



Draft Policy Statement
(68FR62642)

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Nuclear Information and Resource Service

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Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Attn: Rulemakings and Adjudication Staff

Re: Policy Statement on the Treatment of Environmental Justice Matters in NRC
Regulatory and Licensing Actions (Federal Register, November 5, 2003, V. 68, No. 214;
pp 62642-62645)

COMMENTS BY NUCLEAR INFORMATION AND RESOURCE SERVICE ON U.S. NUCLEAR REGULATORY COMMISSION'S DRAFT POLICY STATEMENT ON THE TREATMENT OF ENVIRONMENTAL JUSTICE MATTERS IN NRC REGULATORY AND LICENSING ACTIONS

February 3, 2004

I. INTRODUCTION AND SUMMARY

Nuclear Information and Resource Service ("NIRS") hereby submits its comments on the Nuclear Regulatory Commission's ("NRC's" or "Commission's") Draft Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 68 Fed. Reg. 62,624 (November 5, 2003). As discussed below, the proposal is grossly deficient, because it lacks what the title purports it to contain: an actual policy for the treatment of environmental justice issues in NRC regulatory and licensing actions under the National Environmental Policy Act ("NEPA"). What the NRC needed to do was to assemble, refine, and organize into a single policy statement the work that has been done by the NRC and other agencies since 1994 to develop affirmative steps for addressing environmental justice issues in their decisions. Instead, the proposal consists of a rationalization for the NRC's decision to avoid or limit consideration of environmental justice issues to the extent possible. The proposal reads more like a defensive litigation strategy memorandum than a statement of agency policy.

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The Commission should scrap this proposed policy statement and begin again, taking the following steps:

1. The Commission should explicitly renew the commitment made by former NRC Chairman Ivan Selin to implement the President's 1994 Executive Order on environmental justice. The Commission should also recommit to the four goals established by the NRC for implementation of the Executive Order: integration of environmental justice into NRC's NEPA activities, continuing senior management involvement in environmental justice reviews, openness and clarity, and seeking and welcoming public participation.
2. The Commission should conduct a careful review of the various guidance documents that have been developed by the NRC Staff and federal agencies other than the NRC for implementation of the Executive Order, evaluating how well the guidance has been carried out and how effective it has been.
3. The Commission should identify the useful and effective portions of this guidance, revise it as needed, and assemble it into a single integrated policy.
4. The Commission should abandon its position of categorically refusing to consider racial discrimination, fairness and equity issues in NEPA reviews, based on the recognition that a NEPA analysis that is tainted by racial discrimination lacks the requisite level of objectivity.

II. ABOUT NUCLEAR INFORMATION AND RESOURCE SERVICE

NIRS is a non-profit corporation with over 7,000 members. NIRS has a mission to promote an environmentally sound energy policy, and a concern for the health and safety of the people and ecosphere. We have offices in Washington, DC and Asheville, North Carolina; and through our formal affiliation with World Information Service on Energy, offices in Amsterdam, Argentina, Austria, Czech Republic, Germany, Japan, Korea, Russia, Slovakia, South Africa, Sweden and Ukraine.

NIRS has frequently commented on NRC proposed rules and policy statements, and has a particular interest in licensing and environmental justice issues.

III. COMMENTS ON THE PROPOSED POLICY STATEMENT

- A. The Draft Policy Statement Fails to Set an Affirmative and Comprehensive Policy for Consideration of Environmental Justice Issues in NEPA Decisions.**

Notably, the Commission does not disclaim former Chairman Selin's commitment to carry out Executive Order 12898. Yet, the proposed policy statement makes virtually no attempt to incorporate any of the goals or guidance that were developed as a result of that commitment. For instance, the Commission completely disregards the four goals set forth in the NRC's 1995 Environmental Justice Strategy. *See* letter from Hugh L. Thompson, Jr., NRC Member, Environmental Justice Interagency Working Group to Carol Browner, Chair, Environmental Justice Interagency Working Group (March 24, 1995), enclosing U.S. Nuclear Regulatory Commission Environmental Justice Strategy (March 1995). These goals are:

- (1) integration of environmental justice into NRC's NEPA activities;
- (2) continue senior management involvement;
- (3) openness and clarity
- (4) seeking and welcoming public participation.

Id. at 2. The proposed policy statement does not mention these goals at all, either to re-affirm and refine them, or explain why they have been rejected. Instead, the proposed policy statement sets forth a set of four rationales for avoiding or excluding environmental justice considerations:

- (1) the Executive Order does not create any new or substantive requirements or rights;
- (2) racial motivation is not cognizable under NEPA;
- (3) environmental assessments normally do not include environmental justice analysis;
- (4) it is not appropriate to consider environmental justice in generic or programmatic environmental impact statements ("EISs").

