

**PUBLIC INVOLVEMENT/  
PUBLIC HEARING  
PROCEDURES FOR  
FEDERAL-AID  
PROJECT  
DEVELOPMENT**



# PUBLIC INVOLVEMENT/ PUBLIC HEARING PROCEDURES FOR FEDERAL-AID PROJECT DEVELOPMENT

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## INTRODUCTION

This document describes the public involvement and public hearing procedures to be followed in the development of all federal-aid highway actions processed in Michigan under the provisions of 23 CFR Part 771, as amended (Attached Exhibit A) to comply with 23 U.S.C. Section 128. It replaces the previous edition dated April 15, 1988.

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Pursuant to the regulations, state public involvement/public hearing procedures must provide for:

- Coordination of public involvement activities and public hearings with the entire National Environmental Policy Act (NEPA) process.
- Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions.
- One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for certain Federal-aid projects.
- Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information. The notice shall also provide information required to comply with public involvement requirements of other laws, executive orders, and regulations.

These policies and procedures ensure the public has ample opportunity to effectively participate in transportation decision-making. They also ensure that the development of transportation programs and projects in Michigan support federal, state and local goals and objectives. They support and are consistent with the following federal regulations:

**23 CFR Part 774—Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites SECTION 4(F)**

“Public involvement is integral to good transportation planning. Without meaningful public participation, there is a risk of making poor decisions, or decisions that have unintended negative consequences. With it, it is possible to make a lasting contribution to an area's quality of life. Public involvement is more than an agency requirement and more than a means of fulfilling a statutory obligation. Meaningful public participation is central to good decisionmaking.

“The fundamental objective of public involvement programs is to ensure that the concerns and issues of everyone with a stake in transportation decisions are identified and addressed in the development of the policies, programs, and projects being proposed in their communities.”

*From “The Transportation Planning Process: Key Issue,” by U.S. Dept. of Transportation*

**38 CFR Part 800—Protection of Historic Properties  
SECTION 106**

**Title 36 Chapter 1 Part 59--Land and Water  
Conservation Fund Program of Assistance to States;  
Post-Completion Compliance Responsibilities  
SECTION 6(f)**

**Executive Order 12898 of 1994 to Address  
Environmental Justice in Minority Populations and  
Low-Income Populations**

**Title II of the Americans with Disabilities Act Ensuring  
Program Accessibility**

**Title VI of the Civil Rights Act of 1964**

**Executive Order 12372 of 1984 Intergovernmental  
Review of Federal Programs**

**Executive Order 13166 of 2000 for Improving Access to  
Services for Persons with Limited English Proficiency**

MDOT’s Public Involvement and Hearings Officer and Bureau of Transportation Planning have the primary responsibility for implementing these procedures for local agency Federal-aid highway actions. Within the context of these procedures, references to the “Department” mean either the Bureau of Transportation Planning or the Local Agency Programs. For any actions administered by Local Agency Programs, the procedures also apply to the local agency.

MDOT may develop internal operating guides to supplement these general provisions. MDOT will submit any internal operating guides for public hearings and public involvement to FHWA for acceptance before they are implemented. MDOT also will confer with FHWA before revising any of these general provisions.

**PROJECT DEVELOPMENT AND PUBLIC  
INVOLVEMENT PROCEDURES**

Different public involvement objectives and procedures apply to each phase of the Federal-aid project development

**Michigan Statewide Planning  
Process Participation Plan**

Besides this procedural guide for major action studies, MDOT has developed a participation plan for determining the statewide focus and priorities for transportation investments in Michigan. While many of the same communication techniques and requirements described herein are used in statewide planning, project development differs significantly from the statewide planning process. For this reason, public participation for the State Long-Range Plan, State Transportation Improvement Program and other non-NEPA planning processes are not included within the scope of this document. They are covered in the document *Michigan Statewide Planning Process Participation Plan*.

process and for each class of action. These phases can generally be categorized into preliminary development, impact analysis and decision making, in that order.

There are three classes of action as defined in 23 CFR Part 771.115.

**Class I** includes major actions that may significantly affect the environment and require preparation of an Environmental Impact Statement (EIS).

**Class II**, referred to as Categorical Exclusions (CE), includes actions that do not individually or cumulatively have a significant environmental effect and are excluded from the requirement to prepare an EIS or Environmental Assessment. Categorical Exclusions are listed in 23 CFR 771.117(c)(d) and normally:

- do not involve significant environmental impacts or substantial planning, time or resources, and
- will not induce significant foreseeable alterations in land use, planned growth, development patterns, or natural or cultural resources.

In **Class III** actions, the significance of the impact on the environment is not clearly established at the outset. All actions in this class require an Environmental Assessment (EA) to determine whether the proposed project would have significant environmental impacts or not. An EA results in either a Finding of No Significant Impact (FONSI) or reclassifying the proposed project as a Class I action (EIS).

Class I actions require the specific public involvement activities indicated in these procedures for each of the three phases of project development: preliminary development, impact analysis and decision making. Additionally, under the provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA-LU) of 2005, a public and agency coordination plan is required to inform and involve the public or agencies on the issues involved. A variety of public involvement methods may be used. These could include participatory techniques such as informal meetings, workshops, task forces or advisory committees, opinion surveys, Web questionnaires, electronic audience response systems, field office and project site information

“(a) Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental document. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental document.”

*From 23 CFR 771.111  
Early coordination, public  
involvement, and project  
development*

centers. Indirect methods such as newsletters, Web sites, pamphlets, brochures, mailing lists, news releases, and notices in community newspapers also could be used for the special public involvement program.

Class II projects and programs do not normally require specific public involvement activities or a public hearing. In some cases, however, informing the public and permit agencies about the project is beneficial. Even with Class II actions, when there is an environmental concern, other agency coordination/consultation or Section 4(f) requirements need to be satisfied (see Preliminary Development & Decision Making). In these cases, sufficient information must be furnished to FHWA to determine that a proposed action meets the criteria for a Class II Categorical Exclusion as required under 23 CFR 771.117.

The public involvement techniques for Class III actions will be similar to those for Class I actions, but will be more flexible. Developing public awareness and encouraging public and agency participation is important in all cases. Public awareness is particularly important for actions that may have no direct significant impacts on the environment, but might have secondary impacts which may affect the public.

### **Public Involvement and Resource Agency Coordination Plan and Schedule**

When preparing an EA or EIS, federal SAFETEA-LU (Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005) requires the establishment of a plan for coordinating public and agency participation and soliciting comments during the environmental review process. The plan should be developed in consultation with reviewing agencies to ensure adequate commitment of resources and to avoid problems with implementation. It may include a schedule for the completion of the environmental review process.

FHWA guidance identifies the key factors to consider in developing the coordination plan and establishing a schedule, including when the plan should be developed, what it should contain, what the deadlines must be for

“The coordination plan must be shared with the public and with participating agencies so that they know what to expect and so that any disputes are surfaced as early as possible.”

From FHWA final guidance on SAFETEA-LU Environmental Review Process, November 15, 2006

public and agency comments, and how the plan is to be modified. If an optional project schedule is prepared and is included in the coordination plan, that schedule must be provided to all participating agencies and the project sponsor, and must be made available to the public.

While the schedule is optional, FHWA assumes that a schedule will be used on all EA and EIS projects processed under Section 6002 (Efficient Environmental Reviews for Project Decision Making) of SAFETEA-LU. The schedule should include decision-making deadlines for each agency approval, such as permits, licenses, and other final decisions, consistent with statutory and regulatory requirements, in order to encompass the full environmental review process. Section 6002 allows lead agencies to decide how detailed the schedule should be, and whether to use specific dates or durations. In deciding the level of detail of the schedule, lead agencies should keep in mind the objective of expediting the process by communicating expectations and forcing discipline on themselves and others.

To establish a realistic schedule, SAFETEA-LU requires consideration of the following factors:

- The responsibilities of participating agencies under applicable laws
- The resources available to the cooperating agencies
- The overall size and complexity of the project
- The overall schedule for and cost of the project
- The sensitivity of the natural and historic resources that could be affected by the project

Center for Environmental Quality (CEQ) regulations (40 CFR 1501.8) suggest that, when lead agencies set schedules, they also consider the degree of public controversy and the extent to which relevant information about the project or its impacts are already known. In preparing the schedule, the lead agencies must also solicit and consider any comments on the schedule by the participating agencies, the project sponsor (if not a lead agency), and the State.

The FHWA guidance on SAFETEA-LU recommends the following key coordination points:

- Publication of Notice of Intent and scoping activities
- Development of purpose and need
- Identification of the range of alternatives
- Collaboration on methodologies
- Completion of the DEIS
- Identification of the preferred alternative and the level of design detail.
- Completion of the final environmental impact statement (FEIS)
- Completion of the ROD.
- Completion of permits, licenses, or approvals after the ROD.

## **Comment Periods**

Within this context, lead agencies must design the schedule so that they have adequate time to accept and consider public and participating agency comments and input. They also need to allow time for conducting any appropriate additional engineering studies or impact assessments and for making any necessary project changes resulting from the comments and input. The schedule must be consistent with the SAFETEA-LU requirements regarding comment deadlines and with applicable time periods established under other laws.

SAFETEA-LU mandates that the DEIS comment period not exceed 60 days, unless a different comment period is established by agreement of the lead agencies, the project sponsor, and all participating agencies. The DEIS comment period begins on the date that the Environmental Protection Agency (EPA) publishes the notice of availability of the DEIS in the *Federal Register*.

For any other point within the environmental review process at which the lead agencies seek comment from the public or participating agencies, the lead agencies shall establish a deadline for comment of not more than 30 days, unless a different comment period is established by agreement of the lead agencies, the project sponsor, and all participating agencies. At these points, although the 30-day maximum period applies, a shorter period commensurate with the volume and complexity of the materials to be reviewed may be appropriate. In such cases the comment period is measured from the date when materials are available for comment. All comment periods should be specified in the coordination plan and the lead agencies must notify participating agencies and the public about comment periods. In any case, the lead agency has the authority to extend the deadlines for good cause.

(See pages \_\_\_\_\_ of this document for more on legal notices and comment periods.)

### **Thirty-day Waiting Period**

The 30-day waiting period between the FEIS notice in the *Federal Register* and the signing of the Record of Decision (ROD) is required by CEQ regulations [40 CFR

1506.10(b)], but is not a required comment period. The 30-day wait provides time for other Federal agencies that find the project environmentally unsatisfactory to refer the decision to CEQ [40 CFR 1504].

Occasionally, the lead agencies will seek comment on a specific unresolved issue discussed in the FEIS. In those cases, the comment deadline provisions of SAFETEA-LU apply and the comment period should run concurrently with the required 30-day waiting period. Even if the lead agencies do not request comments on a FEIS, they will address any new and substantive comments submitted during the 30 days following the FEIS publication [40 CFR 1503.1].

Note, however, that an effective environmental review process results in the submission of comments when they are most useful to decision making by the lead agencies. After the FEIS, comments typically should focus on commitments discussed in the FEIS and on conditions that parties want the lead agencies to include in the ROD. The process should avoid duplication, and lead agencies are not required to re-address comments that present issues specifically raised during the DEIS comment period and addressed in the FEIS.

Comments to which the lead agencies respond would be addressed in the ROD or in an attachment to the ROD. Neither the need to solicit further comments on an issue unresolved in the FEIS, nor the receipt of unsolicited comments that require a response, can be anticipated. Therefore, these contingencies would not be addressed in a coordination plan.

For further information see SAFETEA-LU Guidance Document located in the appendix section of this document.

## **PRELIMINARY DEVELOPMENT PHASE**

Public involvement in NEPA studies should start early and occur often throughout the process. Public involvement during the preliminary development phase creates awareness and encourages participation. Early

State public involvement/public hearing procedures must provide for:

- (i) Coordination of public involvement activities and public hearings with the entire NEPA process.
- (ii) Early and continuing opportunities for public involvement.
- (iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any EIS study or for which the FHWA determines that a public hearing is in the public interest.
- (iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing.
- (v) Explanation at the public hearing of the following information, as appropriate:
  - (A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning,
  - (B) The project's alternatives, and major design features,
  - (C) The social, economic, environmental, and other impacts of the project,
  - (D) The relocation assistance program and the right-of-way acquisition process.
  - (E) The State highway agency's procedures for receiving both oral and written statements from the public.
- (vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered.

Edited from 23 CFR 771.111  
*Early coordination, public involvement, and project development*

coordination represents the beginning of an ongoing process of data collection and conforms to federal regulations (23 CFR Parts 771.111, 771.119, and 771.123(b)). It also helps to define the range and limits of alternatives to be considered and the potential impacts to the community.

During the preliminary development of a project or program that is classified as a major Class I (EIS) or Class III (EA) action, the study team solicits the views of the state's resource, recreation and planning agencies, and those of Federal agencies and local officials and agencies having jurisdiction over, interest in or would be potentially affected by the proposed undertaking.

The study team may wish to establish a **Local Advisory Committee (LAC) or Local Agency Group (LAG)**. They are highly effective "sounding boards" for vetting issues related to the study. Comprised of representatives of various advocacy groups, elected officials, and public agencies, LACs meet regularly with study team members to receive updated information and provide valuable input as the study develops. The LAG's focus is more technical and is comprised of local government and agency professionals. As a representative form of participation, LAC membership is appointed. The group typically is seated in a circle, with observers seated on the outside. As advisory bodies, neither votes on matters, but rather discusses issues and seeks clarification from study team members. The representatives in turn take the information they have learned back to their respective groups and return to the following meeting with any comments, questions and/or concerns.

In addition, for Class I projects, the lead agency must host a public meeting or conduct some form of early public notification in the community that would be affected by the proposed undertaking. These activities familiarize interested parties with the initial concept of the study, the type of alternatives the department expects to consider, and the issues that are expected to be significant. The study team uses such a "kickoff" meeting to solicit early public and agency input on social, economic or environmental impacts. The meeting should be held as early in the study process as practical, but typically after the study team has developed a social, economic and

"When the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the Federal Register. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level."

From 23 CFR 771.123  
*Draft environmental impact  
statements*

environmental inventory, and has identified potential alternatives and significant issues. This information assists the public in understanding the proposals.

Public outreach techniques vary with each study. Lead agencies approach outreach tasks with the goal of maximizing public involvement throughout the study process. Typical public meetings at this stage are informal and held at a time and place convenient to both the business community and private citizens in the study area. The public meeting affords attendees the opportunity to request information and notices throughout the development of the proposal. The public announcement of meetings follows the requirements identified elsewhere in the document under “Notification Procedures.”

### **IMPACT ANALYSIS PHASE**

During the impact analysis phase for Class I (EIS) or Class III (EA) studies, a public hearing will be held or an opportunity for a public hearing will be offered on any project that:

- Requires the acquisition of significant amounts of right-of-way, or
- Substantially changes the layout or function of connecting roadways or of the facility being improved, or
- Has a substantial adverse impact on abutting property, or
- Otherwise has a significant social, economic, environmental or other effect, or
- Has generated strong community controversy, or
- For which the FHWA determines that a public hearing is in the public interest.

The lead agency hosts a public hearing after the preparation of the Draft EIS or EA, but before it commits to any specific alternative or approves the project. If the draft environmental document identifies a preferred alternative, it may be made known at the public hearing.

A public hearing affords all interested persons an opportunity to participate in the process of determining the

“(d) The EA need not be circulated for comment but the document must be made available for public inspection at the applicant’s office and at the appropriate Administration field offices in accordance with paragraphs (e) and (f) of this section. Notice of availability of the EA, briefly describing the action and its impacts, shall be sent by the applicant to the affected units of Federal, State and local government. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.”

From 23 *CFR* 771.119  
*Environmental assessments*

“(g) The draft EIS shall be circulated for comment by the applicant on behalf of the Administration. The draft EIS shall be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 *CFR* 1506.9.”

From 23 *CFR* 771.123  
*Draft environmental impact statements*

need for the project and whether the project is consistent with local planning goals and objectives. It also provides a formal opportunity to present views on each of the alternative courses of action, project locations, and design features. Public views and suggestions have a substantial influence on decisions and recommendations made.

Other public (and agency) involvement meetings also may be held during this phase to provide and gather information on the status of project development, its impacts and planned mitigation efforts.

## DECISION MAKING PHASE

Public involvement during the decision making phase of project development allows interested and affected parties the opportunity to review past activities as well as changes and refinements that evolved during the study. Such activities also inform new interest groups about previous activities. During this phase, consultation and coordination with federal agencies continues as required by 23 CFR 771 as FHWA finalizes classification of the project and during preparation of final environmental documents (FEIS and ROD or FONSI). Projects that do not require a public hearing do not require specific public involvement activities at this phase.

For any trunkline Class I (EIS) or Class III (EA) project that requires a public hearing, and any local agency Class I project that requires a public hearing, a press release must be issued to communicate project approvals and anticipated timing of future activities [23 CFR Parts 771.121(b) and 771.125(g)]. For local agency Class III projects, notice of availability of the FONSI must be sent to affected units of Federal, State and local government and the document must be available upon request by the public [23 CFR Part 771.121(b)]. A press release may be issued where deemed appropriate. For projects that require acquisition of several parcels of right-of-way (approximately 25 or more), a public meeting will be held prior to right of way acquisition. Such a meeting will be held in a location and at a time convenient to the individuals who would be directly affected. The public will be notified through the news media. Prior to the

“(b) After a FONSI has been made by the Administration, a notice of availability of the FONSI shall be sent by the applicant to the affected units of Federal, State and local government and the document shall be available from the applicant and the Administration upon request by the public. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.”

From 23 CFR 771.121  
*Findings of no significant impact*

“(g) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. When filed with EPA, the final EIS shall be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate.”

From 23 CFR 771.125  
*Final environmental impact statements*

meeting, reasonable attempts will be made to identify owners of property in order to notify them directly about the public meeting.

When a FONSI or FEIS is available, the lead agency must notify the state intergovernmental review contact established under EO 12372 (Intergovernmental Review of Federal Programs)

### **Documentation of Public Involvement and Resource Agency Coordination**

Final environmental documents must include a summary of public and agency involvement throughout project development. This summary is a chapter in a FEIS. It is an attachment to an EA or to a request for classification as a Categorical Exclusion.

When a Final EIS is approved and a ROD is signed by FHWA, the project will be advanced in accordance with the provisions of 23 CFR Part 771.127. The provision of 23 CFR Part 771.129 (Re-evaluation) also will be followed by the department for Class I, II or III actions when it applies. Based on those re-evaluations the department and FHWA will determine whether changes in the project or new information warrant additional public involvement under these procedures.

### **PUBLIC HEARING PROCEDURES**

Public hearings will be held at a place and time generally convenient for persons affected by, or interested in, the proposed undertaking and, where possible, in a facility that is accessible to the handicapped. The department will hold, or arrange for local public officials to conduct, the required public hearing; however, the Department will remain responsible for meeting all requirements. The Department shall make suitable arrangements for appropriate transportation officials to be present at public hearings as necessary to conduct the hearing and/or be responsive to questions which may arise.

At the public hearing it shall be announced, or otherwise explained, as appropriate:

“(e) When a public hearing is held as part of the application for Federal funds, the EA shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The notice of the public hearing in local newspapers shall announce the availability of the EA and where it may be obtained or reviewed. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the availability of the EA unless the Administration determines, for good cause, that a different period is warranted. Public hearing requirements are as described in §771.111.”

From 23 CFR 771.119  
*Environmental assessments*

- The project’s purpose, need and consistency with the goals, and objectives of any local urban planning;
- The project’s alternatives, and major design features;
- The social, economic, environmental, and other impacts of the project,
- The right-of-way acquisition process and the relocation assistance program;
- The department’s procedures for receiving both oral and written statements from the public.

The Draft EIS or EA will be available for public review at least 15 days prior to any hearing. The document availability also will be announced at the public hearing and those attending will be told how to obtain copies.

Those attending the public hearing also will be given an opportunity to comment on the social, economic and environmental impacts of the project and the alternatives being considered. Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements made at the public hearing. The final date for receipt of such statements or exhibits shall be at least ten days after the public hearing.

A verbatim transcript of the oral proceedings of the public hearing shall be made. A copy of the transcript, including written statements received as part of the public hearing process, shall be made available to the public for inspection and copying and submitted to FHWA with a certification that the required hearing was held [23 CFR Parts 771.111(h)(2)(vi) & 771.119(g)]. Procedures for reviewing the transcript shall be announced at the public hearing. In addition, copies will be provided to individuals who request such copies as provided for in the Freedom of Information Act. A summary of public hearing proceedings will be included in the Final EIS or request for a FONSI.

“(h) The FTA requires a public hearing during the circulation period of all draft EISs. FHWA public hearing requirements are as described in §771.111(h). Whenever a public hearing is held, the draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for FHWA funding is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.”

*From 23 CFR 771.123  
Draft environmental impact  
statements*

## **OPPORTUNITY FOR A PUBLIC HEARING**

The public hearing requirements can be satisfied by: 1) holding a public hearing or, 2) publishing two notices

offering the opportunity for a public hearing and holding a hearing or meeting with the respondent(s) if any written request(s) for such a hearing is received. The procedure for requesting a public hearing shall be explained in the notice. In addition, the notice also shall: 1) announce the availability of the Draft EIS or EA; 2) explain how copies may be obtained; 3) invite comments from all interest parties and 4) explain where the comments on the document should be submitted. The deadline for submission of such comments and/or a request for a public hearing shall be at least thirty (30) days after the date of publication of the first notice and at least fourteen (14) days after the date of publication of the second notice. If no requests are received in response to a notice within the time specified, the Department shall certify that fact to the FHWA and indicate that the public hearing requirements have been fulfilled.

When a limited number of requests is received in response to a notice offering the opportunity for a public hearing, appropriate Department representatives may meet with those individuals responding. If individuals do not withdraw their requests in writing, for reasons other than significant social, economic or environmental matters, the Department shall prepare a written explanation of the situation and may certify to the FHWA that a public hearing would not be in the overall public interest. With FHWA concurrence, the public hearings requirements may then be waived.

The opportunity for another hearing shall be afforded and/or held in any case where: 1) the proposal is so changed from the alternatives that were presented at the previous public hearing or identified in the notice for the opportunity of a public hearing as to have substantially different social, economic and environmental effects. Or 2) substantial unanticipated development has occurred in the area which would change the scope or impact of the project or 3) a revised EA or a supplement to the EIS is required.

## **NOTIFICATION PROCEDURES**

When a public hearing or other required meeting is to be held, a notice shall be published at least twice in a newspaper having general circulation in the vicinity of the proposed undertaking. The notice also will be published in any newspapers such as foreign language newspapers or minority publications that have a substantial circulation in the project area. It is recommended that the first notice be published approximately four (4) weeks before, but in no case less than 15 days prior to the date of the hearing/meeting. The second notice may not be published less than five (5) days prior to the hearing date. The publication of additional notices is optional. An EA must be available for public comment for 30 days [23 CFR part 771.119(e)] and a draft EIS for 45 days [Part 771.123(i)]. A minimum of 45 days for receipt of comments will be required for EA's and EIS's containing Section 4(f) evaluations or when a separate 4(f) evaluation is processed for an action [23 CFR Part 774]. These time frames must be accommodated as part of the period ranging from the publication of the first notice to the closing of public comments following the hearing.

