CHAPTER 3: IDENTIFYING SECTION 4(f) PROPERTIES

Section 4(f) and its provisions state that publicly owned parks, recreation areas, wildlife and waterfowl refuges, and publicly and privately owned historic sites are protected from impacts resulting from transportation projects. The challenge can be in determining whether the property meets the criteria to be protected as a Section 4(f) property.

The information in this chapter is an overview of the identification and consultation requirements for the Section 4(f) process. This chapter does not include all of the examples of Section 4(f) properties that are listed in the FHWA Policy Paper (2012). Rather the focus here is on the most common types of Section 4(f) properties that are encountered on ODOT projects. Practitioners should thoroughly familiarize themselves with the entire contents of Policy Paper for a full understanding of FHWA’s policy.

Practitioners are also encouraged to read the AASHTO publication Practitioner’s Handbook 11 (May 2009) “Complying With Section 4(f) Of The U.S. DOT Act.” This handbook goes into more detail and includes useful information that is relevant to this chapter including many good practices and practical tips which are critical to a full understanding of Section 4(f) procedures.

Official(s) with Jurisdiction (OWJ)

The OWJ is the federal, state, or local agency that owns or administers a Section 4(f) property or has been empowered to represent an agency on matters related to the property. The Federal-Aid Highway Act of 1968 added the requirement that the recognized OWJ over the 4(f) property be consulted when impacts are anticipated and/or more information is needed regarding the purpose and function of a property.

Coordination with Officials With Jurisdiction

When coordinating with the OWJ(s) regarding a project and its impacts, we must have a clear understanding of the property, its designated purpose, and its management plan. The consultation with the OWJ(s) will confirm the purpose of the property and its significance to the community, thereby determining if the property is afforded protection under Section 4(f). Coordination with OWJ(s) is done via formal letter most of the time. However, there are some instances when using an email for the coordination is appropriate.

For recreational properties, the first step in consultation is to identify the OWJ. Once the OWJ has been identified, the project sponsor (or their consultant) will discuss with the OWJ the recreational significance of the property. If the property is determined to meet the criteria for protection under Section 4(f) additional coordination with the OWJ will follow. Once the impacts of the proposed project are known, the project sponsor can work with the OWJ to identify mutually agreed upon measures to minimize harm. These measures will be incorporated as environmental commitments in the NEPA document.
Care should be taken to ensure that the commitments are quantifiable and able to be monitored and enforced.

Measures to minimize harm may include:

- Replacement of impacted facilities
- Restoration of disturbed areas
- Incorporation of design and habitat features which reduce impacts

Additional measures to minimize harm may also be developed based on consultation with the OWJ. When an agreement has been reached, the project sponsor or their consultant will prepare and send a letter (on the project sponsor’s letterhead) to the OWJ which includes a description of the property and its recreational significance, anticipated impacts as a result of the project, the Section 4(f) determination, and measures to minimize harm. This letter will be sent to the OWJ for its concurrence.

OES has developed OWJ coordination templates with sample language to assist Districts, LPAs, and consultants in preparing OWJ correspondence for recreational properties. These templates provide major components needed for the OWJ communication, including specific language to use for some sections of the correspondence. The templates also provide suggested measures to minimize harm along with language which may be used exactly as written or which may be adapted to a particular project. The OWJ correspondence must be sent from the project sponsor to the OWJ.

OES is available to review draft OWJ correspondence prepared by consultants, LPAs, and District offices. These may be sent to OES to review by uploading them to the Online CE System and notifying OES that the correspondence is available for review.

When the project sponsor’s representative and the OWJ are the same individual, the ODOT District office will need to send the correspondence to the project sponsor/OWJ for concurrence. Where the OWJ over the property and the project sponsor are with the same organization but are within different departments (for example the parks department could be the OWJ, while the engineering department could be the project sponsor), the department that is the project sponsor will send the correspondence to the department that is the OWJ.

Coordination with the OWJ for historic sites takes place through the Section 106 process. In Ohio, the OWJ for historic sites is the State Historic Preservation Officer (SHPO). No further OWJ coordination with SHPO is required for Section 4(f) outside of the Section 106 process.

