



October 19, 2021

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VIA ELECTRONIC FILING

Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protections by Asylum Officers

Dear Ms. Strano and Ms. Alder Reid,

As the Director of Litigation for the Center for Immigration Studies (CIS), I hereby submit this comment on behalf of Ralph Pope, John Ladd, Peggy Davis, Fred Davis, Gail Getzwiller, Kevin Lynn, Massachusetts Coalition for Immigration Reform (MCIR), and Californians for Population Stabilization (CAPS) to the U.S. Department of Justice (DOJ) and U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the departments' request for comments on the Joint Notice of Proposed Rulemaking (JNPRM) titled *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protections by Asylum Officers*, as published in the Federal Register on August 20, 2021.¹ I hereby incorporate by reference CIS' comment submitted on October 18, 2021, as well, which is attached herein and also available at CIS' website at

[https://cis.org/sites/default/files/2021-10/JNPRM Asylum Procedures FINAL submitted 10-18-2021.pdf](https://cis.org/sites/default/files/2021-10/JNPRM%20Asylum%20Procedures%20FINAL%20submitted%2010-18-2021.pdf).

As private citizens and non-profit organizations, Ralph Pope, John Ladd, Peggy Davis, Fred Davis, Gail Getzwiller, Kevin Lynn, MCIR, and CAPS (collectively, "commenters") also comment to reiterate that it would be a direct violation of their procedural rights if the departments fail to initiative legally appropriate NEPA review, starting with an environmental assessment (EA), before this rule becomes final. The

¹ 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), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.



National Environmental Policy Act (“NEPA”)² guarantees them, as well as American citizens at large, the opportunity to weigh in on the environmental, social, and economic impacts they suffer and anticipate will be aggravated further *before* the departments adopt these policies. If DHS and DOJ chose to adopt these policies without taking into account the environmental impacts that a NEPA review would reveal, they will be in violation of the law. By their own admission, DHS and DOJ are not informed of the environmental impacts that these policy changes will incur. Therefore, they must conduct environmental review of this proposed rule to be able to make an environmentally enlightened decision.

The departments make a number of unsustainable and mutually exclusive claims in the JNPRM to disavow their legal obligations to conduct environmental analysis under NEPA, claims that commenters are aware are entirely mistaken based on their own experience as well as general knowledge.

First, the departments assert that they are entitled to an exemption under NEPA for immigration related actions, 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.”³

First, NEPA does not provide agencies with an escape hatch from compliance with the entire NEPA process by merely claiming the environmental effects of a program are “speculative.” As the D.C. Circuit Court explained in an early case applying NEPA, the basic function of NEPA is to force federal agencies to consider the potential effects of their actions, and consideration of future impacts necessitates some degree of speculation about the future:

The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. And one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as “crystal ball inquiry.” “The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible.” But implicit in

² National Environmental Policy Act, 42 U.S. Code §§ 4321 through 4347 (2021), available at: https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-NEPA.pdf.

³ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46939 (Aug. 20, 2021), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.



this rule of reason is the overriding statutory duty of compliance with impact statement procedures to “the fullest extent possible.”⁴

The departments’ current response to the idea that NEPA applies to its immigration actions very much resembles the response of other agencies until they were forced by litigation to admit that NEPA did apply to their actions. In an interview conducted in 1980, when NEPA had been law for ten years, William Hedeman, a one-time Director of the Environmental Protection Agency’s Office of Environmental Review, explained:

If you analyze the ten-year history of NEPA you see several stages—an initial stage in which Federal agencies resisted its application by arguing that it was not applicable to most of their activities. As a result of litigation, that stage ultimately evolved into a second stage in which agencies admitted that it was applicable, but prepared environmental impact statements that were written more toward responding to anticipated court litigation.⁵

DHS and DOJ are by no means unusual in simply trying to claim that NEPA just doesn’t apply to its activities. But NEPA does not let an agency off the hook so easily: “An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.”⁶

Second, DHS is demonstrably incorrect to assert that providing any sort of estimation of the environmental effects of population growth caused by administrative immigration decisions presents a particularly impenetrable problem requiring an excessive degree of speculation. Environmental scientists routinely calculate human impacts on the environment and the effects of trends in population growth are a crucial, unavoidable part of any such calculation.⁷ Calculating the environmental impacts of additional population does not require more guesswork than many NEPA analyses agencies have routinely produced for decades.

