a *de minimis* impact to the protected resource.

If the **Section 4(f)** resources cannot be avoided, the agency’s goal is to reduce the project impacts to a level where the impacts are *de minimis*. If the impacts cannot be reduced to the level of *de minimis*, the agency may only approve the use of protected land by the project following an effort to identify any prudent and feasible alternatives which do not require the use of land from the protected property. In cases where no prudent and feasible avoidance alternatives exist, the USDOT agency must include all possible planning to minimize harm to the protected property resulting from the chosen alternative.

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 agency may approve only the alternative which results in the least overall harm.

## 7.2.2 Applicable Projects

**Section 4(f)** applies to all FDOT transportation projects that utilize federal aid funds or require the approval of a USDOT agency, and involve the “use” of a **Section 4(f)** property or resource. For the **Section 4(f)** statute to apply, the project must meet the following criteria:

1. Must require an approval from USDOT in order to proceed;
2. Must be a transportation project;
3. Must require the use of land from property protected under **Section 4(f)** [see **23 U.S.C. § 138(a)** and **49 U.S.C. § 303(a)**]; and
4. None of the exclusions, exceptions, or rules set forth in the statutes, regulations, or USDOT policies apply to the project or the property (see the FDOT [Section 4\(f\) References and Guides](#) web page or [Section 7.2.3.1](#) and [Section 7.3.3](#)).

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

1. A transportation project constructed solely using state or local funds, and not requiring OEM approval;
2. A project intended to address a purpose that is unrelated to the movement of people, goods, and services from one place to another (i.e., not a transportation purpose);
3. A project 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); and
4. A project that will take land from a privately-owned park, recreation area, or refuge.

## 7.2.3 Section 4(f) Protected Resources

For clarity in determinations and approvals, it is best to divide **Section 4(f)** resources into two categories: (1) publicly owned parks, recreation areas, and wildlife or waterfowl refuges, and (2) significant historic and archaeological sites in public or private ownership. **Section 4(f)** only applies to publicly owned parks, recreation areas, and wildlife and waterfowl refuges that have been determined to be significant. **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. **Section 4(f)** applies to significant historic and archeological sites regardless of ownership.

Except in cases of certain multiple use land holdings, **Section 4(f)** applies to the entire resource, not just the portion being used by the proposed project (see [Section 7.2.3.1](#)).

To be considered a **Section 4(f)** protected resource, a property must meet the following criteria:

#### A. For Public Parks and Recreation Areas

- Must be publicly owned which refers to ownership by local, state or federal government (this can also include permanent easements and long-term leases or other public proprietary interests)
- Must be open to the public during normal hours of operation
- The major purpose must be for park or recreation activities
- Must be designated or function as a significant park or recreational area

#### B. For Wildlife and Waterfowl Refuge

- Must be publicly owned which refers to ownership by local, state or federal government (this can also include permanent easements and long-term leases or other public proprietary interests)
- Must be open to the public unless public access is restricted for the protection of refuge habitat, function, or species
- The major purpose must be for wildlife or waterfowl refuge functions
- Must be designated or function as a significant wildlife or waterfowl refuge

#### C. For Historic Sites

- Must be eligible for listing or is listed in the NRHP unless OEM determines that the application of **Section 4(f)** is otherwise appropriate.

For more detail related to determining when a property represents one of these **Section 4(f)** protected site types, see the Questions and Answers numbered 1 through 6 in Part II of the **FHWA Section 4(f) Policy Paper** which can be accessed from the [FDOT Section 4\(f\) References and Guides](#) web page.

### 7.2.3.1 Additional Considerations when Identifying Section 4(f) Properties

The **FHWA Section 4(f) Policy Paper** provides guidance regarding the applicability of **Section 4(f)** to a variety of property types. This is not an all-inclusive list. If the practitioner believes there is a property that is also protected under **Section 4(f)** not listed here, please refer to the **FHWA Section 4(f) Policy Paper** or contact the PDC. See [Section 7.6](#) for a link to the **FHWA Section 4(f) Policy Paper**.

- A. **Historic Districts** - When a project uses land from an individually eligible property within a historic district, or a property that is a contributing element to the historic district, **Section 4(f)** is applicable. All elements within historic districts are presumed to be contributing resources to the district unless FDOT, in consultation with the SHPO/THPO, determines that the element is not contributing. When a

project requires land from a non-historic or non-contributing property lying within a historic district, and does not use other land within the historic district that is considered contributing to its historic significance, there is no direct **Section 4(f)** use of the historic district.

- B. **Wild and Scenic Rivers** - Certain portions of designated Wild and Scenic Rivers may be protected under **Section 4(f)**. However, designation as a Wild and Scenic River, Study River, or listing on the Nationwide Rivers Inventory does not in itself confer **Section 4(f)** protections. Only those portions of the river or the river corridor which function as, or are designated as being significant publicly owned park or recreational areas, significant wildlife or waterfowl refuge areas, or which are significant historic sites are protected under **Section 4(f)**. In certain cases, the river may be designated under the **Wild and Scenic Rivers Act (WSRA) (16 U.S.C. § 1271 et seq. and 36 CFR 297.3)** as a recreational river or is identified as a recreational resource in the river management plan. If a river meets either of those two conditions and it is publicly owned, then the river is protected under **Section 4(f)** as well as under the **WSRA**. When determining the applicability of **Section 4(f)** to portions of designated Wild and Scenic Rivers or Study Rivers, contact the PDC to discuss **Section 4(f)** applicability, see [Part 2, Chapter 12, Wild and Scenic Rivers](#) and the **Overview of the Wild and Scenic Rivers System** on the FDOT [Section 4\(f\) References and Guides](#) web page.
- C. **School Playgrounds** - Publicly owned school playgrounds, running tracks, and ball fields that provide recreational opportunities for the public during non-school hours may qualify as **Section 4(f)** properties.
- D. **Trails and Shared Use Paths** - **Section 4(f)** applies to publicly owned shared use trails, paths, bikeways, or sidewalks (or portions thereof) designated or functioning primarily for recreation, unless the OWJ determines that it is not significant for such purpose [**FHWA Section 4(f) Policy Paper**, Question 15] or when an exception to **Section 4(f)** applies under **23 CFR § 774.13(f)**.
- E. **Golf Courses** - **Section 4(f)** applies to golf courses that are owned, operated, or managed by a public agency for the primary purpose of public recreation, and that are determined to be significant by the OWJ. Golf courses that are owned by a public agency but are managed and operated by a private entity may still be subject to **Section 4(f)** requirements depending on the operating agreement. Golf courses listed in the NRHP are treated as other historic sites as described above.
- F. **Museums, Aquariums, and Zoos** - Publicly owned museums, aquariums and zoos are not subject to **Section 4(f)** unless they are significant historic sites. These facilities will need to be evaluated on a case by case basis to determine if they provide additional park and recreational opportunities and if that is their primary purpose, which would make them subject to **Section 4(f)**.
- G. **Fairgrounds** - When fairgrounds are open to the public and function primarily for public recreation, **Section 4(f)** applies to those portions of the land determined significant for park or recreational purposes (see the Public Multiple Use Land

Holdings discussion below). A fairground may also qualify as a historic site which would require consideration under **Section 4(f)**.

- H. **Bodies of Water - Section 4(f)** applies to lakes and rivers, or portions thereof, which are contained within the boundaries of a park, recreation area, refuge, historic site or adjacent to publicly owned lands to which **Section 4(f)** otherwise applies.
- I. **Public Multiple Use Land Holdings** - Public multiple use land holdings, by definition, are comprised of multiple areas that serve different purposes. Generally, these properties are large and are usually established by legislation to serve a variety of functions, some of which are protected by **Section 4(f)** and some of which are not. For these kinds of properties (frequently these are State or National Forests, large tracts of conservation lands, or Water Management District properties), **Section 4(f)** does not apply to those areas within a multiple-use public property that function primarily for any purpose other than significant park, recreation or refuge purposes, or which are significant historic sites. For example, within a National Forest, there could be some areas that qualify as **Section 4(f)** resources (e.g., campgrounds, trails, picnic areas) while other areas, such as those utilized for timber sales or mineral extraction, would not. Coordination with the OWJ and examination of the management plan for the area will be necessary to determine if **Section 4(f)** should apply to an area of a multiple-use property that would be used by a transportation project.
- J. **Planned Facilities - Section 4(f)** applies to a planned facility when a public entity owns the property and has formally designated and determined it to be significant for park, recreation area, or wildlife and waterfowl refuge purposes. Evidence of formal designation could be the inclusion of the planned facility in an approved City or County Master plan. The key is whether the planned facility is presently publicly owned, presently formally-designated for **Section 4(f)** purposes, and presently significant. A simple expression of interest in developing a property, or a plan to purchase privately held land to develop a property does, not suffice to consider the property to be a planned facility.
- K. **Jointly Planned Rails to Trails Projects** - A *January 1996 MOU between the Florida Department of Environmental Protection (FDEP) and FDOT and Concurred in by FHWA* established an automatic joint planning provision for planned Rails to Trails project corridors which may intersect or exist alongside a highway corridor. In accordance with this MOU, FDEP and FDOT will jointly plan Rail to Trail projects which may coincide with a planned transportation project to accommodate the recreational and highway objectives of both agencies. When such planning occurs, the requirements of **Section 4(f)** are satisfied.

### 7.2.3.2 Leases and Easements

A property may be considered publicly owned for **Section 4(f)** purposes if the land is being managed for a significant recreational or refuge purposes under a long-term lease or easement. The following should be considered when examining the applicability of

**Section 4(f)** to a property subject to lease or easement: the purpose, terms, property management, parties involved, termination clauses, and other restrictions as set forth in the lease or easement agreement.

Additionally, FDOT has easements, such as Right of Way (ROW) easements, for transportation facilities that cross through property protected under **Section 4(f)**. If there is an existing ROW easement, the property is already part of the transportation facility due to the easement encumbrance, and is not subject to **Section 4(f)** protection.

If a project is proposing a new easement across an existing **Section 4(f)** property, then it could constitute a “use” within the meaning of **Section 4(f)** and require a **Section 4(f)** determination. For historic properties, existing property lines may be irrelevant because historic property boundaries are established based upon historical records, settings, and characteristics of the historic or archaeological site. As a result, even within existing ROW or easement, a **Section 4(f)** approval may be required for transportation improvements which involve historic properties.

Any questions on **Section 4(f)** applicability to a lease or easement should be referred to OEM and the Office of General Counsel (OGC).

### 7.2.3.3 Tribal Properties and Section 4(f)

Federally recognized Indian Tribes are sovereign nations and the lands owned by them are not considered publicly owned within the meaning of **Section 4(f)**. If a potential **Section 4(f)** resource is identified on tribal lands that serves a public function, the property will need to be evaluated for **Section 4(f)** applicability. In cases involving tribal trust lands, the Bureau of Indian Affairs (BIA) should be contacted to determine if they should participate in any required consultations.