If there is any question regarding whether a property is protected under Section 4(f), contact the appropriate DEC/District Environmental Staff (if LPA/consultant) or OES (if DEC/District Environmental Staff). OES will consult with FHWA if necessary to make the final determination.
Determining Section 4(f) Applicability

Public Parks and Recreation Areas
For the purposes of Section 4(f), public parks and recreation areas are properties that are owned or leased by a unit of public government (e.g., federal, state, city, village, county, township, or local parks authority) which are specifically set aside and designated as a parks and recreation areas, and open to the general public. In order for a park or recreational property to be protected by Section 4(f) it must be both publicly owned and open to the public.

Research may be required to identify whether the property is owned or managed by a unit of government. Jurisdiction over a property is held by the agency or agencies that own or administer the property; these OWJs are the primary sources of information regarding the purpose, designation, and management of a property.

Examples of OWJ for public parks and recreation areas include the directors of local city/village/county parks & recreation departments or service departments, mayors, county commissioners, township trustees, the Ohio Department of Natural Resources (ODNR), National Park Service (NPS), and U.S. Army Corps of Engineers (USACE) Regional Office Directors.

A Section 4(f) property may have more than one OWJ. In those situations, both agencies would need to be consulted. Below are some examples:

- public parks that are owned by a city but managed by a parks department or organization
- public parks that are owned by a village but managed by a local civic club
- public parks owned by the USACE for flood control and leased to the state or county for a public recreational use

If a lease is involved, the lease document may also provide details regarding designation and management. It is important to review any lease involved with a possible Section 4(f) property.

The OWJ must be consulted to determine the significance of the property for park or recreational purposes, and must concur with any impacts and mitigation measures. See Question 1A in Part II of the FHWA Policy Paper (2012) for a definition of “significant” as it relates to parks, recreation areas, and wildlife and waterfowl refuges.

Parks and recreation areas that are determined to be Section 4(f) properties are presumed to be significant for recreation unless the OWJ can clearly indicate that the entire property is not significant.
Wildlife and Waterfowl Refuges
These properties are typically federally or state owned. A refuge serves specific wildlife and waterfowl refuge activities and may be open to the public. The refuge’s management plan describes the purpose and functions and can help guide the Section 4(f) decision. Privately-owned refuges are not subject to protection under Section 4(f).

Federal refuges are designated under the Endangered Species Protection Act/National Wildlife Refuge System Administration Act of 1966. This law is codified under 16 U.S.C. Section 668dd (a)(1) and 50 CFR 25.11(b). These regulations state that a refuge’s primary purpose is for developing wildlife and ecological conservation and rehabilitation as part of a national program. Any refuge designated under this program is protected by Section 4(f). Publicly-owned state or local refuges are also considered Section 4(f) properties if the primary purpose is conservation, restoration, or management of wildlife and waterfowl resources.

The refuge must be open to the public; but there may be some areas within the refuge that restrict public access or access may be restricted at certain times of the year. If these restrictions are for the purpose of protecting the refuge habitat or particular species, the refuge is protected by Section 4(f) despite restrictions to public access.

The OWJ must be consulted to determine the significance of the resource for refuge purposes and must concur with any impacts and the measures to minimize harm. See Question 1A in Part II of the FHWA Policy Paper for a definition of “significant” as it relates to parks, recreation areas, and wildlife and waterfowl refuges. In Ohio, the OWJ for public wildlife and waterfowl refuges is generally a federal agency or ODNR. The refuges are usually owned and managed by the same agency.

Historic Sites
While parks, recreation areas, and waterfowl and wildlife refuges must be publicly owned to be protected by Section 4(f), historic sites may be publicly or privately owned. For more information, refer to Part II, Section 2 in the FHWA Policy Paper.

Historic sites are identified through compliance with Section 106 of the National Historic Preservation Act (NHPA) of 1966. The NHPA mandates that the federal government shall take into account its impacts on historic properties. The two laws overlap when historic sites are involved.

