UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of:	
HYDRO RESOURCES, INC. 2929 Coors Road, Suite 101 Albuquerque, New Mexico 87120	Docket No. 40-8968-ML ASLBP No. 95-706-01-ML Re: Leach Mining and Milling License

FINAL WRITTEN PRESENTATION OF GRACE SAM AND MARILYN MORRIS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1233, the Presiding Officer's Memorandum and Order (Ruling on Petitions and Areas of Concern; Granting Request for Hearing; Scheduling) of May 13, 1998, the Presiding Officer's Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of September 22, 1998, and their own Notice of Written Presentations dated October 2, 1998, Intervenors Grace Sam and Marilyn Morris ("Ms. Sam and Ms. Morris") hereby submit their final written presentation in this Subpart L proceeding. The scope of this presentation is limited to a discussion of the adequacy of the Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, NUREG-1508 ("FEIS") [Notebook No. 10, Acc. No. 9703200270, 2/28/97] under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the NRC's NEPA implementing regulations, 10 C.F.R. Part 51, and the NEPA implementing regulations of the Council on Environmental Quality ("CEQ"), 40 C.F.R. Parts 1500-1508.

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Ms. Sam and Ms. Morris contend that the FEIS, which provides the justification for the NRC's issuance to Hydro Resources, Inc. ("HRI") of Materials License SUA-1508 on January 5, 1998, to conduct its proposed ISL uranium mining operations, is significantly wanting in several key respects. In particular, Ms. Sam and Ms. Morris believe that the FEIS's discussion of environmental justice issues, alternatives, and secondary effects is deficient.

STATUTORY AND REGULATORY BACKGROUND

NEPA "establishes a 'broad national commitment to protecting and promoting environmental quality.'" Louisiana Energy Services, CLI-98-3, 47 N.R.C. 77, 87 (1998) (quoting Robertson v. Meithow Valley Citizens Council, 490 U.S. 332, 348 (1989)). In passing NEPA, "Congress resolved 'to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.'" Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 193 (D.C. Cir.), cert. denied 502 U.S. 994 (1991) (quoting 42 U.S.C. § 4331(a)). The CEQ, charged by Congress with the task of ensuring NEPA's application throughout the federal bureaucracy, has declared that NEPA "is our basic national charter for the protection of the environment." 40 C.F.R. § 1500.1(a).

NEPA is a procedural statute. It does not mandate particular consequences, but rather fulfills its goals by imposing upon federal agencies an affirmative duty to imbue their decisionmaking with a commitment to the environmental well-being of our country. Citizens Against Burlington, Inc., 938 F.2d at 193-94. "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c). Thus, NEPA

is not concerned so much with the decisions that federal agencies reach, but seeks to ensure that those decisions are made in the light of full disclosure of the effects they will have on the environment. See id. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.")

Central to the fulfillment of NEPA's goals is its requirement that federal agencies prepare an environmental impact statement ("EIS") for all proposals "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must describe in detail "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and "alternatives to the proposed action." Id. § 4332(2)(C)(i), (ii), and (iii). As the Commission itself has explained:

> The principal goals of a[ ] F[inal]EIS are twofold: to force agencies to take a hard look at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decision-making process. The latter information disclosure function of the EIS gives the public the assurance that the agency has indeed considered environmental concerns ... and perhaps more significantly, provides a springboard for public comment. The EIS, then, should provide sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a hard look at environmental factors and to make a reasoned decision. It is intended to foster both informed decision-making and informed public participation, and thus ensure that the agency does not act upon incomplete information, only to regret its decision after it is too late to correct.

Louisiana Energy Services, 47 N.R.C. at 87-88 (internal quotations, footnote, and citations omitted).

The regulations found at 10 C.F.R. Part 51 provide the regulatory framework within

which the NRC fulfills its mandate under NEPA. See 10 C.F.R. § 51.10(a) ("The regulations in this subpart implement section 102(2) in a manner which is consistent with the NRC's domestic licensing and related regulatory authority under the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and the Uranium Mill Tailings Radiation Control Act of 1978[.]...") Where, like here, NEPA issues arise in the larger context of the NRC's grant of a materials license under 10 C.F.R. Part 40,

> Part 51 sets forth a two-step process for meeting NEPA's mandate. First, it requires a license applicant to file a detailed Environmental Report (ER) containing specific information to aid the NRC in preparing its independent analysis of the environmental effects of the proposed licensing action. See 10 C.F.R. [§§] 51.60 and 51.45. Second, it requires the NRC Staff to issue its own FEIS based on a review of information provided by the applicant, information provided by commenters on the Staff's draft EIS, and information and analysis that the Staff itself obtains. See 10 C.F.R. [§] 51.97(c).

Louisiana Energy Services, 47 N.R.C. at 84. Under the regulations, intervenors like Ms. Sam and Ms. Morris are entitled "to litigate the adequacy of the discussion of environmental issues in the FEIS." Id. at 89 (citing 10 C.F.R. § 51.104(a)(2)). Once the adequacy issue is raised, "the NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately considered." Id.

ARGUMENT

I. THE DISCUSSION OF ENVIRONMENTAL JUSTICE ISSUES IN THE FEIS IS INADEQUATE.

In Executive Order 12898, President Clinton proclaimed the federal government's commitment to environmental justice for all citizens:

> 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 effects of its programs, policies, and activities on minority populations and low-income populations in the United States....

E.O. 12898, § 1-101, 59 Fed. Reg. 7629, 7630 (1994).[1] Consistent with the President's mandate, the Commission has declared its own commitment to the implementation of the objectives of Executive Order 12898 into decisions concerning the issuance of materials licenses. "As President Clinton's executive order reminds us, adverse impacts that fall heavily on minority and impoverished citizens call for particularly close scrutiny." Louisiana Energy Services, 47 N.R.C. at 106. The Commission has identified "disparate impact" analysis as its "principal tool for advancing environmental justice under NEPA." Id. at 100. In licensing proceedings, "[t]he 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..

The Commission's approach to the environmental justice issue contemplates a three-step analysis. The first step requires the NRC to determine whether a low-income or minority community will bear a disproportionate share of the impacts expected to result from a proposed

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[1] The EPA has defined environmental justice as

> the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no groups of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations of the execution of Federal, State, local, and tribal programs and policies.

FEIS at 3-78 (citation omitted).

project.[2] If the answer to this question is yes, then the second step of the analysis requires the NRC to determine whether those impacts constitute "high and adverse human health or environmental effects that are significant." CEQ Guidance at 10. See also FEIS at 3-78 ("NMSS guidance identifies a significant environmental justice impact as one that is high and adverse (i.e., significant, unacceptable, or above generally accepted norms)...."). Lastly, if the NRC determines that the expected impacts are high and adverse and will fall disproportionately on a low-income or minority population, then, at the third step, the agency must "heighten [its] attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population." CEQ Guidance at 10; FEIS at 3-78.

The FEIS clearly concludes that the community in which HRI proposes to conduct its mining operations, and that thus will bear a disproportionate share of the impacts expected to result from those operations, is a low-income, minority community:

> The proposed project would be located in the Navajo communities of Crownpoint and Church Rock. These communities and much of the area within 80 km (50 miles) of the project sites are in "Indian country" as defined in 18 U.S. Code 1151. The 80-km (50-mile) area of potential effect also includes almost all of McKinley County, large parts of San Juan and Cibola [C]ounties and the Navajo, Ramah Navajo, and Zuni reservations, and a small part of Sandoval County. **By nearly any definition, the entire area of impact constitutes an "environmental justice population."**

FEIS at 3-78 to 3-79 (emphasis added). "Because the population near the proposed project sites is made up almost entirely of Navajo, many of them living in poverty," the FEIS acknowledges

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[2] As the CEQ points out in "Environmental Justice: Guidance under the National Environmental Policy Act" ("CEQ Guidance") (copy attached as Exhibit A), "[e]nvironmental justice issues encompass a broad range of impacts covered by NEPA, including impacts on the natural or physical environment and interrelated social, cultural and economic effects." CEQ Guidance at 8 (footnote omitted). This interpretation is consistent with the NRC's. See FEIS at 3-78.

that "any significant adverse impact resulting from the project would be an environmental justice impact." Id. at 4-112. In light of this conclusion, the discussion of environmental justice issues in the FEIS is deficient because it fails adequately to discuss steps two and three of the aforementioned analysis in three key areas. First, the FEIS fails to discuss at all certain potentially significant transportation impacts of the project including the use of local roadways by pedestrians, the presence of livestock ranging in the open near local roadways, and the impact on the local community if HRI intends to transport slurry and yellowcake between project sites at night. Second, the FEIS fails to discuss adequately the proposed mitigative measure to relocate the Crownpoint public water supply, particularly considering the high quality of the existing supply, its vital importance to the local community, and the NRC's complete failure to consider the views of the local communities and the Navajo Tribal Utility Authority ("NTUA"), the owner of two of the drinking water supply wells, in the process leading to the decision to require relocation of the wells. Third, the FEIS fails adequately to discuss the effect which the proposed project may have on property values, especially considering the existing low property values in the area and HRI's plans to mine "in close proximity to residences." Id. at 3-53.

A. Transportation

The FEIS's discussion of "Transportation Risk" as an environmental justice issue acknowledges "the high rate of accidents on highways hear the projects sites," but concludes "that there is only a very slight chance of an accident involving trucks delivering chemicals to the sites and transporting uranium slurry, 11e(2) by-product material, and yellowcake from the sites." Id. at 4-116. See also id. at 4-67 to 4-72 (analyzing the environmental consequences of each alternative in the context of transportation risk). Nevertheless, the FEIS recognizes the small

chance that "an accident could occur and could result in the deaths of those involved," and concedes the probability "that the victims of a local accident would be Navajo community members." Id. at 4-116. The data on which the FEIS relies in reaching this conclusion is incomplete, and the analysis itself is inaccurate, because the discussion fails to consider certain well-established facts regarding the use of the local roadways.

1. Pedestrian use of the roadways.

First, the FEIS does not mention use of the local roadways by pedestrians and the impact that an increase in local traffic would have on such use. It is a fact of life that many poor members of the local communities do not own motor vehicles and have no choice but to travel by foot or hitchhike. Many of these travelers regularly walk along the local roadways which the FEIS predicts will see an increase in traffic due to the proposed project. Yet, like in Louisiana Energy Services, for some reason never expressly stated "the FEIS inexplicably focused exclusively on [motor vehicle] traffic." Id., 47 N.R.C. at 108 (criticizing failure of FEIS to consider impact of road closing necessitated by licensing of project on pedestrian travelers). See also FEIS at 3-42 to 3-46 (discussing the regional road network and truck accident frequencies; makes no mention of pedestrian use of local roadways). Thus, although the FEIS recognizes that "Transportation Risk" is an environmental justice issue, its discussion of the issue is inadequate because it fails to consider the potential impact of the proposed project on pedestrian use of the local roadways, a key factual circumstance of this particular environmental justice population. Cf. CEQ Guidance at 8 ("Agencies should recognize that the question of whether agency action raises environmental justice issues is highly sensitive to the history or circumstances of a particular community or population....").

2. Livestock on or near local roadways.

Second, the FEIS does not consider that livestock often are present on or near local roadways. The FEIS does correctly recognize that some members of the local communities "rely heavily on their livestock.... [L]ifeways of the Navajo include herding sheep, goats, and cattle that graze on the land and that are watered from shallow wells or the Rio Puerco." FEIS at 3-86. Despite acknowledging the important subsistence role livestock play in the lives of many local community members, the FEIS ignores the fact that significant numbers of livestock range in the open throughout the local communities, often alongside roadways, and fails to discuss the potential impact the projected increase in traffic will have on the presence of livestock. In addition, the FEIS fails to consider mitigation measures calculated to avoid the loss of livestock in truck accidents or, in the event such accidents occur, to reimburse the owners of livestock lost in accidents. In light of the reliance of many local community members on livestock for survival, the FEIS's discussion of "Transportation Risk" as an environmental justice issue is incomplete and inadequate without reference to this potential impact and measures calculated to mitigate it.

3. Use of roadways at night.

Third, the FEIS does not mention whether trucks associated with the proposed project will use local roadways at night to haul uranium slurry, 11e(2) by-product material, or yellowcake to and from the sites. Once the proposed projects' well fields begin producing uranium, the project will be operating twenty-four hours per day. Thus, it is reasonable to imagine that HRI will need to transport slurry from its well fields in Church Rock or Unit 1, for example, to the central processing facility in Crownpoint at any time of the day or night. Notwithstanding this fact, the FEIS does not discuss nighttime use of the local roadways by HRI's vehicles and, in

particular, whether there is a greater likelihood that accidents will occur on local roadways at night, rather than during the day, because of such use. Considering the extraordinarily high accident death rate among Navajos -- accidents account for 22.6 percent of Navajo deaths, id. at 3-80 -- the FEIS's discussion of "Transportation Risk" as an environmental justice issue is inadequate because it fails both to consider to what extent the increase in local traffic which the proposed project will cause will occur at night and to discuss the impact of such an increase on the local communities.

B. Groundwater Protection

The focus of the FEIS's discussion of "Groundwater" as an environmental justice issue is on the mitigation measures that the NRC Staff believes are necessary to protect the Crownpoint drinking water supply. See id. at 4-113. The water supply is located within 0.4 km (0.25 miles) of the area on the eastern and western edges of the town of Crownpoint where HRI proposes to mine. Id. at 3-22. "Six wells completed in the Westwater Canyon Sandstone of the Morrison Formation" provide the water.[3] Id. The wells are owned by the Bureau of Indian Affairs and the NTUA. Id. Water from the wells "is of better quality than State of New Mexico drinking water quality standards." Id. at 3-24.

The NRC Staff's decision to implement mitigation measures to protect the quality of the water supply arises from the FEIS's identification of "a potential risk that restoration of groundwater to the primary goal at the Crownpoint site may result in uranium concentrations at the town's drinking water wells that exceed the NRC standard 0.44 mg/L...." Id. at 4-49. In light

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[3] Westwater Canyon is also the location of the body of uranium mine which HRI proposes to mine. "The Westwater Canyon provides two valuable resources: uranium ore and high-quality groundwater." Id. at 3-22.

of this:

> The staff would require HRI to relocate the town of Crownpoint drinking wells to an alternate location with acceptable groundwater quality and quantity, prior to mining at the Crownpoint site, to ensure a continued source of high-quality water to the town of Crownpoint. This requirement is included as a mitigative measure in Section 4.3.3 [of the FEIS].

Id. Section 4.3.3 states the mitigative measure thusly:

> Prior to the injection of lixiviant at the Crownpoint site, HRI would be required to replace town of Crownpoint water supply wells NTUA-1, NTUA-2, BIA-3, BIA-5, and BIA-6. The wells, pumps, pipelines, and any other necessary changes to the existing water supply system shall be completed so the system can continue to provide the same quantity of water. The new wells shall be located so that the water quality at each individual well head would not exceed EPA primary and secondary drinking water standards and a concentration of 0.44 mg/L uranium as a result of future ISL mining activities at the Unit 1 and Crownpoint sites. HRI shall coordinate with the appropriate agencies and regulatory authorities, including the BIA, the Navajo Nation Department of Water Development and Water Resources and the NNEPA, and the NTUA, to determine the appropriate placement of the new wells. Further, the existing wells shall be abandoned and sealed so that they cannot become future pathways for the vertical movement of contaminants.

