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Institute (IRLI) is a public-  
interest legal education and  
advocacy law firm dedicated to  
achieving responsible  
immigration policies that serve  
national interests.*

*IRLI is a supporting  
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Reform.*

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August 20, 2018

Attn: Docket No. CEQ-2018-0001  
Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503

#### **Public Comment of the Immigration Reform Law Institute: Docket ID No. CEQ-2018-0001**

The Immigration Reform Law Institute (“IRLI”) writes in response to the Council on Environmental Quality’s (“CEQ”) request for public comment on its advanced notice of proposed rulemaking regarding the update to regulations for implementing the procedural provisions of the National Environmental Policy Act (“NEPA”). 83 Fed. Reg. 28591, 32071; Docket ID No. CEQ-2018-0001.

IRLI is a nonprofit public interest law organization that exists to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI appreciates this opportunity to comment on CEQ’s prospective update to the regulations for implementing the procedural provisions of NEPA. Specifically, IRLI’s comment will address Question 5 as published in the Federal Register notice on June 20, 2018: “Should CEQ’s NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?” 83 Fed. Reg. 28591.

In addressing this question, IRLI urges CEQ to amend its regulations to clarify that the several federal agencies involved in the regulation of

immigration must conduct a NEPA analysis to determine the environmental impact of their population-increasing immigration-related actions. Indeed, immigration—in particular, immigration-driven population growth—is a “significant issue” that CEQ must clarify needs to be addressed as part of the NEPA analysis conducted by immigration-regulating agencies.

Accordingly, this comment will first establish that NEPA recognizes the relationship between population growth and the environment. Then it will discuss the critical environmental effects of immigration-driven population growth. Finally, it will explain the need for immigration-regulating agencies (specifically, the U.S. Department of Homeland Security (“DHS”)) to conduct a NEPA analysis addressing the environmental effects resulting from the population growth created by its implementation of immigration programs.

**I. NEPA recognizes the relationship between population growth and the environment.**

Signed into law by President Richard Nixon on January 1, 1970, NEPA was the first major environmental law in the U.S. and is frequently referred to as the “Magna Carta” of federal environmental laws.<sup>1</sup> NEPA generally requires all federal agencies to consider the environmental impact of proposed actions prior to making a decision.<sup>2</sup> CEQ regulations provide that each federal agency shall adopt procedures to ensure that its “decisions are made in accordance with the policies and purposes [of NEPA].”<sup>3</sup> Specifically, an agency must ensure that its NEPA procedures provide for designating the major decision points for the agency’s principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.<sup>4</sup>

NEPA recognizes the fundamental relationship between population and the environment. Congress’ declaration of national environmental policy as included in the Act reads:

*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 . . . to use all practicable means and measures . . . to create and maintain*

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<sup>1</sup> See National Environmental Policy Act website, available at: <https://ceq.doe.gov/>.

<sup>2</sup> 42 U.S.C. § 4332.

<sup>3</sup> 40 C.F.R. § 1505.1.

<sup>4</sup> *Id.* at § 1505.1(b).

*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.<sup>5</sup>

In fulfilling its declaration of policy, Congress went on to state that the federal government may seek to, “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities[.]”<sup>6</sup>

CEQ regulations likewise recognize population growth as an indirect “effect” subject to NEPA analysis. The pertinent regulations read:

Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, *population density or growth rate*, and related effects on air and water and other natural systems, including ecosystems.<sup>7</sup>

Accordingly, the NEPA statutory and regulatory scheme make clear that population growth (without qualification as to how such growth is caused) is an “effect” for purposes of NEPA analysis.

