"Indirect Effects: An Agency's Obligation to Consider Growth-Inducing Effects under NEPA"

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I. PURPOSE OF NEPA

NEPA requires federal agencies to prepare a detailed statement on the environmental impacts of and alternatives to their proposed actions. 42 U.S.C. § 4332(C). Compliance with NEPA's procedural and analytical requirements is designed to foster both informed decisionmaking and informed public participation. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA mandates that a federal agency proposing a major action with significant environmental effects prepare an EIS, 42 U.S.C. § 4332, which must include:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and]
>
> (iii) alternatives to the proposed action . . . .

Id.

The EIS requirement is designed to make certain that the agency will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that also may play a role in both the decisionmaking process and the implementation of that decision. 42 U.S.C. § 4332(C); *Robertson*, 490 U.S. at 349; *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 676 (5th Cir. 1992). While NEPA does not command a certain outcome, it does "mandate[] that the agency gather, study, and disseminate information concerning the projects' environmental consequences." *Sabine River Auth.*, 951 F.2d at 676.

The form, content, and preparation of the EIS must encourage both "'informed decision-making and informed public participation.'" *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)). Because of the dual purposes of NEPA, a primary function of a court reviewing an EIS is to "ensure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives." *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977).

NEPA does not allow delay until a decision to develop a project is made before preparing an EIS. *EDF v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979); *Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979). Instead, NEPA must be part of the decisionmaking process, and the EIS is triggered by the *proposal* to undertake an action. 40 C.F.R. §§ 1502.1(b), 1501.2, 1502.5. The "complexity" of the proposals is up to the agency, and it cannot rely on the

difficulties of NEPA compliance to shirk its statutory obligations. *Block*, 690 F.2d at 765; *Conner v. Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

II. STANDARD OF REVIEW

In NEPA cases, judicial review raises only issues of law. *Sierra Club v. Watkins*, 808 F. Supp. 852, 860 (D.D.C. 1991) (under NEPA, dispute is what facts or theories must be addressed in environmental document, not which facts or theories are correct); *see also McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980) (conflicting evidence in administrative record does not create issue of fact). The applicable standard of review for an EIS is whether it was prepared in accordance with the procedure required by law. 5 U.S.C. § 706(2)(D). The reviewing court employs a "rule of reason" requiring a "pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

The "rule of reason" standard determines whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Center for Biological Diversity v. United States Forest Service*, 349 F.3d 1157 (9th Cir. 2003); *see also Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1376 (9th Cir. 1998) ("rule of reason" standard is applied in essentially the same manner as the "arbitrary and capricious" standard). Courts generally defer to agency expertise on questions of the proper weight to give various pieces of scientific evidence, particularly if those questions implicate the agency's "area of expertise." *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983). As one court noted, "NEPA does not require [that we] decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346 (9th Cir. 1994) (brackets in original); *see also Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1130 (8th Cir. 1999). Rather, the court's task is to ensure that agency procedures resulted in a reasoned analysis and disclosure of the evidence before it, as "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive." *Id.*

A challenged agency decision on an EIS must be supported by the administrative record in existence at the time of that decision. *See, e.g., National Audubon Soc'y v. U.S. Forest Service*, 4 F.3d 832, 841 (9th Cir. 1993), *amended on other grounds*, 46 F.3d 1437 (9th Cir. 1994); *Sierra Club v. Marsh*, 976 F.2d 763, 771 (1st Cir. 1992). A court may look beyond statements in the challenged environmental document and review the administrative record to determine whether the facts and law support the agency's characterization. *See* 40 C.F.R. § 1508.23; *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985); *Public Serv. Co. v. Andrus*, 825 F. Supp. 1483, 1497 (D. Idaho 1993); *National Wildlife Fed'n v. U.S. Forest Service*, 592 F. Supp. 931 939 (D. Or. 1984), *vacated in non-relevant part*, 801 F.2d 360 (9th Cir. 1986).

