



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

August 26, 2021

Federally Recognized Indian Tribes

INVITATION TO CONSULT AND PARTICIPATE IN THE NUCLEAR REGULATORY
COMMISSION'S SYSTEMATIC REVIEW OF THE AGENCY'S ENVIRONMENTAL JUSTICE
POLICY, PROGRAMS, AND ACTIVITIES (STC-21-060)

Purpose: In a previous [letter](#) on July 9, 2021, the U.S. Nuclear Regulatory Commission (NRC) provided notification that the NRC staff is conducting a systematic review of how the NRC's programs, policies, and activities address environmental justice. The purpose of this letter is offer a consultation opportunity for Tribal leadership (Agencywide Documents Access Management System [ADAMS] Accession No. [ML21189A002](#)). The NRC staff will use your input to develop a paper on its assessment of the agency's environmental justice activities for the NRC's Commissioners. That paper is due to the Commission in February 2022.

Background: On April 23, 2021, the NRC Commission issued a Staff Requirements Memorandum directing the staff to systematically review how the agency's programs, policies, and activities address environmental justice (ADAMS Accession No. [ML21113A070](#)). As part of this review, the Commission directed the NRC staff to evaluate recent Executive Orders and assess how the agency addresses environmental justice, given the agency's mission. As set forth in the Commission's 2004 "Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions" (August 24, 2004, 69 FR 52040)(NRC Environmental Justice Policy Statement), the NRC currently addresses environmental justice in its reviews under the National Environmental Policy Act (NEPA) for regulatory and licensing actions. As directed by the Commission, the NRC staff will consider the practices of other Federal, State, and Tribal agencies and evaluate whether the NRC should incorporate environmental justice beyond implementation through its NEPA reviews. The NRC staff will also review the adequacy of the NRC Environmental Justice Policy Statement. The Commission further directed the NRC staff to consider whether establishing formal mechanisms to gather external stakeholder input would benefit any future environmental justice efforts.

Discussion: The NRC staff is offering consultation on the NRC's environmental justice reviews under the NRC's Tribal Policy Statement (82 FR 2402 (Jan 9, 2017)). Accordingly, the NRC staff invites Tribal leaders who are interested in this voluntary consultation with the NRC on the NRC staff's environmental justice reviews to contact Mr. Allen Fetter, (contact information below) by September 17, 2021, to schedule a virtual meeting.

The NRC staff is also soliciting feedback from Tribal government representatives in other ways.

¹Tribal government may submit comments as described in the enclosed *Federal Register* notice, through e-mail, voicemail, mail, or [regulations.gov](https://www.regulations.gov). Comments should be received by October 29, 2021. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

The NRC staff is particularly interested in obtaining views from Tribal nations on the following questions:

1. What is your understanding of what is meant by environmental justice at the NRC?
2. When the NRC conducts licensing and other regulatory reviews, the agency uses a variety of ways to gather information from tribal governments and tribal members on environmental impacts of the proposed agency action. These methods include in-person and virtual meetings, *Federal Register* notices requesting input, and dialog with community organizations.
 - a. How could the NRC enhance how it engages and gathers input from Tribal governments and tribal members?
 - b. Are there formal tools that might enhance communication with Tribal governments and tribal members interested in NRC's programs, policies, and activities?
 - c. Can you describe any challenges that may affect your Tribal governments' or Tribal members' ability to engage with the NRC on environmental justice issues?
3. How could the NRC enhance identification of environmental justice concerns of tribal nations?
4. What has the NRC historically done well, or is currently doing well, that the agency could continue or expand with respect to environmental justice in the agency's programs, policies, and activities, including engagement efforts?
5. What actions could the NRC take to enhance consideration of Tribal concerns related to environmental justice in the NRC's programs, policies and activities and agency decision-making, considering the agency's mission and statutory authority?
6. Would you recommend that the agency consider any particular organization's environmental justice program(s) that is particularly effective in engaging Tribal nations?
7. Looking to other Federal, State, and Tribal agencies' environmental justice programs, what actions could the NRC take to enhance the agency's environmental justice program?

The NRC welcomes your participation in its systematic review of how the NRC's programs, policies, and activities address environmental justice to ensure that unique Tribal perspectives are considered, as the NRC staff evaluates the agency's current Environmental Justice Policy and practice. The results of the NRC staff's review and any recommendations will be provided

¹ This information request has been approved by OMB 3150-0245 expiration September 30, 2023. The estimated burden per response to comply with this voluntary collection is approximately 2 hours. Send comments regarding the burden estimate to the FOIA, Library, and Information Collections Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555- 0001, or by e-mail to infocollects.resource@nrc.gov, and to OMB Office of Information and Regulatory Affairs (3150-0245), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street, NW Washington, DC 20503; e-mail: oir_submission@omb.eop.gov. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the document requesting or requiring the collection displays a currently valid OMB control number.