Also, Traditional Cultural Places (TCPs) may be subject to the provisions of **Section 4(f)** if the TCP is eligible for listing in or is listed in the NRHP [see **FHWA Section 4(f) Policy Paper**, Question 6]. SHPO will also comment on TCP involvement. For the requirements related to TCPs under **Section 106**, see [Part 2, Chapter 8, Archaeological and Historical Resources](#).

Questions regarding whether tribally owned property is protected under **Section 4(f)** and how to proceed should be referred to the PDC and the OGC.

### 7.2.4 Overview of Section 4(f) Analysis

**Section 4(f)** analysis includes the following:

1. Identification of properties which may represent **Section 4(f)** resources.
2. Initial consultations between the FDOT District and the appropriate OWJ regarding potential **Section 4(f)** properties, including determinations of significance. If the property is not significant, then **Section 4(f)** does not apply.

3. Identification and documentation of the findings of “use” or “no use” of **Section 4(f)** resources. When there is no use of lands protected by **Section 4(f)**, then the project does not require an approval under **Section 4(f)**.
4. Documentation of the appropriate **Section 4(f)** approval option when an approval under **Section 4(f)** is required.

FDOT recognizes the following types of documentation for **Section 4(f)** applicability and approval (see [Section 7.3](#)):

- No **Section 4(f)** Involvement – there are no existing or formally planned **Section 4(f)** properties within or adjacent to the project area, or properties exist but there is no temporary or permanent acquisition of land from a potentially protected resource and no meaningful proximity impacts to the property.
- No Use Determinations – **Section 4(f)** properties exist within or adjacent to the project area, but the proposed project has no use of the properties within the meaning of **Section 4(f)** (see [Section 7.3.2](#), [Section 7.3.4](#), and [Section 7.3.5.4](#)).
- Exceptions and Exemptions – situations and circumstances regarding specific actions or properties that are not subject to the requirements of **Section 4(f)** when meeting the conditions identified in the Statutes, regulations, or policies as discussed in [Section 7.3.3](#).
- *de minimis* – a **Section 4(f)** use that is so inconsequential that it will have no adverse effects on the attributes, features, or activities of the **Section 4(f)** property.
- Programmatic Evaluations – a timesaving, procedural option that allows transportation officials to approve certain minor uses of **Section 4(f)** properties for projects meeting specific conditions without completing an individual **Section 4(f)** evaluation.
- Individual Evaluation – the standard, full **Section 4(f)** evaluation and approval that is prepared when the use of a **Section 4(f)** property does not meet the Programmatic Evaluation criteria and exceeds the definition of a *de minimis* impact.
- Constructive Use – occurs when the transportation project does not incorporate land from a **Section 4(f)** property, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under **Section 4(f)** are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished. Pursuant to the **NEPA Assignment MOU**, if a determination of Constructive Use is anticipated on a project, the District must notify OEM to initiate consultation with FHWA. Both the applicability and approval for a Constructive Use can only be made in consultation with FHWA Headquarters in Washington D.C. For more detail on Constructive Use, see [Section 7.3.5.4](#).

## 7.2.5 Coordination with the Officials with Jurisdiction

The **Federal-Aid Highway Act of 1968** requires consultation with the OWJ over the **Section 4(f)** property when the use of a protected property is anticipated and/or more information is needed regarding the purpose and function of a property. The OWJ is the federal, state, or local agency official that owns or administers a **Section 4(f)** property or represents an agency on matters related to the property.

For public parks, recreation areas, and wildlife and waterfowl refuges, the OWJ(s) are the official(s) of an agency or agencies that own and/or administer the property in question and who are empowered to represent the agency on matters related to the property.

The OWJ for historic sites is the SHPO/THPO (in some cases the NPS and the ACHP may also serve as OWJs) and significance for historic sites is based upon listing in, or eligibility for listing in the NRHP. Most coordination with the OWJ for historic sites (including archaeological sites) within the **Section 4(f)** process takes place parallel to the coordination required by **Section 106**. **Sections 106 and 4(f)** are different laws which require different findings and include different considerations. However, decisions and findings made while following one of these processes often serve to guide the decisions and findings of the other.

When coordinating with the OWJ(s) regarding a project and its impacts, FDOT must have a clear understanding of the property, its designated purpose, and its management plan. Coordination with the OWJ(s) will confirm the purpose of the property and its significance to the community, and whether the property is protected under **Section 4(f)**. If the property is determined to meet the criteria for protection under **Section 4(f)**, additional coordination with the OWJ will follow as appropriate.

When requesting a determination of significance from the OWJ over the property, FDOT must define the term significance for the purposes of **Section 4(f)**. Therefore, when providing the coordination letter to the OWJ for parks, recreation areas, and wildlife and waterfowl refuges, the FDOT District must include the following statement:

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

In the absence of a determination of significance from the OWJ, FDOT presumes the property to be significant and the District continues the **Section 4(f)** process [**23 CFR § 774.11(c)**]. All determinations of significance, whether stated or presumed, are subject to review by OEM for reasonableness pursuant to **23 CFR § 774.11**. When OEM changes a determination of significance, the basis for this change will be included in the project file and discussed in the environmental documentation for the proposed action.

For historic and archaeological sites, the determinations of significance for historic properties generally occurs when the OWJ, FDOT, and other appropriate consulting

parties agree with the findings contained in the **Cultural Resources Assessment Survey (CRAS) Report** completed pursuant to the requirements of **Section 106** of the **NHPA**. If the OWJ does not respond within 30 days of the receipt of the **CRAS Report**, FDOT may presume that the OWJ has concurred with the findings made in the report [**36 CFR § 800.3(c)(4)**]. The **CRAS Report** identifies the historic resources which are either listed in or eligible for listing in the NRHP, and are therefore considered significant under **Section 4(f)**.

Once FDOT has determined there is a use of land protected by **Section 4(f)** by the proposed transportation project, the District can work with the OWJ over the property to identify measures to avoid using land from the property or to minimize harm to the protected resource resulting from the “use” of the property. The District will prepare and send a letter (on FDOT letterhead) to the OWJ for concurrence. This letter includes a description of the property and its significance, anticipated impacts resulting from the project’s use of the protected property, the FDOT’s determination that **Section 4(f)** applies to the use of the property, and any measures to minimize harm to the protected resource. The agreed upon minimization/mitigation measures will be incorporated as environmental commitments in the **NEPA** document (see [Part 2, Chapter 22, Commitments](#)). After the OWJ has been notified of the “use”, the District must continue coordination to identify measures to minimize/mitigate harm to the property and to determine which of the available approval options is the most appropriate analysis for the action. OEM is available to review draft OWJ correspondence prepared by the District or LAP agencies. Drafts may be sent to the PDC for review.

### **7.2.6 Standard Statement for NEPA Assignment and Section 4(f) Documentation**

Technical memorandums, reports or other documents prepared for a project in which OEM serves as the Lead Agency under the **NEPA** Assignment Program must include the following statement:

*The environmental review, consultation, and other actions required by applicable federal environmental laws for this project are being, or have been, carried out by FDOT pursuant to 23 U.S.C. § 327 and a Memorandum of Understanding dated December 14, 2016 and executed by FHWA and FDOT.*

## **7.3 PROCEDURE**

The procedural and documentation requirements outlined below are to be used for **Section 4(f)** analysis and file documentation.

### **7.3.1 Determination of Applicability Process and Documentation**

#### **7.3.1.1 Initial Section 4(f) Review**

To initiate the assessment of potential **Section 4(f)** involvements, District environmental staff should gather preliminary information to examine the following questions:

- Will the transportation project require funds, approvals, or permits from any agency of the USDOT (primarily FHWA, FRA, FTA, and FAA)?
- Are there any **Section 4(f)** properties as defined in **23 CFR § 774.11** within or adjacent to the project area that have been determined to be significant?
- Is it anticipated that the project will require any temporary occupancy or permanent incorporation of a **Section 4(f)** property during the project?
- Is it anticipated that the project's proximity impacts, as defined in **23 CFR § 774.15**, could substantially impair the protected activities, features, or attributes that qualify the property for protection under **Section 4(f)** in a way that would meaningfully reduce or eliminate the value of the property in terms of its **Section 4(f)** purpose and significance?

If the project does not require funding or approvals by an agency of the USDOT, then the project will not need an approval pursuant to **Section 4(f)**. If the USDOT agency is any agency other than OEM (as set forth in the **NEPA Assignment MOU**), then District staff must consult with the appropriate USDOT agency to determine the applicability of **Section 4(f)** to the project and, if it is applicable, the appropriate approval option. Occasionally, state-only projects are reconsidered for federal (USDOT) funding during project development. When this occurs, consideration of the requirements of **Section 4(f)** must be included in the PD&E process for the proposed project.

When there are no **Section 4(f)** properties present, within, or adjacent to the project area or when a protected property is adjacent to the proposed project and a determination of "No Section 4(f) Involvement" or a "Section 4(f) No Use" is made by the District, the basis for this determination must be noted in the file and summarized in the Environmental Document.

As appropriate, this record must include:

- (1) the determination that there will be no acquisition of land from the protected property on either a temporary or permanent basis,
- (2) that there will be no meaningful proximity impacts to protected properties,
- (3) no impacts to the access and usage of protected properties, and
- (4) no temporary occupations of the protected properties.

Prior to making this determination, the evaluation of other issues that could impact the potential to use any **Section 4(f)** resources should be completed. If the determination of no involvement or no use becomes complex, the District will utilize either the **Section 4(f) Determination of Applicability Form, Form No. 650-050-45** or the **Section 4(f) No Use Determination, Form No. 650-050-49** (as appropriate) to support the determination for projects being documented as Type 1 Categorical Exclusions (CEs). In these cases, indicate No Involvement or No Use on the **Type 1 Categorical Exclusion Checklist** and attach the appropriate documentation with the finding of non-applicability of **Section 4(f)**

from OEM, or after the submission and OEM concurrence with a **Section 4(f) No Use Determination, Form No. 650-050-49** or, when appropriate, **Section 4(f) Exceptions/Exemptions Determination, Form No. 650-050-48**.

In cases where **Section 4(f)** has been determined not applicable for the approval of the proposed project, the following standard statement should be included in the appropriate location in the Environmental Document for projects processed as an Environmental Impact Statement (EIS) or Environmental Assessment (EA) with Finding of No Significant Impact (FONSI) along with the appropriate documentation and information supporting the determination that **Section 4(f)** is not applicable:

*The proposed project [Project ID number and name] does not involve a use of any property that qualifies for protection under Section 4(f) of the USDOT Act of 1966, as amended.*

For proposed projects processed as CE type projects, the standard statement should be included in the Environmental Document and supplemented, as appropriate, in the justification for a no involvement or a no use finding as described above in points 1 through 4 above, or by attaching the appropriate **Section 4(f)** determination of applicability document, such as the No Use Determination and the Exemptions and Exceptions to **Section 4(f)** forms as discussed in [Section 7.3.2](#).