In addition to publishing formal notices of the hearing or meeting, copies of the notice or a press release shall be distributed to appropriate news media and local, state and federal governmental agencies that are affected or involved in the project or program. Copies shall also be mailed to any agency, local public official, public advisory group, or individuals who have requested notice of hearings and to other groups or agencies who by nature of their function, interest, or jurisdiction the Department knows, or believes might be interested in, or affected by, the undertaking [23 CFR Part 771.123(g)(1)(2)(3)].

Each notice of a public hearing or meeting shall specify the date, time and place of the hearing or meeting and shall contain a description of the proposal. The notice shall specify that maps, drawings and other pertinent information, including the Draft EIS or EA developed for the proposal, as well as written views received from local, state and federal agencies, will be available for public inspection and shall specify where this information may be obtained or reviewed. This could be some convenient public building such as the city hall, library, or post office

in the vicinity of the proposed project as well as the local department office. A notice of a public hearing shall indicate when applicable that the tentative schedules for right-of-way acquisition and construction will be discussed and shall also indicate that the Department's relocation assistance program will be explained. In addition, information specifically required to comply with public involvement requirements of other laws, Executive Orders and regulations will be provided in the notice [23 CFR Part 771.111(h)(2)(iv)].

### **ROLES OF SECTIONS 4(F), 106 AND 6(F)**

In tandem with the NEPA guidelines for clearing transportation projects, MDOT must endeavor to preserve the beauty and integrity of publicly owned parks and recreation areas, waterfowl and wildlife refuges, and historic sites considered to have national, state or local significance. Section 4(f) of the Department of Transportation Act of 1966 specified that FHWA and MDOT cannot use such lands for a transportation purpose unless: 1) there is no feasible and prudent alternative to their use and 2) every planning effort has been made to minimize resulting harm.

The adverse effects of a proposed project on historic cultural resources are evaluated under Section 106 of the National Historic Preservation Act of 1966. It is an integral part of Section 4(F) that determines the cultural resource's significance, its boundaries, contributing and non-contributing elements within the boundary of a historic district and the reasons why a property is eligible.

Sections 4(f) and 106 require MDOT to notify the public and provide an opportunity for review and comment concerning the effects on the protected activities and properties. They also indicate that the requirements of each may be met in conjunction with other public involvement procedures required under NEPA. According to NEPA rules stated in 23 CFR Part 774, **a minimum of 45 days for receipt of comments is required for EA's and EIS's containing Section 4(f) evaluations or when a separate 4(f) evaluation is processed for an action.**

Section 106 further mandates that MDOT consult with the State Historic Preservation Officer and/or Tribal Historic

Though it has been re-codified and moved to other federal statutes since 1966, Section 4(f) is still known by its original name. It currently is found within 23 CFR-PART 774.

"The views of the public are essential to informed Federal decision making in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking."

*From CFR PART 800 –  
PROTECTION OF HISTORIC  
PROPERTIES  
800.2 Participants in the Section  
106 process*

Preservation Officer to plan for public involvement, including identifying the appropriate points for seeking public input and for notifying the public of proposed actions.

Another process integral to Section 4(f) is Section 6 (f) of the Land and Water Conservation Fund Act. It affects all projects that impact recreational lands purchased or improved with land and water conservation funds. There are no specific public involvement requirements outlined in Section 6(f), only that the process in general complies with Section 4(f).

## **FLEXIBLE AND RESPONSIVE**

The public involvement process must have the flexibility to respond to unusual situations. To ensure that this is possible, appropriate public involvement techniques will be utilized during the planning process whenever they seem especially suited to the project or study.

As the study progresses, additional public involvement techniques will be utilized as deemed appropriate by the Department. Because of the importance of the ongoing nature of the public involvement process, public contact of some nature should be made annually, beginning with the first public notification and continuing until the decision is announced. This could be done in any of several ways such as holding an announced meeting, sending a newsletter to the identified interested parties and agencies, publishing a press release, etc.

When an emergency exists, or it is deemed to be in the overall public interest, the Department can recommend to the FHWA that alternate procedures for public involvement be followed or that certain requirements be waived. Written concurrence must be obtained from the FHWA for such alternate procedures or waiver of certain steps.

## **PUBLIC INVOLVEMENT TOOLS**

Since public involvement occurs continuously throughout environmental studies, it is best to use a variety of efforts to keep the public actively involved. The purpose of this section is to discuss some of the more common tools available for use in effective public involvement efforts.

**Newsletters** – Regular, targeted communications with stakeholders is essential to keeping them informed, engaged and satisfied that they are being heard. Newsletters can help deliver concise updates and other study information directly to those interested in and/or affected by a proposed project. When issued prior to public meetings, newsletters can help promote greater attendance and encourage public comments at key milestones in the study process. They also can double as handouts at public meetings, bringing newcomers up to speed on the study.

**Brochures and Fact Sheets** – Education is integral to effective public outreach. Brochures, fact sheets and other printed materials can help communicate largely technical information to laypersons who want things explained in terms they can easily understand and grasp. Brochures can include graphics and information defining the study area, scope and need, alternatives under study, anticipated impacts and contact information. Fact sheets can help provide factual details about the study and counter any misinformation. Both brochures and fact sheets can be distributed or made available for the taking at local government offices, libraries, schools, retailers, and other community locations.

**Web Sites** – Linked to MDOT’s main page through “Projects and Programs,” the Studies Web site features summary information, schedules, documents and other related information on each of the proposed transportation improvements undergoing an Environmental Assessment or Environmental Impact Statement. It provides an excellent way for the public to stay current on progress and provide input. Each study site has contact information for that study as well as a link to a comment form or E-mail address. While more and more people are joining the ranks of the Internet savvy, not everyone is connected and use of tool remains limited. Local libraries can provide access for persons without computers or who cannot afford an Internet account.

**On-Line Comment Forms** - An easy way to gather comments on a project or study is to provide an Internet-based comment form linked to the study Web site. The layout can follow a standard comment form used at public meetings, or it can take the shape of a questionnaire. A comment form is free flowing whereas a questionnaire can help direct the commenter to provide opinions on specific aspects of the project. In either case the input can be easily gathered electronically and easily shared with study team members.

**Audience Response System** - MDOT maintains this highly interactive system to engage the public at meetings through instant results from audience queries. As many as 100 transponders can be used in conjunction with a PowerPoint presentation that has been embedded with programming to receive and calculates responses to questions.

### **VISUALIZATION: A PICTURE IS WORTH...**

The old adage, “A picture is worth a thousand words,” is no truer than in environmental clearance, where proposed plans can take volumes of words to explain to a lay public. To help lower the knowledge barrier between the team and an inquiring public, SAFETEA-LU calls for states and MPOs to rely on visualization techniques. Effective visualization can strengthen public participation in the planning and project delivery process and aid the public in better understanding plans. It helps break down the complex character of proposed transportation plans, policies and programs so the public can contribute more effectively.

Visualization techniques can be as simple and low cost as sketches, drawings, artist renderings and maps; or they can be complex, including physical models, simulated photos, videos, computer modeled images, interactive GIS systems, GIS-based scenario planning tools and photo manipulation.

As inferred by the above lists, new technology is changing the communication process and making it easier and more cost effective to incorporate visual aids in public meetings. When done right, visualization can provide the public and decision makers a clear idea of the proposed policies,

“Visualization provides a considerable advantage in the way transportation planners, designers, and project teams improve the project development process. Throughout this process, visualization significantly improves the range of capability that project teams have to more thoroughly test design scenarios (as shown in Figure 2), better communicate possible alternatives, and weigh potential impacts. Reliance upon traditional engineering drawings such as typical plans, profiles, and cross-sections is no longer sufficient to satisfactorily convey a clear understanding of transportation improvement alternatives and their associated impacts.”

From “Visualization in Transportation” a guide for states produced by AASHTO’s Task Force on Environmental Design

plans and impacts to the human and natural environment. It also can raise the level of interactivity between the public and the team and improve consensus building.

MDOT is committed to employing visualization techniques where appropriate. It is important to decide when and how much of it to use in a NEPA study. According to the AASHTO guide, “Visualization in Transportation,” the most appropriate visualization technique should be selected based upon what stage the project is in, the needs of the project, the anticipated amount of controversy regarding potential alternatives, the cost and complexity of the project, and the need to convey understandable information to the public. Generally, the cost of the visualization should strive to be in balance with the cost of the improvement.

However, the ultimate factor for determining what type of and how much investment in visualization is warranted should be based on the value the graphic portrayal will likely provide over time when considering the magnitude of issues surrounding the proposed project. For example, when an important yet comparatively low-cost project generates significant public controversy, it may be well worth more time and expense to prepare visualizations than would otherwise be indicated by the cost of the project alone. When the cost of the visualization technique is in line with the cost of the improvement, information can be provided to the designer and public that they will find useful and necessary, yet the agency will not be criticized for spending funds unnecessarily.

If the project has the potential to include items such as planting materials that will appear different in a future condition than in the “construction” year, both existing and proposed images and/or animation should be included in the visualization. The public should be informed that the visualizations shown are a close representation of what the improvement may look like, but that it is not an actual depiction.

## THAT ALL MAY BE HEARD

Public involvement needs to be inclusive of the full range of community interests, especially those who have traditionally been underserved by transportation. They not only have greater difficulty getting to jobs, schools, recreation, and shopping than the population at large, but often they are also unaware of transportation proposals that could dramatically change their lives. Many lack experience with public involvement, even though they have important, unspoken issues that should be heard.

Underserved people include those with special cultural, racial, or ethnic characteristics. Cultural differences sometimes hinder full participation in transportation planning and project development. People with disabilities find access to transportation more difficult. It can be a struggle for them to participate in public involvement opportunities as well. People with low incomes often lack both access and time to participate. Poorly educated people may not be fully aware either of what transportation services are available or of opportunities to help improve them.

These groups are a rich source of ideas that can improve transportation not only for themselves but also for the entire community. Agencies must assume responsibility for reaching out and including them in the decision-making process -- which requires strategic thinking and tailoring public involvement efforts to these communities and their needs.

This section explains the federal laws that guide MDOT's efforts to reach out and involve persons traditionally underserved by transportation.

### **Americans with Disabilities Act Accessibility**

Just as the transportation improvements themselves must be accessible to persons with disabilities, it is essential that all willing persons be given the opportunity to participate fully in processes used to make the transportation decision. Under Title II of the American with Disabilities Act (ADA), MDOT is prohibited from denying qualified individuals with disabilities the opportunity to participate

**Americans With Disabilities Act of 1990 – Title II Subpart E -- Communications {35.160 General.**

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

**{35.161 Telecommunication devices for the deaf (TDD's).**

Where a public entity communicates by telephone with applicants and beneficiaries, TDD's or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech.

in or benefit from its programs or activities due to inaccessibility of facilities or policies and procedures which have the effect of being discriminatory.

By program, the act refers to any activity or service made available to the public that is funded, operated or administered by a local or state government or division thereof. Public forums/meetings, educational programs, and development and maintenance of public rights-of-way are a few of the relevant activities. MDOT must ensure that communication with program participants and members of the public with disabilities is as effective as communication with people who do not have disabilities. Removing communication barriers is fundamental to the program accessibility process.

Communication must be effective to meet the ADA requirements. Effective communication is described as any communication that is understood between the two people communicating. The methods of achieving it will depend on the complexity of the communication and the skills of the individuals involved in it. A public entity must furnish “appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in and to enjoy the benefits of, a service, program or activity” they conduct.

Examples of auxiliary aids and services used to accommodate speech, hearing and visual impairments are:

- Videotext displays
- Interpreters
- Telephone handset amplifiers
- Assistive listening devices
- TTYs (TeleTYpewriters)
- Qualified readers
- Large print materials
- Braille materials

Such services must be available free of charge to the person or persons requiring them. While MDOT is not required to take any action that would fundamentally alter the nature of the program or would create an undue financial or administrative burden, such a burden does not relieve the department of its obligation to provide overall program accessibility.

**Americans with Disabilities Act of 1990 – Title II**

**Subpart D – Program Accessibility {35.149 Discrimination prohibited.**

Except as otherwise provided in {35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

**{35.150 Existing facilities.**

(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not -- (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities; (2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

ADA takes a broad view of accessibility, meaning while all facets of a program must be considered, not all must be accessible to provide overall program accessibility. It is up to MDOT to invite individuals with disabilities to make a request for their preferred method of communication and for the department to do its best to honor the request, or to work out an alternative solution if the desired aid would be an undue burden. Decisions should be based on the complexity of the communication, the number of people involved and the context in which the communication is taking place.

Every effort should be made in study promotional materials to invite accessibility requests. Legal notices, news releases and brochures are excellent vehicles for this. The following is sample language for inviting requests.

“With an advance notice of seven days, MDOT can make most of the materials for this hearing available in alternative formats such as large print or audiotape, and can make accommodations for sign language interpretation and/or assisted listening devices. Please call (517) 373-9523 to request accommodations. For hearing assistance call the Michigan Relay Center at 800-649-3777.”

This language assumes that seven days is a reasonable amount of time to prepare the materials in a suitable format. MDOT’s public involvement and hearings officer will work with the requestor to see which accommodation is reasonable and best meet the need. MDOT will maintain a list of service providers who offer translation, sign language, audio recording, Braille and other appropriate services.

### **Nondiscrimination under Title VI**

MDOT is committed to ensuring that projects, programs and services are performed without discrimination, under Title VI of the Civil Rights Act of 1964. The federal act makes it illegal to discriminate against people, whether intentional or unintentional, on the basis of their race, color or national origin in any program or activity that receives funds directly from the federal government or as a

**Title VI of the  
Civil Rights Act of 1964**  
“No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

sub-recipient of federal funds. A sub-recipient is an entity that receives funds from a recipient of federal funds.

Since MDOT receives federal aid, Title VI applies to all its programs, even those not receiving federal aid. The specific programs relative to this procedural document include highway projects or activities that provide service, financial aid or other benefits to individuals. This includes education or training, work opportunities, health, welfare, rehabilitation, housing or other services, whether provided directly by MDOT or its agents through contracts or other arrangements. In essence, Title VI is the mechanism that ensures that federal financial assistance, which drives or promotes economic development, infrastructure improvements, service delivery, and minority participation in decision-making, is done without discrimination. The intent is to ensure that all persons have fair participation and representation in the planning and execution of public policy.

As citizens become aware of their rights and seek parity in programs funded with their tax dollars, local governments find themselves vulnerable if they have failed to develop a program to enforce this broad, far-reaching law. The Federal Highway Administration (FHWA) requires that agencies act in a proactive manner to avoid non-compliance with Title VI.

Copies of a brief informative brochure, *Your Rights under Title VI of the Civil Rights Act of 1964*, are available from MDOT's Title VI coordinator at 248-967-0248, Extension 217. A supply of them should be available for the taking at public meetings.

### **Environmental Justice**

While Title VI prohibits discrimination by virtue of race, color or national origin, an equally important provision, Environmental Justice, clarifies and reinforces the act to ensure that programs, policies and other activities do not have a disproportionately high and adverse effect on minority populations and low-income populations. The order applies to all aspects of planning and project

#### **'Program' Defined**

The Civil Rights Restoration Act of 1987 amended each of the affected statutes by adding a section defining the word "program" to make clear that discrimination is prohibited throughout an entire agency if any part of the agency receives Federal financial assistance.

If a unit of a State or local government is extended Federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distribute the funds and all of the operations of the department or agency to which the funds are distributed are covered.

Corporations, partnerships, or other private organizations or sole proprietorships are covered in their entirety if such an entity receives Federal financial assistance which is extended to it as a whole or if it is principally engaged in certain types of activities.

*From Impacts of the Civil Rights  
Restoration Act of 1987 on  
FHWA Programs  
N 4720.6  
September 2, 1992  
Federal Highway Administration*

decision making, including public-involvement and the proposed project.

Environmental justice must be considered in all phases of planning. Although Environmental Justice concerns are frequently raised during project development, Title VI applies equally to the plans, programs, and activities of planning.

At the start of the planning process, planners must determine whether Environmental Justice issues exist and use data and other information to: (1) determine benefits to and potential negative impacts on minority populations and low-income populations from proposed investments or actions; (2) quantify expected effects (total, positive and negative) and disproportionately high and adverse effects on minority populations and low-income populations; and (3) determine the appropriate course of action, whether avoidance, minimization, or mitigation. If issues are not addressed at the planning stage, they may arise during project development, or later when they could be more difficult to mitigate and delay project decisions.

Effective involvement of EJ populations in the planning process can alert MDOT and local agencies to EJ concerns early on and avoid surprises during the project-development stage. Continuous interaction between community members and transportation professionals is critical to successfully identify and resolve potential Environmental Justice concerns.

The U.S. DOT Order (5610.2) on Environmental Justice defines "Minority" in the Definitions section of the Appendix, and provides clear definitions of the four (4) minority groups addressed by the Executive Order. These groups are:

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).

#### **EJ Principles**

1) To avoid, minimize, or mitigate disproportionately high and adverse human health or environmental effects, including social and economic effects, on minority populations and low-income populations.

2) To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process.

3) To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority populations and low-income populations.

4. American Indian and Alaskan Native (a person having origins in any of the original people of North America and who maintains cultural identification through tribal affiliation or community recognition).
5. Native Hawaiian or Other Pacific Islander - a person having origins in any of the original peoples of Hawaii , Guam, Samoa, or other Pacific Islands

It is important to note that ethnic populations not specified above are covered under the broad non-discriminatory intent of Title VI.

The FHWA Order defines "low-income" as "a person whose household income is at or below the Department of Health and Human Services poverty guidelines." The Department of Health and Human Services (HHS) poverty guidelines are used as eligibility criteria for the Community Services Block Grant Program and a number of other Federal programs. However, a State or locality may adopt a higher threshold for low-income as long as the higher threshold is not selectively implemented and is inclusive of all persons at or below the HHS poverty guidelines.

The two should not be presumptively combined, meaning there can be minorities who are not low-income, and low-income persons who are not minority.

The order directs Federal departments and agency heads to take appropriate and necessary steps to ensure:

- 1) All programs and activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.
- 2) Analysis of the environmental effects, including human health, economic and social effects, of Federal actions on minority communities and low-income communities.
- 3) Mitigation measures, wherever feasible, address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.

#### **Integrating EJ**

1) Planning and programming activities that have the potential to have a disproportionately high and adverse effect on human health or the environment shall include explicit consideration of the effects on minority populations and low-income populations;

2) Steps shall be taken to provide the public, including members of minority populations and low-income populations access to public information concerning the human health or environmental impacts of programs, policies and activities, including information that will address their concerns.

*U.S. Department of  
Transportation  
EJ Compliance Policy*

- 4) Opportunities for community input in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of meetings, crucial documents, and notices.
- 5) That the public, including minority communities and low-income communities, has adequate access to public information relating to human health or environmental planning, regulations, and enforcement when required under the Freedom of Information Act.

The DOT agreed to identify and avoid discrimination and avoid disproportionately high and adverse effects on minority populations and low-income populations by:

- 1) Identifying and evaluating environmental, public health, and interrelated social and economic effects of DOT programs, policies and activities;
- 2) Proposing measures to avoid, minimize and/or mitigate disproportionately high and adverse environmental and public health effects, and providing offsetting benefits and opportunities to enhance communities, neighborhoods and individuals affected by DOT programs;
- 3) Considering alternatives to proposed programs, policies and activities that minimize or avoid disproportionately high and adverse human health or environmental impacts, consistent with the Executive Order.
- 4) Elicit public involvement opportunities, including soliciting input from affected minority and low-income populations in considering alternatives.

#### **Steps for Assessing EJ**

- (1) Define the project, study, and planning area;
- (2) Develop a community profile;
- (3) Analyze impacts;
- (4) Identify solutions;
- (5) Use public involvement; and
- (6) Document findings

These steps are elaborated on in FHWA's *Community Impact Assessment: A Quick Reference for Transportation*, and its companion document, *Community Impact Mitigation: Case Studies*, published in 1998

At the scoping stage in the NEPA process, which provides early identification of public and agency issues, there should be adequate consideration of Title VI and environmental justice. Minority and low-income populations should be identified as early as possible and their concerns should be examined and addressed, preferably in planning.

Disproportionately high and adverse effects, not size, are the bases for Environmental Justice. A very small minority or low-income population in the project, study, or planning area does not eliminate the possibility of a disproportionately high and adverse effect on these

populations. What is needed is to show the comparative effects on these populations in relation to either non-minority or higher income populations, as appropriate.

Some people wrongly suggest that if minority or low-income populations are small ("statistically insignificant"), this means there is no environmental justice consideration. While the minority or low-income population in an area may be small, this does not eliminate the possibility of a disproportionately high and adverse effect of a proposed action. Environmental Justice determinations are made based on **effects**, not population size. It is important to consider the **comparative impact** of an action among different population groups.

The DOT Order (5610.2) on Environmental Justice asks whether a proposed action or plan causes disproportionately high and adverse effects on minority populations and low-income populations, and whether these populations are denied benefits. A framework of analysis that can determine how a proposed action or plan could differentially impact different populations is required. Community impact assessment can provide this framework.

Like public involvement, community impact assessment is an integral part of planning and project development. Community impact assessment is a process to evaluate the effects of a transportation action on a community and its quality of life. Its information should be used to mold the plan and its projects, and provide documentation of the current and anticipated social and economic environment of a geographic area with and without the proposed action.

### **Limited English Proficiency (LEP)**

Another Title VI related requirement for conducting public involvement concerns improving access to services for persons with Limited English Proficiency or LEP. MDOT, as a recipient of federal funds, is required by presidential Executive Order 13166 to take reasonable steps to ensure "meaningful" access to the information and services they provide' and ensure Title VI compliance.

A Limited-English-Proficient person, as outlined in the U.S. Department of Transportation guidance, is someone "with a primary or home language other than English who

### **EJ Guidance Document Available**

MDOT has prepared a guidance document (see appendix) to raise awareness and understanding of environmental justice issues and the necessary steps to incorporate EJ into the project development process. *Environmental Justice Guidance For Michigan Transportation Plans, Programs and Activities* is intended for MDOT, but may be useful to local governments and Metropolitan Planning Organizations (MPOs). It addresses the issue of Environmental Justice as it relates to transportation planning and development. It includes methods for analyzing potential disproportionate effects as well as important information on successful Public Involvement.

"It is essential that transportation providers, professionals, and other DOT recipients become informed about their diverse clientele from a linguistic, cultural and social perspective. These individuals should become culturally competent so they can encourage vulnerable LEP minority populations to access and receive appropriate transportation services with more knowledge and confidence."

*Federal Register, Vol. 66, No. 14, January 22, 2001*

must, due to the limited fluency in English, communicate in that primary or home language if the individuals are to have an equal opportunity to participate effectively in or benefit from any aid, services or benefit provided by the transportation provide or other DOT recipient.”

A similar term, Linguistically Isolated, is defined in the Census as the percentage of the persons in households in which no one over the age of 14 speaks English well, and is used as a direct measure of those persons with a severe language barrier, as distinct from those of foreign origin who speak English well. Those who are linguistically isolated may also be unable to benefit from transportation services.

What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered is the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.

