



US Department
of Transportation

Federal Highway
Administration

Memorandum

Subject: Nondiscrimination, Environmental Justice,
and Community Impact Assessment in Planning
and Project Development

Date: **JL 27 1995**

From: Associate Administrator for
Program Development

Reply to
Att. of: HEP-32

To: Associate Administrators
Staff Office Directors
Regional Administrators
Federal Lands Highway Program Administrator
Director, Joint ITS Program Office

Attached for your information and comment is the proposed DOT Order on Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," signed by President Clinton on February 11, 1994. This proposed order has undergone internal coordination among the modes at the headquarters level, and we are seeking field input to ensure the order reflects the concerns of those most affected. You are strongly encouraged to share this and seek input from not only your State and local counterparts, but also from concerned groups and communities at the "grass roots" level. Comments on the proposed order are also being sought through publication of a notice in the Federal Register on June 29.

It is FHWA's longstanding policy to actively pursue nondiscrimination in federally-funded activities. Furthermore, it is FHWA's continuing policy to identify and prevent discriminatory effects by actively administering its programs, procedures, operations, and decisionmaking to assure that social impacts to communities and people are recognized early and continually throughout the transportation decisionmaking process--from early planning through implementation. Should the potential for discrimination be discovered, positive corrective action is to be taken.

Executive Order 12898 is primarily a reaffirmation of the principles of Title VI of the Civil Rights Act of 1964 and related statutes, emphasizing the incorporation of those provisions with existing planning and environmental processes. The basic tenets of Title VI require agencies to ensure their programs, policies, and activities (PP&A's) do not have the effect of 1) excluding persons and populations from participation in, 2) denying persons and populations the benefits of, or 3) subjecting persons and populations to discrimination because of race, color, or national origin.

The major difference between EO 12898 and Title VI is that the EO adds low income populations to minority populations when examining the effects of PP&A's. EO 12898 underscores each Federal agency's responsibility to ensure nondiscrimination, including the identification of disproportionate impacts to low income and minority populations in addition to ensuring that the PP&A's do not discriminate on the basis of race, color, or national origin.

To ensure that our PP&A's are in compliance with EO 12898 requirements, we need to apply the following principles in planning and project development:

- continue to identify and evaluate a broad range of alternatives
- continue to use a strong public involvement process
- continue to use a systematic interdisciplinary approach
- continue to identify, avoid, minimize, mitigate and enhance adverse effects and impacts

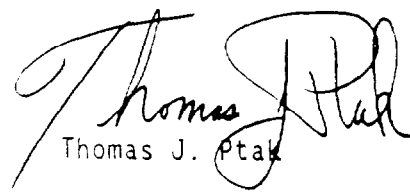
With the implementation of ISTEA, the Title VI and EO 12898 factors are to be considered with other social, economic and environmental concerns during metropolitan and statewide transportation planning, as well as project development. Historically, FHWA's NEPA process occurred during project development and used the NEPA format as the vehicle to address all Federal requirements--including those pertaining to social, economic, and the (physical/natural) environment. The EO has highlighted the consideration of impacts on low-income populations and therefore those impacts should be addressed concurrently with social/community impact considerations.

Another ISTEA policy is to "ensure that transportation policies and investments embrace the concerns of the traveling public and neighborhoods, economic development interests, and other societal concerns." This calls for public involvement at all levels of transportation decisionmaking and is echoed in EO 12898 for minority and low-income populations. All public involvement processes shall ensure activities reach all affected and interested groups and individuals--minority, elderly, low-income, tribal governments, other Title VI groups, and others.

In summary, EO 12898 serves to re-emphasize the requirement to assess and consider the impacts of transportation projects on people and communities, and pro-actively engage all people in public involvement activities in program planning as well as project development. The attached proposed order is a "key component" of DOT's Environmental Justice Strategy and sets forth a process by which DOT and its operating administrations will integrate the goals of the Executive Order into its existing operations.