If the status of a property in terms of **Section 4(f)** changes, or if a permanent acquisition or a temporary occupation of a protected property is found to be necessary subsequent to the original No **Section 4(f)** Involvement or No **Section 4(f)** Use determination, the District must notify the PDC and develop the proper documentation for the approval of the project. Similarly, if subsequent analysis indicates that there may be meaningful proximity impacts to the property resulting from the project, the District must notify the PDC.

### 7.3.1.2 ETDM Screening and Section 4(f) Determination of Applicability

Within FDOT's Efficient Transportation Decision Making (ETDM) process, certain projects qualify for screening through the Environmental Screening Tool (EST). For projects not qualifying for screening through EST, FDOT environmental staff has the option to review the project against the geographic information contained in the Area of Interest (AOI) Tool in order to determine if the proposed project may impact potential **Section 4(f)** protected properties. For more information on ETDM and qualifying projects for screening, see FDOT's [ETDM Manual, Topic No. 650-000-002](#).

Often, it is not difficult to determine if a property is protected by **Section 4(f)**. The proposed "use" and level of **Section 4(f)** evaluation may likewise be obvious. In these cases, a **Section 4(f)** Determination of Applicability (DOA) is not necessary. A **Section 4(f)** DOA is used if the criteria that qualify a property for protection under **Section 4(f)**, or the proposed "use" of the property are in question. When determining the **Section 4(f)** applicability, FDOT may complete a **Section 4(f) Determination of Applicability Form, Form No. 650-050-45** to assist in determining the appropriate level of **Section 4(f)**

evaluation or to document the applicability or inapplicability of **Section 4(f)** for certain alternatives or locations. The form directs the District to provide information about the property and the relationship of the project to the property, including a description of the resource, the characteristics and functions of the property and potential “uses” of the resource. The form is signed by the form preparer and the District Environmental Manager prior to submission to OEM. OEM will then concur with the District determination, request additional information, or provide a determination.

### 7.3.1.3 Resource Mapping for Section 4(f) Determinations of Applicability and Approvals

Separate from the ETDM Screening, the boundaries and attributes of a **Section 4(f)** property must be mapped. As it is crucial to clearly depict the relationship between the project and the potential **Section 4(f)** resource, a map of each resource must be created regardless of the level of **Section 4(f)** documentation. The map should be at an appropriate scale to clearly depict the relationship between the resource and the project. When preparing a resource map, the following items should be shown and clearly labeled:

- Boundaries of any potential **Section 4(f)** properties in or adjacent to the project area (when identifying the historic boundaries, the **Section 4(f)** resource’s boundaries, the current ownership boundaries may differ);
- Location of elements (activities, features, and attributes) contributing to the significance of each potential **Section 4(f)** property;
- Locations, types of use, and the area of the potential **Section 4(f)** property that will be impacted [existing and proposed ROW lines, removal of **Section 4(f)** protected features, and so forth], measured and depicted in acres if known.

### 7.3.2 Section 4(f) Applicability and Section 4(f) No Use Determinations

Districts must include the determination as to whether **Section 4(f)** does or does not apply in the project files and in the appropriate Environmental Document. The record of this determination must include sufficient documentation to support it. The complexity and detail necessary to achieve this varies based upon the complexity of the project, the resources involved, and the relationships between the two.

As with the discussion in [Section 7.3.1.1](#) on findings of no **Section 4(f)** involvement, the supporting documentation may be simple to present, or it may be more complex requiring detailed maps or the citing of passages from the regulations. In all cases, the supporting documentation must be clear and must present sufficient information to show that **Section 4(f)** does or does not apply.

A “No **Section 4(f)** Use” determination is one where a project has no permanent acquisition of land from a **Section 4(f)** property; no temporary occupancies of land that are adverse in terms of the statute’s preservation purpose; and no proximity impacts which significantly impair the protected functions of the property. This determination is

similar to the determination of no **Section 4(f)** involvement, but it usually requires more detailed or nuanced supporting information and documentation.

The determination required for this finding is documented by:

1. Completing the **Section 4(f) No Use Determination, Form No. 650-050-49** or receipt of a finding of the non-applicability of **Section 4(f)** from OEM after the submission of a completed **Section 4(f) Determination of Applicability Form, Form No. 650-050-45** to the PDC.
2. Including all related communication with the OWJ.
3. An explanation as to why **Section 4(f)** does not apply to the project or the property involved. This will require, at a minimum:
  - a. the inclusion of a map or maps of sufficient scale to show the relationship of the proposed action and existing facility including the important activity areas, contributing features, and the intrinsic attributes of the protected property including the proposed and existing ROW and the existing boundaries of the property in question; if there are none, then provide that information;
  - b. a clear discussion of the planned project activities (both temporary and permanent) and necessary structural characteristics (bridges, retaining walls, silt fences, etc.) in relation to the important activity areas and facilities on the property, including placing project activities and structural characteristics on the maps as appropriate;
  - c. a discussion of the property as it functions currently and as it will function once the project is completed, including discussions of ownership and any leases, covenants, restrictions, conveyances, encumbrances, and so forth, which may impact the property and its function, any terrain or other factors which limit or enhance all, or certain areas of the property, and differentiate between the primary functions of the property and any secondary functions, as appropriate and characterize the general or specific setting of the property.
4. If applicable, provide and cite the appropriate policy or guidance associated with the proposed activity or the property in question which was considered in recommending a “No Use” determination (note: most of these policies can be found in the **FHWA Section 4(f) Policy Paper** and other documents which can be accessed through the FDOT [Section 4\(f\) References and Guides](#) web page; an example would be citing and quoting Question 28A of the **FHWA Section 4(f) Policy Paper** when bridging a recreational area). Then, provide sufficient supporting documents as to how the identified policy or guidance statement referenced applies to the action and property in question. When required, provide any appropriate coordination and concurrence documents from the OWJ.

5. Include the identification of any additional **Section 4(f)** approvals or determinations for the proposed project.

The **Section 4(f) No Use Determination, Form No. 650-050-49** or the **Section 4(f) Determination of Applicability Form, Form No. 650-050-45** and supporting documentation are sent to OEM for concurrence or for OEM's finding. Once completed, the appropriate form must be saved in the StateWide Environmental Project Tracker (SWEPT) project file. When completing the **Type 1 Categorical Exclusion Checklist** check the "No Use" option for **Section 4(f)** and follow the instructions provided in the form. For Type 2 CEs, EAs, and EISs the determination is also included in the **Section 4(f)** section of the Environmental Document.

### 7.3.3 Exceptions and Exemptions to Section 4(f) Approval

There are multiple exceptions and exemptions to the requirement for a **Section 4(f)** approval. Most of these are included in the regulations implementing **Section 4(f)** at **23 CFR Part 774** (revised November 2018). In addition, many exceptions and exemptions are a matter of FHWA policy as reflected in the **FHWA Section 4(f) Policy Paper**. For the purposes of documenting the applicability or inapplicability of **Section 4(f)** for FDOT projects under these exemptions and conditions, the appropriate legislative, regulatory, or procedural provision or provisions, must be referenced on the **Section 4(f) Exceptions/Exemptions Determination, Form No. 650-050-48** or the **No Section 4(f) No Use Determination, Form No. 650-050-49**, as appropriate.

In order for a project and/or resource to be eligible for a **Section 4(f)** Exception, the project and/or resource must meet the criteria defined within the regulation or the Statutes. The Administration (FDOT) has identified various exceptions under **23 CFR § 774.13** to the requirement for **Section 4(f)** approval. These exceptions include, but are not limited to:

- a. The use of historic transportation facilities in certain circumstances:
  1. common post-1945 concrete or steel bridges and culverts that are exempt from individual review under **54 U.S.C. § 306108** (see [Part 2, Chapter 7, Archaeological and Historic Resources](#) for specific information on the Program Comment related to the Post-1945 common historic bridges), and
  2. improvement of railroad or rail transit lines that are in use or were historically used for the transportation of goods or passengers, including, but not limited to, maintenance, preservation, rehabilitation, operation, modernization, reconstruction, and replacement of railroad or rail transit line elements, except for
    - i. stations;
    - ii. bridges or tunnels on railroad lines that have been abandoned, or transit lines not in use, over which regular service has never operated, and that have not been

- railbanked or otherwise reserved for the transportation of goods or passengers; and
- iii. historic sites unrelated to the railroad or rail transit lines.
3. Maintenance, preservation, rehabilitation, operation, modernization, reconstruction, or replacement of historic transportation facilities, if the Administration concludes, as a result of the consultation under **36 CFR § 800.5**, that:
    - i. such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the NRHP, or this work achieves compliance with **Section 106** through a program alternative under **36 CFR § 800.14**; and
    - ii. the OWJs over the **Section 4(f)** resource have not objected to the Administration conclusion that the proposed work does not adversely affect the historic qualities of the facility that caused it to be on or eligible for the NRHP, or the Administration concludes this work achieves compliance with **54 U.S.C. § 306108 (Section 106)** through a program alternative under **36 CFR § 800.14**.
- b. Archeological sites that are on or eligible for the NRHP when:
    1. the Administration (FDOT) concludes that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration (FDOT) decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and
    2. the SHPO/THPO or appropriate Tribes over the **Section 4(f)** resource have been consulted and have not objected to the Administration (FDOT) finding in paragraph (b)(1) of this section.
  - c. Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in **23 CFR § 774.9(e)** (see next paragraph), the Administration (FDOT) may permit a project to proceed without consideration under **Section 4(f)** if the property interest in the **Section 4(f)** land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by **Section 4(f)** prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the NRHP prior to the start of construction, then

the property should be treated as a historic site and does not qualify for the **Section 4(f)** exception.

**Section 4(f)** may apply to archeological sites discovered during construction, as set forth in **23 CFR §774.11(f)**. In such cases, the **Section 4(f)** process will be expedited, and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

- d. Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of **Section 4(f)**. The following conditions must be satisfied:
  1. duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;
  2. scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the **Section 4(f)** property are minimal;
  3. there are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;
  4. the land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and
  5. there must be documented agreement of the OWJ over the **Section 4(f)** resource regarding the above conditions.
- e. Projects for the Federal lands transportation facilities described in **23 U.S.C. § 101(a)(8)**.
- f. Certain trails, paths, bikeways, and sidewalks, in the following circumstances:
  1. trail-related projects funded under the Recreational Trails Program, **23 U.S.C. § 206(h)(2)**;
  2. national Historic Trails and the Continental Divide National Scenic Trail, designated under the **National Trails System Act, 16 U.S.C. §§ 1241-1251**, with the exception of those trail segments that are historic sites any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the NRHP. The term includes properties of traditional religious and cultural

importance to an Indian tribe that are included in, or are eligible for inclusion in the NRHP (**23 CFR § 774.17**);

3. trails, paths, bikeways, and sidewalks that occupy a transportation facility ROW without limitation to any specific location within that ROW, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and
  4. trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.
- g. Transportation enhancement activities, transportation alternatives projects, and mitigation activities, where:
1. the use of the **Section 4(f)** property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for **Section 4(f)** protection; and
  2. the OWJ over the **Section 4(f)** resource agrees in writing to paragraph (g)(1) of this section.

