



SCHOOL OF LAW  
THE UNIVERSITY OF TEXAS AT AUSTIN

*Civil Rights Clinic • 727 E. Dean Keeton St. • Austin, TX 78705 • 512-232-2698 • FAX 512-232-0800*

October 30, 2014

Teresa R. Pohlman  
Director  
Sustainability and Environmental Programs  
Department of Homeland Security  
245 Murray Lane SW, Mail Stop 0075  
Washington, DC 20528-0075

Susan Bromm  
Director  
Office of Federal Activities  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Environmental Impact of Family Detention Center in Dilley, Texas

Dear Dr. Pohlman and Ms. Bromm:

The Department of Homeland Security is building a family detention center of unprecedented size that will impact the human environment in ways DHS has failed to consider. Because DHS hastily approved this facility without the careful assessment and meaningful public involvement required by the National Environmental Policy Act, DHS and the public are left ignorant of the serious negative consequences of this action. We request that DHS withdraw its finding of no significant impact and prepare an environmental impact statement, and that the EPA support our request and take the opportunity to review and comment on DHS's analysis and the environmental impacts of the facility.

In late August, DHS approved construction of a 2400-person family detention facility in Dilley, Texas, with a finding of no significant impact. DHS's assessment of the potential impact of this detention center was deficient because it failed to consider:

- Drawdown and Potential Contamination of Local Aquifer (below at II.A.1)
- Strain on Water Utilities in Town of Dilley (II.A.2)
- Risk of Permanent Hearing Loss for Detained Mothers and Children (II.A.3)
- Risk of Respiratory and other Illness for Detained Mothers and Children (II.A.4)
- Controversy Over Effects of Family Detention on Mothers' and Children's Health (II.A.5)
- Commitment of Millions of Dollars to Policy of Presumed Detention for Mothers and Children (II.A.6)
- High Likelihood of Violating Constitutional Rights and Other Laws (II.A.7)
- Humane Alternatives to Widespread Family Detention (II.B)

These deficiencies were compounded by the fact that DHS acted without any meaningful public notice of this dramatic expansion to family detention (below at III). Because of these flaws in DHS's assessment, there remain serious questions about whether this facility will have a significant impact on the human environment.

The facility is slated to open in December. In light of the deficiencies outlined below, DHS should withdraw its finding of no significant impact and prepare an environmental impact statement. The EPA should support this request so that it has the opportunity to review and comment on both the adequacy of DHS's analysis and the environmental impacts of the Dilley facility itself.

## **I. Legal Standard under National Environmental Policy Act**

The National Environmental Policy Act requires federal agencies to study the potential environmental impact of their actions. NEPA's purpose is to ensure that agencies are informed about the environmental impact of their actions, and to make that information available to the public.<sup>1</sup> To serve these purposes, NEPA requires agencies to complete a detailed environmental impact statement before undertaking a "major Federal action[] significantly affecting the quality of the human environment."<sup>2</sup> An agency does not have to prepare a full environmental impact statement if, on the basis of a simpler environmental assessment (EA), the agency determines that the proposed action will not have a significant impact on the environment.<sup>3</sup> That determination is called a finding of no significant impact.

An EA must discuss the need for the proposed action, potential alternative ways of handling that need, and the environmental impact of each possible course of action.<sup>4</sup> The discussion must consist in evidence and analysis sufficient to support a finding of no significant impact.<sup>5</sup> An EA is sufficient only if it discusses the direct, indirect, and cumulative impacts of the proposed action. "Cumulative impacts" means the impact of the proposed action considered in conjunction with past, present, and reasonably foreseeable future actions by any person or agency.<sup>6</sup>

Determining whether an impact is "significant" requires consideration of many different factors defined by regulation. These factors are divided into concerns about the context and intensity of the proposed action.<sup>7</sup> The relevant context is not limited to local effects—agencies are required to

---

<sup>1</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>2</sup> 42 U.S.C. § 4332(C); see *In re Katrina Canal Breaches Litig.* 696 F.3d 436, 449 (5th Cir. 2012) ("[F]ederal agencies must, except in certain qualifying situations, complete a detailed environmental impact statement ('EIS') for any major federal action significantly affecting the quality of the human environment.") (quoting *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 228 (5th Cir. 2007)).

<sup>3</sup> *In re Katrina Canal Breaches Litig.* 696 F.3d at 449.

<sup>4</sup> 40 C.F.R. § 1508.9(b).

<sup>5</sup> § 1508.9(a).

<sup>6</sup> *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 (2004) (quoting 40 C.F.R. § 1508.7).

<sup>7</sup> 40 C.F.R. § 1508.27.

consider their actions in the context of human society as a whole.<sup>8</sup> And intensity must be considered along many dimensions, including the degree to which the proposal is controversial, whether the proposal sets a precedent for future action, and whether the proposal threatens violation of the law.<sup>9</sup>

Importantly, an EA must consider alternatives to the proposed action. An agency cannot ignore an entire category of alternatives without any explanation<sup>10</sup>, nor is it sufficient for an agency to compare two alternatives that are virtually identical.<sup>11</sup> The greater the potential significance of an action, the broader the scope of potential alternatives that must be considered.<sup>12</sup>

DHS has adopted its own NEPA procedures that closely mirror these statutory and regulatory requirements.<sup>13</sup> The procedures encourage transparency and early public involvement in agency decisionmaking.<sup>14</sup> In some cases, DHS rules go further than regulatory requirements. For “actions where the effects of a project or operation on the human environment are likely to be highly controversial,” DHS rules say that an environmental impact statement should “normally” be prepared.<sup>15</sup>

## **II. DHS’s Environmental Assessment of Dilley Facility was Deficient**

### **A. DHS Omitted Major Environmental Concerns From its Assessment**

The environmental assessment of the Dilley facility was divided into a programmatic EA<sup>16</sup>, which discussed DHS’s general plan to handle the influx of children from Central America without

---

<sup>8</sup> § 1508.27(a).

<sup>9</sup> § 1508.27(b)(4), (b)(6), (b)(10).

<sup>10</sup> *Seacoast Anti-Pollution League v. Nuclear Regulatory Comm’n*, 598 F.2d 1221, 1230–31 (1<sup>st</sup> Cir. 1979); *Sierra Club v. Watkins*, 808 F. Supp. 852, 873 (D.D.C. 1991).

<sup>11</sup> *Mucklesboot Indian Tribe v. U.S. Forest Svc.*, 177 F.3d 800, 813 (9<sup>th</sup> Cir. 1999).

<sup>12</sup> *Sabine River Auth. v. U.S. Dep’t of Interior*, 745 F. Supp. 388, 399 (E.D. Tex. 1990), *aff’d*, 951 F.2d 669 (5<sup>th</sup> Cir. 1992).

<sup>13</sup> *Notice of Final Directive*, 71 Fed. Reg. 16790-01 (Apr. 4, 2006), *available at* <http://www.dhs.gov/xlibrary/assets/foia/mgmt-directive-023-01-environmental-planning-program.pdf>.

