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October 29, 2021

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Subject: Systematic Assessment for How the NRC Addressed Environmental Justice in its Programs, Policies, and Activities. Docket ID: NRC-2021-0137

To whom it may concern,

The New York State Energy Research and Development Authority (NYSERDA) appreciates this opportunity to share comments on the Nuclear Regulatory Commission's important environmental justice initiative referenced above. Environmental justice, through a focus on equity, is a cornerstone of New York State's current energy policy, and we are pleased to share the New York perspective with the Commission. We thank the Commissioners and Staff for their focus on this timely and important initiative.

Our comments are attached. If you have any questions, you may contact me at (518) 862-1090 x3274.

Sincerely,

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Comments of the New York State Energy Research and Development Authority (NYSERDA) on the Nuclear Regulatory Commission’s Systematic Assessment for How the NRC Addressed Environmental Justice in Its Programs, Policies, and Activities

The New York State Energy Research and Development Authority (NYSERDA) appreciates this opportunity to share comments on the Nuclear Regulatory Commission’s important environmental justice initiative as sought in the Federal Register notice entitled Systematic Assessment for How the NRC Addressed Environmental Justice in Its Programs, Policies, and Activities¹ (“Notice”). Environmental justice, through a focus on equity and just transition, is a cornerstone of New York State’s current energy policy, and we are pleased to share the New York perspective with the Commission.

NYSERDA interfaces with the NRC in two primary ways: it is a Part 50 licensee at the Western New York Nuclear Service Center, a site owned in trust for the People of the State of New York that was used as the home of a short-lived nuclear fuel reprocessing facility run by Nuclear Fuel Services, and NYSEDA serves as New York’s nuclear coordinator and NRC State Liaison Office (SLO). The Governor-appointed SLO serves as the key person in each State to keep the Governor informed on the wide variety of issues under the NRC’s jurisdiction and provides the NRC with State information, policies, positions, comments, and other input relevant to NRC’s work. Similarly, New York State’s own legislation (Section 7-101 of the New York State Energy Law) directs NYSEDA to coordinate State programs affecting nuclear and radiological activities in the State and to develop State positions with respect to federal government programs affecting those activities.

As discussed more below, we believe approaches used in New York may be of value to the Commission in assessing opportunities for its approach to environmental justice.

The New York Climate Leadership and Community Protection Act

In 2019, New York passed the Climate Leadership and Community Protection Act (the “Climate Act”). Under this statute, New York works to ensure that all New Yorkers are represented in the State’s transition to a cleaner energy future and benefit from investments and opportunities provided by this historic transition. In this way, the Climate Act seeks to address the same historic inequities as the Commission’s current environmental justice initiative, and its structure may be informative to the Commission. The Climate Act created a Climate Action Council, co-chaired by NYSEDA’s President and CEO (who is also the State’s Liaison Officer) and the Commissioner of the Department of Environmental Conservation. The statutory structure involves a number of advisory groups representing a diverse and inclusive set of stakeholder views.

Of relevance to the Commission’s current initiative, the Climate Act created the Climate Justice Working Group, comprised of representatives from environmental justice communities

¹ 86 Fed. Reg. 36307, July 9, 2021.

statewide, including three members from New York City communities, three members from rural communities, and three members from urban communities in upstate New York, as well as representatives from the State Departments of Environmental Conservation, Health, Labor, and NYSERDA. We would suggest that the Commission may benefit from a similar engagement in communities housing active or decommissioning nuclear power plants. We also suggest that partnering with existing state structures may be of value to the Commission, as discussed further within these comments.

How New York Defines Disadvantaged Communities

New York’s Climate Act focuses specifically on “disadvantaged communities” impacted by historic energy policy. We suggest that this definition may aid the Commission in identifying communities within which to build strong local relationships. The Climate Act identifies disadvantaged communities based on geographic, public health, environmental hazard, and socioeconomic criteria, which includes but are not limited to:

- i. areas burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects;
- ii. areas with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, or members of groups that have historically experienced discrimination on the basis of race or ethnicity; and
- iii. areas vulnerable to the impacts of climate change such as flooding, storm surges, and urban heat island effects.²

The Climate Act calls for the Climate Justice Working Group to further define the definition based on stakeholder input.³ Pending the next iteration of the definition, NYSERDA has developed an interim definition and a resulting map, that NYSERDA has made available on its website at <https://www.nyserda.ny.gov/ny/disadvantaged-communities>. The interim criteria for disadvantaged communities includes communities located within census block groups that meet the HUD 50% Area Median Income threshold, that are also located within the [DEC Potential Environmental Justice Areas](#)⁴ or are located within [New York State Opportunity Zones](#)⁴.

