From: Bo Pham
To: <IPNonPublicHearingFile@nrc.gov>
Date: 8/3/2007 10:43:42 AM
Subject: Fwd: NRC EJ Policy

>>> Bo Pham 6/29/07 11:57 AM >>>
Phillip,

Attached is the NRC's policy statement for Environmental Justice. We do have a list of other items to follow up with you on as well, but will take some time to respond.
Thanks.

Bo Pham
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From: Bo Pham

Created By: BMP@nrc.gov

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conducting a full review of the facility's vulnerabilities, security measures, and evacuation plans, the NRC cannot sufficiently ensure the security of the IP facility against terrorist threats or cannot ensure the safety of New York and Connecticut citizens in the event of an accident or terrorist attack.

The Petitioner's representative participated in a teleconference with the Petition Review Board (PRB) on June 19, 2003, to discuss the Petition. This teleconference gave the Petitioner and the licensee an opportunity to provide additional information and to clarify issues raised in the Petition as supplemented. The results of this discussion were considered in the PRB's determination regarding the request for immediate action and in establishing the schedule for reviewing the Petition.

In a letter dated July 3, 2003, the PRB notified the Petitioner that it had determined that his request would be treated pursuant to 10 CFR 2.206 of the Commission's regulations. The July 3, 2003, letter further stated: ''In response to your requests for immediate actions contained in items 1, 2, 3, and 4 above, the NRC has, in effect, partially granted your requests.''

The NRC sent a copy of the proposed Director's Decision to the Petitioner and to Entergy Nuclear Operations, Inc. (the licensee), for comment on May 17, 2004. The Petitioner responded with comments on June 18, 2004. The comments and the NRC staff's response to them are included in the Director's Decision.

The Director of the Office of Nuclear Reactor Regulation has determined that the NRC's actions have, in effect, partially granted the Petitioner's request for an immediate review of vulnerabilities, security measures, and evacuation and emergency response planning at IP2 and 3. In addition, the NRC previously issued a Director's Decision on November 18, 2002, which addresses many of the security measures and emergency planning issues raised in this Petition. *See* Indian Point, 56 NRC at 300–311. No further action is deemed necessary to address the Petitioner's request regarding these issues. Subsequent to that November 18, 2002, Director's Decision, the NRC in its April 29, 2003, Orders required IP and other plants to implement additional security measures. Moreover, on July 25, 2003, the Federal Emergency Management Agency (FEMA) determined that reasonable assurance existed that appropriate protective measures to protect the health and safety of communities around IP2 and 3 can be implemented in the event of a radiological incident at the IP facility. *See* 68 FR 57702 (October 6, 2003). FEMA reaffirmed this position in a letter to the Petitioner dated June 1, 2004. Consequently, the NRC denies the remainder of the Petitioner's requests. The reasons for this decision are explained in the Director's Decision pursuant to Title 10 of Code of Federal Regulations (10 CFR) Section 2.206 (DD–04–03), the complete text of which is available in ADAMS for inspection at the Commission's Public Document Room, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and from the ADAMS Public Library component on the NRC's Web site, *http://www.nrc.gov/reading-rm.html* (the Public Electronic Reading Room).

A copy of the Director's Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206 of the Commission's regulations. As provided for by this regulation, the Director's Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Director's Decision in that time.

Dated at Rockville, Maryland, this 17th day of August 2004.

For the Nuclear Regulatory Commission.

J.E. Dyer,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 04–19307 Filed 8–23–04; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions

AGENCY: Nuclear Regulatory Commission.

ACTION: Final policy statement.

SUMMARY: On November 5, 2003 (68 FR 62642), the Commission issued, for public comment, a draft policy statement on the treatment of environmental justice (EJ) matters in Nuclear Regulatory Commission (NRC) regulatory and licensing actions. This final policy statement reaffirms that the Commission is committed to full compliance with the requirements of the National Environmental Policy Act (NEPA) in all of its regulatory and licensing actions. The Commission recognizes that the impacts, for NEPA purposes, of its regulatory or licensing actions on certain populations may be different from impacts on the general population due to a community's distinct cultural characteristics or practices. Disproportionately high and adverse impacts of a proposed action that fall heavily on a particular community call for close scrutiny—a hard look—under NEPA. While Executive Order (E.O.) 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' characterizes these impacts as involving an ''environmental justice'' matter, the NRC believes that an analysis of disproportionately high and adverse impacts needs to be done as part of the agency's NEPA obligations to accurately identify and disclose all significant environmental impacts associated with a proposed action. Consequently, while the NRC is committed to the general goals of E.O. 12898, it will strive to meet those goals through its normal and traditional NEPA review process. This final policy statement reflects the pertinent comments received on the published draft policy statement.

DATES: Effective August 24, 2004.

FOR FURTHER INFORMATION CONTACT: Brooke G. Smith, Office of General Counsel, Mail Stop O–15D21, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: (301) 415–2490; fax number: (301) 415–2036; e-mail: *bgs@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Summary of Public Comments and Responses to Comments.
(A) General Comments
(B) Creation of New or Substantive Rights
(C) NEPA as a Basis for Considering Environmental Justice-Related Matters
(D) Racial Motivation
(E) Environmental Assessments
(F) Generic/Programmatic EISs
(G) Numeric Criteria
(H) Scoping/Public Participation
III. Final Policy Statement.
IV. Guidelines for Implementation of NEPA as to Environmental Justice Issues.

I. Background

In February 1994, President Clinton issued E.O. 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' which directed each Federal agency to ''* * * make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. * * *'' Executive Order No. 12898 (Section 1–101), 59 FR 7629 (February 16, 1994). Although

independent agencies, such as the NRC, were only requested, rather than directed, to comply with the E.O., NRC Chairman Ivan Selin, in a letter to President Clinton, indicated that the NRC would endeavor to carry out the measures set forth in the E.O. and the accompanying memorandum as part of the NRC's efforts to comply with the requirements of NEPA. *See* Letter to President from Ivan Selin, March 31, 1994. Following publication of the Council on Environmental Quality's (CEQ's) guidelines [1] in December 1997 on how to incorporate environmental justice in the NEPA review process, the NRC staff in the Office of Nuclear Material Safety and Safeguards (NMSS) and the Office of Nuclear Reactor Regulation (NRR) each developed their own environmental justice guidance with the CEQ guidance as the model. *See* NUREG–1748, ''*Environmental Review Guidance for Licensing Actions Associated with NMSS Programs*'' (August 22, 2003) (ADAMS Accession No. ML032450279); NRR Office Instruction, LIC–203, Rev. 1, ''*Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues*'' (May 24, 2004) (ADAMS Accession No. ML033550003).

