

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) 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 Instruction, LIC-203, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues (June 21, 2001) (ADAMS Accession No. ML011710073).

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 § 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).

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

² NEPA is the only available statute under which the NRC can carry out the general goals of E.O. 12898. 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.

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