

## Recommendation 1: Revise the Environmental Justice Policy Statement

### Background

Background and history related to the Environmental Justice (EJ) Policy Statement are in Enclosures 1 and 9.<sup>1</sup> The EJ Policy Statement arose following litigation and specifically addresses the NRC's consideration of EJ in regulatory and licensing actions. It has not been evaluated for updates or revised since its issuance in 2004.

### What the Staff Learned

As part of this EJ review, the staff received numerous comments on the 2004 EJ Policy Statement representing a variety of perspectives. For example, some commenters asserted the EJ Policy Statement serves as a well-developed EJ framework, but others thought it insufficient. Some commenters supported continuing to implement EJ through NEPA, as set forth in the current EJ Policy Statement, while others suggested implementing EJ beyond NEPA under the Atomic Energy Act and Title VI of the Civil Rights Act. Commenters also suggested that the EJ Policy Statement should be revised for clarity to reflect a more modern understanding of EJ and address Tribal related issues.

The staff analyzed statutory and legal authorities to determine if the underlying principles of the EJ Policy Statement may have changed or if enhancements are warranted. The staff also considered issues affecting NEPA reviews including, for example, issues related to identification of EJ communities and communication and consultation with Tribal nations that have EJ concerns. To inform its review, the staff considered benchmarking data, feedback from internal and external stakeholders, and consultations with Tribal nations. Further, the staff looked to comments and responses that the agency received on the 2003 draft EJ Policy Statement.<sup>2</sup>

The EJ Policy Statement addresses how EJ is treated in NRC regulatory and licensing actions. In this capacity, the EJ Policy Statement has and continues to serve the agency well. However, based on its review, the staff concluded the EJ Policy Statement should be revised to address consistency, transparency, and clarity issues, including implementation beyond NEPA. Revisions would improve efficiency, support the NRC's Strategic Goal to "inspire stakeholder confidence in the NRC," as well as support the Principles of Good Regulation.<sup>3</sup>

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<sup>1</sup> Enclosure 9 includes a legal analysis that contains non-public attorney-client information.

<sup>2</sup> Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, Final Policy Statement, 69 Fed. Reg. 52,040, 52,041 (Aug. 24, 2004) (EJ Policy Statement) (summarizing comments received and responses thereto, including comments from the Environmental Protection Agency, dated February 4, 2004 (ADAMS Accession No. [ML040970507](#))).

<sup>3</sup> Strategic Plan, Fiscal Years 2022-2026, NUREG-1614, Vol. 8 (draft report for comment), at 11 ([ML21260A054](#)) ("To be successful, the NRC must not only excel in carrying out its mission but must do so in a manner that inspires confidence."). The final Strategic Plan, Fiscal Years 2022-2026, NUREG-1614, Vol. 8 will be published in April 2022 and will be available at <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1614/index.html> (last visited March 16, 2022).

## Recommendation

The staff is recommending that the Commission revise the EJ Policy Statement, and at a minimum, the areas identified in this paper be considered as part of that revision. As part of the revision process, stakeholders, including EJ communities and Tribal nations, should be engaged on potential revisions and opportunities for feedback during that process should be provided. The staff's view is that specific language would be best achieved through this inclusive decision-making process, and, accordingly, the staff is not suggesting specific language for potential revisions at this time.<sup>4</sup> A draft revised EJ Policy Statement would be provided to the Commission for review and approval, consistent with the process used for the existing EJ Policy Statement. For resource information regarding this recommendation, see Enclosure 13.

The staff recommends that the following areas, at a minimum, be considered in any EJ Policy Statement revision.<sup>5</sup>

### *1) Use plain language.*

As described above, the EJ Policy Statement was borne out of largely legal concerns related to addressing EJ in licensing and regulatory matters. Accordingly, the language and tone are very legal in nature, discussing caselaw, legal requirements, and the limits of the NRC's authority. During its outreach, the staff heard both internally from NRC staff and externally from stakeholders that the EJ Policy Statement does not use plain language, focuses too much on what the Commission cannot do instead of what it can do, and accordingly lacks transparency and clarity. The staff also heard that the agency should look to the NRC's Tribal Policy Statement as a more positive example of tone, clarity, and transparency.

If the Commission approves revising the EJ Policy Statement, as part of that revision, there should be a focus on plain language, which should include consideration of tone, clarity, and transparency. Such an enhancement would be consistent with comments the staff heard about the need to use plain language in agency documents to support understanding and accessibility.

