

# A Seat at the Table for Citizens: Why the National Environmental Policy Act (NEPA) Applies to Immigration and How Best to Implement This Long Overdue Reform

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## A Seat at the Table for Citizens: Why the National Environmental Policy Act (NEPA) Applies to Immigration and How Best to Implement This Long Overdue Reform.

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### **Abstract**

In 1969, Congress passed the National Environmental Policy Act (NEPA). The mandate of this law was that federal government agencies will analyze the environmental effects of their actions before undertaking them. Though many agencies have incorporated environmental analysis of their actions in accordance with this law, none of the agencies within five federal departments<sup>1</sup> tasked with the administration of immigration law have ever taken any steps to analyze the environmental impacts of their immigration related activities. Yet, the environmental impacts of the tens of millions of foreign nationals who have settled into the United States since NEPA was signed into law in 1970 have been profound. The substantial population growth resulting from the settlement of these foreign nationals and their descendants has completely escaped analysis under NEPA. NEPA should be applied to immigration laws, regulations, policies and other regulatory actions. NEPA would thus provide a way for the public to have a voice on the likely environmental effects of changes in immigration policy, before policies are adopted. Given that human population growth's environmental

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<sup>1</sup> The Department of Homeland Security, the Department of State, the Department of Justice, the Department of Labor, and the Department of Health and Human Services.

documentable effects are not in doubt, and that high levels of immigration driven 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 require agency assessment of environmental effects of population growth resulting from agency choice in doubt. Therefore, agency failure to conduct any NEPA analysis whatsoever regarding mass immigration's environmental impacts amounts to a continuing violation of NEPA. The Council on Environmental Quality (CEQ), which regulates NEPA requires all agencies implementing environmentally significant policies and programs to analyze the likely environmental consequences resulting from these actions. The direct, indirect, and cumulative impacts resulting from U.S. population growth are unquestionably environmentally significant. But CEQ has never ensured that the agencies implementing immigration programs and policies comply with NEPA by analyzing their immigration programs' environmental impacts.

The only reason for today's agencies to continue to fail to apply NEPA to immigration is because it is the status quo. This article suggests that the status quo is an insufficient reason. United States Citizenship and Immigration Services (USCIS) should take the lead in correcting this failure, and Section III presents a practical way to go about doing so.

#### **I. What is NEPA?**

The National Environmental Policy Act ("NEPA," "the Act") became law in 1970, signed by President Richard Nixon. NEPA, commonly known as the "Magna Carta" of environmental law, requires "all federal agencies" to evaluate the environmental impacts of their actions, a duty that extends even to "state, local, and private entities when a federal

link is present.”<sup>2</sup> NEPA requires each federal agency to identify, review and consider significant environmental impacts resulting from its actions.<sup>3</sup> The core purpose of NEPA is to ensure that, before a federal agency undertakes a federal action, its decision makers consider the range of potential environmental impacts that the action may have on the “human environment.”<sup>4</sup> NEPA embodies the nation’s policy of ensuring that federal decisions affecting the human environment are made with eyes wide open and in full view of the public so that all stakeholders may understand the implications of federal actions on the natural resources that we all depend on, in one way or another. The Act “help[s] public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”<sup>5</sup>

Under NEPA, the government must analyze any major actions affecting the environment *before* implementing the action.<sup>6</sup> This is a crucial NEPA requirement, because if an agency can conduct analysis *after* finalizing a decision, any analysis is rendered pointless, serving as mere *post hoc* justification. The Act therefore mandates that, before a federal agency undertakes an action which may have a significant effect on the environment, its decision makers must be informed of, and have considered, the full range of its potential environmental impacts. The process an agency must take to ensure it has done so is known broadly as the environmental review process.<sup>7</sup> The environmental review process has two

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<sup>2</sup> Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J. L. & POL’Y 293, 293 (2010), [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol32/iss1/9](https://openscholarship.wustl.edu/law_journal_law_policy/vol32/iss1/9).

<sup>3</sup> See generally 42 U.S.C. § 4331 (1970).

<sup>4</sup> See 40 C.F.R. § 1500.1(c) (2019).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* § 1500.1(b).

<sup>7</sup> COUNCIL ON ENVTL. QUALITY, A CITIZEN’S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD 2 (2007), [https://ceq.doe.gov/docs/get-involved/Citizens\\_Guide\\_Dec07.pdf](https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf).

major purposes: informed decision-making, and citizen involvement.<sup>8</sup> NEPA “does not mandate particular results, but simply prescribes the necessary process.”<sup>9</sup>

Since its adoption, courts have viewed NEPA’s mandate of informed decision-making and public involvement expansively. In the case *Sierra Club v. Watkins*, a DC district court has noted that, not only does NEPA provide “crucial information” to agency officials agencies making discretionary decisions (presumably) within the statutory bounds provided by Congress, but that NEPA also:

[G]uarantees 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.” This audience includes the President, who is responsible for the agency’s policy, and Congress, which has authorized the agency’s actions.<sup>10</sup>

As the *Watkins* court recognizes, a vibrant democracy is incompatible with bureaucrats making decisions in a vacuum. NEPA is intended to remedy such a lack of accountability by providing a two-way information feedback process. Elected officials also benefit from such open, expansive information flow:

These decisionmakers need access to information concerning the environmental effects of the proposed program to decide whether they will support or overrule the agency’s action; environmental documentation aids the President and Congress in deciding larger issues of policy that may include matters outside the scope of a single agency’s discretion.<sup>11</sup>

The *Watkins* decision also points out that NEPA’s requirement that agency officials become fully informed regarding the likely environmental effects of their actions goes hand in hand with the

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<sup>8</sup> *Id.*

<sup>9</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>10</sup> *Sierra Club v. Watkins*, 808 F. Supp. 852, 858 (D.D.C. 1991) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

<sup>11</sup> *Id.*

second purpose of NEPA: citizen involvement. “The ‘larger audience’ also includes the public. NEPA documentation ‘gives the public the assurance that the agency “has indeed considered environmental concerns in its decisionmaking process,” and, perhaps more significantly, provides a springboard for public comment.’”<sup>12</sup>

In conducting its NEPA review, each agency must also consider alternatives and mitigating measures which could avoid or reduce such impacts *before* implementing federal agency actions that may significantly affect the environment. To these ends, NEPA establishes, in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall--

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impacts of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action, . . .

(v) any irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.<sup>13</sup>

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<sup>12</sup> *Id.* (quoting *Robertson*, 490 U.S. at 349); see also *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972) (“[NEPA] is, at the very least, ‘an environmental full disclosure law,’ for the agency decision makers and the general public.”) (quoting *Envtl. Def. Fund, Inc v. Corps of Eng’rs*, 325 F. Supp. 749, 759 (E.D. Ark. 1971)).

<sup>13</sup> 42 U.S.C. § 4332 (1970).

The CEQ regulations, first adopted in 1978, set out the details for how agencies should carry out this statutory mandate: “The phrase ‘to the fullest extent possible’ in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency’s operation expressly prohibits or makes compliance impossible.”<sup>14</sup>

NEPA thus embodies the nation’s policy of ensuring that decisions affecting the human environment are made with eyes wide open and in full view of the public so that all stakeholders may understand the implications of federal actions on the natural resources that we all depend on. The Act “help[s] public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”<sup>15</sup> The regulations are nearly the same today as they were when they were first adopted in 1978, but in 2018, the CEQ announced that it was considering an update to them, and has asked for comments on its proposals, but (as of October 2019) has not proposed revised regulations yet.<sup>16</sup>

As the CEQ explains in “A Citizen’s Guide to the NEPA”:

All Federal agencies in the executive branch have to comply with NEPA before they make final decisions about federal actions that could have environmental effects. Thus, NEPA applies to a very wide range of federal actions that include, but are not limited to, federal construction projects, plans to manage and develop federally owned lands, and federal approvals of non-federal activities such as grants, licenses, and permits. The Federal Government takes hundreds of actions every day that are, in some way, covered by NEPA.<sup>17</sup>

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<sup>14</sup> 40 C.F.R. § 1500.6 (2019); *see also* 40 C.F.R. § 1507.2 (2019).

<sup>15</sup> *Id.* § 1500.1(c).

<sup>16</sup> 83 Fed. Reg. 28591.

<sup>17</sup> COUNCIL ON ENVTL. QUALITY, *supra* note 7, at 1.

