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13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA  
15 SAN DIEGO DIVISION

16 WHITEWATER DRAW NATURAL  
17 RESOURCE CONSERVATION  
18 DISTRICT, *et al.*,

19 Plaintiffs,

20 v.

21 KIRSTJEN M. NIELSEN, *et al.*,

22 Federal Defendants.

23 **Case No. 3:16-cv-2583**

24 **FEDERAL DEFENDANTS’**  
25 **MEMORANDUM IN SUPPORT OF**  
26 **PARTIAL MOTION TO DISMISS**  
27 **COUNTS ONE AND TWO OF THE**  
28 **AMENDED COMPLAINT**

Date: March 12, 2018

No Oral Argument Unless Requested by  
the Court

Hon. H. James Lorenz

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1 **I. INTRODUCTION**

2 Plaintiffs, a coalition of groups addressing local conservation issues in certain  
3 border states, and organizations advocating for the overall reduction of legal and illegal  
4 immigration, assert that Department of Homeland Security (“DHS” or “Department”)  
5 policies and actions have allowed migrants to enter and remain in the United States. Am.  
6 Compl. ¶¶ 27–33, 50–69, ECF No. 44. This influx, Plaintiffs contend, has resulted in  
7 widespread environmental harms—either from the movement of immigrants across the  
8 Southwest border, or from population growth in the United States that Plaintiffs claim is  
9 attributable to the entry and settlement of migrants into the United States—that allegedly  
10 would not/might not have occurred had DHS engaged in environmental review pursuant  
11 to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370m-12. *Id.*  
12 ¶¶ 50–54.

13 The Amended Complaint lists five counts, two of which are wholly unreviewable.  
14 Count I challenges the DHS Instruction Manual, an internal DHS guidance document that  
15 is not a “final agency action” subject to review under the Administrative Procedure Act  
16 (“APA”), 5 U.S.C. §§ 701–706. Count II consists of eight NEPA claims: it challenges  
17 seven statutes that provide the statutory basis for DHS’ authority to implement  
18 immigration policies, and it challenges the discretionary immigration non-enforcement  
19 policy known as Deferred Action for Childhood Arrivals (“DACA”). Count II fails to  
20 identify discrete agency actions that DHS was required to take, and with respect to  
21 DACA’s policy of deferred enforcement, is wholly unreviewable under NEPA.

22 A review of Plaintiffs’ voluminous Amended Complaint makes it clear that they  
23 simply oppose immigration into this country and seek to disrupt the administration of the  
24 Department’s immigration and enforcement policies. Such an overhaul may be  
25 appropriately provided through legislative channels, but it cannot be provided, as pled in  
26 the Amended Complaint, through NEPA and the APA.

## 1 **II. BACKGROUND**

2 Plaintiffs consist of the following groups: three Arizona-based resource  
3 management groups addressing local conservation issues, Am. Compl. ¶¶ 27–29; a  
4 California-based organization whose “priority goal is to reduce both legal and illegal  
5 immigration into California and the United States[,]” *id.* ¶ 33; an organization of  
6 scientists that advocates for population “stabilization,” *id.* ¶ 41; a New Mexico-based  
7 organization that addresses the interests of cattle-ranching communities, *id.* ¶ 44; a  
8 Florida-based organization opposed to population growth caused by immigration, *id.* ¶  
9 46; and Glen Colton and Ralph Pope, individuals also opposed to population growth  
10 caused by immigration, *id.* ¶¶ 43, 47.<sup>1</sup> Plaintiffs assert that DHS’ policies and actions  
11 have allowed foreign nationals to enter and remain in the United States. *Id.* ¶¶ 50–54.  
12 This, Plaintiffs contend, has resulted in widespread environmental harms—either from  
13 the migration of foreign nationals across the Southwest border, or from population  
14 growth in the United States that Plaintiffs claim is attributable to the entry and settlement  
15 of foreign nationals into the United States—that allegedly could have been prevented had  
16 DHS engaged in environmental review pursuant to NEPA. *Id.* ¶¶ 68–69.

17 For example, Plaintiffs claim that immigration-driven population growth causes  
18 urban sprawl and the loss of undeveloped land, *id.* ¶¶ 82–83; “threatens to accelerate  
19 biodiversity loss and the extinction of animal and plant species[,]” *id.* ¶ 84; and increases  
20 greenhouse gas emissions and water use, *id.* ¶¶ 85–86. Meanwhile, along the Southwest  
21 border, Plaintiffs allege that:

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25 <sup>1</sup> Plaintiffs filed their original Complaint on October 17, 2016. *See* ECF No. 1. Due to  
26 the issuance of multiple executive orders, this Court granted a stay of all litigation  
27 deadlines until October 6, 2017. *See* ECF No. 37. Federal Defendants moved to dismiss  
28 the Complaint on October 6, 2017, *see* ECF No. 39, and Plaintiffs filed their Amended  
Complaint on December 8, 2017, *see* ECF No. 44.

1 [t]he massive numbers of people illegally crossing the Southwest border have  
2 left a host of environmental impacts in their wake, such as the destruction of  
3 native and at-risks [sic] species and habitats by trampling of the native  
4 vegetation; garbage dumping on a massive scale; water pollution; and the  
5 setting fires, many of which turn out of control, for the purposes of heat,  
6 cooking, or to distract Border Patrol agents.

