The Role of Secondary Impacts Under NEPA

Rosalie Caprio
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The National Environmental Policy Act of 1969 (NEPA)\(^1\) was designed to "encourage productive and enjoyable harmony between man and his environment."\(^2\) To achieve this goal, the Act imposes procedural requirements on all federal agencies to insure that they "inform every stage of their decision-making process with consideration of environmental factors, broadly understood."\(^3\) The filing of an Environmental Impact Statement (EIS), mandated by section 102, "the only one with teeth,"\(^4\) serves two functions. First, it contributes environmental information to the agency regarding an intended action. Second, the EIS provides the public with information on the environmental consequences of an action.\(^5\) Since the filing of an EIS is the only procedure for ensuring the consideration of environmental factors, the decision to file or not to file is crucial to the implementation of NEPA.\(^6\)

An EIS must be filed for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."\(^7\) An action

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2 Id. § 4321.
5 Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974).
6 NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not to File, 48 N.Y.U. L. Rev. 522, 525 (1973) [hereinafter cited as EIS's and Hanly].
may affect only the physical environment or it may produce an immediate physical impact, which in turn induces other changes in man's living conditions. A primary impact is the immediate physical environmental impact directly attributable to the proposed action. For example, in the construction of a housing project, the primary impact would include tree removal, land leveling, or interference with natural water flow.

A primary impact can induce a secondary impact. A secondary impact occurs when man's manipulation of the physical environment in turn affects his living environment. Secondary impacts are man's effect on his social, economic, and psychological environments. The construction of a housing project increases population density in the area and also strains sewage and water systems. Socio-economic factors such as local unemployment levels, availability of public services, and crime rates may also be affected. These impacts, while not directly involving the physical environment, have serious consequences for the living environment.

Primary impacts are cognizable under NEPA and require the filing of an EIS. If NEPA applies only to primary impacts, however, the Act would lack meaning to the millions of city-dwellers. Trees and natural land configurations contribute minimally to the quality of urban life: 

"[In the inner city] many of our most severe environmental problems interact with social and economic conditions. . . . Their concept [of environment] embraces not only more parks, but better housing; not only cleaner air and water, but rat extermination."

The severity of secondary impacts on the urban environment is demonstrated by the history of the Alaskan pipeline. A twenty percent increase in population caused by the influx of workers has had devastating effects on life in Alaskan communities. Prices have skyrocketed. A loaf of bread costs one dollar. Housing is in short

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8 Primary impacts are those that can be attributed directly to the proposed action . . . . If the action involved construction of a facility, such as a sewage treatment works, an office building or a laboratory, the primary impacts of the action would include the environmental impacts related to construction and operation of the facility and land use changes at the facility site.


9 The Environmental Protection Agency defines secondary impacts as "indirect or induced changes." Id. § 6.304(c)(3).

10 See Council on Environmental Quality (CEQ) Guidelines, id. § 1500.6(a)-(b).


12 See generally Those Post-Pipeline Blues, TIME, Oct. 18, 1976, at 84.
supply. Schools, highways, and recreational facilities are overcrowded. Crime is on the rise. Robberies have increased 100% in Anchorage and 200% in Fairbanks since 1973. “Nearly everywhere, prostitutes, con men and gamblers have swarmed in to help pipeline workers spend their weekly paychecks. . . .” Despite the environmental controversy over the pipeline’s effect on the ecological environment, this impact on the human environment was unforeseen. Failure to predict and plan for such secondary impacts has resulted in the destruction of the human environment which existed prior to construction of the pipeline.

This article will first examine NEPA, its legislative history, and its administrative enforcement to determine if secondary impacts on the human environment are cognizable under the Act. The second section will survey the courts’ construction of NEPA to determine which secondary impacts have been included in the scope of the Act.

I. JUSTIFICATION FOR THE INCLUSION OF SECONDARY IMPACTS UNDER NEPA

A. The Wording of the Act

Since there are no express statutory definitions, impacts on the human environment can be defined only by a careful analysis of the language used throughout the Act. NEPA has been criticized for being “so broad, yet so opaque, that it will take even longer than usual to fully comprehend its import.” Its ambiguous wording complicates the task of determining whether secondary impacts are cognizable under the Act.

The stated congressional purpose behind NEPA is, in part:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . .

The stimulation of the welfare of man can occur both through the

\[\text{References:}\]

13 Id. at 86.
14 Id.
improvement of his physical environment and through the improve-
ment of his socio-economic environment. Although the section does
not expressly state that NEPA covers secondary impacts, it does not
exclude them either.

The declaration of policy section of NEPA specifically encom-
passes secondary impacts on the environment:

[R]ecognizing the profound impact of man's activity on the interrela-
tions of all components of the natural environment, particularly the
profound influences of population growth, high density urbanization,
industrial expansion . . . and recognizing further the critical import-
ance of restoring and maintaining environmental quality to the overall
welfare and development of man, [Congress] declares that it is the
continuing policy of the Federal Government . . . to use all practicable
means and measures . . . in a manner calculated to foster and promote
the general welfare, to create and maintain conditions under which man
and nature can exist in productive harmony, and fulfill the social, eco-

Under the declaration of congressional policy, population growth,
urbanization, and industrial expansion are significant not only be-
cause they affect the natural environment, but also because they
affect the general welfare. The section impliedly refers to two con-
cepts of environment. Congress first announces a policy directed at
controlling man's effect on the natural environment, but then pro-
cceeds to express a concern for controlling the effect of the environ-
ment on man's general welfare. It would appear that Congress in-
tended the Act to work both ways—to improve man's impact on the
physical environment and to improve the impact of environmental
alteration on man's welfare. The improvement of the impact on
man's welfare necessitates the consideration of secondary factors.