to the NRC's Commission for appropriate action. If you have questions regarding this correspondence, please contact the individual listed below:

POINT OF CONTACT: Allen Fetter
TELEPHONE: (301) 415-8556

E-MAIL: Allen.Fetter@nrc.gov

Gregory F. Suber

Digitally signed by Gregory F.
Suber
Date: 2021.08.26 15:50:53 -04'00'

Gregory F. Suber, Director
Environment Justice Review Team

Enclosures:
Federal Register notice
NRC Environmental Justice Policy Statement

submissions are available for inspection and copying, when permitted, at the OSHA Docket Office. For information on using <http://www.regulations.gov> to make submissions or to access the docket, click on the "Help" tab at the top of the homepage. Contact the OSHA Docket Office at (202) 693-2350 for information about materials not available through that website and for assistance in using the internet to locate submissions and other documents in the docket.

Authority and Signature

James S. Frederick, Acting Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice pursuant to 29 U.S.C. 655, 40 U.S.C. 3704, Secretary of Labor's Order No. 8-2020 (85 FR 58393), 5 U.S.C. App. 2, and 29 CFR part 1912.

Signed at Washington, DC, on July 2, 2021.

James S. Frederick,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021-14631 Filed 7-8-21; 8:45 am]

BILLING CODE 4510-26-P

NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meetings

TIME AND DATE: The Members of the National Council on Disability (NCD) will hold a quarterly business meeting on Thursday, July 22, 2021, 1:00 p.m.—4:00 p.m., Eastern Daylight Time (EDT).

PLACE: This meeting will occur via Zoom videoconference. Registration is not required. Interested parties are encouraged to join the meeting in an attendee status by Zoom Desktop Client, Mobile App, or Telephone to dial-in. Updated information is available on NCD's event page at <https://ncd.gov/events/2021/upcoming-council-meeting>. To join the Zoom webinar, please use the following URL: <https://zoom.us/j/99051495407?pwd=MGpQQitxSnNDVXR6MWpjNnlrVlE3dz09> or enter Webinar ID: 990 5149 5407 in the Zoom app. The Passcode is: 151964.

To join the Council Meeting by telephone, dial one of the preferred numbers listed. The following numbers are (for higher quality, dial a number based on your current location): (669) 900-6833; (408) 638-0968; (312) 626-6799; (346) 248-7799; (253) 215-8782; (646) 876-9923; or (301) 715-8592. You will be prompted to enter the meeting ID 990-5149-5407 and passcode 151964.

In the event of audio disruption or failure, attendees can follow the meeting

by accessing the Communication Access Realtime Translation (CART) link provided. CART is text-only translation that occurs real time during the meeting and is not an exact transcript.

MATTERS TO BE CONSIDERED: Following welcome remarks and introductions, the Chairman, Executive Director and Executive Committee will provide reports; followed by a community presentation; a strategic plan presentation; subcommittee updates on policy projects; a schedule of remaining 2021 Council Meetings; and any unfinished business before adjournment.

Agenda: The times provided below are approximations for when each agenda item is anticipated to be discussed (all times Eastern Daylight Time):

Thursday, July 22, 2021

- 1:00–1:05 p.m.—Welcome and Call to Order
- 1:05–1:15 p.m.—Chairman's Report
- 1:15–2:00 p.m.—Executive Director's Report
- 2:00–2:15 p.m.—Executive Committee Report
- 2:15–2:45 p.m.—Community Presentation: National Disability Institute
- 2:45–3:15 p.m.—Strategic Plan Presentation
- 3:15–3:45 p.m.—Subcommittee Updates
- 3:45–4:00 p.m.—Schedule of 2021 Council Meetings, unfinished business
- 4:00 p.m.—Adjourn

Public Comment: There is no in-person public comment session during this council meeting, however the Council is soliciting public comment by email, providing an opportunity to hear from you—individuals, businesses, providers, educators, parents and advocates. Public comment submissions will be reviewed during the meeting and delivered to members of the Council at its conclusion. Your comments are important in bringing to the Council's attention issues and priorities of the disability community. To provide comments, please send an email to PublicComment@ncd.gov with the subject line "Public Comment" and your name, organization, state, and topic of comment included in the body of your email. Submission should be received no later than July 21 to ensure inclusion.

CONTACT PERSON FOR MORE INFORMATION: Nicholas Sabula, Public Affairs Specialist, NCD, 1331 F Street NW, Suite 850, Washington, DC 20004; 202-272-2004 (V), or nsabula@ncd.gov.

Accommodations: An ASL interpreter will be on-camera during the entire

meeting, and CART has been arranged for this meeting and will be embedded into the Zoom platform as well as available via streamtext link. The web link to access CART (in English) is: <https://www.streamtext.net/player?event=NCD>. If you require additional accommodations, please notify Anthony Simpson by sending an email to asimpson.cntr@ncd.gov as soon as possible and no later than 24 hours prior to the meeting.