7 *Id.* ¶ 90. Plaintiffs assert DHS’ immigration policies constitute “programs which have  
8 the effect of encouraging further illegal entry across the Southwest border[.]” *id.* ¶ 89,  
9 though they acknowledge that these “policies are not the sole factor in all of these  
10 components of the illegal border-crossing phenomenon,” *id.* ¶ 90. Plaintiffs do not allege  
11 that the Department directly caused Plaintiffs’ alleged injuries, but rather that DHS’  
12 failure to prevent both legal and illegal immigration allowed an influx of migrants that  
13 has caused them injury. *Id.* ¶¶ 7, 50.

14 Count I of the Amended Complaint alleges that DHS failed “to incorporate NEPA  
15 compliance” into its Instruction Manual, an internal document that guides DHS personnel  
16 in complying with NEPA. Am. Compl. ¶ 102. Count II alleges that DHS violated NEPA  
17 by failing to “initiat[e] any NEPA compliance” for eight purported “programs.” *Id.* ¶  
18 107. Plaintiffs list seven statutes originally found within the Immigration and Nationality  
19 Act (“INA”). *Id.* ¶ 55. Those statutes as-pled are INA § 203(b), now found at 8 U.S.C. §  
20 1153(b); INA §§ 203(a) and 201(b), now found at 8 U.S.C. §§ 1153(a) and 1151(a); INA  
21 § 214, now found at 8 U.S.C. § 1184; INA § 212(d)(5)(a), now found at 8 U.S.C. § 1182;  
22 INA § 244, now found at 8 U.S.C. § 1254; INA § 207, now found at 8 U.S.C. § 1157; and  
23 INA § 208, now found at 8 USC § 1158. Generally, these statutes govern all matters of  
24 immigration and permit DHS, in its discretion, to allow or prohibit entry into the U.S.  
25 under specified circumstances.

26 In addition to the statutes, Count II also alleges that DHS failed to “initiat[e] any  
27 NEPA compliance” with regard to DACA. Am. Compl. ¶ 107. The basis for Plaintiffs’  
28 challenge is the June 15, 2012 DHS Memorandum issued by then Secretary of Homeland  
29 Security Janet Napolitano titled “Exercising Prosecutorial Discretion with Respect to

1 Individuals Who Came to the United States as Children” (“Napolitano Memo”). Am.  
2 Compl. ¶ 55.

3 DHS, along with partner agencies such as the Departments of Justice, Labor, and  
4 State, is responsible for enforcing and implementing immigration laws. *See, e.g.*, 8  
5 U.S.C. § 1103(a)(1). The Secretary of Homeland Security is charged “with the  
6 administration and enforcement” of the INA along with “all other laws relating to the  
7 immigration and naturalization of aliens . . . .” *Id.* The scope of DHS’s mission extends  
8 beyond immigration to diverse policy areas such as maritime law enforcement (6 U.S.C.  
9 § 468(a)(2)), the provision of border security (8 U.S.C. § 1103(a)(5)), and disaster  
10 prevention and management (6 U.S.C. § 742). Acting upon her broad authority, the  
11 Secretary has issued a range of internal documents in support of the Department’s  
12 mission. These include, for instance, the policy memoranda guiding the exercise of  
13 lawful discretion of agency personnel included in Plaintiffs’ Exhibit 1, ECF No. 44-2,  
14 and Exhibit 2, ECF No. 44-3.

15 The Department’s Instruction Manual, challenged in Count I, is not reviewable  
16 under the APA because it is not a “final agency action.” By its very terms, the  
17 Instruction Manual is intended to “establish the policy and procedures DHS follows to  
18 comply with [NEPA].” Instruction Manual at III-1. As it is merely a statement of  
19 internal policy, it fails to meet the definition of a final agency action under the APA.

20 Count II purports to challenge NEPA compliance for eight so-called “programs”  
21 related to immigration. *See* Am. Compl. ¶¶ 55, 103-07. Of the eight “programs” listed in  
22 the Amended Complaint, seven are merely citations to statutes that form the basis or  
23 establish the framework for DHS’ authority to implement immigration policies, and the  
24 eighth challenges DACA. Count II appears to allege that the eight items require  
25 programmatic environmental analysis under NEPA, such as through a Programmatic  
26 Environmental Impact Statement (“PEIS”), and fall under § 706(1) of the APA.  
27 However, such programmatic attacks are precluded under the APA, and thus Plaintiffs  
28

1 fail to state a cognizable claim.

2 Plaintiffs' challenge to DACA in Count II fails for another reason as well.  
3 NEPA's implementing regulations, similar to the APA's bar on judicial review of matters  
4 of prosecutorial discretion, exempt enforcement-related decisions from review.<sup>2</sup>

### 5 **III. STANDARD OF REVIEW**

#### 6 **A. Federal Rule of Civil Procedure 12(b)(1)**

7 Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for  
8 "lack of subject-matter jurisdiction[.]" A federal court is presumed to lack jurisdiction in  
9 a particular case unless the contrary affirmatively appears. *Gen. Atomic Co. v. United*  
10 *Nuclear Corp.*, 655 F.2d 968, 968–69 (9th Cir. 1981). Faced with a Rule 12(b)(1)  
11 motion, a plaintiff bears the burden of proving the existence of the court's subject matter  
12 jurisdiction. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). A challenge to  
13 subject matter jurisdiction may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242  
14 (9th Cir. 2000). With regard to a facial attack, the court may dismiss for lack of subject  
15 matter jurisdiction if, accepting the plaintiff's allegations as true and drawing all  
16 reasonable inferences in the plaintiff's favor, the court determines that the allegations are  
17 insufficient to establish its jurisdiction. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir.  
18 2013).