### *2) Clarify how EJ is addressed at the NRC.*

The EJ Policy Statement explains that Executive Order (EO) 12898 directed agencies to "make achieving [EJ] 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."<sup>6</sup> It does not,

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<sup>4</sup> If, however, the Commission chooses not to update the EJ Policy Statement, the NRC staff would continue to follow the existing policy, and address matters related to consistency, clarity, and transparency on a case-by-case basis, within the parameters of the existing policy.

<sup>5</sup> If the Commission approves revising the EJ Policy Statement, revisions may necessitate revisions to other agency documents, such as guidance documents and policy statements, including for example Agreement State Policy Statements.

<sup>6</sup> EJ Policy Statement, 69 Fed. Reg. at 52,041 (*quoting* Exec. Order No. 12898, Section 1-101, 59 Fed. Reg. 7629 (Feb. 16, 1994)). Also, *quoting Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002), the EJ Policy Statement explains that EJ, as

however, specifically define EJ, although the NRC’s Commission-approved 1995 EJ Strategy does include a “working definition” of EJ.<sup>7</sup> While the 1995 EJ Strategy is referenced in the background section of the EJ Policy Statement, the relationship between the EJ Policy Statement and 1995 EJ Strategy is not addressed in the EJ Policy Statement.

The staff heard that there is not a common understanding both internally and externally of how EJ is addressed and what it means at the NRC, and that various stakeholders have different definitions and concepts of EJ. In addition, the staff found through its benchmarking that some Federal and State agencies define EJ to include “meaningful engagement,” a concept addressed in the 1995 EJ Strategy, but not the EJ Policy Statement.<sup>8</sup>

Clarifying how NRC addresses EJ in the Policy Statement, including the relationship between the EJ Policy Statement and 1995 EJ Strategy, would enhance transparency and clarity, and support the NRC’s Principles of Good Regulation.<sup>9</sup>

3) *Provide a full and clear picture of legal authorities pertinent to EJ matters.*

The Commission’s EJ Policy Statement does not present a full and clear picture of the Commission’s legal authorities with respect to EJ issues. Although EJ does not, in and of itself, create a legal right or a legal remedy, it does provide another lens through which to view existing statutory mandates to help ensure that the NRC appropriately considers disparate impacts to EJ communities and Tribal nations from agency activities.

The EJ Policy Statement explains that the NRC implements EJ in its licensing and regulatory programs only through its NEPA process. The Commission’s position in the EJ Policy

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applied at the NRC, “means that the agency will make an effort under 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 special impacts attributable to the special character of the community.”

<sup>7</sup> Nuclear Regulatory Commission, Environmental Justice Strategy, at 1 n.1, March 1995 ([ML20081K602](#)).

<sup>8</sup> While EJ is not defined in regulation or statute, *Cooper, et al., v. Meritor, Inc. et al.*, 2019 WL 1028530 (Dist. Ct. N.D. Miss) (2012) (quoting Nicholas C. Christiansen, Environmental Justice: Deciphering the Maze of a Private Right of Action, 81 MISS. L.J. 843, 844–45 (2012) (“there is no universally accepted definition of environmental justice.”)), some agencies use a similar definition. The Environmental Protection Agency (EPA), Department of Energy (DOE), and Department of Transportation (DOT) define EJ and include the concept of meaningful involvement. See EPA, “Environmental Justice,” available at <https://www.epa.gov/environmentaljustice> (last visited Feb. 8, 2022); DOE, “What is Environmental Justice,” available at <https://www.energy.gov/lm/services/environmental-justice/what-environmental-justice> (last visited Feb. 9, 2022); DOT, “U.S. Department of Transportation Actions to Address Environmental Justice in Minority and Low-income Populations, DOT Order 5610.2C, available at <https://www.transportation.gov/sites/dot.gov/files/Final-for-OST-C-210312-003-signed.pdf> (last visited Jan. 20, 2022).

<sup>9</sup> The staff recognizes that EJ is currently a dynamic area, and the meaning of EJ is being discussed throughout the government. See, e.g., White House Environmental Justice Advisory Council, Interim Final Recommendations: Justice40 Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions, at 79 (May, 21, 2021), available at [https://www.epa.gov/sites/default/files/2021-05/documents/whejac\\_interim\\_final\\_recommendations\\_0.pdf](https://www.epa.gov/sites/default/files/2021-05/documents/whejac_interim_final_recommendations_0.pdf) (last visited Jan 20, 2022) (recommending EO 12898 be revised to include a definition of EJ); H.R.2021 - Environmental Justice For All Act; S.2630 - Environmental Justice Act of 2021 (draft legislation proposing definitions for EJ) (March and August 2021).

