From: Diane Curran <dcurran@harmoncurran.com>
Sent: Friday, October 29, 2021 6:35 PM
To: NRC-EJReview Resource
Cc: Fetter, Allen
Subject: [External_Sender] Environmental Justice comments
Attachments: 2021.10.29 Curran Environmental Justice Commnets.pdf

To whom it may concern:
Please see attached.
Thanks,

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Federal Register Notice: 86FR36307
Comment Number: 81

Mail Envelope Properties (MN2PR15MB2557338B38347B5CA457C0C2C6879)

Subject: [External_Sender] Environmental Justice comments
Sent Date: 10/29/2021 6:35:14 PM
Received Date: 10/29/2021 6:35:25 PM
From: Diane Curran

Created By: dcurran@harmoncurran.com

Recipients:
"Fetter, Allen" <Allen.Fetter@nrc.gov>
Tracking Status: None
"NRC-EJReview Resource" <NRC-EJReview.Resource@nrc.gov>
Tracking Status: None

Post Office: MN2PR15MB2557.namprd15.prod.outlook.com

Files	**Size**	**Date & Time**
MESSAGE	662	10/29/2021 6:35:25 PM
2021.10.29 Curran Environmental Justice Commnets.pdf	559967	

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Priority: Normal
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October 29, 2021

Program Management
Announcements and Editing Staff
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555–0001
Sent by e-mail to: NRC-EJReview@nrc.gov

Subject: Comments on Systematic Assessment for How the NRC Addresses Environmental Justice in Its Programs, Policies, and Activities, Docket ID NRC–2021–0137

Dear NRC Program Management Staff:

Thank you for inviting me to participate in the U.S. Nuclear Regulatory Commission's (NRC's) systematic review of how NRC programs, policies, and activities address environmental justice. I believe environmental justice is a very important matter for the NRC to be investigating and reforming its policies, and thus I appreciate the opportunity to weigh in.

So far, my participation in this process has included being a member of a panel discussion on September 27, 2021; and providing these written comments in response to the NRC's Federal Register notice, 86 Fed. Reg. 36,307 (July 9, 2021). I continue to stand by the views I expressed during the September 27 panel discussion. The purpose of these additional written comments is to emphasize and supplement my key points.

In addition, with this letter I formally endorse and adopt the very comprehensive and incisive comments submitted to you today by the Natural Resources Defense Council (NRDC). Rather than repeating those comments here, I will simply state that I concur strongly with them. I urge you to give them careful consideration.

At the outset, I wish to clarify that I am submitting these comments on my own behalf rather than on behalf of any client. However, my comments reflect the collective experience of myself and the numerous environmental organizations and state and local governments I have represented in almost every type of NRC proceeding, including licensing proceedings for reactors, factories, spent fuel storage facilities, and a repository; enforcement proceedings; and rulemakings. The subject matter of these proceedings included compliance with federal standards for protection of nuclear facility safety and security; compliance with federal laws for environmental protection, including the National Environmental Policy Act, the Endangered Species Act and the Safe Drinking Water Act; and the National Historic Preservation Act. With particular relevance to this proceeding, I litigated environmental justice issues in two NRC licensing cases: the *Louisiana Energy Services* proceeding for siting and licensing of a uranium enrichment facility in two African American communities in Louisiana (*Louisiana Energy Services, L.L.C.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367 (1997), aff'd in part and rev'd in part, CLI-98-3, 47 N.R.C. 77 (1998)); and the *Hydro Resources Inc.* proceeding for

siting and licensing in-situ uranium leach mines in two Navajo communities in New Mexico. *See Morris et al. v. Nuclear Reg. Comm.,* 598 F.3d 677 (10th Cir. 2010).

COMMENTS

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* 59 Fed. Reg. 7,629 (Feb. 16, 1994) identifies several essential elements of an effective environmental justice policy and program, including preventing discrimination in programs, policies and activities; gathering information on disparate impacts of the agency's decisions; and increasing transparency and opportunities for public participation in the agency's decision-making processes.

While Executive Order 12898 does not impose binding requirements on independent agencies like the NRC, the NRC committed to endeavor to carry it out when the Executive Order was issued, and re-affirmed that commitment in the NRC's current environmental justice policy statement, *Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions*, 69 Fed. Reg. 52,040 (Aug. 24, 2004) ("2004 Policy Statement").

In 2021, in Executive Order 14008, President Biden renewed the Executive Branch's call for environmental justice reforms, directing federal agencies to:

> make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.

Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad,* 86 Fed. Reg. 7,619, 7,629 (Feb. 1, 2021).