Potential Environmental Justice Areas are defined in New York as United States Census block groups of 250 to 500 households each that, in the Census, had populations that met or exceeded at least one of the following statistical thresholds:

1. At least 52.42% of the population in an urban area reported themselves to be members of minority groups; or

² NY ECL Art. 75, § 0111 (1)(c).

³ NY ECL Art. 75, § 0111(2).

2. At least 26.28% of the population in a rural area reported themselves to be members of minority groups; or
3. At least 22.82% of the population in an urban or rural area had household incomes below the federal poverty level.

New York relies on the federal poverty level and urban/rural designations for census block groups as established by the U.S. Census Bureau.⁴

New York defines Opportunity Zones as low-income census tracts with an individual poverty rate of at least 20 percent and median family income no greater than 80 percent of the area median. New York State has recommended 514 census tracts to the U.S. Department of the Treasury for designation as Opportunity Zones. *See* The Opportunity Zone Program in New York State, available at [Opportunity Zone Program | Empire State Development \(ny.gov\)](#).

We offer New York’s approach as a reference which may help the Commission further define communities impacted by its work, thus enabling meaningful community outreach, particularly in New York but perhaps nationwide as well. We note that Executive Order 14035 uses the term “underserved communities”, which may serve NRC’s purposes well in this endeavor, and which refers to “populations sharing a particular characteristic, as well as geographic communities, who have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life. In the context of the Federal workforce, this term includes individuals who belong to communities of color, such as Black and African American, Hispanic and Latino, Native American, Alaska Native and Indigenous, Asian American, Native Hawaiian and Pacific Islander, Middle Eastern, and North African persons. It also includes individuals who belong to communities that face discrimination based on sex, sexual orientation, and gender identity (including lesbian, gay, bisexual, transgender, queer, gender non-conforming, and non-binary (LGBTQ+) persons); persons who face discrimination based on pregnancy or pregnancy-related conditions; parents; and caregivers. It also includes individuals who belong to communities that face discrimination based on their religion or disability; first-generation professionals or first-generation college students; individuals with limited English proficiency; immigrants; individuals who belong to communities that may face employment barriers based on older age or former incarceration; persons who live in rural areas; veterans and military spouses; and persons otherwise adversely affected by persistent poverty, discrimination, or inequality. Individuals may belong to more than one underserved community and face intersecting barriers.”

We would further emphasize that the process of identifying disadvantaged communities, and the changes to federal programs to address disparate impacts is a collective process that needs to engage government and community stakeholders across a spectrum of disciplines, including housing, transportation, etc. as recognized in Executive Order 14035.

⁴ *See* [Maps & Geospatial Information System \(GIS\) Tools for Environmental Justice - NYS Dept. of Environmental Conservation](#).

Such engagement likely provides the opportunity to better understand how each agency is able to address environmental justice issues. While the Commission’s fee-based budget model may not provide an opportunity for direct allocation of monetary resources, we suggest that the identification of community needs may warrant creative partnerships within the industry and with local and state organizations to ensure that needs of disadvantaged host communities and disadvantaged communities both within the emergency preparedness zone (whether the plume exposure pathway extending about 10 miles in radius around the reactor site, or the 50 mile ingestion pathway as defined here: <https://www.nrc.gov/about-nrc/emerg-preparedness/about-emerg-preparedness/planning-zones.html>), and within the impact zone whereby offline reactors pose an economic hardship to the host community, are addressed.