Those agencies involved in regulating immigration—like all agencies applying NEPA analysis—would be allowed to make reasonably informed estimates and, just as in other contexts, the public would not be able to demand that all agency predictions prove to be absolutely accurate. All agencies had to engage in what could be termed “speculation” when they first had to implement NEPA. Performing an immigration NEPA analysis would not require excessive speculation, and it would certainly not be unreasonably difficult.⁸

⁴ *Scientists’ Inst. for Public Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d at 1093, citing *Natural Resources Defense Council v. Morton*, 458 F. 2d 827, 833 (D.C. Cir. 1972)

⁵ The National Environmental Policy Act: An Interview with William Hedeman, Jr., EPA Journal, (Nov./Dec. 1980)<https://archive.epa.gov/epa/aboutepa/national-environmental-policy-act-interview-william-hedeman-jr.html>.

⁶ *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985).

⁷ See, e.g., POPULATION ECOLOGY AND HUMAN POPULATIONS, <https://sites.google.com/a/bvsd.org/mr-little-ap-environmental-science/unit-5-human-populations>

⁸ For instance, Progressives for Immigration Reform, a nonprofit organization based in Washington, D.C., commissioned its own Programmatic Environmental Impact Statement on Immigration. If a small nonprofit organization can conduct a PEIS on immigration, a federal agency can as well. The analysis can



In claiming that NEPA does not apply because of the speculation involved in analyzing immigration programs, the departments ignore the well-established use of nationwide, programmatic NEPA reviews by federal agencies that are much akin to and no more speculative than would be a nationwide, programmatic analysis of immigration programs. An illustrative example of a wide reaching, expansive programmatic review is the “Programmatic Environmental Assessment for the Office of Coast Survey Hydrographic Survey Projects”⁹ which applies to surveying by the agency within all coastal U.S. waters. This programmatic EA for the National Ocean Service (NOS) of the National Oceanic and Atmospheric Administration (NOAA) analyzes the environmental effects of all of NOS's surveying and mapping activities (using echo sounders as well as other instruments) over a five-year period within the Economic Exclusion Zone (EEZ) of the entire United States. The geographic area subject to analysis is vast, encompassing all the waters all to the 200-mile limit from the U.S. coastline, including the North Atlantic Region, South Atlantic Region, Caribbean Sea, Gulf of Mexico, Alaskan waters, Bering Sea, California coast and the entire West Coast, as well as huge areas of the Pacific Ocean surrounding Hawaii and other U.S. territories such as American Samoa. This project area thus includes hundreds of thousands of square miles in two oceans and several seas. The primary environmental concern analyzed is potential impacts to hearing and behavior in marine mammals from the use of underwater devices related to active sonar, but the EA covers other environmental concerns as well.

This EA clearly demonstrates how what could be termed “speculation,” including speculation that includes projecting where impacts will actually occur within a very large geographic area. Although NOS doesn't know where the specific marine mammals are located on which its action might have adverse effects, it does know where its surveys and mapping have taken place in the past and where they are likely to occur in the coming five years covered by the EA. So, for example, NOS could project that 15% of the project activity is likely to take place along the West Coast, 10% in Alaska, 5% in the Pacific Islands, 30% in the Gulf of Mexico, etc. It would then use modeling to determine which species of cetaceans (whales and dolphins) and other marine mammals (e.g., sea otters, manatees, walruses) are most likely to be affected by the proposed action, and to what extent. It can then determine whether or not those predicted impacts are “significant” (which is always a judgment call), and whether or not a full EIS needs to be conducted. Therefore, estimating impacts of a particular wide scale federal program even when they are not known precisely, based on past information, is at the heart of much NEPA analysis.

The kind of forecasting necessary to complete the NOS' programmatic EA is very analogous to a process that immigration agencies could easily conduct. Based on recent experience and available Census and DHS data, DHS could certainly project where new immigrants are likely to settle and create growth pressures, both on the local and regional scales, and then cumulatively, on a national scale. DHS has further information

be found here: Environmental Impact Statement, Progressives for Immigration Reform, (Oct. 2015), <http://www.immigrationeis.org/ieis-docs/PFIR-Immigration-EIS-2015oct-Abstract-and-Executive-Summary.pdf>.