<sup>14</sup> *Id.* § 2.5.

<sup>15</sup> *Id.* § 5.3(A)(1).

<sup>16</sup> *Notice of Programmatic Environmental Assessment and 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*, 79 Fed. Reg. 47661-01 (Aug. 14, 2014), *available at* [http://www.dhs.gov/sites/default/files/publications/PEA\\_UAC%26FamUnits\\_20140812.pdf](http://www.dhs.gov/sites/default/files/publications/PEA_UAC%26FamUnits_20140812.pdf) [hereinafter “PEA”].

including any mention of Dilley, and a supplemental EA<sup>17</sup>, which was specific to the proposed 2400-person facility at the Dilley site. The supplemental EA fails to consider the cumulative impact of the facility, the context and intensity of the facility's impacts, and alternatives to building the facility.

### 1. Drawdown and Potential Contamination of Local Aquifer

The supplemental EA does not set forth evidence sufficient to analyze the direct effects of water use at the Dilley facility; nor does it adequately consider the cumulative effect of the facility given the dramatic increase in fracking in the Dilley area.

DHS failed to adequately consider the preexisting strain on the aquifer that Dilley and many other towns use for water. Dilley draws on the Carrizo-Wilcox aquifer, which runs in a band from the Texas border near Shreveport, Louisiana to Laredo.<sup>18</sup> The supplemental assessment cut and pasted a description of the aquifer from the Texas Water Development Board website, without bothering to reference information on that site<sup>19</sup>—and others<sup>20</sup>—indicating that officials and academics report environmental risks associated with drawdown of the Carrizo-Wilcox aquifer. The effects of a water shortage would be especially devastating for Dilley and all of Frio County, where a majority of residents are farmers who rely on the aquifer for irrigation.

---

<sup>17</sup> *Supplemental Environmental Assessment for Housing of Family Units at the South Texas Family Residential Center [in] Dilley, Texas*, Dep't of Homeland Sec. (Aug. 28, 2014), [http://www.dhs.gov/sites/default/files/publications/Final%20STFRC%20SEA%208\\_27\\_2014%20%28508%20Comp%29.pdf](http://www.dhs.gov/sites/default/files/publications/Final%20STFRC%20SEA%208_27_2014%20%28508%20Comp%29.pdf) [hereinafter "SEA"].

<sup>18</sup> *Carrizo-Wilcox Aquifer*, Tex. Water Dev. Bd., <http://www.twdb.texas.gov/groundwater/aquifer/majors/carrizo-wilcox.asp> (last visited Oct. 26, 2014).

<sup>19</sup> Shirley Wade, *GAM Run 11-007: Groundwater Management Area 13 Model Runs to Estimate Drawdowns under Assumed Future Pumping for Queen City, Sparta, and Carrizo-Wilcox Aquifers*, Texas Water Development Board (June 12, 2012), <http://www.twdb.texas.gov/groundwater/docs/GAMruns/GR11-007.pdf> (predicting drawdown).

<sup>20</sup> Neena Satija, *Aquifer is No Quick Fix for Central Texas Thirst*, Texas Tribune (Sept. 12, 2014), available at <http://www.texastribune.org/2014/09/12/aquifer-is-no-quick-fix-for-central-texas-thirst/> (describing hydrologist's model suggesting that pumping may cause the aquifer to pull water out of the already-low Colorado River: "That could cause further damage downstream to fishermen, who depend on the river's freshwater flows for a steady supply of oysters and shrimp in Matagorda Bay."); Leon Zabava, *Citizens Concerned about Future of Carrizo Aquifer*, Pleasanton Express (July 23, 2014), available at [http://www.pleasantonexpress.com/news/2014-07-23/Front\\_Page/Citizens\\_Concerned\\_about\\_future\\_of\\_Carrizo\\_Aquifer.html](http://www.pleasantonexpress.com/news/2014-07-23/Front_Page/Citizens_Concerned_about_future_of_Carrizo_Aquifer.html) (quoting director of the relevant water conservation district: "It's already affecting our irrigators, farmers, ranchers because as the water level drops, it takes more money to go deeper and the profit margin decreases. So that's affecting our economy. It will continue to do so. At some point in the future it's going to put some of the irrigators out of business. The cost of replacing a well these days is astronomical. A lot of people won't be able to afford that."); Kate Galbraith, *As Fracking Increases, So Do Fears About Water Supply*, N.Y. Times (Mar. 7, 2013), available at <http://www.nytimes.com/2013/03/08/us/as-fracking-in-texas-increases-so-do-water-supply-fears.html>.

Nor does the assessment adequately address the effect of the recent, dramatic increase in fracking in the area. The Eagle Ford shale formation, which almost completely overlaps the Carrizo-Wilcox aquifer, has seen an average of nearly 4000 permits for oil and gas wells issued each year since 2012, compared to just 26 permits issued in 2008 for the same area.<sup>21</sup> Fracking at these new wells draws on the Carrizo-Wilcox aquifer and produces wastewater, most of which is disposed of in Frio County, where Dilley is located.<sup>22</sup> Experts are worried that, although oil companies attempt to inject the wastewater into disposal wells 2000 feet deeper than drinking water wells, the disposal wells are not well insulated and drinking water wells could become contaminated.<sup>23</sup>

DHS addresses none of these issues in the EA's discussion of groundwater, concluding that "[t]he demand from the operation at the site is not expected to exceed the capacity or limits imposed" by Texas authorities.<sup>24</sup> The assessment does not address the effects of drawdown or potential contamination of the Carrizo-Wilcox Aquifer.

## **2. Strain on Water Utilities in Town of Dilley**

The section on water utilities is flawed for the same reason. DHS asserts, on the basis of a telephone conversation with the City Administrator, that Dilley's water plant currently produces 1950 gallons per minute.<sup>25</sup> This single figure is not an adequate basis for assessment of the impact of a 2400-detainee facility. It is not clear when this measurement was taken, whether the rate of production has changed over time, or whether the rate of production is expected to change given the dramatic increase in fracking along the Carrizo-Wilcox aquifer. Moreover, because the report does not indicate the average amount of water that Dilley residents use per day, it is impossible to draw any conclusion about the impact of the detention facility on Dilley's water resources.

DHS relies on the same telephone conversation with the City Administrator as the sole source of data about Dilley's capacity to handle wastewater. DHS reports that the Dilley wastewater treatment plant can handle up to 800,000 gallons of wastewater per day, and currently, the plant treats 300,000 to 360,000 gallons per day. Again, the assessment fails to analyze recent trends in wastewater production, or make any projection about factors other than the detention center—such as an anticipated jump in population growth in response to fracking jobs—that may have an impact on

---

<sup>21</sup> *Texas Eagle Ford Shale Drilling Permits Issued 2008 through August 2014*, Tex. R.R. Comm'n (Sept. 9, 2014), [http://www.rrc.state.tx.us/media/8675/eaglefordproduction\\_drillingpermits\\_issued.pdf](http://www.rrc.state.tx.us/media/8675/eaglefordproduction_drillingpermits_issued.pdf).

