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VICE PRESIDENT &
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December 20, 2002

Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Mail Stop O-16 C1
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Staff

SUBJECT: Environmental Justice

Dear Ms. Vietti-Cook:

On February 11, 1994, President Clinton issued Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations*, 3 CFR 859 ("Executive Order"). The President also issued an accompanying "Memorandum for the Heads of All Departments and Agencies," *Memorandum on Environmental Justice*, dated February 11, 1994, 30 Weekly Comp. Pres. Doc. 279 (February 14, 1994) ("Presidential Memorandum").

Since that time, the NRC has developed guidance regarding the application of the environmental justice concept, as articulated in the Executive Order, to the NRC's licensing process, and has now issued two major decisions regarding its application in the NRC licensing process. On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)[1] requests that the NRC reconsider the application of the Executive Order in the context of the licensing of facilities under Title 10 of the Code of Federal Regulations and issue a Policy Statement to clearly articulate the Commission's expectations regarding the NRC's implementation of the Executive Order and to guide the NRC staff in its revision of its regulatory guidance accordingly.

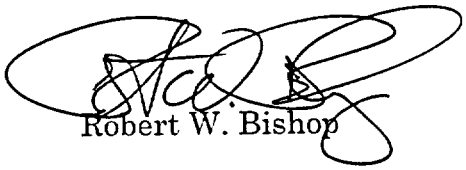
[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Attached is an analysis of the Executive Order and the NRC's subsequent actions that has been prepared by the nuclear energy industry. It demonstrates that the Executive Order does not provide a legal basis for contentions based on environmental justice allegations to be litigated in NRC licensing proceedings. Rather, the NRC should evaluate the environmental impacts of a proposed action consistent with the dictates of the National Environmental Policy Act. The issue under NEPA is not whether a particular major federal action has a disproportionate impact on minority or low-income populations, but whether there are significant adverse impacts, regardless of the population affected. If there are any adverse environmental impacts, they must be resolved in a non-discriminatory manner. The NRC's implementation of the Executive Order cannot lead to a different result.

This issue has immediate implications to the three companies currently preparing early site permit applications for submittal in 2003, and to every other applicant for a license from the NRC. Compliance with current NRC guidance will require the expenditure of significant NRC and license applicant resources. As a result, the nuclear energy industry respectfully requests that the Commission address this issue as promptly as possible.

If you have any questions concerning this matter please contact me at 202.739.8139 or rwb@nei.org.

Sincerely,



Robert W. Bishop

Enclosure

c: The Honorable Richard A. Meserve, Commissioner, USNRC
The Honorable Greta Joy Dicus, Commissioner, USNRC
The Honorable Nils J. Diaz, Commissioner, USNRC
The Honorable Edward McGaffigan, Jr., Commissioner, USNRC
The Honorable Jeffrey S. Merrifield, Commissioner, USNRC
William D. Travers, Executive Director of Operations, USNRC
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ENVIRONMENTAL JUSTICE

Background

On February 11, 1994, President Clinton issued Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations*, 3 CFR 859 ("Executive Order"). The President also issued an accompanying "Memorandum for the Heads of All Departments and Agencies," *Memorandum on Environmental Justice,* dated February 11, 1994, 30 Weekly Comp. Pres. Doc. 279 (February 14, 1994) ("Presidential Memorandum").

The Executive Order does not legally apply to the U.S. Nuclear Regulatory Commission ("NRC") because the NRC is an independent federal agency. However, the NRC voluntarily committed to carry out the measures set forth in the Executive Order and the accompanying memorandum.[1]

Three sections of the Executive Order are pertinent to the application of the Executive Order by the NRC.

First, Section 1-101 of the Executive Order, *"Agency Responsibilities,"* provides:

> To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effect of <u>its</u> programs, policies, and activities on minority populations and low income populations in the United States . . . [Emphasis added.]

Second, Section 2-2, *"Agency Responsibilities for Federal Programs,"* provides that:

> Each Federal agency shall conduct <u>its</u> programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin. [Emphasis added.]

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[1] Letter from NRC Chairman Selin to President Clinton dated March 31, 1994.

Finally, Section 6-609, *Judicial Review,* states that:

> This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. [Emphasis added.]

