

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

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34TH REGULATORY INFORMATION CONFERENCE (RIC)

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TECHNICAL SESSION - T10

THE FUTURE OF NEPA LITIGATION:

THE EVOLVING ROLE OF CLIMATE CHANGE,
 ENVIRONMENTAL JUSTICE, AND RELATED TOPICS

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TUESDAY,

MARCH 8, 2022

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The Technical Session met via Video-
 Teleconference, at 3:00 p.m. EST, Ronald Spritzer and
 William Froehlich, Administrative Judges, Atomic
 Safety and Licensing Board, presiding.

PRESENT:

RONALD SPRITZER, Administrative Judge, ASLBP

WILLIAM FROEHLICH, Administrative Judge, ASLBP

AMANDA LEITER, Professor, American University

AMY ROMA, PARTNER, Hogan Lovells

JESSICA BIELECKI, Deputy Director, Environmental

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P R O C E E D I N G S

3:00 p.m.

JUDGE SPRITZER: Good afternoon. Welcome to Technical Session 10, T10, entitled The Future of NEPA Litigation: The Evolving Role of Climate Change, Environmental Justice, and Related Topics.

My name is Ronald Spritzer. I am a Judge with the Atomic Safety Licensing Board Panel. My Co-Chair for this session is Judge William Froehlich, who is also with the ASLBP.

If we could bring up slide 2. If it's not available -- there we go.

These are a list of our Panel speakers. I'll be providing a more detailed introduction to each of them as they give their -- or just before they give their presentations.

We do also have a more detailed biography for each of our speakers that's available at the RIC website. If you look under Program Agenda and you find a list of the names of the individual speakers, you will see you can click on their name, and that will take you to a more detailed biography.

In the interest of saving our time for

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the presentation and questions, I will dispense with giving that more detailed biography for each speaker.

In terms of how we're going to proceed, we will have four 15-minute presentations, one from each speaker, obviously. And then we will proceed to questions. We're trying to keep the presentations to a total of an hour so we'll have a half hour left for questions and discussion.

In order for that to work, it's very important that people who are listening submit questions, which you can do with the Q&A tab, and Judge Froehlich will be handling the questions later. He'll be presenting them to individual speakers.

But please don't wait until the presentations are over to submit your questions. Submit them as you're listening, as they happen to come to you. That way, Judge Froehlich will have a chance to look them over and decide who's the best one to answer each individual question.

As we've indicated, the topic here is the future of NEPA litigation. I suspect if you are signed up for this session, you know what NEPA is and you have at least some acquaintance with environmental justice, and almost everyone is

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familiar with climate change. But in case there's someone who has signed up for this with no prior knowledge of these issues, I'll provide a hopefully one-minute brief summary.

NEPA is the National Environmental Policy Act. It was passed in 1969. It was one of the country's major environmental statutes. Unlike other major laws like the Clean Air Act and the Clean Water Act, NEPA does not impose standards -- effluent standards or discharge standards -- on pollutants.

Rather, it requires the federal government to undertake a detailed study of the environmental consequences of major federal actions. And for the NRC's part, we treat new nuclear power plants as major federal actions requiring an environmental impact statement.

The environmental impact statement is to cover a wide range of environmental impacts, but we're going to be focusing on two of those: the first, environmental justice, concerns disproportionate impacts, the potential for disproportionate environmental impacts on minority groups or economically disadvantaged groups or both, climate change -- as I indicated, everyone who's read a

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newspaper in the last 20 years or so is familiar with that.

NRC projects typically -- particularly new power plants, at least if they're replacing coal or natural gas or some other fossil fuel -- are not increasing. In fact, they are reducing the kind of discharges that might affect climate change. But there are other ways that climate change has come into our cases, in particular the potential for rising sea levels to affect the operation of nuclear power plants.

All right. With that hopefully very brief introduction, I will proceed to our first speaker. That is Amanda Leiter.

Amanda is a professor of law and Senior Associate Dean at American University's Washington College of Law. She is also the director of the program on environmental and energy law at the Washington College of Law, and she teaches environmental law, administrative law, and torts. Her research interests include administrative law and process and domestic environmental law and policy.

Professor Leiter?

MS. LEITER: Thank you very much. I

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appreciate the introduction, and I appreciate being here with you all today.

So I think my role is to give a sort of overview of NEPA policy shifts over the last couple of years and where NEPA policy currently stands with respect to environmental justice and climate change, as Judge Froehlich just mentioned. And then the more NRC-focused experts who are coming after me on the panel will situate these observations more in the NRC world.

So I'm going to start with an overview, as I said. And I'm going to start at the tail end of the Trump Administration. So, for those who were not following, as the Trump Administration went out the door, it tried to leave in place some -- I think, where you stand on these issues, your adjective or your verb might be a little different, but either kind of streamlining of NEPA policies or gutting of NEPA policies, depending on your view of these issues.

Just to give a brief overview of what that rule looks like, this is a rule that the administration promulgated on July 16th of 2020, so just as it was coming up on the election. It imposed

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time and page limits for environmental impact statement or environmental assessment preparation.

It gave agencies a broader ability to rely on what are known as categorical exclusions, which is a determination by an agency that a certain set of projects essentially are deemed not to have sufficiently significant environmental impacts that either an environmental assessment or a more detailed environmental impact statement needs to be prepared.

To give an example of something that I think is an uncontroversial categorical exclusion, the Forest Service has categorical exclusions for mowing the lawn around Forest Service buildings, for example. They don't have to do an environmental assessment prior to taking that action. But categorical exclusions get a lot more controversial as the action in question gets sort of bigger and more substantive.

The rule also allowed or purported to allow agencies to use the environmental reviews that had been undertaken under other statutes or to use state, tribal, or local reviews to satisfy their NEPA requirements. And it narrowed the range of alternatives an agency needed to analyze in doing its

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environmental assessment and narrowed the range of mitigation options that the agency needed to take into account or to consider.

It also purported to raise the bar for judicial challenges to NEPA compliance and specifically suggested that a challenger would need to provide clear and convincing evidence of a NEPA violation in order to win a NEPA-related lawsuit.

The single most important change for our purposes today was an effort to limit consideration of indirect and cumulative impacts of a project. And I'll focus on the limitation on cumulative impacts. The idea there was to say that you had to look at the impacts of a particular project but not how those impacts might relate to other related impacts in the area or in the world.

So that's of particular import for climate considerations and environmental justice considerations because, of course, climate change is a cumulative phenomenon. And so no single project would ever be said to play a particularly impactful role in climate change, but cumulatively, a series of projects obviously can have a significant impact on the climate.

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Likewise, for environmental justice, it's very hard to assess whether a community is feeling disproportionate environmental impacts unless you can look cumulatively at the full range of projects that are occurring in that community.

Another thing that the Trump Administration tried to do on its way out the door was to withdraw Obama Administration guidance that had provided framework for agencies to consider the potential effects of climate change on a proposed project or the contribution of the project to climate change, so some sort of guidance rules or background rules for how to account for the impacts of a project on climate change.

That was a proposed guidance from CEQ toward the end of the administration -- sorry, from the Council on Environmental Quality and the White House. But that guidance was never finalized.

And then, finally, on the very last day of 2020, in part premised on the Trump NEPA rule, the NRC staff recommended initiating a rulemaking to revise and update NRC's NEPA-related rules. And I'll be talking in a minute about where that effort currently stands.