Section 102(2)(A) of NEPA requires that each federal agency
"utilize . . . [an] approach which will insure the integrated use of
the natural and social sciences . . . in planning and decisionmaking
which may have an impact on man's environment . . . ."18 By mand-
ating the use of social science in environmental planning, this
section intimates that NEPA was designed to have some effect on
the socio-economic factors which contribute to man's living environ-
ment. How an Act designed to operate environmentally can accom-

17 Id. § 4331(a).
18 Id. § 4332(2)(A).
moderate recognition of social factors is not clear, however. The text gives no indication of which secondary factors are cognizable under the Act or whether such secondary factors must bear a particular relationship to the primary impact in order to trigger the NEPA procedures.

Although the mechanics for the consideration of secondary impacts are vague,19 NEPA must be read to include secondary, as well as primary impacts. Excluding secondary impacts ignores the two-way relationship between man and environment announced in the Act.

B. Legislative History

The legislative history of NEPA primarily concerns protection of the ecosystem, but it also includes several specific references to secondary impacts on the human environment. Senator Jackson, the Senate floor manager of NEPA, in presenting the Conference Report, identified the socio-economic problems of the cities as one aspect of the motivating policy behind NEPA.

A great deal . . . remains to be done . . . if mankind and human dignity are not to be ground down in the years ahead by the expansive and impersonal technology modern science has created. . . . We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being. . . .20

By extending the Act to promote "man's social and psychological well-being," Senator Jackson was including within the scope of the Act impacts on man's living environment in addition to purely physical impacts.

The Department of Health, Education and Welfare (HEW) Report on NEPA21 specifically refers to secondary impacts. In a letter

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19 For an interpretation of NEPA which excludes secondary factors, see Factors to be Considered in Making A Threshold Determination that an Environmental Impact Statement is Necessary Under the National Environmental Policy Act of 1969, 2 Fordham Urb. L.J. 419 (1974) [hereinafter cited as EIS Factors]. "There is nothing which states that NEPA is anything more than an environmental law or that anything other than [primary] environmental factors are within its purview," Id. at 431.


21 S. Rep. No. 296, 91st Cong., 1st Sess. 2761-66 (1969). The Departmental Reports are letters to the Chairman of the Committee on Merchant Marine and Fisheries of the House of Representatives from various federal departments in which the heads of these departments discuss their views on the bill.
concerning the pending legislation, the Acting Secretary of HEW discussed environmental programs as they affect man: "Included in these programs are activities concerned with the effect of environmental forces on man in his home, in the community, and in the workplace, and the environment as it relates to products by man and their effect on him." HEW interpreted the Act as affecting not only primary but also secondary environmental impacts.

The legislative history is far from conclusive on the precise interpretation of impacts on the human environment as used in NEPA. But the history does discuss secondary factors, and leaves open the possibility that Congress intended secondary factors to be cognizable under NEPA.

C. Regulations

Several federal agencies, in defining their role under NEPA, have found that secondary impacts must be discussed in an EIS. The Council on Environmental Quality (CEQ), established by NEPA to "formulate and recommend national policies to promote the improvement of the quality of the environment. . . ." not only has included secondary impacts as cognizable under NEPA, but has recognized secondary impacts as sometimes more consequential than primary impacts. In the Guidelines on the preparation of Environmental Impact Statements, the Council advises that:

Secondary, or indirect, as well as primary, or direct, consequences for the environment should be included in the analysis [in an EIS]. Many major Federal actions . . . stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects . . . may often be even more substantial than the primary effects of the original action itself."

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22 Robert H. Finch.
26 Id. §§ 1500 et seq. "This directive provides guidelines to Federal departments, agencies, and establishments for preparing detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment as required by section 102(2)(C) of the National Environmental Policy Act . . . ." Id. § 1500.1.
27 Id. § 1500.8(a)(3)(iii). The Council also recommends the filing of an EIS for an action "the proposed environmental impact of which is likely to be highly controversial . . . ." Id. § 1500.6(a). This article will not discuss what constitutes a "controversial" action.
The Guidelines recommend that secondary factors which have a significant impact on community facilities and activities be discussed in an EIS. The Guidelines cite increased population as a particular secondary impact which should be examined. Redevelopment construction, density and congestion, neighborhood character and continuity, and impacts on low income populations are also named as areas of environmental concern.

The CEQ Guidelines are advisory only and do not have the force of law; nevertheless, as the agency established to define compliance with NEPA, the Council's regulations should be given great weight in interpreting the Act. The CEQ's determination is substantial authority for requiring the discussion of secondary impacts in an EIS.

Other agencies, following the lead of the CEQ, have promulgated regulations which specify that secondary impacts should be included in an EIS. For example, the Environmental Protection Agency (EPA) Regulations dictate that whether an action requires an EIS is to be determined by its primary and secondary effects.

If the action involves construction of a facility, the secondary impacts would include the environmental impacts related to:
(i) induced changes in the pattern of land use, population density, and related effects on air and water quality or other natural resources.
(ii) increased growth at a faster rate than planned for or above the total level planned for by the existing community.

In addition to such secondary factors as population density and growth, the EPA requires an EIS to include a discussion of how socio-economic activities and land use changes caused by the pro-
posed action will conflict with the local land use plans and policies. Considering the EPA's special expertise in environmental matters, its emphasis on secondary impacts strongly supports the argument that secondary impacts are cognizable under NEPA.

The Department of Defense Regulations also discuss secondary impacts. The Defense Regulations find that, "[a]lthough the secondary socio-economic impacts are generally insufficient by themselves to require an EIS, these factors should be included in the statement, in the event an EIS is required." Other agencies, such as the Department of the Treasury and the Department of Housing and Urban Development, which have developed regulations under the authority of NEPA, recognize secondary impacts but do not specifically define their role in the preparation of the EIS.

The regulations promulgated by federal agencies recognize the role of secondary impacts under NEPA. Agencies, bound by their own regulations, must discuss secondary impacts in the preparation of an EIS.

