

# Section 4(f) Processes & Procedures

## Purpose

The purpose of this document is to outline NCDOT's processes and procedures regarding the use of land from publicly owned parks and recreation areas, wildlife and waterfowl refuges, and publicly or privately owned historic sites for transportation projects requiring USDOT approval, specifically FHWA. These types of properties are protected under Section 4(f) of USDOT law, now codified in [49 U.S.C. §303](#) and [23 U.S.C. §138](#).

The following sections and attached flow chart provide a general overview and understanding of Section 4(f), as well as guidance for NCDOT staff and consultants on our review process for potential 4(f) resource impacts from transportation projects anticipated to be federally-funded and/or require approval by a USDOT agency. This document focuses on Section 4(f) as it relates to parks, recreation areas, and wildlife and waterfowl refuges; while historic sites are mentioned here, please refer to NCDOT Cultural Resources staff for further guidance on Section 4(f) historic sites.

## Background

Section 4(f) refers to the original section within the U.S. Department of Transportation Act of 1966 which provided for consideration of park and recreation lands, wildlife and waterfowl refuges, and [historic sites](#) during transportation project development. The law is implemented by the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA) through the regulation 23 CFR 774 (USDOT definitions for terminology used herein can be found at 23 CFR 774.17).

Before approving a project that [uses](#) Section 4(f) property, FHWA must determine that there is no [feasible and prudent](#) alternative that avoids the Section 4(f) properties and that the project includes all possible planning to minimize harm to the Section 4(f) properties; or, FHWA makes a finding that the project has a [de minimis](#) impact on the Section 4(f) property. FHWA is responsible for making all decisions related to Section 4(f) compliance, including whether Section 4(f) applies to the property; FHWA entrusts NCDOT NEPA staff to lead portions of the process outlined below.

## When does Section 4(f) apply?

Since Section 4(f) is a USDOT law, it only applies to transportation projects that have a **USDOT transportation nexus** – either by receiving federal funds and/or requiring approval by FHWA, FRA, or FTA. In other words, if a highway project is funded at the state or local level and does not require FHWA review (such as Interstate Access review), Section 4(f) does not apply. Be aware that NCDOT often programs projects 5-10 years in advance of construction and the programmed funding may shift from state to federal (or vice versa). In general, NCDOT prefers to maximize use of federal dollars and will assume a federal nexus with FHWA; producing federal-level documentation provides the Department with maximum flexibility for construction funding (it “keeps our options open” for grants and other opportunities). Having FHWA as our lead federal agency creates consistency and flexibility for most projects; thus, when preparing federal NEPA documentation (e.g. CEs) we need to account for 4(f) even if the project is only programmed with state funds at that time. Without that accounting, having project funding shift from state to federal would mean potential risks in our scope, schedule and budget.

Additionally, other protections may exist on a property even if they do not qualify for Section 4(f), regardless of funding source. For example, many parks in North Carolina are protected under the State Parks Act, Land

and Water Conservation Fund (LWCF, a federal grant program), or NC Land & Water Fund (LWF) easements, and historic sites may also be protected under Section 106. The NCDOT Environmental Policy Unit (EPU) and Division Environmental staff are available to provide clarification on determining eligible 4(f) parks and recreation lands, and wildlife or waterfowl refuges. The NCDOT Cultural Resources staff provides guidance related to 4(f) historic sites.

## Roles and Responsibilities

Identifying potential 4(f) resources in the project study area early in the project development process is critical to preventing project delays. The amount of time required for 4(f) review and concurrence depends on the level of impact the proposed project will have on the resource. For example, a “no use” or *de minimis* determination takes much less time than a project that will cause substantial impairments and/or a “[constructive use](#)” will take place. Transportation projects should always avoid adverse impacts to Section 4(f) resources to the maximum extent practicable, in accordance with [23 CFR 774.3](#).

