



**NEGATIVE
POPULATION
GROWTH**

THE NPG FORUM

POPULATION AND THE “EIS”

by Joseph J. Brecher

Population was the first issue to be mentioned in the “Declaration of National Environmental Policy” (Title I of NEPA, the National Environmental Policy Act of 1969.) And yet, when it came time to draft the regulations to enforce that law, population was inexplicably demoted to an indirect or ‘secondary’ impact. Because of that change of focus, population has seldom figured in the environmental impact statements (or EIS) that were mandated by NEPA.

The population aspect of a decision is frequently the aspect with the most profound implications, even when that impact was not an intended result. The interstate highway system provides an example. Because of NEPA, EIS have regularly been prepared for construction of those highways. They have dealt usually with such issues as the filling of a wetland. The completion of each section has, however, usually had much vaster ramifications. It changes the economy of its area — not just because of the cluster of motels and service stations at the interchanges — but because industries and populations come with the Interstate, like Brazilian peasants following a new logging road. That effect is more or less predictable, and it is just such effects that the EIS should examine.

The environmental community is coming to understand the fundamental connection between population change and ecological impacts. As a rough rule of thumb, it is fair to say that — at any given level of consumption and technology — the environmental impact of any activity is roughly proportional to the population being served.

Recognizing the connection, eighteen of the principal environmental groups in the country, in a concerted “Blueprint for the Environment” delivered in late 1988 to President-elect Bush, called for the Council on Environmental Quality to amend its regulations to provide “for the consideration of population growth and other socio-economic impacts of federal programs and actions.” (Recommendation EOP-18)

It is time to get on with that proposal. It is hard to imagine any other single change in U.S. Government regulations that would do so much to force the nation to look at the population implications of what it is doing, and to consider how induced population change might affect the quality of life in specific places and times. Armed with such analysis, the “NIMBYs” of the nation — the local groups fighting uncontrolled growth in their own backyards — would have a powerful new tool to deal with policy makers.

With this thought in mind, we asked Joseph Brecher to provide us with a brief as to the legal justification for another concerted effort at persuading the government to change its regulations so as to do what the law told it to do, in the first place. Mr. Brecher is an attorney in private practice in Oakland CA, specializing in environmental law. Before establishing his practice in 1975, he worked for the Native American Rights Fund.

We hope that organizations trying to deal with the chaotic by-products of population-associated growth will find the brief of use and will consider acting upon it.

— Lindsey Grant, Editor

Introduction

Almost any kind of development usually induces population growth. Construction of a relatively small infrastructure project in an undeveloped area may cause limited environmental impact, in and of itself, but it often serves as the opening wedge for a tidal wave of development that surges in behind it. This results in profound changes in an area extending far beyond the scope and boundaries of the original project.

Although the law recognizes this problem, the existing legal mechanisms do not adequately deal with this important question. Instead, it is shunted off to second-class status

under the rubric of “indirect” or “secondary” impacts. Until the applicable agencies develop procedures to analyze induced population growth, the public and the decision-makers will be approving projects blindly, unaware of the true costs that will inevitably have to be paid down the road. This paper examines the current state of the law in this area and suggests a course of action for remedying the situation.

The Role of NEPA

The National Environmental Policy Act (NEPA) is the nation’s most important environmental statute, creating a duty for all federal agencies to give serious consideration to the environmental impacts of projects they approve or carry

out. NEPA recognizes the importance of the issue of population and growth. 42 U.S.C. §4331(a) notes “the profound influences of population growth [and] high-density urbanization...” All federal agencies are required to “use all practicable means...to...achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities...” 42 U.S.C. §4331(b)(5).

Despite this strong statutory language on the need to control population growth and new urbanization, the issue is rarely broached under NEPA. When population growth is made an issue, with a few exceptions, the courts have ruled that the subject need not be given serious attention. This unfortunate situation can be attributed to the inadequacy of the Council on Environmental Quality’s regulation in this area.