II. COURTS' RECOGNITION OF SECONDARY IMPACTS UNDER NEPA

Since no one agency is empowered to enforce NEPA, the courts are charged with ensuring compliance with the Act's procedural mandates. In order to determine compliance with NEPA, the courts must evaluate the agency's determination of environmental impact. In various situations, the courts have required the discussion of secondary impacts, reasoning that the Act would provide

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37 Id. § 6.304(c)(4).  
38 32 C.F.R. § 214.7(b)(2) (1976). Population density and neighborhood character are recognized as secondary impacts. Id. § 214.7(c)(3)(i)-(ii).  
41 42 U.S.C. § 4332 (1970); Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). "[I]t is the court which must construe the statutory mandates . . . and having construed them, apply them to the particular project and decide whether the agency's failure violates the Congressional command." Scherr v. Volpe, 336 F. Supp. 882, 888 (W.D. Wis. 1971), aff'd, 466 F.2d 1027 (7th Cir. 1972).  
42 See City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) (industrial growth); Hanly v. Mitchell, 469 F.2d 378 (2d Cir. 1975) (crime); Tierrasanta Community Council v. Richardson, 6 ENVTL. REP. CASES 1065 (S.D. Cal. 1973) (socially disruptive influences); Goose Hollow
no protection for the urban environment were secondary impacts not recognized. The ambiguity of the Act itself, however, aggravated by the courts' initial uncertain treatment of secondary impacts, has resulted in a failure on the part of the courts to provide any clear-cut guidelines for the discussion of secondary impacts in an EIS. Slowly, certain trends have evolved from this case-by-case treatment of secondary impacts. An analysis of the past litigation and the developing trends will aid in predicting future court action on the issues surrounding secondary impacts in certain fact situations.

A. Growth in Population

1. Where growth is certain

The secondary impact of population growth has been found to constitute a significant impact on the human environment. The construction of a housing project, for instance, induces an increase in population. Since the impact is determined by the character of the area before the action and the resultant degree of change, what may be a significant environmental impact in a rural area might not be significant in the city or vice-versa. A significant growth in population at the least strains sewage systems, schools, mass transportation, and community services. Particularly in a rural setting, increased population can induce significant construction of roads and other facilities, drastically changing the character of the area. Population induces physical changes in the environment. The CEQ


EIS Factors, supra note 19, at 430.

At least one court has expanded its definition to encompass "all the factors that affect the quality of life . . . ." Jones v. HUD, 390 F. Supp. 579, 591 (E.D. La. 1974), and one administrator has concluded from the courts' interpretation of NEPA that, "'major' means 'any' and . . . 'significant effect' means 'some effect' . . . ." Joint Hearings Before the Senate Comm. on Public Works and the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 415 (1972) (statement of Roger Cromton, Chairman, Administrative Conference of the United States).

See CEQ Guidelines, 40 C.F.R. § 1500.6(b) (1976).
advise that overburdening public services must be discussed in an EIS because it tends to induce new construction to provide additional services. Courts have readily held population growth to be cognizable under NEPA because of its physical, rather than social impact. The pertinent cases emphasize the physical impact of population growth. *Goose Hollow Foothills League v. Romney* enjoined construction of a high-rise apartment building, financed through the Department of Housing and Urban Development (HUD), in an area which had no high-rise buildings. The court criticized HUD for its failure to file an EIS assessing the impact of the concentration of population, the resultant change in the character of the neighborhood, and the increased traffic in the area. Conversely, in *Town of Groton v. Laird*, the court found that the secondary impacts of a housing project had been adequately evaluated. There, the Navy had considered additional strain on roads, sewage and water facilities as well as increased automobile fuel consumption and air pollution in making its decision not to file an EIS.

Two cases specifically identify the effects of population growth as physical impacts. *Fort Story v. Schlesinger* held that a housing project’s effects on utilities, highways, schools, and other public services are impacts on the physical environment and are within the zone of interests protected by NEPA. In *Chelsea Neighborhood Associations v. United States Postal Service*, the court held that “possible overcrowding at a local elementary school [and] the need for future expansion of local health services,” were physical impacts within the meaning of NEPA.

In *Fort Story* and *Chelsea Neighborhood Associations*, impacts which are normally considered socio-economic were labeled physical impacts by focusing on their ultimate effect on the physical environment. Since the courts readily recognize physical impacts, a strat-
egy of emphasizing the physical consequences of secondary impacts facilitates a finding of significant impact.

Where a significant increase in population will result from a proposed action, courts have found that factors such as noise and availability of parking space deserve discussion in the EIS. Implications for city growth policies, character of the neighborhood, and neighborhood stability have also been determined as proper subjects for consideration in the EIS. These factors have both socio-economic and physical effects. An activity which will affect both the physical environment and man's living environment is generally held cognizable under NEPA.

2. Factors which might affect the recognition of growth as a significant impact

Growth is a secondary factor accorded great weight by the courts and will require the filing of an EIS under varying circumstances. A primary impact which in itself is not significant requires the filing of an EIS where it induces a significant secondary growth impact. Even induced growth which is speculative may trigger the NEPA procedures if it is reasonably foreseeable.

