

Draft Policy Statement  
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February 3, 2004

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

Re: Public Citizen comments on the draft "Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions"

To Whom It May Concern:

The draft policy statement on the treatment of environmental justice (EJ) matters in U.S. Nuclear Regulatory Commission (NRC) licensing, rulemaking, and regulatory actions purports to be a reaffirmation of the Commission's commitment to the consideration of EJ issues within the context of National Environmental Policy Act (NEPA) licensing requirements. Framing the statement thus is disingenuous, however, because the draft policy statement suggests a retreat from the basic principles of EJ. The effect is a virtual license to NRC staff to deemphasize EJ matters in licensing proceedings, contrary to the intent of Executive Order 12898 (hereafter, "the EO"), "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The EO was issued as progressive public policy initiative designed to mitigate environmental and health hazards created by federally-sanctioned developments and industrial activities that disproportionately affected minority and low-income populations.

The NRC's draft EJ policy statement appears to be a nod to the Nuclear Energy Institute (NEI), which submitted a letter<sup>1</sup> to the NRC in December 2002, sharply criticizing the agency for its handling of EJ issues in licensing hearings involving Louisiana Energy Services (LES)<sup>2</sup>, which seeks a license for a uranium enrichment facility; and Private Fuel Storage (PFS)<sup>3</sup>, which seeks a license for a high-level nuclear waste storage facility on the Indian reservation of the Goshute tribe in Skull Valley, Utah. This draft policy statement appropriates many of the arguments and incorporates some of the recommendations articulated by the NEI in its letter.

EJ matters have been justly and appropriately addressed by the NRC in the cases of LES and PFS, despite NEI's assertion to the contrary. The licensing woes of these companies do not warrant a wholesale policy revision as significant as the one proposed, which would greatly benefit the nuclear industry but hinder the achievement of environmental justice in NRC licensing and regulatory actions. In 1994, then Chairman Ivan Selin pledged that the NRC would "endeavor to carry out the measures set forth in EO 12898,"<sup>4</sup> but it now appears that the NRC is abandoning its commitment to achieving environmental justice.

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SECY-02

The NRC should retract its recent draft EJ policy statement and instead commit itself more fervently to the goals set forth in the EO.

## **Statement of Policy on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions**

### ***Impetus for the EJ Policy Statement Appears to Have Come from an Industry Demand***

The NRC claims that it is "committed to the general goals of [the EO]," but it has now introduced the caveat that it shall henceforth "strive to meet those goals *through its normal and traditional NEPA process*" (emphasis added). Further, the Commission cites the two previous cases in which EJ issues have been considered (LES and PFS) and reasons that, "[i]n light of the previous adjudications, the Commission sees a need, and thinks it appropriate, to set out its views and policy on the significance of the E.O. and guidelines of when and how EJ will be considered in NRC's licensing and regulatory actions." But the practical outcome of the policy statement would be a retraction of EJ as a cognizable element in licensing adjudications, which suggests that the statement is not so much policy clarification as a gift to the nuclear industry.

In order that the draft policy statement on EJ may be understood in the proper context, it is essential to first consider the industry complaint that precipitated its development. The NEI's criticism of the NRC's handling of EJ matters employs a logic that is true to its interests but not true to the history of EJ and the rationale and intention of the EO.

### ***The Nuclear Energy Institute's Complaint is Based on Self-Interest, Not Sound Reason***

The policy statement appears to have come in direct response to complaints from the nuclear industry about the NRC's treatment of EJ. The December 2002 letter from NEI berates the NRC for what the industry lobby perceives as the misinterpretation and misapplication of the EO that charged each federal agency with the task of "achieving environmental justice [as] part of its mission." The letter concludes, rather brazenly, 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." The NEI is clearly unconcerned with achieving environmental justice; rather, its goal is to ensure that its industry clients expeditiously secure licenses for their nuclear facilities. In particular, the NEI seeks to ease the license application process for its members in the LES and PFS partnerships, as well as for members with other proposed nuclear projects. These companies do not want to have their licenses delayed or denied because of environmental justice interventions, regardless of their validity.

It is unfortunate that the NRC appears to be bowing to industry pressure in this way, especially since the argument presented by the NEI in its letter smacks of self-interest and a manipulated logic. NEI seeks wholesale retraction of the just and progressive EJ policy introduced by President Clinton in 1994, despite the NRC's stated pledge to carry it out. It is regrettable that the agency now appears to be retreating from this policy at the behest of the NEI, while

appropriating the industry's faulty logic. In formulating this policy, it appears that the NEI complaint was accepted absolutely, while the views of the public at-large were not solicited until now.

### ***The NEI's Argument Betrays an Ill Logic***

The crux of NEI's argument is that contentions or interventions based on environmental justice claims are not cognizable in the context of NRC licensing because they are precluded by a legal qualification in Section 6-609 of the EO, which states:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity *by a party against the United States, its agencies, its officers, or any person*. The order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. [Emphasis added.]