19 By contrast, when a motion to dismiss is "a factual attack on subject matter  
20 jurisdiction . . . [n]o presumptive truthfulness attaches to plaintiff's allegations, and the  
21 existence of disputed material facts will not preclude the trial court from evaluating for  
22 itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of  
23 proof that jurisdiction does in fact exist." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs.*

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26 <sup>2</sup> Federal Defendants do not, at this time, move to dismiss for lack of standing. However,  
27 Federal Defendants preserve the right to raise such an affirmative defense at a later time.  
28 *Hollingsworth v. Perry*, 570 U.S. 693 (2013) ("Article III demands that an 'actual  
controversy' persist throughout all stages of litigation.).

1 *Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (quoting *Mortensen v. First Fed. Sav. & Loan*  
2 *Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). The court may review these additional facts  
3 without converting the motion to a motion for summary judgment. *Savage v. Glendale*  
4 *Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). When  
5 considering a factual attack, “the district court is not restricted to the face of the  
6 pleadings, but may review any evidence, such as affidavits and testimony, to resolve  
7 factual disputes concerning the existence of jurisdiction.” *McCarthy v. United States*,  
8 850 F.2d 558, 560 (9th Cir. 1988).

9 **B. Federal Rule of Civil Procedure 12(b)(6)**

10 A motion to dismiss for failure to state a claim upon which relief can be granted  
11 under Federal Rule of Civil Procedure 12(b)(6) may be based on either a “lack of a  
12 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
13 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990) (citing  
14 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)). In addition,  
15 a complaint that fails to provide the grounds for the requested relief beyond labels and  
16 conclusions will not survive a motion challenging the sufficiency of a complaint’s  
17 statement of the claim for relief under Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550  
18 U.S. 544, 555 (2007); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th  
19 Cir. 2001) (“Nor is the court required to accept as true allegations that are merely  
20 conclusory, unwarranted deductions of fact, or unreasonable inferences.” (citation  
21 omitted)).

22 Where a plaintiff fails to assert a cognizable legal theory in support of a claim, the  
23 claim must be dismissed. Moreover, while a plaintiff’s material factual allegations are  
24 assumed to be true, district courts may not assume the truth of legal conclusions “merely  
25 because they are cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643  
26 F.2d 618, 624 (9th Cir. 1981) (citations omitted). A court may consider material properly  
27 submitted as part of the complaint without converting the motion to dismiss into a motion  
28

1 for summary judgment. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001).

### 2 **C. Judicial Review under the APA**

3 Where a statute, such as NEPA, does not provide a cause of action, the APA  
4 provides for judicial review of challenges to a federal agency's compliance with these  
5 statutes. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1238 (9th  
6 Cir. 2005). Section 702 of the APA waives federal sovereign immunity to the extent that  
7 "[a] person suffering legal wrong because of agency action, or adversely affected or  
8 aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial  
9 review thereof." 5 U.S.C. § 702. The APA defines "agency action" to "include[] the  
10 whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or  
11 denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). For an agency action to be a  
12 "final agency action" reviewable under § 706(2), the action must both "mark the  
13 consummation of the agency's decisionmaking process," and "be one by which rights or  
14 obligations have been determined, or from which legal consequences will flow[.]"  
15 *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks and citations  
16 omitted).

17 To state a cognizable claim under § 706(2) of the APA, a plaintiff must identify a  
18 final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not  
19 in accordance with law." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th  
20 Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). Jurisdiction under the APA is limited to  
21 review of "[a]gency action made reviewable by statute and final agency action for which  
22 there is no adequate remedy in a court . . . ." 5 U.S.C. § 704; *see also Lujan v. Nat'l*  
23 *Wildlife Fed'n*, 497 U.S. 871, 882 (1990). When agency action is "committed to agency  
24 discretion by law[.]" judicial review is unavailable. 5 U.S.C. § 701(a)(2). Section  
25 701(a)(1) of the APA applies "when Congress has expressed an intent to preclude judicial  
26 review" and § 701(a)(2) applies when "the statute is drawn so that a court would have no  
27 meaningful standard against which to judge the agency's exercise of discretion" because  
28

1 the statute “‘committed’ the decisionmaking to the agency’s judgment absolutely.” *See*  
2 *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (citing 5 U.S.C. § 701(a)(2)).

