

Section 4(f) Review Guidance

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NEBRASKA

Good Life. Great Journey.

DEPARTMENT OF TRANSPORTATION

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Acronyms, Abbreviations, and Terms

AASHTO	American Association of State Highway and Transportation Officials
ACHP	Advisory Council on Historic Preservation
APE	Area of Potential Effects
CE	NEPA Categorical Exclusion
CERT	Nebraska Conservation and Environmental Review Tool
CFR	Code of Federal Regulations
DEIS	NEPA Draft Environmental Impact Statement
EA	NEPA Environmental Assessment
EDU	Environmental Documents Unit
EDU Supervisor	The NDOT Environmental Section Supervisor that oversees the EDU
EIS	NEPA Environmental Impact Statement
FHWA	Federal Highway Administration
FLH	Federal Lands Highway
GIS	Geospatial Information System
LPA	Local Public Agency
MOU	Memorandum of Understanding
NDOT	Nebraska Department of Transportation
NEPA Specialist	NDOT Environmental Section staff with Professional Qualified Staff certification for "NEPA Specialist" as administered by the NDOT Environmental Section Training Plan.
NEPA	National Environmental Policy Act
NEPA Team Lead	The NDOT supervisor that oversees NDOT NEPA Specialists
NGPC	Nebraska Game and Parks Commission
NPS	National Park Service
NRHP	National Register of Historic Places
OWJ	Official with Jurisdiction
PA	Programmatic Agreement
PQS	Professionally Qualified Staff
PCM	Project Coordination Meeting
Project Name	The official project name
Project Number	The federal-aid number assigned to the project
QC	Quality Control

ROW	right-of-way
SAFETEA-LU Act	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.
Section 106	Section 106 of the National Historic Preservation Act of 1966
SHPO	State Historical Preservation Officer
TCP	Traditional Cultural Place
THPO	Tribal Historic Preservation Officer
USACE	United States Army Corps of Engineers
USC	United States Code
USDOT	United States Department of Transportation
USFWS	United States Fish and Wildlife Service
WSR	Wild and Scenic River

1.0 Introduction

This Section 4(f) guidance document aids Nebraska Department of Transportation (NDOT) personnel and consultants in the implementation of the Section 4(f) regulations for transportation-related projects. Included is guidance for decision-making, ultimately leading to the final Section 4(f) determination.

Section 4(f) refers to the original section within the United States Department of Transportation (USDOT) Act of 1966 which set the requirement for consideration of park and recreational lands, wildlife and waterfowl refuges, and historic sites for federally funded transportation projects. The law, now codified in two places (49 U.S.C. 303 and 23 U.S.C. 138), is implemented by the Federal Highway Administration (FHWA) through regulations found at [23 CFR 774](#).

Section 4(f) reviews for Environmental Assessments (EA), Environmental Impact Statements (EIS), and those Categorical Exclusions (CE) not assigned to NDOT under CE Assignment continue to be processed in accordance with the procedures contained within this document and the Environmental Procedures Manual, with the exception that review and approval of those 4(f) determinations are retained by FHWA. This procedure includes any consultations described in this manual as required with the Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead (see page 10 for examples). See Chapter 1, Overview in the Environmental Procedures Manual for more information on CE Assignment.

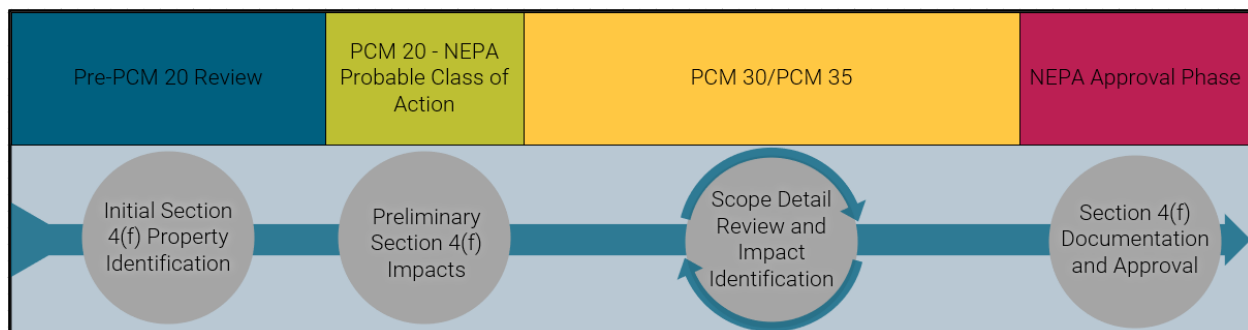
The following resources are available through various Federal websites, and should be consulted regularly throughout the Section 4(f) evaluation process:

- [Section 4\(f\) Tutorial](#)
- [Section 4\(f\) Policy Paper](#)
- [Center for Environmental Excellence by American Association of State Highway and Transportation Officials \(AASHTO\): Complying with Section 4\(f\) of the U.S. DOT Act](#)
- [23 CFR 774](#)

2.0 Section 4(f) Properties Identification

The Section 4(f) Properties Identification process evaluates and documents the applicability of Section 4(f) to recreation areas and wildlife and waterfowl refuges that may be affected by NDOT transportation related projects. The process includes determining the Section 4(f) study area (Section 2.1), making Section 4(f) property qualification determinations (Section 2.2-2.6), and creating the Section 4(f) Properties Identification Documentation (Section 2.7). The Section 4(f) Properties Identification process works in tandem with the Section 106 of the National Historic Preservation Act of 1966 (Section 106) review process which identifies historic sites, archeological resources, and traditional cultural places. Together these two processes identify the totality of Section 4(f) resources.

The Section 4(f) Properties Identification process begins prior to, and in support of, the determination of the probable National Environmental Policy Act (NEPA) class of action and the Project Coordination Meeting (PCM) 20. The probable NEPA class of action documentation and the meeting minutes for the PCM 20 and PCM 30 must include a list of all potential Section 4(f) properties that have the potential to be used by the project (including Section 106 resources) and a preliminary estimate of the potential type of use (temporary, permanent, constructive). Identification and documentation efforts are repeated as necessary through the project development process as more project scope details and potential impacts emerge and as the study area is adjusted. The Properties Identification process and the Section 106 process inform the determination of Section 4(f) use (Section 3.0). Final Section 4(f) Properties Identification documentation is created for use in NEPA documentation and subsequent re-evaluations (Section 2.7).



2.1 - Section 4(f) Study Area

The Section 4(f) study area includes all properties:

- directly abutting project activities;
- that may be acquired for temporary easements or temporary/permanent right-of-way;
- that may be impacted by access restrictions; or,

- that are in reasonable proximity to project activities if there is the potential for “constructive use” (see Section 3). “Reasonable proximity” for CE projects will be defined as areas directly adjacent to project activities.