Based on this qualification, the NEI incorrectly concludes that the EO "does not establish new substantive or procedural requirements applicable to the NRC's licensing activities... These provisions can only be read as precluding a contention to be raised in a licensing proceeding on the basis of an alleged violation of 'environmental justice.' "

While the qualification in Section 6-609 is clearly intended to protect the federal government and its agencies and officers from legal prosecution based on claims of environmental justice, it is not designed to eliminate EJ contentions from NRC licensing proceedings. Section 1-103 of the EO directs federal agencies to develop an agency-wide environmental justice strategy that "shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised" toward the end of achieving environmental justice. Moreover, the basic charge of the EO states that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing...disproportionately high and adverse human health or environmental effect of its *programs, policies, and activities* on minority populations and low-income populations" (emphasis added). The language is intended to be inclusive, covering the broad range of activities in which government agencies are involved.

Moreover, in the past the EO has been properly interpreted as covering the wide array of government activity, including the licensing of facilities that may have significant impacts on ecology and human health according to the NRC. Former NRC Chairman Ivan Selin, in his initial response to the EO, wrote: "Given the nature of our responsibilities as a licensing and regulatory agency, the Executive Order and the accompanying memorandum seem most likely to apply to our efforts to fulfill the requirements of the National Environmental Policy Act." The NEI's assertion that the EO expressly states that EJ contentions are not admissible in NRC licensing proceedings is not valid. The EO was neither written with this intention nor interpreted as such—until now.

Furthermore, the NEI incorrectly argues that the presidential memorandum that accompanied the EO<sup>5</sup> restricts departments' and agencies' application of EJ considerations. On the contrary, the memo is specifically intended to *expand* the application of EJ considerations by emphasizing existing environmental and civil rights statutes, as it plainly states: "The purpose of this separate memorandum is to underscore certain provisions of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment." To further emphasize this point, the memo goes on to cite specific statutes to which EJ evaluations ought to be applied:

Each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 (NEPA)... Mitigation measures outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.

And:

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.

Despite this clear articulation of the broad and inclusive purpose of the memo and the EO to which it refers, the NEI distorts its meaning, suggesting that the memo states explicitly that Section 2-2 of the EO—which reaffirms the illegality of discrimination on the basis of race, color, and national origin under federal programs—is "only applicable to activities receiving Federal financial assistance." The NEI further suggests that NRC licensees do not receive Federal financial assistance and, therefore, should not be subjected to EJ contentions during licensing proceedings. But both the EO and the accompanying presidential memo are intended to be as expansive and inclusive as possible. Furthermore, former Chairman Selin, in noting the licensing and regulatory nature of the NRC, made it clear in his response to President Clinton that the EO was readily interpreted as covering the broad range activities of federal agencies that might affect the environment or public health.

Finally, the NEI argues that, because NEPA does not require an EJ review, the EO actually precludes inclusion of EJ contentions within the context of NRC licensing proceedings or NEPA-required evaluations. The NEI states that "NEPA has been in existence for 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 circumstances." However, it was precisely the purpose of the EO to amend federal regulatory actions, such as those under NEPA, so that EJ issues be taken into consideration by the regulatory agency to account for the possibility of environmental injustice and avoid it where possible.

***The EJ Policy Statement Appropriates the Faulty Logic of the NEI and Represents a Clear Regression in the NRC's Efforts to Ensure EJ as Part of Its Mission***

It is remarkable that the draft EJ policy statement appropriates many of the arguments and incorporates many of the recommendations articulated by the NEI in its December 2002 letter to the NRC on the treatment of EJ matters. The NRC draft policy statement echoes the argument of the NEI in affirming that "E.O. 12898 does not establish new substantive or procedural requirements applicable to NRC regulatory or licensing activities." The statement further notes that the EO "simply serves as a reminder to agencies to become aware of the various demographic and economic circumstances of local communities as part of any socioeconomic analysis that might be required by NEPA." But such a characterization slights the original intention of the EO. Again, according to Section 1-101 of the EO:

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, as appropriate, disproportionately high and adverse human health or environmental effect of its programs, policies, and activities on minority populations and low-income populations... [Emphasis added.]

This is an explicit charge to proactively implement EJ issues into the regular operations and activities of federal agencies—it is much more than a mere "reminder" of some preexisting duty. The EO represented an admission that there had been a failure in the past to properly address EJ matters; its clear intention was to rectify that failure through the codification of EJ considerations into agency activities.

