

**Guidance for Completing the  
Section 4(f) Review  
Process in Nebraska  
For Federal-Aid Projects**

**NEBRASKA**

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**DEPARTMENT OF TRANSPORTATION**

*September 2018*

## **Introduction**

The Nebraska Department of Transportation (NDOT) is pursuing formal Categorical Exclusion assignment (CE Assignment), (23 USC 326) of the Federal Highway Administration's (FHWA) responsibilities under the National Environmental Policy Act (NEPA), including environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects in Nebraska.

NDOT will accept Assignment under 23 USC 326 of FHWA's NEPA responsibilities for any Categorical Exclusion (CE) level determinations. 23 USC 326 allows the United States Department of Transportation (USDOT) Secretary to assign, and a state to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for Environmental Assessments (EAs) or Environmental Impact Statements (EISs) pursuant to regulations promulgated by the Council on Environmental Quality (CEQ) under part 1500 of Title 40 Code of Federal Regulations (CFR) (as in effect on October 1, 2003).

NEPA Actions and Section 4(f) reviews for Environmental Assessments (EA) and Environmental Impact Statements (EIS) and those CEs not assigned to NDOT under the *Memorandum of Understanding between Federal Highway Administration, Nebraska Division and the Nebraska Department of Transportation State Assumption of Responsibility for Categorical Exclusions 23 U.S.C. § 326 (CE MOU)* continue to be processed in accordance with the processes contained in the *Environmental Procedures Manual*, with the exception that review and approval are retained by the Federal Highway Administration.

This Section 4(f) guidance document was written primarily to aid the NDOT personnel and consultants in the implementation of the Section 4(f) regulations and documentation process. Included is a step-by-step flowchart to assist in working through the process, and guidance for decision-making, ultimately leading to the final determination. Each of the numbered boxes in the flowchart corresponds directly to a section heading with the same number in the guidance document.

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 AASHTO: Section 4(f)
  - [Overview](#)
  - [Research, Documents & Reports](#)
  - [Case Studies](#)
- [23 CFR 774](#)

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

In August 2005, Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ([SAFETEA-LU](#)), made the first substantive revision to Section 4(f) since the DOT Act of 1966. Section 6009, which amended existing Section 4(f) legislation at both Title [49 U.S.C Section 303](#) and Title [23 U.S.C. Section 138](#), simplified the process and provided for approval of projects that have only *de minimis* (minor) impacts on lands identified as Section 4(f). Under the new provisions, once the US DOT determines that a transportation use of a Section 4(f) property results in a *de minimis* impact with the required concurrence(s) from Official(s) with Jurisdiction, then analysis of avoidance alternatives are not required and the Section 4(f) evaluation process is complete.

**The Section 4(f) review and documentation should be completed only after Section 106 has been sufficiently complete that historic properties have been identified.**

### **Identification of Section 4(f) Properties – (1)**

Section 4(f) properties include publicly owned parks, recreation areas, wildlife and waterfowl refuges, and historic properties. The following are additional criteria that must be true for Section 4(f) protection (See *Section 4(f) Property* in [23 CFR 774.17](#)):

- *Planned or existing* parks and recreational areas of national, state, or local significance which are both publicly owned and open to the public.
- *Planned or existing* publicly owned wildlife and waterfowl refuges of national, state, or local significance which are open to the public to the extent that public access does not interfere with the primary purpose of the refuge.
- Historic sites of national, state, or local significance (significance is determined through the Section 106 process by consultation with consulting parties such as the State Historic Preservation Office [SHPO]) in public *or* private ownership regardless of whether they are open to the public.

A property is most likely a Section 4(f) property if:

- It is publicly owned (except historic resources, which may be privately owned).
- It is listed on or determined eligible for listing on the National Register of Historic Places (historic resources only).
- It is open to the public during normal hours of operation (except under certain circumstances for refuges and not required for historic resources).
- It serves recreation activities (i.e., walking, hiking, bird watching, or organized sports) as a major purpose as stated in the area's master plan (consultation with the Official(s) with Jurisdiction (OWJ(s)) is required to confirm the property status and intended use).
- Public use is allowed (i.e., school property used after-hours for practice fields, playground, etc.).

If a property functions as a refuge, even if it is not officially designated as a "refuge," it will likely qualify for section 4(f) protection (i.e., Wildlife Management Areas, Waterfowl Production Areas, etc.).

**→Action Point:** *One Section 4(f) Initial Assessment Form per PROJECT must be included as an attachment to the Categorical Exclusion (CE) Form, or in the EA or EIS. All potential Section 4(f) properties are to be addressed with a single Section 4(f) Initial Assessment Form.*

Look at the project scope as early as possible to determine if the project will encounter any potential Section 4(f) properties within the project area. (There should be enough information from Design available by the time of Plan In Hand to identify potential for impacts.) Pay close attention to potential Section 4(f) properties which are located outside the 0.25 mile project buffer but have a single access point through the project area, causing possible access restrictions. These properties must be included in the Section 4(f) Initial Assessment.

