

**PART II**

**CHAPTER 11**

**Section 106 and Section 4(f)**

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## 11-1.0 Section 4(f) Overview

Under the provisions of [Section 4\(f\) of the Department of Transportation Act of 1966](#), the Department of Transportation (DOT) is prohibited from using any publicly owned public parks, recreation areas, and wildlife or waterfowl refuges, or any publicly or privately owned historic site listed or eligible for listing on the National Register of Historic Places for public transportation purposes without first determining either that associated impacts are *de minimis* or that there is no prudent and feasible alternative to the use of such resources. If no prudent and feasible alternative exists, then the DOT is required to develop measures to minimize harm to the resource resulting from the transportation project. FHWA regulations 23 CFR 771.135 specifically address the evaluation of Section 4(f) resources and impacts.

A Section 4(f) resource is “used” when:

1. Land from a 4(f) site is **permanently incorporated** into a transportation facility;
2. There is a **temporary occupancy** of land that is adverse in terms of the Section 4(f) statute's preservationist purposes [23 C.F.R. 771.135(p)(7)]; or
3. There is a **constructive use** of land [23 C.F.R. 771.135(p)(2)].

For the regulation and related guidance on complying with Section 4(f) please refer to the FHWA Environmental Review Toolkit website at: <http://www.environment.fhwa.dot.gov/4f/index.asp>.

## 11-2.0 Section 106 and Section 4(f) Coordination

Although Section 4(f) and Section 106 overlap because they both address historic properties, they are completely separate laws. Section 106 involves considering the effects of federal undertakings on cultural resources and providing the ACHP an opportunity to comment on the undertaking. Section 4(f) requires that a project may not use land from Section 4(f) properties unless there is no prudent and feasible alternative to using that land; and the project includes all possible planning to minimize harm to the Section 4(f) property resulting from the use. Section 4(f) applies to a historic site when that site is listed or eligible for listing in the NRHP regardless of ownership. Completion of Section 106 requirements does not complete Section 4(f). Section 106 must come to closure first so that the determination can be made regarding use under Section 4(f).

### 11-2.1 Key differences of Section 106 and Section 4(f)

1. Section 106 is a procedural law, whereas Section 4(f) is a substantive law. Section 4(f) requires the avoidance of use of a historic property unless it has been demonstrated, after sufficient analysis, that there are no prudent or feasible alternatives. Section 4(f) applies to the actual use or occupancy of a historic site, while Section 106 involves assessment of effects of an action on historic properties arrived through consultation. There is no direct correlation between “use” in the Section 4(f) context and “effect” in the

Section 106 context. Due to its substantive requirements, Section 4(f) is supported by stronger case law and is therefore viewed as a more powerful statute than Section 106.

2. Section 4(f) only applies to US DOT funded projects. A project with an Army Corps of Engineers (ACOE) permitted action, with no FHWA involvement, would not be subject to Section 4(f) analysis, although Section 106 would still apply.
3. The Section 106 process is integral to the Section 4(f) process, but the Section 4(f) process is not integral to the Section 106 process. The identification, boundary determination and evaluation of historic properties under Section 106 are keys to understanding the potential “use” of a property. For instance, fully justifying historic boundaries for a NRHP eligible or listed property is critical to understanding if a “use” is occurring to the property.

### 11-3.0 Determining Section 4(f) “Use”

A Section 4(f) use occurs if land from within a historic site (NRHP-eligible or listed) is being permanently incorporated into a transportation facility or it will be temporarily occupied. If land from within the site is not being physically used, there still may be a constructive use. A constructive use may occur when proximity impacts may substantially impair the property’s activities, features, or attributes that qualify the property for protection under Section 4(f).<sup>1</sup> Constructive use is rarely applied, but may be considered for certain situations. Close consultation with FHWA will determine constructive use applicability. Accordingly, the following sections refer to physical use of a property.