The DOT guidelines provide the following factors for determining when “reasonable steps” should be taken:

- 1) The number and proportion of LEP persons potentially served by the programs or activities, and the variety of languages spoken in the service area. However, DOT encourages even those recipients whose programs or activities affect very few LEP persons on an infrequent basis to consider reasonable steps for involvement of LEP persons and to plan for situations in which LEP persons will be affected under the program or activity in question.
- 2) The frequency with which LEP individuals are affected by the program or activity.
- 3) The importance of the effect the program or activity will have on LEP persons, bearing in mind that transportation is considered an essential service to participation in modern society. DOT encourages you to take more vigorous steps where the denial or delay of access may have more crucial implications than in

situations that are not as crucial to one's day-to-day activities.

4) The resources available to the recipient agency, and whether the agency has budgeted funds for providing special language services. This is determined on a case-by-case basis and takes into consideration MDOT's entire budget and whether the costs for providing reasonable access are one time or can be amortized over the project life.

5) The level of services provided to fully English proficient people; whether LEP persons are being excluded from services, or being provided a lower level of services:

6) Whether the agency has adequate justification for restrictions, if any, on special language services or speaking languages other than English (rarely granted, case-by-case basis).

The following process is explained for addressing LEP in DOT activities:

1. Needs Assessment. A recipient should conduct a thorough assessment of the language needs of the population and communities affected by the recipient. An approach may be developed to identify geographic areas where LEP communities live using existing resources such as census data, data from local organizations and community groups, faith-based groups that provide services in languages other than English, immigrant aid organizations, state refugee coordinators, non-English media outlets, and school district LEP statistics.
2. Written Language Assistance Plan. Recipients should develop and implement written language assistance plans that will ensure meaningful opportunities for LEP persons to access their programs and activities and effectively participate in them.
3. Staff Training. Recipients should ensure that staff understand their language assistance policy and are capable of carrying it out.

4. Provision of Special Language Assistance. Recipients must actually provide necessary services to LEP persons.
5. Monitoring. Recipients should conduct regular oversight of their language assistance programs to ensure that LEP persons can meaningfully access their programs and activities.

A vital part of an effective compliance program includes having effective methods for notifying LEP persons regarding their right to language assistance and the availability of such assistance free of charge. These methods include but are not limited to: Language identification or “I speak” cards; posting of signs at the entrance to meetings in regularly encountered non-English languages; translation of printed materials in appropriate non-English languages; phone procedures for communicating with non-English-speaking persons; and inclusion of statements on the availability of free translation assistance on printed materials such as study brochures, legal notices, fliers and postcards.

The DOT encourages recipients to use communication methods likely to reach the affected community (e.g., insert information with utility bills, place public service announcements on local radio shows, place notices on bulletin boards in grocery stores, houses of worship, community newspapers and community centers).

For further information, consult the guidance documents, “Improving Access to Services for Persons with Limited English Proficiency.” 65 FR 50121 (September 16, 2000) and “Enforcement of Title VI of the Civil Rights Act of 1964--National Origin Discrimination Against Persons With Limited English Proficiency” (hereinafter referred to as “DOJ LEP Guidance”), reprinted at 65 FR 50123 (September 16, 2000).

### **Tribal Coordination**

The Federal Highway Administration (FHWA), by legal mandate, has a government-to-government relationship with Indian tribes. The National Historic Preservation Act (NHPA) also requires that FHWA consult with Indian tribes for undertakings subject to Section 106 of the NHPA that may affect properties considered to have traditional

For specific federal rules on consulting with Native Americans, see *38 CFR Part 800 Protection of Historic Properties SECTION 106, (2) Indian tribes and Native Hawaiian organizations.*

religious and cultural significance (per Section 101[d][6][B] of the NHPA). This requirement applies regardless of the location of the historic property. Such an Indian tribe(s) shall be a consulting party.

The FHWA, in their letter dated December 13, 2001, has authorized MDOT to conduct day-to-day and project-specific Section 106 consultation with the federally recognized tribes in Michigan. MDOT, therefore, is responsible for inviting the tribes to participate in the consultation process. The tribes may choose to or choose not to participate as a consulting party. The MDOT staff archeologist is responsible for extending the invitation and coordinating tribal involvement.

With Class I and III studies, Tribes and other consulting parties should be invited in writing to participate early in the Section 106 process. Since the exact location of tribal resources may not be known by those outside the tribe, it is best to extend the invitation to all 12 federally recognized tribes in the state to determine their need or interest in participating. The need for tribal consultation and selecting the appropriate tribes with which to consult are assessed on a case-by-case basis by the MDOT staff archaeologist. If tribal consultation is deemed necessary and concerns regarding the proposed project are raised by a tribe(s), the MDOT staff archaeologist is available to assist the region or TSC personnel with resolving tribal issues/concerns.”

Besides fulfilling Section 106 requirements, and in accordance with the governor’s Executive Directive No. 2004-5 and other federal and state policies and requirements, MDOT is committed to fostering a positive relationship between the State of Michigan, its departments and agencies, and the state’s Indian tribes.

MDOT’s overarching guidelines specify the need for meaningful and timely consultation with Indian tribes on a regular basis and prior to certain types of department actions. The department’s Tribal Affairs Coordinator is the appointed agency representative responsible for developing, administering, and reporting on the MDOT Tribal Operating Guidelines. The Coordinator ensures a consultation process that informs and engages all state, department, and tribal personnel, as appropriate, to

accomplish the purpose and objectives of the governor's directive.

Tribal consultation is a formal process that recognizes the sovereignty of each tribe. It occurs on a government-to-government basis, meaning MDOT-to-tribe, not MDOT hired consultant-to-tribe. This nuance is very important to understanding MDOT's relationship with the tribes.

Consequently, as stated above, the MDOT staff archeologist is responsible for all project-specific consultation activities. Furthermore, routine communications between tribes and the department are not considered consultations under the MDOT Tribal Operating Guidelines, except where conflict and/or issues arise between the tribe(s) and MDOT, and/or if consultation is requested by the tribe(s) or the Tribal Affairs Coordinator. The MDOT staff archeologist and the tribal affairs coordinator collaborate to apply the appropriate level of communication and formality on a case-by-case basis.

**PROCEDURES FOR CLASS I ACTIONS  
ENVIRONMENTAL IMPACT STATEMENTS**

| Procedure Number and Type               | Federal Requirement  | MDOT Procedure  | Additional Notes   |
|---|--|---|--|
| 1) Public and Agency Participation Plan | Establish a plan and optional completion schedule for coordinating public and agency participation.  | Work with lead agencies to establish a plan at the outset for involving the public and agencies in key coordination points, from the notice of intent to post ROD tasks.  | Coordinate changes to plan and/or schedule with participating agencies.  |
| 2) Establish Local Advisory Group(s)    | There are no federal requirements for establishing a Local Advisory Council or Local Agency Group.   | Establish a Local Advisory Council and Local Agency Group that meets throughout the study process. The LAC is comprised of representatives from elected officials, government agencies, citizen groups, and other organizations with an interest in the project. The LAG is a more technical group comprised of professional from private and public sector organizations who discuss the technical requirements of the proposal. | The LAC and LAG are representative forms of public involvement that rely on delegates who bring the ideas and concerns of their respective groups to the table for discussion, and in turn communicate those discussions back to their groups. While the main interaction at the LAC and LAG meetings is between representatives and study team members, there are opportunities for observers to speak at each meeting. |
| 3) Announce EIS Start                   | FHWA issues a Notice of Intent in the Federal Register; MDOT announces the intent to prepare an EIS by appropriate means at the local level. | MDOT issues the Notice of Intent in the Federal Register and a news release announcing the start of the study process (typically the scoping meeting) and encouraging continuous public involvement.  | Send the news release to all news media in the vicinity of the study area and regionally or statewide depending on interest. While the scoping session typically is limited to advisory council and agency representatives, the meeting should be open to the public and provide comment opportunities.  |

| Procedure Number and Type                  | Federal Requirement   | MDOT Procedure   | Additional Notes  |
|--|---|--|---|
| 4) Kickoff Public Meeting                  | Conduct a kickoff public meeting to inform the public of the proposed undertaking.  | MDOT conducts an informal meeting as early as practical to inform the public of the study process and discuss any initial social, economic and environmental issues to be addressed in the study. This and any other meetings take place in a convenient, Americans With Disabilities-compliant facility. MDOT issues a news release to promote the meeting. | Attendees are given an opportunity to be placed on a mailing list to receive information and notices throughout development of the proposal.  |
| 5) Illustrative Alternative Public Meeting | No federal requirements for any additional meetings during the preliminary development phase, but early and continuous opportunities for public involvement are encouraged. Conduct further public meetings as needed.  | Conduct a second public meeting to present and obtain public input on the preliminary list of alternatives. Provide an opportunity for written comments, and, if appropriate, an open mic comment period. Issue a news release to promote the meeting.   | Visualization techniques (aerial photographs, diagrams, alternative features, etc.) should be employed at this meeting to facilitate understanding and encourage input.   |
| 6) Practical Alternative Public Meeting    | No federal requirements for any additional meetings during the preliminary development phase, but early and continuous opportunities for public involvement are encouraged. Conduct further public meetings as needed.  | Conduct a third public meeting to present and obtain public input on the narrowed list of alternatives the study team will move forward with into the Draft EIS. Provide an opportunity for written comments, and, if appropriate, an open mic comment period.   | Continue to use visualization techniques (aerial photographs, diagrams, alternative features, etc.) to facilitate understanding and encourage input. Issue a news release promoting the date, time and location of meeting.   |
| 7) Draft EIS Circulation and Legal Notice  | 1) The Draft EIS shall be filed with the Environmental Protection Agency, transmitted to agencies for comment and made available to the public.<br>2) The comment period shall be no less than 45 days from the date the notice of availability is published in the Federal | 1) With its approval of the DEIS for circulation, FHWA transmits a copy to the EPA and requests that a notice of availability appear in the next available issue of the Federal Register.<br>2) MDOT's public involvement and hearings officer prepares and places a legal notice  | 1) See MDOT document distribution guidelines for agency and public officials distribution list.<br>2) The notice also must be published in any newspapers such as foreign language newspapers or minority publications that have a substantial circulation in the project area. |

| Procedure Number and Type                | Federal Requirement   | MDOT Procedure  | Additional Notes  |
|--|---|---|---|
|  | Register.   | <p>at least twice in one or more newspapers having general circulation in the project area. The first insertion coincidez with the Federal Register announcement.</p> <p>3) The legal notice includes a brief description of the study, the date, time and location of the public hearing, the document review sites, the deadline for submitting comments, and other important information.</p> <p>4) The initial legal notice publishing date is less than 15 days prior to the hearing date and no less than 45 days before the deadline for comments specified in the notice. Publish the second notice approximately one week (no less than five days) prior to the hearing date</p> | <p>3) The MDOT Office of Communications issueea a news release announcing the availability of the document, the hearing schedule and comment period.</p> <p>3) The public involvement and hearings officer coordinates writing, printing and distributing a hearing brochure and publishes the DEIS, hearing brochure and related information on the MDOT Studies Web site.</p> <p>4) The legal notice and news release includes a statement on the availability of materials in alternate formats for visual and audio impaired persons and in non-English languages, when significant non-English speaking populations are within the project area.</p> |
| 8) Conduct a public hearing on the DEIS. | <p>1) The state highway agency shall conduct one or more public hearings, or offer an opportunity for a hearing, at a convenient time and place for any major Federal-aid project.</p> <p>2) The hearing should present information on the project’s purpose and need; alternatives and major design features; social, economic, environmental, and other impacts of the project; relocation assistance and right-of-way acquisition.</p> | <p>1) Conduct public hearings at a place and time generally convenient for persons affected by, or interested in, the proposed undertaking and, where possible, in a facility that is accessible to the handicapped.</p> <p>2) The public involvement and hearings officer advises the project manager on the appropriate format* to use, including open house, auditorium style, or a combination of both.</p> <p>3) Provide an opportunity to comment in writing on the social, economic and environ-</p>   | <p>1) Hire at least one certified court reporter to record verbatim all oral comments and formal proceedings.</p> <p>2) Provide a private area for taking oral comments staffed by a court reporter during the hours of the public hearing.</p> <p>3) Have court reporter (or hire additional reporter to) record any open mic comments given during the formal proceedings.</p>  |

| Procedure Number and Type                                      | Federal Requirement   | MDOT Procedure  | Additional Notes   |
|--|---|---|--|
|  |   | mental impacts of the project and the alternatives being considered.  |  |
| 9) Opportunity for a Public Hearing                            | Conduct one or more public hearings, or offer an opportunity for a hearing, at a convenient time and place for any major Federal-aid project. | <p>1) If no public meeting is planned, publish two notices in local newspapers offering the opportunity for a public hearing, and hold a hearing or meeting with the respondent(s) if any written request(s) for such a hearing are received.</p> <p>2) The notice should explain the process for requesting a hearing, invite comments and explain how to submit them.</p> <p>3) The deadline for comments and requests is 30 days after the first legal notice is published and at least 14 days after the second notice.</p> | <p>1) If a small number of people respond to the request for a hearing, appropriate MDOT personnel meet with them to address their concerns, hopefully leading to withdrawal of the request. If no withdrawal occurs, MDOT may move forward with the hearing or decide that holding one would not be in the overall public interest.</p> <p>2) Schedule a second hearing whenever there are substantial changes in the proposal since the previous meeting; substantial unanticipated development has occurred that would change the scope or impact of the project, or a revised EA or EIS is required.</p> |
| 10) Certification of Hearing or Opportunity to Conduct Hearing | Submit a transcript to FHWA of each public hearing and a certification that a required hearing or hearing opportunity was offered.            | <p>1) Generally within 30 days following the end of the comment period, MDOT's public involvement and hearings officer prepares the certification document containing the transcript of the hearing, legal notice, all comments received during the comment period, and a summary of the comments. 2) The document is submitted to FHWA. The document for a hearing opportunity includes language indicating that the specified comment period and request to conduct a hearing</p>   | <p>1) MDOT's Office of Communications issues a news release announcing the availability of the hearing transcript at the DEIS review sites.</p> <p>2) Place the certification letter and comment summary on the study Web site. There is no minimum timeframe for maintaining the documents at the review sites, but review sites are asked to maintain the document through at least issuance of the Final EIS.</p>   |

| Procedure Number and Type                | Federal Requirement  | MDOT Procedure  | Additional Notes  |
|--|--|---|---|
|  |  | <p>occurred.</p> <p>3) Distribute the hearing document to each of the DEIS review sites.</p>  |   |
| 11) Final Environmental Impact Statement | <p>1) Transmit the Final EIS to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA.</p> <p>2) Publish a notice of availability in local newspapers.</p> <p>3) When filed with EPA, make the FEIS available for public review at MDOT offices and at appropriate local agency offices. Make a copy available for public review at institutions such as local government offices, libraries and schools, as appropriate.</p> | <p>1) Follow the document distribution guidelines to assure that all appropriate persons, organization or agencies receive copies of the approved FEIS.</p> <p>2) MDOT’s public involvement and hearing’s officer transmits copies of the FEIS to each of the review sites used for the Draft EIS and Hearing documents.</p> <p>3) While there is no federally required timeline for FEIS review and comment, ask review sites to maintain the document for at least 30 days from the date when availability notice first appears in the Federal Register and local newspapers, whichever is most recent.</p> <p>4) MDOT’s public involvement and hearings officer publishes a legal notice announcing the availability of the FEIS in local newspapers.</p> <p>5) MDOT’s Office of Communications issues a news release.</p> | <p>1) MDOTs public involvement and hearings officer arranges for the FEIS to be placed on the study Web site. Note Web availability in the news release and legal notice.</p> <p>2) Comments on FEIS are directed to the public involvement and hearings officer who forwards them to the study team for consideration and inclusion in the Record of Decision application.</p> |
| 12) Reevaluating EIS                     | FHWA and state highway agency determine whether changes in the project or new information warrant additional public involvement.   | MDOT issues a news release to local media informing the public of the reevaluation and inviting public input throughout the process.  | An additional public hearing may be necessary if the Re-evaluation finds there are substantial changes that have altered the proposal’s purpose, need and scope. A less formal “update” public meeting may be warranted for presenting to the public  |

| Procedure Number and Type | Federal Requirement  | MDOT Procedure   | Additional Notes                       |
|---------------------------|--|--|--|
|                           |  |  | changes outlined in the Re-evaluation. |
| 13) Record of Decision    | The Administration completes and signs a Record of Decision (ROD) no sooner than 30 days after publication of the final EIS notice in the Federal Register or 90 days after publication of a notice for the Draft EIS, whichever is later. | MDOT Office of Communications issues a news release announcing the ROD.  |  |
| 14) Post ROD Meeting      |  | <p>1) Hold a public meeting following the Record of Decision for projects that require the acquisition of several (approx. 25 or more) parcels of right of way.</p> <p>2) Conduct the meeting in a location and at a time convenient to the individuals directly affected.</p> <p>3) Send notices of the public meeting directly to those identified property owners.</p> <p>4) MDOT Office of Communications issues a news release to the media to inform the public.</p> |  |

**PROCEDURES FOR CLASS III ACTIONS  
ENVIRONMENTAL ASSESSMENTS**

| Procedure Number and Type                       | Federal Requirement  | MDOT Procedure  | Additional Notes  |
|---|--|---|---|
| 1) Public and Agency Participation Plan         | Establish a plan and optional completion schedule for coordinating public and agency participation.  | Work with lead agencies to establish a plan at the outset for involving the public and agencies in key coordination points through completion of the approved Environmental Assessment.   | Coordinate changes in the plan and/or schedule with participating agencies.   |
| 2) Starting the EA Process                      | <p>1) The applicant, in consultation with FHWA shall, at the earliest, consult with interested agencies and others about the scope of the project and to achieve the following objectives: determine potential for social, economic and environmental impact, identify alternatives and mitigation measures, and identify other environmental review and consultation requirements to accomplish concurrently.</p> <p>2) There are no publishing requirements for announcing EA preparation.</p> | MDOT will announce the start of the EA process with the first public meeting.   |   |
| 3) Kickoff Public Meeting                       | There is no federal requirement to conduct a public meeting. While early and continuous opportunities for public involvement are encouraged, MDOT may decide if and when public meetings are needed.   | Conduct (typically) at least one public meeting during development of the EA, plus either a public hearing or a request to conduct a public hearing. The more controversy and impacts involved the more need for both a public meeting and hearing. | Give attendees an opportunity to be placed on a mailing list to receive information and notices throughout development of the proposal.                   |
| 4) EA Circulation and Legal Notice<br><br>\<br> | 1) The FHWA-approved EA need not be circulated for comment, but the document must be made available for public inspection at MDOT and  | 1) With FHWA approval of the EA for circulation, transmit a copy to the appropriate units of federal, state and local government, as well as  | <p>1) See MDOT document distribution guidelines for agency and public officials distribution list.</p> <p>2) The notice also must be published in any</p> |

| Procedure Number and Type               | Federal Requirement  | MDOT Procedure  | Additional Notes  |
|---|--|---|---|
|   | <p>FHWA offices.</p> <p>2) A notice of availability of the EA, briefly describing the action and its impacts, shall be sent by MDOT to the affected units of federal, state and local government, as well as the state intergovernmental review contacts. No Federal Register notice is required.</p> <p>3) A legal notice announcing the availability of the EA document, review sites and the hearing date (if planned) shall appear in local newspapers no less than 15 days prior to any hearing date.</p> <p>4) Comments shall be submitted in writing to MDOT or FHWA within 30 days of the availability of the EA, unless for good cause, or other federal regulations require a longer comment period.</p> | <p>the state intergovernmental review contacts.</p> <p>2) MDOT's public involvement and hearings officer prepares and places a legal notice in one or more newspapers having general circulation in the project area.</p> <p>3) The legal notice includes a brief description of the study; the date, time and location of any public hearing or an offer to conduct a hearing; the document review sites, the deadline for submitting comments, and other important information.</p> <p>4) Explain the process for requesting a hearing, invite comments and explain how to submit them.</p> <p>5) The initial legal notice publishing date is no less than 15 days prior to any hearing date and no less than 30 days before the deadline for comments specified in the notice.</p> | <p>newspapers such as foreign language newspapers or minority publications that have a substantial circulation in the project area.</p> <p>3) The MDOT Office of Communications issues a news release announcing the availability of the document, the hearing schedule or offer to conduct one, and the comment period.</p> <p>3) The public involvement and hearings officer coordinates writing, printing and distributing a hearing brochure and publishes the EA, hearing brochure and related information on the MDOT Studies Web site.</p> <p>4) The legal notice and news release includes a statement on the availability of materials in alternate formats for visual and audio impaired persons and in non-English languages, when significant non-English speaking populations are within the project area.</p> |
| 5) Conduct a Public Hearing (if needed) | Public hearing is not required.  | <p>1) If needed, conduct public hearing at a place and time generally convenient for persons affected by, or interested in, the proposed undertaking and, where possible, in a facility that is accessible to the handicapped.</p> <p>2) The public involvement and hearings officer advises the project manager on</p>   | <p>If no hearing is planned, but a request for one is received during the comment period, the public involvement and hearings officers speaks with the requestor to determine if concerns can be worked out short of conducting a hearing. The decision to conduct a hearing rests with the project manager and the public hearings officer.</p>  |

| Procedure Number and Type                                | Federal Requirement   | MDOT Procedure   | Additional Notes |
|--|---|--|------------------|
|  |   | <p>the appropriate format* to use, including open house, auditorium style, or a combination of both.</p> <p>3) In any case, provide attendees opportunity to comment in writing on the social, economic and environmental impacts of the project and the alternatives being considered.</p>  |                  |
| (6) Certification of Hearing or Offer to Conduct Hearing | <p>Submit a transcript to FHWA of the public hearing (if conducted), comments received during the comment period, and a certification that a required hearing or hearing opportunity was offered.</p> | <p>1) Generally within 30 days following the end of the comment period, MDOT's public involvement and hearings officer will prepare the certification document containing the transcript of the hearing, legal notice, all comments received during the comment period, and a summary of the comments. 2) The document will be submitted to FHWA. The document for a hearing opportunity will include language indicating that the specified comment period and request to conduct a hearing occurred. 3) The hearing document will be distributed to each of the DEIS review sites.</p> |                  |
| (7) Finding of No Significant Impact                     | <p>After FHWA issues a FONSI, MDOT sends a notice of availability to the affected units of federal, state and local government, and makes the document available to the public upon request.</p>      | <p>1) MDOT follows its document distribution guidelines to assure that all appropriate persons, organization or agencies receive copies of the approved FONSI. 2) MDOT's public involvement and hearing's officer transmits copies of the FONSI to each of the review sites used for</p>   |                  |

|  |  |   |  |
|--|--|---|--|
|  |  | <p>review of the EA and certification documents.</p> <p>3) While there is no federally required timeline for EA review and comment, ask review sites to maintain the document for at least 30 days.</p> <p>4) MDOT's public involvement and hearings officer places the FONSI on the MDOT Studies Web site.</p> <p>5) MDOT's Office of Communications issues a news release regarding the FONSI availability.</p> |  |
|--|--|---|--|

- With the open house format, the public is invited to stop by anytime during the hearing hours to view displays, meet with the study, ask questions and provide comments. An auditorium style hearing is more formal, with a presentation and optional open mic where public comments are heard by all.