In City of Davis v. Coleman, the court held that although the primary impact of the construction of a highway interchange was insufficient to require an EIS, the potentially severe secondary impact of induced population growth necessitated compliance with NEPA. The court found that the interchange was not being built to accommodate existing demands, but rather to facilitate a local plan for industrial growth which the city predicted would affect the

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41 See Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir. 1972) (noise); Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378, 387 (2d Cir. 1975) (availability of parking).
43 In general, some impact on the physical environment must exist in order to trigger the NEPA procedures, even though such impact need not be significant. But see Department of Defense Regulations, 32 C.F.R. § 214.7(b)(2) (1976), which state that secondary impacts alone generally are not sufficient to require the filing of an EIS. The Department of the Defense has not been a party to a growth case which involved an absence of a significant primary impact. The effect of this regulation on a court's determination of such a case is a matter of conjecture.
44 521 F.2d 661 (9th Cir. 1975).
45 Id. at 666.
water supply and frustrate the city's controlled growth policy.\textsuperscript{66} Emphasizing that "the most serious environmental effects of a project may not be obvious,"\textsuperscript{67} the court stated:

The growth inducing effects of the Kidwell Interchange project are its raison-d'etre, and with growth will come growth of problems: increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities.\textsuperscript{68}

The impacts recognized by the court are the same environmental consequences that would result from the construction of a housing project. Growth will have the same impact on the environment irrespective of how it is induced.

The fact that a primary impact is insufficient to trigger NEPA procedures is irrelevant to the issue of whether the secondary impact of increased population requires an EIS. A significant secondary growth impact alone triggers the NEPA procedures.\textsuperscript{69}

"[T]he purpose of an EIS/EIR is to evaluate the possibilities in light of current and contemplated plans and to produce an informed estimate of the environmental consequences. . . . Drafting an EIS/EIR necessarily involves some degree of forecasting."\textsuperscript{70} The degree of foreseeability of an increase in population will determine whether that increase creates an obligation to file an EIS. In a case involving the construction of multi-unit housing, the influx of people to fill the units is an expected and very probable result of the construction. In such cases, the impact of growth should be discussed in an EIS. If induced growth will not obviously occur, any party challenging an agency decision must show that population is likely to increase as a result of the proposed action. Unless anticipated growth is foreseeable, it should not require the filing of an EIS. The intent of the federal agency involved, the character of the area, and the conduct of third parties can all affect the foreseeability of anticipated growth.\textsuperscript{71}

\textsuperscript{66} Id. at 671.
\textsuperscript{67} Id. at 673.
\textsuperscript{68} Id. at 675.
\textsuperscript{69} See id. at 676, n.18. Where the primary impact requires an EIS, the impact of growth must be discussed.
Where growth is an intended result of an action, its impact is presumably foreseeable and the responsible federal agency should be required to predict its consequences. Conversely, where there is no intent or plan to induce growth, to expect a federal agency to predict what form speculative development would take may be less reasonable. In *Trout Unlimited v. Morton*, a suit to enjoin the construction of the Teton dam on the grounds that the EIS did not discuss the possibility of second home development on the reservoir bank was denied, in part, because the induced growth was not an intended result. In *City of Davis v. Coleman*, however, the court found that industrial expansion was the raison-d’etre of the federal action and held that the EIS should discuss the effects of growth.

Two cases brought in the District of Columbia involving attempts to enjoin the Comptroller of Currency from approving bank charters demonstrate the importance of area characteristics in determining the foreseeability of growth. In *First National Bank of Homestead v. Watson*, the local bank sought to force the filing of an EIS on the grounds that a new bank, with its increased lending activity, would induce further urbanization in an area already being threatened with a serious ecological crisis. The court found that the new bank’s location in the Miami, Florida area did not significantly affect the human environment. Given the highly developed and industrialized nature of that area, the court found that the bank would have no foreseeable effect on the local rate of growth. In contrast, the same court in *Billings v. Camp*, required the impact of growth induced by the chartering of a new bank to be discussed in an EIS. In *Billings*, the bank was to be located in Woodstock, Vermont, a small, nonindustrial town. The increased development occasioned by the introduction of a new bank could have a severe impact on the growth rate of the area.

The predicted conduct of third parties also can contribute to a

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\[\text{aff’d, 524 F.2d 241 (1st Cir. 1975) articulated a reasonably foreseeable test. 8 Envt’l Rep. Cases at 1125.}\]
\[\text{72 509 F.2d 1276 (9th Cir. 1974).}\]
\[\text{73 Id. at 1284.}\]
\[\text{74 521 F.2d 661, 673 (9th Cir. 1975).}\]
\[\text{75 363 F. Supp. 466 (D.D.C. 1973).}\]
\[\text{76 Id. at 469.}\]
\[\text{77 Id. at 471.}\]
\[\text{78 Id. at 473.}\]
\[\text{80 Id. at 1745.}\]
court's finding that growth is not foreseeable. Where local ordinances or disinterested individuals are likely to limit growth, the court will find the impact too speculative to be included in an EIS. In *Cummington Preservation Committee v. FAA,*\(^8\) the court found that since development plans had not received the required town approval,\(^8\) and since approval was unlikely,\(^8\) growth was too speculative to require discussion in an EIS. The court in *First National Bank of Homestead v. Watson*\(^8\) also held that no EIS was required because growth was outside the control of the new bank.\(^8\) The court reasoned that the bank would merely fund plans which were developed by others.

*Homestead* demonstrates the possible misapplication of this rationale to support a finding that growth is not foreseeable. The CEQ Guidelines specify the inclusion in an EIS of secondary impacts in the form of associated investments which, through inducing new facilities and activities, could have a significant impact on the environment.\(^8\) One of the principal functions of a bank is lending. The role of a bank in the development of an area is readily apparent. The Comptroller in *Homestead* could anticipate the form of potential growth, despite the necessity of third party conduct. The *Homestead* holding was based in part on the fact that the character of the area made a significant growth impact unforeseeable. However, to the extent that the decision rested on the necessity of third party action to produce an increase in population, that decision would seem to controvert the NEPA goal of ensuring that environmental concern form an integral part of federal decision making.\(^8\) A federal agency should not avoid its NEPA responsibility by mere anticipation of possible conduct of third parties.