Comments on the proposed order should be addressed (or E-mailed) to Mr. Eugene W. Cleckley (GCLECKLEY) at 400 7th Street, SW, Washington, D.C., 20590. Consistent with the Federal Register Notice, we are requesting your comments by August 28.

Attached are copies of (1) proposed DOT Order, (2) EO 12898, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" and (3) its accompanying White House transmittal memo.



Thomas J. Ptak

3 Attachments

PROPOSED DOT ORDER

SUBJECT: DEPARTMENT OF TRANSPORTATION ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS

1. PURPOSE AND AUTHORITY.

- a. This Order establishes procedures for the Department of Transportation (DOT) to use in complying with Executive Order 12898, entitled Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations. Relevant definitions are in the appendix.
- b. The objective of this DOT Order is to set forth a process by which DOT and its operating administrations will integrate the goals of the Executive Order with existing requirements set forth in Title VI of the Civil Rights Act of 1964 (Title VI), the National Environmental Policy Act (NEPA), the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), and other applicable statutes, regulations and guidance that concern planning; social, economic, or environmental matters; public health or welfare; or public involvement.

2. SCOPE. This Order applies to the Office of the Secretary, all operating administrations, and all other DOT components.

3. BACKGROUND. Executive Order 12898 requires each Federal agency, to the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, to achieve environmental justice as part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including social and economic effects, of its programs, policies, and activities on minority populations and low-income populations in the United States. Compliance with this DOT Order is a key element in the environmental justice strategy adopted by DOT, and can be achieved within the framework of existing laws, regulations, and guidance.

4. DATA COLLECTION AND RESEARCH.

- a. In complying with this Order DOT will rely upon the data collected (or readily available) for planning, for demonstrating compliance with NEPA or Title VI, or for other purposes. Consideration of the goals and objectives of Executive Order 12898 and this Order shall be an integral part of future DOT data collection and research activities.
- b. To the extent permitted by existing law, and whenever practical and appropriate, DOT shall collect, maintain, and analyze information on the race, color, national origin, and income level of persons affected by DOT programs, policies, and activities, and use such information in complying with this Order.

5. IDENTIFYING ADVERSE IMPACTS AND DETERMINING WHETHER THEY HAVE A DISPROPORTIONATELY HIGH AND ADVERSE EFFECT ON MINORITY OR LOW-INCOME POPULATIONS.

- a. The Office of the Secretary and each operating administration shall develop a process for identifying (1) adverse impacts, (2) mitigation and enhancement measures, and (3) disproportionately high and adverse effects on minority or low-income populations, using the methodology in the appendix. The Office of the Secretary and each operating administration shall determine the most effective and efficient way of integrating the processes and objectives of this Order with their existing regulations and guidance, as outlined in paragraph 7.a.
- b. Actions Having a Disproportionately High and Adverse Effect on Minority Populations or Low-Income Populations.
 - (1) If, after taking into account all mitigation and enhancement measures that will be taken and all offsetting benefits to the affected minority or low-income populations, the program, policy, or activity will still have an adverse impact, then DOT shall determine whether such adverse impact on minority populations or low-income populations is disproportionately high, using guidance in the appendix.
 - (2) Determinations made pursuant to this paragraph shall be incorporated in the NEPA or other document, described in paragraph 7.b.(3).

- (3) The NEPA or other document described in paragraph 7.b.(3) shall contain a description of any measures that will be taken to address the disproportionately high and adverse effects on minority or low-income populations.
- (4) This paragraph does not restrict the application of Title VI of the Civil Rights Act of 1964 to the program, policy, or activity, or otherwise limit or preclude claims by individuals or groups of people with respect to any DOT program, policy, or activity.

6. ACTIONS TO ADDRESS DISPROPORTIONATELY HIGH AND ADVERSE EFFECTS. [The following are options for consideration with respect to actions to address disproportionately high and adverse effects on minority populations and low-income populations under the Executive Order. A duty to address disproportionately high and adverse effects on certain populations is also established by Title VI of the Civil Rights Act of 1964 and related statutes and regulations. The ability to require specific findings and remedial action may differ somewhat for low-income populations and populations expressly protected by Title VI. For this reason, the DOT is considering including a provision in this Order which treats these two groups differently. This difference is seen most clearly in Option B, below. We will continue to consider DOT's authority with respect to low-income populations.]