### 3 **D. Judicial Review under NEPA**

4 In enacting NEPA, Congress was concerned with the potential impacts of major  
5 federal actions significantly affecting the physical environment. *See Hale v. Norton*, 476  
6 F.3d 694, 700 (9th Cir. 2007) (citing 42 U.S.C. § 4332(C)). NEPA does not apply to  
7 every action involving a federal agency, however, but only where there is a proposal for  
8 “major Federal action.” *Sierra Club v. Penfold*, 857 F.2d 1307, 1313 (9th Cir. 1988).  
9 NEPA imposes procedural rather than substantive requirements. *Robertson v. Methow*  
10 *Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Native Ecosystems Council v.*  
11 *Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). An agency’s compliance with NEPA is  
12 bounded by a “rule of reason” to “ensure[] that agencies determine whether and to what  
13 extent to prepare [analysis] based on the usefulness of any new potential information to  
14 the decisionmaking process.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

## 15 **IV. ARGUMENT**

### 16 **A. Count I Fails to Allege a Final Agency Action**

#### 17 1. The Instruction Manual is not a final agency action

18 As non-binding internal agency guidance that does not require any third party to do  
19 or refrain from doing anything, the DHS Instruction Manual does not constitute a final  
20 agency action subject to judicial review under the APA. Plaintiffs’ challenge to the  
21 Directive therefore must be dismissed.

22 NEPA claims may be reviewed only pursuant to the APA, and, as a waiver of  
23 sovereign immunity for claims against the United States, the APA limits what federal  
24 agency activities may be challenged in federal court. *Cent. Delta Water Agency v. U.S.*  
25 *Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1089 (E.D. Cal. 2009) (“[NEPA claims]  
26 must fall within the APA’s limited waiver of sovereign immunity.”). The APA limits  
27 judicial review to “final agency action.” 5 U.S.C. § 704. Thus, Plaintiffs bear the burden  
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1 of establishing subject matter jurisdiction, which includes “identifying specific federal  
2 conduct and explaining how it is ‘final agency action’ within the meaning of [the APA].”  
3 *Wyoming v. U.S. Dep’t of Interior*, 360 F. Supp. 2d 1214, 1227 (D. Wyo. 2005), *aff’d*,  
4 442 F.3d 1262 (10th Cir. 2006).

5 The DHS Instruction Manual neither marks the consummation of the agency’s  
6 decision-making process, nor constitutes an action by which rights or obligations have  
7 been determined or from which legal consequences will flow. *Bennett*, 520 U.S. at 177–  
8 78. The Instruction Manual, along with DHS Directive 023-01, “establish[es] the policy  
9 and procedures DHS follows to comply” with NEPA and Council on Environmental  
10 Quality (“CEQ”) regulations. Instruction Manual at III-1. It is the agency’s internal  
11 guidance for complying with NEPA. The Instruction Manual and Directive “adopt and  
12 supplement the CEQ regulations” to “help ensure the integration of environmental  
13 stewardship into DHS decision making.” DHS Directive 023-01 at 1 (ECF No. 44-2). In  
14 sum, the Instruction Manual serves as a guide to ensure NEPA compliance on a project-  
15 by-project or action-by-action basis.

16 Policy memoranda and guides for agency operations do not constitute reviewable  
17 final agency actions. *See Schweiker v. Hansen*, 450 U.S. 785, 789–90 (1981) (holding  
18 that federal agency’s internal instruction manual, a thirteen-volume handbook for internal  
19 use by thousands of Social Security Administration employees, “is not a regulation[,] has  
20 no legal force, and . . . does not bind the [federal agency]”); *Cement Kiln Recycling Coal*  
21 *v. EPA*, 493 F.3d 207, 227–28 (D.C. Cir. 2007) (concluding that the EPA’s technical  
22 guidance document, the Human Health Risk Assessment Protocol for Hazardous Waste  
23 Combustion Facilities, was non-binding because it “does not ‘command[,]’ does not  
24 ‘require[,]’ does not ‘order[,]’ and does not ‘dictate’”); *Kugel v. United States*, 947 F.2d  
25 1504, 1507 (D.C. Cir. 1991) (intra-office manual, “*The Attorney General’s Guidelines on*  
26 *Criminal Investigations of Individuals and Organizations*,” “do[es] not . . . create a duty  
27 in favor of the general public”).

1 Plaintiffs cannot establish that the Instruction Manual marks the consummation of  
2 DHS' decision-making process as it relates to NEPA. Courts have examined several  
3 factors to ascertain whether an action marks the consummation of an agency's decision-  
4 making process. First, the action "must not be of a merely tentative or interlocutory  
5 nature." *Bennett*, 520 U.S. at 178. But, "tentative" is a precise description of the  
6 Instruction Manual challenged here as the document is merely a guide to assist DHS  
7 personnel. "[G]uidances do not consummate the decision-making process, they are  
8 merely steps relied on to reach a decision" and do not qualify as final agency actions.  
9 *Friends of Potter Marsh v. Peters*, 371 F. Supp. 2d 1115, 1120 (D. Alaska 2005).  
10 Second, an action may mark the consummation of an agency's decision-making process  
11 if it constitutes the agency's "last word on the matter[.]" *Or. Nat. Desert Ass'n v. U.S.*  
12 *Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006). In the NEPA context, a common  
13 example is where an agency provides the "last word on a project's environmental impact"  
14 as a whole. *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982). The  
15 Instruction Manual does no such thing. Third, the court may inquire whether an agency  
16 has "arrived at a definitive position and put the decision into effect." *Idaho Watersheds*  
17 *Project v. Hahn*, 307 F.3d 815, 828 (9th Cir. 2002). For instance, when an agency  
18 implements its decision to allow grazing on federal land by issuing grazing permits to  
19 ranchers, the final action requirement is met. *Id.*; *Or. Nat. Desert Ass'n*, 465 F.3d at 985.  
20 Here, Federal Defendants have not issued a permit, implemented a project, nor taken any  
21 other comparable action reflecting implementation of a definitive position.