In fact, these propositions make up virtually the entire proposed policy statement. Thus, the proposed policy statement amounts to a series of negative, generic propositions of what the Commission will *not* consider. A fifth proposition, that the procedural guidelines for environmental justice review should allow for a flexible analysis to "reflect the unique nature of each review," has a more positive ring – but it contradicts propositions 2, 3, and 4. The fifth proposition begs the question: if each NEPA review is unique, why does the Commission consider it appropriate to establish the blanket exclusions of environmental justice considerations from environmental assessments and generic EISs, and why does it believe that racial discrimination is irrelevant in every case?

Section III, the portion of the proposed policy statement that addresses "guidelines for implementation of NEPA," takes the proposal even further downhill. While the reader might reasonably be expected to see some discussion of what affirmative considerations are required, Section III is primarily devoted to a description of what considerations are *not* needed in an environmental justice review. Only two sentences are devoted to

describing what an analysis of environmental impacts of a proposed federal action on minority or low-income communities should contain:

In evaluating the human and physical environment under NEPA, effects on low-income and minority communities may only be apparent by considering factors peculiar to those communities. Thus, the goal of an EJ portion of the NEPA analysis is (1) to identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities.

68 Fed. Reg. at 62,645. This flimsy and unhelpful bit of guidance completely ignores a wealth of concrete and useful policy guidance developed by the NRC Staff since 1994 for the inclusion of environmental issues in NEPA reviews.

For instance, the proposed policy disregards the guidance developed within the NRC for ensuring that public participation by affected minority communities is encouraged. The Office of Nuclear Reactor Regulation ("NRR") offers guidance for meeting this goal:

The staff should develop effective public participation strategies. The staff should acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation and should incorporate active outreach to affected groups.

The staff should strive for meaningful community representation in the process. The staff should be aware of the diverse constituencies within any community and should endeavor to have complete representation of the community as a whole. The staff should be aware that community participation must occur as early as possible if it is to be meaningful.

The staff should seek Tribal agency representation in the process in a manner that is consistent with government-to-government relations.

NRC Office Instruction LIC-203, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues at D-2 (June 21, 2001).

The proposed policy statement also fails to include guidance, developed by the NRC Staff, regarding the steps that should be taken to ensure an adequate NEPA review of environmental impacts on minority communities. At a minimum, the policy statement should contain the following language from the environmental guidance document of the Council on Environmental Quality:

The staff should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical

environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

Council on Environmental Quality, Environmental Justice: Guidance Under the National Environmental Policy Act at 2 (December 10, 1997). This language is also provided in the NRR guidance document at page D-2.

The proposed policy statement should also include the following useful language from the NRR guidance document, which gives further content to a proposed methodology for evaluating environmental justice issues in a NEPA analysis. Although it is lengthy, it is repeated here because the Commission seems to have completely ignored the principles and policies that it sets forth:

When the [environmental justice] review does identify minority or low-income populations in a potentially significant environmental impact area(s), the staff needs to determine whether disproportionately high and adverse effects result from the proposed action by considering the following:

- a) Are the radiological or other health effects significant or above generally accepted norms? Is the risk or rate of hazard significant and appreciably in excess of the general population? Do the radiological or other health effects occur in groups affected by cumulative or multiple adverse exposures from environmental hazards?
- b) Is there an impact on the natural or physical environment that significantly and adversely affects a particular group? Are there any significant adverse impacts on a group that appreciably exceed or is likely to appreciably exceed those on the general population? Do the environmental effects occur or would they occur in groups affected by collative or multiple adverse exposure from environmental hazards?

Reviewers should recognize that the impacts to minority or low-income populations may be different from impacts on the general population due to a community's distinct cultural practices. In addition, reviewers should take into account different patterns of living and consumption of natural resources, such as subsistence consumption.

Reviewers should assess the significance or potential significance of such diverse impact on each minority or low-income population and also provide an assessment of the degree to which each minority or low-income population is disproportionately receiving benefits compared to the entire geographic area.

If there are significant impacts to the minority or low-income population, then it is necessary to look at mitigative measures and benefits. The reviewer should determine and discuss whether there are any mitigative measures that could be taken to reduce the impacts. To the extent practicable, mitigation measures should reflect the needs and preferences of the affected minority or low-income populations. The conclusion may be that there are disproportionately high and adverse impacts to minority or low-income population; however, factors such as the mitigative measures and/or the benefits of a project may outweigh the disruptive impacts. In any case, the facts should be presented so that the ultimate decision-maker can weigh all aspects in making the agency decision. . . .

