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NUCLEAR ENERGY INSTITUTE

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December 4, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

SUBJECT: Comments on Draft Title VI Guidance
(65 Fed. Reg. 39650 – June 27, 2000)

These comments are submitted by the Nuclear Energy Institute (NEI),[1] on behalf of the nuclear energy industry, in response to the U.S. Environmental Protection Agency's *Federal Register* notice seeking public comment on the Draft Title VI Guidance that EPA promulgated June 27, 2000. The *Federal Register* notice promulgated draft guidance for EPA assistance recipients administering environmental permitting programs (Draft Recipient Guidance) and draft revised guidance for investigating Title VI administrative complaints challenging environmental permits (Draft Revised Investigation Guidance). The latter guidance is intended to replace the *Interim Guidance for Investing Title VI Administrative Complaints Challenging Permits (Interim Guidance)* issued in February 1998.

The EPA guidance is intended to assist recipients of EPA financial assistance in implementing environmental permitting programs in compliance with Title VI of the Civil Rights Act of 1964, as amended. Although Title VI does not directly apply to EPA, EPA has the authority to ensure that local or state agencies, or other entities receiving financial assistance from EPA, do not, in the course of their activities, discriminate on the basis of race, color, or national origin either intentionally or through programs that have a discriminatory affect based on race, color, or national origin.

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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In addition to the express terms of the Civil Rights Act and cases interpreting federal agency responsibilities under that Act, EPA also cites Executive Order 12898 (59 Fed. Reg. 7629; February 11, 1994), *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, as further authority for EPA to ensure that it conducts its activities in a manner that its programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefit of, or subjecting persons to discrimination under such programs, policies and activities, because of their race, color, or national origin. In accordance with the Executive Order and an accompanying "Memorandum on Environmental Justice for the Heads of All Departments and Agencies, February 14, 1994," federal agencies are to identify and address, as appropriate, disproportionately high and adverse human health and environmental effects of their programs, policies, and activities on minority populations and low-income populations. Critically important to federal agencies regarding the application of Executive Order 12898 is Section 6-609, *Judicial Review*. That provision states unequivocally that the Executive Order is "intended only to improve the internal management of the Executive Branch and is not intended to, nor does it create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by party against the United States, its agencies, its officers, or any person."

Since the issuance of the Executive Order, the concept of "environmental justice" has been applied in a variety of federal agency licensing and permitting proceedings in ways to obstruct the siting of facilities despite their compliance with all applicable laws and regulations. The effect has been to subvert the fundamental precepts of the Executive Order by allowing it to be used as a mechanism to thwart legitimate economic development. The explicit terms of the Executive Order demonstrate that it was only intended to affect the government's internal management and not the private rights of any person or entity. However, there appears to be a growing tendency to read into environmental justice a governmental responsibility to affect (i.e., change) decisions regarding siting, permitting, and other activities involving governmental approval of private actions.

EPA correctly notes that neither Executive Order 12898 nor EPA guidelines create any new legal rights or obligations. Neither the Executive Order nor the EPA guidelines have the legal authority to create any new enforceable substantive or procedural law, as the Executive Order explicitly acknowledges.

As a matter of policy, both Executive Order 12898 and the EPA guidelines encourage early and frequent public participation in the permitting process, which is also a laudable goal. However, neither Executive Order 12898 nor the EPA

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guidelines have the legal authority to mandate the adoption of expanded public participation processes that are "suggested," and the failure of a permitting authority to adopt additional "suggested" procedures does not make the permitting process unlawful.

Unless the application of "environmental justice" is limited in a manner consistent with the explicit language of the Executive Order, there could be an enormous economic impact on the domestic economy. An expansion of the Executive Order beyond its terms could adversely affect the ability of many American businesses to site facilities or develop additional facilities on sites already in use, and thus substantially reduce commerce that can be brought into economically disadvantaged areas. There is a significant risk that federal agency licensing and permitting proceedings could result in grave injustice to those whom they are designed to protect.

Although the EPA proposed guidance, as opposed to the Interim Guidance, does not directly address the application of Executive Order 12898 in the context of guidance to financial assistance recipients, the likelihood is that the concept will continue to be raised in that context. Therefore, it would be beneficial for EPA to articulate its position regarding the application of Executive Order 12898 to EPA financial assistance recipients, individuals or entities involved in permitting processes conducted by those agencies, and to members of the general public. A critical part of that discussion should be the recitation of the scope of the Executive Order, including a clear statement that the Executive Order creates no new rights or responsibilities of any person, organization or party. Such a clarification should eliminate much of the disquiet that greeted EPA's Interim Guidance when it was promulgated.

Unfortunately, neither Executive Order 12898 nor the EPA guidelines establish specific criteria, allowing environmental justice issues to be inferred solely because a site for which a permit application has been submitted may be in an area where there is a sizeable minority population or a low income population. A site selection process, using objective engineering, technical and environmental criteria, cannot legally be prohibited because the area in which in it is located has a high minority or low income population. Unfortunately, the lack of specificity with which such concepts as "disparate impacts," "high and disproportionate impacts" and similar terms are used in the environmental justice context will fail to bring any stability to the permitting processes where a complaint is raised. For example, proximity to a facility should not be the only criteria for determining whether a "disparate impact" will occur in the neighboring community, given the context for which many positive benefits might also impact that same community. EPA should articulate the

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criteria by which it will determine whether a proposed facility would result in a "disparate impact" on that community and how other terms used in the "environmental justice" context will be applied to enable stability to be achieved in permitting processes. Comparable changes should be made to EPA's *Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, issued April 1998.

The nuclear energy industry supports the significant changes that EPA has made in superseding the 1998 Interim Guidance with the more thoughtful approach taken in the Draft Recipient Guidance and Draft Revised Investigation Guidance. However, further clarification is necessary as described above. Further, the nuclear energy industry recommends for EPA's consideration the very thoughtful comments filed by the Business Network for Environmental Justice.

Please fell free to contact me at 202.739.8139 if you have any questions concerning these comments or to discuss any other matters raised by the EPA's draft guidance.

Sincerely,

Robert W. Bishop

(Transmitted by e-mail. Hard copy to follow by regular mail.)

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