Due to last-minute confirmations or cancellations, NCD may substitute items without advance public notice.

Dated: July 7, 2021.

Anne C. Sommers McIntosh,

Executive Director.

[FR Doc. 2021-14764 Filed 7-7-21; 4:15 pm]

BILLING CODE 8421-02-P

NUCLEAR REGULATORY COMMISSION

[NRC-2021-0137]

Systematic Assessment for How the NRC Addresses Environmental Justice in Its Programs, Policies, and Activities

AGENCY: Nuclear Regulatory Commission.

ACTION: Public meeting and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is requesting comments as part of its systematic review for how NRC programs, policies, and activities address environmental justice. Specifically, the NRC would like input on how the agency is addressing environmental justice, considering the agency's mission and statutory authority. The information will be used to inform the agency's assessment of how it addresses environmental justice.

DATES: Submit comments by August 23, 2021. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. The NRC will hold public meetings related to its assessment. See Section IV Public Meeting, of this document for additional information.

ADDRESSES: You may submit comments by any of the following methods:

- **Telephone:** 301-415-3875.
- **Email:** NRC-EJReview@nrc.gov.
- **Mail comments to:** Office of Administration, Mail Stop: TWFN-7-A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Program Management, Announcements and Editing Staff.

• *Federal Rulemaking Website*: Go to <https://www.regulations.gov> and search for Docket ID NRC–2021–0137. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Allen Fetter, Office of the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–8556, email: Allen.Fetter@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2021–0137 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

• *Federal Rulemaking Website*: Go to <https://www.regulations.gov> and search for Docket ID NRC–2021–0137.

• *NRC’s Agencywide Documents Access and Management System (ADAMS)*: You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to pdr.resource@nrc.gov. The Staff Requirements Memorandum (SRM)–M210218B, “Briefing on Equal Employment Opportunity, Affirmative Employment, and Small Business, 10:00 a.m., Thursday, February 18, 2021, Video Conference Meeting,” dated April 23, 2021, which provides direction to the staff or this assessment, is available in ADAMS under Accession No. ML21113A070.

• *Attention*: The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at pdr.resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages comment submission via email and phone. Please reference Docket ID NRC–2021–0137 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post comment submissions received via [regulations.gov](https://www.regulations.gov) at <https://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

The NRC is an independent agency established by the Energy Reorganization Act of 1974 that began operations in 1975 as a successor to the licensing and regulatory activities of the Atomic Energy Commission. The NRC’s mission is to license and regulate the Nation’s civilian use of radioactive materials to provide reasonable assurance of adequate protection of public health and safety and to promote the common defense and security and to protect the environment. As part of its licensing and regulatory activities, the NRC conducts safety, security, and environmental reviews.

Specifically, with respect to environmental reviews, the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.*, requires all Federal agencies to evaluate the impacts of proposed major actions on the human environment. As part of its responsibilities under NEPA, the NRC considers environmental justice. According to the Commission, “[t]he term ‘environmental justice’ refers to the federal policy established in 1994 by Executive Order 12898, which directed federal agencies to identify and address ‘disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations.’” *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear

Generating Units 2 and 3), CLI–15–6, 81 NRC 340, 369 (2015).

The NRC, as an independent agency, was requested, rather than directed, to comply with Executive Order 12898, and this Executive Order did not, in itself, create new substantive authority for Federal agencies. In a March 31, 1994, letter to President Clinton, NRC Chairman Ivan Selin indicated that the NRC would endeavor to carry out the measures set forth in Executive Order 12898 and the accompanying memorandum as part of the NRC’s efforts to comply with NEPA (ADAMS Accession No. ML033210526). As noted in the NRC’s 1995 Environmental Justice Strategy (ADAMS Accession No. ML20081K602 (March 24, 1995)), because “the NRC is not a ‘land management’ agency, *i.e.*, it neither sites, owns, or manages facilities or properties,” the NRC determined that Executive Order 12898 would “primarily apply to [NRC] efforts to fulfill” NEPA requirements as part of NRC’s licensing process.

On August 24, 2004, following public comment on a draft Policy Statement (68 FR 62642), the Commission issued its “Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions” (69 FR 52040). The purpose of this Policy Statement was to set forth a “comprehensive statement of the Commission’s policy on the treatment of environmental justice matters in NRC regulatory and licensing actions.” *Id.* at 52,041. The Policy Statement explains that the focus of an environmental justice review “should be on identifying and weighing disproportionately significant and adverse environmental impacts on minority and low-income populations that may be different from the impacts on the general population. It is not a broad-ranging or even limited review of racial or economic discrimination.” *Id.* at 52,047.

