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VIA ELECTRONIC FILING

Re: National Environmental Policy Act Implementing Regulations Revisions, Docket Number CEQ-2023-0003

This comment is submitted on behalf of the Center for Immigration Studies, a non-profit research group based in Washington D.C., and citizens Sheena Rodriguez, Kevin Lynn, Steve Kropper, Linda Huhn, David Holzman, Mike Hanauer, and Henry Barbaro. In this proposed rule, (the "NPRM") the Council for Environmental Quality ("CEQ") states that it proposes these changes "to provide for an effective environmental review process that promotes better decision making; ensure full and fair public involvement; provide for an efficient process and regulatory certainty; and "provide for sound decision making grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects."

As CEQ continues to implement its revision to the 2020 NEPA regulations, it must consider federal agencies' greatest failure to date of considering the effects of its actions, 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



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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 335 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.¹ 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.² The policy choices of the current Administration, such as ending the Remain in Mexico policy, ending construction of border barriers, instituting a host of parole programs allowing otherwise inadmissible aliens to enter and remain in the country, and curtailing interior enforcement policies, have greatly boosted immigration from what it otherwise was on pace to be, and significant environmental impacts have followed. During the Biden Administration, the foreign-born population has grown by an unprecedented 4.8 million.³ This unprecedented growth has thus occurred through a series of policy choices and the creation of discretionary immigration programs. None of the agencies that adopted these discretionary policy choices complied with NEPA when they did so.

Agencies that carry out policy choices regarding immigration include the Department of Homeland Security (DHS), the Department of State (DOS), the Department of Justice (DOJ), the Department of Health and Human Services (HHS), and the Department of Labor (DOL). The CEQ has allowed all these agencies to promulgate NEPA procedures which fail to mention or provide any framework for analyzing their immigration related programs. Furthermore, the CEQ has allowed these agencies to promulgate categorical exclusions that are vague and undefined and rely on circular reasoning. For instance, DHS adopted a set of categorical exclusions for

¹ 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/

² 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>.

³ Steven Camarota & Karen Zeigler, Just-Released Data: Foreign-Born Population Above 46 million in July 2022, CTR. FOR IMMIGR. STUD. (Sept. 22, 2023), <https://cis.org/Camarota/JustReleased-Data-ForeignBorn-Population-Above-46-million-July-2022>.



“Administrative and Regulatory Activities,” one of which is A3, which state that the following are categorically excluded:

Promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents of the following nature:

- (a) Those of a strictly administrative or procedural nature;
- (b) Those that implement, without substantive change, statutory or regulatory requirements;
- (c) Those that implement, without substantive change, procedures, manuals, and other guidance documents;
- (d) Those that interpret or amend an existing regulation without changing its environmental effect;
- (e) Technical guidance on safety and security matters; or
- (f) Guidance for the preparation of security plans.

See DHS Instruction Manual # 023-010001-01, at page A-1-A-2, available at https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf

At least two sub parts of DHS’s categorical exclusion are arbitrary and capricious, and CEQ should not have approved them. Specifically, A3(a) does not define what is “strictly administrative or procedural.” While a sensible definition might confine activities defined as “strictly administrative” as properly categorically excluded, DHS’s NEPA procedures fail to define what these words mean. It seems possible that anything an administrative agency does could potentially be “administrative” even though that would be an improper definition in the context. Indeed, DHS has cited this categorical exclusion several times when making *substantive* changes to immigration policies that will enlarge the numbers of foreign nationals who enter and settle into the country. Likewise, A(3)(d) is equally problematic, as it relies on circular reasoning. What this categorical exclusion says is that a regulatory action is determined to not have an environmental effect if it makes a change that doesn’t have an environmental effect. In other words, an action can belong to a category that doesn’t have a significant environmental impact because it doesn’t have a significant environmental impact. A categorical exclusion applying such circular reasoning is simply an invitation for an agency to declare that any rule it makes is has no environmental impact simply because the agency says it has no environmental impact. Again, in the context of immigration, DHS has repeatedly committed precisely this violation, determining regulatory actions have no environmental impact simply *because* DHS determined they belong to a category of actions that have no environmental impact. This circular reasoning is arbitrary and capricious. At no point did DHS engage in any kind of scoping or analysis related to immigration, despite immigration policy being a major component of its mission.