PROCEDURES FOR CLASS II ACTIONS  
CATEGORICAL EXCLUSIONS

| Procedure Number and Type | Federal Requirement   | MDOT Procedure  | Additional Notes   |
|---------------------------|---|---|--|
|                           | <p>There are no specific procedures or federal requirements for public involvement in Class II actions. Class II actions do not individually or cumulatively have a significant environmental effect and are excluded from the requirement to prepare an Environmental Impact Statement or Environmental Assessment. Such actions are listed in 23 CFR 771.117 (c)(d), and are called Categorical Exclusions. They normally (1) do not involve significant environmental impacts or substantial planning, time or resources: and, (2) will not induce significant foreseeable alternations in land use, planned growth, development patterns, or natural or cultural resources.</p> | <p>1) MDOT may employ appropriate techniques to inform the public and/or permit agencies of the CE project.<br/>           2) MDOT environmental resource specialists work with appropriate region staff to complete a Project Classification Form (#1775) and determine any need for public involvement activities prior to construction, including, but not limited to, public meetings, city/village council presentations, direct mail notices, and media announcements.<br/>           3) As part of the check-off clearance process for CEs, the specialist indicates if impacts are anticipated on various environmental factors.<br/>           4) Public involvement is recommended on projects where there are anticipated social or cultural resources (historic or archeological) impacts, a detour or temporary closure of road or ramp, or if there is controversy.</p> | <p>1) Public involvement for CEs is left to the discretion of region and TSC personnel.<br/>           2) At a minimum, a public meeting is recommended during the planning phase for projects where social and/or cultural impacts are expected, when controversy is involved or anticipated, and/or when a detour or temporary closure of road or ramp is planned. There should be an opportunity to provide written comments to be shared with the study team.<br/>           3) Public involvement is an effective tool for vetting project plans to:<br/>           a) validate the team's understanding of no significant, delay-causing issues or surprises in the community impacted by the project; b) address individual and community concerns in advance to avoid last-minute delays in clearing the project for construction; and c) elevate the CE to an Environmental Assessment based on newly revealed impacts identified through public involvement.<br/>           4) MDOT's public involvement and hearings officer is available to assist the region or TSC personnel with determining the appropriate public involvement techniques for a project.</p> |

Notes:

1) Under Section 4(f) (PART 774—Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites), public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

2) Under Section 106 (Historic Properties), the agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decision making.

## **APPENDIX**

### **Federal Requirements Guiding MDOT Public Involvement**

- **23 CFR Parts 635, 640, 650, 712, 771 and 790 - Environmental and Related Procedures; Final Rule (NEPA Requirements)**
- **3 CFR Part 774—Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites SECTION 4(F)**
- **38 CFR Part 800—Protection of Historic Properties SECTION 106**
- **Title 36 Chapter 1 Part 59--Land and Water Conservation Fund Program of Assistance to States; Post-Completion Compliance Responsibilities SECTION 6(f)**
- **Environmental Justice Guidance for Michigan Transportation Plans, Programs and Activities**

**23 CFR Parts 635, 640, 650,**

**712, 771 and 790**

**Environmental and Related Procedures;  
Final Rule**

**CODE OF FEDERAL REGULATIONS**

**Department of Transportation**

**Federal Highway Administration**

**Urban Mass Transportation Administration**

**23 CFR Parts 635, 640,650, 712, 771 and 790**

**Environmental and Related Procedures; Final Rule**

**Title 23: Highways**

**PART 771— ENVIRONMENTAL IMPACT AND RELATED PROCEDURES**

**(current as of July 14, 2008)**

**Section Contents**

- § 771.101 Purpose.
- § 771.103 [Reserved]
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- environmental impact statements.
- § 771.127 Record of decision.
- § 771.129 Re-evaluations.
- § 771.130 Supplemental environmental impact statements.
- § 771.131 Emergency action procedures.
- § 771.133 Compliance with other requirements.
- § 771.137 International actions.

**Authority:** 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 110, 128, 138 and 315; 49 U.S.C. 303(c), 5301(e), 5323, and 5324; 40 CFR part 1500 *et seq.*; 49 CFR 1.48(b) and 1.51.

**Source:** 52 FR 32660, Aug. 28, 1987, unless otherwise noted.

**§ 771.101 Purpose.**

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and the regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508. This regulation sets forth all FHWA, FTA, and Department of Transportation (DOT) requirements under NEPA for the processing of highway and mass transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, and 49 U.S.C. 303, 5301(e), 5323(b), and 5324(b).

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24469, May 9, 2005]

**§ 771.103 [Reserved]**

**§ 771.105 Policy.**

It is the policy of the Administration that: (a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation.<sup>1</sup>

<sup>1</sup> FHWA and FTA have supplementary guidance on the format and content of NEPA documents for their programs. This includes a list of various environmental laws, regulations, and Executive orders which may be applicable to projects. The FHWA Technical Advisory T6640.8A, October 30, 1987, and the FTA supplementary guidance are available from the respective FHWA and FTA headquarters and field offices as prescribed in 49 CFR part 7.

- (b) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals.
- (c) Public involvement and a systematic interdisciplinary

approach be essential parts of the development process for proposed actions.

(d) Measures necessary to mitigate adverse impacts be incorporated into the action.

Measures necessary to mitigate adverse impacts are eligible for Federal funding when the Administration determines that:

(1) The impacts for which the mitigation is proposed actually result from the Administration action; and  
(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. In making this determination, the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, Executive Order, or Administration regulation or policy.

(e) Costs incurred by the applicant for the preparation of environmental documents requested by the Administration be eligible for Federal assistance.

(f) No person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this regulation.

[52 FR 32660, Aug. 28, 1987; 53 FR 11065, Apr. 5, 1988, as amended at 70 FR 24469, May 9, 2005]

#### **§ 771.107 Definitions.**

The definitions contained in the CEQ regulation and in Titles 23 and 49 of the United States Code are applicable. In addition, the following definitions apply.

(a) *Environmental studies.*

The investigations of potential environmental impacts to determine the environmental process to be followed and to assist in the preparation of the environmental document.

(b) *Action.* A highway or transit project proposed for FHWA or FTA funding. It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(c) *Administration action.*

The approval by FHWA or FTA of the applicant's request for Federal funds for construction. It also includes approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(d) *Administration.* FHWA or FTA, whichever is the designated lead agency for the proposed action.

(e) *Section 4(f).* Refers to 49 U.S.C. 303 and 23 U.S.C. 138.<sup>2</sup>

<sup>2</sup> Section 4(f), which protected certain public lands and all historic sites, technically was repealed in 1983 when it was codified, without substantive change, as 49 U.S.C. 303. This regulation continues to refer to section 4(f) because it would create needless confusion to do otherwise; the policies section 4(f) engendered are widely

referred to as "section 4(f)" matters. A provision with the same meaning is found at 23 U.S.C. 138 and applies only to FHWA actions.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24469, May 9, 2005]

#### **§ 771.109 Applicability and responsibilities.**

(a)(1) The provisions of this regulation and the CEQ regulation apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

(2) This regulation does not apply to, or alter approvals by the Administration made prior to the effective date of this regulation.

(3) Environmental documents accepted or prepared by the Administration after the effective date of this regulation shall be developed in accordance with this regulation.

(b) It shall be the responsibility of the applicant, in cooperation with the Administration to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation. The FHWA will assure that this is accomplished as a part of its program management responsibilities that include reviews of designs, plans, specifications, and estimates (PS&E), and construction inspections. The FTA will

assure implementation of committed mitigation measures through incorporation by reference in the grant agreement, followed by reviews of designs and construction inspections.

(c) The Administration, in cooperation with the applicant, has the responsibility to manage the preparation of the appropriate environmental document.

The role of the applicant will be determined by the Administration accordance with the CEQ regulation:

(1) *Statewide agency.* If the applicant is a public agency that has statewide jurisdiction (for example, a State highway agency or a State department of transportation) or is a local unit of government acting through a statewide agency, and meets the requirements of section 102(2)(D) of NEPA, the applicant may prepare the environmental impact statement (EIS) and other environmental documents with the Administration furnishing guidance, participating in the preparation, and independently evaluating the document. All FHWA applicants qualify under this paragraph.

(2) *Joint lead agency.* If the applicant is a public agency and is subject to State or local requirements comparable to NEPA, then the Administration and the applicant may prepare the EIS and other environmental documents as joint lead agencies. The applicant shall initially develop substantive portions of the environmental document, although the Administration will be responsible for its scope and content.

(3) *Cooperating agency.* Local public agencies with special expertise in the proposed action may be cooperating agencies in the preparation of an environmental document. An applicant for capital assistance under the Federal transit laws (49 U.S.C. Chapter 53) is presumed to be a cooperating agency if the conditions in paragraph (c) (1) or (2) of this section do not apply. During the environmental process, the Administration will determine the scope and content of the environmental document and will direct the applicant, acting as a cooperating agency, to develop information and prepare those portions of the document concerning which it has special expertise.

(4) *Other.* In all other cases, the role of the applicant is limited to providing environmental studies and commenting on environmental documents.

All private institutions or firms are limited to this role.

(d) When entering into Federal-aid project agreements pursuant to 23 U.S.C. 110, it shall be the responsibility of the State highway agency to ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental documents unless the State requests and receives written Federal Highway Administration approval to modify or delete such mitigation features.

[52 FR 32660, Aug. 28, 1987; 53 FR 11065, Apr. 5, 1988, as amended at 62 FR

6873, Feb. 14, 1997; 70 FR 24469, May 9, 2005]

### **§ 771.111 Early coordination, public involvement, and project development.**

(a) Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental document. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental document.

(b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action. This is normally no later than the review of the transportation improvement program (TIP). (c) When FHWA and FTA are involved in the development of joint projects, or when FHWA or FTA acts as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-

by-case basis.

(d) During the early coordination process, the Administration, in cooperation with the applicant, may request other agencies having special interest or expertise to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies.

(e) Other States, and Federal land management entities, that may be significantly affected by the action or by any of the alternatives shall be notified early and their views solicited by the applicant in cooperation with the Administration. The Administration will prepare a written evaluation of any significant unresolved issues and furnish it to the applicant for incorporation into the environmental assessment (EA) or draft EIS.

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as

discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and area wide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

(h) For the Federal-aid highway program:

(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 40 CFR parts 1500 through 1508.

(2) State public involvement/public hearing procedures must provide for:

(i) Coordination of public involvement activities and public hearings with the entire NEPA process.

(ii) Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions.

(iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any Federal-aid project which requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the

FHWA determines that a public hearing is in the public interest.

(iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information.

The notice shall also provide information required to comply with public involvement requirements of other laws, Executive orders, and regulations.

(v) Explanation at the public hearing of the following information, as appropriate:

(A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning,

(B) The project's alternatives, and major design features,

(C) The social, economic, environmental, and other impacts of the project,

(D) The relocation assistance program and the right-of-way acquisition process.

(E) The State highway agency's procedures for receiving both oral and written statements from the public.

(vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing.

(3) Based on the reevaluation of project environmental documents required by §771.129, the FHWA and the State highway agency will determine whether changes in the project or new information warrant

additional public involvement.

(4) Approvals or acceptances of public involvement/public hearing procedures prior to the publication date of this regulation remain valid.

(i) Applicants for capital assistance in the FTA program achieve public participation on proposed projects by holding public hearings and seeking input from the public through the scoping process for environmental documents. For projects requiring EISs, a public hearing will be held during the circulation period of the draft EIS. For all other projects, an opportunity for public hearings will be afforded with adequate prior notice pursuant to 49 U.S.C. 5323(b), and such hearings will be held when anyone with a significant social, economic, or environmental interest in the matter requests it. Any hearing on the action must be coordinated with the NEPA process to the fullest extent possible.

(j) Information on the FTA environmental process may be obtained from: Director, Office of Human and Natural Environment, Federal Transit Administration, Washington, DC 20590. Information on the FHWA environmental process may be obtained from: Director, Office of Project Development and Environmental Review, Federal Highway Administration, Washington, DC 20590.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24469, May 9, 2005]

#### **§ 771.113 Timing of Administration activities.**

(a) The Administration in cooperation with the applicant will perform the work necessary to complete a FONSI or an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition (with the exception of hardship and protective buying, as defined in §771.117(d)), purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed:

(1)(i) The action has been classified as a categorical exclusion (CE), or  
(ii) A FONSI has been approved, or  
(iii) A final EIS has been approved and available for the prescribed period of time and a record of decision has been signed;

(2) For actions proposed for FHWA funding, the FHWA Division Administrator has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;  
(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR part 450, subpart B, and 23 CFR part 630, subpart A, have been met.

(b) For FHWA, the completion of the requirements set forth in paragraphs (a)(1) and (2) of this section is considered acceptance of the general project location and concepts

described in the environmental document unless otherwise specified by the approving official.

However, such approval does not commit the Administration to approve any future grant request to fund the preferred alternative.

(c) Letters of Intent issued under the authority of 49 U.S.C. 5309(g) are used by FTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by FTA until the NEPA process is completed.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 70 FR 24469, May 9, 2005]

#### **§ 771.115 Classes of actions.**

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EISs)*. Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally required an EIS:

- (1) A new controlled access freeway.
- (2) A highway project of four or more lanes on a new location.
- (3) New construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit).
- (4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

(b) *Class II (CEs)*. Actions that do not individually or cumulative have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in §771.117(c). When appropriately documented, additional projects may also qualify as CEs pursuant to §771.117(d).

(c) *Class III (EAs)*. Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

#### **§ 771.117 Categorical exclusions.**

(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the Administration, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

- (1) Significant environmental impacts;
- (2) Substantial controversy on environmental grounds;
- (3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or
- (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following actions meet the criteria for CEs in the CEQ regulation (section 1508.4) and §771.117(a) of this regulation and normally do not require any further NEPA approvals by the Administration:

- (1) Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.
- (2) Approval of utility installations along or across a transportation facility.
- (3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's *highway safety plan* under 23 U.S.C. 402.

(5) Transfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action.

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

(8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(9) Emergency repairs under 23 U.S.C. 125.

(10) Acquisition of scenic easements.

(11) Determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation.

(12) Improvements to existing rest areas and truck weigh stations.

(13) Ridesharing activities.

(14) Bus and rail car rehabilitation.

(15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

(16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

(17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(18) Track and rail bed maintenance and improvements when carried

out within the existing right-of-way.

(19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

(20) Promulgation of rules, regulations, and directives.

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.

Examples of such actions include but are not limited to:

(1) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).

(2) Highway safety or traffic operations improvement projects including the installation of ramp metering control devices and lighting.

(3) Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings.

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

(6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

(10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes; advance land acquisition loans under 49 U.S.C. 5309(b).<sup>3</sup> Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction

projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

<sup>3</sup> Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

Protective acquisition is done to prevent imminent development of a parcel which is needed for a proposed transportation corridor or site.

Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

(e) Where a pattern emerges of granting CE status for a particular type of action, the Administration will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 70 FR 24469, May 9, 2005]

**§ 771.119 Environmental assessments.**

(a) An EA shall be prepared by the applicant in consultation with the Administration for each action that is not a CE and does not clearly require the preparation of an EIS, or where the Administration believes an EA would assist in determining the need for an EIS.

(b) For actions that require an EA, the applicant, in consultation with the Administration, shall, at the earliest appropriate time, begin consultation with interested agencies and others to advise them of the scope of the project and to achieve the following objectives: determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements which should be performed concurrently with the EA. The applicant shall accomplish this through an early coordination process (*i.e.*, procedures under §771.111) or through a scoping process. Public involvement shall be summarized and the results of agency coordination shall be included in the EA.

(c) The EA is subject to Administration approval before it is made available to the public as an Administration document. The FTA applicants may circulate the EA prior to Administration approval provided that the document is clearly labeled as the

applicant's document. (d) The EA need not be circulated for comment but the document must be made available for public inspection at the applicant's office and at the appropriate Administration field offices in accordance with paragraphs (e) and (f) of this section. Notice of availability of the EA, briefly describing the action and its impacts, shall be sent by the applicant to the affected units of Federal, State and local government. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(e) When a public hearing is held as part of the application for Federal funds, the EA shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The notice of the public hearing in local newspapers shall announce the availability of the EA and where it may be obtained or reviewed. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the availability of the EA unless the Administration determines, for good cause, that a different period is warranted. Public hearing requirements are as described in §771.111.

(f) When a public hearing is not held, the applicant shall place a notice in a newspaper(s) similar to a public hearing notice and at a similar stage of development of the action, advising the public of the availability of the EA and where information concerning the action may be obtained. The notice shall invite comments from all interested parties.

Comments shall be submitted in writing to the applicant or the Administration within 30 days of the publication of the notice unless the Administration determines, for good cause, that a different period is warranted. (g) If no significant impacts are identified, the applicant shall furnish the administration a copy of the revised EA, as appropriate; the public hearing transcript, where applicable; copies of any comments received and responses thereto; and recommend a FONSI. The EA should also document compliance, to the extent possible, with all applicable environmental laws and Executive orders, or provide reasonable assurance that their requirements can be met.

(h) When the Administration expects to issue a FONSI for an action described in §771.115(a), copies of the EA shall be made available for public review (including the affected units of government) for a minimum of 30 days before the Administration makes its final decision (See 40 CFR 1501.4(e)(2).) This public availability shall be announced by a notice similar to a public hearing notice.

(i) If, at any point in the EA process, the Administration determines that the action is likely to have a significant impact on the environment, the preparation of an EIS will be required.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005]

**§ 771.121 Findings of no significant impact.**

(a) The Administration will review the EA and any public hearing comments and other comments received regarding the EA. If the Administration agrees with the applicant's recommendations pursuant to §771.119(g), it will make a separate written FONSI incorporating by reference the EA and any other appropriate environmental documents.

(b) After a FONSI has been made by the Administration, a notice of availability of the FONSI shall be sent by the applicant to the affected units of Federal, State and local government and the document shall be available from the applicant and the Administration upon request by the public. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(c) If another Federal agency has issued a FONSI on an action which includes an element proposed for Administration funding, the Administration will evaluate the other agency's FONSI. If the Administration determines that this element of the project and its environmental impacts have been adequately identified and assessed, and concurs in the decision to issue a FONSI, the Administration will issue its own FONSI incorporating the other agency's FONSI. If environmental issues have not been adequately identified and assessed, the Administration will require appropriate environmental studies.

**§ 771.123 Draft environmental impact statements.**

(a) A draft EIS shall be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the Federal Register. Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level.

(b) After publication of the Notice of Intent, the Administration, in cooperation with the applicant, will begin a scoping process. The scoping process will be used to identify the range of alternatives and impacts and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For FHWA, scoping is normally achieved through public and agency involvement procedures required by §771.111. For FTA, scoping is achieved by soliciting agency and public responses to the action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The draft EIS shall evaluate all reasonable alternatives to the action and

discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive orders to the extent appropriate at this stage in the environmental process.

(d) An applicant which is a *statewide agency* may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures. Where the applicant is a *joint lead* or *cooperating agency*, the applicant may select a consultant, after coordination with the Administration to assure compliance with 40 CFR 1506.5(c). The Administration will select any such consultant for *other* applicants. (See §771.109(c) for definitions of these terms.)

(e) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet.

(f) A lead, joint lead, or a cooperating agency shall be responsible for printing the EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet requirements for copies which can reasonably be expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to

the nearest location where the statement may be reviewed.

(g) The draft EIS shall be circulated for comment by the applicant on behalf of the Administration. The draft EIS shall be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS shall be transmitted to:

- (1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS;
- (2) Federal, State and local government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action. Copies shall be provided directly to appropriate State and local agencies, and to the State intergovernmental review contacts established under Executive Order 12372; and
- (3) States and Federal land management entities which may be significantly affected by the proposed action or any of the alternatives. These copies shall be accompanied by a request that such State or entity advise the Administration in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

(h) The FTA requires a public hearing during the circulation period of all draft EISs. FHWA public hearing requirements are as described

in §771.111(h). Whenever a public hearing is held, the draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for FHWA funding is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(i) The Federal Register public availability notice (40 CFR 1506.10) shall establish a period of not less than 45 days for the return of comments on the draft EIS. The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

(j) For FTA funded major urban mass transportation investments, the applicant shall prepare a report identifying a locally preferred alternative at the conclusion of the Draft EIS circulation period. Approval may be given to begin preliminary engineering on the principal alternative(s) under consideration. During the course of such preliminary engineering, the applicant will refine project costs, effectiveness, and impact information with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. These studies will be used to prepare the final

EIS or, where appropriate, a supplemental draft EIS. 52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005]

#### **§ 771.125 Final environmental impact statements.**

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in §771.109(b). The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive orders, or provide reasonable assurance that their requirements can be met.

(2) Every reasonable effort shall be made to resolve interagency disagreements on actions before processing the final EIS. If significant issues remain unresolved, the final EIS shall identify those issues and the consultations and other efforts made to resolve

them.

(b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

(c) The Administration will indicate approval of the EIS for an action by signing and dating the cover page. Final EISs prepared for actions in the following categories will be submitted to the Administration's Headquarters for prior concurrence:

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that (i) additional coordination with other Federal, State or local governmental agencies is needed; (ii) the social, economic, or environmental impacts of the action may need to be more fully explored; (iii) the impacts of the proposed action are unusually great; (iv) major issues remain unresolved; or (v) the action involves national policy issues.

(2) Any action to which a Federal, State or local government agency has indicated opposition on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

(3) Major urban mass transportation investments as defined by FTA's regulation on major capital investment projects (49 CFR part 611).

(d) The signature of the FTA approving official on the cover sheet also indicates compliance with 49 U.S.C. 5324(b) and fulfillment of the grant application requirements of 49 U.S.C. 5323(b).

(e) Approval of the final EIS is not an Administration Action (as defined in §771.107(c)) and does not commit the Administration to approve any future grant request to fund the preferred alternative.

(f) The initial printing of the final EIS shall be in sufficient quantity to meet the request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. When filed with EPA, the final EIS shall be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as

appropriate.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005]

#### **§ 771.127 Record of decision.**

(a) The Administration will complete and sign a record of decision (ROD) no sooner than 30 days after publication of the final EIS notice in the Federal Register 90 days after publication of a notice for the draft EIS, whichever is later. The ROD will present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project and document any required Section 4(f) approval in accordance with part 774 of this chapter. Until any required ROD has been signed, no further approvals may be given except for administrative activities taken to secure further project funding and other activities consistent with 40 CFR 1506.1.

(b) If the Administration subsequently wishes to approve an alternative which was not identified as the preferred alternative but was fully evaluated in the final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised ROD shall be subject to review by those Administration offices which reviewed the final EIS under §771.125(c). To the extent practicable the approved revised ROD shall be provided to all persons, organizations, and agencies that received a copy of the final EIS pursuant to

§771.125(g).  
[52 FR 32660, Aug. 28,  
1987, as amended at 73 FR  
13395, Mar. 12, 2008]

**§ 771.129 Re-evaluations.**

(a) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within 3 years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.

(b) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

(c) After approval of the EIS, FONSI, or CE designation, the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988]

**§ 771.130 Supplemental environmental impact statements.**

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS shall be supplemented whenever the Administration determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or

(2) New information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

(b) However, a supplementary EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or

(2) The Administration decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a revised ROD shall be prepared and circulated in accordance with §771.127(b).

