EARTHJUSTICE

November 6, 2018

via Federal eRulemaking Portal
Debbie Seguin
Assistant Director, Office of Policy
U.S. Immigration and Customs Enforcement
500 12th Street SW
Washington, DC 20536

Re: Docket Number ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Ms. Seguin,

Earthjustice submits the following comments on behalf of Alianza Nacional de Campesinas, GreenLatinos, Hispanic Federation, Labor Council for Latin American Advancement, the National Hispanic Medical Association, and Southwest Environmental Center (collectively, "Public Interest Groups") to express opposition to the proposed rule, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," published jointly by the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) in the Federal Register on September 7, 2018.[1] The proposed regulations are inconsistent with the *Flores* Settlement Agreement (FSA)[2] and would dismantle the critical protections established in the FSA for immigrant children in the custody of DHS and HHS (jointly, the "agencies").[3] The proposed regulations also are inconsistent with the terms of the multiple legal authorities that govern DHS and HHS's treatment of children in their custody.[4]

While the Public Interest Groups share grave concerns about many aspects of the proposed rule expressed by others and join in the widespread call for the agencies to reconsider and withdraw the proposed rule, we write specifically to address the agencies' analysis of their obligations under the National Environmental Policy Act (NEPA).[5] The notice indicates that the two agencies intend to invoke three categorical exclusions to exclude the proposed rulemaking from NEPA review. However, as explained below, these categorical exclusions cannot be

[1] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018).
[2] Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter FSA].
[3] In fact, last week, Plaintiffs in the *Flores* case filed a Motion to Enforce Settlement, asking the court for a class-wide order declaring the federal government in anticipatory breach of the FSA in light of this proposed rule.
[4] We support and incorporate by reference the comments submitted in this docket by the Center for Children's Law and Policy, dated Nov. 5, 2018; Human Rights First, dated Oct. 31, 2018; and Southern Poverty Law Center, dated Nov. 5, 2018, which raise some of these issues.
[5] *See* 83 Fed. Reg. at 45,523–24.

invoked to evade environmental review of this proposed rule under NEPA because the proposed rule clearly exceeds the scope of the cited categorical exemptions, and furthermore, significant environmental effects are likely to result from the proposed rule. Because of these significant environmental effects, DHS and HHS must undertake an Environmental Impact Statement (EIS) before finalizing the proposed rule.

THE PUBLIC INTEREST GROUPS

Alianza Nacional de Campesinas

Alianza Nacional de Campesinas is a national farmworker women's organization that was founded in 2011 to address and advance the rights of the more than 700,000 farmworker women in the United States. Since its founding, Alianza has called for the fair treatment of immigrant women and children, including refugees and asylees, improved immigration protections, and more expedient processing of immigration petitions for those seeking relief. Alianza has a specific interest in this matter, as many of the women and children who are fleeing their home countries come from rural communities in Latin America, much like the rural communities from which Alianza's members migrated to the U.S. They have fled their countries of origin to escape gender-based violence, gang violence, natural disasters and other circumstances that make it impossible for them to continue to live in their countries of origin. Alianza also has deep concern for individuals living along the U.S.-Mexico border who have been impacted by U.S. immigration policy.

GreenLatinos

GreenLatinos is a national non-profit organization that convenes a broad coalition of Latino leaders committed to addressing national, regional, and local environmental, natural resources and conservation issues that significantly affect the health and welfare of the Latino community in the United States. GreenLatinos seeks to provide an inclusive forum through which its members can establish collaborative partnerships and networks to improve the environment; protect and promote conservation of land and other natural resources; amplify the voices of minority, low-income, and tribal communities; and train, mentor, and promote the current and future generations of Latino environmental leaders for the benefit of the Latino community and beyond. GreenLatinos is interested in ensuring that DHS and HHS undertake a proper and transparent environmental investigation and analysis to ensure the health and safety of detainees.

Hispanic Federation

Founded in 1990, Hispanic Federation is one of the nation's leading Latino nonprofit membership organizations with 100-plus member organizations and a mission to protect and promote the public interest especially as it relates to immigrant and Latino communities. Hispanic Federation has worked for years, using both legislative and grassroots advocacy, to support passage of immigration policies that are humane and that provide solutions to fix our broken immigration system. Hispanic Federation is one of the co-founders of a large and diverse intersectional coalition of environmental, civil rights, wildlife, faith, and border community and immigration groups leading opposition to the President's quest to expand the immigration

detention system and to increase funding for a wasteful border wall that would divide communities and wreak environmental havoc.

Labor Council for Latin American Advancement

The Labor Council for Latin American Advancement (LCLAA) is the leading national organization for Latino(a) workers and their families. LCLAA was born in 1972 out of the need to educate, organize and mobilize Latinos in the labor movement and has expanded its influence to organize Latinos in an effort to impact workers' rights and their influence in the political process. LCLAA represents the interest of more than 2 million Latino workers in the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), the Change to Win Federation, independent unions, and all its membership. LCLAA has long been committed to family reunification and to defending immigrant rights, in conjunction with its mission to defend and work for immigrant and working family rights.

