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VIA ELECTRONIC FILING

**Re: National Environmental Policy Act Implementing Regulations Revisions, Docket Number CEQ-2021-0002**

In this proposed rule, the Council for Environmental Quality (“CEQ”) states that it “proposes these changes in order to better align the provisions” with CEQ’s perspective on “how NEPA can best inform agency decision making” as well as “NEPA’s statutory text and purpose, including making decisions informed by science.” In this Notice of Proposed Rulemaking, CEQ proposes to restore the substance of “effects” and “cumulative impacts” of the 1978 regulations that were removed from the 2020 regulations so that every reference in the NEPA regulations to “effects” includes “direct, indirect, and cumulative effects.”

Direct effects are effects caused by the action and occur at the same time and place. 40 CFR 1508.8(a) (2019). Indirect effects are effects caused by the action that are later in time or farther removed in distance but are still reasonably foreseeable. *Id.* at § 1508.8(b). Cumulative effects are effects resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of who undertakes the other actions. *Id.* at § 1508.7.

The CEQ explains that it believes the need to restore the language of “cumulative impacts” to the definition of effects because:

Analysis of reasonably foreseeable cumulative effects is integral to sound and complete environmental review. Cumulative effects analysis is an essential component of NEPA analysis, as it allows agencies and the public to understand how the incremental impacts of a proposed action contribute to cumulative environmental problems such as air pollution, water pollution, climate change, and biodiversity loss, among others. Today, science and data confirm that cumulative environmental harms, including repeated or frequent exposure to toxic air or water pollution, threaten human and environmental health and poses undue burdens on historically marginalized communities. CEQ seeks to ensure that agencies fully analyze reasonably foreseeable cumulative effects before Federal decisions are made by restoring the term and its definition.



As CEQ continues to implement its revision to the 2020 updated NEPA regulations, it must consider federal agencies' greatest failure to date of considering the cumulative and indirect impacts of its programs—the federal government-wide failure to consider the actions it takes to increase population growth in the United States through immigration. If CEQ wants to achieve its stated goal of ensuring that NEPA is implemented according to its statutory text and purpose, and in accordance with the science, it must stop allowing federal agencies to ignore in their totality the environmental effects of federal programs and policies that are responsible for the primary stated concern of the statute. NEPA was explicitly concerned with population growth; in fact, population growth is the *first* concern mentioned in NEPA's "Congressional declaration of national environmental policy":

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, **particularly the profound influences of population growth**, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S. § 4331 (a) (emphasis added).

In 1970, when Congress realized that population growth, above all else, would profoundly impact the population, and therefore required the federal government to become transparent to the public about the environmental consequences of agency policies, the U.S. population was approximately 210 million. Today, the United States' population has surged past 330 million. Immigration has been responsible for a large proportion of this growth. According to the Pew Research Center, immigrants and their descendants accounted for 72 million in U.S. population growth between 1965 and 2015, after the Hart Cellar Immigration Act of 1965 was passed.<sup>1</sup> The bulk of this immigration induced population growth occurred well after the passage of NEPA in 1970. Immigration is likely to be the primary factor in population growth in the foreseeable future as well—depending on policy choices by the government. The Census Bureau has projected that net immigration between 2017 and 2060 will be 46 million, adding 75

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<sup>1</sup> Pew Research Center, 2015. "Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065: Views of Immigration's Impact on U.S. Society Mixed." Washington, D.C.: September. [http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/ph\\_2015-09-28\\_immigration-through-2065-03/](http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/ph_2015-09-28_immigration-through-2065-03/)



million to the population in total (the descendants of immigrants also increase the US population). It also projects that immigration will be responsible for 95 percent of total American population growth in this time period. <sup>2</sup>

Examples of the environmental impacts that have resulted from that population growth include traffic congestion, energy consumption, water resources, wildlife and its habitats, our ecological footprint, urban sprawl and the loss of rural lands, carbon dioxide emissions, soil and air quality, vegetation, noise, recreation, visual resources (aesthetics), cultural and historic resources, and waste management (including hazardous and toxic wastes). Discussion of all of these particular impacts on particular citizens and locations are frequently found within the environmental impact studies produced by the government as part of their NEPA compliance. Immigration programs and policies' cumulative and indirect impacts are particularly profound and undeniable. CEQ now calls attention to the “essential” nature of ensuring that the incremental and cumulative impacts of policy proposals *must* be studied in order to achieve the core purpose of NEPA—environmentally enlightened agency decision-making.