The study area for historic sites, archeological resources, and traditional cultural places is the “Section 106 Area of Potential Effects (APE)” as defined by agreements with FHWA, the Nebraska State Historic Preservation Officer, the Advisory Council on Historic Preservation (ACHP), and NDOT Section 106 Specialists.

Evaluation and documentation must be updated if the study area expands due to project changes or the realization of new project impacts (right-of-way, access restrictions...etc.).

2.2 - Properties that Qualify for Section 4(f) Protection

A property is protected by Section 4(f) based on the below applicability criteria, as defined across [23 CFR Part 774](#):

- Planned or existing parks and recreational areas of national, state, or local significance that:
 - are publicly owned;
 - are open to the public during normal hours of operation; and,
 - primarily serve a recreational purpose.
- Planned or existing publicly owned wildlife and waterfowl refuges of national, state, or local significance that:
 - are publicly owned;
 - are open to the public (unless public access interferes with the primary purpose of the refuge); and,
 - have wildlife and waterfowl refuge activities as a primary purpose.
- Historic sites of national, state, or local significance that are:
 - listed on or determined eligible for listing on the National Register of Historic Places.

The below table serves to further illustrate this:

Requirements for Section 4(f) Protection					
	Public Ownership	Open to Public	Recreational Activities	Wildlife and Waterfowl Refuge Activities	NRHP Eligible or Listed
Parks and Recreational areas	X	X	X		
Wildlife and Waterfowl Refuges	X	X (Unless it interferes with refuge's primary purpose)		X	
Historic Sites					X

In some cases, questions regarding the above applicability criteria may result in the need to coordinate with a representative of the administering agency of the property, known in Section 4(f) regulations as the Official with Jurisdiction (OWJ), to gather additional information. The OWJ for parks, recreational areas, and wildlife and waterfowl refuges is defined as the official(s) 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. For historic properties, the OWJ will be the State Historical Preservation Officer (SHPO) or, if the property is located on tribal land, the Tribal Historic Preservation Officer (THPO). For more information on determining the OWJ for a property, refer to [23 CFR 774.17](#) or to the Section 4(f) Policy Paper.

The following is a non-exhaustive list of common example properties and their corresponding OWJ. (Note, a single property may have more than one OWJ.):

- City park: city parks department
- State Recreation Area: Nebraska Game and Parks Commissions (NGPC) and U.S. Army Corps of Engineers (USACE)
- National wildlife refuge: U.S. Fish & Wildlife Service (USFWS)
- School grounds: school superintendent
- Historic Property: SHPO
- Historic Property on Tribal Land: THPO

2.3 – Applicability Criteria for Parks, Recreation Areas, and Wildlife/Waterfowl Refuges

This section describes applicability criteria for parks, recreation areas, and wildlife/waterfowl refuges. For atypical properties, see below or consult the FHWA [Policy Paper Part II](#). If it is unclear whether a property should be removed for Section 4(f) consideration based on the criteria below, coordination with the NDOT Environmental Section Manager, the Environmental Documents Unit Supervisor, or the NEPA Team Lead is required. See Section 2.7 for documentation requirements in these circumstances.

Publicly owned: A publicly owned property is a property owned by a federal, state or local government or governmental agency. If a governmental body has a permanent proprietary interest in the land (such as a permanent easement, or in some circumstances, a long-term lease), the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead will determine on a case-by-case basis whether the particular property should be considered publicly owned. Information in the lease agreement, such as the primary function of the property and the duration of the lease, will help determine whether the property should be considered publicly owned for purposes of Section 4(f).

Federally recognized Indian Tribes are sovereign nations and the land owned by them is not considered publicly owned within the meaning of Section 4(f). Therefore, Section 4(f) does not automatically apply to tribal land.

Open to the public: A property that is open to the public is accessible for public use during normal hours. School practice fields or playgrounds that serve a walk-on recreation purpose for the general public after school hours are generally considered open to the public. If the facility serves only school activities and functions, it is not considered to be open to the public.

In situations where it is determined that the property or resource owned by a Tribal Government or within an Indian Reservation functions as a significant public park, recreational area, or wildlife and waterfowl refuge (which is open to the general public), the land would be considered Section 4(f) property.

Used primarily for recreation: A property that serves recreational activities (i.e., walking, hiking, bird watching, or organized sports) as a major purpose are considered to be used primarily for recreation. Determinations may be confirmed via a master plan or comprehensive plan. In cases where it is unclear or cannot be verified by other means, consultation with the OWJ(s) is required to confirm the property status and intended use.

When assessing if a pedestrian or bicycle path is primarily used for recreation, reviewing the management plan for the facility, the OWJ(s) website, or any original documentation from when the facility was created or designated is helpful in determining primary use. Unless the facility is officially designated for uses other than transportation, such as part of a recreational trail network or park feature, it will be assumed the facility is primarily used for transportation.

Section 4(f) applies to publicly owned portions of federally designated Wild and Scenic River (WSR) areas that are designated in a management plan as a significant park, recreation area, or wildlife and waterfowl refuge. The OWJ should be consulted to determine how the river is designated, how the river is used, and how the river is described in its management plan. The OWJ over a WSR would be

the officials of the federal agency or agencies that own or administer the portion of the river corridor in question. In Nebraska, this will be the National Park Service (NPS) or the USFWS. The final determination of whether Section 4(f) is applicable to a WSR lies with NDOT. Permitted river portage facilities (access roads, parking lots, boat launches) on NDOT ROW that are not associated with a Section 4(f) qualifying WSR may still qualify for Section 4(f) protections. Section 4(f) does not apply to segments of navigable waters the NGPC has designated as “water trails”. The NGPC does not own or manage any segment of river for recreational use. Likewise, Section 4(f) does not apply to river segments identified as part of the Nationwide Rivers Inventory (NRI) in Nebraska when there is no official management plan for that segment of river.

Planned: A facility is considered “planned” (rather than “existing”) when a public entity owns the property and has formally designated and determined it to be significant for park, recreation area, or refuge purposes. Evidence of formal designation is the inclusion of the planned facility into a city or county master or comprehensive plan. A search for planned facilities only needs to take place for projects that would acquire ROW.

Multiple-use property: A multiple-use property has designated uses in addition to recreation, wildlife/waterfowl conservation, or historic preservation. Section 4(f) applies only to those portions of a multiple-use public property that are designated by statute or identified in an official management plan of the administering agency as being primarily for park, recreation, or wildlife and waterfowl refuge purposes, and are determined to be significant for such purposes. Section 4(f) will also apply to any historic sites within the multiple-use public property that are on or eligible for the National Register. ([FHWA Policy Paper Part II, Public Multiple-Use Land Holdings](#), 23 CFR 774.11(d)).

Section 4(f) applies only to portions of a public-school campus developed and/or used for public park or recreation purposes such as baseball diamonds, soccer fields, tennis courts, track and field facilities, and other features such as jungle gyms or swing sets. This can also include open space or practice fields if those areas serve a park or recreation function. The NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead must be consulted to assure the reasonableness of the justification for a multiple-use property’s Section 4(f) boundary.