Exemptions from **Section 4(f)** approval are identified within **23 CFR § 774.11** and in **Sections 1303 and 11502 of the Fixing America's Surface Transportation (FAST) Act of 2015**.

Exemptions under the regulations and the **FAST Act**, as well as those resources which are exceptions (that is, excluded) from the exemptions are identified below:

1. **23 CFR § 774.11(e)(2)** - The interstate highway system is exempt from being treated as a historic resource under **Section 4(f)** with the exception of those individual elements of the Interstate System formally identified for **Section 4(f)** protection on the basis of national or exceptional historic significance.
  - a. Interstate highway-related facilities in Florida determined historically significant and therefore not exempt under **Section 4(f)** are:
    - (i) I-275 Bob Graham/Sunshine Skyway Bridge
    - (ii) I-75 Alligator Alley - Milepost range 19.6-49.3
    - (iii) I-75 Snake Wall
    - (iv) I-95 Myrtle Avenue Overpass

2. **23 CFR § 774.11(h)** - When a property formally reserved for a future transportation facility temporarily functions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject the property to **Section 4(f)**.
3. **23 CFR § 774.11 (i)** - When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established, and concurrent or joint planning or development of the transportation facility and the **Section 4(f)** resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in **23 CFR § 774.17**.
  - (1) Formal reservation of a property for a future transportation use can be demonstrated by a document of public record created prior to or contemporaneously with the establishment of the park, recreation area, or wildlife and waterfowl refuge. Examples of an adequate document to formally reserve a future transportation use include:
    - (i) A map of public record that depicts a transportation facility on the property;
    - (ii) A land use or zoning plan depicting a transportation facility on the property; or
    - (iii) A fully executed real estate instrument that references a future transportation facility on the property.
  - (2) Concurrent or joint planning or development can be demonstrated by a document of public record created after, contemporaneously with, or prior to the establishment of the **Section 4(f)** property. Examples of an adequate document to demonstrate concurrent or joint planning or development include:
    - (i) A document of public record that describes or depicts the designation or donation of the property for both the potential transportation facility and the **Section 4(f)** property; or
    - (ii) A map of public record, memorandum, planning document, report, or correspondence that describes or depicts action taken with respect to the property by two or more governmental agencies with jurisdiction for the potential transportation facility and the **Section 4(f)** property, in consultation with each other.

### 7.3.3.1 Documentation and Coordination

An Exception/Exemption or a No Use determination by the District requires OWJ concurrence or no objection, as appropriate. The District must provide all

Exception/Exemption determinations and all No Use determinations to OEM for concurrence.

If a project is eligible for a **Section 4(f)** Exception/Exemption, the District completes the **Section 4(f) Exceptions/Exemptions Determination, Form No. 650-050-48** or the **No Section 4(f) No Use Determination, Form No. 650-050-49** and, if required by the specific exception, exemption, or exclusion must include a letter from the OWJ concurring with the conditions and actions that qualify the project for the associated exception as well as the appropriate finding from the District.

The complete **Section 4(f) Exceptions/Exemptions Determination, Form No. 650-050-48** or the **No Section 4(f) No Use Determination, Form No. 650-050-49** and documentation will be sent to OEM for concurrence. Once complete the **Section 4(f) Exceptions/Exemptions Determination, Form No. 650-050-48** or the **No Section 4(f) No Use Determination, Form No. 650-050-49** and documentation must be saved in the SWEPT project file. When completing the **Type 1 Categorical Exclusion Checklist** check the Exception/Exemption option for **Section 4(f)** and follow the instructions provided in the form. For a Type 2 CE, check the appropriate option for **Section 4(f)** and follow the instructions provided in the **Type 2 Categorical Exclusion Determination Form**. For EAs and EISs, the determination is also included in the **Section 4(f)** section of the Environmental Document.

### 7.3.4 “Use” under Section 4(f)

Once the District has determined the resource is protected under **Section 4(f)**, the District, in consultation with OEM, must determine whether the project will require a transportation “use” of the protected resource.

The following sections describe uses within the meaning of **Section 4(f)**.

#### 7.3.4.1 Permanent Incorporation

The most common type of use occurs when land from a **Section 4(f)** protected resource is permanently incorporated into a transportation facility, e.g. fee simple purchase. It can include the acquisition of an easement for the maintenance or operation of a transportation facility or a transportation-related facility.

#### 7.3.4.2 Temporary Occupancy

Temporary occupancy is when there is a temporary occupancy for the purpose of project construction-related activities that is adverse in terms of the statute’s preservation purpose. When temporary occupancies meet the conditions listed in **23 CFR § 774.13(d)** the use of the resource does not constitute a use within the meaning of **Section 4(f)**. If the temporary occupancy does not meet the conditions, there is a **Section 4(f)** use and the appropriate **Section 4(f)** approval process must be followed.

### 7.3.4.3 Constructive Use

Constructive use occurs when a transportation project does not incorporate land from **Section 4(f)** property but when the project's proximity impacts are so severe that the protected activities, features, attributes that qualify the protected resource are substantially impaired (see **23 CFR § 15** and [Section 7.3.5.4](#)). In cases where the District believes that a **Section 4(f)** use may arise due to proximity impacts and there is no acquisition of land from the protected property, the District must inform OEM. Once OEM is informed, FDOT will determine if there is a potential for a substantial impairment to the protected property. If FDOT concludes that such a potential exists, OEM will inform FHWA-Headquarters (HQ) of the circumstances and proceed in consultation with FHWA-HQ in accordance with the **NEPA Assignment MOU**.

### 7.3.5 Section 4(f) Approvals

Except in situations involving a determination of **Section 4(f)** applicability arising from proximity impacts, once FDOT has determined that **Section 4(f)** applies, the District must prepare a *de minimis* finding or a **Section 4(f)** evaluation for submittal to OEM. When coordinating with the OWJ, external agencies or the public, the Districts should copy the PDC on outgoing correspondence.

As set forth in **23 CFR § 774.3**, FDOT **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 (as defined in **23 CFR § 774.17**) to the property resulting from such use; or
3. the use of the property, including any measures to minimize harm (such as avoidance, minimization, mitigation or enhancement), will have a *de minimis* impact on the property.

To receive approval for the use of a property protected by **Section 4(f)**, the District needs to submit one of the following documents to OEM:

1. a *de minimis* impact determination;
2. a programmatic **Section 4(f)** evaluation; or
3. an individual **Section 4(f)** evaluation.

Analyses of the “no prudent and feasible alternative” and the “all possible planning to minimize harm” standards are only required for approval of the individual and programmatic evaluations; it is not required for a *de minimis*.

### 7.3.5.1 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 measures), results in either:

1. a determination that the project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under **Section 4(f)**; or
2. a finding under **36 CFR § 800**, that no historic property is affected by the project or that the project will have “no adverse effect” on the historic property in question.

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 the transportation use of the **Section 4(f)** property, together with any measures to minimize harm, such as impact avoidance, minimization, and mitigation or enhancement measures incorporated into the project, do not adversely affect the activities, features, or attributes that qualify the resource for protection under **Section 4(f)**.

In reaching an approval of the use of a **Section 4(f)** protected property, the project record must reflect that the following steps were completed in the order set forth in **23 CFR § 774.5(b)** and as outlined below:

1. The OWJ must be notified of the intent to pursue a *de minimis* and consulted on measures to minimize harm. For non-historic properties, the OWJ will also be informed that there will be an opportunity for the public comment on the project in relation to the protected resource.
2. For parks, recreation areas, or wildlife and waterfowl refuges, an opportunity for public review and comment must be provided [**23 CFR § 771.111(h)(2)(viii)** and **774.5(b)(2)(i), (ii)**]. For a *de minimis* determination no additional public involvement outside the regular **NEPA** process is required ([Part 1, Chapter 11, Public Involvement](#)). If a proposed action does not normally require public involvement, such as for certain minor projects covered by a Type 1 CE, an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided as appropriate to the resource:
  - a. for historic and archaeological properties, the opportunity for the public to review and comment on the effects of the project on the protected activities, features, or attributes of the **Section 4(f)** property occurs within the **Section 106** process, as appropriate, or
  - b. for non-historic properties the opportunity for public comment should be appropriate to the nature of the resource and the public it serves. For most projects, this will be completed through the **NEPA** public involvement process. In cases where such opportunities do not exist or where a different method of notifying the public would be more appropriate (such as efforts directed to local bicycling groups for a project involving a bike trail); and

3. The OWJ, after being informed of the public comments and FDOT's intent to make a *de minimis* impact finding, must concur in writing that the project (including all measures to mitigate and minimize harm) 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**].

In the case of historic properties, the SHPO/THPO must concur in writing to an FDOT finding of “no affects to historic properties” or “no adverse effects” to the property in question. FDOT includes its intent to pursue a *de minimis* approval in the signature block of the effects finding letter provided to the SHPO/THPO and in **Stipulation VIII of the Section 106 Programmatic Agreement (Section 106 PA)** executed between the ACHP, FHWA, SHPO, and FDOT on March 16, 2017.

4. Once these steps are completed, the District can submit the **Section 4(f) de minimis Determination for Historic Sites, Form No. 650-050-46** or, as appropriate, the **Section 4(f) de minimis Determination for Parks, Recreation Areas and Wildlife or Waterfowl Refuges, Form No. 650-050-47**.

Since a *de minimis* approval is an approval of the use of a **Section 4(f)** property, FDOT can only finalize the approval when it provides its approval of the project. However, OEM will inform the District of the appropriateness of a *de minimis* approval for the proposed project.

### 7.3.5.1.1 *de minimis* Consultation

To comply with the requirements for a *de minimis* approval for a project, follow the 4 steps outlined in [Section 7.3.5.1](#).

For parks, recreation areas, and wildlife and waterfowl refuges, the District must notify the OWJ that the activities, features, and attributes qualifying the property for **Section 4(f)** protection will be the basis for a *de minimis* impact determination [**23 CFR § 774.5(b)**]. The OWJ must concur that the project will not adversely affect the activities, features, or attributes that make the property eligible for **Section 4(f)** protection prior to the District seeking OEM concurrence with the *de minimis* finding.

The OWJ concurrence **must be in writing** [**23 CFR § 774.5(b)(2)(ii)**]. This concurrence can be in the form of a signed letter on agency letterhead, signatures in concurrence blocks on transportation agency documents or agreements provided via e-mail, or by other methods deemed acceptable by OEM.

For historic sites, the consulting parties identified in **36 CFR Part 800** must be afforded the opportunity to comment on the effects of the proposed project on historic resources. The OWJ 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 with a finding of “no historic properties affected” or “no adverse effect” to the property in question in accordance with **36 CFR Part 800**.

The **Section 106 PA** referenced above, programmatically informs the SHPO and the ACHP that such a finding may result in FDOT approving the use of the property as *de*

*minimis*. In addition, the signature block provided for SHPO concurrence on effect findings, also provides this statement (see [Part 2, Chapter 8, Archaeological and Historic Resources](#)).