⁹ Final Programmatic Environmental Assessment for the Office of Coast Survey Hydrographic Survey Projects (May 2013), at'l Oceanic and Atmospheric Admin., <https://nauticalcharts.noaa.gov/about/docs/regulations-and-policies/2013-18-nepa-ocs-final-pea.pdf>.



for these estimates, at least on a macro level, based on the locations that immigrants declare in their benefits applications, as well as where their U.S. sponsors live. In fact, DHS already publishes annual statistics on the metropolitan areas in which new arrivals settle.¹⁰ Patterns of immigration settlement have remained relatively consistent for many decades, and thus, projecting the environmental impacts of our immigration is quite feasible. It can be done from a combination of mining data from administrative benefits applications and examining historical settlement trends. In addition, the Census Bureau data offer rich and even more detailed statistics on the settlement patterns of immigrants. From there, reasonable predictions about the environmental impacts of immigration driven population growth can easily be produced. Not only could the environmental impacts of our immigration policies be estimated, but also there is already ample data already collected and published that could be used to do so.¹¹ It is merely of matter of connecting the dots in an organized fashion.

Therefore, there is no merit at all to the argument that environmental analysis that involves forecasting and quantifying human impacts over wide areas where the locations of those impacts cannot predetermined and assessed with laser precision need not be done at all. This argument is contrary to the very purpose of programmatic environmental reviews. Indeed, such forecasting is the essence of NEPA. If agencies could avoid NEPA compliance by merely labeling the impacts of their actions “speculative,” then agencies could essentially nullify NEPA. Such agency posturing degrades NEPA into little more than an aspirational statute. But the courts have made clear since the seminal case of *Calvert Cliffs* that NEPA has real teeth and requires genuine action on the part of agencies.¹²

The departments might object that the common practice of agencies conducting programmatic analysis of ongoing programs over large areas is not comparable to environmental analysis of our immigration programs because our immigration programs are much more consequential with far more significant and manifold impacts. It is true that our nation’s immigration programs have much farther reaching and myriad environmental consequences than a very large number of the routine programmatic environmental analyses (generally EAs, rather than EISs) conducted across the federal government.¹³ However, the argument that the environmental

¹⁰ See Department of Homeland Security, Yearbook of Immigration Statistics, <https://www.dhs.gov/immigration-statistics/yearbook>.

¹¹ *Id.*

¹² *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F. 2d 1109 (D.C. Cir. 1971).

¹³ To give a few examples, agencies conduct PEAs of: federal support for broadband in rural communities nationwide, see *Programmatic Env’t Assessment, Broadband Deployment to Rural America, U.S. Department of Agriculture (Sept. 2018)*, https://www.rd.usda.gov/sites/default/files/Final_FONSI_RUS_PEA_signed.pdf; the effects of a nationwide program requiring owners of antennas to register them with the Federal Aviation Administration, see *Final Programmatic Env’t Assessment for the Office of Coast Survey Hydrographic Survey Projects, Nat’l Oceanic and Atmospheric Admin., (May 2013)*, <https://nauticalcharts.noaa.gov/about/docs/regulations-and-policies/2013-18-nepa-ocs-final-pea.pdf>; the effects of a worldwide network of moored buoys and coastal stations operated by the National Oceanic and Atmospheric Administration, see *Programmatic Environmental Assessment for NDBC Operations*,



impacts of a certain type of program are far more significant, far reaching, and manifold than so many other programs and projects which routinely undergo NEPA compliance fails to persuade that such programs are exempt from NEPA. Rather, it highlights the need for NEPA compliance.

However, even though the very massive environmental effects of immigration induced population growth increases the scope of NEPA review involved, the undertaking would be far more feasible than the departments fear precisely because population growth is such an important driver of environmental impacts. Because environmental scientists have been so concerned about population growth for such a long time, it has been extensively studied in the decades since NEPA was adopted and is comparatively well understood. Therefore, the models used by environmental scientists regarding population growth and its known environmental impacts have become so sophisticated that developing an analysis that would provide the government genuinely beneficial information about the impacts of our immigration programs based on local and national population growth would be a far less onerous undertaking than the departments imagine in this poor excuse for an exemption from NEPA for immigration programs. The effects of immigration are, quite simply, hardly the mysterious unknowable unknown that the departments purport it to be. The only reason it seems so is because immigration agencies have failed to comply with the NEPA. The very purpose of NEPA was to make decision-making on the part of agencies more environmentally enlightened. The agencies that implement immigration programs clearly need to be enlightened as to the effects of their programs.