The Policy Statement also reiterates guidance on defining the geographic area for environmental justice assessments and identifying low-income and minority communities. *Id.* In addition, it explains that a scoping process is used to “assist the NRC in ensuring that minority and low-income communities, including transient populations, affected by the proposed action are not overlooked in assessing the potential for significant impacts unique to those communities.” *Id.* at 52,048. In performing a NEPA analysis, “published demographic data, community interviews and public input through well-noticed public scoping meetings should be used in identifying minority and low-income communities

that may be subject to adverse environmental impacts.” *Id.*

On April 23, 2021, in a Staff Requirements Memorandum (ADAMS Accession No. ML21113A070), the Commission directed the staff to “systematically review how the agency’s programs, policies, and activities address environmental justice.” As part of this review, the Commission directed the staff to evaluate recent Executive Orders and assess whether environmental justice is appropriately considered and addressed in the agency’s programs, policies, and activities, given the agency’s mission. As directed, the staff will consider the practices of other Federal, State, and Tribal agencies and evaluate whether the NRC should incorporate environmental justice beyond implementation through NEPA. The staff will also review the adequacy of the 2004 Policy Statement. The Commission further directed the staff to consider whether establishing formal mechanisms to gather external stakeholder input would benefit any future environmental justice efforts. To carry out the Commission’s direction, the staff is seeking to engage stakeholders and interested persons representing a broad range of perspectives. This **Federal Register** notice and the meetings referenced herein are part of this engagement effort.

III. Requested Information and Comments

The NRC is interested in obtaining a broad range of perspectives from stakeholders and interested persons. The focus of this request is to gather information to inform a systematic assessment for how the NRC addresses environmental justice in its programs, policies, and activities, considering the agency’s mission and statutory authority. The NRC is particularly interested in receiving input on the following questions:

(1) What is your understanding of what is meant by environmental justice at the NRC?

(2) As described in the Commission’s 2004 Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions (69 FR 52040), the NRC currently addresses environmental justice in its NEPA reviews to determine if a proposed agency action will have disproportionately high and adverse impacts on minority and low-income communities, defined as environmental justice communities.

(a) When the NRC is conducting licensing and other regulatory reviews, the agency uses a variety of ways to gather information from stakeholders

and interested persons on environmental impacts of the proposed agency action, such as in-person and virtual meetings, **Federal Register** notices requesting input, and dialog with community organizations.

(i) How could the NRC expand how it engages and gathers input?

(ii) What formal tools might there be to enhance information gathering from stakeholders and interested persons in NRC’s programs, policies, and activities?

(iii) Can you describe any challenges that may affect your ability to engage with the NRC on environmental justice issues?

(b) How could the NRC enhance opportunities for members of environmental justice communities to participate in licensing and regulatory activities, including the identification of impacts and other environmental justice concerns?

(c) What ways could the NRC enhance identification of environmental justice communities?

(d) What has the NRC historically done well, or currently does well that we could do more of or expand with respect to environmental justice in our programs, policies, and activities, including engagement efforts? In your view, what portions of the 2004 Policy Statement are effective?

(3) What actions could the NRC take to enhance consideration of environmental justice in the NRC’s programs, policies and activities and agency decision-making, considering the agency’s mission and statutory authority?

(a) Would you recommend that NRC consider any particular organization’s environmental justice program(s) in its assessment?

(b) Looking to other Federal, State, and Tribal agencies’ environmental justice programs, what actions could the NRC take to enhance consideration of environmental justice in the NRC’s programs, policies, and activities?

(c) Considering recent Executive Orders on environmental justice, what actions could the NRC take to enhance consideration of environmental justice in the NRC’s programs, policies, and activities?

(d) Are there opportunities to expand consideration of environmental justice in NRC programs, policies, and activities, considering the agency’s mission? If so, what are they?

IV. Public Meeting Information

The NRC plans to hold public meetings during the public comment period for this action. The first public meetings are currently planned for July

15, 2021, from 1:30 p.m.–3:00 p.m. ET and 8:00 p.m.–9:30 p.m. ET, via webinar. The public meetings will provide forums for the NRC staff to discuss issues and questions with stakeholders and interested persons. During the public meetings, the NRC does not intend to provide responses to comments submitted during the public meetings. The public meetings were noticed on the NRC’s public meeting website. Members of the public should monitor the NRC’s public meeting website for additional information about the public meetings at <https://www.nrc.gov/public-involve/public-meetings/index.cfm>. The NRC will post notices for additional public meetings associated with this effort and may post additional material related to this action to the Federal Rulemaking website at <https://www.regulations.gov/> under Docket ID NRC–2021–0137.

Dated: July 6, 2021.

For the Nuclear Regulatory Commission.

Gregory F. Suber,

*Director, Environmental Justice Review Team,
Office of the Executive Director for
Operations.*

[FR Doc. 2021–14673 Filed 7–8–21; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92320; File No. SR–NYSEArca–2021–28]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade the Shares of ConvexityShares Daily 1.5x SPIKES Futures ETF Under NYSE Arca Rule 8.200–E (Trust Issued Receipts)

July 2, 2021.