As such, population growth inducing agency actions should be subject to an environmental assessment under NEPA. As 42 U.S.C. § 4332(C) explains, each agency is required to prepare an “Environmental Impact Statement” (“EIS”) for each “major federal action[] significantly affecting the quality of the human environment . . . .” CEQ regulations further provide for the preparation of a document known as an Environmental Assessment (“EA”) to enable an agency to determine whether a particular action may have a significant impact on the quality of the human environment and thus require preparation of an EIS.<sup>8</sup> An EA or EIS must also discuss and analyze alternatives to a proposed program or project—including a “no-action” alternative, which may have less environmental impact than the proposed action, as well as mitigation measures in relation to potential environmental impacts.<sup>9</sup> An EIS may be, and sometimes must be, prepared for broad federal actions such as the adoption of new agency programs or regulations.<sup>10</sup> Agencies shall prepare statements on broad actions, including related actions, in order to include environmental considerations in policy, and shall time such statements to coincide with meaningful points in agency planning and decision making.<sup>11</sup>

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<sup>5</sup> 42 U.S.C. § 4331(a) (emphasis added).

<sup>6</sup> *Id.* at § 4331(b)(5).

<sup>7</sup> 40 C.F.R. § 1508.8(b) (emphasis added).

<sup>8</sup> *Id.* at § 1501.4.

<sup>9</sup> *Id.* at §§ 1502.14, 1502.16, 1508.9.

<sup>10</sup> *Id.* at § 1508.18.

<sup>11</sup> *Id.* at § 1502.4(b).

In preparing an EA or EIS, an agency must consider direct, indirect, and cumulative effects.<sup>12</sup> Under NEPA, “effects” and “impacts” are synonymous and include:

ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects . . . .<sup>13</sup>

Nonetheless, the NEPA regulatory scheme does allow for the exclusion of certain agency actions from NEPA analysis. This is achieved through the use of “Categorical Exclusions,”<sup>14</sup> defined as:

[A] category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations ([40 C.F.R.] § 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

For those federal actions that are not categorically excluded and are, following completion of an EA, determined not to have “a significant impact on the human environment” and thus do not require preparation of an EIS, the agency issues a “finding of no significant impact” (“FONSI”).<sup>15</sup>

## **II. Immigration is the leading cause of U.S. population growth, which has undeniable effects on the environment.**

According to the Pew Research Center, immigration has been the leading cause of U.S. population growth for the last half-century.<sup>16</sup> Indeed, new immigrants, their children, and their grandchildren accounted for 55 percent of U.S. population growth between the years 1965 and 2015.<sup>17</sup> This amounted to the addition of 72 million people to the U.S. during this time frame, as the country’s population grew from 193 million in 1965 to 324 million in 2015.<sup>18</sup> If current trends continue, Pew estimates that between 2015 and 2065, immigrants and their descendants

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<sup>12</sup> See *Id.* at §§ 1502.16, 1508.8, 1508.9, 1508.27.

<sup>13</sup> 40 C.F.R. § 1508.8(b).

<sup>14</sup> *Id.* at § 1508.4.

<sup>15</sup> *Id.* at § 1508.13.

<sup>16</sup> *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, Pew Research Center (Sept. 28, 2015), <http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/#fn-22980-1> (last visited Aug. 17, 2018).

<sup>17</sup> *Id.*

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

will account for 88 percent of the U.S. population increase, or an added 103 million people, as the nation's population grows to 441 million.<sup>19</sup>

The impact of such immigration-driven population growth on the environment is hardly deniable. As explained below, its effects lead to urban sprawl; losses in farmland, habitat, and biodiversity; increases in greenhouse gas emissions; and increases of water demands and withdrawals from natural systems.

*A. Immigration-driven population growth leads to urban sprawl.*

Urban sprawl, which refers to development on the bounds of urban and suburban areas, has been identified as a leading environmental problem in the United States.<sup>20</sup> Urban sprawl results in severe environmental consequences, “including increasing overall energy and water consumption, increasing air and water pollution, and decreasing open space and wildlife habitat.”<sup>21</sup> To accommodate urban sprawl, since 1982, more than 41 million acres of undeveloped rural land was built on in the United States.<sup>22</sup> This is an area roughly the size of the State of Florida.<sup>23</sup>