Compliance with Section 106 of the NHPA determines whether historic sites listed on or eligible for listing on the National Register of Historic Places (NRHP) will be affected by a federal undertaking. Properties that are determined to be listed on or eligible for listing on the NRHP are subject to Section 4(f) protection.

Refer to ODOT’s Cultural Resources Manual for more information regarding Section 106 of the NHPA.
There are generally two categories of historic sites to consider:

- above ground resources representing the built environment (historic districts, buildings, objects, structures, etc.)
- below ground resources representing the archaeological record (prehistoric or historic archaeological sites)

In Ohio, the OWJ for historic sites is the State Historic Preservation Officer (SHPO). Significance of historic sites is determined in consultation with the SHPO through the Section 106 process. If the Advisory Council on Historic Preservation (ACHP) is involved in consultation concerning a historic site as part of the Section 106 process, they would also be an OWJ.

**Special Considerations for Historic Sites**

**Archaeological Sites**
There is a special consideration for archaeological sites under Section 4(f) that is very different from any consideration for an above ground resource. In order for archaeological sites to be protected by Section 4(f) they must meet an additional requirement based on an exception in the implementing regulations (23 CFR 774.13(b)). Archaeological sites are often listed or eligible for listing on the NRHP based on their information potential.

For such sites, adverse effects under Section 106 can be mitigated through data recovery (excavation). This is determined through consultation and agreement with the [State Historic Preservation Office](https://www.ohiodot.oh.us/ohiohistoricpreservation) (SHPO). If an archaeological site is eligible for the NRHP only for its information potential and is not considered important for preservation in place, it is not protected by Section 4(f). If the site is important for preservation in place, it is protected by Section 4(f). An example of a site important for preservation in place in Ohio could be a burial mound or earthwork complex. Section 4(f) Exceptions are further discussed in [Chapter 4](#) of this manual.

**National Historic Landmarks**

**National Historic Landmark** (NHL) is a special category of historic property and impacts to such properties require some additional coordination and consideration. NHLs are nationally significant historic places that are determined to represent an outstanding aspect of American history and culture. They are designated by the Secretary of the Interior. In addition to the SHPO and possibly the ACHP, the National Park Service (NPS) (representing the Department of the Interior) is considered an OWJ for projects that impact an NHL. Coordination with SHPO, ACHP, and NPS is carried out through the Section 106 process.

Pursuant with [Question 2E of the FHWA Policy Paper](#), the Section 4(f) requirements for NHLs are essentially the same as for any other historic site. However, under Section 110(f) of the National Historic Preservation Act agencies
must “to the maximum extent possible...minimize harm” to an NHL that may be
directly and adversely affected by an undertaking. The FHWA Policy Paper states
that the importance and significance of the NHL should be considered when
analyzing least overall harm pursuant to 23 CFR 774.3(c)(1)(iii) which states that
the relative significance of each Section 4(f) property be considered.

Additional Property Examples
The following properties are some of the most common that may meet the criteria for
Section 4(f) protection; however, that is not always clear. They will require additional
research to determine if they are protected by Section 4(f).

For more information on less common Section 4(f) properties, please see the FHWA
Policy Paper.

Wild and Scenic Rivers
National Wild and Scenic Rivers (WSR) are officially designated under the National
Wild and Scenic Rivers Act (WSRA) of 1970 and codified in 16 U.S.C. 1271 and
36 CFR 297.3. A WSR is the “…river and the adjacent area within the boundaries
of a component of the National Wild and Scenic River System.” Within the WSR
system portions of rivers in the U.S. are designated as wild, scenic, and/or
recreational. Research will be required to determine if a river has a WSR
designation and then to determine which agency is the OWJ. In Ohio, ODNR State
Scenic River coordinators are a good source of this information.

Pursuant with Question 21B of the FHWA Policy Paper, consult with the OWJ to
determine how the river is designated, how the river is being used, and to examine
the management plan over that portion of the river. If the river is publicly owned
and designated a recreational river under the WSRA or is a recreation resource
under a management plan, then it would be a Section 4(f) property. For those
portions of a WSR to which Section 4(f) applies, the OWJ are the official(s) of the
Federal agency or agencies that own or administer the affected portion of the river
corridor in question. The river’s management plan is critical for determining its
primary purpose and designation as a WSR.