On the Section 4(f) Initial Assessment Form:

- **1. A.:** For historic properties, the determination of significance is made as part of the Section 106 process. Based on the NDOT Section 106 Tier Review Form or best available information, list any properties that are listed or eligible for listing on the National Register of Historic Places.\*
  - Due to the nature of a Section 106 Tier I project, an individual review of historic resources is NOT required for projects that fit the Tier I parameters. Thus, Section 106 Tier I projects will be marked as N/A.
- **1. B.:** Using the links listed below and any other appropriate resources, locate possible Section 4(f) properties, either existing or planned. (It must be clearly noted that a Comprehensive Plan was found and consulted, or attempted to be found if one does not exist.) Potential properties further than ¼ mile from the project, but with a single access point through the project area, MUST be considered in the Section 4(f) process.
  - A facility is considered “planned” 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/Comprehensive Plan.
- **1. C.:** Provide a list of the resources consulted in 1. B. to determine if potential Section 4(f) properties are present.
- **1. D.:**
  - If any properties are listed in 1. A. or 1. C., complete 2. A. – 2. E. If there are no properties, documentation is complete. Obtain signature(s) and attach the Initial Assessment Form to the CE Form or incorporate into the appropriate chapter in the EA/EIS.

\* NOTE: NDOT, FHWA, SHPO, and The Advisory Council on Historic Preservation (ACHP) executed the *Programmatic Agreement 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* (Section 106 PA). Per the Section 106 PA, the NDOT Professionally Qualified Staff (NDOT PQS) is authorized by SHPO and the ACHP to make “no potential to affect historic properties” and “no historic properties affected” determinations on a project-by-project basis. Modified by the *2018 Amendment to Section 106 Programmatic Agreement* with the SHPO and ACHP regarding FHWA’s intention to step away from the Section 106 PA. Based on the Programmatic Agreement Between SHPO and NDOT for Section 4(f), there is an understanding that NDOT would thereafter address certain programmatically agreed upon Section 4(f) uses and Section 4(f) exceptions in Nebraska formerly handled by FHWA and assigned to NDOT under the CE MOU. All archeological sites qualify for the exception to Section 4(f) detailed at 23 CFR 774.13(b) unless the NDOT PQS for Section 106 determines that the archeological site has important value for preservation in place and the SHPO/THPO has not objected. This information can be found on page 2 of the NDOT Section 106 Tier Review form or through coordination with the NDOT PQS. Regardless of whether the exception applies, include archaeological site numbers identified within the APE in the 106 Tier Review form, in block 1A of the Section 4(f) Initial Assessment Form.

The following resources are helpful for locating Section 4(f) properties in Nebraska, but this is not an exhaustive list:

- [Nebraska Water Trails Guide](#)
- [Nebraska Game and Parks Trails](#)
- [NGPC Nebraska State Parks map](#)
- [NGPC Owned or Managed Sites](#)
- [US Fish and Wildlife Service Wildlife Refuges](#)
- [US Fish and Wildlife Service Wilderness Areas](#)
- [US Fish and Wildlife Waterfowl Production Areas](#)
- [National Register of Historic Places](#)
- [National Bridge Inventory Database](#)
- Internet aerial maps
- Local department/agency responsible for community parks, bike trails, etc.
- Comprehensive Plans for communities in Nebraska: Consult the appropriate municipal website to determine if a comprehensive plan is in place for that community (*future planned projects must be considered*)

### **Applicability Criteria for Section 4(f) Parks, Recreation Areas, and Wildlife/Waterfowl Refuges (Not Historic Properties) – (2)**

For regulations concerning Applicability, please consult [23 CFR 774.11](#).

For atypical properties, please consult the FHWA [Policy Paper Part II](#).

→**Action Point:** On the Section 4(f) Initial Assessment Form:

- 2. A.: List any potential Section 4(f) properties from 1. D. that are NOT publicly owned or NOT privately owned and leased to a public entity. Also, for each applicable property, briefly explain the steps taken to come to this conclusion.
  - A public entity includes a federal, state or local government or governmental agency.

If there is a lease involved, *consult with NDOT Environmental Section Manager or Documents Unit Manager early.*

- 2. B.: List any potential Section 4(f) properties from 1. D. that are NOT open to the public (this does not apply to wildlife and waterfowl refuges, which may be closed to public access to accommodate preservation purposes; however this does not mean the refuges are exempt from Section 4(f) consideration). Also, for each applicable property, briefly explain the steps taken to come to this conclusion.
- 2. C.: List any potential Section 4(f) properties from 1. D. that are considered multiple-use properties. Also, for each applicable property, briefly explain what those multiple-uses are. (See the explanation of multiple-use properties at the end of this section.) These properties will need to be carried forward in 2. D.
- 2. D.: List any pedestrian or bicycle paths from 1.D. that are not officially designated primarily for recreation, and describe how this determination was made.
- 2. E. List all properties from 1. D. that were NOT called-out in 2. A. or 2. B.; these properties will be carried forward in the Section 4(f) process. Carry forward any multiple-use properties from 2. C. This is a summary question to ensure that all applicable properties are considered for Section 4(f) protection.
  - If there are no applicable properties to be carried forward, note this and documentation is complete. Obtain signature(s) and attach the Initial Assessment Form to the CE Form or incorporate into the appropriate chapter in the EA/EIS.

