

Draft Policy Statement
(68FR62642)

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26

DOCKETED
USNRC

January 5, 2004

February 10, 2004 (11:35AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

To whom it may concern:

Attached please find the State of Nevada's comments on NRC's draft Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions.

Sincerely,

Robert R. Loux
Executive Director

RRL/cs
Attachment

**STATE OF NEVADA COMMENTS ON THE
U.S. NUCLEAR REGULATORY COMMISSION'S
DRAFT POLICY STATEMENT ON THE TREATMENT OF ENVIRONMENTAL
JUSTICE MATTERS IN NRC REGULATORY AND LICENSING ACTIONS
January 5, 2004**

“To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, 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 effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Marianas Islands” (emphasis added).¹

In promulgating Executive Order 12989 (EO), President Clinton clearly intended for federal agencies to go beyond a business-as-usual approach in addressing environmental justice matters associated with activities and operations of those agencies. Since the order has not been rescinded or amended by President Bush, this directive continues in force and should be strictly and expansively complied with by federal agencies, including the Nuclear Regulatory Commission. NRC’s draft “Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulation and Licensing Actions” appears to represent not only a retreat from NRC’s current guidance on environmental justice, but also a violation of the spirit and intent of the EO. The State of Nevada strongly urges NRC to retract the draft policy statement and continue to address environmental justice matters as committed to in Chairman Selin’s letter of March 31, 1994 and in full compliance with the “Guidelines” set forth by the Council on Environmental Quality in 1997.

General Comments

It is difficult to see why NRC has found it necessary to issue the draft policy statement at this time and in the fashion it has. At a minimum, the Notice should have contained a detailed discussion regarding how (specifically) the new policy being articulated differs from current environmental justice guidance and NRC practices and what NRC hopes to accomplish by promulgating a new policy. As it stands, the draft policy appears to be more a signal to NRC staff and existing and prospective licensees to de-emphasize EJ issues rather than a clear definition of new policy.

¹ Section 1-1, Agency Responsibilities of Executive Order 12989, “Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations”.

The significance of the EO is that it recognized that normal and traditional policies and processes of federal agencies for identifying and considering EJ impacts and issues were not sufficient, and that EJ impacts were not being adequately addressed. Clearly, the EO intended that agencies go beyond then-current practices and take proactive and aggressive measures to improve the way EJ matters were being addressed. In this regard, the EO was clearly a remedial measure, and NRC's initial response to it appears to have been both appropriate and effective, as reflected in the Commission's handling of the Louisiana Energy Services application. The proposed new policy statement appears to be a regression to a time when EJ matters were not singled out for special attention, but rather were lumped together with other issues in NRC's NEPA and other processes. As such, the draft policy is not consistent with the spirit and intent of EO 12898.

Specific Comments

- (1) *Section II, Statement of Policy, The Executive Order Does Not Create Any New or Substantive Requirements or Rights* - It is correctly pointed out that the EO does not create any new requirements or rights. The draft policy further states, "The basis for admitting EJ contentions in NRC licensing proceedings stems from the agency's NEPA obligations 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." While the EO may not have created new statutory requirements, Nevada contends it did more than simply remind agencies of their EJ obligations. It directed them to be *proactive* and aggressive in identifying and considering EJ matters in NEPA and other activities. The draft policy statement, by insisting that EJ be handled as part of NRC's "normal and traditional processes," ignores this critical aspect of the EO. The assumption that EJ matters will be adequately addressed by "normal and traditional" NEPA processes is precisely what the EO was intended to remedy. At the time of the EO, EJ matters were not being adequately addressed through routine application of NEPA by federal agencies, and it was determined that special emphasis was required to assure that EJ issues and impacts were given the attention they deserved and required. NRC's draft policy statement appears to represent a clear regression in this regard.
- (2) *Section II, Statement of Policy, Racial Motivation Not Cognizable Under NEPA* - The draft states that "Racial motivation and fairness and equity issues are not cognizable under NEPA, and though discussed in the E.O., their consideration would be contrary to NEPA and the E.O.'s limiting language that it creates no new rights." While this statement may be accurate in the narrow legal sense, in practice separating environmental and socioeconomic impacts that disproportionately affect minorities from the broader context of racial discrimination may not be possible. In order to understand adequately such impacts, it may very well be necessary to understand the context of

discrimination in which the impacts occur. To do otherwise could cause the agency to miss or underestimate the significance of disparate or disproportionate impacts.