What the NEPA process provides is the opportunity for the citizen “to be involved” in the federal agency’s decision making process: to “help . . . understand” what the agency is proposing, “to offer alternative ways for the agency to accomplish what it is proposing,” and to put forth “comments on the agency’s environmental analysis.”<sup>18</sup> NEPA establishes a scope of review requiring federal agencies “to consider environmental effects that include, among others, impacts on social, cultural, and economic resources, as well as natural resources.”<sup>19</sup> Citizens have information about their communities and resources that they value and can give the government guidance on “potential environmental, social, and economic effects” that federal action may have on those places and resources.<sup>20</sup>

NEPA’s procedural requirements apply when a federal agency considers a project or program, adopts a rule or regulation, as well as other circumstances. The CEQ regulations create a three-part decision-making process for NEPA compliance that provides an elaborate framework for NEPA decision making.<sup>21</sup> *A Citizen’s Guide to NEPA* provides a useful visual representation of the NEPA process.<sup>22</sup>

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<sup>18</sup> *Id.*

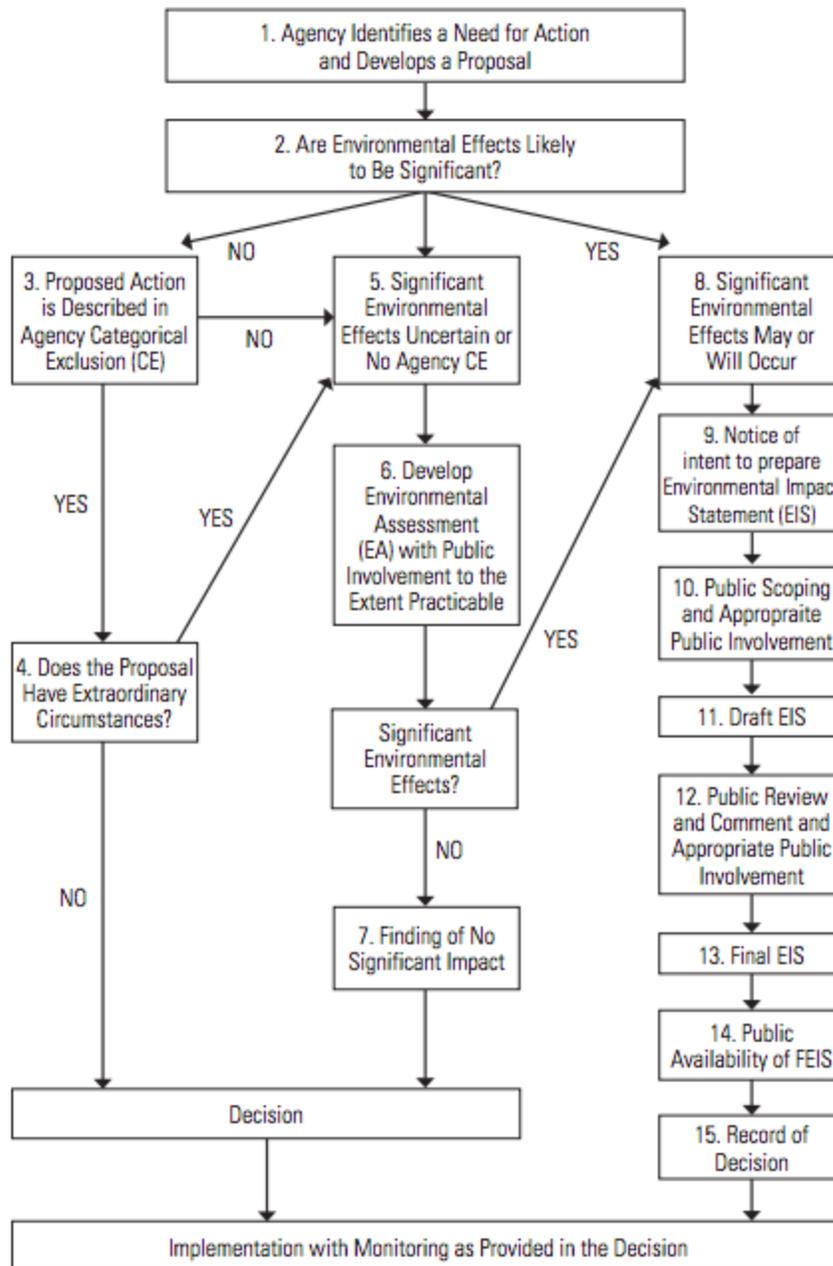
<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Mandelker, *supra* note 1, at 297.

<sup>22</sup> COUNCIL ON ENVTL. QUALITY, *supra* note 7, at 8.

## The NEPA Process



*\*Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS or the Record of Decision (CEQ NEPA Regulations, 40 C.F.R. § 1502.9(c)).*

The first type of situation under the NEPA framework requires very minimal agency review. Under the first option, the agency designates an action as fitting under a “categorical exclusion,” defined as “a category of actions that . . . does not individually or cumulatively have

a significant effect on the human environment.”<sup>23</sup> However, if no categorical exclusion applies to the agency action, the agency must conduct a more substantial environmental review.<sup>24</sup> This environmental review can take the form of an environmental assessment (EA) or an environmental impact statement (EIS).<sup>25</sup> An EIS is far more elaborate than an EA.<sup>26</sup> Generally, the agency is supposed to prepare an EA in order to determine whether it should prepare a much more detailed, elaborate EIS. If, after preparing an EA, the agency concludes there will be no significant impact to the environment it may issue a “finding of no significant impact” (“FONSI”), which relieves the agency of the obligation of conducting the far more detailed EIS.<sup>27</sup> Upon completion of the EA, the agency may also decide that it is relieved of the obligation of conducting an EIS because it undertakes to mitigate any significant environmental impacts resulting from the action.

The initiation of NEPA review for an action, potentially both during EA and EIS stages, commences with the agency conducting a public “scoping”<sup>28</sup> which must alert potentially impacted interested parties, including the public, state, local, and tribal governments. The purpose of scoping is to give the public a chance to comment on the proposed action, recommend alternatives, and identify issues to be addressed in the agency’s NEPA analysis.<sup>29</sup> An agency will, at a minimum, place a notice in the federal register to notify the public and provide an opportunity to submit written comments. However, in many NEPA reviews, agencies

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<sup>23</sup> *Id.* at 10.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 13.

<sup>27</sup> *See id.* at 12-13.

<sup>28</sup> *See id.* at 13-14.

<sup>29</sup> *See* 43 C.F.R. § 46.235.

also use other methods to communicate with the public and concerned stakeholders, such as public meetings, conference calls, formal hearings, and informal workshops, and will advertise these meetings more widely at public events in order to get more participation.

Large or complex proposals/actions may involve multiple federal agencies along with state, local, or tribal agencies.<sup>30</sup> If more than one agency has a major role in the proposed action and also has NEPA responsibilities or responsibilities under a NEPA-like law state or local law, that agency may be a “joint lead agency.”<sup>31</sup> A “joint lead agency” shares the lead agency’s responsibility for managing the NEPA process, including public involvement and the preparation of documents.<sup>32</sup> On the other hand, if another agency has “a decision or special expertise regarding a proposed action, but less of a role than the lead agency,” it is known as a “cooperating agency.”<sup>33</sup> Because the combined effect of agencies may have more of an environmental impact than one agency may know alone, NEPA encourages interagency cooperation.

A number of examples of environmental impact statements and other environmental review documents may be found at the Department of Energy’s website.<sup>34</sup>

## **II. Why is NEPA Not Only Appropriate, But Mandatory for Immigration?**

### **A. One of NEPA’s Primary Concerns is Population Growth.**

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<sup>30</sup> *Id.* at 9.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> <https://www.energy.gov/nepa/nepa-documents>

By adopting NEPA, Congress explicitly expressed concern regarding the impact of human population growth on the quality of the “human environment,” which is broadly defined in the CEQ regulations “to include the natural and physical environment and the relationship of people with that environment...when an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.”<sup>35</sup>

Congressional disquiet over endless population growth is demonstrated 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.

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources.

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations

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<sup>35</sup> *Id.* § 1508.14

of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
5. ***achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities;*** and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.<sup>36</sup>

(emphasis added).

Of particular interest is Congress' discussion of population growth in the historical and statutory notes section of the NEPA statute:

#### Commission on Population Growth and the American Future

Pub.L. 91-213, §§ 1 to 9, Mar. 16, 1970, 84 Stat. 67-69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future . . .<sup>37</sup>

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<sup>36</sup> 42 U.S.C.A. § 4331(a) (emphasis added).

<sup>37</sup> 42 U.S.C. 4331.

Clearly, the consequences of population growth in the United States were of primary Congressional concern when NEPA was adopted fifty years ago. But that concern was never translated into federal action.

That the “Magna Carta” of our nation’s environmental law should be so concerned with national population growth is not surprising. National Population growth touches upon every possible environmental concern. In an expert report commissioned for litigation over the issue of the application of NEPA to agency actions addressing immigration,<sup>38</sup> sustainability expert Dr. Philip Cafaro documented in detail how population growth is a key factor in determining a wide variety of environmental impacts.<sup>39</sup> For example, immigration-driven population growth leads to urban sprawl and farmland loss, habitat and biodiversity loss, an increase in worldwide levels of greenhouse gas emissions, and an increase of water demands and water withdrawals from natural systems.<sup>40</sup> Population growth is also responsible for one of the leading environmental problems across the United States: urban sprawl, that is, new development on the fringes of existing urban and suburban areas.<sup>41</sup> Sprawl increases overall energy and water consumption, air and water pollution, and decreases open space and natural wildlife habitat, which endangers the survival of many species.<sup>42</sup> From 1982 to 2010, a period of massive immigration,

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<sup>38</sup> See *Whitewater Draw Nat. Res. Conservation Dist. v. Nielsen*, No. 3:16-CV-02583-L-BLM, 2018 WL 4700494 (S.D. Cal. Sept. 30, 2018).

<sup>39</sup> Plaintiff’s Exhibit 5, *Whitewater Draw Nat. Res. Conservation Dist. v. Nielsen*, No. 3:16-CV-02583-L-BLM, 2018 WL 4700494 (S.D. Cal. Sept. 30, 2018). This report is available online at [https://docs.wixstatic.com/ugd/1a0a2e\\_39cb8e641a8146c6bb6bf718b0fa5fcf.pdf](https://docs.wixstatic.com/ugd/1a0a2e_39cb8e641a8146c6bb6bf718b0fa5fcf.pdf).

<sup>40</sup> See *id.* at 1.

<sup>41</sup> See *id.* at 24.

