

## Environmental Justice Background and Chronology

### Issuance of Executive Order 12898 on Environmental Justice and the Nuclear Regulatory Commission's Response, February–March 1994

On February 11, 1994, President Clinton issued Executive Order (EO) 12898, directing each Federal agency to “make achieving environmental justice 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>1</sup> The EO called for the creation of a Federal Interagency Working Group on Environmental Justice (EJ IWG) tasked with providing guidance to Federal agencies on criteria for identifying impacts on EJ populations.<sup>2</sup> The EO also directed Federal agencies to develop an agency-specific EJ Strategy.<sup>3</sup> As explained in EO 12898, the order does not “create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law” and creates no right of judicial review.<sup>4</sup> Independent agencies, including the Nuclear Regulatory Commission (NRC), were not required to follow the terms of EO 12898, but were “requested to comply with the provisions of [the] order.”<sup>5</sup>

A separate memorandum to heads of Federal departments and agencies accompanying EO 12898 underscored the importance of certain provisions of existing law, including Title VI of the Civil Rights Act and the National Environmental Policy Act (NEPA), to prevent minority and low-income communities from being subject to disproportionately high and adverse environmental effects.<sup>6</sup> The President specifically recognized the importance of procedures under NEPA for identifying and addressing EJ concerns. The memorandum stated that “each Federal agency shall analyze the environmental effects, including human health, economic, and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA].” The memorandum particularly emphasized the importance of NEPA’s public participation process, directing that “each federal agency shall provide opportunities for community input in the NEPA process....” The memorandum also referenced Title VI of the Civil Rights Act and explained that “[e]nvironmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities.”

In a letter to the President dated March 31, 1994, former NRC Chairman Ivan Selin stated, the NRC would “endeavor to carry out the measures set forth in Executive Order 12898” and the accompanying memorandum.<sup>7</sup>

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<sup>1</sup> Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (EO 12898).

<sup>2</sup> *Id.* at Sec. 1-102.

<sup>3</sup> *Id.* at Sec. 1-103.

<sup>4</sup> *Id.* at Sec. 6-609.

<sup>5</sup> *Id.* at Sec. 6-604.

<sup>6</sup> Memorandum from The White House to the Heads of All Departments and Agencies, “Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (Feb. 11, 1994) (Presidential Memorandum).

<sup>7</sup> Letter from NRC Chairman Ivan Selin to the President, March 31, 1994. (ADAMS Accession No. [ML033210526](#)).

## Commission's 1995 Environmental Justice Strategy, March 1995

As discussed above, one of the measures outlined in EO 12898, Section 1-103, required Federal agencies to develop EJ strategies that assure the consideration of EJ in each agency's programs, policies, and activities. The central purpose for the EJ Strategy was to promote the enforcement of health and environmental laws, assure greater public participation, improve research and data collection related to the health and the environment of minority and low-income populations, and identify different patterns in the consumption of natural resources in these populations.

In March 1995, the Commission approved the NRC's EO 12898 "Environmental Justice Strategy" (1995 EJ Strategy).<sup>8</sup> The stated goal of NRC's 1995 EJ Strategy "is to integrate environmental justice into the conduct of all pertinent activities at the agency primarily in the NRC's fulfillment of its NEPA responsibilities." The NRC also used the following working definition of EJ in the development of the strategy, "environmental justice means the fair treatment and meaningful involvement of all people, regardless of race, ethnicity, culture, income or educational level with respect to the development, implementation and enforcement of environmental laws, regulations and policies."

The 1995 EJ Strategy contains five principles of implementation. The first principle is integration of EJ into NRC's NEPA activities, with greater emphasis being placed on discussing impacts on minority and low-income populations when preparing NEPA documents.

The second principle is to continue senior management involvement. In this regard, the EJ Strategy states that the NRC Environmental Justice Group, whose members are senior agency officials, will continue to provide guidance in this area. It also states that "[a]n Environmental Justice Coordinator has been appointed to ensure appropriate policy information flow among the different entities within the NRC, as well as with outside interested members of the public."<sup>9</sup>

The third principle is openness and clarity and notes that agency positions should be readily understood and easily applied, which is of particular importance when dealing with EJ issues.

The fourth principle is "Seeking and Welcoming Public Participation," which notes that the NRC maintains regular communication with a broad spectrum of entities such as States, Tribal nations, members of the public, and other agencies. The principle also states that NRC management is committed to improving its outreach efforts with stakeholders, including EJ populations.<sup>10</sup>

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<sup>8</sup> Staff Requirements Memorandum, COMSECY-95-013 - Environmental Justice Strategy (March 24, 1995) (ML003756575) (non-public). The NRC submitted its draft strategy to the Environmental Protection Agency in December 1994 ([ML20077F649](#)) and submitted its final EJ Strategy to the Environmental Protection Agency in March 1995 ([ML20081K602](#)). The NRC's 1995 EJ Strategy, along with EJ strategies from the Federal agencies and Executive branch offices named in EO 12898, comprising the members of the EJ IWG, were made public in June 1995. Interagency Working Group on Environmental Justice: Notification of Availability of Final Federal Agency Environmental Justice Strategies, 60 Fed. Reg. 30,871 (June 12, 1995).

<sup>9</sup> NRC Environmental Justice Strategy, March 1995 ([ML20081K602](#)).

<sup>10</sup> *Id.*

Finally, the fifth principle is to “Continue Review and Monitoring of Title VI Activities” and notes the NRC’s commitment to monitoring Title VI activities.<sup>11</sup>

The 1995 EJ Strategy included an attachment outlining specific projects where the NRC was addressing EJ. At the time of issuance, the NRC had a designated Environmental Justice Coordinator, oversight group (comprised of senior agency officials), and a representative to the Federal EJ IWG.