Population growth is the single most important cause of urban sprawl.<sup>24</sup> It comes as no surprise then that the cities and states with the highest population growth rates have also experienced the most sprawl.<sup>25</sup> For instance, according to one report, “[c]ities whose populations increased between 0% and 10% during a twenty-year period averaged a 38% increase in developed land, while cities whose populations increased between 30% and 50% averaged a 72% increase in developed land during that same time.”<sup>26</sup> Other studies have similarly demonstrated population growth's paramount role in urban sprawl:

The two most thorough studies on the causes of sprawl in the U.S. during the last two decades of the twentieth century analyzed several dozen possible factors. Grouping together all those factors that can increase per capita land use and comparing these with the single factor of more “capitas,” it found that between 1982 and 1997, 52 percent of sprawl in the U.S. was attributable to population increase while 48 percent was

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

<sup>20</sup> Philip Cafaro, Ph.D., *The Environmental Impact of Immigration into the United States*, p.24 (2016), <https://docs.google.com/a/philipcafaro.com/viewer?a=v&pid=sites&srcid=cGhpbGlwY2FmYXJvLmNvbXx3d3d8Z3g6YjI1NmUzM2Q5MwQ2OGJj>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.* at p.26.

<sup>25</sup> *Id.* at p.26-27.

<sup>26</sup> *Id.* at p.27.

attributable to misguided policies that increased land use per person (Kolankiewicz and Beck 2001. Beck et al. 2003). A follow-up study on the more recent 2000-2010 period found that population growth was now causing approximately 70-90% of suburban sprawl nationwide (Kolankiewicz et al. 2014).<sup>27</sup>

If levels of immigration-driven population growth remain unchanged, it is estimated the U.S. would need to develop an additional 79 million acres of rural farmland—an area larger than the State of New Mexico—to sustain the new population.<sup>28</sup>

*B. Immigration-driven population growth results in losses to farmland, habitat, and biodiversity.*

Related to the increase in urban sprawl, population growth also contributes to losses in farmland, habitat, and biodiversity. A summary report by the U.S. Department of Agriculture’s Natural Resources Conservation Service reviewing the years 1982-2007 reveals:

The net change of rural land into developed land has averaged 1.6 million acres per year over the last 25 years, resulting in reduced agricultural land, rangeland, and forest land. Loss of prime farmland, which may consist of agriculture land or forest land, is of particular concern due to its potential effect on crop production and wildlife.<sup>29</sup>

Consequently, the continuation of immigration-driven population growth will further result in “adverse and severe” effects on our nation’s habitats and biodiversity.<sup>30</sup> These consequences “would likely be associated with the permanent loss of several billion acres of wildlife habitat directly to development (sprawl and urbanization)[.]” and “a much larger area of habitat—forestland, wetlands, desert, shrub-scrub, tundra, alpine, riparian, grasslands—would be vulnerable to degradation from increased environmental pressures and stresses associated with [an increased] human population . . . .”<sup>31</sup> These population growth-induced stressors include things like air pollution, acid precipitation damage, increased demand for water, habitat fragmentation, development of renewable energy sources, and damaging logging practices, to name just a few.<sup>32</sup>

To be sure, population growth threatens to accelerate the loss of biodiversity and lead to the extinction of animal and plant species.<sup>33</sup> The United Nations’ Secretariat of the Convention on Biological Diversity alarmingly estimates that humanity may be causing the extinction of one out

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<sup>27</sup> *Id.* at p.28.

<sup>28</sup> *Id.* at p.29.

<sup>29</sup> *Id.* at p.25 (citing U.S. Department of Agriculture’s Natural Resources Conservation Service).

<sup>30</sup> Cafaro at p.52.

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

<sup>32</sup> *Id.* at p.52-53.