In 1998, the Commission, for the first time in an adjudicatory licensing proceeding, analyzed the E.O. in *Louisiana Energy Services* (*LES*). *See Louisiana Energy Services* (Claiborne Enrichment Center), CLI–98–3, 47 NRC 77 (1998). In *LES*, the applicant was seeking an NRC license to construct and operate a privately owned uranium enrichment facility on 70 acres between two African American communities, Center Springs and Forest Grove. *See id.* at 83. One of the impacts of constructing and operating the facility entailed closing and relocating a parish road bisecting the proposed enrichment facility site. *See id.* The intervenor's contention alleged that the discussion of impacts in the applicant's environmental report was inadequate because it failed to fully assess the disproportionate socioeconomic impacts of the proposal on the adjacent African American communities. *See id.* at 86.

In *LES*, the Commission held that ''[d]isparate impact analysis is our principal tool for advancing environmental justice under NEPA. The NRC's goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities.'' *Id.* at 100. The Commission emphasized that the E.O. did not establish any new rights or remedies; instead, the Commission based its decision on NEPA, stating that ''[t]he only ''existing law'' conceivably pertinent here is NEPA, a statute that centers on environmental impacts.'' Id. at 102.

This view was reiterated by the Commission in *Private Fuel Storage* (*PFS*). *See PFS* (Independent Spent Fuel Storage Installation), CLI–02–20, 56 NRC 147, 153–55 (2002); see also PFS, CLI–04–09, 59 NRC 120 (2004). In PFS, the Commission stated that environmental justice, as applied at the NRC, ''means that the agency will make an effort under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community.'' *Id.* at 156.

The purpose of this policy statement is to present a comprehensive statement of the Commission's policy on the treatment of environmental justice matters in NRC regulatory and licensing actions. The policy statement incorporates past Commission decisions in *LES* and *PFS*, staff environmental guidance, as well as Federal case law on environmental justice. The proposed policy statement, ''Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,'' was published in the **Federal Register** on November 5, 2003 (68 FR 62642). After an extension, the public comment period expired on February 5, 2004. This final policy statement reflects the pertinent comments received on the published draft policy statement.

II. Summary of Public Comments and Responses to Comments

Twenty-nine organizations and individuals submitted written comments on the draft policy statement. The commenters represented a variety of interests. Comments were received from individuals, Federal and State agencies, and citizen, environmental, and industry groups. The comments addressed a wide range of issues concerning the treatment of environmental justice matters in the Commission's regulatory and licensing actions. The Commission also received approximately 700 postcards expressing general opposition to the policy statement.

The following sections A through H represent major subject areas and describe the principal public comments received on the draft policy statement (organized according to the major subject areas) and present NRC responses to those comments.

(A) General Comments
(B) Creation of New or Substantive Rights
(C) NEPA as a Basis for Considering Environmental Justice-Related Matters
(D) Racial Motivation
(E) Environmental Assessments
(F) Generic/Programmatic EISs
(G) Numeric Criteria
(H) Scoping/Public Participation

A. General Comments

A.1 Comment: Some commenters suggested that the policy statement include a detailed explanation of how the new policy on environment justice differs from the current staff EJ guidance and NRC practice. Specifically, one commenter stated that the NRC should make explicit how the new policy would change its treatment of EJ-related issues. Another commenter suggested that the statement provide examples detailing how NEPA would be implemented and interpreted under the new policy statement.

Another commenter recommended that the NRC develop a comprehensive statement that includes an analysis of the impacts and effects of the proposed action on low-income and minority populations by building on the past ten years of EJ policy development and guidance. Another commenter recommended that the NRC review staff guidance documents prepared by the NRC and other Federal agencies on implementing the E.O. and evaluate how well the guidance was carried out and how effective the guidance has been. After identifying the effective portions, the comment stated that the NRC should revise and assemble the guidance into a single, integrated policy that, at a minimum, contains language from CEQ's ''Environmental Justice: Guidance Under the National Environmental Policy Act.''

Response: This policy statement is intended to be a Commission-approved general clarification of the Commission's position on the treatment of environmental justice issues in NRC regulatory and licensing actions. This statement reaffirms the Commission's

[1] ''Environmental Justice, Guidance Under the National Environmental Policy Act,'' Council on Environmental Quality (Dec. 10, 1997). The NRC provided comments on the CEQ's draft and revised draft versions of this document to both CEQ and the Office of Management and Budget. Letter to Mr. Bradley M. Campbell, Associate Director for Toxics and Environmental Quality, Council on Environmental Quality from Hugh L. Thompson, Jr., Deputy Executive Director for Regulatory Programs, U.S. NRC, April 25, 1997; letter to Mr. Zach Church, Office of Management and Budget, from Hugh L. Thompson, Jr., Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support, May 10, 1996.

commitment to pursue and address environmental justice policy goals through the NEPA process by (1) Consolidating the Commission's views as set forth in the *LES* and *PFS* decisions, (2) combining NRR and NMSS guidance to provide an agency prospective, and (3) addressing current case law relevant to environmental justice matters as litigated in the federal court system. In preparing the policy statement, the Commission also consulted guidance from other Federal agencies and CEQ, regarding the treatment of environmental justice.

This policy statement does not change how the agency will implement or interpret NEPA, except to clarify certain procedures that correctly identify and adequately weigh significant adverse environmental impacts on low-income and minority populations by assessing impacts peculiar to those communities. At bottom, this policy statement does not represent a change in the overall practice of the Commission with regard to EJ-related matters but a clarification that the NRC will address EJ matters in its normal NEPA approach.

A.2 Comment: One commenter stated that the draft policy statement narrows the scope of E.O. 12898 and NEPA with respect to environmental justice issues. This commenter asserts that the policy statement, which provides that ''* * * EJ issues are only considered when and to the extent required by NEPA,'' limits agency discretionary authority in considering EJ issues and, thus, should be changed to conform to the E.O. urging that agencies address environmental justice ''to the greatest extent practicable and permitted by law * * *'' and to the CEQ Guidance.

Response: As an independent agency, the Commission is not required to follow the E.O. or to adopt CEQ guidelines. The E.O. itself states that it does not change an agency's obligations or expand its authority. The Commission's intent in drafting an EJ policy statement is simply to ensure that EJ is a part of the normal and standard NEPA process in NRC regulatory and licensing actions.