The CEQ Regulations

The Council on Environmental Quality (CEQ) is authorized to issue binding guidelines for the implementation of NEPA. See Executive Order No. 11514, May 24, 1977, Section 3(h); *National Indian Youth Council v. Watt* (10th Cir. 1981) 664 F.2d 220.

The CEQ Guidelines deal with the population issue in an unfortunate manner. The definition of the term “effects” is divided into two parts at 40 C.F.R. §1508.8. “Direct” effects “are caused by the action and occur at the same time and place.” “Indirect effects” 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.

This arbitrary division into “primary” and “secondary” impacts, which is not sanctioned by the statutory language, is probably the main reason the courts have been reluctant to take the issue of induced population growth seriously.

NEPA in the Courts

There have been approximately one dozen cases which put major emphasis on the population issue in the context of NEPA. They present a very mixed bag. The following sections describe the various approaches the courts have adopted.

A. Favorable cases. The strongest and most often cited case favoring a serious analysis of population growth impacts is *City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661. In that case, federal and state highway authorities proposed to build a freeway interchange near Davis, California without filing an Environmental Impact Statement (EIS) or a California Environmental Impact Report (EIR). Instead, they issued a Negative Declaration, claiming that there would be no significant environmental impacts. The court noted that the purpose of the interchange was “to stimulate and service future industrial development in the Kidwell area...” Environmentalists argued that, aside from failing to prepare an

EIS, the highway authorities had also erred by refusing to consider the growth-inducing impacts of the interchange.

The proceedings were governed by 23 U.S.C. §128, which requires highway authorities to hold a hearing and consider “the total impact of the project as a whole...” See *Lathan v. Brinegar*, 506 F.2d 677, 690. The implementing regulations for §128 provided that the highway departments are to consider direct “and indirect benefits or losses to the community and to highway users”, including regional and community growth, conservation and preservation including general ecology, public facilities and utilities, “community cohesion including residential and neighborhood character and stability, and displacement of people, businesses and farms.”

The court noted that the Negative Declaration discussed only the “primary” environmental impacts of the interchange but not the “secondary” or “indirect” impacts, such as population effects. The court noted these effects were dismissed as “speculative” and “uncertain”. The court responded sternly: “This will not do.” It continued:

The purposes of §128, as amplified by NEPA, are ill-served by rigid bifurcation of potential social, economic and environmental effects into those which are “primary” or “direct” and those which are “secondary” or “indirect”. 521 F.2d at 680.

The court criticized the Negative Declaration for leaving a large number of questions unanswered: it did not discuss “probable impact on growth, land use or the planning process.” In addition, there was no estimate of the increased demand for city services which would be occasioned by increased population and no discussion of the possible impacts on community cohesion and the tax base. All these matters should have been considered, the court ruled. 521 F.2d at 680-81.

In *Coalition for Canyon Preservation v. Bowers* (9th Cir. 1980) 632 F.2d 774, the plan was to widen a narrow highway into a major four-lane facility, including parking lanes, in a number of small tourist towns near Glacier National Park in Montana. The court ruled that the EIS on the project should have analyzed “secondary impacts such as growth, land-use development, and social and economic activities.” 632 F.2d at 782.

The court noted: “Although treatment of secondary impacts is not a specific requirement of an impact statement, the central focus is on those impacts, both primary and secondary, that have a ‘significant impact’ on the environment.” 632 F.2d at 783. Speaking of the small towns that would be connected by the upgraded highway, the court noted that “tourism is their main source of income and roadside businesses are common. It is likely that this project will have major effects on the character of these towns. This case requires analysis of these secondary effects. The subject was not addressed in the EIS.” 632 F.2d at 774.

Another case which endorses the study of population impacts in an EIS is *McDowell v. Schlesinger* (W.D. Mo. 1975) 404 F. Supp. 221. In that case, the court ruled that the Department of Defense would have to prepare an Environmental Impact Statement on a plan to move and close certain military facilities. The court acknowledged that the major impacts asserted by the plaintiffs were “secondary” social and economic impacts, “as contrasted to direct impacts on the ecology.” 404 F.Supp. at 244. However, the court noted, concerns such as impact on population are specifically set forth in NEPA, 42 U.S.C. §4331(a) and the Guidelines’ definition of secondary impacts. 404 F.Supp. at 244-45.

