SECTION 4(F) & CHAPTER 26

TxDOT Environmental Conference 2017
## What’s the Difference?

<table>
<thead>
<tr>
<th>Section 4(f)</th>
<th>Chapter 26</th>
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<tbody>
<tr>
<td>23 CFR §774</td>
<td>Texas Parks &amp; Wildlife Code</td>
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<tr>
<td>Federal Regulation</td>
<td>State Regulation</td>
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<tr>
<td>Applies to all Federal projects</td>
<td>Applies to all projects</td>
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<tr>
<td>Multiple Processing Options</td>
<td>Single Processing Option</td>
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<tr>
<td>Public Notice in some instances</td>
<td>Public Hearing always required with specific advertising requirement</td>
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<tr>
<td>Documentation - ENV Approval</td>
<td>Documentation - ENV Approval</td>
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</table>
**Exception:** The property is not permanently incorporated into a transportation facility, or may be an improvement or enhancement to the facility.

**De Minimis:** The transportation use of the Section 4(f) property, including incorporation of any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures), does not adversely affect the activities, features, or attributes that qualify the resource for protection under Section 4(f).

**Programmatic:** Time-saving procedural option for preparing individual Section 4(f) evaluations for certain minor uses of Section 4(f) property. Must meet programmatic criteria for the appropriate nationwide programmatic Section 4(f) evaluation.

**Individual:** 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 situation (23 CFR 774.3).
Section 4(f) - Parks

FY 2017

Programmatic

De Minimis

Exception
Section 4(f) Exceptions - Parks

When is an Exception required?

- If a project impacts a public park, recreational land, wildlife or waterfowl refuge.
- Any work within a public park.
- Adjacent to a school recreational facility.
- Work within a wildlife or waterfowl refuge

* No ROW or permanent easements – change of ownership
Section 4(f) Exceptions

There are four exceptions:

1. **Temporary Occupancy**

   Must meet following conditions:

   - The duration of use will be less than the time needed for construction of the project and there will be no change of ownership.
   - The scope of the work would be minor resulting in minimal changes to the property.
   - No significant features of the property would be adversely affected.
   - The occupied segments of the property would be returned to their as-found condition or better.
   - The Official with Jurisdiction (OWJ) has agreed that the property is significant and that the proposed project meet all conditions above.
2 Trail, Path, Bikeway, or Sidewalk

Must meet either of the following conditions:

• The trail, path, bikeway, or sidewalk is part of a local transportation system and functions primarily for transportation purposes.

• The trail, path, bikeway, or sidewalk is part of a transportation facility ROW and continuity of the trail, path, bikeway, or sidewalk is maintained.

• The OWJ over the property agrees in writing.
Section 4(f) Exceptions

3 Transportation Enhancement or Mitigation Activities

Must meet the following conditions:

• The use of the property is solely for the purposes of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection.

• The OWJ over the property agrees in writing that the use is preserving or enhancing the property.
Section 4(f) Exceptions

23 U.S.C. 204 Park Road or Parkway Project

Must meet the following conditions:

- The Section 4(f) protected resource has been verified as falling under the Federal Lands Access Program (23 U.S.C. 204).
Section 4(f) Exceptions

Use within a Public Park

- Hike & Bike Trails
- Sidewalks
- Road construction – temporary easement
Recreational Facilities

- School facilities such as playgrounds or athletic fields
- Public recreational facilities
- Public golf courses
- Facilities must be open to the public
Section 4(f) Exceptions

School Facilities
Section 4(f) Exceptions

School Facilities
Section 4(f) **De Minimis** applies when the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection.
Section 4(f) De Minimis

- ROW or permanent easements are required from 4(f) protected property
- Public notice requirement
- Owner with Jurisdiction (OWJ) concurs that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection
- No threshold for the amount of ROW
Section 4(f) Exceptions

School Facilities
Section 4(f) De Minimis

1. Consult with OWJ
2. Public Notice
3. Concurrence Letter to OWJ
4. Complete Checklist
5. Submit to ENV for Approval
Section 4(f) Documentation

- Checklist must be completed and submitted to ENV-PDM for all Section 4(f) documentation.
- Checklist are completed by project sponsor and submitted to ENV-PDM for review.
- ENV-PD reviews checklist to ensure project meets requirements for exception or De Minimis and that all required documentation has been provided.
The checklist must include the following attachments:

- Brief project description
- Explanation of how the property will be used
- A detailed map of the Section 4(f) property including:
  - Current and proposed ROW
  - Property boundaries
  - Existing and planned facilities
- Ground-level photo of impact location
- Concurrence letter from OWJ
Example

Section 4(f) Documentation

Checklist for Section 4(f) Exceptions for Public Parks, Recreation Lands, Wildlife & Waterfowl Refuges, and Historic Properties

Main CS-2-0014-06-300
District: Austin
County(ies): Travis
Property ID:
Property Name: Boggy Creek Greenbelt

Projects are assigned to TxDOT under the MRA Agreement #017

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 10, 2014, and executed by FHWA and TxDOT.