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So that's where we were at the end of the Biden Administration. In the first hundred days -- or at the end of the Trump Administration. Excuse me. In the first hundred days of the Biden Administration, the White House undertook several efforts to change the tone around NEPA and climate change and environmental justice.

I'll run through those briefly, and then I'll give you a sort of overview of where things now stand. I should say before I start all of this that this is very much in flux. There are developments on these issues every day, so watch this space if you're interested in these issues because things are evolving rapidly.

So the first thing that people looked for at the start of the Biden Administration was the possibility that Congress would act under the Congressional Review Act, the CRA, to disapprove the Trump NEPA rule that had been issued in the summer of 2020. That did not happen even though Congress did act under the Congressional Review Act to disapprove a few other Trump rules from the tail end of the Trump Administration.

It's not clear why we didn't see

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Congressional disapproval of the NEPA rule. It's possible that the administration didn't think it had the votes to push that through, and/or they could have been concerned -- under the Congressional Review Act, you may be familiar with there's a provision that folks aren't sure about that suggests that a disapproved rule, quote, may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued.

So there may have been concern in the Biden Administration that if they pushed for a Congressional Review Act disapproval of the Trump NEPA rule, their authority to issue new and related rules around NEPA procedures, particularly with respect to climate change and environmental justice, may have been curtailed under the Congressional Review Act.

So, again, at the start of the Biden Administration, the Trump-era NEPA rule was still in effect, and there was CEQ draft guidance rescinding the Obama-era NEPA climate guidance. So the next thing that happened in the Biden Administration were two important executive orders, Executive Order 13990

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and Executive Order 14008.

In 13990, as relevant here, the Biden Administration directed the Council on Environmental Quality to pull the Trump NEPA climate guidance and reinstate the Obama-era guidance, and CEQ subsequently did that. So that sort of wiped the slate clean with respect to the draft climate guidance that the Trump Administration had put in place.

And the Biden Administration also directed CEQ to propose new rules to replace the Trump-era NEPA rule, but of course, for those of you familiar with rulemaking, that's a long process. That's a notice-and-comment process where the Agency has to issue a draft rule, take comment on the draft rules, issue a final rule, et cetera. So this announcement in EO 13990 was very much the start of an anticipated multiyear process to replace the Trump-era NEPA rule.

And then, finally, EO, or Executive Order, 13990 reinstated the Obama Administration's Interagency Working Group on the Social Cost of Greenhouse Gases. That's a group that attempts to provide estimates for how carbon emissions, nitrous

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oxide emissions, and methane emissions should be accounted for when an agency thinks about the environmental impacts of and particularly the climate impacts of a proposed project.

And the Interagency Working Group was directed to consider new estimation methodology to the extent that its current methodologies did not adequately take account of climate risk, environmental justice, and intergenerational equity.

For the short term, what the Interagency Working Group did was to reinstate the Obama Administration's estimate of the cost of carbon emissions, and specifically, that's a \$51-per-ton estimate.

So then, a few weeks later, in February of last year, the Biden Administration issued Executive Order 14008. That created a National Climate Task Force that included the heads of most relevant agencies, the White House, the Office of Management and Budget, et cetera. Those agencies were directed to submit a draft action plan to think about how the agency would bolster adaptation and increase resilience to climate change impacts, and also, they're directed to issue annual progress

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reports.

They created an Environmental Justice Interagency Council, which was directed to submit to the President within 120 days a set of recommendations for updating environmental justice procedures at the agencies. They directed the Council on Environmental Quality to create a geospatial Climate and Economic Justice Screening tool, and I'll tell you in a minute where that effort stands.

They directed the Environmental Protection Agency to strengthen enforcement of environmental violations that have a disproportionate impact on environmental justice communities and to create a community notification program to let environmental justice communities know about pollution levels.

And I should say one of the sort of contentious and interesting issues in this work is to identify what is an environmental justice community. We need some sort of metric for identifying what communities face high environmental risks.

And they began what they're calling a Justice40 Initiative that charges the Council on

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Environmental Quality, the Office of Management and Budget, and the White House's National Climate Advisor to recommend ways to ensure that federal investments in any kind of project are made with a goal that 40 percent of the overall benefits flow to disadvantaged communities.

That includes clean energy investments, et cetera. And when they talk about the overall benefits, they're talking very broadly -- not just about the benefits of the project, but about employment that the project might create, et cetera.

Excuse me. I'm not sure what I'm choking on, but -- and then they asked that the agency publish -- or sorry, that the CEQ, the Office of Management and Budget, and the National Climate Advisor publish an environmental justice scorecard detailing how different agencies are doing on their environmental justice performance measures.

So, to bring us to 2020, there are a few recent updates or more recent actions that I want to discuss, and then I'll turn it over to my fellow panelists.

In July of 2021, the NRC issued a request for comments on how NRC programs, policies, and

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activities should address environmental justice. And after a couple of extensions, the due date for those comments was the end of October of 2021.

They received thousands of comments. I've seen a couple of different counts, but certainly on the order of 2,000 comments, many of which were duplicative. And you'll hear from some of my fellow panelists about what was recommended in those comments. There's not yet further action on that effort.

Then, in October of 2021, the Council on Environmental Quality issued its Phase 1 Notice of Proposed Rulemaking to replace the Trump NEPA rule. And the most important piece of that for purposes of this discussion is that the proposed rule would again require consideration of direct, indirect, and cumulative impacts of a proposed project.

The proposed rule would also expand the required range of alternatives for an agency to consider and allow agencies to treat NEPA, the National Environmental Policy Act, as the floor for their environmental evaluation rather than as the ceiling. So agencies may require that project proponents analyze environmental impacts more broadly

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than NEPA would require.

The Council on Environmental Quality does plan to have a Phase 2 rule that will tackle the most difficult question, which is how to incorporate programmatic analyses in a way that would enable streamlining of NEPA review for projects that would advance the administration's clean energy infrastructure priorities. So that's going to be a really interesting set of questions that we're going to have to see how CEQ evaluates.

A couple of other things that happened, the Working Group on the Social Cost of Greenhouse Gases reinstated the \$51-per-ton figure and was at work, actually, on a higher figure. The Western District of Louisiana Court's Judge Cain, on February 11th of this year, enjoined that effort. And the administration is considering how to appeal.

That has tied a couple of processes at different agencies up in knots because they had relied on environmental impact statements that had been prepared with the \$51-per-ton cost estimate, and now they're figuring out how to go forward.

And then, very recently, the administration went live with the beta version of its

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Climate and Environmental Justice Screening Tool, which seeks to identify what are called environmental justice communities, communities that are marginalized, underserved, and overburdened by pollution for purposes of the administration's various environmental justice efforts.

Interestingly, the current version of the tool provides socioeconomic, environmental health, and climate information and relies on that same information to identify environmental justice communities, but does not rely on race. And you may have seen in the press that the administration got a lot of feedback over that choice, both positive and negative. So that's been a very interesting issue to watch.

And I think there are a couple of moves the NRC made just a couple of weeks ago, but I think that my fellow panelists plan to address those moves. And if not, I will come back to them in questions. So I'll turn it over now.

JUDGE SPRITZER: Great. Thank you, Amanda. That was very helpful in terms of the overall picture where things stand.