The Executive Branch's renewal of its commitment to environmental justice in federal agency programs, policies, and decisions calls upon the NRC to do the same, and to review the continued validity and effectiveness of its current policy, which at this point is over 20 years old. The NRC should undertake several significant and readily identifiable revisions to its policy and additional programmatic steps to more fully implement the goals of Executive Orders 12898 and 14008.

In particular, I urge the NRC to take the following six actions:

1. broaden NRC's overly narrow interpretation of its legal authority to consider environmental justice issues,
2. reform procedural regulations that prevent effective public participation in NRC proceedings,

3. provide for greater transparency by increasing funding and staffing for compliance with the Freedom of Information Act,
4. establish an independent Office of Public Counsel to assist members of the public who seek to intervene in NRC licensing proceedings,
5. establish an Environmental Justice Advisory Board to monitor NRC proceedings and advise the Commission on environmental justice matters, and
6. institutionalize an agency-wide review of environmental justice policies and programs every ten years.

These recommendations are discussed in more detail below.

1. NRC should broaden its overly narrow interpretation of its legal authority to consider environmental justice issues and correct bias in existing regulations.

The NRC's interpretation of its legal authority to consider environmental justice issues is overly narrow with respect to both the Atomic Energy Act and the National Environmental Policy Act (NEPA). In addition to the discussion below, I commend to you the comprehensive analysis by New Mexico Environmental Law Center attorney Eric Jantz in his article *Environmental Racism with a Faint Green Glow* (Natural Resources Journal, Vol. 58, Summer 2017), https://digitalrepository.unm.edu/nrj/vol58/iss2/12/.

Atomic Energy Act. In the 2004 Policy Statement, the NRC cited *New Hampshire v. Atomic Energy Commission,* 406 F.2d 170, 175 (1st Cir. 1969) for the proposition that the Atomic Energy Act "does not give the Commission the authority to consider EJ-related issues in NRC licensing and regulatory proceedings." 69 Fed. Reg. at 52,044. In *New Hampshire,* the First Circuit of the U.S. Court of Appeals held that the Atomic Energy Act did not authorize the Atomic Energy Commission (NRC's predecessor agency) to regulate non-radiological threats to public health or the environment, such as thermal pollution. 406 F.2d at 174 ("The history of the 1954 legislation reveals that the Congress, in thinking of the public's health and safety, had in mind only the special hazards of radioactivity.") But nothing in the Atomic Energy Act or the court's decision precludes the NRC from taking into account the health conditions of individual members of the public or communities in protecting them from "the special hazards of radioactivity."

This specific issue was discussed at length in Judge Lucero's dissenting opinion in *Morris,* 598 F.3d at 705-08. There, a majority of a three-judge Tenth Circuit panel upheld an NRC decision interpreting NRC regulations to ignore the cumulative health effects of pre-existing mining activities that already had contaminated the environment in the Navajo communities where the Petitioners lived. The majority deferred to the NRC's interpretation of the meaning of 10 C.F.R. § 20.1301(a)(1) with respect to the question of whether a cap on the total effective dose equivalent ("TEDE") from the "licensed operation" could be limited only to the prospective licensed activity, and not take into account the community's ongoing exposure to radioactive emissions from past mining operations that had never been cleaned up. 598 F.3d at 687-88 and 706 (citing *In re Hydro Res., Inc.,* 63 N.R.C. 510, 516 (2006)). The majority found that "[t]he

clear language of this regulation supports the NRC's decision to focus only on the licensed operation."

Judge Lucero found that the NRC's interpretation of "licensed operation" was "inconsistent with the regulation because it renders superfluous the exclusion of 'background radiation' and radiation from other specified sources in § 20.1003." *Id.* at 706 (citing *Time Warner Ent. Co., L.P. v. Everest Midwest Licensee, L.L.C.,* 381 F.3d 1039, 1050 (10th Cir. 2004)).

Judge Lucero concluded that "the majority's decision in this case will unnecessarily and unjustifiably compromise the health and safety of the people who currently live within and immediately downwind" from the proposed mine site, where a previous uranium mine had been abandoned. 598 F.3d at 705. As he also noted, the new mining activity "will result in total radiation levels nine to fifteen times the permitted regulatory limit." *Id*. Thus, protecting a "vulnerable" community from the "ill effects of radiation" was the only way the NRC could interpret the Atomic Energy Act's requirement for protection of public health and safety (42 U.S.C. § 2099) and implementing regulation 10 C.F.R. § 20.1301(a)(1), in a manner that is "true to the regulation and that adequately protects the interests of the public and the petitioners in this case." *Id*.