The following checklist was developed as a tool to assist in streamlining the Section 4(f) Exception process and to ensure that all necessary information is documented in the File of Record (FOR).

What Type of Property is Being Evaluated?

☐ A park, recreation land, or wildlife/waterfowl refuge
☐ A historic property

Section 4(f) Defining Criteria for Parks, Recreation, and Refuge Properties

1. Yes ______ Is the property publicly owned?

2. Yes ______ Is the property open to the public (except in certain cases for refuges)?

3. Yes ______ Is the property’s major purpose for park, recreation, or refuge activities?

4. Yes ______ Is the property significant?

Defining the Property’s Significance

Note: Significance is presumed in the absence of a determination with the official with jurisdiction.

1. Yes ______ Does the property play an important role in meeting the park, recreation, or refuge objectives for the official with jurisdiction?

2. Yes ______ Is the property’s major purpose for park, recreation, or refuge activities?

Establishing Section 4(f) Use of the Property

1. No ______ Does the project require a temporary use (i.e., temporary easement, construction easement, etc.)

Establishing Section 4(f) Exception Eligibility

1. Which Type of Exception are You Applying?
   - ☐ Temporary Occupancy
   - ☑ Trail, Path, Bicycle, or Sidewalk
   - ☐ Transportation Enhancement or Mitigation Activities
   - ☐ 23 U.S.C. 204 Park Road or Parkway Project

2. Yes ______ Does the trail, path, bikeway, or sidewalk meet one of the following conditions?
   a. The trail, path, bikeway, or sidewalk is part of a local transportation system and functions primarily for transportation purposes.
   b. The trail, path, bikeway, or sidewalk occupies part of a transportation facility right of way and continuity of the trail, path, bikeway, or sidewalk is maintained.

Documentation

The following MUST be attached to this checklist to ensure proper documentation of the Section 4(f) Exception (Each numbered item is a separate document):

1. Brief project description
2. Explanation of how the property will be used (“use” as defined by Section 4(f))
3. A detailed map of the Section 4(f) property including:
   a. Current and proposed ROW
   b. Property boundaries
   c. Access points for pedestrians and vehicles
   d. Existing and planned facilities
4. Concurrence letter with the Official with Jurisdiction

TxDOT Approval Signatures

District Reviewer Certification

I reviewed this checklist and all attached documentation and confirm that the above property and proposed project meet the requirements of 23 CFR 774 for a Section 4(f) Exception finding.

[Signature]
District Personnel Name
July 10, 2017

ENV Technical Expert Reviewer Certification

I reviewed this checklist and all attached documentation and confirm that the above property and proposed project meet the requirements of 23 CFR 774 for a Section 4(f) Exception finding.

[Signature]
District Personnel Name
July 10, 2017
Example

Upper Boggy Creek Trail Phase I (CSJ 0914-04-300)
Checklist for Section 4(f) Exceptions for Public Parks, Recreation Lands, Wildlife & Waterfowl Refuges, and Historic Properties

Project Description

The City of Austin, in partnership with TxDOT, proposes to construct approximately 0.5 miles of a shared-use pedestrian bike and bike path along Upper Boggy Creek and through the Boggy Creek Greenbelt and Downs Malson Fields Park. The project has a southern terminus with an existing trail and pedestrian bridge south of E. 12th Street and a northern terminus at Alexander Avenue near the Capital Metro-MLK Jr. commuter rail station. The proposed trail system would consist of asphalt bikeways that would vary in width from eight to fourteen feet and would connect existing bike lanes on E. 12th Street to existing bike lanes on Alexander Avenue.

Determination of Trail, Path, Bikeway, or Sidewalk Exception under Section 4(f)
The Boggy Creek Greenbelt is a publicly accessible recreation area owned by the City of Austin and maintained by the Parks & Recreation Department. The greenbelt runs along Boggy Creek and offers picnic shelters, picnic tables, volleyball courts and four miles of trails. The proposed project would upgrade a portion of the existing trail from the pedestrian bridge over Boggy Creek to E. 12th Street.

The Boggy Creek Greenbelt on which the project will take place has significance under the requirements of 23 CFR 774.11. In addition, it was established through previous coordination with the City that the Upper Boggy Creek Trail is part of the local transportation system and that it functions primarily for transportation. As such, the improvements to the trail proposed as part of the project do not require approval under Section 4(f). The City of Austin concurred with this determination on June 29, 2017.