<sup>22</sup> Greg Harman, *Waste Land: Frio County Struggles with Fracking's Leftovers*, Texas Observer (Sept. 25, 2014), <http://www.texasobserver.org/waste-land-frio-county-struggles-frackings-leftovers/>.

<sup>23</sup> *Id.*; see also *Frio County Judge: Stop Pumping Toxic Fracking Waste into Our Ground*, Kens5 Eyewitness News (May 16, 2013), <http://www.kens5.com/story/news/local/2014/06/26/10438894/>; Dave Fehling, *More Than Their Fair Share? Texas County Questions Frack Water Disposal Wells*, StateImpact (May 7, 2013), <https://stateimpact.npr.org/texas/2013/05/07/more-than-their-fair-share-texas-county-questions-frack-water-disposal-wells/>.

<sup>24</sup> SEA at 9.

<sup>25</sup> *Id.* at 17.

Dilley's capacity to process wastewater in the future. Dilley is a very small town<sup>26</sup>, and minor changes in population growth could have a significant effect on its infrastructure.

In the section on cumulative effects, DHS seems to acknowledge the potential for water insecurity in the Dilley area. DHS hedges its estimate of revenue from fracking by specifying that “[t]hese forecasts assume the availability of sufficient water to sustain the level of fracking activity.”<sup>27</sup> The assessment also notes that “[a]griculture is expected to continue to play a significant role in the Frio County economy, but the majority of this activity requires irrigation—potentially using the same aquifer that provides water for fracking in the [Eagle Ford shale formation].”<sup>28</sup> Without any further explanation, however, the assessment immediately goes on to conclude that the detention center will have “little discernible impact” because it is “temporary” and “the scale . . . suggests that no major adverse cumulative impacts on the human environment.”<sup>29</sup> This assertion is not supported by any evidence.

DHS's analysis is not sufficient to address the impact of increasing Dilley's population by two-thirds when there is a fracking boom and, potentially, a looming water shortage in the area.

### **3. Risk of Permanent Hearing Loss for Mothers and Children**

DHS observes, appropriately, that “[h]igh noise levels over a long duration can impact the health of exposed populations and be a nuisance to the surrounding community.”<sup>30</sup> Construction of the Dilley facility will require use of bulldozers, backhoes, and other heavy machinery, which generates noise at 85–100 dBA at the source; by comparison, OSHA forbids employers from exposing workers to constant noise greater than 90 dbA, and recommends keeping the level below 85 dBA.<sup>31</sup> 85 dBA is so loud that two people standing just two feet apart would have to raise their voices to hear one another.<sup>32</sup> When noise is as loud as 100dBA, such as the noise caused by a bulldozer, repeated exposure for just an hour per day is sufficient to permanently damage hearing.<sup>33</sup> The hearing loss that results from exposure to loud noises is irreversible; not even a hearing aid or

---

<sup>26</sup> As the City Administrator himself has observed: “We used to be known as two outhouses facing each other, but I think we’ve grown a little bit more than that.” *Morning Edition: How Will a Small Town in Arizona Manage an ICE Facility in Texas?* at 3:31–3:37 (NPR radio broadcast Oct. 28, 2014), available at <http://www.npr.org/2014/10/28/359411980/how-will-a-small-town-in-arizona-manage-an-ice-facility-in-texas> [hereinafter “NPR Dilley Broadcast”].

<sup>27</sup> *Id.* at 39.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> SEA at 25.

<sup>31</sup> *Id.* at 26–27 (estimating noise caused by construction); *Worker Safety Series: Protecting Yourself from Noise in Construction*, Occupational Safety and Health Administration, <https://www.osha.gov/Publications/3498noise-in-construction-pocket-guide.pdf> (last visited Oct. 26, 2014) [hereinafter “Noise in Construction”].

<sup>32</sup> *Noise in Construction* at 6.

<sup>33</sup> *Id.* at 6–7.

surgery can correct this type of damage.<sup>34</sup> Nevertheless, DHS characterizes the impact of this noise as “minor.”<sup>35</sup>

To insulate construction workers from the noise of these machines, DHS will require construction workers to wear ear protection.<sup>36</sup> As for mothers and children detained at the facility, DHS concedes that the only way to deal with the noise will be “physical separation”—in other words, the detainees would need to leave the facility to protect themselves from the noise.<sup>37</sup> Of course, Dilley will be a secure facility, and mothers and children will be locked inside without the option to leave. Neither the detained families—nor their guards—will have the option of “physical separation” to handle the noise. Instead, staff and detainees, including toddlers and infants, will be subjected to twelve hours of noise from heavy machinery<sup>38</sup>, day in and day out, from early December until the end of April.<sup>39</sup> DHS failed to consider the serious risk of hearing loss that this ongoing large-scale construction will pose to everyone at the Dilley facility, and the assessment is deficient for failing to adequately consider this impact on the human environment.

#### **4. Risk of Respiratory and other Illness for Detained Mothers and Children**

The Supplemental EA considers the impact that the Dilley facility may have on local air quality, but it fails to account for the impact that already-poor air quality will have on detainees and facility staff. The “fracking bonanza”<sup>40</sup> at the Eagle Ford shale formation is poorly regulated for air pollution, and residents are already experiencing health effects from the emissions. Local residents report persistent nausea, headaches, nosebleeds, rashes, and respiratory problems after the industry began fracking in their area.<sup>41</sup> Local doctors report that they have seen a rise in some of these symptoms

---

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 5.

<sup>36</sup> SEA at 27.

<sup>37</sup> *Id.*

<sup>38</sup> For a brief recording of the type of noise detainees will hear for twelve hours a day, see generally NPR Dilley Broadcast at 0:38–0:41, 1:08–1:10.

<sup>39</sup> *Amendment of Solicitation/Modification of Contract [between Immigration and Customs Enforcement and City of Eloy]*, Immigration and Customs Enforcement 154 (Sept. 23, 2014), [http://www.ice.gov/doclib/foia/contracts/south\\_texas\\_family\\_residential\\_center\\_city\\_of\\_loy\\_igsa\\_modification.pdf](http://www.ice.gov/doclib/foia/contracts/south_texas_family_residential_center_city_of_loy_igsa_modification.pdf) (describing “Ramp Up Plan” to move detainees into the facility within 45 days of the contract’s execution, but continue construction until 210 days after execution).

<sup>40</sup> Forrest Wilder, *Air Pollution from Fracking in Eagle Ford Shale Threatens Health, Report Claims*, Texas Observer (Sept. 19, 2013), [available at http://www.texasobserver.org/report-air-pollution-fracking-eagle-ford-shale-threatens-health/](http://www.texasobserver.org/report-air-pollution-fracking-eagle-ford-shale-threatens-health/).