On May 13, 2021, NYSE Arca, Inc. (“NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares of the ConvexityShares Daily 1.5x SPIKES Futures ETF under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts). The proposed rule change was published for comment in the **Federal Register** on May 26, 2021.³ The

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 91949 (May 20, 2021), 86 FR 28420.

U.S. Nuclear Regulatory Commission

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

AGENCY: Nuclear Regulatory Commission.

ACTION: Final Policy Statement.

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

12898, it will strive to meet those goals through its normal and traditional NEPA review process. This final policy statement reflects the pertinent comments received on the published draft policy statement.

EFFECTIVE DATE: [Insert publication date].

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

SUPPLEMENTARY INFORMATION:

I. Background.

II. Summary of Public Comments and Responses to Comments.

(A) General Comments

(B) Creation of New or Substantive Rights

(C) NEPA as a Basis for Considering Environmental Justice-Related Matters

(D) Racial Motivation

(E) Environmental Assessments

(F) Generic/Programmatic EISs

(G) Numeric Criteria

(H) Scoping/Public Participation

III. Final Policy Statement.

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

I. Background

In February 1994, President Clinton issued E.O. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," which directed each Federal agency to ". . . make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. . . ." Executive Order No. 12898 (Section 1-101), 59 FR 7629 (February 16, 1994). Although independent agencies, such as the NRC, were only requested, rather than directed, to comply with the E.O., NRC Chairman Ivan Selin, in a letter to President Clinton, indicated that the NRC would endeavor to carry out the measures set forth in the E.O. and the accompanying memorandum as part of the NRC's efforts to comply with the requirements of NEPA. See Letter to President from Ivan Selin, March 31, 1994. Following publication of the Council on Environmental Quality's (CEQ's) guidelines¹ in December 1997 on how to incorporate environmental justice in the NEPA review process, the NRC staff in the Office of Nuclear Material Safety and Safeguards (NMSS) and the Office of Nuclear Reactor Regulation (NRR) each developed their own environmental justice guidance with the CEQ guidance as the model. See NUREG-1748, *"Environmental Review Guidance for Licensing Actions Associated with NMSS Programs"* (August 22, 2003) (ADAMS Accession No. ML032450279); NRR Office

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

Instruction, LIC-203, Rev. 1, “*Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues*” (May 24, 2004) (ADAMS Accession No. ML033550003).

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

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

This view was reiterated by the Commission in *Private Fuel Storage (PFS)*. See *PFS* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153-55 (2002); see also *PFS*, CLI-04-09, 59 NRC 120 (2004). In *PFS*, the Commission stated that environmental justice, as applied at the NRC, “means that the agency will make an effort under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear

facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community.” *Id.* at 156.

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

II. Summary of Public Comments and Responses to Comments

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

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

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

A. General Comments

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

Another commenter recommended that the NRC develop a comprehensive statement that includes an analysis of the impacts and effects of the proposed action on low-income and minority populations by building on the past ten years of EJ policy development and guidance. Another commenter recommended that the NRC review staff guidance documents prepared by the NRC and other Federal agencies on implementing the E.O. and evaluate how well the guidance was carried out and how effective the guidance has been. After identifying the effective portions, the comment stated that the NRC should revise and assemble the guidance into a

single, integrated policy that, at a minimum, contains language from CEQ's "Environmental Justice: Guidance Under the National Environmental Policy Act."

Response. This policy statement is intended to be a Commission-approved general clarification of the Commission's position on the treatment of environmental justice issues in NRC regulatory and licensing actions. This statement reaffirms the Commission's commitment to pursue and address environmental justice policy goals through the NEPA process by (1) consolidating the Commission's views as set forth in the *LES* and *PFS* decisions, (2) combining NRR and NMSS guidance to provide an agency prospective, and (3) addressing current case law relevant to environmental justice matters as litigated in the federal court system. In preparing the policy statement, the Commission also consulted guidance from other Federal agencies and CEQ, regarding the treatment of environmental justice.

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

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

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

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

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

A.4 Comment. Some commenters urged that the draft statement be rejected because it retreats from or undermines the goals and intent of E.O. 12898. Other commenters stated that the policy statement de-emphasizes EJ matters in NRC licensing proceedings. Another similar letter commented that the NRC has declared E.O. 12898 to be irrelevant by limiting EJ

matters to the NEPA context. The commenter noted that it was the shortcomings and ambiguity of NEPA that made the E.O. necessary in the first place.

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

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

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

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

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

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

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

A.8 Comment. Several comments dealt with the cumulative impacts on certain populations and regions. Specifically, in the context of the proposed Yucca Mountain High-Level

Waste Repository, it was stated that Nevada has and continues to bear “the burden of nuclear projects for the nation.”