A.3 Comment: One commenter stated that the draft policy statement disregards NRC staff guidance. Specifically, the commenter stated that the policy overlooks NRR's guidance for ensuring that public participation by affected minority and low-income communities is encouraged. Also, the commenter stated that the policy statement overlooks steps developed by NRC staff to ensure that an adequate NEPA review of environmental impacts on minority communities has been done.

Response: This policy statement does not disregard staff guidance. Rather, it seeks to clarify the Commission's environmental justice policy, by, among other things, combining NRR and NMSS guidance to provide a consolidated agency view. NRR and NMSS staff guidance relating to NEPA and, specifically, environmental justice will continue to be used and will be updated, if necessary, to reflect the direction of this final policy statement. Matters not addressed in the policy statement but discussed in the staff guidance will remain unchanged.

A.4 Comment: Some commenters urged that the draft statement be rejected because it retreats from or undermines the goals and intent of E.O. 12898. Other commenters stated that the policy statement de-emphasizes EJ matters in NRC licensing proceedings. Another similar letter commented that the NRC has declared E.O. 12898 to be irrelevant by limiting EJ matters to the NEPA context. The commenter noted that it was the shortcomings and ambiguity of NEPA that made the E.O. necessary in the first place.

Response: The Commission is committed to the general goals set forth in E.O. 12898, and strives to meet those goals as part of its NEPA review process. While the policy statement clarifies that EJ per se is not a litigable issue in our proceedings, it does not de-emphasize the importance of adequately weighing or mitigating the effects of a proposed action on low-income and minority communities by assessing impacts peculiar to those communities. Rather, the policy statement sets forth the criteria for admissible contentions in this area within the NEPA context and consistent with the Commission's regulations in 10 CFR Part 2.

A.5 Comment: Several commenters stated that the policy appears to support the Nuclear Energy Institute's position on environmental justice as submitted to the Commission in December 2002.

Response: While the Commission agreed with some aspects of NEI's position as set forth in its December 2002 letter to the agency, there were a number of positions that the Commission did not agree with as reflected in this policy statement. This policy statement reflects the position of the Commission after considering all of the comments received in response to the draft policy statement.

A.6 Comment: One commenter stated that it would be helpful to understand the policy statement's impact on the Commission's future decision whether to adopt the Department of Energy's (DOE's) final environmental impact statement (EIS) on the High-Level Waste Repository at Yucca Mountain.

Response: Given that the policy statement is not site-specific, it is premature for the Commission to address the specific comment on the Yucca Mountain High-Level Waste Repository. With that said, the Nuclear Waste Policy Act of 1982 (NWPA) requires the NRC to adopt, ''to the extent practicable,'' the final EIS prepared by DOE in connection with the issuance of a construction authorization and license for the Yucca Mountain High-Level Waste Repository. *See* 42 U.S.C. 10134(f)(4). Commission regulations that set forth the standards used to determine whether it is practicable for the Commission to adopt the final EIS published by DOE are at 10 CFR 51.109. These standards will not be impacted by the publication of this policy statement.

A.7 Comment: Several commenters expressed concern that the policy statement does not address mitigation of disproportionate environmental impacts falling on low-income and minority populations.

Response: Current NRR and NMSS staff guidance adequately addresses the issue of mitigation, making clarification in the policy statement unnecessary. For example, with regard to environmental justice matters, Appendix C of NUREG–1748 states that ''[i]f there are significant impacts to the minority or low-income population, it is then necessary to look at mitigative measures. The reviewer should determine and discuss if there are any mitigative measures that could be taken to reduce the impact. To the extent practicable, mitigation measures should reflect the needs and preferences of the affected minority and low-income populations.'' NUREG–1748, C–6, 7.

A.8 Comment: Several comments dealt with the cumulative impacts on certain populations and regions. Specifically, in the context of the proposed Yucca Mountain High-Level Waste Repository, it was stated that Nevada has and continues to bear ''the burden of nuclear projects for the nation.''

Response: The Commission considers cumulative impacts when preparing an environmental impact statement for a proposed action. With regard to environmental justice matters, applicants are asked to provide NRC staff with a description of cumulative impacts to low-income and minority populations and socioeconomic resources, if applicable, in their environmental report (ER) submitted

with any license application. NUREG–1748, 6.4.11.

With regard to the proposed Yucca Mountain High-Level Waste Repository, the NWPA requires the NRC to adopt, ''to the extent practicable,'' the final EIS prepared by DOE in connection with the issuance of a construction authorization and license for the repository. *See* 42 U.S.C. 10134(f)(4). The NRC will follow the NWPA direction.

A.9 Comment: One commenter suggested that where the NRC has never analyzed EJ issues at a particular facility, the NRC should supplement the previous EIS rather than preparing an EA or relying on categorical exclusions.

Response: Pursuant to 10 CFR 51.92, the NRC staff will prepare a supplement to an EIS where the proposed action has not been taken if (1) There are substantial changes in the proposed action that are relevant to environmental concerns or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 10 CFR 51.92(a); *see also* 10 CFR 51.72(a). Additionally, the staff may supplement an EIS when, in its opinion, preparation of the supplement will further the purposes of NEPA. 10 CFR 51.92(b). The Commission will continue to implement these provisions of its environmental protection regulations and will address EJ matters consistent with the existing NEPA review process and NRC's implementing regulations in Part 51.

A.10 Comment: One commenter recommended that in order to ''provide greater certainty and discipline in licensing proceedings in which EJ [issues are] raised,'' the NRC should establish, through adjudicatory proceedings or rulemaking, binding guidance for the litigation of EJ issues. The commenter also encouraged that the Commission either have prompt interlocutory review of admitted EJ contentions or determine the admissibility of proffered EJ contentions.

Response: The Commission in LES, CLI–98–3, 47 NRC 77 (1998), and in PFS, CLI–02–20, 56 NRC 147, provided guidance on the admissibility of EJ contentions under NEPA. Recently, in a Notice of Hearing and Commission Order on a new LES application, the Commission's guidance for this proceeding stated that the Commission itself, rather than the Atomic Safety and Licensing Board, ''will make the determination as to whether contentions associated with environmental justice matters will be admitted in [the] proceeding.'' *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI–04–03, 59 NRC 10, 15 (2004). Once the admissibility determination is made by the Commission, it will provide the appropriate guidance on the litigation of admissible EJ contentions, if any. *Id.* This policy statement will serve as general guidance on EJ issues and the Commission will determine whether there is a need for the Commission to provide additional guidance on a case-by-case basis.