National Hispanic Medical Association

The National Hispanic Medical Association (NHMA) works to improve the health of Hispanics though advocacy, leadership development and educational activities. NHMA's mission is to empower Hispanic physicians to lead efforts to improve the health of Hispanics and other underserved populations. NHMA believes that the science and evidence are clear that immigration detention directly harms children and families by detrimentally impacting their physical and mental health. NHMA advocates for humane immigration policies that treat immigrant children and families with the dignity they deserve.

Southwest Environmental Center

The Southwest Environmental Center (SWEC) is a non-profit conservation organization dedicated to the protection and restoration of native wildlife and their habitats in the Southwest. SWEC has more than 10,000 members and online activists, and is headquartered in Las Cruces, New Mexico. SWEC's interest in this issue relates to its advocacy against border militarization and for the protection of human rights and the environment of the Southwest. In recent years, SWEC has become increasingly concerned about how militarization of the U.S.-Mexico border affects the environment of the Southwest. As a result, SWEC has taken a leading role in organizing protests against the construction of a border wall along the U.S.-Mexico border, and has partnered closely with human rights and immigration groups in this fight.

BACKGROUND

A. The Proposed Rule

The proposed rule makes a number of changes that likely mean that more immigrant children and families will be detained by the federal government for longer periods of time.[6] In this proposed rule, DHS proposes an "alternative licensing process" with the express purpose of

[6] 83 Fed. Reg. at 45,488 ("DHS acknowledges that this rule may result in additional or longer detention for certain minors. . . .").

bringing additional detention capacity online without having to comply with the state standards for licensing set forth under the *Flores* agreement.[7] Under the proposed alternate licensing provision, DHS could evade the *Flores* settlement's prohibition against keeping children in secure, unlicensed facilities for more than 20 days.[8] The rule also significantly restricts options for release of children in DHS custody,[9] and anticipates that fewer children and their family members will be released on parole.[10]

Although DHS and HHS fail to anticipate any of the costs of extended detention, others have used DHS data to estimate them. The Center for American Progress calculates that the costs to DHS alone from the proposed rule will be between $2 billion and $12.9 billion over the next decade, or $201 million per year at the low end and $1.3 billion per year at the high end.[11] Part of this cost will come from incarcerating more children and their relatives for longer in existing detention facilities, which currently have a capacity of 3,326 beds.[12] ICE will also need to acquire more family detention beds, which will require purchasing, constructing, or expanding family detention centers.[13]

While DHS declines in this notice of proposed rulemaking to "determine how the number of FRCs [family detention centers] may change due to this proposed rule,"[14] notably, the Trump administration is investigating increasing family detention center capacity by five or six times. The Trump administration requested information to "conduct market research" about what it would take to acquire 15,000 new family detention beds, and the DHS has asked the U.S. Department of Defense to look into space for up to 12,000 family detention beds.[15] Meanwhile, Center for American Progress estimates that if ICE detains entire family units and detains them longer, it will need to acquire 10,660 new beds.[16] As these figures indicate, the changes wrought

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[7] *Id.* at 45,486 ("Most prominently, the rule would create an alternative to the existing licensed program requirement for family residential centers, so that ICE may use appropriate facilities to detain family units together during their immigration proceedings, consistent with applicable law.").
[8] *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).
[9] *See* 83 Fed. Reg. at 45,502–3 (proposing to strip parole authority for children in expedited removal proceedings and allow the release of children in custody only to a parent or legal guardian).
[10] *Id.* at 45,488.
[11] *See* Philip E. Wolgin, *The High Costs of the Proposed Flores Regulations*, Ctr. for Am. Progress (Oct. 19, 2018) [attached as Attachment 1].
[12] *Id.* at 2.
[13] *Id.*
[14] 83 Fed. Reg. at 45,519.
[15] *See* The Associated Press, *Officials: DHS Asks Military for 12,000 Beds to Detain Families*, Politico (June 28, 2018), https://www.politico.com/story/2018/06/28/migrant-families-border-detain-beds-680632; Jolie McCullough & Chris Essig, *The Trump Administration Is Making Plans to Detain More Immigrants in Texas. Here's Where They Would Be Held*, The Texas Trib. (Aug. 2, 2018), https://www.texastribune.org/2018/08/02/ trump-administration-texas-migrant-detention-facilitiesmap/. Moreover, President Trump has publicly announced plans to build "tent cities" across the U.S.-Mexico border to detain immigrants. *See* Franco Ordoñez, *Trump Says He Will Hold Asylum Seekers From Central America in Massive Tent Cities*, McClatchy (Nov. 1, 2018), https://www.mcclatchydc.com/news/policy/immigration/article220982805.html.
[16] Wolgin, *supra* note 11, at 6.

by the proposed rulemaking will have predictable and quantifiable effects in dramatically expanding the family detention program.

