

Section 4(f) of the USDOT Act of 1966 (49 USC § 303) prohibits the Secretary of Transportation from approving or funding any program or project that requires the use of: (1) any publicly owned land in a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance; or (2) any land from a historic site of national, state, or local significance (collectively “Section 4(f) resources”), unless there is no feasible and prudent alternative to the use of such land and the project includes all possible planning to minimize harm to the resource. The proposed Moynihan Station Development Project does not implicate any public park, recreation area, or wildlife or waterfowl refuge, but the James A. Farley Complex is a historic site within the meaning of this statute.

In 2005, a provision was added to Section 4(f) that eliminates the need for the no feasible and prudent alternatives analysis if a project that would otherwise use a Section 4(f) resource is determined to have a *de minimis* impact on the resource. 49 U.S.C. § 303(d). A *de minimis* impact determination is a finding that the project will not adversely affect the qualities of the resource that make it eligible for protection under Section 4(f). An agency within the USDOT can make a finding of *de minimis* impact for a historic site if: (1) it determines through the Section 106 consultation process that a transportation project would have no adverse effect on the site; (2) the SHPO, and the Advisory Council if participating, concurs in writing with the *de minimis* impact finding; and (3) the finding has been developed in consultation with parties consulting as part of the Section 106 process. 49 U.S.C. § 303(d)(2).

This provision has been interpreted by the FHWA and the FTA in their updated joint Section 4(f) regulations (23 C.F.R. Part 774). Consistent with the statutory amendment to Section 4(f) in 2005, these regulations clarify the procedures for performing Section 4(f) reviews and provide that a project does not use a Section 4(f) resource—and thus does not trigger the alternatives analysis that Section 4(f) would otherwise require—if the project would only have a *de minimis* impact on the resource. 23 C.F.R. § 774.3(b).

In making a finding of *de minimis* impact, a USDOT agency must consider “any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval” as part of the transportation program or project. This means that the finding of *de minimis* impact takes into account any measures that may avoid, minimize, or offset the impacts of the project on a Section 4(f) resource. For historic sites, a finding of *de minimis* impact satisfies the requirements of Section 4(f) in full. Therefore, if a finding of *de minimis* impact is made for a historic site, no further Section 4(f) analysis is required for that site.

For the Moynihan Station Development Project, FRA made a finding of no adverse effect on the Farley Complex in 1999 when it issued a FONSI and in 2006 when it entered into the Programmatic Agreement with the ESDC, MSDC, SHPO, and the conditionally designated preferred developer. An amendment to the 2006 Programmatic Agreement has been prepared in accordance with the Section 106 regulations and will be entered into by the FRA, ESDC, MSDC, SHPO, PANYNJ, the conditionally designated developer, and, if it elects to participate,

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the Advisory Council on Historic Preservation as described in Chapter 4.2, “Historic Properties.” The amended Programmatic Agreement, like the 2006 Programmatic Agreement, would state that SHPO does not expect any significant adverse effects to the Farley Complex, assuming the final design is developed in consultation with SHPO. In addition, the amended Programmatic Agreement, like the 2006 Programmatic Agreement, will establish a process for continued Project review with SHPO and for evaluating the effects on the Farley Complex caused by the Project. The amended Programmatic Agreement will be entered into to satisfy FRA’s Section 106 responsibilities for the Project and is part of a Section 106 consultation process that has been underway since 1994. Based on the review that has been conducted with respect to the preliminary conceptual design, the Programmatic Agreement, and the amended Programmatic Agreement set forth in Chapter 4.2, “Historic Properties,” FRA may determine that the Project would only have a *de minimis* effect on the Farley Complex within the meaning of Section 4(f) and hence would not trigger the alternatives analysis that would otherwise be required by the statute. \*