The Administrative Procedure Act, 5 U.S.C. § 706(2), authorizes a court to hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, or privilege; or without observance of procedure required by law. *See Sabine River Auth.*, 951 F.2d at 679 ("we review the materials submitted to the district court . . . and determine whether the agency's conclusions were arbitrary and capricious"). *Colorado Environmental Coalition v. Dombeck*,

185 F.3d 1162, 1167 (10th Cir. 1999) (internal quotation and citation omitted). Under the APA, "a reviewing court must undertake a thorough, probing, in-depth review of the agency's decision and then decide whether it was based on the relevant factors and whether there has been a clear error of judgment." *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 747 (W.D. Tex. 1997) (internal quotations omitted). In making its review, the court should consider the "whole" administrative record compiled by the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); 5 U.S.C. § 706; *Dole*, 770 F.2d at 434 ("the administrative record the court must review . . . is the record in existence at the time the agency committed itself to a particular course or decision").

Normally, an agency action is considered arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Texas Oil and Gas Ass'n v. United States Envtl. Prot. Agency, 161 F.3d 923, 933 (5th Cir. 1998) (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). While this standard of review is a narrow one, the Court must still ensure that the agency examined the relevant factors and articulated a satisfactory explanation for its actions. *See State Farm*, 463 U.S. at 43. The Court undertakes a "thorough, probing, in-depth review," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), that is "searching and careful," *Marsh*, 490 U.S. at 378. The court must "'steep' itself in technical matters sufficiently to determine whether the agency 'has exercised reasoned discretion.'" *Chemical Manufacturer's Ass'n v. EPA*, 870 F.2d 177, 199 (5th Cir. 1989); *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

Furthermore, if the agency has failed to articulate a rational connection between the facts found and the choice made, the agency's decision cannot be upheld. *See Sierra Club v . Glickman*, 67 F.3d 90, 97 (5th Cir. 1995). In *Sierra Club v. Sigler*, 695 F.2d 957, (5th Cir. 1983), the court explained that there can be no "hard look" at environmental impacts when an agency fails to consider relevant factors in an EIS. *Id*. at 979; *see also Texas Comm. on Natural Res. v. Van Winkle*, 197 F. Supp. 2d 586, 597, 619-20 (N.D. Tex. 2002).

III. CONSIDERATION OF INDIRECT ENVIRONMENTAL EFFECTS

A. *Applicable Statutes, Regulations, and Guidance*

NEPA requires that an agency discuss the environmental effects of a proposed action in an EA or an EIS. 42 U.S.C.A. § 4332(2)(C). NEPA's implementing regulations, adopted by the Council on Environmental Quality (the "CEQ Regulations"), define environmental effects to include both the direct and indirect effects of a proposed action. "Direct effects" of a proposed action are those "that are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). "Indirect effects" are defined as those that are:

> caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may 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.

Id. at (b) (emphasis added). The CEQ Regulations go on to explain that "effects" include ecological, aesthetic, historic, cultural, economic, social, or health effects, whether those effects are direct, indirect, or cumulative. *Id.*

Guidance issued by the CEQ provides that an agency must identify all of the known indirect effects of a proposed action, as well as make a good faith effort to explain the effects that are "reasonably foreseeable." *See NEPA's Forty Most Asked Questions*, Question No. 18, Council on Environmental Quality. While an agency is not required to engage in speculation or contemplation about future plans in the face of total uncertainty, the agency does have a responsibility to "make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable…." *Id.* In sum, "the agency cannot ignore uncertain, but probable, effects of its decisions." *Id.*

Courts have recognized that the indirect effects of a proposed action may, in fact, have a more significant effect on the environment than the direct effects. *See e.g. Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). Nevertheless, neither the CEQ Regulations nor the existing case law on the topic set forth a clear test or other criteria to determine when and to what extent an agency must consider the indirect growth-inducing effects of a proposed action. Rather, most courts tend to base their determination on whether the potential growth-inducing effects of the proposed action are "reasonably foreseeable" and thus require consideration, or are "too remote or speculative" to require agency consideration.