B. The National Environmental Policy Act

NEPA, the "basic national charter for protection of the environment," requires agencies to undertake a careful assessment of the environmental impacts of their proposed actions.[17] NEPA's dual purpose is to ensure that federal agencies consider and understand the environmental impact of their actions and to provide the public with an opportunity for informed and meaningful participation in the agency's decision-making process.[18] Actions covered under NEPA include "new or revised agency rules, regulations, plans, policies, or procedures," such as this proposed rulemaking.[19] DHS and HHS have both adopted their own procedures that implement the requirements contained in NEPA and in the Council on Environmental Quality (CEQ) regulations implementing NEPA.[20]

NEPA imposes environmental review requirements that "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."[21] Pursuant to NEPA, federal agencies must prepare an Environmental Impact Statement (EIS) before approving "major Federal actions significantly affecting the quality of the human environment."[22] If it is unclear whether a federal action will significantly affect the environment, agencies prepare an Environmental Assessment (EA) to "provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact."[23] Whether undertaking an EA or an EIS, an agency's review must discuss the need for the proposed action, describe potential alternative approaches to meet the stated need, and assess the environmental impacts of each course of action, including direct, indirect, and cumulative impacts.[24] Ultimately, it is incumbent on the agency pursuant to NEPA to "take a 'hard look' at the environmental effects of their planned action."[25]

The CEQ regulations permit agencies to define categories of actions that may be excluded from NEPA review in limited circumstances.[26] These "categorical exclusions" are limited to categories of action "which do not individually or cumulatively have a significant effect on the environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."[27] Both DHS and HHS have created lists of

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[17] 42 U.S.C. § 4332; 40 C.F.R. § 1500.1(a).
[18] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
[19] *See* 40 C.F.R. § 1508.18 (defining "major Federal action").
[20] *See* U.S. Dep't. of Homeland Sec., *Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA)* (2014), [hereinafter "DHS Manual"]; U.S. Dep't of Health & Human Servs., *General Administration Manual Part 30, Environmental Protection*, §§ 30-20-00 to -50 and 30-50-00 to -80 (Feb. 25, 2000) [hereinafter "HHS Manual"].
[21] 40 C.F.R. § 1500.1(b).
[22] 42 U.S.C. § 4332(C).
[23] 40 C.F.R. § 1508.9(a)(1).
[24] *Id.* at §§ 1508.9(b), 1508.25.
[25] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373-74 (1989).
[26] 40 C.F.R. § 1508.4.
[27] *Id.*

categorical exclusions and adopted procedures for applying them, as discussed further below.[28] Even if an action arguably falls within a categorical exclusion, however, an agency may not apply that categorical exclusion if the action may have significant environmental effects.[29] In other words, to safeguard against the incorrect application of a categorical exclusion to an action that may have a significant environmental effect, agencies must have procedures in place to deal with "extraordinary circumstances in which a normally excluded action may have a significant effect."[30]

COMMENTS

I. DHS AND HHS MAY NOT INVOKE CATEGORICAL EXCLUSIONS FOR THIS PROPOSED RULE

Pursuant to its NEPA manual, DHS must determine that a particular action "clearly meet[s]" certain conditions before the agency can apply a categorical exclusion.[31] First, the action must "clearly fit[] the category described in the [categorical exclusion]."[32] Second, it must not be a piece of a larger action, as it "is not appropriate to segment a proposed action or connected actions by division into smaller parts in order to avoid a more extensive evaluation of the potential for environmental impacts under NEPA."[33] Finally, the agency must find that no extraordinary circumstances exist, as "[t]he presence of one or more extraordinary circumstances precludes the application of a [categorical exclusion] to a proposed action" and means that at least an EA is required.[34] Notably, "extraordinary circumstances" are simply circumstances "associated with the proposed action that might give rise to significant environmental effects requiring further analysis and document in an EA or EIS."[35]

Similarly, pursuant to HHS's guidelines for administering NEPA, that agency must determine both that the action falls within a defined categorical exclusion and that there are "no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal."[36] HHS likewise conceives of "extraordinary circumstances" as ones "in which a normally excluded action may have a significant environmental effect."[37] HHS further specifies that extraordinary circumstances include "[u]ncertain effects or effects involving unique or unknown risks" or "[u]nresolved conflicts concerning alternate uses of available resources."[38]

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[28] *See* DHS Manual at V-3 (procedure for applying categorical exclusions and list of extraordinary circumstances), A-1 at tbl.1 (list of DHS Categorical Exclusions); HHS Manual §§ 30-20-40 (required determinations before applying categorical exclusions and list of categorical exclusions), 30-50-25 (procedure for applying categorical exclusions).
[29] 40 C.F.R. § 1508.4.
[30] *Id.*
[31] DHS Manual at V-4.
[32] *Id.* at V-5.
[33] *Id.*
[34] *Id.*
[35] *Id.* at II-4.
[36] HHS Manual § 30-50-25.
[37] *Id.* § 30-50-30.
[38] *Id.*

In accordance with DHS's and HHS's own procedures for implementing NEPA, categorical exclusions cannot be applied to the proposed rule at issue. First, as set forth in greater detail below, none of the three cited categories of exclusions even apply to this rulemaking. Further, even if the rulemaking could be said to fall into a categorical exclusion, it will likely have significant environmental effects resulting from the expansion of the detention system that constitute the "extraordinary circumstances" invalidating the use of any categorical exclusion. Finally, for purposes of the DHS procedures implementing NEPA, it is also worth noting that this action is part of a larger action – the program of detaining children and families – which also invalidates the reliance on a categorical exclusion.[39]

A. The Proposed Rule Does Not Fit Into Any Categorical Exclusions

Both DHS and HHS claim that the proposed rule falls into categorical exclusions specified by each agency and therefore does not require further NEPA analysis.[40] In fact, as explained below, the claimed categorical exclusions plainly do not apply to the action at issue here.