As Judge Lucero recognized, the Atomic Energy Act does not just authorize the NRC to take into account the health characteristics and vulnerabilities of affected communities, but it *requires* the agency to do so, in order to satisfy the Act's requirement to provide adequate protection of public health and safety. The NRC's interpretation of its regulations in the *Hydro Resources* case caused an environmental *in*justice because it failed to use the power of the Atomic Energy Act to protect a vulnerable community from continued radiological harm. To impose that injustice was a choice, not the inevitable result of applying the Act. It is time for the NRC to abandon that myth.

In fact, the NRC already has set precedents for considering the characteristics and vulnerabilities of potential host communities in its regulatory decisions. As the majority noted in *Morris*, NRC's previous interpretations of 10 C.F.R. § 20.1301(a)(1) would have taken the ongoing effects of historic mining operations into account in determining acceptable emission levels, but was subsequently changed. 598 F.3d at 688.

In addition, the NRC's current siting regulations for nuclear facilities take into account some characteristics of potential host communities, including "population density and use characteristics." 10 C.F.R. § 100.20(a). One purpose of considering these factors is "to determine whether individual as well as societal risk of potential plant accidents is low." *Id.* 10 C.F.R. § 100.21(h) also requires that siting decisions for low-population areas must consider "safety, environmental, economic, or other factors."

In the past, the NRC has applied this standard to avoid communities with multiple institutions like schools and hospitals, which could be difficult to evacuate and thereby put the residents at relatively greater risk than less populated communities. To address environmental justice

concerns, the NRC can and should add consideration of health vulnerabilities. And it should add economic criteria to ensure that siting decisions do not skew towards under-served communities that lack schools and hospitals due to their economic circumstances.

In summary, the fact that the term "environmental justice" does not appear in the Atomic Energy Act does not excuse the NRC from considering the gamut of radiological health-and-safety related issues stemming from the particular vulnerabilities of environmental justice communities.
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National Environmental Policy Act. As the U.S. Court of Appeals for the D.C. Circuit recognized in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Com.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971), agencies must comply with NEPA "to the fullest extent possible." The NRC has fallen far short of this statutory and judicial mandate in two important respects that relate to environmental justice.

First, by constricting the scope of its NEPA analysis of environmental justice impacts to address only the disclosure of disparate impacts, and to refuse to address the issue of bias in environmental alternatives analyses, including siting decisions. Not only is this exclusion unjustified, but the NRC improperly used environmental justice as an *excuse* to ignore bias and lack of scientific integrity in the siting process in *Louisiana Energy Services,* (Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. 77 (1998). And the agency institutionalized this willfully blindered approach to NEPA decision-making in the 2004 Policy Statement.

Consideration of a reasonable array of alternatives, including alternative sites, is one of the key determinations of any NEPA analysis. As the Commission has held, "[e]ven when a proposed action does not require preparation of an EIS, the "consideration of alternatives remains critical to the goals of NEPA." *Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 N.R.C. 56, 75 (2010) (quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988). For a proposed new nuclear facility, the choice of alternatives among prospective sites is obviously an important decision, with potentially significant health and environmental impacts for the proposed host community. Thus, it is important that a NEPA alternative site analysis satisfy NEPA's "rule of reason" by systematically applying objective scientific standards and principles to its analysis.

The site selection process reviewed by the Commissioners in the 1998 *Louisiana Energy Services* decision made a complete mockery of NEPA's requirement for objectivity and scientific rigor. While purporting to conduct a "nationwide" search for a suitable site, LES (the license applicant) steadily increased the focus of the scoping study on regions of increasing poverty and minority representation – until it arrived at one of the poorest states in the U.S., the poorest and high minority regions in that state, and finally the poorest and highest minority community in the region – the neighboring communities of Forest Grove and Center Springs. Once LES had settled on Forest Grove and Center Springs, it embarked on a purported search for a "low population" area that involved only "eyeball" population assessments that were demonstrably biased and erroneous, including a determination that housing was uninhabited because it was in poor

condition, and that an area should be avoided because it had "nice" homes. A detailed description of LES' bogus site selection process can be found in the Proposed Findings of Fact and Conclusions of Law by Intervenor Citizens Against Nuclear Trash (May 26, 1995) (ML20084L745). *See also* Opposition Brief of Intervenor, Citizens Against Nuclear Trash on Appeal of LBP-97-8 (Sept. 18, 1997) (ML20211H226). As set forth in CANT's Proposed Findings and brief, the site selection process was not only economically and racially discriminatory, but it violated the most basic principles of sound science and objectivity required by NEPA.

Astoundingly, in its decision on appeal, the Commission completely ignored CANT's evidence and legal arguments demonstrating unacceptable bias and lack of scientific integrity or objectivity in the site selection process. The Commission's professed excuse was that an inquiry into racial bias in decision-making "go[es] well beyond what NEPA has traditionally been interpreted to require." 47 N.R.C. at 102. As a result, a grossly biased and unscientific siting decision was allowed to stand.