We will now move on to our next speaker,

who is Amy Roma. She is a partner and Global Energy Practice Leader at the law firm of Hogan Lovells. She advises clients on a wide range of legal, business, and policy matters involving the commercial nuclear industry, including issues relating to the existing nuclear fleet, advanced reactors, fusion facilities, and supporting nuclear infrastructure. Her clients include nuclear industry participants, radioactive materials users, start-ups, investors, NGOs, and various other stakeholders.

Amy?

MS. ROMA: Thank you, Judge Spritzer.

Hi, everybody. Thank you for joining us here today.

Thank you for that overview, Professor Leiter. That was really interesting.

So I'm just going to kind of shift it over to maybe give it more of an NRC lens for the discussion. I figured I could start with environmental justice. That's a big chunk of the conversation just because there's a lot going on. I know that Jessica, who's speaking after me, is going to be talking about what the NRC is doing in its activities, and then talk about climate change, and

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then talk about what the industry is doing on its end with respect to these issues.

We're cramming a lot of information into a really small amount of time, so I'm going to be moving through things quickly. But I'm going to start off with a story because stories always make things a little bit more interesting.

I'm a nuclear regulatory lawyer. I've been practicing for about 20 years. But my career started off at the U.S. Nuclear Regulatory Commission. When I left law school, it was around the 2003 time frame. And I worked at the Licensing Board as a law clerk.

The very first case that I was asked to work on was an ISL mining case. And so that's a uranium mining case. And I went into the hearing room my first week of work to get more familiar with the hearing record, and I just started pulling folders off the shelf and flipping through it.

The very first thing that I opened up was a letter that was written in a different language. I didn't really understanding what I was looking at, and so I flipped through it, and there was an English translation afterwards explaining that it was a

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member of the Navajo tribe. So it was the Navajo Diné, and they were writing letters to the Commission explaining the negative environmental and health impacts that they had from uranium mining.

There were hundreds of letters, and I sat on the floor and read all of them. Some of them were written by people -- they were family members that were taking dictations of letters. And so it was somebody who didn't read or write in English or could not speak English, and they were dictating the letter to a family member, who was writing it and submitting it.

They were discussing the death of loved ones from terrible cancers that they blamed on the uranium mining in their communities. It was very impactful, and it's something that I always took with me through the last 20 years of practice, including to the role that I now serve in my current job, which is not only Energy Practice Group Leader but also a board member who serves on our ESG Board. And so that's Environment, Social, and Governance, and I'm going to talk about that later in my presentation.

But I want to first turn to, what is EJ? So I know that we've already talked about this a

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little bit. And EJ, environmental justice, can mean a lot of different things, but it's generally seen as the fair treatment and meaningful involvement of all people, regardless of their race, color, national origin, or incomes, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

The NRC traditionally views environmental justice under NEPA, the National Environmental Policy Act. And just to provide a little bit more of an overview on NEPA, expanding upon what Judge Spritzer said, the purpose of NEPA is twofold. It's to force agencies to take a hard look at the environmental consequences of a proposed project, but it's also to permit the public to play a role in the NRC's decision-making process.

Therefore, NEPA is intended to foster both informed decision-making and informed public participation. The statute requires only that an agency undertake an appropriate assessment of the environmental impacts of its actions without mandating that the agency reach any particular results concerning that action.

During an environmental review, the NRC

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staff analyzes the potential impacts of the proposed action on different aspects of the human environment. And there's a very long list of areas that this entails, but it includes land use, air quality, noise levels, as well as human health, historic and cultural resources, socioeconomics, and environmental justice.

The NRC first had environmental justice put on its radar under the phrase environmental justice when President Clinton issued an executive order in 1994. In the executive order, he asked federal agencies to make achieving environmental justice part of its mission. It didn't create any new rights or pass any new laws, so the agencies are supposed to work within their existing framework to make that happen.

This executive order was not binding on the NRC, because the NRC is an independent agency. But the Chairman of the NRC voluntarily committed to implement its principles into what the Agency was undertaking.

In an NRC adjudicatory proceeding in 1998, it was the first time that the NRC in this setting, in an adjudicatory proceeding, had the

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opportunity to look at environmental justice through a NEPA lens. And that was in the Louisiana Energy Services case, and that was the Claiborne Enrichment Facility, so that's a different facility than the one that's currently operating in Hobbs, New Mexico.

This case became the seminal NRC environmental justice case. It involved the first proposed commercial uranium enrichment facility. It was to be located between two low-income African American communities. There was a contested hearing during that licensing proceeding, and the interveners claimed that the staff's environmental impact statement did not adequately consider the disparate impact of the facility on the two local African American communities, including the negative impacts associated with moving the one road that connected the two communities.

One of the factors that came into play in this case was that a number of the people in those two communities didn't have cars, and so they needed to walk between the communities. And this project would move the road and make it four-tenths of a mile longer. And then the other negative impacts was associated with the interveners' claim that it would

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create a negative impact on property values.

The Licensing Board for that proceeding agreed and looked to President Clinton's executive order for guidance, and found that under NEPA the staff should have considered these issues; that is, the disparate impacts of moving the road and the alleged negative impacts on property values.

On appeal, the Commission agreed with the Licensing Board, explaining that a disparate impact analysis is our principal tool for advancing environmental justice under NEPA. The interveners had also said in that proceeding that the NRC staff was supposed to look for evidence of racial discrimination in citing the facility, and the Licensing Board at the time agreed.

The Commission disagreed on appeal, explaining that NEPA is a statute that centers on environmental impacts. It is not a civil rights law calling for full-scale racial discrimination litigation in NRC licensing proceedings.

The next big thing that happened on the environmental justice front was the NRC issued the Environmental Justice Policy Statement in 2004. The policy statement took the precedent set forth by the

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Commission in the LES decision, as well as precedent set forth in the private fuel storage Commission decision as well, folded that in with existing staff guidance and federal case law and environmental justice, and provided kind of the guiding principles for how the NRC should approach environmental justice in its licensing actions and reviews.

The policy statement explained 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 also reaffirmed that racial motivation is not cognizable under NEPA.

And that was largely it. There weren't any huge EJ cases coming out of the NRC or any big NRC action with respect to environmental justice. And so the President's two recent executive orders in 2021 that Professor Leiter referred to -- it was Executive Order 13985 and 14008.

The orders directed the agencies to make achieving environmental justice part of their missions. Again, because it was an executive order

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and the NRC is an independent agency, NRC wasn't bound by the executive order but voluntarily agreed to implement its principles in April 2021.

This led to the Commission's current environmental justice review in which the staff was directed to systematically review how the Agency's program, policies, and activities address environmental justice. Jessica is going to talk more about the staff's activities in that regard.

With respect to climate change and NEPA, there's a lot going on here, and it's ever-evolving. NEPA requires an agency to consider the total effects of a project on the environment. So climate change should be considered for both the good and the bad, and it generally comes up in one of two ways.

First is the consideration of what greenhouse gas emissions a project produces that can contribute to climate change. And for nuclear, that's usually a pretty good story to tell with respect to nuclear power plants because they produce large amounts of energy without producing greenhouse gas emissions.

But the other angle is, since the changing weather and environmental conditions brought

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by climate change might impact action or alter its environmental effects, that may also need to be considered. And so the fact that nuclear power plants or other nuclear facilities may have low greenhouse gas emissions doesn't really come into play when you have to factor how might climate change impact them and alter the analysis the staff needs to do when it does its environmental impact statement.