Id. at 4-62. See also Materials License SUA-1508 at 9, ¶ 10.27.

Ms. Sam and Ms. Morris contend that the analysis in the FEIS leading to the conclusion that mining at the Crownpoint site presents an acceptable risk so long as mitigative measures are implemented to protect the Crownpoint water supply by requiring HRI to move the drinking water wells before it engages in ISL mining there is inadequate because it fails to discuss and take into consideration local community and NTUA views of the plan. The CEQ has made clear that agencies "should carefully consider community views in developing and implementing mitigation strategies. Mitigation measures identified in an EIS ... should reflect the needs and preferences of affected low-income populations, minority populations, or Indian tribes to the extent practicable." CEQ Guidance at 16. The Crownpoint water supply provides high-quality water to the residents

of Crownpoint and its surrounding environs, a particularly arid area in the dry Southwest, where water is the limiting resource. See FEIS at 3-1 to 3-3 and Table 3-2. Understandably, then, there is opposition in the local communities to the plan to move the drinking water wells. See id. at A-22 to A-24. This too is understandable when one considers that the FEIS identifies no nearby replacement water supply of equivalent quality and quantity. Simply put, the FEIS completely ignores the legitimate views of the local environmental justice population in deciding what is an acceptable method of mitigating the potential threat to the Crownpoint water supply.

The FEIS similarly fails to consider the views of the NTUA. As a general principle, "[a]gencies should seek tribal representation in the [NEPA] process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights." CEQ Guidance at 9. Contrary to this guiding principle, the FEIS's discussion of the mitigative measure to relocate the Crownpoint water supply does not even mention the views of the NTUA, the Navajo Nation-owned utility company which owns and operates two of the Crownpoint drinking water wells. In fact, the two NTUA-owned wells, NTUA-1 and NTUA-2, account for the majority of the water supply. See FEIS at 3-24 and A-24. Although it seems obvious that the NRC Staff would have solicited the views of the NTUA regarding the relocation of its wells, there is nothing in the FEIS which indicates that it did so.[4]

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[4] But see Letter from Joseph J. Holonich, NRC, to Malcolm P. Dalton, NTUA, dated January 15, 1998 [Notebook No. 11, Acc. No. 9801300007, 1/15/98], discussing the NTUA Management Board's enactment of a resolution "opposing the proposed in situ leach mining of uranium of Hydro Resources, Inc., at Crownpoint, New Mexico" and the two options the NTUA can pursue with respect to the proposed project. Id. at 1. This letter, which indicates the NTUA's opposition to mining at the Crownpoint site, may explain why the NRC Staff did not include in the FEIS the views of the NTUA regarding the relocation of its wells. It does not

In sum, the FEIS characterizes the decision to require HRI to move the Crownpoint drinking water wells before mining can occur at the Crownpoint site as "consistent with the conservative licensing approach used by the NRC to mitigate potential risk and ensure the protection of public health." Id. at A-23. In its effect, however, the decision ignores the "needs and preferences" of the affected population and the Navajo utility company which owns the two wells which supply the majority of the water to the Crownpoint community. In this regard, the FEIS is grossly inadequate.

C. Property Values

The Commission has left no doubt that a proposed project's impact on property values presents an environmental justice issue that must be fully discussed and analyzed in a FEIS. See Louisiana Energy Services, 47 N.R.C. at 108-09. Yet the FEIS here engages in no discussion of the effects, good or bad, that HRI's proposed project may have on property values in the Navajo communities where HRI proposes to conduct its mining operations. Not surprisingly, because it makes no conclusions about the proposed project's potential effects on local property values, the FEIS also never discusses how to mitigate the potential impacts of any negative effects on property values that might have been identified.

What few facts the FEIS does provide regarding housing in the area of HRI's proposed mining operations strongly suggest the need for a thorough examination of the proposed project's potential effects on residential property values. Discussing the socioeconomics of the affected environment, the FEIS reveals that "[t]here is a significant difference in the value of housing in

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excuse, however, the failure to include the NTUA's views, whatever they may have been at the time, in the FEIS.

Gallup compared to the rest of McKinley County, reflecting the higher incomes of residents in Gallup." FEIS at 3-60. In fact, "Crownpoint per unit housing value is only 25 percent of that in Gallup, reflecting the lower incomes of the predominantly Native American population." Id. This information, when coupled with the fact that HRI proposes to place "well fields and monitor wells ... in close proximity to residences" in Crownpoint, id. at 3-53, compels the conclusion that, for better or worse, the proposed project will have some effect on residential property values in Crownpoint. Compare Louisiana Energy Services, 47 N.R.C. at 108 (concluding that predicted negative impact of uranium enrichment facility on property values "would presumably fall heaviest on" communities adjacent to proposed site). But the FEIS does not go beyond the compelling data it presents to analyze to what extent, if any, HRI's proposed project might affect existing residential property values. Without a thorough analysis of potential impacts, there is simply no way to assess competently what measures might be taken to mitigate the impact a diminution of property values would have on the poor Navajo communities already destined to bear a disproportionate share of the proposed project's effects. In short, like the FEIS at issue in Louisiana Energy Services, the FEIS here gives at best "only cursory attention to the property-values issue." Id. Because it "does not specify where, why, or to what extent the impacts on property values would be likely felt[,]" id., the FEIS fails adequately to discuss this environmental justice issue.

II. THE DISCUSSION OF ALTERNATIVES IN THE FEIS IS INADEQUATE.

Under NEPA, the NRC must discuss in the FEIS alternatives to HRI's proposed project. 42 U.S.C. § 4332(2)(C)(iii); 10 C.F.R. § 51.91(c). "[T]he discussion of alternatives forms 'the heart of the environmental impact statement.'" Citizens Against Burlington, Inc., 938 F.2d at 193

(quoting 40 C.F.R. § 1502.14). Elaborating on the scope of the discussion of alternatives, the D.C. Circuit in a more recent case has stated:

> The range of alternatives that the agency must consider is not infinite, of course, but it does include all "feasible" or "reasonable" alternatives to the proposed action. 40 C.F.R. §§ 1502.14(a)-(c), 1508.25(b)(2). This "rule of reason governs both **which** alternatives the agency must discuss, and the **extent** to which it must discuss them."

City of Grapevine, Tex. v. Department of Transp., 17 F.3d 1502, 1506 (D.C. Cir.), cert. denied 513 U.S. 1043 (1994) (quoting Citizens Against Burlington, Inc., 938 F.2d at 195) (emphasis in original; internal quotations omitted).

The FEIS focuses on four alternatives:

- Alternative 1 (the proposed action) -- issue HRI a license for the construction and operation of facilities for ISL uranium mining and processing at the Church Rock, Unit 1, and Crownpoint sites as proposed in the license application and related submittals;

- Alternative 2 (modified action) -- issue HRI a license for the construction and operation of facilities for ISL uranium mining and processing as proposed by HRI, but at alternative sites and/or using alternative liquid waste disposal methods;

- Alternative 3 (the NRC Staff-recommended action) -- issue HRI a license for the construction and operation of facilities for ISL uranium mining and processing as proposed by HRI, but with additional measures required and recommended by the NRC staff to protect public health and safety and the environment; and

- Alternative 4 (no action) -- do not issue HRI a license for the construction and operation of facilities for ISL uranium mining and processing at the Church Rock, Unit 1, or Crownpoint sites.

FEIS at 2-1. Although it is clear throughout the FEIS that Alternative 3 is the NRC Staff's preferred alternative, there is a lack of analysis and adequate explanation why the Staff rejects Alternative 2 (modified action) and Alternative 4 (no action). For this reason, the FEIS does not

comply with NEPA and the applicable implementing regulations.

A. The Discussion Of Alternative 2 (Modified Action) Is Inadequate.

The FEIS lacks a proper comparative analysis between Alternative 2 and the NRC Staff-recommended Alternative 3. The pertinent CEQ implementing regulation requires that the FEIS "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. See also 10 C.F.R. § 51.71. More specifically, the FEIS must:

> [r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated[;] [and] [d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

40 C.F.R. § 1502. 14(a)-(b). See also Louisiana Energy Services, 47 N.R.C. at 98 ("An FEIS should 'briefly discuss' the reasons why an alternative was rejected and not further studied.") (citing Tongass Conservation Soc. v. Cheney, 924 F.2d 1137, 1141 (D.C. Cir. 1991). Here, the FEIS simply fails to meet this standard.

Alternative 2 is described in the FEIS as a "modified action." As such, it considers various configurations in the number and combination of the sites at which HRI proposes to mine; other possible sites for yellowcake drying and packaging; and liquid waste disposal site options. See FEIS at 2-28 to 2-31. For example, Alternative 2 considers only one or two sites for ISL mining as opposed to all three proposed by HRI. Id. at 2-31. The different site options for ISL mining which Alternative 2 explores include:

- the Church Rock site only;
- the Unit 1 site only;
- the Crownpoint site only;
- the Church Rock and Unit 1 sites only;
- the Church Rock and Crownpoint sites only; and
- the Unit 1 and Crownpoint sites only.

Id. Alternative 2 also considers alternative sites for Yellowcake Drying and Packaging:

- the proposed Church Rock processing facility;
- the proposed Unit 1 processing facility;
- HRI's existing ISL facility at Kingsville, Texas; and
- the Ambrosia Lake uranium mill, located north of Milan, New Mexico.

Id.. Finally, Alternative 2 lists the options for liquid waste disposal methods as "a combination of evaporation ponds, aquifer reinjection, land application, and reinjection into the Westwater Canyon sandstone outside the mining area." Id. In short, Alternative 2 limits the number of sites at which ISL mining would be permitted and looks at alternatives for processing and liquid waste disposal. Beyond identifying the various configurations and combinations that comprise Alternative 2, the FEIS nowhere contains even a brief analysis in comparative form which details the reasons why the NRC Staff rejected Alternative 2 in favor of Alternative 3.

Section 4 of the FEIS discusses the environmental consequences associated with each proposed alternative. It in turn is divided into sections discussing the effects of each alternative upon air quality and noise (section 4.1), geology and soils (section 4.2), groundwater (section 4.3), surface water (section 4.4), transportation risk (section 4.5), health physics and radiological impacts (section 4.6), ecology (section 4.7), land use (section 4.8), socioeconomics (section 4.9), aesthetics (section 4.10), cultural resources (section 4.11), environmental justice (section 4.12), and cumulative impacts (section 4.13). Most of these sections are further organized into

subsections which individually discuss each of the four alternatives.[5] Consistently throughout each of these sections, the FEIS reminds the reader that Alternative 3 is the NRC Staff-recommended action, but engages in no discussion of the comparative merits of the various alternatives. In particular, there is no comparative discussion of Alternative 2 and no explanation why it was discarded as a reasonable alternative in favor or Alternative 3.

For example, in the discussion of the impacts of Alternative 2 upon air quality and noise (section 4.1.2), the FEIS concedes that "[a]dditional air and noise pollution in the local area could be avoided by not developing one or two of the three proposed sites" and that "[u]sing an alternative site for yellowcake drying and packaging would help avoid additional fugitive dust emissions around the Crownpoint facility...." Id. at 4-4. Yet, despite the stated environmental benefit Alternative 2 would provide, the NRC recommends Alternative 3, which requires certain license conditions to mitigate air quality and noise impacts. See id. at 4-5.[6] The FEIS fails to discuss or even identify the benefits or impacts of Alternative 3, or how the advantages of Alternative 3 outweigh the advantages of Alternative 2. The FEIS's failure to include a comparative analysis of Alternatives 2 and 3 violates NEPA and the NRC's own regulations.

While it is true that NEPA's "mandate to the agencies is essentially procedural," Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558

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[5] The sections on environmental justice (section 4.12) and cumulative impacts (section 4.13) do not contain subsections which individually examine each of the four alternatives. The section on socioeconomics (section 4.9) contains subsections for Alternatives 1, 3 and 4, but does not discuss Alternative 2.

[6] The mitigation measures include the suspension of yellowcake drying operations if emission control equipment is not operating at design performance specifications, the use of manufacturer-recommended vacuum pressure in the drying chamber, and the use of dust suppression techniques. See Materials License SUA-1508 at 5, ¶ 10.9.

(1978), it is the substantive findings under Alternative 2 that beg the question of whether the FEIS follows proper procedure when it fails to include a comparative analysis between Alternatives 2 and 3. For example, under the section discussing the environmental impacts on groundwater (section 4.3,) the FEIS finds that "[c]onservative analysis by the NRC staff suggests there is a potential risk that restoration of groundwater to the primary goal at the Crownpoint site might result in uranium concentrations at the town's drinking water wells that exceed the NRC standard...." FEIS at 4-59 and 4-60. Rather than comparatively analyzing the options of an Alternative 2 modified project that does not use the Crownpoint site (for example, Unit 1 site only), however, the FEIS summarily states that "[t]he staff would require HRI to relocate the town of Crownpoint drinking wells to an alternate location with acceptable groundwater quality and quantity." Id. at 4-60. Thus, the FEIS reaches its conclusion and recommends Alternative 3 without discussing why the options considered as part of Alternative 2 are rejected in favor of Alternative 3 even when the information provided in the FEIS points to a lessening of environmental impacts under Alternative 2.

This is a trend that repeats itself throughout the FEIS. There is never any discussion comparing Alternative 2 to Alternative 3 or explaining why Alternative 2 is eliminated as a reasonable alternative. In spite of this, the FEIS makes a number of conclusions that imply that Alternative 2 is a more viable alternative insofar as it will reduce environmental impacts:

Geology and Soils. The FEIS concludes that under the proposed project there would be impacts at the Unit 1 or Church Rock site, but under Alternative 2 "[t]here would be no significant impact on geologic and soil resources from using the existing drying and packaging facilities at HRI's Kingsville Dome site in Texas or at the Ambrosia Lake Uranium Mill north of

Milan, New Mexico." Id. at 4-13.

Surface Water. Under Alternative 2, the FEIS concludes that "[i]mpacts for each of the alternative sites would be less than the impacts of the proposed project." Id. at 4-65.

Health Physics and Radiological Impacts. The FEIS contends that "[r]educing the number of sites would reduce the number of potential sources of radon." Id. at 4-86.

Ecology. The FEIS states that "[i]n general, limiting well field operations to no more than two of the three proposed sites would lessen the probable extent of impacts on biota by limiting the area involved." Id. at 4-91.

Land Use. "In terms of the temporary revocation of grazing permits, impacts would be reduced by not developing the Crownpoint and/or Unit 1 sites. The potential impacts of resident relocation could be avoided altogether by not developing the Unit 1 site." Id. at 4-94.

Aesthetics. Under Alternative 2, "limiting well field construction and operation to just two of the three proposed sites would lessen the likely extent of aesthetic impacts by limiting the affected areas." Id. at 4-108.