22 Plaintiffs' challenge to the Instruction Manual also cannot meet the second prong  
23 of *Bennett*; whether the challenged action is one by which rights or obligations have been  
24 determined or from which legal consequences flow. *Bennett*, 520 U.S. at 178. A  
25 challenge to an agency action fails the second prong of the *Bennett* test if the challenged  
26 action "establishes only the procedural framework under which the [agency] intends to  
27 operate." *Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs*, 335 F.3d  
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1 607, 619 (7th Cir. 2003). The “action” Plaintiffs challenge here represents nothing more  
2 than the internal, procedural framework under which DHS intends to implement NEPA.  
3 Legal consequences do not flow from the Instruction Manual—it has no force of law.  
4 The Ninth Circuit has emphasized that courts “have no authority to bind [an agency] to  
5 the guidelines in [a] Manual or [a] Handbook.” *W. Radio Servs. Co. v. Espy*, 79 F.3d  
6 896, 902 (9th Cir. 1996); *see also Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014, 1017  
7 (9th Cir. 1987) (upholding internal INS operating instructions as general statements of  
8 policy against procedural challenge because the subject policies did “not establish a  
9 ‘binding norm’” and were not “‘finally determinative of the issues or rights to which  
10 [they are] addressed,’ but [instead left] INS officials ‘free to consider the individual facts  
11 in the various cases that arise.’”). Other circuits have reached similar conclusions. *See,*  
12 *e.g., Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (recognizing  
13 that the APA created “three boxes” for administrative actions: “legislative rules,  
14 interpretive rules, and general statements of policy,” and that courts do not review  
15 “general statements of policy”).

16 The Instruction Manual challenged in Count I guides DHS personnel in *evaluating*  
17 agency actions; it does not *propose*, much less *require*, any specific actions with on-the-  
18 ground impacts and is thus not “final agency action.” *United States v. Alameda Gateway*  
19 *Ltd.*, 213 F.3d 1161, 1167 (9th Cir. 2000); *Northcoast Env’tl. Ctr. v. Glickman*, 136 F.3d  
20 660, 667 (9th Cir. 1998). Plaintiffs fail to show that the Instruction Manual meets both  
21 prongs of *Bennett*, thus Count I should be dismissed..

22 2. The Instruction Manual does not qualify as a “rule” under the APA

23 Plaintiffs may argue that the Instruction Manual qualifies as a rule under 5 U.S.C.  
24 § 551(4), and thus requires NEPA analysis pursuant to 40 C.F.R. § 1508.18(a). *See* Pls.’  
25 Am. Compl. ¶¶ 96, 97. However, the Instruction Manual is merely a document  
26 establishing internal guidelines and does not meet the standard found in 5 U.S.C. §  
27 551(4).

1           5 U.S.C. § 551(4) states that “‘rule’ means the whole or a part of an agency  
2 statement of general or particular applicability and future effect designed to implement,  
3 interpret, or prescribe law or policy[.]” The Ninth Circuit has consistently found that  
4 documents that establish guidelines or state internal policy do not have the force and  
5 effect of law and do not meet the definition of a “rule.” *See, e.g., Lowry v. Barnhart*, 329  
6 F.3d 1019, 1022 (9th Cir. 2003) (noting that not all agency pronouncements create  
7 judicially enforceable rights); *Alameda Gateway Ltd.*, 213 F.3d at 1168 (Army Corps’  
8 regulation “was not intended to have the force of law, but was instead a policy statement  
9 to guide the practice of district engineers”); *Ctr. for Biological Diversity v. Brennan*, 571  
10 F. Supp. 2d 1105, 1119–20 (N.D. Cal. 2007). To have the force and effect of law, a rule  
11 must be substantive and “conform to certain procedural requirements.” *Alameda*  
12 *Gateway Ltd.*, 213 F.3d at 1168 (quoting *United States v. Fifty-Three (53) Eclectus*  
13 *Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982)).

14           Documents that are interpretive or “general statements of policy or rules of agency  
15 organization, procedure or practice” do not have the force and effect of law. *Alameda*  
16 *Gateway Ltd.*, 213 F.3d at 1168; *see Hells Canyon Preservation Council v. U.S. Forest*  
17 *Serv.*, 593 F.3d 923, 930–31 (9th Cir. 2010). An agency’s management guidelines are  
18 not final agency action if they do not “propose any site-specific activity [or] call for  
19 specific actions directly impacting the physical environment.” *Glickman*, 136 F.3d at 667,  
20 670. While an agency’s pronouncements may create judicially enforceable duties, such a  
21 pronouncement must “‘prescribe substantive rules—not interpretive rules, general  
22 statements of policy or rules of agency organization, procedure or practice,’ and must  
23 have been ‘promulgated pursuant to a specific statutory grant of authority and in  
24 conformance with the procedural requirements imposed by Congress.’” *Lowry*, 329 F.3d  
25 at 1022 (quoting *Fifty-Three (53) Eclectus Parrots*, 685 F.2d at 1136). Here, the  
26 Instruction Manual, by its very terms, was created to “establish the policy and procedures  
27 DHS follows[.]” Instruction Manual at III-1. The fact that it was not published in the  
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1 Code of Federal Regulations provides further evidence that the document was not  
2 intended to be binding. *See W. Radio Servs. Co.*, 79 F.3d at 901. The Instruction Manual  
3 is, thus, not a rule.