<sup>41</sup> *As Drilling Ravages Texas’ Eagle Ford Shale, Residents ‘Living in a Petri Dish’*, Center for Public Integrity (Feb. 18, 2014), <http://www.publicintegrity.org/2014/02/18/14235/drilling-ravages-texas-eagle-ford-shale-residents-living-petri-dish> (reporting on pollution in nearby Karnes County) [hereinafter “Eagle Ford Petri Dish”]; *Reckless Endangerment While Fracking the Eagle Ford*, Earthworks 8 (Sept.

since the fracking boom.<sup>42</sup> This is consistent with studies from other oil- and gas-producing areas showing that fracking results in localized air pollution that is harmful to human health.<sup>43</sup>

Drilling in the area has outpaced competent regulation and infrastructure. The lack of pipeline has resulted in so much “flaring,” or burning off of excessive methane, that the shale formation is literally visible from space.<sup>44</sup> The industry is producing 50% more nitrogen oxides (precursors to ground-level ozone and smog) than the entire eight-county San Antonio metropolitan area.<sup>45</sup> Pollutants that result from fracking, such as hydrogen sulfide, can pose a significant threat—but regulatory officials have not made sufficient attempts to measure this activity because the pollution appears to be too dangerous for the regulator’s own investigators to go measure it.<sup>46</sup> Journalists report that “Texas’ air monitoring system is so flawed that the state knows almost nothing about the extent of the pollution in the Eagle Ford.”<sup>47</sup>

DHS should have considered the extent to which the highly questionable air quality along the Eagle Ford shale formation would impact the health of staff members and detained women and children at the Dilley facility.

## **5. Controversy Over Family Detention’s Effect on Mothers’ and Children’s Health**

To determine whether a proposed action will have a significant environmental impact, an agency must consider whether the impact is controversial.<sup>48</sup> A “controversy” in this context is defined as a

---

2013), <http://www.earthworksaction.org/files/publications/FULL-RecklessEndangerment-sm.pdf> (same).

<sup>42</sup> *Reckless Endangerment While Fracking the Eagle Ford* at 8; cf. *Eagle Ford Petri Dish* (“If you have pockets of communities with the same symptoms downwind of similar sources, then there is a body of evidence”) (quoting atmospheric scientist who studies air pollution).

<sup>43</sup> *Reckless Endangerment While Fracking the Eagle Ford* at 6 (collecting studies of air pollution following fracking in Colorado).

<sup>44</sup> Frederic Bush, *Environmental Costs Missing From Eagle Ford Shale Reports*, Rivard Report (Mar. 29, 2013), <http://therivardreport.com/whats-missing-from-eagle-ford-shale-reports-environmental-costs/>; David Wogan, *The Eagle Ford Shale Boom From Space*, Scientific American (Dec. 27, 2012), <http://blogs.scientificamerican.com/plugged-in/2012/12/27/the-eagle-ford-shale-boom-from-space/>.

<sup>45</sup> Bush at 1 (noting something that will be no comfort to Dilley staff and detainees: “Fortunately, the Eagle Ford Shale is in a lightly populated area, so the respiratory problems associated with oil and gas production and diesel-burning trucks and generators aren’t going to kill that many people”).

<sup>46</sup> *Reckless Endangerment While Fracking the Eagle Ford* at 30 (finding that, despite “numerous complaints,” “very few attempts have been made by TCEQ to measure H<sub>2</sub>S concentrations” and concentrations of other pollutants because “air pollution [is] too dangerous for its own investigators”).

<sup>47</sup> *Eagle Ford Petri Dish* at 1.

<sup>48</sup> 40 C.F.R. § 1508.27(b)(4).

substantial dispute about the “size, nature, or effect” of the proposed action.<sup>49</sup> If the impact of a proposed action is highly controversial, it is impossible to determine whether the action will have a significant impact, and the agency must conduct further study in the form of an environmental impact statement.<sup>50</sup>

The controversy in this case is the nature and effect of widespread family detention on mothers’ and children’s health. DHS did not assess this controversy in any way. The assessment does not consider any data about the long-lasting physical and mental health effects of detaining vulnerable mothers and children in prison-like conditions—this deficiency alone is sufficient for a court to set aside DHS’s finding that the detention center will not have a significant impact on the human environment. But even if DHS had bothered to make a conclusory assertion that family detention does not have a significant impact, that assertion would not be entitled to any deference, because it would fly in the face the available data..

The majority of mothers and children whom DHS will detain in the Dilley facility are already in a fragile mental state. The recent influx of children from Guatemala, El Salvador, and Honduras is the result of chronic and acute violence in those countries. Mothers are so terrified by gang violence and/or domestic violence in their home countries that they risk traveling with their young children to the hope of safety in the United States, often experiencing additional violence, including kidnapping and rape, during their journey.<sup>51</sup>

Detaining these women and children upon their arrival in the United States is harmful to their health. Detention in a prison-like setting exacerbates trauma experienced by women and children who flee violence in their home countries— rates of anxiety, depression and PTSD symptoms are extremely high among detained asylum seekers, and those rates increase the longer a person sits in detention.<sup>52</sup> Detainees at existing family detention facilities are supervised by a staff of mostly male guards. This gender dynamic makes the experience of detention particularly intimidating for women

---

<sup>49</sup> *Biodiversity Conservation Alliance v. U.S. Forest Serv.*, 765 F.3d 1264, 1274 (10th Cir. 2014) (interpreting § 1508.27(b)(4)); *In Defense of Animals v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1069 (9th Cir. 2014) (same).

<sup>50</sup> See *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 861 (7th Cir. 2003) (“The [agency’s] own assessment that the project is not objectively highly controversial is entitled to deference if it is made after a hard look at the controversy and rationally related to the data.”).

<sup>51</sup> 168 Nongovernmental Organizations, *Letter to President Obama re: NGOs United in Opposition to Family Detention in Dilley, Karnes, and Artesia*, Women’s Refugee Commission (Sept. 25, 2014), <http://www.womensrefugeecommission.org/press-room/2156-ngos-united-in-opposition-to-family-detention-in-dilley-karnes-and-artesia> [hereinafter “Letter from 168 NGOs”].

<sup>52</sup> Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, Bellevue/NYU Program for Survivors of Torture 5 (2003), <http://www.survivorsoftorture.org/files/pdf/perstoprison2003.pdf> [hereinafter “Health Consequences of Detention for Asylum Seekers”].

and young girls fleeing gender-based or sexual violence in their home countries.<sup>53</sup> Distressingly, their apprehension is not unfounded: many mothers have reported sexual abuse at the hands of male guards at family detention centers.<sup>54</sup>

Detention is particularly harmful to young children's health.<sup>55</sup> Locking children in a secure facility inhibits their physical and psychological development.<sup>56</sup> Growing children require food at times other than normal meal times, but in existing family detention centers, young children including toddlers and babies do not have adequate access to food at appropriate times and in appropriate amounts for their nutritional needs.<sup>57</sup> Children are not allowed to keep toys and playthings—even crayons and paper—in their living quarters.<sup>58</sup> The youngest children do not have access to age-appropriate developmental and educational programming.<sup>59</sup> In addition to the lack of basic resources to care for young children, the fact of detention itself strips mothers of their role as decisionmaker and protector of the family, which confuses young children and undermines childrearing.<sup>60</sup> Guards threaten to “write up” mothers if their children make a mess, or make too much noise, or wander out of line in the cafeteria.<sup>61</sup> Mothers are forced to separate from their children when they appear for court via videoconference, leaving their children in the care of guards who lack child care licensing or training. In existing family detention facilities, toddlers are left in an

---

<sup>53</sup> Ranjana Natarajan *et al.*, *Letter to Immigration and Customs Enforcement re: Complaints Regarding Conditions at Karnes County Residential Center*, Grassroots Leadership 2 (Sept. 25, 2014), <http://grassrootsleadership.org/sites/default/files/uploads/press-releases/2014-09-25%20ICE%20Letter%20re%20Karnes%20Conditions%20Final.pdf> [hereinafter “Conditions at Karnes”].