Statement stems from the *Louisiana Energy Services (LES)*<sup>10</sup> and *Private Fuel Storage (PFS)*<sup>11</sup> decisions where the Commission explained that “[t]he only ‘existing law’ conceivably pertinent here is NEPA ....” As described further in Enclosure 9 and as noted in comments, the EJ Policy Statement does not recognize there may be other statutory authorities beyond NEPA that may be pertinent to EJ matters. Revisions to provide a full and clear picture of applicable legal authorities would provide transparency and clarity, supporting the Principles of Good Regulation.

- 4) *Clarify the EJ Policy Statement does not preclude consideration of EJ in Title VI of the Civil Rights Act programs and activities.*

The NRC currently does not implement EJ through its Title VI program. The EJ Policy Statement states that NEPA is the only available statute under which the NRC can carry out the goals of EO 12898. Because the EJ Policy Statement does not address implementation of EJ beyond regulatory and licensing actions,<sup>12</sup> questions have arisen as to whether the Commission intended to preclude implementation of EJ through Title VI. Commenters also raised similar issues asserting that the NRC cannot avoid its obligations under Title VI with respect to EJ and that the EJ Policy Statement language that NEPA is the only available statute to carry out the goals of EO 12898 is a statement without justification that should be clarified.

Clarifying that the EJ Policy Statement does not preclude consideration of EJ in NRC Title VI programs and activities would provide transparency as to whether EJ considerations can be applied to Title VI programs and activities. In addition, such clarification would be consistent with the Presidential Memorandum accompanying EO 12898, practices of other Federal agencies, as well as the 1995 Commission-approved EJ Strategy, which address Title VI. For additional discussion of this issue, see Enclosure 9.

- 5) *Clarify the discussion of discrimination in regulatory and licensing actions.*

As described in Enclosure 1, in the *LES* proceeding, and in the subsequent EJ Policy Statement, the Commission stated that racial motivations and fairness and equity issues are not cognizable under NEPA. The Commission explained that the focus of the EJ review should be on “identifying and weighing disproportionately significant and adverse impacts on minority and low-income populations that may be different from the impacts on the general population.”<sup>13</sup> The EJ Policy Statement does not, however, clearly address the Commission’s position on racial motivation or other forms of discrimination in regulatory and licensing actions in the context of the NRC’s mission, nor does it address what could happen if there was the potential for such discrimination, even if outside the NRC’s regulatory authorities. Accordingly, revisions should consider clarifying that racial motivation or other forms of discrimination in regulatory and licensing actions is unacceptable and reinforce that, despite the NRC’s limited jurisdiction in this area, concerns about potential discrimination outside of the scope of NEPA or other statutory antidiscrimination statutes (e.g., Title VI) will, to the extent possible, be raised with the appropriate Federal authorities. Clarifying this area would enhance transparency for internal

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<sup>10</sup> *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

<sup>11</sup> *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002).

<sup>12</sup> As noted in Enclosure 1, the NRC does not have authority to enforce Title VI in its licensing process. EJ Policy Statement, 69 Fed. Reg. at 52,046 n. 2.

<sup>13</sup> *Id.* at 52,045.

and external stakeholders and would be consistent with EO 13985 principles in that it would encourage engagement with certain communities.<sup>14</sup> For further discussion of this issue, see Enclosure 9.

6) *Address confusion, inconsistencies, and guidance for NRC environmental review processes and activities.*

The Commission intended for the EJ Policy Statement to provide Commission-approved clarification of the treatment of EJ issues in NRC regulatory and licensing actions.<sup>15</sup> In addition, the Commission stated that it also intended to clarify certain procedures for identifying and weighing significant adverse environmental impacts on EJ populations.<sup>16</sup> Accordingly, the EJ Policy Statement includes specifics about how EJ should be addressed in certain situations, and references applicable guidance documents.

The staff learned through its outreach that there has been confusion and inconsistency in the application and implementation of the EJ Policy Statement. For example, as noted by commenters and NRC staff, the EJ Policy Statement's discussion of EJ in environmental assessments seems inconsistent and has caused confusion. In one place the EJ Policy Statement notes that most environmental assessments (EAs) will not include EJ analyses, but "if there is a clear potential for significant offsite impacts from the proposed action then an appropriate EJ review might be needed."<sup>17</sup> In another place, the EJ Policy Statement notes that where a proposed action has a clear potential for offsite impacts to EJ communities, "an EJ analysis will be done during the preparation of an EA."<sup>18</sup> Revisions could address confusion that has resulted from this language.