In addition, the court relied on Department of Defense regulations which specified that the Department give close environmental scrutiny to mission changes and troop developments “which precipitate long-term population increases or decreases in any area, with special attention to the secondary impacts which may cause indirect environmental impact.” 32 C.F.R. §214.7(d)(7). See 404 F.Supp. at 246.

On the basis of these authorities, the court concluded that “NEPA’s ambit extends to the effects of proposed action on neighborhood cohesiveness and character, population density, crime control, and aesthetic considerations.” 404 F.Supp. at 246.

Another case which emphasizes the importance of considering “secondary” impacts is *Sierra club v. Marsh (D. Me. 1989)* 714 F. Supp. 539, 559-65.

B. Unfavorable cases. Despite the few beacons of light described above, most courts have concluded that an EIS need not discuss population impacts of development. The courts have offered two principal reasons to support these holdings. First, some have held that if there is no direct, primary effect on the environment, secondary impacts need not even be considered. This was the ruling in *Image of Greater San Antonio v. Brown* (5th Cir. 1978) 570 F.2d 517, 522. There, the issue was the effect of moving 1,200 civilian employees away from an Air Force base. The court noted that the plaintiffs alleged no physical effects on the environment. In its view, “the primary concern [of NEPA] was with the physical environmental resources of the nation.” It continued as follows:

We do not mean to say that socio-economic effects can never be considered under NEPA. When an action will have a primary impact on the natural environment, secondary socio-economic effects may also be considered. [Citations.] But when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger an agency’s obligation to prepare an EIS. 570 F.2d at 522.

This holding was followed in *Monarch Chemical Works, Inc. v. Exxon* (D. Neb. 1979) 466 F.Supp. 639. There, the chemical company claimed an EIS should have been prepared when the City decided to condemn vacant land for a correctional facility. The company was trying to acquire the same

land to expand its own facilities. The company said the City should have considered “induced changes in patterns of land usage, the population density...and the socio-economic consequences of the construction of a prison upon industrial and commercial growth.” 466 F.Supp. at 655.

As in *Greater San Antonio, supra*, the court found that, absent a primary environmental impact, no EIS need be prepared. It distinguished the *McDowell* case on the ground that a primary impact might have existed there. (Alternatively, the court found that the plaintiffs had failed to show that any of the predicted secondary impacts would, in fact, occur.) 466 F. Supp. at 656-57.

Another reason the courts use for rejecting analysis of population effects is that those impacts are too “speculative” or “remote”. For example, in *Trout Unlimited v. Morton* (9th Cir. 1974) 509 F.2d 1276, environmentalists claimed that an EIS on a proposed reservoir should include an analysis of possible second home development at the new lake. The court acknowledged that the failure to discuss that possibility “gives us pause. We agree that the statement could have been improved by a discussion of these issues.” 509 F.2d at 1283. But the court concluded that second home development and its consequences “are only remote possibilities.” The court accepted the Bureau of Reclamation’s conclusion that because the area was now highly developed for agriculture with only a few small towns, “no significant change could be expected either in population or land use patterns.” Because there was no specific plan to build second homes, the court could not assume that they would come in to being. 509 F.2d at 1284.

Even more discouraging, the *Trout Unlimited* opinion states in a footnote that there might not be *any* requirement to study population impacts at all: “While agreeing that under a given factual situation, failure to include a discussion of secondary impacts might render an EIS fatally defective, we cannot say that a specific treatment of secondary impacts is a substantive requirement of the impact statement. The central focus should not be on a primary/secondary impact analysis but upon those impacts (either primary or secondary) which have a ‘significant impact’ upon the environment.” 509 F.2d at 1283 note 9.