#### 4 **B. Count II is a Non-Justiciable Programmatic Challenge**

5 Plaintiffs' challenges in Count II fail to allege a discrete agency action that DHS  
6 was required to take. Count II purports to challenge NEPA compliance for nearly all of  
7 DHS' statutory immigration authority, alleging that "DHS has eight programs covering,  
8 respectively: 1) employment based immigration; 2) family based immigration; 3) long-  
9 term nonimmigrant visas; 4) parole; 5) TPS; 6) refugees; 7) asylum; and DACA." Am.  
10 Compl. ¶ 105. Plaintiffs allege that the seven statutory areas of immigration policies and  
11 DACA require programmatic environmental analysis, such as through a PEIS, under 40  
12 C.F.R. § 1508.18(b)(3). Am. Compl. ¶¶ 104, 105. However, Count II fails to state a  
13 claim under § 706(1) of the APA, which requires allegations of both a *discrete* agency  
14 action and that the agency was *required* to take such action, and it should be dismissed.

15 In *Lujan and Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004)  
16 ("*SUWA*"), the Supreme Court made clear that the APA does not authorize suits seeking  
17 "*wholesale* improvement of [an agency] program by court decree," regardless of whether  
18 such suits are couched in terms of a challenge to a final agency action or as a suit to  
19 compel agency action unlawfully withheld or unreasonably delayed. *Lujan*, 497 U.S. at  
20 891; *SUWA*, 542 U.S. at 64–65. Instead, in order "to protect agencies from undue  
21 judicial interference with their lawful discretion, and to avoid judicial entanglement in  
22 abstract policy disagreements which courts lack both expertise and information to  
23 resolve," the APA insists upon an "'agency action,' either as the action complained of (in  
24 §§ 702 and 704) or as the action to be compelled (in § 706(1))." *SUWA*, 542 U.S. at 66,  
25 62.

26 In *Lujan*, the Supreme Court clarified that the APA's final agency action  
27 requirement precludes "general judicial review of [an agency's] day-to-day operations."  
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1 *Lujan*, 497 U.S. at 899. In *Lujan*, the plaintiffs claimed that the Bureau of Land  
2 Management (“BLM”) violated NEPA when implementing what plaintiffs termed the  
3 “land withdrawal review program.” *Id.* at 875. This prompted the Court to observe that  
4 the purported “land withdrawal review program:”

5 is simply the name by which petitioners have occasionally referred to the  
6 continuing (and thus constantly changing) operations of the BLM in reviewing  
7 withdrawal revocation applications and the classifications of public lands and  
8 developing land use plans as required by the [relevant statute]. It is no more  
9 an identifiable “agency action”—much less a “final agency action”—than a  
10 “weapons procurement program” of the Department of Defense or a “drug  
interdiction program” of the Drug Enforcement Administration.

11 *Id.* at 890. Absent discrete, final agency action, the APA does not permit a plaintiff to  
12 obtain wholesale review of an entire program. *Id.* at 891–94; *see also Glickman*, 136  
13 F.3d at 668–70.

14 In *SUWA*, the Court further clarified the permissible scope of § 706(1) challenges,  
15 holding that § 706(1) only authorizes claims asserting that “an agency failed to take a  
16 *discrete* agency action that it is *required* to take[,]” and further explained that these two  
17 limitations “rule out several kinds of challenges.” *SUWA*, 542 U.S. at 64–65. With  
18 respect to the first limitation, the Court held that an APA “failure to act” is “properly  
19 understood as a failure to take an *agency action*—that is, a failure to take one of the  
20 agency actions (including their equivalents) earlier defined in § 551(13).” *Id.* at 62. It  
21 explained that this limitation of judicial review “to discrete agency action precludes the  
22 kind of broad programmatic attack . . . rejected in [*Lujan*],” such that the *Lujan* plaintiffs  
23 “would have fared no better if they had characterized” their claim as an alleged failure to  
24 act. *Id.* at 64–65. With respect to the second limitation “to *required* agency action[,]” the  
25 Court explained that it “rules out judicial direction of even discrete agency action that is  
26 not demanded by law.” *Id.* at 65.

27 In this case, Plaintiffs contest seven statutes that DHS administers, covering broad  
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1 categories such as “family” and “employment.” Am. Compl. ¶ 55. This is precisely the  
2 type of broadside policy attack the APA’s limitations discussed in *Lujan* and *SUWA* are  
3 intended to preclude. Plaintiffs cannot demand that DHS be required to analyze the  
4 seven broad areas of statutory authority in a PEIS because the challenged statutes do not,  
5 individually or collectively, constitute a discrete program. Instead, the statutes provide  
6 the Congressionally-mandated framework under which DHS operates. For example, 8  
7 U.S.C. § 1153(a) states that “[a]liens subject to the [definitions found in 8 U.S.C § 1151]  
8 shall be allotted visas . . . in a number not to exceed 23,400” for unmarried children of  
9 citizens, “in a number not to exceed 114,200” for spouses and unmarried children of  
10 permanent resident aliens, and “in a number not to exceed 23,400” for married children  
11 of citizens. 8 U.S.C. § 1153(a)(1)-(3). Plaintiffs merely list the statutes that provide the  
12 parameters for DHS’ operation; they fail to identify any discrete, final agency action on  
13 the part of the agency, and their claim fails. *See Ctr. for Biological Diversity v.*  
14 *Veneman*, 394 F.3d 1108, 1111–13 (9th Cir. 2005) (affirming dismissal for lack of  
15 subject matter jurisdiction because plaintiffs did not challenge “discrete agency action”);  
16 *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 801–02 (9th Cir. 2013) (dismissing APA  
17 claim challenging the Department of Interior’s “day-to-day operations” because the claim  
18 did not challenge “final agency action”).