DHS's preliminary determination is that the proposed rule falls within two categorical exclusions identified as A3(b) and A3(d) in the agency's list of categorical exclusions.[41] Categorical exclusion A3(b) applies to "[p]romulgation of rules . . . that implement, without substantive change, statutory or regulatory requirements."[42] Categorical exclusion A3(d) applies to "[p]romulgation of rules . . . that interpret or amend an existing regulation without changing

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[39] DHS's procedures implementing NEPA preclude the use of a categorical exclusion when an action is part of a larger action, because it "is not appropriate to segment a proposed action or connected actions by division into smaller parts in order to avoid a more extensive evaluation of the potential for environmental impacts under NEPA." DHS Manual at V-5. Here, the proposed rulemaking is part of a larger governmental policy of detaining children and families, a policy that the government resumed in 2014 when the number of children and women arriving from Central America to seek asylum increased. *See* John Burnett, *The U.S. Has a Long, Troubled History of Detaining Families Together*, Nat'l Pub. Radio (June 29, 2018), https://www.npr.org/2018/06/29/624789871/president-trumps-new-plan-isnt-to-separate-migrant-families-but-to-lock-them-up.

Recognizing that potentially significant impacts might result from resuming family detention on a large scale, in 2014, DHS prepared a Programmatic Environmental Assessment for the family detention program as a whole that evaluated "potential impacts to the human environment resulting from increased Departmental activities necessary to process, detain, and transport [unaccompanied minors] and families." *See* Dep't. of Homeland Sec., Programmatic Environmental Assessment for Departmental Actions to Address the Increased Influx of Unaccompanied Children and Families Across the Southwest Border of the United States (Aug. 14, 2014) [hereinafter "PEA"], https://www.regulations.gov/document?D=DHS-2014-0042-0003; Dep't. of Homeland Sec., Finding of No Significant Impact for Departmental Actions to Address the Increased Influx of Unaccompanied Children and Families Across the Southwest Border of the United States (Aug. 14, 2014) [hereinafter "FONSI"], https://www.regulations.gov/document?D=DHS-2014-0042-0002. The changes now proposed by DHS and HHS are plainly part of the existing detention program and policy. Accordingly, pursuant to its own guidelines implementing NEPA, DHS may not apply a categorical exclusion to this proposed action.

[40] *See* 83 Fed. Reg. at 45,523-24.

[41] *See id.* (citing DHS Manual at A-1, tbl.1).

[42] DHS Manual at A-1, tbl.1.

its environmental effect."[43] The agencies claim that the proposed rule "clearly fits" within these categorical exclusions, but fail to provide any rationale other than a general assertion that the proposed rule "would implement the relevant and substantive terms of the FSA, with such limited changes as are necessary to implement closely related provisions of the HSA [Homeland Security Act] and the TVPRA, [Trafficking Victims Reauthorization Act] and to ensure that the regulations set forth a sustainable operational model."[44]

Neither categorical exclusion applies, however. DHS's guidelines implementing NEPA require that, for a categorical exclusion to apply, "[t]he entire action" must "clearly fit[] within one or more of the [identified categorical exclusions]."[45] Here, categorical exclusion A3(b) does not apply because the proposed rule does not "implement, without substantive change, statutory or regulatory requirements." [46] In fact, it would implement a host of substantive changes to existing legal requirements set forth in the FSA, the HSA, and the TVPRA. For instance, the agencies acknowledge that "one of the most important changes from the literal text of the FSA would be the licensing requirement that applies to programs in which minors may be detained during immigration proceedings."[47] Contrary to the FSA's explicit requirement that unaccompanied minors be placed in licensed programs, defined as programs "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children,"[48] the proposed rule "would eliminate th[is] barrier to the continued use of [family residential centers], by creating an alternative federal licensing scheme for such facilities."[49] Creating a new and "alternative" licensing scheme that would allow detention in an entirely different type of facility is undoubtedly a substantive change to existing legal requirements.[50]

Categorical exclusion A3(d), which excludes from further NEPA analysis the promulgation of rules that "interpret or amend an existing regulation without changing its environmental effect," also does not apply. The proposed rule contemplates "additional or longer detention for certain minors" and the detention of entire family units in newly conceived, federally licensed family detention centers.[51] As set forth in detail in Section II, these changes to

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[43] *Id.* at V-5.
[44] 83 Fed. Reg. at 45,523.
[45] DHS Manual at V-5.
[46] *Id.* at A-1, tbl.1.
[47] 83 Fed. Reg. at 45,488.
[48] FSA ¶ 6
[49] 83 Fed. Reg. at 45,488.
[50] The proposed rule also contemplates substantive changes to the HSA and TVPRA. For instance, DHS proposed regulation 8 C.F.R. § 236.3(d) would authorize immigration officers to re-determine a child's unaccompanied alien child (UAC) status on each encounter. *See* 83 Fed. Reg. at 45,497. Such repeated determinations that would place into jeopardy the significant substantive and procedural protections afforded by UAC status are not contemplated by the TVPRA and fly in the face of the special concern for the unique vulnerability of unaccompanied immigrant children recognized in existing law. *See, e.g.*, 8 U.S.C. § 235(c)(6). In another example of the proposed rulemaking's departure from existing law, DHS proposed regulation 8 C.F.R. § 236.3(c)(1) introduces a new standard for age determinations--"the totality of the evidence and circumstances"--that is not reflected in either the TVPRA or the HSA, and in fact likely falls short of the TVPRA's requirement that "multiple forms of evidence" be considered in determining the age of an immigrant child. *See* 8 U.S.C. § 1232(b)(4).
[51] 83 Fed. Reg. at 45,488.

the existing legal requirements would have significant attendant environmental impacts—including pollution, habitat destruction, strain on community water and sewer infrastructure, and health impacts on detainees—which make categorical exclusion A3(d) inapplicable.