B. *Caselaw*

While the requirement to consider any potential indirect growth-inducing effects of a proposed action applies to all types of actions, these types of effects are most typically arise in the context of highway and transportation projects, infrastructure projects (such as water, sewer, power etc.) and residential and commercial land development. This is not surprising, given that these types of projects are typically undertaken when either existing infrastructure has or is nearing capacity or where new development is planned in an area with inadequate services. As a result, the majority of court decisions addressing growth-inducing effects fall into these general categories.

1. Adequate Consideration of Growth-Inducing Effects

While recognizing that NEPA requires an agency to consider the indirect effects that a proposed action may have on growth, many courts are reluctant to find that an agency acted arbitrarily in failing to consider such effects. *See, e.g., Enos v. Marsh*, 616 F.Supp. 32 (D. Haw. 1984) (EIS was adequate where it acknowledged potential consequences of secondary industrial growth that harbor project may induce, but where consequences were too speculative for further consideration); *Penn. Protect our Water and Environmental Resources, Inc. v. Appalachian Regional Comm.*, 573 F.Supp. 1203, 1373 (M.D. Penn. 1982) (EIS for proposed access road did not need to consider the growth-inducing effects of the road where the surrounding landowners testified that there were no plans to develop property in vicinity of road); *Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F.Supp.2d 953 (S.D. Ind. 2000) (Corps did not need to consider growth-inducing effects in permitting a

riverboat casino where the record did not suggest any planned residential or commercial development in the vicinity of the casino). In such cases, the courts' reasoning is based on a finding that the indirect growth-inducing effects are too remote or speculative for consideration, or that, based on the agency's limited consideration, the effects are not significant.

For example, in *Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997), the Ninth Circuit Court of Appeals examined whether an EIS for a highway project properly considered the growth-inducing effects that the project may have on the area to be served by the highway. Initially, the court noted that the area that would be affected by the highway project was already well-developed and that existing growth necessitated the project. Moreover, because any limited additional growth was already identified in local plans and was within the control of local authorities, the court found that the construction "will not spur any unintended, or, more importantly, unaccounted for, development because local officials have already planned for future use of the land…." *Id.* at 1162. Thus, the court found that the agency's consideration of growth-inducing effects in the EIS was adequate.

In an action involving a proposed rural water system, the court in *Sierra Club v. Cavanaugh*, 447 F.Supp. 427 (D. S.D. 1978), addressed whether the Farmer's Home Administration had adequately considered the growth-inducing effects of that system on the surrounding area. The water system was designed to serve a service area consisting primarily of six rural communities (with a total population of under 6,000) and a number of farm residences in Lincoln County, South Dakota. *Id.* at 430. The size of the system was designed to meet the present population of the service area, as well as to accommodate the foreseeable growth needs of the service area. An EA had been prepared and had discussed the potential growth-inducing effects of the system, concluding that these effects were not significant.

The Sierra Club sought to enjoin construction of the water system until an EIS was prepared, arguing that the system would stimulate urban sprawl from neighboring Sioux Falls, as well as aggravate an existing water supply shortage in the area. After examining the environmental assessment ("EA") and administrative record, the court disagreed. In reaching its holding, the court relied primarily on two facts: first, that since the water system was designed to meet existing and reasonably foreseeable growth, the proposed project would have only negligible growth-inducing potential. *Id.* at 431-32. And second, the court reasoned that the growth-inducing potential was not significant because any development resulting from the availability of water must comply with local zoning regulations. *Id.* at 432.

The court applied similar reasoning in *Georgia River Network v. U.S. Army Corps of Engineers*, 334 F.Supp.2d 1329 (N.D. Ga. 2004), in the context of a proposed water supply project. In that case, the Corps had prepared an EA and issued a FONSI when granting a Section 404 permit to a local water authority for the construction of a reservoir. The population of the county served by the water authority had increased by 103% between 1990 and 2000, making it the third fastest growing county in the United States. According to the local water authority, the county would exhaust its current water supply by 2004 without construction of the proposed reservoir, which was expected to yield 23.6 million gallons of water per day and provide an adequate water supply through 2016. *Id.* at 1332-33

