U.S. Department of Transportation
**Federal Highway Administration**

# Memorandum

Subject: **INFORMATION:** Guidance on Environmental Justice and NEPA

Date: December 16, 2011

From: Gloria M. Shepherd
Associate Administrator for Planning, Environment, and Realty

In Reply Refer To: HEP-1

To: Directors of Field Services
Division Administrators
Federal Lands Highway Division Engineers

Executive Order 12898, Federal Actions to Address Environmental Justice (EJ) in Minority and Low-Income Populations (EO)[1], was signed by President Clinton on February 11, 1994. The Executive Order (EO) and accompanying Presidential Memorandum focus Federal attention on the environmental and human health conditions in minority and low-income communities, enhances efforts to assure nondiscrimination in Federal programs affecting human health and the environment, and promotes meaningful opportunities for access to public information and for public participation in matters relating to minority and low-income communities and their environment.

The EO directed all Federal departments and Federal agency heads to take the appropriate steps to identify and address any disproportionately high and adverse human health or environmental effects of Federal programs, policies, and activities on minority and low-income populations. For projects not requiring FHWA approval, there is no Federal requirement to comply with this EO. The U.S. Department of Transportation (DOT) and the FHWA have taken steps to ensure compliance with the EO:

- DOT's Final EJ Strategy was published in the June 29, 1995 Federal Register, Vol. 60 No. 125.[2]

[1] Available online at http://www.dotcr.ost.dot.gov/documents/ycr/eo12898.pdf (last accessed August 30. 2011).
[2] Available online at http://www.epa.gov/compliance/ej/resources/publications/interagency/dot-strategy-1995.pdf (last accessed August 30. 2011).

- DOT's EJ Order was published in the April 15, 1997 Federal Register, Vol. 62, No. 72.[3]
- FHWA's EJ Order 6640.23, was signed by the Administrator on December 2, 1998.[4]

This guidance advises FHWA offices on the process to address EJ during the NEPA review, including documentation requirements. It supplements the FHWA Technical Advisory 6640.8A, which provides guidance for documenting the potential social, economic, and environmental impacts considered in the selection and implementation of highway projects. The following information supplements existing guidance on compliance with the principles of EJ. Explicit consideration of potential effects on minority and low income populations is required in NEPA documents, and normally will be found under the social and economic discussion sections. This guidance applies to all NEPA classes of action, as appropriate.

***One example of how to briefly describe the EO in your environmental document:***
***"Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, signed by the President on February 11, 1994, directs Federal agencies to take the appropriate and necessary steps to identify and address disproportionately high and adverse effects of Federal projects on the health or environment of minority and low-income populations to the greatest extent practicable and permitted by law."***

EJ evaluations should briefly describe the Executive Order 12898. (See example in inset). That description should be followed by the information described below.

IDENTIFYING EXISTING MINORITY AND LOW INCOME POPULATIONS
Minority: Black or African American, Hispanic, Asian American, American Indian/Alaskan Native, and Native Hawaiian or Pacific Islander.

Low-income: DOT and FHWA use the Department of Health and Human Services poverty guidelines. The guidelines are updated annually and available online at http://aspe.hhs.gov/poverty/.

Using localized census tract data and other relevant information sources, gather data and list any readily identifiable groups or clusters of minority or low-income persons in the EJ study area. Small clusters or dispersed populations should not be overlooked.

***An example of a determination of no adverse impacts:***
***"No minority or low-income populations have been identified that would be adversely impacted by the proposed project as determined above. Therefore, in accordance with the provisions of E.O. 12898 and FHWA Order 6640.23, no further EJ analysis is required."***

[3] Available online at http://www.fhwa.dot.gov/environment/ejustice/dot_ord.htm (last accessed August 30. 2011).
[4] Available online at http://www.fhwa.dot.gov/legsregs/directives/orders/6640_23.htm (last accessed August 30. 2011).

1) In the appropriate section of the NEPA document, typically the section regarding social and economic impacts, provide demographic information on the general population in the project study area. Social characteristics should include identification of the ethnicity, age, mobility and income level of the population. These data elements, while not all required for an EJ analysis, are important to provide context for understanding area demographics.
2) When there are no minority or low-income populations in the study area, no EJ analysis is required.
3) When it has been determined that there will be no adverse effects on identified EJ populations by the proposed project [based on the EJ analysis], the NEPA document should reflect that determination (See example statement in inset above).
4) When there are minority and low-income populations in the study area that may be adversely impacted, follow the next steps of this guidance to determine whether there is a disproportionately high and adverse impact on the population.