National, State or Local Significance: A property is significant for Section 4(f) if the availability and function of the property plays an important role in meeting the objectives the OWJ has defined for it. Park, recreational areas, and wildlife and waterfowl refuges otherwise determined to qualify for Section 4(f) protection, given the above criteria, are assumed to be significant absent a significance determination stating otherwise provided by the OWJ(s) of the property. The NDOT Environmental Section Manager, Documents Unit Supervisor, or the NEPA Team Lead will review OWJ determinations that a park, recreation area, or wildlife and waterfowl refuge is not significant to assure the reasonableness of the determination (23 CFR 774.11(c)).

2.4 - Applicability Criteria for Wildlife/Waterfowl Refuges

All applicability criteria described in Section 2.3 apply to this section except “used primarily for recreation” and “open to the public.” Instead, wildlife and waterfowl refuges are governed by two unique criteria.

Used primarily for wildlife and waterfowl refuge purposes: Wildlife and waterfowl refuges must be used primarily for refuge purposes to qualify for Section 4(f) protection. Wildlife and Waterfowl refuge

and wildlife and waterfowl refuge purposes are not defined in [23 CFR 774.11](#). Instead, FHWA considers the National Wildlife Refuge Administration Act contemporaneous legislation in the implementation of Section 4(f) regarding refuges. To that end, for the purposes of Section 4(f), National Wildlife Refuges are always considered wildlife and waterfowl refuges and therefore subject to Section 4(f). Further, any significant publicly owned public property (including waters) where the primary purpose of such land is the conservation, restoration, or management of wildlife and waterfowl resources including, but not limited to, endangered species and their habitat is a wildlife and waterfowl refuge for the purposes of Section 4(f). If available, the management plan for the area should be consulted to determine whether the primary use is for wildlife and waterfowl refuge purposes. Recreational activities may or may not be allowed on wildlife or waterfowl refuges and should be considered separately when analyzing whether a wildlife or waterfowl refuge is used primarily for refuge purposes.

For more information regarding wildlife and waterfowl refuges and determining whether a property is used primarily for wildlife and waterfowl refuge purposes, refer to the FHWA Policy Paper Part II, Question 1E.

Open to the public: Wildlife and waterfowl refuges may be closed to public access to accommodate preservation purposes and still qualify for Section 4(f) protection.

2.5 - Applicability Criteria for Historic Properties, Archeological Sites and Traditional Cultural Places

To qualify for Section 4(f) protection, historic properties must be listed on the National Register of Historic Places (NRHP) or eligible for listing in the NRHP. NRHP listed or eligible historic properties will be identified as a part of the Section 106 process and documented in the Section 106 Professionally Qualified Staff (PQS) memo, following the processes established in the 2023 Programmatic Agreement (PA) among The Federal Highway Administration, The Nebraska State Historic Preservation Officer, The Advisory Council on Historic Preservation, and The Nebraska Department of Transportation to Satisfy the Requirements of Section 106 for the Federal-Aid Highway Program In The State of Nebraska and the NDOT National Historic Preservation Act Section 106 Guidelines (Section 106 Process). Within an NRHP listed or eligible historic district, Section 4(f) applies to those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. Elements within the boundaries of a historic district are assumed to contribute, unless they are determined by the Section 106 Process not to contribute.

Section 4(f) applies to archeological sites that are on or eligible for the NRHP and that warrant preservation in place, including those sites discovered during construction. Section 4(f) does not apply if NDOT determines, after consultation with the SHPO/THPO, federally recognized Indian tribes (as appropriate), and the Advisory Council on Historic Preservation (if participating) that the archeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed not to recover the resource) and has minimal value for preservation in place, and the SHPO/THPO and ACHP (if participating) does not object to this determination (See 23 CFR 774.13(b)). Section 4(f) requirements apply to archeological districts in the same way they apply in historic districts, but only where preservation in place is warranted.

A Traditional Cultural Place (TCP) is defined generally as land that may be eligible for inclusion in the NRHP because of its association with cultural practices or beliefs of a living community that; (a) are

rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. Land referred to as a TCP is not automatically considered a historic property, or treated differently from other potentially historic properties. A TCP must also meet the NRHP criteria as a site, structure, building, district, or object to be eligible or listed in the NRHP, and thus qualify for Section 4(f) protection. For those TCPs of significance to an Indian tribe, the THPO or designated representative of the Indian tribe should be acknowledged as possessing special expertise to assess the NRHP eligibility of the resources that possess religious and cultural significance to them. TCPs may be eligible under multiple criteria and therefore should not be presumed to be eligible only as archeological resources (See 23 CFR 774.11(e)).

2.6 - Resources for Identifying Non-Historic Section 4(f) Properties

Many online resources can be utilized to support identifying non-historic Section 4(f) Properties (parks, recreation areas, wildlife/waterfowl refuges). Table 2-1 is composed of online resources that may be helpful in identifying Section 4(f) properties in Nebraska. The table is not intended to be comprehensive and should be used in conjunction with common online research tools and mapping applications. When property boundaries are unknown or precise information is required, NDOT Right-of-Way Division should be consulted to assist in determining property boundaries.

Table 2-1

<i>NGPC Resources:</i>	
Nebraska Conservation and Environmental Review Tool (CERT)	An NGPC managed Geospatial Information System (GIS) application particularly useful for identifying NGPC owned property.
NGPC Parks	Details NGPC managed park and recreational areas.
NGPC Trails	Details NGPC managed trails, including hiking, biking, and water trails.
NGPC Map and Data Portal	Offers geo-spatial data sets related to conservation, fish and wildlife management, parks, and outdoor recreation in Nebraska.
<i>USFWS Resources</i>	
USFWS National Wildlife Refuge System	Details USFWS National Wildlife Refuge System

USFWS Rainwater Basin Wetland Management Area/Waterfowl Production Areas	Details the USFWS Rainwater Basin Wetland Management Area in southcentral Nebraska, which is composed of several Waterfowl production areas with the potential for recreational or refuge use.
USFWS Facilities Viewer	Displays USFWS properties.
USFWS "Where to Hunt" Viewer	Displays USFWS properties in interactive GIS application.
<i>Local Public Agency (LPA) Recreational Resources</i>	
City of Lincoln Park Facilities	A – Z listing of City of Lincoln parks.
City of Lincoln Trails	Details City of Lincoln trails, including a trail viewer.
City of Omaha Parks Finder	Displays City of Omaha parks in interactive GIS application.
City of Grand Island City Parks	Displays City of Grand Island parks in interactive GIS application.
<i>LPA Comprehensive Plan Resources</i>	
City of Lincoln Comprehensive Plan	City of Omaha Master Plan

2.7 - Section 4(f) Property Identification Documentation

Recreational properties and refuges that qualify for Section 4(f) protection, as well as those properties that were reviewed but determined to not qualify for Section 4(f) protection, must be documented in the official project file. This documentation step does not apply to historic properties protected by Section 4(f), which will be identified and documented as a part of the Section 106 process.

