

PROTECTING THE HUMAN ENVIRONMENT: USING NEPA TO CHALLENGE IMMIGRATION DETENTION

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Historically, the concerns of environmentalism and the concerns of human rights advocates in the immigration sphere have conflicted significantly. Environmentalism has bolstered and promoted harmful “overpopulation” theories which demonize immigrants and incorrectly blame them for environmental degradation. Environmental interests have, in this same vein, advocated for tighter border security, and a more robust crimmigration infrastructure, which has caused harm to asylum seekers and fed the privatized immigration detention system with more bodies to profit upon. Environmental laws were built upon these theories and have been used both in the past and today to further “eco-nativist” agendas. This need not be the legacy of the National Environmental Policy Act (NEPA), which has the potential to protect immigrants under its broad-sweeping language of environmental protection, so long as humans can be understood to be members, and not just creators of the environment, in alignment with environmental justice principles. NEPA’s mandate to preserve the “human environment” can and should be used to shine a light on the federal government’s obligation to consider the harms that our nation’s crimmigration infrastructure inflicts on vulnerable populations of immigrants and asylum seekers in major federal actions. NEPA requires consideration of environmental justice concerns when the government undertakes immigration detention and infrastructure projects.

I. INTRODUCTION: THE EVOLUTION OF ENVIRONMENTAL LAW AND ENVIRONMENTAL HEALTH CONCERNS OF DETENTION	373
II. REPORT: IMMIGRATION DETENTION AND THE NATIONAL ENVIRONMENTAL POLICY ACT	375
A. Immigration Detention: History and Context	375

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1. Historical development of civil immigration detention...	376
2. Statutory authority for immigration detention	377
3. Crimmigration creates the conditions for immigration detention	378
4. Immigration Detention in Practice: The Dilley Detention Center.....	379
B. Environmental Regulation of Federal Projects.....	380
1. The National Environmental Policy Act	380
2. Current interpretations of NEPA limit it to outdoor environments	381
3. Properly interpreted, NEPA applies to indoor environments as well.....	382
III. ANALYSIS: APPLYING NEPA TO IMMIGRATION DETENTION CONDITIONS	384
A. NEPA is Necessary for Immigration and Detention Infrastructure.....	384
1. NEPA's language does not focus exclusively on the outdoor environment.....	384
2. NEPA's legislative history highlights broad goals	385
3. NEPA applies to crimmigration and detention infrastructure	387
a. NEPA is so relevant at the US/MX Border that it must be waived	387
b. NEPA analysis is required for prisons and detention centers.....	390
4. NEPA analysis and challenges at domestic prisons show the applicability of NEPA to detention	391
5. Environmental justice frameworks affirm NEPA's applicability	392
6. NEPA's human environment includes the environment inside immigration detention centers	393
B. NEPA Lawsuit over Dilley Detention Center Conditions: Threshold Considerations Indicate a Challenge Could be Brought	393
1. Plaintiffs, standing, and mootness are manageable hurdles	394
2. Venue could present challenges	396
C. NEPA Lawsuit over Dilley Detention Center Conditions: Substantive NEPA Challenges Present a Strong Case for Plaintiffs	396
1. Public comment for Dilley was inadequate.....	397
2. Conditions at Dilley and their general impact on detainees were not adequately analyzed	398

3. Environmental justice was not adequately reviewed at Dilley	399
4. Review of air and water quality was inadequate	399
5. Psychological impacts and related physical impacts of living conditions were not considered	400
IV. CONCLUSION: LOOKING FORWARD TO A MORE EXPANSIVE NEPA DOCTRINE	401

I. INTRODUCTION: THE EVOLUTION OF ENVIRONMENTAL LAW AND ENVIRONMENTAL HEALTH CONCERNS OF DETENTION

The National Environmental Policy Act (NEPA)¹ was passed in 1970 under the Nixon Administration, only a few months before the first Earth Day was celebrated on 1,500 college campuses nationwide.² It was an era of massive social change, as American citizens sought to bring about broad changes in policy: on the Vietnam war, civil rights, and pollution issues.³ For example, the Cuyahoga River had caught on fire due to the pollutants it contained, and Americans were concerned about their ability to weigh in on issues that affected the environment as well as their health and safety.⁴ NEPA was one of many mechanisms developed in response to these pollution and environmental safety concerns.⁵ The statute played a significant role in the growing movement to address the impacts that humans have on our natural environment.

Despite overt concern with the human impacts on the environment caused by development and polluting industry, NEPA did not develop into a statute that took its mandate to protect the “human environment” seriously.⁶ While some early cases attempted to use the statute to challenge low income housing developments on the theory of impacting the “human environment,” courts focused on requiring analysis of physical environmental impacts, not social ones.⁷ NEPA has since

¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4370m-12 (2022). This Note omits the use of “the” before “NEPA” to be consistent with other scholarly works and custom around the use of the acronym. Victor B. Flatt, *Human Environment of the Mind: Correcting NEPA Implementation by Treating Environmental Philosophy and Environmental Risk Allocation as Environmental Values Under NEPA*, 46 HASTINGS L.J. 85, 86 n.3 (1994).

² Stephanie Pollack, *Reimagining NEPA: Choices for Environmentalists*, 9 HARV. ENV'T L. REV. 359, 384 (1985).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 86–87.

⁶ See *id.* at 86 (discussing the failure of institutions to recognize environmental philosophy and environmental risk allocation as environmental values that should be considered in the NEPA process).

⁷ See *First Nat'l Bank of Chi. v. Richardson*, 484 F.2d 1369, 1378, 1380 (7th Cir. 1973) (upholding the determination of the General Services Administration despite clarifying that

predominantly governed siting decisions for projects that concern the natural world, interpreted separately from the human world.⁸

Prioritizing “nature” at the cost of human safety flows directly from the dark past of the environmental movement, which was grounded in fears that “overpopulation” would pollute the earth and spoil the “commons” that we all share.⁹ Eco-nativism and “greening of hate”—blaming immigrants for environmental degradation—by some members of the movement have further limited NEPA’s potential to address environmental human rights issues.¹⁰ Ongoing attempts to argue that NEPA analysis should consider the presumed impacts of overpopulation caused by immigration are one significant example of this phenomenon.¹¹ Anti-immigration conservation organizations argue (despite clear evidence to the contrary) that immigration to the United States is the primary cause of population growth, which has caused urban sprawl, a loss of biodiversity, and increased carbon dioxide emissions.¹² The ongoing use of overpopulation as a justification for immigration control measures and infrastructure serves to indicate the apparent dissonance between traditional “environmentalism” and the environmental justice movement.¹³

Despite NEPA’s past and its limitations, the statute has immense potential to impact the future of environmental health and safety in the United States. Immigration detention centers have serious public health impacts on those housed within their walls, and environmental analysis has not adequately addressed these problems.¹⁴ In step with a growing movement to consider environmental justice in environmental law,

NEPA deals with the urban environment as well and supporting a concept of NEPA that “embraces not only more parks, but better housing; not only cleaner air and water, but rat extermination”); *see also* *Nucleus of Chi. Homeowners Ass’n v. Lynn*, 524 F.2d 225, 229–30 (7th Cir. 1975) (NEPA concerns the “quality of urban life”).

⁸ *See* Pollack, *supra* note 2, at 373–74.

⁹ Matto Mildenerger, *The Tragedy of the Tragedy of the Commons*, SCI. AM.: BLOG (Apr. 23, 2019), <https://www.scientificamerican.com/blog/voices/the-tragedy-of-the-tragedy-of-the-commons>.

¹⁰ Maya J. Williams, *On the Fence About Immigration and Overpopulation: “Environmentalists” Challenge DHS Policies on NEPA Basis in Whitewater Draw Natural Resource Conservation District v. Mayorkas*, 34 VILL. ENV’T L.J. 301, 301–02, 324 (2023); *see also* Betsy Hartmann, *The Greening of Hate: An Environmentalist’s Essay*, in GREENWASH: NATIVISTS, ENVIRONMENTALISM & THE HYPOCRISY OF HATE 13, 13 (S. Poverty L. Ctr. ed., 2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Greenwash.pdf (defining the term “greening of hate”).

¹¹ Williams, *supra* note 10, at 324.

¹² *Id.* at 301; *see also* *Sustainability Initiative*, NUMBERSUSA, <https://www.number-susa.com/initiatives/sustainability> (last visited Feb. 9, 2025) (conflating sustainability with population control through immigration enforcement).

¹³ Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses*, 43 AM. BEHAV. SCIENTIST 508, 543 tbl.6 (2000) (comparing values within environmentalist paradigms).

¹⁴ *See* Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 98, 104–06 (2019).

immigration detention litigation is fertile ground to clarify the intentions and application of NEPA to protect the “human environment.”¹⁵

This Note argues that NEPA must be read from an environmental justice perspective to protect the human environment in immigration detention centers, because the human environment includes living conditions, and because immigration detention centers are major federal actions significantly affecting the environment. Weaving together the history of NEPA and environmental regulation with the history and modern realities of immigration infrastructure and detention practices, this Note joins a conversation about what environmental justice framing can do for the law. Part II.A explains what immigration detention is in the United States, detailing the history and statutory basis for detention. This part introduces the Dilley, TX detention center and the conditions experienced by immigrant detainees. Part II.B introduces NEPA, discussing its origins and purpose, current and potential future interpretations, and the environmental justice connections to NEPA’s mandate. Part III.A analyzes whether NEPA applies to immigration detention, arguing that its text and legislative history, history of application to infrastructure projects, as well as an environmental justice lens, require a broader reading of the statute than has been utilized in the past. Part III.B calls for this broadening of the “human environment” in a NEPA lawsuit over the Dilley Detention Center’s conditions and considers the threshold issues of standing, venue, and the waivability of NEPA requirements. Part III.C considers the substantive matter of a NEPA challenge to the facility.

II. REPORT: IMMIGRATION DETENTION AND THE NATIONAL ENVIRONMENTAL POLICY ACT

A. Immigration Detention: History and Context

The history of civil immigration detention in the United States shows the practice’s penal origins and its ubiquitous presence throughout much of our nation’s history. The United States has long detained immigrants and currently operates the largest immigration detention system in the world.¹⁶ Beginning in the late 19th century, the United States enacted a series of laws which excluded immigrants, focusing mainly on Chinese citizens arriving in the States.¹⁷ The practice of detaining people arose from a need to identify who was excludable and to prevent people from leaving once they arrived on U.S. soil, as officials assumed immigrants

¹⁵ Dorceta E. Taylor, *Prisons, Jails, and the Environment: Why Environmentalists Should Care About Mass Incarceration?*, 68 AM. BEHAV. SCIENTIST 449, 450 (2024) (arguing the importance of considering the environmental impacts associated mass incarceration).