Additional questions to consider, if there are Section 4(f) properties present:

1. Is the property considered significant by the OWJ(s)? (In the absence of a significance determination, presume it is significant. NDOT Environmental Section Manager or Documents Unit Manager will review a determination that a park, recreation area, or wildlife and waterfowl refuge is not significant to assure its reasonableness.) (23 CFR 774.11(c))
2. Is the property listed on or eligible for listing on the NRHP? (23 CFR 774.11(e)) (Refer to Section 106 documentation.)

3. Is the property part of a federally-designated wild and scenic river that is historic, or publicly owned, and functions as a significant park, recreation area or refuge? (Refer to the NDOT Resource Analysis Guidance Wild and Scenic Rivers) (*23 CFR 774.11(g)*)

Consultants and/or local governments must identify potential Section 4(f) properties (NDOT Right-of-Way should be consulted to assist in determining property boundaries) and recommend a Section 4(f) tool (i.e., exception, *de minimis*, programmatic, etc.) to NDOT Environmental Documents Unit (EDU) for confirmation before proceeding with coordination with the OWJ(s). If a determination of the property status or appropriate assessment tool is unclear, NDOT EDU will coordinate with NDOT Environmental Section Manager or Documents Unit Manager for guidance.

Contact NDOT EDU to coordinate with the OWJ(s), if necessary to gather information about the property (ownership, significance of property, how it is maintained/funded, etc.). “The term significant means that in comparing the availability and function of the park, recreation area or wildlife and waterfowl refuge, with the park, recreation or refuge objectives of the agency, community or authority, the property in question plays an important role in meeting those objectives” ([FHWA Policy Paper Part II, Q&A #1A](#)). Assume significance, however if significance is questionable, contact NDOT EDU for clarification.

The administering agency of the property is the Official with Jurisdiction. If there is a question about who the OWJ is, consult with NDOT EDU for guidance. NOTE: The same property may have more than one OWJ. The following is a list of types of properties and their corresponding OWJ. This is not exhaustive, but is included to provide examples:

- City park: City Parks Department
- State park: Nebraska Game and Parks Commission
- National wildlife refuge: US Fish and Wildlife Service
- School grounds: School Superintendent (see **School Playgrounds** in the **Unique Circumstances** block below for more guidance)

Multiple-use property: A multiple-use property has additional designated uses (i.e., timber management, municipal reservoirs, mining, or grazing) as well as recreation 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\(d\)](#)) Examples of multiple-use properties include, but are not limited to, US Forest Service lands that are actively logged but also open for public recreation, and school playground areas that are used after hours for public recreation.

### **Determination of Section 4(f) Use – (3)**

There are three instances that are considered *use* for Section 4(f) [[23 CFR 774.17](#)]:

1. When a Section 4(f) property is *permanently incorporated* into a transportation facility;
2. When there is a *temporary occupancy* of land that is adverse in terms of the statute’s preservation purpose as determined by the criteria in [§774.13\(d\)](#); or
3. When there is a *constructive use* of a Section 4(f) property as determined by the criteria in [§774.15](#) (proximity effects that substantially impair the protected features of the property).

If the project will result in a constructive use, consultation between NDOT, FHWA Division Office, and FHWA Headquarters Offices will be required.

“No use” indicates there is no temporary occupancy, incorporation of land, or constructive use of a Section 4(f) property, or an exception applies. If an exception is being applied to the project, documentation of its application is submitted to NDOT Environmental Project, Section, or Documents Unit Manager for concurrence. See the **Exceptions-(4)** section below for more information.

→**Action Point:** Is right-of-way required (either temporary or permanent) from a Section 4(f) protected property? If at all possible, obtain current, up to date right-of-way information and clearly defined property boundaries for the Section 4(f) properties in order to accurately determine a *use*.

On the Section 4(f) Initial Assessment Form:

- **3. A.:** Using the definition of *use* found above, determine if there is a potential *use* of any of the Section 4(f) properties identified in 2. D. for this project. Access restrictions must be included in the consideration of *use*. \*\*
- **3. B.:** For any Section 4(f) properties that will NOT be impacted, describe the properties and how impact to each will be avoided. For the occasional projects that require further justification to support a “No” answer in 3. A., describe here. If there are no properties that will be impacted, DOCUMENTATION IS COMPLETE.

- Once the Initial Assessment Form is complete, obtain signature(s) and attach it to the CE Form or incorporate into the appropriate chapter in the EA/EIS.

NDOT Environmental Section Manager or Documents Unit Manager Signature is only needed under the following circumstances:

- If the property is leased; or
- If the property is considered multiple-use; or
- If the OWJ(s) claims that the property is NOT significant (must attach documentation from the OWJ(s) indicating a lack of significance).

\*\* NOTE: Temporary or permanent access restrictions to protected properties must also be considered during Section 4(f) evaluation, in order to determine if the access change or restrictions will adversely affect the features or attributes of the Section 4(f) property that make it eligible for protection.