<sup>33</sup> *Id.* at p.41.

of every three species on Earth in the next one to two hundred years.<sup>34</sup> Indeed, 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>35</sup> All five are caused by increased human population and the increased human activities associated with human population growth.<sup>36</sup> Accordingly, “[c]onservation scientists agree that habitat loss is by far the number one threat to nonhuman species.”<sup>37</sup>

*C. Immigration-driven population growth increases worldwide levels of greenhouse gas emissions.*

Greenhouse gas emissions in the U.S., the most important of which is carbon dioxide (“CO<sub>2</sub>”), are increasing because of immigration-driven population growth.<sup>38</sup> According to one study, the growth is proportional:

[I]t was found that greenhouse gas emissions in the United States from fossil fuel combustion grew by almost 13 percent from 1990 to 2000. U.S. population grew by almost an identical amount — slightly over 13 percent in the same decade. Thus, the increase in greenhouse gas emissions closely matched the increase in population. Put a different way, the growth in aggregate emissions was driven entirely by population growth, not growth in per capita emissions.<sup>39</sup>

Foreign nationals that settle in the U.S. produce an estimated four times more CO<sub>2</sub> than they would have in their countries of origin.<sup>40</sup> Accordingly, the estimated 637 tons of CO<sub>2</sub> produced annually by U.S. immigrants is 482 million tons more than they would have produced had they remained in their home countries.<sup>41</sup>

The continued emissions of greenhouse gases have detrimental environmental consequences. Their emissions increase their concentration in the atmosphere and in the case of CO<sub>2</sub>, even the upper layers of the ocean.<sup>42</sup> Oceans absorb an estimated 30-40 percent of CO<sub>2</sub> emissions, placing the aquatic environment at risk and acidifying the ocean.<sup>43</sup> Increases in the concentration of

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at p.41-42.

<sup>37</sup> *Id.* at p.42.

<sup>38</sup> Leon Kolankiewicz, *Immigration, Population Growth, and the Environment*, p.14, Center for Immigration Studies (Apr. 2015) <https://cis.org/sites/cis.org/files/immigration-population-growth-environment-2015.pdf>.

<sup>39</sup> *Id.*

<sup>40</sup> Cafaro at p.66.

<sup>41</sup> *Id.*

<sup>42</sup> Kolankiewicz at p.14.

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

greenhouse gases are widely-believed by many scientists to cause global temperatures to rise, ultimately resulting in devastating “long-term impacts on the earth’s climate, biosphere, agriculture, and coastal communities from sea level rise.”<sup>44</sup>

*D. Immigration-driven population growth diminishes overall water resources and quality.*

Immigration-driven population growth has also had a significant impact on the waters of the U.S., increasing withdrawals from natural systems such as rivers and streams and diminishing overall water resources.<sup>45</sup> Water taken for human consumption is necessarily removed from an ecosystem, leading to a host of environmental impacts. “When too much water is taken from 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>46</sup> Such critical ecosystem services and functions include “supporting aquatic biota, fisheries, and wildlife such as waterfowl, [] commercial navigation, hydroelectric power generation, recreation (e.g., boating, fishing, swimming), and even sightseeing and tourism.”<sup>47</sup> These activities are threatened when water levels are depleted.

Moreover, population size has a direct impact on the *quality* of available water.<sup>48</sup> “[T]he occurrence and severity of water pollution or impairment of water quality is directly related to human population size and/or density[,]” as “there is very little natural pollution in the absence of human populations and their contaminant-generating activities.”<sup>49</sup> Undoubtedly, numerous human activities can lead to water pollution. For instance, the introduction of excess nitrogen and phosphorus fertilizers into streams, rivers, and lakes encourage explosive growth of “algal blooms,” which can lead to the destruction of these aquatic ecosystems and the species that inhabit them.<sup>50</sup> As it stands, more than 123 freshwater animal species have become extinct in North America as a result of water withdrawals and pollution since 1900.<sup>51</sup>

It is also worth noting the recent trouble the U.S. has had with supplying clean water for drinking and recreation for even its current population—estimated to be around 324 million. This includes the recent multi-year drought in the State of California, the nation’s most

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<sup>44</sup> *Id.*

<sup>45</sup> Cafaro at p.75.