The court rejected plaintiff's assertion that the Corps' EA failed to adequately consider the growth-inducing effects caused by the availability of additional water supply. The court found evidence in the record that "the purpose of the reservoir is to keep up with the water demands

of Henry County's increasing population, not that the projected population growth rate is attributable to the construction of this Reservoir." *Id.* at 1344. Thus, because the Corps was required only to look at the indirect effects of the reservoir itself, it was not required to consider the environmental consequences of the county's population growth. *Id.* at 1344-45. The court further found that the Corps had adequately considered foreseeable development around the reservoir, such as increased infrastructure and utilities, and reasonably concluded that any indirect effects would be minimized by existing local, state and federal regulations and mandatory mitigation requirements incorporated into the Section 404 permit. *Id.* at 1346. This court viewed the indirect effects of the reservoir project to be limited to the growth spurred as a result of the reservoir itself, and did not require broader consideration of the growth that would be served by the water that reservoir would provide to the community.

In *Florida Wildlife Federation v. Goldschimdt*, 506 F.Supp. 350 (S.D. Fla., 1981), plaintiffs challenged an EIS supporting construction of a new highway segment, claiming that it failed to analyze the secondary growth effects that the highway would induce. The EIS included discussions of induced growth and development in several sections and ultimately concluded that development of areas served by the highway was already planned for development and therefore that growth was "foreseen for the near future, regardless of whether the Interstate highway is built." *Id.* at ____. The court upheld the agency's decisions, noting that this development was not resulting in the first instance from the highway construction, but rather from forces other than the highway. As a result, the EISs consideration of growth-inducing effects was adequate.

A recent decision from the federal district court for Nevada upheld an EIS prepared in connection with the proposed widening of a highway linking northwest Las Vegas and the "Resort Corridor." *Sierra Club v. U.S. Dept. of Transp.*, 310 F.Supp. 2d 1168 (D. Nev. 2004). Plaintiffs challenged FHA's decision, claiming that the EIS was inadequate in that it failed to properly consider the growth and traffic-inducing effects of the proposed expansion. In its decision, the court recognized that "Nevada is the fastest growing State in the United States, having doubled its population every decade since 1970. A large percentage of that growth is occurring in the northwest portion of the Las Vegas metropolitan area. . . . Commuter trips between the northwest and the Resort Corridor are expected to increase by fifty-four percent by 2015." *Id.* at 1177. Nevertheless, the court found that the EIS's discussion of growth-inducing impacts was reasonably thorough where it discussed existing plans for master planned communities in the area, as well as city and county growth plans, and zoning regulations and patterns. *Id.* at 1186. As a result, the court was satisfied that the agency had taken a "hard look" and upheld the agency's decision. *Id.*

2. Inadequate Consideration of Growth-Inducing Effects

While courts frequently uphold an agency's consideration of the indirect growth-inducing effects of a proposed action, this is not always the case. However, those cases that have held that an agency failed to adequately consider the growth-inducing effects of a proposed action have typically arisen in the context of an EA and subsequent FONSI by the agency, rather than in cases where the agency prepared a more detailed EIS.

An early leading case on an agency's obligation to discuss growth inducing effects in its NEPA analysis is *Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). In that case, the City of Davis challenged the FHA's negative declaration of environmental impact (a finding comparable to a

FONSI) on the basis that the FHA had failed to consider the growth and development that would result from the proposed action. The FHA, in cooperation with state and local agencies, proposed to construct an interchange in a rural area just outside of Davis. The project proponents portrayed the interchange as necessary to provide convenient highway access to area residents. However, the City of Davis claimed that the real intent of the interchange was to provide highway access to a proposed research park that was planned for the rural area. Thus, argued Davis, the FHA was required to consider the significant growth-inducing effects of the interchange.

The Ninth Circuit found clear evidence in the record that the project was intended to stimulate and service the planned research park, that development of the research park was the only credible economic justification for the project, and that construction of the interchange was "an indispensable prerequisite" to development of the research park. *Id.* at 674. Thus, the court held that the FHA must undertake an EIS and consider the growth-inducing effects of the interchange project. In so holding, the court reasoned that:

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

Id. at 675.