¹⁶ *Immigration Detention & Enforcement*, NAT’L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/immigration-detention-enforcement> (last visited Feb. 9, 2025).

¹⁷ CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 93 (2d ed. 2021).

would not return if asked to and making them stay on the ships they arrived on was impractical.¹⁸

1. Historical development of civil immigration detention

While the methods and length of detention have been subject to legal challenge over time, the practice of detaining arriving immigrants remains commonplace to this day. Detention of immigrants was first authorized with the earliest legal restrictions on the immigration of people of Chinese and Asian ancestry in 1891.¹⁹ In 1896, the Supreme Court considered the legality of immigration detention in *Wong Wing v. United States*.²⁰ The Court held that detention could be used in the process of exclusion and expulsion of immigrants, a holding that was reaffirmed in 2003, when the Court held that detention during deportation proceedings was constitutionally valid.²¹

The modern immigration detention system can be traced to a series of sociopolitical events surrounding the Mariel Boatlift in the late 1970s and early 1980s.²² At that time, Haitian and Cuban people were seeking refuge in the United States in large numbers, and shelters were haphazardly created to house them in Florida.²³ These refugees were initially welcomed, but over time they were racialized and cast as undesirable and even dangerous.²⁴ Especially once Ronald Reagan took office, Haitians, who were seen as especially undesirable, were excluded at higher rates, and refugee camps became increasingly militarized.²⁵

In 1996, President Clinton signed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA),²⁶ which, in addition to authorizing the construction of a border wall, restructured the deportation and detention process, instituting mandatory detention and expedited deportation.²⁷ Under modern law, the Department of Homeland Security is the agency primarily responsible for executing immigration detention in the United States.²⁸ The IIRIRA authorizations justified expanding the need for bed space and the construction of facilities designed specifically to house people who are waiting for their

¹⁸ *Id.*

¹⁹ *Id.* at 239.

²⁰ *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

²¹ GARCÍA HERNÁNDEZ, *supra* note 17, at 94 & n.4.

²² JENNA M. LOYD & ALISON MOUNTZ, *BOATS, BORDERS, AND BASES: RACE, THE COLD WAR, AND THE RISE OF MIGRATION DETENTION IN THE UNITED STATES* 55 (2018).

²³ *Id.* at 56, 61.

²⁴ *Id.* at 58.

²⁵ *Id.* at 73–75.

²⁶ Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 18 U.S.C. and 8 U.S.C.).

²⁷ Michelle L. Edwards et al., *Environmental Injustices in Immigrant Detention: How Absences Are Embedded in the National Environmental Policy Act Process*, 4 ENV'T & PLAN. E: NATURE & SPACE 429, 430 (2021).

²⁸ GARCÍA HERNÁNDEZ, *supra* note 17, at 239.

day in court.²⁹ More recently, in 2018, the Trump Administration's zero-tolerance policy and resulting separation and detention of families brought renewed concern to the issue of detention conditions and shined a brighter light than ever before on the practices in detention facilities.³⁰ Today, the United States budgets for an average daily population of 34,000 people in immigration detention, which costs \$2.9 billion dollars a year.³¹ This emphasizes what an enormous and enormously expensive endeavor detention is, particularly in relation to the alternatives.³²

2. Statutory authority for immigration detention

The legal authority for the civil detention of immigrants comes from several different sections of the Immigration and Nationality Act (INA).³³ The INA authorizes detention in two main ways: at the discretion of a border patrol agent or immigration judge, or mandatorily, based on the facts of an immigrant's entry and presence in the United States.³⁴

INA section 287(a) gives immigration officials the power to stop, arrest and detain at their discretion. Without a warrant, officers are empowered to interrogate anyone believed to be an *alien*—not legally present in the United States—about their right to remain in the United States.³⁵ The statute further authorizes the arrest of anyone believed to be in violation of immigration law and likely to escape before an arrest warrant can be obtained.³⁶ These powers also extend to arrests for crimes that are not immigration related.³⁷ Immigration judges also have discretionary detention powers and may decide to keep someone detained based on their dangerousness and flight risk.³⁸

Mandatory detention is also authorized under the INA, making detention unavoidable for many. Regardless of dangerousness or flight risk, INA section 236(c) makes detention mandatory if there is reason to believe that a noncitizen is removable for a crime-based reason.³⁹ The constitutionality of this provision was upheld in *Demore v. Kim*.⁴⁰ Detention is also mandatory if someone is anticipated to be removed, either due to the entry of a removal order against them or if they are

²⁹ *Id.* at 242–44.

³⁰ Ryo, *supra* note 14, at 98.

³¹ *Featured Issue: Immigration Detention and Alternatives to Detention*, AM. IMMIGR. LAWS. ASS'N (Jan. 30, 2025), <https://www.aila.org/library/featured-issue-immigration-detention>.

³² *Id.* (showing that the average cost of alternative management strategies would cost as little as \$14/person/day in comparison to the \$164/person/day that detention costs).

³³ Immigration and Nationality Act § 287, 8 U.S.C. § 1357 (2018).

³⁴ GARCÍA HERNÁNDEZ, *supra* note 17, at 95.

³⁵ INA § 287(a)(1), 8 U.S.C. § 1357(a)(1).

³⁶ INA § 287(a)(2), 8 U.S.C. § 1357(a)(2).

³⁷ INA § 287(a)(5), 8 U.S.C. § 1357(a)(5).

³⁸ GARCÍA HERNÁNDEZ, *supra* note 17, at 97–98.

³⁹ *Id.* at 100.

⁴⁰ *Id.*

subject to expedited removal.⁴¹ INA section 241 mandates detention once an order of removal is issued, during the “removal period” which is meant to last no more than 90 days.⁴² Detention is also mandatory for those considered “inadmissible arriving aliens” under INA section 235(b)(1).⁴³ These individuals are detained before their “credible fear” interview determining eligibility for asylum, and if they are not found eligible, they are detained until they are removed.⁴⁴ There are many different legal mechanisms both allowing and requiring detention for noncitizens, contributing to the immense number of people detained in civil immigration detention centers in the United States today.

3. *Crimmigration creates the conditions for immigration detention*

Detention of immigrants is best understood within the framework of crimmigration. Crimmigration is a body of scholarship arising from Professor Juliet Stumpf’s 2006 article that focused on the criminalization of immigration law.⁴⁵ Crimmigration refers to the intermingling of immigration and criminal law, such that the two fields overlap and converge in important ways.⁴⁶ This overlap has the effect of creating an in-group and an out-group, distinguishing those with status from those without, and naming them “legal” or “illegal.”⁴⁷ The crimmigration framework has important outcomes that are physical in nature, including the creation of mechanisms to divide members of different classes, and to keep the out-group out.⁴⁸ The development of these physical barriers and confinement spaces has been extensively documented and linked to the criminalization of people-on-the-move.⁴⁹

Within the ecosystem of crimmigration, an increasing overlap between political ideologies and legal outcomes has resulted in many countries closing and seeking to physically secure their borders.⁵⁰ The outgrowth of this attitude has been visible for the past few years in

⁴¹ See 8 U.S.C. § 1225(b)(1), (2) (mandating detention after entry, pending a final credible fear determination, and where credible fear is not found, until removal); 8 U.S.C. § 1231(a)(2) (mandating detention during the 90-day “removal period”).

⁴² 8 U.S.C. § 1231(a)(1)(A).

⁴³ 8 U.S.C. § 1225(b)(1)(A).

⁴⁴ *Id.* § 1225(b)(1)(B).

⁴⁵ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

⁴⁶ GARCÍA HERNÁNDEZ, *supra* note 17, at 2.

⁴⁷ Stumpf, *supra* note 45, at 380.

⁴⁸ *Id.* at 381.

⁴⁹ See generally THE HAGUE PROCESS ON REFUGEES & MIGRATION, PEOPLE ON THE MOVE: HANDBOOK OF SELECTED TERMS AND CONCEPTS (Antoine Meyer & Auke Witkamp eds., 2008), <https://unesdoc.unesco.org/ark:/48223/pf0000163621> (explaining the terms in use in referencing “people-on-the-move” and the impact of those on the academic conversation and political climate of migration globally).

⁵⁰ Catherine Dauvergne, *Introduction* to the RESEARCH HANDBOOK ON THE LAW AND POLITICS OF MIGRATION: *Law, Politics, and the Spaces Between* 1, 1 (Catherine Dauvergne ed., 2021).

Texas's efforts to install razor wire and floating buoys along parts of the border.⁵¹ The United States-Mexico border wall and immigration detention centers are examples of the phenomenon of crimmigration, because this infrastructure is used as a means of controlling the movements of people seeking to enter or remain in the United States.⁵²

4. Immigration Detention in Practice: The Dilley Detention Center

The Southwest Texas Family Residential Center in Dilley, Texas was a facility that illustrated modern crimmigration infrastructure and the reality of conditions in immigration detention. The facility was, before its 2024 closure, the largest immigration detention center in the nation and was specifically designed to house families.⁵³ Most of the detainees in Dilley were arriving immigrants who were subject to mandatory detention awaiting a hearing.⁵⁴ Authorized in 2014, the facility spanned 55 acres and was touted as a “significant milestone” in ICE’s effort to reform immigration detention, presumably because they offered certain amenities such as recreational resources, cable television, and a computer lab to those detained in Dilley.⁵⁵

The conditions at Dilley were not so rosy as ICE presented them to be. While the Dilley detention center is no longer operational, it is a model that can be used by ICE in the future, and its legacy displays what immigration detention is and how the conditions experienced by those detained are not accidental but constructed. Serious human rights abuses were documented at Dilley, including allegations of family separation, sexual assault, malnutrition, depression, and inadequate medical care, among other problems.⁵⁶ The detention center’s facilities are located at the waste disposal area for the Eagle Ford Shale, the second largest oil

⁵¹ Wayne A. Cornelius & Monica W. Varsanyi, *Subnational Immigration Policymaking in the United States: The Role of Issue Entrepreneurs in California, Texas, and Florida*, J. ETHNIC & MIGRATION STUD., Dec. 2024, at 10.

⁵² GARCÍA HERNÁNDEZ, *supra* note 17, at 219–23, 239–45.

⁵³ Edwards et al., *supra* note 27, at 443; Sandra Sanchez, *ICE to Close Nation’s Largest Migrant Detention Center in South Texas*, BORDER REP., <https://www.borderreport.com/immigration/migrant-centers/ice-to-close-nations-largest-migrant-detention-center-in-south-texas> (June 24, 2024, 12:40 AM) (showing that the SWTFDC was, before its closure, housing the largest number of people of any detention center in the nation).

