

Draft Policy Statement (68FR62642) WINSTON & STRAWN LLP

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BY E-MAIL

Annette L. Vietti-Cook, Secretary
Attention: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: Draft Policy Statement on the Treatment of Environmental
Justice Matters in NRC Regulatory and Licensing Actions,
68 Fed. Reg. 62,642, November 5, 2003

Dear Ms. Vietti-Cook:

On behalf of the Part 51 Utility Group,¹ we appreciate the opportunity to provide comments on the Commission's Draft Policy Statement on the Treatment of Environmental Justice ("EJ") Matters in NRC Regulatory and Licensing Actions, 68 Fed. Reg. 62,642 (Nov. 5, 2003). The Commission has clearly undertaken a thoughtful review of Executive Order ("EO") 12898 and its application in the NRC licensing context. In particular, we would like to emphasize the following points:

- We agree with the Commission's conclusion that EO 12898 does not establish any new substantive or procedural requirements applicable to NRC regulatory or licensing activities, or any new right or benefit to any person. We agree that EJ *per se* is not a litigable issue in NRC proceedings.
- We note that the Nuclear Energy Institute ("NEI"), in its comments to the Commission dated January 5, 2004, has proffered a strong argument that EJ matters are also not cognizable under the National Environmental Policy Act of 1969 ("NEPA"). However, if and to the extent the NRC permits EJ to be litigated in NRC proceedings (as is contemplated under the draft Policy Statement), we agree that it is NEPA, and not EO 12898, that is the basis for the agency's EJ inquiry. Moreover, we agree that such a review should, at the very least, be limited to consideration of the agency's process of "identifying and weighing

¹ The Part 51 Utility Group is a consortium of nuclear utilities that follows NRC activities related to the environmental regulations applicable to plant license renewal.

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disproportionately significant and adverse environmental impacts on minority and low-income populations that may be different from the impacts on the general population.”²

- Furthermore, if and to the extent the NRC determines that EJ issues are litigable in NRC proceedings, we recommend that the agency establish definitive, binding guidance either through adjudicatory orders in individual proceedings, or through notice and comment rulemaking. Past NRC proceedings concerning environmental justice issues have resulted in protracted, expensive proceedings (for example, the environmental justice issue in the *Private Fuel Storage* proceeding was decided by the Atomic Safety and Licensing Board some four and a half years after the contention was first proffered).³ Binding criteria would provide greater certainty and discipline in licensing proceedings in which EJ is raised as an issue. In addition, given the potential for confusion regarding the limits of admissible EJ contentions, we strongly encourage a policy favoring prompt Commission interlocutory review of any admitted contentions on EJ. The Commission has already taken positive steps in this regard. In particular, the recently-issued Notice of Hearing in connection with the proposed National Enrichment Facility provides that the Commission itself will determine the admissibility of any EJ contentions proffered in that proceeding.⁴ We encourage similar action in other future proceedings.
- We agree with the NRC’s determination that EJ should not normally be considered for an environmental assessment (“EA”) where a Finding of No Significant Impact (“FONSI”) is issued unless “special circumstances warrant the review.” The Commission should, however, set forth with specificity the “special circumstances” that will warrant such a review. In particular, we agree that where “there is a clear potential for significant offsite impacts from the proposed action,” then an EJ review *may* be warranted. However, the final Policy Statement should clarify that this is the *only* circumstance in which an EJ review will be considered in the context of an EA/FONSI.

If you have any questions regarding these comments, please contact me at (202) 371-5738.

Respectfully submitted,



Kathryn M. Sutton

² 68 Fed. Reg. at 62,644, col. 1.

³ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171 (2002).

⁴ See *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-03, 58 NRC ___ (Jan. 30, 2004), slip op. at 5.