<sup>54</sup> Marisa Bono *et al.*, *Letter to Secretary of Homeland Security re: Complaints Regarding Sexual Abuse of Women in DHS Custody at Karnes County Residential Center*, Mexican American Legal Defense and Educational Fund 2–4 (Sept. 30, 2014), [http://www.maldef.org/assets/pdf/2014-09-30\\_Karnes\\_PREA\\_Letter\\_Complaint.pdf](http://www.maldef.org/assets/pdf/2014-09-30_Karnes_PREA_Letter_Complaint.pdf) [hereinafter “Sexual Abuse at Karnes”].

<sup>55</sup> Of a representative sample of all Australian pediatricians, a majority characterize mandatory detention of children as child abuse. *Migrant Detention ‘Abuse’ Can Scar Children for Life*, IRIN (Oct. 21, 2014), <http://www.irinnews.org/report/100741/migrant-detention-abuse-can-scar-children-for-life>.

<sup>56</sup> Letter from 168 NGOs (citing Janet Cleveland *et al.*, Brief Submitted to the Canadian House of Commons Standing Committee on Citizenship and Immigration, *The Harmful Effects of Detention and Family Separation on Asylum Seekers’ Mental Health in the Context of Bill C-31* 3, 7 (April 2012)).

<sup>57</sup> *Conditions at Karnes* at 1–2.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 3; Letter from 168 NGOs (citing Women’s Commission for Refugee Women and Children & Lutheran Immigration and Refugee Service, *Locking up Family Values: The Detention of Immigrant Families*, Lutheran Immigration and Refugee Service 42, 43 (Feb. 2007), <http://lirs.org/wp-content/uploads/2012/05/RPTLOCKINGUPFAMILYVALUES2007.pdf>; Cleveland *et al.* at 11).

<sup>61</sup> *Conditions at Karnes* at 3.

open room with too few guards to adequately supervise them.<sup>62</sup> The guards do not help the children use the restroom, feed them when they are hungry, or make any effort to comfort them when they cry.<sup>63</sup> This experience further traumatizes children and erodes their sense of security at a time when they need it most. Long-term exposure to high stress levels creates well-developed neural pathways for fear, impacting a child's ability to learn and cope with adversity for years to come.<sup>64</sup>

For these and other reasons, 168 immigrants' rights, faith-based, civil rights, human rights, anti-violence, and criminal justice reform organizations and legal service providers sent a letter to President Obama in late September strongly urging him to close all family detention facilities and halt construction of the Dilley facility.<sup>65</sup> Some of our nation's most senior lawmakers joined in that call on October 16 and October 27, opposing the expansion of family detention in large part because of "the negative consequences of long-term detention on the physical and mental well-being of young children."<sup>66</sup> DHS has yet to formally address these health consequences.

Put simply, prison-like conditions are not a healthy "human environment" for children—especially children who have narrowly escaped harrowing violence. It would seem to be a straightforward proposition that children, especially those who are not even alleged to pose any danger, do not belong behind bars. The nature and effect of family detention cannot be characterized as anything other than controversial. At the very least, DHS must acknowledge the effect that almost tripling the amount of women and children in family detention will have on the human environment for those locked inside.

## **6. Commitment of Millions of Dollars to Policy of Presumed Detention for Mothers and Children**

To determine whether a proposed action will have a significant impact, an agency must consider whether the action "may establish a precedent for future actions with significant effects or represent[] a decision in principle about a future consideration."<sup>67</sup> DHS's assessment of the Dilley facility's impact completely fails to address this point.

The decision to construct the Dilley facility is a drastic reversal in course from a change in immigration detention policy made just five years ago. Following intense public scrutiny of the T. Don Hutto family detention center near Austin, Texas, DHS announced in 2009 that it would stop

---

<sup>62</sup> *Id.*

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

<sup>64</sup> *Migrant Detention 'Abuse' Can Scar Children for Life* at 3 (quoting a pediatrician who works with children who have been detained).

<sup>65</sup> Letter from 168 NGOs.

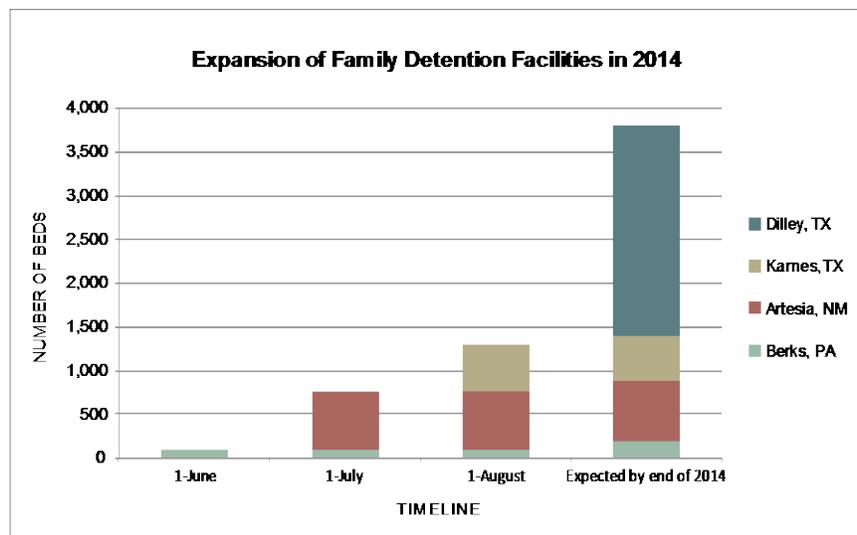
<sup>66</sup> Patrick J. Leahy *et al.*, *Letter to Secretary of Homeland Security*, Senator Patrick J. Leahy 1 (Oct. 16, 2014), available at <http://www.leahy.senate.gov/download/101614-to-johnson-re-dilley-detention-center>; see Zoe Lofgren *et al.*, *Letter to President Obama*, Congresswoman Zoe Lofgren (Oct. 27, 2014), available at [http://lofgren.house.gov/uploadedfiles/family\\_detention\\_letter\\_october\\_2014.pdf](http://lofgren.house.gov/uploadedfiles/family_detention_letter_october_2014.pdf).