Implementation by the NRC

The NRC submitted a Draft Environmental Justice Implementation Plan ("Plan") to the Federal Interagency Working Group established by the Environmental Protection Agency ("EPA") pursuant to the Executive Order.[2] The NRC's Plan established five "Principles of Environmental Justice Implementation:"

- Involving NRC senior management to ensure appropriate policy information flow occurs among different entities within the NRC and to outside parties

- Transacting nuclear regulation publicly and candidly

- Seeking and welcoming public participation through improving outreach efforts with stakeholders, including minority and low-income communities

- Integrating "environmental justice" into NRC's National Environmental Policy Act ("NEPA") activities, including evaluating the extent to which minority and low-income communities will be impacted by a proposed project and the extent to which they will receive a share of the economic benefits of a project

- Continuing the NRC's review and monitoring of the NRC's financial assistance programs to ensure that the recipients of funding under those programs comply with the provisions of Title VI of the Civil Rights Act of 1964. The NRC concluded that those programs are limited (1) to funding training and travel under Section 274, *Cooperation With States,* of the Atomic Energy Act of 1954, as amended, and (2) to awarding grants for the support of scientific research and for the exchange of scientific information.

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[2] Letter from Ms. Maria E. Lopez-Otin, NRC Subcommittee Member, to Ms. Kathy Aterno, Chair, Environmental Justice Subcommittee on Policy and Coordination, EPA, dated December 12, 1994.

Four of those enumerated principles are fully in accord with the Executive Order and the accompanying Presidential Memorandum.

Unfortunately, the fourth enumerated principle, and the NRC's subsequent application of that approach in a variety of licensing contexts, is not consistent with the Executive Order. For example, Regulatory Guide 4.7, *"General Site Suitability Criteria for Nuclear Power Stations,"* (Revision 2, April 1998), directs the NRC staff to evaluate the suitability of a nuclear power station site near "distinctive" communities to demonstrate that the construction and operation of the proposed facility will not adversely affect the distinctive character of the community nor disproportionally affect minority or low-income populations. Further, NRR Office Letter No. 906, Revision 2, *"Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues,"* (September 21, 1999), states that "[e]nvironmental justice reviews will be performed for all regulatory actions, including licensing actions and rulemaking activities, requiring preparation of an environmental impact statement (EIS), a supplement to an EIS, or a generic EIS (GEIS)."[3] (Emphasis added.) Similar provisions are made applicable to other types of NRC licenses (e.g., NRC Office of Nuclear Material Safety and Safeguards NUREG-1569, *Draft Standard Review Plan for In-Situ Leach Uranium Extraction License Applications*, Appendix B, *Environmental Justice in National Environmental Policy Act of 1969 Documents*; and NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs,* Draft Report for Interim Use and Comment, Appendix B, *Environmental Justice Procedures*).

However, nothing in NEPA provides support for the premise that either the significance of any impacts or the level of their mitigation are to be judged based on the race or economic status of those affected. NEPA has been in existence for more than 30 years and it has never been interpreted to require an analysis of whether a particular major federal action will have a disproportionate impact on selected populations of differing race or economic circumstances. If there are any adverse environmental impacts, they must be resolved in a non-discriminatory manner.

NRC Licensing Decisions Interpreting the Executive Order

The Commission dealt directly with the application of the Executive Order, and more generally the subject of environmental justice, in its consideration of an Atomic Safety and Licensing Board ("Board") decision in *In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center),* CLI-98-3, 47 NRC 77 (1998). In that proceeding, the Board found that the NRC staff's environmental review of the proposed facility was inadequate because it failed to investigate thoroughly the

[3] See, for example, NUREG-1714, *Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Toole, County, Utah,* Private Fuel Storage, L L C., Docket No. 72-22 (June 2000).

possibility that "racial considerations" affected the facility's siting, and it failed to account fully for the facility's "disparate impact" on two nearby African-American communities.[4]

With respect to the Board's decision concerning possible racial discrimination in the site selection process, the Commission concluded that "the Board's approach cannot in our view be sustained, notwithstanding the worthy intentions that motivated it."[5] The Commission observed that "[t]he Board apparently felt bound by President Clinton's executive order, and by a former NRC Chairman's commitment to abide by that order, to inquire on its own into racial discrimination, so as to 'give meaning' to the executive order."[6] "But the Board's effort to enforce what it saw as a 'nondiscrimination directive' in the executive order (cite omitted) was misplaced. The executive order, by its own terms, established no new rights or remedies. *See* E.O. 12898, § 6-609."[7]

Unfortunately, and at odds with the analysis of the Executive Order cited immediately above, the Commission then went on to affirm the Board's "disparate impact" ruling. Notwithstanding its conclusion that the Executive Order established no new rights or remedies, the Commission concluded that a "'[d]isparate impact' analysis is our principal tool for advancing environmental justice under NEPA."[8] As will be discussed in more detail below, the Commission's conclusion that NEPA requires an analysis of not just the socio-economic implications of a proposed major federal action, but also an evaluation of disparate impacts on the populations that are the subject of the Executive Order, is without legal foundation.