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DHS, without any pushback from CEQ, has stated on numerous occasions that its actions taken that expand immigration have no environmental impact because they fit into categorical exclusion A3. *See, e.g.* 80 Fed. Reg. 23,680; 81 Fed. Reg. 13,040; 81 Fed. Reg. 82,398; 82 Fed. Reg. 5,238. DHS's behavior is particularly egregious considering an examination of the administrative record for their categorical exclusions reveals that DHS never engaged in a proper scoping process in so far as their actions relate to immigration at all, rather, simply relied on what amounts to the ad hoc opinions by staff as its basis for the categorical exclusion. CEQ should not have allowed DHS to simply fail to consider at any point if its core function of the implementation of immigration policy had any environmental significance. Yet citation to this categorical exclusion comprises DHS's only form of NEPA compliance when it comes to actions that increase immigration, for it has *never* done either an EIS or an EA in regards to the creation and expansion of its immigration programs, or any of its myriad actions governing the administration of the U.S. immigration laws. See DHS's administrative record for categorical exclusions, available at https://www.dhs.gov/xlibrary/assets/nepa/Mgmt_NEPA_AdminRecdetailedCATEXsupport.pdf.

Perhaps CEQ simply does not have the staff or resources to conduct substantively more than a rubber stamp of agency NEPA procedures themselves, much less police the application of those NEPA procedures, or perhaps CEQ itself is unaware that immigration is a massively environmentally significant action carried out under the purview of federal agencies. In any case, now that CEQ's attention to this issue has been raised, it must clarify, in these NEPA regulations themselves, that actions that expand immigration are properly subject to NEPA compliance so that agencies do not continue to ignore the issue completely.

Examples of the environmental impacts that have resulted from population growth driven by immigration 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). Furthermore, actions taken by agencies which increase unlawful immigration also result in devastating environmental damage on the borderlands themselves. Discussion 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. Furthermore, these and other impacts from immigration clearly disproportionately fall upon low income and minority communities, as immigrants are frequently low income, and move into low income areas and compete with workers at the lower scale of the socioeconomic spectrum, and therefore any environmental justice analysis should also not ignore the impacts of immigration. An example of the environmental justice issues that arise from the immigration policies of federal agencies is the recent shelter crisis in New York City, which has hit those requiring shelter and services in the city particularly hard, and which Mayor Eric Adams has stated has been caused by the influx of migrants into New York City after they crossed the



southern border. See, for example, Jonathan Gordon, “Mayor Adams expands housing voucher program statewide in response to migrant surge.” News12 Westchester, Sept. 27, 2023, <https://westchester.news12.com/mayor-adams-expands-housing-voucher-program-statewide-in-response-to-migrant-surge>. Policy choices to create the border crisis have exacerbated homelessness in many cities across America. Thus agencies have clearly been ignoring environmental justice considerations when adopting policies that have expanded and continued the border crisis.

Numerous places in the NPRM propose to add force to agency considerations of carbon emissions and environmental justice under NEPA. Immigration to the U.S. drives increased world-wide and national carbon emissions. On average, immigrants to the U.S. substantially increase their personal carbon footprint from what it would have been if they had remained in their home countries.⁴ Expansionary immigration policies are therefore significant drivers of increased carbon emissions. Allowing agencies to continue to ignore the impacts of immigration therefore is at cross purposes with the goals of this NPRM to strengthen NEPA when it comes to both environmental justice and climate change considerations.

Neither the goals of this NPRM nor the original goals of NEPA can be achieved as long as federal agencies continue to operate as though there is an immigration exemption in the statute. The CEQ will not be able to facilitate reason-based decision making that protects public health and the environment, if no analysis is done by agencies on the programs and policies that implement massive population transfer to the United States. Such neglect will prevent CEQ from implementing the Biden Administration’s key priorities outlined in E.O. 14008, “*Tackling the Climate Crisis at Home and Abroad*.” Allowing federal agencies to ignore the effect of immigration makes it impossible for CEQ “to establish a government-wide approach to the climate crisis by reducing GHG emissions across the economy; increasing resilience to climate change-related effects; conserving land, water, and biodiversity; transitioning to a clean-energy economy; advancing environmental justice; and investing in disadvantaged communities.” Immigration will make it harder to reduce GHG emissions across the economy, and harder to conserve land, water, and biodiversity, and harder to invest in disadvantaged communities. The ongoing actions of immigration agencies such as the DHS, HHS, DOS, and DOJ in creating the southern border crisis, as well as their other immigration actions, are directly contrary to all of these stated goals. The CEQ will also be unable to achieve the President’s goals outlined in E.O. 14096, “*Revitalizing Our Nation's Commitment to Environmental Justice for All*.” Ignoring immigration is inconsistent with instituting a “government-wide approach to advancing environmental justice.” Agencies have admitted, both in court and during the regulatory process, that they do not understand the effect of immigration on the environment, and do not