EXPLAIN COORDINATION, ACCESS TO INFORMATION AND PARTICIPATION

The NEPA document should include in the appropriate section a discussion of major proactive efforts to ensure meaningful opportunities for public participation including activities to increase low-income and minority participation. Include in the document the views of the affected population(s) about the project and any proposed mitigation, and describe what steps are being taken to resolve any controversy that exists. Document the degree to which the affected groups of minority and/or low-income populations have been involved in the decision-making process related to the alternative selection, impact analysis and mitigation.

IDENTIFYING DISPROPORTIONATELY HIGH AND ADVERSE EFFECTS
As per FHWA Order 6640.23, a disproportionately high and adverse effect on a minority or low income population means the adverse effect is predominantly borne by such population **or** is appreciably more severe or greater in magnitude on the minority or low-income population than the adverse effect suffered by the non-minority or non-low-income population.

1) EJ considerations should be summarized in the appropriate section of the NEPA document; such as the social-economic section of the environmental consequences chapter. References to other sections in the NEPA document can be cited, as appropriate. The beneficial and adverse effects on the overall population and on minority and low-income populations, in particular, need to be addressed under the applicable topics such as: air, noise, water pollution, hazardous waste, aesthetic values, community cohesion, economic vitality, employment effects, displacement of persons or businesses, farms, accessibility, traffic congestion, relocation impacts, safety, and construction/temporary impacts, etc.

2) Compare the impacts on the minority and/or low-income populations with respect to the impacts on the overall population within the project area. Fair distribution of the beneficial and adverse effects of the proposed action is the desired outcome.

3) Under NEPA, consideration must be given to mitigation (as defined in 40 CFR 1508.20) for all adverse effects regardless of the type of population affected. Discuss what measures are being considered for alternatives to avoid or mitigate the adverse effects. Follow the protocol of avoidance first, then minimization, and finally measures to offset or rectify the adverse effects. Using opportunities to enhance and increase sustainability in communities and neighborhoods is desirable. Any activity that demonstrates sensitivity to special needs should be highlighted, such as accommodations for transit dependency and/or addressing the need for translators.

***An example of a statement of a determination of no disproportionately high and adverse effects:***
***"Based on the above discussion and analysis, the XYZ alternative(s) will not cause disproportionately high and adverse effects on any minority or low-income populations in accordance with the provisions of E.O. 12898 and FHWA Order 6640.23 No further EJ analysis is required."***

4) If the effects remain adverse after mitigation is considered, then a determination must be made whether those effects are disproportionately high and adverse with respect to minority and/or low income populations. If the effects on minority and/or low income populations are disproportionately high and adverse even with mitigation and benefits to those populations taken into account, the next section must be followed.

5) If there are no disproportionately high and adverse effects on minority and/or low income populations once mitigation and benefits are considered, that determination should be stated in the document and the EJ evaluation is complete. (See example of statement in inset above.)

## PROCEEDING WHEN THERE ARE DISPROPORTIONATELY HIGH AND ADVERSE EFFECTS

If there is a disproportionately high and adverse effect on an EJ population, after taking benefits and mitigation into account, the NEPA document must evaluate whether there is a further practicable mitigation measure or practicable alternative that would avoid or reduce the disproportionately high and adverse effect(s).[5] FHWA will approve the proposed action only if it determines no such practicable measures exist, and the FHWA determination ought to be stated in the document. The NEPA document needs to describe how the impacted populations/communities were involved in the decision-making process. The document needs to also identify what practicable mitigation commitments have been made.

[5] For purposes of the EJ analysis of the practicability, the social, economic (including costs) and environmental effects of avoiding or mitigating the adverse effects should be taken into account.

In addition, if the affected population is a minority population protected under Title VI, FHWA will not approve the proposed action unless FHWA determines:

1) There is a substantial need for the project, based on the overall public interest; **and**
2) Alternatives that would have less adverse effects on protected populations have either:
    a) Adverse social, economic, environmental, or human health impacts that are more severe; **or**
    b) Would involve increased costs of an extraordinary magnitude.

Where appropriate, the NEPA document must include both of these evaluations and contain the FHWA determination on the explicit issues required within these evaluations.

JUDICIAL REVIEW

Executive Order 12898, the U.S. DOT Order 5610.2, and the FHWA Order 6640.23 are limited to improving internal management of the Federal Government and are not to be construed as creating any right of judicial review for compliance or noncompliance.

TITLE VI

While a person, or persons, cannot bring a legal claim under any of the EJ orders, such person, or persons, can bring a claim under Title VI. Title VI of the Civil Rights Act of 1964, requires that no person, because of race, color, or national origin, be excluded from participation in, denied the benefits of, or in any other way be subjected to discrimination under any program or activity receiving Federal assistance. Any member of a protected class under Title VI may file a complaint with the FHWA Office of Civil Rights, Attention HCR-20, alleging that he or she was subjected to discrimination in violation of Title VI.