A.11 Comment: Several commenters recommended that the policy statement include the four goals established in the E.O. and found in the NRC's 1995 Environmental Justice Strategy (ADAMS Accession No. ML003756575 (March 24, 1995)), and that the policy statement indicate how the Commission will achieve those goals. The goals are: (a) Integration of EJ into NRC's NEPA activities, (b) continuing senior management involvement in EJ reviews, (c) openness and clarity, and (d) seeking and welcoming public participation.

Response: The policy statement, as well as NRR and NMSS staff guidance, reflects the four environmental justice goals set out above.

(a) Consistent with the goals set forth in the E.O. and in the Commission's 1995 EJ Strategy, the NRC considers disproportionately high and adverse impacts on low-income and minority populations as part of its NEPA review.

(b) It is NRC's policy that senior managers review and concur on every EIS prepared by the staff. *See* NUREG–1748, 4.5. Thus, there is and will be continuing senior management involvement in NRC's EJ reviews. In addition, changes or updates made to staff environmental guidance are reviewed and concurred on by senior agency officials.

(c) The NRC's NEPA process for preparation of an environmental impact statement mandates openness and clarity and provides for, among other things, public scoping meetings. The NRC usually holds at least one public meeting in the vicinity of the proposed action involving an EIS. The NRC also holds a poster session or open house prior to the meeting to provide an opportunity for one-on-one discussions with interested parties. Finally, the NRC posts publically available information regarding proposed actions on the agency Web site and in press releases, meeting notices, **Federal Register** notices, and will mail certain documents, such as the scoping summary report, to interested members of the public.

(d) The scoping process identified in 10 CFR 51.29 and public participation in commenting on the draft EIS are a fundamental part of the NEPA process and are consistent with the E.O. and CEQ guidelines. Both NMSS and NRR have issued guidance that provides for public participation in identifying minority and low-income populations through the EIS scoping process (*i.e.* interviews, public comment, local meetings, and general outreach efforts). The scoping meetings are announced in the **Federal Register**, on the NRC Web site, in local or regional newspapers, posters around the meeting location, and/or on local radio and television stations at least one week before the public meeting. The NRC requests the assistance of tribal, church, and community leaders to disseminate the information to potentially affected groups. Participants in the scoping process are provided an opportunity to submit oral comments at the scoping meeting and written comments through a project e-mail address or by regular mail.

A.12 Comment: One comment letter stated that the policy statement should clearly articulate that it covers and will look at potential impacts from all operations related to a proposed action. Specifically, the commenter stated that with regard to Nye County, the location of the proposed high-level waste repository at Yucca Mountain, an environmental analysis should include transportation of spent nuclear fuel and high-level waste to the proposed repository.

Response: The policy statement indicates that the EJ analysis should be limited to the impacts associated with the proposed action (*i.e.*, the communities in the vicinity of the proposed action). This policy statement does not address site-specific EJ concerns. The NWPA requires the NRC to adopt, ''to the extent practicable,'' the final EIS prepared by DOE in connection with the issuance of a construction authorization and license for the Yucca Mountain High-Level Waste Repository. *See* 42 U.S.C. 10134(f)(4). The NRC will follow the NWPA direction.

B. Creation of New or Substantive Rights

B.1 Comment: One comment asserted that the Commission's failure to conduct an EJ evaluation in an EIS or noncompliance in any other way with the E.O. as part of the Commission's NEPA responsibility would not be grounds for the NRC to deny the proposed licensing action.

Response: It is the Commission's position that the E.O. itself does not establish new substantive or procedural requirements applicable to NRC regulatory or licensing activities. The E.O. itself is very clear on this point. As

a procedural statute, however, NEPA requires Federal agencies to take a ''hard look'' at the environmental impacts of major Federal actions significantly affecting the quality of the human environment. Therefore, an EIS must appropriately assess disproportionately high and adverse impacts of a proposed action that fall heavily on a particular community.

B.2 Comment: While agreeing with the Commission that E.O. 12898 does not create any new rights or a private cause of action, one commenter asserted that this was not relevant in the context of the NRC's licensing proceedings because there is no requirement that a contention or area of concern be grounded in a statutorily created right. The commenter stated that neither the Atomic Energy Act of 1954, as amended (AEA) nor the NRC regulations mandate that the admission of contentions be based on a particular statutorily created right or cause of action.

Response: The Commission's regulations setting forth the standards for admissible contentions are found at 10 CFR 2.309. This section provides that for each contention, the request for a hearing or petition to intervene must, among other things, (1) Provide a specific statement of the issue of law or fact to be raised or controverted, (2) provide a brief explanation of the basis for the contention, (3) demonstrate that the issue raised in the contention is within the scope of the proceeding, and (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding. *See* 10 CFR 2.309(f). In the context of EJ-related matters, the only possible basis for an admissible contention is NEPA, which statutorily mandates a hard look at the significant environmental impacts of a proposed major Federal action. Because E.O. 12898 does not create any new rights, it cannot provide a legal basis for contentions to be litigated in NRC licensing proceedings.

B.3 Comment: Though noting that 6–609 of the E.O. expressly states that no new rights are created by the E.O., a commenter stated that at least two administrative appeals tribunals (the Environmental Appeals Board and the Interior Board of Land Appeals) have reviewed decisions for compliance with the E.O. as a matter of policy under existing statutory authority. The commenter suggested that the policy statement provide an explanation of how and under what standards issues of environmental justice are presently reviewed by the NRC within the context of NEPA or other statutory authority.

Response: Although independent agencies, such as the Commission, are not required to follow the E.O., the Commission has stated that it will endeavor to carry out the measures set forth in the E.O. The policy statement seeks to make clear that, in following the spirit of the E.O., the Commission's intent is to comply with NEPA.

B.4 Comment: Several commenters stated that the policy statement contradicts former Chairman Selin's acknowledgment that the E.O. applies to the NRC's requirements under NEPA. Specifically, the commenters stated that the E.O. intended to expand the scope of the NRC's NEPA requirements to include EJ-related matters in licensing proceedings, not limit that scope.