<sup>42</sup> *Id.*

41.4 million acres of previously undeveloped urban land was built on to accommodate the nation's growing cities and towns--an area approximately equivalent to the state of Florida.<sup>43</sup>

The anticipated future loss of American wilderness due to population growth is a fate often lamented by many who never connect such population growth to its primary cause. For instance, the former President of the United States, Barack Obama acknowledged this great environmental loss in his speech marking the designation and preservation from development of the Papahānaumokuākea Marine National Monument in Hawaii near the end of his term. He stated, "I look forward to knowing that 20 years from now, 40 years from now, 100 years from now, this is a place where people can still come to and see what a place like this looks like when it's not overcrowded or destroyed by human populations."<sup>44</sup> Population growth also threatens to accelerate biodiversity loss and the extinction of animal and plant species.<sup>45</sup> The United Nations' Secretariat of the Convention on Biological Diversity estimates that humanity may be causing the extinction of one out of every three species on Earth in the next one to two hundred years.<sup>46</sup> Conservation biologists agree that the most important "direct drivers" of biodiversity loss are: habitat loss, the impacts of alien species, over-exploitation, pollution, and global climate change.<sup>47</sup> All five are caused by increased human population and the increased human activities associated with human population growth.<sup>48</sup>

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

<sup>44</sup> Press Release, The White House: Office of the Press Secretary, Remarks by the President at the Designation of the Papahānaumokuākea Marine National Monument, (Sept. 1, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/01/remarks-president-designation-papahānaumokuākea-marine-national-monument>.

<sup>45</sup> Plaintiff's Exhibit 5, *supra* note 35, at 41.

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

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

<sup>48</sup> *Id.* at 42.

Carbon dioxide (“CO2”) emissions produced in the United States also increase because of national population growth.<sup>49</sup> When that national increase in emissions is caused by immigration driven population growth, it is not the case that net global emissions remain the same because the population that immigrated would have produced emissions anywhere they lived. Rather, the foreign nationals that settle in the United States produce an estimated four times more CO2 in the United States on average than they would have in their countries of origin.<sup>50</sup> According to Dr. Carfaro, as of 2016, the estimated 637 tons of CO2 produced annually by U.S. produced annually by the immigrant share of the population is 482 million tons more than they would have produced if they remained in their native countries.<sup>51</sup> Therefore the impact of immigration to the United States on global emissions is equal to approximately five percent of the increase in annual world-wide emissions since 1980. That is 5 percent of total *global* CO2 emissions, not 5 percent of U.S. emissions. These numbers do not even include the CO2 impacts of children born to US immigrants.<sup>52</sup>

Because a greater population uses more water, population growth also results in a higher aggregate water use, putting increased pressure on water systems, including rivers and underground aquifers. Water taken for human consumption is necessarily removed from an ecosystem, leading to a host of environmental impacts.<sup>53</sup> “When too much water is taken from

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<sup>49</sup> *See id.* at 66.

<sup>50</sup> *Id.*

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

<sup>52</sup> *See id.* at 68.

<sup>53</sup> *Id.* at 76-87.

these ecosystems for consumptive use by human beings, there may not be enough water left behind to perform these critical ecosystem services and functions.”<sup>54</sup>

The relevance of the concerns about population growth to NEPA analysis specifically is readily apparent from taking a look at actual environmental reviews currently conducted under NEPA. Dr. Cafaro surveyed the “purposes and needs” sections of several recent federal and state agency EISs for his report and found that population growth is the ultimate impetus behind many of the government projects which undergo NEPA analysis. Dr. Cafaro explains how new, environmentally harmful projects are continually created around the country to accommodate immigration-driven population growth.<sup>55</sup> These recent EISs cite anticipated or planned population growth as creating the need for a myriad of environmentally harmful new infrastructure: e.g., transit projects, including the creation of light rail systems, new airports, projects for road-widening and road construction<sup>56</sup>; energy projects, such as coal and natural gas development, new power plants, and pipelines<sup>57</sup>; as well as water supply projects, such as new dams and reservoirs.<sup>58</sup> There are also many other kinds of developments such as new schools and housing projects, that, not generally located on federal land, are rarely mentioned by EISs, but which nevertheless, are only needed because of population growth.<sup>59</sup>

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<sup>54</sup> *Id.* at 78.

<sup>55</sup> *See id.* at 16-24.

<sup>56</sup> *Id.* at 17-18.

<sup>57</sup> *Id.* at 18-20.

<sup>58</sup> *Id.* at 20-22.

<sup>59</sup> *See id.* at 22-24.

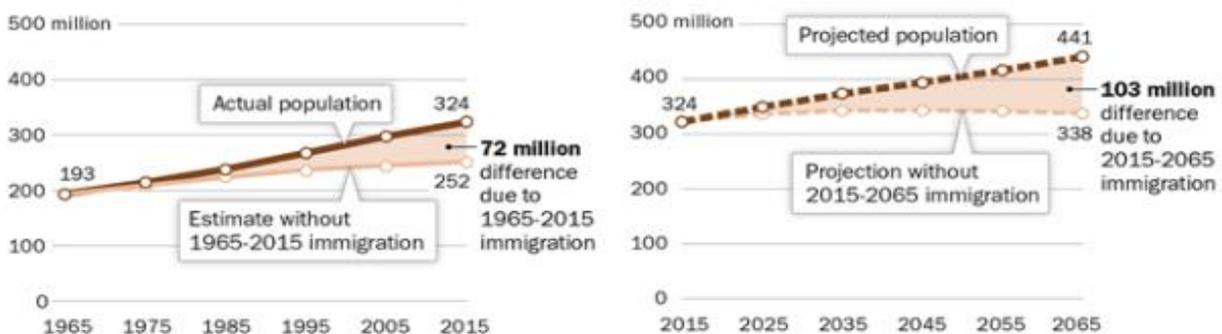
The idea that NEPA mandates discussion of the inevitable *consequences* of population growth, but not the *causes* of population growth, turns the purpose of NEPA on its head and is a betrayal of Congressional intent.

**B. The source of American population growth is immigration: the large scale entrance and settlement of foreign nationals into the United States.**

National population growth is the result of birthrates and mortality, net immigration, or a combination of the three. American birthrates and mortality are not a matter of federal government policy, at least not directly. But the second source of population growth, immigration, very much is a matter of federal policy. Unlike the days when population growth was primarily a result of the free choices of Americans planning their own families, today United States population growth is almost *exclusively* the result of immigration, a subject of federal government control. Through its immigration actions, rules and policies, the U.S. government has for decades chosen high population growth.<sup>60</sup>

FIGURE 2

**Immigrants and Their Descendants Accounted for 72 Million in U.S. Population Growth from 1965 to 2015; Projected to Account for 103 Million More by 2065**



Note: Difference due to immigration refers to immigrants arriving from 1965 to 2015, and from 2015 to 2065, and their descendants.  
 Source: Pew Research Center estimates for 1965-2015 based on adjusted census data; Pew Research Center projections for 2015-2065

PEW RESEARCH CENTER

<sup>60</sup> *Modern Immigration Wave Brings 59 Million to U.S., Driving Population*

This choice, whether deliberately or by default, continues, and is set to continue for the foreseeable future. This population growth is not the choice of the American citizenry. High immigration levels represent a specifically federal policy of population expansion.

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>61</sup> The impact on immigration levels was fairly small in the first few years after the passage of the immigration law, but increased with time. The bulk of this immigration-induced population growth therefore occurred well after the passage of NEPA in 1970. Unless current policies are changed, immigration will also continue to greatly increase the U.S. population by vast numbers for the foreseeable future.

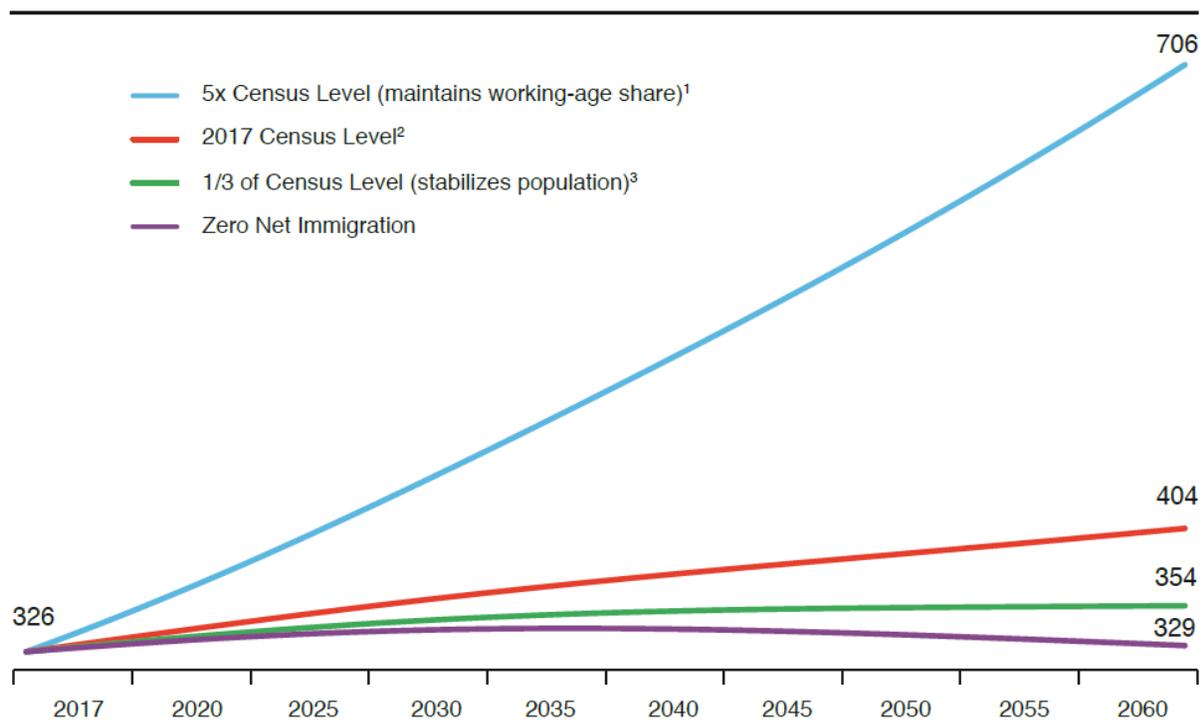
Federal immigration policy, implemented through agency actions will be the determining factor of the nation's population growth into the future. According to Census Bureau

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*Growth and Change Through 2065: Views of Immigration's Impact on U.S. Society Mixed*, Pew Research Ctr. (Sept. 23, 2015), [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/)

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

Figure 1. Impact of Immigration Levels on U.S. Population, 2017 to 2060 (millions)



Source: Based on Census Bureau projection released September 2018, and a projection model developed by Decision Demographics and the Center for Immigration Studies.