Where substantial questions are raised about the environmental consequences of federal action, the responsible agencies should not proceed with the proposed action in ignorance of what those consequences will be.\(^8\) The reasonably foreseeable test\(^8\) should determine

\(^8\) *8 Env'tl. Rep. Cases* at 1125.
\(^8\) The region was considered a "fragile wilderness area." *Id.* at 1125 n.8.
\(^8\) *Id.* at 472-73.
\(^8\) 40 C.F.R. § 1500.8(3)(ii) (1976).
\(^8\) City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).
when a speculative growth in population deserves discussion in an EIS. When the character of an area, the intent of the responsible agency, and the possibility of third party interference indicate that growth is a reasonably foreseeable result of an agency action, that agency must attempt whatever prediction is practicable. Thus, speculative impacts can be cognizable under NEPA.

B. Crime and Socially Disruptive Influences

The secondary impacts of crime or socially disruptive influences have no immediate effect on the physical environment, but do affect the general living environment. These non-physical secondary impacts are cognizable under NEPA. Crime has been held to constitute a significant impact on the environment. Although there has been some dispute as to the environmental impact of socially disruptive influences, the trend has been toward recognition of these impacts under NEPA.

Courts have held that a potential increase in crime in an urban area is a cognizable impact under NEPA. Crime has an impact on the general living environment; where personal safety is threatened, the neighborhood becomes an unpleasant place to live. Eventually property values decline and neighbors vacate the area, affecting the stability and character of the neighborhood. *Hanly v. Mitchell* held that an EIS has to consider the threat of riots, disturbances, and danger to safety posed by the construction of a jail in a heavily populated, inner-city area. "Noise, traffic, over-burdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban 'environment' and are surely results of the 'profound influences of . . . high-density urbanization. . . ." *Hanly*, on rehearing, (hereinafter *Hanly II*) held that the introduction of a drug maintenance center could have a significant environmental impact by exposing neighbors and passers-by to drug addicts and drug pushers.
The characteristics of the surrounding area can determine if crime foreseeably will have a significant effect on the area. *First National Bank of Chicago v. Richardson,* while recognizing that crime could have a significant impact on the environment, held that since the jail in question was to be located in a non-residential, blighted area, the impact from crime would not be significant.

Some dispute has been centered on the issue of whether community distaste for having a detention center in the neighborhood is a factor which contributes to environmental impact. Distaste can lower property values and have effects on a neighborhood similar to those created by crime. The court in *Hanly II,* however, indicated that psychological reaction might not be an impact cognizable under NEPA:

> It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination [of environmental impact] since they do not lend themselves to measurement. . . . Unlike factors such as . . . crime, in which crime statistics are available, psychological factors are not readily translatable into concrete measuring rods.

The court did not have to decide the question of whether psychological distaste was an environmental impact since there was another jail in the area.

The Second Circuit's identification of measurability of effect as the standard for determining environmental impact has been criticized. Former Chief Justice Friendly, in his dissent in *Hanly II,* argued that a statute which speaks of "the overall welfare and development of man" should not be limited solely to measurable entities. Citing section 102(2)(B) of the Act, Justice Friendly read the congressional mandate that "presently unquantified environmental amenities and values . . . be given appropriate consideration in decisionmaking . . ." as compelling the inclusion of psychological and sociological factors in evaluating environmental impacts. Further, the concept of measurability is not compatible with the predic-

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*484 F.2d 1369 (7th Cir. 1973).*
*Id. at 1380.*
*Hanly v. Kleindienst, 471 F.2d 823, 833 (2d Cir. 1972).*
*Id.*
*Id. at 836.*
*42 U.S.C. § 4331(a). For a discussion of the wording of the statute, see text Part I(A), supra.*
*471 F.2d at 839.*
tion required by an EIS: "[I]f the decision turns on accuracy of measurement, crime statistics are no better than 'psychological dis­taste;' their precision comes from the fact they tell us about the past rather than what a group will do in the future in a new place." 103

In contrast to Hanly II, Tierrasanta Community Council v. Richardson,104 involving a youth detention center in a low-density residential area, held that the "psychological and sociological effects of the proposed youth facility on the families residing in the community adjoining the proposed facility, surrounding property values, the character of the adjoining residential neighborhoods, [and] the education of elementary school children attending a school adjacent to the facility," were significant impacts.105 By re­quiring an EIS, the court enabled the community to participate in the decision to build the center.106

The restrictive measurability standard of Hanly II has not been followed even in the circuit which established it. The court in Chelsea Neighborhood Associations v. United States Postal Service,107 enjoining the construction of a multi-story housing pro­ject on the grounds that the EIS was inadequate, criticized the absence of a discussion of the physical and emotional isolation caused by living at the top of an 80 foot plateau.108

That an EIS must consider these human factors is well estab­lished. . . . We do not know whether informed social scientists would conclude that the top of the [project] would likely become a human jungle, unsafe at night and unappealing during the day. The question must be faced, however, by those who plan the project.109

Without specific reference to the measurability standard, the court in Chelsea Neighborhood Associations did not limit environmental

103 Daffron, Using NEPA to Exclude the Poor, 4 ENV. AFF. 81, 90 (1975) [hereinafter cited as Daffron].
105 Id. at 1097. Note that, as in the case of population growth, the fact that the primary impact is not sufficient to require an EIS does not bar the application of NEPA to secondary social impacts. Id. at 1068.
106 Although the Hanly II court did not require NEPA procedures, it did allow community participation. Since the action would affect the sensibilities of the neighborhood, the court required that the responsible federal agency give the public notice and an opportunity to submit relevant facts which might bear on the agency's decision to file an EIS. Such an alternative would have been unnecessary had the Hanly II court held that psychological and sociological factors contributed to environmental impact. See 471 F.2d at 836-37.
107 516 F.2d 378 (2d Cir. 1975).
108 Id. at 388.
109 Id.
impacts to those that are measurable. Whereas statistics might exist to demonstrate how unsafe a housing project might be, any indication of the emotional isolation caused by living in a project is found only in the sociological and psychological disciplines so readily dismissed in Hanly II.