NCDOT Environmental Policy Unit (EPU) and Division Environmental Staff are responsible for leading the coordination between the project team and external agencies such as FHWA, National Park Service (NPS), US Forest Service (USFS), and NC Natural Heritage Program (NHP) when necessary. Consultants are responsible for identifying resources in the project area, drafting communications with the [Official with Jurisdiction](#) (OWJ) over the resource, documenting findings, conducting public input & outreach when necessary, and working with NCDOT EPU or Division Environmental staff on *de minimis* or programmatic concurrences.

Once a protected 4(f) resource is identified, consult with NCDOT EPU or Division Environmental staff to initiate coordination with the proper OWJ. Coordination with state and federal agencies is done only through NCDOT Environmental Staff.

NCDOT Cultural Resources staff guide the process for eligible historic sites.

## Types of Section 4(f) Properties

There are two main types of Section 4(f) properties: (1) public and privately-owned historic sites that are on or eligible for listing on the National Register of Historic Places (NRHP); and (2) publicly-owned parks, recreation areas, and wildlife and waterfowl refuges. The ATLAS Screening Tool can help identify where these properties are in relation to the project study area. However, a complete screening of potential 4(f) resources also requires field visits and communications with local officials to determine all eligible resources in the vicinity. For instance, publicly-owned land that is not readily-identifiable as a public park may or may not be a 4(f) resource and would require careful coordination. Public input and outreach can also help identify properties that may be eligible for Section 4(f) protections that otherwise would not be identified through mapping alone. The general requirements for the two different types of 4(f) resources are outlined below.

### Section 4(f) parks, recreation areas, and refuges must:

- Be [publicly owned](#). The major purpose must be for park, recreation, or refuge activities, and must be [significant](#) as a park, recreation area or refuge.
- Be open to the public, with access permitted to the entire public during normal hours of operation.
  - In certain cases, refuges may not be completely open for public access but still qualify for protections under Section 4(f). For example, sensitive areas of a refuge may be closed off or sections of the refuge may only be open certain times of the year.

Public ownership refers to ownership by a local, state, or federal government agency. Types of ownership can include fee simple, permanent easement, or lease agreement:

- Fee simple: land is owned solely by government entity for park, recreation or refuge purposes

- Permanent easement for 4(f) purposes: government agency has easement on a property for recreation or wildlife purposes
- Lease agreement: similar to an easement, but lease agreement is typically intended for the long-term

When a transportation project may impact a 4(f) resource located on a property with an easement or lease, the terms of the lease and use of the land will be reviewed by NCDOT EPU and FHWA on a case-by-case basis.

**Section 4(f) historic sites must:**

- Be of national, state, or local significance *and*
- Be on or eligible for listing on the National Register of Historic Places (NRHP)

Unlike parks, recreation areas, and wildlife and waterfowl refuges, historic sites do not need to be publicly owned to qualify for protection under Section 4(f). During the review process, consult with NCDOT Cultural Resources staff on the potential for historic sites in the project study area.

## Identification of 4(f) Resources

Many different types of resources can qualify as a 4(f) resource if certain use conditions are met and the property is publicly owned and available to all members of the public. Utilizing NCDOT’s ATLAS Screening Tool during preliminary project screening will help identify resources in the project study area that may require further investigation on their applicability to Section 4(f).

While the ATLAS screening tool provides an extensive list of potential Section 4(f) resources, desktop review alone is not sufficient for identifying all eligible resources. Public input, community studies, and coordination with local officials are necessary to ensure 4(f) resources are not being overlooked. For example, a local church’s soccer field that is leased to the town and available for public use may qualify that portion of the property as a 4(f) resource. This type of scenario would not be discovered without desktop review, public involvement, and/or coordination with local officials.