<sup>67</sup> 40 C.F.R. § 1508.27(b)(6).

detaining families at Hutto.<sup>68</sup> The agency also set aside plans to construct three other family detention facilities, noting that immigration detention must be implemented “thoughtfully and humanely,” targeting only those who pose a serious risk of flight or danger to the community.<sup>69</sup>

This past summer, DHS reversed course, requesting funding for 6300 family detention beds and designating 1200 beds and cribs for family detention in Karnes City, Texas, and a renovated facility in Artesia, New Mexico.<sup>70</sup> The Dilley facility is a firm commitment of resources to DHS’s new policy. Dilley will triple DHS’s capacity to detain mothers and their children. As Senator Leahy and nine other senators noted in their October 16 letter, “[t]his decision threatens to make permanent a practice of presumptive detention for families and marks a reversal of this administration’s family detention policy.”<sup>71</sup>

DHS has made no secret of its policy to detain all women and children seeking asylum, even after they pass an initial interview establishing that they have a credible fear of persecution in their home country. Many women who pass this interview are unaware that they may ask a judge to be released on bond; for women who do ask, DHS opposes bond in all cases, even when the family seeking asylum does not pose a danger to the community or a risk of flight.<sup>72</sup>



*Graph Courtesy of Detention Watch Network*

<sup>68</sup> Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, New York Times (Aug. 5, 2009), available at [http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all&_r=1&).

<sup>69</sup> *Id.* (quoting John Morton, Assistant Secretary of Homeland Security).

<sup>70</sup> Cristina Parker *et al.*, *For-Profit Family Detention: Meet the Private Prison Corporations Making Millions by Locking up Refugee Families*, Grassroots Leadership (Oct. 2014), <http://grassrootsleadership.org/profit-family-detention-meet-private-prison-corporations-making-millions-locking-refugee-families>.

<sup>71</sup> Leahy *et al.* at 1.

<sup>72</sup> *Id.* at 1–2; Lofgren *et al.* at 1–2 (observing that “there is no legal authority for using detention as a political tool”).

Until recently, DHS's policy was to release families unless there was a compelling need to detain them.<sup>73</sup> Now, the main question DHS asks is not whether the family needs to be detained, but whether DHS has empty bed space.<sup>74</sup> As Senator Leahy observed, "if 2,400 more beds become available, the answer to that question will increasingly be yes."<sup>75</sup> Because the Dilley facility represents a commitment of substantial resources to this new policy of presumptive family detention, DHS should assess the impacts of that policy before concluding that the Dilley facility will have "no significant impact" on the human environment.

## 7. High Likelihood of Violating Constitutional Rights and Other Laws

Another factor contributing to the significance of a proposed action is whether the action threatens a violation of federal, state, or local law. DHS's assessment did not discuss this factor, even though its experience makes clear that family detention facilities are hotbeds for very serious constitutional violations.

Because asylum seekers placed in immigration detention have not been convicted of a crime, it is not constitutional to subject them to punishment. But detainees at these facilities report harsh and punitive conditions that would violate constitutional due process<sup>76</sup>:

- **Inadequate Food.** Young children at the Artesia and Karnes facilities are losing weight; they do not have access to adequate nutrition throughout the day.<sup>77</sup>
- **Inadequate Medical Care.** There is no doctor on staff at the Karnes detention center.<sup>78</sup> Persistent coughs and other chronic ailments go undiagnosed and, in some cases, untreated.<sup>79</sup> Mental health services are also inadequate. While there is a therapist on staff at Karnes, women who feel depressed or have nightmares have had trouble scheduling a mental health appointment.<sup>80</sup>

---

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1.

<sup>75</sup> *Id.*

<sup>76</sup> Frio County Commissioner Pepe Flores conceded that the detainees are essentially prisoners: "'I don't know if you want to call them prisoners or not, but I guess technically that's what they are.'" NPR Dilley Broadcast at 3:01–3:11.

<sup>77</sup> Mark Noferi, *Children in Jail: What It's Like for Immigrant Families Held at Karnes, Texas*, Immigration Impact (Sept. 26, 2014), <http://immigrationimpact.com/2014/09/26/children-in-jail-what-its-like-for-immigrant-families-held-at-karnes-texas/> (describing children who are losing weight); *Conditions at Karnes* at 1–2 (reporting inadequate food for children); Leslie Holman, *et al.*, *Letter to President Obama*, American Immigration Lawyers Association 3 (Sept. 16, 2014), <http://www.aila.org/content/default.aspx?docid=50092> (writing that attorneys for women at Artesia "describe children who are dehydrated, listless, cold and losing weight").

<sup>78</sup> *Conditions at Karnes* at 3.

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

<sup>80</sup> *Id.*

- **Sexual Abuse.** Guards remove women and girls from their cells late at night and early in the morning to engage in sexual activity.<sup>81</sup> Guards have also kissed, fondled, and groped detainees in front of children.<sup>82</sup>
- **Interference with Attorney/Client Communication.** Detainees cannot effectively communicate with their attorneys and their consulates. Women are only permitted to place one phone call per day.<sup>83</sup> They report that the cost of an outgoing domestic call is as high as five dollars for two minutes—a price that detained asylum seekers generally cannot afford.<sup>84</sup> Women encounter difficulties when they attempt to place free calls to pro bono attorneys.<sup>85</sup> At Artesia, women are forced to call their attorneys in the presence of a guard.<sup>86</sup> Phone calls that do go through have been cut off by facility staff after just three to five minutes.<sup>87</sup> When attorneys call the facility to leave a message for their clients, guards do not deliver those messages in a timely manner.<sup>88</sup>

Detention at these facilities is also overwhelmingly likely to violate the detainees' due process right to have their asylum claims heard. Detainees at Artesia and Karnes have reported the following barriers to fair adjudication of their claims:

- **Staff mislead detainees about their rights.** Facility staff at Artesia have actively misled detainees about their right to seek asylum, and suggested that they may be punished for asserting their rights.<sup>89</sup>
- **Lack of notice regarding asylum procedures.** DHS officials conduct the credible fear interview—a crucial step that determines whether women may proceed with an asylum claim or are fast-tracked for removal—without giving women a plain-language explanation of the

---

<sup>81</sup> *Sexual Abuse at Karnes* at 2.

<sup>82</sup> *Id.*

<sup>83</sup> Complaint ¶¶ 94–100, *M.S.P.C. v. Johnson*, No. 14 Civ. 4137 (D.D.C. filed Aug. 22, 2014), available at <http://americanimmigrationcouncil.org/sites/default/files/M.S.P.C.%20v.%20Johnson.pdf> [hereinafter “Artesia Conditions Complaint”].

<sup>84</sup> *Conditions at Karnes* at 2.

<sup>85</sup> *Id.*

<sup>86</sup> *Expose & Close: Artesia Family Residential Center, New Mexico*, Detention Watch Network 5–6 (Sept. 2014), [http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose\\_close\\_-\\_artesia\\_family\\_residential\\_center\\_nm\\_2014.pdf](http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_close_-_artesia_family_residential_center_nm_2014.pdf).