### **Council on Environmental Quality Environmental Justice Guidance, December 1997**

The Council on Environmental Quality (CEQ) has oversight of the Federal government’s compliance with EO 12898 and NEPA.<sup>12</sup> In consultation with EPA, the EJ IWG, and other affected agencies, CEQ developed guidance to further assist Federal agencies with their NEPA procedures so that EJ concerns are effectively identified and addressed. The NRC commented on several draft versions of the guidance,<sup>13</sup> and on December 10, 1997, the CEQ issued “Environmental Justice, Guidance Under the National Environmental Policy Act.”<sup>14</sup> Subsequently, staff in the offices of Nuclear Reactor Regulation and Nuclear Material Safety and Safeguards each developed EJ guidance for NRC NEPA activities (LIC-203, Revision 4 and NUREG-1748, respectively) using the CEQ guidance as the model.<sup>15</sup>

In CEQ’s guidance, there are several provisions in EO 12898 that are important when identifying and addressing EJ concerns in the NEPA process, in particular: (1) periodically reviewing and revising agency EJ strategies; (2) recognizing the importance of incorporating research, data collection, and analysis, and data on exposure issues into NEPA analyses, as appropriate; (3) collecting, maintaining, and analyzing information on patterns of subsistence consumption of fish, vegetation, or wildlife; and (4) ensuring effective public participation and access to information within the NEPA process.<sup>16</sup>

CEQ’s guidance also noted that the President’s memorandum accompanying EO 12898 identified important ways to consider EJ under NEPA, including: “1) analyze the environmental effects, such as human health, economic, and social effects of federal actions, including effects on minority and low-income populations, and Indian tribes; 2) [r]emediation measures identified as

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<sup>11</sup> *Id.* The 1995 EJ Strategy explains that the NRC’s financial assistance programs under Title VI of the Civil Rights Act are “limited to funding training and travel under Section 274 of the Atomic Energy Act of 1954 as amended, in connection with States assuming certain regulatory authority over specified nuclear materials, and the award of grants for the support of basic and applied scientific research and for the exchange of scientific information.”

<sup>12</sup> Environmental Justice, Guidance Under the National Environmental Policy Act (Dec. 10, 1997) ([ML13022A298](#)) (1997 CEQ EJ Guidance), at 1.

<sup>13</sup> Letter to Mr. Bradley M. Campbell, Associate Director for Toxics and Environmental Protection, Council on Environmental Quality from Hugh L. Thompson, Jr., Deputy Executive Director for Regulatory Programs, NRC, April 25, 1997; Letter to Mr. Zach Church, Office of Management and Budget, from Hugh L. Thompson, Jr., Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support, May 10, 1996 ([ML20141A554](#)).

<sup>14</sup> See generally 1997 CEQ EJ Guidance.

<sup>15</sup> NUREG-1748, “Environmental Review Guidance for Licensing Action Associated with NMSS Program,” Final Report, (Aug. 2003) ([ML032450279](#)); LIC-203, Revision 4, “Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues,” (July 13, 2020) ([ML20016A379](#)).

<sup>16</sup> 1997 CEQ EJ Guidance, at 3-4.

part of an environmental review ... should, whenever feasible, address significant and adverse environmental effects of proposed federal actions on minority and low-income populations and Indian tribes ... ; and 3) provide opportunities for effective community participation in the NEPA.”<sup>17</sup> The memorandum also notes that Environmental Protection Agency is responsible for ensuring that Federal agency NEPA analyses and documentation have appropriately addressed environmental effects on minority and low-income populations and Indian tribes, including human health, social, and economic effects.<sup>18</sup>

### **NRC’s Statutory Authorities**

As noted above, EO 12898 did not create any new legal rights or remedies; accordingly, agencies were to implement EJ within existing statutory authorities. NRC statutory authorities relevant to this EJ assessment include the Atomic Energy Act (AEA), NEPA, and Title VI of the Civil Rights Act. Background information for each is discussed in turn below.

#### **NRC’s Statutory Authority Under the AEA and NEPA**

The AEA provides the NRC with statutory authority to regulate the civilian use of nuclear materials and facilities in the United States.<sup>19</sup> As a general matter, there are certain considerations that must be included in the NRC’s deliberations on regulatory matters, and other considerations that may be considered under the NRC’s discretionary authority. Specifically, Section 182 of the AEA requires the Commission to take those actions it deems necessary to ensure that “the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public.” Under applicable caselaw, the NRC must have “reasonable assurance” that there is “adequate protection” of public health and safety before approving a licensing action.<sup>20</sup> The AEA also provides the NRC with discretionary authority to take measures, beyond those needed to achieve adequate protection, to protect health and to minimize danger to life or property as the Commission deems necessary or desirable.<sup>21</sup> The NRC has interpreted its authority under the AEA as being limited to the consideration of radiological health and safety and common defense and security in NRC licensing and regulatory proceedings.<sup>22</sup>

Nevertheless, the NRC has some limited authority to consider non-radiological hazards in certain instances. Specifically, under Section 84 of the AEA, the NRC has statutory authority to

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<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> See Presidential Memorandum at 2.

<sup>19</sup> 42 U.S.C. § 2011 *et seq.*

<sup>20</sup> *Power Reactor Development Co. v. Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO*, 367 U.S. 396, 405-6 (1961); *Nader v. Ray*, 363 F. Supp. 946, 954 (D.D.C. 1973).

<sup>21</sup> See, e.g., AEA §§ 103 and 161. See also *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 117 (D.C. Cir. 1987); *Union of Concerned Scientists v. NRC*, 880 F.2d 552 (D.C. Cir. 1989).