The documentation must include a project aerial map (with north arrow, scale bar, and legend) that depicts qualifying properties with a fill and properties reviewed but not qualifying with a different fill. The fill must be partially transparent to allow the property aerial image to remain visible. The properties determined to qualify for Section 4(f) protection must be labeled. The documentation must

also include a table for all recreational and refuge properties reviewed containing the following columns:

- Property name
- Property type
- Entity the property is owned by
- Entity the property is managed by
- If the property is publicly owned
- If the property is open to the public
- If the property is primarily used for recreation or as wildlife or waterfowl refuge
- if the property is a multiple-use property
- if the property is existing or planned
- if the property is determined to qualify for Section 4(f) protection

Additional discussion must be included in the Section 4(f) Property Identification documentation in the following circumstances:

- A governmental body has a permanent proprietary interest in a privately owned property and the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead has been consulted whether the particular property should be considered publicly owned.
- A determination is made that a property does not qualify for Section 4(f) due to OWJ declaration of the lack of significance and the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead has been consulted to assure its reasonableness.
- A property is divided into multiple-uses and the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead has been consulted to assure the reasonableness of the demarcation of the Section 4(f) boundary.
- The status of a property is unclear and the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead has been consulted.

Quality Control (QC) review of the Section 4(f) Properties Identification determinations and documentation may occur in tandem with the QC reviews occurring for the NEPA document, or prior. Approval of Section 4(f) Properties Identification documentation is done through the final approval of the NEPA document.

3.0 Determination of Section 4(f) Use

There are three forms of Section 4(f) use [[23 CFR 774.17](#)]:

1. Permanent Incorporation:

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

2. Temporary Occupancy:

When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose. Examples of a temporary occupancy of Section 4(f) property include temporary easement, right-of-entry agreements, or other short-term arrangements involving a Section 4(f) property. A temporary occupancy will not result in a Section 4(f) use if all of the criteria in [§774.13\(d\)](#) are met.

3. Constructive Use:

- When there is a constructive use of a Section 4(f) property as determined by the criteria in [§774.15](#). Constructive uses occur when proximity effects substantially impair the protected features of the property. Constructive uses are rare and time intensive to address, therefore, if the project appears to result in a constructive use, consult with NDOT. Any constructive use determinations by NDOT must be shared with FHWA before application according to the terms of the CE Assignment MOU.

Because use has a specific meaning within the context of Section 4(f), avoid using other words, such as impact or affect, interchangeably. In most cases, impacts and affects are what result in a use and describing them otherwise can cause confusion.

At minimum, the following common project specific information is required to accurately determine whether a Section 4(f) use will occur:

- Clearly defined Section 4(f) property boundaries as determined during the Section 4(f) Property Identification process.
- Right-of-way information, including existing right-of-way boundaries; proposed new right-of-way, permanent easements, or temporary easements; and right-of-entry agreements or other negotiated access agreements.
- Temporary or permanent access restrictions that may impact an identified Section 4(f) property.
- Project construction impacts that may result in proximity impacts.

Environmental consultants should obtain right-of-way and access restriction information through the NDOT NEPA Specialist assigned to the project. For project specific right-of-way information, the NDOT NEPA Specialist will coordinate with NDOT ROW Division for State sponsored projects or the NDOT Local Assistance Division for locally sponsored projects. For access restriction and construction impact information, the NDOT NEPA Specialist will coordinate with NDOT Roadway Design Division for State sponsored projects or the NDOT Local Assistance Division for locally sponsored projects.

If there are multiple Section 4(f) properties within the project study area, each property must be assessed for use independently, including measures to minimize harm and any other mitigation. Documentation is required for each property that will be used by the project, including any properties or uses qualifying for an exception to the requirement for Section 4(f) evaluation and approval.

If there will be a use to multiple Section 4(f) properties along one alignment, NDOT will consider all relevant concerns to determine if a major impact outweighs multiple minor impacts. If multiple Section 4(f) properties will be impacted by a project and an Individual Evaluation is required, the identification of an alternative with least overall harm to Section 4(f) resources will be required. See *Section 6.2, Alternatives with Least Overall Harm* below for further guidance on projects with multiple properties, uses, and alternatives.

The property type and determination of Section 4(f) use type guides the selection of the appropriate Section 4(f) determination tool for the project. Coordination with the OWJ(s) regarding anticipated uses may be needed to assist in selecting the appropriate processing tool. NDOT recommends environmental consultants submit Section 4(f) use determinations to the NDOT NEPA Specialist, Environmental Section Manager, Environmental Documents Unit Supervisor, and/or the NEPA Team Lead as soon as possible after the project PCM 35 and well before completion of project NEPA documentation. Early coordination will facilitate efficiency in a potentially lengthy process and ensure identification of the correct Section 4(f) tool.

3.1 - Exceptions

Regulations allow for certain exceptions to the requirement for Section 4(f) evaluation and approval. The exceptions include, but are not limited to, the following:

- (a) The use of historic transportation facilities in certain circumstances;
- (b) Archeological sites that are NRHP listed or eligible, given certain circumstances;
- (c) Designations of parks/recreation areas/refuges made late in project development;
- (d) Temporary occupancies so minimal that they are not considered a use;
- (e) Federal lands transportation facilities;
- (f) Certain trails, paths, bikeways, and sidewalks, under certain circumstances; and
- (g) Transportation enhancement projects and mitigation activities.

Each of the above exceptions have set parameters that must be fulfilled to apply them to a specific property or use. Refer to [23 CFR 774.13](#) for a complete listing of these parameters and consult the

[FHWA Policy Paper](#) for additional guidance on their application. Additional guidance for criterion (e) – Federal lands transportation facilities – can be found in the [Federal Lands Highway \(FLH\) Guidance on Section 4\(f\) Exception memo](#). Note that most exceptions require coordination with the OWJ(s) to determine if they agree that a Section 4(f) Exception applies to the potentially protected property.

It is important to **ensure that all parameters listed in the relevant exception have been satisfied**. Failure to do so could result in significant project delays.

More commonly used 23 [CFR 774.13](#) Exceptions in Nebraska include:

- (a) The use of historic transportation facilities in certain circumstances:
- (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:
- (1) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, or this work achieves compliance with Section 106 through a program alternative under [36 CFR 800.14](#); and
- (2) The official(s) with jurisdiction 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 National Register, 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](#).

23 CFR 774.13 Text

This exception is specific to the repair, rehabilitation or maintenance of a NRHP listed or eligible transportation facility, or feature of a transportation facility. This cannot be used for replacement of listed or eligible facilities or features, or for actions which would adversely affect the facility or feature under Section 106. Repairs or rehabilitation of an historic bridge, where the SHPO concurs the activity would not adversely affect the eligibility of the historic bridge, would be an example of the applicability of this exception.