<sup>87</sup> *Id.*; Noferi at 1–2; Artesia Conditions Complaint ¶¶ 94–100.

<sup>88</sup> *Conditions at Karnes* at 2.

<sup>89</sup> *Id.* ¶¶ 64–68, 79–84, 101–106.

significance of the interview.<sup>90</sup> Facility staff at Artesia give women little or no advance notice of these interviews.<sup>91</sup>

- **Short-cutting crucial asylum procedures.** DHS officials who conduct credible fear interviews at Artesia rush women through the process, instructing them to keep their answers short and cutting them off if they speak too long.<sup>92</sup> At Karnes, women were not allowed to elaborate on their answers to questions.<sup>93</sup> To pass the credible fear interview, women are required to describe violence, death threats, and rape in front of their children.<sup>94</sup>
- **Failure to explore children’s asylum claims.** Children are ordered removed without an inquiry into their own individual grounds for asylum.<sup>95</sup>

In short, family detention facilities are designed to circumvent individualized review of asylum claims required by both domestic and international law, and deport Central American asylum seekers as quickly as possible. As DHS Secretary Jeh Johnson recently testified before the Senate Committee on Appropriations: “[T]here are adults who brought their children with them. Again, our message to this group is simple: we will send you back. . . . Last week we opened a detention facility in Artesia, New Mexico for this purpose.”<sup>96</sup> Secretary Johnson’s comments make it clear that family detention facilities are built to deter immigration and subvert the fundamental right to seek asylum.

In addition to the foregoing constitutional violations, family detention violates the settlement agreement in *Flores v. Reno*.<sup>97</sup> The *Flores* settlement agreement requires DHS to place all minors in its custody in the “least restrictive” setting possible<sup>98</sup>, and family detention in a secure facility is the exact opposite. The settlement agreement also requires DHS to determine whether minors may be released to their parents, relatives, or other legal guardians<sup>99</sup>, but DHS’s policy of presumptive family

---

<sup>90</sup> *Id.* ¶ 131; Ranjana Natarajan *et al.*, *Report Made to Inter-American Commission on Human Rights Regarding Grave Rights Violations Implicated in Family Immigration Detention at the Karnes County Detention Center*, UT Law Immigration Clinic 5 (Sept. 26, 2014), [http://www.utexas.edu/law/clinics/immigration/IACHR\\_Karnes\\_Report\\_10.20.14.pdf](http://www.utexas.edu/law/clinics/immigration/IACHR_Karnes_Report_10.20.14.pdf) [hereinafter “Grave Rights Violations at Karnes”].

<sup>91</sup> Artesia Conditions Complaint ¶¶ 132–34.

<sup>92</sup> *Id.* ¶¶ 68–72.

<sup>93</sup> *Grave Rights Violations at Karnes* at 5.

<sup>94</sup> Artesia Conditions Complaint ¶¶ 125–26, 135–146; Lofgren *et al.* at 3–4; *Grave Rights Violations at Karnes* at 5.

<sup>95</sup> Artesia Conditions Complaint ¶¶ 147–150.

<sup>96</sup> *Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations*, Department of Homeland Security (July 10, 2014), <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>; see NPR Dilley Broadcast at 0:12 (“[The Obama administration] wants to send a clear message to Central Americans: if you come, you will be detained and deported.”).

<sup>97</sup> No. 85 Civ. 4544 (C.D. Cal Jan. 17, 1997), available at [https://cliniclegal.org/sites/default/files/attachments/flores\\_v.\\_reno\\_settlement\\_agreement\\_1.pdf](https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf).

<sup>98</sup> *Id.* ¶ 11.

<sup>99</sup> *Id.* ¶ 14.

detention ignores this requirement. Finally, the agreement requires DHS to provide a host of protective services to children in custody, such as counseling and case management<sup>100</sup>, none of which are provided in DHS family detention centers.

Family detention is also very likely to violate international law. International human rights law protects all people from arbitrary detention, which means that detention must be pursuant to codified procedures, and it must be proportional to the important governmental need it serves.<sup>101</sup> To protect the fundamental right to seek and enjoy asylum, international law forbids detention of asylum-seekers unless the government considers alternatives to detention and finds that a specific case calls for the “exceptional measure” of detaining an asylum-seeker.<sup>102</sup> The decision to detain must be individualized, which precludes detention for the purpose of general deterrence.<sup>103</sup> Yet construction of the Dilley facility is premised on universal, presumptive detention of mothers and children seeking asylum for the purpose of deterring other mothers and children who might do the same.

## **B. DHS Did Not Consider Any Alternatives to Widespread Family Detention**

DHS failed to consider meaningful alternatives to the Dilley facility as required by law. The supplemental EA considered two sites other than Dilley: Carrizo Springs, Texas, and an existing facility in Cameron County, Texas. The assessment did not consider the potential environmental effects of these alternatives—which is the entire point of considering alternatives to the proposed action—but even if DHS had considered the impact of a 2400-person facility at each of these sites, that would not have been a meaningful range of alternatives.

DHS’s goal as defined in the programmatic EA is to “respond[] to the humanitarian aspects” of the influx of Central American children.<sup>104</sup> President Obama called on DHS and other agencies to provide “shelter” and other aid for children seeking asylum.<sup>105</sup> DHS failed to assess any method of accomplishing this goal other than a 2400-bed family detention facility.

---

<sup>100</sup> *Id.* ¶¶ 6, 19 & Ex. 1.

<sup>101</sup> *Grave Rights Violations at Karnes* at 13 (citing, *inter alia*, U.N. High Comm’n for Refugees, *Detention Guidelines* § 4.2 (2012), available at <http://www.unhcr.org/505b10ee9.html>); cf. U.N. Comm. on the Rights of the Child, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration* ¶ 32 (2012), [http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGD-Childrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf) (“[R]egardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children’s rights, is never in their best interests and is not justifiable.”).

<sup>102</sup> *Id.* at 14 (citing U.N. High Comm’n for Refugees, *Detention Guidelines* § 4.1).

<sup>103</sup> *Id.* at 14–15 (citing, *inter alia*, U.N. High Comm’n for Refugees, *Detention Guidelines* §§ 4–7).

<sup>104</sup> PEA at 1.

<sup>105</sup> *Response to the Influx of Unaccompanied Alien Children Across the Southwest Border*, Daily Comp. Pres. Docs., 2014 DCPD No. 00422 (June 2, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr>.