The Commission more recently interpreted its responsibilities regarding environmental justice in *In the Matter of Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation* NRC Docket No. 72-22-ISFSI ("PFS")[9]. The Licensing Board in that case considered an environmental justice contention that

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[4] CLI-98-3, 47 NRC 77, 100 (1998).

[5] 47 NRC at 101.

[6] Id. at 102.

[7] Ibid.

[8] Id. at 100.

[9] PFS is a group of eight electric utility companies that have partnered with the Skull Valley Band of the Goshute Indians to build and operate a temporary facility to store spent nuclear fuel from commercial nuclear power plants on the Indian tribe's reservation in Skull Valley, Utah. PFS has applied for a license to construct and operate the facility from the NRC, which has regulatory jurisdiction over such facilities. The Skull Valley Band of Goshute Indians, a sovereign nation under federal law, has agreed to lease 820 acres of their 18,000-acre reservation in Skull Valley, Utah to the PFS project.

had been filed by some individual members of the Skull Valley Band of Goshute Indians, the lessor of the land upon which the PFS facility would be built. Those individuals had alleged that they had not received an equitable amount of the economic benefits of the project and thus had a basis for objecting under the Executive Order because, as a minority "subgroup" of the tribe, they would suffer a disproportionate environmental impact from the project. The Licensing Board concluded that the Executive Order required the Board to at least hold a hearing and collect evidence to determine whether it has jurisdiction over a matter related to the distribution within the tribe of income derived from the PFS project. The Board stated in its opinion that NEPA and the NRC regulations promulgated thereunder dictated that the project could not go forward unless PFS provided sufficient benefits to all affected parties (i.e., distributed income from the PFS lease equitably among the members of the Band) to offset the negative effects of the project. The Board interpreted the Commission's decision regarding the Claiborne Enrichment Center (discussed above) as a basis for the Board's conclusion that an inquiry into "disparate impacts" required it to consider evidence relating to the distribution of funds within the Skull Valley Band.

In CLI-02-20 (October 1, 2002), the Commission dismissed the environmental justice contention on the basis that "[n]othing in the executive order or NEPA suggests that agencies also must investigate which subgroups within a minority community may obtain special benefits as compared to others."[10] As the Commission correctly observed, the Executive Order established no new rights or remedies, but rather was intended to guide the implementation of NEPA in the evaluation of environmental impacts. However, the Commission's decision let stand the principle that other contentions based on environmental justice allocations are justiciable in an NRC licensing context. Because there was no "right" to bring an environmental justice claim under NEPA before the promulgation of the Executive Order in 1994, and the Executive Order clearly states that it does not create any new rights or remedies, there is no legal basis for the NRC to allow the litigation of an environmental justice contention subsequent to the issuance of the Executive Order.

Application of the Executive Order to the NRC's Licensing Processes

The Presidential Memorandum addresses the intent of Section 2-2 of the Executive Order. It states that "[i]n accordance with Title VI of the Civil Rights Act of 1964, each federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria that discriminate on the basis of race, color or national origin."[11] [Emphasis added.] The U.S. Supreme

[10] CLI-02-20 at 20.

[11] "Memorandum for the Heads of All Departments and Agencies," *Memorandum on Environmental Justice*, dated February 11, 1994, 30 Weekly Comp. Pres. Doc. 279 (February 14, 1994).

Court has concluded that Section 601 of Title VI [of the Civil Rights Act] itself "prohibits only intentional discrimination."[12] Section 602 of Title VI of the Civil Rights Act authorizes federal agencies to effectuate the provisions of § 601 by issuing rules, regulations, or orders of general applicability.[13] Section 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds."[14] Section 2-2 of the Executive Order is simply a recitation of Section 602 of the Civil Rights Act.

Thus, Section 2-2 of the Executive Order merely directs Federal agencies to enforce Title VI of the Civil Rights Act with respect to programs or activities potentially affecting the human health or the environment that receive Federal financial assistance. As the Presidential Memorandum states explicitly, Section 2-2 of the Executive Order is only applicable to activities receiving Federal financial assistance. The licensing of, for example, utilization facilities under Section 103 of the Atomic Energy Act does not constitute a program or activity "receiving Federal financial assistance."