- (d) Temporary occupancies of land which 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 Official(s) with Jurisdiction over the Section 4(f) resource regarding the above conditions.

For a temporary impact to qualify for the temporary occupancy exception, it is critical that there be no adverse permanent impacts and that there be no interference with the protected activities, features, or attributes of the property either on a permanent or temporary basis. The Section 4(f) property needs to be accessible and usable by the public for its intended purpose throughout construction for the exception to apply. For example, if there will be interference with the public's ability to use ball fields or playground equipment during construction, this exception would not apply.

In addition, if recreational features of the property will be permanently impacted by the project, the exception likely will not apply. For example, in most circumstances the removal of recreational features cannot occur under this exception. However, the removal of a handful of small trees within the property boundary may still qualify the property for the exception, if the trees are not integral components of the property, if they are replaced in a manner that brings the property back to pre-existing conditions or better, and both the OWJ(s) and NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead agree.

For a temporary impact to a trail to qualify for the temporary occupancy exception, it is critical that trails be accessible and usable by the public throughout construction. If a small segment of a trail must be interrupted during construction (e.g., a few feet impacted to tie in a new trail, a road crossing of a trail interrupted during milling operations, etc.), the exception may still apply. For example, consider whether a short re-routing of the trail (e.g., up to tenth of a mile) may be feasible for a short time during construction to maintain the continuity of the trail.

For more information on Temporary Occupancy exempted and non-exempted use, please see the [FHWA Section 4\(f\) Policy Paper Q&A #7A](#).

(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 as defined in [§ 774.17](#);
- (3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, 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.

If it appears (f)(3) may apply, coordination with the NDOT ROW Division or Local Public Agency will be required to determine whether a lease, permit to occupy, or other designation is present that limits a trail, path, bikeway, and/or sidewalk to a specific location within transportation right-of-way (ROW). In some circumstances, coordination with the OWJ may also be required. In the event a trail, path, bikeway, and/or sidewalk within transportation ROW is not limited to any

specific location within that ROW, coordinate with NDOT Roadway Design Division to ensure that continuity of the trail can be maintained.

If this exception appears to apply to a project, coordinate early with the NDOT NEPA Specialist, Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead to verify acceptable application.

(g) Transportation enhancement projects and mitigation activities, where:

- (5) 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
- (6) The Official(s) with Jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

23 CFR 774.13 Text

For this exception to apply, “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.” Trails being constructed with federal funds that are simply passing through a Section 4(f) property (such as a park) with an origin or destination point outside the boundaries of that property may not qualify for this exception, unless it can be substantiated that the sole use of the Section 4(f) property (e.g., park) by the trail project will lead to the preservation or enhancement of the property being impacted (e.g., park), and both the OWJ(s) and NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead agree that the exception applies. However, if the trail work noted in this example is an incidental element of a larger transportation project as opposed to a stand-alone trail project, this exception would not apply. For more information, see the [FHWA Policy Paper Q&A #17B](#).

Exception Documentation

If an exception applies to a Section 4(f) property or potential use, complete the Section 4(f) Exceptions form. A separate Form is required for each Section 4(f) property for which an exception applies. The documentation submitted for NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead approval will include: the Exceptions Form, a series of maps showing the Section 4(f) property (further description in the Exceptions Form), and written concurrence from the OWJ(s) (if required). NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead approval is required.

On the Section 4(f) Exceptions Form:

- Official(s) with Jurisdiction: Provide the following contact information for each OWJ: name, organization, title, phone number/e-mail.
- Property Description: Provide any additional information about the Section 4(f) property that would support the application of the selected exception(s). For example, property size and location, function, ownership, availability to the public, etc.

- Type of Exception: At the completion of the Section 4(f) Exceptions Form, select the most appropriate exception from the drop-down menu (realizing there may be instances when more than one exception applies).
- Establishing Section 4(f) Exception Relevancy: From the list of exceptions, select all of the exceptions that apply to the identified property, realizing that more than one exception may apply.
 - All historic archeological properties qualify for the exception to Section 4(f) detailed at 23 CFR 774.13(b) unless the Section 106 PQS determines that the historic archeological site has important value for preservation in place. This information can be found on page 2 of the NDOT Section 106 Tier II Review form or through coordination with the NDOT PQS. If exception (b) is applicable to the property, check the box and obtain appropriate NDOT signatures, and documentation is complete.
- Project Impacts and Exception Description: Discuss project impacts and why the selected exception applies, including any coordination or other pertinent information used for justification.

If exception (d) is applicable to the property, ensure a description of how the five required conditions will be satisfied is included. Include the size of the property in acres and anticipated temporary impacts).
- Mitigation: Include any measures to be implemented that would reduce impacts to the property or its users.
- Approval Signatures: Final approval for the Exceptions Form would be required from the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, the NEPA Team Lead, or Environmental Project Manager.

3.2 - De Minimis Impact Determinations

In 2005, Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU Act) allowed FHWA to streamline the Section 4(f) evaluation process for projects that have *de minimis* impacts. *De minimis* impacts are defined as impacts that will not adversely affect the features, attributes or activities that qualify the parks, recreation areas, or refuges for protection. *De minimis* impact determinations also apply to historic properties with “No Historic Properties Affected” or “No Adverse Effect” determinations pursuant to the Section 106 PA.

A *de minimis* impact determination may be made for permanent incorporation or temporary occupancy of a Section 4(f) property, but not for constructive uses. Measures to avoid, minimize, or mitigate impacts or enhance the resource are considered before the [de minimis determination](#) is made. In other words, the determination of whether a use is an adverse effect to the features, attributes or activities of the protected property is made after taking into account the efforts to minimize harm and mitigate potentially negative impacts.

“The *de minimis* impact determination...shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement

measures are taken into account, are *de minimis*..., and that the coordination required...has been completed.” (23 CFR 774.7(b))

NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead determines whether a *de minimis* determination is appropriate. Once it has been concluded that a *de minimis* impact applies, public involvement actions are required, and the practitioner must provide public comments to the OWJ(s) for consideration prior to or as a part of the request for their concurrence. Written concurrence from the OWJ(s), as well as the public involvement memo and attachments, must be included in the Section 4(f) *de minimis* documentation. See the Public Involvement section below and the Environmental Procedure Manual Chapter 9: Public and Agency Involvement for further guidance.

If the impact has been determined to be *de minimis*, complete the Section 4(f) *De Minimis* Form. A separate *De Minimis* Form is required for each Section 4(f) property for which a *de minimis* determination is appropriate. Informal coordination with NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead is recommended at the start of the *de minimis* review process to ensure the proper tool is being used.