Response. The Commission considers cumulative impacts when preparing an environmental impact statement for a proposed action. With regard to environmental justice matters, applicants are asked to provide NRC staff with a description of cumulative impacts to low-income and minority populations and socioeconomic resources, if applicable, in their environmental report (ER) submitted with any license application. NUREG-1748, § 6.4.11.

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

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

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

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

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

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

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

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

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

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

(d) The scoping process identified in 10 C.F.R. § 51.29 and public participation in commenting on the draft EIS are a fundamental part of the NEPA process and are consistent with the E.O. and CEQ guidelines. Both NMSS and NRR have issued guidance that provides for public participation in identifying minority and low-income populations through the EIS scoping process (i.e. interviews, public comment, local meetings, and general outreach efforts). The scoping meetings are announced in the *Federal Register*, on the NRC Web site, in local or regional newspapers, posters around the meeting location, and/or on local radio and television

stations at least one week before the public meeting. The NRC requests the assistance of tribal, church, and community leaders to disseminate the information to potentially affected groups. Participants in the scoping process are provided an opportunity to submit oral comments at the scoping meeting and written comments through a project e-mail address or by regular mail.

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

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

B. Creation of New or Substantive Rights

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

Response. It is the Commission's position that the E.O. itself does not establish new substantive or procedural requirements applicable to NRC regulatory or licensing activities. The E.O. itself is very clear on this point. As a procedural statute, however, NEPA requires Federal agencies to take a "hard look" at the environmental impacts of major Federal actions significantly affecting the quality of the human environment. Therefore, an EIS must appropriately assess disproportionately high and adverse impacts of a proposed action that fall heavily on a particular community.

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

Response. The Commission's regulations setting forth the standards for admissible contentions are found at 10 C.F.R. § 2.309. This section provides that for each contention, the request for a hearing or petition to intervene must, among other things, (1) provide a specific statement of the issue of law or fact to be raised or controverted, (2) provide a brief explanation

of the basis for the contention, (3) demonstrate that the issue raised in the contention is within the scope of the proceeding, and (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding. See 10 C.F.R. § 2.309(f). In the context of EJ-related matters, the only possible basis for an admissible contention is NEPA, which statutorily mandates a hard look at the significant environmental impacts of a proposed major Federal action. Because E.O. 12898 does not create any new rights, it cannot provide a legal basis for contentions to be litigated in NRC licensing proceedings.

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

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

B.4 Comment. Several commenters stated that the policy statement contradicts former Chairman Selin's acknowledgment that the E.O. applies to the NRC's requirements under NEPA. Specifically, the commenters stated that the E.O. intended to expand the scope of the

NRC's NEPA requirements to include EJ-related matters in licensing proceedings, not limit that scope.

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

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

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

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

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

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

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

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

Response. The NRC strives to proactively identify and consider environmental justice issues in pertinent agency licensing and regulatory actions primarily by fulfilling its NEPA responsibilities for such actions. As part of NEPA’s original mandate, agencies are required to

look at the socioeconomic impacts that have a nexus to the physical environment. See 40 C.F.R. § 1508.8. It is the Commission's view that the obligation to consider and assess disproportionately high and adverse impacts on low-income and minority populations as part of its NEPA review was not created by the E.O. Rather, it is the Commission's view that the E.O. reminded agencies that such an analysis is appropriate in its normal and traditional NEPA review process.

While the E.O. directs Federal agencies to “. . .develop an agency-wide environmental justice strategy. . . ,” it did not suggest that agencies codify EJ analysis into their regulations. The E.O. directed Federal agencies to “. . .make achieving environmental justice [to the greatest extent practicable and permitted by law] part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. . . .” Executive Order No. 12898, 59 FR at 7629 (Section 1-101). In fact, the Presidential Memorandum specifically discussed implementing the E.O. within the bounds of already existing law, such as NEPA. See *Presidential Memorandum* at p. 1. In *LES*, CLI-98-3, 47 NRC 77, the Commission stated that “[t]he only ‘existing law’ conceivably pertinent [to the NRC’s fulfillment of the E.O.] is NEPA, a statute that centers on environmental impacts.” *LES*, 47 NRC at 102.

D. Racial Motivation

D.1 Comment. A number of commenters requested that the Commission reject the policy statement because it does not resolve the issue of racial discrimination in the siting of nuclear reactors and other facilities licensed by the NRC. Several comments stated that the policy statement should pay special attention to the nuclear industry’s history of siting facilities in

minority and disadvantaged communities with special attention to facilities sited on ancient ancestral homelands of Native Americans.