Response: Consistent with Commission practice and the E.O., EJ issues are addressed in the context of the agency's NEPA responsibilities. EJ-related matters properly within the NEPA context are limited only to the extent that any ''EJ'' contentions are valid NEPA contentions and are set out and supported as required by 10 CFR Part 2 of the Commission's regulations. The E.O. neither expanded nor limited the scope of the agency's NEPA responsibilities or the way environmental issues may be dealt with in agency proceedings.

C. NEPA as the Basis for Considering Environmental Justice-Related Matters

C.1 Comment: One commenter stated that the AEA provides a basis for the NRC to carry out the goals of E.O. 12898. The commenter noted that the AEA provides that the development of atomic energy shall be regulated so as to protect the health and safety of the public. Given the broad goals of the E.O. and the specific mandate of the AEA to protect public health and safety, the commenter stated that the AEA presents a clear opportunity for the NRC to address environmental hazards in low-income and minority communities.

Response: The AEA does not give the Commission the authority to consider EJ-related issues in NRC licensing and regulatory proceedings. Apart from the mandate set forth in NEPA, the Commission is limited to the consideration of radiological health and safety and common defense and security. *See New Hampshire* v. *Atomic Energy Commission,* 406 F.2d 170, 175, 176 (1st Cir. 1969).

C.2 Comment: One letter commented that NEPA is a procedural statute that does not require a particular outcome; by contrast, E.O. 12898 promotes the implementation of Federal policies and duties in a nondiscriminatory manner.

Response: As stated in the Presidential Memorandum, both ''environmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities.'' *Memorandum for Heads of All Departments and Agencies* (Feb. 11, 1994) (Presidential Memorandum). In the licensing context, the NRC's focus is on full disclosure, as required by NEPA, of the environmental impacts associated with a proposed action ''* * * and [to] take care to mitigate or avoid special impacts attributable to the special character of the community.'' *PFS,* CLI–02–20, 56 NRC at 156.

In the context of providing financial assistance, the Commission's regulations in 10 CFR Part 4 prohibit discrimination with respect to race, color, national origin, or sex in any program or activity receiving Federal financial assistance from the NRC.

C.3 Comment: Several commenters stated that the E.O. is more than a mere reminder to the agencies of their preexisting EJ obligations. One commenter stated that by handling EJ matters as part of the Commission's ''normal and traditional processes'' the NRC is ignoring the E.O.'s direction to Federal agencies to be proactive in identifying and considering EJ matters in NEPA and other activities. Other commenters stated that the E.O. was an admission of failure in addressing EJ matters and was intended to rectify the failure by codifying EJ analysis into agency activities.

Response: The NRC strives to proactively identify and consider environmental justice issues in pertinent agency licensing and regulatory actions primarily by fulfilling its NEPA responsibilities for such actions. As part of NEPA's original mandate, agencies are required to look at the socioeconomic impacts that have a nexus to the physical environment. *See* 40 CFR 1508.8. It is the Commission's view that the obligation to consider and assess disproportionately high and adverse impacts on low-income and minority populations as part of its NEPA review was not created by the E.O. Rather, it is the Commission's view that the E.O. reminded agencies that such an analysis is appropriate in its normal and traditional NEPA review process.

While the E.O. directs Federal agencies to ''* * * develop an agency-wide environmental justice strategy * * *,'' it did not suggest that agencies codify EJ analysis into their regulations. The E.O. directed Federal agencies to ''* * * make achieving environmental justice [to the greatest extent practicable

and permitted by law] part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. * * *'' Executive Order No. 12898, 59 FR at 7629 (Section 1–101). In fact, the Presidential Memorandum specifically discussed implementing the E.O. within the bounds of already existing law, such as NEPA. See *Presidential Memorandum* at p. 1. In *LES,* CLI–98–3, 47 NRC 77, the Commission stated that ''[t]he only 'existing law' conceivably pertinent [to the NRC's fulfillment of the E.O.] is NEPA, a statute that centers on environmental impacts.'' *LES,* 47 NRC at 102.

D. Racial Motivation

D.1 Comment: A number of commenters requested that the Commission reject the policy statement because it does not resolve the issue of racial discrimination in the siting of nuclear reactors and other facilities licensed by the NRC. Several comments stated that the policy statement should pay special attention to the nuclear industry's history of siting facilities in minority and disadvantaged communities with special attention to facilities sited on ancient ancestral homelands of Native Americans.

Response: The Commission continues to recognize that ''racial discrimination is a persistent and enduring problem in American society.'' *LES,* CLI–98–3, 47 NRC 77, 101 (1998). However, as explained in the draft policy statement, EJ issues are only considered when and to the extent required by NEPA. NEPA is an environmental statute and a broad-ranging inquiry into allegations of racial discrimination goes beyond the scope of NEPA's mandate to adequately identify and weigh significant adverse environmental impacts.

D.2 Comment; Several commenters asserted that the statement that ''racial motivation and fairness or equity issues are not cognizable under NEPA* * *'' represents a debasement of the express intent and spirit of the E.O., which is an executive charge to take into consideration the complex matrix of race, class, and ethnic elements that might indicate discrimination against low-income and minority populations.

Several commenters stated that racial bias is a legitimate consideration in the NEPA process because it relates to the objectivity of the decisionmaking process for evaluating environmental impacts and choosing among alternatives. This commenter further asserted that expertise in racial discrimination is not necessary to determine that scientific criteria are not being applied objectively.

Response: NEPA is not the appropriate context in which to assess racial motivation and fairness or equity issues. As stated by the Commission in *LES*, ''were NEPA construed broadly to require a full examination of every conceivable aspect of federally licensed projects, 'available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.'' *LES,* CLI–98–3, 47 NRC 77, 102–03, *quoting Metropolitan Edison Co.,* 460 U.S. 766, 776 (1983).

E. Environmental Assessments

E.1 Comment: Several commenters stated that the policy of not doing an EJ review for an environmental assessment (EA) where a Finding of No Significant Impact (FONSI) is expected appears to absolve the NRC from carrying out the type of proactive reviews E.O. 12898 sought to promote. One letter expressed the concern that the NRC will use EAs and FONSIs to avoid an EJ analysis. This commenter stated that if the NRC has not done an EJ review in a site-specific EIS, then the NRC has no basis for determining whether a specific action has unique EJ impacts on a minority or low-income community. Another commenter stated that ''absent [an EJ] review, it is possible that significant impacts to minorities and low-income populations could be missed.''