Cultural Resources. "[D]eveloping only one or two sites instead of three would be expected to reduce impacts to cultural resources proportionately." Id. at 4-111.

Simply put, because the FEIS details numerous possible advantages inhering in the choice of Alternative 2 as the preferred alternative, but contains no comparative analysis between the relative advantages and disadvantages of Alternative 2 and Alternative 3, it is not at all apparent why the NRC Staff recommends Alternative 3. The FEIS's failure to include an explanation of the reasoning behind the choice of Alternative 3 as the preferred alternative renders it inadequate.

B. The Discussion Of Alternative 4 (No Action Alternative) Is Inadequate.

An FEIS also must include an analysis of the no-action alternative in its consideration of alternatives to a proposed action. See 40 C.F.R. § 1502.14(d). The extent of the no-action discussion is governed by the "rule of reason." Louisiana Energy Services, 47 N.R.C. at 97 (citing Citizens Against Burlington, Inc., 938 F.2d at 195). The "no-action" discussion "need not be exhaustive or inordinately detailed." Id. (citing Farmland Preservation Ass'n v. Goldschmidt, 611 F.2d 233, 239 (8th Cir. 1979)). But, as with the other alternatives to the proposed action, the FEIS must still "briefly discuss" the reasons why the no-action alternative has been eliminated and must "[d]evote substantial treatment to [it] ... so that reviewers may evaluate [its] ... comparative merits." 40 C.F.R. § 1502.14(b). In particular, the discussion of the no-action alternative must be balanced in evaluating the benefits of the proposed project against the benefits of no action. In Louisiana Energy Services, the Commission deemed the discussion of the no-action alternative in the FEIS inadequate because of "a lack of evenhandedness; that is, the discussion included an extensive description of the benefits of building the [project], but was virtually silent on the benefits of not building it." Id., 47 N.R.C. at 98. Concluding that the FEIS had to be revised, the Commission stated:

> The "no-action" discussion at issue in this case does not measure up to these standards. Lacking balance and analysis, it merely lists various benefits of the project without delineating the principal reasons why the "no-action" option was eliminated from consideration.... [I]t meticulously identifies virtually all of the [project's] expected benefits, from positive local environmental effects, to the creation of jobs and generation of new tax revenues, to various national policy goals. **It offers no comparative reasoning whatever.** By merely reciting all of the benefits expected from the [project], the "no-action" section does not indicate how the agency evaluated the relative significance of these individually cited benefits. In short, the reader cannot readily discern how the agency weighed the various benefits and costs of not building the facility.

Id. at 98 (emphasis added). The same can be said for the discussion of the no-action alternative in the FEIS here.

The no-action alternative is discussed in various subsections throughout section 4 of the FEIS. Each subsection in which it is discussed gives the no-action alternative very brief treatment; on all occasions but one it is discussed in one or two sentences.[7] While brevity alone in discussing the no-action alternative does not constitute a violation of NEPA and the implementing regulations, the discussion of the no-action alternative in this FEIS does fail to measure up to the requirements of NEPA because, as was the case with the FEIS in Louisiana Energy Services, it is wholly unbalanced in its perspective and contains "no comparative reasoning whatever."

1. Benefits of "no action" not presented.

The benefits of the no-action alternative are never mentioned, much less discussed comparatively in the FEIS. In contrast, the benefits for going forward with the project are found throughout the FEIS. For example, possible benefits of increased employment, royalty income, and tax revenues are discussed at length in section 5 of the FEIS, "Costs and Benefits Associated with the Proposed Project," as well as in section 4's discussion of socioeconomics. The stated benefits of building the project are analyzed in more than five pages, which include four tables. See FEIS at 5-1 to 5-6. Some of these benefits are then reiterated in detail in the ten pages of the

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[7] In the subsections that contain a discussion of Alternative 4, only the subsection on Cultural Resources, section 4.11, discusses it in more than one or two sentences. The "no-action" discussions of each parameter discussed in the FEIS can be found on the following sections: air quality and noise (section 4.1.4); geology and soils (section 4.2.4); groundwater (section 4.3.4); surface water (section 4.4.4); transportation risk (section 4.5.4); health physics and radiological impacts (section 4.6.4); ecology (section 4.7.4); land use (section 4.8.4); socioeconomics (section 4.9.7); aesthetics (section 4.10.4); cultural resources (section 4.11.4); and environmental justice (section 4.12.10).

section on socioeconomics. See id. at 4-96 to 4-105. Thus, the FEIS dedicates large amounts of space to a discussion of the benefits of going forward with the proposed project, but presents absolutely no discussion of the benefits which would accrue by not licensing the project. Section 4.3.4 of the FEIS is typical of the "discussion" of the no-action alternative contained throughout the FEIS. Of the effects the no-action alternative would have on groundwater, it states: "Under the no-action alternative, there would be no impacts to groundwater quantity or quality. Groundwater quantity and quality would remain as described in Section 3.3."[8] Id. at 4-63. For this reason, the FEIS's discussion of the no-action alternative suffers from the same "lack of evenhandedness" that the Commission concluded was fatal to the FEIS in Louisiana Energy Services.

2. No comparative reasoning.

Just as the discussion of Alternative 2 in the FEIS is inadequate because there is no comparative analysis of it with the NRC Staff-recommended Alternative 3, so too is the discussion of the no-action alternative deficient. It is unclear from the FEIS how, if at all, the NRC Staff compared and evaluated the impacts of its preferred alternative with the no-action alternative.

For example, in its discussion of groundwater the FEIS concludes that "[l]ocal groundwater quality in the Westwater Canyon sandstone within the proposed mining units would deteriorate during HRI's proposed project, " id. at 4-15, and that "[c]onservative analysis by the NRC staff suggests there is a potential risk that restoration of groundwater to the primary goal at

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[8] Section 3.3, which discusses hydrology, also makes no reference to any potential benefits of the no-action alternative. See id. at 3-22 to 3-42.

the Crownpoint site might result in uranium concentrations at the town's drinking water wells that exceed the NRC standard...." Id. at 4-59 and 4-60. Given the identification of this clear risk to groundwater quality associated with the NRC Staff-recommended Alternative 3, the FEIS fails to compare the potential advantages and disadvantages vis-a-vis groundwater of choosing the no-action alternative. It is plain from the Commission's decision in Louisiana Energy Services that the discussion of the no-action alternative must provide for such a comparison. See id., 47 N.R.C. at 98 (the no-action discussion should "provide a fair accounting of the costs and benefits of no action and how the NRC Staff evaluates them"). If the NRC Staff made one, it was not included in the FEIS. That omission is fatal to the FEIS under NEPA and the implementing regulations.

III. THE COST BENEFIT ANALYSIS IN THE FEIS CONTAINS AN INADEQUATE DISCUSSION OF SECONDARY EFFECTS.

NEPA requires agencies to balance a proposed project's economic benefits against its adverse environmental effects. Calvert Cliffs' Coordinating Committee v. U. S. Atomic Energy Comm'n, 449 F.2d 1109, 1113 (D.C. Cir. 1971). NRC regulations also direct the Staff in an FEIS "to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and its alternatives, and, 'to the fullest extent practicable, quantify the various factors considered.'" Louisiana Energy Services, 47 N.R.C. at 88 (quoting 10 C.F.R. § 51.71(d)). "If important factors cannot be quantified, they may be discussed qualitatively." Id.

NRC and CEQ regulations suggest that the agency consider socioeconomic or "secondary" benefits in an FEIS. Id. at 99 (citing 40 C.F.R. § 1508.8(b) and 10 C.F.R. § 51.71). However, an FEIS must not contain misleading information on the economic benefits of a project

or distorted economic assumptions that impair fair consideration of a project's adverse environmental effects. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996) (EIS violated NEPA since it was based on misleading economic assumptions which impaired fair consideration of the project's adverse environmental effects). The use of misleading economic assumptions can defeat the purpose of an FEIS in two ways: by impairing the agency's consideration of the adverse environmental effects and by skewing the public's evaluation of a project. Id.

The FEIS in this case is flawed since it contains misleading economic assumptions in its cost-benefit analysis that impair fair consideration of the environmental impacts of the project by both the NRC Staff and the public. The cost-benefit discussion is for the most part contained in section 5 of the FEIS, although some of the proposed project's benefits are reiterated in the discussion of socioeconomics in section 4.9. After a brief discussion of the general public benefit of the project as a domestic source of uranium for nuclear reactors and of profit that the project might provide to HRI, section 5 then devotes most of its space to secondary benefits. See FEIS at 5-1 to 5-6. The specific subjects discussed include "Benefits from Employment and Royalty Income" and "Benefits from Tax Revenues." In discussing these subjects, the FEIS makes numerous conclusions that are misleading. Generally, the conclusions are too speculative, and thus should not be taken too seriously, because they ignore vital information the absence of which tends to make the analysis of costs and benefits unrealistic. The inclusion of such speculative information in the cost-benefit discussion is inappropriate and renders the FEIS inadequate. It violates NEPA and the implementing regulations both by impairing the FEIS's consideration of the adverse environmental effects of the proposed project as well as by skewing the public's

evaluation of the project.

A. Navajo Nation Business Activity Tax

Section 5.1.3 of the FEIS discusses possible tax revenue that the Navajo Nation may derive from the proposed project. Table 5.4 estimates that the Navajo Nation could collect $942,000 annually from the project through the application of its Business Activity Tax ("BAT") and an additional $15,000.00 in construction taxes. Id. at 5-5. The FEIS also states this potential tax benefit to the Navajo Nation in sections 3.7.5 and 4.9.5.2. In actuality, this tax "benefit" to the Navajo Nation is much too speculative to be touted throughout the FEIS as a significant secondary benefit of the proposed project, for the discussion of it ignores the fact that HRI is likely to challenge any attempt by the Navajo Nation Tax Commission to exercise jurisdiction over it.[9] While glossing over the issue, the FEIS does recognize the conditional status of the BAT tax benefit to the Navajo Nation when it states that "[t]he gross receipts of the project **may** be taxed by the Navajo Nation **if** it is determined that the project is located within 'Indian country.'" Id. at 5-4 (emphasis added). Nevertheless, the picture which the FEIS paints relies on the existence of a significant tax benefit to the Navajo Nation as a secondary benefit to justify the NRC Staff's choice of Alternative 3 as the preferred alternative. Given the disputed status of the lands in which HRI proposes to mine, it is inappropriate and misleading to rely on such a tenuous potential secondary benefit as a basis for licensing the proposed project, especially when the cost-benefit discussion in Section 5 never expressly mentions that the possibility that the tax benefit

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[9] The continuing jurisdictional dispute over the lands which the proposed project encompasses was been discussed most recently in Intervenors' Amended Written Presentation in Opposition to Hydro Resources, Inc.'s Application For a Materials License with Respect to: Groundwater Protection, Volume I, January 18, 1999 at 14-15.

which the Navajo Nation ultimately derives from the proposed project might be zero. Because it fails to mention the difficulties the Navajo Nation is likely to face in any attempt to collect the BAT from HRI, the cost-benefit analysis's discussion of the BAT is misleading.

B. Economic Development

Although not specifically mentioned in section 5's analysis of costs and benefits, the FEIS in section 4.9.1 specifically discusses the potential for development of hotel or motel accommodations in the area of the proposed project:

> The proposed project would require some local overnight accommodations for personnel making site visits. At present, there are no hotel or motel accommodations in the Crownpoint area. This would be an opportunity for developing and operating accommodations in the Crownpoint area and could result in employment for Crownpoint residents.

Id. at 4-99. The FEIS offers no further analysis of the costs or benefits of such potential development. It offers no discussion of the difficulties of starting a hotel or motel business on the Navajo Nation. It offers no facts that would imply that possible hotel or motel accommodations are anything more than simple conjecture and blind speculation. Mention of it amounts to more than harmless theorizing because it gives the impression of the potential for economic development that, in reality, simply does not exist. Inclusion in the FEIS of this kind of unsubstantiated speculation prejudices the cost-benefit analysis by suggesting to the reader an extremely unlikely outcome of the proposed project that will skew his or her evaluation of the project's advantages and disadvantages.

The FEIS similarly misleads the reader with regard to potential benefits to local businesses. It states: "Those employed by the project would make purchases at businesses within the local community, resulting in a benefit to local businesses. For example, the local supermarket

could receive a significant benefit from an increase in expenditures." Id. Again, the FEIS offers no further facts or analysis to support this conclusion. There is no discussion of what services the few businesses that operate within the local community provide or what products they sell,[10] what purchases local residents are able actually to make locally, and whether local residents are able to do most of their shopping locally or must go outside the local area to obtain necessary goods and services. Moreover, the FEIS states the NRC Staff's belief that most new hiring would be local so that only about 10 to 15 employees would be brought in from outside the local area. Id. at 4-96 and 4-99. If this is true, it is difficult to imagine how the arrival of so few workers from outside the community would manifest itself as a significant increase in the sales of local businesses. The FEIS gives the impression that the local community will derive a significant economic benefit from the proposed project that simply will not occur. In addition to creating false hopes in the minds of readers of the FEIS, such exaggeration likely impaired the NRC's consideration of the real benefits and costs of the proposed project.

C. Jobs And Employment

The FEIS discusses increased local employment as the "most important local benefit from the proposed project." Id. at 5-3. It asserts that the "NRC staff review indicates that about one hundred long-term jobs may be available that would not require highly specialized experience or skills. It appears that members of the local communities could fill most, if not all, of these jobs." Id. The NRC Staff believes that the number of jobs ultimately filled by local workers would depend on "how well HRI executes its stated intention to hire local Navajo." Id. Details about

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[10] The FEIS merely identifies local businesses by name and number of employees. See id. at 3-59 to 3-60.

HRI's intention to hire local Navajos is found in section 4.9.1 of the FEIS:

> HRI has made a commitment to hire from the local Navajo community as much as possible. Local hiring preferences are also written into royalty agreements with owners of allotment land at the Unit 1 site. The first hiring priority for these agreements is for the lessor and members of the lessor's immediate family, followed by a general preference for hiring members of the Navajo Nation. The following analysis assumes that beyond the hiring commitment in these lease agreements, HRI would fulfill its Navajo hiring commitment from members of the local communities within the Church Rock and Crownpoint chapters.

Id. at 4-96. The discussion about the potential benefits for local employment in the FEIS is extremely speculative and exaggerated in light of relevant Navajo law which would make an HRI local hiring preference impossible.

The Navajo Preference in Employment Act ("NPEA"), 15 N.N.C. § 601 et seq. (copy attached as Exhibit B), is the Navajo Nation's main employment statute. Under the NPEA, the local hiring preference on which the FEIS bases its prediction that the proposed project will provide one hundred jobs to local community members would be illegal. As its title implies, the NPEA requires that "all employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation" give preference in employment to Navajos. 15 N.N.C. § 604(A)(1). However, the NPEA also requires, among other things, that employers "use non-discriminatory job qualifications and selection criteria in employment," id. § 604(A)(7); "advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation," id. § 604(A)(6); and most notably, "[a]mong a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be." Id. §604(C)(3). These provisions of the NPEA make a local hiring preference untenable.

