

[Federal Register: November 5, 2003 (Volume 68, Number 214)]
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[DOCID:fr05no03-141]

NUCLEAR REGULATORY COMMISSION

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

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of draft policy statement and notice of opportunity
for public comment.

SUMMARY: This draft policy statement on the treatment of environmental justice (EJ) matters in Nuclear Regulatory Commission (NRC) regulatory and licensing actions is being issued for public comment. It 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 to fulfill its 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.

DATES: Comments on this draft policy statement should be submitted by January 5, 2004, and will be considered by the NRC before publishing the final policy statement. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Submit comments to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff. Deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays. Because of continuing disruptions in the delivery of mail to United States Government offices, it is requested that comments also be

transmitted to the Secretary of the Commission either by means of facsimile transmission to (301) 415-1101, or by e-mail to hearingsdocket@nrc.gov. Comments received may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, Maryland or at NRC's Public Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Special Counsel, Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC, 20555-0001. Telephone: (301) 415-2746; fax number: (301) 415-2036; e-mail: jxl@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In February 1994, President Clinton issued E.O. 12898, "Federal Actions to Address Environmental Justice in

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Minority Populations and Low-Income Populations" that 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 (Feb. 16, 1994). Although independent agencies, such as the NRC, were only requested 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 its 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) guidelines \1\ in December 1997 on how to incorporate environmental justice in the NEPA review process, the NRC staff in the Office of Nuclear Material Safety and Safeguards (NMSS) and the Office of Nuclear Reactor Regulation (NRR) each developed their own environmental justice guidance with the CEQ guidance as the model. See NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs," August 22, 2003 (ADAMS Accession No. ML032450279); NRR Office Instruction, LIC-203, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues (June 21, 2001) (ADAMS Accession No. ML011710073).

\1\ Environmental Justice, Guidance Under the National Environmental Policy Act, Council on Environmental Quality (Dec. 10, 1997).

In 1998, the Commission, for the first time in an adjudicatory licensing proceeding, analyzed the Executive Order 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 located 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). 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. Recently, questions have been raised concerning the Commission's responsibilities under E.O. 12898. In light of the previous adjudications, the Commission sees a need, and thinks it appropriate, to set out its views and policy on the significance of the E.O. and guidelines of when and how EJ will be considered in NRC's licensing and regulatory actions.

II. Statement of Policy

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. provides that it 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 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 Sec. 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 a 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. See 40 CFR 1508.8 and 1508.14 (2003).

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

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

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identify impacts due to their uniqueness as part of the NRC's NEPA review process.

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

allege, with the requisite documentary basis and support as required by 10 CFR part 2, that the proposed action will have significant adverse impact on the physical or human environments 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.

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

Environmental Assessments Normally Do Not Include Environmental Justice Analysis

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

\4\ At least one court supports the view that EJ does not need

to be considered in an EA. See *American Bus Ass'n v. Slater*, 1999 U.S. Dist. LEXIS 20936, 9 Am. Disabilities Cas. (BNA) 1427 (D.C. Cir. Sept. 10, 1999).

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 miles 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 as the goal is to evaluate the communities, neighborhoods and areas that may be disproportionately impacted.

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

3. Scoping

The NRC will emphasize scoping, the process identified in 10 CFR 51.29, and public participation in those instances where an EIS will be prepared. Reliance on traditional scoping is consistent with the E.O. and CEQ guidance. See E.O. 12898, 59 FR at 7632 (Section 5-5); CEQ Guidance at 10-13. CEQ guidance reminds us that ``the participation of diverse groups in the scoping process is necessary for full consideration of the potential environmental impacts of a proposed agency action and any alternatives. By discussing and informing the public of the emerging issues related to the proposed action, agencies may reduce misunderstandings, build cooperative working relationships, educate the public and decision makers, 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 and in assessing the potential for significant impacts unique to those communities.

III. Guidelines for Implementation of NEPA as to EJ Issues

[sbull] The legal basis for 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.

[sbull] 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.

[sbull] In developing an EA where a Finding of No Significant Impact 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.

[sbull] 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.

[sbull] ``EJ per se'' is not a litigable issue in NRC proceedings. Rather the NRC's obligation is to assess the proposed action for significant impacts to the physical or human environment. Contentions must be made in the NEPA context, must focus on compliance with NEPA, and must be adequately supported as required by 10 CFR part 2 to be admitted for litigation.

[sbull] 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.

[sbull] 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 147 (2002).

[sbull] 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 receive adverse environmental impacts.

Dated at Rockville, Maryland, this 30th day of October, 2003.

For the Nuclear Regulatory Commission.
Annette Vietti-Cook,
Secretary of the Commission.
[FR Doc. 03-27805 Filed 11-4-03; 8:45 am]

BILLING CODE 7590-01-P