

The National Environmental Policy Act (NEPA): What Does NEPA Have to Do with Immigration?

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The National Environmental Policy Act (NEPA) was signed into law by President Richard Nixon on January 1, 1970. It is one of the most far-reaching federal laws, applicable to almost every area of public policy in the United States, and that application goes beyond a strict interpretation and application of statutory law.

NEPA requires the federal government to “encourage productive and enjoyable harmony between man and his environment.” On the NEPA.gov homepage it says that the legislation is the “‘Magna Carta’ of Federal environmental laws.”ⁱ This all may sound like fanciful descriptions of a federal statute, but NEPA really is one of the most sweeping pieces of legislation in American history, and as such it can cause great controversy with how and when it’s applied; and when it’s ignored by the executive branch for political or ideological reasons.

Practically speaking, according to the EPA NEPA:

requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach. Specifically, all federal agencies are to prepare detailed statements assessing the environmental impact of and alternatives to major federal actions significantly affecting the environment. These statements are commonly referred to as Environmental Impact Statements (EIS) and Environmental Assessments (EA).ⁱⁱ

This means assessing how the actions of the federal government will affect things like water or air quality, or the destruction of wildlife habitats, paying special attention to potential impacts on threatened or endangered species. And now the federal government must consider how greenhouse gases affect climate change under NEPA guidelines.ⁱⁱⁱ

Before NEPA, the government most often chose to carry out projects, such as building roads or dams, in the most expedient way -- or in the way that most benefitted large political donors. NEPA in many respects has been effective in accomplishing what it was supposed to do, even if, as with anything the federal government does, there are legitimate criticisms to be made about how it can be better utilized, or how federal agencies should stick to the letter of the law and not their own interpretations, which vary widely and change depending on who is in charge.

However, much of the criticism can be directed at Congress. While that body does have the sole plenary power to pass legislation, it can also ensure that the executive branch carries out those laws as intended. Yet, Congress has abnegated that responsibility to bureaucrats, many of whom are highly partisan, and to the federal courts, whose composition and jurisdiction are under the control of the legislative branch. One has only to look to immigration to see an outstanding example. Department of Homeland Security Secretary Alejandro Mayorkas (appointed by President Biden) has declared that he will decide who is and who is not subject to immigration law.^{iv} While Secretary Mayorkas was impeached in February 2024 by the House of Representatives, Congress still voted two months later to fully fund the policies Mayorkas initiated in violation of existing law, essentially acceding to his insult to their constitutional prerogative.

What Does NEPA Have to Do with Immigration?

Just as the federal government is failing to enforce laws against illegal immigration, the federal government is failing to abide by NEPA’s requirement that “all federal agencies are to prepare” an EIS to assess the “environmental impact of and alternatives to major federal actions significantly affecting the environment.” This has been the case since 1970.

Consider how immigration (through direct immigration and births to immigrants in the U.S.) is the primary driver of U.S. population growth and will contribute to almost all population growth in the

coming decades. Obviously, immigration has led to greater demand for roads leading to more runoff from paved surfaces; caused much higher levels of traffic and resultant pollutants; contributed to urban sprawl and the loss of wildlife habitat; increased energy demand; strained water supplies, especially in the western states; and it has led to greater greenhouse gas emissions. All of this is because of federal actions on immigration policy.

Congress has set annual limits that have led to the admission of over one million permanent residents annually since 1990, and the executive branch has failed, or in the case of President Biden, absolutely refused, to enforce immigration laws. This has resulted in an illegal alien population that may approach 20 million by the end of President Biden's term in January 2025, with total net migration to the United States over nine million just since Biden was elected president in November 2020.^v

Not only has the federal government never prepared an EIS on immigration as required by NEPA, it has provided no adequate explanation for why it has not done so. In fact, the federal government's position is that immigration has no effect on the U.S. environment, so NEPA doesn't apply. This violation of NEPA is not as obvious as the blatant disregard of immigration law. Many Americans are likely unaware of NEPA's existence, but there are ongoing efforts to force the federal government to comply with the requirement set down by NEPA when it comes to immigration.