<sup>22</sup> Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, Final Policy Statement, 69 Fed. Reg. 52,040, 52,044 (Aug. 24, 2004) (citing *New Hampshire v. AEC*, 406 F.2d 170, 175, 176 (1st Cir. 1969)) (EJ Policy Statement). See also SECY-12-0110, Consideration of Economic Consequences within the U.S. Nuclear Regulatory Commission’s Regulatory Framework (Aug. 14, 2021) ([ML12173A478](#)) at Enclosure 3, NRC Legal Authorities Concerning Offsite Property Damage (explaining that the AEA provides authority to license and regulate nuclear materials for the purpose of protecting public health and safety and the common defense and security, and there must be a link to radiological health and safety).

“protect the public health and safety and the environment from radiological and non-radiological hazards” associated with “byproduct material” as defined in Section 11e.(2). Based on its statutory authority under the AEA, the NRC can condition certain materials licenses associated with uranium milling, and enforce any such conditions under the AEA, including environmental conditions associated with Section 11e.(2) byproduct material.

NEPA requires Federal agencies to include in any recommendation or report on proposals for major Federal actions significantly affecting the quality of the human environment, a detailed statement on the environmental impacts of the action.<sup>23</sup> In accordance with its NEPA responsibilities, the NRC is required to take a “hard look” at the environmental impacts of a proposed major Federal action that could significantly affect the environment, as well as reasonable alternatives to that action.<sup>24</sup> This “hard look” is tempered by a “rule of reason.”<sup>25</sup>

In 2007, the NRC clarified its interpretation of its authority under both the AEA and NEPA with the issuance of the Limited Work Authorization (LWA) rule.<sup>26</sup> With respect to its authority under the AEA, the preamble for the LWA rule states that the NRC does not possess statutory authority to regulate activities that do not have an impact upon radiological health and safety or common defense and security.<sup>27</sup> Further, relying on the Supreme Court’s decision in *Robertson v. Methow Valley Citizens Council*,<sup>28</sup> the NRC also clarified its interpretation of its NEPA authority, stating that NEPA is a procedural statute and does not expand the jurisdiction delegated to an agency by its organic statute.<sup>29</sup> Thus, the preamble for the LWA rule explains that while NEPA may require the NRC to consider the environmental effects caused by the exercise of its permitting/licensing authority, NEPA cannot be the source of the expansion of the NRC’s authority to require or permit activities that are not reasonably related to radiological health and safety or protection of the common defense and security.<sup>30</sup> The preamble also states that NEPA does not provide the NRC with independent statutory authority to extend the agency’s jurisdiction solely for the purpose of assuring that adverse environmental impacts are considered and mitigated.<sup>31</sup>

In sum, current law supports the interpretation that NEPA is a procedural statute that does not confer any substantive authority on an agency beyond that granted in the agency’s enabling statute or other legislation.<sup>32</sup> Any NRC decision to approve, deny, or condition a license or to require mitigation measures must be premised upon its authority under the AEA or other legislation to protect public health and safety and security.

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<sup>23</sup> 42 U.S.C. § 4321 *et seq.*

<sup>24</sup> See *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3rd Cir. 1989); *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).

<sup>25</sup> See, e.g., *DOT v. Public Citizen*, 541 U.S. 752, 767-69 (2004); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-156, 6 AEC 831, 836 (1973).

<sup>26</sup> Limited Work Authorizations for Nuclear Power Plants, Final rule, 72 Fed. Reg. 57,416 (Oct. 9, 2007) (LWA Rule). See also Licenses, Certifications, and Approvals for Materials Licensees, Final rule, 76 Fed. Reg. 56,962 (Sept. 15, 2011) (adopting similar changes for materials licensees based on the NRC’s interpretation of its AEA and NEPA authority in the LWA Rule).

<sup>27</sup> LWA Rule, 72 Fed. Reg. at 57,420.

<sup>28</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-52 (1989).

<sup>29</sup> LWA Rule, 72 Fed. Reg. at 57,427.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 57,420.

<sup>32</sup> See *Methow Valley*, 490 U.S. at 350-353.

## NRC's Statutory Authority Under Title VI of the Civil Rights Act

Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving Federal financial assistance.<sup>33</sup> Federal financial assistance can include both the award or grant of money and assistance in nonmonetary form.<sup>34</sup> Examples of Federal financial assistance include, among other things, the use or rental of Federal land or property at below market value, Federal training, a loan of Federal personnel, subsidies, and other arrangements with the intention of providing assistance.<sup>35</sup> Federal financial assistance does not include licenses<sup>36</sup> or statutory programs or regulations that directly or indirectly support or establish guidelines for an entity's operations.<sup>37</sup> Thus, NRC licensing activities are not "federal financial assistance," and the NRC does not have the authority to enforce Title VI in its licensing process.<sup>38</sup>

Appendix A of the NRC's implementing regulations in 10 C.F.R. Part 4 provides a non-exhaustive list of examples of Federal financial assistance to which Part 4 applies. The NRC's External Limited English Proficiency (LEP) Program also falls under Title VI. Under EO 13166, "Improving Access to Services for Persons with Limited English Language Proficiency," recipients of Federal financial assistance must provide improved access by taking "reasonable steps to ensure meaningful access to their programs and activities by LEP persons."<sup>39</sup>

## **Environmental Justice in NRC Adjudicatory Proceedings**

The Commission's current policy on EJ was heavily influenced by EJ issues arising within the context of the NRC's licensing and adjudicatory proceedings. The Commission first addressed EJ issues and EO 12898 in the *Louisiana Energy Services (LES)* uranium enrichment facility proceeding.<sup>40</sup> The *LES* proceeding involved an application for a 30-year materials license for a

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<sup>33</sup> 42 U.S.C. § 2000d *et seq.*

<sup>34</sup> See *United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 607 n.11 (1986) ("Although the word 'financial' usually indicates 'money,' federal financial assistance may take nonmoney form." citing *Grove City Col. v. Bell*, 465 U.S. 555, 564–65 (1984)).