We are soliciting comments on the following options, which vary in stringency, once a disproportionate impact has been identified. Commenters are invited to suggest additional options that DOT should consider. Comment is also sought on whether minority populations and low-income populations should be treated differently by the DOT Order.]

OPTION A:

6. ACTIONS TO ADDRESS DISPROPORTIONATELY HIGH AND ADVERSE EFFECTS.

- (a) If it is determined pursuant to paragraph 5.b above that the program, policy, or activity (including all offsetting mitigation and enhancement measures that will be taken) will have a disproportionately high and adverse effect on minority or low-income populations, then the program, policy, or activity may not be carried out unless further mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are not

practicable. In determining whether a measure or alternative is "practicable", the social, economic (including costs) and environmental effects of avoiding or mitigating the adverse effects will be taken into account.

- (b) Under Title VI of the Civil Rights Act of 1964, each federal agency is required to ensure that no person, on the ground of race, color, or national origin, is excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance. DOT's responsibilities under Title VI and related statutes and regulations are not limited by this paragraph, nor does this paragraph limit or preclude claims by individuals or groups of people with respect to any DOT program, policy, or activity under these authorities.

OPTION B:

6. ACTIONS TO ADDRESS DISPROPORTIONATELY HIGH AND ADVERSE EFFECTS.

- (a) If it is determined pursuant to paragraph 5.b above that the program, policy, or activity (including all offsetting mitigation and enhancement measures that will be taken) will have a disproportionately high and adverse effect on minority or low-income populations, then the program, policy, or activity may not be carried out unless further mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are not practicable. In determining whether a measure or alternative is "practicable", the social, economic (including costs) and environmental effects of avoiding or mitigating the adverse effects will be taken into account.
- (b) In addition, if the program, policy or activity will have a disproportionately high and adverse effect on populations protected by Title VI of the Civil Rights Act of 1964 ("protected populations"), then the program, policy or activity may not be carried out unless a substantial need for the program, policy or activity, based on the overall public interest, can be demonstrated, and
- (1) An agreement is reached with the potentially affected protected populations to proceed with the program, policy or activity, or
 - (2) Alternatives that will have less adverse effects

on protected populations (and still satisfy the need identified in subparagraph (b) above) either

- (A) would have other high adverse social, economic, environmental, or human health impacts that are more severe, or
 - (B) would involve increased costs of extraordinary magnitude.
- (c) Under Title VI of the Civil Rights Act of 1964, each federal agency is required to ensure that no person, on the ground of race, color, or national origin, is excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance. DOT's responsibilities under Title VI and related statutes and regulations are not limited by this paragraph, nor does this paragraph limit or preclude claims by individuals or groups of people with respect to any DOT program, policy, or activity under these authorities.

OPTION C:

6. ACTIONS TO ADDRESS DISPROPORTIONATELY HIGH AND ADVERSE EFFECTS.

- (a) If it is determined pursuant to paragraph 5.b above that the program, policy, or activity (including all offsetting mitigation and enhancement measures that will be taken) will have a disproportionately high and adverse effect on minority or low-income populations, then the program, policy or activity may not be carried out unless consideration has been given to the following factors:
- (1) whether a substantial need for the program, policy or activity, based on the overall public interest, can be demonstrated, and
 - (2) whether alternatives that will have less adverse effects on minority or low-income populations (and still satisfy the need identified in subparagraph (1) above) either
 - (A) would have other high adverse social, economic, environmental, or human health impacts that are more severe, or

- (B) would involve increased costs of extraordinary magnitude.
- (b) Under Title VI of the Civil Rights Act of 1964, each federal agency is required to ensure that no person, on the ground of race, color, or national origin, is excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance. DOT's responsibilities under Title VI and related statutes and regulations are not limited by this paragraph, nor does this paragraph limit or preclude claims by individuals or groups of people with respect to any DOT program, policy, or activity under these authorities.