⁵⁴ Guillermo Contreras, *Inside the Country’s Largest Immigrant Family Detention Center*, SAN ANTONIO EXPRESS-NEWS, <https://www.expressnews.com/news/local/article/Inside-the-country-s-largest-immigrant-family-13149672.php> (Aug. 13, 2018, 6:52 AM).

⁵⁵ *South Texas Family Residential Center*, U.S. IMMIGR. & CUSTOMS ENFT (Feb. 15, 2019), <https://www.ice.gov/factsheets/south-texas-family-residential-center>; *see also* Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>.

⁵⁶ Candice Bernd, *US is Locking Immigrants in Toxic Detention Centers*, EARTH ISLAND J. (July 31, 2017), https://www.earthisland.org/journal/index.php/articles/entry/US_locking_immigrants_toxic_detention_centers.

production region in the United States.⁵⁷ This means that the groundwater is seriously contaminated in the area, and in many places has to be heavily chlorinated.⁵⁸ Ongoing fracking activities also created noise and air pollution that posed risks to the health of detainees.⁵⁹

B. Environmental Regulation of Federal Projects

Unlike crimmigration laws and policies, environmental statutes are designed to protect humans and our environment from the harms caused by pollution, excessive consumption, and rapid development. While most federal environmental laws pertain specifically to one type of pollution or harm, such as the Endangered Species Act or the Clean Water Act, others apply more broadly, like the National Environmental Policy Act (NEPA), which has been applied to the universe of environmental harms.⁶⁰ Despite all that NEPA touches, however, the statute is not currently realizing its goals or meeting its true potential.

1. The National Environmental Policy Act

The National Environmental Policy Act is a procedural statute that takes a proactive approach to environmental enforcement. NEPA requires agencies to consider the environmental impact of a federal action if it significantly affects the quality of the human environment.⁶¹ NEPA is a mechanism for gathering information about the impacts of proposed federal actions in order to weigh the costs and benefits of those actions.⁶² In this way, the statute mandates information generation about projects, which is required to be made available for public comment, so that citizens may weigh in on proposals.⁶³

Procedurally, NEPA requires agencies to prepare statements detailing the potential environmental impacts of a project.⁶⁴ An agency must do an Environmental Assessment (EA) if the impacts of a project are unclear, an Environmental Impact Statement (EIS) if the project will or is likely to have a significant impact, or opt for a Categorical Exclusion (CE) if the project will not have a significant impact.⁶⁵

⁵⁷ *Id.*; Stephanie Kelly, *Oil Production Picking up in Second-largest U.S. Shale Field*, REUTERS, <https://www.reuters.com/business/energy/oil-production-picking-up-second-largest-us-shale-field-2023-01-18> (Jan. 18, 2023, 2:03 AM).

⁵⁸ Bend, *supra* note 56.

⁵⁹ *Id.*

⁶⁰ *Laws and Executive Orders*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (Jan. 29, 2025); *Summary of the National Environmental Policy Act*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (July 31, 2024).

⁶¹ NEPA, 42 U.S.C. § 4332(2)(C) (2022).

⁶² Flatt, *supra* note 1, at 87.

⁶³ Edwards et al., *supra* note 27, at 445–46.

⁶⁴ 42 U.S.C. § 4332.

⁶⁵ *Id.*

An EIS is only required if three conditions are met: (1) that there is a “major federal action,” (2) that the action will “significantly affect” the quality of the environment, and finally (3) that the “human environment” is going to be affected.⁶⁶ “Effects” and “impacts” are used interchangeably in NEPA, and are defined in Title 40 of the Code of Federal Regulations, Section 1508.1(g).⁶⁷ These terms encompass impacts and effects that may be direct, indirect, and/or cumulative in nature.⁶⁸

Effects under NEPA 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.”⁶⁹ When effects are just social or just economic, an EIS is not necessary, but an EIS is required when the “economic or social and natural or physical environmental effects are interrelated.”⁷⁰ In order for an EA to be necessary, courts have held that there must be a close causal relationship between the environmental effect and the alleged cause.⁷¹

Cumulative impacts are a significant part of NEPA analysis, mandating consideration of past, present, and future effects and acknowledging that effects can build upon one another.⁷² Cumulative impacts are analyzed with reference to their “context” and “intensity.”⁷³ This means that some impacts, such as the lack of adequate air filtration, which might not impact a person’s health if exposed for one day but would have an impact over time, can be reviewed comprehensively.⁷⁴

2. Current interpretations of NEPA limit it to outdoor environments

Since its passage, NEPA’s regulatory framework has been interpreted to broadly cover impacts to the natural environment, and courts have interpreted it along those lines as well.⁷⁵ Socio-economic and

⁶⁶ *Id.*

⁶⁷ 40 C.F.R. § 1508.1(i) (2024).

⁶⁸ *Id.*

⁶⁹ 40 C.F.R. § 1501.1(i)(4).

⁷⁰ 40 C.F.R. § 1502.16(b); *see also* Travis D. Jones, *Humans Long Ignored: Revisiting NEPA’s Definition of “Human Environment” in the Era of Black Lives Matter*, 32 VILL. ENV’T L.J. 1, 3 (2021).

⁷¹ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004).

⁷² 40 C.F.R. § 1508.1(i).

⁷³ *Id.* § 1508.27. After this article was authored but prior to its publication, President Trump issued Executive Order 14154 directing the CEQ to remove its NEPA implementing regulations, and the agency did so, eliminating its authority over NEPA review. 90 Fed. Reg. 10610 (Feb. 25, 2025).

⁷⁴ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (“Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.”).

⁷⁵ *Flatt*, *supra* note 1, at 90 (citing the expansive regulatory language and pointing to early court interpretations of the “term ‘environment’ as encompassing ‘all of the factors that affect the quality of human life, [such as] crowding, squalor, and crime.’” (alteration in original)).

sociological impacts of federal actions on communities have been held to not be within the purview of NEPA, except where they are interrelated with physical effects.⁷⁶ Where this connection exists, NEPA has been required to address “quality of life” impacts such as traffic and congestion.⁷⁷

Early NEPA cases held that the environment included “all of the factors that affect the quality of human life,” including “crowding, squalor, and crime.”⁷⁸ However, the Supreme Court interpreted NEPA to not require a consideration of the psychological impacts of proposed actions in *Metropolitan Edison v. People Against Nuclear Energy*.⁷⁹ There, the Court held that Congress did not intend to address psychological impacts as part of the human environment, and that only the physical environment is regulated under NEPA.⁸⁰ In addition, in *Hanly v. Kleindienst*,⁸¹ a challenge to the construction of a jail alleged to affect the human environment, was struck down on the notion that the psychological and sociological impacts on neighbors could not be considered part of NEPA’s human environment.⁸²

3. Properly interpreted, NEPA applies to indoor environments as well

In order to uphold its textual mandate to protect the “human environment” and stay in alignment with environmental justice mandates, NEPA must be interpreted to include indoor as well as outdoor environments. Humans spend time both indoors and outdoors, meaning our bodies are physically affected by both types of surroundings.⁸³ In fact, the average American spends 90% of their time indoors.⁸⁴ Not accounting for indoor environments in NEPA analyses means that no consideration can be given to the spaces in which people spend the majority of their time.

NEPA’s generally narrow definition of the “human environment” has also had a grave impact on environmental health concerns and on certain vulnerable populations, which must be remedied with a broader

⁷⁶ *Id.* at 91.

⁷⁷ See *RB Jai Alai, LLC v. Sec’y of the Fla. Dep’t of Transp.*, 47 F. Supp. 3d 1353, 1362–63 (M.D. Fla. 2014) (“Accordingly, NEPA’s zone of interests can be said to include the environment, quality of life, land use and resource management, economic growth, and public health and safety.”).

⁷⁸ *Flatt*, *supra* note 1, at 90 (quoting *Jones v. U.S. Dep’t. of Hous. & Urb. Dev.*, 390 F. Supp. 579, 591 (E.D. La. 1974)).

⁷⁹ *Jones*, *supra* note 70, at 3–4; *Metro. Edison v. People Against Nuclear Energy*, 460 U.S. 766, 777–79 (1983).

⁸⁰ *Metro. Edison*, 460 U.S. at 778.

⁸¹ 471 F.2d 823 (2d Cir. 1972).

⁸² *Jones*, *supra* note 70, at 5–6.

⁸³ *Indoor Air Quality*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/report-environment/indoor-air-quality> (July 8, 2024).

⁸⁴ *Id.*

definition.⁸⁵ NEPA has contributed to the significant and unjust exposure of communities of color to pollutants, but also has the potential to address these issues if it were broadened to address the impacts of pollution on local economies and long term health outcomes.⁸⁶ In the context of gentrification, NEPA has the potential to make displacement and other potential impacts of urban environments visible by ensuring that they be considered.⁸⁷

Environmental justice means pursuing “fair treatment and meaningful involvement” of all people in federal decision-making that affects human health and the environment.⁸⁸ This movement was initially a grassroots effort, founded by people of color seeking broader cultural awareness of the disproportionate burdens their communities face.⁸⁹ Expanding NEPA’s definition to include more environments experienced by all people, including those who cannot leave indoor spaces due to disability, illness, or incarceration, is in step with and compelled by the principles of environmental justice.

Furthermore, environmental justice was meant to be a specific component of every NEPA analysis under the directive of Executive Order 12898, issued in 1994, and the subsequent Council on Environmental Quality (CEQ) guidance on environmental justice.⁹⁰ This means that agencies must address and analyze the environmental impact of proposed actions on minority and low income communities in NEPA documents.⁹¹ Given this specific requirement, environmental justice should not have been ignored nor neglected by agencies performing NEPA analysis.

Applying environmental justice concerns to NEPA raises the question of the limits of the law’s applicability. Environmental justice compels questioning why NEPA would not apply to the human environment and the people who live inside immigration detention centers.

⁸⁵ Jones, *supra* note 70, at 6–7; Jesse Hevia, Comment, *NEPA and Gentrification: Using Federal Environmental Review to Combat Urban Displacement*, 70 EMORY L.J. 711, 753 (2021) (recognizing NEPA as a “bedrock environmental law that provides a valuable tool” of public participation, yet further proffering that “[a]gencies should be required to address these reasonably foreseeable indirect effects in EISs under NEPA and to substantively consider the disproportionate impact of their proposed actions on low-income and minority populations.”).

⁸⁶ Jones, *supra* note 70, at 13–14.