A few things have kind of come up in that regard. Professor Leiter talked about the NRC staff recommendation at the end of 2021 to undertake a pre-rulemaking that would look at transforming the NRC's environmental review process. But what also came up in the last couple weeks was a Commission decision on subsequent license renewal. And in that case, the Commission reversed a number of issued subsequent license renewals. So subsequent license renewal is -- an initial license is for 40 years. Initial license renewal is for an additional 20 years, and subsequent license renewal, sometimes also called SLR, is another 20 years after that.

In those cases, the interveners had challenged that the NRC staff needed to take into

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consideration the environmental impacts caused by more extreme weather events and flooding associated with climate change into the EIS prepared for a subsequent license renewal.

At the time, the Commission had come out and said that a generic environmental impact statement was applicable for SLRs, and so they were kind of foreclosed from raising a number of those issues because of the GEIS. And with the Commission decision, they decided to roll back the existing SLRs, so the SLRs that were already issued were rolled back to their previous license states. And the staff was directed to update the GEIS to include subsequent license renewal in the environmental impacts -- to do an environmental analysis of those effects.

So how climate change directly impacts those SLRs remains to be seen. The interveners were arguing that it should be considered in the staff's review, and now the staff is undertaking that additional review. And the Commission also ordered that no new subsequent license renewals, of which a number were pending, could be issued until this issue was resolved.

And so I think we're going to see with

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both the 2020 recommendation that the staff had for the NRC to undertake an assessment of its environmental reviews, along with the implementation of these two executive orders in the environmental justice aspects of the NRC's work, and then now with these decisions in the SLRs, I think a lot is going to be going on that could impact things one way or the other with respect to incorporating and folding both climate change and environment justice into NRC reviews.

And then I'm just going to briefly turn to the industry and how industry generally reviews environmental justice. And, yeah, I can't speak for every company, but I definitely see it -- I know what my own company is doing. I know how much this is being implemented kind of across the board, both within the nuclear industry and more broadly.

But for the most part, EJ -- environmental justice -- and climate change, particularly as it relates to an industry's greenhouse gas emissions that they're emitting, are folded into the company's ESG policies. So ESG stands for environmental, social, and governance. I'm just going to break them down very quickly.

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But on the environmental side, you look at the direct and indirect impacts of emissions, pollution, waste, resources, and how to mitigate those impacts. For example, a company may make a commitment to become net carbon neutral, and then it's got to implement policies to make that happen.

From the social side of things, you look at the direct and indirect impacts on societal well-being, such as social justice and equity and creating opportunities for societal development. So that can come in a whole range of things.

Oftentimes, with a company proposing a new project, it can come into play with how you mitigate the impacts on the local community and what actions can you take to make improvements in the local community, but it can also range into how do you as a company implement a diversity and inclusion policy? So it's really wide-ranging.

On the governance side, it looks at a company's leaderships, internal controls, and shareholder rights. And so, if you look at it as almost like a diagram, EJ would be a little circle within ESG, which is a much bigger circle.

I see this within my own practice. I

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serve on the firm's ESG Board. We're a large company with about three billion dollars in annual revenues, and it's a pretty small Board.

Interestingly enough, I am not serving on the Board for the E, the environmental, associated with my work in the energy sector, but I'm serving on the Board largely for my work on the social side of things due to the extensive humanitarian pro bono work that I've undertaken. But I also participate in the environmental, particularly with issues having to do with energy transition.

So, in sum, I would say that over the course of 20 years that I have been practicing, I have seen businesses come a long way from where they used to operate, and I think that we see a lot of positive developments and a better appreciation on the business sector side for how important issues such as climate change and environmental justice and its corollary, economic justice, are for not only government licensing and approvals but, more importantly, for being a good member of society and positively contributing to the community around you.

And so, with that, I will thank you very much and turn the microphone back over to Judge

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Spritzer.

JUDGE SPRITZER: Thank you, Amy. And to follow along the lines that you've been developing, we're next going to hear from Jessica Bielecki, who is the Deputy Director for the NRC's Environmental Justice Review Team, which is looking at the issues that we've just been hearing about.

Jessica joined the NRC in 2007 as an honor law graduate in the Office of General Counsel. In 2012, she was detailed as legal counsel for an NRC Commissioner. And then, after returning to OGC in 2013, she served as Deputy Assistant General Counsel and as acting Assistant General Counsel for the High-Level Waste Fuel Cycle and Nuclear Security Division.

As I mentioned, she currently also serves as Deputy Director for the NRC's Environmental Justice Review Team, which will be the focus of her discussion, I believe.

Jessica?

MS. BIELECKI: Thank you, Judge Spritzer. And good afternoon. I'm happy to be here.

As Judge Spritzer mentioned, my remarks will focus on environmental justice. Thanks to Amy for sharing her story of environmental justice at the

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NRC. I'm going to address current activities at the NRC related to environmental justice, in particular ongoing NRC staff activities.

Before I begin, I'd like to say that the views I share today are my own and do not represent the views of the Commission.

So to help orient us for this discussion, I would like to take just a moment to mention the NRC's mission, which is to license and regulate the nation's civilian use of radioactive materials. As part of its licensing and regulatory activities, the NRC conducts safety, security, and environmental reviews. It does not cite, own, or manage nuclear facilities or properties. I think it's important to keep this mission in mind when considering how the NRC addresses environmental justice when perhaps compared to other agencies with different missions or authorities.

As Amy mentioned, including environmental justice as part of the NRC's environmental reviews under the National Environmental Policy Act began after Executive Order 12898 was issued in 1994. This EO provides, among other things, for agencies to develop environmental

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justice strategies.

Following the issuance of the executive order, the NRC committed to carry out the measures set forth in the order and, in 1995, issued its Environmental Justice Strategy. The goal of the strategy is to integrate environmental justice in the conduct of all pertinent activities. This strategy has not been revised since issuance.

And then, in 2004, as you heard, the Commission issued its policy statement for environmental justice for licensing and regulatory matters. In this policy statement, it reaffirmed its commitment to the goals of Executive Order 12898 and, as Amy mentioned, incorporated the earlier NRC adjudicatory decisions.

The policy statement focuses on consideration of environmental justice under the National Environmental Policy Act. Like the strategy, the policy statement has not been revised since issuance in 2004.

How the NRC addresses environmental justice hasn't changed significantly over the years. Looking at Commission case laws since 2004, environmental justice contentions have been raised in

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adjudicatory proceedings related to various licensing actions, including early site permits, license renewal for reactors, and licenses for continued interim storage facilities.

These issues have been reviewed consistent with the EJ Policy Statement. Likewise, federal case law continues to be consistent with the NRC's Environmental Justice Policy Statement in that environmental justice issues litigated in the federal courts typically arise in the context of an agency's review under the National Environmental Policy Act.

For example, just last year, the D.C. Circuit reviewed an environmental justice issue arising from an analysis by the Federal Energy Regulatory Commission under the National Environmental Policy Act.

As you may have heard this morning in the Commissioner plenary session, and as my fellow panelists mentioned, in April last year, the Commission directed the staff to systematically review how the Agency addresses environmental justice.