Specifically, nothing about NEPA's core purpose at all (particularly because it focused on population growth as the first justification for its very passage) can be achieved as long as federal agencies continue to operate as though there is an immigration exemption in the statute. NEPA cannot achieve its goal of “facilitating reason-based decision making that protects public health and the environment,” if no agency has ever provided the “important information” that might lead to the selection of a “preferred alternative” such as a “no action” alternative in some cases, when it comes to the programs and policies that implement massive population transfer to the United States. In this Notice, CEQ notes that actions could cause significant consequences “later in time or farther removed in distance” that are still “reasonably foreseeable.”

The incremental and cumulative impacts of immigration cause great consequences, and they *force* ongoing and often unpopular environmental trade-offs onto the American public to deal with the population growth caused by previous government choice. Early NEPA analysis upon the adoption of new or expanded immigration programs and policies would allow the public and government decision makers to understand the choices they are making when it is not too late to reverse them—the entire goal of NEPA, which is to foster excellent decision-making rather than increase paperwork.

This dynamic plays out often during countless NEPA hearings around the country that analyze the environmental consequences of many new infrastructure projects such as dams, or reservoirs or roads—made necessary only to accommodate anticipated population growth. Local environmental activists often take a large role in the NEPA process of such projects. But, their participation is often fruitless, as the

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<sup>2</sup> Steven Camarota & Karen Zeigler, *Projecting the Impact of Immigration on the U.S. Population*, CTR. FOR IMMIGR. STUD. (Feb. 4, 2019), <https://cis.org/Report/Projecting-Impact-Immigration-US-Population>.



decision was made inevitable long before the NEPA hearing they were able to participate in, through the actions of prior federal bureaucrats that never even paid lip service to NEPA.

For instance, even when environmentalists accurately object to the building of a new road or reservoir because of its destruction of natural habitats, proponents of these projects will often win the debate by pointing out that population growth makes these projects necessary despite their environmental downsides. The idea that NEPA mandates discussion of the inevitable consequences of population growth but not the causes of population growth turns the purpose of NEPA on its head. The effects of continued population growth will only grow more significant in the future if the United States remains or expands on its current immigration driven population growth trajectory, and Americans continue to feel the effects of ever-greater overcrowding in their daily lives. Unlike the days when population growth was primarily a result of the free choices of Americans in planning their own families, today population growth is primarily the result of immigration, a federal government policy. The U.S. government is choosing high population growth, not the American citizenry.

Given that population growth's environmental effects are not in doubt, and that mass immigration's effect on population growth is not in doubt, the profound environmental effects of mass immigration are also not in doubt. Nor is the original intent of NEPA to promote study of population growth through government choice in doubt. Therefore, agency failure to conduct any analysis of mass immigration whatsoever amounts to a violation of NEPA. But CEQ has never ensured that the agencies implementing immigration programs and policies followed through by analyzing their immigration programs' environmental impacts. It must do so now, particularly as various agencies tasked with implementing immigration are currently making discretionary choices to vastly expand immigration.

Several different agencies are responsible for implementing our nation's immigration policies. The Department of Homeland Security, the Department of State, the Department of Justice, the Department of Health and Human Services, and the Department of Labor all have roles in the regulatory apparatus that implements immigration policy. Collectively, therefore, these agencies have been responsible for regulating the admission and permanent settlement of the well over 60 million foreign nationals who have settled into the United States since NEPA was signed into law in 1970.