⁸⁷ Hevia, *supra* note 85, at 715.

⁸⁸ *EJ 2020 Glossary*, U.S. ENV’T PROT. AGENCY, https://19january2021snapshot.epa.gov/environmentaljustice/ej-2020-glossary_.html (last visited Feb. 27, 2025). Due to the Trump Administration’s initiative to remove mass amounts of federal websites, linked sites may reflect archived versions. See Ethan Singer, *Thousands of U.S. Government Web Pages Have Been Taken Down Since Friday*, N.Y. TIMES: THE UPSHOT, <https://www.nytimes.com/2025/02/02/upshot/trump-government-websites-missing-pages.html> (Feb. 3, 2025).

⁸⁹ *Environmental Justice Timeline*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> (June 6, 2024).

⁹⁰ *Environmental Justice and the National Environmental Policy Act (NEPA)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act> (Nov. 5, 2024).

⁹¹ *Id.*

III. ANALYSIS: APPLYING NEPA TO IMMIGRATION DETENTION CONDITIONS

A. NEPA is Necessary for Immigration and Detention Infrastructure

NEPA should be interpreted as protecting the human environments we live in, including addressing the health and safety impacts of crimmigration infrastructure. Practically, this would mean that the existing legal framework and review practices could stay in place, but the scope of NEPA review would be broadened to include not just the impacts of structures on the surrounding environment but also how structures cause and create environments themselves. This interpretation of NEPA is compelled by the text and legislative history of the statute, as well as by the statute's application to infrastructure generally and immigration infrastructure specifically, which are appropriately considered major federal actions with a significant effect on the human environment.

1. NEPA's language does not focus exclusively on the outdoor environment

The text of NEPA does not mandate a strict focus on the outdoor environment and should instead be interpreted to focus on the way humans interact with the spaces where we live. The text of NEPA consists of two main parts: section 101, which lays out the national policy that NEPA is designed to implement, and section 102, which details the procedures that shall take place in order to achieve the previous section's goals.⁹² Section 101 devotes significant space to concern for the human health, notably commanding government agencies to "use all practicable means and measures . . . to foster and promote the general welfare," which displays a broad interpretation of the statute's concern.⁹³ The section further emphasizes the connection between humans and the environment in describing the purpose of the prior clause as being "to create and maintain conditions under which man and nature can exist in productive harmony."⁹⁴ Finally, the section emphasizes the enduring nature of the statute's goals, endeavoring to "fulfill the social, economic, and other requirements of present and future generations of Americans."⁹⁵

In addition, the first section lays out the six goals of the Act, which include "assur[ing] for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."⁹⁶ This language

⁹² NEPA, 42 U.S.C. § 4331–32 (2022).

⁹³ *Id.* § 4331(a).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 42 U.S.C. § 4331(b)(2). While there is no case law relying on "culturally pleasing surroundings" it is hard to imagine any culture is represented in immigration detention confinement.

makes no reference to outdoor surroundings. Furthermore, humans clearly spend time in and are affected by both indoor and outdoor spaces every day. To ensure a “healthful” or “productive” existence, this regulation would need to account for indoor, not just outdoor, environments.

NEPA also states that “all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the *human environment*, a detailed statement by the responsible official on the environmental impact of the proposed action.”⁹⁷ The term “human environment” is defined as “. . . comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment.”⁹⁸ The explicit definition of “human environment,” referring to not just the natural environment but also the physical environment, indicates that more than just the natural world should be considered by NEPA.

2. NEPA’s legislative history highlights broad goals

A close reading of the statute and a peek into its legislative history raises questions about the drafters’ intent in the “human environment” being interpreted as narrowly as it has been in the past. The outdoor nature of NEPA is not inherent from the text, nor the exclusive intent expressed by its authors.⁹⁹ Further, the legislative history of NEPA displays a foregrounded concern for human health by the drafters.¹⁰⁰ For example, the introduction of the Senate’s report on NEPA discusses the requirement of an annual environmental quality report on the “current status and condition of the major natural, manmade, and altered environmental systems of the Nation.”¹⁰¹ This indicates concern with a variety of different environments, natural and not, but also those which are both. This is an expansive definition of the types of systems that are of concern for NEPA.

⁹⁷ 42 U.S.C. § 4332(2)(C)(i) (emphasis added).

⁹⁸ 40 C.F.R. § 1508.1(r) (2022); “Human environment” was challenged right after passage by interests trying to prevent the law from applying to the natural world, but the opposite has happened, and now NEPA mostly applies to the natural environment, and not to those environments created by humans; Flatt, *supra* note 1, at 90–91.

⁹⁹ OFF. OF AIR & RADIATION, U.S. ENV’T PROT. AGENCY, EPA/400/1-89/001C, REPORT TO CONGRESS ON INDOOR AIR QUALITY, VOLUME II: ASSESSMENT AND CONTROL OF INDOOR AIR POLLUTION 8-1 (1989) (“While not specific to indoor air, this broad overarching legislation provides a context for the consideration of indoor air quality and other environmental concerns in all major Federal actions taken pursuant to other authorities.”); 42 U.S.C. § 4321 (stating that the purpose of NEPA is fourfold: first, to “encourage productive and enjoyable harmony between man and his environment;” second, to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;” third, “to enrich the understanding of the ecological systems and natural resources important to the Nation;” and finally, “to establish a Council on Environmental Quality.”).

¹⁰⁰ S. REP. NO. 91-296, at 1–2 (1969).

¹⁰¹ *Id.* at 10.

The report focuses heavily on the health and safety concerns that NEPA was meant to address. In its explanation of the different parts of NEPA, the report states that section 101(b) “asserts congressional recognition of each person’s fundamental and inalienable right to a healthful environment.”¹⁰² The Senate’s report also centers values of decency and dignity at the heart of the law’s purpose.¹⁰³ “The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man’s impact on his environment under informed and responsible control.”¹⁰⁴ This emphasis on individual rights and a world of decency and dignity, emphasize the expansive nature of who the environment must be protected for, and thus the expansion of what environments should be considered.

The report also states that environmental laws are meant to “meet the overall goal of a quality of life in a quality environment,”¹⁰⁵ and refers to “life-sustaining natural elements” as “air, water, soil, and living space.”¹⁰⁶ There is also an emphasis on “living space in qualities and quantities sufficient to our needs,” showing that the connectivity of humans with the environment was considered important to effecting NEPA’s purpose.¹⁰⁷ These references to “living space” also indicate that traditionally “natural” areas are not the only things covered by NEPA. A focus on structures and on healthy surroundings is evident from a passage explaining that the purpose of section 102 is to require “[t]he Federal Government . . . to protect and improve the quality of each citizen’s surroundings . . . in regard to . . . the planning, design, and construction of manmade structures.”¹⁰⁸ “Each individual should be assured of safe, healthful, and productive surroundings in which to live and work and should be afforded the maximum possible opportunity to derive physical, esthetic, and cultural satisfaction from his environs.”¹⁰⁹

The Senate’s report uses expansive and comprehensive language to explain that NEPA was designed to consider impacts on a variety of “environments” for the betterment of the nation.¹¹⁰ This included “living space,” natural and man-made spaces, and other environments affecting human life.¹¹¹

While the legislative history contains some language that specifically references natural resources and sets the outside natural environment apart from living spaces and notions that humans and nature are interconnected, these references are minimal and not incompatible with

¹⁰² *Id.* at 19.

¹⁰³ *Id.* at 17.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 14.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.* at 18.

¹⁰⁹ *Id.*

¹¹⁰ See generally *id.* (naming a variety of different qualities of environment to be protected).

¹¹¹ *Id.*

a broader reading of the legislative history. For instance, the legislative history notes that our nation has “overdrawn its bank account in life-sustaining natural elements,” and then goes on to define the elements as “air, water, soil, and living space,” linking together the human and natural environments as being of equal concern.¹¹² In addition, the existence of language acknowledging the goal of protecting the natural environment as well as the human environment does not weaken the argument that both were intended to be protected. The legislature’s emphasis on living space, the health rights of individuals, and to factors in the environment that are not strictly natural lend themselves to a broad interpretation of the human environment under NEPA. Thus, the application of NEPA analysis to immigration infrastructure projects displays the reasonableness of a broader interpretation of NEPA.

3. NEPA applies to crimmigration and detention infrastructure

NEPA analysis is required for all major federal actions, and there are few federal actions more significant in their impact than national security projects. While matters of significant national importance such as war or terrorism sometimes call for expedited processes or waiver of environmental review, NEPA remains applicable and relevant to immigration infrastructure today.

a. NEPA is so relevant at the US/MX Border that it must be waived

The lengths that federal immigration agencies have gone to in pursuit of waiver of environmental regulations in relation to United States-Mexico border wall construction shows how applicable environmental regulation is to this type of infrastructure. While the United States has an extensive border with Canada, and many ports of entry along the coasts that have been historically used to enter the country, the border with Mexico is the main focus of political consciousness and commentary today.¹¹³ The United States-Mexico border spans 1,933 miles and while some parts are near cities, much of that distance is sparsely populated.¹¹⁴ Crossing the border from Mexico was selectively restricted through the use of racial quotas until the 1965 amendment of the INA, which shifted restrictions to national origin caps.¹¹⁵ The cap for Mexico was set at nearly 180,000 fewer people than were already crossing the border at that time, which served to make an

¹¹² *Id.* at 16; The Associated-Words Canon or *noscitur a sociis* brings to bear on this argument by indicating that associated words, as the ones in this list, bear on one another’s meaning, so the inclusion of “living space” which is not a natural element, alongside “air” which certainly is a natural element indicates that the two were considered equally by NEPA’s drafters, *Noscitur a Sociis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹³ GARCÍA HERNÁNDEZ, *supra* note 17, at 219.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 220–21.

existing practice suddenly illegal.¹¹⁶ The war on drugs and broad politics of fear that permeated the 1980s turned the illegality of border crossing into a cultural phenomenon.¹¹⁷ As a result, security at the border with Mexico became a bigger and bigger political concern.¹¹⁸ In 1994, the Immigration and Naturalization Service (INS)¹¹⁹ began implementing new policies that increased the presence of border patrol agents at specific, well-used crossing points near San Diego, California and El Paso, Texas.¹²⁰ This led to an increase in attempts to cross the border in remote areas.¹²¹ This increased activity at the border and subsequent bolstering of enforcement activities led to widespread environmental harm, including fires and waste accumulation.¹²²

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)¹²³ was passed, authorizing the construction of a physical border wall.¹²⁴ The Act gave the Attorney General the discretion to waive some environmental regulations and targeted building a 14-mile fence near San Diego, CA.¹²⁵ NEPA review, which could be partially waived under section 102(c) of IIRIRA, could be completely waived under the Real ID Act of 2005, which expanded the scope of what could be waived in the name of constructing barriers and prohibited judicial review of waivers except for constitutional challenges.¹²⁶ The Act also reduced the statute of limitations on filing a challenge to waivers from six years to sixty days.¹²⁷ Border fence construction and the disregard for environmental protection were further encouraged with the Secure Fence Act of 2006, which not only authorized

¹¹⁶ *Id.*

¹¹⁷ Karin Moreno, *Private Prisons and the Shift in Marketplace from the War on Drugs to the War on Terror*, in PRIVATE PRISONS 86, 87 (2018); Sarah Tosh, *Drug Prohibition and the Criminalization of Immigrants: The Compounding of Drug War Disparities in the United States Deportation Regime*, INT'L J. DRUG POL'Y, Jan. 2021, No. 102846.