In 2016, the Immigration Reform Law Institute (IRLI) sued DHS (*Whitewater Draw*) alleging its policies failed to take into account NEPA requirements.^{vi} Julie Axelrod, IRLI's lead counsel at the time said, "Our lawsuit will demonstrate that legal and illegal immigration have a very significant impact on the environment, which DHS has spent the last 46 years ignoring."

DHS' position in this case is that it is in the agency's discretion to decide whether NEPA applies to immigration policy. And in DHS's discretion, adding tens of millions of people to the U.S. through the actions of the federal government has no significant effects on the environment. It also maintains that U.S. citizens don't have standing (meaning a party can demonstrate it has suffered sufficient harm and the case can proceed) to sue a federal agency even if that agency's failure to follow the law has caused demonstrable harm to U.S. The Ninth Circuit Court agreed with DHS and the appeals court upheld that decision.

In 2020, the Center for Immigration Studies (CIS) filed suit (*Massachusetts Coalition for Immigration Reform v. U.S. Department of Homeland Security et. al.*) in the D.C. District Court on behalf of the Massachusetts Coalition for Immigration Reform (MCIR) and four other individual clients for "promulgating NEPA procedures...that failed to consider any aspect of USCIS' entire mission; that is, the regulation of the conditions by which foreign nationals enter and remain in the United States."^{vii} The final hearing in that case concluded in August 2024 and the judge's decision is pending.

NEPA and Border Protection

Most who closely follow the immigration debate will be aware of the efforts by environmentalist to block the construction of fencing along the U.S.-Mexico border, arguing that doing so damages sensitive flora and impedes wildlife migration. Groups like the Center for Biological Diversity sued the Trump administration claiming it lacked authority to build the wall in sensitive areas of the border (unfortunately the Center completely ignores the damage caused at the border by illegal immigration and refuses to acknowledge habitat loss in U.S. due to mass immigration.)^{viii}

It is true that some groups who oppose border fencing use environmental arguments to distract from the fact that their political agenda is one of open borders. But whatever one thinks about President Trump's "wall," or any barriers along the southern border designed to deter illegal immigration, there are serious and sincere arguments put forth by environmentalists who have genuine concerns.^{ix} However, NEPA and

other environmental regulations that might prevent the building of barriers have been explicitly waived by Congress because it determined that national security was of paramount concern.^x The courts accordingly upheld the Trump Administration's authority to erect a border fence.

What has not been addressed is the damage caused by illegal border crossers, which is part of the reason the lawsuits mentioned above were filed. This problem has been documented for years. In 2018, CIS discussed a report by the Arizona Department of Environmental Quality (ADEQ).^{xi} ADEQ estimates that over 2,000 tons of trash are discarded at the Arizona border every year. As a consequence, the department established a website entitled "Arizona Border Trash" in 2012 to coordinate and keep track of the state's trash cleanup operations. According to ADEQ, each ton of trash requires landfill fees of \$37 to \$49, which are footed by Arizona taxpayers. That does not include fees for materials, transportation, or labor. ADEQ further estimates that each border-crosser leaves an average of six to eight pounds of trash behind.

In May 2021, the House Natural Resources Committee Republicans held a forum conducted by Rep. Paul Gosar (R-Ariz.) on the environmental consequences of the current border crisis and discussed the accumulated effect of illegal border crossing over the last several decades.^{xii} Trespassing across both public and private lands, including protected pristine areas, those seeking to cross illegally into the U.S. damage and destroy threatened plant species and wildlife habitats, and leave tons of trash along their routes.

During the meeting, Rep. Westerman (R-Ark.) said that 100 abandoned cars and 500 tons of trash were found in in the Buenos Aires National Wildlife Refuge (Arizona) in just one year. And that 30 out of 77 investigations identified illegal border crossers as responsible for starting wildfires on federal lands.

