

**CDOT GUIDANCE ON *DE MINIMIS* DETERMINATIONS
FOR NON-HISTORIC SECTION 4(F) RESOURCES**

July 29, 2013

In 2005, Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), amended existing Section 4(f) legislation to simplify the processing of projects that have only *de minimis* impacts on resources protected by Section 4(f). This provision provides that once the U.S. Department of Transportation (U.S. DOT) determines that a transportation use of a Section 4(f) resource, after consideration of any avoidance, minimization, and mitigation or enhancement measures, results in a *de minimis* impact on that resource, an analysis of avoidance alternatives is not required, and the Section 4(f) evaluation process is complete. However, in order for the Federal Highway Administration (FHWA) to make a Section 4(f) determination, certain requirements must still be met. These processes differ between historic and non-historic Section 4(f) resources. Outlined in this document is guidance on the process necessary for compliance with the Section 4(f) *de minimis* finding for non-historic Section 4(f) resources.

This document is intended to supplement and support the Section 4(f) Policy Paper released July 20, 2010: <http://environment.fhwa.dot.gov/4f/4fpolicy.asp>

Parks, Recreational Resources, and Wildlife Refuges

The following procedures must be met in order for the impacts to parks, recreational resources, and wildlife refuges to be considered *de minimis*.

In order for the use of parks, recreational resources, or wildlife refuges to be considered *de minimis*:

1. The transportation use of the Section 4(f) resource, together with any impact avoidance, minimization, and mitigation or enhancement measures incorporated into the project, does not adversely affect the activities, features, and attributes that qualify the resource for protection under Section 4(f);
2. The public has been afforded an opportunity to review and comment on the effects of the project on the protected activities, features, and attributes of the Section 4(f) resource; and
3. The Official(s) with Jurisdiction (OWJ) over the property are informed of FHWA's or Federal Transit Administration (FTA)'s intent to make the *de minimis* impact finding, which is based on the OWJ's written concurrence that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f).

Public Involvement

If the use of a park, recreational, or wildlife refuge is being considered as part of a NEPA process with its own public involvement process, no separate public involvement is required for Section 4(f) *de minimis* as long as the proposed impacts and finding have been adequately disclosed as described below. However, for those projects that do not otherwise require public involvement, it will be necessary to provide the public notice and opportunity to comment on any proposed impacts, avoidance, minimization, mitigation, and enhancement activities related to a *de minimis* finding.

Public involvement should be appropriate to the individual project. While there are no specific requirements as to what the public involvement must include, it must at a minimum provide the public with published notice of the anticipated use of the park, recreational resource, or wildlife refuge, the anticipated effects on the activities, features, and/or attributes, and provide a reasonable opportunity for the public to respond. If only written comments are being accepted, a minimum of 30 calendar days from publication of the notice must be provided to allow ample time for written comments to be received. If a public meeting is to be used for comment, published notice given before the meeting must be consistent with CDOT's public involvement procedures.

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 *de minimis*

process. According to the Policy Paper, "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)). If appropriate for the EA/EIS process, public notice and comment activities specific to the *de minimis* process may be used.

For public meetings, open houses, or other formal public involvement activities being used to meet the public notice and comment requirements for a *de minimis* finding, the properties and the impacts and avoidance, minimization, mitigation, and enhancement activities related to the properties must be individually discussed and public comment requested. For EAs and DEISs in which this process is followed, no additional public involvement activities are required.

Concurrence from the Official with Jurisdiction (OWJ)

Consultation with the OWJ should begin as early in the project environmental review process as possible. Before public involvement, the project team and the OWJ should be in general agreement as to the potential level of impacts to the Section 4(f) resource as well as have general agreement concerning avoidance, minimization, mitigation, and enhancement measures that will be presented to the public for comment.

Concurrence from the OWJ takes place after public involvement and requires written documentation of the consultation with the OWJ. This can be done with a letter or written resolution from the OWJ. CDOT, or its consultant, may draft a letter which includes the OWJ's concurring signature. The documentation must outline:

- ▶ The consultation that has taken place
- ▶ Any effects that the project will have on any of the activities, features and/or attributes that qualify the property as a Section 4(f) resource
- ▶ Public Involvement activities for the resource including any changes to proposed actions that resulted from public input which both CDOT and the OWJ agree to include in the project
- ▶ A summary of the avoidance, minimization, mitigation, and enhancement measures that will be necessary
- ▶ Concurrence from the OWJ that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f)

The following, or similar, language should conclude the letter:

As the official with jurisdiction over **[INSERT NAME OF PARK, RECREATIONAL RESOURCE, OR WILDLIFE REFUGE]**, I hereby concur with the recommendation of the project proponents that the use and impacts associated with this project along with the identified avoidance, minimization, and mitigation and/or enhancement measures, will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f).