Because neither the tribes nor the NPS are signatories to the **Section 106 PA**, in cases where either a THPO or a tribal **Section 106** official is acting as an OWJ (or in cases where the NPS is acting as an OWJ) the District and OEM, if participating, must ensure that those officials are informed in writing that a concurrence with either a “no affects to historic properties” or a “no adverse effects” to the historic property in question means that FDOT may pursue a *de minimis* approval for the use of those properties. As with other *de minimis* approvals, the concurrence of these officials to those findings must be in writing.

### 7.3.5.1.2 Public Involvement Requirements

For parks, recreation areas, or wildlife and waterfowl refuges, an opportunity for public review and comment must be provided [**23 CFR §774.5(b)(2)(i), (ii)**]. For a *de minimis* determination no additional public involvement outside the regular **NEPA** process is required ([Part 1, Chapter 11, Public Involvement](#)). However, during public involvement for the project, the public’s opinion must be specifically requested on the effects of the proposed action on the activities, features, and attributes. If a proposed action does not normally require public involvement, such as for certain minor projects covered by a Type 1 CE, an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided as appropriate to the resource and prior to the *de minimis* and Type 1 CE approvals. In all cases, the public opportunity for review and comment must occur prior to the formal opinion of the OWJ.

Compliance with **36 CFR Part 800** satisfies the public involvement and agency coordination requirements for *de minimis* impact findings for historic and archeological properties. To document the public involvement activities for **36 CFR Part 800** the *de minimis* determination will not occur until after the public hearing and comment period for Type 2 CEs, EAs, and EISs. For lower level Type 1 CEs that involve *de minimis* approvals for historic properties, the **Section 106** process must be completed to make the *de minimis* determination and the *de minimis* approval coincides with the Type 1 CE approval.

### 7.3.5.1.3 Documenting the *de minimis* determination

Once it has been determined that the project is eligible for a **Section 4(f) *de minimis*** finding, the District completes the **Section 4(f) *de minimis* Determination for Historic Sites, Form No. 650-050-46** or the **Section 4(f) *de minimis* Determination for Parks, Recreation Areas and Wildlife or Waterfowl Refuges, Form No. 650-050-47** and submits it to OEM for concurrence.

### 7.3.5.1.4 Approval and Documentation Process

The District submits the *de minimis* Determination form and documentation to OEM for concurrence. Once OEM concurs and signs the determination, the final **Section 4(f) *de***

***de minimis Determination for Historic Sites, Form No. 650-050-46*** or ***Section 4(f) de minimis Determination for Parks, Recreation Areas and Wildlife or Waterfowl Refuges, Form No. 650-050-47*** and its attachments must be uploaded to the SWEPT project file.

When completing the ***Type 1 Categorical Exclusion Checklist***, check the *de minimis* option for ***Section 4(f)*** and follow the instructions provided in the form. When completing the ***Type 2 Categorical Exclusion Determination Form*** check the appropriate option for ***Section 4(f)*** and follow the instructions provided in the form. For EAs and EISs, the determination is included in the ***Section 4(f)*** portion of the Environmental Document. In addition, any mitigation measures that were relied upon to reach a *de minimis* determination will be documented as commitments in the Environmental Document in accordance with [Part 2, Chapter 22, Commitments](#).

### 7.3.5.2 Programmatic Section 4(f) Evaluations

Programmatic ***Section 4(f)*** evaluations are administrative alternatives to completing an Individual ***Section 4(f)*** evaluation, but which still require appropriate findings using supporting studies and consultation. Programmatic evaluations are prepared for certain uses of ***Section 4(f)*** property that meet specific criteria as set forth in the conditions and findings sections of the specific programmatic evaluation.

The benefit of using a Programmatic ***Section 4(f)*** is that the conditions set forth for each of these have already received legal sufficiency review and have already been coordinated with the appropriate federal agencies. Therefore, these evaluations normally do not require an individual legal sufficiency review or coordination with the U.S. Department of the Interior (DOI), the U.S. DOA, or the U.S. Department of Housing and Urban Development (HUD). However, if a federal agency has to take specific action under a different federal law such as a DOI approval under ***Section 6(f) of the LWCF***, that federal approval will still be required (see Concurrent Requirements in [Section 7.5](#); also see the discussion of Wild and Scenic Rivers in [Section 7.2.3.1](#)).

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. coordination and agreement with the OWJ.

The Districts should coordinate their preparation of any programmatic evaluation with the PDC.

The five Nationwide Programmatic **Section 4(f)** Evaluations provided under **23 CFR § 774.3(d)** are only applicable to FHWA-funded projects. The Programmatic **Section 4(f)** Evaluations are (in order of publication):

1. **Section 4(f) Statement of Determination for Independent Walkways or Bikeway Construction Projects, Form No. 650-050-55**
2. **Programmatic Section 4(f) Evaluation and Approval for FHWA (Federal Aid) Projects that Necessitate the Use of Historic Bridges, Form No. 650-050-50**
3. Final Nationwide **Section 4(f) Programmatic Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites, Form No. 650-050-51**
4. Final Nationwide **Section 4(f) Programmatic Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges, Form No. 650-050-52**
5. **Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property; Section 4(f) Net Benefit Programmatic for Historic Sites, Form No. 650-050-53, and Section 4(f) Net Benefit Programmatic for Public Parks, Recreation Lands, and Wildlife & Waterfowl Refuges, Form No. 650-050-54**

The specific applicability criteria and the required analyses for each of these programmatic evaluations can be reviewed by accessing the corresponding publication in the **Federal Register (FR)**. The references section below provides links to the associated **FR** for each programmatic evaluation. Additional information can be found in the **FHWA Environmental Toolkit** linked at the FDOT [Section 4\(f\) References and Guides](#) web page or at the FHWA **Section 4(f)** web page contained in their environmental tool kit. For further information, see [Section 7.6](#) for direct references.

The requirements for each Nationwide programmatic evaluation are also located on the forms associated with the appropriate programmatic evaluation. Should the District have any questions, please contact the PDC.

### **7.3.5.2.1 Programmatic Section 4(f) Evaluations, Submittals, and Coordination**

The Programmatic Evaluation form and documentation are submitted to OEM by the District via the Electronic Review and Comment System (ERC) for concurrence. OEM must review and concur with all Programmatic **Section 4(f)** Evaluations. Once the document has been finalized, the District uploads the evaluation into SWEPT.

The approval of the Programmatic Evaluation is concurrent with the signing and approval of the **NEPA** Environmental Document. Upon approval, the District will send a signed copy of the Programmatic Evaluation to the OWJ.

When completing the **Type 2 Categorical Exclusion Determination Form**, the Programmatic **Section 4(f)** Evaluation is summarized in the **Section 4(f)** section of the document and the Programmatic Evaluation is uploaded into SWEPT and linked to the form.

For EAs and EISs, results of the Programmatic Evaluation are summarized in the **Section 4(f)** section of the draft document and circulated as appropriate to the specific requirements of the draft Environmental Document and the requirements set forth by the specific Programmatic Evaluation. As all alternatives must remain viable until following the public opportunity to comment and the public hearing. The Programmatic Evaluation is approved concurrently and attached to the FONSI or Final Environmental Impact Statement (FEIS). In addition, any mitigation measures or commitments are documented in the Environmental Document and in accordance with [Part 2, Chapter 22, Commitments](#).

The Programmatic **Section 4(f)** Evaluation will include the following standard statement:

*Based upon the criteria and findings required by [insert name of appropriate Programmatic Section 4(f) Evaluation] the proposed [insert project name and number] meets the requirements set forth in Section 4(f) of the USDOT Act of 1966, as amended, that there is no feasible and prudent alternative to the use of [Section 4(f) property] and the proposed action includes all possible planning to minimize harm to the [Section 4(f) property] resulting from such use.*

### 7.3.5.3 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 resulting in greater than a *de minimis* impact and does not meet the conditions of a Programmatic **Section 4(f)** Evaluation (**23 CFR § 774.3**). The **Individual Section 4(f) Evaluation** documents the proposed use of **Section 4(f)** property for all alternatives within a project area.

Based on sufficient analysis, the **Individual Section 4(f) Evaluation** must find:

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 as defined in **§774.17** to minimize harm to the **Section 4(f)** property resulting from the transportation use [see **23 CFR § 774.3(a)**].

#### 7.3.5.3.1 Outline for Preparing Draft Individual Section 4(f) Evaluations

The **Draft Individual Section 4(f) Evaluation** must provide the analysis of project alternatives and the initial discussion and identification of avoidance, minimization, and mitigation opportunities. The Individual **Section 4(f)** analysis must provide the data which indicates that there is no feasible and prudent alternative which avoids using properties

protected by **Section 4(f)**. Additionally, when there is no prudent and feasible avoidance alternative and there are two or more alternatives that “use” **Section 4(f)** property, the individual evaluation must include a least overall harm analysis.

Draft evaluations should provide a comparative analysis of the various alternatives under consideration and should not include any preferences or recommendations. The draft is used by decision makers to select the preferred alternative. In addition, the evaluation must include an analysis for each project alternative at each **Section 4(f)** property location.

Formatting for the **Individual Section 4(f) Evaluation** is based on FHWA guidance as reflected in the [FHWA Section 4\(f\) Policy Paper](#).

**The Draft Individual Section 4(f) Evaluation must include the following information:**

1. appropriate statements concerning the applicability or non-applicability of **Section 4(f)** to the resources;
2. an identification and description of the relationships of each alternative to each location of **Section 4(f)** protected resources;
3. activities, features and attributes of each **Section 4(f)** property;
4. analysis of impacts to each **Section 4(f)** property by each alternative;
5. records of public involvement activities;
6. results of coordination with the OWJ for each protected property;
7. alternatives considered to avoid using the **Section 4(f)** property, including the analysis of the impacts caused by avoiding the **Section 4(f)** resource;
8. a least overall harm analysis, if appropriate;
9. all measures taken to minimize harm to the resources, including mitigation measures; and
10. comments submitted during the coordination procedures as required by **23 CFR § 774.5** and responses to those comments.

The following standard statement is included for the conclusion of the **Draft Section 4(f) Evaluation**:

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

### 7.3.5.3.2 Feasible and Prudent Alternatives Analysis for Individual Section 4(f) Evaluations

The intent of the **Section 4(f)** statute is to avoid and, where avoidance is not feasible and prudent, to include all possible planning to minimize the harm caused by the use of the protected resource by the transportation project. When assessing the importance of protecting a **Section 4(f)** property, it is important to consider the relative value of its resources to the preservation purpose of the statute (**23 CFR § 774.17**). An avoidance “alternative analysis” [**23 CFR § 774.3(a) and (c)**] must be performed to determine if there is a feasible and prudent avoidance alternative.

#### 7.3.5.3.2.1 Identifying a Range of Alternatives

A project alternative that avoids one **Section 4(f)** property by using another is not an avoidance alternative; true avoidance alternatives avoid the use of all **Section 4(f)** resources. A feasible and prudent avoidance alternative avoids using **Section 4(f)** property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the **Section 4(f)** property.