19 Further, neither NEPA nor its implementing regulations *require* DHS to prepare a  
20 PEIS for the seven broad areas of statutory authority and DACA. The second prong of  
21 *SUWA* requires that a plaintiff challenge an agency action that the agency is *required* to  
22 take. *SUWA*, 542 U.S. at 64. § 706(1) “empowers a court only to compel an agency ‘to  
23 perform a ministerial or non-discretionary act[.]’” *SUWA*, 542 U.S. at 64. Yet an  
24 agency’s decision to prepare a PEIS rests wholly within its discretion. *See Kleppe v.*  
25 *Sierra Club*, 427 U.S. 390, 412 (1976) (noting that the decision to conduct a PEIS  
26 requires “a high level of technical expertise and is properly left to the informed discretion  
27 of the responsible federal agencies”); *Nevada v. Dep’t of Energy*, 457 F.3d 78, 92 (D.C.

1 Cir. 2006) (“The decision whether to prepare a programmatic EIS is committed to the  
2 agency’s discretion.”). CEQ regulations similarly reflect that preparing a PEIS is  
3 discretionary. *See* 40 C.F.R. § 1502.4(b) (“[An EIS] *may be prepared* . . . for broad  
4 Federal actions . . . .” (emphasis added)); *id.* § 1502.4(c)(2) (“When preparing statements  
5 on broad actions . . . , agencies *may find it useful* to evaluate the proposal(s) . . .  
6 [g]enerically, including actions which have relevant similarities, such as common timing,  
7 impacts, alternatives, methods of implementation, media, or subject matter” (emphasis  
8 added)).

9       Since § 706(1) can only be used to compel “non-discretionary” acts, and the  
10 preparation of a PEIS is, by definition, discretionary, DHS’ alleged failure to prepare a  
11 PEIS is not reviewable under the APA. *See La Cuna De Aztlan Sacred Sites Prot. Circle*  
12 *Advisory Comm. v. U.S. Dep’t of the Interior*, No. 2:11-CV-00395-ODW (OPX), 2012  
13 WL 12888325, at \*4 (C.D. Cal. Mar. 21, 2012) (“because this Court may review under  
14 APA only final agency action the agency was required to take and because Defendants  
15 were not required to prepare a PEIS, Defendants’ decision not to prepare a PEIS is not  
16 reviewable”). As the Supreme Court has repeatedly affirmed, NEPA does not exist to  
17 “give citizens a general opportunity to air their policy objections to proposed federal  
18 actions.” *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777  
19 (1983). Despite Plaintiffs’ obvious objections to DHS’ statutory mandate to implement  
20 and oversee immigration policy, Plaintiffs “cannot seek *wholesale* improvement of this  
21 program by court decree, rather than in the offices of the Department or the halls of  
22 Congress, where programmatic improvements are normally made.” *Lujan*, 497 U.S. at  
23 891. Plaintiffs’ challenge in Count II fails both prongs of *SUWA* and should be  
24 dismissed.

### 25       **C. Plaintiffs’ Challenge to DACA is Unreviewable under NEPA**

26       Although NEPA applies generally to “major federal actions,” excluded from that  
27 definition are decisions “bringing judicial or administrative civil or criminal enforcement  
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1 actions.” 40 C.F.R. § 1508.18(a). Hence, in a display of uniformity with the APA’s bar  
2 on reviewing matters of enforcement and prosecutorial discretion,<sup>3</sup> the decision whether  
3 to bring judicial and administrative civil and criminal enforcement actions is specifically  
4 exempted from NEPA’s requirements. *See United States v. Rainbow Family*, 695 F.  
5 Supp. 314, 324 (E.D. Tex. 1988) (rejecting claim that NEPA required an environmental  
6 analysis to enjoin large, unpermitted gatherings in a national forest, because “it [wa]s not  
7 a ‘major Federal action’ under NEPA, requiring environmental analysis, to bring a civil  
8 or criminal action to enforce Forest Service or other governmental regulations or  
9 statutes”). Thus, a challenge to DACA cannot be brought under NEPA because of the  
10 express exemption for law enforcement activities. Such activities are simply not the kind  
11 of actions that are (or should be) informed by NEPA analysis or are subject to judicial  
12 review for compliance with NEPA.