¹¹⁸ *Id.*

¹¹⁹ The INS was replaced by Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) in 2003. *Immigration and Naturalization Service (INS)*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/immigration_and_naturalization_service_\(ins\)](https://www.law.cornell.edu/wex/immigration_and_naturalization_service_(ins)) (last visited Feb. 11, 2025).

¹²⁰ Jennifer Echemendia, Comment, *Waiving Environmental Concerns Along the Border: Fence Construction and the Waiver Authority of the Real ID Act*, 3 PITT. J. ENV'T & PUB. HEALTH L. 81, 81 (2009).

¹²¹ *Id.* at 82.

¹²² *Id.*

¹²³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

¹²⁴ Kevin Hernandez, Note, *The Implications of Environmental Law and Latino Property Rights on Modern-Age Border Security: Rejecting a Physical Border and Embracing a Virtual Wall*, 22 HARV. LATINX L. REV. 69, 70-71 (2019).

¹²⁵ *Id.*

¹²⁶ Echemendia, *supra* note 120, at 93.

¹²⁷ Skye M. Walker, Note, *Wars, Walls, and Wrecked Ecosystems: The Case for Prioritizing Environmental Conservation in a National Security-Centric Legal System*, 51 ENV'T L. 913, 922 (2021).

but initially required—before Congress removed the mandatory language—nearly 800 additional miles of fencing to be constructed.¹²⁸

Legal challenges to border wall construction were brought in several suits by citizens and environmental organizations alleging failure to perform NEPA analyses. Largely, these efforts to challenge the waiver authority under section 102(c) of the IIRIRA were unsuccessful.¹²⁹ In a series of opinions, beginning with *Sierra Club v. Ashcroft*¹³⁰ in 2005, courts have upheld the constitutionality of the waiver authority outlined in the statutes, noting that the authority was narrow enough for an intelligible principle.¹³¹ In *Defenders of Wildlife v. Chertoff*,¹³² *County of El Paso v. Chertoff*,¹³³ and *Center for Biological Diversity v. McAleenan*,¹³⁴ the plaintiffs argued that the waivers were presentment violations and constituted a line item veto, both of which were rejected by courts on the ground that a waiver is an individualized determination of inapplicability not a modification of a law.¹³⁵

Border wall construction was further invigorated by President Donald Trump, who ran a campaign that highlighted racist anti-immigrant sentiments and asserted the urgent need for even more border wall construction.¹³⁶ Trump's calls for expedited construction and the means used to achieve it led to *Sierra Club v. Trump*¹³⁷ and *California v. Trump*,¹³⁸ both decided in the Ninth Circuit. While the government prevailed in both cases due the Real ID Act's removal of appellate jurisdiction for waiver challenges, the court recognized that the plaintiffs had standing in relation to the harm caused by the waiver.¹³⁹ The court also held, however, that the states who were plaintiffs in *Sierra Club v. Trump* had standing and had sufficiently alleged harm related to their ability to enforce state environmental law, providing a glimmer of hope in this field.¹⁴⁰ This series of decisions show simply that waiver, while still a powerful tool for evading environmental review, is not infinite.¹⁴¹ The

¹²⁸ Hernandez, *supra* note 124, at 72.

¹²⁹ Walker, *supra* note 127, at 923.

¹³⁰ No. 04CV0272, 2005 WL 8153059 (S.D. Cal. Dec. 13, 2005).

¹³¹ Walker, *supra* note 127, at 923 & n.70.

¹³² 527 F.Supp.2d 119 (D.D.C. 2007).

¹³³ No. EP-08-CA-196, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008).

¹³⁴ 404 F.Supp.3d 218 (D.D.C. 2019).

¹³⁵ Walker, *supra* note 127, at 923.

¹³⁶ See generally JESSICA BOLTER ET AL., MIGRATION POL'Y INST., FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY (2022), <https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf> (discussing substantial changes in immigration policy under the Trump administration based on anti-immigrant sentiment).

¹³⁷ 977 F.3d 853 (9th Cir. 2020), *vacated sub nom.* Biden v. Sierra Club, 142 S. Ct. 56 (2021).

¹³⁸ 963 F.3d 926 (9th Cir. 2020), *cert. granted sub nom.* Trump v. Sierra Club, 141 S. Ct. 618 (2020).

¹³⁹ Walker, *supra* note 127, at 923–24.

¹⁴⁰ *Sierra Club*, 977 F.3d at 865–66.

¹⁴¹ Walker, *supra* note 127, at 925.

applicability of NEPA is also expressly shown by the need for waiver for border wall construction. If NEPA review was wholly inapplicable to immigration infrastructure or to agencies acting in the name of national security, waiver would not have been necessary, but the fact that it was indicates that NEPA does in fact apply to these activities, strengthening the argument that it applies in the context of detention centers like the one in Dilley, Texas.

b. NEPA analysis is required for prisons and detention centers

In the context of detention centers, waiver of NEPA has seldom been permitted and only under extremely narrow circumstances. Waiver was first considered as a tool for subverting the requirements of detention center construction projects long before the border wall, during the Cuban/Haitian migration crisis in the 1980s.¹⁴² After a proposed facility in Glasgow, MT raised concerns among local indigenous groups as to its legality under NEPA, officials considered seeking waiver of environmental review for their project, which would have sent refugees from the Caribbean to the coldest reaches of the U.S. border with Canada.¹⁴³ Waivability of environmental regulations for immigration infrastructure had just been authorized for the first time in Title V of the Refugee Education Assistance Act of 1980.¹⁴⁴ This Act specifically exempted certain actions from being considered “major federal actions” subject to NEPA.¹⁴⁵

Notwithstanding the possibility of waiver under the REAA, NEPA compliance for a refugee “holding center” at a former U.S. air base in Puerto Rico was litigated in the early 1980s in *Marquez-Colon v. Reagan*.¹⁴⁶ An injunction preventing construction or preparation of the site was vacated after the passage of the REAA, but the district court in Puerto Rico also ordered a preliminary injunction preventing the transfer of refugees to the facilities pending an EIS.¹⁴⁷ The First Circuit vacated the order on appeal in reliance on the government complying with a consent agreement it had with Puerto Rico.¹⁴⁸

In the opinion, the court took a balancing approach to assessing the need for the injunctions as opposed to the harm caused by failing to

¹⁴² LOYD & MOUNTZ, *supra* note, 22 at 70 (detailing a letter between Kathryn Oberly, special litigation counsel for the Land and Natural Resources Division at the Department of Justice, and David Crosland, General Counsel for the INS suggested that the INS quickly do an EA and issue a “negative declaration” determining that NEPA is not applicable).

¹⁴³ *Id.*

¹⁴⁴ Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, tit. V, 94 Stat. 1799, 1809.

¹⁴⁵ LLOYD & MOUNTZ, *supra* note 22, at 70; 94 Stat. at 1809.

¹⁴⁶ *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981).

¹⁴⁷ *Id.* at 612.

¹⁴⁸ *Id.* at 616.

comply with NEPA.¹⁴⁹ In making this determination, the court relied on the existence of the consent agreement to uphold environmental laws, the excessive burden of an injunction on the government, and the fact that “the compound was built on asphalt and concrete runways remaining from the Fort’s use as a fighter base, not in a pristine wilderness area.”¹⁵⁰ The court ultimately vacated the injunction but expressed concern for upholding environmental law and emphasized the unique circumstances under which waiving some NEPA requirements could take place, highlighting that NEPA cannot be waived in other circumstances.¹⁵¹ This case illustrates the narrow circumstances under which NEPA can be waived and the possibility of courts issuing injunctions preventing the use of immigration detention facilities that do not comply with NEPA. Immigration detention centers have been subject to NEPA review since *Marquez-Colon* and continue to be to this day.¹⁵²

4. NEPA analysis and challenges at domestic prisons show the applicability of NEPA to detention

Domestic prisons are also subject to NEPA regulations, which can be useful for challenging conditions inside, as one recent NEPA challenge to proposed prison construction displays. Prison facilities, like detention centers, often have environmental concerns relating to their construction because many facilities, both historically and today, have been sited near hazardous locations that present environmental risks and human health concerns.¹⁵³ This was certainly the case with the Letcher County federal correctional facility in Kentucky that the Bureau of Prisons (BOP) proposed in 2014.¹⁵⁴ BOP performed an EIS and received comments from the interested public in 2015.¹⁵⁵ Prisoners alongside environmental public interest groups filed a federal NEPA lawsuit in 2018, alleging that prisoners were not afforded the opportunity to comment on the EIS and that the BOP failed to perform an environmental justice review, among other claims.¹⁵⁶ As a result of the suit, BOP withdrew its intent to construct pending a new EIS, a draft of which was issued in February of

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Elizabeth A. Bradshaw, *Tombstone Towns and Toxic Prisons: Prison Ecology and the Necessity of an Anti-prison Environmental Movement*, 26 CRITICAL CRIMINOLOGY 407, 407–08 (2018).

¹⁵³ Edwards et al., *supra* note 27, at 430–31.

¹⁵⁴ Panagioti Tsolkas, *Plans for a New Federal Prison on Coal Mine Site in Kentucky Withdrawn*, PRISON LEGAL NEWS (Sept. 8, 2019), <https://www.prisonlegalnews.org/news/2019/sep/8/plans-new-federal-prison-coal-mine-site-kentucky-withdrawn>.

¹⁵⁵ *Id.*

¹⁵⁶ Panagioti Tsolkas, *Prisoners File Environmental Lawsuit Against Proposed Federal Prison in Kentucky*, PRISON LEGAL NEWS (Jan. 8, 2019), <https://www.prisonlegalnews.org/news/2019/jan/8/prisoners-file-environmental-lawsuit-against-proposed-federal-prison-kentucky>; Complaint for Declaratory & Injunctive Relief at 1–4, *Barroca v. Bureau of Prisons*, No. 1:18-cv-02740 (D.D.C. Nov. 26, 2018).