First, any local preference for jobs may be considered a discriminatory criterion in the selection of employees in violation of the NPEA, thus nullifying HRI's local employment preference procedures. Id. § 604(A)(7). Second, any job vacancies at the project would have to be advertised and announced throughout the entire Navajo Nation, not just locally. Id. §604(A)(6). Given the Navajo Nation's high unemployment rate, see FEIS at 3-58 to 3-60, the chances that Navajos from outside the local communities of Church Rock and Crownpoint will apply for work at the project is great. Finally, the NPEA would specifically require HRI to hire "the Navajo with the best qualifications" rather than local Navajos or Navajos who signed or have a family member who signed a royalty agreement with HRI. Thus, a hiring preference based solely on local residency or prior agreement would be illegal. In light of this, the FEIS's discussion of the significant benefit of up to one hundred jobs for members of the local community is fallacious. The NRC Staff's failure to acknowledge the illegality under Navajo law of the planned local hiring preference skews the FEIS's entire cost-benefit analysis. Notably, it also affects the public's, especially the local community members', evaluation of the project. For this reason, the FEIS violates NEPA and the implementing regulations.

D. McKinley County Tax Revenue

Finally, the FEIS is misleading because its discussion of the potential local county tax benefit from the proposed project contains no information on how such taxes would be used in or directed back into the local Navajo communities. It is misleading for the FEIS to devote substantial discussion to the tax benefit McKinley County may derive from the proposed project without exploring how that potential benefit will affect the local communities. The FEIS predicts that McKinley County's real property tax will net $484,000 and its personal property tax $55,000

annually from the proposed project. Id. at 5-5 (Table 5-4). The FEIS concludes that "[t]he potential tax contribution of the proposed project to McKinley County would be a significant part of local tax revenues" and indicates that "[m]ost of the tax collections would go to the General County Operating Fund and to public schools." Id. at 4-101. However, the FEIS fails to detail how the county tax collections would be directed, if at all, to the local communities where ISL mining and processing would take place, to what extent the increase in the General County Operating Fund would affect the local communities, and to what extent the public schools in the local communities would benefit. In short, the FEIS's analysis of the tax benefit McKinley County may derive from the proposed project is misleading insofar as it characterizes the potential benefit as a significant one without including in the analysis a discussion of how the increase in tax revenue will affect the local communities.[11]

CONCLUSION

For the reasons herein stated, Ms. Sam and Ms. Morris hereby request that the Presiding Officer find the FEIS inadequate with respect to its discussion and analysis of environmental justice issues, alternatives, and the costs and benefits of secondary effects. Accordingly, the Presiding Officer should revoke HRI's material license and order the NRC Staff to redo the FEIS so that it includes: (1) a thorough explanation and analysis of the proposed project's potential

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[11] The FEIS does state that "[t]here is no direct connection between the various taxes that may be collected and the local communities," and implies that the local communities will derive no benefit from McKinley County's collection of taxes from the proposed project when it acknowledges that "[t]he best chance for local communities to benefit from tax collection would be through the Navajo Nation...." Id. at 5-4. These conclusory statements leave the further impression that the local communities will not benefit in any way from the increase in tax revenue McKinley County may derive from the proposed project and further suggest that the FEIS's characterization of an increase in county tax revenues as a significant benefit of the proposed project is misleading.

impacts on transportation, groundwater, and property values within the local environmental justice population and, if necessary, a discussion of measures calculated to mitigate the effect of those impacts that considers the views and preferences of members of the local communities and the NTUA; (2) a balanced discussion of both Alternative 2 and the no-action alternative which comparatively analyzes their relative advantages and disadvantages with those of the NRC Staff-recommended Alternative 3; and (3) a cost-benefit analysis that bases its discussion of secondary effects upon realistic, rather than speculative, factual assumptions concerning the Navajo Nation BAT, the likelihood that economic development will occur in the local Navajo communities as a result of the proposed project, and the likelihood that the proposed project will create one hundred jobs for members of the local community.

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ENVIRONMENTAL JUSTICE

Guidance Under the National Environmental Policy Ac

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I.

Introduction

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,"[1] provides that "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 effects of its programs, policies, and activities on minority populations and low-income populations." The Executive Order makes clear that its provisions apply fully to programs involving Native Americans.

In the memorandum to heads of departments and agencies that accompanied Executive Order 12898, the President specifically recognized the importance of procedures under the National Environmental Policy Act (NEPA)[2] for identifying and addressing environmental justice concerns. The memorandum states that "each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]." The memorandum particularly emphasizes the importance of NEPA's public participation process, directing that "each Federal agency shall provide opportunities for community input in the NEPA process." Agencies are further directed to "identify potential effects and mitigation measures in consultation with affected communities, and improve the accessibility of meetings, crucial documents, and notices."

The Council on Environmental Quality (CEQ) has oversight of the Federal government's compliance with Executive Order 12898 and NEPA.[3] CEQ, in consultation with EPA and other affected agencies, has developed this guidance to further assist Federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed. To the extent practicable and permitted by law, agencies may supplement this guidance with more specific procedures tailored to particular programs or activities of an individual department, agency, or office.

II.

[1] 59 Fed. Reg. 7629 (1994).

[2] 42 U.S.C. §4321 et seq.

[3] Certain oversight functions in the Executive Order are delegated to the Deputy Assistant to the President for Environmental Policy. Following the merger of the White House Office on Environmental Policy with CEQ, the Chair of CEQ assumed those functions. The Environmental Protection Agency (EPA) has lead responsibility for implementation of the Executive Order as Chair of the Interagency Working Group (IWG) on Environmental Justice.

Executive Order 12898 and the Presidential Memorandum

In addition to the general directive in Executive Order 12898 that each agency identify and address, as appropriate, "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations,"[4] there are several provisions of the Executive Order and a number of supporting documents to which agencies should refer when identifying and addressing environmental justice concerns in the NEPA process.

First, the Executive Order itself contains particular emphasis on four issues that are pertinent to the NEPA process:

- The Executive Order requires the development of agency-specific environmental justice strategies.[5] Thus, agencies have developed and should periodically revise their strategies providing guidance concerning the types of programs, policies, and activities that may, or historically have, raised environmental justice concerns at the particular agency. These guidances may suggest possible approaches to addressing such concerns in the agency's NEPA analyses, as appropriate.

- The Executive Order recognizes the importance of research, data collection, and analysis, particularly with respect to multiple and cumulative exposures to environmental hazards for low-income populations, minority populations, and Indian tribes.[6] Thus, data on these exposure issues should be incorporated into NEPA analyses as appropriate.[7]

- The Executive Order provides for agencies to collect, maintain, and analyze information on patterns of subsistence consumption of fish, vegetation, or wildlife.[8] Where an agency action may affect fish, vegetation, or wildlife, that agency action may also affect subsistence patterns of consumption and indicate the potential for disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, and Indian tribes.

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[4] Executive Order No. 12898, 59 Fed. Reg. at 7630 (Section 1-101).

[5] *Id.* at 7630 (Section 1-103).

[6] *Id.* at 7631 (Section 3-3).

[7] For further information on considering cumulative effects, see Considering Cumulative Effects Under The National Environmental Policy Act (Council on Environmental Quality, Executive Office of the President, Jan. 1997)

[8] *Id.* at 7631 (Section 4-401).

- The Executive Order requires agencies to work to ensure effective public participation and access to information.[9] Thus, within its NEPA process and through other appropriate mechanisms, each Federal agency shall, "wherever practicable and appropriate, translate crucial public documents, notices and hearings, relating to human health or the environment for limited English speaking populations." In addition, each agency should work to "ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public."[10]

Second, the memorandum accompanying the Executive Order identifies four important ways to consider environmental justice under NEPA.

- Each Federal agency should analyze the environmental effects, including human health, economic, and social effects of Federal actions, including effects on minority populations, low-income populations, and Indian tribes, when such analysis is required by NEPA.[11]

- Mitigation measures identified as part of an environmental assessment (EA), 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 populations, low-income populations, and Indian tribes.[12]

- Each Federal agency must provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices.[13]

- Review of NEPA compliance (such as EPA's review under § 309 of the Clean Air Act) must ensure that the lead agency preparing NEPA analyses and documentation has appropriately analyzed environmental effects on minority populations, low-income populations, or Indian tribes, including human health, social, and economic effects.[14]

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[9] *Id.* at 7632 (Section 5-5).

[10] *Id.* at 7632 (Section 5-5).

[11] Memorandum from the President to the Heads of Departments and Agencies. Comprehensive Presidential Documents No. 279. (Feb. 11, 1994).

[12] *Id.*

[13] *Id.*

[14] *Id.*

Third, the Interagency Working Group (IWG), established by the Executive Order to implement the order's requirements, has developed guidance on key terms in the Executive Order. The guidance, reproduced as Appendix A, reflects a general consensus based on Federal agencies' experience and understanding of the issues presented. Agencies should apply the guidance with flexibility, and may consider its terms a point of departure rather than conclusive direction in applying the terms of the Executive Order.

III.

Executive Order 12898 and NEPA

A. NEPA Generally

NEPA's fundamental policy is to "encourage productive and enjoyable harmony between man and his environment."[15] In the statute, Congress "recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[16] The following goals, set forth in NEPA, make clear that attainment of environmental justice is wholly consistent with the purposes and policies of NEPA[17]:

- to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings"[18];

- to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences";[19]

- to "preserve important historic, cultural, and natural aspects of our natural heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice"[20]; and

- to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities."[21]

These goals are promoted through the requirement that all agencies of the Federal government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a "detailed statement by the

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[15] 42 U.S.C. § 4321.

[16] 42 U.S.C. § 4331(c).

[17] 42 U.S.C. § 4331(b).

[18] 42 U.S.C. § 4331(b)(2).

[19] 42 U.S.C. § 4331(b)(3).

[20] 42 U.S.C. § 4331(b)(4).

[21] 42 U.S.C. § 4331(b)(5).

responsible official" on: the environmental impacts of the proposed action; adverse environmental effects that cannot be avoided should the proposal be implemented; alternatives to the proposed action; the relationship between local, short-term uses of man's environment and long-term productivity; and any irreversible or irretrievable commitments of resources involved in the proposed action itself.[22]

Preparation of an EA may precede preparation of an EIS, to determine whether a proposed action may "significantly affect" the quality of the human environment. The EA either will support a finding of no significant impact (FONSI), or will document the need for an EIS. Agency procedure at each step of this process should be guided by the agency's own NEPA regulations and by the CEQ regulations found at 40 C.F.R. Parts 1500-1508.

B. Principles for Considering Environmental Justice under NEPA

Environmental justice issues may arise at any step of the NEPA process and agencies should consider these issues at each and every step of the process, as appropriate. Environmental justice issues encompass a broad range of impacts covered by NEPA, including impacts on the natural or physical environment and interrelated social, cultural and economic effects.[23] In preparing an EIS or an EA, agencies must consider both impacts on the natural or physical environment and related social, cultural, and economic impacts.[24] Environmental justice concerns may arise from impacts on the natural and physical environment, such as human health or ecological impacts on minority populations, low-income populations, and Indian tribes, or from related social or economic impacts.

1. General Principles

Agencies should recognize that the question of whether agency action raises environmental justice issues is highly sensitive to the history or circumstances of a particular community or population, the particular type of environmental or human health impact, and the nature of the proposed action itself. There is not a standard formula for how environmental justice issues should be identified or addressed. However, the following six principles provide general guidance.

- Agencies should consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or

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[22] 42 U.S.C. § 4332(c).

[23] The CEQ implementing regulations define "effects" or "impacts" to include "ecological...aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative." 40 C.F.R. 1508.8.

[24] 40 C.F.R. 1508.14.

Indian tribes.

- Agencies should consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available. For example, data may suggest there are disproportionately high and adverse human health or environmental effects on a minority population, low-income population, or Indian tribe from the agency action. Agencies should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action.

- Agencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

- Agencies should develop effective public participation strategies. Agencies should, as appropriate, acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups.

- Agencies should assure meaningful community representation in the process. Agencies should be aware of the diverse constituencies within any particular community when they seek community representation and should endeavor to have complete representation of the community as a whole. Agencies also should be aware that community participation must occur as early as possible if it is to be meaningful.

- Agencies should seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights.

2. Additional Considerations

The preceding principles must be applied in light of these further considerations that are pertinent to any analysis of environmental justice under NEPA.

- The Executive Order does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law. For example, for an EIS to be required, there must be a sufficient impact on the physical or natural environment to be "significant"

within the meaning of NEPA. Agency consideration of impacts on low-income populations, minority populations, or Indian tribes may lead to the identification of disproportionately high and adverse human health or environmental effects that are significant and that otherwise would be overlooked.[25]

- Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.

- Neither the Executive Order nor this guidance prescribes any specific format for examining environmental justice, such as designating a specific chapter or section in an EIS or EA on environmental justice issues. Agencies should integrate analyses of environmental justice concerns in an appropriate manner so as to be clear, concise, and comprehensible within the general format suggested by 40 C.F.R. § 1502.10.

C. Considering Environmental Justice in Specific Phases of the NEPA Process

While appropriate consideration of environmental justice issues is highly dependent upon the particular facts and circumstances of the proposed action, the affected environment, and the affected populations, there are opportunities and strategies that are useful at particular stages of the NEPA process.

1. Scoping

During the scoping process, an agency should preliminarily determine whether an area potentially affected by a proposed agency action may include low-income populations, minority populations, or Indian tribes, and seek input accordingly. When the scoping process is used to develop an EIS or EA, an agency should seek input from low income populations, minority populations, or Indian tribes as early in the process as information becomes

[25] Title VI of the Civil Rights Act of 1964, U.S.C. 2000d *et seq.*, and agency implementing regulations, prohibit recipients of federal financial assistance from taking actions that discriminate on the basis of race, sex, color, national origin, or religion. If an agency is aware that a recipient of federal funds may be taking action that is causing a racially discriminatory impact, the agency should consider using Title VI as a means to prevent or eliminate that discrimination

available.[26] Any such determination, as well as the basis for the determination, should be more substantively addressed in the appropriate NEPA documents and communicated as appropriate during the NEPA process.

If an agency identifies any potentially affected minority populations, low-income populations, or Indian tribes, the agency should develop a strategy for effective public involvement in the agency's determination of the scope of the NEPA analysis. Customary agency practices for notifying the public of a proposed action and subsequent scoping and public events may be enhanced through better use of local resources, community and other nongovernmental organizations, and locally targeted media.

Agencies should consider enhancing their outreach through the following means:

- Religious organizations (e.g., churches, temples, ministerial associations);
- Newspapers, radio and other media, particularly media targeted to low-income populations, minority populations, or Indian tribes;
- Civic associations;
- Minority business associations;
- Environmental and environmental justice organizations;
- Legal aid providers;
- Homeowners', tenants', and neighborhood watch groups;
- Federal, state, local, and tribal governments;
- Rural cooperatives;
- Business and trade organizations;
- Community and social service organizations;
- Universities, colleges, vocational and other schools;
- Labor organizations;
- Civil rights organizations;
- Local schools and libraries;
- Senior citizens' groups;
- Public health agencies and clinics; and
- The Internet and other electronic media.