Some unfortunate cases go even further than *Trout Unlimited* in deeming future growth too “speculative” to require analysis. In *Trout Unlimited*, there was no evidence of any specific plan for second homes, at all. But in *Pennsylvania Protect Our Water v. Appalachian Reg. Com’n.*, 574 F.Supp. 1203 (E.D. Pa. 1982), the induced growth effects of a proposed project appeared far more certain. There, the plan was to develop a motel, civic arena, and ski area. Environmentalists sought to require a study of the growth impacts of the development, pointing to an early feasibility study prepared by the landowner for a massive residential development adjacent to the recreation area.

However, the landowner had never proceeded with the residential project, so the court accepted the conclusion in the EIS that future development is “too remote and speculative to discuss in detail.” The court found the discussion in the

EIS "of secondary growth was minimally acceptable under all the circumstances." 574 F. Sup. at 1236. It distinguished *Coalition for Canyon Preservation* and *Davis v. Coleman* on the ground that "increased and foreseeable development was one of the immediate goals of the projects, which thus required more detailed FEIS consideration." 574 F. Supp. at 1236.

Summary of the State of the Law

Under the present state of the law, there is only a minimal chance that agencies will give serious consideration to the growth and population impacts of new development. The CEQ regulations are drawn in such a way that they do not clearly require such analysis. By placing population and growth issues in the category of "secondary" impacts, they relegate those issues to a subordinate status, to be discussed only if there exists some other, "primary" impact from a proposed growth-inducing action. Furthermore, growth and population issues need not be analyzed unless the developer or the agency concedes that specific plans for secondary development already exist.

The few cases which *have* required growth and population analysis rely heavily on specific agency policies for implementing NEPA, rather than the weak CEQ Guidelines. It is obvious that the Guidelines, themselves, do not effectively require federal agencies to focus on these crucial issues.

Proposal for Action

Individuals or groups who are interested in this issue should file a petition with the Council on Environmental

Quality, requesting the adoption of a revised Guideline that specifically requires analysis of the growth and population impacts of any development. The specific language of the proposed rule would, of course, have to be crafted with very special attention to detail, so as to avoid loopholes. The petition would be filed under the authority of the Administrative Procedure Act, 5 U.S.C. §553(e), which states: "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

Perhaps CEQ would accept the proposal or an acceptable variant. If that agency rejected the petition, the next step would be a petition for review in federal district court for the District of Columbia. As with all efforts to make new law, trying to assess the chances for success in such litigation is difficult. The petitioners could make a convincing showing that Congress meant for population and growth to be studied and that the present Guidelines have not, in fact, resulted in any effective consideration of those issues. On the other hand, the government would point out that CEQ *has* a regulation on the subject already and, although it might not be entirely to our liking, it fulfills the statutory mandate to deal with the issue. This argument, too, has some credibility. Which argument the judge chooses is, in part, the luck of the draw.

In the final analysis, it might be well to proceed as outlined here despite the obvious problems. The petitioners would have two chances to win — before CEQ and in court. The goal of getting meaningful studies of growth and population as part of the NEPA process is important enough to warrant bucking the odds. And even if the petitioners were not victorious, the litigation would publicize and promote discussion of a complex and important issue.

NPG Comment

Another point deserves mention. The EIS process simply requires that we look at the implications of what we are doing. It does not mandate a given policy. Others may very well hold views different from NPG's as to desirable population size and yet agree that the question needs to be looked at, in the context of specific projects and programs.

On the matter of "programs": since NEPA began, the government has been much better about doing EIS on limited and concrete projects like highway bridges than on the broader programs that drive them. There are EIS on individual timber concessions from National Forests, but none on the broader decision to accelerate cutting, including much of the remaining old growth in the Northwest. There are EIS on specific oil leases, but not on energy policy. If, at the same time that we try to bring the government to open its eyes to the population connection, we could persuade it to do EIS on the really big decisions, we would have a better governmental decision process.

NPG believes that the proposal in this paper should be pursued and hopes to cooperate with others to bring it about.

NEGATIVE POPULATION GROWTH, Inc.

210 The Plaza, P.O. Box 1206, Teaneck, N.J. 07666-1206, Telephone: (201) 837-3555

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