<sup>35</sup> See DOJ Title VI Legal Manual, Section V, Subsection C(1), available at <https://www.justice.gov/crt/book/file/1364106/download> (last visited Jan. 31, 2022).

<sup>36</sup> For example, the Supreme Court has noted that the "Federal Communications Commission is not a funding agency" and television broadcasting licenses do not constitute Federal financial assistance. *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 509-12 (1983). See also DOJ Title VI Legal Manual, Section V, Subsection C(2)(a).

<sup>37</sup> See, e.g., *Herman v. United Bhd. Of Carpenters & Joiners of Am., Loc Union No. 971*, 60 F.3d 1375, 1381-82 (9th Cir. 1995) ("Federal regulation standing alone is not equivalent to federal financial assistance").

<sup>38</sup> See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, Final Policy Statement, 69 Fed. Reg. 52,040, 52,046-47 n.2 (Aug. 24, 2004), ("Title VI is inapplicable to the NRC's regulatory and licensing actions.").

<sup>39</sup> Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. 10,066 (Mar. 3, 2004).

<sup>40</sup> *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

uranium enrichment facility where the applicant was seeking to construct and operate the facility on a 70-acre site located between two African American communities.<sup>41</sup>

The intervenor filed an EJ contention based on NEPA that asserted the negative economic and sociological impacts of closing a parish road connecting the two minority communities had not been appropriately considered in the applicant's environmental report.<sup>42</sup> The intervenors alleged that if the road was closed off, it would cause hardships to families who use the road, residents who carpool to work, school transportation, sports-related activities that involve children living in both communities, and church services that are divided between the two communities.<sup>43</sup> Further, the intervenors claimed that the siting of the enrichment center followed a national pattern of siting hazardous facilities in minority communities and that no steps to avoid or mitigate the disparate impact on the minority communities had been taken.<sup>44</sup>

In LBP-97-8, the Atomic Safety and Licensing Board determined that a thorough NRC staff investigation of the facility site selection process was necessary to determine whether racial discrimination played a role in the process and to comply with the nondiscrimination directive in EO 12898.<sup>45</sup> The Board also found that the NRC staff's NEPA analysis of the impacts of relocating the parish road and the economic impact of the facility on property values in the minority communities was inadequate.<sup>46</sup> Accordingly, the Board directed the NRC staff to take appropriate steps to address these insufficiencies in its NEPA analysis.<sup>47</sup>

In CLI-98-3, the Commission (1) reversed the Board's requirement for an investigation of racial discrimination in siting and (2) affirmed the Board's disparate impact ruling with respect to the inadequacy of the NRC staff's analysis regarding the impacts of relocation of the parish road and the economic impact of the facility on property values.<sup>48</sup> In reversing the Board's decision directing further investigation into racial discrimination, the Commission emphasized that EO 12898 did not establish any new rights or remedies.<sup>49</sup> The Commission concluded that "[t]he only 'existing law' conceivably pertinent here is NEPA, a statute that centers on environmental impacts" and that the Board's proposed inquiry into racial discrimination went "well beyond what NEPA has traditionally been interpreted to require."<sup>50</sup> Along those lines, the Commission held that "NEPA is not a civil rights law calling for full-scale racial discrimination litigation in NRC licensing proceedings."<sup>51</sup>

Moreover, the Commission noted that the Board's approach appeared to be incompatible with CEQ's draft guidance for implementing EO 12898, which made no mention of a NEPA-based

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<sup>41</sup> See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 370 (1997) for additional background on this proceeding.

<sup>42</sup> *Id.* at 371-72.

<sup>43</sup> *Id.* at 372.

<sup>44</sup> *Id.* at 372-73.

<sup>45</sup> *Id.* at 412.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *LES*, CLI-98-3, 47 NRC at 77.

<sup>49</sup> *Id.* at 102.

<sup>50</sup> *Id.* (noting that despite nearly 30 years of extensive NEPA litigation, the Commission was unaware of a single judicial or agency decision that has invoked NEPA to consider a claim of racial discrimination).

<sup>51</sup> *Id.* at 106.



inquiry into racial discrimination and focused on identifying and assessing impacts of proposed actions on EJ populations.<sup>52</sup> Finally, the Commission noted that the Board's decision seemed questionable from a procedural standpoint because among other things, the intervenor's original EJ contention pointed simply to the applicant's failure "to avoid or mitigate the *disparate impact* of the proposed plant on this minority community" and the intervenors pleadings before the Board developed no comprehensive legal theory of racial discrimination.<sup>53</sup>

The Commission did, however, uphold the Board's disparate impact ruling and held that "[d]isparate impact' analysis is our principal tool for advancing environmental justice under NEPA. The NRC's goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities."<sup>54</sup> The Commission ultimately agreed with the Board that the NRC staff's NEPA analysis of the impacts of relocation of the parish road and the economic impact of the facility on property values should be revised and should also include a discussion of possible mitigating measures.<sup>55</sup>

In 2001, the Commission reviewed EJ concerns in the *Hydro Resources* proceeding involving a license for a proposed multiple-site in situ leach mining project where the intervenors asserted that the NRC failed to adequately assess EJ implications of the project.<sup>56</sup> Referencing its decision in the *LES* proceeding, the Commission noted that the NRC "integrates environmental considerations into its NEPA review process" and noted its expectation that NRC environmental impact statements (EISs) and presiding officers in adjudications, "inquire whether a proposed project has disparate impacts on 'environmental justice' communities and whether and how those impacts may be mitigated."<sup>57</sup> Ultimately, the Commission concluded that the NRC's final EIS "(1) sufficiently highlights issues pertinent to the [EJ] community, including those factors that might amplify the environmental effect of the project, (2) recommends appropriate mitigative measures, and (3) provides adequate information for effective public participation."<sup>58</sup>