<sup>1</sup> Roughly keeps same percent of population working-age as in 2017.

<sup>2</sup> Refers to the level of immigration projected by the Census Bureau in its newest projections.

<sup>3</sup> Roughly stabilizes population size after 2040.

projections, future *net immigration* (the difference between the number coming and number leaving) will total 46 million by 2060.<sup>62</sup>

Total U.S. population will then hit 404 million: that is, the US population will be 79 million larger than in 2017.<sup>63</sup> 95 percent of this 79 million increase will be due to continuing immigration.<sup>64</sup> The graph above <sup>65</sup> illustrates the vast differences on future population growth

<sup>62</sup> Steven A. Camarota & Karen Zeigler, *Projecting the Impact of Immigration on the U.S. Population 1* (Ctr. For Immigration Studies Background, 2019), <https://cis.org/Report/Projecting-Impact-Immigration-US-Population>.

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

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

<sup>65</sup> *Id.* at 4.

that will occur based on U.S. immigration policy during this century. Given the vast array of environmental impacts that shall inevitably result from this population growth, immigration policy is therefore central to fully understanding the future “profound impact” of “activity on the interrelations of all components of the natural environment” (to quote the Act).

**C. Nevertheless, NEPA has *never* been applied to immigration programs, policies, rules, regulations, or at *any* agency decision points that have to do with immigration.**

In the fifty years since NEPA was adopted, NEPA has been regularly and routinely used to force such agencies as the Department of Transportation, the Department of Housing and Urban Development, the U.S. Army Corps of Engineers, the Department of Commerce and many others to routinely consider the environmental implications of their actions. Over the decades, an enormous body of NEPA law has developed. Furthermore, consideration of population-growth-inducing effects is routine for most federal agencies in their NEPA analysis.<sup>66</sup> Nonetheless, despite the many environmental reviews conducted by federal agencies over the decades since NEPA’s adoption, not one includes any examination of the impacts of the myriad “actions” which permit foreign nationals to enter and settle in the United States.

Immigration inherently increases the population of the destination country, and the natural increase through births and deaths of immigrants further contributes to the national population. The adoption and regulation of large scale immigration programs comprise major government actions that have demonstrated environmental significance based on impacts to

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<sup>66</sup> See, e.g., *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846 (9th Cir. 2005); *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir. 1997); *Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517 (9th Cir. 1994).

population size alone. Yet fifty years after the passage of NEPA, no agency has ever applied any level of NEPA review to our nation's immigration programs or the administration actions thereof. It is difficult to square this complete absence of NEPA compliance with the fact that NEPA provides no express statutory exemptions from such compliance.<sup>67</sup>

The administration of immigration policy is carried out by federal agency components within five different cabinet level departments: the Department of Homeland Security (DHS), the Department of State (DOS), the Department of Health and Human Services (HHS), the Department of Labor (DOL), and the Department of Justice (DOJ).<sup>68</sup> Though all five of these departments have promulgated NEPA regulations or procedures in accordance with CEQ's directive,<sup>69</sup> none of these departments' NEPA procedures address impacts resulting from immigration. At the discretionary decision points when NEPA analysis should apply, such as the promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, or notices, it is an undeniable fact that with respect to the entrance and settlement of foreign nationals in the United States, our federal agencies

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<sup>67</sup> *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1979 (D.C. Cir. 1973).

<sup>68</sup> Authority over visas is shared by DOS and DHS, because DOS issues the visas overseas (by a consular officer) and DHS promulgates rules governing the requirements for the visa. The immigration court system, which determines removals, however, is directed by an office inside the DOJ, the Executive Office of Immigration Review (EOIR). Meanwhile, decisions involving the U.S. labor market are made by DOL. Finally, HHS makes decisions regarding humanitarian programs, including unaccompanied alien children (UACs) in removal proceedings, through the Office of Refugee Resettlement (ORR).

<sup>69</sup> Dep't of Homeland Security, Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (2014), [https://www.dhs.gov/sites/default/files/publications/DHS\\_Instruction%20Manual%20023-01-001-01%20Rev%2001\\_508%20Admin%20Rev.pdf](https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf); Dep't of State Regulations for the Implementation of the National Environmental Policy Act, 22 CFR 161; Dep't of Justice Procedures for Implementing the National Environmental Policy Act, 46 Fed. Reg. 7953 (Jan. 26, 1981); Dep't of Labor National Environmental Act (NEPA) Compliance Procedures, 45 Fed. Reg. 51,118 (Aug. 1, 1980), 29 CFR 11; Dep't of Health and Human Services, General Administrative Manual Part 30: NEPA Review (2000), <https://www.hhs.gov/hhs-manuals/gam-part-30/305000/index.html>;

simply operate as if no such statute establishing environmental review process exists or applies. Whether deliberately or inadvertently, these federal agencies, charged with implementing immigration statutes through rules, policies, and various other actions, have not only failed to integrate consideration of population impacts into their routine agency NEPA analysis of proposed immigration related actions, they have entirely failed to conduct *any* NEPA analysis for such actions. When it comes to the application of NEPA, the bureaucratic administration of the United States immigration system has simply fallen through the cracks.

**D. The Failure of Federal Agencies to Incorporate NEPA into Agency Administration of the Entrance and Settlement of Foreign Nationals Has Never been Explained, Much Less Justified Under the Law: It Simply Happened and Became the Status Quo.**

While it is perhaps understandable that undertaking NEPA analysis on immigration related actions is not a welcome task for federal agencies, NEPA compliance is not voluntary. As the D.C. Circuit observed 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>70</sup> Nonetheless, each agency is vested with broad discretion to determine the scope and extent of NEPA review for each particular action.<sup>71</sup>

While Congress plays a large role in capping the many of the numbers of immigrant and long-term non-immigrant admissions, it is indisputable that vast blocks of discretion are vested

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<sup>70</sup> Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F. 2d 1109, 1114 (D.C. Cir. 1971).

<sup>71</sup> See Dep't of Transp. v. Public Citizen, 541 U.S. 752, 756 (2004) (holding that if an agency lacks discretion to be influenced by the information in its EIS, it is not forced to conduct one).

in the agencies to implement and administer these immigration statutes. The immigration statutes themselves do not provide an exemption for the federal agencies to avoid any and all application of NEPA to an entire policy area subject to federal regulation. As was noted, there is no express exemption of immigration related agency actions from NEPA compliance. Furthermore, discretionary policies as actually practiced by bureaucrats within the agencies that administer immigration policies have over the decades certainly resulted in many environmental consequences that were by no means statutorily inevitable. The day to day agency administration of the policies that govern the entrance and settlement of foreign nationals into the United States involves a great deal of discretion delegated to various executive agencies to determine how many, who, and at what pace foreign nationals enter the United States, as well as how long they stay, and under what circumstances they will be removed.

Agencies directly control the actual entrance of foreign nationals (at least, all legal entrance) via 1) the granting of a visa,<sup>72</sup> 2) visa waiver,<sup>73</sup> or 3) parole,<sup>74</sup> and defining the conditions under which they can stay. Agencies also have a great deal of discretion in the implementation and management of the programs under which foreign nationals are lawfully granted entrance by these three methods. Richard Boswell, a law professor specializing in immigration, characterizes the grant of discretion as follows: Congress “delegated broad, and

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<sup>72</sup> See *What is a U.S. Visa?*, U.S. DEPARTMENT OF STATE - BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html>.

<sup>73</sup> See *Visa Waiver Program*, U.S. DEPARTMENT OF STATE - BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>.

<sup>74</sup> See *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states>.

arguably unchecked discretion to a myriad of government agencies to enforce the immigration statutes.”<sup>75</sup> Immigration law, Professor Boswell asserts, is a “patchwork of promulgations” that represents a “tide-like shift between restrictiveness and openness towards immigrants.” While “unchecked” discretion is an overstatement in many situations, the implementation of immigration programs is widely recognized as entailing a vast array of discretionary choices that affect immigration policy in a host of ways. These choices are often accompanied with considerable consequences. The exact degree of agency discretion allowed by Congress in specific programs is often disputed, but immigration experts widely agree that agency policy is allowed significant amount of lawful variation. Discretionary agency choices will affect levels of immigration, which foreign nationals will be allowed in and how long they may stay, which affects where they will ultimately settle, and these myriad decisions will in turn result in documentable environmental impacts.