The *Louisiana Energy Services* decision thus was a complete abrogation of the NRC's NEPA obligations. And the Commission's irrational refusal to apply environmental justice principles to siting decisions still stands today. The Commission should retract that policy immediately, and stop using environmental justice as a shield against its own accountability for biased siting decisions. Nothing in NEPA suggests that a siting analysis that arbitrarily identifies a particular community to host a dangerous facility, based on purely economic or racial criteria, should ever be accepted as objective or scientific. In *Louisiana Energy Services,* the Commission should have addressed the lack of scientific integrity and objectivity in LES' siting analysis and rejected it. To the extent the NRC was uncomfortable with its lack of expertise on issues of racial discrimination, it should have recruited another agency with suitable expertise to evaluate the apparent racial bias in the study. The NRC should never again take the position that racial bias in a NEPA analysis can be ignored and thereby accepted.

Second, the Commission should comply with the U.S. Court of Appeals' holding in *New York v. NRC,* 681 F.32d 471, 482 (D.C. Cir. 2012), that an analysis of risk cannot be substituted for an analysis of environmental impacts. One of the greatest environmental injustices perpetrated by the NRC is to reduce all environmental analyses to a risk calculation. By using this method, the NRC hides the potential environmental impacts of its proposed actions. I cannot think of a single proposed NRC licensing action, during the past 40 years, to which the NRC attributed any environmental significance – because it said the probability of those impacts were so low. And yet the public is well-aware that if an accident happens, the environmental consequences can be extreme. The NRC should make a commitment to greater transparency by separately addressing probability and consequences of nuclear facility licensing in its environmental impact statements.

2. **NRC should reform its procedural regulations that prevent effective public participation in NRC proceedings.**

Providing adequate opportunities for public participation is a key element of environmental justice as defined in Executive Order 12898. Unfortunately, the NRC is known to the public as an agency that is hostile to public participation, and that loads its hearing procedures with byzantine hurdles and traps that may be missed by even the most experienced practitioners. These hurdles and traps appear designed to ensure that few if any members of the public will ever be able to question the adequacy of a license application or supporting environmental analysis in an adjudicatory hearing before a panel of NRC administrative judges.

The NRC has long attempted to justify these burdens as necessary to shorten a hearing process that would be unacceptably long if members of the public were not hobbled at every turn in the efforts to be heard. This is a canard that has been widely discredited, and yet the NRC has not abandoned it or instituted reforms.

In 2013, the NRC Commissioners conducted an extensive inquiry into the types of reforms that should be made to ensure a fair hearing process. The recommendations I made then still hold, and thus I request you to consider the comments I presented to the Commissioners in my letter of February 26, 2013 (ML13057A976).

I also urge you to consider the evaluation and recommendations by the Harvard Negotiation & Mediation Clinical Program, *Moving Toward a Framework for Contested Hearings in the Licensing of Advanced Reactors* (June 16, 2021) (ML21173A166). If the NRC does nothing else, it should implement the Harvard Clinic's recommendation to delay commencement of the hearing process until the NRC Staff has completed its review and issued its Safety Evaluation and Environmental Impact Statement or Environmental Assessment.
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3. **NRC should increase funding and staffing for compliance with the Freedom of Information Act.**

Transparency is also an important environmental justice goal and value to which the NRC must give much greater attention. To increase the agency's transparency, the NRC should increase funding and staffing for compliance with the Freedom of Information Act (FOIA). It should not take years to get a response to a FOIA request, as it does now.

4. **NRC should establish an independent Office of Public Counsel.**

I urge you to establish an independent Office of Public Counsel, as recommended in the comments by NRDC.

5. **NRC should establish an Environmental Justice Advisory Board to monitor NRC programs and proceedings and advise the Commission on environmental justice matters.**

NRC should establish an Environmental Justice Advisory Board to monitor NRC proceedings and advise the Commission on environmental justice matters. The Advisory Board should be composed of community members, and individuals with environmental justice expertise and experience.

6. **NRC should institutionalize an agency-wide review of environmental justice policies and programs every ten years.**

Finally, the NRC should update its environmental justice policies and programs at least every ten years. The most recent delay of over ten years is unacceptable. As an independent agency that has made a commitment to the implementation of environmental justice goals and values, the NRC can set its own schedule and ensure that it remains up-to-date on all developments in methodology and legal precedents. The ten-year review should be in addition to, and integrated with, the work of the Environmental Justice Advisory Board.

Thank you for this opportunity to submit comments on the very important issue of the NRC's environmental justice policies. Please let me know if you have any questions or if there is any other way I can be helpful.

Sincerely,

s/Diane Curran
Diane Curran