Id. at D-10 - D-11. The proposed policy statement should not be issued until the Commission has reviewed this and other guidance developed over the last ten years by the NRC Staff, and integrated the principles underlying this guidance into an affirmative policy for considering environmental justice issues in NEPA decisions.

In summary, the NRC should go back to the drawing board, starting with the four goals established by the 1995 Environmental Justice Strategy document. For each goal, the Commission should explain how it intends to carry it out. For instance, the Commission should explain how it intends to ensure that environmental justice considerations are integrated into the entire NEPA review process, from scoping to the final decision. The Commission should re-commit to including senior management in environmental justice aspects of the NEPA review process, and explain how that will be done. The Commission should also describe the concrete measures it intends to implement to ensure openness and clarity in the NEPA process, taking into account language and cultural barriers that may exist in communicating with minority communities. Finally, the Commission should describe the concrete measures the NRC will take to ensure that minority communities are fully included in the process for holding public meetings and commenting on proposals.

B. Racial Discrimination is Cognizable Under NEPA Because It Reflects Biased Decision-making.

NIRS strongly disagrees with the Commission's assertion that "[r]acial motivation and fairness or equity issues are not cognizable under NEPA." 68 Fed. Reg. at 62,644. To the contrary, racial bias in the NEPA decision-making process is a legitimate consideration under NEPA, because it relates to the objectivity of the process for evaluating environmental impacts and choosing among alternatives.

The relevance of racial discrimination to the NEPA decision-making process is especially clear with respect to the process for selecting a preferred site for a new facility. If improper considerations are allowed to influence the weighing of alternatives, the choice of alternatives may be skewed away from the most environmentally sound alternative.

As the U.S. Court of Appeals held in *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971), an environmental analysis must be conducted “fully and in good faith,” or else it must be rejected. *See also Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1129 (5th Cir. 1974). Distorted, selective, and incomplete reporting of relevant data in an EIS can have the effect of foreclosing consideration of reasonable alternatives. *Cedar-Riverside Environmental Defense Fund v. Hills*, 422 F. Supp. 294, 323 (D. Minn. 1976), *vacated and remanded for mootness*, 560 F.2d 377 (8th Cir. 1977).

Bias comes in many forms, including personal, economic, and racial. Whatever the source of the bias, the concern is the same regarding the integrity of the NEPA decision-making process: that some improper and non-scientific consideration was allowed to skew the decision. Thus, the Commission is wrong when it states that issues of racial motivation and fairness “are more appropriately considered under Title VI of the Civil Rights Act.” *Id.* Issues of racial motivation and fairness are directly relevant to the objectivity – and therefore integrity -- of the NEPA decision-making process. Moreover, it does not take expertise in racial discrimination to determine that scientific criteria are not being applied objectively. To the extent that outside expertise on how institutional or insidious discrimination can affect the decision-making process, it is available to the NRC through other federal agencies. The NRC cannot shirk its responsibility to protect the NEPA process simply by declaring that it lacks the relevant expertise.

There are two ways that the NEPA decision-making process can be adversely affected by discriminatory considerations: if the decision-making criteria are applied in a biased manner, and if the criteria themselves are biased. Examples of both types of bias can be seen in the Claiborne Enrichment Center case, *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 391 (1997) (hereinafter “LBP-97-8”), *affirmed in part and reversed in part*, *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-106 (1998) (hereinafter “CLI-98-3”).

1. Bias in application of objective criteria

The process of choosing among alternatives in an EIS involves making an objective assessment of the characteristics of the array of reasonable alternatives, and evaluating their suitability against a set of objective scientific criteria. In order to comply with NEPA, these criteria must be objectively applied. In *Cedar-Riverside Environmental Defense Fund v. Hills*, for example, the District Court approved a Special Master’s decision rejecting an EIS whose distorted and selective representation of evidence regarding the environmental impacts of a proposed housing project demonstrated “a pattern showing bias on the part of HUD toward justifying a previously made decision.” *Id.* at 322. As a result, consideration of reasonable alternative sites and housing types was foreclosed. *Id.* at 323.

The *Claiborne Enrichment Center* case illustrates the way in which race discrimination can undermine the objectivity of a NEPA analysis. As described in the EIS for the Claiborne Enrichment Center, Louisiana Energy Services (“LES”) “followed a three-phased screening process to identify a suitable site for the CEC.” NUREG-1484, Final Environmental Impact Statement for the construction and Operation of Claiborne Enrichment Center, Homer, Louisiana at 2-3 (1994). First, LES evaluated candidate regions in the United States; then it evaluated candidate areas within a chosen region; and then it narrowed the process to candidate sites within the chosen area. *Id.* At the final stage of the site selection process, the array of candidate sites had been narrowed to a few sites in a relatively small geographic radius of two miles.