Finally, we note that equity, a cornerstone of environmental justice, may not be achieved with one-size-fits-all solutions. Certain impacted communities may need specific, tailored approaches that are not relevant to other organizations – the disabled, the incarcerated, nursing home residents, areas with failing infrastructure, areas in need of job growth, etc.

Specific Responses to Questions Asked in the Notice

NYSERDA offers the following specific comments in response to the questions posed in the Federal Register notice.

What is your understanding of what is meant by environmental justice at the NRC?

NYSERDA can identify two separate definitions of environmental justice provided by NRC: the first is found in the 2004 Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions (69 FR 52040)(the “2004 Policy Statement”) at 52041, pulling its definition from *Private Fuel Storage*: “the Commission stated that environmental justice, as applied at the NRC ‘means that the agency will make an effort under [the National Environmental Policy Act] NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid the special impacts attributable to the special character of the community.’” See 69 FR 52041, citing *Private Fuel Storage*, CLI-02-20, 56 NRC 147, 153-55 (2002) and CLI-04-09, 59 NRC 120 (2004).

The second definition, referenced in the Notice, is the definition set forth in President Clinton’s 1994 Executive Order 12898: “[t]he term “environmental justice” refers to the federal policy established in 1994 by Executive Order 12898, which directed federal agencies to identify and address “disproportionally high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations.”” Notice at 36068, citing *In re Entergy Nuclear Operations, Inc.* CLI-15-6, 81 NRC 340, 369 (2015).

NYSERDA suggests that both of these definitions are too narrow. As an initial matter, consideration of environmental justice is well within the NRC’s statutory authority. Congress determined in the Atomic Energy Act that “it is the policy of the United States that the

development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare ... [and that] the development, use, and control of atomic energy shall be directed so as to ... improve the general welfare [and] increase the standard of living”.⁵ The Atomic Energy Act already limits the Commission’s ability to issue licenses only to those licensees “who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish”,⁶ therefore giving the Commission the ability to define the measures it believes support public health and minimize dangers, within which environmental justice considerations necessarily fall.

The 1994 Executive Order, which serves as a meaningful national milestone in the nation’s consideration of environmental justice, directed agencies to assess the impacts of its *programs, policies, and activities*; the 2004 Policy Statement does not put forward a meaningful rationale for limiting the consideration of environmental justice to NEPA only, though of course environmental justice, as a component of NEPA’s required hard look, should be part of all NEPA reviews. By grounding its review of environmental justice within its enabling authority, the Commission has the ability to look beyond the narrow, primarily 10 CFR Part 2-related limitations that have hindered meaningful environmental justice efforts to date (see discussion below). NYSERDA supports a revision or full replacement of the 2004 Policy Statement that captures a more fulsome environmental justice review.

Even within the NEPA context, however, a clearer explanation of the potential impacts of Commission actions on environmental justice (EJ) communities is warranted. In the Indian Point relicensing matter, the Atomic Safety and Licensing Board acknowledged that the Staff had not taken NEPA’s hard look at “whether relicensing Indian Point would cause disproportionate and adverse impacts on the minority and low-income populations within the 50-mile environmental impact area around the plant when compared to the impacts on the non-EJ population within that radius in the improbable, but not impossible, event of a severe accident at Indian Point that releases radiation into the natural environment” in response to a contention submitted by Hudson Riverkeeper and Hudson River Sloop Clearwater.⁷

Although the Board found that the Staff did use a reasonable method for identifying minority and low income populations within the 50-mile radius around Indian Point (using the smallest census geographical unit that contains both minority and income information), the Board found that the Staff failed to: (1) determine whether the environmental justice population would suffer disproportionate and adverse effects during the period of extended operation from relicensing in comparison to those effects that the non-EJ population would experience, and (2)

⁵ 42 USCS 2011(1).

⁶ 42 USC 2133(b)(2).