<sup>46</sup> *Id.* at p.78.

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

<sup>48</sup> *Id.* at p.77-80.

<sup>49</sup> *Id.* at p.80.

<sup>50</sup> *Id.* at p.79.

<sup>51</sup> *Id.* at p.80.

populous state with nearly 40 million residents.<sup>52</sup> The drought was so severe that in 2015, it led Governor Jerry Brown to declare statewide mandatory water restrictions for the first time in California's history, ordering towns and cities to reduce their water use by 25 percent.<sup>53</sup> This drought has led the state to overdraft its underground aquifers, with potentially devastating environmental consequences.<sup>54</sup>

**III. Federal agencies regulating immigration should conduct a NEPA analysis to determine the environmental impact of their population growth inducing immigration-related actions.**

Several federal agencies have a hand in regulating our nation's immigration system. The agency with perhaps the most obvious role (and that which will be the focus of this comment) is DHS. Over the course of many decades DHS (and its predecessor the Immigration and Naturalization Service ("INS")), has implemented at least eight programs regulating the entry and settlement of foreign nationals promulgated pursuant to its authority under the nation's immigration laws, specifically the Immigration and Nationality Act ("INA"). These programs include:

1. Employment-based immigration, authorized by INA §§ 201, 203(b);
2. Family-based immigration, authorized by INA §§ 201, 203(a);
3. Long-term nonimmigrant visas, authorized by INA § 214;
4. Parole, authorized by INA § 212(d)(5);
5. Temporary Protective Status, authorized by INA § 244;
6. Refugees, authorized by INA § 207;
7. Asylum, authorized by INA § 208;
8. Deferred Action for Childhood Arrivals ("DACA"), authorized via policy memorandum.

These programs have been implemented through DHS' ongoing exercise of discretion, via the adoption of both regulations and policy memoranda. While these eight programs do not represent all entry and settlement to the U.S. by foreign nationals, they do comprise the bulk of the programs substantially administered by DHS that allow for foreign nationals' entry and long-term settlement. Indeed, it is estimated that the eight programs listed above have resulted in the entry and settlement of approximately 35 million foreign nationals.<sup>55</sup>

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<sup>52</sup> U.S. Census Bureau. <https://www.census.gov/newsroom/press-releases/2014/cb14-232.html> (last visited Aug. 16, 2018).

<sup>53</sup> Cafaro at p.91.

<sup>54</sup> *Id.* at p.90-91.

<sup>55</sup> See analysis by Jessica Vaughan, Center for Immigration Studies, Exhibit 3, Table 1 of *Whitewater v. Nielsen*, 3:16-cv-02583-L-BLM.

As previously established, these population growth inducing DHS programs have—and will continue to have—an impact on the environment. Therefore, when implementing immigration programs, an agency—in this case DHS—must ensure that its NEPA procedures provide for designating the major decision points for the agency’s principal programs likely to have a significant effect on the human environment and assure that the NEPA process corresponds with them. Consequently, NEPA review should have been initiated long ago for the above-mentioned programs. Nonetheless, DHS has repeatedly failed to initiate a NEPA review—and therefore repeatedly failed to comply with NEPA. To be sure, neither DHS nor its predecessor even had NEPA procedures prior to 2014. And the few times the promulgation of a DHS rule has acknowledged NEPA since 2014, such procedures have been arbitrarily and capriciously applied to result in no EA or EIS taking place.

DHS’ NEPA procedures were at last finalized in late 2014 as DHS Directive 02301, Implementation of the National Environmental Policy Act and Instruction Manual 023-01-001-01 (“Instruction Manual”). The Instruction Manual “serves as the DHS implementing procedures for NEPA (as required by 40 C.F.R. §§ 1505.1 and 1507.3) which supplement the CEQ regulations and therefore must be read in conjunction with them.” The Instruction Manual states that NEPA applies to a wide range of DHS activities:

Generally, NEPA applies to Federal actions that affect the human environment. Within DHS, NEPA generally applies to actions to be undertaken, funded, permitted or otherwise approved by DHS[,] including activities that may be wholly initiated within DHS, executed by DHS under the direction of Congress, or proposed by persons or organizations outside of DHS that require approval funding, a license, or a permit from DHS.