- (3) *Section II, Statement of Policy, Environmental Assessments Normally Do Not Include Environmental Justice Analysis* – This section of the draft policy would seem to contravene the intent of the EO, which is to prompt agencies to be more proactive and aggressive in evaluating the potential for EJ impacts resulting from agency actions and decisions. In classic ‘Catch 22’ fashion, the draft policy indicates that an EJ review should not be considered for an EA where a Finding of No Significant Impact (FONSI) is expected, while absent such a review, it is possible that significant impacts to minorities and low income population could be missed. The guidance contained in this section of the draft policy statement appears to absolve NRC from carrying out the type of proactive reviews and consideration the EO sought to promote.
- (4) *Section II, Statement of Policy, Generic and Programmatic Impact Statements Do Not Include Environmental Justice Analysis* – The comment contained in item # 3 above applies here as well. It would seem especially short-sighted not to require a discussion of possible EJ issues and impacts as part of a generic or programmatic EIS, especially in cases where the overall program itself and the facilities and decisions that are part of it could have disproportionate and disparate impacts on low income and minority communities. Such a review at the programmatic level could save time, money, and conflict later on, when the program reaches a stage where concrete actions and decisions would have such impacts. Anticipating EJ impacts at the earliest opportunity should be a goal of the agency’s NEPA process and should not be discouraged by the sweeping exclusion of generic and programmatic EISs.
- (5) *Section II, Statement of Policy, Need for Flexibility in NRC’s Environmental Justice Analysis (Subparagraph 2 – Identifying Low-Income and Minority Communities)* – Specifying quantitative values for identifying what qualifies as a low-income or minority community can be both risky and misleading. Risky in that using numerical measures may not encompass the range of factors determining minority or low-income status; misleading in that it might cause staff and analysts to overlook significantly and uniquely impacted areas solely because they failed the quantitative test and were not examined further.
- (6) *Section II, Statement of Policy, Need for Flexibility in NRC’s Environmental Justice Analysis (Subparagraph 3 – Scoping)* – It is in the scoping portion of the NEPA process that the EO is most relevant and germane. While the draft policy states, “Reliance on traditional scoping is consistent with the E.O. and CEQ guidance,” it ignores the fact that the EO is intended to promote outreach and other scoping-related activities that go beyond what is minimally required in “traditional” scoping efforts. The EO requires more proactive and

aggressive efforts to identify and reach out to low-income and minority populations than might be done under traditional scoping. Blindly assuming that NRC's staff, licensees and applicants will adequately involve such populations in scoping and subsequent aspects of the NEPA process is naïve and disregards the history of federal agencies' inadequate attention to these populations that created the need for the EO in the first place.

- (7) *Section III, Guidelines for Implementation of NEPA as to EJ Issues (5th Bullet – EJ per se is not a litigable issue in NRC proceedings)* – This statement may be seen as splitting hairs rather than affording useful guidance. If a NEPA analysis is shown to be deficient in its identification of EJ impacts and that deficiency results in inadequate or inaccurate assessment of impacts to the physical or human environment, such deficiency would clearly be the basis for challenging an EIS, EA, or FONSI. This bullet has the effect of denigrating the importance of EJ reviews and sends a message to staff and others that EJ matters are essentially irrelevant in NRC proceedings.

Concluding Comment

The draft policy statement purports to do little more than reaffirm NRC's commitment to addressing environmental justice matters within the context of the agency's NEPA activities. However, by narrowing the application of certain elements of EJ reviews within the context of NEPA activities, the draft appears to provide license for NRC staff, licensees, and applicants to reduce emphasis on finding and addressing EJ impacts in violation of the spirit of Executive Order 12898. It is not at all apparent that a new policy statement is required, and issuing one at this time and in the form represented by the current draft gives the clear impression that NRC is seeking to reduce the burden for identifying and addressing EJ impacts in areas within NRC's purview. Nevada strongly recommends that NRC withdraw the draft policy statement and, instead, focus future efforts on strengthening rather than weakening the importance of fully incorporating environmental justice into the universe of NRC operations.