Statistical measurability should not limit the impacts cognizable under NEPA. Where socially disruptive impacts are likely to have an effect on the community, those impacts should be discussed in the EIS. Crime and the psychological reactions of a community affect not only the quality of the living environment, but ultimately can result in an impact on the physical environment as well. The responsible federal agency should be required to discuss these secondary impacts in the EIS.

C. Influx of Minorities

Assuming that psychological impacts are properly considered under NEPA, the extent to which neighborhood fear and distaste can be recognized as a secondary impact must be limited. Including fear as a factor which determines environmental impact could allow NEPA to be used to enforce racial and group prejudices. NEPA has been raised in attempts to exclude racial minorities and low income groups. Community fear, generated by the introduction of a low income housing project foreseeably could affect the environment by lowering property values and contributing to neighborhood instability. Yet, every allegation that an influx of low income neighbors would have an environmental impact has been dismissed by the courts.

In Nucleus of Chicago Homeowners v. Lynn, local residents alleged that low income tenants, as a group, possess "a higher propensity toward criminal behavior and acts of physical violence, . . . a disregard for physical and aesthetic maintenance of real and personal property, . . . [and] a lower commitment to hard work." They argued that such residents would have an adverse impact on physical safety, the aesthetics of the neighborhood, and the economic quality of life. Citing the inability to predict human behavior from economic statistics, and the selection and eviction procedures available under the housing plan, the court found that HUD had adequately considered the impact of the housing on the neighbor-

110 524 F.2d 225 (7th Cir. 1975), cert. denied, 96 S. Ct. 1462 (1976).
111 Id. at 228.
hood. "To the extent that this claim can be construed to mean that HUD must consider the fears of neighbors of prospective public housing tenants, we seriously question whether such an impact is cognizable under NEPA."112

Similarly, the plaintiffs in Maryland-National Capital Park & Planning Commission v. United States Postal Service113 alleged that the Post Office, in determining that the construction of a bulk mail facility did not require an EIS, had failed to recognize that an influx of low income workers would be a significant environmental impact.114 The court held that the "impact from people pollution on 'environment,' . . . ." was not cognizable under NEPA.115

The cases which have refused to apply NEPA to serve exclusionary ends were decided as much on jurisprudential and underlying constitutional grounds as on the basis of environmental injury.116 At issue in the exclusionary cases is the impact of people. Determining the impact of a group requires prediction of the future behavior of individuals. The law cannot accept the proposition that individual behavior can be predicted, sociological evidence to the contrary. "Sociological evidence based on social class characteristics is unsuited to the judicial forum on the jurisprudential ground that it runs counter to the voluntaristic view of human beings, and the ideal of individualized, rule-bound adjudication which characterize our tribunals."117 However, requiring a discussion of the impact of crime from a new jail also entails the prediction of human behavior.118 Thus, the courts' refusal to use NEPA to impede the construction of low income housing can not be explained simply as an evidentiary problem.

Underlying all of the attempts to exclude certain income groups under NEPA is the possibility that such exclusionary use of the Act violates due process and equal protection.119 Racial groups have traditionally received special protection under the Constitution.120

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112 Id. at 231.
113 487 F.2d 1029 (D.C. Cir. 1973).
114 Id. at 1037.
115 Id.
116 See generally Daffron, supra note 103, at 94-110.
117 Id. at 97.
118 Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1975) required an EIS to discuss the impact of crime from a new jail. See text Part II(B), supra.
119 Id. at 101-10 U.S. CONST. amend. V provides, "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . ."
Since the lower income brackets are disproportionately comprised of racial minorities, federal action which would serve to exclude low income housing may deny the equal protection of the law.\textsuperscript{121} Criminality, rather than being a specially protected classification, affords a rational basis for prediction of future behavior which has generally been recognized by the judicial system.\textsuperscript{122} Since criminals as a group have not been afforded special constitutional status, resting a federal decision on a classification of criminality does not raise the constitutional problems inherent in a racial classification.

Several solutions are available to the courts for avoiding the use of NEPA for exclusionary purposes. The standard of measurability proposed in \textit{Hanly II}\textsuperscript{23} was used by the Second Circuit to avoid serving exclusionary ends through NEPA. "Implicit in the court's rejection of sociological effects . . . may have been the unspoken convictions that the plaintiffs were objecting to the economic and social status of the new jail's inmates and visitors."\textsuperscript{124} In \textit{Trinity Episcopal Church v. Romney},\textsuperscript{125} the Second Circuit refined the measurability standard by holding that where a finding of an environmental impact might interfere with housing for racial and economic groups, the analysis of the environmental impact must rest on objective and measurable criteria. "Accordingly, neither the alleged anti-social propensities of low income persons nor the fears which their increasing presence may engender are objective criteria of community stability and as such do not fall within the ambit of a NEPA study."\textsuperscript{126}

The measurability standard, however, runs counter to the objective of prediction inherent in the EIS procedure,\textsuperscript{127} and a preferable basis for denying exclusionary claims should be found. A finding of impermissible motives underlying the suit, as yet implicit in this area of litigation, should be the explicit basis for denying exclusionary claims. The courts do not hesitate to look behind the pleadings to determine motives in other types of NEPA litigation.\textsuperscript{128} Furthermore, the Supreme Court recently held that racially discriminatory

\textsuperscript{121} See, e.g., Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971).


\textsuperscript{123} 471 F.2d 823 (2d Cir. 1972).

\textsuperscript{124} \textit{EIS's and Hanly, supra} note 6, at 544.

\textsuperscript{125} 387 F. Supp. 1044 (S.D.N.Y. 1975), aff'd, 523 F.2d 88 (2d Cir. 1975).

\textsuperscript{126} 387 F. Supp. at 1037.