A separate commenter, however, agreed with the draft policy statement that unless special circumstances exist, an EJ review is unnecessary in an EA where a FONSI is expected. Nevertheless, this commenter suggested that the policy statement ''set forth with specificity the 'special circumstances' that will warrant [an EJ] review.'' Another commenter stated that the ''special circumstances'' requiring the completion of an EJ review should ''arise where [a] facility has a clear potential for off-site impacts to minority and low-income communities and these impacts have never been addressed in any NEPA review.''

Response: The Commission's policy does not eliminate the possibility of an EJ review in the context of an EA. Rather, the policy limits such a review to those times when a FONSI may not be appropriate because impacts that would not otherwise be significant could be significant due to the unique characteristics of low-income or minority communities. Under those special circumstances, an EJ review may be necessary to provide the basis for concluding that there are no significant environmental impacts. With regard to EAs, the policy statement clarifies the previously undefined ''special circumstances'' and notes that, in the case of most EAs, there are little or no offsite impacts and, therefore, an EJ review is generally not necessary to make a FONSI.

An EJ review in an EA is anticipated by the Commission, where, as described in one of the comments, a proposed action has clear potential for offsite impacts to minority and low-income communities. In these circumstances an EJ analysis will be done during the preparation of an EA regardless of whether an EJ analysis had been addressed in an earlier NEPA analysis for the site. However, an EJ analysis will not be performed during an EA if the proposed action does not create a clear potential for offsite impacts even in circumstances where EJ was not addressed in an earlier NEPA analysis for the site.

E.2. Comment: One commenter requested that the final policy statement clarify that the only circumstance warranting an EJ review in the EA/FONSI context is where a clear potential for offsite impacts from the proposed action exists.

Response: As discussed above and in the draft policy statement, the Commission does not foresee circumstances warranting an EJ review except where there is a clear potential for offsite impacts.

E.3 Comment: One commenter suggests that the NRC should solicit public comment with respect to EJ during the EA process to determine whether there are cumulative impacts that might be significant on the subject population.

Response: As a general matter, public comments are not sought during the preparation of an EA. During an EA, the NRC might seek public comment only in those special circumstances where there is a clear potential for offsite impacts and there are some indications of populations that might signal the existence of an EJ issue.

F. Generic/Programmatic EISs

F.1 Comment: Several commenters addressed the consideration of EJ-related matters in generic and programmatic EISs. The commenter's view was that in some circumstances, the consideration of EJ issues should be required when it is apparent that the generic NRC regulatory program will have significant impacts on a number of similar low-income or minority communities.

Response: The Commission believes it is difficult to foresee or predict many circumstances, if any, in which a meaningful NRC EJ analysis could be completed for a generic or programmatic EIS given the lack of site-specific information. Nonetheless, the Commission's policy will not preclude the possibility of an EJ analysis in programmatic or generic EISs if a meaningful review can be completed.

G. Numeric Criteria

G.1 Comment: Several commenters disagreed with the numeric guidance used to identify the geographic area in which demographic information is sought and to identify potentially affected low-income and minority communities. One commenter stated that the numeric limits are arbitrary in that no objective basis for setting those limits and no legal basis for that practice exist. The commenter further stated that the NRC must ensure that its NEPA evaluation properly identifies and accounts for unique facts associated with a particular community that may contribute to a larger or lesser impact. It should not matter whether that community falls within any of the numeric criteria used by the NRC staff to evaluate EJ, but rather whether there is any particular community that, by its very nature, would suffer a greater or lesser impact from a proposed Federal action.

Another commenter stated that the numeric guidance is misleading because such guidance may cause staff to overlook significantly and uniquely impacted areas because they failed the quantitative test and were not examined further. The same commenter also described such guidance as risky because such numerical measures may not encompass the range of factors used to determine low-income or minority status.

Response: The Commission recognizes that the numeric criteria are guidance—a starting point—for staff to use when defining the geographic area for assessment and identifying low-income and minority communities within the geographic area. To the extent possible, the staff will continue to use numeric guidance as a screening tool since such guidance should be sufficient in most cases; however, the staff analysis also includes the identification of EJ concerns during the scoping process. This is clearly articulated in the policy statement, as well as in existing staff guidance. *See* NUREG–1748.

G.2 Comment: One commenter stated the 50 miles normally used by NRR should be applied by NMSS in the case of the Yucca Mountain High-Level Waste Repository.

Response: This policy statement does not address site-specific concerns. In accordance with NEPA, and consistent with Commission practice, the geographic area assessed for NEPA purposes will be commensurate with the potential impact area of the proposed activity. The distances are guidelines used by NRR and NMSS to reflect the different activities regulated by those offices and are generally consistent with the area of potential impacts normally considered in NRC environmental and safety reviews. With regard to the high-level waste repository, the NWPA defines the agency's NEPA obligations.

G.3 Comment: One commenter suggested that the policy statement should encourage or require the selection of the methodology that identifies the most eligible census blocks, not the least when identifying low-income or minority populations. As an example, the commenter stated that using Nevada as the metric, Nye County may have only one low-income block. This block would not include the Yucca Mountain High-Level Waste Repository. However, the commenter noted that if Nye County is used as a metric for comparison, then most of the census blocks in the county may be EJ eligible. This commenter further stated that this is a more reasonable approach because rural areas generally are economically depressed.

Response: The NRC uses the Census ''block group'' as the geographic area for evaluating census data because the U.S. Census Bureau does not report information on income for ''blocks'', the smaller geographic area. In accordance with staff guidance, the impacted area may be compared to either the State or the County data. Furthermore, staff analysis will be supplemented by the results of the EIS scoping review to obtain additional information. This should adequately identify the presence, if any, of a low-income or minority population in the impacted area. This policy statement is not site-specific and cannot address the specific comment regarding the High-Level Waste Repository at Yucca Mountain.

H. Scoping/Public Participation

H.1 Comment: Several commenters assert that, in addition to the draft policy statement's paragraph addressing scoping, the final policy statement should include a public participation and outreach element in the decisionmaking process that conforms to the E.O., and CEQ and NRC policies.

Response: The Commission's intent in drafting the statement is to clarify that EJ is a normal, but not expansive, part of NEPA. The policy statement was not intended to address public participation more than the current 10 CFR Part 51 and staff environmental review guidance does.