The Ninth Circuit did recognize that the potential development caused by the interchange included a range of possibilities and depended on the plans of private parties and local governments. However, the court rejected any suggestion that, because the consequences of growth and development would result from local and private action, the agency need not consider the growth-inducing effects of the proposed action. *Id.* at 677. Furthermore, the court rejected the FHA's argument that the uncertainty of the development in the area made the indirect environmental effects of the interchange too speculative for evaluation. Instead, "uncertainty about the pace and direction of development merely suggests the need for exploring in the EIS/EIR alternative scenarios based on these external contingencies." *Id.* at 676. In finding that the growth-inducing effects of the proposed action were foreseeable, the court reasoned that some degree of reasonable forecasting and speculation is implicit in NEPA and cannot be avoided by simply labeling a discussion of future effects as a "crystal ball inquiry." *Id.* (citing references and quotations omitted).

The recent decision by the Nevada federal district court in *Western Land Exchange Project v. U.S. Bureau of Land Mgmt.*, 315 F.Supp.2d 1068 (D. Nev. 2004), similarly held that an agency must consider the growth-inducing effects of a project when stimulating growth and development is one of the project's goals. In *Western Land Exchange*, the BLM prepared an EA/FONSI for the sale of 6,478 acres of BLM lands in southeastern Lincoln County, Nevada, pursuant to the Lincoln County Land Act of 2000 ("LCLA"). In the EA, the BLM had reasoned that the "mere transfer of title to the LCLA lands" did not have significant effects on the environment. *Id.* at 1088. Plaintiffs challenged this approach, claiming that the BLM was required to prepare an EIS because the growth-inducing effects of the proposed land sales were likely to have significant environmental effects in the area. The court agreed, concluding that the BLM was required to consider the effects of future development as an indirect effect, where, as here, "[a]gressive development of the land was the assumed purpose of the entire project." *Id.* at 1089. In reaching this decision, the court noted that the impacts of future

development would be "'caused by the action,' in the most straightforward sense, insofar as they would not occur but for privatization," and that those impacts were reasonably foreseeable because they were intended. *Id.*[1]

The court also found that the BLM had failed to give adequate consideration to growth-inducing impacts as part of potential "cumulatively significant" environmental impacts from the land sale in combination with other foreseeable development activities in the area. Among the foreseeable future actions identified were: additional land privatizations and transfers by the BLM, construction of a proposed power plant, and the possible construction of a regional airport. *Id.* at 1095 As a result, "obvious questions" were raised as to cumulative impacts by the "breathtaking" pace of development in the affected region, which must be considered by the BLM. *Id.*

Likewise, in *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985), the First Circuit Court of Appeals was faced with a decision by the Corps of Engineers not to prepare an EIS for the construction of a port and causeway on an undeveloped island off the coast of Maine. In that case, the record indicated that the island had recently been zoned for industrial purposes and construction of a nuclear or coal-fired power plant, an oil refinery, or an aluminum reduction factory on the island had all been discussed. The record also showed that local government had supported the project because of its likely potential to stimulate industrial development and economic growth. Furthermore, the court found that detailed and precise plans existed that addressed the potential development for the island. In light of these circumstances, the court found it "nearly impossible to doubt that building the port and causeway will lead to further development of the island." *Id.* at 878. Therefore, the court held that the growth-inducing effects of the proposed action were significant enough to require preparation of an EIS and the Corps' decision not to do so was arbitrary and capricious. *See also Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 2005 WL 3234287 (S.D. Fla., Sept. 30, 2005) (where the objective of a multi-phase development to serve one company who would serve as anchor for entire project with the objective of spurring additional growth in area, agency failed to adequately consider growth-inducing effects of proposed action).