The determination of whether the project will impact features or attributes of the property that make it eligible for Section 4(f) protection is important and guides in the selection of the appropriate Section 4(f) tool for the project. During the assessment and determination of appropriate Section 4(f) tools, consultation with the OWJ(s) will be required. Even if the OWJ(s) determines that the property is not significant, NDOT Environmental Section Manager or Documents Unit Managers have the final decision on significance and must be consulted for any questionable significance determinations.

If there are multiple Section 4(f) properties within the project study area, each property must be assessed for impacts independently, including measures to minimize harm and any other mitigation. 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 the **Alternatives with Least Overall Harm-(8)** section below for further guidance on projects with multiple properties, uses, and alternatives.

- Approval Signatures: Final approval for the Initial Assessment Form would be required from the NDOT EDU or the Environmental Section Manager or Documents Unit Manager as necessary.

**Timing of Submittal: From this point forward in the Section 4(f) process, any Section 4(f) documentation is typically submitted to the NDOT Environmental Project Manager, or Environmental Section Manager or Documents Manager, as appropriate, prior to completion of the NEPA documentation. Early coordination facilitates efficiency in a potentially lengthy process and ensures identification of the correct Section 4(f) tool.**

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### **Exceptions – (4)**

Regulations (23 *CFR* 774.13) 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) Restoration/rehabilitation/maintenance of NRHP listed or eligible transportation facility;
- (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.

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.

Consult the regulations concerning Exceptions to the requirement for Section 4(f) approval for the complete listing of Exceptions and to **ensure that all parameters have been satisfied** ([23 CFR 774.13](#)). Also consult the [FHWA Policy Paper](#). Additional guidance for criterion (e) – Federal lands transportation facilities – can be found at the following link: [Criterion \(e\)](#).

### **More commonly used 23 CFR 774.13 Exceptions in Nebraska:**

- (a) Restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:
  - (1) The Administration concludes, as a result of the consultation under 36 CFR 800.5, that such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, and
  - (2) The Official(s) with Jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(1) of this section.

*Items to consider:* This exception is specific to the repair, rehabilitation or maintenance of a 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.

*Items to consider:* 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 features of the property will be permanently impacted by the project, the exception likely will not apply. For example, the removal of features such as benches, retaining walls, exercise stations, fences, etc., 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 or Documents Unit Manager agree.

For more information on Temporary Occupancy exempted and non-exempted use, please see the [FHWA Section 4\(f\) Policy Paper Q&A #7A](#). Q&A #7A is also included in this guidance document, within the trails discussion in the Unique Circumstances Section.

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

*Items to consider:* 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 an individual 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 or Documents Unit Manager 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](#).

→**Action Point:** If an exception applies to the property, complete the Section 4(f) Exceptions Form (requires NDOT Environmental Section Manager or Documents Unit Manager approval). A separate Form is required for each Section 4(f) property for which an exception applies. The documentation submitted for NDOT Environmental Section Manager or Documents Unit Manager 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).

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 NDOT Professionally Qualified Staff (NDOT PQS) for Section 106 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.
  - If exception (d) is applicable to the property, describe in the field below the exceptions how the five required conditions will be satisfied (including the size in acres of the property and the 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 Project Manager, Section Manager, or Documents Unit Manager.

### **De Minimis – (5)**

In 2005, Section 6009(a) of the 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, or that no historic property is affected or there will be “no adverse effect” on the historic property ([36 CFR 800](#)). A *de minimis* impact determination may be made for a permanent incorporation or temporary occupancy of a Section 4(f) property, but not for constructive use. 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 or Documents Unit Manager 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 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 (described in the *Action Point* below). See the Public Involvement section below and the Environmental Procedure Manual Chapter 9: Public and Agency Involvement for further guidance.

→**Action Point:** 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. A single finding cannot be made for a project as a whole that has multiple resources. Informal coordination with NDOT Environmental Section Manager or Documents Unit Manager 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 EDU is required before starting the *de minimis* review. The documentation submitted for NDOT Environmental Section Manager or Documents Unit Manager 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.

\* 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 Official with Jurisdiction and they were informed of NDOT’s intent to apply *de minimis* via project-specific correspondence. The date in the field would be the date the entity concurred on the Section 106 effect determination. A notation of “N/A” in the field indicates the entity was not the OWJ. “Programmatic” in the SHPO field indicates that a determination of “no historic properties affected” or “no adverse effect” was made for the project per the Section 106 Programmatic Agreement and the *de minimis* notification was provided via letter agreement with the SHPO.

- 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.

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

Note: The following table should be used as a guide to help determine if minor use of a Section 4(f) property is appropriate. This is only one parameter that may help to determine if *de minimis* is appropriate.

<u>Total Size of Site</u>	<u>Maximum Acquisition</u>
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< 10 acres	10% of site
10 – 100 acres	1 acre
> 100 acres	1% of site

Coordinate with the NDOT Environmental Section Manager or Documents Unit Manager 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).

- **Approval Signatures:** Final approval for the *de minimis* Form would be required from the NDOT Environmental Section Manager or Documents Unit Manager.

