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ENVIRONMENTAL LAW CENTER

Draft Policy Statement
(68FR62642)

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DOCKETED
USNRC

February 3, 2004 (9:35AM)

Secretary, U.S. Nuclear Regulatory Commission
Attn: Rulemaking and Adjudications Staff
Washington, D.C., 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

RE: Comments On Proposed Policy Statement On The Treatment Of Environmental
Justice Matters In NRC Regulatory And Licensing Actions, 68 Fed. Reg. 62642 (2003).

January 26, 2004

To Whom It May Concern:

Please accept the following comments on the Nuclear Regulatory Commission's ("NRC") Proposed Policy Statement On The Treatment Of Environmental Justice Matters In NRC Regulatory And Licensing Actions, 68 Fed. Reg. 62642 (2003).

The Nuclear Regulatory Commission should not adopt the proposed policy statement because it undermines the intent of Executive Order 12898 ("E.O."). The proposed statement not only undermines the intent of Executive Order 12898, issued by President Clinton, but also represents a substantial retreat from the NRC's current environmental justice policy. Instead of moving backwards, the NRC should work toward a policy statement that fully realizes the intent of E.O. 12898 by incorporating a meaningful environmental justice review in all NRC regulatory and licensing actions.

COMMENTS

I. The Proposed Environmental Justice Policy Undermines The Intent Of E.O. 12898.

By limiting environmental justice review to a National Environmental Policy Act ("NEPA") analysis and prohibiting parties to a licensing proceeding from raising environmental justice as an area of contention, the NRC would substantially undermine the intent of E.O. 12898. The intent of E.O. 12898 is to affect a fundamental change in agency decision-making and its scope is intended to be broad. Section 1-101 provides:

To the greatest extent practicable and permitted by law ... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing ... disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations in the United States ...

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SP-067

Section 2-2 further provides:

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities, because of their race, color, or national origin.

Moreover, in his February 11, 1994 Memorandum For The Heads Of All Departments And Agencies regarding E.O. 12898, President Clinton stated that the E.O. is "designed to focus Federal attention on the environmental human health conditions in minority communities and low-income communities with the goal of achieving environmental justice." Additionally, President Clinton, in the same memorandum clearly stated that the E.O. was "intended to promote nondiscrimination in Federal programs substantially affecting human health and the environment." Thus, by its plain language and by the explicit directive of supporting documents, E.O. 12898 is intended to fundamentally affect the decision-making process of Federal agencies and is meant to be broad in scope.

The NRC's proposed policy seeking to limit the scope of its future environmental justice inquiries to a NEPA analysis for discreet projects ignores E.O. 12898's intent and undermines its purpose.

NEPA requires a federal agency to take a "hard look" at any major federal action substantially affecting the natural environment that falls within its jurisdiction. See eg. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). NEPA does not require a particular outcome. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). Thus, NEPA is essentially a procedural statute. Id.

By contrast, E.O. 12898 does promote a particular outcome –implementing Federal agency policies and discharging Federal agency duties in a nondiscriminatory manner. The outcome promoted by E.O. 12898 is substantive, that is, directing Federal agencies to implement their policies, programs, and activities in a nondiscriminatory manner. Thus, by allowing environmental justice considerations to be just one consideration among many that may or may not be ultimately implemented by the NRC in a particular project, the NRC is substantially circumscribing the intent of the E.O.

Additionally, limiting the NRC's environmental justice considerations to project specific NEPA analyses unduly narrows the scope of E.O. 12898. The Executive Order's breadth is wide. It directs each Federal agency to make achieving environmental justice *part of its mission*. E.O. 12898, §1-101, emphasis added. Furthermore, agencies must

also examine their policies, programs and activities to determine how they affect low-income and minority populations and how discriminatory behaviors can be addressed. Id.

In its proposed environmental justice policy, the NRC would only conduct an environmental justice analysis in the narrow context of a NEPA analysis of discreet projects where an Environmental Impact Statement ("EIS") is warranted. NRC further narrows the scope of E.O. 12898 by making it the policy of the NRC to ignore potential environmental justice concerns if an EA, but not an EIS, is indicated for a particular project. The proposed environmental justice policy narrows E.O. 12898's scope further still by exempting programmatic EISs from environmental justice analyses.

Finally, the most significant weakening of E.O. 12898 comes from the NRC's announcement that environmental justice will no longer be admitted as contention in NRC adjudicatory proceedings. The NRC justifies this decision by noting that by its language and subsequent court decisions, the E.O. does not create any new rights or private cause of action. 68 Fed. Reg. 62643 (2003).

While this characterization of the E.O. is accurate, in the context of NRC licensing and regulatory proceedings, it is not necessarily relevant. Nowhere in the Atomic Energy Act or the NRC's regulations is there a mandate that the admission of contentions be based on some particular statutorily created right or cause of action. NRC regulations provide that each contention must consist of a specific statement of law or fact to be raised or controverted. 10 C.F.R. 2.714(b)(2). The regulations further provide that a request for a hearing include the "requestor's areas of concern about the licensing activity that is the subject matter of the proceeding." 10 C.F.R. §2.1205(e)(3). Thus, there is no requirement that a contention or area of concern be grounded in a statutorily created right.

Moreover, since the E.O. is meant to direct how agencies implement existing statutes and conduct their duties under existing authority, environmental justice contentions should be admitted if there is an allegation that the NRC has discriminatorily carried out its obligations under existing law. Barring environmental justice contentions from being admitted in NRC adjudications undermines the purpose of E.O. 12898.

Furthermore, even if a contention is required to be grounded in a statutorily granted right of action, NEPA provides such a right. In the event that the NRC fails to adequately analyze social and economic impacts of an NRC licensed project on minority and low-income communities, participants in NRC proceedings should be permitted to raise this fact as a contention or area of concern.

II. The Atomic Energy Act Provides A Basis For The NRC To Carry Out The Goals Of E.O. 12898.

The NRC claims that NEPA is the "only available statute under which the NRC can carry out the general goals of E.O. 12898." 68 Fed. Reg. 62643 (2003). In support

of its position the NRC cites to the February 11, 1994 Memorandum For The Heads Of All Departments And Agencies regarding E.O. 12898. Id. However, the NRC's rationale is unduly restrictive and undercuts the purpose of the Executive Order.

President Clinton's memorandum on his Executive Order notes that its goal is to protect the environment and health of minority and low-income communities. That memo also notes that the E.O. is intended to underscore that "environmental and civil rights statutes provide many opportunities to address environmental hazards in minority and low-income communities." Hence, while the E.O. does not create an independent private right of action, it does direct agencies how to implement statutes and perform their regulatory duties under existing law. Moreover, the E.O.'s plain meaning indicates that the statutes specifically mentioned are not intended to be the exclusive list, but appear to be just two examples.

The NRC should take the opportunity to use the AEA to implement E.O. 12898's purpose. The Atomic Energy Act provides that the development of atomic energy shall be regulated so as to protect the health and safety of the public. 42 U.S.C. §2012(d), (e). Given the broad goals of the E.O. and the specific mandate of the AEA to protect the public health and safety, the aforementioned provisions present a clear opportunity for the NRC to address environmental hazards in low-income and minority communities.

In sum, the NRC's proposed environmental justice policy is unduly restrictive and undermines the purpose of Executive Order 12898. Instead of seeking to minimize or completely eliminate its environmental justice obligations, the NRC should be exploring ways to improve and expand them.

Sincerely,



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Staff Attorney