2024.¹⁵⁷ This prison challenge illustrates that federal actions require a NEPA analysis that meaningfully engages in analyzing the conditions of imprisonment and even consults with those affected.¹⁵⁸ While the new EIS may allow the project to go forward, this case shows that, if an agency does not conduct NEPA review appropriately, it can successfully be challenged by those affected.¹⁵⁹

Detention centers are also subject to NEPA because of incarceration facilities' long history of perpetuating environmental harms, implicating environmental justice concerns. Detention centers and prisons have been linked to and implicated in causing environmental harm as well as harm to humans.¹⁶⁰ Harm to the environment includes harms that are both directly and indirectly related to detention. There are documented, widespread environmental law violations in prisons, jails, and detention centers, but little to no enforcement of environmental review or health standards in detention centers.¹⁶¹ One reason is that EPA does not count prisoners and detained people in its studies because the census data it uses does not include incarcerated people, while another is that the facilities perform insufficient environmental review, so EPA does not have adequate data to analyze.¹⁶² Improving environmental review of these spaces has the potential to bring environmental justice concerns into the space of immigration law, shedding light upon the conditions of incarceration and giving voice to detained people living in unsafe environments.¹⁶³

5. *Environmental justice frameworks affirm NEPA's applicability*

Environmental justice framing bolsters the argument for broadening NEPA's human environment mandate and lends important context in support of applying NEPA to the conditions inside immigration detention facilities. Environmental justice frameworks use social construction theory to understand the environment as not separate from but intrinsically tied to society and social issues.¹⁶⁴ Social construction theory is the idea that characteristics that are typically considered biological or immutable, such as class, race, or gender, are actually products of our

¹⁵⁷ For a copy of the draft EIS, see FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., DRAFT ENVIRONMENTAL IMPACT STATEMENT: PROPOSED DEVELOPMENT OF A NEW FEDERAL CORRECTIONAL INSTITUTION AND FEDERAL PRISON CAMP—LETCHER COUNTY, KENTUCKY (2024), https://www.proposed-fci-letchercountyky.com/_files/ugd/5947b2_6cd3ea7da5044517b0a31a636019012f.pdf.

¹⁵⁸ OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT OF THE FEDERAL BUREAU OF PRISONS' EFFORTS TO MAINTAIN AND CONSTRUCT INSTITUTIONS 21–23 (2023), https://oig.justice.gov/sites/default/files/reports/23-064_1.pdf.

¹⁵⁹ *Id.*; FED. BUREAU OF PRISONS, *supra* note 157.

¹⁶⁰ Edwards et al., *supra* note 27, at 431.

¹⁶¹ *Id.*

¹⁶² *Id.* at 442.

¹⁶³ *Id.*; David N. Pellow, *Critical Environmental Justice Studies*, in ENVIRONMENTAL JUSTICE: KEY ISSUES 293, 295–300 (Brendan Coolsaet ed., 2020).

¹⁶⁴ Taylor, *supra* note 13, at 524.

human interpretation and definition.¹⁶⁵ Thus the color of someone's skin and the meaning that it holds is not tied to biology but to the cultural and historical contexts that give meaning to the categories we create. Viewed in this way, the environment is not just made up of trees, grass, or wilderness, but is all around us, in the spaces we create with other humans or on the sidewalk outside our homes.

If the environment is not a static thing that exists in the same way for each viewer, but rather it is fluid and perceived differently by different groups in society, how can indoor environments be excluded from its scope?¹⁶⁶ How, indeed, can the environment of a detention center, or any living space, not be considered part of the human environment, if the environment is what we make it, and where we as humans exist? This framing breaks NEPA out of the box of a traditional environmental statute grounded in ideals of preserving "nature" and environmental degradation divorced from the "human impact."¹⁶⁷

6. NEPA's human environment includes the environment inside immigration detention centers

Environmental review of immigration detention centers under NEPA requires analysis of the indoor human environment experienced by detainees. The text and context of NEPA display a broader focus than the outdoor environment and emphasize that NEPA was intended to protect humans' experience of their environment.¹⁶⁸ In addition, the history of conducting NEPA analysis for immigration infrastructure projects clarifies that NEPA analysis is not just appropriate but necessary to ensure the safety of conditions in immigration detention.¹⁶⁹ Viewing this issue through an environmental justice lens only strengthens the argument, because detainees are the very people that environmental review is meant to consider and seeks to protect.

B. NEPA Lawsuit over Dilley Detention Center Conditions: Threshold Considerations Indicate a Challenge Could be Brought

The conditions in the Dilley Detention Center violated NEPA's mandate to protect the human environment and required a full EIS addressing the human health impacts on detainees. The Dilley Detention Center is an example of a case where the NEPA process was inadequate and where a challenge to the detention of immigrants based on NEPA violations could have taken place. To illustrate how this could have been

¹⁶⁵ SOCIAL CONSTRUCTIONISM, INTRODUCTION TO WOMEN, GENDER, SEXUALITY STUDIES, UMASS AMHERST, <https://openbooks.library.umass.edu/introwgss/chapter/social-constructionism>.

¹⁶⁶ *Id.*

¹⁶⁷ Taylor, *supra* note 13, at 557.

¹⁶⁸ See discussion *supra* Sections II.B.1–2.

¹⁶⁹ See discussion *supra* Sections III.A.3–4.

done and inform future advocacy, this Note will first address threshold questions of standing, class certification, and venue. Subsequently, it will consider the substantive issues of the case.

If NEPA is interpreted as specifically regulating the human environment in detention centers as a part of challenges to specific DHS actions, the environmental impacts on humans must be addressed in places like the Dilley Detention Center. In practice this would happen through litigation challenging the adequacy of the government's NEPA review, as authorized under the statute. NEPA creates a procedural requirement that agencies consider the environmental impacts of a project, and the sufficiency of that analysis can be challenged under the Administrative Procedure Act (APA).¹⁷⁰ The APA requires that an agency not take actions that are "arbitrary and capricious," meaning that agencies must not take actions that are unsupported by some analysis and data.¹⁷¹ Thus, citizen suits under the APA challenging a NEPA analysis or lack thereof are limited to this "arbitrary and capricious" standard. An injured party may bring a claim relating to an agency's application of any of the three environmental analyses (EA, EIS, or CE), and must demonstrate that they have an injury in fact that is causally connected and redressable, as well as follow all procedural rules.¹⁷²

1. Plaintiffs, standing, and mootness are manageable hurdles

Preliminary issues of finding plaintiffs with standing and bringing a claim in a venue where success is likely would present challenges but have a high likelihood of success. Finding plaintiffs who could represent detainee's interests in this case is an important initial priority. In order to bring a NEPA claim, the plaintiffs would first have to establish Article III constitutional standing.¹⁷³ The elements of standing are causation, harm that is actual and imminent, and redressability.¹⁷⁴ One plaintiff in *Mass. Coal. for Immigration Reform* (2024) was found to possess standing to bring claims that DHS policy had caused him environmental injury as landowner and cattle rancher living adjacent to the U.S.-Mexico Border.¹⁷⁵ The initial lawsuit contained the claims of several landowners who alleged that they had suffered harm from trash being left on their

¹⁷⁰ 5 U.S.C. §§ 551–559, 701–706 (2018); COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, A CITIZEN'S GUIDE TO NEPA: HAVING YOUR VOICE HEARD 12, 14, 23 (2021) [hereinafter CEQ], <https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf>.

¹⁷¹ 5 U.S.C. § 706(2)(A); JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) 4 (2024).

¹⁷² DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION § 4:19 (2d ed. 2024).

¹⁷³ See Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment?*, AM. BAR ASS'N (Oct. 9, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol—19—issue-1/standing—who-can-sue-to-protect-the-environment-.

¹⁷⁴ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (detailing the elements of standing).

¹⁷⁵ *Mass. Coal. for Immigr. Reform v. U.S. Dep't of Homeland Sec.*, No. 20-cv-03438, 2024 WL 4332121, at *1–2 (D.D.C. Sept. 27, 2024).

land by border-crossers.¹⁷⁶ This harm, they alleged, was caused by DHS policies of humanitarian aid, asylum case review in the United States, and cessation of border wall construction, which were all enacted without required NEPA review.¹⁷⁷ The actual harm, caused by these policy changes, would be redressed if NEPA analysis had been performed assessing the environmental harm of not completing sections of the border wall.¹⁷⁸ On a motion for summary judgment, the D.C. District Court agreed with these border plaintiffs, and after a bench trial, found for the plaintiff landowners on standing, as well as on their claims about border wall construction and asylum policy.¹⁷⁹

On the same theory—that plaintiffs suffered environmental harms as a result of the way NEPA analysis was conducted—detainees alleging injury to the human environment should be successful in alleging standing. Here, detainees are suffering ongoing physical impacts as a direct result of detention living spaces, which were created pursuant to immigration policies. Environmental review would redress their harm, because it would right the procedural wrong that has been committed and bring to light any potential inadequacy in the operations of the detention center with respect to human health.

Difficulties could arise related to having a rotating and difficult-to-reach class of people experiencing these conditions, and this challenge presents limitations to filing a lawsuit representing a large number of plaintiffs. According to DHS, families are only meant to be held in detention for 72 hours (though people are often held for longer periods of time) after which time their location could be difficult to track, and their ability to stay in the United States would not be certain.¹⁸⁰ This should not be an insurmountable barrier, however, for two main reasons. First, the plaintiffs would allege not only substantive but procedural harms, for which the requirements are reduced as to immediacy and redressability.¹⁸¹ Second, class certification could be utilized in order to preserve the claims of plaintiffs who are no longer detained.¹⁸² Federal Rule of Civil Procedure 23 allows one or more members of a larger group to sue for the whole group pursuant to specific rules.¹⁸³ FRCP 23 requires that classes be so numerous that joinder is impracticable, there are common questions of law and fact, the claims or defenses presented are typical of the whole class, and that the representative parties fairly and

¹⁷⁶ *Mass. Coal. for Immigr. Reform v. U.S. Dep't of Homeland Sec.*, 698 F. Supp. 3d 10, 17–18 (D.D.C. 2023).

¹⁷⁷ *Id.* at 18–19.

¹⁷⁸ *Id.*

¹⁷⁹ *Mass. Coal. for Immigr. Reform*, 2024 WL 4332121, at *10.