However, while DHS’ adoption of NEPA procedures presented an opportunity to correct INS’ decades-long failure to recognize the environmental impacts of its population-growth inducing immigration programs; in practice, the Instruction Manual served to perpetuate the INS blind spot regarding the environmental consequences of mass immigration to the United States. In the Instruction Manual, DHS arbitrarily and capriciously fails even to recognize that one of its core missions is the regulation of the entry into and settlement of foreign nationals in the United States. The Instruction Manual thereby fails to provide any analysis as to whether the programs that implement that mission might therefore have an effect on the environment.

Accordingly, the few times since 2014 that DHS has considered NEPA in its promulgation of a rule or policy, NEPA has either been categorically excluded or wholly misapplied.

For example, DHS did conduct a NEPA review in one instance related to the entry into and settlement of foreign nationals in the United States. On June 2, 2014, President Barack Obama

issued a Presidential Memorandum entitled “Response to the Influx of Unaccompanied Alien Children across the Southwest Border,” in which he directed the Secretary of Homeland Security to establish an interagency working group to address the “humanitarian aspects” of a large influx of foreign nationals. The Southwest Border Memo’s goal was to assure a unified response by the federal government to provide “housing, care, medical treatment, and transportation” to the unaccompanied alien children crossing the Southwest Border.

DHS determined that the Southwest Border Memo and the actions DHS took in response to it constitute a federal action subject to NEPA. Accordingly, DHS prepared a “Programmatic Environmental Assessment” (“PEA”) (with a FONSI) that was issued on August 12, 2014. The PEA provides:

In addition to the influx of unaccompanied alien children, there is also an increase in the number of family units entering the United States. [DHS] is responsible for the apprehension, processing, detention, and removal of such persons crossing the southwest border into the United States without authorization. The unprecedented increase in the number of apprehended persons has the potential to fill or exceed the capacity of the DHS supporting infrastructure (real property for processing and housing apprehended persons, services including medical care, transportation, utilities, meals, hygiene, recreation, etc.) currently available. Therefore, action is being considered at the DHS level to provide increased and expedited allocation of Departmental resources in the following three areas:

- 1) Provide adequate facilities for Customs and Border Protection (CBP) to safely house unaccompanied alien children (normally for no more than 72 hours) and family units until they can be transferred to the department of Health and Human Services (HHS) and Immigrations and Customs Enforcement (ICE) respectively, and provide adequate facilities for ICE to safely house family units;
- 2) Provide transportation (land, air, water) between intake, processing, and housing facilities, as well as between these facilities and physicians and dentists offices, hospitals, consular offices, and airports or other transportations hubs, and
- 3) Provide medical care, including care to treat, prevent, and minimize the spread of communicable illnesses.

While it is encouraging to see DHS perform a PEA, as conducted, the above PEA fails to address the environmental impacts on the Southwest border resulting from the crossing of unaccompanied alien children and family units and the population growth resulting from their presence. For instance, the PEA states that DHS’ needs for increased support infrastructure (e.g., housing and associated services, transportation, and medical care) while the foreign nationals are in DHS’ custody will result in only “minor” and “temporary” environmental impacts. In doing so, DHS’ NEPA review only addresses the direct *physical* impacts resulting from the agency’s

temporary custody of foreign nationals, failing to recognize that the foreign nationals comprising the “increased influx of unaccompanied alien children and family units” subject to the June 2, 2104, action entered the U.S. with the intent to settle in this nation. The PEA (and the FONSI) thus illustrate DHS’ institutional blindness to the environmental impacts of people arriving and settling in the United States. Indeed, DHS should have performed a NEPA review of the indirect or cumulative impacts resulting from the settling of these foreign nationals to the United States.