III. Final Policy Statement

The Executive Order Does Not Create Any New or Substantive Requirements or Rights

E.O. 12898 does not establish new substantive or procedural requirements applicable to NRC regulatory or licensing activities. Section 6–609 of the E.O. explicitly states that the E.O. does not create any new right or benefit. By its terms, the E.O. is ''intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right [or] benefit * * * enforceable at law * * *'' 59 FR at 7632–33 (Section 6–609); *see also Presidential Memorandum.* Courts addressing EJ issues have uniformly held that the E.O. does not create any new rights to judicial review. See, *e.g., Sur Contra La Contaminacion* v. *EPA,* 202 F.3d 443, 449–50 (1st Cir. 2000). Consequently, it is the Commission's position that the E.O. itself does not provide a legal basis for contentions to be admitted and litigated in NRC licensing proceedings. See *LES,* CLI–98–3, 47 NRC 77; *PFS,* CLI–02–20, 56 NRC 147.

NEPA, Not the Executive Order, Obligates the NRC To Consider Environmental Justice-Related Issues

The basis for admitting EJ contentions in NRC licensing proceedings stems from the agency's NEPA obligations, and EJ-related contentions had been admitted by an NRC Licensing Board prior to the issuance of the E.O. in 1994. *See LES*, LBP–91–41, 34 NRC at 353. As clearly stated in 1–101 of the E.O., an agency's EJ responsibilities are to be achieved to the extent permitted by law. *See* 59 FR at 7629 (Section 1–101). The accompanying Presidential Memorandum stated that ''each Federal agency shall analyze the environmental effects * * * of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA].'' *Memorandum for Heads of All Departments and Agencies* (Feb. 11, 1994) (Presidential Memorandum).[2] The E.O. simply serves

[2] NEPA is the only available statute under which the NRC can carry out the general goals of E.O. 12989. Although the Presidential Memorandum directed Federal agencies to ensure compliance

as an appropriate and timely reminder to agencies to become aware of the various demographic and economic circumstances of local communities as part of any socioeconomic analysis that might be required by NEPA or their authorizing statutes. *See* 40 CFR 1508.8 and 1508.14 (2003).

The Commission, in *LES*, has made it clear that EJ issues are only considered when and to the extent required by NEPA. The Commission held that the disparate impact analysis within the NEPA context is the tool for addressing EJ issues and that the ''NRC's goal is to identify and adequately weigh or mitigate effects, on low-income and minority communities' by assessing impacts peculiar to those communities. *LES*, CLI–98–3, 47 NRC at 100; *see also, PFS*, CLI–02–20, 56 NRC at 156. At bottom, for the NRC, EJ is a tool, within the normal NEPA context, to identify communities that might otherwise be overlooked and identify impacts due to their uniqueness as part of the NRC's NEPA review process.

As part of NEPA's mandate, agencies are required to look at the socioeconomic impacts that have a nexus to the physical environment. *See* 40 CFR 1508.8 and 1508.14. An ''environmental-justice''-related socioeconomic impact analysis is pertinent when there is a nexus to the human or physical environment or if an evaluation is necessary for an accurate cost-benefits analysis. *See One Thousand Friends of Iowa* v. *Mineta*, 250 F. Supp. 2d 1064, 1072 (S.D. Iowa 2002) (the fact that numerous courts have held that an agency's failure to expressly consider environmental justice does not create an independent basis for judicial review forecloses any argument that NEPA was designed to protect socioeconomic interests alone). Therefore, EJ *per se* is not a litigable issue in NRC proceedings. The NRC's obligation is to assess the proposed action for significant impacts to the physical or human environment. Thus, admissible contentions in this area are those which allege, with the requisite documentary basis and support as required by 10 CFR Part 2, that the proposed action will have significant adverse impacts on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated.

Racial Motivation Not Cognizable Under NEPA

Racial motivation and fairness or equity issues are not cognizable under NEPA, and though discussed in the E.O., their consideration would be contrary to NEPA and the E.O.'s limiting language emphasizing that it creates no new rights.[3] The focus of any ''EJ'' review should be on identifying and weighing disproportionately significant and adverse environmental impacts on minority and low-income populations that may be different from the impacts on the general population. It is not a broad-ranging or even limited review of racial or economic discrimination. As the Commission explained in *LES*, ''an inquiry into a license applicant's supposed discriminatory motives or acts would be far removed from NEPA's core interest: 'the physical environment—the world around us. * * * ' '' *LES*, CLI–98–3, 47 NRC at 102, *quoting Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). Thus, the EJ evaluation should disclose whether low-income or minority populations are disproportionately impacted by the proposed action.

Environmental Assessments Normally Do Not Include Environmental Justice Analysis

The agency's assessment of environmental justice-related matters has been limited in the context of EAs. Previously, the Commission has stated that absent ''significant impacts, an environmental justice review should not be considered for an EA where a Finding of No Significant Impact [FONSI] is issued unless special circumstances warrant the review.'' SRM–MO21121A (Supplemental)—Affirmation Session: 1. SECY–02–0179—Final Rule: Material Control and Accounting Amendments, Dec. 3, 2002 (ADAMS Accession No. ML023370498).[4] If there will be no significant impact as a result of the proposed action, it follows that an EJ review would not be necessary. However, the agency must be mindful of special circumstances that might warrant not making a FONSI. In most EAs, the Commission expects that there will be little or no offsite impacts and, consequently, impacts would not occur to people outside the facility. However, if there is a clear potential for significant offsite impacts from the proposed action then an appropriate EJ review might be needed to provide a basis for concluding that there are no unique impacts that would be significant. If the impacts are significant because of the uniqueness of the communities, then a FONSI may not be possible and mitigation or an EIS should be considered.

Generic and Programmatic Impact Statements Do Not Include Environmental Justice Analysis

An NRC EJ analysis should be limited to the impacts associated with the proposed action (*i.e.*, the communities in the vicinity of the proposed action). EJ-related issues differ from site to site and normally cannot be resolved generically. Consequently, EJ, as well as other socioeconomic issues, are normally considered in site-specific EISs. Thus, due to the site-specific nature of an EJ analysis, EJ-related issues are usually not considered during the preparation of a generic or programmatic EIS. EJ assessments would be performed as necessary in the underlying licensing action for each particular facility.

Need for Flexibility in NRC's Environmental Justice Analyses

The procedural guidelines for EJ review should allow for flexibility in the analysis to reflect the unique nature of each review. It is important, however, that the NRC be consistent in its approach to this matter and develop clear, defined procedural guidance for identifying minority and low-income communities and assessing the impacts they may experience.