The decision in *Friends of the Earth, Inc. v United States Corps of Engineers*, 109 F.Supp.2d 30 (D. D.C. 2000), also arose in the context of a project intended to stimulate economic development. In that case, the Corps had approved three proposed floating casino projects off the Mississippi Coast after preparation of an EA. In reviewing the record, the court found that various proposals for upland development surrounding the casinos were "entirely conditional" on the construction of proposed casinos. The court also pointed out that the project developers had "sold" the projects to the surrounding community by touting the significant growth and economic development that the casinos would bring to the area. The court rejected the Corps' position that any secondary growth caused by the proposed casinos was "highly speculative and indefinite." *Id.* at 33. Rather, "[s]ince economic development of these areas [near the proposed casinos] is the announced goal and anticipated consequence of the casino projects, the Corps cannot claim that the prospect of indirect secondary development is 'highly

[1] It should be noted that the Supreme Court's decision in *Public Citizen*, p. 10, *infra*, calls into question whether bare "but for" causation, as was used by the court in *Western Land Exchange Project*, is sufficient to require analysis of an indirect effect under NEPA. Nevertheless, the *Western Land Exchange* court's reliance on the "but-for" test may be less significant, given that the court found a direct connection between the action and the development in concluding that the purpose of the project was that same development.

speculative.'" *Id.* at 34. Thus, the court held that the Corps was required to consider such growth-inducing effects in an EIS. *Id.*

In *Tomac v. Norton*, 240 F.Supp.2d 45 (D.D.C. 2003), the federal district court for the District of Columbia again was faced with a case involving the proper consideration of growth-inducing effects. In that case, the Bureau of Indian Affairs had prepared an EA on a proposed action to take land into trust for the construction of a tribal casino outside a small community. The court noted that the BIA had catalogued a number of socioeconomic effects of the casino's construction in the EA, including creation of new jobs, projected population increase, a housing demand increase, increase in school enrollment, increased spending, and potential increased commercial development. However, the agency had not discussed the impact that this secondary growth would have on public services, endangered species, wetlands, air quality, or other natural resources. *Id.* at 51. While recognizing that an agency is not required to consider speculative indirect effects, the court held that the BIA's own projections for growth could not be construed as "speculative." *Id.* at 52. Furthermore, the BIA had failed to explain why it had concluded that the local growth and development effects it had identified were not significant. Based on these deficiencies, the court concluded that the BIA had failed to adequately analyze the potential growth-inducing effects of the casino construction. *Id.*

C. *Lessons Gleaned from Caselaw*

While not providing any clear rules or criteria, these cases do provide some guidance as to when an agency must consider the indirect growth-inducing effects of a proposed action. First, if a proposed action is *intended* to stimulate growth, courts are likely to find that the agency must consider this growth in an EIS. Additionally, if there are relatively detailed or precise plans for development in the vicinity of a proposed action or if an agency identifies or quantifies an action's potential growth-inducing effects in an EA, courts appear much less likely to permit an agency to dismiss full consideration of these effects by characterizing them as too remote or speculative. Preparation of an EIS may somewhat lessen concerns over adequate consideration of growth-inducing effects, as development of the EIS will necessarily involve a more thorough analysis of the environmental effects of the proposed action than that contained in an EA.

These cases demonstrate a reluctance on the part of most courts to second-guess an agency's determination that the growth-inducing effects of a proposed action are not significant or are too remote or speculative to be considered. As a general matter, courts have upheld agency decisions that a project will not have significant growth-inducing effects where the growth is within the control of the local governments, is planned for in land-use planning documents, and is subject to local zoning regulations. Particularly when faced with water-related infrastructure projects, courts have upheld an agency's decision regarding its consideration of the growth-inducing effects of a water system where the systems were designed only to meet current demands and projected anticipated growth. Moreover, these cases suggest that consideration of growth-inducing effects may be appropriately limited to the growth in the confined vicinity of the proposed project, and need not consider the more distant growth that may ultimately be served by the resource provided by the project.