One of the factors used to make a final narrowing of six remaining candidate sites was a criterion calling for “low adjacent population within a 2-mile radius.” LBP-97-8, 45 NRC at 386. Prior to the hearing, Intervenors had deposed Larry Engwall, the Louisiana Energy Services official who performed the low population survey. On the basis of Mr. Engwall’s deposition testimony, Dr. Robert Bullard, a sociologist with considerable expertise in environmental justice issues, evaluated Mr. Engwall’s approach to the low-population survey as follows:

Relying on Mr. Engwall’s deposition testimony . . . Dr. Bullard testified that, as the principal person responsible for site selection process at this stage involving winnowing the six Homer sites to three, Mr. Engwall initially evaluated and scored the low population criterion for the LeSage site based upon an “eyeball assessment.” As Mr. Engwall described this process, he drove along the road through Forest Grove and every now and then he drove up a dirt road where he saw ‘a small cluster of houses’ and ‘boarded up houses.’ From this survey, Mr. Engwall concluded that in this area there were ‘maybe ten people living there at most.’ . . . Dr. Bullard further testified that it did not appear Mr. Engwall drove through Center Springs at all. As a result of this survey, Mr. Engwall gave the LeSage site a ‘low population’ score of 9 out of a maximum of 10 and, when multiplied by the ‘want’ weight of 8, it yielded a weighted score of 72. . . .

Dr. Bullard declared that, in fact, there are 150 people living in Forest Grove and 100 in Center Springs. According to Dr. Bullard, had Mr. Engwall taken the most basic measures to assess population levels, such as consulting aerial photographs or county land records or talking to inhabitants of Forest Grove, he would not have rendered this African American population essentially invisible or taken the condition of the housing as empirical evidence of the number of people living there.

Next, Dr. Bullard asserted, Mr. Engwall compounded the problem by using invalid and biased considerations in comparing the population level of the LeSage site to that of the Emerson site. The Emerson site, which was the overall second highest rated site in Fine Screening Phase I, was given a ‘low population’ score of

7, yielding a significantly lower weighted score of 56. Again, relying on Mr. Engwall's deposition testimony . . . Dr. Bullard asserted that the Emerson site score also was based on Mr. Engwall's observations from driving around the site, which led him to conclude that between 50 and 100 people actually lived there. Yet when asked what he saw that caused him to score the site a seven, Mr. Engwall answered '[p]robably the proximity to the lake.' Mr. Engwall went on to explain that '[w]e just felt opinion-wise people would probably not want this plant to be close to their pride and joy of their lake where they go fishing.' . . . The significance of the lake, Dr. Bullard asserted, also was emphasized a few pages earlier in his deposition when Mr. Engwall testified that the Emerson site was rated neutral to slightly negative because

[i]t was right on the edge of this lake. This lake is a very nice lake. This lake is the pride and joy of this part of Louisiana, nice boating, nice homes along the lake. It was felt that an industrial facility real close to that lake would not be in keeping with the existing usage which was nice homes, vacation and fishing, hunting. . . .

Based on Mr. Engwall's deposition testimony, Dr. Bullard concluded it was clear that quality of life considerations improperly affected Mr. Engwall's scoring of the low population criterion for the Emerson site given that, at this state of the evaluation process, there were no site specific criterion [sic] related to quality of life. He further maintained that Mr. Engwall's biased judgment on the quality of life concern regarding the desirability of avoiding the lakeside site where white, middle class people lived was directly related to the relative scoring of the low population criterion. Dr. Bullard asserted that the total effect of Mr. Engwall's actions was to discriminate against the Forest Grove and Center Springs communities because their residents' lifestyle and socioeconomic status were on a much lower plane. . . .

Id. 45 NRC at 387-88. The Licensing Board independently reviewed the admitted portions of Mr. Engwall's deposition testimony, and concluded that it "clearly supports Dr. Bullard's assertion that racial and economic-based quality of life considerations influenced Mr. Engwall's scoring of the Emerson site." 45 NRC at 394. Rather than drawing a conclusion that the site selection process was discriminatory, however, the Board concluded that an "inference" of discrimination was raised, and remanded the decision to the Staff for further inquiry. 45 NRC at 392.

On appeal, the Commission reversed the Licensing Board, finding that NEPA is not a tool for investigating racial discrimination. CLI-98-3, 47 NRC at 101-104. According to the Commission, the Board's decision called for "a highly complex racial bias study with no obvious stopping point." 47 NRC at 103. The Commission also stated that NEPA is not "a civil rights law calling for full-scale racial discrimination litigation in NRC proceedings."