During the years between 1970, the year NEPA was adopted, and 1978, the year NEPA regulations were first promulgated by CEQ, the two agencies primarily responsible for the regulation of the entrance and settlement of foreign nationals into the United States were the Immigration and Naturalization Service (INS), (then an agency within the DOJ), and the Bureau of Consular Affairs (which issues visas and is located within the DOS). During these early years, these two agencies adopted in-house agency NEPA procedures that conspicuously failed to incorporate any requirement for environmental review relating to the entrance and settlement of foreign nationals into the United States. It is these initial failures which have led to decades

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<sup>75</sup> RICHARD BOSWELL, ESSENTIALS OF IMMIGRATION LAW 1 (2d ed. 2009).

of neglect of NEPA obligations on the part of all federal agencies in connection with their administration of immigration policy. A look at the NEPA regulations promulgated by the DOJ in January 1981<sup>76</sup> and by the DOS in September 1980<sup>77</sup> reveals that neither contemplated a procedure to incorporate NEPA review into routine agency immigration decisionmaking. If these agencies had, as the statute intends for all environmentally significant discretionary decisions, the public would have a voice in these decisions, and decades of agency decisionmaking regarding administration of the entrance and settlement of mass numbers of foreign nationals would have been practiced with public knowledge of the policies' likely environmental effects. But that did not happen.

The DOJ's NEPA 1981 procedures contained an Appendix specifically governing INS..

These procedures include a brief description of INS itself:

The INS administers and enforces the immigration and national[it]y laws. This includes determining the admissibility of persons seeking entry into the United States and adjudicating requests for benefits and privileges under the immigration and nationality laws. The enforcement actions of INS involve the prevention of illegal entry of persons into the United States and the investigation and apprehension of aliens already in the country who because of inadmissibility at entry or misconduct committed following entry may be subject to deportation.

In carrying out its statutory enforcement responsibilities[,] the INS is authorized to arrest and detain aliens believed to be deportable and to effectuate removal from the U.S. of aliens found deportable after hearing.<sup>78</sup>

These DOJ NEPA procedures, however, applied only to "efforts associated with the leasing, purchase, design, construction, and maintenance of new and existing INS facilities."<sup>79</sup> Thus,

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<sup>76</sup> 46 Fed. Reg. 7,953 (Jan. 26, 1981).

<sup>77</sup> 45 Fed. Reg. 59,553 (Sept. 10, 1980).

<sup>78</sup> 46 Fed. Reg. 7,953-02 (Jan. 26, 1981).

<sup>79</sup> *Id.*

while the INS acknowledged that its mission included managing the entrance and permanent residence of foreign nationals, its NEPA procedures simply did not contemplate whether its decisions in furtherance of that mission would have environmental impacts. The INS apparently believed that the only actions it might take with potential environmental significance were the building of facilities to house detained foreign nationals. The INS operated as though NEPA is a review process restricted to governmental operations associated with the direct leasing, purchase, design, construction, and maintenance of physical structures, rather than a mandate for environmentally enlightened decision making. Viewing NEPA so narrowly has no basis either in the statute itself, the regulations implementing it by CEQ, or the body of judicial precedent interpreting and applying the statute:

The statutory phrase “actions significantly affecting the quality of the environment” is intentionally broad, reflecting the Act’s attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency. The legislative history of the Act indicates that the term “actions” refers not only to construction of particular facilities, but includes “project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs \* \* \*.” Thus there is “Federal action” within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA’s impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. In each of these instances the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party—private or governmental—to take action affecting the environment.<sup>80</sup>

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<sup>80</sup> See, e.g., *Scientists’ Inst. for Public Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973).

Surely, if 60 million people enter the country legally and settle permanently in the U.S., their cumulative impacts upon on the “human environment” of the United States dwarfs the effects of those comparatively very few who are temporarily detained in federal facilities.

These original NEPA procedures clearly demonstrate that INS did not consider its entire immigration mission somehow categorically excluded from NEPA. An agency that reviews one of its actions, and determines that action fits a specified categorical exclusion has put that action though NEPA review, albeit one that involves the lowest level of environmental analysis. But INS did not create a categorical exclusion for immigration. Rather, INS operated as though there were an exemption to immigration within the NEPA statute itself. Amazingly, in the myriad regulations it promulgated creating and updating large-scale immigration programs, INS never so much as cited NEPA.

Likewise, DOS’s NEPA regulations make no mention of the potential environmental impacts resulting from the entrance of foreign nationals through its issuance of visas. DOS simply did not and does not contemplate whether its regulations or policies governing its visa programs might result in a difference of many millions of foreign nationals entering the United States, much less what environmental impacts would result from those admissions. However, a reading of DOS’s NEPA regulations<sup>81</sup>, suggests that DOS *did* consider anything related to its mission of issuing visas as categorically excluded, from the application of NEPA review. Section 161.7(b)(2) defines the following as one of its categorical exclusions: “(2) Provision of consular services--visas, passports and citizenship, and special consular services, such as issuing or

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<sup>81</sup> See 22 C.F.R. § 161 (2019).

reviewing passports and visas, taking legal depositions, notarizing absentee ballots and other documents and delivering retirement checks, social security payments and veterans benefits.” This view, that the issuance of a visa to a foreign national allowing that individual to enter, and possibly settle into the United States, is no different from mere paperwork undertaken to provide services to citizens abroad, is entirely disconnected from the reality that, en masse, the issuance of visas means more than simply paperwork: it significantly drives population growth, even when visas granted are intended to be temporary.<sup>82</sup> Strangely enough, however, while the DOS has never put any of its major decisions regarding visas through any sort of NEPA review, it also has never actually specifically cited to this categorical exclusion as an explanation. DOS simply fails to mention NEPA altogether.

Is it possible that, in 1980 and 1981, this unlawful oversight on the part of these agencies in Washington DC was excusable? The high levels of immigration of the 1980s through today had not yet occurred, and the massive environmental effects of immigration were not obvious at the time. Furthermore, in the evocative phrase of the *Calvert Cliffs* Court, “footdragging agencies” cannot always be counted on to enthusiastically adopt new accountability measures set forth by Congress if courts and plaintiffs do not do their part in forcing agency compliance. It is unfortunate that no environmental group at the time that the INS or DOS promulgated these regulations chose to press the issue in court.<sup>83</sup>

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<sup>82</sup> For instance, in 2017, 700,000 foreign national overstayed their visas. Jessica M. Vaughn & Preston Huennekens, *Analyzing the New Visa Overstay Report 1* (Ctr. for Immigration Studies. 2018), <https://cis.org/sites/default/files/2018-09/vaughan-overstay.pdf>

<sup>83</sup> At the time, there was only one group whose primary mission was to advocate for reduced immigration, and that was the Federation for American Immigration Reform (FAIR), which was founded in large part because of environmental concerns. FAIR did in fact, file a case in Miami in 1985 against the Attorney General for the way he was implementing provisions of the Cuban Adjustment Act. The case did not center on NEPA, nor did it mention any issues with the DOJ’s NEPA procedures, but it did include a NEPA claim. The case, including the NEPA claim,

However, by the early 21st century, after three decades of high levels of immigration, ignorance of the effects of immigration on population growth is no longer plausible. In 2002, the creation of the Department of Homeland Security, a new cabinet-level department responsible for immigration enforcement, offered a chance to rectify the mistake that the INS had made in failing to properly apply NEPA to its administration of the entry and settlement of foreign nationals in the United States. With the creation of DHS, the INS was abolished, and new sub-agencies taking over most of its functions within DHS.<sup>84</sup> The functions of the INS were assigned to U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). USCIS adjudicates benefits for immigrants and non-immigrants, such as granting and extending visas, green cards, and naturalization, and reviews appeals of visa decisions. CBP is responsible for inspecting both persons and goods arriving at the border and granting or denying entry to the United States. ICE is responsible for investigating and enforcing violations of the immigration laws within the United States.

The act that created DHS also restructured authority over visas. While DOS's Bureau of Consular Affairs continued to be responsible for issuing visas, DHS was given authority to

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was dismissed in 1986. See *Federation for American Immigration Reform (FAIR) v. Meese*, 643 F. Supp. 983 (S.D. Fla. 1986). The judge gave little attention or analysis to the NEPA claim, stating that NEPA's "primary concern is with the natural environment," and that FAIR's allegations about "water supply, sewage, and traffic congestion" were "at best, socio-economic." *Id.* at 989. Such reasoning displayed a profound misunderstanding of NEPA, which concerned effects to the "human" environment, not just the "natural environment," and failed to realize that socio and economic impacts are intertwined with impacts to the natural environment. A federal action is not somehow precluded from having environmental impacts because it has social and economic impacts also. Impacts on social, cultural, economic, and natural resources are all included in impact statements. See 40 CFR 1508.08. FAIR did not appeal so the reasoning in this decision was never further tested.

<sup>84</sup> The immigration court system, the Executive Office of Immigration Review (EOIR), which determines removals, however, remained in the DOJ rather than moving to DHS along with the former INS.

formulate regulations for visa issuances. In 2003, the Secretary of State and the Secretary of Homeland Security signed a Memorandum of Understanding agreeing that DOS would propose and issue visa regulations subject to DHS consultation and final approval.<sup>85</sup> DHS is responsible for developing and implementing visa policy, while DOS manages the visa process. The formulation of this MOU was an opportunity to correct the total absence of NEPA review in U.S. visa policy, but unsurprisingly, environmental concerns continued unmentioned.

An even more obvious opportunity to revisit the issue occurred when DHS issued new, department wide NEPA procedures. DHS issued in-house NEPA procedures in 2006,<sup>86</sup> but revised them and published them in final form in November 2014.<sup>87</sup> However, DHS's NEPA procedures, like the INS' before it, once again completely fail to contemplate whether any DHS discretionary actions related to the entrance and settlement of foreign nationals into the United States have potential effects on the environment. Amazingly DHS, in adopting its NEPA procedures, simply continues the INS legacy of considering only the impacts of constructing detention facilities for foreign nationals. DHS's blindness to the obvious, documentable environmental impacts of its actions which directly increase the U.S. population through the admission of foreign nationals is all the harder to accept because now a separate component agency of DHS, USCIS, is responsible for administering the nation's lawful immigration system. USCIS administers "the legal immigration programs that allow foreign nationals to visit, work,

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<sup>85</sup> Memorandum of Understanding between the Secretary of State and the Secretary of Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, [https://nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/pr/dos-dhs-mou.pdf](https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/dos-dhs-mou.pdf)

<sup>86</sup> 71 Fed. Reg. 16,790 (Apr. 4, 2006).