⁷ *In the Matter of* ENTERGY NUCLEAR OPERATIONS, INC. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 (Nov, 27, 2013), Partial Initial Decision (Ruling on Track 1 Contentions) (“Ruling”) at 382.

determine if the members of the low-income population who cannot afford to, or do not have the freedom to, self-evacuate or effectively shelter-in-place due to substandard housing would be disparately and adversely impacted in comparison to those who have the freedom, financial means, and readily-available modes of transportation to self-evacuate or access adequate shelter. By failing to consider factors peculiar to the EJ community in the event of an accident, the Board found that the Staff failed to identify and adequately weigh effects on low-income and minority communities surrounding Indian Point.⁸ The Commission reversed on appeal on grounds related to the scope of license renewal pleadings,⁹ but the substantive questions – whether disadvantaged populations around a nuclear facility would suffer disproportionate and adverse effects in comparison to those effects that other populations would experience, and if the members of low-income populations who cannot afford to, or do not have the freedom to, self-evacuate or effectively shelter-in-place due to substandard housing would be disparately and adversely impacted in comparison to those who have the freedom, financial means, and readily-available modes of transportation to self-evacuate or access adequate shelter – were not addressed. This current review process affords the Commission an opportunity to holistically address real questions of disparity in disadvantaged communities related to the Commission’s work that could influence the outcomes of regulatory actions in the future.

While environmental justice warrants meaningful consideration in any NEPA review or in resulting adjudicatory analyses, there is no basis for looking at environmental justice only under NEPA. The Commission’s current review should evaluate whether any of its functions disproportionately impact disadvantaged communities. We address one such issue, access to participation in the Commission’s adjudicatory process, below.

Additionally, it is unclear exactly how NRC identifies and defines environmental justice communities. NYSERDA would suggest that a definition that originates with the active input of such communities, possibly through a working group process similar to that under way in New York, and/or by deferring to State designations where such designations exist, may be the most appropriate way to define what amount to micro-level (census block, etc.) community designations.

It is clear that in the decades since Executive Order 12989, merely identifying impacts on disadvantaged communities is not enough; decades later, federal agencies are still asking themselves if these efforts are working. As New York has recognized, support for remedial, resiliency-oriented, and community-strengthening efforts through active stakeholder engagement in decisionmaking, innovative communication methods, and targeted funding are also needed to address environmental injustice. NYSERDA supports the NRC’s constitution of an environmental justice review team¹⁰ but suggests that any team made up of only internal NRC

⁸ *Id.* at 384-85.

⁹ *In the Matter of* ENTERGY NUCLEAR OPERATIONS, INC. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR, CLI-15-6, MEMORANDUM AND ORDER (Mar. 9, 2015) at 61.

¹⁰ See [Charter: Systematic Review of Programs, Policies, and Activities Addressing Environmental Justice \(nrc.gov\)](https://www.nrc.gov/charter).

staff members misses the mark; inclusion of stakeholder views in a collaborative decisionmaking capacity is the goal.

And of course, another change since 1994 is the very clear and acknowledged emergency of climate change as an additional threat to already disadvantaged communities. As New York has recognized in law, “[c]limate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination. Actions undertaken by New York State to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities, control potential regressive impacts of future climate change mitigation and adaptation policies on these communities, and prioritize the allocation of public investments in these areas.”¹¹ The NRC should consider as intertwined issues the impacts of climate change on its facilities as directly relevant to its environmental justice priorities.

How could the NRC expand how it engages and gathers input? What formal tools might there be to enhance information gathering from stakeholders and interested persons in NRC’s programs, policies, and activities?

NYSERDA staff have participated in NRC proceedings for many decades. We appreciate the changes made over the years in response to emerging issues like the COVID-19 pandemic, during which the Commission took meaningful steps to bring its programming online to reach a broad audience, from individual plant-focused meetings to the Regulatory Information Conference. We would suggest that some of these changes become permanent, because they offer meaningful opportunities to participate from afar, or for those with disabilities, and economic or other restrictions that prevent in-person attendance at events.

NYSERDA staff also appreciate the steps taken at a recent Indian Point decommissioning-oriented meeting, whereby a second meeting was scheduled when storm-related impacts truncated remote access to a meeting, and where a transcript was provided for those who could not attend. We believe that resources such as these can engage stakeholders who may work non-traditional hours or who may not be able to attend in-person meetings.