The alternative analysis identifies a reasonable range of project alternatives, including those that avoid using **Section 4(f)** property [**FHWA Section 4(f) Policy Paper**]. Depending on the project context, the potential alternatives may include the following:

- Location Alternatives - a location alternative refers to the re-routing of the entire project along a different alignment.
- 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.
- Alignment Shifts - an alignment shift is the re-routing of a portion of the project to a different alignment to avoid a specific resource.
- Design Changes - A design change is a modification of the proposed design in a manner that would avoid impacts, such as reducing the planned median width, building a retaining wall, or incorporating design exceptions.

For more information on developing and analyzing alternatives see [Part 2, Chapter 3, Engineering Analysis](#).

#### 7.3.5.3.2.2 Feasible and Prudent Avoidance Analysis

The next step is to determine if each of the identified alternatives are feasible and prudent. “A feasible and prudent avoidance alternative avoids using **Section 4(f)** property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the **Section 4(f)** property” (**23 CFR § 774.17**). If it is determined an avoidance alternative is feasible and prudent and meets the purpose and need of the

project, this alternative must be selected by FDOT, and the **Section 4(f)** evaluation process is complete.

Under **23 CFR § 774.17** an avoidance alternative is not considered feasible if it cannot be built as a matter of sound engineering judgement.

Under **23 CFR § 774.17** an avoidance alternative is not considered prudent if it results in one of the following situations:

- it compromises the project to a degree that it 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:
  - severe social, economic, or environmental impacts;
  - severe disruption to established communities;
  - severe disproportionate impacts to minority or low-income populations; or
  - severe impacts to environmental resources protected under other federal statutes;
- it results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
- it causes other unique problems or unusual factors; or
- it involves multiple factors as outlined above that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

For more information on applying the prudent standard, see **Sections 3.3.1 and 3.4** of the **FHWA Section 4(f) Policy Paper** linked to the FDOT [Section 4\(f\) References and Guides](#) web page. If there is more than one alternative that uses **Section 4(f)** property then a Least Overall Harm Analysis of those alternatives is required (see [Section 7.3.5.3.2.4](#)).

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

“All possible planning”, as defined under **23 CFR § 774.17**, means all reasonable measures identified in the **Section 4(f)** analysis to minimize harm or mitigate adverse effects to the resource resulting from the “use,” were considered and documented. Impacts to the **Section 4(f)** property should be reduced or eliminated by including mitigation in the analysis. In addition, the mitigation measures are relied upon as part of the comparison of alternatives.

For public parks, recreation areas, and wildlife and waterfowl refuges, the measures to minimize harm may include, but are not limited to: design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways. For historic sites, the measures to minimize harm normally serve to preserve the historic activities, features, or attributes of the site as agreed upon by FDOT and the SHPO/THPO, in accordance with the consultation process under **Section 106 (36 CFR Part 800)**.

In evaluating the “reasonableness of measures to minimize harm” under **23 CFR § 774.3(a)(2)**, FDOT will consider the preservation purpose of the statute and the following as described in **23 CFR § 774.17(3)**:

- the views of the OWJ;
- whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the **Section 4(f)** property and the benefits of the measure to the property, in accordance with **23 CFR § 771.105(d)**;
- any impacts or benefits of the measures to communities or environmental resources outside of the **Section 4(f)** property.

#### 7.3.5.3.2.4 Least Overall Harm Analysis

Least overall harm analysis is conducted to determine which of the potential feasible and prudent alternatives that “use” a **Section 4(f)** property have the net impact that results in the “least overall harm” in accordance with **23 CFR § 774.3(c)(1)** and “includes all possible planning to minimize harm to **Section 4(f)** property” as required by **23 CFR § 774.3(c)(2)**. Not all uses of **Section 4(f)** property have the same magnitude of impact, and not all **Section 4(f)** properties are of the same quality; therefore, the least overall harm analysis is a qualitative analysis. When preparing and examining the alternatives which impact **Section 4(f)** property it is important to ensure that comparable mitigation measures are included for each alternative. The District is responsible for selecting the alternative that has the least overall harm to a **Section 4(f)** property. If the net harm to the **Section 4(f)** properties in all the feasible and prudent alternatives is equal, the District may select any one of them.

To determine which of the alternatives would cause the least overall harm, FDOT must compare the factors set forth in **23 CFR § 774.3(c)(1)** concerning the alternatives under consideration:

1. the ability to mitigate adverse impacts to each **Section 4(f)** property (including any measures that result in benefits to the property);
2. the relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each **Section 4(f)** property for protection;

3. the relative significance of each **Section 4(f)** property;
4. the views of the OWJ 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.

### **7.3.5.3.3 Submission and Coordination of Draft Individual Section 4(f) Evaluations**

The District must upload the **Draft Individual Section 4(f) Evaluation** in ERC, assigning the PDC for review and comment. The PDC must add OGC and may add any other relevant reviewers. For Type 2 CEs, the **Draft Individual Section 4(f) Evaluation** is uploaded into ERC as a separate document. For EAs and EISs, the **Draft Individual Section 4(f) Evaluation** is incorporated into the EA or Draft Environmental Impact Statement (DEIS).

Once OEM has completed its review of the **Draft Individual Section 4(f) Evaluation** and the comments have been addressed by the District, OEM approves it for public availability and the District circulates the document to the OWJ and DOI as well as any other appropriate agency for review and comment, such as the U.S. Forest Service and HUD. FDOT will use electronic media to distribute the draft to agencies, as appropriate.

The District must wait a minimum of 45 days for receipt of comments. If comments are not received within 15 days after the comment deadline, the District may assume a lack of objection and proceed with the action (**23 CFR § 774.5**).

If any of these agencies raise issues during coordination, the District will work with OEM and the agency to resolve the issues.

### **7.3.5.3.4 Public Involvement Requirements for Draft Individual Section 4(f) Evaluations**

There is no specific requirement to provide public notice or a public opportunity to comment on **Individual Section 4(f) Evaluations**. However, for most projects requiring the preparation of an **Individual Section 4(f) Evaluation**, public involvement occurs pursuant to the requirements of **Section 339.155(5)(b), Florida Statutes (F.S.)**, and **23 CFR § 771.111**. When public involvement is required for a proposed project which includes an **Individual Section 4(f) Evaluation**, the Draft Evaluation should be provided along with other project information and project documents and the public involvement effort must follow the procedures set forth in [\*\*Part 1, Chapter 11, Public Involvement\*\*](#). If a situation arises where the District staff is uncertain as what level of public involvement would be appropriate, they should contact the appropriate PDC.

For those actions that do not require public review and comment under **NEPA** or under **Section 339.155, F.S.**, public involvement may still be required under a concurrent law such as **Section 106** of the **NHPA** when the **Individual Section 4(f) Evaluation** is for the approval of the use of a historic property.

### 7.3.5.3.5 Final Section 4(f) Individual Evaluation Outline

When the preferred alternative uses **Section 4(f)** land, the **Final Individual Section 4(f) Evaluation** must contain:

1. Information developed in the draft evaluation.
2. A discussion of the basis for concluding that there are no feasible and prudent alternatives to the use of the **Section 4(f)** land. The supporting information must demonstrate that the proposed action “does not cause severe problems of a magnitude that substantially outweighs the importance of protecting the section 4(f) property” (**23 CFR § 774.17**). 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. The **Final Individual Section 4(f) Evaluation** must demonstrate that the preferred alternative is a feasible and prudent alternative with the least harm to the **Section 4(f)** resources after considering mitigation to the **Section 4(f)** resources.
4. When there is more than one alternative which uses **Section 4(f)** resources, a discussion of the reasons for concluding that the selected action is the alternative which results in the least overall harm must be included.
5. A summary of the formal coordination with the OWJs and the Headquarters Office of the DOI and other agencies as appropriate. Copies of all formal coordination comments and a summary of other relevant **Section 4(f)** comments received, and an analysis and response to any questions raised should be included.
6. Where **Section 6(f)** land is involved, documentation of the results of the coordination with the NPS must be included.
7. Final approval **Section 4(f)** language must include the following statement:

*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] resulting from such use.*

#### 7.3.5.3.5.1 Submission of Final Individual Section 4(f) Evaluation and Legal Sufficiency Review [23 CFR § 774.7(d)]

After completion of the circulation and public comment period, the District submits the **Final Individual Section 4(f) Evaluation** to OEM in SWEPT.

SWEPT also provides a copy of the **Final Individual Section 4(f) Evaluation** to OGC for legal sufficiency review. OGC must certify that the evaluation is legally sufficient before the **Section 4(f)** Evaluation can be approved by the Director of OEM as part of the **NEPA** document.

For FDOT processing purposes, the standard approval statement will be included on the cover page of FEIS or FONSI. The name and description of the project and the name(s) of the **Section 4(f)** properties being used by the project must also be included. Where the **Section 4(f)** approval is documented in the FEIS, the basis for the **Section 4(f)** approval must be summarized in the Record of Decision (ROD).

For Type 2 CE documents, the approval of the separate **Final Individual Section 4(f) Evaluation** report should occur with and be referenced in the approval for the **NEPA** Document.

Once approved, the District will electronically distribute copies of the signed document to the agencies that received the **Draft Individual Section 4(f) Evaluation**.

### 7.3.5.3.5.2 Project File Documentation

When completing the **Type 2 Categorical Exclusion Determination Form** with an **Individual Section 4(f) Evaluation**, summarize the results of the evaluation in the **Section 4(f)** section of the form, and upload the **Final Individual Section 4(f) Evaluation** into SWEPT. For EAs the results of the **Final Individual Section 4(f) Evaluation** are summarized in the **Section 4(f)** portion of the FONSI and uploaded into SWEPT. For projects processed as an EIS, the **Final Individual Section 4(f) Evaluation** is included in the FEIS and uploaded into SWEPT. In addition, any mitigation measures or commitments are documented in the Environmental Document.

### 7.3.5.4 Constructive Use

A “Constructive Use” occurs when the transportation project does not incorporate land from a **Section 4(f)** property, but the proximity impacts of the project are so severe that the protected activities, features, or attributes qualifying the property for protection under **Section 4(f)** are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished (**23 CFR § 774.15**).

If the District believes a project may involve a Constructive Use, the District contacts the PDC to verify the potential for a Constructive Use and to assess measures to minimize harm to the resource in order to avoid having a Constructive Use. When the District and OEM believe that a Constructive Use determination may be appropriate, OEM will initiate consultation with FHWA-HQ Office of Project Development and Environmental Review in accordance with the **NEPA Assignment MOU**.

Under **23 CFR § 774.15**, when a Constructive Use determination is made, it is based on the following:

1. identification of the current activities, or attributes of the property which qualify for protection under **Section 4(f)** and which may be sensitive to proximity impacts;
2. analysis of the proximity impacts of the proposed project on the **Section 4(f)** resource. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should be not attributed to the proposed project; and
3. consultation, on the foregoing identification and analysis, with the OWJ over the **Section 4(f)** property.