While agencies are not required to consider every possible alternative to a proposed course of action—especially in the context of an EA—agencies may not arbitrarily ignore entire categories of potential alternatives. DHS has done so here: DHS failed to consider any alternative to family detention, even though alternatives to detention are proven to effectively ensure appearances at immigration proceedings.<sup>106</sup> Methods from electronic ankle monitoring to less-restrictive, community based supervision are effective, less expensive, and less punitive than family detention.<sup>107</sup> Provision of legal services likewise has been shown to increase appearance rates.<sup>108</sup> Non-secure facilities akin to shelters also improve appearance rates.<sup>109</sup>

One of DHS's current alternatives to detention, Intensive Supervision Appearance Program II, is very successful.<sup>110</sup> The agency assesses the potential detainee's "risk profile" and recommends an alternative program—"options includ[e] a full-service program with case management and a technology-only program."<sup>111</sup> In 2011, 96% of participants in that program made all of their appearances.<sup>112</sup> This program costs just \$9 per detainee per day, compared to \$116 per detainee per day for detention.<sup>113</sup> Again, this is a preexisting DHS program—one that DHS failed to discuss when assessing alternatives to a 2400-person detention facility for women and children.

### **III. DHS Finalized Plans for the Dilley Facility Without Meaningful Public Participation**

The foregoing issues that DHS has overlooked—or ignored—are troubling enough. But DHS's mistakes are compounded by the fact that they precluded meaningful public participation in their decisionmaking by concealing this project from the public until DHS made a final decision about whether to construct the facility. One of NEPA's animating principles is informed public participation in agency decisionmaking. For that reason, NEPA's implementing regulations impose a duty for agencies to "[m]ake diligent efforts to involve the public" when preparing NEPA

---

<sup>106</sup> *Family Detention*, Lutheran Immigration and Refugee Service 2 (Aug. 7, 2014), <http://lirs.org/wp-content/uploads/2014/08/LIRS-Family-Detention-Backgrounder-140807.pdf>.

<sup>107</sup> *Id.* (noting alternatives are effective and less expensive); U.N. High Comm'n for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees* iv (Apr. 2006), available at <http://www.unhcr.org/4474140a2.html> ("[Detention is] seldom if ever required . . . where [] asylum seekers wish to remain. . . . [People] who reach their 'destination' country are unlikely to abscond because they have a vested interest in remaining . . . and in complying with the asylum procedure.").

<sup>108</sup> *Id.* at iv–v ("The provision of competent legal advice and concerned case management . . . — which serve as non-intrusive forms of monitoring and which ensure that asylum seekers fully comprehend the consequences of non-compliance— . . . raise rates of appearance and compliance.").

<sup>109</sup> *Id.*

<sup>110</sup> Julie Myers Wood & Steve J. Martin, *Smart Alternatives to Immigrant Detention*, Washington Times (Mar. 28, 2013), available at <http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

documentation. DHS made no such effort here, resulting in a slapdash assessment that fails to discuss serious environmental concerns.

**A. DHS Plans Dilley Facility in Twelve Days After Issuing Misleading Assessment**

Construction of the Dilley facility is ostensibly in response to a memorandum from President Obama. The past two years saw a spike in migration of children from Guatemala, El Salvador, and Honduras. President Obama issued a memorandum on June 2, 2014, directing the Secretary of Homeland Security to establish an interagency working group to ensure that the government was “unified in providing humanitarian relief to the affected children, including housing, care, medical treatment, and transportation.”

DHS turned this directive to provide humanitarian relief on its head by designing a program to detain and deport people with legitimate claims to asylum. On August 14, 2014, DHS published notice of a programmatic environmental assessment and finding of no significant impact in the Federal Register, describing an intention to comply with the President’s memorandum by “provid[ing] [] facilities . . . to safely house family units.”<sup>114</sup> The programmatic EA claims that its “priority goals” include transferring young children to Health and Human Services custody and assessing potential “shelter facilities.”<sup>115</sup>

The programmatic EA is extremely general and did not provide the public any notice that DHS was contemplating the construction of a 2400 bed family detention center. It discusses plans for “housing locations” throughout the border region, and explicitly states that there will be supplemental EAs for each specific project.

Just eight days after publishing the programmatic EA, DHS started contacting the necessary authorities about constructing the Dilley facility, without sharing drafts of the supplemental EA with the public. Five days after DHS began contacting partner agencies, on August 27, 2104, DHS posted the final supplemental EA and a finding of no significant impact on its website. Like the programmatic EA, the supplemental EA uses the term “housing” to describe the detention center.

**B. The Public was Excluded from a Decision with Serious Consequences**

The public was not adequately involved DHS’s plans to construct the Dilley facility. The programmatic EA was too general to put the people of Dilley—and other residents and businesses that depend on the Carrizo-Wilcox Aquifer—on notice that a 2400-bed family detention facility would be constructed in their backyard. The programmatic EA does not reference family detention at all, outside of vague references to “detention” used interchangeably with “housing.” In fact, the assessment claims that it will not apply to “significant changes to buildings,” yet DHS is now renovating a camp for oil workers to detain thousands of women and children. The claimed “priority goal” of moving pregnant women and young children into the custody of Health and Human Services makes the absence of explicit references to family detention even more misleading.

---

<sup>114</sup> PEA at 1.

<sup>115</sup> *Id.* at 8.

Public involvement in decisions of this magnitude is more than a legal technicality. Meaningful public notice of plans to construct the Dilley facility would have given interested parties the opportunity to debate this unprecedented expansion of family detention and highlight the other foregoing deficiencies in the supplemental EA. Rather than give the public that power—which is a central function of NEPA—DHS prepared a slapdash assessment over the course of twelve days, hoping to undertake a major federal action in the shadows. The EPA should not condone DHS's patent subversion of congressional intent.

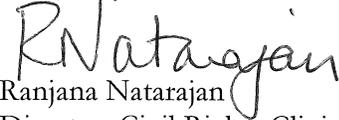
#### IV. Conclusion

In response to President Obama's call for humanitarian aid at the border, the Department of Homeland Security has made an ill-informed decision to detain 2400 mothers and children in prison-like conditions. The agency made this decision without adequate consideration of the project's cumulative environmental impacts, without any consideration of reasonable alternatives to family detention, and without any public notice. DHS should withdraw its finding of no significant impact and prepare an environmental impact statement that complies with federal regulations, takes into account the issues that DHS failed to address, and invites rather than avoids public participation. We hope the EPA will support this call for responsible agency decisionmaking.

Sincerely,



Trisha Trigilio  
Fellow, Civil Rights Clinic  
University of Texas School of Law



Ranjana Natarajan  
Director, Civil Rights Clinic  
University of Texas School of Law



Kelly Haragan  
Director, Environmental Law Clinic  
University of Texas School of Law

cc: Honorable Jeh Johnson  
Secretary of Homeland Security  
Washington, DC 20528

Honorable Charles E. Schumer  
United States Senate  
Washington, DC 20510

Honorable Zoe Lofgren  
House of Representatives  
Washington, DC 20515

Honorable Patrick J. Leahy  
President of the Senate Pro Tempore  
United States Senate  
Washington, DC 20510

Honorable John Conyers, Jr.  
House of Representatives  
Washington, DC 20515

Ron Curry  
Region 6 Regional Administrator  
Environmental Protection Agency  
1145 Ross Avenue, Suite 1200  
Dallas, TX 75202