Listed below are some considerations when determining Section 4(f) use:

#### 11-3.1 Historic Boundaries

When determining whether a property is “used” in Section 4(f) parlance, it is critical to have a clearly delineated historic property boundary. In some cases, the boundary of the historic property, for Section 106 and Section 4(f) purposes, is not the same as the legal boundary of the property. For example, a historic building may have a legal boundary of several acres; however, the historic boundary may be more narrowly defined because not all of the acreage conveys the historic significance of the building. The historic property boundary should be developed in consultation with the SHPO. Clearly marked and labeled maps showing a property’s historic boundaries in relation

**Remember:**

**To determine Section 4(f) use, in the Section 106 documentation, it is helpful to have a historic property’s boundary overlaid on the project plans. Color-coding the property boundaries, project limits and areas of proposed right-of-way will ensure FHWA can make the appropriate determination.**

<sup>1</sup> Section 4(f) Policy Paper: Office of Planning, Environment and Realty Project Development and Environmental Review, July 20, 2012. See <http://environment.fhwa.dot.gov/4f/4fpolicy.asp>

to the project footprint and right-of-way limits shall be provided in the Section 106 documentation.

### 11-3.2 Section 4(f) and Archeological Sites

Section 4(f) applies to archaeological sites that are listed in or eligible for the NRHP *and* that warrant preservation in place.<sup>2</sup> Section 4(f) does not apply to archaeological sites that are important primarily for what can be learned from data recovery and have minimal value for preservation in place. Coordination with INDOT, FHWA and SHPO should occur when a NRHP-eligible archaeological site is impacted to determine if Section 4(f) is applicable.

### 11-3.3 Section 4(f) and Historic Districts

When taking land from within a historic or archaeological district, Section 4(f) applies to the use of those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. It must be noted generally that properties within the bounds of an historic district are assumed to contribute, unless it is otherwise stated, or if they are determined not to be contributing. For those properties that are not contributing elements of the district or are not individually significant, the property and the district as a whole must be carefully evaluated in order to determine whether or not it could be used without substantial impairment of the features or attributes that contribute to the National Register eligibility of the district.

## **11-4.0 Section 4(f) Approval Procedures**

As explained in the Section 4f Policy Paper,<sup>3</sup> there are three methods available for FHWA to approve a 4(f) use:

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

The following subchapters summarize the three Section 4(f) approval methods in regards to historic sites. With any Section 4(f) determination it is important to consult closely with INDOT and FHWA to apply the appropriate Section 4(f) approval.

### 11-4.1 de minimis Impact

A finding of *de minimis*, which can include temporary or permanent occupancy, on a historic property may be made when:

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<sup>2</sup> Ibid; see <http://environment.fhwa.dot.gov/4f/4fpolicy.asp#ar>

<sup>3</sup> Ibid;. See <http://environment.fhwa.dot.gov/4f/4fpolicy.asp>

1. The process required by Section 106 of the NHPA results in the determination of “no adverse effect” or “no historic properties affected” with the concurrence of the SHPO and ACHP, if participating in the Section 106 consultation;
2. The SHPO and ACHP, if participating in the Section 106 consultation, are informed of FHWA’s intent to make a *de minimis* impact finding based on their written concurrence in the Section 106 determination; and
3. FHWA has considered the views of any consulting parties participating in the Section 106 consultation.

Approval of the *de minimis* determination is conveyed through the “Section 106 Recommendation for Area of Potential Effect, Eligibility Determinations, and Effect Findings and Section 4(f) Compliance Requirements” form (see PART V Forms). A 4(f) statement is included in the form indicating that FHWA/INDOT has determined a *de minimis* finding, and asks for SHPO concurrence to the Section 106 finding. The *de minimis* determination is not approved until SHPO and ACHP, if participating, has concurred to the Section 106 finding of “no adverse effect” or “no historic properties affected” for the historic site being used.

#### 11-4.2 Programmatic Section 4(f) Evaluations

There are three Programmatic Section 4(f) evaluations that apply to historic properties. Each is discussed below.

##### *11-4.2.1 Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*

While already in a transportation use, historic bridges are considered Section 4(f) properties subject to evaluation. A proposed action will “use” a historic bridge when the action impairs the historic integrity of the bridge either by rehabilitation or demolition.

To apply the Historic Bridge Programmatic Section 4(f) Evaluation, three alternatives that avoid any use of the historic bridge must be examined:

- a) do nothing,
- b) build a new structure at a different location without affecting the historic integrity of the historic bridge, and
- c) rehabilitate the historic bridge without affecting the historic integrity of the structure.