7. INTEGRATION WITH EXISTING OPERATIONS.

- a. The Office of the Secretary and each operating administration shall determine the most effective and efficient way of integrating the process and objectives of this Order with their existing regulations and guidance, and utilize existing authority in NEPA, Title VI, the URA and other statutes, regulations, and guidance that concern planning; social, economic, or environmental matters; public health or welfare; public involvement; or related matters. Within 6 months of the date of this Order each operating administration will provide a report to the Assistant Secretary for Transportation Policy and the Director of the Departmental Office of Civil Rights describing the procedures it has developed to integrate, or how it is integrating, the processes and objectives set forth in this Order into its operations. Public input on any procedures developed to comply with this Order should be solicited.
- b. In undertaking the integration with existing operations described in paragraph 7.a., DOT shall observe the following principles:
- (1) Planning and programming activities, that affect human health or the environment, shall include consideration of such effects on minority populations and low-income populations. Procedures shall be established or expanded, as necessary, to provide meaningful opportunities for public involvement by minority populations and low-income populations during the planning and development of programs, policies, and activities (including the identification of potential

- impacts, alternatives, and mitigation measures).
- (2) Affirmative steps shall be taken to provide the public, including minority populations and low-income populations, access to public information concerning the human health or environmental impacts of programs, policies, and activities.
 - (3) The assessment of the effects of actions on minority populations or low-income populations, that is required by this Order, shall be included as part of any environmental document prepared in accordance with NEPA. If a program, policy, or activity that DOT determines is subject to the assessment prescribed by this Order is not subject to NEPA, or for any reason such impacts are not addressed in the NEPA document, a separate written analysis of such impacts shall be prepared and made available to the public. DOT may develop simplified assessments to the extent appropriate. Consideration of alternatives in these documents shall include comparisons of the impacts of each alternative on minority and low-income populations.
 - (4) DOT shall consider mitigation and enhancement measures to avoid or minimize environmental or human health impacts to minority populations and low-income populations in accordance with paragraph 3.b. of the Appendix.
- c. All future rulemaking activities undertaken pursuant to DOT Order 2100.5 (which governs all DOT rulemaking), and the development of any future guidance or procedures for DOT programs, policies, or activities, that affect human health or the environment, shall address compliance with Executive Order 12898 and this Order, as appropriate.
 - d. The formulation of all future DOT policy statements and proposals for legislation will include consideration of the provisions of Executive Order 12898 and this Order.

8. ONGOING DOT RESPONSIBILITY.

Compliance with the Executive Order is an ongoing DOT responsibility. DOT will continuously monitor its programs, policies, and activities to ensure that potential disproportionately high and adverse effects on minority or low-income populations are avoided, minimized or mitigated in a manner consistent with this Order. The Department's Director of Civil Rights and the Assistant Secretary for

Transportation Policy will have joint authority and responsibility for monitoring and enforcing the implementation of this Order. Nothing in this Order creates any right to judicial review of the compliance or noncompliance of DOT, its officers, employees, or any other persons, with this Order.

FOR THE SECRETARY OF TRANSPORTATION:

APPENDIX Guidance for Implementing Provisions of DOT -----

1. DEFINITIONS The following terms were used in this Order shall have the following meanings*:
 - a. DOT means the Office of the Secretary, DOT operating administrations, and all other DOT components.
 - b. Low-Income means a person whose median household income is below the Department of Health and Human Services poverty guidelines.
 - c. Minority means a person who is a citizen or lawful permanent resident of the United States and who is:
 - (1) Black (a person having origins in any of the black racial groups of Africa);
 - (2) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);
 - (3) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or
 - (4) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition).
 - d. Programs, polices, and/or activities means all projects, programs, policies, and activities that affect human health and the environment, and which are undertaken or approved by DOT. These include (but are not limited to) permits, licenses, or financial assistance provided by DOT.
 - e. Regulations and guidance means regulations, programs, polices, guidance, and procedures promulgated, issued, or approved by DOT.