For local governments or consultants, coordination with NDOT Environmental Documents Unit (EDU) is required before starting the *de minimis* review. The documentation submitted for NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead approval will include: the *De Minimis* Form, a detailed project map, public involvement documentation (memo and attachments), and written concurrence from the OWJ(s).

When requesting concurrence from the OWJ(s), provide the public involvement documentation and notification of the intent to make a *de minimis* determination. The OWJ(s) is NOT concurring on the *de minimis* determination, but rather that the impact will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f). When drafting the letter to the OWJ(s), be sure to include the following: (1) project description, (2) a brief explanation of Section 4(f) and how it applies to the project, (3) Section 4(f) analysis, including how the three conditions for *de minimis* will be satisfied, (4) a summary of the public involvement, and (5) request for concurrence.

On the Section 4(f) *De Minimis* Form:

- Official(s) with Jurisdiction: Provide the following contact information for each OWJ: name, organization, title, phone number/e-mail.
- Section 4(f) *De Minimis* Eligibility: Answer only the questions in the applicable block (A or B), as well as the N/A question at the beginning of the inapplicable block. All questions in Block C must be answered.
 - Park, Recreation Area, and Refuge: There may be more than one date for public involvement activities or OWJ(s) concurrence. Include all applicable dates.
 - Historic and Archeological Resource: There may be more than one date for public involvement activities or SHPO and/or THPO concurrence. Include all applicable dates. Public involvement for historic and archeological resources would follow the Environmental Procedure Manual Chapter 9: Public and Agency Involvement.

- For historic properties, the PQS field will always be filled out. If there is a date in the SHPO or THPO field, this would indicate the entity is the OWJ. The date in the field would be the date the entity concurred on the Section 106 effect determination. "Programmatic" in the SHPO field indicates that a determination of "no historic properties affected" was made for the project per the Section 106 PA. Notification of NDOT's intent to apply *de minimis* will be provided via letter agreement (SHPO) or via project specific correspondence (THPO). A notation of "N/A" in the field indicates the entity was not the OWJ.
- Comments: If public involvement for *de minimis* occurs more than once, include a description of each public involvement event in the Comments box. Also include any other pertinent information to support the *de minimis* determination.
- Approval Signatures: Final approval for the *De Minimis* Form would be required from the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or NEPA Team Lead.

For further guidance regarding *de minimis* determinations, please consult the FHWA [Policy Paper Part II: De Minimis Impact Determinations](#).

Coordinate with the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead early if the use will exceed the listed maximum acquisition, and they will carefully consider if *de minimis* is appropriate. Early coordination is also required if there is potential for the action to adversely impact the intended use of the property (e.g., removal of any recreational equipment or other features), to determine if *de minimis* may be appropriate with the application of acceptable measures to minimize harm (e.g., relocate or replace equipment in a manner that does not adversely impact the property).

3.3 – Section 4(f) Use of Historic Properties

Processing the use of historic properties in Nebraska is governed by the [NDOT, FHWA, and SHPO Section 4\(f\) Letter Agreement](#). Per the letter agreement, NDOT has been given the authority to address the SHPO's OWJ responsibilities programmatically for CE projects when:

- A Section 4(f) *de minimis* determination is proposed to activities that result in a Section 106 determination of "no historic properties affected" or "no adverse effect" as established by the terms of the Section 106 PA;
- Applying Section 4(f) exception 23 CFR 774.13(a)(3) for activities related to historic transportation facilities, with a Section 106 determination of "no historic properties affected" or "no adverse effect" as established by the terms of the Section 106 PA; or,
- Applying Section 4(f) exception 23 CFR 774.13(b) to activities related to archeological sites, when the NDOT Section 106 PQS determines that an archeological site does not warrant preservation in place, and said determination is in compliance with the Section 106 PA.

When utilizing the letter agreement described above, ensure a copy is attached to applicable Section 4(f) documentation. If the letter agreement does not apply to an impact or potential Section 4(f) use of

a historic property, project specific OWJ coordination with the SHPO will be required. Please note that the letter agreement does not apply to Tribal owned historic properties.

4.0 Programmatic Evaluation

FHWA developed five nationwide programmatic Section 4(f) evaluations as a time saving procedural option for preparing individual Section 4(f) evaluations for certain uses of Section 4(f) property. Programmatic evaluations apply to specific projects that have a common fact pattern from a Section 4(f) perspective. Programmatic evaluations should only be considered when a Section 4(f) exception or de minimis determination cannot be applied.

Five programmatic Section 4(f) evaluations have been issued:

- [Section 4\(f\) Statement and Determination for Independent Bikeway or Walkway Construction Projects](#)
- [Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites](#)
- [Final Nationwide Section 4\(f\) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges](#)
- [Section 4\(f\) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4\(f\) Property](#) (Net benefit programmatic)
- [Programmatic Section 4\(f\) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges](#) (Historic Bridge programmatic)

The only programmatic regularly used in Nebraska is the Historic Bridge programmatic, though other programmatic could apply based on project impacts.

The application of programmatic evaluations requires coordination with the NDOT NEPA Specialist, NDOT Environmental Section Manager, NDOT Environmental Documents Unit Supervisor, and/or the NEPA Team Lead to ensure applicability. If one of the programmatic evaluations applies, the avoidance alternatives specified in the guidelines for each programmatic must be analyzed to determine whether they are feasible and prudent. These avoidance alternatives are the only alternatives to be considered when using a programmatic evaluation. If an avoidance alternative is determined to be feasible and prudent, it must be selected (see Section 5.1).

Coordination with the OWJ(s) is still required for certain programmatic evaluations. Provided other avenues of Section 4(f) compliance have been exhausted, project impacts resulting in the use of a Section 4(f) property that do not qualify for processing via a programmatic evaluation must be processed with an individual Section 4(f) evaluation (see Section 5).

For further guidance regarding the nationwide programmatic evaluations discussed above, please consult the [FHWA Environmental Review Toolkit](#) and the [FHWA Policy Paper Part I, 3.3.2](#).

See **Appendix A** for a comparison of Nationwide Section 4(f) Programmatic Evaluations.

If there is not a feasible and prudent alternative but a programmatic applies, consult the [FHWA Policy Paper Part I.4.0](#). At a minimum, the following five elements taken from the FHWA Policy Paper must be included in the programmatic Section 4(f) evaluation memo:

1. Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project; [23 CFR 774.11](#)
2. Whether or not there is a use of Section 4(f) property (including but not limited to right-of-way acquisition, temporary easements, or access closure); [23 CFR 774.17](#)
3. Records of public involvement, if any; [23 CFR 774.5](#)
4. Results of coordination with the Official(s) with Jurisdiction as applicable; [23 CFR 774.5](#) and
5. Documentation of the specific requirements (including but not limited to alternatives analysis and impact avoidance and minimization measures) of the programmatic evaluation that is being applied; 23 CFR 774.3(d)(1).