Situations describing when a Constructive Use occurs can be found at **23 CFR § 774.15(e)** and situations describing when a Constructive Use does not occur can be found at **23 CFR § 774.15(f)**, both of which can be accessed via the FDOT [Section 4\(f\) References and Guides](#) web page.

## 7.4 POST PROJECT DEVELOPMENT AND ENVIRONMENT

### 7.4.1 Late Designations, Unanticipated Discoveries, and Emergency Repairs

After the CE, FONSI, or ROD has been processed, a separate **Section 4(f)** approval will be required, except as provided in **23 CFR § 774.13**, if:

1. a proposed modification of the alignment or design would require the use of **Section 4(f)** property; or
2. the District in consultation with OEM determines that **Section 4(f)** applies to the use of a property; or
3. a proposed modification of the alignment, design, or measures to minimize harm [after the original **Section 4(f)** approval] would result in a substantial increase in the amount of **Section 4(f)** property used, a substantial increase in the adverse impacts to **Section 4(f)** property, or a substantial reduction in the measures to minimize harm [**23 CFR § 774.9(c)(1)-(3)**].

A separate **Section 4(f)** approval required for a CE, FONSI, or ROD will not necessarily require the preparation of a new or supplemental **NEPA** document [**23 CFR § 774.9(d)**]. Coordinate with OEM when there are changes to a project that result in changes to impacts to a **Section 4(f)** property.

There are times when late discoveries, late designations, or determinations of significance of **Section 4(f)** resources are made after the completion of the Environmental Document. When this involves a **Section 4(f)** resource other than an archaeological site, FDOT may allow the project to proceed without consideration under **Section 4(f)** if the property interest in the lands from the site was acquired prior to the change in the

designation or the determination of significance as long as an adequate effort was made to identify properties protected by **Section 4(f)** prior to the acquisition. In cases involving a historic site, if it was reasonably foreseeable that a resource would be determined eligible for the NRHP prior to the start of construction, the resource should be treated as a significant historic site as set forth in **23 CFR § 774.13(c)**.

In judging the adequacy of the effort made to identify properties protected by **Section 4(f)**, FDOT will consider the requirements and standards that existed at the time of the research.

When the post-review discovery is of an archeological site, FDOT will consult with the SHPO/THPO and other appropriate parties in accordance with **Section 106 of the NHPA** to reach resolution regarding the treatment of the site within an expedited time frame. The decision to apply **Section 4(f)** to the site will be based on the outcome of the **Section 106** process. If the archaeological site proves significant for more than the information it contains, this late discovery will also trigger a request for an expedited **Section 4(f)** evaluation [**23 CFR § 774.9(e)**]. Because the DOI has a review responsibility for **Individual Section 4(f) Evaluations** but is not usually a party to the **Section 106** consultation process, the DOI must be notified and requested to provide any comments within a shortened response period (less than the standard 30 days) in regard to the treatment of the archaeological site [see **FHWA Section 4(f) Policy Paper**, Section II, Questions 26(a) and (b) and **23 CFR § 774.9**].

When responding to hurricanes, floods, or other natural disasters, Districts should avoid, to the maximum extent possible, using lands which may be protected by **Section 4(f)** for emergency repair actions and/or debris storage and materials staging areas. When using land from a known **Section 4(f)** protected resource, the District must notify the OWJ for that property and coordinate the action with them as much as is practicable and appropriate.

In cases where the **Section 4(f)** resource is a historic or archaeological site, please refer to [Part 2, Chapter 8, Archaeological and Historical Resources](#) to ensure the proper treatment of these properties under the appropriate provisions of **Section 106** and other, historic preservation laws.

The analysis for emergency repairs (those meant to restore essential functions in the immediate aftermath of an emergency) cannot fulfill the purpose of **Section 4(f)** to evaluate feasible and prudent avoidance alternatives. However, situations may arise where other **Section 4(f)**-related documentation may be required if an activity uses a **Section 4(f)** property. These immediate actions to restore essential functions include the initial clearing of debris off and to the side of a roadway for emergency vehicle access.

The analysis for permanent repairs remains subject to the requirements established for an approval under **Section 4(f)** as set forth in **23 U.S.C. § 138** and **49 U.S.C. § 303, 23 CFR Part 774**, this Chapter, and other appropriate guidance and procedures.

Regarding debris storage areas established for post-emergency debris, these locations are generally approved and designated prior to the emergency response actions in order to ensure their availability in the event of the storm event or other emergency.

## 7.4.2 Commitment Compliance

Commitments must be recorded in the Environmental Document. Project commitments are carried forward into design, ROW, and construction phases of project delivery. The commitments and required coordination are updated per [Procedure No. 650-000-003, Project Commitment Tracking, Part 2, Chapter 22, Commitments](#), and documented in the Commitment Status section of the *Re-evaluation Form*.

Any changes to an existing commitment relating to **Section 4(f)** protected properties require coordination with the District Environmental Office. The District Environmental Office will inform the appropriate consulting parties and re-initiate consultation as necessary. District staff must review the commitments made to avoid, minimize and mitigate effects to **Section 4(f)** protected properties and ensure compliance.

## 7.4.3 Re-evaluations

Prior to a project advancing to the next phase, or if there are major design changes, the impacts to **Section 4(f)** resources are re-evaluated per [Part 1, Chapter 13, Re-evaluations](#). In addition, design changes could re-initiate consultation with the OWJ. Commitments and coordination should be contained in the Commitment Status section of the *Re-evaluation Form* and tracked through [Procedure No. 650-000-003, Project Commitment Tracking](#). When completing Re-evaluations in relation to **Section 4(f)** properties, it is important to revisit proximity impacts as well as any direct uses of protected properties to ensure full consideration of the potential changes of impacts to **Section 4(f)** properties.

## 7.5 CONCURRENT REQUIREMENTS

Due to the nature of the resources protected under **Section 4(f)**, there are often concurrent laws requiring separate federal and/or state findings or approvals such as **Section 106 of the NHPA**, **Section 12(a) of the WSRA**, and **Section 7 of the Endangered Species Act**. The majority of these concurrent requirements overlap as part of the **NEPA** process. There are also certain **Section 4(f)** protected properties encumbered with a federal interest. For projects that propose the use of land from a **Section 4(f)** property purchased or improved with federal grant-in-aid funds under the **LWCFA**, the **Federal Aid in Fish Restoration Act (Dingell-Johnson Act)**, the **Federal Aid in Wildlife Act (Pittman-Robertson Act)**, or other similar laws, coordination with the appropriate federal agency is required to ascertain the agency's position on the land conversion or transfer. Other federal requirements that may apply to the property should be determined through consultation with the OWJ or the appropriate federal land managing agency as outlined in **23 CFR § 774.5(d)**. These federal agencies may have regulatory authority or other requirements for converting land to a different use. These requirements are independent of the **Section 4(f)** requirements and must be satisfied

during the project development process. Most of these concurrent requirements also overlap within the **NEPA** process.

### 7.5.1 Section 6(f)

The most common federal encumbrance encountered when completing a **Section 4(f)** approval is the **LWCFA**. State and local governments often obtain grants through the **LWCFA** to acquire or make improvements to parks and recreational 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. **Section 6(f)** directs the DOI to assure that replacement lands of equal value, location and usefulness are provided as conditions to such conversions. Consequently, where conversions of **Section 6(f)** lands are proposed for highway projects, replacement lands will be necessary. As with most other federal encumbrances, **Section 6(f) applies to all projects and not just those that are federally funded**. A project can have **Section 6(f)** impacts but **Section 4(f)** may not apply.

To determine whether **LWCFA** funding was involved in the acquisition or improvement of a **Section 4(f)** property, the District should consult with the OWJ or reference the lists of these grants maintained by the NPS and FDEP. See [Section 7.6](#) for a link to the appropriate NPS site. If **LWCFA** funds were used for acquisition or improvement, under **59 CFR § 59.3** the following prerequisites must be met:

- all practical alternatives to the proposed conversion must be evaluated;
- the fair market value of the property to be converted must be established by an appraisal meeting the “Uniform Appraisal Standards for Federal Land Acquisitions”;
- the replacement property must be of at least equal value;
- the replacement property must be of reasonably equivalent usefulness and location to that being converted;
- the property proposed for substitution meets the eligibility requirements for **LWCFA** assisted acquisition;
- in the case of assisted sites that are partially rather than wholly converted, the impact of the converted portion on the remainder shall be considered. If such a conversion is approved the unconverted area must remain recreationally viable or be replaced as well;
- the Regional Office of the NPS is assured that all environmental review requirements related to the project have been met;
- the state procedures including those of the FDEP have been adhered to if the project conversion and substitution constitute any changes to the **LWCFA** property;

- the proposed conversion and substitution are in accordance with the recreation plans of the state and the facility.

To convert **Section 6(f)** properties to non-recreation uses, the OWJ over the **Section 6(f)** property must agree to the conversion in a letter of transmittal recommending the proposal. The conversion must meet the prerequisites and be approved by the appropriate NPS Regional Director in writing. This is accomplished through coordination with the FDEP who, in turn, seeks NPS approval of the conversion and proposed acquisition of replacement property. Regardless of the mitigation proposed, the **Section 4(f)** Evaluation and Environmental Document must include the NPS position relative to **Section 6(f)** conversion and analyze how the converted park land and recreational usefulness will be replaced.

If any **Section 6(f)** properties are identified in the project area, the District should contact the PDC for assistance.

### 7.5.2 Acquisition and Restoration Council- Concurrent Requirement

While determining the applicability of **Section 4(f)** to state-owned lands or, during the coordination with the OWJ, the District may identify properties which require an approval from Florida's Acquisition and Restoration Council (ARC) before they can be converted into a transportation facility. For such properties, regardless of the applicability or non-applicability of **Section 4(f)** an easement from the Division of State Lands of the FDEP may be required prior to locating the project across these lands. This process is a state process and is independent from the **Section 4(f)** process although, when occurring on a USDOT funded or approved project, the conditions developed during the coordination for the ARC's approval may dictate the inclusion of certain minimization and mitigation efforts into the **Section 4(f)** document.

The District staff should coordinate with the PDC at the earliest opportunity for further guidance once they become aware of the proposed acquisition from FDEP protected land. For more detail on the ARC process, see [Part 2, Chapter 23, Acquisition and Restoration Council \(ARC\) Coordination](#).