<sup>87</sup> DHS Instruction Manual, *supra* note 65.

live, and seek refuge in the United States.”<sup>88</sup> In fact, these are some of the most environmentally significant programs that the federal government operates. But neither USCIS nor its entire mission of administering our nation’s lawful immigration system are mentioned or contemplated by DHS’s NEPA procedures. Given the major environmental impacts of the programs USCIS administers, its use of DHS’s present, incomplete NEPA procedures constitutes an unlawful violation of NEPA.

In recent years (between 2015 and early 2017), members of the public have begun to comment publicly on DHS regulations that expand various immigration programs, asking why the agency never analyzes the environmental effects of its regulations which demonstrably drive population growth.<sup>89</sup> In response, departing from prior agency practice of skipping reference to NEPA altogether, DHS has begun to cite categorical exclusions in some cases, claiming that expansions to immigration programs are categorically excluded because their changes were “strictly . . . administrative or procedural.”<sup>90</sup> DHS has also claimed that its regulatory changes are categorically excluded because they are “rules that interpret or amend an existing regulation without changing its environmental effect.”<sup>91</sup> Yet, DHS has never defined “administrative or procedural” in its NEPA procedures (nor justified why making a substantive change to an immigration program fits the category). Nor has DHS explained how it has

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<sup>88</sup> See, e.g., <https://www.uscis.gov/archive/archive-news/uscis-director-l-francis-cissna-new-agency-mission-statement>

<sup>89</sup> See e.g., 80 Fed. Reg. 23,680 (Apr. 29, 2015); 81 Fed. Reg. 13,040 (Mar. 11, 2016); 81 Fed. Reg. 82,398 (Nov. 18, 2016); 82 Fed. Reg. 5,238 (Jan. 17, 2017).

<sup>90</sup> 81 Fed. Reg. 13040, 13,117 (Mar. 11, 2016), 82 Fed. Reg. 5,238, 5,284 (Jan. 17, 2017).

<sup>91</sup> 80 Fed. Reg. 23,680, 23,688 (Apr. 29, 2015); 81 Fed. Reg. 13,040, 13,117 (Mar. 11, 2016); 81 Fed. Reg. 82,398, 82,475 (Nov. 18, 2016); 82 Fed. Reg. 5,238, 5,284 (Jan. 17, 2017).

determined whether a change to a program is environmentally insignificant when the program itself has never undergone any NEPA review in the first place.

Even more recently (later in 2017 and in 2019), DHS also began to frame the beginnings of an argument for why immigration related actions should be exempt from NEPA. In a rule temporarily amending the H-2B nonimmigrant visa program to increase its numbers, DHS argued that: “Generally, a rule which changes the number of visas which can be issued has no impact on the environment and any attempt to analyze that impact would be largely, if not completely, speculative.”<sup>92</sup> Speaking of that specific rule, DHS (along with DOL, which shared responsibility for the rule) stated that such an analysis could not be conducted because “The Departments cannot estimate with reasonable certainty which employers will successfully petition for employees in what locations and numbers.” The agencies decided that this particular rule was too small (at 15,000) to be significant in any case: “with a current U.S. population in excess of 323 million and a U.S. land mass of 3.794 million square miles, this is insignificant by any measure.” In a final rule on an H-1B rule, DHS presented the same argument, that that NEPA does not apply due to the excessively speculative nature of any effort to conduct an impact analysis.” And, so, after 50 years, DHS has offered only this meager, obviously post hoc justification for why it has not conducted and will continue not to conduct any NEPA analysis of programs currently driving nearly all United States population growth.

Under the law, this explanation is woefully insufficient. First, NEPA does not provide agencies with an escape hatch from compliance with the entire NEPA process by merely

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<sup>92</sup> 82 Fed. Reg. 32,987 (Jul. 19, 2017).

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 this rule of reason is the overriding statutory duty of compliance with impact statement procedures to “the fullest extent possible.”<sup>93</sup>

NEPA does not let an agency off the hook merely because it wishes to throw its hands in the air and avoid investigating the potential environmental effects of its actions. “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.”<sup>94</sup>

Second, DHS is also demonstrably incorrect to assert that providing any sort of estimation of the environmental effects of population growth caused by administrative immigration decisions presents an impenetrable problem requiring an unusual degree of speculation. Moreover, environmental scientists routinely calculate human impacts on the

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<sup>93</sup> *Scientists’ Inst. for Public Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d at 1093.

<sup>94</sup> *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985).

environment and the effects of trends in population growth are a crucial, unavoidable part of any such calculation.<sup>95</sup> Calculating the environmental impacts of additional population does not require more guesswork than many NEPA analyses agencies have routinely produced for decades. Knowing exactly where each foreign national is planning to go, is certainly not necessary for an application of the NEPA process which would allow the public the opportunity to weigh in on our immigration programs in a much more meaningful way than is now available. Such opportunity for public participation provides for the possibility of more informed, transparent decisionmaking by the agencies. Those agencies involved in regulating immigration, like all agencies applying NEPA analysis, would be allowed to make reasonable, 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 necessarily require excessive speculation, and it would not be unreasonably difficult.<sup>96</sup>

Third, DHS’ argument that any particular tweak to a program is insignificant, because any few thousand admissions to a country with a population of 323 million will melt unnoticeably into the population ignores NEPA’s requirement for the cumulative impacts of numerous related actions to be studied. The cumulative impact of DHS’ multiple immigration programs adds up to some very large numbers, even within a large population. Significantly,

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<sup>95</sup> See, e.g., <https://sites.google.com/a/bvsvd.org/mr-little-ap-environmental-science/unit-5-human-populations>

<sup>96</sup> 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. Their analysis can be found here: <http://www.immigrationeis.org/ieis-docs/PFIR-Immigration-EIS-2015oct-Abstract-and-Executive-Summary.pdf>.

such agency rationalization, ignores *both* the compounding effect of population growth over time resulting from births to immigrants, *and* the multiplier effect of chain migration. Because of the way the US immigration system is currently structured, the settlement of one foreign national as a permanent resident in the U.S. (and many so called “non immigrants” eventually become permanent) leads to the settlement of an average of 3.45 family members.<sup>97</sup> Even so, DHS can possibly justify a refusal to prepare an EIS or even an EA for many of its smaller individual actions. But how can it justify never having done either a programmatic or a project-based EIS for any of its immigration programs at all? The root of DHS’ “blind spot” lies in its improper DHS NEPA procedures, which completely fail to contemplate any environmentally significant impacts arising from its immigration mission.

DHS’s recently stated arguments as to why NEPA has never been applied to its immigration actions are frivolous. On a deeper level, it is apparent that the agency’s unstated argument is essentially that no immigration agency has to apply NEPA because it has not been done before. That is not a good reason, and it is time for a change. Acting Director of USCIS Ken Cuccinelli recently stated that if the answer to the question “why are we doing it that way?” is “because we’ve always done it that way,” that is “not a good answer.” USCIS should take this chance to remedy an unlawful wrong that has stood undisturbed for fifty years.<sup>98</sup>

### **III. What Could NEPA Analysis on Immigration Programs Look Like?**

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<sup>97</sup> Stacie Carr & Marta Tienda, *Family Sponsorship and Late Age Immigration in Aging America: Revised and Expanded Estimates of Chained Migration*, POPUL. RES. POLICY REV., (Dec. 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3884518>.

<sup>98</sup> *Immigration Newsmaker: A Conversation with USCIS Acting Director Ken Cuccinelli*, Center for Immigration Studies, September 26, 2019, Washington DC, available at <https://cis.org/Transcript/Conversation-USCIS-Acting-Director-Ken-Cuccinelli>

Though an agency has no choice about whether to comply with NEPA, it does have a great deal of discretion in the way it carries out its environmental review process. Therefore, even as the federal government’s complete neglect of NEPA in the immigration arena may be a violation of the law, there are many ways that the immigration agencies could choose to meet their obligations. The following section suggests some practices to rectify this long-standing neglect.

Of the agencies responsible for immigration, DHS, specifically, USCIS, a subcomponent agency within it, generally takes the lead in administering U.S. legal immigration programs. It would thus make sense for USCIS to act as the lead agency in most EISs regarding immigration, though it would need at times to coordinate with the Bureau of Consular Affairs within DOS, the Office of Refugee Resettlement (ORR) within HHS, DOL, and the Executive Office of Immigration Review (EOIR) within DOJ, as needed. For the promulgation of some regulations, these agencies might even act as co-lead agencies in the future.

One of the first responsibilities for USCIS, then, as the lead agency in charge of the nation’s immigration programs, should be to promulgate its own component NEPA regulations. Currently, USCIS simply uses the NEPA procedures, which it calls, “Instructional Manual 023-01-001-01 (“the Instruction Manual”), and which was adopted in its final form by the wider agency of DHS in 2014.<sup>99</sup> DHS, being such a large and sprawling department that includes many diverse agencies with very different missions, such as the Transportation Security Administration (TSA), the Coast Guard, and the Federal Emergency Management Agency (FEMA), already

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<sup>99</sup> <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex>

contemplates that some of its component agencies may have their own NEPA procedures, which DHS calls “Component Supplemental Instructions.” According to the Instruction Manual, “Components have the option of developing Supplemental Instructions for implementing NEPA within their respective organizations to fit their unique missions and needs.” Instruction Manual at IV-14. USCIS, the agency primarily responsible for the implementation of policies that add more than one million people a year to the United States population, should promulgate and adopt its own supplemental NEPA procedures to meet its unique mission of administering the nation’s lawful immigration system.