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

[26] For more information on scoping, see Memorandum from Nicolas C. Yost, Scoping Guidance (Council on Environmental Quality, Executive Office of the President, April 30, 1981).

proposed action, agencies may reduce misunderstandings, build cooperative working relationships, educate the public and decisionmakers, and avoid potential conflicts. Agencies should recognize that the identity of the relevant "public" may evolve during the process and may include different constituencies or groups of individuals at different stages of the NEPA process. This may also be the appropriate juncture to begin government-to-government consultation with affected Indian tribes and to seek their participation as cooperating agencies. For this participation to be meaningful, the public should have access to enough information so that it is well informed and can provide constructive input.

The following information may help inform the public during the scoping process:

- A description of the proposed action;
- An outline of the anticipated schedule for completing the NEPA process, with key milestones;
- An initial list of alternatives (including alternative sites, if possible) and potential impacts;
- An initial list of other existing or proposed actions, Federal and non-Federal, that may have cumulative impacts;
- Maps, drawings, and any other appropriate material or references;
- An agency point of contact;
- Timely notice of locations where comments will be received or public meetings held;
- Any telephone number or locations where further information can be obtained;
- Examples of past public comments on similar agency actions.

Thorough scoping is the foundation for the analytical process and provides an early opportunity for the public to participate in the design of alternatives for achieving the goals and objectives of the proposed agency action.

2. Public Participation

Early and meaningful public participation in the federal agency decision making process is a paramount goal of NEPA. CEQ's regulations require agencies to make diligent efforts to involve the public throughout the NEPA process. Participation of low-income

populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures. These barriers may range from agency failure to provide translation of documents to the scheduling of meetings at times and in places that are not convenient to working families.

The following steps may be considered, as appropriate, in developing an innovative strategy for effective public participation:

- Coordination with individuals, institutions, or organizations in the affected community to educate the public about potential health and environmental impacts and enhance public involvement;
- Translation of major documents (or summaries thereof), provision of translators at meetings, or other efforts as appropriate to ensure that limited-English speakers potentially affected by a proposed action have an understanding of the proposed action and its potential impacts;
- Provision of opportunities for limited-English speaking members of the affected public to provide comments throughout the NEPA process;
- Provision of opportunities for public participation through means other than written communication, such as personal interviews or use of audio or video recording devices to capture oral comments;
- Use of periodic newsletters or summaries to provide updates on the NEPA process to keep the public informed;
- Use of different meeting sizes or formats, or variation on the type and number of media used, so that communications are tailored to the particular community or population;
- Circulation or creation of specialized materials that reflect the concerns and sensitivities of particular populations such as information about risks specific to subsistence consumers of fish, vegetation, or wildlife;
- Use of locations and facilities that are local, convenient, and accessible to the disabled, low-income and minority communities, and Indian tribes; and
- Assistance to hearing-impaired or sight-impaired individuals.

3. Determining the Affected Environment

In order to determine whether a proposed action is likely to have disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, or Indian tribes, agencies should identify a geographic scale for which they will obtain demographic information on the potential impact area. Agencies may use demographic

data available from the Bureau of the Census (BOC) to identify the composition of the potentially affected population. Geographic distribution by race, ethnicity, and income, as well as a delineation of tribal lands and resources, should be examined. Census data are available in published formats, and on CD-ROM available through the BOC. This data also is available from a number of local, college, and university libraries, and the World Wide Web. Agencies may also find that Federal, tribal, state and local health, environmental, and economic agencies have useful demographic information and studies, such as the Landview II system, which is used by the BOC to assist in utilizing data from a geographic information system (GIS). Landview II has proven to be a low-cost, readily available means of graphically accessing environmental justice data. These approaches already should be incorporated into current NEPA compliance.

Agencies should recognize that the impacts within minority populations, low-income populations, or Indian tribes may be different from impacts on the general population due to a community's distinct cultural practices. For example, data on different patterns of living, such as subsistence fish, vegetation, or wildlife consumption and the use of well water in rural communities may be relevant to the analysis. Where a proposed agency action would not cause any adverse environmental impacts, and therefore would not cause any disproportionately high and adverse human health or environmental impacts, specific demographic analysis may not be warranted. Where environments of Indian tribes may be affected, agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship.

4. Analysis

When a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe has been identified, agencies should analyze how environmental and health effects are distributed within the affected community. Displaying available data spatially, through a GIS, can provide the agency and the public with an effective visualization of the distribution of health and environmental impacts among demographic populations. This type of data should be analyzed in light of any additional qualitative or quantitative information gathered through the public participation process.

Where a potential environmental justice issue has been identified by an agency, the agency should state clearly in the EIS or EA whether, in light of all of the facts and circumstances, a disproportionately high and adverse human health or environmental impact on minority populations, low-income populations, or Indian tribe is likely to result from the proposed action and any alternatives. This statement should be supported by sufficient information for the public to understand the rationale for the conclusion. The underlying analysis should be presented as concisely as possible, using language that is understandable

to the public and that minimizes use of acronyms or jargon.

5. Alternatives

Agencies should encourage the members of the communities that may suffer a disproportionately high and adverse human health or environmental effect from a proposed agency action to help develop and comment on possible alternatives to the proposed agency action as early as possible in the process.

Where an EIS is prepared, CEQ regulations require agencies to identify an environmentally preferable alternative in the record of decision (ROD).[27] When the agency has identified a disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes from either the proposed action or alternatives, the distribution as well as the magnitude of the disproportionate impacts in these communities should be a factor in determining the environmentally preferable alternative. In weighing this factor, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income populations, minority populations, or Indian tribes.

6. Record of Decision

When an agency reaches a decision on an action for which an EIS was prepared, a public record of decision (ROD) must be prepared that provides information on the alternatives considered and the factors weighed in the decision-making process. Disproportionately high and adverse human health or environmental effects on a low-income population, minority population, or Indian tribe should be among those factors explicitly discussed in the ROD, and should also be addressed in any discussion of whether all practicable means to avoid or minimize environmental and other interrelated effects were adopted. Where relevant, the agency should discuss how these issues are addressed in any monitoring and enforcement program summarized in the ROD.[28]

Dissemination of the information in the ROD may provide an effective means to inform the public of the extent to which environmental justice concerns were considered in the decision-making process, and where appropriate, whether the agency intends to mitigate any disproportionately high and adverse human health or environmental effects within the constraints of NEPA and other existing laws. In addition to translating crucial portions of the EIS where appropriate, agencies should provide translation, where practicable and

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[27] 40 C.F.R. § 1505.2(b)

[28] See 40 C.F.R. § 1505.2(c).

appropriate, of the ROD in non-technical, plain language for limited-English speakers. Agencies should also consider translating documents into languages other than English where appropriate and practical.

7. Mitigation

Mitigation measures include steps to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with a proposed agency action.[29] Throughout the process of public participation, agencies should elicit the views of the affected populations on measures to mitigate a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe and should carefully consider community views in developing and implementing mitigation strategies. Mitigation measures identified in an EIS or developed as part of a FONSI should reflect the needs and preferences of affected low-income populations, minority populations, or Indian tribes to the extent practicable..

D. Where no EIS or EA is prepared

There are certain circumstances in which the policies of NEPA apply, and a disproportionately high and adverse human health or environmental impact on low-income populations, minority populations, or Indian tribes may exist, but where the specific statutory requirement to prepare an EIS or EA does not apply. These circumstances may arise because of an exemption from the requirement, a categorical exclusion of specific activities by regulation, or a claim by an agency that another environmental statute establishes the "functional equivalent" of an EIS or EA. For example, neither an EIS nor an EA is prepared for certain hazardous waste facility permits.

In circumstances in which an EIS or EA will not be prepared and a disproportionately high and adverse human health or environmental impact on low-income populations, minority populations, or Indian tribes may exist, agencies should augment their procedures as appropriate to ensure that the otherwise applicable process or procedure for a federal action addresses environmental justice concerns. Agencies should ensure that the goals for public participation outlined in this guidance are satisfied to the fullest extent possible. Agencies also should fully develop and consider alternatives to the proposed action whenever possible, as would be required by NEPA.

[29] See 40 C.F.R. § 1508.20.

IV.

Regulatory Changes

Consistent with the obligation of all agencies to promote consideration of environmental justice under NEPA and in all of their programs and activities, agencies that promulgate or revise regulations, policies, and guidances under NEPA or under any other statutory scheme should consult with CEQ and EPA to ensure that the principles and approaches presented in this guidance are fully incorporated into any new or revised regulations, policies, and guidances.

V.

Effect of this Guidance

Agencies should apply, and comply with, this guidance prospectively. If an agency has made substantial investments in NEPA compliance, or public participation with respect to a particular agency action, prior to issuance of this guidance, the agency should ensure that application of this guidance does not result in additional delays or costs of compliance.

This guidance is intended to improve the internal management of the Executive Branch with respect to environmental justice under NEPA. The guidance interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898. It does not create any rights, benefits, or trust obligations, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person.

APPENDIX A

GUIDANCE FOR FEDERAL AGENCIES ON KEY TERMS IN EXECUTIVE ORDER 12898

INTRODUCTION

Pursuant to Executive Order 12898 on Environmental Justice, Federal agencies are to make the achievement of environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations, low-income populations, and Indian tribes and allowing all portions of the population a meaningful opportunity to participate in the development of, compliance with, and enforcement of Federal laws, regulations, and policies affecting human health or the environment regardless of race, color, national origin, or income. To that end, set forth below is guidance for Federal agencies on key terms contained in Executive Order 12898.

This guidance is intended only to improve the internal management of the Executive Branch. It shall not be deemed to create any right, benefit, or trust obligation, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person. Consequently, neither this Guidance nor the deliberative processes or products resulting from the implementation of this Guidance shall be treated as establishing standards or criteria that constitute any basis for review of the actions of the Executive Branch. Compliance with this Guidance shall not be justiciable in any proceeding for judicial review of Agency action.

TEXT OF EXECUTIVE ORDER 12898,
"FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS," ANNOTATED WITH PROPOSED GUIDANCE ON TERMS IN THE EXECUTIVE ORDER[30]

Section 1-1. IMPLEMENTATION.

1-101. *Agency Responsibilities.* To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, 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 effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Marianas Islands.

Low-income population: Low-income populations in an affected area should be identified with the annual statistical poverty thresholds from the Bureau of the Census' Current Population Reports, Series P-60 on Income and Poverty. In identifying low-income populations, agencies may consider as a community either a group of individuals living in geographic proximity to one another, or a set of individuals (such as migrant workers or Native Americans), where either type of group experiences common conditions of environmental exposure or effect.

Minority: Individual(s) who are members of the following population groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

Minority population: Minority populations should be identified where either: (a) the minority population of the affected area exceeds 50 percent or (b) the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis. In identifying minority communities, agencies may consider as a community either a group of individuals living in geographic proximity to one another, or a geographically dispersed/transient set

[30] Executive Order provisions are in standard font. Guidance is in **bold** font.

of individuals (such as migrant workers or Native American), where either type of group experiences common conditions of environmental exposure or effect. The selection of the appropriate unit of geographic analysis may be a governing body's jurisdiction, a neighborhood, census tract, or other similar unit that is to be chosen so as to not artificially dilute or inflate the affected minority population. A minority population also exists if there is more than one minority group present and the minority percentage, as calculated by aggregating all minority persons, meets one of the above-stated thresholds.

Disproportionately high and adverse human health effects: When determining whether human health effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

(a) Whether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. Adverse health effects may include bodily impairment, infirmity, illness, or death; and

(b) Whether the risk or rate of hazard exposure by a minority population, low-income population, or Indian tribe to an environmental hazard is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and

(c) Whether health effects occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

Disproportionately high and adverse environmental effects: When determining whether environmental effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

(a) Whether there is or will be an impact on the natural or physical environment that significantly (as employed by NEPA) and adversely affects a minority population, low-income population, or Indian tribe. Such effects may include ecological, cultural, human health, economic, or social impacts on minority communities, low-income communities, or Indian tribes when those impacts are interrelated to impacts on the natural or physical environment; and

(b) Whether environmental effects are significant (as employed by NEPA) and are or may be having an adverse impact on minority populations, low-

income populations, or Indian tribes that appreciably exceeds or is likely to appreciably exceed those on the general population or other appropriate comparison group; and

(c) Whether the environmental effects occur or would occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards.

1-102. Creation of an Interagency Working Group on Environmental Justice. (a) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency ("Administrator") or the Administrator's designee shall convene an interagency Federal Working Group on Environmental Justice ("Working Group"). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (I) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (1) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(b) The Working Group shall:

(1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1-103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;

(3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with section 3-3 of this order;

(4) assist in coordinating data collection, required by this order;

(5) examine existing data and studies on environmental justice;

(6) hold public meetings as required in section 5-502(d) of this order; and

(7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

1-103. *Development of Agency Strategies.*

(a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

<u>Differential patterns of consumption of natural resources</u>: The term "differential patterns of consumption of natural resources" relates to subsistence and differential patterns of subsistence, and means differences in rates and/or patterns of fish, water, vegetation and/or wildlife consumption among minority populations, low-income populations, or Indian tribes, as compared to the general population.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform this Working Group of the process.

(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the Working Group.

1-104. *Reports to the President.* Within 14 months of the date of this order, the Working Group shall submit to the President, through the Office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.

Sec. 2-2. FEDERAL AGENCY RESPONSIBILITIES FOR FEDERAL PROGRAMS.

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that 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) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Sec. 3-3. RESEARCH, DATA COLLECTION, AND ANALYSIS.

3-301. *Human Health and Environmental Research and Analysis.*

(a) Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental

hazards.

Environmental hazard and substantial environmental hazard: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "environmental hazard" means a chemical, biological, physical or radiological agent, situation or source that has the potential for deleterious effects to the environment and/or human health. Among the factors that may be important in defining a substantial environmental hazard are: the likelihood, seriousness, and magnitude of the impact.

(b) Environmental human health analyses, whenever practical and appropriate, shall identify multiple and cumulative exposures.

Environmental Exposure: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "environmental exposure" means contact with a chemical (e.g., asbestos, radon), biological (e.g., Legionella), physical (e.g., noise), or radiological agent.

Multiple Environmental Exposure: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "multiple environmental exposure" means exposure to any combination of two or more chemical, biological, physical or radiological agents (or two or more agents from two or more of these categories) from single or multiple sources that have the potential for deleterious effects to the environment and/or human health.

Cumulative Environmental Exposure: For purposes of research, data collection, and analysis under Section 3-3 of the Executive Order, the term "cumulative environmental exposure" means exposure to one or more chemical, biological, physical, or radiological agents across environmental media (e.g., air, water, soil) from single or multiple sources, over time in one or more locations, that have the potential for deleterious effects to the environment and/or human health.