Further, Section 6-609 of the Executive Order and the accompanying Presidential Memorandum explicitly state that the Executive Order does not create any new right or benefit, substantive or procedural, enforceable by law or equity, by a party against the United States, it agencies, its officers, or any person, nor does it create any right to judicial review involving the compliance or non-compliance by the Unites States, its agencies, or any other person with the Executive Order. Thus, the Executive Order does not establish new substantive or procedural requirements applicable to the NRC's licensing activities (e.g., in the NRC's consideration of an initial license application, a license amendment, or license renewal). These provisions can only be read as precluding a contention to be raised in a licensing proceeding on the basis of an alleged violation of "environmental justice."

As a result, because NRC licensees are not recipients of "Federal financial assistance" through a "plan, program or activity" administered by the NRC, Section 2.2 of the Executive Order cannot serve as the basis for the NRC to apply the Executive Order in any NRC licensing proceeding, and Section 6-609 of the Executive Order can only be read as providing that no contention can be legally grounded on an allegation related to "environmental justice" because to do otherwise would create a new right or responsibility that would be subject to judicial review.

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[12] *Alexander et al. v. Sandoval*, 121 S.Ct. 1511, 1516 (2001).

[13] Id. at 1521.

[14] Ibid.

Implications to NRC NEPA Reviews

Under NEPA, the NRC must evaluate the impacts of a major Federal action significantly affecting the quality of the human environment.[15] Under Section 102(2)(c) of NEPA, agencies are required to analyze significant, adverse impacts on the physical environment resulting from major federal actions as well as proximately related secondary, socio-economic impacts.

The Presidential Memorandum accompanying the Executive Order identifies four important ways for Federal agencies to consider environmental justice under NEPA:[16]

- Each Federal agency should analyze the environmental effects, including human health, economic, and social effects of Federal actions, including effects on minority and low-income populations, when such analysis is required by NEPA.
- Mitigation measures identified as part of a finding of no significant impact (FONSI), an environmental impact statement (EIS), or a record of decision (ROD), should, whenever feasible, address significant and adverse environmental effects of proposed federal actions on minority and low-income populations.
- Each Federal agency should provide opportunities for effective community participation in the NEPA process, including consultation with the affected population when identifying potential effects, considering mitigation measures, or improving the accessibility of public meetings, crucial documents and notices.
- Review of NEPA compliance (such as EPA's review under § 309 of the Clean Air Act) should ensure that the lead agency preparing NEPA analyses and documentation has appropriately analyzed environmental effects on minority and low-income populations, including human health, social and economic effects.

Nothing in NEPA suggests that either the significance of such impacts or the level of their mitigation is to be judged based on the race or economic status of those affected. NEPA has been in existence for more than 30 years, and it has never been interpreted to require analysis of whether a particular major federal action will have a disproportionate impact on selected populations of differing race or economic circumstances. As observed by the U.S. District Court in *New River Valley Greens v. DOT,* an agency "could not be held to have violated NEPA for failing to consider

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[15] See, *National Environmental Policy Act,* Section 102(2)(C), implemented by the NRC in 10 CFR Part 51, Subpart A, *National Environmental Policy Act – Regulations Implementing Section 102(2).*

[16] Memorandum from the President to the Heads of Departments and Agencies. (February 11, 1994).

disproportionate impacts on minorities and low-income populations" prior to the Executive Order because no such mandate exists under NEPA.[17]

Therefore, the issue under NEPA is not whether a particular major federal action has a disproportionate impact on minority or low-income populations, but whether there are significant adverse impacts, regardless of the population affected. The Executive Order does not impose any different approach for a NEPA evaluation. The provisions of Section 1-101 are expressly limited "[t]o the greatest extent practicable and permitted by law." (Emphasis added.) As found by the court in *New River Valley Greens,* disproportionate impacts play no role in NEPA evaluations as a matter of law. Indeed, the Presidential Memorandum supports this interpretation. In discussing the application of NEPA, it does not use the word "disproportionate" or any other term synonymous with it. Rather, the Presidential Memorandum directs each Federal agency to "analyze the environmental effects, including human health, economic and social affects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. section 4321 et seq." (Emphasis added.) Thus, the Executive Order requires agencies to consider these effects only when and to the extent required by NEPA. The Executive Order does not, and in fact legally cannot, change the legal standard against which those impacts are to be judged under NEPA.

