

Draft Policy Statement
(68FR62642)

DOCKETED
USNRC

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April 6, 2004 (9:13AM)

DATE: February 4, 2004

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SUBJ: Nuclear Regulatory Commission's (NRC) Proposed Policy Statement on the
Treatment of Environmental Justice in Matters in NRC's Regulatory and
Licensing Actions-- Comments

28

Template = SECY-067

SECY-02

General Comments:

(1) **It is unclear how the draft Policy would alter existing NRC policy with respect to environmental justice.** As noted in the draft Policy, both the Office of Nuclear Material Safety and Safeguards and the Office of Nuclear Reactor Regulations have detailed protocols for addressing environmental justice. The draft Policy, however, does not rescind those policies, and, in large part, provides much less detail. Hence, it is unclear how the draft policy would change the NRC's decisionmaking process with respect to environmental justice, as a practical matter.

Suggestion: NRC may wish to make explicit how the new policy would change its treatment of environmental justice issues.

(2) **The Draft Policy narrows the scope of Executive Order 12898's and NEPA's application with respect issues of environmental justice.** Executive Order § 1-101 directs agencies to address environmental justice, "[t]o the greatest extent practicable and permitted by law..." This requires the use of an agency's discretionary authority to identify, consider and address, as appropriate, issues of environmental justice. The draft Policy narrows the Executive Order's application, both by: (1) paraphrasing only part of the language of Executive Order 12898's first provision, § 1-101 ("an agency's EJ responsibilities are to be achieved to the extent permitted by law." Draft Policy at 5); and (2) providing that "...EJ issues are only considered when and to the extent required by NEPA," Draft Policy at 6. Rather than a directive to use NRC discretionary authority, the language of the draft Policy apparently limits NRC consideration of environmental justice. Indeed, under the draft Policy, NRC would apparently be proscribed from following elements of CEQ's *Environmental Justice: Guidance Under the National Environmental Policy Act (1997)*, which depends, in part, on the use of agency discretion.

Suggestion: NRC may wish to modify the language of the draft Policy to conform to the Executive Order's requirement that agencies address environmental justice "[t]o the greatest extent practicable and permitted by law...", and the CEQ Guidance.

(3) **The draft Policy is silent with respect to issues of public participation, except to the extent that the draft Policy addresses public participation, implicitly, in the scoping process.** Executive Order 12898, the Memorandum Accompanying the Executive Order, CEQ's Guidance, and existing NRC policy on environmental justice include directives regarding public participation in the decisionmaking process. By contrast, except for a paragraph addressing "Scoping," draft Policy at 10-11, public participation mechanisms are not addressed in the draft Policy.

Suggestion: NRC may wish to develop a public participation and outreach element in its final Policy that conforms to the spirit of the Executive Order and existing NRC and CEQ policy.

Specific Comments:

(1) **Creation of New or Substantive Rights.** Section 6-609 of the Executive Order expressly states that no new rights are created. However, at least two agencies' administrative appeals tribunals (Environmental Appeals Board, and the Interior Board of Land Appeals) review decisions for compliance with the Executive Order as a matter of policy under existing statutory authority. *See, e.g., In re: San Carlos Apache Tribe, et al*, 149 IBLA 21 (1999); *See also, In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72, 2000 WL 391442 (EAB, March. 14, 2000). It is unclear whether the Draft Policy would break from the NRC's existing practice of reviewing for compliance.

Suggestion: If the draft Policy would change the NRC review mechanism or standard, NRC may wish to make that decision explicit. If the mechanism or standard would remain the same, NRC may wish to provide an explanation of how and under what standard issues of environmental justice are presently reviewed within the context of NEPA or other statutory authority.

(2) **Racial Motivation.** We disagree that issues of "fairness and equity" are "contrary to NEPA and the E.O.'s limiting language emphasizing that it creates no new rights." Draft Policy at 7. It is our position that such issues may be addressed under the "social" or "cultural" impact criteria under 40 CFR 1508.8, to the extent that they are related to an environmental impact. Moreover, to the extent that cumulative impacts are, at times, best understood in their social or historical context, issues of fairness and racial motivation have special relevance. We would concur, however, that issues of intentional discrimination are also relevant under laws other than NEPA.

Suggestion: NRC may wish to re-clarify how issues of racial motivation, fairness and equity are treated under the draft Policy.

(3) **Environmental Assessments.** Proscribing mention of environmental justice in Environmental Assessments (EAs) or in Findings of No Significant Impact (FONSIs), except under unusual circumstances, deviates from the spirit of the Executive Order, and the express language of both the Presidential Memorandum accompanying the Executive Order and the CEQ's Guidance. Moreover, as a matter of policy soliciting public comment with respect to environmental justice issues during the EA process would help ensure that the Commission has not inadvertently neglected to identify or properly assess an impact to a differently situated population.

Suggestion: NRC may wish to solicit comment regarding environmental justice during the EA process to help determine whether there are, for example, unique or cumulative impacts that might be significant on the subject populations.

(4) **Programmatic Impact Statements.** Consideration of environmental justice issues in a programmatic NEPA document frequently allows agencies to consider systemic or cumulative impacts in a manner that is more illuminating of potential impacts than case-by-case analysis. Moreover, such analysis at the programmatic level can lead to greater consistency and ability to avoid or mitigate cumulative or indirect impacts at the site-specific level.

Suggestion: NRC may wish to reconsider the position expressed in the draft Policy with respect to programmatic analysis.

(5) Need for Flexibility.

A. Paragraphs 1 & 2. Defining Geographic Area for Assessment, and Identifying Low-Income and Minority Communities We concur with staff guidance, which is quoted as recommending that, "geographic scale should be commensurate with the potential impact area..." Draft Policy at 9. This recommendation provides the flexibility needed to tailor analysis and is consistent with the CEQ Guidance. Establishment of fixed distances, which may not be commensurate with the magnitude of, or potential impact from, the proposed activity would not meaningfully capture the potential impact. Moreover, it may not be appropriate to adhere strictly to threshold "cut-points" in the identification of minority or low-income populations. Finally, consistent with the CEQ Guidance, the NRC should consider whether there are discrete populations or settlements that are disproportionately burdened (or which fail to receive benefits) that may be missed by a broader analysis.

Suggestion: NRC may wish to consider providing additional flexibility in the environmental justice analysis to appropriately tailor the analysis to circumstances.

B. Paragraph 3. Scoping. It is unclear what is meant by "traditional scoping" in the context of maintaining consistency "with the E.O. and CEQ guidance." Draft Policy at 10. To the extent that traditional scoping does not include features such as proactive involvement with the potentially impacted population, translation of documents, as appropriate, and holding meetings at times and at locations that meet the needs of the potentially impacted population, we do not believe that traditional scoping would be consistent with the spirit of the Executive Order 12898, Executive Order 12166, Improving Access to Services for Persons with Limited English Proficiency, or the CEQ's Guidance.

Suggestion: NRC may wish to clarify this paragraph.