The direction included consideration of recent executive orders and whether environmental

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justice is appropriately considered and addressed given the Agency's mission; consideration of the practices of other federal, state, and tribal agencies and whether the NRC should incorporate environmental justice beyond implementation through the National Environmental Policy Act, as well as whether the 2004 Environmental Justice Policy Statement is adequate; finally, consideration of whether establishing formal mechanisms to gather external stakeholder input would benefit any future EJ efforts.

To inform this review, the Commission directed the staff to engage stakeholders representing a broad range of perspectives and leverage the Agency's institutional knowledge and transformation resources. To address this direction, an interdisciplinary team was formed from staff across the Agency. I'm going to share what our team has been doing over the last several months.

As part of the review of how the Agency currently addresses environmental justice, we're considering among other things the NRC's 1995 Environmental Justice Strategy and 2004 policy statement, along with various guidance documents and

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the Agency's National Environmental Policy Act, adjudicatory and outreach activities.

We are also evaluating executive orders that address environmental justice. As part of this, we are looking at the 1994 executive order, EO 12898, and evaluating more recent executive orders that address, among other things, environmental justice, like EO 13990 and 14008 that Professor Leiter discussed earlier.

While the specific provisions of the executive orders are unique, the spirit is similar in how environmental justice should be considered in agency programs, policies, and activities. The recent executive orders in particular focus on making the consideration of environmental justice a priority.

I think it's important to emphasize what Amy noted: the executive orders that address environmental justice do not create new rights or remedies, and many of these executive orders are not directed at independent agencies like the NRC. Accordingly, we're considering the goals of these executive orders, given the Agency's mission that I mentioned earlier.

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The staff is also benchmarking the environmental justice practices of numerous other agencies, including executive agencies and independent agencies like the NRC. Through this effort, we're learning that other agencies are looking for opportunities to enhance how they address environmental justice. Also, other federal agencies have staff or organizations dedicated to environmental justice, and some agencies leverage federal advisory committees to support their environmental justice programs.

Finally, in addition to consideration under the National Environmental Policy Act, environmental justice is also being considered by some federal agencies under other statutes, such as Title VI of the Civil Rights Act.

To inform the review, we've been conducting a lot of outreach to solicit perspectives from geographically, ethnically, and economically diverse stakeholders and interested persons. As Professor Leiter mentioned, in July of last year, we issued a Federal Register notice with specific questions on which we were seeking feedback.

For example, we asked what ways could the

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NRC enhance identification of environmental justice communities, and are there opportunities to expand consideration of environmental justice at the NRC considering the Agency's mission?

And we've been adapting as we go. For example, early on, we heard that some communities or individuals do not have access to broadband, and our reliance on technology may exclude groups from participating. So, to help maximize participation, we offered ways to provide comments through multiple means: telephone, email, mail, online. And we received approximately 2,500 comment submissions, as noted earlier. Many were duplicates, but there was a lot of great information in there.

We also held several public meetings and met in person when we could and virtually with various community organizations, individuals, and state, tribal, and local representatives over several months. When scheduling meetings, we were mindful to offer multiple ways to connect and looked for times that could help maximize participation.

During our outreach, some representatives of tribal nations emphasized their sovereign status and EJ-related issues. To try to

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maximize engagement with these nations, we offered consultation under the Agency's Tribal Policy Statement. We coordinated with federal partners to leverage existing meetings with tribal representatives. We conducted government-to-government meetings and engaged various tribal groups to get their input on EJ issues.

To help keep external stakeholders informed on the progress of our work, we developed two public web pages that we are continuing to update. And our outreach included internal resources within the Agency as well. For example, we conducted numerous interviews with Agency subject-matter experts.

Throughout this outreach, we've heard a lot of specific feedback. For example, we heard that the NRC should make it clear that environmental justice is a priority consistent with the goals of recent executive orders that address environmental justice. Commenters said that relationship-building and trust are critical to effectively engage with EJ communities and tribal nations on environmental justice matters.

To this end, commenters suggested early

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and consistent outreach from the pre-application phase throughout a licensed facility's operating life. Commenters also suggested this outreach should be tailored to the particular community.

We received suggestions to create formal mechanisms like assigning dedicated internal Agency resources or establishing an environmental justice organization, as well as establishing an external advisory committee.

We heard the NRC has a good framework in place for consideration of environmental justice and that the Environmental Justice Policy Statement is effective, and then we also heard that the Environmental Justice Policy Statement is too narrowly focused on the National Environmental Policy Act and that the NRC should look to the Atomic Energy Act and Title VI of the Civil Rights Act to implement environmental justice.

Further, commenters noted the NRC's 1995 Environmental Justice Strategy and 2004 Environmental Justice Policy Statement should be updated, and some provided specific suggestions for how to do so. Commenters also suggested changes related to the NRC's adjudicatory proceedings.

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Finally, commenters suggested updates to guidance documents related to consideration of environmental justice. And like I said, these are just examples. There are many more comments.

So where is the staff in its EJ review now? The team has been carefully reviewing and analyzing the feedback we received and the benchmarking data, and we're in the process of finalizing our analysis. We are scheduled to provide a response to the Commission at the end of this month, the end of March. So, because we are still working, I can't yet discuss the details about the analysis or conclusions, but I would like to close by noting the staff review is just a step in the Agency's assessment of how it addresses environmental justice.

The staff, our team, will provide its analysis to the Commission, and any policy decisions regarding how the Agency addresses environmental justice would come from the Commission. So please stay tuned. Thank you.

And, Judge Spritzer, I'll turn it back to you.

JUDGE SPRITZER: Thank you. Last but certainly not least, we are going to hear from Diane

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Curran.

You heard earlier about the LES case, the Claiborne Environmental Center case, which was probably, as Amy Roma indicated, the major case the NRC has had dealing with environmental justice issues.

And Diane was involved as counsel for the interveners in that case and has been involved over the years in a number of other NRC litigation.

She has represented state and local governments and environmental organizations across the United States in legal proceedings before the NRC and federal courts.

And as I indicated, in 1997 she was involved in the LES case, which was a significant environmental justice decision, as you've already heard. Diane?

MS. CURRAN: Thank you, Judge Spritzer, and thanks to all the panelists, I really appreciate your presentations.

This is such an important opportunity for me to talk to this audience about what I've learned about NEPA and environmental justice over the past 40 years.

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I have represented many different kinds of environmental and civic organizations, Native American organizations, state and local governments in all kinds of nuclear licensing cases including, Amy, the uranium mining case that you referred to earlier, the HRI case, Yucca Mountain, nuclear reactors, nuclear factories, spent fuel storage.

My clients all tend to have three common characteristics, one they live near a nuclear facility or a proposed facility and they're concerned about its safety and environmental impacts.

Two, they are good citizens who are committed to using the legal processes available to them to make this facility safer or to stop it?

I am just in awe, often it's a group of people who work all day and they come home at night and read NRC inspection reports, and they know the NRC project manager by name.

My clients also know their chances of winning a case before the NRC are very small. I tell them when we start working together we're probably not going to win.

And I was involved in the case that Amy described where the renewed licenses and license

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applications were just sent back to the NRC, which got me in my lifetime off of just one hand for the number of wins that I've had before the NRC. I'm up to six now in federal court.

But very difficult to win because in my view, the NRC, in spite of the very strong statutes for public participation, has many ways of protecting itself from real involvement from the public.

