



NUCLEAR ENERGY INSTITUTE

January 5, 2004

Robert Willis Bishop
VICE PRESIDENT &
GENERAL COUNSEL

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Room 16 H3, Mail Stop 0-16 C1
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

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USNRC

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATTENTION: Rulemakings and Adjudication Staff

SUBJECT: Draft Policy Statement: *Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions*
(68 Fed. Reg. 62642, November 5, 2003)

On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)¹ hereby submits the following comments on the Nuclear Regulatory Commission's draft Policy Statement, *Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions* (68 Fed. Reg. 62642, November 5, 2003).

The nuclear energy industry has long supported the goals of Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (the "Executive Order"). However, the industry has also consistently opposed the misuse of the Executive Order² (e.g., by those who would distort its principles to serve their own ends; for example, by trying to block a project that they oppose merely by citing the Executive Order and alleging that the proposed project would have a disparate impact on them or on some specific group).

Because of concerns regarding how the NRC was applying the Executive Order, the Commission undertook a comprehensive assessment of the Executive Order, its terms and conditions, and how it was being implemented by the Nuclear Regulatory

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

² See, e.g., NEI filed an *amicus curia* brief in *In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, Docket No. 70-3070-ML, as part of the Commission's review of the Atomic Safety and Licensing Board's Final Initial Decision, LBP-97-8 (1997).

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Commission ("NRC") in licensing proceedings.³ The result was the draft Policy Statement published in the Federal Register November 5, 2003, to which these comments are directed.

Application of the Executive Order in the NRC's Licensing Processes

The nuclear energy industry believes that the draft Policy Statement reflects a thoughtful examination of the terms of the Executive Order and how it should be applied in an NRC licensing proceeding context. We agree with the Commission's analysis and conclusion that "EJ [environmental justice] *per se* is not a litigable issue in our proceedings."⁴

As the Presidential Memorandum accompanying the Executive Order notes, Section 2-2 of the Executive Order is only applicable to activities receiving Federal financial assistance. The licensing of, for example, nuclear power plants under Section 103 of the Atomic Energy Act does not constitute a program or activity "receiving Federal financial assistance."

Further, Section 6-609 of the Executive Order and the accompanying Presidential Memorandum explicitly state that the Executive Order does not create any new right or benefit, substantive or procedural, enforceable by law or equity, by a party against the United States, its agencies, its officers, or any person, nor does it create any right to judicial review involving the compliance or non-compliance by the United States, its agencies, or any other person with the Executive Order. Thus, the Executive Order does not establish new substantive or procedural requirements applicable to the NRC's licensing activities (e.g., in the NRC's consideration of an initial license application, a license amendment, or license renewal). These provisions can only be read as precluding the raising of any contention in a licensing proceeding based on an alleged violation of "environmental justice" because to do otherwise would create a new right or responsibility that would be subject to judicial review.

³ For example, *In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, Docket No. 70-3070-ML; *In the Matter of Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation)*, Docket No. 72-22-IFSSI.

⁴ 68 Fed. Reg. at 62644.

Implications of the Executive Order to NRC NEPA Reviews

However, the nuclear energy industry disagrees with the Commission's conclusion that environmental justice matters are still cognizable under the National Environmental Policy Act of 1969 ("NEPA") in the manner currently practiced by the NRC Staff.

Under NEPA, the NRC must evaluate the impacts of a major Federal action significantly affecting the quality of the human environment.⁵ Under Section 102(2)(C) of NEPA, Federal agencies are required to analyze significant, adverse impacts on the physical environment resulting from major federal actions as well as proximately related secondary, socio-economic impacts. NEPA does not authorize Federal agencies to take actions that would discriminate against, or for, any particular group.

Nothing in NEPA suggests that either the significance of such impacts or the level of their mitigation is to be judged based on the race or economic status of those affected. NEPA has been in existence for more than 30 years, and it has never been interpreted to require analysis of whether a particular major federal action will have a disproportionate impact on selected populations of differing race or economic class. As observed by the U.S. District Court in *New River Valley Greens v. DOT*, an agency "could not be held to have violated NEPA for failing to consider disproportionate impacts on minorities and low-income populations" prior to the Executive Order because no such mandate exists under NEPA.⁶ And the Executive Order clearly does not create any new rights or responsibilities, or new grounds for seeking judicial review.

As the Commission correctly observed, "As part of NEPA's mandate, agencies are required to look at the socioeconomic impacts [of a proposed licensing action] that have a nexus to the physical environment."⁷ Notwithstanding justifiable societal concerns with racial and other types of discrimination that underlie the principles of environmental justice, "Racial motivation and fairness or equity issues are not cognizable under NEPA, and though discussed in the E.O. [Executive Order], their consideration would be contrary to NEPA and the E.O.'s limiting language emphasizing that it creates no new rights."⁸

⁵ See, *National Environmental Policy Act*, Section 102(2)(C), implemented by the NRC in 10 CFR Part 51, Subpart A, *National Environmental Policy Act - Regulations Implementing Section 102(2)*.