We also appreciate the NRC’s recent efforts to explain its outreach strategy and efforts as to this particular Notice, on its website: [Environmental Justice Public Outreach | NRC.gov](https://www.nrc.gov/pressroom/2020/06/20200615-environmental-justice-public-outreach). This is, in our experience, unprecedented and a very important step that we hope will result in robust local engagement. While NYSERDA regularly receives updates via the State Liaison Office and are aware of similar outreach to local governments, we support targeted outreach contacts at relevant community benefit organizations are critical also. Along with so-named environmental justice organizations, homes for the disabled, nursing homes, hospitals, community centers, and similar organizations can be essential sources of on-the-ground input into a comprehensive understanding of the challenges impacting host communities and the surrounding areas.

¹¹ 75 NY CLS ECL § 1 (7).

We appreciate also Commissioner Baran's Twitter presence, noting in particular his recent tweets about the opportunity to submit comments on this Notice (which was, in one instance, how we learned of an extension of time to submit comments), and believe that social media is an increasingly important and relevant way to reach community-level contacts. We encourage other Commissioners to maintain a social media presence as well, making government more accessible to parties who don't peruse the Federal Register regularly. And of course, many members of disadvantaged communities may lack access to the Internet, posing an ongoing challenge to governmental agencies and underscoring the need to mobilize community organizations for information sharing. The NRC can work with local communities to determine the appropriate methods of communication for that particular community to ensure its members receive notice. It may also be beneficial to establish a broad listserv for the communities around each facility, alerting its subscribers to publications of notice and comment and other NRC announcements.

We note also that, as captured in the Town of Cortlandt's comments to the NRC on this Notice, the lack of early communication opportunities can lead to needless litigation. Establishing open and early channels of communication with affected communities may aid in the efficient use of adjudicatory resources on all sides as well as increasing inclusion of diverse viewpoints in Commission decision-making.

Would you recommend that NRC consider any particular organization's environmental justice program(s) in its assessment? Looking to other Federal, State, and Tribal agencies' environmental justice programs, what actions could the NRC take to enhance consideration of environmental justice in the NRC's programs, policies, and activities?

NYSERDA submits the above discussion regarding New York's approach as a potentially helpful model to aid the Commission in not only seeking input on its decisions, but indeed having stakeholders assist in making the decisions themselves.

Considering recent Executive Orders on environmental justice, what actions could the NRC take to enhance consideration of environmental justice in the NRC's programs, policies, and activities?

As an initial matter and to underscore the steps the Staff can take to further communication with environmental justice stakeholders and make its practice less esoteric, the Executive Orders referenced in this section of the Notice were not identified, and no links or other identifying information was included in the Notice. Staff should not obligate citizens to figure out what the Staff may be asking about, but should make requests for public comment simple, understandable, and friendly to even the most unsophisticated of potential commenters.

That said, NYSERDA’s research indicates that the Notice may be referring to Executive Order 14008,¹² which established a national focus on environmental justice that goes well beyond that of Executive Order 12898, requiring 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.” (emphasis added)

Executive Order 14008, among other things, established the White House Environmental Justice Interagency Council to work with local environmental justice leaders and White House Environmental Justice Advisory Council, and required the Council to develop clear performance metrics to ensure accountability, and publish an annual public performance scorecard of its own implementation. NYSERDA suggests that developing a metrics-based approach may be a helpful way to gauge the Commission’s success in its environmental justice initiatives, as it does here in New York. The Executive Order also required the White House Council on Environmental Quality (CEQ) to create a geospatial climate and economic justice screening tool and publish annual interactive maps highlighting disadvantaged communities.¹³ As referenced above, New York has established a similar map, and we suggest that the NRC could defer to developed State resources where available, and rely on the CEQ map, once completed, in other areas. To the extent that environmental justice advocates may view the map to be rushed or incomplete (see [Environmental Map Delay Spurs Worries of Slowing Equity Effort \(bloomberglaw.com\)](https://www.bloomberglaw.com/environmental-map-delay-spurs-worries-of-slowness-equity-effort)), Staff should consult advocacy organizations in relevant communities and understand whether the use of the federal map would find support among involved stakeholders, deferring to State and local tools where available.