The draft EJ policy statement is a regression in terms of civil rights and progressive public policy, and it is a virtual retraction of former Chairman Selin's pledge that the NRC would "endeavor to carry out the measures set forth in Executive Order 12898." The NRC's suggestion that "EJ per se is not a litigable issue in our proceedings" seems to contradict Mr. Selin's acknowledgement that, given the nature of the NRC as a licensing and regulatory agency, the EO applies to NRC's requirements under NEPA. The EO is clearly intended to *expand* the scope of NRC's NEPA requirements to include EJ matters in licensing proceedings, not limit that scope. The policy statement notes that "[r]acial motivation and fairness or equity issues are not cognizable under NEPA," but this represents a debasement of the expressed intent and spirit of the EO, which is an executive charge to take into consideration the complex matrix of race, class, and ethnic elements that might indicate undue discrimination of minority and low-income populations. Withdrawal from this noble pursuit creates the impression of subservience to the demands of the nuclear industry.

***The Expressed Intent of the EJ Policy Statement is Disingenuous***

The design of the policy statement appears to be intended to relegate the consideration of EJ matters to irrelevance in licensing proceedings. For instance, the statement recommends that there should be no EJ analysis in either the Environmental Assessment (EA) or the Generic and Programmatic Impact Statements. Instead, the new policy suggests that, if there is a possibility of

an environmental injustice, an assessment may be “performed as necessary in the underlying licensing action for each particular facility” or in an Environmental Impact Statement (EIS). Yet the EIS is a requirement of NEPA, the statute the NRC cites as the “basis for admitting EJ contentions in NRC licensing proceedings.” At the same time, the NRC argues that the EO creates no new “requirements or rights” that are applicable to its licensing or regulatory actions, and that its EJ obligations stem solely from NEPA requirements, not from the EO. So relegating EJ consideration to the EIS appears to be a declaration of the total irrelevance of the EO that established the EJ policy. It was precisely the shortcomings and ambiguity of the NEPA requirements that made the EO necessary in the first place.

### *The NRC is Accountable to Congress, the President, and the American People*

The regulatory agencies are arms of the Executive branch of the federal government. When the president directs federal agencies to execute the law in the form of executive orders, and the directors of the agencies accede to that order, and Congress has made no pronouncement of law to the contrary, then the agencies ought to carry out the order of the president, as the NRC has in the case LES and PFS. Thus, the NEI’s claim that “there is no legal basis for the NRC to admit a contention related to ‘environmental justice’ in any licensing proceeding” is patently false.

The NRC should not be beholden to the wishes of the nuclear industry. The NRC is accountable to the laws of Congress, the orders of the president, and, ultimately, to the American people—not to the industry that it is supposed to be regulating.

### **Conclusion**

The NRC’s proposed policy statement on the treatment of environmental justice matters in NRC regulatory and licensing actions will effectively eliminate serious EJ considerations, and it clearly contradicts the intentions of the EO. The statement is clearly a response to the NEI’s December 2002 letter, which wrongly asserts that “there is no legal basis for the NRC to admit a contention related to ‘environmental justice’ in any licensing proceeding” and “any contentions related to [EJ] currently being adjudicated should be dismissed.” The NRC’s draft policy statement has the appearance of an overture to the industry, signifying that EJ evaluations shall be so strictly limited henceforth that the issue will be ignored.

As three large electric utilities seek Early Site Permits for the construction of new nuclear reactors and two energy industry consortiums seek licenses for controversial nuclear facilities, there is a manifest industry interest to clear the path for the licensing of these facilities. Moreover, the NEI has the broad interest of securing a license for the U.S. Department of Energy’s Yucca Mountain nuclear waste repository, which may also face contentions related to EJ. It is unfortunate that the NRC appears so willing to violate its regulatory duty by renegeing on the directives of the EO, when the clear beneficiary of this action is the industry it regulates.

Public Citizen urges a wholesale retraction of the EJ policy statement. Instead, the NRC should commit itself to the goals set forth in the EO, and it should develop a policy that reflects that and takes into consideration the broad range of opinions held by members of the public and other stakeholders—not just the opinion of the nuclear industry.

If you have any questions regarding the comments submitted herein, please do not hesitate to call a representative of Public Citizen at 202-454-5109. Thank you.

Sincerely,



Joseph P. Malherek

Policy Analyst, Public Citizen's Critical Mass Energy and Environment Program

<sup>1</sup> Bishop, Robert W. Letter to Annette L. Vietti-Cook, Secretary, U.S. Nuclear Regulatory Commission. 20 December 2002.

<sup>2</sup> *In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, CLI-98-3, 47 NRC 77 (1998).

<sup>3</sup> *In the Matter of Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation)* NRC Docket No. 72-22-ISFSI.

<sup>4</sup> Selin, Ivan. Letter to U.S. President: William J. Clinton. 31 March 1994.

<sup>5</sup> "Memorandum for the Heads of All Departments and Agencies." *Memorandum on Environmental Justice*, 11 Feb. 1994. 30 Weekly Comp. Pres. Doc. 279. 14 Feb. 1994.