My clients value NEPA because it is set up to shed light on difficult, controversial safety and environmental issues. It's set up to force disclosure and discussion of information about radiological risks that might otherwise be hidden, discounted, or simply not discussed.

And really importantly, if properly applied NEPA analysis can lead to an all-important discussion of reasonable alternatives for mitigating or avoiding adverse environmental impacts.

Now, I know NRC is licensing private businesses here and not necessarily making the choices, but the NRC is responsible for ensuring that a reasonable array of alternatives were looked at.

And this is a part of environmental justice that's really important.

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Environmental justice requires that when the Agency looks at disparate impacts and it also requires those impacts must be address, it's the alternatives analysis where you get the potential to address impacts by making a different decision, making a decision that avoids disparate impacts on an environmental justice community, that avoids climate change impacts that could effect that community, a tremendously important part of a NEPA analysis.

Today I want to address three things. One, the types of licensing proceedings that can be expected, in my view, in the coming decade or two, and how I expect NEPA and environmental justice issues to arise in those proceedings.

Two, the reasons I believe NRC's current approach to NEPA if it is not changed is fated to either ignore or undermine environmental justice, and that's primarily because NRC has completely disabled itself from making effective consideration of alternatives.

And then finally, I would like to propose three reforms that would help to address the problem. The first question, what kind of proceedings will dominate the scene at the NRC in the next 15 years?

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We're all familiar with the Cold War legacy in which the U.S. Department of Energy's primary task for decades has been to clean up radiological and chemical contamination of Cold War industrial sites.

I think it's fair to say that we did now also in the commercial reactor legacy phase. With respect to reactor licensing, we're at the tail end. We're not going to see licensing proceed for more large reactors.

We've only got one from the so-called nuclear renaissance, and that is Vogtle very loaded at a price of \$30 billion. I don't think we're going to get more than that.

It seems likely that we'll have some small modular reactors, but this number, who knows how many, will be determined by how much taxpayer money the Federal Government will put into SMRs, these are not a significant attraction for private investors.

Then for reactor licensing, the most significant thing that's going on is extension of existing licenses.

The reactors that were licensed in the

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'70s and the '80s, most have received an initial license renewal term, and now some of them are starting to come in for a second or subsequent license renewal term.

That is where there's going to be some significant NEPA analysis in the context of reactor licensing. And as Amy mentioned, there has been a remand to the NRC Staff of a generic environmental impact statement that is going to undergird any future license renewal decisions.

And this is a very important opportunity for the NRC to take a new and hard look at the way it's been evaluating environmental impacts.

Finally, there's the question in terms of the commercial reactor legacy which is spent fuel storage and disposal. We have thousands of tons of spent fuel piling up at reactor sites.

We have a centralized interim storage facility that's just been licensed, we have one that's still pending. There will be another repository proceeding.

At this point, it seems like the Federal Government may be making the siting decisions for these things, although, for the Holtec and ISP

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facilities in New Mexico and Texas, a private company has made some siting decisions, it's hard to tell what's going to happen in the future.

But definitely, NRC will play a role in licensing.

Looking at these mostly reactor renewal proceedings and spent fuel storage and disposal proceedings, I think those are the primary things we're going to see. I'd like to talk a little bit about how environmental justice plays into those cases.

The first thing is I want to back up for a minute and just remind all of us the purpose of NEPA is to avoid significant adverse and environmental impacts to the human environment, human beings are a part of the environment that is to be protected.

And as set forth in the Clinton Environmental Justice Executive Order, we now understand that some communities are more vulnerable by virtual of economic conditions, their location where they've endured cumulative impacts over many years because they live amidst industrial facilities, radiological facilities, and an increased

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vulnerability to health and safety injuries due to poverty and previous exposures.

There's two other features of environmental justice communities that I think are really important to bear in mind in addition to the vulnerability and cumulative impacts of many years.

One is the lack of mobility. That was an issue in the Claiborne Enrichment Center case. People without resources, they can't go anywhere, they can't pick up and leave.

When you think about the COVID-19 pandemic, how many people picked up and left or stayed safe in their homes, even that, when they wanted to avoid mixing with society and getting sick.

When you don't have resources, you don't have the mobility to get out of the way, and it's partly because of resources but it may be because this is where your community has lived for generations.

Perhaps they were forced there, perhaps, in the case of the residents of Center Springs and Forest Grove in Louisiana, it was because their homes were given to them after the Civil War freed slaves and gave them land in that community.

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They did not want to go anywhere, they did not want to leave their home. And then another characteristic is the lack of resources to participate in this very complicated decision-making process that the NRC has.

People hire me because I know where the trap doors and the booby traps are, and there are many in trying to participate in an NRC proceeding. It is very difficult, it requires legal counsel, and it requires usually expertise.

This is something people need money for and often, the people who are environmental justice communities who may be affected by these facilities don't have those kinds of resources.

And then looking at the reactor license renewal and spent fuel storage and disposal case plan of proceedings, I just want to talk for a minute about how environmental justice comes up.

First, in a siting decision, kind of like in the Claiborne Enrichment Center, that facility was going to go right smack in the middle of these two little communities. No question they were going to be neighbors of the facility.

And we see this in the citing of nuclear

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waste facilities which are exclusively now in the Southwestern United States where large numbers of Native American and Hispanic people live.

In fact, this area is really becoming a national sacrifice zone for radioactive waste. This ranges from uranium mine tailings to spent fuel, other high-level nuclear waste.

These communities have already suffered from decades of exposure to uranium mining waste and nuclear weapons testing. As potential neighbors of new facilities, they face disproportionate impacts in a direct way.

There is also for reactor licensing decisions or relicensing decisions, it doesn't really matter if you live right next door to a facility. It's certainly worse if you live next door.

But what matters for the most part is that supposing there's a reactor accident and contamination, as we know, it can go for miles around.

Communities that already have health vulnerabilities, limited access to healthcare, limited mobility to get away or perhaps they're evacuated but they need to return to protect their property, these people are going to suffer

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disproportionately.

It doesn't have to be that they live next door, it's that the characteristics of those populations make them more vulnerable to the broad threat. Again, this is very similar to what we've seen with COVID-19.

So, how does NRC undermine environmental justice in its NEPA process? There really are multiple ways but as I was preparing for this talk, it came to me that there's one that's really, really significant and fatal.

And that is the NRC undermines and really prevents itself from doing any kind of effective alternatives analysis. We know that the alternatives analysis in an EIS is the heart of an EIS.

The D.C. Circuit has called it that because it's a way to identify and choose less environmentally harmful alternative actions.

But NRC effectively prevents the meaningful consideration of alternatives primarily by applying a methodology for impact analysis that reduces all radiological environmental impacts to an insignificant level.

This it does by multiplying the

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consequences of a severe accident by its probability and this done come up mostly in the analysis of severe accidents for reactors. But it is also true for other types of facilities.

And we know from both the Chernobyl accident and the Fukushima accident how very, very severe the consequences of a reactor accident can be.

So, even if the consequences of a radiological accident are catastrophic, the impacts, the conclusion about the impacts is rendered insignificant by multiplying the very potentially severe consequences by a low probability number.

Thus, for example, spent fuel pool storage fires, which could have really catastrophic results, really similar to what happened at Chernobyl, seizing on this byproduct and contaminate huge geographic regions, displacing many people, destroying agricultural land.