(c) Federal agencies shall provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order.

3-302. *Human Health and Environmental Data Collection and Analysis.* To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. § 552a):

(a) each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks

borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(b) In connection with the development and implementation of agency strategies in section 1-103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public unless prohibited by law; and

Federal environmental administrative or judicial action includes any administrative enforcement action, civil enforcement action, or criminal enforcement action initiated by, or permitting or licensing determination undertaken by, a Federal agency to enforce or execute a Federal law intended, in whole or in part, to protect human health or the environment.

(c) Each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding Federal facilities that are: (1) subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001-11050 as mandated in Executive Order No. 12856; and (2) expected to have a substantial environmental, human health, or economic effect on surrounding populations. Such information shall be made available to the public, unless prohibited by law.

(d) In carrying out the responsibilities in this section, each Federal agency, whenever practicable and appropriate, shall share information and eliminate unnecessary duplication of efforts through the use of existing data systems and cooperative agreements among Federal agencies and with State, local, and tribal governments.

Sec. 4-4. SUBSISTENCE CONSUMPTION OF FISH AND WILDLIFE.

4-401. *Consumption Patterns.* In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public

the risks of those consumption patterns.

Subsistence consumption of fish and wildlife: Dependence by a minority population, low-income population, Indian tribe or subgroup of such populations on indigenous fish, vegetation and/or wildlife, as the principal portion of their diet.

Differential patterns of subsistence consumption: Differences in rates and/or patterns of subsistence consumption by minority populations, low-income populations, and Indian tribes as compared to rates and patterns of consumption of the general population.

4-402. *Guidance.* Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or wildlife. Agencies shall consider such guidance in developing their policies and rules.

Sec. 5-5. PUBLIC PARTICIPATION AND ACCESS TO INFORMATION.

(a) The public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies. Each Federal agency shall convey such recommendations to the Working Group.

(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

(c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

(d) The Working Group shall hold public meetings, as appropriate, for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice. The Working Group shall prepare for public review a summary of the comments and recommendations discussed at the public meetings.

Sec. 6-6. GENERAL PROVISIONS.

6-601. *Responsibility for Agency Implementation.* The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

6-602. *Executive Order No. 12250.* This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

6-603. *Executive Order No. 12875.* This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

6-604. *Scope.* For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

6-605. *Petitions for Exemptions.* The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all or some of the petitioning agency's programs or activities should not be subject to the requirements of this order.

6-606. *Native American Programs.* Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.

Native American programs: Native American programs include those Federal programs designed to serve Indian Tribes or individual Indians, recognizing that such programs are to be guided, as appropriate, by the government-to-government relationship, the Federal trust responsibility, and the role of tribes as governments within the Federal system.

6-607. *Costs.* Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

6-608. *General.* Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

6-609. *Judicial Review.* 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.

Chapter 5. [Reserved]

HISTORY

ACJY-126-60, July 20, 1960.
ACJN-74-60, June 13, 1960.
Note. Previous Chapter 5, "Wages", §§401-401, repealed by CD-79-82, December 16, 1982.

Chapter 7. Navajo Preference in Employment Act

HISTORY

Former Chapter 7. Former Chapter 7 was repealed in its entirety by CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.
CAU-39-63, August 20, 1963.
CA-54-58, August 26, 1958.

SECTION

Exhibit
B

§ 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

HISTORY

CO-78-90, October 25, 1990.
CAU-63-85, §1, August 1, 1985.
Note. Slightly reworded for purposes of statutory form.

§ 602. Purpose

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;

2. To provide training for the Navajo People;

3. To promote the economic development of the Navajo Nation;

4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;

5. To foster the economic self-sufficiency of Navajo families;

6. To protect the health, safety, and welfare of Navajo workers; and

7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.

B. It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 603. Definitions

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 NNC §254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the sole purpose of co-counseling in association with a person described in clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 604. Navajo employment preference

A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this §604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the Act. In the event of a required joint plan by an employer and associated labor organization, only the non-complying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omis-

sions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act, provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and *bona fide* seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 605. Reports

All employers doing business or engaged in any project or enterprise within the territorial jurisdiction of the Navajo Nation or pursuant to a contract with the Navajo Nation shall submit employment information and reports as required to ONLR. Such reports, in a form acceptable to ONLR, shall include all information necessary and appropriate to determine compliance with the provisions of this Act. All reports shall be filed with ONLR not later than ten (10) business days after the end of each calendar quarter, provided that ONLR shall have the right to require filing of reports on a weekly or monthly schedule with respect to part-time or full-time temporary employment.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 606. Union and employment agency activities; rights of Navajo workers.

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.

B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

HISTORY

CO-73-90, October 1990.
CAU-63-85, August 1, 1985.

§ 607. Navajo prevailing wage

A. Definitions. For purposes of this section, the following terms shall have the meanings indicated:

1. The term "prevailing wage" shall mean the wage paid to a majority (more than 50 percent) of the employees in the classification on similar construction projects in the area during a period not to exceed 24 months prior to the effective date of the prevailing wage rate set hereunder; provided that in the event the same wage is not paid to a majority of the employees in the classification, "prevailing wage" shall mean the average of the wages paid, weighted by the total number of employees in the classification.

2. The term "prevailing wage rate" shall mean the rate established by ONLR pursuant to this section.

3. The term "wage" shall mean the total of:

a. The basic hourly rate; and

b. The amount of: (a) contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a *bona fide* fringe benefit fund, plan or program for the benefit of employees; and (b) costs to the contractor or subcontractor which may be reasonably anticipated in providing *bona fide* fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the employees affected. The types of fringe benefits contemplated hereunder include medical or hospital health care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeships or other similar programs; or other *bona fide* fringe benefits.

4. The term "area" in determining the prevailing wage means the geographic area within the territorial jurisdiction of the Navajo Nation; provided that in the event of insufficient similar construction projects in the area during the period in question, "area" shall include the geographic boundaries of such contiguous municipal, county or state governments as ONLR may determine necessary to secure sufficient wage information on similar construction projects.

5. The term "classifications" means all job positions in which persons are employed, exclusive of classifications with assigned duties which are primarily administrative, executive or clerical, and subject to satisfaction of the conditions prescribed in §§607(E)(7) and (8), exclusive of "apprentice" and "trainee" classifications as those terms are defined herein.

6. "Apprentice" means: (a) a person employed and individually registered in a *bona fide* apprenticeship program registered with the

U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with an Apprenticeship Agency administered by a state or Indian Tribe and recognized by the Bureau; or (b) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a state or Tribal Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

7. "Trainee" means a person: (a) registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration; or (b) employed and/or receiving on-the-job training under a public employment or work experience program which is approved and funded by the Navajo Nation.

8. The term "construction" shall mean all activity performed under a contract which relates to: (a) the building, development, rehabilitation, repair, alteration or installation of structures and improvements of all types, including without limitation buildings, bridges, dams, plants, highways, sewers, water mains, powerlines and other structures; (b) drilling, blasting, excavating, clearing and landscaping, painting and decorating; (c) transporting materials and supplies to or from the site of any of the activities referred to in (a) or (b) by employees of the contractor or subcontractor; and (d) manufacturing or finishing materials, articles, supplies or equipment at the construction site of any of the foregoing activities by employees of the contractor or subcontractor.

9. The term "contract" shall mean the prime construction contract and all subcontracts of any tier thereunder entered into by parties engaged in commercial, business or governmental activities (whether or not such activities are conducted for profit).

B. Establishment of wage rates.

1. For all construction reasonably anticipated to occur in the area on a regular basis, ONLR shall establish a general prevailing wage rate for each classification within specified types of construction. ONLR shall define classifications and types of construction in accordance with guidelines generally recognized in the construction industry. In all cases where construction is contemplated for which prevailing wage rates have not been set, the contract letting entry shall submit to ONLR a written request for a project prevailing wage scale. Such request shall be submitted not less than 60 days prior to

the scheduled date for bid solicitation and shall include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR shall use its best efforts to provide a project prevailing wage scale for each classification involved in the project construction within 60 days after receipt of a request therefor.

2. In setting prevailing wage rates, ONLR shall conduct such surveys and collect such data as it deems necessary and sufficient to arrive at a wage determination. Wage data may be collected from contractors, contractors' associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area, including the names and addresses of contractors and subcontractors; the locations, approximate costs, dates and types of construction; the number of workers employed in each classification on the project; and the wage rates paid such workers. Wage rate data for the area may be provided, and considered in making wage determinations, in various forms including signed statements, collective bargaining agreements and prevailing wage rates established by federal authorities for federally-assisted construction projects.

3. Any classification of workers not listed in a prevailing wage rate and which is to be used under a construction contract shall be classified in conformance with the prevailing wage determination issued and applicable to the project; provided that an additional classification and prevailing wage rate therefor will be established in the event each of the following criteria are satisfied:

a. The work performed by the proposed classification is not performed by a classification within the existing prevailing wage scale;

b. The proposed classification is utilized in the area by the construction industry; and

c. The wages set for the proposed classification bear a reasonable relationship to the wage rates contained in the existing scale for other classifications.

4. Subject to the prior written approval thereof by the Director of ONLR, a general prevailing wage rate shall be effective on the date notice of such rate is published in a newspaper in general circulation in the Navajo Nation. The notice shall contain the following information:

(1) The fact a prevailing wage rate has been set and approved in writing by the Director of ONLR;

(2) The type of construction for which the rate was established;

(3) The effective date, described as the date of publication of the notice or other specified date;

(4) The address and telephone number of ONLR; and

(5) A statement that ONLR will provide a copy of the full wage determination on request, and respond to any reasonable questions regarding such determination or its application.

a. General prevailing wage rates shall continue in effect until such time as any modifications are adopted.

b. A prevailing wage rate for a particular project shall be effective on the date of issuance to the requesting party of a written wage determination approved by the Director of ONLR. The wage determination shall continue in effect for the duration of the project; provided that any such determination may be modified by ONLR in the event the period of time from the effective date of the determination to the date bids are solicited exceeds 180 days and the estimated date of completion of the project is more than one year after the effective date of the determination.

c. Project and general wage determinations may be modified from time to time, in whole or in part, to adjust rates in conformity with current conditions, subject to the special conditions applicable to project determinations. Such modifications become effective upon the same terms and conditions which are applicable to original determinations.

d. Fringe benefits. The fringe benefit amount of wages reflected in a prevailing wage rate shall be paid in cash to the employee, and shall not be deducted from such employee's wages, unless each of the following conditions is satisfied:

(1) The deduction is not contrary to applicable law;

(2) A voluntary and informed written consent authorizing the deduction is obtained from the employee in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining or continuing employment;

(3) No profit or other benefit is obtained as a result of deduction, directly or indirectly, by the contractor, subcontractor or any person affiliated with them in the form of a commission, dividend or other consideration; and

(4) The deduction serves the convenience and interests of the employee.

C. No contract-letting entity, contractor or subcontractor shall proceed with a construction contract subject to this section in the absence of a contractual requirement for payment of prevailing wages pursuant

to a specified wage determination issued by ONLR. Violation of this obligation shall render the contract-letting entity, and the employer contractor or subcontractor, jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, together with interest thereon (or if no prevailing wage rates have been set, such wage rate as may be issued by ONLR during the course, or after the completion, of the construction project).

1. Failure by any employer, contractor or subcontractor to pay prevailing wages shall render such employer liable for the difference between the amount of wages actually paid and the prevailing rate, together with interest thereon.

2. Any deduction of fringe benefits by an employer contractor or subcontractor in violation of §607(C) shall render such employer liable for the amount of such deduction, together with interest thereon.

3. Upon written request of ONLR, a contract-letting entity or contractor, as the case may be, shall withhold from any monies payable on account of work performed by an employer contractor or subcontractor under a construction contract such sums as may be determined by ONLR as necessary to satisfy any liabilities of such contractor or subcontractor for unpaid prevailing wages or wrongful deduction of fringe benefits.

4. If following a hearing under §611 a contract-letting entity (other than the Navajo Nation), contractor or subcontractor is found to have willfully violated this section the Commission may enter a debarment order disqualifying such party from receiving any contract, or subcontract thereunder, with the Navajo Nation for a period not to exceed three years.

5. The liabilities described in this §607(C) shall not foreclose the Commission from awarding such other relief or imposing such other civil penalties as may be appropriate following a hearing conducted under §611.

D. Exemptions. This section shall not apply to:

1. A contract associated with a construction activity which relates to the provision of architect, engineer, legal or consultant services, or, except as provided under §607(A)(8)(d), the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or any of its subcontractors.

2. A construction contract relating to a project having a total cost of $2,000 or less.

3. A construction contract which is let by a natural person who is an owner or person legally authorized to let such contract, for such person's personal, family or household purposes.

4. A construction contract to the extent the work thereunder is performed by employees of the owner, or employees of the person or entity legally authorized to let the prime contract.

5. A construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act, 40 U.S.C., §§276(a) *et seq.*, (as amended), or other federal law applicable to such project.

6. A construction contract to the extent such contract requires payment of wages pursuant to a wage scale established under a collective bargaining agreement between any contractor or subcontractor and a labor organization.

7. With the exception of the provisions of §607(C), an apprentice, provided that the apprentice is paid not less than: (a) the basic hourly rate prescribed in the registered program for the apprentice's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of §607(A)(6)), shall be paid wages in an amount of not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

8. With the exception of the provisions of §607(C), a trainee provided that the trainee is paid not less than: (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of §607(A)(7)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 608. Health and safety of Navajo workers

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 609. Contract compliance

A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents"), which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict

B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 610. Monitoring and enforcement

A. Responsible Agency. Compliance with the Act shall be monitored and enforced by ONLR.

B. Charges.

1. Charging Party. Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a claim that respondent is engaging in a pattern of conduct or practice in violation of rights guaranteed by the Act. An individual Charge and ONLR Charge are collectively referred to herein as a "Charge".

2. Form and Content. A Charge shall be in writing, signed by the charging party (which shall be the Director of ONLR in the case of an ONLR Charge), and contain the following information:

a. The name, address any telephone number of the charging party;

b. The name and address or business location of the respondent against whom the Charge is made.

c. A clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complaint of;

d. With respect to a Charge alleging a pattern or practice in violation of the Act, the period of time during which such pattern or practice has existed and whether it continues on the date of the Charge;

e. The specific harm sustained by the charging party in the case of an Individual Charge or the specific harm sustained by specified Navajos or a class of Navajos with respect to an ONLR Charge; and

f. A statement disclosing whether proceedings involving the alleged violation have been initiated before any court or administrative agency or within any grievance process maintained by the respondent, including the date of commencement, the court, agency or process and the status of the proceeding.

g. ONLR shall provide assistance to persons who wish to file Individual Charges. Notwithstanding the foregoing provisions, a Charge shall be deemed sufficient if it contains a reasonably precise identification of the charging party and respondent, and the action, pattern or practice which are alleged to violate the Act.

3. Place of Filing. Individual Charges may be filed in any ONLR office. An ONLR Charge shall be filed in ONLR's administrative office in Window Rock.