\textsuperscript{127} See text Part II(B), \textit{supra}.

\textsuperscript{128} See text Part II(D)(1), \textit{infra}.
intent should determine equal protection violations in housing. Where the underlying motive of a suit is to exclude racial and economic classifications, concerns based on the anticipated behavior of groups should not be recognized as valid claims under NEPA.

A discussion of minorities and income groups does have a place in an EIS. Where an initial concern with race or income factors provides the impetus for raising legitimate environmental impacts, such factors are cognizable under NEPA. For example, in Jones v. HUD, a proposed action which would result in a change of income characteristics in an area was held to be a significant impact on the environment. The change in land use and possible traffic congestion were found to be impacts which required the filing of an EIS. In Prince George's County v. Holloway, the relocation of a Naval base posed serious problems concerning the availability of adequate housing for low and middle income groups and racial minorities. The court found that this impact should have been discussed. The courts in these cases were not concerned with behavior of low income groups or racial minorities, but rather focused on the physical impact caused, in one case, by altering the character of the neighborhood, and, in the other, by overburdening existing housing facilities. In such a context, where no exclusionary motive exists, an initial consideration of income characteristics is entirely proper.

D. Economic Interests

1. Business Motives

Economic injury is not a secondary impact which is cognizable under NEPA. Where a plaintiff will be injured environmentally as

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132 Id. at 592.


134 404 F. Supp. at 1187.

135 Id. at 1186.

well as economically, he can raise only the environmental issues under NEPA. A plaintiff alleging solely economic injury has no standing to challenge the agency action. Such a plaintiff has an injury in fact, but does not have an injury within the zone of interests protected by NEPA, for NEPA protects only environmental interests.

The court held that the plaintiffs lacked standing to bring the suit in Zlotnick v. Redevelopment Land Agency. Owners of nonresidential property which was to be acquired by the city under a redevelopment plan argued that if a more thorough EIS were filed, the city might decide on a different redevelopment plan, thereby allowing them to develop their property in a commercially profitable manner. These allegations were insufficient under NEPA. The courts will examine the underlying motives of the plaintiffs to determine if they are economic. In Pizitz, Inc. v. Volpe, the court found the EIS sufficient and characterized the suit as "spurious" because, as the pleadings reflect, plaintiffs' primary concern in filing and prosecuting this litigation was to avert a threatened loss of business. . . . Of course, the National Environmental Policy Act was not designed to prevent loss of profits."

In certain cases, economic and environmental injuries can be closely interrelated. A plaintiff alleging economic injury also can have cognizable environmental injury. In such a case, the court will examine the environmental issues. Plaintiffs in Cummington Preservation Committee v. FAA alleged injury to the operation of a dairy farm. The court held that these interests were economic and that the plaintiffs lacked standing to assert their economic inju-
ries. However, the Court recognized that an injury to the profits of a dairy farm resulting from damage to cows implies an environmental injury. The court deemed the pleadings amended to allege environmental injuries and decided the case on the merits.

Notwithstanding the relationship between environmental and economic injury, a plaintiff who has only a financial interest cannot achieve standing under NEPA simply by fashioning an environmental injury for the purpose of the pleadings. In Clinton Community Hospital Corp. v. Southern Maryland Medical Center, the injury alleged by the plaintiff hospital was its predicted forced closing caused by the construction of a newer, larger hospital. Plaintiff's real aim was "to prevent the building of a competitive hospital by highlighting the disadvantages of the competitor's site near an existing air base. While showing a real injury, this status is not within the area protected or regulated by NEPA." Again, plaintiffs were found to lack standing.

The underlying economic interests of the plaintiff may affect the weight given to environmental claims. In First National Bank of Homestead v. Watson, one factor in the court's determination that the alleged impact of growth was not significant may have been the nature of the plaintiff raising the environmental issue. Plaintiff Bank, the only banking association in Homestead, brought suit individually and on behalf of directors, officers, and shareholders, as citizens. Although the plaintiffs raised sufficient environmental issues to maintain standing, the suit appeared to be an attempt to control commercial competition. Further, the court found "some indication in the record that plaintiffs would not object to the establishment of an independent bank unsupported by the resources of a bank holding company and presumably with fewer assets." Although not expressly stated, the court might not have fully considered the environmental issues because of the extent of the plaintiffs'
underlying business motive.\textsuperscript{151}

Where a plaintiff arguably has a business interest to protect, the court should examine carefully any allegation of environmental injury. Preservation of a profitable business is not a factor which determines the environmental impact of an action. Although certain environmental injuries will result in economic injuries, those alleging business injury only cannot raise NEPA issues. Business injury, although an injury in fact, is not within the zone of interests protected by NEPA, and will not confer standing.

2. The Military Lay-Off Cases

Several cases raise the issue of whether a transfer of a military base which results in the lay-off of civilian employees is an action which significantly affects the human environment under NEPA. The effects of a base transfer on the area in which the base will be relocated are significant impacts on the human environment.\textsuperscript{152} The lay-off cases concern the environmental impact on the area vacated by a transfer.

The immediate physical impact on the environment is negligible or even beneficial.\textsuperscript{153} The transfer of a military facility can eliminate air and noise pollution in the area. The lay-off of civilian employees, however, increases the local rate of unemployment which can lead to a high incidence of mortgage default and the disruption of the family unit as the wage-earner leaves the area to find work.\textsuperscript{154} Both of these factors affect the stability of a neighborhood, possibly resulting in its deterioration. Thus, a major lay-off not only affects the living environment, but also can have serious consequences for the physical environment.

Despite the serious environmental harm posed by the transfer of a military base, only one case has held that such an action requires the filing of an EIS. In \textit{McDowell v. Schlesinger},\textsuperscript{155} civilian employees and a Missouri county brought suit to enjoin the Department of

\textsuperscript{151} For a discussion of this case in the context of growth as a secondary factor, see text Part II(A)(2), \textit{supra}.