1. Defining Geographic Area for Assessment

One of the first steps the staff takes in its EJ analysis is to identify the geographic area for which it seeks to obtain demographic information. While staff guidance states that the geographic scale should be commensurate with the potential impact area, NMSS and NRR have adopted numeric guidance based on activities that those offices regulate. Under current NMSS procedures, the potentially affected area is normally determined to be a radius of 0.6 mile from the center of the proposed site in urban areas, and four miles if the facility is located in a rural area. NRR normally uses a 50-mile radius that should be examined for licensing and regulatory

with the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964 for all Federally funded programs and activities that affect human health or the environment, Title VI is inapplicable to the NRC's regulatory and licensing actions. Likewise, while environmental justice matters may be appropriately addressed during the permitting process under other environmental statutes, including the Resource Conservation and Recovery Act, the Clean Water Act, and the Clean Air Act, the NRC does not have permitting authority under those statutes.

[3] Such issues are more appropriately considered under Title VI of the Civil Rights Act. *See* LES, CLI–98–3, 47 NRC at 101–106. The NRC does not have the authority to enforce Title VI in the NRC licensing process.

[4] At least one court supports the view that EJ does not need to be considered in an EA. *See American Bus Ass'n* v. *Slater*, 1999 U.S. Dist. LEXIS 20936, 9 Am. Disabilities Cas. (BNA) 1427 (D.C. Cir. Sept. 10, 1999).

actions involving power reactors. These distances reflect the different activities regulated by NRR and NMSS and are consistent with the area of potential impacts normally considered in NRC environmental and safety reviews. However, these procedures provide that the distances are guidelines and that the geographic scale should be commensurate with the potential impact area and should include a sample of the surrounding population because the goal is to evaluate the communities, neighborhoods, and areas that may be disproportionately impacted.

For the purposes of NEPA, the Commission recognizes that numerical distances are helpful to characterize the likely extent of impacts for categories of regulatory action. Thus, we are retaining the current procedure as articulated by NMSS and NRR in their respective office guidance since this numeric guidance should be sufficient in most cases to include all areas with an actual or potential for reasonably foreseeable physical, social, cultural, and health impacts.

2. Identifying Low-Income and Minority Communities

Once the impacted area is identified, potentially affected low-income and minority communities should be identified. Under current NRC staff guidance, a minority or low-income community is identified by comparing the percentage of the minority or low-income population in the impacted area to the percentage of the minority or low-income population in the County (or Parish) and the State. If the percentage in the impacted area significantly exceeds that of the State or the County percentage for either the minority or low-income population then EJ will be considered in greater detail. ''Significantly'' is defined by staff guidance to be 20 percentage points. Alternatively, if either the minority or low-income population percentage in the impacted area exceeds 50 percent, EJ matters are considered in greater detail. As indicated above, numeric guidance is helpful; thus, the staff should continue to use such guidance in identifying minority and low-income communities. The staff's analysis will be supplemented by the results of the EIS scoping review discussed below.

3. Scoping

The NRC will emphasize scoping, the process identified in 10 CFR 51.29, and public participation in those instances where an EIS will be prepared. Reliance on traditional scoping is consistent with the E.O. and CEQ guidance. *See* E.O. 12898, 59 FR at 7632 (Section 5–5); *CEQ Guidance* at 10–13. CEQ guidance reminds us that ''the participation of diverse groups in the scoping process is necessary for full consideration of the potential environmental impacts of a proposed agency action and any alternatives. By discussing and informing the public of the emerging issues related to the proposed action, agencies may reduce misunderstandings, build cooperative working relationships, educate the public and decisionmakers, and avoid potential conflicts.'' *CEQ Guidance* at 12. Thus, it is expected that in addition to reviewing available demographic data, a scoping process will be utilized preceding the preparation of a draft EIS. This will assist the NRC in ensuring that minority and low-income communities, including transient populations, affected by the proposed action are not overlooked in assessing the potential for significant impacts unique to those communities.

IV. Guidelines for Implementation of NEPA as to Environmental Justice Issues

- The legal basis for the NRC analyzing environmental impacts of a proposed Federal action on minority or low-income communities is NEPA, not Executive Order 12898. The E.O. emphasized the importance of considering the NEPA provision for socioeconomic impacts. The NRC considers and integrates what is referred to as environmental justice matters in its NEPA assessment of particular licensing or regulatory actions.
- In evaluating the human and physical environment under NEPA, effects on low-income and minority communities may only be apparent by considering factors peculiar to those communities. Thus, the goal of an EJ portion of the NEPA analysis is (1) To identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. It is not a broad-ranging review of racial or economic discrimination.
- In developing an EA where a FONSI is expected it is not necessary to undertake an EJ analysis unless special circumstances warrant the review. Special circumstances arise only where the proposed action has a clear potential for off-site impacts to minority and low-income communities associated with the proposed action. In that case, an appropriate review may be needed to provide a basis for concluding that there are no unique environmental impacts on low-income or minority communities that would be significant.
- EJ-related issues normally are not considered during the preparation of generic or programmatic EISs. In general, EJ-related issues, if any, will differ from site to site and, thus, do not lend themselves to generic resolutions. Consequently, EJ, as well as other socioeconomic issues, are considered in site-specific EISs.
- EJ per se'' is not a litigable issue in NRC proceedings. Rather the NRC's obligation is to assess the proposed action for significant impacts to the physical or human environment. Contentions must be made in the NEPA context, must focus on compliance with NEPA, and must be adequately supported as required by 10 CFR Part 2 to be admitted for litigation.
- The methods used to define the geographic area for assessment and to identify low-income and minority communities should be clear, yet allow for enough flexibility that communities or transient populations that will bear significant adverse effects are not overlooked during the NEPA review. Therefore, in determining the geographic area for assessment and in identifying minority and low-income communities in the impacted area, standard distances and population percentages should be used as guidance, supplemented by the EIS scoping process, to determine the presence of a minority or low-income population.
- The assessment of disparate impacts is on minority and low-income populations in general and not to the ''vaguely defined, shifting ''subgroups'' within that community.'' *See PFS*, CLI–02–20, 56 NRC at 156.
- In performing a NEPA analysis for an EIS, published demographic data, community interviews and public input through well-noticed public scoping meetings should be used in identifying minority and low-income communities that may be subject to adverse environmental impacts.

Dated at Rockville, Maryland, this 18th day of August, 2004.

Annette Vietti-Cook,

Secretary of the Commission.

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