### **Programmatic Evaluation – (6)**

FHWA developed five nationwide programmatic Section 4(f) evaluations that can be used to streamline the evaluation process. The application of programmatic evaluations requires coordination with the NDOT Environmental Section Manager or Documents Unit Manager to consider the feasible and prudent avoidance alternatives; avoidance alternatives are specified in the guidelines for each type of programmatic according to 23 CFR 774.3(d). These avoidance alternatives are the only alternatives to be considered when using a programmatic evaluation. Coordination with the OWJ(s) is still required if a programmatic evaluation is used. If the project impacts a Section 4(f) property and does not qualify for a programmatic evaluation or *de minimis*, then an individual Section 4(f) evaluation must be completed (see the Individual Evaluation section below).

The five nationwide programmatic evaluations are:

- [Section 4\(f\) Statement and Determination for Independent Bikeway or Walkway Construction Projects](#)
- [Programmatic Section 4\(f\) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges](#)
- [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](#)

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

See **Appendix 1** for a comparison of Nationwide Section 4(f) Programmatic Evaluations.

→**Action Point:** 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; 23CFR 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; 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 or Documents Unit Manager.

## **Feasible and Prudent Avoidance Alternatives – (7)**

For regulations concerning feasible and prudent avoidance alternatives, please consult [23 CFR 774.7](#) and [774.17](#). Definitions for what is *not* feasible or prudent are found in 23 CFR 774.17, *Feasible and prudent avoidance alternative* (2) & (3).

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](#)).

“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).

→**Action Point:** If there is impact to the property, is there a feasible and prudent avoidance alternative? If yes, the feasible and prudent alternative **must** be selected, and documented in the Section 4(f) block as well as the Additional Comments block in the CE form, or in the appropriate chapter of the EA/EIS. If no, coordination with NDOT Environmental Section Manager or Documents Unit Manager should occur to determine the alternative with the least overall harm.

### **Alternatives with Least Overall Harm – (8)**

If one of the feasible and prudent alternatives meets the purpose and need of the project, and has no Section 4(f) use, that alternative must be selected over the others. If the analysis of avoidance alternatives concludes that there is no feasible and prudent avoidance alternative and does not qualify for a *de minimis* or programmatic determination, then the NDOT Environmental Section Manager or Documents Unit Manager 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 protect 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.

→**Action Point:** If impact avoidance is not possible, select the alternative with the least overall harm, documenting minimization efforts pursued and mitigation measures utilized. Proceed to the individual evaluation.

Note: 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. The balancing of impacts with least overall harm leads to taking more from the property with the least impact on the activities, features, or attributes that qualify it for Section 4(f) protection.

### **Individual Evaluation – (9)**

Per the CE MOU executed on 09/05/2018 responsibility for the review and approval of individual section 4(f) evaluations would be phased in until such time as State staff responsible for approving such evaluations have completed Individual Section 4(f)/legal sufficiency workshop training(s) provided by FHWA, and Individual Section 4(f) implementation guidance materials and procedures are complete. When such training(s), implementation guidance material and procedures have been completed, FHWA shall notify the State that the responsibility, for review and approval of individual Section 4(f) evaluations is assigned;

thereafter, assignment will remain with the State and be carried out, monitored and reviewed in accordance with the remaining provisions of the CE 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 of which must be submitted to the FHWA Division Office for review and approval. The final individual Section 4(f) evaluation is subject to a legal sufficiency review by FHWA's Office of Chief Counsel. The review is intended to ensure that Section 4(f) requirements have been met, in case of a legal challenge to Section 4(f) use.

→**Action Point:** 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](#).

### **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 and Agency Involvement

#### **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; however, based on the scope of the project, public involvement may be required.

#### ***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 36 CFR 800, is not obligatory ([23 CFR 774.5 \(b\)\(1\)\(iii\)](#)).

"The public involvement requirements associated with specific NEPA document and process 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 1** for a comparison of Nationwide Section 4(f) Programmatic Evaluations.

### **Individual Section 4(f) Evaluation:**

During major environmental processes, the Environmental Assessment (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 Environmental Section is required to ensure the proper methods of public involvement are reached (23 CFR 774.5).

## **Unique Circumstances**

Due to recurring questions around the applicability of Section 4(f) to some resources, the following discussion provides further guidance for the Nebraska program and reiterates pertinent Questions and Answers from the FHWA Policy Paper (2012) that address these areas. This section will discuss these resources in the following order: trails, school playgrounds, Nebraska Game and Parks Commission designated Canoe Trails, planned 4(f) properties and refuges. All numbers correspond to the Q&A from the Policy Paper. For further clarification, see the [FHWA Policy Paper](#) and the NDOT Environmental Section Manager or Documents Unit Manager.

### **Trails:**

- **Determining Section 4(f) eligibility for Trails:**

- FHWA Section 4(f) Policy Paper, Question 15A: Do the requirements of Section 4(f) apply to shared use paths or similar facilities?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If the publicly owned facility is primarily used for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply since it is not a recreational area. Section 4(f) would apply to a publicly owned, shared use path or similar facility (or portion thereof) designated or functioning primarily for recreation, unless the OWJ(s) determines that it is not significant for such purpose. During early consultation, it should be determined whether or not a management plan exists that addresses the primary purpose of the facility in question. If the exceptions in 23 CFR 774.13(f) and (g) do not apply, the utilization of the *Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects* should be considered if the facility is within a park or recreation area. Whether Section 4(f) applies or not, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated shared use paths and similar facilities.