\textsuperscript{153} For a discussion of the beneficial impact on the environment of a military transfer, see National Ass'n of Gov't Employees v. Rumsfeld, 8 ENVT'L REP. CASES 2153 (D.D.C. 1976).

\textsuperscript{154} \textit{See} IMAGE of Greater San Antonio v. Rumsfeld, 9 ENVT'L REP. CASES 1183, 1185 (W.D. Tex. 1976).

\textsuperscript{155} 404 F. Supp. 221 (W.D. Mo. 1975).
Defense from proceeding with a planned transfer of an Air Force unit. The court held that the secondary impact of the resulting unemployment, even in the absence of a primary impact, was sufficient to require the filing of an EIS.

[Plaintiffs have shown that the proposed transfer . . . of approximately 7,500 persons [away from the area] could and will result in significant impacts to the . . . area on, among other things, existing social and economic activities and conditions in the area: problems relating to law enforcement and fire prevention, growth and development patterns in the area, including existing land use patterns, and neighborhood character and cohesiveness, etc. . . . While most of these potential impacts may properly be termed 'secondary' impacts, . . . [w]here such impacts may be significant, . . . NEPA applies to the proposed action, including its requirement of the preparation of a detailed EIS by the defendant agencies.154

Other courts which have considered a military lay-off have denied that the resultant secondary impacts were cognizable under NEPA. These courts hold that secondary impacts do not require the filing of an EIS in the absence of a primary impact and that economic injuries, even though they result in environmental injuries, are not cognizable under NEPA. National Association of Government Employees v. Rumsfeld157 and Breckinridge v. Rumsfeld,158 both involving the elimination of civilian jobs, held that secondary impacts standing alone are not cognizable under the Act. Other circuits, however, have found that secondary impacts, in the absence of a significant primary impact, are cognizable under NEPA.159 In IMAGE of Greater San Antonio v. Rumsfeld,160 despite extensive evidence of the impact on the living and physical environments, the court held that these secondary impacts were insufficient to trigger the NEPA procedures. "All of the cases that are concerned with the socio-economic impacts are also concerned with increased demands on our life support systems. They address the impact of an influx of people upon limited natural resources."161 The court's reasoning

154 Id. at 254.
156 537 F.2d 864 (6th Cir. 1976).
157 See City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975); Tierrasanta Community Council v. Richardson, 6 ENV'TL REP. CASES 1065 (S.D. Cal. 1973).
159 Id. at 1187.
here is questionable, since the secondary injuries alleged by the IMAGE plaintiffs have a physical impact on the living environment and are of the type which have been readily accepted as significant impacts.

The courts in IMAGE, Breckinridge, and Government Employees equated recognizing the environmental impact of unemployment with giving standing to an economic injury.

We hold that the district court was in error in undertaking to transform NEPA from a law designed to protect and enhance the natural resources of the nation into a statute prohibiting the discharge and transfer of personnel at an army installation. . . . [I]t was not the intention of Congress for NEPA to be used for purposes of promoting full employment or to prevent the discharge or transfer of federal personnel.142

The courts are correct in their interpretation that NEPA does not define an economic policy, but these cases do not concern purely a financial interest in preventing lost profits.143 Rather, these are cases where a primarily economic action could result in a significant environmental impact. If environmental injury which causes economic injury is cognizable under NEPA,144 economic action which would cause environmental injury also should be recognized under the Act. A refusal to consider the environmental impact of an action merely because the action is economic in nature controverts the policy of NEPA.145

The nature of the proposed agency action should be irrelevant;146 significant impact should be the sole standard for the filing of an EIS. "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."147 Since a lay-off of a substantial number of workers would have an impact on the human environment, such an action should require the filing of an EIS.

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142 Breckinridge v. Rumsfeld, 537 F.2d 864, 865 (6th Cir. 1976).
144 See text Part II(D)(1), supra.
146 City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975).
147 Trout Unlimited v. Morton, 509 F.2d 1276, 1283 n.9 (9th Cir. 1974).
CONCLUSION

Several sections of NEPA,188 the legislative history of the Act,189 and various regulations promulgated under NEPA170 all dictate the inclusion of secondary impacts under the Act. In general, if the secondary impact significantly affects the environment, it requires the filing of an EIS irrespective of whether the primary impact alone is significant. The role of secondary impacts under NEPA has been uncertain in the courts, but the recognition of secondary factors is essential to its goal of assuring "for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings."171

Although the liberal inclusion of secondary impacts under NEPA has been criticized for detracting from the goal of long term resource protection,172 the recognition of secondary impacts has ensured the vitality of the Act by focusing attention on the more subtle problems of man's living environment.173 The goal of protecting natural resources and the goal of promoting man's living environment are not mutually exclusive. Even where secondary environmental impact is questionable, NEPA goals would be better served by requiring the filing of an EIS. The EIS procedure merely allows community input and ensures that environmental factors contribute to the agency decision.

NEPA does and should protect a broad range of factors which affect the quality of the human environment. In order to continue as effective legislation, NEPA must be construed to recognize fully the wide variety of impacts on the human environment. An action should be subject to an EIS procedure where plaintiffs genuinely

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173 "NEPA and the controversy that has grown up around it have served to focus the attention of the government, private industry, and the public on some fundamental issues that have long cried out for attention." Joint Hearings Before Senate Comm. on Public Works and the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 1 (1972) (statement of Sen. Baker).
allege a foreseeable environmental injury, regardless of whether the form of injury is deterioration of neighborhoods, a higher incidence of crime, or overburdened public facilities. NEPA should not be used to promote concerns which are not environmental, such as business profits or racial prejudices. Significant environmental impact, whatever its form, is the only factor relevant to the application of NEPA.