Conversely, if a river is included in the WSR system and designated as wild but is
not being used as or designated under a management plan as a park, recreation
area, wildlife and waterfowl refuge and is not a historic site, then Section 4(f) would
not apply.

In some cases the national WSR is administered by the state. ODNR serves as
the OWJ over these rivers in Ohio. If the river segment involved in a project is listed
as a national WSR, the LPA, consultant or DEC/District Environmental Staff should
contact the ODNR Scenic River coordinator for that area for assistance in
determining the OWJ and obtaining the management plan.
Similar to National Wild and Scenic Rivers, State Scenic Rivers designations include scenic, wild, and/or recreational (click on Scenic Rivers Designation tab on the State Scenic Rivers webpage above). In order to determine whether a state scenic river or portions thereof are subject to Section 4(f), consultation with ODNR (the OWJ over state scenic rivers) and review of the management plan are necessary. Current state scenic rivers are updated periodically by ODNR. The same criteria of designation and purpose apply. If the portion of river is designated for recreation, then it is a Section 4(f) property. If it is designated scenic or wild with no recreational features, it is not a Section 4(f) property.

**School Playgrounds**

*Question 14 of the FHWA Policy Paper* defines a playground as 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) only applies to the playground portion of the school property; it does not apply to the entire school property or campus.

If a playground’s purpose is generally for use by the school for school functions only (e.g., physical education classes, recess, school sports, etc.), it is not a Section 4(f) property. The OWJ should be consulted to determine this. Typically, the OWJ for a school in Ohio is the school district superintendent.

In some communities the school playground also serves as a primary recreation facility when school is not in session. 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, it will be protected by Section 4(f).

One example of an organized public purpose would be a community athletic league using the playground (sports field) for regular activities. If many people in the community use the playground for general recreation, similar to a park, this could be considered substantial walk-on recreation. However, if the playground is open to the public and occasionally the public uses it for casual recreation, it will most likely not be considered a Section 4(f) property. Discussions with the school OWJ are important in determining the primary purpose(s).

Playgrounds at private schools, even if accessible to the public for recreation, are not protected under Section 4(f).

**Trails and Shared Use Paths**

Section 4(f) applies to publicly owned trails, paths, bikeways, and sidewalks that primarily serve a recreational purpose. If such a facility is primarily for transportation use or is part of the local transportation system (including bike lanes), Section 4(f) does not apply. The trail may have a management plan which
can assist in determining its primary purpose. Please refer to Questions 15A-E of the FHWA Policy Paper for more information regarding trails and shared use paths.

Designated trails which are within the highway right-of-way but are not limited to any specific location within that right-of-way may meet the criteria of a Section 4(f) Exception (23 CFR 774.13(f)(3)). Section 4(f) Exceptions are discussed further in Chapter 4 of this manual.

Examples of the OWJ for trails and shared use paths include the directors of parks and recreation departments, service directors, mayors, county commissioners, township trustees, the Ohio Department of Natural Resources (ODNR), or National Park Service (NPS) designees.

**Golf Courses**
Section 4(f) applies to golf courses that are owned, operated and managed by a public agency for the primary purpose of public recreation and determined to be significant. Section 4(f) does not apply to privately owned and operated golf courses even when they are open to the general public. Golf courses that are owned by a public agency but managed and operated by a private entity may still be subject to Section 4(f) requirements depending on the structure of the agreement.

Golf courses that are on or eligible for listing on the NRHP are considered Section 4(f) properties regardless of ownership or accessibility to the public. Please see Questions 18a and 18b in the FHWA Policy Paper for additional discussion on Section 4(f) applicability for golf courses.

The OWJ for golf courses will typically be the agency or agencies that own or administer the property, but may also be the facility’s golf pro or superintendent.