(c) Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new

circumstances. If, based upon the studies, the Administration determines that a supplemental EIS is not necessary, the Administration shall so indicate in the project file.

(d) A supplement is to be developed using the same process and format (*i.e.*, draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required.

(e) A supplemental draft EIS may be necessary for FTA major urban mass transportation investments if there is a substantial change in the level of detail on project impacts during project planning and development. The supplement will address site-specific impacts and refined cost estimates that have been developed since the original draft EIS.

(f) In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental EIS shall not necessarily:

- (1) Prevent the granting of new approvals;
- (2) Require the withdrawal of previous approvals; or
- (3) Require the suspension of project activities; for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration shall suspend any activities which would have an adverse

environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005]

**§ 771.131 Emergency action procedures.**

Requests for deviations from the procedures in this regulation because of emergency circumstances (40 CFR 1506.11) shall be referred to the Administration's headquarters for evaluation and decision after consultation with CEQ.

**§ 771.133 Compliance with other requirements.**

The final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation

with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA approval of the appropriate NEPA document will constitute its finding of compliance with the report requirements of 23 U.S.C. 128.

*Note: On March 12, 2008 FHWA issued a Final Rule on Section 4(f), which clarifies the 4(f) approval process and simplifies its regulatory requirements. In addition, the Final Rule moves the Section 4(f) from regulation § 771.135 to 23 CFR 774.*

**§ 771.137 International actions.**

(a) The requirements of this part apply to:  
(1) Administration actions significantly affecting the environment of a foreign

nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions which significantly affect natural resources of global importance designated for protection by the President or by international agreement.  
(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration shall coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

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**PART  
774—  
Parks,  
Recreation  
Areas,  
Wildlife  
and  
Waterfowl  
Refuges,  
and  
Historic  
Sites  
SECTION  
4(F)**

**On March 12, 2008 FHWA issued a [Final Rule](#) on Section 4(f), which clarifies the 4(f) approval process and simplifies its regulatory requirements. In addition, the Final Rule moves the Section 4(f) from regulation § 771.135 to [23 CFR 774](#).**

**Amendment from March 12, 2008**

### **23 CFR--PART 774**

View Printed Federal Register page [73 FR 13395](#) in PDF format.

**Amendment(s) published March 12, 2008, in 73 FR 13395**

Effective Date(s): April 11, 2008

4. Add part 774 to read as follows:

### **PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(F))**

Sec. 774.1 Purpose. 774.3 Section 4(f) approvals. 774.5 Coordination. 774.7 Documentation. 774.9 Timing. 774.11 Applicability. 774.13 Exceptions. 774.15 Constructive use determinations. 774.17 Definitions.

**Authority:** 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation

Equity Act: A Legacy for Users (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

#### **§ 774.1 Purpose.**

The purpose of this part is to implement 23 U.S.C. 138 and 49 U.S.C. 303, which were originally enacted as Section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as “Section 4(f).”

#### **§ 774.3 Section 4(f) approvals.**

The Administration may not approve the use, as defined in § 774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in § 774.17, to the use of land from the property; and  
(2) The action includes all possible planning, as defined in § 774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in § 774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Administration may

approve only the alternative that:

(1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:  
(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);  
(ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;  
(iii) The relative significance of each Section 4(f) property;  
(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;  
(v) The degree to which each alternative meets the purpose and need for the project;  
(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and  
(vii) Substantial differences in costs among the alternatives.  
(2) The alternative selected must include all possible planning, as defined in § 774.17, to minimize harm to Section 4(f) property.  
(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes

project type, degree of use and impact, and evaluation of avoidance alternatives.<sup>1</sup> An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met

<sup>1</sup> FHWA has issued five programmatic Section 4(f) evaluations: (1) Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property; (2) Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites; (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites; (4) Historic Bridges; Programmatic Section 4(f) Evaluation and Approval; and (5) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.

(1) The determination whether a programmatic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as specified in the applicable programmatic Section 4(f) evaluation.  
(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or

revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the Federal Register for comment prior to being finalized. New or revised programmatic Section 4(f) evaluations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

(e) The coordination requirements in §774.5 must be completed before the Administration may make Section 4(f) approvals under this section. Requirements for the documentation and timing of Section 4(f) approvals are located in §§774.7 and 774.9, respectively.

#### § 774.5 Coordination.

(a) Prior to making Section 4(f) approvals under §774.3(a), the Section 4(f) evaluation shall be provided for coordination and comment to the official(s) with jurisdiction over the Section 4(f) resource and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. The Administration shall provide a minimum of 45 days for receipt of comments. If comments are not received within 15 days after the comment deadline, the Administration may assume a lack of objection and proceed with the action.

(b) Prior to making *de minimis* impact determinations under

§774.3(b), the following coordination shall be undertaken:

(1) For historic properties:  
(i) The consulting parties identified in accordance with 36 CFR part 800 must be consulted; and  
(ii) The Administration must receive written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of “no adverse effect” or “no historic properties affected” in accordance with 36 CFR part 800. The Administration shall inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of “no adverse effect” or “no historic properties affected.”  
(iii) Public notice and comment, beyond that required by 36 CFR part 800, is not required.  
(2) For parks, recreation areas, and wildlife and waterfowl refuges:  
(i) Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.  
(ii) The Administration shall inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding. Following an

opportunity for public review and comment as described in paragraph (b)(2)(i) of this section, the official(s) with jurisdiction over the Section 4(f) resource must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection. This concurrence may be combined with other comments on the project provided by the official(s).

(c) The application of a programmatic Section 4(f) evaluation to the use of a specific Section 4(f) property under §774.3(d)(1) shall be coordinated as specified in the applicable programmatic Section 4(f) evaluation.

(d) When Federal encumbrances on Section 4(f) property are identified, coordination with the appropriate Federal agency is required to ascertain the agency's position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval.

#### **§ 774.7 Documentation.**

(a) A Section 4(f) evaluation prepared under §774.3(a) shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property. (b) A *de minimis* impact determination

under §774.3(b) shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are *de minimis* as defined in §774.17; and that the coordination required in §774.5(b) has been completed.

(c) If there is no feasible and prudent avoidance alternative the Administration may approve only the alternative that causes the least overall harm in accordance with §774.3(c). This analysis must be documented in the Section 4(f) evaluation.

(d) The Administration shall review all Section 4(f) approvals under §§774.3(a) and 774.3(c) for legal sufficiency.

(e) A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS under §771.111(g) of this chapter.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the Section 4(f) approval may not be available at that stage in the development of the action. In such cases, the documentation should address the potential impacts that a proposed action will have on Section 4(f) property and whether those impacts could have a bearing on the decision to be made. A preliminary Section 4(f) approval may be made at this time as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This

preliminary approval shall include all possible planning to minimize harm to the extent that the level of detail available at the first-tier EIS stage allows. It is recognized that such planning at this stage may be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary Section 4(f) approval is then incorporated into the first-tier EIS.

(2) The Section 4(f) approval will be finalized in the second-tier study. If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

(3) The final Section 4(f) approval may be made in the second-tier CE, EA, final EIS, ROD or FONSI. (f) In accordance with §§771.105(a) and 771.133 of this chapter, the documentation supporting a Section 4(f) approval should be included in the EIS, EA, or for a project classified as a CE, in a separate document. If the Section 4(f) documentation cannot be included in the NEPA document, then it shall be presented in a separate

document. The Section 4(f) documentation shall be developed by the applicant in cooperation with the Administration.

**§ 774.9 Timing.**

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in the final EIS or in the ROD. Where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD. Actions requiring the use of Section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notification by the Administration of Section 4(f) approval.

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in §774.13, if:

- (1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or
- (2) The Administration determines that Section 4(f) applies to the use of a property; or
- (3) A proposed modification of the alignment, design, or measures to minimize harm (after the original Section 4(f) approval) would result in a

substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental NEPA document. If a new or supplemental NEPA document is also required under §771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with §771.130(f) of this chapter.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in §774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

**§ 774.11 Applicability.**

(a) The Administration will determine the applicability of Section 4(f) in accordance with this part. (b) When another Federal agency is the Federal lead agency for the NEPA process, the Administration shall make

any required Section 4(f) approvals unless the Federal lead agency is another U.S. DOT agency.

(c) Consideration under Section 4(f) is not required when the official(s) with jurisdiction over a park, recreation area, or wildlife and waterfowl refuge determine that the property, considered in its entirety, is not significant. In the absence of such a determination, the Section 4(f) property will be presumed to be significant.

The Administration will review a determination that a park, recreation area, or wildlife and waterfowl refuge is not significant to assure its reasonableness. (d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, Section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl refuge purposes. The determination of which lands so function or are so designated, and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource. The Administration will review this determination to assure its reasonableness.

(e) In determining the applicability of Section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the official(s) with jurisdiction to identify all

properties on or eligible for the National Register of Historic Places (National Register). The Section 4(f) requirements apply to historic sites on or eligible for the National Register unless the Administration determines that an exception under §774.13 applies.

(1) The Section 4(f) requirements apply only to historic sites on or eligible for the National Register unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

(2) The Interstate System is not considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate System formally identified by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.

(f) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction, except as set forth in §774.13(b).

(g) Section 4(f) applies to those portions of federally designated Wild and Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as, or are designated in a management plan as, a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287, must be satisfied, independent of the Section 4(f) approval.

(h) When a property formally reserved for a future transportation facility

temporarily functions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject the property to Section 4(f).

(i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in §774.17. Examples of such concurrent or joint planning or development include, but are not limited to:

(1) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation facility and the Section 4(f) property; or  
(2) Designation, donation, planning, or development of property by two or more governmental agencies with jurisdiction for the potential transportation facility and the Section 4(f) property, in consultation with each other.

#### **§ 774.13 Exceptions.**

The Administration has identified various exceptions to the requirement for Section 4(f) approval. These exceptions include, but are not limited to:

(a) Restoration, rehabilitation, or maintenance of transportation facilities

that are on or eligible for the National Register when:

(1) The Administration concludes, as a result of the consultation under 36 CFR 800.5, that such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, and  
(2) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(1) of this section.

(b) Archeological sites that are on or eligible for the National Register when:

(1) The Administration concludes that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and  
(2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.

(c) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in §774.9(e), the Administration may permit a project to proceed without

consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section. (d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:

- (1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;
- (2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal;
- (3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;
- (4) The land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and
- (5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

- (e) Park road or parkway projects under 23 U.S.C. 204.
- (f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:
  - (1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);
  - (2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241–1251, with the exception of those trail segments that are historic sites as defined in §774.17;
  - (3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and
  - (4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.
- (g) Transportation enhancement projects and mitigation activities, where:
  - (1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and
  - (2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

**§ 774.15 Constructive use determinations.**

- (a) A constructive use occurs when the transportation project does not incorporate land from a Section 4(f)

property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

- (b) If the project results in a constructive use of a nearby Section 4(f) property, the Administration shall evaluate that use in accordance with §774.3(a).
- (c) The Administration shall determine when there is a constructive use, but the Administration is not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property. However, such documentation may be prepared at the discretion of the Administration.
- (d) When a constructive use determination is made, it will be based upon the following:
  - (1) Identification of the current activities, features, or attributes of the property which qualify for protection under Section 4(f) and which may be sensitive to proximity impacts;
  - (2) An analysis of the proximity impacts of the proposed project on the Section 4(f) property. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be

attributed to the proposed project; and

(3) Consultation, on the foregoing identification and analysis, with the official(s) with jurisdiction over the Section 4(f) property.

(e) The Administration has reviewed the following situations and determined that a constructive use occurs when:

(1) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as:

(i) Hearing the performances at an outdoor amphitheater;

(ii) Sleeping in the sleeping area of a campground;

(iii) Enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance;

(iv) Enjoyment of an urban park where serenity and quiet are significant attributes; or

(v) Viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.

(2) The proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from

the setting of a Section 4(f) property which derives its value in substantial part due to its setting;

(3) The project results in a restriction of access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;

(4) The vibration impact from construction or operation of the project substantially impairs the use of a Section 4(f) property, such as projected vibration levels that are great enough to physically damage a historic building or substantially diminish the utility of the building, unless the damage is repaired and fully restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, i.e., the integrity of the contributing features must be returned to a condition which is substantially similar to that which existed prior to the project; or

(5) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife and waterfowl refuge adjacent to the project, substantially interferes with the access to a wildlife and waterfowl refuge when such access is necessary for established wildlife migration or critical life cycle processes, or substantially reduces the wildlife use of a wildlife and waterfowl refuge.

(f) The Administration has reviewed the following situations and determined that a constructive use does not occur when:

(1) Compliance with the requirements of 36 CFR

800.5 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register, results in an agreement of "no historic properties affected" or "no adverse effect;"

(2) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment;

(3) The projected noise levels exceed the relevant threshold in paragraph (f)(2) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(4) There are proximity impacts to a Section 4(f) property, but a governmental agency's right-of-way acquisition or adoption of project location, or the Administration's approval of a final environmental document, established the location for the proposed transportation project before the designation, establishment, or change in the significance of the property. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as

a historic site for the purposes of this section; or (5) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a property for protection under Section 4(f);(6) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built, as determined after consultation with the official(s) with jurisdiction; (7) Change in accessibility will not substantially diminish the utilization of the Section 4(f) property; or (8) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of protected activities, features, or attributes of the Section 4(f) property.

#### § 774.17 Definitions.

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

*Administration.* The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

*All possible planning.* All possible planning means that

all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways. (2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under §774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with §771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources

outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under §774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under §774.3(b).

(5) A *de minimis* impact determination under §774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

*Applicant.* The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein. *CE.* Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and §771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

*De minimis impact.* (1) For historic sites, *de minimis* impact means that the

Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have “no adverse effect” on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

*EA.* Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500–1508 and §771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

*EIS.* Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500–1508, and §§771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

*Feasible and prudent avoidance alternative.* (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built

as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

*FONSI.* Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and §771.121 of this chapter.

*Historic site.* For purposes of this part, the term “historic site” includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural

importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

*Official(s) with jurisdiction.*

(1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land, the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part.

When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or

agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

*ROD.* Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and §771.127 of this chapter.  
*Section 4(f) evaluation.* Refers to the documentation

prepared to support the granting of a Section 4(f) approval under §774.3(a), unless preceded by the word “programmatic.” A “programmatic Section 4(f) evaluation” is the documentation prepared pursuant to §774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

*Section 4(f) Property.* Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an

historic site of national, State, or local significance.

*Use.* Except as set forth in §§774.11 and 774.13, a “use” of Section 4(f) property occurs:

- (1) When land is permanently incorporated into a transportation facility;
- (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d); or
- (3) When there is a constructive use of a Section 4(f) property as determined by the criteria in §774.15.

# **38 CFR Part 800 Protection of Historic Properties SECTION 106**

**36 CFR PART 800 --  
PROTECTION OF  
HISTORIC PROPERTIES  
(incorporating  
amendments effective  
August 5, 2004)**

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**Authority:** 16 U.S.C. 470s.

**Subpart A-Purposes and  
Participants**

**§ 800.1 Purposes.**

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such

provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

**§ 800.2 Participants in the  
Section 106 process.**

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an

undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.*

Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106,2 provides guidance and advice on the application of the procedures in this part, and

generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process.

Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.*

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists

Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with §800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to §800.3(f)(3).

*(2) Indian tribes and Native Hawaiian organizations.*

*(i) Consultation on tribal lands.*

*(A) Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

*(B) Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative

designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

*(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.*

Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian

organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such

Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under §800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A

representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses and other approvals.*

An applicant for Federal assistance or for a Federal permit, license or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government to government relationships with Indian tribes.

(5) *Additional consulting parties.*

Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern

with the undertaking's effects on historic properties.

(d) *The public.*

(1) *Nature of involvement.*

The views of the public are essential to informed Federal decision making in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.*

The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decision making.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

## **Subpart B-The section 106 Process**

### **§ 800.3 Initiation of the section 106 process.**

#### *(a) Establish undertaking.*

The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

*(1) No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

*(2) Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

*(b) Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with

the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State or tribal law to meet the requirements of section 106.

*(c) Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

#### *(1) Tribal assumption of SHPO responsibilities.*

Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

*(2) Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section

106 process, including taking actions that would conclude the section 106 process under this subpart.

#### *(3) Conducting consultation.*

The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

*(4) Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.<sup>4</sup>

*(d) Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or

affecting historic properties on tribal lands.

*(e) Plan to involve the public.*

In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process.

The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with §800.2(d).

*(f) Identify other consulting parties.*

In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

*(1) Involving local governments and applicants.*

The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

*(2) Involving Indian tribes and Native Hawaiian organizations.*

The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

*(3) Requests to be consulting parties.*

The agency official shall consider all written requests

of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

*(g) Expediting consultation.*

A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

#### **§ 800.4 Identification of historic properties.**

*(a) Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in §800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties;

and (4) Gather information from any Indian tribe or Native Hawaiian organization

identified pursuant to §800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites.

The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

*(b) Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

*(1) Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the

area of potential effects. The Secretary's Standards and Guidelines for Identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal and local laws, standards and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

*(2) Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14 (b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to §800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations

of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

*(c) Evaluate historic significance.*

*(1) Apply National Register criteria.*

In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

*(2) Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency

official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

*(d) Results of identification and evaluation.*

*(1) No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

*(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.*

*(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately*

documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv)(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of

receipt of the request, the agency official's responsibilities under section 106 are fulfilled

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/ THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may

be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

#### **§ 800.5 Assessment of adverse effects.**

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by

the undertaking that may occur later in time, be farther removed in distance or be cumulative.

*(2) Examples of adverse effects.*

Adverse effects on historic properties include, but are not limited to:

- (i) Physical destruction of or damage to all or part of the property;
- (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;
- (iii) Removal of the property from its historic location;
- (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
- (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
- (vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
- (vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

*(3) Phased application of criteria.*

Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

*(b) Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

*(c) Consulting party review.*

If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

*(1) Agreement with, or no objection to, finding.* Unless the Council is reviewing the finding pursuant to paragraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not

provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

*(2) Disagreement with finding.*

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches

religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.*

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15-day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching

a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/ THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment.*

(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not

conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

**§ 800.6 Resolution of adverse effects.**

(a) *Continue consultation.*

The agency official shall consult with the SHPO/ THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when: (A) The agency official wants the Council to participate; (B) The undertaking has an adverse effect upon a National Historic Landmark; or (C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it

will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall

invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.*

The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the

relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the

standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects.*

(1) *Resolution without the Council.*

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects. (ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend

or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.*

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency

official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

#### **§ 800.7 Failure to resolve adverse effects.**

##### *(a) Termination of consultation.*

After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agencywide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the

Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

##### *(b) Comments without termination.*

The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

##### *(c) Comments by the Council.*

(1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments.

Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council

under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

##### *(4) Response to Council comment.*

The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

- (i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;
- (ii) Providing a copy of the summary to all consulting parties; and
- (iii) Notifying the public and making the record available for public inspection.

#### **§ 800.8 Coordination With the National Environmental Policy Act.**

##### *(a) General principles.*

###### *(1) Early coordination.*

Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the

National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a “major Federal action significantly affecting the quality of the human environment,” and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/THPOs, Indian tribes and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of

effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.*

During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project

alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and (v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.*

(i) The agency official shall submit the EA, DEIS or EIS to the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the

Council may object to the agency official that preparation of the EA, DEIS or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may

delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

(ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

(iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) a binding commitment to such proposed measures is incorporated in (A) the ROD, if such measures were proposed in a DEIS or EIS; or (B) an MOA drafted in compliance with § 800.6(c);

or (ii) the Council has commented under § 800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.*

If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, for if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

#### **§ 800.9 Council review of section 106 compliance.**

(a) *Assessment of agency official compliance for individual undertakings.*

The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

*(b) Agency foreclosure of the Council's opportunity to comment.*

Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

*(c) Intentional adverse effects by applicants.*

*(1) Agency responsibility.*

Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance

despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

*(2) Consultation with the Council.*

When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

*(3) Compliance with Section 106.* If an agency official, after consulting with the

Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

*(d) Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

*(1) Information from participants.*

Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process.

The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

*(2) Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process.

Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/

THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

**§ 800.10 Special requirements for protecting National Historic Landmarks.**

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under §800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation

involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

**§ 800.11 Documentation standards.**

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information

needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality.*

(1) *Authority to withhold information.*

Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) *Consultation with the Council.*

When the information in question has been developed

in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information.

The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

*(3) Other authorities affecting confidentiality.*

Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

*(d) Finding of no historic properties affected.*

Documentation shall include:

- (1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;
- (2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and
- (3) The basis for determining that no historic properties are present or affected.

*(e) Finding of no adverse effect or adverse effect.*

Documentation shall include:

- (1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;
- (2) A description of the steps taken to identify historic properties;
- (3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;
- (4) A description of the undertaking's effects on historic properties;
- (5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and
- (6) Copies or summaries of any views provided by consulting parties and the public.

*(f) Memorandum of agreement.*

When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

*(g) Requests for comment without a memorandum of agreement.*

Documentation shall include:

- (1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;
- (2) A description of any reasonable alternatives or mitigation

measures that were considered but not chosen, and the reasons for their rejection; (3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and (4) Any substantive revisions or additions to the documentation provided the Council pursuant to §800.6(a)(1).

**§ 800.12 Emergency situations.**

*(a) Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

*(b) Alternatives to agency procedures.* In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed

procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or (2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings

that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

### **§ 800.13 Post-review discoveries.**

(a) *Planning for subsequent discoveries.*

(1) *Using a programmatic agreement.*

An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of

the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/ THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/ THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the

concurrence of the Indian tribe on the proposed action.

### **Subpart C-Program Alternatives**

#### **§ 800.14 Federal agency program alternatives.**

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures. (2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the Federal Register.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

- (i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;
- (ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) When nonfederal parties are delegated major decision making responsibilities;
- (iv) Where routine management activities are undertaken at Federal installations, facilities, or other land management units;

or

(v) Where other circumstances arrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.*

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public Participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the

THPO, Indian tribe or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual

undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories.*

(1) *Criteria for establishing.* The Council or an agency official may propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and  
(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) *Public participation.* The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.*

The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the

exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/ THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The proponent of the exemption shall publish notice of any approved exemption in the Federal Register.

(d) *Standard treatments.*

(1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the Federal Register.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.*

The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribe and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an

Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section. (5)

*Termination.* The Council may terminate a standard treatment by publication of a notice in the Federal Register 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.*

The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the Federal Register of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribe and Native Hawaiian organizations when developing program alternatives.*

Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government-to-government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential

memoranda and applicable provisions of law.

(2) *Results of consultation.*

The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

**§ 800.15 Tribal, State, and local program alternatives.**

**(Reserved) § 800.16**

**Definitions.**

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day* or *days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be

considered the head of the agency.

(1)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the

terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with §800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director

of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or reservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) *Senior policy official* means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

#### **Appendix A to Part 800 -- Criteria for Council Involvement in Reviewing**

#### **Individual section 106 Cases**

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements

that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or

carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to §800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native

Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

**Title 36 Chapter 1 Part 59--Land and Water  
Conservation Fund Program of Assistance to  
States; Post-Completion Compliance  
Responsibilities**

**SECTION 6(f)**

**PART 59—LAND AND WATER CONSERVATION FUND PROGRAM OF ASSISTANCE TO STATES; POSTCOMPLETION COMPLIANCE RESPONSIBILITIES**

Sec. 59.1 Applicability.