The departments' blanket assertions that immigration programs are too speculative for NEPA to apply is therefore arbitrary and capricious on its face. They are simply wrong about the impossibility of reasonably feasible environmental analysis. Yet, it is not surprising that DHS's conclusion of such feasibility was so off base. DHS arrived at this conclusion without ever engaging in any scoping, analysis or data collection on the subject whatsoever. Without scoping, DHS has no basis for making any conclusion about the lack of feasibility of estimating the environmental impacts of its programs relating to the entrance and settlement of foreign nationals. As articulated by the Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."¹⁴ The departments have simply never grounded these assertions that the effects of immigration are far too speculative to understand through the analysis of any sort of data at all, much less the relevant data. Both DHS' and DOJ's NEPA procedures themselves are silent on the subject.

In actuality, the policy changes proposed in the JNPRM have the potential to significantly impact the environment. As CIS has explained in its previous comment, the proposed regulatory changes have the potential to increase population growth in the

National Data Buoy Center (Jan. 2018), https://www.ndbc.noaa.gov/pea/ndbc_final_pea_20180104.pdf; the effects of the issuance of credit assistance under the Water Infrastructure and Finance Act, *see* Programmatic Environmental Assessment: Finding of No Significant Impact, Env't Protection Agency (Apr. 2018), <https://www.federalregister.gov/d/2018-08865>

¹⁴ 463 U.S. 29, 43 (1983).



United States and to exacerbate the crisis on the Southwest border. The commenters who live on the border have felt the daily environmental effects of an out of control border on their lives and this policy will only make those effects worse. The consequences of constantly having all sorts of people cross their property, leaving trash, stealing goods off their property at will is more than an inconvenience—it affects their health and their very ability to make a living.

Furthermore, the JNPRM also will effect fragile habitats on the border. Many southwest ecosystems are fragile and composed of an extraordinary and unique composition of native plant and animal species. For instance, the mountainous ecosystems of southern Arizona and New Mexico are commonly called “sky islands”—islands of unique montane vegetation surrounded by a desert setting. These fragile and diverse ecosystems have taken millions of years to evolve. These beautiful and ecologically valuable mountain ranges have been degraded already to varying degrees over recent decades by the hundreds of thousands of illegal border crossers who start fires that can burn out of control, dump garbage, pollute the waters, trample the native vegetation, and destroy the wilderness characteristics of the land. Exacerbating this border crisis further will only accelerate this environmental damage.

Equally unavailing are the departments’ claims¹⁵ that the JNPRM fits into either categorical exclusion (CATEX) A3(a)¹⁶, which applies to rules of a “strictly administrative or procedural nature”¹⁷, or CATEX A3(d), applicable to the “[p]romulgation of rules . . . that amend an existing regulation without changing its environmental effect.”¹⁸ CATEX A3(a) could not apply to a proposed rule like the instant JPNRM, and the administrative record for this categorical exclusion is devoid of evidence that it can. This rule, by the departments’ own admission, includes changes to the asylum program that will affect how aliens qualify and apply for asylum, and obtain employment authorization, as well.¹⁹ There is no conceivable scenario in which the changes to the parole regulations at 8 CFR § 235.3(b)(2)(iii)²⁰ will not result in substantially greater numbers of illegal aliens being released from detention (that is the

¹⁵ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46940 (Aug. 20, 2021), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>

¹⁶ *Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA)*, U.S. DEP’T OF HOMELAND SECURITY, OFC. OF THE CHIEF READINESS SUPPORT OFFICER (effective Mar. 26, 2015), at A-1, available at: https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf

¹⁷ *Id.* at A-2.

¹⁸ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46940 (Aug. 20, 2021), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

¹⁹ *Id.* at 46916.