*In the event governmentwide definitions are issued under the Executive Order, these definitions will be modified as necessary to conform to them.

2. REFERENCES.

- a. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations February 11, 1994, 59 Federal Register 7629.
- b. National Environmental Policy Act, 42 USC 4371.
- c. Title VI of the Civil Rights Act, 42 USC 2000(d).

3. IDENTIFYING ADVERSE IMPACTS, MITIGATION AND DISPROPORTIONATE IMPACTS ON MINORITY OR LOW-INCOME POPULATIONS.

a. Identifying Adverse Impacts.

- (1) As part of infrastructure planning and other developmental processes, DOT shall identify social, economic and environmental effects and determine whether such effects are likely to have adverse impacts on the total population and on minority or low-income populations. In making a determination regarding adverse impacts, DOT shall consider both the impacts of individual projects and the cumulative impacts of its programs and projects on all affected populations and shall provide opportunities for the public, including members of minority populations and low-income populations that could be affected, to provide their input on the potential impact of such DOT programs, policies, and projects.
- (2) In the case of DOT programs, policies, or activities that do not involve infrastructure planning or developmental processes, the responsible DOT agency will develop a process for identifying adverse impacts and obtaining public input as appropriate.
- (3) In determining whether or not an action will have an adverse impact, consideration shall be given to individual or cumulative effects, as appropriate. Adverse impacts may include, but are not limited to: air, noise, and water pollution and soil contamination; destruction or disruption of man-made or natural resources; destruction or diminution of aesthetic values; destruction or disruption of community cohesion or a community's economic vitality; destruction or disruption of the availability of public and private facilities and service; vibration; adverse employment

- effects; displacement of persons, businesses, farms, or nonprofit organizations; increased traffic congestion; isolation, exclusion or separation of minority or low-income individuals from the broader community; and the denial of, reduction in, or significant delay in the receipt of, benefits of DOT programs, policies, or activities.

b. Identifying Mitigation and Enhancement Measures

- (1) DOT will use its existing statutory authorities, including NEPA, Title VI, the URA, other crosscutting Federal requirements, and statutes that apply only to one or more DOT operating administration (for example 23 USC 109(h)), as well as related regulations and guidance, to develop effective mitigation and enhancement strategies and specific mitigation and enhancement measures that DOT will employ.
- (2) DOT will examine existing programs that have been developed to ensure opportunities for minority populations and low-income populations to develop specific mitigation and enhancement measures that address social, economic, and environmental issues, and will offset disproportionately high and adverse effects.
- (3) In determining whether or not there is an adverse impact, DOT shall take into account any offsetting mitigation and enhancement measures that will be taken (including those developed through the public involvement and community participation process), and any other offsetting benefits that will accrue to the affected minority populations or low-income populations as a result of the program, policy, or activity.
- (4) The following are general approaches to mitigation and enhancement measures that will be utilized as reasonable and necessary, consistent with existing law:
 - (a) Avoiding or minimizing adverse impacts by reducing the degree or magnitude of the action or its implementation.
 - (b) Mitigating or eliminating adverse impacts by repairing, rehabilitating, or restoring the affected environment and/or community resource.

- (c) Reducing or eliminating adverse impacts over time by long-term preservation and maintenance operations.
- (d) Compensating for adverse impacts by replacing adversely impacted resources or providing substitute resources or environments that enhance the affected area.

c. Determining Whether an Action Has a Disproportionately High and Adverse Effect on Minority Populations or Low-Income Populations. An adverse impact shall be found to have a disproportionately high and adverse effect on low-income or minority populations when:

- (a) The adverse impact is predominantly borne by a minority population and/or a low-income population, or
- (b) The adverse impact that will be suffered by the minority population and/or low-income population is more severe or greater in magnitude than the adverse impact that will be suffered by the non-minority population and/or non-low-income population.