⁶ *New River Valley Greens v. DOT*, LEXIS 16547 (D.D.C. 1996).

⁷ 68 Fed. Reg. at 62644.

⁸ *Id.*

Unfortunately, and incorrectly, the draft Policy Statement endorses the current NRC Staff practice that requires the submission of and subsequent analysis of extensive data within a 0.6 mile radius or a 4 mile radius of a facility to be licensed by the Office of Nuclear Material Safety and Safeguards ("NMSS") (depending on whether the proposed action is in an urban or rural area, respectively) or a 50-mile radius of a facility to be licensed by the Office of Nuclear Reactor Regulation ("NRR") and analyze it for the presence of low-income and minority communities (as determined by whether the percentage of individuals classified as low-income or minority in the potentially impacted area is "significantly" higher than that of the State or county (i.e., in NRC practice, a "significant" differentiation is twenty percent). Additionally, if either the minority or low-income population percentage in the impacted area exceeds fifty percent, "environmental justice matters are considered in greater detail."⁹ Not only are the numerical limits established in the NRC guidance apparently arbitrary in that there is no objective basis for setting those limits, there is no legal basis for that practice.

The issue under NEPA is not whether a particular major federal action has a disproportionate impact on minority or low-income populations, but whether there are significant adverse impacts to the population affected by the proposed action, regardless of the make-up of that population. The Executive Order does not impose any different approach for a NEPA evaluation. As found by the court in *New River Valley Greens*, disproportionate impacts play no role in NEPA evaluations as a matter of law. The Executive Order does not, and in fact legally cannot, change the legal standard against which those impacts are to be judged under NEPA. Rather, the NRC must ensure that its NEPA evaluation properly identifies and accounts for unique factors associated with a particular community that may contribute to a larger or lesser impact (e.g., the environmental impacts of a proposed facility on the Columbia River might have unique implications to Indian tribes along the Columbia River because of their greater consumption of salmon than the general population, due to their heritage as well as unique federally-granted fishing rights). It shouldn't matter whether that community falls within any of the numerical criteria used by the NRC Staff to evaluate "environmental justice," but rather whether there is any particular community that, by its very nature, would suffer a greater or lesser impact from a proposed Federal action.

Conclusion

Executive Order 12898 was promulgated to provide guidance to Federal agencies regarding the implementation of Title VI of the Civil Rights Act. By its explicit terms, the Executive Order does not create any new legal rights or responsibilities.

⁹ *Supra* at 62645.

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Further, it only applies to recipients of Federal financial assistance. The NRC's licensing of the use of radioactive materials under the Atomic Energy Act (e.g., issuing a license or license amendment for a nuclear power plant licensed under Section 103) does not constitute an activity receiving "Federal financial assistance."

Although it is unlikely that anyone would disagree with the fundamental precepts of the Executive Order, the reasonableness of the underlying societal principle does not transform the Executive Order into something it is not -- a binding legal requirement. As a matter of law, even if the NRC were to fail to conduct an "environmental justice" evaluation in an Environmental Impact Statement or in any other way allegedly not comply with the Executive Order as part of the NRC's NEPA responsibilities, such a failure could not serve as grounds for the NRC to deny the requested licensing action.

The Commission should make its draft Policy Statement final, with appropriate modifications regarding the NRC's responsibilities under NEPA consistent with both the explicit terms of the Executive Order and the case law that pertains. The Commission should then direct all Atomic Safety and Licensing Boards that any contentions related to "environmental justice" currently being adjudicated should be dismissed, and no contentions related to environmental justice should be admitted in any future licensing proceedings.

Once the Policy Statement has been revised and issued in final form, the Commission should ensure that the Commission's expectations regarding the NRC's implementation of Executive Order 12898 are promptly communicated to the NRC Staff so that appropriate revisions can be made to Regulatory Guide 4.7, *General Site Suitability Criteria for Nuclear Power Stations*; NRR Office Letter No. 906, Revision 2, *Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues*; NUREG-1569, *Draft Standard Review Plan for In-Situ Leach Uranium Extraction License Applications*, Appendix B, *Environmental Justice in National Environmental Policy Act of 1969 Documents*; NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs*; Draft Report for Interim Use and Comment, Appendix B, *Environmental Justice Procedures* and other NRC guidance consistent with the discussion and analysis above.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert W. Bishop", written in a cursive style.

Robert W. Bishop

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c: The Honorable Nils J. Diaz, Chairman, USNRC
The Honorable Edward McGaffigan, Jr., Commissioner, USNRC
The Honorable Jeffrey S. Merrifield, Commissioner, USNRC
William D. Travers, Executive Director of Operations, USNRC
Karen D. Cyr, Esq., General Counsel, USNRC