¹⁸⁰ DEP'T OF HOMELAND SEC., PROGRAMMATIC ENVIRONMENTAL ASSESSMENT FOR ACTIONS TO ADDRESS AN INCREASED INFLUX OF UNACCOMPANIED ALIEN CHILDREN AND FAMILY UNITS ACROSS THE SOUTHWEST BORDER OF THE UNITED STATES 1 (2014) [hereinafter PEA], <https://www.regulations.gov/document/DHS-2014-0042-0003>.

¹⁸¹ *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

¹⁸² FED. R. CIV. P. 23(a).

¹⁸³ *Id.*

adequate protect the interests of the class.¹⁸⁴ Immigrant detainees were successfully certified as a class at the district court level (and their claims affirmed by the Ninth Circuit) in *Unknown Parties v. Johnson*,¹⁸⁵ lending precedent to the success of class certification here.

2. Venue could present challenges

Venue is an important concern in all litigation, and succeeding in a novel NEPA challenge like this one in the Fifth Circuit would be difficult. Texas has far more immigration detention centers and detainees than any other state in the United States.¹⁸⁶ This would make it an advantageous place to bring a challenge like this one, due to the number of detainees and the potential for new projects to be considered given its proximity to the border and track record of detaining immigrants.¹⁸⁷ That said, it could be a very difficult place to bring a NEPA challenge.¹⁸⁸ Texas is in the Fifth Circuit, which is known as a relatively conservative circuit, presenting challenges if a decision were to be appealed.¹⁸⁹ Detention centers exist and are modified (potentially triggering NEPA review) throughout the country, so finding specific projects and proposals in friendly jurisdictions would be crucial to successfully litigating their effects on the human environment.¹⁹⁰

C. NEPA Lawsuit over Dilley Detention Center Conditions: Substantive NEPA Challenges Present a Strong Case for Plaintiffs

Once a NEPA challenge to the Dilley detention center passed the initial considerations, a substantive challenge would need to address the impact of conditions at the center on the human environment and the inadequacy of environmental review. The DHS performed two main NEPA analyses in the planning process for the Dilley Detention

¹⁸⁴ *Id.*

¹⁸⁵ No. CV-15-00250-TUC, 2016 U.S. Dist. LEXIS 189767, at *3 (D. Ariz. Nov. 18, 2016, *aff'd sub nom.* Doe v. Kelly, 878 F.3d 710 (9th Cir. 2017).

¹⁸⁶ *Detention Centres*, GLOB. DET. PROJECT, <https://www.globaldetentionproject.org/detention-centres/map-view> (last visited Feb. 9, 2025) (presenting a visual representation of detention centers in the United States and around the globe); *Immigration Detention Quick Facts*, TRAC IMMIGRATION, <https://tracreports.org/immigration/quickfacts> (last visited Feb. 27, 2025) (verifying that Texas leads the nation in detention centers and detainees.).

¹⁸⁷ *Id.*

¹⁸⁸ Megan Kimble, *Texas is Skirting Federal Environmental Law to Push for Highway Expansion*, GRIST (July 27, 2022), <https://grist.org/transportation/texas-is-skirting-federal-environmental-law-to-push-for-highway-expansion> (showing that Texas is skirting NEPA assessments in other areas).

¹⁸⁹ Nina H. Farah, *Congressional Mandates Trumped NEPA Lawsuits in 2023*, POLITICO: E&E NEWS (Dec. 21, 2023, 6:42 AM), <https://www.eenews.net/articles/congressional-mandates-trumped-nepa-lawsuits-in-2023> (exemplifying the difficulty of NEPA energy lawsuits in the Fifth Circuit and beyond).

¹⁹⁰ Joseph J. Brecher, *Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers*, 2 ECOLOGY L.Q. 91, 91–92 (1972).

Center.¹⁹¹ The first was a Programmatic EA (PEA), which was developed during the Obama administration and broadly addressed the need for a solution to the problem of an “increased influx” of unaccompanied children and families crossing the border with Mexico as well as future influxes.¹⁹² This was issued in 2014.¹⁹³ Just a few days later, a supplemental EA (SEA) was issued proposing the detention center project in Dilley.¹⁹⁴

In the NEPA analysis for the detention center, the alternatives to the chosen action were not adequately considered.¹⁹⁵ Two alternatives were immediately dismissed for failing core location criteria, and the no-action alternative was deemed to be outright unviable.¹⁹⁶ To be in compliance with the CEQ regulations in effect at the time, alternatives had to be discussed in an EA and considered in order to identify ways in which the agency could revise the action to minimize environmental effects.¹⁹⁷

1. Public comment for Dilley was inadequate

In addition, the required public comment period was improperly expedited for the Dilley Detention Center, preventing public participation.¹⁹⁸ The PEA was issued on August 14, 2014 and posted in the federal register the same day.¹⁹⁹ Less than two weeks later, the SEA with a Finding of No Significant Impact (FONSI) was published on the DHS website.²⁰⁰ Public participation is one of NEPA’s core goals.²⁰¹ Yet here, DHS made no effort to involve the public in their decision to pursue

¹⁹¹ Bernd, *supra* note 56.

¹⁹² PEA, *supra* note 180, at 2.

¹⁹³ *Id.*

¹⁹⁴ U.S. IMMIGR. & CUSTOMS ENFT, DEPT OF HOMELAND SEC., SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT FOR HOUSING OF FAMILY UNITS AT THE SOUTH TEXAS FAMILY RESIDENTIAL CENTER DILLEY, TEXAS 1 (n.d.) [hereinafter SEA], https://www.dhs.gov/sites/default/files/publications/Final%20STFRC%20SEA%208_27_2014%20%28508%20Comp%29.pdf.

¹⁹⁵ Edwards et al., *supra* note 27, at 439.

¹⁹⁶ *Id.* at 442–43.

¹⁹⁷ CEQ, *supra* note 170, at 11.

¹⁹⁸ Environmental Planning and Historic Preservation Program, 79 Fed. Reg. 47,661 (Aug. 14, 2014); Letter from Trisha Trigilio, Civ. Rts. Clinic Fellow, Univ. of Texas Sch. of L. et al., to Teresa R. Pohlman, Dir. of Sustainability & Env’t Programs, Dep’t of Homeland Sec., & Susan Bromm, Dir. of the Off. of Fed. Activities, Env’t Prot. Agency, at 17–18 (Oct. 30, 2014) [hereinafter UT Letter], https://immigrantjustice.org/sites/default/files/UT_EnvironmentalImpactofDilley_2014_10_30.pdf.

¹⁹⁹ Environmental Planning and Historic Preservation Program, 79 Fed. Reg. 47,661.

²⁰⁰ UT Letter, *supra* note 198, at 18; U.S. IMMIGR. & CUSTOMS ENFT, FINAL FINDING OF NO SIGNIFICANT IMPACT FOR THE PROPOSED U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SOUTH TEXAS FAMILY RESIDENTIAL CENTER DILLEY, TEXAS (2014) https://www.dhs.gov/sites/default/files/publications/FINAL%20STFRC%20FONSI%20%208%2027%2014%20%28508%20Comp%29_0.pdf [hereinafter FONSI].

²⁰¹ CEQ, *supra* note 170, at 4 (stating that NEPA requires agencies to inform the public about their decision making, and that citizens possess helpful information that NEPA requires agencies to consider).

the construction of the Dilley Detention Center.²⁰² While agencies do have some discretion over the extent to which they involve the public, in performing an EA the CEQ NEPA regulations in effect at the time required at minimum that a FONSI be made available to the public for 30 days of review where the proposed action has not been done before by the particular agency.²⁰³ Here the PEA proposed a solution to the “influx” of children and families, an emergent issue that had not yet been addressed, so the 30 days of review were mandatory.²⁰⁴ Despite the alleged significance of the project, only two alternatives were considered, and no emergency powers were used.²⁰⁵ The process of environmental review under NEPA does not provide for expediting public comment processes, especially because the agency did not seek a categorical exclusion exempting it from review.²⁰⁶ Based on the findings of the SEA, DHS determined that an EA was adequate to proceed with the project and no EIS was needed, despite the many procedural errors outlined here.²⁰⁷ The determination that an EA was adequate was incorrect given the failure of the SEA and PEA to account for the impacts on the human environment for detainees in the facility. A full EIS should have been performed.

2. Conditions at Dilley and their general impact on detainees were not adequately analyzed

In general, while the PEA asserts that ICE will operate family facilities “in an open environment” and with access to teachers and a library, it does not specifically connect these ideas to an assessment of health, safety, or the environment.²⁰⁸ It also references the ICE Family Residential Standards,²⁰⁹ which were created in collaboration with non-governmental organizations and the DHS office of Civil Rights, but the document does not address the health and safety of the residents of the facility.²¹⁰ The PEA’s cumulative analysis also does not take into account the health and human safety impacts on those who would be directly affected by future projects.²¹¹ Cumulative impacts analysis under NEPA is meant to consider all past, present, and reasonably foreseeable future impacts of a project.²¹² Here, the only reference to safety pertains to

²⁰² UT Letter, *supra* note 198, at 17–18.

²⁰³ CEQ, *supra* note 170, at 11.

²⁰⁴ PEA, *supra* note 180, at 1.

²⁰⁵ *Id.* at 1, 15.

²⁰⁶ CEQ, *supra* note 170, at 11; FONSI, *supra* note 200, at 4.

²⁰⁷ FONSI, *supra* note 200, at 4.

²⁰⁸ PEA, *supra* note 180, at 7.

²⁰⁹ IMMIGR. & CUSTOMS ENFT, FAMILY RESIDENTIAL STANDARDS (FRS): PROGRAM PHILOSOPHY, GOALS, AND EXPECTED OUTCOMES (2020), <https://www.ice.gov/doclib/frs/2020/2020family-residential-standards.pdf>.

²¹⁰ PEA, *supra* note 178, at 31.