The agencies likewise wrongly claim that the proposed rule falls into an HHS categorical exclusion for "[g]rants for social services (e.g., support for Head Start, senior citizen programs or drug treatment programs)," because "ORR's state licensed facilities are operated under social service grants."[52] This categorical exclusion includes an exception for "projects involving construction, renovation, or changes in land use," which the agencies claim does not apply because ORR lacks construction authority.[53] HHS's attempt to evade further NEPA review through the invocation of this categorical exclusion fails.

Pursuant to HHS's own policy for implementing NEPA, a proposed action must "fall[] within" an exclusion category for the categorical exclusion to apply.[54] Here, the proposed HHS regulations go far beyond a "grant[] for social services" for state-licensed facilities and therefore do not "fall within" this categorical exclusion. ORR's authority and actions with respect to unaccompanied children plainly reach far beyond the granting of funds for social services to state-licensed facilities. By their own terms, the proposed HHS regulations address "the care, custody, and placement of UACs [Unaccompanied Alien Children]," and contemplate the agency taking actions that include making age determinations, transferring children between HHS facilities, making determinations about whether a child is an escape risk, and releasing children from HHS custody.[55] None of these actions are "grants for social services." Moreover, the proposed HHS regulations would establish an entirely new administrative procedure to make custody determinations for unaccompanied children in ORR custody.[56] Under this proposal, the Secretary of HHS "would appoint independent hearing officers to determine whether a[n Unaccompanied Alien Child], if released, would present a danger to community (or flight risk)."[57] Again, such agency action clearly falls well beyond the scope of a "grant[] for social services."[58]

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[52] 83 Fed. Reg. at 45,524.
[53] HHS Manual § 30-20-40(B)(2)(f); *see* 83 Fed. Reg. at 45,524.
[54] HHS Manual § 30-20-40(A)(1)(a).
[55] *See* 83 Fed. Reg. at 45,505-10 (describing the proposed HHS regulations).
[56] *See* 83 Fed. Reg. at 45,509 (describing proposed 45 C.F.R. § 410.810 and the proposed "810 Hearings").
[57] *Id.*
[58] Even if HHS's proposed action in this rulemaking fell entirely within the categorical exclusion for "grants for social services," which it plainly does not, the exception for "projects involving construction, renovation, or changes in land use" applies, regardless of whether ORR lacks construction authority. *See* HHS Manual § 30-20-40(B)(2)(f). In the agencies' own words, one of the most "prominent[]" provisions in the proposed rule is the establishment of "an alternative to the existing licensed program requirement for family residential centers," which would allow federal licensing of family residential centers. 83 Fed. Reg. at 45,486. If implemented as proposed, in other words, the rule would expand the number of detention facilities for migrants and refugees, not to mention "result in additional or longer detention." *Id.* at 45,488. Construction of additional detention facilities, expansion of existing facilities, and attendant changes in land use are therefore reasonably foreseeable results of this action, regardless of whether ORR itself will undertake the construction.

B. Because of the Proposed Rule's Likely Environmental Impacts, Extraordinary Circumstances Exist and Categorical Exclusions Cannot Be Applied

Even if the agencies were correct in their determination that the proposed action falls under the cited categorical exclusions, it would still be unlawful to apply categorical exclusions to this proposed agency action because of its significant environmental effects. Where an action that might otherwise be covered by a categorical exclusion may have significant impacts, "extraordinary circumstances" preclude application of any categorical exclusion.[59]

As DHS's NEPA guidelines specify, "extraordinary circumstances" are simply circumstances "associated with the proposed action that might give rise to significant environmental effects requiring further analysis and document in an EA or EIS."[60] Extraordinary circumstances could include "a potentially significant effect on public health or safety," "a potentially significant effect on an environmentally sensitive area,"[61] or involve situations "where it is reasonable to anticipate a cumulatively significant impact on the environment."[62] As described below in Section III, the proposed rule will have potentially significant environmental impacts related to the tremendous growth in detention capacity that will be required to accommodate the additional and extended detention of children and families that the rule will enable. These potentially significant effects include well-documented and reasonably foreseeable impacts on the public health and safety of children and families, impacts on environmentally sensitive areas as a result of the construction and expansion of family detention centers concentrated near the southern border, as well as cumulatively significant impacts.