59.2 Information collection

59.3 Conversion requirements.

59.4 Residency requirements.

59.5–59.6 [Reserved]

**AUTHORITY:** Sec. 6, L&WCF Act of 1965 as amended; Pub. L. 88–578; 78 Stat. 897; 16 U.S.C. 4601–4 *et seq.*

**SOURCE:** 51 FR 34184, Sept. 25, 1986, unless otherwise noted.

**§ 59.1 Applicability.**

These post-completion responsibilities apply to each area or facility for which Land and Water Conservation Fund (L&WCF) assistance is obtained, regardless of the extent of participation of the program in the assisted area or facility and consistent with the contractual agreement between NPS and the State. Responsibility for compliance and enforcement of these provisions rests with the State for both State and locally sponsored projects. The responsibilities cited herein are applicable to the area depicted or otherwise described on the 6(f)(3) boundary map and/or as described in other project documentation approved by the Department of the Interior. In many instances, this mutually agreed to area exceeds that actually receiving L&WCF assistance

so as to assure the protection of a viable recreation entity. For leased sites assisted under L&WCF, compliance with post-completion requirements of the grant ceases following lease expiration unless the grant agreement calls for some other arrangement.

**§ 59.2 Information collection.**

The information collection requirements contained in § 59.3 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024–0047. The information is being collected to determine whether to approve a project sponsor’s request to convert an assisted site or facility to other than public outdoor recreation uses. The information will be used to assure that the requirements of section 6(f)(3) of the L&WCF Act would be met should the proposed conversion be implemented. Response is required in order to obtain the benefit of Department of the Interior approval.

**§ 59.3 Conversion requirements.**

*(a) Background and legal requirements.*

Section 6(f)(3) of the L&WCF Act is the cornerstone of Federal compliance efforts to ensure that the Federal investments in L&WCF assistance are being maintained in public outdoor recreation use. This section of the Act assures that once an area has been funded with L&WCF assistance, it is continually maintained in

public recreation use unless NPS approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value.

*(b) Prerequisites for conversion approval.*

Requests from the project sponsor for permission to convert L&WCF assisted properties in whole or in part to other than public outdoor recreation uses must be submitted by the State Liaison Officer to the appropriate NPS Regional Director in writing. NPS will consider conversion requests if the following prerequisites have been met:

(1) All practical alternatives to the proposed conversion have been evaluated.

(2) The fair market value of the property to be converted has been established and the property proposed for substitution is of at least equal fair market value as established by an approved appraisal (prepared in accordance with uniform Federal appraisal standards) excluding the value of structures or facilities that will not serve a recreation purpose.

(3) The property proposed for replacement is of reasonably equivalent usefulness and location as that being converted. Dependent upon the situation and at the discretion of the Regional Director, the replacement property need not provide identical recreation experiences or be located at the same site, provided it is in a reasonably equivalent location. Generally, the replacement property should be administered by the same political jurisdiction as the converted property. NPS will

consider State requests to change the project sponsor when it is determined that a different political jurisdiction can better carry out the objectives of the original project agreement.

Equivalent usefulness and location will be determined based on the following criteria:

(i) Property to be converted must be evaluated in order to determine what recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation resources and opportunities available. The property being proposed for substitution must then be evaluated in a similar manner to determine if it will meet recreation needs which are at least like in magnitude and impact to the user community as the converted site. This criterion is applicable in the consideration of all conversion requests with the exception of those where wetlands are proposed as replacement property.

Wetland areas and interests therein which have been identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan shall be considered to be of reasonably equivalent usefulness with the property proposed for conversion regardless of the nature of the property proposed for conversion.

(ii) Replacement property need not necessarily be directly adjacent to or close by the converted site. This policy provides the administrative flexibility to determine location recognizing that the property should meet existing public outdoor recreation needs.

While generally this will involve the selection of a site serving the same community (ies) or area as the converted site, there may be exceptions. For example, if property being converted is in an area undergoing major demographic change and the area has no existing or anticipated future need for outdoor recreation, then the project sponsor should seek to locate the substitute area in another location within the jurisdiction. Should a local project sponsor be unable to replace converted property, the State would be responsible, as the primary recipient of Federal assistance, for assuring compliance with these regulations and the substitution of replacement property.

(iii) The acquisition of one parcel of land may be used in satisfaction of several approved conversions.

(4) The property proposed for substitution meets the eligibility requirements for L&WCF assisted acquisition. The replacement property must constitute or be part of a viable recreation area. Unless *each* of the following additional conditions is met, land currently in public ownership, including that which is owned by another public agency, may not be used as replacement land for land acquired as part of an L&WCF project:

(i) The land was not acquired by the sponsor or selling agency for recreation.

(ii) The land has not been dedicated or managed for recreational purposes while in public ownership.

(iii) No Federal assistance was provided in the original acquisition unless the

assistance was provided under a program expressly authorized to match or supplement L&WCF assistance.

(iv) Where the project sponsor acquires the land from another public agency, the selling agency must be required by law to receive payment for the land so acquired. In the case of development projects for which the State match was not derived from the cost of the purchase or value of a donation of the land to be converted, but from the value of the development itself, public land which has not been dedicated or managed for recreation/conservation use may be used as replacement land even if this land is transferred from one public agency to another without cost.

(5) In the case of assisted sites which are partially rather than wholly converted, the impact of the converted portion on the remainder shall be considered.

If such a conversion is approved, the unconverted area must remain recreationally viable or be replaced as well.

(6) All necessary coordination with other Federal agencies has been satisfactorily accomplished including, for example, compliance with section 4(f) of the Department of Transportation Act of 1966.

(7) The guidelines for environmental evaluation have been satisfactorily completed and considered by NPS during its review of the proposed 6(f)(3) action.

In cases where the proposed conversion arises from another Federal action, final review of the State's proposal

shall not occur until the NPS Regional office is assured that all environmental review requirements related to that other action have been met.

(8) State intergovernmental clearinghouse review procedures have been adhered to if the proposed conversion and substitution constitute significant changes to the original Land and Water Conservation Fund project.

(9) The proposed conversion and substitution are in accord with the Statewide Comprehensive Outdoor Recreation Plan (SCORP) and/or equivalent recreation plans.

(c) *Amendments for conversion.* All conversions require amendments to the original project agreements. Therefore, amendment requests should be submitted concurrently with conversion requests or at such time as all details of the conversion have been worked out with NPS. Section 6(f)(3) project boundary maps shall be submitted with the amendment request to identify the changes to the original area caused by the proposed conversion and to establish a new project area pursuant to the substitution. Once the conversion has been approved, replacement property should be immediately acquired. Exceptions to this rule would occur only when it is not possible for replacement property to be identified prior to the State's request for a conversion. In such cases, an express commitment to satisfy section 6(f)(3) substitution requirements within a specified period, normally not to exceed one year following conversion

approval, must be received from the State. This commitment will be in the form of an amendment to the grant agreement.

(d) *Obsolete facilities.*

Recipients are not required to continue operation of a particular facility beyond its useful life. However, when a facility is declared obsolete, the site must nonetheless be maintained for public outdoor recreation following discontinuance of the assisted facility. Failure to so maintain is considered to be a conversion. Requests regarding changes from a L&WCF funded facility to another otherwise eligible facility at the same site that significantly contravene the original plans for the area must be made in writing to the Regional Director. NPS approval must be obtained prior to the occurrence of the change. NPS approval is not necessarily required, however, for each and every facility use change. Rather, a project area should be viewed in the context of overall use and should be monitored in this context. A change from a baseball field to a football field, for example, would not require NPS approval. A change from a swimming pool with substantial recreational development to a less intense area of limited development such as a passive park, or vice versa, would, however, require NPS review and approval. To assure that facility changes do not significantly contravene the original project agreement, NPS shall be notified by the State of *all* proposed changes in advance of their occurrence. A primary NPS consideration in the review of requests for

changes in use will be the consistency of the proposal with the Statewide Comprehensive Outdoor Recreation Plan and/or equivalent recreation plans. Changes to other than public outdoor recreation use require NPS approval and the substitution of replacement land in accordance with section 6(f)(3) of the L&WCF Act and paragraphs (a) through (c) of this section. [51 FR 34184, Sept. 25, 1986, as amended at 52 FR 22747, June 15, 1987]

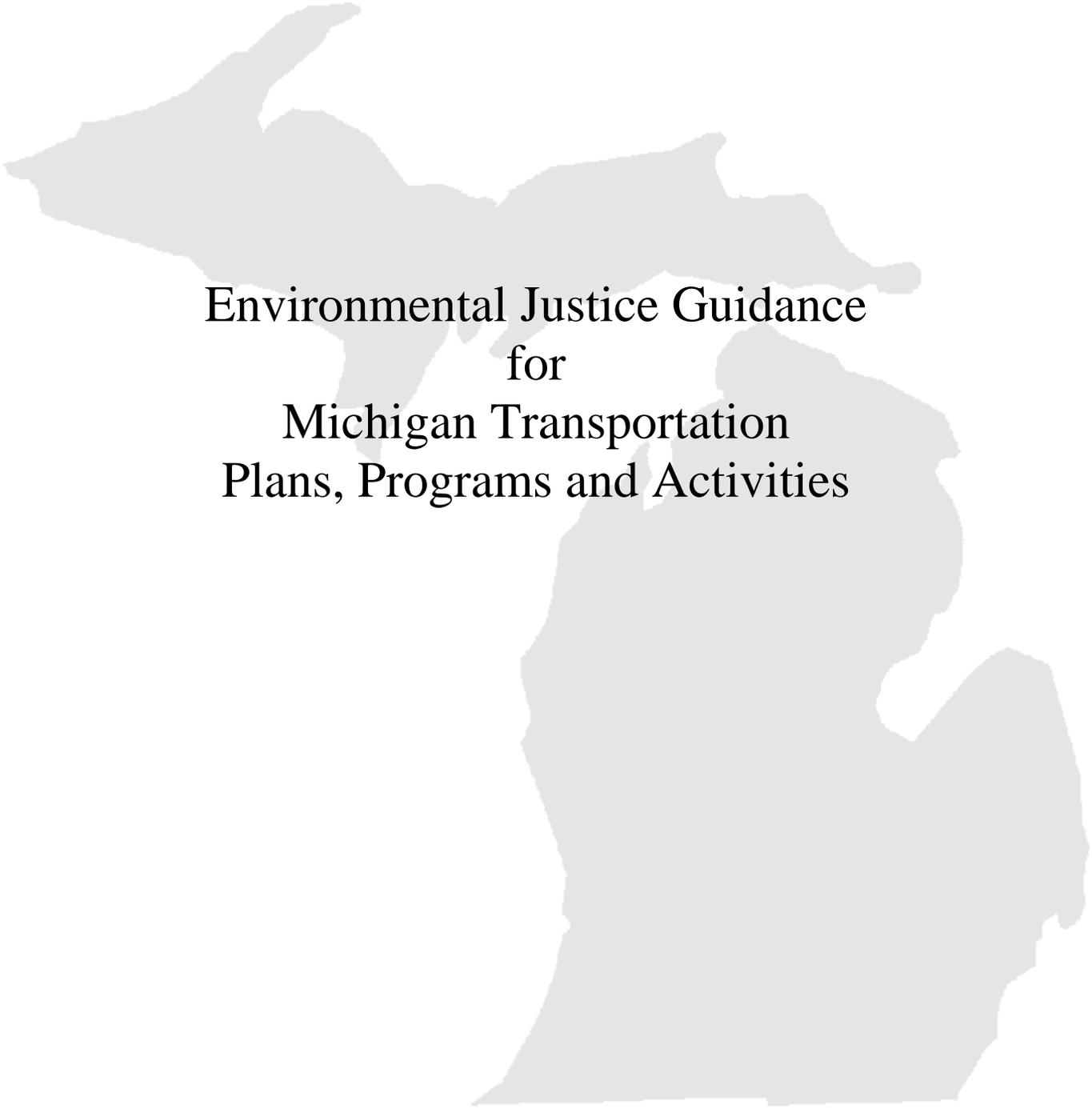
#### **§ 59.4 Residency requirements.**

(a) *Background.* Section 6(f)(8) of the L&WCF Act prohibits discrimination on the basis of residence, including preferential reservation or membership systems, except to the extent that reasonable differences in admission and other fees may be maintained on such basis. This prohibition applies to both regularly scheduled and special events. The general provisions regarding nondiscrimination at sites assisted under Interior programs and, thereby, all other recreation facilities managed by a project sponsor, are covered in 43 CFR part 17 which implements the provisions of Title VI of the Civil Rights Act of 1964 for the Department.

(b) *Policy.* There shall be no discrimination for L&WCF assisted programs and services on the basis of residence, except in reasonable fee differentials. Post-completion compliance responsibilities of the recipient should continue to ensure that discrimination on

the basis of residency is not occurring.

(c) *Fees.* Fees charged to nonresidents cannot exceed twice that charged to residents. Where there is no charge for residents but a fee is charged to nonresidents, nonresident fees cannot exceed fees charged for residents at comparable State or local public facilities. Reservation, membership, or annual permit systems available to residents must also be available to nonresidents and the period of availability must be the same for both residents and nonresidents. Recipients are prohibited from providing residents the option of purchasing annual or daily permits while at the same time restricting nonresidents to the purchase of annual permits only. These provisions apply only to the approved 6(f)(3) areas applicable to the recipient. Nonresident fishing and hunting license fees are excluded from these requirements.



Environmental Justice Guidance  
for  
Michigan Transportation  
Plans, Programs and Activities

April 2008

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## **I. INTRODUCTION**

### **A. Purpose**

In February of 1994 President Clinton signed Executive Order 12898. Its major goal is to ensure that no minority or low-income population suffers “disproportionately high and adverse human health or environmental effects” due to any “programs, policies, and activities” undertaken by a federal agency or any agency receiving federal funds. As the Michigan Department of Transportation (MDOT) does receive federal funding, the above-mentioned order applies to its programs, policies and activities. Environmental Justice (EJ), however, is not a new requirement. In fact, since no additional legislation accompanied the President’s order, its authority rests in Title VI of the Civil Rights Act of 1964, and MDOT has long considered these principles in its planning processes.

This document presents a series of steps that can lead to compliance with the intent of the Executive Order. It provides a framework for MDOT’s Planning Staff and their partners to raise awareness and understanding of environmental justice issues and the necessary steps that are needed to incorporate EJ into the project development process, this guidance is intended for MDOT, but maybe useful to local governments and Metropolitan Planning Organizations (MPOs). It addresses the issue of Environmental Justice as it relates to transportation planning and development. It includes methods for analyzing potential disproportionate effects as well as important information on successful Public Involvement.

### **B. MDOT’S Relationship to Environmental Justice**

The people within the state of Michigan depend upon some form of transportation each day. MDOT essentially provides these vital services to millions of people. There are, however, certain intrinsic disadvantages in the creation and maintenance of the vital infrastructure that comprises the transportation system. It is both in these services and in these disadvantages that the principle of environmental justice applies to MDOT. Whether it is a change in travel time, increased or decreased access to employment, air quality, noise, or even the purchase of right of way, MDOT has an obligation to ensure that any negative consequences of its activities are not borne disproportionately by any group mentioned in the executive order.

This obligation can be met in a variety of ways and on a variety of levels. MDOT’s first responsibility, when planning specific programs or projects, is to identify those populations that will be affected by a given program or project. If a disproportionate effect is anticipated, mitigation procedures must be followed. If mitigation options do not sufficiently eliminate the disproportionate effect, reasonable alternatives should be discussed and, if necessary, implemented. Disproportionate effects are those effects which are appreciably more severe for one group or predominantly borne by a single group.

MDOT is responsible for ensuring that its overall program as well as individual projects, do not disproportionately distribute benefits or negative effects to any population. An analysis at the statewide level should examine the total negative and positive outcomes of transportation projects to see whether there is a disproportionate effect. This process involves establishing a baseline (a geographic representation of the

location of those populations mentioned in the executive order) and then examine MDOT's program as a whole as it relates to these areas

Environmental Justice ensures that transportation services are provided equitably to every population in Michigan. Through careful planning and proactive involvement, MDOT provides the highest quality of integrated transportation services for economic benefit and improved quality of life and the highest quality of transportation services to all of Michigan's citizens, regardless of race or income.

## II. LEGAL HISTORY OF ENVIRONMENTAL JUSTICE

Under **Title VI of the 1964 Civil Rights Act** and related statutes, each Federal agency (including the Federal Highway Administration) is required to ensure that no person is excluded from participation in, denied the benefit of, or subjected to discrimination under any program or activity receiving Federal financial assistance on the basis of race, color, national origin, age, sex, disability, or religion.

The **National Environmental Policy Act of 1969 (NEPA)** stressed the importance of providing for, "all Americans a safe, healthful, productive, and esthetically pleasing surroundings." It also required taking a "systematic, interdisciplinary approach" when considering environmental and community factors in decision-making.

This approach was further emphasized in the **Federal-aid Highway Act of 1970**. 23 United States Code 109(h) established a further basis for equitable treatment of communities being affected by transportation projects. It requires consideration of the anticipated effects of proposed transportation projects upon residences, businesses, farms, accessibility of public facilities, tax base, and other community resources.

On February 11, 1994, President Clinton, recognizing that the impacts of federal programs and activities may raise questions of fairness to affected groups, signed **Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations**. The Executive Order requires that each Federal agency shall, to the greatest extent allowed by law, administer and implement its programs, policies, and activities that affect human health or the environment so as to identify and avoid "disproportionately high and adverse" effects on minority and low-income populations. The major difference between Title VI and the Executive Order is that the Order adds low-income populations as another group to be considered when designing programs or activities receiving Federal financial assistance.

The U. S. Department of Transportation published its draft **Order to Address Environmental Justice in Minority Populations and Low-Income Populations** in the Federal Register on June 29, 1995. The report was primarily a reaffirmation of the principles of 1964's Title VI. On April 15, 1997, USDOT published the final **Order to Address Environmental Justice in Minority Populations and Low-Income Populations (US DOT Order 5610.2)**. The order expounds upon the President's 1994 Executive Order, relating the principles directly to transportation.

An October 1, 1999, U.S. DOT letter further clarified that transportation agencies are to ensure that low income populations and minority populations receive a proportionate share of benefits from federally funded transportation investments.



### **III. PUBLIC INVOLVEMENT AND ENVIRONMENTAL JUSTICE**

One of the most critical elements for complying with EJ is the need to ensure opportunity for active participation from low income populations and minority populations in the transportation decision making processes. For many low-income and minority populations in Michigan there had been limited or no participation in transportation-related public involvement meetings. The key to involving these groups is the need for MDOT, local governments and the MPOs to assure them that they will have a genuine voice in determining the fate of transportation projects in their respective areas, and that their input is both welcomed and encouraged.

There are also proposed federal rules that expand target populations to include identifying and engaging the elderly and persons with a disability. It is recommended that these groups be considered relative to this guidance.

It is also important to keep in mind during the public involvement process, that there may be persons with Limited English Proficiency (LEP). Under Executive Order 13166, "Improving Access to Services by Persons with Limited English Proficiency", MDOT is responsible for ensuring that all persons including non-English speaking or individuals with limited English proficiency have equal access to its services and information. The Department must provide resources, such as bilingual interpreters and translated materials for meetings in order to ensure that the information and services are readily available in the languages clearly understood by persons with limited English proficiency.

#### **A. Targeting Low-income and Minority Populations**

The first step in addressing EJ, is to identify the target geographic locations and neighborhoods in which low-income populations and minority populations reside. The identified populations will need to be engaged and involved in the transportation decision-making process. Second, it is important to develop focused advertising, and take meetings to these neighborhoods rather than expect these populations to come to the MPO, local government or state.

After identifying the appropriate neighborhoods to target, it is extremely useful to identify neighborhood leaders or individuals who live and work in these neighborhoods, and who have knowledge of its residents and their respect. Ministers, priests, school and church leaders, local human service providers and business owners who are also residents of the targeted neighborhoods can be "tapped" to help in developing advertising, identifying locations for meetings and even helping to facilitate meetings.

#### **B. Advertising Needs**

Meeting advertising, project flyers, and other project materials need to be free of technical jargon and be written in the language and educational level that is appropriate for the

general populations. Creative thinking is helpful in generating interesting slogans or ads that may be of interest to the target populations.

Notifications of meetings, hearings, and public outreach events need to be looked at from the viewpoints of these populations. Notices in local newspapers may meet the letter of the law, but often do not reach the intended audience. Distributing flyers or meeting notices through the appropriate neighborhood shops, churches, at social service agencies, county departments of human services, public health clinics, the bureau of employment services, community centers or organizations may be a better approach. Announcements on ethnic radio stations or neighborhood newsletters should also be considered.

Flyers or postcards are likely to get more attention than standard notices on letterhead. These can be sent to residences and posted in public places and popular meeting places to reach target audiences. Care should be exercised to see that too much text is avoided, and that the written content uses a tone familiar within the community. It may be helpful to have local community leaders review printed materials in advance to see if they feel the approach used will be effective. Also, notices in languages besides English are beneficial.

Word of mouth can be an effective way of generating interest in meetings, by tapping into the networks of respected community leaders and activists.

### **C. Meeting Location Consideration**

Meetings should be held in accessible, neighborhood-based ADA accessible locations. Meetings could possibly be combined with regularly-scheduled meetings of an organization in the community or neighborhood schools; or conducted at places where the target population frequently goes, such as churches, community centers, libraries, or adult education facilities.

Many low-income people are limited in their ability to attend meetings by a lack of transportation and by child care issues. Providing rides to meetings, or locations near public transportation routes and on-site child care can increase attendance.

### **D. Public Interest and Trust**

Sometimes the lack of interest and trust are major hurdles that must be overcome in meetings. Often the sentiment is that transportation officials don't really want to hear what the groups have to say. The implementation of the Transportation Service Centers placed MDOT employees much closer to all customers and is serving to bridge the gap. Transportation people are often perceived as outsiders who have made predetermined decisions. The feeling may be that MDOT and/or other transportation officials conduct meetings to describe a problem the state or a local agency has identified, rather than a problem the community has identified. It is difficult to generate enthusiasm for a project that solves a problem for which the local community feels no ownership.

In some cases, past highway construction and other transportation decisions have resulted in negative effects on low income and minority neighborhoods. Often, the time frames that transportation officials talk about are long term, and the target populations lose interest. These issues will be considered both during the development of the meeting advertising and during the development of the meeting content and format.

#### **E. Meeting Accommodations**

It is unusual to find anyone from any population who truly likes to attend meetings. The advertising and location selected should set the tone for the meeting. Attendees should enter the meeting with the feeling that it is worth their time and effort to attend. They should feel they will be a part of a discussion or decision that will directly affect them. They should feel like their ideas will be listened to and valued.

When attendees arrive, it is important to provide a comfortable, inviting atmosphere. If feasible, MDOT or the MPO should use representatives at their meetings, who are culturally, racially, and ethnically compatible with the target populations. Culturally-specific media may also provide a positive assist.