NRC still concludes that the environmental impacts of these accidents are insignificant by multiplying the estimated consequences times the estimated probability in getting a low number.

And this it does for everything and so

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when the NRC is doing a comparison of alternatives because the impacts of everything are small, then there's really not much to compare.

Even though, for instance, we all know that dry storage of spent fuel is by far less vulnerable to intentional attack, accidental release of radiation, they both get such low scores for significance that there's really no effective comparison of these two measures.

And another example is with the Holtec facility, the proposed facility that would store over 173,000 tons of spent fuel in an above-ground facility. That's more than twice as much as the capacity of Yucca Mountain.

This would be, over time but eventually, more than twice as much as Yucca Mountain. This would be the most radioactive place between the Earth and the sun. And yet, the NRC says these environmental impacts are insignificant.

How many people in this audience would want to live next to such a large facility for storing spent nuclear fuel? Anybody with resources and mobility would say no thank you but many people can't.

So, what I really want to urge on you

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today is that NRC's approach to impact analysis, which is then used, as a practical matter, to nullify the effectiveness of an alternatives analysis, is fundamentally flawed for four important reasons.

First, numerical estimates of consequences and probability are typically incomplete and highly uncertain. As stated by the physicist, Dr. Harold Lewis, in a system as complex as a nuclear reactor, a complete and precise theoretical calculation is impossibly difficult.

Second, significant aspects of consequences and probability are not susceptible to numerical estimation.

These include the probability of intentional attacks, which NRC deems reasonably foreseeable and yet to which it cannot assign a probability estimate of occurrence.

Third, large consequences can be qualitatively different than smaller consequences and I think it's so fascinating to consider this quote from Mikhail Gorbachev who stated in 2006, the nuclear meltdown at Chernobyl which then was 20 years before, even more than the launch of Perestroika, was perhaps the real cause of the collapse of the Soviet

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Union five years later.

Indeed, the Chernobyl catastrophe was a historic turning point. There was the error before the disaster and there was the very different error that has followed.

And finally, purely arithmetical risk formulations assume that risk is uniformly acceptable across the board.

But as I said before, most people have asked whether they would be willing to live near a site containing more than 100,000 tons of highly radioactive material would say no, thank you, regardless of the Government's assurance regardless the low risk.

And many people would not have the option of saying no thank you. An arithmetic calculation does not get at the tremendous disparity in how people evaluate and are able to act on predictions of risk.

So, if you look at NRC environmental impact statements over the past decade or two, I challenge you to find any really serious consideration of alternatives.

It's simply a minor part of the exercise when, in fact, as the Court of Appeals ruled, it

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should be at the heart of an environmental impact statement.

And I do think that if the NRC cannot reform this, then we don't have a good hope of really having genuine environmental analysis of environmental justice impacts, of climate impacts, or of renewable energy alternatives.

We're on a threshold of a renewable energy revolution where all parties should be taking a serious look at other forms of generating electricity that don't generate this high amount of very highly reactive radioactive spent fuel that's going to go to one of these national sacrifice zones, and that don't create the risk of a catastrophic accident.

It's really important to have a good assessment of impacts and a good assessment of alternatives to participate in a meaningful analysis of how we go forward. I have three suggestions for reform by the NRC.

I have a lot of suggestions actually but I'm going to focus on these three. Above all, the NRC should go back to the drawing board and reconsider its method of evaluating the radiological risk of

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licensing new facilities and relicensing existing reactors.

The remanded subsequent license renewal environmental review process provides the NRC with a major opportunity to look at this issue. And I would just urge the NRC to get the best technical expertise from inside the Agency and outside the Agency.

In a way, as Jessica was talking about with environmental justice, just as the Agency was looking at how other agencies review environmental justice, look at how other agencies around the globe are evaluating risk.

It's really different. Don't pass up that opportunity.

Second, the Commission can and should take a major procedural step to advance environmental justice by delaying hearing notices until the NRC Technical Staff has completed its own review of license applications.

And that would be by publishing the safety evaluation report and the environmental impact statement.

For decades, members of the public have been required to begin the process of challenging

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licensing decisions at the application stage when the Applicant and the NRC are still in the process of working out exactly what should go into the application.

So many issues are resolved in that process and so much precious money and time of members of the public are wasted in litigating issues that don't turn out to be real.

And it's not really clear what the real issues are until the environmental impact statement is and they run out of money and heart.

So, I'm really thrilled that the Commission has taken a first step in doing this in the remanded environmental process for Turkey Point, Peach Bottom, North Anna...Maybe that's all.

I'm forgetting how many, there's five of them altogether I think. But the Commissioners have said we're not going to ask the public to submit contentions until the environmental impact statement is finished.

That's the way to do it.

Thank you, and I hope the NRC will institute that practice as a rule.

Finally, the Commission should appoint an

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advisory the Board to provide an ongoing review of how NRC policies, programs, and legal interpretations undermine its goal of identifying and addressing disparate impacts of its licensing decisions.

Given the complexity of issues like risk analysis, this should be a highly skilled team that includes scientists, attorneys, people that are capable of evaluating both technical and legal issues at a very high level.

And it should be independent of the Commission. And I thank you very much for listening to me and I will turn it back over to Judge Spritzer.

JUDGE SPRITZER: Let me turn it back over to you for questions. We have a few I think, not as many as we expected.

JUDGE FROELICH: We have just a few questions and I'll put them out to the panel I guess as a whole and whoever has an answer should be the one to jump forward.

Let me just throw this one out, what factual technical evidence is there that currently operating nuclear power-plants are having disproportionate adverse impacts on the newer or economically disadvantaged communities?

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It wasn't a specific panelist designated but it seems to be geared towards Ms. Curran. Diane?

MS. CURRAN: Thank you.

I don't think it's a question of what's happening now, it's more the risk of what could happen from my perspective, and this is one of my interests over many years of litigating NRC licensing cases.

The risk for a reactor is the risk of an accident and as I was saying, if an accident occurs, it's not going to have the same effect on everybody.

The recipient communities and individuals will vary in their own health conditions and the cumulative impacts they've already suffered, whether they have access to doctors, whether they can get in the car and get away.

Those are the differences.

MS. LEITER: Can I jump in on this?

I just want to emphasize, and I don't mean to weigh in on either side of this in terms of whether there are significant disparate impacts, but I want to emphasize the analysis of the impacts is a far ranging analysis.

So, it would have to look at the fuel cycle, it would have to look at who was employed at

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the facilities, et cetera.

And the environmental justice kinds of impacts that I have seen related to these facilities are very much present and certainly, the impacts of an accident could be disparate.

But the impacts of the fuel cycle are clearly disparate in terms of where the fuel is taken from, where it's processed, et cetera.

And then also in order to get a sense of whether both cost and benefit of a facility are falling disproportionately on one group or another. You do need to look at who's employed at the facility, who is in its leadership, et cetera.

So, it's not so much a question of looking just at the collusion from one smoke stack, it's a question of looking at all of the ways that smoke stack affects the broader community, including where it's getting its fuel from, et cetera.

And I should also note, I would think on the positive side from the NRC's point of view, that when you look at impacts, you're also looking under NEPA and very expressly you're supposed to be looking at the positive impacts.

And certainly, if you were to look at the

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potential disparate impacts of climate change, it's very clear in the studies that have come out recently that the ill effects of climate change are going to be felt disproportionately where they're known as environmental justice communities.