4. Date of Filing. Receipt of each Individual Charge shall be acknowledged by the dated signature of an ONLR employee which shall be deemed the date on which the Individual Charge is filed. The date on which an ONLR Charge is signed by the ONLR Director shall be deemed the date of filing for such Charge.

5. Amendment. A Charge may be amended by filing, in the office where the Charge was first submitted, a written instrument which sets forth the amendment and any portions of the original Charge revised thereby. To the extent the information reflected in the amendment arose out of the subject matter of the original Charge, the amendment shall relate back and be deemed filed as of the filing date of such Charge. Any portion of the amendment which does not qualify for relation back treatment shall constitute a new Charge.

6. Time Limitation. A Charge shall be filed within one year after accrual of the claim which constitutes the alleged violation of the Act. The date of accrual of a claim shall be the earlier of:

a. The date on which the charging party had actual knowledge of the claim; or

b. Taking into account the circumstances of the charging party, the date on which the charging party should reasonably have been expected to know of the existence of the claim; provided, however, that a Charge relating to a continuing, or pattern or practice, violation of the Act shall be filed within one year after the later of:

(1) The date of termination of such violation, pattern or practice; or

(2) The date of accrual of the claim to which the Charge relates. Failure to file a Charge within the time limitations prescribed herein shall bar proceedings on the related claim before the Commission or in any Court of the Navajo Nation; provided, however, that nothing herein shall be interpreted as foreclosing proceedings before any Navajo Court or administrative body (other than the Commission) on any claim which also arises under applicable common, statutory or other law independent of this Act.

7. Notice to Respondent. Within 20 days after a Charge is filed, ONLR shall serve a copy thereof on respondent; provided, however, that if in ONLR's judgment service of a copy of the Charge would impede its enforcement functions under the Act. ONLR may in lieu of a copy serve on respondent a notice of the Charge which contains the date, place and summary of relevant facts relating to the alleged violation, together with the identity of the charging party unless withheld for the reason stated above. Service of any amendment to

the Charge shall be accomplished within 20 days after the amendment is filed. Failure of ONLR to serve a copy of a Charge or notice thereof within the prescribed time period shall not be a ground for dismissal of the Charge or any subsequent proceedings thereon.

8. Withdrawal of Charge.

a. ONLR may, in its discretion, withdraw any ONLR Charge upon written notice thereof to respondent and each person identified in the Charge whose rights under the Act were alleged to have been violated. Any person receiving notice of withdrawal or any other person who asserts a violation of his or her rights as a result of the violation alleged in the withdrawn ONLR Charge may file an Individual Charge which, if filed within 90 days after the issuance date of ONLR's withdrawal notice, shall relate back to the filing date of the ONLR Charge.

b. Any charging party may, in his or her discretion, withdraw an Individual charge by filing a written notice of withdrawal with the ONLR Office where the Charge was submitted, with a copy thereof filed with the ONLR administrative office in Window Rock. ONLR shall, within 20 days after receiving the notice, transmit a copy to the respondent. Within 90 days after receipt of the withdrawal notice, ONLR may file an ONLR Charge relating in whole or part to the violations alleged in the withdrawn Individual Charge. Any filing of an ONLR Charge within the prescribed time period shall relate back to the filing date of the withdrawn Charge.

9. Overlapping Charges. Nothing herein shall be construed as prohibiting the filing of any combination of Individual Charges and an ONLR Charge which, in whole or part, contain common allegations of violations of the Act.

10. Informants. Irrespective of whether a person is otherwise eligible to file an Individual Charge, any such person or an organization may in lieu of filing a Charge submit to ONLR written or verbal information concerning alleged violations of the Act and may further request ONLR to file an ONLR Charge thereon. In addition to other limitations on disclosure provided in §610(M) and in the absence of the written consent of the informant, neither the identity of the informant nor any information provided by such informant shall be disclosed to the respondent, agents or legal counsel for the respondent, or the public, either voluntarily by ONLR or pursuant to any discovery or other request for, or order relating to, such information during the course of any judicial or non-judicial proceeding, including a proceeding before the Commission or any subsequent appeal or challenge to a Commission or appellate deci-

sion; provided, however, that in the event the informant is called as a witness by ONLR at a Commission proceeding involving the information provided by the informant:

a. The informant's name may be disclosed, but his or her status as an informant shall remain privileged and confidential and shall not be disclosable through witness examination or otherwise; and

b. With the exception of the witness status as an informer, information provided by the informant is disclosable in accordance with the procedures outlined under §610(M).

C. Investigation of Charges.

1. ONLR shall conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the act has been violated.

2. Subpoenas.

a. The Director of ONLR shall have the authority to sign and issue a subpoena compelling the disclosure by any person evidence relevant to a Charge, including a subpoena ordering, under oath as may be appropriate:

(1) The attendance and testimony of witnesses;

(2) Responses to written interrogatories;

(3) The production of evidence, including without limitation books, records, correspondence or other documents (or lists or summaries thereof) in the subpoenaed person's possession, custody or control of which are lawfully obtainable by such person; and

(4) Access to evidence for the purposes of examination and copying. Neither an individual charging party nor a respondent shall have a right to demand issuance of a subpoena prior to the initiation of any proceedings on the Charge before the Commission, in which event subpoenas are issuable only pursuant to the procedures governing such proceedings.

b. Service of the subpoena shall be effected by one of the methods prescribed in §610(O). A subpoena directed to a natural person shall be served either on the person at his or her residence or office address or, in the case of personal delivery, at such residence or office either on the person subpoenaed or on anyone at least eighteen years of age (and in the case of office service, a person who is also an employee of such office). Service of a subpoena directed to any other person shall be addressed or delivered to either the statutory agent (if any) of such person or any employee occupying a managerial or supervisory position at any office of the person maintained within or outside the terri-

torial jurisdiction of the Navajo Nation. Personal service may be performed by a natural person at least eighteen years of age, including an employee of ONLR.

c. The subpoena shall set a date, time and place for the attendance of a witness, or production of or access to evidence, as the case may be, provided that the date for compliance shall be not less than 30 days after the date on which service of the subpoena was effected.

d. Any person served with a subpoena intending not to fully comply therewith shall, within five business days after service, serve on the Director of ONLR a petition requesting the modification or revocation of the subpoena and identifying with particularity each portion of the subpoena which is challenged and the reasons therefor. To the extent any portion of the subpoena is not challenged, the unchallenged parts shall be complied with in accordance with the terms of the subpoena as issued. The ONLR Director shall issue and serve on petitioner a decision and reasons therefor within eight business days following receipt of the petition, and any failure to serve a decision within such period shall be deemed a denial of the petition. In the event the Director's decision reaffirms any part of the subpoena challenged in the petition, the Director may extend the date for compliance with such portion for a period not to exceed 10 business days. Any petitioner dissatisfied with the decision of the ONLR Director shall either:

(1) Comply with the subpoena (with any modifications thereof reflected in the Director's decision); or

(2) Within five business days following receipt of the Director's decision or the date such decision was due, file a petition with the Commission (with a copy concurrently served on the ONLR Director) seeking modification or revocation of the subpoena and stating with particularity therein each portion of the subpoena challenged and the reasons therefor. A copy of the ONLR Director's decision, if any, shall be attached to the petition.

e. In the event a person fails to comply with a served subpoena, ONLR may petition the Commission for enforcement of the subpoena. For purposes of awarding any relief to petitioner, the Commission may issue any order appropriate and authorized in a case where it is established that a Commission order has been violated. A copy of the petition shall be concurrently served on the non-complying person.

f. Beginning on the first day of non-compliance with a subpoena served on a respondent, or any employee or agent of respondent, until the date of full compliance therewith, there shall be a tolling of all periods of limitation set forth in this section.

D. Dismissal of Charges.

1. Individual Charges. ONLR shall dismiss an Individual Charge upon reaching any one or more of the following determinations:

a. The Individual Charge, on its face or following an ONLR investigation, fails to demonstrate that probable cause exists to believe a violation of the Act has occurred;

b. The Individual Charge was not filed within the time limits prescribed by §610(B)(6);

c. The charging party has failed to reasonably cooperate in the investigation of, or attempts to settle, the Individual Charge;

d. The charging party has refused, within 30 days of receipt, to accept a settlement offer agreed to by respondent and approval by ONLR, which accords substantially full relief for the harm sustained by such party; or

e. The Charge has been settled pursuant to §610(G).

2. ONLR Charges. ONLR shall dismiss an ONLR Charge upon determining that:

a. No probable cause exists to believe a violation of the Act has occurred;

b. The Charge was not filed within the time limits prescribed by §610(B)(6); or

c. The Charge has been settled pursuant to §610(G).

3. Partial Dismissal. In the event a portion of a Charge is dismissable on one or more of the foregoing grounds, only such portion of the Charge shall be dismissed and the remainder retained by ONLR for final disposition.

4. Notice. Written notice of dismissal, stating the grounds therefor, shall be served on respondent and the individual charging party in the case of an Individual Charge or, in the case of an ONLR Charge, on the respondent and any person known to ONLR who claims to be aggrieved by the violations alleged in such Charge. Such notice shall be accompanied by a right to sue authorization pursuant to §610(H).

E. Probable Cause Determination. Following its investigation of a Charge and in the absence of a settlement or dismissal required under §610(D), ONLR shall issue written notice of its determination that probable cause exists to believe a violation of the Act has occurred or is occurring. Such notice shall identify each violation of the Act for which

probable cause has been found, and copies thereof shall be promptly sent to the respondent, the charging party in the case of an Individual Charge, and, in the case of an ONLR Charge, each person identified by ONLR whose rights are believed to have been violated. Any probable cause determination shall be based on, and limited to, the evidence obtained by ONLR and shall not be deemed a judgment by ONLR on the merits of allegations not addressed in the determination.

F. Conciliation. If, following its investigation of a Charge, ONLR determines there is probable cause to believe the Act has been or is being violated, ONLR shall make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion. In the event there is a failure to resolve the matter informally as to any allegations in an Individual Charge for which probable cause has been determined, ONLR shall either issue the notice prescribed in §610(H) or initiate a Commission proceeding under §610(I) concerning unresolved allegations. A successful resolution of any such allegation shall be committed to writing in the form required under §610(G). Nothing herein shall be construed as prohibiting ONLR from initiating or participating in efforts to informally resolve a Charge prior to issuance of a probable cause determination.

G. Settlement.

1. Settlement agreements shall be committed to writing and executed by respondent, the individual charging party if any and, in the case of any Charge, by the Director of ONLR. Refusal of an individual charging party to execute a settlement agreement subjects the Individual Charge to dismissal under the conditions set forth in §610(D)(1)(d). Settlement agreements may also be signed by those aggrieved persons identified as having a claim with respect to an ONLR Charge.

2. Settlement agreements hereunder shall be enforceable among the parties thereto in accordance with the terms of the agreement. Any member of a class of persons affected by the settlement who is not a signatory to the agreement shall have the right to initiate proceedings before the Commission pursuant to the procedure in §610(H)(2)(a)(3).

3. Each settlement agreement shall provide for the dismissal of the Charge to the extent the violations alleged therein are resolved under the agreement.

4. Any breach of a settlement agreement by respondent shall present grounds for filing a Charge under this section. A charging party asserting a claim for breach may either seek:

a. Enforcement of that portion of the settlement agreement alleged to have been breached; or

b. In the case of a material breach as to any or all terms, partial or total rescission of the agreement, as the case may be, and such other further relief as may have been available in the absence of settlement. A Charge asserting a breach of a settlement agreement with respect to any original allegation in the Charge covered by such agreement shall, for purposes of all time limitations in this section, be deemed to arise on the accrual date of the breach.

H. Individual Right to Sue.

1. Individual Charges.

a. Prior to the expiration of 180 days following the date an Individual Charge was filed, ONLR, by notice to the individual charging party, shall authorize such individual to initiate a proceeding before the Commission in accordance with the procedures prescribed in §610(J), if:

(1) The Individual Charge has been dismissed by ONLR pursuant to §610(D)(1);

(2) ONLR has issued a probable cause determination under §610(E), there has been a failure of conciliation contemplated by §610(F), and ONLR has determined not to initiate a Commission proceeding on behalf of the individual charging party; or

(3) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed.

b. After the expiration of 180 days following the date an Individual Charge was filed, the individual charging party shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination, or commenced or concluded conciliation efforts.

2. ONLR Charges.

a. Prior to the expiration of 180 days following the date an ONLR Charge was filed, ONLR, by notice to any person known to it who claims to be aggrieved by the allegations presented in such Charge, shall authorize such person to initiate a proceeding before the Commission in accordance with the procedures prescribed in §610(J), if:

(1) The ONLR Charge has been dismissed by ONLR pursuant to §610(D)(2);

(2) ONLR has issued a probable cause determination under §610(E), there has been a failure of conciliation contemplated by §610(F), and ONLR has determined not to initiate a Commission proceeding on the Charge;

(3) ONLR has entered into a settlement agreement under §610(G) to which such aggrieved person is not a party; or

(4) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the ONLR Charge was filed.

b. After the expiration of 180 days following the date an ONLR Charge was filed and prior to the date on which ONLR commences a Commission proceeding, any person claiming to be aggrieved by the allegations presented in such Charge shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination or commenced or concluded conciliation efforts.

3. Content of Notice. A notice of right to sue shall include the following information:

a. Authorization to the individual charging party or aggrieved person to initiate a proceeding before the Commission pursuant to and within the time limits prescribed by §610(J);

b. A summary of the procedures applicable to the institution of such proceeding, or a copy of the Act containing such procedures;

c. A copy of the Charge; and

d. A copy of any written determination of ONLR with respect to such Charge.

4. ONLR Assistance. Authorization to commence Commission proceedings hereunder shall not prevent ONLR from assisting any individual charging party or aggrieved person in connection with Commission proceedings or other efforts to remedy the alleged violations of the Act.

I. ONLR Right to Sue.

1. Individual Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an Individual Charge with respect to which ONLR has issued a probable cause determination under §610(E) and there has been a failure of conciliation contemplated by §610(F). ONLR shall have such right notwithstanding that the individual charging party has a concurrent right to sue hereunder which has not been exercised. ONLR's right to sue shall continue until such time as the individual charging party

commences a Commission proceeding and, in that case, shall be revived in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Initiation of Commission proceedings by ONLR shall terminate the right to sue of an individual charging party, subject to revival of such right in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under §610(L).

2. ONLR Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an ONLR Charge with respect to which ONLR has issued a probable determination under §610(E) and there has been a failure of conciliation contemplated by §610(F). ONLR shall have such right notwithstanding that a person claiming to be aggrieved as a result of the allegations in the ONLR Charge has a concurrent right to sue hereunder which has not been exercised. In the event an aggrieved person first initiates a Commission proceeding in an authorized manner, ONLR's right to sue shall only expire as to such person and shall revive in the event the aggrieved person's proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under §610(L).

J. Initiation of Commission Proceedings. Proceedings before the Commission shall be initiated upon the filing of a written complaint by a petitioner with the Commission.