II. DHS AND HHS MUST PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED RULE

It would be unlawful for DHS and HHS to finalize the proposed rule without first completing an EIS, which is required for "major Federal actions significantly affecting the quality of the human environment."[63] Under NEPA, federal agencies are to take environmental considerations into account in their decision-making "to the fullest extent possible."[64] NEPA accordingly requires federal agencies to consider fully the environmental consequences of the

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[59] *See* 40 C.F.R. §§ 1508.4, 1508.27. *See also U.S. v. Coal. for Buzzards Bay*, 644 F.3d 16 (1st Cir. 2011) (reversing Coast Guard's invocation of categorical exclusion where extraordinary circumstances were present); *California ex rel. Lockyer v. U.S. Dept. of Ag.*, 575 F.3d 999 (9th Cir. 2009) (striking down application of categorical exclusion for administrative procedures); *Reed v. Salazar*, 744 F. Supp. 2d 98, 116 (D.D.C. 2010) ("However, this Court agrees that where there is substantial evidence in the record that an extraordinary circumstance might apply, an agency may act arbitrarily and capriciously by failing to explain its determination that a categorical exclusion is applicable.").

[60] DHS Manual at II-4; *see also* HHS Manual § 30-50-30(2) (describing "extraordinary circumstances" as ones "in which a normally excluded action may have a significant environmental effect").

[61] DHS Manual at V-6.

[62] HHS Manual § 30-20-40(A)(1)(b).

[63] 42 U.S.C. § 4332(C).

[64] 42 U.S.C. § 4332; *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976); 40 C.F.R. § 1500.2.

proposed action and reasonable alternatives,[65] including effects that are "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.[66]

Direct impacts are "caused by the action and occur at the same time and place;" indirect impacts, are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable;" and cumulative impacts are impacts on the environment that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertake such other actions."[67] Indirect impacts include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."[68]

A. The Proposed Rule Will Have Significant Impacts on the Human Environment

The term "significantly" in NEPA requires considerations of "both context and intensity."[69] Intensity "refers to the severity of impact,"[70] and the CEQ regulations identify ten factors that "should be considered in evaluating intensity," including "[w]hether the action is related to other actions with individually insignificant but cumulatively significant effects," "[t]he degree to which the proposed action affects public health or safety," "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," and "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."[71] As outlined below, a number of these factors weigh in favor of a determination that the proposed rule will significantly affect the environment, thereby warranting the preparation of an EIS.[72]

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[65] *See* 40 C.F.R. § 1502.16.
[66] 40 C.F.R. § 1508.8.
[67] *Id*. §§ 1508.7, 1508.8(a), (b).
[68] 40 C.F.R. § 1508.8(b); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (finding that the agency violated EPA when it did not consider induced development resulting from a transportation project). As these regulations make clear, the fact that construction of new detention capacity may be completed by private actors does not excuse DHS and HHS from considering those impacts in an EIS, whether as indirect or cumulative effects. In other words, whether they are ultimately built by DHS, HHS, another federal agency, a state or local government, or a private prison company, the agencies' EIS must consider the impacts of any construction of new detention centers induced by the proposed rule as part of the rule's overall impact on the human environment.
[69] 40 C.F.R. § 1508.27.
[70] *Id*. § 1508.27(b).
[71] *Id*. § 1508.27.
[72] Courts have invalidated Findings of No Significant Impact on the basis of as few as two of these intensity factors. *See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001) (finding the uncertainty and controversy factors invalidated the FONSI); *Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30 (D.D.C. 2000) (finding the ecologically critical affected area and amount of controversy warranted a finding of significance).

First, the proposed rule will undoubtedly result in a cumulatively significant impact on the human environment —that is, an impact on the environment that results from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." Because the proposed rule is designed to allow more children and families to be detained for a longer period of time, its implementation will likely require an enormous growth in detention capacity. In addition, the establishment of an alternative licensing program is designed to allow feder[73]al licensing of additional family detention centers.[74] In other words, the rule would increase the number of detention facilities for migrants and refugees, and therefore require construction or acquisition of additional detention facilities or expansion of existing facilities.

The construction and expansion of detention centers across the Southwest to accommodate this policy would have significant environmental effects, some of which have been previously identified by DHS, including air pollution, water pollution, land use changes, increased flooding risk, and destruction of habitat.[75] Additionally, surrounding communities will experience burdens on local drinking water resources and sewage and energy infrastructure, and increased traffic and disturbance of public and private land.[76] It is reasonable to expect that the impacts of multiple new and expanded facilities, added to the present impact of existing family detention centers and other facilities that house immigrant children and families, will have a significant impact on the human environment. Because "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment," an EIS must be prepared.[77]

An EIS is warranted also because of "[t]he degree to which the proposed action affects public health or safety."[78] The rule can be expected to have significant impacts on the health of children and families who will be detained for extended periods of time if this rule is finalized. Under NEPA, the agencies must consider these human health impacts.[79] Studies of detained children found that most children, since being detained, reported symptoms of depression, sleep problems, loss of appetite, and somatic complaints such as headaches and abdominal pains; specific findings of concern include inadequate nutritional provisions, restricted meal times, and weight loss.[80] Studies have shown that detention negatively impacts the mental health of detained