## 7.6 REFERENCES

- American Association of State Highway and Transportation Officials (AASHTO), 2011. Green Book: A Policy on the Geometric Design of Highway and Streets. 6th edition
- 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>
- FHWA. 2012. Guidance on Section 4(f) Exception for Federal Lands Transportation Facilities. <https://www.fhwa.dot.gov/map21/guidance/guidefltpexempt.cfm>
- FHWA. 2012. Section 4(f) Policy Paper. July 20, 2012. <https://www.environment.fhwa.dot.gov/4f/4fpolicy.asp>
- FDOT. Section 4(f) References and Guides web page. [https://www.fdot.gov/environment/pubs/4\(f\)/Section4f.shtm](https://www.fdot.gov/environment/pubs/4(f)/Section4f.shtm)
- FDOT. Efficient Transportation Decision Making Manual, Topic No. 650-000-002. <http://www.fdot.gov/environment/pubs/etdm/etdmmanual.shtm>
- FDOT. 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 (LWCFA) of 1965. <https://www.nps.gov/subjects/lwcf/lwcf-in-your-neighborhood.htm>
- Memorandum of Understanding Between FDEP and FDOT and Concurred in by FHWA, Concerning the Development of Florida's Rails to Trails Program and Compliance with 49 U.S.C. 303 and 23 CFR 771 for Intersection Transportation Improvements That May Require the Use of Federal Funds. 1996. [https://environment.transportation.org/pal\\_database/agreement\\_details.aspx?pal\\_id=48](https://environment.transportation.org/pal_database/agreement_details.aspx?pal_id=48)
- Memorandum of Understanding Between FHWA and FDOT Concerning the State of Florida's Participation in the Surface Transportation Project Delivery Program Pursuant to 23 U.S.C. 327, December 14, 2016. <http://www.fdot.gov/environment/pubs/Executed-FDOT-NEPA-Assignment-MOU-2016-1214.pdf>
- National Parks Service- LWCF List. <https://www.nps.gov/subjects/lwcf/lwcf-in-your-neighborhood.htm>
- NEPA of 1969, 42 U.S.C. §§ 4321-4347. <https://www.gpo.gov/fdsys/pkg/USCODE-2014-title42/pdf/USCODE-2014-title42-chap55.pdf>
- NHPA of 1966, as amended, 54 U.S.C. § 300101 *et seq.* <https://achp.gov/digital-library-section-106-landing/national-historic-preservation-act>
- 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>

Title 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>

Title 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](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title36/36cfr59_main_02.tpl)

Title 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>

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](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>

## 7.7 FORMS

[Programmatic Section 4\(f\) Evaluation and Approval for FDOT Projects that Necessitate the Use of Historic Bridges, Form No. 650-050-50](#)

[Section 4\(f\) de minimis Determination for Historic Sites, Form No. 650-050-46](#)

[Section 4\(f\) de minimis Determination for Parks, Recreational Areas and Wildlife or Waterfowl Refuges, Form No. 650-050-47](#)

[Section 4\(f\) Determination of Applicability, Form No. 650-050-45](#)

[Section 4\(f\) Exceptions/Exemptions Determination, Form No. 650-050-48](#)

[Section 4\(f\) Net Benefit Programmatic for Historic Sites, Form No. 650-050-53](#)

[Section 4\(f\) Net Benefit Programmatic for Public Parks, Recreation Lands and, Wildlife and Waterfowl Refuge, Form No. 650-050-54](#)

[Section 4\(f\) No Use Determination, Form No. 650-050-49](#)

[Section 4\(f\) Programmatic Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites, Form No. 650-050-51](#)

[Section 4\(f\) Programmatic Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges, Form No. 650-505050-52](#)

[Section 4\(f\) Statement of Determination for Independent Bikeway or Walkway for Construction Projects, Form No. 650-050-55](#)

## **7.8 HISTORY**

5/22/1998, 9/1/2016, 6/14/2017: NEPA Assignment and re-numbered from Part 2, Chapter 13, 1/14/2019

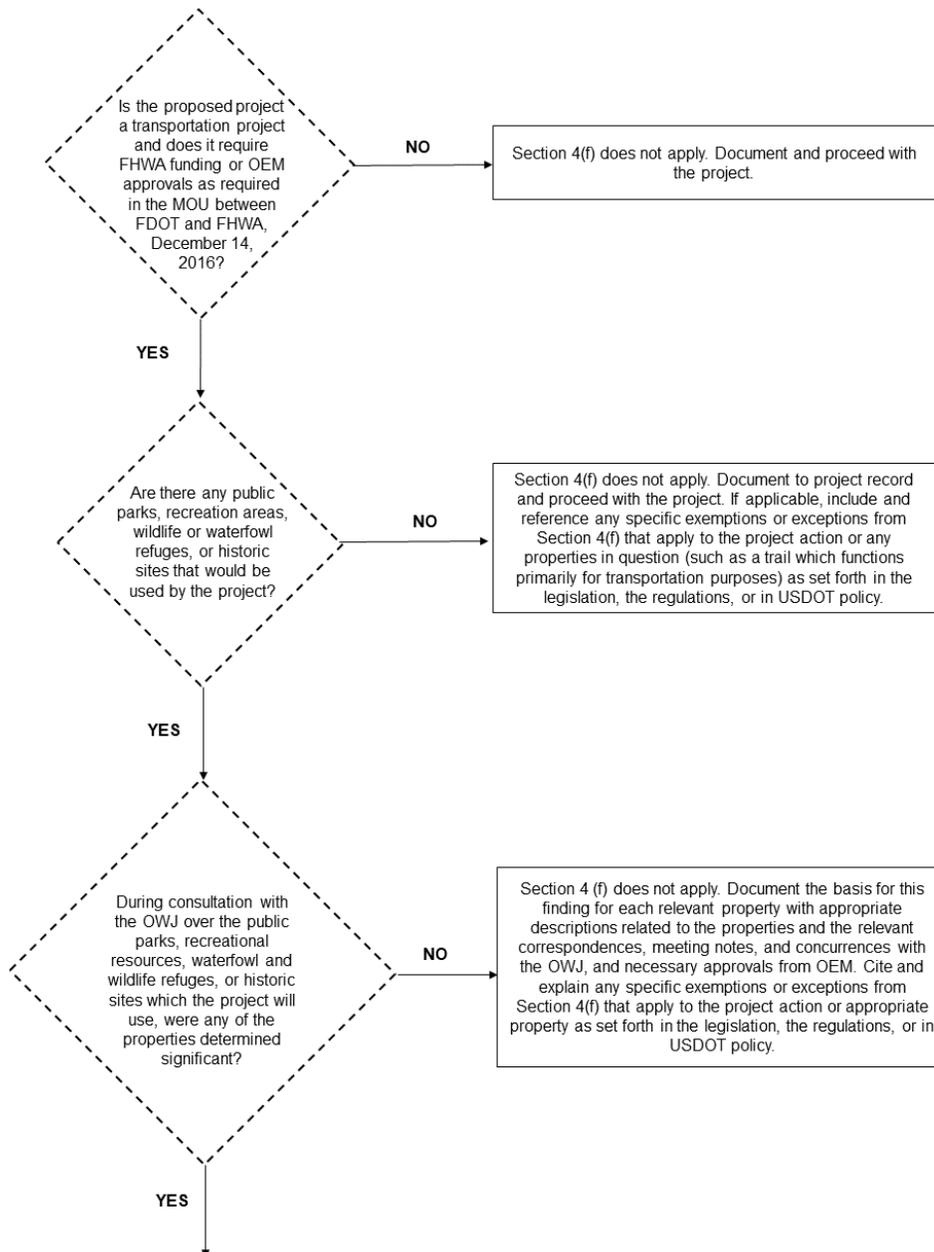


Figure 7-1 Flow Chart

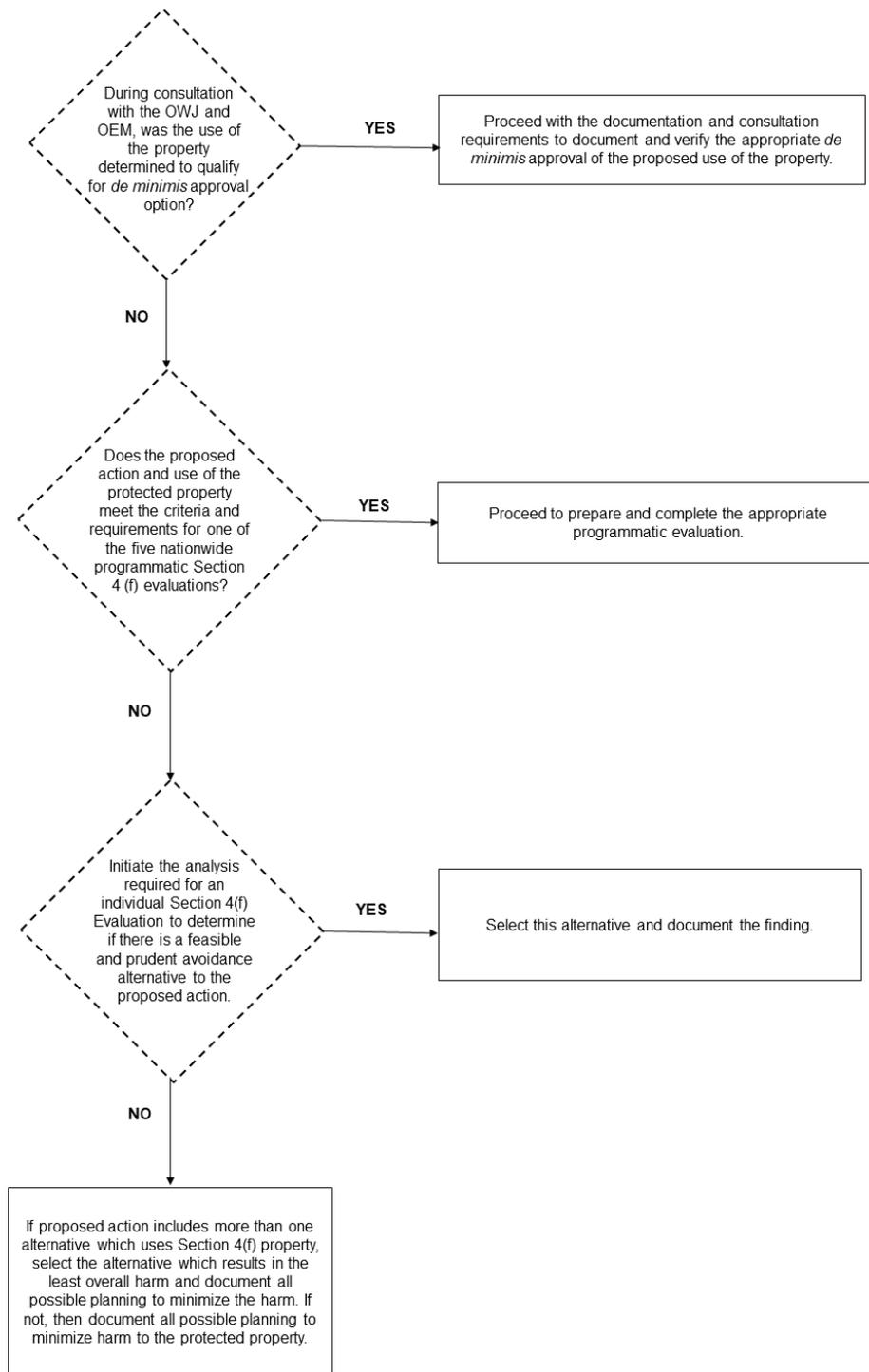


Figure 7-1 Flow Chart (Page 2 of 2)