While this letter will be used to demonstrate consultation with the OWJ submitted to the FHWA, it is important to document all consultation activities with the OWJ in the project file.

De minimis finding by FHWA

A *de minimis* finding must be made for each separate Section 4(f) resource for which *de minimis* is appropriate. A single finding cannot be made on a project as a whole.

Only the U.S. DOT agencies have authority to make Section 4(f) *de minimis* findings. As appropriate for the project, this can be accomplished as part of the Record of Decision (ROD), as part of the Final Environmental Impact Statement (FEIS) as part of the Finding of No Significant Impact (FONSI), or as a separate *de minimis* finding process.

A *de minimis* or other Section 4(f) finding will be required in cases where a design modification changes the use of or impact to a Section 4(f) resource after the original NEPA process has been completed. Design changes that modify use of a Section 4(f) resource may be identified during a supplemental EIS process (23 CFR §771.130), as part of a re-evaluation (23 CFR §771.129) or during FHWA's review and approval of a project's plans, specifications and estimates for a project (23 CFR §635.309).

In cases where the non-historic *de minimis* finding is being requested as a part of the FONSI, FEIS, or ROD, the following information must be included as a separate and independent section of the FONSI, FEIS or ROD. This section must include the following information:

- ▶ Identification of non-historic Section 4(f) resources for which a *de minimis* determination is being requested
- ▶ Identification of OWJ for each non-historic Section 4(f) resource
- ▶ Identification of the features, functions, and attributes that qualify the resource for protection under Section 4(f)
- ▶ Outline of public involvement activities including any changes to proposed actions that resulted from public input.
- ▶ Impacts to each non-historic Section 4(f) resource where a *de minimis* finding is being requested including physical use of the non-historic resource and any impacts to associated features, attributes or activities
- ▶ Statement of commitments for including all possible planning to avoid and minimize harm to the resource, which includes efforts to minimize impacts as well as any enhancement and mitigation measures
- ▶ All consultation and public involvement activities related to the resource that have already occurred and the results of these activities, particularly as they relate to avoidance, minimization, mitigation, or enhancement activities
- ▶ Statement that concurrence has been received from any applicable OWJ

To the extent possible, project teams are encouraged to provide this information in tabular form and use maps or other visual representations where such representations help clarify information.

The Section 4(f) *de minimis* finding must include a written concurrence from the OWJ (as outlined above) and coordination activities for each property for which *de minimis* is being requested and public comments.

FHWA finding language must conclude the *de minimis* finding request for each specific resource in the FONSI, FEIS, or ROD (see Sample FHWA finding language below).

A copy of all *de minimis* materials must be submitted to CDOT Environmental Program Branch for review and approval before the FONSI, FEIS or ROD is submitted for signature.

In cases where the non-historic *de minimis* finding is being requested as part of a Categorical Exclusion or situations where Section 4(f) is being done separately from NEPA, the coordination with the OWJ and the public involvement process described in this guidance still apply. For these situations, a CDOT Section 4(f) specialist will prepare a letter formally requesting the *de minimis* finding from FHWA that includes the finding language below:

Sample FHWA finding language:

The FHWA hereby finds that:

- ▶ CDOT has consulted with the official(s) with jurisdiction on the uses and impacts to the non-historic Section 4(f) resource from the proposed [Project]
- ▶ The public has been given an opportunity to provide input
- ▶ The official(s) with jurisdiction concur that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f). The FHWA finds that the Project will have *de minimis* impacts on [INSERT NAME of Section 4 (f) resource].

Therefore, all Section 4(f) requirements, as they relate to these uses, have been met.

Scheduling Considerations

The regulations are intended to simplify the processing and approval of projects that have only *de minimis* impacts on lands protected by Section 4(f). However, there are aspects to the process that must be considered when evaluating whether a *de minimis* determination should be pursued. The Environmental Project Manager should weigh the following factors which may alter the existing schedule:

- ▶ Educating the OWJ on the Section 4(f) and *de minimis* process to the extent necessary to obtain its written concurrence.
- ▶ Consultation with the OWJ can and should begin early in the process. However, the public's opportunity to comment on the impacts to the resource may not occur until late in the process. Obtaining the OWJ's written concurrence should be sought shortly after the public comment period has been completed.
- ▶ There is risk involved in pursuing a *de minimis* determination where impacts are not adverse. In cases where it is not clear, demonstrating to FHWA that the impacts are not adverse will require additional justification.

Additionally, as part of the project close out, a final letter on letterhead with the signature of the OWJ should be included in the project file, and submitted to FHWA by the project manager outlining the final Section 4(f) use and effects.

The figure below summarizes the process followed for a Section 4(f) *de minimis* resource.

Suggested Section 4(f) De Minimis Impact Determination Process for Parks, Recreation Areas, and Wildlife and Waterfowl Refuges