In 2002, the Commission reviewed another EJ contention in the *Private Fuel Storage (PFS)* proceeding involving the licensing of an interim spent fuel storage installation that would be located on a Tribal Reservation.<sup>59</sup> The Commission reiterated its holding in the *LES* proceeding and stated that "[a]t the NRC, we said, the 'only "existing law" conceivably pertinent ... is NEPA, a statute that centers on environmental impacts."<sup>60</sup> Further, the Commission declined to use NEPA as an authority to investigate corruption claims.<sup>61</sup>

With respect to the agency's disparate impacts analysis, the Commission stated in the *PFS* proceeding that the NRC 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

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<sup>52</sup> *Id.* at 102.

<sup>53</sup> *Id.* at 104-105.

<sup>54</sup> *LES*, CLI-98-3, 47 NRC at 100.

<sup>55</sup> *Id.* at 107-110.

<sup>56</sup> *Hydro Resources, Inc.* (Rio Rancho, NM), CLI-01-04, 53 NRC 31 (2001).

<sup>57</sup> *Id.* at 64.

<sup>58</sup> *Id.* at 71.

<sup>59</sup> *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002).

<sup>60</sup> *Id.* at 153.

<sup>61</sup> *Id.* at 155.



take care to mitigate or avoid special impacts attributable to the special character of the community. Thus, an NRC EIS looks at the pertinent minority community in general, not at vaguely defined, shifting 'subgroups' within that community."<sup>62</sup> Finally, similar to the *LES* proceeding, the Commission cited procedural concerns with going to a hearing based on a legal theory that departs dramatically from the admitted EJ contention.<sup>63</sup>

### **NRC's Response to Stakeholder Comments on Environmental Justice and the Development of the 2004 EJ Policy Statement**

In April 2002, following the Commission's decision in the *LES* case (CLI-98-3), Louisiana Energy Services submitted a series of white papers to the Commission discussing several policy issues associated with the licensing of a uranium enrichment facility at a different location, including EJ issues.<sup>64</sup> On December 20, 2002, the Nuclear Energy Institute (NEI) submitted a letter to the Commission contending that the agency "has mistakenly interpreted and applied [EO 12898] to licensing actions...."<sup>65</sup> NEI requested that the Commission "reconsider the application of the Executive Order in the context of the licensing of facilities ... and issue a Policy Statement to clearly articulate the Commission's expectations regarding the NRC's implementation of the Executive Order and to guide the NRC staff in its revision of its regulatory guidance accordingly."<sup>66</sup> On February 10, 2003, the Commission responded to NEI stating it would ask the NRC staff to develop and propose a draft policy statement on the treatment of EJ matters in NRC licensing matters.<sup>67</sup> In March 2003, the Commission directed the NRC staff to develop a policy statement on environmental justice that would systematically address an agency-wide standard for consideration of EJ issues in NRC environmental reviews.<sup>68</sup>

In November 2003, the Commission issued, for public comment, a draft policy statement on the treatment of EJ matters in NRC regulatory and licensing actions.<sup>69</sup> After considering public comments on the proposed policy statement, including comments from other Federal agencies, the Commission issued its Final Policy Statement on the Treatment of Environmental Justice

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<sup>62</sup> *Id.* at 156.

<sup>63</sup> *Id.* at 158.

<sup>64</sup> Letter from Louisiana Energy Services to the NRC, Policy Issues Associated with the Licensing of a Uranium Enrichment Facility, Apr. 24, 2002 ([ML022350051](#)).

<sup>65</sup> Letter to Annette L. Vietti-Cook, Secretary, U.S. Nuclear Regulatory Commission from Robert W. Bishop, Vice President and General Counsel, Nuclear Energy Institute, Dec. 20, 2002 ([ML030220012](#)).

<sup>66</sup> *Id.*

<sup>67</sup> Letter from Richard A. Meserve, NRC to Robert W. Bishop, Esq, NEI, Feb. 10, 2003 ([ML030210442](#)).

<sup>68</sup> SRM-SECY-02-0219–Licensing and Hearing Issues Raised by Louisiana Energy Services in Advance of its Application (Mar. 5, 2003) (ML030640177) (non-public).

<sup>69</sup> Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, Issuance of draft policy statement and notice of opportunity for public comment, 68 Fed. Reg. 62,642 (Nov. 5, 2003).

Matters in NRC Regulatory and Licensing Matters in 2004.<sup>70</sup> The EJ Policy Statement incorporates the Commission's decisions in the *LES* and *PFS* proceedings, NRC staff environmental guidance, and Federal caselaw on EJ.<sup>71</sup> The EJ Policy Statement specifies that it "is intended to be a Commission-approved general clarification of the Commission's position on the treatment of environmental justice issues in NRC regulatory and licensing actions."<sup>72</sup> The EJ Policy Statement reaffirms the Commission's commitment to the general goals of EO 12898 and states that the NRC "will strive to meet those goals through its normal and traditional NEPA review process."<sup>73</sup> The EJ Policy Statement also clarifies that the basis for admitting EJ contentions in NRC licensing proceedings stems from the agency's NEPA obligations.<sup>74</sup> The EJ Policy Statement notes that the AEA does not give the Commission the authority to consider EJ-related issues in NRC licensing and regulatory proceedings.<sup>75</sup> The EJ Policy Statement also does not address implementation of EJ beyond regulatory and licensing actions such as through Title VI of the Civil Rights Act.<sup>76</sup>

### **No Significant Changes to EJ Legal Landscape Since Issuance of EJ Policy Statement**

Since the issuance of the Commission's EJ Policy Statement in 2004, very little has changed in the legal landscape with respect to EJ. There have been no changes to the NRC's statutory authority relevant to EJ. Moreover, Commission caselaw since the issuance of the EJ Policy Statement has remained consistent with the Policy Statement. Likewise, Federal caselaw continues to be consistent with the EJ Policy Statement in that EJ issues litigated in the Federal courts typically arise in the context of an agency's NEPA review.