*Items to consider:* When initially assessing trails to determine if they are protected Section 4(f) resources, reviewing the management plan for the trail, the OWJ(s) website, or any

original documentation from when the trail was created is helpful when trying to determine the trail's primary use. If a primary function or use of the trail is for recreation, it is owned or managed by a public entity, and it is open to the general public for use, it should be considered a Section 4(f) property. If there is any doubt, local governments and consultants must coordinate with the NDOT EDU, who will then coordinate with NDOT Environmental Project, Section, or Documents Unit Manager as needed.

Many trails have been constructed using Transportation Enhancement (TE) funds, Transportation Alternatives Program (TAP) funds and Recreational Trails Program (RTP) funds. The original funding source for the construction or improvement of a trail does not preclude its protection under Section 4(f) for future transportation project impacts. Records from the planning or grant approval for the original construction of these trails may provide the practitioner information on the intended use of the trail, and therefore may warrant review. Of note, the original construction or improvement of a trail project using RTP funds are exempt from Section 4(f) consideration (RTP funds are administered by the Nebraska Game and Parks Commission on the behalf of FHWA, which is a separate program from NDOT or NDOT's programs)

- FHWA Section 4(f) Policy Paper, Question 15C: Are shared use paths, bikeways, or designated scenic or recreational trails on highway rights-of-way subject to the requirements of Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If a path or trail is simply described as occupying the right-of-way of the highway and is not limited to any specific location within the right-of-way, a use of land would not occur provided that adjustments or changes in the alignment of the highway or the trail would not substantially impair the continuity of the path or trail. In this regard, it would be helpful if all future designations, including those made under the National Trails System Act, describe the location of the trail only as generally in the right-of-way.

*Items to consider:* If this exception appears to apply to a project, coordinate early with the NDOT Environmental Project, Section, or Documents Unit Manager to verify the application.

- FHWA Section 4(f) Policy Paper, Question 15B: The National Trails System Act permits the designation of scenic, historic, and recreation trails. Are these trails or other designated scenic or recreation trails on publicly owned land subject to the requirements of Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. National Scenic Trails (other than the Continental Divide National Scenic Trail) and National Recreation Trails that are on publicly owned recreation land are subject to Section 4(f), provided the trail physically exists on the ground thereby enabling active recreational use.

*Items to consider:* National Historic Trails are treated differently than scenic and recreational trails designated under the National Trails System Act. National Historic Trails themselves are exempt from Section 4(f), however, trail segments (including similar components such as trail buffers or other adjacent sites that were acquired to complement the trails) that are on or eligible for the National Register are subject to Section 4(f) (See [23 CFR 774.13\(f\)\(2\)](#)). For more information, see the full response to Question 15B in the FHWA Policy Paper. For a map showing the National Trails System, see: <http://www.nps.gov/nts/maps.html>

- FHWA Section 4(f) Policy Paper, Question 15D: Are trails on privately owned land, including land under public easement and designated as scenic or recreational trails subject to the requirements of Section 4(f)?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. Section 4(f) generally does not apply to trails on privately owned land. Section 4(f) could apply if an existing public easement permits public access for recreational purposes. In any case, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated trails.

*Items to consider:* If a trail is on privately owned land but is managed by a public entity for public use, first try to obtain a copy of the lease agreement. Information in the lease agreement, such as the primary function of the trail and the duration of the lease, will help determine whether the trail should be protected under Section 4(f). If this situation arises for a trail that may be impacted by a federal-aid project, coordinate early with the NDOT Environmental Section Manager or Documents Unit Manager to verify the Section 4(f) applicability.

- **Determining use of Section 4(f) protected trails:**

- FHWA Section 4(f) Policy Paper, Question 15A: Do the requirements of Section 4(f) apply to shared use paths or similar facilities?

Answer: FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If the publicly owned facility is primarily used for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply since it is not a recreational area. Section 4(f) would apply to a publicly owned, shared use path or similar facility (or portion thereof) designated or functioning primarily for recreation, unless the Official(s) with Jurisdiction determines that it is not significant for such purpose. During early consultation, it should be determined whether or not a management plan exists that addresses the primary purpose of the facility in question. If the exceptions in 23 CFR 774.13(f) and (g) do not apply, the utilization of the Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects should be considered if the facility is within a park or recreation area. Whether Section 4(f) applies or not, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated shared use paths and similar facilities.

*Items to consider:* If a project may impact a trail, first determine whether one of the exceptions applies. If not, review the Independent Bikeway or Walkway Programmatic Section 4(f) Evaluation to see if it may apply to the use. *De minimis* may also be a viable tool for the project. The practitioner, through guidance from NDOT EDU, should pick the tool that best fits the circumstance. If a clear choice is not obvious, coordinate with the NDOT Environmental Section Manager or Documents Unit Manager.