In a separate instance, DHS actually did consider NEPA when promulgating a rule, only to quickly dismiss it by categorically excluding its impact on the environment. In January 2017, DHS promulgated the final International Entrepreneur Rule<sup>56</sup> to add a new category of aliens to the preexisting parole program.<sup>57</sup> Substantively, this rule created a new parole program to allow so-called “international entrepreneurs” to remain in the United States.

In creating this new program, DHS categorically excluded it from NEPA analysis. In doing so, DHS completely disregarded public comments encouraging NEPA analysis. As recorded in the final rule:

**Environmental Policy Act (NEPA)**

*Comment:* An advocacy organization stated that all rules, including immigration rules, are subject to review under the National Environmental Policy Act. The commenter suggested that, at minimum, an Environmental Assessment be conducted to account for the growth-inducing impacts that would occur with an influx in population under this rule.

*Response:* DHS agrees that NEPA applies to this, as to every, final rulemaking. As explained in section IV.E of this preamble, the rule has been reviewed for environmental effects and found to be within two categorical exclusions from further review because experience has shown rules of this nature have no significant impacts on the environment. DHS also notes that any entrepreneurial ventures undertaken will be governed by local, state and federal laws and regulations, including those protecting human health and the environment. We disagree with the commenter’s assertion that an Environmental Assessment is required.<sup>58</sup>

To effectively determine that no environmental assessment is necessary because new immigration programs “have no significant impacts on the environment” defies not only common sense, but research demonstrating the converse. As such, it is difficult to believe that the cumulative effect of creating yet another immigration program does not have a significant

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<sup>56</sup> 82 Fed. Reg. 5238 (Jan. 17, 2017).

<sup>57</sup> DHS has since proposed rescinding this rule.

<sup>58</sup> 82 Fed. Reg. 5270.

effect on the environment as required to receive a “Categorical Exclusion.”<sup>59</sup> Therefore, instead of dismissing the application of NEPA, DHS should have conducted an EA to determine whether the creation of what amounted to a new immigration program through the International Entrepreneur rule would have a significant impact on the quality of the human environment and thus require preparation of an EIS.<sup>60</sup> Indeed, an EIS may be, and sometimes must be, prepared for broad federal actions such as the adoption of new agency programs or regulations.<sup>61</sup> This subsequent EA and/or EIS must have then gone on to discuss and analyze alternatives to the proposed International Entrepreneur program—including a “no-action” alternative, which may have less of an environmental impact, as well as mitigation measures in relation to the potential environmental impacts.<sup>62</sup>

Accordingly, because of DHS’ blatant disregard for NEPA, IRLI submits that CEQ must clarify that immigration-driven population growth poses an environmental impact subject to NEPA for which DHS and other immigration-regulating federal agencies must conduct an environmental assessment.

#### **IV. Conclusion.**

Given that immigration-driven population growth is the key driver of population growth in the U.S., the undeniable impact that population growth has on the environment, and the clear identification of population growth as an “effect” subject to NEPA analysis, IRLI recommends that CEQ amend its regulations to clarify that the federal agencies involved in the regulation of immigration must conduct an environmental assessment to determine the environmental impact of their immigration-related actions. To continue to refuse to hold immigration-regulating agencies accountable to NEPA’s requirements not only violates NEPA, but completely undermines Congress’ goals and policies in enacting it. As such, the proper application of NEPA by other agencies will be futile unless—and until—the CEQ recognizes that immigration increases the overall U.S. population and that such population growth has a significant impact on the environment requiring NEPA analysis.

Respectfully submitted,  
The Immigration Reform Law Institute

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<sup>59</sup> 40 C.F.R. § 1508.4.

<sup>60</sup> 40 C.F.R. § 1501.4.

<sup>61</sup> *Id.* at § 1508.18.

<sup>62</sup> *See Id.* at §§ 1502.14, 1502.16, 1508.9.