**Museums, Aquariums, and Zoos**
Publicly owned museums, aquariums, and zoos are not normally considered parks, recreation areas, or wildlife and waterfowl refuges, and are not subject to Section 4(f) unless they are significant historic sites. However, these facilities will need to be evaluated on a case-by-case basis to determine if they provide additional park and recreational opportunities and if that is their primary purpose, which would make them subject to Section 4(f). Additional information on applicability of these facilities is discussed in Question 19 of the FHWA Policy Paper.

**Fairgrounds**
Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g. stock car races, horse racing, concerts, county or state fairs), rather than as park or recreation areas. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) applies only to those portions of land determined significant for park
or recreational purposes, unless they are significant historic sites. Please see Question 20 of the FHWA Policy Paper.

Some county fairgrounds are owned by the County Commissioners and some are owned by the local agricultural society. This underscores the importance of contacting a County and/or a fair board to determine the primary function of the property.

**Public Multiple Use Land Holdings**

Multiple use land holdings are often large tracts of land that contain areas with different designated purposes. 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 public park, recreation, wildlife and waterfowl refuge purposes, and are determined to be significant for such purposes. Section 4(f) will also apply to any significant historic sites within the multiple-use public property.

One example of a Public Multiple Use Land Holding would be a National Forest, which may have specific areas designated for recreation such as camping or picnicking within its larger boundaries. The property’s management plan is the key to determining if Section 4(f) applies to any area of the holding. Section 4(f) does not apply to those areas within a multiple-use public property that function primarily for any purpose other than significant park, recreation or refuge purposes, such as timber sales or mineral extraction.

If no management plan has been adopted or the plan is out-of-date, then FHWA, based upon discussions with OES and the OWJ, will determine if Section 4(f) applies to any portion of the property. Please see Question 4 of the FHWA Policy Paper.

**Planned Section 4(f) Properties**

Section 4(f) applies when the land is one of the 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, even though the property is not presently functioning as such. 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. Please see Question 25 of the FHWA Policy Paper.
**Other Section 4(f) Considerations**

**Leases and Easements**
Leases and easements may require research to determine the applicability of Section 4(f) to the property. Easements are generally the right to use a property without ownership such as for utility, conservation, or roadway maintenance. If an easement exists within the project area, the terms of the easement should be carefully considered and discussed with the OWJ. The following should be considered: the purpose of the easement, terms of the easement, how the property is currently managed, parties involved in the easement, termination clauses, and other restrictions.

While easements are generally in perpetuity, leases are usually for a specific length of time. A lease may constitute a permanent and/or proprietary interest for the purpose of Section 4(f). Under a long term lease by a government agency, a property may be considered ‘publicly owned’ for Section 4(f) purposes if the land is being managed for a significant recreational purpose. As with easements, the terms of the lease must be carefully examined to determine if the property should be afforded protection under Section 4(f) regulations. If a government entity has a long term lease and has established a park or refuge on a property it will likely be considered a Section 4(f) property.

Any questions regarding easements or leases and Section 4(f) should be discussed with OES and FHWA.

**Exemptions and Exceptions**
The federal regulations 23 CFR 774.11 and 23 CFR 774.13 established resources and special circumstances that are exemptions and exceptions to the applicability of Section 4(f).

The regulation at 23 CFR 774.11(e)(2) states that the Interstate System is exempt and not considered to be an historic site subject to 4(f). The regulation then makes an exception of those elements of the Interstate System that have national and exceptional historic significance, and which have been so identified by FHWA for Section 4(f) protection. Two such elements are located in Ohio: The “Welcome to Ohio” arch on Interstate-70 at the Indiana border and the twin Interstate-80 bridges over the Cuyahoga River Valley in Northeast Ohio.

The regulation at 23 CFR 774.13 lists specific exceptions for certain Section 4(f) properties. Each of these exceptions has specific criteria that must be met. When those criteria are met, impacts to those properties do not constitute a Section 4(f) use. Most of these exceptions require that the OWJ be consulted and not object to the specific conditions. Please see the above link and Chapter 4 for more details on these exceptions.