- FHWA Section 4(f) Policy Paper, Question 7a, definition of Temporary Occupancy Use:

Temporary Occupancy: Examples of temporary occupancy of Section 4(f) land include right-of-entry, project construction, a temporary easement, or other short-term arrangement involving a Section 4(f) property. A temporary occupancy will not constitute a Section 4(f) use when all of the conditions listed in 23 CFR 774.13(d) are 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.

In situations where the above criteria cannot be met, the temporary occupancy will be a use of Section 4(f) property and the appropriate Section 4(f) analysis, coordination, and documentation will be required (*See* 23 CFR 774.13(d)). In those cases where a temporary occupancy constitutes a use of Section 4(f) property and the *de minimis* impact criteria (Questions 10 and 11) are also met, a *de minimis* impact finding may be made. *De minimis* impact findings should not be made in temporary occupancy situations that do not constitute a use of Section 4(f) property.

*Items to Consider:* For a temporary impact to a trail to qualify for the temporary occupancy exception, it is critical that there be no adverse permanent impacts to the trail and that there be no interference with the protected activities, features, or attributes of the trail either on a permanent or temporary basis. Therefore, trails need to be accessible and usable by the public throughout construction for the exception to apply. 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 use of the trail without interfering with the use of the trail. An important consideration when applying this exception to trail impacts is verifying there be no interference with the protected activities, features, or attributes of the trail during construction.

In addition, if features of the trail property will be permanently impacted by the project, careful consideration is needed to determine if the exception could apply. For example, the permanent removal of trail features, such as trash receptacles, benches, retaining walls, fences, etc., cannot occur under this exception. Minor removals that are mitigated to bring the property back to pre-existing conditions or better might still qualify for the exception. For example the removal of a handful of small trees that are associated with the trail property may still qualify for the exception, if the trees are replaced in a manner that brings the property back to pre-existing conditions or better and both the Official(s) with Jurisdiction and the NDOT Environmental Project, Section or Documents Unit Manager agree.

### **School Playgrounds:**

- FHWA Section 4(f) Policy Paper, Question 14: Are publicly owned school playgrounds subject to the requirements of Section 4(f)?

Answer: While the primary purpose of public school playgrounds is generally for structured physical education classes and recreation for students, these properties may also serve significant public recreational purposes and therefore may be subject to Section 4(f) requirements. When a public school playground serves only school activities and functions,

the playground is not subject to Section 4(f). When a public school playground is open to the public and serves either organized or substantial walk-on recreational purposes that are determined to be significant (See Question 1), it will be subject to the requirements of Section 4(f). The actual function of the playground is the determining factor in these circumstances. Documentation should be obtained from the Official(s) with Jurisdiction over the facility stating whether or not the playground is of local significance for recreational purposes.

There may be more than one Official with Jurisdiction over a school playground. A school official is considered to be the Official with Jurisdiction of the land during school activities. However, in some cases a school board may have authorized another public agency (e.g., the city park and recreation department) to control the facilities after school hours. In such cases, the public agency with authority to control the playground would be considered an Official with Jurisdiction with regard to any after-hours use of the playground. The FHWA is responsible for determining which official or officials have jurisdiction over a playground.

The term playground refers to the area of the school property 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. Section 4(f) would apply to the playground areas only and not the entire campus, unless the school and campus are also significant historic sites.

*Items to Consider:* The determination of whether a school playground and associated fields are protected Section 4(f) properties can be difficult. Of importance, if a portion of the playground and field area is considered a protected Section 4(f) resource, the entire recreational area is protected. It is not possible to call one corner of the recreational facility protected under Section 4(f) (e.g., the basketball court), without the entire recreational area being considered Section 4(f) (e.g., the open field maintained for open recreational use adjacent to the basketball court).

### **Nebraska Game and Parks Commission designated Canoe Trails:**

- FHWA Section 4(f) Policy Paper, Question 21A: How does the Section 4(f) apply to publicly owned lakes and rivers?

Answer: Lakes are sometimes subject to multiple, even conflicting, activities and do not readily fit into one category or another. Section 4(f) would only apply to those portions of publicly owned lakes and/or adjacent publicly owned lands that function primarily for park, recreation, or refuge purposes. Section 4(f) does not apply to areas which function primarily for other purposes or where recreational activities occur on incidental, secondary, occasional or dispersed basis.

In general, rivers are not subject to the requirements of Section 4(f). Those portions of publicly owned rivers, which are designated as recreational trails are subject to the requirements of Section 4(f). Of course, Section 4(f) would also apply to lakes and rivers, or portions thereof, which are contained within the boundaries of a park, recreation area, refuge, or historic site to which Section 4(f) otherwise applies.

*Items to Consider:* The Nebraska Game and Parks Commission has designated ten river segments as canoe trails in Nebraska. These canoe trails are considered Section 4(f) resources. For information on the individual trails, including trail maps, visit the Nebraska Game and Parks Commission website at:

<http://outdoornebraska.ne.gov/boating/guides/CanoeTrails/canoetrails.asp>

A primary consideration for these canoe trails is maintaining access during construction both in the river and to any portage sites and associated parking areas. Examples of maintaining access could include use of a partial causeway, so only a portion of the river is restricted to canoes and other vessels during construction, providing safe portage around a work site during construction, signage, maintaining access to parking areas, etc.