Describe the property and the how it will be used.
Example

Section 4(f) Documentation

Dear Ms. Hart,

In accordance with 23 CFR 774.13, a project, which would be carried out in conjunction with the Texas Transportation Commission includes the creation of a new trail and roadway in the Boggy Creek Greenbelt, as a requirement of Section 4(f) review. The environmental review, conducted in accordance with the National Environmental Policy Act (NEPA), will be prepared for this project as required by 23 CFR 774.13. A Memorandum of Agreement (MoA) between FHWA, TxDOT, and the Texas Transportation Commission has been signed to support the project.

Introduction

The City of Austin, in partnership with the Texas Transportation Commission, the Texas Department of Transportation (TxDOT), and the Austin Metropolitan Planning Organization (MPO), is pleased to announce the planning of a new trail and roadway in the Boggy Creek Greenbelt. The new trail will be constructed in the area near the Capital Area Transit Authority (CAT) busway, which will connect existing bike lanes and provide a safe and accessible alternative for bicycle riders.

Key to Features

- **Existing Trail**
- **Stream/Creek**
- **Pathway/Path**
- **Project Trail**

Upper Boggy Creek Trail Phase I

Downs Mabson Field Park & Boggy Creek Greenbelt

CSJ: 0910-04-300

May 3, 2017

Evan Hart

Interim City Manager

City of Austin

P.O. Box 1568

Austin, TX 78767

Sincerely,

Shirley Nichols

Austin Metropolitan Planning Organization

Shirley Nichols

Environmental Services Specialist

CONCUR:

Name: Evan Hart

DATE: May 3, 2017

Elaine Hart

Interim City Manager
Section 4(f) – Multiple Properties
Section 4(f) Documentation

Section 4(f) Toolkit:

- Guidance
- Checklists
- Template Letters

### U.S. DOT Section 4(f) Toolkit

Section 4(f) of the U.S. Department of Transportation Act (U.S. DOT Act) protects publicly owned and accessible parks, recreation areas, and wildlife and waterfowl refuges and historic sites, regardless of ownership and accessibility. Local governments, consultants, and TxDOT staff use these tools to address the requirements of the FWSA regulations promulgated in Code of Federal Regulations (CFR) as Title 23 Part 774.

Questions? For historic resources, contact the Section 4(f) specialist at (512) 416-2619. For parks and recreation areas, contact the Section 4(f) specialist at (512) 416-2644.

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<tr>
<th>Title</th>
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<th>Description</th>
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<tbody>
<tr>
<td>Environmental Handbook for Section 4(f), U.S. Department of Transportation Act</td>
<td>05/25</td>
<td>Describes the TxDOT procedures and standards for complying with Section 4(f) of the U.S. DOT Act.</td>
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<tr>
<td>Section 4(f) Compliance Process Howtochart</td>
<td>08/14</td>
<td>Shows the process for determining if Section 4(f) applies and the various parts for completing the compliance process.</td>
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<tr>
<td>Use, Impacts and Approval Relationships</td>
<td>03/23</td>
<td>Describes the different types of uses, including constructive use, the possible magnitude of those impacts and the appropriate approval type for each specific magnitude for each type of use.</td>
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<tr>
<td>Section 4(f) and TPyNC Chapter 25 Competition Public Parks, Recreational Lands, and Wildlife and Waterfowl Refuges</td>
<td>04/14</td>
<td>Provides a comparative overview of the Texas Parks and Wildlife Code Chapter 25 requirements and the U.S. DOT Act Section 4(f) requirements.</td>
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<tr>
<td>Review and Approval Process for Parks, Recreation Areas, Wildlife and Waterfowl Refuges</td>
<td>04/14</td>
<td>Illustrates the internal Environmental Affairs Division process for reviewing projects that impact Section 4(f) protected publicly owned and accessible parks, recreation areas, wildlife and waterfowl refuges.</td>
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<tr>
<td>Review and Approval Process for Section 4(f) Historic Properties</td>
<td>04/14</td>
<td>Illustrates the process for reviewing projects that impact a Section 4(f) protected historic property.</td>
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### Exceptions

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<tr>
<td>Checklist for Section 4(f) Exceptions for Public Parks, Recreation Land, Wildlife and Waterfowl Refuges, and Historic Sites</td>
<td>09/15</td>
<td>Used to streamline the Section 4(f) Exception Process and ensure that all necessary information is documented in the Project file</td>
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<tr>
<td>Letter Template for Official with Jurisdiction (OSWA) Notification of Intent to Pursue an Exception</td>
<td>10/15</td>
<td>Used by project sponsors to prepare a letter notifying the State Historic Preservation Officer (SHPO) of the OSWA of the intent to pursue an exception.</td>
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</table>
- State requirement – state and federal projects

- Public Hearing is **required** (Chapter 26, Parks & Wildlife Code)

- Notice of the public hearing is required to be published three times (30 days, 20 days and 10 days) before the hearing.