[73] 40 C.F.R. § 1508.7.
[74] 83 Fed. Reg. at 45,486
[75] *See* PEA, *supra* note 39.
[76] *Id.*
[77] 40 C.F.R. § 1508.27.
[78] *Id.*
[79] *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771 (1983) ("All the parties agree that effects on human health can be cognizable under NEPA, and that human health may include psychological health."); *see also* 40 C.F.R. §§ 1508.8; 1508.27(b)(2).
[80] Kimberly A. Ehntholt et al., *Mental Health of Unaccompanied Asylum-Seeking Adolescents Previously Held in British Detention Centres*, 23 Clinical Child Psychol. & Psychiatry 238 (2018) [attached as Attachment 2]; Ann Lorek et al., *The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study*, 33 Child Abuse & Neglect 573 (2009) [attached as Attachment 3]; Fabricio E. Balcazar, *Policy Statement on the Incarceration of Undocumented Migrant Families*, 57 Am. J. Community Psychol. 255 (2016) (summarizing research) [attached as Attachment 4].

children and families.[81] In a retrospective analysis, children were reported to have tenfold increase in psychiatric disorders after detention.[82] Moreover, the damage persists even after children are no longer detained.[83] Detention has a negative impact on mental health in adults as well. In a 2003 study, 86% of individuals in immigration detention reported experiencing symptoms of depression, 77% experienced anxiety, and 50% experienced Post-Traumatic Stress Disorder.[84] Most of those individuals attributed their mental illness symptoms to being detained, and reported that symptoms worsened significantly during their detention.[85]

A lack of access to adequate health care while in detention further exacerbates these health problems. Family detention centers, all located in remote areas far from urban centers, have consistently failed to recruit adequate health staff, such as pediatricians, child and adolescent psychiatrists, and pediatric nurses.[86] Nor have detention centers provided trauma-informed care, which is the care standard recommended for all detention settings and especially for traumatized children, such as the children arriving from Central America.[87] In fact, access to mental health treatment in particular has been very limited or nonexistent in detention centers.[88] In addition, existing detention centers often fail to provide adequate translation services, especially for those who speak indigenous languages; medical observers have reported instances where translation was not available during medical emergencies.[89]

These health impacts are closely tied to the physical environments of the detention centers themselves. For instance, DHS has documented multiple serious finger injuries to children resulting from housing families in minimally adapted maximum security facilities with heavy duty locks and doors.[90] Many facilities lack medical space as well as residential space; in one case, the gymnasium was used as an overflow medical space.[91] Detention facilities and processing centers under the authority of DHS have exposed children to constant illumination, which causes sleep deprivation and affects circadian rhythms that are crucial for healthy development.[92] Further, in current family detention facilities, families are typically placed in rooms that accommodate six people at a time and where children share rooms with unrelated

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[81] *See, e.g.*, Kathleen O'Connor et al., *No Safe Haven Here: Mental Health Assessment of Women and Children Held in U.S. Immigration Detention* (2015), [attached as Attachment 5].
[82] Zachary Steel et al., *Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia*, 28 Australian & N.Z. J. Pub. Health 527 (2004) [attached as Attachment 6].
[83] Trine Filges et al., *The Impact of Detention on the Health of Asylum Seekers: A Systematic Review*, 28 Res. on Soc. Work Prac. 399 (2016) [attached as Attachment 7].
[84] Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* 2 (2003) [attached as Attachment 8].
[85] *Id.*
[86] Dr. Scott Allen & Dr. Pamela McPherson, Letter to the Senate Whistleblowing Caucus 4 (July 17, 2018) [attached as Attachment 9].
[87] *Id.* at 5.
[88] Physicians for Human Rights, *supra* note 84, at 8.
[89] Allen & McPherson, *supra* note 86, at 5.
[90] *Id.* at 4.
[91] *Id.*
[92] Charles A. Czeisler, *Housing Immigrant Children — The Inhumanity of Constant Illumination*, 379 New Eng. J. Med. e3 (2018) [attached as Attachment 10].

adults, including sleeping, dressing, and using the restroom with no door or privacy from adults.[93]

In addition to these problems with the physical environment that may be typical of many facilities, some existing facilities are sited in locations that can be expected to have impacts on the health of detained individuals. For instance, at least one existing family detention facility has been constructed in an active fracking field, where air pollution has been reportedly so severe that it was too dangerous for state regulators even to measure.[94] Other detention facilities have been constructed near Superfund sites,[95] and still others may be constructed on military bases with documented environmental contamination.[96]

The impacts of the proposed rule rise to the level of significance also because of"[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial."[97] Impacts are controversial where there is "a substantial dispute [about] the size, nature, or effect" of the action.[98]

> A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency's conclusions. NEPA then places the burden on the agency to come forward with a well-reasoned explanation demonstrating why those responses disputing the [agency's] conclusions do not suffice to create a public controversy based on potential environmental consequences. The term well reasoned explanation is simply a less direct way of saying that the explanation must be convincing.[99]

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[93] Human Rights First, *Health Concerns at the Berks Family Detention Center* (2016) [attached as Attachment 11].

[94] Existing immigration detention facilities have been located in areas that endanger the health of the people detained there, leading to reported health impacts that are specific to those facilities. For example, a family detention center in Dilley, Texas is located in an active fracking field, the Eagle Ford Shale, where local residents reported symptoms that included persistent nausea, headaches, nosebleeds, rashes, and respiratory problems after fracking began in the area. *See* Trisha Trigilio et al., Univ. of Tex. Civil Rights Clinic, Letter to Teresa R. Polman, Dir. Sustainability & Envtl. Programs, DHS, and Susan Bromm, Dir. Office of Fed. Activities, EPA 7, 8 (Oct. 30, 2014) [attached as Attachment 12]; Earthworks, *Reckless Endangerment While Fracking the Eagle Ford* (Sept. 2013) [attached as Attachment 13].