Also consult the [FHWA Section 4\(f\) Tutorial for Programmatic Evaluations](#) for guidance concerning structure, applicability, evaluation of alternatives, findings, mitigation and minimization, coordination, and approval procedures. In addition to the evaluation memo, documentation *in the project file* will include: maps (project location and impact) and written concurrence(s) from the OWJ(s).

- Approval Signatures: Final approval for the Programmatic Evaluations would be required from the NDOT Environmental Section Manager, Environmental Documents Unit Supervisor, or the NEPA Team Lead.

5.0 Individual Evaluation

NDOT is responsible for carrying out, monitoring and reviewing individual Section 4(f) evaluations in accordance with the provisions of the Section 326 Memorandum of Understanding (MOU). An individual Section 4(f) evaluation must be completed when approving a project that requires the use of Section 4(f) property if the use results in a greater than *de minimis* impact and a programmatic Section 4(f) evaluation cannot be applied to the project ([23 CFR 774.3](#)). The federally-outlined procedures for preparing and circulating Section 4(f) documentation is contained in [23 CFR 774.5](#) and [774.7](#), and FHWA's Technical Advisory, [T 6640.8A](#), Guidance for Preparing and Processing of Environmental and Section 4(f) Documents.

An [individual Section 4\(f\) evaluation](#) is processed in two phases – a draft and a final. Both documents must be submitted to the Environmental Document Unit Manager and/or the Environmental Section Manager for review and approval. Additionally:

- NEPA Actions and Section 4(f) reviews for EAs and EISs and those CEs not assigned to NDOT under the CE MOU must be submitted to the FHWA Division Office for review and approval.
- For CE's assigned to NDOT under the 326 MOU, the individual Section 4(f) evaluation is subject to a legal sufficiency review by the Nebraska Attorney General prior to a NEPA decision or approval. For projects not assigned to NDOT, the draft individual Section 4(f) evaluation is subject to a legal sufficiency review by FHWA's Office of Chief Counsel prior to a NEPA decision or approval.
- For CEs under assignment, the draft and final individual Section 4(f) evaluation are submitted to the Environmental Documents Unit Supervisor and/or the Environmental Section Manager for review and approval. In addition, the final individual Section 4(f) evaluation is subject to a legal sufficiency review by one of the Assistant Attorney Generals of the Transportation Bureau of the Nebraska Attorney General's Office assigned to assist the Environmental Section.
- FHWA and NDOT Legal Sufficiency review is intended to ensure that Section 4(f) requirements have been met, in case of a legal challenge to Section 4(f) use.

If an individual evaluation is anticipated for a project, early identification and notification of NDOT EDU is critical. Individual Section 4(f) Evaluations will take a minimum of a year to process and finalize, with multiple steps that must be completed before approval.

Consult the [FHWA Policy Paper Part I, 4.0](#) for specific information regarding the purpose of the individual Section 4(f) evaluation, as well as the essential information to be included in the evaluation document. At a minimum, the following eleven elements taken from the FHWA Policy Paper must be included in the individual Section 4(f) documentation:

1. Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
2. Whether or not there is a use of Section 4(f) property;

3. Activities, features, and attributes of the Section 4(f) property;
4. Analysis of the impacts to the Section 4(f) property;
5. Records of public involvement;
6. Results of coordination with the Official(s) with Jurisdiction;
7. Alternatives considered to avoid using the Section 4(f) property, including analysis of the impacts caused by avoiding the Section 4(f) property;
8. A least overall harm analysis, if appropriate;
9. All measures undertaken to minimize harm to the Section 4(f) property;
10. Comments submitted during the coordination procedures required by [23 CFR 774.5](#) and responses to the comments; and
11. Results of the internal legal sufficiency review.

For further description of document structure (draft and final evaluations), consult the [FHWA Section 4\(f\) Tutorial: Individual Evaluations](#).

5.1 - Feasible and Prudent Avoidance Alternatives

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. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

An alternative is not prudent if:

- (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
- (ii) It results in unacceptable safety or operational problems;
- (iii) After reasonable mitigation, it still causes:
 - (A) Severe social, economic, or environmental impacts;
 - (B) Severe disruption to established communities;
 - (C) Severe disproportionate impacts to minority or low income populations; or
 - (D) Severe impacts to environmental resources protected under other Federal statutes;

- (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
- (v) It causes other unique problems or unusual factors; or
- (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

([23 CFR 774.17](#)).

For further guidance regarding feasible and prudent alternatives, please consult the FHWA [Policy Paper Part I, 3.3.3.1](#).

The intent of the statute, and the policy of NDOT, is to avoid and, where avoidance is not feasible and prudent, minimize the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites by projects. Unless the use of a Section 4(f) property is determined to have a *de minimis* impact, NDOT must determine that no feasible and prudent avoidance alternative exists before approving the use of such land ([23 CFR 774.3](#)).

If there is a Section 4(f) use to the property and there is a feasible and prudent avoidance alternative, it **must** be selected. Documentation can be placed in the Section 4(f) block in the CE form or in the appropriate chapter of the EA/EIS, as applicable. If there is not a feasible and prudent avoidance alternative, coordination with NDOT Environmental Section Manager or Environmental Documents Unit Supervisor should occur to determine the alternative with the least overall harm ([23 CFR 774.7](#)).

5.2 - Alternatives with Least Overall Harm

If the analysis of avoidance alternatives concludes that there is no feasible and prudent avoidance alternative, each of which has a Section 4(f) use that cannot be avoided or resolved with a *de minimis* or programmatic determination, then the NDOT Environmental Section Manager or Environmental Documents Unit Supervisor may approve, from among the remaining alternatives, only the alternative that causes the least overall harm to the Section 4(f) property. If only one alternative is available for consideration, the project will move forward with this alternative, making every effort to minimize and mitigate the impact.

The selected alternative must include *all possible planning* ([23 CFR 774.17, All possible planning](#)). *All possible planning* means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project. This may include, but is not limited to, design modifications to reduce impacts, replacement of land or facilities, monetary compensation, or preservation of features or attributes.

To determine which alternative would cause the least overall harm, NDOT would compare and document the seven factors set forth in 23 CFR 774.3(c)(1):

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 officials with jurisdiction over each Section 4(f) property.
5. The degree to which each alternative meets the purpose and need for the project.
6. After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f).
7. Substantial differences in costs among alternatives.

For historic properties, consideration should be given to whether land is acquired from the property, or whether the structure would be removed or how the integrity of the resource is affected.

When a project has more than one Section 4(f) property, each property is treated separately for Section 4(f) documentation purposes and for considering feasible and prudent avoidance alternatives, but the properties are considered as a whole in terms of least overall harm. If impact avoidance is not possible, select the alternative with the least overall harm, documenting minimization efforts pursued and mitigation measures utilized in the individual evaluation.