With regard to Commission caselaw, there have been several EJ contentions in adjudicatory proceedings related to various licensing actions including Early Site Permits (ESP), license renewals for reactors, as well as licenses for Consolidated Interim Storage Facilities (CISF).<sup>77</sup> In these adjudicatory proceedings, intervenor groups raised EJ contentions under NEPA, and the Commission reviewed these issues consistent with the EJ Policy Statement. For example,

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<sup>70</sup> Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, Final Policy Statement, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

<sup>71</sup> *Id.* at 52,041 (citing *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77(1998); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153-55 (2002); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-04-09, 59 NRC 120 (2004)).

<sup>72</sup> *Id.* at 52,041.

<sup>73</sup> *Id.* at 52,040, 41-42.

<sup>74</sup> *Id.* at 52,046.

<sup>75</sup> *Id.* at 52,044.

<sup>76</sup> The EJ Policy Statement only briefly mentions Title VI in two footnotes and a comment response. 69 Fed. Reg. 52,044-47.

<sup>77</sup> *See, e.g., Sys. Energy Res., Inc.*, (Early Site Permit for Grand Gulf ESP Site), CLI-05-04, 61 NRC 10 (2005) (affirming a Board ruling rejecting an EJ contention alleging, among other things, that the environmental report under-represented EJ populations affected by the proposed facility, omitted information regarding potential impacts to EJ populations from proximity to the reactor, did not sufficiently describe EJ populations, and did not address poverty driven deficiencies in emergency planning); *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), CLI-20-14, 92 NRC 463 (2020) (upholding the Board's decision rejecting an EJ contention that claimed that reviewing the impacts that may result from the proposed action—construction and operation of the proposed CISF—also requires an EJ evaluation of communities along as-yet-unknown transportation routes).

in the Holtec CISF proceeding, the Commission affirmed the Board's holding that EJ does not require consideration of a wider range of alternative sites, and relying on its decision in the *LES* proceeding, the Commission dismissed arguments regarding institutional racism in the site selection process.<sup>78</sup>

Notably, in the *North Anna ESP* proceeding, the Commission commented on the purpose and nature of the EJ Policy Statement and explained that “the Policy Statement is neither a rule nor an order, and therefore does not establish requirements that bind either the agency or the public.”<sup>79</sup> Notwithstanding, the Commission observed that “the Commission's Policy Statement and internal guidance on conducting environmental justice reviews are in place to clearly explain to the public how the agency will conduct its environmental justice reviews in licensing matters such as this.”<sup>80</sup> In doing so, the Commission reiterated its expectation that the NRC staff's EJ reviews in future licensing actions of this magnitude should conform to the EJ Policy Statement and relevant guidance.<sup>81</sup>

Of the handful of EJ contentions raised through the NRC's adjudicatory process since issuance of the EJ Policy Statement, only one contention was admitted for hearing—an EJ contention related to emergency preparedness concerns in the Indian Point license renewal proceeding. In the Indian Point proceeding, the Commission reversed the licensing board's ruling insofar as it required the NRC staff's EJ analysis to discuss emergency planning measures in the context of a license renewal NEPA analysis and to revisit impacts analyses already determined in the NRC's *Generic Environmental Impact Statement for License Renewal of Nuclear Plants* (NUREG-1447, Vol. 2).<sup>82</sup> With respect to the intervenor's assertions that there would be disproportionate and adverse effects to EJ populations in the event of a severe accident at Indian Point during the license renewal term, the Commission noted that the intervenor provided “no evidence that radiation doses received by any group as a result of a severe accident would exceed federal guidelines.”<sup>83</sup> Further, the Commission found that the NRC staff and the applicant “have demonstrated that no particular population segment will suffer a disproportionately high risk of radiological exposures from a severe accident.”<sup>84</sup>

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<sup>78</sup> *Holtec Int'l* (HI-STORE Consol. Interim Storage Facility), CLI-20-4, 91 NRC 167, 196 (2020) (noting that the Board's rejection of the proposed contention “accords with our stated environmental justice policy.”).

<sup>79</sup> *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 240 (2007).

<sup>80</sup> *Id.* at 248.

<sup>81</sup> *Id.*

<sup>82</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 369, 377 (2015) (“Because emergency planning is addressed as part of ongoing plant oversight and is appropriately outside the scope of license renewal, the license renewal environmental review may not serve as a ‘back door’ to litigating the effectiveness of site emergency plans.”).

<sup>83</sup> *Id.* at 381.

<sup>84</sup> *Id.* at 386.