## Determining 4(f) Applicability

When determining whether a property’s major purpose is as a park, recreation area or refuge, the master plan or management plan for the resource may need to be reviewed. If the land’s primary use is for purposes other than those listed above but recreation activities are occasionally conducted there, the resource would not be considered a Section 4(f) property. For example, occasional art shows on the grounds of a city hall would not qualify the property as Section 4(f). Consult NCDOT EPU, Division Environmental staff, and/or the property’s official with jurisdiction (OWJ) for clarification on the main purpose and use of a property to determine applicability as a 4(f) resource.

The following list contains examples of Section 4(f) resources:

- Public school playgrounds, if the property is open to the public (not just students/staff of the school) and serves significant organized or walk-on recreation purposes
- Publicly owned golf courses when the primary purpose is recreation
- Water bodies – many public lakes and rivers in North Carolina are government-designated paddle trails or have recreation as a major purpose & use. Other protected water bodies are those abutting a park or recreation area where Section 4(f) is applicable.
- Wild & Scenic Rivers: North Carolina has five wild & scenic rivers (WSR), designated at both state and federal levels. WSRs with a “recreation” designation are Section 4(f) resources. Consult with

NCDOT Division Environmental Staff or EPU whenever a WSR or a tributary to a WSR is either within or in the vicinity of a transportation project.

- Planned facilities: if a public agency owns land and has developed a management or master plan for future recreation purposes, that land may be considered a Section 4(f) resource.

The following are examples of resources that are typically not Section 4(f) resources, but may appear to be at first glance:

- Trails & multi-use paths: When publicly owned, some shared use paths like trails and greenways are considered a Section 4(f) resource.<sup>1</sup>
- Private lands that host recreational league activities (soccer fields, etc.)
- Lands protected by conservation easements that are held by a private or nonprofit organization

## Joint Development

NCDOT and FHWA must comply with [23 CFR 774.11\(i\)](#) when determining whether 4(f) applies when a potential resource was jointly planned for development with a future transportation corridor. The 4(f) requirements generally do not apply to use of a reserved transportation corridor within a 4(f) resource for its intended transportation purpose, since the land was reserved from the resource and never part of the protected 4(f) resource. In North Carolina, the most common governmental action to reserve a transportation corridor would be a park master plan, an adopted land use plan, or similar restrictive action. Evidence of the reserved transportation corridor should be documented in the project file. Recent examples encountered by NCDOT can be provided by contacting Environmental Policy staff.

## Categorical Exclusions & Section 4(f)

Since Section 4(f) is a USDOT law applicable to FHWA projects, the review of Section 4(f) resources is an included step in the NEPA Categorical Exclusion (CE) process. In other words, any transportation project that requires a CE also triggers a review of potential 4(f) resources. As noted previously, identification of Section 4(f) resources is accomplished via numerous review methods including but not limited to: ATLAS Screening Tool, coordination with local officials, public involvement meetings, Cultural Resources review, and Community Impact Studies.

## Public Involvement during Section 4(f) Review

Public involvement (PI) requirements during 4(f) determinations are specific to the type of determination being made. PI is not required for no use, no 4(f), or exceptions in 23 CFR 774.13. However, in accordance with 23 CFR 771.111 the transportation project will still require PI as part of the NEPA process.

***De minimis***: In accordance with 23 CFR 774.5(b)(2)(i),(ii) an opportunity for public review and comment must be provided for *de minimis* determinations. However, this involvement can and should be included within the regular NEPA PI process for the transportation project. It is important to provide the outcome of the PI to the OWJ in order to inform their *de minimis* concurrence review. A template public notice document is provided [here](#). **Public involvement can take several different forms depending on the resource and impacts;** NCDOT has met this requirement via signage on-site, mailing distribution, public meetings, and other means.