Additionally, the “[Programmatic Agreement among the Federal Highway Administration, the Indiana Department of Transportation \(INDOT\), the Indiana State Historic Preservation Officer \(SHPO\), and the Advisory Council on Historic Preservation \(ACHP\) Regarding Management and Preservation of Indiana’s Historic Bridges](#)” (Historic Bridge PA) governs the project development process for historic bridges in Indiana. This agreement states that FHWA will work with INDOT, and the bridge owner--if the bridge does not belong to INDOT--to

develop a Purpose and Need statement and an alternatives analysis for any project involving a historic bridge. Rehabilitation for vehicular use must be thoroughly evaluated before other alternatives are considered.

For approval of the Historic Bridge Programmatic Section 4(f), the Historic Bridge Alternatives Analysis fulfills the requirements of the Historic Bridge PA and the Historic Bridge Programmatic Section 4(f) Evaluation when applicable.

Refer to Part IV Historic Bridges for more information on the Historic Bridge PA and completing the Section 4(f) alternatives analysis for historic bridges.

FHWA final approval of the CE will affirm that all Historic Bridge PA requirements have been fully addressed, serve to confirm that FHWA has concluded its responsibilities under Section 106, and serve as FHWA approval of the Historic Bridge Programmatic 4(f) and the preferred alternative.

Rehabilitation that does not impair the historic integrity of the bridge as determined by procedures implementing Section 106 is not subject to Section 4(f).<sup>4</sup> That is to say, in general, if a rehabilitation project results in a “no adverse effect” finding for the bridge, the bridge is not subject to Section 4(f).

#### *11-4.2.2 Final Nationwide Section 4(f) Evaluation and Approval for Federally Aided Highway Projects with Minor Involvements with Historic Sites*

This programmatic evaluation is applicable under the following conditions:

- a. Improvements only to existing facilities;
- b. Does not impair the use of the Section 4(f) property;
- c. Does not require the removal or alteration of historic objects;
- d. Does not require the disturbance of archaeological resources that should be preserved in place;
- e. SHPO agrees in writing with the assessment of effects and mitigation.

Please note that the *de minimis* impact determination has essentially replaced the need to apply this programmatic evaluation. For FHWA/INDOT projects, the *de minimis* determination is applied for minor uses of historic properties.

#### *11-4.2.3 Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) property*

A Net Benefit is applied under the following conditions:

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<sup>4</sup> Ibid

- a. The proposed transportation project uses a Section 4(f) historic site.
- b. The project includes all appropriate measures to minimize harm and mitigation to *preserve, rehabilitate and enhance* the Section 4(f) property.
- c. For historic properties, there is no demolition or major alteration of the characteristics that qualify it for inclusion in the National Register. For archaeological properties that are important for preservation in place, it does not require the disturbance or removal of these properties.
- d. The SHPO must agree to the mitigation for historic properties in an MOA.

A Net Benefit determination is rarely applied, but is possible through coordination with FHWA and SHPO. When a Net Benefit is applied, specific language in the 800.11 documentation should be included that references the Section 4(f) regulations in regards to the Net Benefit and explains why the project meets the conditions of the Net Benefit. Further, the MOA will include a statement that the project was determined a Net Benefit.

#### 11-4.3 Individual Section 4(f) Evaluation

When it has been determined that the use is not *de minimis* and does not comply with the Programmatic Evaluations, then an individual Section 4(f) evaluation must be completed.

The Section 4(f) evaluation must show that:

- a. There is no “feasible and prudent” alternative to the use of the 4(f) property; and
- b. The project includes all possible planning to minimize harm to the 4(f) property.

An individual Section 4(f) evaluation requires coordination with the U.S. Department of Interior (USDOI) and requires FHWA legal counsel to review the evaluation for legal sufficiency prior to approval. Please keep in mind that Section 106 must be completed prior to approval of the Section 4(f) evaluation. Please refer to INDOT’s [Procedural Manual for Preparing Environmental Studies](#) for details in preparing the Section 4(f) documentation.<sup>5</sup>

Obtaining approval of the individual Section 4(f) evaluation may take 3-6 months. Therefore, it is important early in the planning process to identify potential Section 4(f) properties and potential use and approval options.

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<sup>5</sup> The *Procedural Manual for Preparing Environmental Studies* can be downloaded at the following website:  
[http://www.in.gov/indot/files/Procedural\\_Manual\\_for\\_Preparing\\_Environmental\\_Studies\\_2008.pdf](http://www.in.gov/indot/files/Procedural_Manual_for_Preparing_Environmental_Studies_2008.pdf)