As noted above, in Federal court, EJ issues in Federal caselaw typically arise in NEPA litigation, which is consistent with the EJ Policy Statement. For example, the Sixth Circuit reviewed EJ issues alleging that the Federal Highway Administration violated NEPA and principles of EJ by failing to take a “hard look” at alternative bridge proposals that would not be government-owned and not located in a certain minority, low-income community.<sup>85</sup> More recently, the DC Circuit reviewed an EJ case arising from a FERC NEPA analysis.<sup>86</sup> The D.C. Circuit found that

FERC’s NEPA analyses of the projects’ impacts on climate change and EJ communities were deficient under the Administrative Procedure Act, and therefore, FERC’s determinations of public interest and convenience under its organic statute, the Natural Gas Act, were deficient to the extent they relied on the NEPA analysis of those impacts.<sup>87</sup>

### **Memorandum of Understanding on Environmental Justice, August 2011**

In September 2010, the Environmental Protection Agency Administrator and White House CEQ Chair reconvened the EJ IWG for the first time in more than a decade.<sup>88</sup> In December 2010, the White House organized an Environmental Justice Forum, during which cabinet Secretaries and senior Administration officials met with more than 100 EJ leaders from across the country to discuss environmental and public health issues affecting their communities.<sup>89</sup> At the meeting, the Administration recommitted the Federal government to advancing the goals of EO 12898.

Subsequently, on August 4, 2011, 17 Federal executive branch agencies and offices signed a “Memorandum of Understanding on Environmental Justice and Executive Order 12898” (MOU) to, among other things, “declare the continued importance of identifying and addressing

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<sup>85</sup> *Latin Americans for Soc. & Econ. Dev. v. Adm’r of Fed. Highway Admin.*, 756 F.3d 447, 453, 476 (6<sup>th</sup> Cir. 2014) (finding that “just as the FHWA is not required to select an alternative with the least environmental impact under NEPA, the FHWA is not required to select an alternative with the least EJ impact. NEPA requires only that the FHWA consider the environmental impacts of its projects in making its decisions.”).

<sup>86</sup> *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021).

<sup>87</sup> *Id.* at 1330-31.

<sup>88</sup> “Promoting a Sustainable and Healthy Environment for All Americans,” September 22, 2010, available at <https://obamawhitehouse.archives.gov/blog/2010/09/22/promoting-a-sustainable-and-healthy-environment-all-americans> (last visited Jan. 28, 2022).

<sup>89</sup> “A Promise of Environmental Justice for All Americans,” December 15, 2010, available at <https://obamawhitehouse.archives.gov/blog/2010/12/20/a-promise-environmental-justice-all-americans> (last visited Jan. 31, 2022).

environmental justice considerations in agency programs, policies, and activities as provided in Executive Order 12898.”<sup>90</sup> The NRC was not a signatory to this MOU.

The MOU identifies agency responsibilities and formalizes commitments, processes, and procedures outlined in EO 12898. The MOU also expanded the scope of the EJ IWG and included agencies not originally named in EO 12898. It also adopted an Interagency Working Group charter, providing the EJ IWG with additional structure and direction. By signing the MOU, agencies also agreed to update their EJ strategies and to seek greater public involvement in their strategies, consistent with EO 12898, Section 5-5.<sup>91</sup>

In the MOU, participating agencies agreed to submit annual implementation progress reports to the EJ IWG (now the White House Environmental Justice Interagency Council [Interagency Council], see EO 14008) on their efforts to address EJ issues.<sup>92</sup> These reports describe progress in implementing EJ and performance measures identified in each agency’s strategy, as well as responses to any questions or recommendations provided by the public. In addition, the MOU states:

In its Environmental Justice Strategy, Annual Implementation Progress Reports and other efforts, each Federal agency will identify and address, as appropriate, any disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations, including, but not limited to, as appropriate for its mission, in the following areas: (1) implementation of the National Environmental Policy Act; (2) implementation of Title VI of the Civil Rights Act of 1964, as amended; (3) impacts from climate change; and (4) impacts from commercial transportation and supporting infrastructure (“goods movement”).<sup>93</sup>

### **Promising Practices for Environmental Justice Methodologies in NEPA Reviews, March 2016**

The most recent guidance on how Federal agencies should conduct EJ reviews comes from the “Promising Practices for Environmental Justice Methodologies in NEPA Reviews” (Promising Practices report) issued in March 2016 by the EJ IWG NEPA Committee.<sup>94</sup> The NRC technical

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<sup>90</sup> Memorandum of Understanding on Environmental Justice and Executive Order 12898, August 4, 2011, available at <https://www.epa.gov/environmentaljustice/memorandum-understanding-environmental-justice-and-executive-order-12898> (last visited Jan. 31, 2022) (2011 EJ MOU) (The following agencies signed the MOU: White House Council on Environmental Quality; Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Health and Human Services; Department of Homeland Security; Department of Housing and Urban Development; Department of the Interior; Department of Justice; Department of Labor; Department of Transportation; Department of Veterans Affairs; Environmental Protection Agency; General Services Administration; and Small Business Administration.).

<sup>91</sup> *Id.* at 3.

<sup>92</sup> Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) (EO 14008).

<sup>93</sup> 2011 EJ MOU at 3.

<sup>94</sup> Promising Practices for EJ Methodologies in NEPA Reviews, March 2016, available at <https://www.epa.gov/environmentaljustice/ej-iwg-promising-practices-ej-methodologies-nepa-reviews> (last visited Jan. 31, 2022) (Promising Practices for EJ Report).

review staff contributed to the development of this guidance by participating in NEPA committee workshops at the Environmental Protection Agency and Department of Transportation, drafting language for the report, and conducting technical reviews of draft guidance.<sup>95</sup>

The Promising Practices report offers innovative approaches to addressing EJ in NEPA reviews. One of the most significant findings include the “No-Threshold” approach for “identifying or determining the presence of EJ populations regardless of population size” (e.g., majority minority population). This approach (not currently used by the NRC) assumes that potentially affected minority and low-income populations are always present and focuses the review on determining whether these populations would experience human health and environmental effects from the proposed action and whether these effects would be disproportionately high and adverse.<sup>96</sup>