[95] The Northwest Detention Center in Tacoma, Washington, abuts a Superfund site known as the Tideflats or "Tar Pits" where hazardous waste was dumped for years. *See* Melissa Hellmann, *Incarcerated and Infirmed: How Northwest Detention Center Is Failing Sick Inmates*, Seattle Wkly. (Oct. 10, 2018), http://www.seattleweekly.com/news/incarcerated-and-infirmed-how-northwest-detention-center-is-failing-sick-inmates/. People detained there have reported "exacerbated asthma, respiratory illnesses, and rash outbreaks that could be linked to the center's proximity to environmental hazards." *Id.*

[96] DHS may be considering housing up to 12,000 migrant children and families on military bases with documented environmental contamination. *See* Spencer Ackerman, *As Caravan Advances, Pentagon Prepares to Use Two Bases for Migrant Detention*, Daily Beast (Nov. 2, 2018), https://www.thedailybeast.com/as-caravan-advances-pentagon-prepares-to-use-two-bases-for-migrant-detention.

[97] 40 C.F.R. § 1508.27.

[98] *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir.1998); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973).

[99] *NPCA*, 241 F.3d at 736 (citations and internal quotation marks omitted).

Here, DHS has previously concluded that its family detention program "would have beneficial impacts to the health and safety of unaccompanied alien children, family units, DHS personnel, and the surrounding communities . . . ."[100] The evidence provided above about the health and safety impacts of detention, including the attached studies and scientific literature, in addition to the comments submitted by other parties, including the American Academy of Pediatrics, plainly casts serious doubt on this conclusion. This apparent controversy weighs in favor of an EIS that fully explores and considers these impacts.

Finally, an EIS is warranted because of "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."[101] By its own terms, the proposed rule terminates the *Flores* agreement and establishes new requirements for the treatment of immigrant children and families, which will include prolonged detention. The proposed action therefore necessarily "establish[es] a precedent for future actions with significant effects," which too weighs in favor of preparing an EIS.

B. The EIS Must Analyze Alternatives to Detention

In preparing an EIS, agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action.[102] This alternatives analysis "is the heart of the environmental impact statement" and "should present environmental impacts of the proposal in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and public."[103] Agencies are required to "devote substantial" treatment to each alternative, including "reasonable alternatives not within the jurisdiction of the lead agency."[104] "The existence of a viable but unexamined alternative renders an alternatives analysis inadequate."[105]

In the case of this proposed rule, an EIS must include consideration of non-detention alternatives. Alternatives to the proposed action of expanding the family detention system include, for example, expansion of monitoring programs, such as ICE's existing Intensive Supervision Appearance Program II (ISAP II), under which participants are managed based on risk profile, with options ranging from a full-service program including case management to a technology-only program.[106] ISAP II relies on methods such as biometric voice recognition software, employer verification, unannounced home visits, and in-person reporting, and has an estimated cost of 17 cents to $17 per person per day, compared to the estimated cost of $116 per

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[100] PEA at 25.
[101] 40 C.F.R. § 1508.27.
[102] *Id.* § 1502.14.
[103] *Id.*
[104] *Id.*; *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) (finding that reasonable alternatives need not be "limit[ed] to measures the agency or official can adopt").
[105] *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) (internal quotations omitted).
[106] Julie Myers Wood & Steve J. Martin, *Smart Alternatives to Immigrant Detention*, The Washington Times, Mar. 28, 2013, http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/.

person per day for detention.[107] Another reasonable alternative that should be considered in an EIS is the establishment of community support programs, which offer case management and referrals to services for participants, and have already been piloted by Lutheran Immigration and Refugee Service and the U.S. Conference of Catholic Bishops in cooperation with ICE.[108] These non-detention alternatives are less costly than the physically detaining immigrants and would avoid or significantly reduce the anticipated environmental effects, including human health effects, associated with detaining concentrated populations.

CONCLUSION

For all the reasons set forth here and in comments presented by other groups,[109], the Public Interest Groups urge the agencies to reconsider and withdraw this proposal to weaken the *Flores* settlement protections for children and to vastly expand the detention of immigrant families and children. In these comments, the Public Interest Groups highlight the need for the agencies to comply with NEPA, which prohibits reliance on categorical exclusions for this proposed action. In light of the rule's significant impacts on the health of detained children and families, on communities, and on the surrounding environment, it would be unlawful for the agencies to finalize this rule without undertaking an EIS.

Thank you for the opportunity to comment. Please feel free to contact us with any questions.

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National Hispanic Medical Association
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[107] *Id.*; ACLU, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock Up* (n.d.) [attached as Attachment 14].
[108] ACLU, *supra* note 107; Lutheran Immigration and Refugee Service, *From Persecution to Prison: Child and Family Detention* (n.d.) [attached as Attachment 15].
[109] *See* comments listed *supra* note 4.

LIST OF ATTACHMENTS