²¹¹ *Id.*

²¹² 32 C.F.R. § 651.16 (2024).

employees of the facility and those constructing the facility, with no mention of detainees in the past, present, or future.²¹³ The PEA states that “DHS would follow existing Occupational Safety and Health protocols for its personnel” and that “significant cumulative impacts to human health and safety are not anticipated.”²¹⁴

3. Environmental justice was not adequately reviewed at Dilley

The failure to consider detainees in the PEA’s analysis of environmental justice contradicts the entire purpose of including the section and displays the inadequacy of the environmental analysis for the detention center. The PEA references Executive Order 12898, and its requirement the agency consider environmental justice in cumulative effects analysis of the detention center.²¹⁵ Despite the acknowledgement of environmental justice concerns in the surrounding community, the document’s list of “[m]easures to avoid impacts to the human environment” includes to “[f]ollow applicable detention standards and policies,” in reference to detainees.²¹⁶ This does not address the status of detainees as part of a cognizable environmental justice group, or detail how they might be protected under NEPA’s mandate to consider the environmental impacts they might face.²¹⁷ The executive order nowhere mentions citizenship status or anything related to immigration, only a commitment to address environmental justice concerns through analyzing the environmental impacts on vulnerable populations, which should certainly encompass the detainees if the order is to be followed, and especially under a broader definition of human environment under NEPA.²¹⁸

4. Review of air and water quality was inadequate

A challenge to the SEA, with regard to its analysis of water and air quality issues that cause environmental harm to those living in the facility, would have been successful under this reframed view of the human environment. In Dilley and the area surrounding the detention center, the water and air quality is significantly affected by ongoing fracking activities.²¹⁹ Residents have reported serious health impacts, and the air monitoring by the State of Texas is inadequate to determine the full scope of harms this pollution could cause.²²⁰ The air and water quality issues in Dilley have had documented health impacts on residents

²¹³ PEA, *supra* note 180, at 31.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 31–32.

²¹⁷ Pellow, *supra* note 163, at 297–98 (using the Dilley Detention Center as an example of an environmental justice case study contemporarily relevant to the field).

²¹⁸ *Id.* at 298.

²¹⁹ UT Letter, *supra* note 198, at 4, 7.

²²⁰ *Id.* at 7.

which, by creating unsafe living conditions, constitute physical harm to the human environment. NEPA's effects encompasses "aesthetic, historic, cultural, economic, social, or health"²²¹ effects; these environmental harms should have been considered as part of the "human environment."

The impacts of pollution from fracking at Dilley should be considered pollution with environmental impact under prior precedent.²²² While the plaintiffs in *Forest Guardians v. USFS* did not ultimately prevail, the court in its ruling referred to "dust, noise and diesel fumes" as "significant environmental impacts."²²³ Here, the EA that the FONSI was based on did not consider what the *Forest Guardians* court considered to be significant environmental impacts.²²⁴ This failure to consider the human environment means that the FONSI was incorrectly issued, and a full EIS is needed to consider the impacts of the detention center living conditions on the human environment.

5. Psychological impacts and related physical impacts of living conditions were not considered

Detention has psychological and interrelated physical impacts on detainees, particularly children, that were not considered in the environmental review of the Dilley Detention center. Despite claims of creating an "open environment," detention centers are not creating an optional place for people to live where they truly have freedom of movement.²²⁵ This has particularly detrimental effects on children's development, and can cause emotional trauma when children are left alone or only supervised by guards who do not engage with them or their needs.²²⁶ In addition, the purpose of detention is to ensure that detainees arrive at their court dates, requiring many parents to be separated from their children for those proceedings without any childcare provided by the facilities.²²⁷ These emotional impacts can and do cause physical impacts upon detainees' future abilities to work and thrive after they are released from detention.²²⁸

Furthermore, the impacts of the layout and structure of the facility upon detainees were not adequately considered in the environmental review. The facility contains approximately 300 bedrooms with a capacity

²²¹ 40 C.F.R. § 1508.1(g)(i)(4) (2024).

²²² *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1173 (10th Cir. 2007).

²²³ *Id.*

²²⁴ SEA, *supra* note 194, at 7–9, 20–28.

²²⁵ PEA, *supra* note 180, at 7.

²²⁶ UT Letter, *supra* note 198, at 10–11.

²²⁷ *Id.*

²²⁸ Harini Sivalingam & Sharry Aiken, Narratives of Harm and the Case for Detention Abolition, Presentation at Lewis & Clark Law School Conference: Crimmigration through Time, Space, and Culture (Mar. 1, 2024) (detailing the trauma of detention and its ongoing and generational impacts on children and families); *Mental Health and Forced Displacement*, WORLD HEALTH ORG. (Aug. 31, 2021), <https://www.who.int/news-room/fact-sheets/detail/mental-health-and-forced-displacement>.

of six to eight people in each one.²²⁹ Certainly not every family unit entering the facility was made up of six to eight people, and given that the facility averaged at least 1,845 residents per day,²³⁰ many unrelated families were likely housed in the same intimate living spaces. This necessitated housing unrelated families in the same bedrooms and sleeping areas at best, where they have not already been split up or sent to separate facilities.²³¹ A lack of privacy has only compounding effects on the trauma that families experience in facilities like Dilley. These impacts present a foundation for a strong legal challenge to the adequacy of the NEPA review for the Dilley Detention Center.

IV. CONCLUSION: LOOKING FORWARD TO A MORE EXPANSIVE NEPA DOCTRINE

NEPA's mandate to protect the "human environment" should be expanded using an environmental justice lens to include immigration detention infrastructure and the environments it creates. NEPA's language and legislative history lend credibility to the notion that the statute could encompass a more expansive definition of "human environment", even if it has not done so in the past.

The histories of crimmigration infrastructure, including border barriers and detention facilities, reveal persistently inadequate considerations of environmental harms, as well as the strength of political agendas. Politics has been a driving force in immigration policy that has led to our country upholding anti-immigrant policy and practice that harms human environments.

A deep dive into the NEPA process and environmental harms at the Dilley Family Detention Center show potential avenues to resist this history and apply environmental law to protect detainees. This work is especially urgent as detentions in the U.S. have increased exponentially under the second Trump administration.²³² The site of the Dilley Family Detention Center is being used in a limited capacity as of 2025, and new detention centers are facing NEPA challenges to their construction.²³³ For

²²⁹ SEA, *supra* note 194, at 1; *South Texas Family Residential Center*, U.S. IMMIGR. & CUSTOMS ENFT (Feb. 15, 2019), <https://www.ice.gov/factsheets/south-texas-family-residential-center>.

²³⁰ *Detention Facilities Average Daily Population*, TRAC IMMIGR., <https://tracreports.org/immigration/detentionstats/facilities.html> (last visited Feb. 7, 2025).

²³¹ LEIGH BARRICK, *DIVIDED BY DETENTION: ASYLUM-SEEKING FAMILIES' EXPERIENCES OF SEPARATION 7–10* (2016); see also Michael Garcia Bochenek, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, HUM. RTS. WATCH (Feb. 28, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells> (describing families being detained separately).

²³² Meg Anderson, *Private Prisons and Local Jails are Ramping Up as ICE Detention Exceeds Capacity*, NPR (Jun. 4, 2025), <https://www.npr.org/2025/06/04/nx-s1-5417980/private-prisons-and-local-jails-are-ramping-up-as-ice-detention-exceeds-capacity>.

²³³ Maria Sacchetti et. al., *Trump Officials to Reopen Texas Detention Center for Migrant Families*, WASH. POST, (Mar. 5, 2025) <https://www.washingtonpost.com/immigration/2025>

instance, a federal judge granted a preliminary injunction preventing further construction and use of a detention center known as “Alligator Alcatraz” after environmental groups brought suit for NEPA violations related to the construction of the detention center.²³⁴

The conditions that existed in Dilley are present to some extent in immigration detention centers all over the country, as well as in jails and prisons whose conditions could be improved by this broadening of NEPA. Detention is also a growing phenomenon globally, and as restrictionist immigration policies are set in place across the globe amidst concurrent climate and economic crises, this work is all the more urgent.²³⁵

NEPA litigation of immigration detention center conditions could also aid in the efforts of tort cases involving exposure to toxic chemicals.²³⁶ Efforts by community groups successfully pressured ICE to stop detaining people in a facility in Glades County Florida, where detainees had been sickened by exposure to toxic chemicals improperly used for cleaning.²³⁷ Another case, however, is still being litigated on similar facts against GEO Group, one of the largest private prison operators in the nation.²³⁸ The complaint alleges that GEO Group knowingly used a toxic chemical as a disinfectant, spraying it indoors despite knowing the product was harmful to human health.²³⁹ A broader interpretation of the human environment under NEPA applied to immigration detention could add additional claims to a lawsuit such as this one and strengthen the claims that the health of immigration detainees is legally protected.²⁴⁰

Although NEPA has not historically been extended to encompass the “human environment,” using the statute in this way has potential as a tool for protecting human rights and addressing environmental justice concerns for immigrants and asylum seekers in the United States. This “human environment” focus could potentially model a path toward challenging the conditions in prisons and non-immigrant detention

/03/05/dilley-texas-family-detention-center-ice; Friends of the Everglades, Inc., et al., v. Kristi Noem, et al., No. 25-22896-CV, 2025 WL 2423258 at *34 (S.D. Fla. Aug. 21, 2025).

²³⁴ *Friends of the Everglades*, 2025 WL 2423258 at *34.

²³⁵ Michael Flynn, *Searching for Safe Haven*, BULL. ATOMIC SCIENTISTS, Nov.–Dec. 2002, at 22, 24–25; see also Pellow *supra* note 163, at 297–98 (linking detention and migration with climate change as well as “repressive, militaristic US foreign policies in Latin America”).

²³⁶ *Shut Down Glades County Detention Center*, ACLU OF FLA., <https://www.acluf.org/en/campaigns/shut-down-glades-county-detention-center> (last visited Feb. 11, 2025).

²³⁷ *Id.*

²³⁸ Press Release, Social Justice Legal Foundation, Class Action Lawsuit on Behalf of Detained Immigrants Alleges GEO Group Poisoned Them at Adelanto Detention Center (Mar. 21, 2023), <https://www.socialjusticelaw.org/class-action-lawsuit-on-behalf-of-detained-immigrants-alleges-geo-group-poisoned-them-at-adelanto-detention-center>.

²³⁹ *Id.*

²⁴⁰ Luis González, Comment, *Only YOU Can Prevent Immigration Detention: Analyzing the Ways Environmental Laws Can Close or Prevent the Opening of Toxic and Dehumanizing Immigration Detention Centers*, 42 UCLA J. ENV'T L. & POL'Y 85, 90–96 (2024).

centers as well.²⁴¹ Focusing on the “human environment” spotlights NEPA as a model for human rights review. If this was successful, a logical outgrowth of the NEPA process for environmental justice concerns would be something like the “human rights review,” which would take into account the potential human rights impacts of major federal actions.²⁴²

²⁴¹ Tsolkas, *supra* note 156; Complaint for Declaratory & Injunctive Relief, *supra* note 156, at 4–6, 17–19.

²⁴² Lesley Wexler, *Human Rights Impact Statements: An Immigration Case Study*, 22 GEO. IMMIGR. L.J. 285, 303–05 (2008).