### **Government Accountability Office (GAO) Environmental Justice Report, September 2019**

Subsequent to issuance of EO 12898 and the 2011 MOU, Congress asked GAO to review the EJ efforts of the 17 Federal agencies’ who signed the 2011 MOU, including examining EJ actions, strategic plans, and progress reports, as well as working group collaborations since 2011. In response, GAO reviewed each agency’s EJ plans, reports, and funding data; interviewed agency officials; and reviewed working group collaboration. GAO issued its conclusions and recommendations in a report to Congress in September 2019.<sup>97</sup>

In its report, GAO made 24 recommendations including recommendations for 9 agencies to update their strategic plans and recommendations for 11 agencies to issue annual progress reports on their EJ efforts. In addition, four of the recommendations were for the Environmental Protection Agency and the EJ IWG to develop guidance on EJ strategic plans, develop methods for assessing progress toward meeting EJ goals, develop strategic goals for the Federal government’s efforts to carry out EO 12898, and update the MOU to renew commitments to collaborative efforts and the EJ IWG. Of the 15 agencies, 8 agreed with the GAO recommendations. The remaining seven agencies either responded with partial agreement, disagreement, or no comment.

### **Recent Executive Orders that Address Environmental Justice and Environmental Justice Developments, 2021**

More recently, in 2021, the President issued several EOs establishing Administration policy and goals related to EJ. For example, EO 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” signed on January 20, 2021,<sup>98</sup> is directed to “executive departments and agencies” and addresses a number of areas, including EJ. Section 1 of this EO states, that the policy of the new Administration is to, in part, “... prioritize ...

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<sup>95</sup> As of the date of this paper, CEQ and the EJ Interagency Council (formerly the EJ IWG) NEPA Committee have initiated the process to update the 2016 Promising Practices Report.

<sup>96</sup> See *generally* Promising Practices for EJ Report.

<sup>97</sup> United States Government Accountability Office, “Environmental Justice; Federal Efforts Need Better Planning, Coordination, and Methods to Assess Progress,” GAO-19-543 (September 2019), available at <https://www.gao.gov/products/gao-19-543> (last visited Jan. 31, 2022).

<sup>98</sup> Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (EO 13990).

environmental justice ....”<sup>99</sup> Also, it directs agencies to seek public and stakeholder input, including from EJ organizations, when considering certain matters.

EO 14008, “Tackling the Climate Crisis at Home and Aboard,” signed on January 27, 2021, sets forth, among other things, policy goals related to “secur[ing] environmental justice ... for disadvantaged communities that have been historically marginalized and overburdened by pollution ....”<sup>100</sup> It also directs that “[a]gencies 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 to disadvantaged communities, as well as the accompanying economic challenges of such impacts.”<sup>101</sup> Like EO 13990, EO 14008 is directed toward “executive departments and agencies,” and does not specifically mention independent agencies like the NRC.

In addition, EO 14008 establishes the Interagency Council and a White House Environmental Justice Advisory Council (WHEJAC), to advise the CEQ Chair and the Interagency Council. The NRC is not a member of the Interagency Council. Specifically, WHEJAC advises the White House (and CEQ) on how to increase the Federal government’s efforts to address current and historic environmental injustice through strengthening EJ monitoring and enforcement. The Advisory Council also provides advice and recommendations to the Interagency Council and CEQ on a government-wide approach to EJ, including, but not limited, to EJ in the following areas:

- Climate change mitigation, resilience, and disaster management
- Toxic substances, pesticides, and pollution reduction in overburdened communities
- Equitable conservation and public lands use
- Tribal and Indigenous issues
- Clean energy transition
- Sustainable infrastructure, including clean water, transportation, and the built environment
- NEPA, enforcement, and civil rights
- Increasing the Federal government’s efforts to address current and historic environmental injustice.

On May 21, 2021, WHEJAC submitted its recommendations report to the President related to the Justice40 program created by EO 14008,<sup>102</sup> “Justice40 Climate and Economic Justice Screening Tool and Executive Order 12898 Revisions, Interim Final Recommendations.”<sup>103</sup> To date, the Interagency Council’s response and recommendations to the President with respect to the WHEJAC’s recommendations is pending.

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<sup>99</sup> *Id.*

<sup>100</sup> EO 14008 at Sec. 219.

<sup>101</sup> *Id.*

<sup>102</sup> Letter from WHEJAC to CEQ, May 21, 2021, available at <https://www.epa.gov/environmentaljustice/white-house-environmental-justice-advisory-council-final-recommendations-cover> (last visited Jan. 31, 2022).

<sup>103</sup> Justice40 Climate and Economic Justice Screening Tool and Executive Order 12898 Revisions, Interim Final Recommendations, May 13, 2021, available at <https://www.epa.gov/environmentaljustice/whejac-justice40-climate-and-economic-justice-screening-tool-executive-order> (last visited Jan. 31, 2022) (Justice40 is a Federal effort to deliver at least 40 percent of the overall benefits from Federal investments in climate and clean energy to disadvantaged communities.).



Finally, on December 8, 2021, the President issued EO 14057, “Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability.”<sup>104</sup> The EO notes in Section 101, “the mounting risks and costs already posed by the climate crisis,” and in responding to this crisis the “opportunity to ... advance environmental justice.” The EO directs the Federal government to incorporate EJ consideration into sustainability and climate adaptation planning, programs, and operations. In addition, Section 507(b) states that “[t]o support a whole-of-government approach to achieve the policy in section 101 of this order, independent agencies are encouraged to implement the policy, goals, and provisions of this order, consistent with applicable law.”<sup>105</sup>

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<sup>104</sup> Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, Exec. Order No. 14057, 86 Fed. Reg. 70,935 (Dec. 8, 2021).

<sup>105</sup> *Id.*