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

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

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

Response. NEPA is not the appropriate context in which to assess racial motivation and fairness or equity issues. As stated by the Commission in *LES*, “were NEPA construed broadly to require a full examination of every conceivable aspect of federally licensed projects, ‘available resources may be spread so thin that agencies are unable adequately to pursue

protection of the physical environment and natural resources.” *LES*, CLI-98-3, 47 NRC 77, 102-03, *quoting Metropolitan Edison Co.*, 460 U.S. 766, 776 (1983).

E. Environmental Assessments

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

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

Response. The Commission’s policy does not eliminate the possibility of an EJ review in the context of an EA. Rather, the policy limits such a review to those times when a FONSI may not be appropriate because impacts that would not otherwise be significant could be significant due to the unique characteristics of low-income or minority communities. Under

those special circumstances, an EJ review may be necessary to provide the basis for concluding that there are no significant environmental impacts. With regard to EAs, the policy statement clarifies the previously undefined “special circumstances” and notes that, in the case of most EAs, there are little or no offsite impacts and, therefore, an EJ review is generally not necessary to make a FONSI.

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

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

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

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

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

F. Generic/Programmatic EISs

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

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

G. Numeric Criteria

G.1 Comment. Several commenters disagreed with the numeric guidance used to identify the geographic area in which demographic information is sought and to identify potentially affected low-income and minority communities. One commenter stated that the numeric limits are arbitrary in that no objective basis for setting those limits and no legal basis for that practice exist. The commenter further stated that the NRC must ensure that its NEPA evaluation properly identifies and accounts for unique facts associated with a particular

community that may contribute to a larger or lesser impact. It should not matter whether that community falls within any of the numeric criteria used by the NRC staff to evaluate EJ, but rather whether there is any particular community that, by its very nature, would suffer a greater or lesser impact from a proposed Federal action.

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

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

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

Response. This policy statement does not address site-specific concerns. In accordance with NEPA, and consistent with Commission practice, the geographic area assessed for NEPA purposes will be commensurate with the potential impact area of the proposed activity. The distances are guidelines used by NRR and NMSS to reflect the different activities regulated by those offices and are generally consistent with the area of potential

impacts normally considered in NRC environmental and safety reviews. With regard to the high-level waste repository, the NWPA defines the agency's NEPA obligations.

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

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

H. Scoping/Public Participation

H.1 Comment. Several commenters assert that, in addition to the draft policy statement's paragraph addressing scoping, the final policy statement should include a public

participation and outreach element in the decisionmaking process that conforms to the E.O., and CEQ and NRC policies.

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

III. Final Policy Statement

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

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

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

The basis for admitting EJ contentions in NRC licensing proceedings stems from the agency's NEPA obligations, and EJ-related contentions had been admitted by an NRC Licensing Board prior to the issuance of the E.O. in 1994. See *LES*, LBP-91-41, 34 NRC at 353. As clearly stated in § 1-101 of the E.O., an agency's EJ responsibilities are to be achieved to the extent permitted by law. See 59 FR at 7629 (Section 1-101). The accompanying Presidential Memorandum stated that "each Federal agency shall analyze the environmental effects. . . of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]." *Memorandum for Heads of All Departments and Agencies* (Feb. 11, 1994) (Presidential Memorandum).² The E.O. simply serves as an appropriate and timely reminder to agencies to become aware of the various demographic and economic circumstances of local communities as part of any socioeconomic analysis that might be required by NEPA or their authorizing statutes. See 40 C.F.R. §§ 1508.8 and 1508.14 (2003).

The Commission, in *LES*, has made it clear that EJ issues are only considered when and to the extent required by NEPA. The Commission held that the disparate impact analysis within the NEPA context is the tool for addressing EJ issues and that the "NRC's goal is to identify and adequately weigh or mitigate effects, on low-income and minority communities" by

²NEPA is the only available statute under which the NRC can carry out the general goals of E.O. 12989. Although the Presidential Memorandum directed Federal agencies to ensure compliance with the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964 for all Federally funded programs and activities that affect human health or the environment, Title VI is inapplicable to the NRC's regulatory and licensing actions. Likewise, while environmental justice matters may be appropriately addressed during the permitting process under other environmental statutes, including the Resource Conservation and Recovery Act, the Clean Water Act, and the Clean Air Act, the NRC does not have permitting authority under those statutes.

assessing impacts peculiar to those communities. *LES*, CLI-98-3, 47 NRC at 100; see *also*, *PFS*, CLI-02-20, 56 NRC at 156. At bottom, for the NRC, EJ is a tool, within the normal NEPA context, to identify communities that might otherwise be overlooked and identify impacts due to their uniqueness as part of the NRC's NEPA review process.