Holding meetings at a variety of times of day and providing food or refreshments make attendance more inviting. Target populations may include senior citizens who may prefer to meet in the daytime, particularly those who have safety concerns about being out after dark. The provision of child care may also be considered.

Some of the attendees may have some apprehension about talking in a large group setting. This potential problem can be overcome by the use of small breakout sessions, facilitated by local community people. Another way to overcome this problem is the use of the open house meeting style where participants may speak one-to-one with the experts and they may visit in anytime during the scheduled period.

Finally, most people look favorably upon brief meetings. It is better to hold several shorter meetings than to turn people off with long sessions.

#### **F. Availability of Public Documents**

Documents relative to the transportation plan or project being addressed should be placed in locations convenient and frequented by low income and minority target populations. Community centers, county court houses, recreation centers, libraries or churches are appropriate. Locations should include some that are open after 5:00 p.m. The summary documents should be written briefly in the language and to the educational level that is appropriate for the area population considering the populations that are to be reached by the environmental justice process.



## IV. ANALYSIS PROCESSES

The first step in EJ compliance is to identify the spatial locations of the low income and minority populations. The second step is to evaluate proposed selected projects against possible impact and thirdly, decide on the best strategy possible to maximize involvement. Who should be involved in the decision making process and who will be impacted by the expenditure of federal transportation funds.

### A. Scope of Analysis

An Environmental Justice analysis must include an appropriate geographical area for the project or program activities. All areas that could logically be considered part of the “project impact area” or program should be evaluated. On a project level basis, consideration for EJ analysis does not arise until a need statement has justified the probable implementation of a project. The footprint of this project then becomes the basis for identifying the population that would potentially be affected, and the associated negative effects that could arise. These data, as well as information garnered through the Public Involvement Process (PIP), are then analyzed to see if any disproportionate effect will exist as a result of the proposed action. If such an effect is identified, mitigation steps are incorporated into the implementation plan.

Additionally, the Transportation Improvement Plan (TIP) and the Statewide Transportation Improvement Plan (STIP) presently analyze MDOT and MPO projects to ensure that the benefits of Federal transportation dollars are not disproportionately distributed among the populations existent in the area. MPOs’ long range plans also examine proposed future projects in a similar fashion.

For MDOT, the State Long Range Plan (SLRP) is a broad policy document guiding the implementation of transportation projects in Michigan. There are no projects contained within it. Instead, the SLRP is a series of goals, objectives, and corresponding strategies that the state hopes to accomplish within the time frame of the plan. MDOT has an obligation to ensure that none of the goals or objectives contains an inherent potential for producing a disproportionate effect as implemented.

### B. Definitions

Low income and minority populations are defined by final USDOT Order 5610.2 on Environmental Justice, contained in the Federal Register on April 15, 1997.

**Low-Income** means a person whose median household income is at or below the Department of Health and Human Services poverty guidelines. [See Appendix C]

**Minority** means a person 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 people of North America and who maintains cultural identification through tribal affiliation or community recognition).

**Low-Income Population** means any readily identifiable group of low-income persons who live in geographic proximity, and, if circumstances warrant, geographically dispersed/transient

Persons (such as migrant workers or Native Americans) who will be similarly affected by a proposed DOT program, policy or activity.

**Minority Population** means any readily identifiable groups of minority persons who live in geographic proximity, and if circumstances warrant, geographically dispersed/transient persons (such as migrant workers or Native Americans) who will be similarly affected by a proposed DOT program, policy or activity. It should be noted that the proposed new Federal Rules require expanding the analysis to the persons with a disability and the elderly.

**<sup>1</sup>Elderly** means a person aged 65 or older.

**<sup>2</sup>Persons with a disability** means anyone with a physical or mental impairment substantially limiting one or more major life activities; has a record of such impairment; or is regarded as having such an impairment [ (A) self-care, (B) receptive and expressive language, (C) learning, (D) mobility, (E) self-direction, (F) capacity for independent living, (G) economic self-sufficiency, (H) cognitive functioning, and (I) emotional adjustment.

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<sup>1</sup> Definition from the U.S. Department of Labor

<sup>2</sup> Based on the U.S. Census distribution of population tables

### C. Sources and Quality of Data Needed

MDOT recommends using U.S. Census data to identify low-income and minority populations. The 2000 Census data is recommended as the best available source for demographic data for EJ analysis purposes. FHWA recommends the use of U.S. Census data to identify minority persons or populations, because the data has specific definitions of minority groups and can be useful to determine minority populations, especially in urban areas.

The U.S Census Bureau 2000 demographic statistics divides racial groupings other than “White” into five groupings:

1. Black or African American;
2. American Indian or Alaskan Native;
3. Asian;
4. Native Hawaiian; and
5. Other. This category is predominantly used as identification for people of Hispanic origin.

Understanding the U.S Census Bureau’s definition of racial groupings is imperative to interpreting the final EJ findings and the relative association in the racial groupings as identified in EO 12898. According to the U.S Census Bureau 2000, the following definition shows those indicated categories:

***Black or African American*** refers to people having origins in any of the Black racial groups of Africa. It includes people who indicated their race or races as “Black, African American, Negro,” or wrote in entries such as African American, Agro American, Nigerian, or Haitian.

***American Indian or Alaskan Native*** refers to people having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment. It includes people who indicated their race or races by marking this category or writing in their principal or enrolled tribe, such as Rosebud, Sioux, Chippewa, or Navajo.

***Asian*** refers to people having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent. It includes people who indicated their race or races as “Asian Indian,” “Chinese,” “Filipino,” “Korean,” “Japanese,” “Vietnamese,” or “Other Asian,” or wrote in entries such as Burmese, Hmong, Pakistani or Thai.

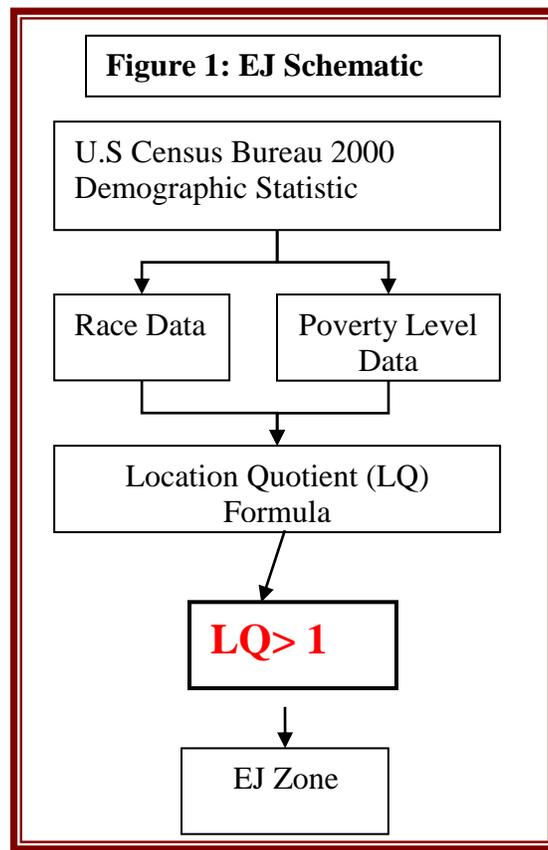
***Native Hawaiian and Other Pacific Islander*** refer to people having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands. It includes people who indicated their race or races as “Native Hawaiian”, “Guamanian or Chamorro”, “ Samoan”, or “Other Pacific Islander”, or wrote in entries such as Tahitian, Mariana Islander, or Chuukese.

**Other** refers to people who do not identify with the other population groups. This category is predominantly used as identification for people of Hispanic origin. It should be noted that “Other race” in the U.S. Census Bureau 2000 demographic figures is synonymous to the Hispanic population. This term “Other race” and “Hispanic” is thus interchangeably used in this analysis to mean the same group of people.

One other statistic relevant to this analysis is the low-income population group, as specified in EO 12898. As determined in the U.S Census Bureau 2000 statistic, through the Department of Human Services poverty guidelines, the block group statistics for people considered low-income population is captured under the title – Poverty Status in 1999, “Individuals”. This represents the number of people determined to be living below poverty standards in such particular block group. This statistic encompasses people of all races.

#### **D. Identifying Target Populations**

In order to identify Target Populations, MDOT uses the Location quotient (LQ) method. The LQ is an economic based statistical technique used in calculating and comparing the share contribution of an areas local economy to another referenced economy. The LQ method can be defined as a statistical method that strives to show if a local economy has a greater share than expected of a given economy. Using the average of the local economy against the average of the local economy against the average of the larger economy the LQ method marks that extra contribution of such local economy as the additional contribution that such local economy is contributing. In this scenario, the LQ method is used to determine whether or not a particular block group has a greater share of its racial groupings than expected in the state. The minority or low-income population groups having a greater than one (1) contribution will be recognized as an EJ zone in the state. Figure 1 outlines the schematic process that is used to identify minority or low-income population groups.



The statistical method used for zones is as follows:

$$\text{EJ Zone} = \frac{\text{Block Group} / \text{Race in the State}}{\text{Total Pop. in that Block Group} / \text{Total}}$$

Pop. in the State

formula of LQ determining EJ

$$\frac{\text{No. of Race in a}}{\text{Total No. of that}}$$

Total

The method of interpreting the resulting calculated values are as follows:

**LQ < 1.0:** Such block groups are considered Non-EJ zones. This implies that such block groups having values less than one (1) have insufficient racial population in the state and as such will not be considered an EJ zone.

**LQ = 1.0:** Such block groups have populations that are just sufficient for their constituents

**LQ > 1.0:** Places with LQ greater than one (1) provides evidence that these groups have racial populations greater than their expected EJ populations. These block groups would represent the selection set considered being EJ zones.

Appendix A includes examples of calculations used to determine EJ zones as provided in the Michigan Department of Transportation, Statewide Environmental Justice Analysis, Process Development Manual.

The basis for Environmental Justice is disproportionate impact(s) to minority and low-income population groups. Even a very small minority or low-income population in a project (or study) area does not eliminate the possibility of a disproportionately high or adverse effect of a proposed action or project on these populations. It is especially important, in cases where a project impacts a very small number or area of low-income or minority populations, to thoroughly document in both the planning and NEPA processes that:

- Other reasonable alternatives were evaluated and were eliminated for reasons such as the alternatives impacted a far greater number of people or did greater harm to the environment, etc.
- The project's impact is unavoidable,
- The benefits of the project far out-weigh the overall impacts, and
- Identify mitigation measures being taken to reduce the harm to low-income or minority populations.

If it is concluded that no minority and/or low-income population groups are present in the project area, document how the conclusion was reached and indicate this in NEPA document. If it is determined that one or more of these population groups are present in the area, potential disproportionate tests will have to be administered.

## **V. DISPROPORTIONATE EFFECTS TESTS**

After the target population areas have been identified, the actual EJ analysis or "tests" for disproportionately high and adverse effects and equal benefit should be conducted.

### **A. "Disproportionately High and Adverse Human Health or Environmental Effects "**

The following definitions are contained in the final US DOT Order on Environmental Justice contained in the Federal Register on April 15, 1997.

**Adverse effects** means the totality of significant individual or cumulative human health or environmental effects, including interrelated social and economic effects, which may include, but are not limited to: bodily impairment, infirmity, illness or death; 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 services; 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 within a given community or from the broader community; and the denial of, reduction in, or significant delay in the receipt of benefits of DOT programs, policies, or activities.

**Disproportionately high and adverse effect on minority and low- income populations** means an adverse effect that: (1) is predominately borne by a minority population and/or a low-income population, or (2) will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low-income population.

## **B. Equal Benefit**

The October 1, 1999, US DOT letter clarifying EJ states that Executive Order 12898 also applies to the need to demonstrate equal benefit from transportation investments. MDOT's EJ tests and analysis is captured in every STIP year analysis where maps are generated to show project locations as identified in the Five Year Plan. Positive benefits are expressed in the number of transportation related projects implemented and the cost ratio benefit for EJ and non EJ areas of Michigan.

## **C. Alternative Impacts and Assessment**

Identifying objective methods to evaluate potential economic, social, and environmental impacts of transportation system changes on a target population is an imposing task. It is important to have a strategy in place that will improve the environment and public health and safety in the transportation of people and goods, and the development and maintenance of transportation systems and services. We need to make sure that transportation policies and investments mesh with environmental concerns. In addition the interests, issues, and contributions of affected communities must be taken into consideration, and communities are given the opportunity to be involved in the decision-making process.

When evaluating adverse impact or proportionate benefits, two questions must be addressed:

- What types of impacts should be identified and evaluated, and
- How can the positive and negative impacts be “tested” quantitatively or subjectively?

Impacts contained in the Executive Order that are to be evaluated include the totality of significant individual or cumulative human health or environmental effects, including interrelated social and economic effects, which may include, but are not limited to those effects identified in Section A, above.

Some of these impacts can be quantified in measurable units, such as residential displacements, business and farm displacements, change in travel times between origins and destinations, air quality changes and noise increases. Other impacts are not easy to quantify. These impacts, such as feelings of anxiety due to separation and isolation, destruction of aesthetic value, decreased land value projections, and adverse employment will have to be evaluated based on qualitative standards. They will require subjective analysis by staff and discussion during the public involvement process. Some impacts will require both types of evaluation.

A list of the impacts, and possible measures or questions that can be used in evaluating disproportionate impacts and equal benefits is provided in Appendix B, Alternative Impacts Assessment. It is not necessary to collect new data for every plan or project if the data in the models is current. This will allow for the comparison of changes based on Geographic Analysis Areas (such as block group).

What is important in conducting the above analysis is that the impacts have been discussed and evaluated, even at a subjective level; that something of a “balance sheet” is prepared; and that the issues are presented through the public involvement process to the target area population for their comment and suggestions for evaluation and mitigation.

## **VI. INCORPORATING EJ INTO TRANSPORTATION PLANNING AND ENVIRONMENTAL PROCESSES**

As stated, the EJ process is not intended as a new or separate process to be conducted by the State, local governments or MPOs. It is an analysis and process that should be incorporated into all current planning, environmental, Local Public Agency project (LPA), public transportation, and project development policies, procedures, and processes. All state and MPO written and formal policies and processes need to add a statement recognizing and acknowledging the need to address EJ as part of their policies and processes. Documentation of EJ compliance should be conducted at all levels.

## **A. MPOs**

MPOs should review the actions, analysis and processes which are used to develop their long range plan, Transportation Improvement Program (TIP), and individual transportation projects. MPOs who work with local transit agencies to develop Transit Development plans, should work with their transit agencies to help them incorporate EJ into their policies and processes. All processes should be adjusted to incorporate the principles presented in this guidance document. It is expected that each MPO will need to adapt this guidance for their particular region, the basic principles from this guidance should be followed. These include:

- identifying target populations,
- evaluating proposed project list against target populations,
- conducting tests for disproportionate impacts, and
- developing a public involvement process designed to fully engage low income and minority populations.

All actions and activities relative to EJ should be well documented. This may include, but is not limited to:

### ***Long range transportation planning process:***

- As part of the planning analysis, conduct regional demographic analyses that identify locations of low income and minority populations. Expand this demographic analysis to identify concentrations of the elderly, persons with a disability, and populations without access to private automobiles.
- Expanding and adapting public involvement activities to reach out to and include these populations.
- During the alternatives evaluation process, include EJ into the analyses for each alternative being considered.
- When the final plans are drafted and projects and policies identified, conduct an EJ analysis of the impact of them individually (NEPA process) and as a whole.

### ***Transportation Improvement Program (TIP):***

- Apply the demographic findings to the Traffic Analysis Zones (TAZ) in the MPO models.
- Use transportation models to analyze the impacts (such as changes in travel time) to target populations.

### ***Individual Transportation Projects:***

- Follow the principles in this guidance and incorporate them into the project development and environmental analysis processes for the project.

### ***Public Transportation Planning:***

- Work with the local transit agencies and the MDOT Bureau of Urban and Public Transportation to explain and incorporate the principles in this guidance to their planning processes and proposed routes.

**Local Public Agency Projects:**

- Work with the local government agency managing the project and the MDOT Local Assistance Section to explain and incorporate the principles in this guidance to their project development processes. Document all activities relative to EJ.

All actions, analysis, and public involvement activities relative to EJ should be well documented by the MPO for both the planning and environmental processes. Documentation is critical to the long term ability of the MPO to demonstrate compliance should any questions arise in the future. Documentation should also include the evaluation of all possible alternatives for a project, actions considered and taken to avoid, minimize, mitigate, or enhance the disproportionate impacts and enhance the potential benefits.

**B. MDOT**

MDOT compliance with and responsibility for EJ is broader than that of the MPOs. In addition, to incorporating EJ into its planning and project transportation development processes and conducting an EJ analysis of the STIP, MDOT coordinates the distribution of this guidance, inform, advise, and provide educational opportunities for the MPOs, local governments, and all MDOT staff about EJ. MDOT Planning works with the MPOs and other local government entities to facilitate the development and distribution of a statewide demographic analysis of target populations throughout the state.

MDOT has strived to formally incorporate EJ principles and the actions recommended in this guidance into its planning and project/transportation development processes. At a minimum a reference to EJ or a cross reference to this guidance maybe written into all state planning, project development, environmental, NEPA, transit planning, and LPA processes. MDOT staff responsible for these processes will need to incorporate EJ into their activities and document the processes. Processes needing to address and incorporate EJ include:

- Long Range Plan Development Process
- STIP Development Process
- Project Planning Process
- Project Development Process
- Transit Planning
- Local Public Agency Process

## Appendix A

### SAMPLE CALCULATIONS OF THE LOCATION QUOTIENT INDEX

The following calculations show the process used in arriving at the final calculation.

#### **BLACK**

$$\text{Block Group ratio} = \frac{\text{No. of Blacks in Block Group}}{\text{Total No. of Population in Block Group}} = \frac{4}{753} = 0.0053$$

$$\text{State ratio for Blacks} = \frac{\text{Total No. of Blacks in Michigan}}{\text{Total No. of Population in Michigan}} = \frac{1412742}{9883183} = 0.1429$$

$$\text{LQ (for this particular Block Group)} = \frac{0.0053}{0.1429} = 0.0370 \text{ (Is less than 1- Non EJ)}$$

#### **AMERICAN INDIAN & ALASKAN NATIVE**

$$\text{Block Group ratio} = \frac{\text{No. of American Indian in Block Group}}{\text{Total No. of Population in Block Group}} = \frac{9}{1042} = 0.0086$$

$$\text{State ratio for American Indian} = \frac{\text{Total No. of American Indian in Michigan}}{\text{Total No. of Population in Michigan}} = \frac{58479}{9883183} = 0.0059$$

$$\text{LQ (for this particular Block Group)} = \frac{0.0086}{0.0059} = 1.4576 \text{ (Is greater than 1- EJ zone)}$$

#### **ASIAN & HAWAIIAN** (these population groups were combined under EO 12898)

$$\text{Block Group ratio} = \frac{\text{No. of Asian + Hawaiian in Block Group}}{\text{Total No. of Population in Block Group}} = \frac{4+1}{1042} = 0.0048$$

$$\text{State ratio for Asians} = \frac{\text{Total No. of Asian \& Hawaiian in Michigan}}{\text{Total No. of Population in Michigan}} = \frac{179202}{9883183} = 0.0181$$

$$\text{LQ (for this particular Block Group)} = \frac{0.265}{0.0181} = 0.2134 \text{ (Is less than 1- Non EJ zone)}$$

0.0178

**HISPANIC**

Block Group ratio =  $\frac{\text{No. of Hispanic in Block Group}}{\text{Total No. of Population in Block Group}} = \frac{11}{954} = 0.0115$

State ratio for Blacks =  $\frac{\text{Total No. of Hispanic in Michigan}}{\text{Total No. of Population in Michigan}} = \frac{129552}{9883183} = 0.0131$

LQ (for this particular Block Group) =  $\frac{0.0115}{0.0131} = 0.087$  (Is less than 1- Non EJ zone)

**LOW-INCOME POPULATION**

Low-income Block Group ratio=

$\frac{\text{No. Below Poverty Level: Individual in Block Group}}{\text{Total No. of Poverty Stat Determined Individual in Block Group}} = \frac{78}{918} = 0.0849$

Low-income State ratio =

$\frac{\text{Total No. of Below Poverty Level: Individual in Block Group}}{\text{Total Population of Poverty Stat Determined Individual in Michigan}} = \frac{1021605}{9700622} = 0.1053$

LQ (for this particular Block Group) =  $\frac{0.0849}{0.1053} = 0.80$  (Is less than 1- Non EJ zone)

## APPENDIX B

### Alternative Impacts Assessment

This appendix is provided to assist the project manager with a method to conduct an impact assessment for projects within their program areas or plans.

**Step One:** Determine if a minority or low-income population is present within the project area. (Follow the steps outlined in Figure 1 – EJ Process Schematic Plan). If the conclusion is that no minority and/or low-income population is present within the project area, document how the conclusion was reached and indicate this in the project NEPA document (Categorical Exclusion, Environmental Assessment, or Environmental Impact Statement). If the conclusion is that there are minority population groups and/or low-income population groups present, proceed to Step Two.

**Step Two:** Determine whether project impacts associated with the identified low-income and minority populations are disproportionately high and adverse. The questions are to be dealt with in this order:

**Question 1:** Is the anticipated adverse impact high? Any impact which exceeds a state or federal standard should be considered high. If an impact is determined to be "significant" per NEPA, it would also be considered high. In some areas there may be quantitative standards to draw upon, e.g., noise, air quality, water quality, contamination, etc. In other impact areas, the decision will be based on qualitative standards. A public involvement effort will often be necessary to address qualitative impacts thoroughly.

**Question 2:** Is the high and adverse impact anticipated to fall disproportionately on a low-income or minority population?

Both questions need to be answered to determine whether there maybe disproportionate impacts. The first question is whether the overall adverse impact is predominantly borne by the minority or low-income group? If the answer is "NO", then the impact may not be disproportionate in nature. The second question is whether the adverse effect is "appreciably more severe" than that experienced by non-minority or non-low-income persons." (See potential impacts and questions.) If it is determined that there are disproportionately high and adverse impacts to minority and low-income populations, proceed to Step Three.

*When an adverse effect will be experienced by a low income or minority population, the second question is will the effect experienced by either of these groups be "appreciably more severe" than that experienced by non-minority or non-low-income persons? If the project is similar in its design, comparative impacts, and the relevant number of similar existing system elements in non-minority and non-low-income areas, the project may not reach the disproportionately high and adverse standard. That is, if the proposed facility is similar to that used in many other locations throughout the state or region, and there are non-minority or non-low-income populations who have been affected in a similar manner in these locations, then the adverse impact resulting from the proposed action may not reach the high adverse and disproportionate*

**Step Three:** Propose measures that will avoid, minimize, and/or mitigate disproportionately high and adverse impacts, and provide offsetting benefits and opportunities to enhance communities, neighborhoods, and individuals affected by the proposed project.