IV. OTHER ISSUES RELATED TO GROWTH-INDUCEMENT

A. *Causation*

It should also be noted that a recent NEPA decision from the Supreme Court—while not specifically addressing growth-inducing effects—indicates that the scope of an agency's authority may also play a role in determining whether indirect effects must be considered under NEPA. In *U.S. Dep't of Transp. v. Public Citizen***,** 124 S.Ct. 2204 (2004), the DOT prepared an EA analyzing proposed new safety regulations that would apply to Mexican motor carriers crossing the U.S.-Mexico border and issued a finding of no significant impact ("FONSI"). These new regulations were prompted by a Presidential announcement to lift a moratorium on Mexican motor carriers operating in the U.S. after an international tribunal had found that the moratorium was in violation of NAFTA. The President, however, had indicated that it would not lift the moratorium until new safety regulations were promulgated. While the agency did consider effects on traffic, safety, and air emissions due to an increase in the number of roadside inspections, DOT did not consider the environmental impact of an increased number of Mexican trucks on U.S. highways in the EA.

Plaintiffs argued that rescission of the moratorium and the attendant entry of Mexican trucks was a "reasonably foreseeable" indirect effect of the issuance of the regulations and thus required consideration by the agency. However, DOT had concluded that because any change in trade volume or increase in the presence of Mexican trucks on U.S. highways would be a result of the President's lifting of the moratorium, and not of the agency's issuance of regulations, it need not consider those impacts. The Supreme Court agreed, stating that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.* at 2215, *citing Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Instead, a "reasonably close causal relationship," similar to proximate cause in tort law, is required. *Id.* Thus, the Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect. Hence, DOT was not required to consider these effects in its EA when determining whether its action is a 'major Federal action.'" *Id.* at 2217.

This decision and its logic could be relevant to an analysis of whether or not, in certain circumstances, where an agency does not have discretion regarding approval of a project, is required to consider the indirect growth-inducing effects of that project. It could be argued that, similar to DOT in *Public Citizen*, where an entity has no ability to prevent indirect growth-inducing effects, its actions cannot be considered a legally relevant cause of growth-inducing effects. This argument, however, was recently rejected by a federal district court in Florida in *Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 2005WL3234287 (S.D. Fla., Sept. 30, 2005). To date, no circuit court has opined on the applicability of this logic to an agency's obligation to consider indirect growth-inducing effects.

B. *EPA Regulations*

In addition to the requirement that growth-inducing effects be considered under the CEQ regulations, EPA regulations, 40 C.F.R. § 6.506(a)(1) require that an EIS be prepared if a sewage treatments works will "induce changes … in … residential land use concentration and distribution." Thus, decisions considering agency compliance with this requirement in an EIS provides some additional guidance as to how these types of effects should be addressed.

In *Town of Orangetown v. Gorsuch*, 718 F.2d 29 (2nd Cir. 1983), the Second Circuit reviewed an EPA decision not to prepare an EIS prior to approval of construction of a sewage treatment facility. A local municipality claimed that the EPA failed to adequately consider the

development pressure that would be created by the new facility. The court disagreed, finding that the EPA had considered the local zoning scheme, current demographics, and projected anticipated growth in the area. *Id.* at 38. Furthermore, the sewage treatment facility was designed to only meet the population growth that was anticipated to occur over a 20-year period. Thus, the court held that the municipality "had not established that expansion of the sewage treatment system will encourage a significant increase in development rather than merely meet the district's presently overburdened needs and anticipated growth." *Id. See also Parsippany-Troy Hills v. Costle*, 503 F.Supp. 314 (D. N.J. 1979) (upholding an EPA-approved sewage treatment facility because the facility was designed to accommodate only an approximately 12% increase in growth over the next five to seven years, so EPA's determination that the facility's impact on growth was not significant and decision not to prepare an EIS was supported).

V. CONCLUSION

Whether and to what extent an agency is required to consider the indirect growth-inducing effects of a proposed action under NEPA will be dependent on the specific facts surrounding the proposed action. Courts generally will defer to an agency decision that the growth-inducing effects of a proposed action are not significant or are too speculative for consideration. However, some courts have required that an agency prepare an EIS to consider the significant growth-inducing effects of a proposed action. These cases tend to involve a proposed project where an EA/FONSI was issued and the professed, or readily apparent, intent of the project was to stimulate growth and development in the area of the project. Particularly with respect to infrastructure projects, courts have upheld agency findings that projects designed to meet current demands and projected population growth will not have a significant growth-inducing effect.