The excuses provided by these agencies for their failures to subject their immigration policies to any level of NEPA review at all flagrantly violate every consideration named by CEQ in this Notice of Proposed Rulemaking. For instance, the Department of Homeland Security and the Department of Justice stated in a Joint Notice of Proposed Rulemaking<sup>3</sup> in August that they consider immigration related

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<sup>3</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906 (Aug. 20, 2021)



programs exempt from NEPA, stating: “Generally, the Departments believe NEPA does not apply to a rule intended to change a discrete aspect of an immigration program because any attempt to analyze its potential impacts would be largely, if not completely, speculative.” In another recent proposed rulemaking, the Department of Homeland Security claimed that one of its programs was exempt from NEPA because it believed “analysis of such effects would require predicting a myriad of independent decisions by a range of actors... at indeterminate times in the future. Such predictions are unduly speculative and not amenable to NEPA analysis.”<sup>4</sup> Statements such as these— which, at the very least, disclaim all need to analyze indirect or cumulative impacts, encapsulate the essence of the kind of failure to engage in environmentally aware reasoning that the CEQ has proclaimed NEPA regulations must not allow in this proposed rulemaking.

Given the interagency nature of the implementation of immigration, CEQ taking the lead in correcting this neglect of NEPA would be particularly appropriate. However, a lack of action by CEQ does not excuse the agencies’ failure to perform their duties under NEPA. As the D.C. Circuit said in one of the earliest cases involving agency obstruction over compliance with NEPA: the statute’s language does not provide an “escape hatch for footdragging agencies; it does not make NEPA’s procedural requirements somehow ‘discretionary.’ Congress did not intend the Act to be a paper tiger.”<sup>5</sup>

Congress enacted NEPA to “promote environmentally sensitive decision-making.”<sup>6</sup> NEPA was intended to ensure that the agency reaching a decision on an action that will have an environmental impact “will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>7</sup> This “audience includes the President, who is responsible for the agency’s policy, and Congress, which has authorized the agency’s actions.”<sup>8</sup> The president and Congress may use the environmental information to decide “larger issues of policy that may include matters outside the scope of a single agency’s discretion.”<sup>9</sup> The “‘larger audience’ also includes the public,” and NEPA analysis provides “a springboard for public comment.”<sup>10</sup> As one court put it: “At the very least, NEPA is an environmental full disclosure law.”<sup>11</sup> In enacting NEPA, Congress “may not have intended to alter the then existing decisionmaking responsibilities or to take away any

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<sup>4</sup> *Deferred Action for Childhood Arrivals*, 86 Fed Reg 53736 (Sept. 28, 2021).

<sup>5</sup> *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F. 2d 1109, 1114 (D.C. Cir. 1971).

<sup>6</sup> *Anderson v. Evans*, 314 F. 3d 1006, 1016 (9th Cir. 2002).

<sup>7</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>8</sup> *Sierra Club v. Watkins*, 808 F. Supp. 852, 858, (D.D.C. 2006).

<sup>9</sup> *Id.*

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

<sup>11</sup> *Environmental Defense Fund, Inc v. Corps of Engineers*, 325 F.Supp. 749, 759 (E.D.Ark. 1971).



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then existing freedom of decisionmaking, but it certainly intended to make such decisionmaking more responsive and more responsible.”<sup>12</sup>

NEPA aims to give the public a voice in governmental decisions that impact the everyday citizens’ daily lives and the environment they live in. It was designed to prevent policies with an environmental cost to the public at large and to future generations being thoughtlessly imposed by distant bureaucrats in the capital and those with the resources and connections to influence them.

Today, there is no government program or project with a greater impact on the environment of present and future generations of Americans that has become more disconnected and uninfluenced by the needs of everyday American citizens than immigration. The public could be given the opportunity to weigh in on the impact immigration has had on their communities through hearings across the nation under NEPA, but it has never happened. Furthermore, due to the neglect of the CEQ in allowing agencies to sidestep the environmental impacts of immigration completely, it is the government program whose environmental effects are most avoided in public debate on the issue. In order that NEPA may fulfill its mandate in promoting environmentally sensitive decision-making, CEQ should explicitly tell agencies to stop ignoring immigration in their NEPA procedures, and the public must receive the transparency it deserves on immigration at last.

Sincerely,

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<sup>12</sup> *Id.*