**Step Four:** If after mitigation, enhancements, and off-setting benefits to the affected populations, there remains a high and disproportionate adverse impact to minority or low-income populations, then the following questions must be considered:

- Question 1: Are there further mitigation measures that could be employed to avoid or reduce the adverse effect to the minority or low-income population? If further mitigation measures exist, then those measures must be employed unless they are "not practicable."
- Question 2: Are there other additional alternatives to the proposed action that would avoid or reduce the impacts to the low income or minority population? If such an alternative exists, and it is "practicable", then that alternative must be selected. If further mitigation or alternatives that avoid the impact are judged to be not practicable, that conclusion must be documented, supported by evidence, and included in the NEPA document.
- Question 3: Considering the overall public interest, is there a substantial need for the project?
- Question 4: Will the alternatives that would still satisfy the need for the project and has less impact on protected populations (a) have other social, economic, or environmental impacts that are more severe than those of the proposed action, or (b) have increased costs of extraordinary magnitude.

**Step Five:** Include all findings, determinations, or demonstrations in the environmental document prepared for the project.

**Possible sources of information or other assistance to help determine if a low income or minority population is present in the project area.**

1. Examine census information, at the lowest level of aggregation available for the project area.
2. Contact Tribal Governments in the project area.
3. Identify organized groups who may reside in the project area. This may involve contacting places of worship, or initiating contact with various state councils.
4. Contact relevant city or county officials. This may include a city administrator, city or county planner.
5. Contact various state agencies.
6. Contact appropriate federal agencies. This may include Housing and Urban Development, Bureau of Indian Affairs, and others.
7. Contact the appropriate Metropolitan Planning Organization (MPO) or Regional Development Commission.
8. Talk directly to people who live in and near the project area.
9. Undertake direct observation –walk or drive through the project area (scoping process).
10. Other measures as appropriate.

The following variables help to scale the impacts in the table.

1. Current measure or value in region or state
2. Altered measure or value in region or state
3. Positive Impact / Benefit to region or state
4. Adverse impact to region or state
5. Current measure or value w/in Target Population or Area
6. Altered measure or value w/in Target Population or Area
7. Positive Impact /Benefit to Target Population or Area
8. Adverse Impact to Target Population or Area
9. Short term impact
10. Long term impact

The following table contains a list of potential impacts and questions that one might ask as part of any EJ evaluation.

|   | <b>IMPACT</b>  | <b>Questions</b>  |
|---|--|---|
| 1 | Pedestrian Accessibility                                   | <p>How will the traffic speed within the target area change?</p> <p>How will traffic volumes change?</p> <p>Is there a change in traffic type or volume on local (target area) streets?</p> <p>Will there be a change in the relative safety in the target area for pedestrians, bicyclists, motorists?</p> <p>Will the safe and easy access to community or regional resources (shopping, bus stops, schools, etc) be changed?</p> |
| 2 | Air, Noise, and Water Pollution and Soil Contamination     | <p>Will the traffic noise level change?</p> <p>Will the traffic induced air quality increase?</p> <p>Will local waters and soil contamination levels change?</p> <p>Will the overall air, water, and noise quality of the target area change?</p>   |
| 3 | Destruction or Disruption of Man-made or Natural Resources | <p>Will the number of trees and other plants change?</p> <p>Will waterways such as streams and brooks change?</p> <p>Will the number or size of parks, parkland or outdoor recreational opportunities change?</p> <p>Will the changes provide overall improvement or harm to the natural and man-made resources?</p>  |

|   |   |   |
|---|---|---|
| 4 | Destruction or Diminution of Aesthetic Values   | <p>Will any public art or statutes be added, moved or removed?</p> <p>What percentage of project costs are being spent on enhancements?</p> <p>Will the amount of open space change?</p> <p>Is the improvement attractive?</p> <p>Will the view or vista change?</p>  |
| 5 | Destruction or Disruption of Community Cohesion   | <p>Will the man-made dividers, (such as an overpass, bridge, 4 lane or greater roadway or rail tracks) be constructed through a portion of an existing community and cause it to be segmented?</p> <p>Is the proposed project or plan perceived to significantly benefit one portion of existing neighborhoods and significantly harm another portion of the same neighborhoods?</p>  |
| 6 | Destruction or Disruption of a Community's Economic Vitality                                | <p>Will the number of locally owned businesses in the target area change?</p> <p>Will the total number businesses in the target area change?</p> <p>Will the financial investment benefit the target area's population?</p> <p>Will property owners land value change?</p> <p>Will the number of jobs available in the target area change?</p>  |
| 7 | Destruction or Disruption of the Availability of Public and Private Facilities and Services | <p>Will the time to travel to public and private facilities and services (such as schools, medical facilities, shopping, community centers, libraries, etc. change?</p> <p>Will there be a change in the number and type of impediments to access public and private facilities (such as more or wider roadways to cross, additional bus transfers, increased distance to them)?</p> <p>Will the number or location of public or private facilities be changed?</p> |
| 8 | Vibration   | <p>Will vibration levels caused by increased traffic or transit improvements change?</p> <p>Will vibration levels caused by increased traffic or transit improvements change?</p>   |

|    |  |  |
|----|--|--|
| 9  | Adverse Employment Effects   | <p>Will time to travel to jobs throughout the regional area change?</p> <p>Will time to travel to jobs within the target area change?</p> <p>Will the number of jobs change (How many jobs within the target area vs. regional area or state will be lost / gained?)</p> <p>Will the type of jobs available within the target area change?</p> <p>Will the target area become a more attractive place for employers to locate their facilities?</p>  |
| 10 | Displacement of Persons, Businesses, Farms, or Nonprofit Organizations   | <p>How many target vs non-target population persons will be displaced?</p> <p>How many target vs non-target population businesses will be displaced?</p> <p>How many target vs non-target population farms will be displaced?</p> <p>How many target vs non-target population non-profit corporations will be displaced?</p> <p>Will an alternative project location or project approach (which meets the project or plan's purpose and need) displaced fewer target vs non-target population persons, businesses, farms or non-profit corporations?</p> |
| 11 | Increased Traffic Congestion   | <p>Will traffic congestion levels change?</p>  |
| 12 | Isolation  | <p>Will access roadways into and out of the target area become dead ends or be cut-off?</p> <p>Will roadways, bridges and other traffic improvements be constructed to surround the target area and create the feeling of an isolated "island"?</p>  |
| 13 | Exclusion or Separation of Minority or Low-income Individuals Within a Given Community or from the Broader Community | <p>Will the transportation changes result in increased travel time from the target area to community resources such as schools, churches, shopping, jobs, recreational facilities, etc.</p> <p>Will the transportation improvements increase the feeling of exclusion or alienation between the target populations and the broader region or state?</p>  |

|    |   |   |
|----|---|---|
| 14 | The Denial Of, Reduction In, or Significant Delay in The Receipt Of, Benefits | <p>Will access to or use of the transportation improvement be denied to any low income or minority population or groups (for reasons such as cost to use, ability to access, etc.)?</p> <p>Will access to or use of the transportation improvement be denied or more difficult to access based on its location?</p> <p>Will the overall benefits and improvements being proposed by the plan or project be available to the same level and within the same basic time frame to the target population as it will to the broader community, region, or state?</p> |
|----|---|---|

## APPENDIX C

### Questions and Answers on Environmental Justice and Title VI

The following Questions and Answers below were taken from the Federal Highway Administration website on Environmental Justice. ([www.fhwa.dot.gov/environment/ej2.htm](http://www.fhwa.dot.gov/environment/ej2.htm))

#### 1. What are the fundamental concepts of Environmental Justice?

There are three fundamental Environmental Justice principles:

- (1) To avoid, minimize, or mitigate disproportionately high and adverse human health or environmental effects, including social and economic effects, on minority populations and low-income populations.
- (2) To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process.
- (3) To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority populations and low-income populations.

#### 2. Is Environmental Justice a new requirement?

No. The recipients of Federal-aid have been required to submit assurances of compliance with, and the U.S. DOT must ensure nondiscrimination under, Title VI of the Civil Rights Act of 1964 and many other laws, regulations, and policies. In 1997, the Department issued its U.S. DOT Order to Address Environmental Justice in Minority Populations and Low-Income Populations to summarize and expand upon the requirements of Executive Order 12898 on Environmental Justice.

#### 3. What is the legal basis for addressing the concerns of low-income populations?

The Department's planning regulations (23 C.F.R. 450) require metropolitan planning organizations (MPOs) and States to "seek out and consider the needs of those traditionally underserved by existing transportation systems, including, but not limited to, low-income and minority households." As required by NEPA and 23 U.S.C. 109(h), impacts on all communities including low-income communities must be routinely identified and addressed.

#### 4. What is Title VI of the Civil Rights Act of 1964?

Title VI declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance, and authorizes and directs the involved Federal departments and agencies to take action to carry out this policy.

Title VI prohibits discrimination: whether --intentional or where the unintended effect is unduly burdensome.

**5. What is the relationship between the U.S. DOT Order on Environmental Justice and Title VI?**

The U.S. DOT Order clarifies and reinforces Title VI responsibilities as well as addresses effects on low-income populations. The goal of the U.S. DOT Order is to ensure that programs, policies, and other activities do not have a disproportionately high and adverse effect on minority or low-income populations. This goal is to be achieved, in part, by implementing both Title VI and NEPA during the development and implementation of transportation activities.

**6. What types of activities require Title VI and Environmental Justice considerations?**

Title VI and environmental justice apply to all U.S. DOT programs, policies, and activities, including, but not limited to: contracting, system planning, project development, implementation, operation, monitoring, and maintenance.

**7. How early can issues which give rise to Title VI/ Environmental Justice concerns be addressed?**

At the start of the planning process, planners must determine whether Environmental Justice issues exist and use data and other information to: (1) determine benefits to and potential negative impacts on minority populations and low-income populations from proposed investments or actions; (2) quantify expected effects (total, positive and negative) and disproportionately high and adverse effects on minority populations and low-income populations; and (3) determine the appropriate course of action, whether avoidance, minimization, or mitigation. If issues are not addressed at the planning stage, they may arise during project development, or later when they could be more difficult to mitigate and delay project decisions.

Environmental Justice is an important part of the planning process and must be considered in all phases of planning. This includes all public-involvement plans and activities, the development of Regional Transportation Plans [In Michigan they are commonly known as the Metropolitan Planning Organizations Transportation Long Range Plan], Transportation Improvement Programs (TIP's), Statewide Transportation Improvement Programs (STIP's), and work programs (such as the Unified Planning Work Programs (UWP's)). A truly integrated and effective planning process actively considers and promotes environmental justice within projects and groups of projects, across the total plan, and in policy decisions.

**8. Must Title VI and Environmental Justice be considered ONLY on projects requiring an Environmental Impact Statement (EIS)?**

No. Title VI and Environmental Justice applies to all planning and project development programs, policies and activities. In project development,

environmental justice should be considered in all decisions whether they are processed with an Environmental Impact Statements (EIS's), Environmental Assessments (EA's), Categorical Exclusions (CE's), or Records of Decision (ROD's). Potential impacts to the human environment should drive the processing option decision as much as potential impacts to the natural environment. Impacts to both the natural and human environment are to be given comparable consideration throughout transportation decision making.

At the scoping stage in the NEPA process, which provides early identification of public and agency issues, there should be adequate consideration of Title VI and environmental justice. Minority and low-income populations should be identified as early as possible and their concerns should be examined and addressed, preferably in planning. Because the nondiscrimination requirements of Title VI extend to all programs and activities of State DOTs and their respective sub-recipients and contractors, the concepts of Environmental Justice apply to all State projects, including those which do not involve Federal-aid funds, whether Advance Construction, Design Build, or not.

Communities are constantly changing, so evaluation of human impacts must be given continuous attention throughout planning, project development, implementation, operation, and maintenance. Mitigation of any sort can cause negative as well as positive impacts. Be aware of who is being impacted and how.

**9. Do all impacts have to be evaluated for Title VI and Environmental Justice, or just health and environmental impacts?**

All reasonably foreseeable adverse social, economic, and environmental effects on minority populations and low-income populations must be identified and addressed.

As defined in the Appendix of the USDOT Order, adverse effects include, but are not limited to:

- Bodily impairment, infirmity, illness, or death.
- 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 services.
- 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 within a given community or from the broader community.
- The denial of, reduction in, or significant delay in the receipt of, benefits of DOT programs, policies, or activities.

**10. Who is considered to be a "Minority" for purposes of Title VI and Environmental Justice?**

The U.S. DOT Order (5610.2) on Environmental Justice defines "Minority" in the Definitions section of the Appendix, and provides clear definitions of the four (4) minority groups addressed by the Executive Order. These groups are:

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).
4. American Indian and Alaskan Native (a person having origins in any of the original people of North America and who maintains cultural identification through tribal affiliation or community recognition).

**11. What is considered "Low-Income" for purposes of Environmental Justice?**

The FHWA Order defines "low-income" as "a person whose household income is at or below the Department of Health and Human Services poverty guidelines." The Department of Health and Human Services (HHS) poverty guidelines are used as eligibility criteria for the Community Services Block Grant Program and a number of other Federal programs. However, a State or locality may adopt a higher threshold for low-income as long as the higher threshold is not selectively implemented and is inclusive of all persons at or below the HHS poverty guidelines. The most current HHS poverty guidelines can be found at HHS's website: <http://aspe.hhs.gov/poverty/figures-fed-reg.shtml>

**12. Can the determinations and discussions of minority and low-income be combined?**

The two terms "minority" and "low-income" should not presumptively be combined. There are minority populations of all income levels; and low-income populations may be minority, non-minority, or a mix in a given area. As the definition of minority indicates, even minority populations can be of several categories. When such distinctions exist, appropriate assessment, discussion, and consideration should be provided using appropriate and accurate descriptors. Within documentation, an Environmental Justice discussion may appear either with discussion of other demographic information (other protected-group and general area information), assessment, and consideration, or as a separate discussion. As in any public document, specific information about any one individual or any very small group should not appear in the document to protect privacy; however, backup data should appear in the files. Descriptions in such documents should be statistical, group, or location-based.

**13. Should discussions about populations, such as the elderly, children, or the disabled be included when addressing Environmental Justice and Title VI?**

Yes. Within the framework provided by Executive Order 12898 on Environmental Justice, the U.S. DOT Order (5610.2) addresses only minority populations and low-income populations, and does not provide for separate consideration of elderly, children, disabled, and other populations. However, concentrations of the elderly, children, disabled, and other populations protected by Title VI and related nondiscrimination statutes in a specific area or any low-income group ought to be discussed. If they are described as low-income or minority, the basis for this should be documented.

For community impact assessment, concentrations of the elderly, children, the disabled, or similar population groups (i.e., female head of household) could also experience adverse impacts as the result of an action. All impacts on sectors of the community, including minority and low-income populations as well as impacts on the community as a whole, should be routinely investigated, analyzed, mitigated, and considered during decision making, similar to investigations of impacts on minority populations and low-income populations. All NEPA processing documentation should address all impacts (to the human and natural environments), and describe any mitigating protections or benefits that would be provided by Federal or State law, or as part of the action. In particular, the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 et seq.), prohibits discrimination on the basis of age in programs receiving Federal financial assistance while persons with a disability are protected by Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794 and 49 C.F.R. Part 27.7).

**14. How can minority populations be determined for a given area?**

U.S. Census data has specific definitions of minority groups and can be useful for determining minority populations. Census data is available at the census tract, census block, and block group level. Explanation of how these classifications are defined can be found in U.S. Census publications on social, economic, and housing characteristics, under "Area Classifications," and at <http://www.census.gov/geo/www/tiger/glossary.html>. The U.S. Census data also includes economic census data and TIGER (Topologically Integrated Geographic Encoding and Referencing) files, which are a digital database that can be used with mapping or Geographic Information System (GIS) software to show geographic distribution of populations and other census data. The types of data sets and resources available from the U.S. Census Bureau are summarized on their website at <http://www.census.gov>.

Other data can supplement U.S. Census data, if it has a sound basis and gives an accurate assessment of income levels. In some instances, population characteristics can be derived from information available from MPOs, councils of government, and city or county agencies. Other local sources of information include State and local tax and financing agencies, economic and job development agencies, social service agencies, local health organizations, school districts, local public agencies, and community action agencies. Whatever is used for income, the

source and basis of the information and what it represents should be identified. It is recommended that each situation be evaluated in context.

However, State and local data sets may prove more useful for developing up-to-date profiles of minority populations. Analysts should be resourceful in seeking out supplemental sources of information. Some of this information, however, may vary widely in quality, level of specificity, and format. Therefore, it is important when collecting information that analysts recognize when the data was collected, the data

sources used, and the reliability of the data. The FHWA's 1996 publication, *Community Impact Assessment: A Quick Reference for Transportation*, identifies potential sources of information that can be used to develop community profiles. The guide is available by calling FHWA Headquarters at (202) 366-0106.

No matter the source, analysts should use the most up-to-date data available, understand the basic assumptions used in each compilation, and recognize the purposes for which data were originally collected.

**15. How large must the minority or low-income population be to consider Environmental Justice?**

Disproportionately high and adverse effects, not size, are the bases for Environmental Justice. A very small minority or low-income population in the project, study, or planning area does not eliminate the possibility of a disproportionately high and adverse effect on these populations. What is needed is to show the comparative effects on these populations in relation to either non-minority or higher income populations, as appropriate.

Some people wrongly suggest that if minority or low-income populations are small ("statistically insignificant"), this means there is no environmental justice consideration. While the minority or low-income population in an area may be small, this does not eliminate the possibility of a disproportionately high and adverse effect of a proposed action. Environmental Justice determinations are made based on effects, not population size. It is important to consider the comparative impact of an action among different population groups.

**16. Must there be a neighborhood or community of minority, or low-income groups in order for there to be a Title VI and Environmental Justice effect?**

No. The Executive Order 12898 on Environmental Justice and the DOT Order (5610.2) on Environmental Justice refer exclusively to "populations," while the White House distribution memo refers to both "communities" and "populations." The DOT Order defines each "population" as: (1) any readily identifiable group of minority persons or low-income persons who live in geographic proximity; or (2) geographically dispersed persons, such as migrant workers or Native Americans. Therefore, depending on the context and circumstances, a proposed action could cause a disproportionately high and adverse effect on a population even in cases where there are no clearly delineated neighborhoods or communities.

Neighborhood and community boundaries and impacts, however, should be considered in planning, programming, and project development activities, whether there are minority or low-income populations involved or not. Most importantly, the public should always be involved in defining "neighborhood" and "community" through the public-involvement process, since the identification or definition of neighborhood and community boundaries can be subjective.

#### **17. How should Environmental Justice be addressed in the planning process?**

Environmental Justice must be considered in all phases of planning. Although Environmental Justice concerns are frequently raised during project development, Title VI applies equally to the plans, programs, and activities of planning.

On October 7, 1999, FHWA and FTA issued a memorandum to their respective field administrative offices clarifying Title VI requirements in metropolitan and statewide planning. The memorandum . . . provides technical assistance for three key areas of planning: (1) provides questions and concerns to raise during annual self-certification of compliance with Title VI, metropolitan planning certification reviews in Transportation Management Areas (TMAs), and statewide planning findings; (2) provides questions and concerns to raise while reviewing public-involvement efforts regarding the engagement of minority populations and low-income populations; and (3) encourages and State Planning and Research to begin developing or enhancing technical capability for assessing impact distributions among populations.

#### **18. How should Environmental Justice be addressed in the NEPA process?**

Environmental Justice should be considered and addressed in all NEPA decision making and appropriately documented in Environmental Impact Statements, Environmental Assessments, Categorical Exclusions, or Records of Decision. The Executive Order and the accompanying Presidential Memorandum call for specific actions to be directed in NEPA-related activities. They include:

- Analyzing environmental effects, including human health, economic, and social effects on minority populations and low-income populations when such analysis is required by NEPA;
- Ensuring that mitigation measures outlined or analyzed in EA's, EIS's, and ROD's, whenever feasible, address disproportionately high and adverse environmental effects or proposed actions on minority populations and low-income populations;
- Providing opportunities for community input in the FHWA NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving accessibility to public meetings, official documents, and notices to affected communities; and
- In reviewing other agencies' proposed actions under Section 309 of the

Clean Air Act, EPA must ensure that the agencies have fully analyzed environmental effects on minority communities and low-income communities, including human health, social, and economic effects.

**19. What role does Public Involvement play in the consideration of Environmental Justice?**

Public involvement is an integral part of transportation planning and project development decision making. The DOT Order (5610.2) on Environmental Justice directs the Department to provide minority populations and low-income populations greater access to information on, and opportunities for public participation in matters

that may impact human health and the environment. TEA-21 also emphasizes the meaningful involvement by all the public in transportation decision making.

Effective public involvement in the planning process and the project-development process can alert State and local agencies about environmental justice concerns so that they do not result in surprises during the project-development stage. Continuous interaction between community members and transportation professionals is critical to successfully identify and resolve potential Environmental Justice concerns.

State, regional, local, and tribal agencies should all have public-involvement procedures established that provide for consideration of Environmental Justice. These procedures should provide an inclusive, representative, and equal opportunity for two-way communication resulting in appropriate action that reflects this public involvement. Environmental Justice should be considered in all aspects of planning and project decision making, including the design of both the public-involvement plan and the proposed facility.

**20. What role does community impact assessment play in Environmental Justice?**

The DOT Order (5610.2) on Environmental Justice asks whether a proposed action or plan causes disproportionately high and adverse effects on minority populations and low-income populations, and whether these populations are denied benefits. A framework of analysis that can determine how a proposed action or plan could differentially impact different populations is required. Community impact assessment can provide this framework.

Like public involvement, community impact assessment is an integral part of planning and project development. Community impact assessment is a process to evaluate the effects of a transportation action on a community and its quality of life. Its information should be used to mold the plan and its projects, and provide documentation of the current and anticipated social and economic environment of a geographic area with and without the proposed action. The assessment process is comprised of the following steps: (1) define the project, study, and planning area; (2) develop a community profile; (3) analyze impacts; (4) identify solutions; (5) use public involvement; and (6) document findings. These steps are elaborated on in

FHWA's Community Impact Assessment: A Quick Reference for Transportation, and its companion document, Community Impact Mitigation: Case Studies, published in 1998.

**21. What technical assistance or resources are available on Environmental Justice?**

FHWA's website at [www.fhwa.dot.gov/environment/ej2.htm](http://www.fhwa.dot.gov/environment/ej2.htm) provides a summary of the DOT Order and the FHWA Order, as well as a list of available technical assistance, resources, and contacts on Environmental Justice and Title VI. The "Overview of Transportation and Environmental Justice" brochure has been developed and provides a cogent summary of Environmental Justice, in a single, easy-to-read format. The brochure explains what Environmental Justice is and discusses how transportation partners including the public can support and integrate Environmental Justice and Title VI in transportation decision making. Upcoming products to be developed include case studies and effective practices and will appear on this site.

**APPENDIX D**

2008 Poverty Guidelines for the 48 Contiguous States and the District of Columbia  
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| <b>Size of family unit</b> | <b>Poverty guideline</b> |
|----------------------------|--------------------------|
| 1.....                     | \$10,400                 |
| 2.....                     | 14,000                   |
| 3.....                     | 17,600                   |
| 4.....                     | 21,200                   |
| 5.....                     | 24,800                   |
| 6.....                     | 28,400                   |
| 7.....                     | 32,000                   |
| 8.....                     | 35,600                   |

For family units with more than 8 members, add \$3,600 for each additional member. (The same increment applies to smaller family sizes also, as can be seen in the figures above.)

Source: *Federal Register*, Vol. 73, No. 15, January 23, 2008, pp.3971-3972.