And so I would think from the point of view of the NRC thinking about reduced carbon emissions from nuclear facilities might make the calculus of nuclear plants less negative from an environmental justice point of view, if you start to take account of the reduced greenhouse gas emissions from nuclear relative to the power facilities that nuclear power replaced.

MS. ROMA: Can I add to that? I just want to add the follow-up on Professor Leiter's comment. The environmental assessment in the EIS and the NEPA review are all triggered by an agency action, so the Agency will be taking an action.

So, you don't look at how are all the nuclear power-plants operating today but is it a nuclear power-plant undergoing license renewal? And that's an action the Agency needs to take.

And then you look at those impacts, both the negative and the positive, in doing the NEPA

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review.

JUDGE FROELICH: I have a question here, I think I'll direct it initially to Ms. Curran.

It said if the NRC were to take a different approach to its risk calculation, would you ask them to abandon the current approach entirely, the probability times consequences?

Do you have an approach in mind that would factor environmental justice and other qualitative concerns into that calculation?

MS. CURRAN: I'm sorry to say I don't have the formula but I was reading about it, a critique, and actually this was comments on the continued storage generic environmental impact statement.

And it was comments of an expert on how to look at the environmental impacts of pool fires, that's a potentially really catastrophic impact.

And he had a lot of examples from other places where, for instance, there's places where if the consequences are so dire and you have a way of avoiding those consequences that doesn't cost much money, then the probability is not something you should mess around with.

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And this is quite a study. I don't have the answer off the top of my head, I'm just saying what's being done is pretty simplistic and doesn't get us a good result.

JUDGE FROELICH: I have a question that came in for you, Amy.

It says how can the NRC best balance the need to consider environmental justice, cumulative impacts, climate impacts, et cetera, while still conducting licensing and adjudicatory processes that are timely and efficient?

MS. ROMA: That might be a question for Jessica. It's certainly a balance, it's difficult.

Starting off with a good environmental report that has done a lot of the leg work means the NRC has to do less leg work in its environmental impact statement for where it needs to look and how to focus its efforts.

So, I think speaking from the outsider perspective, the better you make those environmental reports, the more streamlined your EIS process can be on the back end.

Jessica, I'm not putting you on the spot but I'm not sure if you have anything to add there?

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MS. BIELECKI: I think you're right, it is a balance. As we talked about early on, NEPA is a procedural statute that focuses on disclosure of information. So, for example, if you're going to do an environmental justice analysis, if you do a scan of the area around the facility and find there are no EJ communities, then your analysis is going to be much shorter than if you look around the facility and there are numerous EJ communities.

And that will take more time and more analysis. So, I think it's very fact-specific and there's a balance.

JUDGE FROELICH: Ms. Curran, please?

MS. CURRAN: I'd just like to point out that the process the NRC is embarking on for subsequent license renewal is to prepare a new generic environmental impact statement.

And that's going to take a couple years but once it's done that's something that does streamline the licensing process because they don't need to reinvent the wheel for every single reactor on generic issues.

So, I think the NRC already has some really good tools for doing that.

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The thing from my client's perspective is we're looking to the Agency which has the resources and the expertise to do it in the first place. So, there's no way the public can substitute for what the NRC does.

But we're looking to make sure it gets done and the hard issues are addressed.

JUDGE FROELICH: I have two more that are NEPA-related and I'll start with Jessica, if you would. What feedback did you receive about environmental justice for non-NEPA activities such as site remediation criteria?

MS. BIELECKI: Off the top of my head, when I first read the question what came to mind is considerations related to emergency preparedness. Emergency preparedness typically is not a NEPA activity, we consider it more on the safety side of things.

We heard a lot of comments from communities and individuals about how the NRC conducts its emergency preparedness reviews or the information it receives from FEMA and others.

So, that's one area we've certainly been looking at. We also received feedback about

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considerations under the Atomic Energy Act, particularly for certain types of byproduct materials.

So, those are areas we've been looking at as well as issues related to uranium mining and milling. And I should have mentioned that all of the comments we received as part of the environmental justice assessment are available in Adams, they are public.

So, if folks are interested, that's all public information and there's a lot of really good information in there. So, thanks to those who commented.

JUDGE FROELICH: We received a question basically for the panel as a whole or for whoever might want to answer this one. As an extension of this NEPA discussion, could the panel comment on skepticism around Chevron deference?

Particularly on the Supreme Court, changes in the scope of agency deference could affect how the Agency evaluates the finding in its NEPA reviews. Any thoughts?

MS. LEITER: Sure, I will start. I think there were interesting tea leaves to read in the

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recent clean power discussion on the court.

There does seem to be in the Supreme Court case reviewing the clean power plan from a couple of weeks ago increasing skepticism about an agency's broad ability to set its own policy on what the Court is thinking of as major questions beyond what is narrowly specified in the Agency's statutes.

And hence, several members of the current court would not defer to an Agency's reading of its statute unless you read pretty closely into the language in the statute.

And so I think this is a non-answer but it's going to be really interesting to see whether the NRC and other agencies have the room to be as innovative in their NEPA implementation and response to the Biden Administration's direction.

As at least some of the agencies are trying to be in terms of thinking about maybe requiring more than NEPA requires, treating NEPA as a floor, that's something that might make this court anxious.

There's a lot of speculation that one raising their race was left out of the environmental justice calculator that the CEQ recently issued is in

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part out of concern that that's another thing that this court has shown, specifically race-based considerations, something else this court has shown some weariness about.

So, I do think the agencies are not acting in as unfettered a way as they might once have been able to do.

JUDGE FROELICH: We have not very much time left but I'd love to hear from Ms. Curran or Ms. Roma if you have any final thoughts?

MS. CURRAN: Just one more comment on the issue of race and I really felt this way in the Claiborne Enrichment Center case, yes, racial discrimination occurred. It was egregious, it was really clear but you didn't have to talk about race discrimination.

The Commission could have said this company claimed to have done a survey looking for the best site for this facility.

And they talked about doing an eyeball survey and making observations like, well, there were some nice houses over there.

That's not scientific and all you have to do was say that wasn't an appropriate scientific

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review.

We hold NEPA reviews to a high standard and in that case, that was the Applicant doing it and the NRC put its alma mater on it and said to the world this is okay with us.

And I just hope that will change now.

JUDGE FROELICH: If we have no more comments from our panelists, I see that our time has just about expired.

I'd like to thank everyone in our audience for your attention and your attendance at this session.

And I'd especially like to thank our panelists for their time, their insights, and their perspectives on these important issues.

Also, a quick thanks to Dan and Sam, the technicians, and to Wanda Ellis, the session coordinator who helped pull this all together in this virtual environment.

And with that, I'd like just to ask everyone to mark their calendars because next year's RIC will be March 14th through 16th, 2023.

Hopefully it will be in person and we can all get back together on the next set of current

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issues before the Agency.

JUDGE SPRITZER: If we could bring up Slide 3, is that it?

JUDGE FROELICH: Yes, that's it.

JUDGE SPRITZER: Yes, thank you for listening, thank you to our speakers, I think this is very enlightening certainly for me and hopefully for everyone that listened.

And if you do have any questions, send them along to us. With that I think we're done, thank you.

JUDGE FROELICH: Thank you all.

(Whereupon, the above-entitled matter went off the record at 4:33 p.m.)

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