These new procedures must establish the path for routine, ongoing NEPA review of immigration programs and policies, both retrospectively and prospectively. While NEPA is usually prospectively applied, the failure of federal agencies regulating immigration to even minimally comply with their NEPA obligations for fifty years, the interests of informed decision making and public involvement demand retroactive analysis. Such retroactive review would establish a baseline of immigration driven population growth that would vastly inform future NEPA analysis and decisionmaking. NEPA reviews, in general, may be on a site- or project-specific level or on broader – programmatic – level. Given the nationwide and broad nature of immigration, the most sensible step would be to conduct a Programmatic Environmental Impact Statement (PEIS).<sup>100</sup> It would also make sense, with respect to immigration, to perform

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<sup>100</sup> The term “programmatic” describes any broad or high level NEPA review; it is not limited to a NEPA review for a particular program. See, The Executive Office of the President, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Effective Use of Programmatic NEPA Reviews, December 18, 2014, available at: [https://obamawhitehouse.archives.gov/sites/default/files/docs/effective\\_use\\_of\\_programmatic\\_nepa\\_reviews\\_final\\_dec2014\\_searchable.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_final_dec2014_searchable.pdf)

regular updates of programmatic reviews every five years. Such regular, periodic review is often performed when agencies choose the programmatic route for review.

The first step of a PEIS for immigration includes scoping. The purpose of scoping in the NEPA process is to solicit input from the public and relevant agencies as to the “scope” of the NEPA document, that is, which alternatives and issues should be addressed. USCIS should announce to stakeholders, local, state, and tribal agencies, and interested organizations as well as the public at large that it is conducting a PEIS for its immigration programs. The first step for scoping should be a Notice of Intent (NOI) in the *Federal Register* followed by nationwide public hearings. Because these will be the first NEPA hearings on immigration ever conducted, USCIS should conduct a very visible advertising campaign to make sure that ordinary citizens are fully aware of this opportunity to have their voices heard regarding the effects of immigration on themselves and their environment. These effects, as specified by CEQ’s regulations in 40 CFR 1508, include ecological (such as the effects on natural resources and on the components, structures, and functions of affected ecosystems), aesthetic, historic, cultural, economic, social, and health, whether direct, indirect, or cumulative. USCIS should conduct hearings in locations across the nation, especially those places most heavily affected by large-scale immigration. This would be an opportunity for the agency to become informed by the people who feel the impacts of immigration-induced population growth on their local communities and infrastructure, in order to inform the agency officials how it is affecting their lives. This type of information has never been considered by the federal government in its immigration decisionmaking.

As is apparent from so many of the environmental reviews currently conducted by the government, increased population creates a host of consequences, such as increased need for roads, schools, water, wastewater treatment, housing, and energy, to name only a few. Forecasting these needs accurately, and making wise decisions in anticipation, with the best possible information, is clearly part of the environmentally informed and enlightened decision making NEPA is intended to foster. DHS, conjuring an excuse to avoid NEPA review of its actions on the basis of not needing to engage in “speculation,” apparently relies on the broad claim that it simply has no idea where the foreign nationals it admits into the country are going to go. Aside from the fact that the patterns of immigrant settlement are observable and prone to certain patterns, which facilitates reasonable predictions, NEPA is designed as a tool to force federal agencies to seek and provide better information to the public, not to excuse their own lack of review based on failing to seek and acquire information.

The first PEIS conducted by USCIS should attempt to remedy this lack of information. USCIS should take an accounting of how many foreign nationals have settled in the United States, through which programs, where they settled, and the local costs and benefits of this population growth. Much of this information can be gleaned from Census data. A PEIS is an opportunity to take stock of the nation’s immigration programs and policies, and determine if our government really understands the effects and if predictions or assurances were accurate. Or is the United States simply on immigration autopilot?

Most foreign nationals come to the country through the grant of either an immigrant or non-immigrant visa. Immigrant visas are largely granted through four categories: family-based immigration, employment-based immigration, diversity visas, and humanitarian. Of these,

family based immigration is the largest category. There are also about 80 categories of non-immigrant visas, though many non-immigrant aliens ultimately convert to permanent resident status. In addition, aliens can also be granted parole or Temporary Protected Status (TPS). The initial PEIS will provide a much needed opportunity to review the impacts of these categories. Basic questions will be answered, such as: How many immigrants have settled after admission in each category? Are there a significant number who were admitted on the basis of fraud, thus causing a greater number of admissions than anticipated under the policy? Are there any programs that turned out to be much larger than was expected, and if so, why? Do localities that receive large numbers of immigrants from any of these programs deserve a say in how they will be implemented?

After taking into account questions such as these, USCIS will release the PEIS to the public. At that point, as is generally done when an EIS or EA is completed, USCIS should also the public another opportunity to make written comments on the adequacy of the document and its analysis. At this point, another round of public meetings would be held, if USCIS believes it would be beneficial. To alert the public, again, USCIS would at minimum publish a Notice of Availability (NOA) in the *Federal Register*, formally announcing the availability of the PEIS, the location and timing of any public meeting(s), where to send written comments, and the deadline for receiving comments. USCIS would also make the PEIS available on its website so that interested parties can easily download and upload written comments there. Ultimately, USCIS would prepare a Record of Decision (ROD) based on what it learned from the PEIS, once again published in the *Federal Register*, informing the public and stakeholders which alternative, or combination or hybrid of alternatives, it is selecting.

The initial PEIS will be particularly important, because it will give USCIS the opportunity to determine, and later spell out in its own NEPA procedures, the specific points at which, during its immigration decision making processes, future EAs should be conducted. These new “Component Supplemental Instructions”<sup>101</sup> can then specify when an EIS or an EA that is specific to a particular new immigration related program should be conducted. For instance, a good point for an EA to be conducted is at the proposal stage of a new visa program or an expansion of an existing immigration program, before any regulations are promulgated. Often, visa programs providing a new avenue for foreign nationals to enter the country begin with the promulgation of a regulation, and an EA should be conducted before the new program is implemented and visas issued or extended. One example include the creation and expansion of programs such as the Optional Practical Training Program,<sup>102</sup> a program created by the immigration bureaucracy to allow foreign nationals in the country on a student visa to work after graduation for up to three years. Other examples include the creation of the U visa, which allows victim who have worked with law enforcement to stay in the country<sup>103</sup>, or the Special Immigrant Visa program for Afghan and Iraqi translators.<sup>104</sup> Such a process is a decision point that further expands the United States population, and thus can be expected to have environmental consequences. At the very least, the cumulative effects of these programs can be expected to have impacts. Another decision point when an EA should be conducted, for

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<sup>101</sup> As detailed above, “Component Supplemental Instructions” is the term used by DHS’s NEPA procedures to refer to those adopted by its component agencies, of which USCIS is one.

<sup>102</sup> See <https://www.uscis.gov/opt>

<sup>103</sup> See <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>

<sup>104</sup> See <https://travel.state.gov/content/travel/en/us-visas/immigrate/siv-iraqi-afghan-translators-interpreters.html>

instance, is before the designation of Temporary Protected Status, which allows foreign nationals in the U.S. to remain here because of conditions in their home countries, for a new population.<sup>105</sup> An EA at least, and also an EIS, should also be prepared prior to the implementation of any future amnesty or legalization program, such as a “Dream” Act for those who entered the United States as minors, should one be passed by Congress.

In the meantime, USCIS should consider putting a temporary hold on some of our current programs, particularly ones that the PEIS flags as endemic with avoidable fraud, until USCIS’ supplemental instructions are ready. These programs have been implemented without *any* NEPA review and thus, without the benefit of enlightened decision making that the citizenry is owed. At least some regulations, those which have expanded immigration through discretionary decisions via agency action, should be repromulgated with the benefit of the information that the NEPA process would have provided to agency decisionmakers. The INS, DOS, and now UCSIS, should have conducted scoping before implementing any of its programs allowing for the entrance and settlement of mass numbers of foreign nationals into this nation, including its family, employment, diversity and asylum and refugee programs; any organized parole or legalization programs; and any long-term non-immigrant visa programs. Going forward, accountable steps must be taken to ensure that discretionary agency decisions that further increase immigration must be subject to NEPA review.

**IV. Applying NEPA to Immigration would be salutary: a breakdown of Information Between those Who Determine Immigration Policy and those Who are Affected by Immigration Policy Has Occurred.**

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<sup>105</sup> <https://www.uscis.gov/humanitarian/temporary-protected-status>

**A) The political class is out of touch with the public's opinion on immigration.**

The 2016 presidential election came as a shock to Washington insiders in both political parties. The election of President Trump was the first time in American history that a person with no political or military experience won the presidency. Neither party expected him to win either the nomination or the general election. It is no coincidence that this outsider ran on immigration control as his signature issue against the elite consensus. Arguably, the governing class (which consists not only of elected officials, but the federal bureaucracy, federal lobbyists, and the Washington media) was so entirely shocked because they believed the public at large would reject President Trump on grounds relating to his personal characteristics, rather than policy. The message that the governing class could have taken to heart was that the American public felt more strongly opposed to elite consensus on issues like immigration than elites imagined possible. Elite soul-searching should only have been all the more deep the more the governing class felt repulsed by the persona of the man who won the presidency. But why is elite consensus on immigration so divorced from popular sentiment? At least some of the answer is that the administration of immigration law, despite its wide impacts on the body politic as a whole, has been largely captured by parochial interests.