No “highly complex racial basis study” was required, however, to ascertain that the allegedly scientific process for selecting the ultimate site for the Claiborne Enrichment Center was tainted by a variety of irrelevant considerations which skewed the decision toward a pre-ordained outcome. Such a lack of objectivity is fatal to a NEPA review. *Cedar-Riverside, supra*, 422 F. Supp. at 323. See also *Hughes River Watershed Conservancy v. Agriculture Department*, 81 F.3d 437, 446 (3rd Cir. 1996) (Misleading assumptions “can defeat the first function of an EIS by impairing the agency’s consideration of the adverse environmental effects of a proposed project,” and by “skewing the public’s evaluation of a project”).¹

Thus, the Licensing Board correctly concluded in LBP-97-8 that racial discrimination was relevant to the adequacy of the NEPA analysis, because it led to the fatal tainting of the analysis with subjective considerations. It was not necessary for the NRC to have embarked on a complex racial discrimination analysis to conclude that a purportedly objective site selection process was skewed by subjective considerations to yield a pre-ordained result.

2. Bias in criteria for evaluation of alternatives

As the Licensing Board recognized in LBP-97-8, racial discrimination or bias can also be inherent in site selection criteria. 45 NRC at 388. For instance, one of the criteria for site selection for the Claiborne Enrichment Center was that the facility should not be sited within five miles of institutions such as schools, hospitals, or nursing homes. As Dr. Bullard explained, this criterion was “inherently biased toward the selection of sites in minority and poor areas because these areas generally lack institutions such as schools, hospitals and nursing homes that are the focus of this criterion.” While it is “not necessarily inappropriate to attempt to site a hazardous facility in an area that is far from these institutions”, Dr. Bullard warned that this criterion cannot be applied equitably “unless the process is enlightened by consideration of the demographics of the affected population.” *Id.* Otherwise, disadvantaged populations “will invariably be favored as hosts for more hazardous facilities as is evidenced by the fact that minority communities

¹ The Commission also attempted to minimize the significance of the skewed site selection process, by claiming that the FEIS was only required to “briefly discuss” alternative sites. 47 NRC at 104. The length or brevity of the discussion of alternatives is irrelevant, however. The question is whether the EIS made an objective comparison of the alternatives that were provided. In the EIS for the Claiborne Enrichment Center, the Staff made the representation that while it did not participate in Louisiana Energy Services’ (“LES”) site selection process, “the NRC staff believes that the approach used by LES was reasonable.” EIS at 2-3. Having chosen to rely on LES’ site selection process rather than conducting one of its own, the NRC was responsible for ensuring that the process was, indeed, objective and fair.

already host a disproportionate share of prisons, half-way houses, and mental institutions.” *Id.*

Similarly, a “community support” criterion used for the Claiborne Enrichment Center site selection process, which involved consultation with local business and political leaders, steered the process toward areas with the weakest business and political leadership, *i.e.*, minority communities. *Id.*

3. Where source of a biased result is unclear

The *Claiborne Enrichment Center* case also presented an aspect in which the result of the site selection process raised an “inference” of racial bias, but the source of the bias was not clear from the evidence. 45 NRC at 392. Statistical evidence presented by the Intervenor showed that as the site selection process progressively narrowed from national to state to regional to local, the level of poverty and African American representation in the population rose dramatically, “until it culminated in the selection of a site with a local population that is extremely poor and 97% African American.” 45 NRC at 386. While the Licensing Board did not find this pattern constituted conclusive evidence of discrimination in the site selection process, the Board concluded that it raised an “inference” of racial discrimination that should be investigated by the NRC Staff. 45 NRC at 391. Thus, the progressively increasing levels of minority representation and poverty during the site selection process strongly suggested that the criteria being used to choose a site for the Claiborne Enrichment Center had more to do with socioeconomics than the physical suitability of the sites. This was sufficient to demonstrate that the site selection process was skewed, subjective, and not in keeping with NEPA’s requirement for scientific objectivity.

Accordingly, the proposed policy statement is flat wrong in declaring that racial discrimination is irrelevant to an environmental justice NEPA review.

III. CONCLUSION

The NRC’s Draft Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions is virtually devoid of affirmative policies for considering environmental justice issues in the NEPA decision-making process. Instead, it is a catalogue of the ways in which the NRC does *not* plan to consider environmental justice issues. Moreover, the NRC’s rationale for refusing to consider discrimination in the NEPA decision-making is not supportable. The NRC should scrap this proposal and begin again.

Respectfully submitted,

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