## Types of Section 4(f) Uses & Approval Options

Per FHWA, a “use” of a protected Section 4(f) resource refers to an adverse impact or incorporation of the

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<sup>1</sup> Exceptions: FHWA-funded trails are considered transportation resources. Recreational Trails Program, Rails to Trails, and Transportation Alternatives trails are exempt from Section 4(f), per [23 CFR 774.13](#). Always consult with EPU, Division Environmental Staff, or the OWJ when assistance in determining trail funding sources is needed.

property into a transportation project. Types of use that can occur include **permanent**, **temporary**, and **constructive**. NCDOT projects may require temporary use of a 4(f) property, such as a bridge replacement project requiring a temporary construction or access easement. If an easement needed to be permanent, such as a permanent drainage easement, this would constitute a permanent use of the Section 4(f) resource. When kept minimal and proven to not cause adverse impacts to the property, temporary and permanent uses can typically be handled through a *de minimis* finding.

A constructive use of a 4(f) resource occurs when a nearby transportation project will cause significant, detrimental impacts to the resource *without* a temporary or permanent taking of the land; that is, constructive use is caused by proximity impacts where the resource itself will not be occupied. The impacts from a nearby transportation project are so severe that the factors that qualify the resource as Section 4(f) - such as recreation activities - are substantially impaired and diminished. This type of impact requires coordination with FHWA Headquarters Office as well as a lengthy alternatives analysis process. Therefore, constructive uses of Section 4(f) properties are avoided by NCDOT to the maximum extent practicable.

For example, if a transportation project were to restrict access or cause ecological impairments, a constructive use would occur (e.g. a bridge replacement over a greenway where the new bridge does not provide the same or more vertical clearance above the greenway for cyclists). These situations are rare and require significant documentation and public input, so it is best to avoid constructive uses of Section 4(f) properties to the maximum extent practicable.

Use of a 4(f) resource can culminate with one of three approval determinations: **de minimis** impact, **programmatic evaluation**, or **individual Section 4(f) evaluation**. A resource can also be determined to have no use - meaning the Section 4(f) property will not be impacted by the transportation project whatsoever. The majority of NCDOT transportation projects fall under a finding of no use or *de minimis* impact. If an NCDOT project is determined to meet the exception requirements for a **temporary occupancy**, then NCDOT must document our ability to meet the conditions listed in [23 CFR 774.13\(d\)](#), which includes a concurrence letter from the resource's OWJ.

## ***De minimis Determination***

When a transportation project's impacts to a Section 4(f) resource are minimal and the OWJ concurs in writing that the project will have no adverse impacts on the property, FHWA/NCDOT can make a *de minimis* determination. The letter must state that the OWJ is familiar with the proposed transportation project, has been given ample time for public comment and involvement when needed, and they concur that the project will have a *de minimis* impact on the Section 4(f) resource. Template concurrence letters and public notice letters are located on the [NCDOT EPU site](#).

For historic sites, the State Historic Preservation Officer and/or Tribal Historic Preservation Officer must be notified in writing of the proposed transportation project. Since historic sites are also included in the Section 106 documentation, a finding of "no adverse effect" under Section 106 can typically be used for a *de minimis* impact determination under Section 4(f). SHPO/THPO must concur in writing that the transportation project will not adversely impact the Section 4(f) historic resource; this written documentation is typically produced during the Effects consultation process with SHPO. Consult with the NCDOT Cultural Resources staff for assistance with 4(f) documentation for historic resource effects.

Since a *de minimis* finding can only be made where the use does not adversely affect the activities, features, or attributes protected under Section 4(f), a *de minimis* impact finding is inappropriate where a project results in a constructive use.

## ***Nationwide 4(f) Programmatic Evaluations***

The Programmatic Evaluations predate the *de minimis* finding, so they do not get used as often as they were used 15 years ago. Of the five nationwide programmatic evaluations listed below, NCDOT typically only utilizes

#2 (Historic Bridges), and that evaluation is initiated by NCDOT Cultural Resources staff and concluded by the project team using the applicable NCDOT template. The five Nationwide Programmatic Section 4(f) Evaluations provided under 23 CFR § 774.3(d) are:

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

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

Individual Evaluations are required when a transportation project will impact a Section 4(f) resource to an extent not covered under a no use or *de minimis* impact or any of the five nationwide Programmatic Evaluations listed above. Individual evaluations require extensive alternatives analysis and a lengthy public involvement process so these impacts are avoided by NCDOT to the maximum extent practicable.