⁴ In 2008, Steven A. Camarota and Leon Kolankiewicz calculated that immigrants in the United States produce an estimate four times more CO₂ in the United States as they would have in their countries of origin. See Steven A. Camarota and Leon Kolankiewicz, *Immigration to the United States and World-Wide Greenhouse Gas Emissions*, CTR. FOR IMMIGR. STUD. (Aug. 12, 2008) at <https://cis.org/Report/Immigration-United-States-and-WorldWide-Greenhouse-Gas-Emissions>



even understand how they would go about studying it, even though many of the techniques used in routine environmental analyses conducted under NEPA would be applicable. Therefore, it is impossible for them to understand whether immigration increases carbon emissions or has disproportionate effects on low income communities and minority communities. By ignoring immigration, agencies fail to be able to understand that their actions are violating these executive orders. The CEQ must instruct them to stop violating NEPA by analyzing the environmental affects of these actions before carrying them out.

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 government choices. 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.

NEPA hearings around the country routinely analyze the environmental consequences of many new infrastructure projects such as dams, reservoirs, or roads—made necessary only to accommodate anticipated population growth. With the multiple actions by the Biden Administration that have greatly increased the pace of immigration, these environmental consequences are felt with ever more force. For instance, the Dallas/Ft Worth region of Texas, which has been hit with a massive amount of population growth in a very short time, with immigration as an important direct and indirect cause of this unsustainable growth, has found itself with a water system entirely inadequate to meet the needs even of its current population, and is currently updating that infrastructure at cost and consequence to its current residents such as Ms. Rodriguez. NEPA hearings may allow residents to at least weigh in on these infrastructure updates as they continue, but, the population growth of the region makes the adoption of massive infrastructure projects such as these inevitable whether residents want them or not.

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 ever more significant in the future if the United States remains on the current enhanced population trajectory chosen by the Biden Administration, 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, particularly since the beginning of the Biden Administration, population growth is primarily the result of immigration, a federal government policy. Agencies of the U.S. government are choosing high population growth through specific, sweeping, consequential decisions, not the American citizenry through many small individual choices. None of these decisions have complied with NEPA. Federal agencies have argued rather than it is entirely unforeseeable that any of their actions could possibly



have environmental consequences. They continue to argue their actions have no foreseeable consequences even as those consequences continue to unfold. CEQ is derelict in refusing to take action.

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, in these regulations, particularly as various agencies tasked with implementing immigration are currently making discretionary choices to vastly expand immigration and are therefore violating the very executive orders that this NPRM claims to be implementing.

The excuses provided by these agencies for their failures to subject their immigration policies to NEPA review demonstrate that they will not comply with the law unless they are forced. For instance, DHS and the DOJ stated in a Joint Notice of Proposed Rulemaking⁵ in 2021 that they consider immigration related 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." However, the effects of immigration are actually far more predictable than many policies routinely subject to NEPA compliance. Reasonable "speculation" is implicit in NEPA. *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973).

In another recent proposed rulemaking, the DHS 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."⁶ Statements such as these demonstrate a clear failure to follow an "environmental review process that promotes better decision making" as articulated in the NPRM. These agencies have claimed that, when it comes to immigration, their very ignorance of the effects of their policies provides legal reason they need not consult the public nor conduct any analysis. Such claims show that, in the area of immigration, agencies are falling far short of ensuring "full and fair public involvement" or "sound decision making grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects." If the CEQ's stated concerns in this NPRM are genuine, it will take this opportunity to make the agencies comply with the law.

⁵ 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)

⁶ Deferred Action for Childhood Arrivals, 86 Fed Reg 53736 (Sept. 28, 2021).



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Given the interagency nature of the implementation of immigration, CEQ taking the lead in correcting this neglect of NEPA would be 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." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F. 2d 1109, 1114 (D.C. Cir. 1971).

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 actions on immigration by the Biden Administration have greatly increased this problem. 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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