Also in 2021, Arizona Attorney General Mark Brnovich, a Republican, filed his own lawsuit against the Biden Administration, specifically tying President's Biden decision to halt construction of a border wall with ongoing ecological damage caused by unchecked illegal immigration.

The press release by the office Arizona AG states in part:

NEPA protects the environment by requiring federal agencies to carefully weigh environmental considerations before taking any major federal action. As the drafters of NEPA recognized, population growth has significant environmental impacts. In its complaint, the AGO [Attorney General's Office] argues that DHS and other federal officials did not provide environmental impact statements or environmental assessments when DHS abruptly halted ongoing border wall construction and also began permitting entry of additional migrants by ending the 'Remain in Mexico' policy.^{xiii}

Brnovich's lawsuit was important because a federal court is more likely to grant a state standing in court than it would to a private party in a case like this. Further, a state attorney general's office has the resources and legal staff to pursue the case long-term. The lawsuit was also controversial because it was predicated on the need to build a barrier along the U.S.-Mexico border. Ultimately, after an initial setback in federal court, Brnovich's successor in the Attorney General's office dropped the case.

What's Next?

A recent event that may give new life to legal challenges that are trying to force DHS to conduct an EIS on immigration policy is a June 2024 Supreme Court decision overturning what is known as the Chevron Doctrine (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 1984).^{xiv} Under Chevron, if Congress has not explicitly addressed an issue in dispute regarding regulations put in place by a federal government agency, courts generally must side with the agency's interpretation of the law. In overruling

Chevron, the Supreme Court severely curtailed executive branch agencies from interpreting laws and which will likely result in the courts taking a more active role in determining how ambiguity in federal law will be resolved – of course Congress can always clarify the meaning of any law by amending it.

The overruling of Chevron is seen as a massive jolt to the federal bureaucracy. Interestingly, the Chevron case was about environmental protections, specifically a challenge to the Environmental Protection Agency’s interpretation of the Clean Air Act of 1963. Will the federal courts rule differently on NEPA cases now that the Chevron Doctrine is no longer in place? That remains to be seen, but it is likely to have little if any effect on the MCIR v. DHS NEPA case. A big difference in that lawsuit is that the federal agency isn’t being sued for how it is regulating a Congressional statute but for not complying with its regulatory obligation under statutory law.

Further, there were no immigration cases previously dismissed by federal judges on the basis of Chevron, so there is no precedent that directly affects the MCIR v. DHS suit. Theo Wold, the former Solicitor General of Idaho, now at the Claremont Institute, is cautious about overstating the post-Chevron effect, arguing that it will transfer “interpretive power over federal regulations away from the administrative state [to] federal judiciary.”^{xv} How this will play out overall is unknown, and if it will influence the Ninth Circuit judge’s opinion in the current NEPA case is yet to be seen. Ultimately, as Wold writes, “unless and until Congress chooses to legislate more specifically and with fewer statutory ambiguities,” regulatory power will reside within another branch of the federal government.

The effects of mass migration on the U.S. environment are clear, and these effects will continue. It is uncertain when the federal government will, if ever, acknowledge these effects and comply with its obligations to make them known to the American people.

Update:

On September 27, 2024, a federal judge^{xvi} for the first time held the Department of Homeland Security (DHS) accountable for ignoring the National Environmental Policy Act (NEPA) when taking immigration actions that “unsecured the border almost overnight.”

In his opinion in *Massachusetts Coalition for Immigration Reform v. Department of Homeland Security, et. al.*, Judge McFadden found the plaintiff’s witnesses credible, holding that former Chief of the U.S. Border Patrol Rodney Scott had credibly determined that, “Overnight, the United States ‘went from having a very secure border’ back to a policy of ‘catch and release’ without any ‘physical deterrent’ to illegal crossings.” The Judge also concluded: “Presidential administrations enjoy significant discretion in the enforcement of our Nation’s immigration laws and protection of our borders. But this latitude does not license violations of other laws,” such as NEPA.