6.0 Public Involvement

Public Involvement is important to encourage the public to get engaged early in the planning process and stay involved throughout many stages of the transportation planning and decision-making process. In certain circumstances, public involvement is required to specifically address Section 4(f) to provide the public with the opportunity to review and comment concerning the impacts on the protected activities, features or attributes of the Section 4(f) property. Below is a guide to when public involvement may be required to specifically address Section 4(f).

Specific information on NDOT public involvement practices can be found in the Environmental Procedure Manual Chapter 9: Public Involvement Procedure.

No Section 4(f) Properties:

- No additional public involvement would be required for Section 4(f).

No Use of Identified Section 4(f) Properties :

- No additional public involvement would be required for Section 4(f).

Exception:

- Specific public involvement is not necessary for Section 4(f); however, based on the scope of the project, public involvement may be required for other reasons.

De Minimis Impact

- The public notice and opportunity for comment may be combined with similar actions undertaken as part of the NEPA process as long as the proposed impacts and findings related to the Section 4(f) properties have been adequately disclosed. If a proposed action does not normally require public involvement, an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided. The public feedback must be provided to the OWJ(s) for consideration. Once the documentation of the *de minimis* impact evaluation is complete, include the following in the NEPA documentation: the *de minimis* form with maps, the OWJ concurrence, and the public involvement memo and attachments.
- For parks, recreation areas, or refuges, when there is a specific or isolated population that uses the Section 4(f) property, a more direct contact approach such as targeted mailing can be used. When it is unknown who uses the property, or the users come from a much larger geographic area, the public involvement requirement may involve a public meeting and/or hearing. If a public meeting or hearing will be used to satisfy the public outreach requirements of Section 4(f), be sure to clearly disclose such in the meeting or hearing notifications and advertisements (23 CFR 774.5 (b)(2)(i)).
- For historic properties, public notice and comment beyond that required in Section 106 (36 CFR 800) is not obligatory (23 CFR 774.5 (b)(1)(iii)).

- "The public involvement requirements associated with specific NEPA documents and processes will, in most cases, be sufficient to satisfy the public notice and comment requirements for the *de minimis* impact finding (23 CFR 774.5(b)(2))" provided the NEPA public outreach clearly discloses and solicits input on the Section 4(f) use as well. ([FHWA Policy Paper Q&A #11C](#)).

Programmatic Evaluation

- Independent walkway and bikeways construction projects:
 - No additional public involvement would be required for Section 4(f).
- Historic bridges:
 - Follow Section 106 protocol for public involvement.
- Minor involvements with historic sites:
 - Follow Section 106 protocol for public involvement.
- Minor involvements with parks, recreation areas, and waterfowl and wildlife refuges:
 - Additional public involvement is not necessary; however, based on the scope of the project, public involvement may be required. If public outreach (public meeting/public hearing/etc.) is held for the project, according to NDOT Public Involvement policy, impacts to Section 4(f) properties must be included in the discussion.
- Net benefits to a Section 4(f) property:
 - Additional public involvement is not necessary; however, based on the scope of the project, public involvement may be required. If public outreach (public meeting/public hearing/etc.) is held for the project, according to NDOT Public Involvement policy and the NDOT Section 106 manual (if historic), impacts to Section 4(f) properties must be included in the discussion.

See Appendix A for a comparison of Nationwide Section 4(f) Programmatic Evaluations.

Individual Section 4(f) Evaluation

- During major environmental processes, the EA or the Draft Environmental Impact Statement (DEIS) is the primary vehicle for meeting public notice and comment requirements for the Section 4(f) properties. Coordination with NDOT Communications Division and NDOT EDU is required to ensure the proper methods of public involvement are reached ([23 CFR 774.5](#)).

Appendix A. Section 4(f) Programmatic Evaluations Table

	Independent Bikeway or Walkway Projects	Use of Historic Bridges	Minor Involvement with Parks, Recreation Lands, and Wildlife and Waterfowl Refuges	Minor Involvement with Historic Sites	Transportation Projects that have a Net Benefit to a Section 4(f) Property	
Date Enacted	5/23/1977	7/5/1983	12/23/1986	12/23/1986	4/20/2005	
Project Type	Independent bikeway or walkway project; not incidental activities of a highway project.	Rehabilitation or replacement of historic bridges.	Improvement of operational characteristics, safety, and/or physical condition of an existing highway on essentially the same alignment		Any type of project on existing or new alignment.	
NEPA Level	CE or EA only	CE, EA, or EIS	CE or EA only	CE or EA only	CE, EA, or EIS	
Resource Applicability	Parks or recreation areas only.	Historic bridges that are not a National Historic Landmark.	Parks, recreation lands, and wildlife and waterfowl refuges adjacent to the existing highway facility.	Historic sites adjacent to the existing highway facility.	All Section 4(f) properties.	
Impact Threshold	No significant impacts (no displacements, historic site impacts, minimal water quality impacts, etc.).	If bridge can be rehabilitated without affecting the historic integrity, Section 4(f) does not apply. If bridge is to be demolished and/or replaced, Section 4(f) applies.	The amount of property that may be acquired/used:		Project may not remove or alter historic buildings, structures, or objects, or archeological resources important for preservation in place. Project must result in a no effect or no adverse effect determination via the Section 106 process.	No impact limits, but project results in an overall enhancement to the property. For all properties, official(s) with jurisdiction concur in writing with assessment of impacts, proposed mitigation, proposed measures to minimize harm; and that such measures will result in a net benefit to the Section 4(f) property. For historic properties, the project does not require the major alteration of the characteristics that qualify the property for the National Register of Historic Places (NRHP) such that the property would no longer retain sufficient integrity to be considered eligible for listing. The evaluation of alterations could result in an adverse effect determination per 36 CFR 800 so long as the property remains eligible and the SHPO/THPO concurs there is a net benefit to the property.
			Total size of Section 4(f) site	Maximum area to be acquired		
			< 10 acres	10 % of total site area		
			10 - 100 acres	1 acre		
			> 100 acres	1 % of total site area		
Coordination and Concurrence Requirements	Official with jurisdiction concurs in writing that project is acceptable and consistent with designated use of property.	If replacement is proposed, the bridge must be made available for an alternative use. SHPO concurs in writing with assessment of impacts and proposed mitigation.	Official with jurisdiction concurs in writing with assessment of impacts and proposed mitigation.	SHPO/THPO concurs in writing with assessment of impacts and proposed mitigation.	Official with jurisdiction or SHPO/THPO concurs in writing with assessment of impacts, proposed mitigation, proposed measures to minimize harm; mitigation necessary to preserve, rehabilitate and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the Section 4(f) property.	
Public Notice	Rely on public comment required by NEPA.	Rely on public comment required by NEPA and Section 106.	Rely on public comment required by NEPA.	Rely on public comment required by NEPA and Section 106.	For projects with one or more public meetings or hearings, information on the proposed use of the Section 4(f) properties shall be communicated to the public.	