Staff could, and should, also be referring to the following Executive Orders, which are relevant to the Commission’s work, and which should be incorporated into the Commission’s environmental justice policies going forward to the broadest extent possible:

- Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, establishing as “policy of [the Biden] Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality” and that “Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.”¹⁴

¹² Executive Order 14008: Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>

¹³ *Id.* at section 222.

¹⁴ Executive Order 13983 (January 25, 2021), available at <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>

- Executive Order 13990: Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis (announcing the Administration’s commitment to science first in an effort to protect public health and the environment, prioritizing environmental justice and job creation in this effort, and directing agency heads to immediately review all actions taken during the prior administration to determine if any are inconsistent with this policy, and if so, consider suspending, revising, or revoking such actions or policies.)¹⁵
- Executive Order 14030, Climate-Related Financial Risk, establishing a government-wide strategy for assessing and mitigating financial risk to the federal government and associated programs due to climate change, which strategy must advance economic opportunities, workforce development and empowerment, and mitigate negative environmental effects in disadvantaged communities and communities of color.¹⁶
- Executive Order 14035: Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, establishing that it is the policy of the Biden Administration to cultivate a workforce that draws from the full diversity of the Nation, and directing the reestablishment of a coordinated Government-wide initiative to promote diversity and inclusion in the Federal workforce, expanding its scope to specifically include equity and accessibility, resulting in the development and issuance of a Government-wide Diversity, Equity, Inclusion, and Accessibility Strategic Plan.¹⁷

With regard to the latter, NYSERDA has recently issued its own Diversity, Equity, and Inclusion (DEI) Strategic Plan, committing to, among many other things, “[b]uild effective and enduring diversity, equity, and inclusion that represents and reflects the New York State communities we serve and is free of systemic and structural biases, including racism, that are historic barriers to the equitability of opportunity — both internal and external.”¹⁸ We believe that DEI is a corollary and critical partnership component in the path to true and meaningful environmental justice, and we encourage the NRC to join, to the fullest extent possible, federal efforts to commit to DEI within and outside of the NRC as well.

¹⁵ Executive Order 13990 (January 25, 2021), available at <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>

¹⁶ Executive Order 14030 (May 25, 2021), available at <https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk>.

¹⁷ Executive Order 14035 (June 30, 2021), available at <https://www.federalregister.gov/documents/2021/06/30/2021-14127/diversity-equity-inclusion-and-accessibility-in-the-federal-workforce>

¹⁸ <https://www.nysesda.ny.gov/-/media/Files/About/DEI/NYSERDA-DEI-Strategic-Plan-2021-FINAL.pdf>. For more information about NYSERDA’s commitment to DEI, visit <https://www.nysesda.ny.gov/About/Diversity-Equity-and-Inclusion-at-NYSERDA>.

Are there opportunities to expand consideration of environmental justice in NRC programs, policies, and activities, considering the agency's mission? If so, what are they?

As noted above, environmental justice is squarely within the Commission's statutory authority, and the Commission is within the sphere of influence to which the President refers when he states that "[a]ffirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government."¹⁹ In addition to the comments made above, NYSERDA submits that environmental justice cannot be achieved at the NRC without a meaningful review of the overly strict application of screening criteria as barriers to entry into adjudicatory proceedings under 10 C.F.R. Part 2. As an active participant in NRC licensing decisions for more than forty years, New York state government has a long history of both commenting on, and seeking participation in, nuclear licensing decision-making. Regretfully, we have seen many of our fellow stakeholders excluded from meaningfully participating in NRC proceedings due to the overly strict application of procedures that are ostensibly, and ironically, designed to support public participation. 10 C.F.R. § 2.309 is one of those.