- Chapter 26 Checklist
Chapter 26 is triggered when there is a “use” or “take” from a public land designated and used as a park, recreation area, scientific area, wildlife refuge, or historic site.

➡️ **Use**: If the proximity of the undertaking activities causes the property to no longer function for its intended purposes.

➡️ **Take**: Conversion of ROW or easement to a transportation use – change in ownership.

➡️ **Designated**: Historic site
Under Section 26.002 of the Texas Parks and Wildlife Code when public land is proposed for taking:

- State law requires that public hearing notices for the acquisition of public land be published for **three consecutive weeks** with the last publication not less than one week or more than two weeks before the hearing date.

- When a project affects publicly protected land, a separate written notice must be provided to the owner with jurisdiction over that land. The notice must be sent at least **30 days** before the hearing date.
Chapter 26

- Public hearing can be conducted solely for compliance with Chapter 26.
  - Not required to follow public hearing requirements, but must comply with advertising requirement in TPWC.
  - Hearing can be conducted by project sponsor.
- If conducted along with planned project public hearing, must follow state rules for conducting the hearing.
- Notice must describe property and reference Chapter 26.
Chapter 26 Checklist

• Following completion of the public hearing, the Chapter 26 Checklist must be completed and submitted to ENV for approval.
Chapter 26 Toolkit

- Guidance
- Templates
- Links

Chapter 26 Parks and Wildlife Code Toolkit

Chapter 26 of the Texas Parks and Wildlife Code (PWC) protects any public land designated and used as a park, recreation area, scientific area, wildlife refuge, or historic area from use or take from such land. While Chapter 26 is similar to Section 4(f), compliance with Section 4(f) does not equate compliance with Chapter 26, and vice versa. Use the following tools to comply with Chapter 26.

Questions? Contact the Project Delivery Section of the Environmental Affairs Division at 512-416-2763.

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<tr>
<td>Parks and Wildlife Code Chapter 26 Environmental Handbook</td>
<td>05/2016</td>
<td>Describes the applicability and requirements for complying with Parks and Wildlife Code (PWC) Chapter 26, which involves the transportation use of parks, recreation areas, scientific areas, wildlife refuges and historic sites.</td>
<td></td>
</tr>
<tr>
<td>Checklist: Parks and Wildlife Code, Chapter 26 Compliance</td>
<td>05/2016</td>
<td>Records project-level compliance with PWC, Chapter 26 and ensures the preparation of all necessary documentation.</td>
<td></td>
</tr>
<tr>
<td>Standard Operating Procedure for Reviewing, Processing and Approving Chapter 26 of the Texas Parks and Wildlife Code</td>
<td>03/2014</td>
<td>Describes the process used by the Project Delivery Section of the Environmental Affairs Division to evaluate compliance with PWC Chapter 26.</td>
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<tr>
<td>Section 4(f) and PWC Chapter 26 Comparison Chart</td>
<td>05/2016</td>
<td>Provides a comparative overview of the PWC Chapter 26 requirements and the U.S. DOT Act Section 4(f) requirements.</td>
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</tr>
<tr>
<td>Chapter 26, Title 3, Parks and Wildlife Code</td>
<td></td>
<td>Requires TxDOT to make specific findings before approving the use of protected public lands for a transportation project.</td>
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4(f) ≠ Chapter 26
Section 4(f) and Chapter 26 are two separate regulations with separate and distinct requirements.

A project with a parks De Minimis and Chapter 26 impact will have two separate public involvement requirements.

Public Notice requirement for Section 4(f) De Minimis

Public Hearing required for Chapter 26
1. Chapter 26 without Section 4(f)?

**YES.** If the project is state-funded, 4(f) would not apply.

2. Section 4(f) without Chapter 26?

**YES.** A project that does not result in a take or use from a public property may require a Section 4(f) Exception, but not result in a Chapter 26 impact.

3. If project has a *De Minimis* impact, it may not have a Chapter 26 impact?

**NO.** A *De Minimis* impact results in a take or use of the property, therefore Chapter 26 would apply.
Section 4(f) - Parks
Contact:
Michelle Lueck
TxDOT-ENV Project Delivery Manager
Michelle.Lueck@txdot.gov
(512) 416-2644