Therefore, the court found that DHS should not be ignoring the environmental effects of out-of-control immigration and should be required to comply with NEPA to control reckless and environmentally destructive policies. Otherwise, through excessive and relentless population growth, America’s environment will continue to suffer from resource shortages (e.g., diminished drinking water, wildlife habitat, farmland, biodiversity) and a loss of resiliency to natural weather events (e.g., droughts, floods, wildfires, hurricanes).

- ⁱ NEPA.gov, “National Environmental Policy Act,” <https://ceq.doe.gov/>.
- ⁱⁱ United States Environmental Protection Agency, “What is the National Environmental Policy Act?” <https://www.epa.gov/nepa/what-national-environmental-policy-act>.
- ⁱⁱⁱ Executive Office of the President, Council on Environmental Quality, “Memorandum for Heads of Federal Departments and Agencies,” August 1, 2016, https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.
- ^{iv} Stephan Dinan, “DHS to issue new deportation rules, DOJ tells federal judge,” *The Washington Times*, June 7, 2021, <https://www.washingtontimes.com/news/2021/jun/7/dhs-issue-new-deportation-rules-doj-tells-federal-/>.
- ^v Paul Kiernan, “How Immigration Remade the U.S. Labor Force: A historic influx of migrants has changed the size, makeup and outlook of the U.S. labor market and the economy,” *The Wall Street Journal*, September 4, 2024, <https://www.wsj.com/economy/how-immigration-remade-the-u-s-labor-force-716c18ee>.
- ^{vi} Immigration Reform Law Institute, “IRLI Responds to DHS on the Environmental Impact of Immigration,” Press Release, February 27, 2018, <https://irli.org/irli-responds-to-dhs-on-the-environmental-impact-of-immigration/>.
- ^{vii} Julie Axelrod, “MCIR v. USCIS,” Center for Immigration Studies, March 22, 2021, <https://cis.org/Environmental-Lawsuits/MCIR-v-USCIS>.
- ^{viii} “No Border Wall,” Center for Biological Diversity, https://www.biologicaldiversity.org/campaigns/border_wall/.
- ^{ix} Gary Wockner, “Can environmentalists be against the border wall and still oppose illegal immigration?,” *The Washington Times*, January 8, 2021, <https://www.washingtontimes.com/news/2021/jan/8/can-environmentalists-be-against-the-border-wall-a/>.
- ^x Matthew S. Schwartz, “Government Can Waive Environmental Laws To Build Border Wall Prototypes, Court Rules,” NPR, February 12, 2019, <https://www.npr.org/2019/02/12/693777466/government-can-waive-environmental-laws-to-build-border-wall-prototypes-court-ru>.
- ^{xi} “Arizona Border Trash,” Arizona Department of Environmental Quality, Office of Border Environmental Protection: Waste, <https://legacy.azdeq.gov/obep/waste.html>.
- ^{xii} “House Natural Resources Republicans Biden Border Crisis Forum,” House Committee on Natural Resources GOP, MAY 27, 2021, <https://www.youtube.com/watch?v=W1V0-CymPsc>.
- ^{xiii} Arizona Attorney General, “Attorney General Mark Brnovich Sues Federal Government Over Environmentally Harmful Immigration Decisions,” Press Release, April 12, 2021, <https://www.azag.gov/press-release/attorney-general-mark-brnovich-sues-federal-government-over-environmentally-harmful>.
- ^{xiv} SCOTUS blog, Loper Bright Enterprises v. Raimondo, <https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo/>.
- ^{xv} Theo Wold, “The Leviathan Has Not Been Tamed,” September 12, 2024, <https://tomklingenstein.com/about/>.
- ^{xvi} Julie Axelrod, “CIS Prevails in Challenge to Biden-Harris Immigration Actions,” Center for Immigration Studies, September 30, 2024, <https://cis.org/Axelrod/CIS-Prevails-Challenge-BidenHarris-Immigration-Actions>.

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