In a recent Indian Point adjudicatory proceeding related to financial assurance provided by Indian Point's new first-time owners, New York and local governments (including the host community and surrounding communities) submitted a number of contentions, well supported by affidavits of five subject matter experts.²⁰ Notwithstanding the breadth of qualified expert support raising first-of-a-kind issues with a new decommissioning business model that could impact facilities across the nation, the majority of Commissioners denied New York's request for a hearing. Commissioners Baran and Hanson articulated the problem with the Commission's current approach, with Commissioner Baran dissenting in part, noting that "the majority decision takes an overly strict approach to contention admissibility and inappropriately delves into and decides the merits of aspects of the contentions".²¹ Chairman Hanson stated that he is "troubled by the inordinately high standards we continue to impose on petitioners in license transfer proceedings", finding that "the majority imposes standards that far exceed those provided in our regulations for contention admissibility and ultimately frustrate the opportunity for interested parties to request a hearing at this stage in the proceeding."²²

NYSERDA shares the Chairman's concerns, and asserts that review of the 10 C.F.R. 2.309 standards for admission -- or at least the way the regulation has been implemented by the Commission -- is warranted as an element of the NRC's environmental justice review. By excluding even well-supported contentions, the Commission discourages active participation from groups lacking financial resources, further exacerbating the economic disparity between

¹⁹ Executive Order 13895.

²⁰ Memorandum and Order, CLI-21-01, In the Matter of Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Holtec International, and Holtec Decommissioning International, LLC, Docket Nos. 50-003-LT-3 50-247-LT-3, 50-286-LT-3, 72-51-LT-2 (Indian Point Nuclear Generating Station, Units 1, 2, and 3 and ISFSI) ("Order"), *available at* <https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21015A201>.

²¹ Order, Baran Dissent at 1.

²² Order, Hanson Dissent at 1.

industry groups who have frequent access to the Commission via drop-in meetings and other mechanisms and members of disadvantaged local communities who can afford no such access. As a result of decisions like the recent Indian Point decision, members of affected communities will continue to view investment in subject matter experts for petitions to intervene as an increasingly unworthy use of staff and fundraising time, as it results in no meaningful opportunity for actual participation in NRC decision-making.

NRC Staff recently partnered with a clinic at Harvard University to examine the hearing process to be employed for advanced reactor licensing, and Harvard’s findings share these concerns.²³ The study found an “immense power differential” between industry representatives and intervenors in contested hearings, “creating a power imbalance and mistrust.”²⁴ When combined with the Staff’s practice of supporting the applicant in nearly all adjudicatory matters, the disparity in resources worsens. In a 2009 law review article, a longtime intervenor counsel observed that NRC staff have been in touch with the applicant for many months prior to any hearing process commencing, obtaining information unavailable to intervenors and the public, and queried, “How can it be fair or in aid of full public participation to impose on the public a high burden of production and proof as a prerequisite to participation in a licensing hearing when such a standard is not even applied to the NRC Staff with its vast array of legal and technical resources?”²⁵ If a host state with teams of lawyers and experts cannot obtain the regulatory procedural process afforded it in the NRC’s hearing regulations, how can a community group or affected community individuals ever hope to attain meaningful input into NRC decision-making via the hearing mechanism? We encourage the Commission to direct NRC Staff to expeditiously revisit equitable access to the hearing process, as a result of comments collected in this environmental justice review and in other fora.

Conclusion

In summary, NYSEDA values the Commission’s attention to continually improving its accessibility, relevance, and commitment to members of disadvantaged communities in the furtherance of environmental justice. We believe inclusive models and tools, as New York is currently developing and implementing, may aid the Commission in doing so, and we thank the Commissioners and Staff for the opportunity to share our experiences and approaches to this important matter.

²³ USNRC, Publication of Harvard Negotiation and Mediation Clinical Program (HNMCP) Report, “Moving Toward A Framework For Contested Hearings In The Licensing Of Advanced Reactors,” Prepared For The NRC December 2020 and Nrc Staff Respose [sic] (June 2021).

²⁴ *Id.* at 5.

²⁵ Anthony Z. Roisman, Erin Honaker, and Ethan Spaner, *Regulating Nuclear Power In The New Millennium (The Role Of The Public)*, 26 Pace Envtl. L. Rev. 317 (2009) at 325 (available at: <https://digitalcommons.pace.edu/pelr/vol26/iss2/2>). A summary of the treatment of environmental justice contentions in adjudicatory hearings can be found at Eric Jantz, ENVIRONMENTAL RACISM WITH A FAINT GREEN GLOW, *Natural Resources Journal*, 58(2) at 265–268, available at <http://www.jstor.org/stable/26509979>.