²⁰ *Id.* at 46946.



purpose of the proposed procedural change²¹), which will inevitably encourage massive additional numbers of others to follow.²²

Terming those changes as “procedural” or “administrative” does not change the fact that they have the potential to substantially increase the population of the United States, and substantially increase the number of illegal migrants crossing the border, which en masse, have significant environmental effects. Likewise, the departments cannot use CATEX A3(d) without some analysis showing that the proposed change would result in no change to the environmental footprint of the current asylum program. DHS and DOJ would be unable to do so with respect to the instant JNPRM because the changes therein would greatly increase the population growth that already results from the U.S. asylum program, as detailed in CIS’s previous comment. Even if the departments’ assertion were not wrong as a matter of practical fact, there is no rational basis for it, given that DHS and DOJ have never done any analysis of the current asylum program, or any previous one, either, and claim in the instant JNPRM that “any attempt to analyze its potential impacts would be largely, if not completely, speculative.”²³

Simply put, by their own admissions in this very JNPRM the departments admit that they would not be able to judge whether CATEX A3(d) applies, and it is therefore arbitrary and capricious for them to claim the categorical exclusion. A claim that a proposed policy change will not change the environmental footprint of the policy assumes that the environmental footprint of the policy is calculable, which the departments have claimed it is not. While the proposed policy change *is* calculable, it would take analysis to calculate—which the departments have freely admitted they have not done.

The departments must, at the very least, provide a response that includes a specific definition of CATEX A3(a) and an explanation of how they are able to judge whether CATEX A3(d) can apply to programs whose current environmental footprint is unknown. Not to do so would be to rely on a mere tautology and would be arbitrary and capricious.

²¹ See *id.* at 46910 (“The proposed parole provision would allow more noncitizens arriving at the U.S. border without proper documents for entry into the country to be placed into expedited removal and allow for them to have their fear claims heard and considered **outside the detention setting when space is unavailable or impracticable to use.**”) (Emphasis added.).

²² See, e.g., *Final Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL (Nov. 14, 2019), at 2 (“We assess that pull factors, **especially the prompt release of migrants who bring a child**, account for much of the huge increase in FMU migration over the past year.”) (Emphasis added.), available at:

https://www.dhs.gov/sites/default/files/publications/fccp_final_report_1.pdf.

²³ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46939 (Aug. 20, 2021), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.



Given the legal insufficiency of the department's claims of exemption or categorical exclusion, before promulgating any final rule, they must conduct, at the very least, an environmental assessment. According to commenters' own lived experience, the departments would not be able to issue merely a finding of no significant impact at the close of such an assessment. An environmental impact statement is required in order for the departments to make an *environmentally enlightened* decision about whether to implement the policies contained in the JNPRM. Without *first* conducting an environmental impact statement, promulgating a final rule would clearly violate NEPA.

Additionally, the departments also have the legal obligation to consult with the U.S. Fish and Wildlife Service before adopting a final rule, as either part of the NEPA process or separately. Specifically, under Section 7 of the Endangered Species Act (ESA), federal agencies must consult with the U.S. Fish and Wildlife Service when any action the agency carries out may affect a listed endangered or threatened species or designated critical habitat. Both the potential of population growth and the potential of increasing the numbers of people crossing the border as a result of these policies have the potential to jeopardize species that are federally protected, or to destroy or modify the critical habitats of federally protected species.

The ESA constitutes “the most comprehensive legislation enacted for the preservation of endangered species ever enacted by any nation.”²⁴ The most comprehensive legislation enacted for the preservation of endangered species ever enacted by any nation surely has no implied exemption for a government policy that constitutes one of the nation’s most significant threats to biodiversity in the United States, population growth.

The threshold for triggering an agency’s duties under the ESA and NEPA is low— if an agency takes an action that “may affect” a listed species or critical habitat, ESA Section 7 consultation is required. When a species has been listed or critical habitat designated under the ESA, all federal agencies—including DHS and DOS—must ensure in consultation with the Services that their programs and activities are in compliance with the ESA. 16 U.S.C. § 1536(a)(2). Specifically, section 7(a)(2) of the ESA mandates that all federal agencies “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” *Id.* Section 7 applies to all actions in which there is discretionary Federal involvement or control, 50 C.F.R. § 402.03. The scope of agency actions subject to consultation are broadly defined to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”).

Through consultation under Section 7 of the ESA, federal agencies work with the Services to determine whether their actions will jeopardize ESA-listed species’ survival

²⁴ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).



or adversely modify designated critical habitat, and if so, to identify ways to modify the action to avoid that result. 50 C.F.R. § 402.14. An agency is required to review its actions “at the earliest possible time” to determine whether the action may affect listed species or critical habitat. 50 C.F.R. § 402.14(a).