- FHWA Section 4(f) Policy Paper, Question 8E: Does Section 4(f) apply to the construction of an access ramp providing direct vehicular ingress/egress to a public boat launch area from an adjacent highway?

Answer: When an access ramp is constructed as part of a project to construct a new bridge or to reconstruct, replace, repair, or alter an existing bridge on a Federal-aid system, FHWA's longstanding policy is that Section 4(f) approval is not necessary for the access ramp and public boat launching area. This policy was jointly developed by FHWA and the U.S. Department of the Interior (DOI) in response to the enactment of section 147 of the *Federal-Aid Highways Act of 1976* (Pub. L. 94-280 (HR 8235) May 5, 1976). Where public boat launching areas are located in publicly owned parks, recreational areas, or refuges otherwise protected by the provision of Section 4(f), it would be contrary to the intent of section 147 to search for feasible and prudent alternatives to the use of such areas as a site for an access ramp to the public boat launching area. Such ramps must provide direct access to a public boat launching area adjacent to the highway. This policy only applies to the access ramp and public boat launching area; any other use of Section 4(f) property for the project will require Section 4(f) approval.

### **Planned Section 4(f) properties:**

- FHWA Section 4(f) Policy Paper, Question 25: Do the requirements of Section 4(f) apply to publicly owned properties planned for park, recreation area, or wildlife refuge and waterfowl refuge purposes, even though they are not presently functioning as such?

Answer: Section 4(f) applies when the land is one of the enumerated types of publicly owned lands and the public agency that owns the property has formally designated and determined it to be significant for park, recreation area, or wildlife and waterfowl refuge purposes. Evidence of formal designation would be the inclusion of the publicly owned land, and its function as a Section 4(f) property into a city or county Master Plan. A mere expression of interest or desire is not sufficient. For example, when privately held properties of these types are formally designated into a Master Plan for future park development, Section 4(f) is not applicable. The key is whether the planned facility is presently publicly owned, presently formally-designated for Section 4(f) purposes, and presently significant. When this is the case, Section 4(f) would apply.

### **Refuges:**

- FHWA Section 4(f) Policy Paper, Question 1E: What is a wildlife and waterfowl refuge for purposes of Section 4(f)?

Answer: The term wildlife and waterfowl refuge is not defined in the Section 4(f) law. On the same day in 1966 that Section 4(f) was passed, Congress also passed the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 80 Stat. 926) to provide for the conservation, protection, and propagation of native species of fish and wildlife, including migratory birds, that are threatened with extinction; to consolidate the authorities relating to the administration by the Secretary of the Interior of the National Wildlife Refuge System; and for other purposes. The Refuge System referred to in that Act includes areas that were designated as wildlife refuges and waterfowl refuges. FHWA has considered this contemporaneous legislation in our implementation of Section 4(f) regarding refuges. For purposes of Section 4(f), National Wildlife Refuges are always considered wildlife and waterfowl refuges by FHWA in administering Section 4(f); therefore no individual determination of their Section 4(f) status is necessary. In addition, 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 considered by FHWA to be a wildlife and waterfowl refuge for purposes of Section 4(f).

In determining the primary purpose of the land, consideration should be given to:

- 1) The authority under which the land was acquired;

- 2) Lands with special national or international designations;
- 3) The management plan for the land; and,
- 4) Whether the land has been officially designated, by a Federal, State, or local agency with jurisdiction over the land, as an area whose primary purpose and function is the conservation, restoration, or management of wildlife and waterfowl resources including, but not limited to, endangered species and their habitat.

Many refuge-type properties permit recreational activities that are generally considered not to conflict with species conservation, such as trails, wildlife observation and picnicking. Other activities, such as educational programs, hunting, and fishing, may also be allowed when the activity is consistent with the broader species conservation goals for the property.

Examples of properties that may function as wildlife and waterfowl refuges for purposes of Section 4(f) include: State or Federal wildlife management areas, a wildlife reserve, preserve or sanctuary; and waterfowl production areas including wetlands and uplands that are permanently set aside (in a form of public ownership) primarily for refuge purposes. The FHWA should consider the ownership, significance, function and primary purpose of such properties in determining if Section 4(f) will apply. In making the determination, the FHWA should review the existing management plan and consult with the Federal, State or local Official(s) with Jurisdiction over the property. In appropriate cases, these types of properties will be considered multiple-use public land holdings (See 23 CFR 774.11(d) and Question 4) and must be treated accordingly.

The U.S. DOI administers a variety of Federal grant programs in support of hunting, fishing, and related resource conservation. While the fact that a property owned by a State or local government has at some time in the past been the beneficiary of such a grant does not automatically confer Section 4(f) status, the existence and terms of such a prior grant, when known, should be considered along with the other aspects of the property described above when determining if the property should be treated as a wildlife and waterfowl refuge for purposes of Section 4(f). Finally, it should be noted that sites purchased as mitigation for transportation projects (e.g., for endangered species impacts) can be considered refuges for purposes of Section 4(f) if the mitigation sites meet all of the applicable criteria for Section 4(f) status as a refuge, including public ownership and access, significance, and functioning primarily as a refuge.