Similarly, stakeholders raised questions related to how the NRC identifies EJ populations and the use of "significantly" and "in greater detail." The EJ Policy Statement explains that "significantly" is "defined by NRC staff guidance to be 20 percentage points," and "[a]lternatively, if either the minority or low-income population percentage in the impacted area exceeds 50 percent, EJ matters are considered in greater detail."<sup>19</sup> In 2016, the Federal Interagency Working Group on Environmental Justice and NEPA Committee issued its "Promising Practices for EJ Methodologies in NEPA Reviews" report,<sup>20</sup> which introduces the "No-Threshold" analysis approach to identify EJ populations regardless of population size. Many other Federal agencies use this approach.<sup>21</sup> With regard to "greater detail," the EJ Policy Statement explains that "[i]f the percentage in the impacted area significantly exceeds that of the State or the County

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<sup>14</sup> See Advancing Racial Equity and Support for Underserved Communities through the Federal Government, Exec. Order No. 13985, Sec. 8, "Engagement with Members of Underserved Communities," 86 Fed. Reg. 7009 (Jan. 20, 2021).

<sup>15</sup> EJ Policy Statement, 69 Fed. Reg. at 52,041.

<sup>16</sup> *Id.* at 52,042.

<sup>17</sup> *Id.* at 52,047.

<sup>18</sup> *Id.* at 52,045.

<sup>19</sup> *Id.* at 52,048.

<sup>20</sup> Promising Practices for EJ Methodologies in NEPA Reviews, March 2016, available at [https://www.epa.gov/sites/default/files/2016-08/documents/nepa\\_promising\\_practices\\_document\\_2016.pdf](https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf) (last visited Jan. 11, 2022).

<sup>21</sup> As of the date of this paper, the Federal EJ Interagency Council (formerly the Environmental Justice Interagency Working Group) NEPA Committee had initiated the process to update and revise the 2016 Promising Practices Report. Since NRC staff contributed to the development of the 2016 report, the Chair of the NEPA Committee has requested NRC staff participation in the update.

percentage for either the minority or low-income population then EJ will be considered in greater detail.”<sup>22</sup> In a 2007 adjudicatory decision, the Commission explained that the question at the “heart of a ‘greater detail’ review [is]: are there potentially significant environmental impacts to minority or low-income populations?” and found that the NRC staff’s discussion in the case at issue reflected a greater detail review.<sup>23</sup> Updating the EJ Policy Statement to reflect more recent EJ caselaw, like this example, and guidance (LIC-203 and NUREG-1748 are referenced in the EJ Policy Statement), would help address questions and improve consistency.

Another example is a need for clarification in the relationship between the NRC’s Tribal Policy Statement and EJ Policy Statement. The Tribal Policy Statement was issued in 2017, 13 years after the EJ Policy Statement. Tribal programs and activities are not addressed in the EJ Policy Statement, and it is not clear how these Policies relate. Meaningful government-to-government engagement is critically important for Tribal nations, just as meaningful engagement is important to EJ communities. The NRC’s Tribal Policy Statement, and related guidance, sets forth ways to meaningfully conduct government-to-government engagement with federally recognized tribes. Revising the EJ Policy Statement to mention the Tribal program and the Tribal Policy Statement would provide important updates and clarity.

A final example is the need to help clarify how EJ applies to Agreement States. The NRC has no authority to require implementation of EJ in an Agreement State’s regulatory program once the NRC has discontinued its authority (see Enclosure 7 for additional information on the NRC’s Agreement State Program authorities). The NRC could, however, take the opportunity in the EJ Policy Statement to encourage Agreement States to support implementation of EJ in their regulatory programs. For example, the NRC took a similar approach with its Safety Culture Policy Statement, which like EJ, is a matter the NRC cannot require States to implement. In the case of the Safety Culture Policy Statement, the NRC “encourage[d] the Agreement States, Agreement State licensees, and other organizations interested in nuclear safety to support the development and maintenance of a positive safety culture, as articulated in [that] Statement of Policy.”<sup>24</sup> Including such a statement in the EJ Policy Statement would clarify the distinction between how the NRC and Agreement States implement EJ, and encourage EJ in Agreement State programs, as appropriate.

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<sup>22</sup> EJ Policy Statement, 69 Fed. Reg. at 52,048.

<sup>23</sup> *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 244, 247 (2007).

<sup>24</sup> Final Safety Culture Policy Statement, 76 Fed. Reg. 34,773, 33,777 (June 14, 2011).