1. Complaints shall satisfy each of the following conditions:

a. The petitioner is authorized to file the Complaint under the terms and conditions prescribed by this section;

b. The underlying Charge was filed within the time limits prescribed in §610(B)(6); and

c. The complaint was filed within 360 days following the date on which the underlying Charge was filed.

2. Upon motion of respondent and a showing that any one or more of the foregoing conditions has not been satisfied, the Commission shall dismiss the complaint; provided, however, that no complaint shall be dismissed under (2) above as to any allegation of a pattern of conduct or practice in violation of the Act to the extent such pattern or practice continued to persist during the time limits prescribed in §610(B)(6); and provided further that, in the absence of dismissal or conclusion of Commission proceedings on the merits, nothing herein shall be construed as prohibiting the refiling of a Charge alleging the same or comparable pattern or practice viola-

tions of the Act which continued to persist during the time limits prescribed in §610(B)(6) for refiling such Charge.

K. Preliminary Relief. Prior to the initiation of Commission proceedings on a Charge and notwithstanding the failure to satisfy any precondition to such proceedings, either ONLR, an individual charging party or aggrieved person may, upon notice to respondent, petition the Commission for appropriate temporary or preliminary relief in the form of an injunction or other equitable remedy on the ground that prompt action is necessary to carry out the purposes of the Act, including the preservation and protection of rights thereunder. Nothing herein shall be construed as foreclosing a petition which seeks comparable relief subsequent to the commencement of Commission proceedings.

L. Intervention in Commission Proceedings. Within three business days after the date on which any complaint, or petition pursuant to §610(K), is filed with the Commission, other than a complaint or petition filed by ONLR, the Commission shall cause copies thereof to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have a unconditional right to intervene in the Commission proceeding initiated by such complaint or petition upon the timely application by motion accompanied by a pleading setting forth the claims for which intervention is sought.

M. Confidentiality.

1. Conciliation. In the absence of written consent of the persons concerned, statements or offers of settlement made, documents provided or conduct by participants in conciliation efforts under §610(F) shall not be admissible in any Commission or other proceeding relating to the Charge which is the subject of conciliation, to prove liability for or invalidity of the Charge or the amount or nature of relief therefor; provided, however, that nothing herein shall be construed as requiring the exclusion of such evidence merely because it was presented in the court of conciliation if:

a. The evidence is otherwise discoverable; or

b. The evidence is offered for another purpose, including without limitation, proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

2. Charge, Records and Information.

a. Prior to the institution of Commission proceedings thereon, and in the absence of the written consent of the persons concerned, ONLR shall not disclose as a matter of public information any Charge, response thereto, any statements or other information obtained in the course of its investigation of the

Charge, except that nothing herein shall prevent earlier disclosure of such information by ONLR in its discretion:

(1) To charging parties or their attorneys, respondents or their attorneys, witnesses or other interested persons where the disclosure is deemed by ONLR to be necessary for securing a resolution of the Charge, including appropriate relief therefor; or

(2) To employees or representatives of the Navajo Nation or employees or representatives of federal, state or local authorities have a governmental interest in the subject matter of the Charge; or

(3) To persons for the purpose of publishing data derived from such information in a form which does not reveal the identity of charging parties, aggrieved persons, respondents or persons supplying the information.

b. Except as otherwise provided herein, any person to whom a permissible disclosure is made hereunder shall be bound to maintain the confidentiality of such information from further disclosure and shall use the information solely for the purpose for which it was disclosed.

2. Privileged Information. Neither ONLR, charging parties, aggrieved persons, respondents, witnesses or persons supplying information in connection with a Charge shall be compelled, either before or after commencement of Commission proceedings, to disclose any information which represents the opinions or conclusions formed by ONLR during the course of its investigation of a Charge, or any information which is protected by the attorney-client privilege, the informer's privilege referred to in §610(B)(10), or any other absolute or limited privilege recognized under the laws of the Navajo Nation. To the extent justice requires, the Commission may, balancing the rights of parties and affected persons, prohibit or limit the disclosure of any other information for good cause shown, including a showing that disclosure would impede enforcement of the Act, jeopardize rights guaranteed thereunder, or cause annoyance, embarrassment, oppression or undue burden or expense to parties or affected persons.

N. Non-retaliation. It shall be unlawful for any employer, labor organization, joint labor-management committee involved in apprenticeship or other matters relating to employment, employment agency or other person to, directly or indirectly, take or attempt to induce another person to take, any action adversely affecting:

1. The terms and conditions of any person's employment or opportunities associated with such employment;

2. An applicant's opportunity for employment;

3. The membership of an employee or applicant for employment in a labor organization; or

4. Any other right, benefit, privilege or opportunity unrelated to employment, because such person has opposed an employment practice subject to this Act or has made a charge, testified, or assisted or participated in any manner in an investigation, proceeding or hearing under the Act.

O. Service of Documents. Service of any notice, determination or other document required to be transmitted under this section shall be accomplished by personal delivery or certified mail, return receipt requested.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 611. Hearing

A. The Commission shall schedule a hearing within sixty (60) days of the filing of a written complaint by a petitioner with the Commission. The hearing shall be held at a location designated by the Commission.

1. Notice. The Commission shall issue a notice of hearing. The time and place of the hearing shall be clearly described in the notice. The notice shall also set forth in clear and simple terms the nature of the alleged violations and shall state that: (a) the violations may be contested at a hearing before the Commission; and (b) any party may appear by counsel and cross-examine adverse witnesses.

2. Upon application by a party to the Commission or on the Commission's own motion, the Commission may issue subpoenas compelling the disclosure by any person evidence relevant to the Complaint, including a subpoena ordering, under oath as may be appropriate:

a. The attendance and testimony of witnesses;

b. Responses to written interrogations;

c. The production of evidence; and

d. Access to evidence for the purpose of examination and copying.

3. The Commission is authorized to administer oaths and compel attendance of any person at a hearing and to compel production of any documents.

4. In the event a party does not make an appearance on the day set for hearing or fails to comply with the rules of procedure set forth by the Commission for the conduct of hearings, the Commission is authorized to enter a default determination against the non-appearing and/or non-complying party.

B. Burden of proof. In any compliance review, complaint proceeding, investigation, or hearing, the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by clear and convincing evidence.

C. Hearing. The Commission shall conduct the hearing in a fair and orderly manner and extend to all parties the right to be heard.

1. The Commission shall not be bound by any formal rules of evidence.

2. The respondent shall have the opportunity to answer the complaint and the parties shall have the right to legal counsel, to present witnesses, and to cross-examine adverse witnesses.

3. The Commission shall issue its decision by a majority vote of a quorum present which shall be signed by the Chairperson of the Commission.

4. Copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt.

5. Records of the proceeding shall be recorded. Any party may request a transcript of the proceeding at their own expense.

6. The decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.
Note. Slightly reworded for purposes of statutory form.

§ 612. Remedies and sanctions

A. If, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall:

1. Issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of intentional violation, imposition of civil fines; provided that liability for back-pay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which is the basis for the complaint.

2. In the case of an individual suit initiated pursuant to §610(H), award costs and attorneys' fees if the respondent's position was not substantially justified.

3. Refer matters involving respondent contracts, agreements, leases and permits to the Navajo Nation Attorney General for appropriate action.

B. In the absence of a showing of good cause therefor, if any party to a proceeding under this Act fails to comply with a subpoena or order issued by the Commission, the Commission may impose such actions as are just, including without limitation any one or more of the following:

1. In the case of non-compliance with a subpoena of documents or witnesses:

a. An order that the matters for which the subpoena was issued or any other designated facts shall be deemed established for the purposes of the proceeding and in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

c. An order striking pleading or parts thereof, or staying further proceedings until the subpoena is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

2. In the case of non-compliance by a party or non-party with a Commission subpoena of documents or witnesses or with any other order of the Commission:

a. An order holding the disobedient person in contempt of the Commission and imposing appropriate sanctions therefor, including a civil fine; or

b. An order directing the disobedient person to pay the reasonable costs and/or attorneys fees caused by the non-compliance.

C. The person or party in whose favor a Commission's decision providing for remedial action is entered shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce the remedial action; provided that the Commission itself shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce civil fines or sanctions imposed by the Commission against a person or party. In both instances the Attorney General of the Navajo Nation shall have an unconditional right to intervene on behalf of the Navajo Nation. Any attempted enforcement of a Commission order or decision directing payment of money by the Navajo Nation or any of its governmental entities shall, with respect to the extent of any liability be governed by the Navajo Sovereign Immunity Act, 1 NNC §§551 *et seq.*, as amended.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.
Note. Slightly reworded for purposes of statutory form.

§ 613. Appeal and stay of execution

A. Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court by lodging a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure and within ten (10) days after receipt of the Commission's decision.

B. In the absence of a stipulation by the parties approved by the Commission, a stay of execution of the decision from which the appeal is taken shall only be granted upon written application of the appellant to the Commission and an opportunity for response by appellee. The application for a stay shall be filed within the period prescribed for appeal in subsection (A) hereof. No stay shall be issued unless the appellant presents a clear and convincing showing that each of the following requirements have been satisfied:

1. Appellant is likely to prevail on the merits of the appeal;
2. Appellant will be irreparably harmed in the absence of a stay;
3. Appellee and interested persons will not be substantially harmed by a stay;
4. The public interest will be served by a stay; and
5. An appeal bond or other security, in the amount and upon the terms prescribed by subsection (C) below, has been filed with and approved by the Commission; provided that no appeal bond shall be required of ONLR, the Navajo Nation or any governmental agency or enterprise of the Navajo Nation.

C. The appeal bond shall be issued by a duly authorized and responsible surety which shall obligate itself to pay to appellee, or any other person in whose favor an award is made by the Commission decision, the amounts specified or described in the bond upon conclusion of the appeal and failure of appellant, following written demand by appellee, to satisfy the foregoing obligations.

1. The amount or nature of liability assumed by the surety shall be specified in the bond and shall include:

a. The total amount of all monetary awards made in the Commission decision, together with such interest thereon as may be prescribed in the Commission's decision;

b. Costs of appeal and attorneys' fees incurred by appellee in defending the appeal and which may be awarded to appellee by the Navajo Nation Supreme Court;

c. Damages sustained by appellee or other recipients of a Commission award for delay in satisfaction of the Commission decision caused by the appeal; and

d. Such other amount or liability reasonably required to be secured to protect the interests of the appellee or other award recipients.

2. The bond shall provide that the surety submits to the jurisdiction of the Commission and the Courts of the Navajo Nation, and irrevocably appoints the Commission as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion of the appellee filed with the Commission, with copies thereof served on the surety and appellant.

3. In lieu of posting an appeal bond, appellant may, with the approval of the Commission, post a cash bond and undertaking in the amount and upon the terms which are required above with respect to an appeal bond.

4. No appeal bond or cash bond and undertaking, nor the liabilities of the surety or appellant thereunder, shall be exonerated or released until all amounts and liabilities prescribed therein have been fully paid and satisfied.

D. Within three business days following the filing with the Navajo Nation Supreme Court of any appeal from a Commission proceeding, the Clerk of such Court shall, in all cases other than those in which ONLR is not either the appellant or appellee, cause copies of the notice of appeal and all other documents filed in connection therewith to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene and participate as *amicus* in the appeal proceedings upon timely application therefor by motion lodged with the Navajo Nation Supreme Court. ONLR's right of participation shall be coextensive with that of the parties to the appeal, including the right to file opening, answering and reply briefs, and the right to present oral argument to the Court.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 614. Non-Navajo spouses

A. When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the application for Navajo preference consideration.

B. Upon meeting the above requirements, such consideration shall be limited to preference in employment where the spouse would normally be in a pool of non-Navajo workers. In this instance, Navajo preference would place the non-Navajo spouse in the applicant pool of Navajos for consideration. However, preference priority shall still be given to all Navajo applicants who meet the necessary job qualifications within that pool.

C. Non-Navajo spouses having a right to secondary preference under this section shall also have and enjoy all other employment rights granted to Navajos under the Act, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 615. Polygraph test

A. No person shall request or require any employee or prospective employee to submit to, or take a polygraph examination as a condition of obtaining employment or of continuing employment or discharge or discipline in any manner an employee for failing, refusing, or declining to submit to or take a polygraph examination.

B. For purposes of this section, "polygraph" means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test, or question individuals for the purpose of determining truthfulness. This provision shall not apply to federal or state government employees.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.
Note. The words "lie detector" were changed to "polygraph".

§ 616. Rules and regulations

The Human Services Committee of the Navajo Nation Council is authorized to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act. The Commission is hereby delegated the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under §611 of the Act, provided that such rules are consistent with the provisions of the Act.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

§ 617. Prior inconsistent law repealed

All prior Navajo Nation laws, rules, regulations, and provisions of the Navajo Nation Code previously adopted which are inconsistent with this Act are hereby repealed.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 618. Effective date and amendment of the Act

A. The effective date of this Act shall be 60 days after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.

B. Any amendment or repeal of the Act shall only be effective upon approval by the Navajo Nation Council, and shall not be valid if it has the effect of amending, modifying, limiting, expanding or waiving the Act for the benefit or to the detriment of a particular person.

C. Any amendment to the Act, unless the amendment expressly states otherwise, shall be effective 60 days after the passage thereof by the Navajo Nation Council.

D. The time limits prescribed in §610 relating to filing a Charge and subsequent proceedings thereon were added by amendment adopted by the Navajo Nation Council subsequent to the effective date of the original Act. Notwithstanding an actual accrual date for any alleged violation of the Act which is prior to the effective date of the amendment which added the time limits in §610 hereof, such alleged violation shall be deemed to accrue on the effective date of the foregoing amendment for purposes of all time limits set forth in §610.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 619. Severability of the Act

If any provision of this Act or the application thereof to any person, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications thereof.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

February 19, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judge Peter B. Bloch, Presiding Officer

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
2929 Coors Road	)	
Suite 101	)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that:

On February 19, 1999, I caused to be served copies of the following:

FINAL WRITTEN PRESENTATION OF GRACE SAM AND MARILYN MORRIS

upon the following persons via first class United States mail, postage prepaid, and in accordance with the requirements of 10 C.F.R. § 2.712. The parties marked by an asterisk (*) were also served via e-mail. The envelopes were addressed as follows:

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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Special Assistant
Atomic Safety & Licensing Board Panel
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Dated this 19th day of February, 1999

Samuel D. Gollis

HOPI LEGAL SERVICES
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February 19, 1999

Office of the Secretary
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852
Attn: Rulemakings and Adjudications Staff

Re: In the Matter of Hydro Resources, Inc., Docket No. 40-8968-ML

Dear Madam or Sir:

I have enclosed for filing in the above-referenced case an original and three copies of the Final Written Presentation of Grace Sam and Marilyn Morris and a Certificate of Service. Please return a conformed copy of each to me in the self-addressed, stamped envelope I have provided.

Thank you for your assistance. Please call me directly at (520) 738-5345 if you have any question.

Sincerely,

Samuel D. Gollis

Encls.