More importantly, no provision of NEPA requires the application of the Executive Order to licensing decisions. In fact, Section 6-609 of the Executive Order could not be more clear – the Executive Order applies only to the internal management of Federal agencies and the process by which a Federal agency provides funding to recipients as part of the agency's programs. Conducting an activity (e.g., licensing a nuclear power plant) pursuant to a statutory mandate (e.g., Atomic Energy Act or NEPA) does not turn that licensing activity into a "Federal program" as described in Section 2-2 of the Executive Order (i.e., a program receiving Federal financial assistance) such that environmental justice would become part of a NEPA evaluation.

Summary

Executive Order 12898 was promulgated to provide guidance to Federal agencies regarding the implementation of Title VI of the Civil Rights Act. By its explicit terms, the Executive Order does not create any new legal rights or responsibilities. Finally, it only applies to recipients of Federal financial assistance. The NRC's licensing of the use of radioactive materials under the Atomic Energy Act (e.g., issuing a license or license amendment for a utilization facility licensed under Section 103) does not constitute an activity receiving "Federal financial assistance."

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[17] *New River Valley Greens v. DOT*, LEXIS 16547 (D.D.C. 1996).

Although it is unlikely that anyone would disagree with the fundamental precepts of the Executive Order, the reasonableness of the underlying societal principle does not transform the Executive Order into something it is not -- a binding legal requirement. As a matter of law, even if the NRC were to fail to conduct an "environmental justice" evaluation appropriately in an EIS, or in any other way allegedly not comply with the Executive Order as part of the NRC's NEPA responsibilities, such a failure could not serve as grounds for the NRC not to take the requested licensing action.

Although not dispositive, it is informative that this precise issue has been dealt with by an EPA Environmental Appeals Board.[18] The Appeals Board observed that " . . . the Executive Order does not purport to, and does not have the effect of, changing the substantive requirements for issuance of a permit under the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations." The Appeals Board concluded that "[t]he Region correctly observes that under RCRA and its implementing regulations, 'there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community.' (Cite omitted.) Accordingly, if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency must issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community." The Appeals Board did then identify two areas in which the EPA had discretion to implement the Executive Order within the constraints of RCRA: (1) assuring early and ongoing public participation in permitting and siting decisions, and (2) imposing such terms and conditions on the permit that are deemed necessary to protect human health and the environment. Those applications would seem to be equally pertinent to the NRC's implementation of its responsibilities under the AEA and NEPA.

Finally, any alleged failure of the NRC to comply with the Executive Order would not be judicially reviewable (see Section 6-609 of the Executive Order and the comparable section of the Presidential Memorandum).

Conclusion

The NRC has mistakenly interpreted and applied the Executive Order to licensing actions, assuming incorrectly that the Executive Order implies that the NRC must conduct an "environmental justice" evaluation for <u>all</u> activities being conducted by the NRC, not merely those pertaining to NRC programs and activities associated with the distribution of Federal financial assistance.

Elevating the Executive Order to the status of a substantive legal requirement in licensing proceedings, even if only by the NRC under its NEPA responsibilities, imposes new elements of unpredictability and delay in NRC licensing proceedings

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[18] *In re: Chemical Waste Management of Indiana, Inc.*, 1995 RCRA LEXIS 16, 22 (June 29, 1995).

that is without any legal basis. Simply stated, there is no legal basis for the NRC to require licensees to accumulate the detailed data and provide the comprehensive analyses required to comply with NRC requirements pertinent to "environmental justice" (see, for example, NUREG-1748, Appendix B) and for the NRC to conduct and document its subsequent evaluation. Similarly, there is no legal basis for the NRC to admit a contention related to "environmental justice" in any licensing proceeding.

Recommendation

The Commission should issue a Policy Statement to clearly articulate the Commission's expectations regarding the NRC's implementation of Executive Order 12898 and direct the NRC Staff to revise Regulatory Guide 4.7, *General Site Suitability Criteria for Nuclear Power Stations;* NRR Office Letter No. 906, Revision 2, *Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues;* NUREG-1569, *Draft Standard Review Plan for In-Situ Leach Uranium Extraction License Applications*, Appendix B, *Environmental Justice in National Environmental Policy Act of 1969 Documents*; NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs;* Draft Report for Interim Use and Comment, Appendix B, *Environmental Justice Procedures;* and other NRC guidance consistent with the discussion and analysis above.

The Commission should also direct all Atomic Safety and Licensing Boards that any contentions related to environmental justice currently being adjudicated should be dismissed, and no contentions related to environmental justice should be admitted in any future licensing proceedings.