As detailed above, immigration policy is generally carried out by agency policy. Vast amounts of power are delegated to executive agencies to determine how many, who, and at what pace people enter the United States and how long they stay, and how they can be removed. Congress has often responded to public or lobbying pressure on immigration by writing grants of authority both to open and to restrict immigration, but leaving the details to executive agencies, insulated from political pressure, to determine later. Immigration is hardly

the only the only area of policy so taken over by what has come to be called “the fourth branch of government” or “the administrative state.” As Professor John Marini wrote in a recent book on the subject, the powers set out in the Constitution granted to the Congress have in many cases been delegated to executive agencies: “The administrative state has undermined the capacity of our institutions to pursue the public interest. Congress has delegated political authority to unaccountable knowledge elites in the bureaucracy who are shielded from the popular control that might be exercised through elections.”<sup>106</sup>

With respect to immigration, the failures of the “knowledge elites” to remain in tune with the public interest have been particularly acute. When it comes to immigration, “knowledge elites” tend to be one decidedly in favor of ever increasing, higher immigration levels. The growth of the administrative state has meant the growth of government by “experts.” When it comes to immigration, the body of expertise that has been developed is not reciprocal. The levers of power exerting pressure on both the executive branch tend to operate only from the point of view of the individual seeking to enter or stay in the country, rather than from the point of view of the citizen whose country is inevitably affected, both for good and evil, by high levels of immigration.

A common problem in administrative agencies is the predicament of what is known as regulatory capture. While agencies are charged with regulating and enforcing laws for the public good, in practice, these agencies often end up advancing the interests of those very subjects they regulate. The agency often grows to see the regulated party as its “client” rather

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<sup>106</sup> JOHN MARINI, UNMASKING THE ADMINISTRATIVE STATE: THE CRISIS OF AMERICAN POLITICS IN THE TWENTY-FIRST CENTURY 26 (2019).

than the public. The administration of immigration laws is not immune to regulatory capture: in the case of the United States Immigration and Naturalization Service (USCIS) and the other agencies which regulate immigration into the United States, those regulated are the immigrant, or sometimes, the future employers of the potential immigrant. USCIS, for instance, is even funded by fees from potential immigrants. We can see the interplay between USCIS's mission as granted by law and the way it regards its mission from changes to its mission statement. Before 2018, USCIS' mission statement was:

USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our *customers*, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.

When former USCIS Director Francis Cissna changed the mission statement, he explained:

In particular, referring to applicants and petitioners for immigration benefits, and the beneficiaries of such applications and petitions, as "customers" promotes an institutional culture that emphasizes the ultimate satisfaction of applicants and petitioners, rather than the correct adjudication of such applications and petitions according to the law. Use of the term leads to the erroneous belief that applicants and petitioners, rather than the American people, are whom we ultimately serve."<sup>107</sup>

This tension demonstrates how, as an agency, officials within USCIS have the potential to accustom themselves to serving the needs of immigrants rather than serving the needs of the American public. The old mission statement reflects an agency mindset that an immigrant applies for entry, and has a right to a process at the agency, but the American public does not.

Furthermore, each potential immigrant who can obtain access to a lawyer has every incentive to hire one to help successfully navigate the system: the end result is a vast army of

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<sup>107</sup> L. Francis Cissna, *New Agency Mission Statement*, <https://www.uscis.gov/archive/archive-news/uscis-director-l-francis-cissna-new-agency-mission-statement>

dedicated immigration lawyers promoting immigrants to enter, reside, and gain employment in the country. Further promoting the expansion of the many pathways into the United States is a host of organizations and associations dedicated to immigration expansion. For instance, the American Immigration Lawyers Association (AILA) is an association of immigration lawyers. It states its mission is: to “promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members,”<sup>108</sup> Of course, AILA’s idea of a just immigration system entails promoting further openness to immigration. One would expect nothing less from an organization dedicated to serving its clients by helping them enter and remain in the country— and there is nothing wrong with such an organization advocating for the interests of its clients. However, there is simply no countervailing advocacy group of privately hired professionals providing a check and balance on AILA: there is no such thing as individual Americans hiring a lawyer to stop an immigrant or potential immigrant from entering or remaining in this country. The point of view of American lawyers with expertise in immigration law, therefore, is almost exclusively one-sided. On the other side, are only the government lawyers who administer the system from an enforcement perspective.

The immigration bureaucracies which admit large numbers of foreign nationals do impact American communities, but American citizens who are affected by the bureaucracies’ decisions do not hire lawyers to advocate for whatever interests they have in tightening enforcement, or even for learning how the system works, because it is not a system they have a

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<sup>108</sup> See <https://www.aila.org/about/mission>

personal interest in learning to navigate. Many citizens are not even aware just how decentralized within various branches of the administrative state the regulation of immigration law happens. Navigating this unwieldy, diffuse system is not something American citizens are called upon to do. In fact, many Americans, when brought face to face with the complications of the immigration system, are shocked by its complexity.

Nor do citizens usually have any way to impose any discipline or even appropriate procedures on the agencies that manage immigration. While, legally, agencies are supposed to provide some measure of transparency and due process through the Administrative Procedures Act, in practice, these agencies frequently administer immigration law through ad-hoc procedures that are never published as final agency actions. Accordingly, the public has no way to force the agencies to provide information, much less notice and the opportunity to “have a seat at the table” regarding ongoing administration of immigration policy. For instance, though the role of HHS in handling a surge at the border of unaccompanied minors has contributed to the current crisis on the southwest border, nonetheless, the procedures that the ORR uses have not been properly regularized. As noted by the United States Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs: “the ORR never promulgated its policies as regulations or subjected them to notice-and-comment rulemaking. Instead, ORR maintained most of its policies in a constantly-changing Policy Guide that gives no certainty to UAC care providers or to UACs, nor transparency to Congress or the public.”<sup>109</sup>

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<sup>109</sup> <https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf>

Immigration provides the perfect example of the need for continuous feedback and accountability between the public, the bureaucracy, and elected officials, the “larger audience” envisioned by the court in *Sierra Club v. Watkins*.

**B) Both the Public and the Political Class need to be reminded of the Environmental Case for Limits to Immigration.**

As immigration has become a sharply partisan issue, environmentalists, who once made up much of the immigration control movement, have abandoned the issue. Discussion of the environmental impacts of mass immigration is now taboo. Unfortunately, the general public is now largely unaware of how much population growth is due to immigration, and what the environmental effects of that immigration are. The natural constituents for controlling and reducing immigration are the labor and environmental movements. Incredibly, perhaps out of partisan alliance, both movements stood down on immigration.<sup>110</sup> The results are apparent in the 2016 election: popular revolt. And on one side of the current immigration debate are the Democrats who seem to object to any concept of limits on immigration whatsoever.<sup>111</sup>

American immigration debate includes much romanticism over the words “Give me your tired, your poor, your huddled masses yearning to breathe free” from the poem “The New Colossus.”<sup>112</sup> But when the poem was written in 1883, the world population was less than 1.6

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<sup>110</sup> For a discussion of how the environmental movement gave up the position of immigration control in the 1990’s, see: Roy Beck and Leon Kolankiewicz, *The Environmental Establishment Abandons U.S. Population Stabilization*, (Ctr. for Immigration Studies Backgrounder, 2001), <https://cis.org/Report/Forsaking-Fundamentals>

<sup>111</sup> For instance, in the Democratic Presidential debate of June 2019, nine of ten candidates indicated they sought to decriminalize border crossing. See Associated Press, *Most Democrats promise to decriminalize border crossings during 2020 debate*, PBS (June 27, 2019), <https://www.pbs.org/newshour/politics/most-democrats-promise-to-decriminalize-border-crossings-during-2020-debate>.

<sup>112</sup> For instance, a recent district court opinion cited the New Colossus as having been “incorporated into the national consciousness as a representation of the country’s promise to would be immigrants.” *City of San Francisco et al v. USCIS et al*, 19-cv-4717, (N.D. Cal 2019). This case put a halt on a new regulation promulgated by DHS

billion. Today it is 7.7 billion.<sup>113</sup> Is an open door policy sustainable in a world of 7.7 billion people and rapid transportation? If the point of NEPA is anything at all, it is that the government should not forget that the protection of quality of life and nature requires a recognition of physical limits to human activities.

Applying NEPA to immigration for the first time would reacquaint the reasons for immigration control with one of its natural heirs, the environmental movement.

## Conclusion

Nowhere is NEPA more needed than the administration of immigration. Thanks to the decades long blindspot and reigning political correctness politicians are not even aware of how much immigration there is in the United States. For instance, on the September 2019 Democratic presidential primary debate stage, one candidate called for bringing the levels of legal immigration during the Trump Administration back to what they were during the Obama Administration. No other candidate corrected him, but, in fact, the levels had not changed at all.<sup>114</sup> Certainly, the fact that candidates have so little awareness of the actual immigration numbers involved, not just as to whether there are any limits to what immigration levels could and should be based on environmental sustainability, demonstrates that there is a *need* for more environmentally enlightened decision making when it comes to immigration.

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restricting the immigration of foreign nationals who are likely to become public charges. Strikingly, under a proper interpretation of NEPA, a rule like this, which would either limit or not effect levels of immigration, is not the kind of rule that increases the population and thus has environmental impacts. Yet in practice, the courts have been more willing to hear cases that might have some limiting effect rather than cases that expand immigration.

<sup>113</sup>See, Worldometers.info, at <https://www.worldometers.info/world-population/world-population-by-year/>, last visited on October 11, 2019.

<sup>114</sup>Mark Krikorian, *Do the 2020 Democrat Candidates Know Anything About Immigration Policy?*, NAT. REV. (Sept. 13, 2019), <https://www.nationalreview.com/corner/do-the-candidates-know-anything-about-immigration-policy/>.