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

Racial Motivation Not Cognizable Under NEPA

Racial motivation and fairness or equity issues are not cognizable under NEPA, and though discussed in the E.O., their consideration would be contrary to NEPA and the E.O.'s

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

Environmental Assessments Normally Do Not Include Environmental Justice Analysis

The agency’s assessment of environmental justice-related matters has been limited in the context of EAs. Previously, the Commission has stated that absent “significant impacts, an environmental justice review should not be considered for an EA where a Finding of No Significant Impact [FONSI] is issued unless special circumstances warrant the review.” SRM-MO21121A (Supplemental) - Affirmation Session: 1. SECY-02-0179 - Final Rule: Material Control and Accounting Amendments, Dec. 3, 2002 (ADAMS Accession No. ML023370498).⁴ If there will be no significant impact as a result of the proposed action, it follows that an EJ review would not be necessary. However, the agency must be mindful of special circumstances that

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

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

might warrant not making a FONSI. In most EAs, the Commission expects that there will be little or no offsite impacts and, consequently, impacts would not occur to people outside the facility. However, if there is a clear potential for significant offsite impacts from the proposed action then an appropriate EJ review might be needed to provide a basis for concluding that there are no unique impacts that would be significant. If the impacts are significant because of the uniqueness of the communities, then a FONSI may not be possible and mitigation or an EIS should be considered.

Generic and Programmatic Impact Statements Do Not Include Environmental Justice Analysis

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

Need for Flexibility in NRC's Environmental Justice Analyses

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

1. Defining Geographic Area for Assessment

One of the first steps the staff takes in its EJ analysis is to identify the geographic area for which it seeks to obtain demographic information. While staff guidance states that the geographic scale should be commensurate with the potential impact area, NMSS and NRR have adopted numeric guidance based on activities that those offices regulate. Under current NMSS procedures, the potentially affected area is normally determined to be a radius of 0.6 mile from the center of the proposed site in urban areas, and four miles if the facility is located in a rural area. NRR normally uses a 50-mile radius that should be examined for licensing and regulatory actions involving power reactors. These distances reflect the different activities regulated by NRR and NMSS and are consistent with the area of potential impacts normally considered in NRC environmental and safety reviews. However, these procedures provide that the distances are guidelines and that the geographic scale should be commensurate with the potential impact area and should include a sample of the surrounding population because the goal is to evaluate the communities, neighborhoods, and areas that may be disproportionately impacted.

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

2. Identifying Low-Income and Minority Communities

Once the impacted area is identified, potentially affected low-income and minority communities should be identified. Under current NRC staff guidance, a minority or low-income community is identified by comparing the percentage of the minority or low-income population in

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

3. Scoping

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

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

- ! The legal basis for the NRC analyzing environmental impacts of a proposed Federal action on minority or low-income communities is NEPA, not Executive Order 12898. The E.O. emphasized the importance of considering the NEPA provision for socioeconomic impacts. The NRC considers and integrates what is referred to as environmental justice matters in its NEPA assessment of particular licensing or regulatory actions.

- ! In evaluating the human and physical environment under NEPA, effects on low-income and minority communities may only be apparent by considering factors peculiar to those communities. Thus, the goal of an EJ portion of the NEPA analysis is (1) to identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. It is not a broad-ranging review of racial or economic discrimination.

- ! In developing an EA where a FONSI is expected it is not necessary to undertake an EJ analysis unless special circumstances warrant the review. Special circumstances arise only where the proposed action has a clear potential for off-site impacts to minority and low-income communities associated with the proposed action. In that case, an appropriate review may be needed to provide a

basis for concluding that there are no unique environmental impacts on low-income or minority communities that would be significant.

- ! EJ-related issues normally are not considered during the preparation of generic or programmatic EISs. In general, EJ-related issues, if any, will differ from site to site and, thus, do not lend themselves to generic resolutions. Consequently, EJ, as well as other socioeconomic issues, are considered in site-specific EISs.
- ! “EJ per se” is not a litigable issue in NRC proceedings. Rather the NRC’s obligation is to assess the proposed action for significant impacts to the physical or human environment. Contentions must be made in the NEPA context, must focus on compliance with NEPA, and must be adequately supported as required by 10 C.F.R. Part 2 to be admitted for litigation.
- ! The methods used to define the geographic area for assessment and to identify low-income and minority communities should be clear, yet allow for enough flexibility that communities or transient populations that will bear significant adverse effects are not overlooked during the NEPA review. Therefore, in determining the geographic area for assessment and in identifying minority and low-income communities in the impacted area, standard distances and population percentages should be used as guidance, supplemented by the EIS scoping process, to determine the presence of a minority or low-income population.

- ! The assessment of disparate impacts is on minority and low-income populations in general and not to the “vaguely defined, shifting ‘subgroups’ within that community.” See *PFS*, CLI-02-20, 56 NRC at 156.

- ! In performing a NEPA analysis for an EIS, published demographic data, community interviews and public input through well-noticed public scoping meetings should be used in identifying minority and low-income communities that may be subject to adverse environmental impacts.

Dated at Rockville, Maryland, this _____ day of _____, 2004.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,
Secretary of the Commission.