Federal agency actions that induce population growth are not exempt from this ESA mandate. Population growth is a clear threat potential threat to endangered species in this nation. Phil Cafaro, PH D, expressed the threat to biodiversity from population growth below:

By environmental scientists’ accounts, biodiversity (the variety of living things, comprehensively understood in terms of genetic diversity, species diversity and diversity of natural communities) is rapidly diminishing across the globe. The United Nation’s Secretariat of the Convention on Biological Diversity estimates that humanity could extinguish one out of every three species on Earth within the next one to two hundred years (SCBD 2010), while according to Raven et al. (2011): “biodiversity is diminishing at a rate even faster than the last mass extinction at the end of the Cretaceous Period, 65 million years ago, with possibly two-thirds of existing terrestrial species likely to become extinct by the end of this century.”

While paleontologists debate the causes of previous mass extinctions, the primary causes of the current one are due to ever more people to consuming, degrading and appropriating ever more resources. The consensus among conservation biologists is that the five most important “direct drivers” of biodiversity loss are habitat loss, the impacts of alien species, over-exploitation, pollution, and global climate change (Primack 2014). All five direct drivers are themselves mainly caused by the “primary drivers” of increased human populations (Brashares et al. 2001, McKee et al. 2003) and increased human economic activity (Wood et al. 2000). According to the Millennium Ecosystem Assessment, the force of these extinction drivers increased immensely over the past century as human populations and human economies exploded in size (Reid et al. 2005). Subsequent research (Butchart et al. 2010, Steffen et al. 2015) bears out the MEA’s further conclusion that the forces driving extinction are increasing in power, as societies become more populous and wealthy.

Conservation scientists agree that habitat loss is by far the number one threat to nonhuman species. For example, over 1400 species currently are listed as threatened or endangered in the U.S. under the Endangered Species Act (ESA). In a thorough study of ESA information published in the U.S. Federal Register, D. S. Wilcove and colleagues found habitat degradation or loss implicated as a cause for 85% of threatened and endangered species in the United States, making habitat loss by far the number one cause of species endangerment (Wilcove et al. 1998).

Importantly, habitat loss is directly tied to overall human numbers. The area of developed land—from which natural wildlife habitats have been permanently erased—in U.S. states is closely correlated with the population sizes of those states. The larger a state’s population, the larger the area of developed land in that state. Given the potential



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of population growth driven harm to endangered species, the JNPRM, which will certainly result in population growth, easily meets the threshold for consultation demanded by ESA Section 7.

On the basis of population growth many U.S. endangered or threatened species may be affected, including, to name just a very few: the piping plover, the gray wolf, the long-eared bat, the grizzly bear, the Canada lynx, the western prairie fringed orchid, the steel head trout, the chinook salmon, the sockeye salmon, the leedy rosewort, the dwarf trout lily, the Karner Blue Butterfly the Florida panther, the gulf Coast jaguarundi, the jaguar, the key deer, the puma, the Atlantic Bluefin tuna, the loggerhead sea turtle, the southern resident killer whale, the black footed ferret, the Eastern indigo snake, the Florida scrub-jay, the rusty patched bumble bee, and many more.

Furthermore, the JNPRM also will effect fragile habitats on the border as well. Any federally protected species along the entire southwest border, and any critical habitats in the southwest border region have the potential to be affected.

The JNPRM fails to include any plans for such consultation required by Section 7 of the ESA and the departments would be exposed to litigation risk on this issue if they attempt to finalize the regulation without conducting an examination of the possible impact this rule could have on endangered or threatened species. Before the final promulgation of the policies contained in the JNPRM, the departments are required to conduct an environmental analysis under NEPA sufficient to alert them to all of the potential environmental impacts it may create. The departments have already admitted they remain willfully ignorant of all such potential impacts in this very JNPRM. This includes effects to endangered species. Such willfulness is a failure to conduct at the very least an informal consultation process under with the U.S. Fish and Wildlife Service to ensure that the rule they promulgate will not destroy critical habitats or compromise endangered or threatened species. Such a consultation is not voluntary, but required. DHS and DOJ must begin this process before proceeding with any implementation of the policies of the JNPRM.

Sincerely,

Julie Axelrod
Director of Litigation
Center for Immigration Studies