13 The decision to grant or not grant deferred status under DACA meets the definition  
14 of a judicial or administrative civil or criminal enforcement action. Under the INA,  
15 individuals are subject to removal from the United States if, among other things, “they  
16 were inadmissible at the time of entry, have been convicted of certain crimes, or meet  
17 other criteria set by federal law.” *Arizona v. United States*, 567 U.S. 387, 396 (2012)  
18 (citation omitted). Due to resource constraints, the federal government cannot remove  
19 every removable alien, which means that a “principal feature of the removal system is the  
20 broad discretion exercised by immigration officials.” *Arizona*, 567 U.S. at 396 (citation  
21 omitted). “One form of discretion the Secretary of Homeland Security exercises is  
22 ‘deferred action,’ which entails temporarily postponing the removal of individuals  
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24 <sup>3</sup> The APA bars judicial review of certain categories of decisions that “courts traditionally  
25 have regarded as ‘committed to agency discretion.’” *Lincoln v. Vigil*, 508 U.S. 182, 192  
26 (1993) (quoting 5 U.S.C. § 701(a)(2)). Among the decisions committed to executive  
27 discretion are an “agency decision not to prosecute or enforce, whether through civil or  
28 criminal process,” and “an agency’s exercise of enforcement power.” *Chaney*, 470 U.S.  
at 831, 833.

1 unlawfully present in the United States.” *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir.  
2 2015) (citation omitted), *cert. denied*, 136 S. Ct. 900 (2016). Deferred action is a practice  
3 by which the Secretary exercises her “discretion to abandon” the removal process, and to  
4 notify an individual alien of a non-binding decision to forbear from seeking his removal  
5 for a set period. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483  
6 (1999); *see* 8 C.F.R. § 274a.12(c)(14) (describing “deferred action” as “an act of  
7 administrative convenience to the government which gives some cases lower priority”).  
8 In 2012, DACA made deferred action available to certain unlawfully present aliens who  
9 came to the United States as children. *See* “Napolitano Memo.” DACA is an “exercise  
10 of prosecutorial discretion,” *id.* at 1, and it reflects the Department’s decision to bring or  
11 not bring an enforcement action against a particular individual.

12 Case law supports the position that Plaintiffs’ challenge to DACA is unreviewable  
13 under NEPA. There are not a plethora of cases addressing the issue, likely because  
14 NEPA, like the APA, is clear in its prohibition on review of law enforcement activities.  
15 However, this Circuit has addressed the question and found a similar challenge  
16 unreviewable under NEPA. *United States v. Glenn-Colusa Irrigation District*, 788 F.  
17 Supp. 1126 (E.D. Cal. 1992), is especially on point. In that case, the government moved  
18 for an injunction to enforce certain provisions of the Endangered Species Act (“ESA”).  
19 *Id.* at 1128. The irrigation district contended that enforcement of the ESA “without  
20 completion of an environmental impact statement violates the National Environmental  
21 Policy Act[.]” *Id.* at 1135. The court disagreed, finding that the government’s decision  
22 to enforce the statute did not trigger NEPA. *Id.* As the court observed, a contrary  
23 interpretation requiring NEPA analyses for law enforcement-related actions “would lead  
24 to a highly impractical result in which any decision of a law enforcement agency—  
25 whether to go forward with an action or forbear from action—would require a NEPA  
26 analysis.” *Id.* Here, as in *Glenn-Colusa*, the Department’s decision on how to enforce  
27 immigration laws is not reviewable under NEPA. *See also Calipatria Land Co. v. Lujan*,

1 793 F. Supp. 241, 245 (S.D. Cal. 1990); *Tucson Rod & Gun Club v. McGee*, 25 F. Supp.  
2 2d 1025, 1029 (D. Ariz. 1998); *West v. Holder*, 60 F. Supp. 3d 197, 204 (D.D.C. 2015),  
3 *aff'd sub. nom.*, *West v. Lynch*, 845 F.3d 1228 (D.C. Cir. 2017); *Mobil Oil Corp. v. F.T.C.*,  
4 562 F.2d 170, 173 (2d Cir. 1977) (reversing the district court’s decision to require NEPA  
5 analysis in the enforcement context and holding that “NEPA does not intend that the FTC  
6 may be indefinitely delayed in undertaking its statutory duties[.]”).<sup>4</sup>

7 NEPA was not intended to become a means of delaying or obstructing an agency’s  
8 discretionary authority to enforce the laws entrusted to its care, which is precisely what  
9 Plaintiffs’ wholesale attack on immigration policies seeks to do here. Plaintiffs’  
10 challenge to DACA should be dismissed.

11 **V. CONCLUSION**

12 Counts I and II should be dismissed. Count I fails both prongs of *Bennett*,  
13 challenging a general statement of policy and not a final agency action as required by the  
14 APA. Count II is a non-justiciable programmatic challenge that fails to allege a discrete  
15 agency action that DHS was required to take. Finally, Plaintiffs’ challenge to DACA in  
16 Count II further fails because judicial review is precluded under NEPA. For the  
17 foregoing reasons, the Court should dismiss Counts I and II.

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20 Respectfully submitted,

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26 <sup>4</sup> Also of note in *Mobil Oil Corp. v. F.T.C.*, CEQ issued an advisory memorandum on the  
27 application of NEPA to the FTC’s enforcement actions. The CEQ concluded that NEPA  
28 analysis was not required because such a process would impede enforcement of the laws  
19 entrusted to the FTC and severely restrict the agency’s prosecutorial discretion. 562 F.2d  
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