As described above, a constructive use of a 4(f) resource occurs when a nearby transportation project will cause significant, detrimental impacts to the resource *without* a temporary or permanent taking of the land; constructive uses typically warrant an Individual Evaluation due to the context and severity of their effects.

## Documentation Procedures

The following documents are required for proper Section 4(f) documentation: concurrence letter signed by NCDOT and OWJ, proof of public notice, and any comments received by the public. NCDOT has developed template forms for Section 4(f) concurrence with OWJ and Section 4(f) public notice. While use of the forms is not required, it is recommended. The templates will be updated as needed and posted to the [NCDOT EPU site](#).

### Essential Documentation for Each Approval Type

	De Minimis	Programmatic Evaluation	Individual Evaluation
Applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project	✓	✓	✓
Whether or not there is a use of Section 4(f) property	✓	✓	✓
Records of public involvement, or Section 106 consultation where applicable	✓	✓	✓
Results of coordination with the OWJ	✓	✓	✓
Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments	✓		✓
Avoidance, minimization or mitigation measures that were relied upon to make the <i>de minimis</i> finding	✓		
Documentation of the specific requirements of the programmatic evaluation being applied		✓	
Activities, features, and attributes of the Section 4(f) property			✓
Analysis of the impacts to the Section 4(f) property			✓
Alternatives considered to avoid using the Section 4(f) property, including analysis of the impacts caused by avoiding the Section 4(f) property			✓
A least overall harm analysis, if appropriate			✓
All measures undertaken to minimize harm to the Section 4(f) property			✓
Results of the internal legal sufficiency review			✓

## Definitions

Constructive Use: (23 CFR 774.15) A type of indirect use in which a transportation project's proximity impacts (as opposed to direct impacts) are so severe that the protected activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired. Examples include excessive noise level increases, diminished aesthetic features, ecological intrusions, and other indirect impacts to the resource's environment or utility. Only FHWA Headquarters may determine whether a Constructive Use occurs.

De minimis: For historic sites, *de minimis* impact means that FHWA has determined, in accordance with [36 CFR part 800](#) that no historic property is affected by the project or that the project will have "no adverse effect" on the historic site in question. For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

Feasible and prudent: A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.

Historic sites: Includes prehistoric and historic districts, sites, buildings, structures or objects listed in, or eligible for, the National Register of Historic Places. This may also include places of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

Official with jurisdiction (OWJ): The agency or agencies that own or administer the property and are empowered to represent the agency on matters related to the property. In some cases, there may be more than one Federal, state or local agency that would be considered the officials with jurisdiction.

Publicly owned: Property that is owned by a government authority via either fee simple ownership or permanent easement.

Significant: In comparing the availability and function of the resource with the recreational, park, and refuge objectives of that community, the resource in question plays an important role in meeting those objectives. The OWJ makes the significance determination, and if unable to obtain that determination NCDOT presumes the resource is significant. All determinations are subject to review by FHWA.

Use: Generally, "use" occurs with a U.S. DOT approved project or program (1) when land from a Section 4(f) site 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 preservationist purposes, or (3) when the proximity impact of the transportation project on the Section 4(f) site, without acquisition of land, are so great that the purposes for which the Section 4(f) site exists are substantially impaired.

## Additional Resources

[AASHTO Practitioner's Handbook - Complying with Section 4\(f\) of the USDOT Act](#)

[FHWA Environmental Review Toolkit - 4\(f\)](#)

[FHWA 4\(f\) Policy Paper \(July 2012\)](#)

NCDOT 4(f) Parks, Recreation Areas, and Wildlife/Waterfowl Refuge Process

Consultant

NCDOT Staff

Resource Owner (OWJ)

USDOT (i.e. FHWA)

