

Bad Timing: The Ninth Circuit Takes NEPA Backwards

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The 2006 Ninth Circuit decision Northern Alaska Environmental Center v. Kempthorne held that the Bureau of Land Management could move forward with a plan to issue oil and gas leases on the largest tract of untouched federal land in Alaska without conducting a site-specific Environmental Impact Statement. The court held that site-specific analysis could be deferred until the actual sites where oil and gas drilling would take place are known. This Note argues that Kempthorne misapplies prior National Environmental Policy Act (NEPA) caselaw and subverts the core purposes of NEPA. Prior caselaw and NEPA itself dictate that environmental impacts must be assessed before a government agency irreversibly and irretrievably commits resources. The decision undermines the purposes of NEPA by discouraging agencies from taking an actual “hard look” at environmental impacts; by not requiring a holistic analysis of such impacts; and by limiting the role of public input in the process.

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INTRODUCTION

The Ninth Circuit recently decided *Northern Alaska Environmental Center v. Kemphorne*,¹ which represents a serious setback for the enforcement of the National Environmental Policy Act (NEPA).² NEPA mandates the preparation of an Environmental Impact Statement (EIS) for all federal programs “significantly affecting the quality of the human environment.”³ The *Kemphorne* litigation involved an EIS prepared by the Bureau of Land Management (BLM) for oil and gas development leases on a large swath of the North Slope of Alaska.⁴ Environmental groups challenged the EIS under NEPA on the grounds that it failed to consider the site-specific impacts and the cumulative impacts of the proposed development.⁵ The court held that the BLM was indeed required to report these impacts of the North Slope development, but that such reports need not happen at the leasing stage of the program.⁶

NEPA was designed to bring about a comprehensive change in the way federal agencies make decisions, requiring them to consider and weigh the environmental consequences of proposed actions.⁷ It requires federal agencies to issue a comprehensive statement of environmental impacts for all “major Federal actions” likely to have significant environmental impacts.⁸ By requiring a detailed report of a project’s environmental impacts, Congress hoped to introduce environmental values into the decisionmaking process.⁹

The *Kemphorne* court subverted the spirit of NEPA when it decided that elements of the oil and gas drilling EIS could be delayed. NEPA has been interpreted by the courts as an exclusively procedural statute; regardless of the merits of the eventual decision, an agency is in compliance with the statute as long as the procedural components are

1. 457 F.3d 969 (9th Cir. 2006).

2. 42 U.S.C. §§ 4321–4370f (2006).

3. *Id.* § 4332.

4. *Kemphorne*, 457 F.3d at 973.

5. *Id.*

6. *Id.* at 976–77, 980.

7. See Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act’s Substantive Law*, 20 J. LAND RESOURCES & ENVT'L L. 245, 248–54 (2000).

8. 42 U.S.C. § 4332 (2006).

9. See Katie Kendall, Note, *The Long and Winding “Road”: How NEPA Noncompliance for Preservation Actions Protects the Environment*, 69 BROOK. L. REV. 663, 667 (2004).

satisfied.¹⁰ However, enforcement of NEPA's procedural provisions should effectuate the substantive goals of the statute. The procedures are intended to force agencies to consider environmental impacts and evaluate a broad range of factors when making decisions, all while receiving public input. The *Kemphorne* ruling allows and encourages agencies to skirt NEPA's intended goals by allowing EISs to become pro forma exercises divorced from the actual decisionmaking process.

Part I of this Note examines the *Kemphorne* decision along with the applicable precedent, and Part II argues that *Kemphorne* misapplied precedent and is therefore dubious law. Part III describes the broad goals that NEPA is intended to effectuate, and argues that *Kemphorne's* holding with respect to EIS timing subverts the spirit of NEPA in four ways. First, it enables agencies to divorce the EIS process from the decisionmaking process. Second, it fails to require holistic environmental analysis, which was a priority of NEPA's framers. Third, the decision does not sufficiently allow for public input. Fourth, the decision will reduce the quality of information contained in EISs. In Part V, I conclude that in order to give effect to the purposes of NEPA, the courts must ensure that the EIS process takes place in a timeframe that ensures its effect upon the overall decisionmaking process.

I. *KEMPHORNE*: THE DECISION AND ITS PRECEDENTS

A. *The Background of the Case*

Northern Alaska Environmental Center v. Kemphorne concerns the BLM's decision to open up the Northwest Planning Area (NWPA), a part of the National Petroleum Reserve (the Reserve) in Alaska, to oil and gas companies for leasing and potential development. A subdivision of the Department of the Interior, the BLM is responsible for administering federally owned land.¹¹ The 23 million acre Reserve is the largest tract of publicly owned land in the United States, and one of the nation's largest wilderness areas.¹² It is thought to have significant reserves of oil and natural gas, and many other natural resources along with serving as an important habitat for fish and wildlife, such as caribou

10. See, e.g., Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

11. See U.S. Department of the Interior, DOI Bureaus, <http://www.doi.gov/bureaus.html> (last visited Sept. 6, 2007).

12. *N. Alaska Envtl. Ctr. v. Kemphorne*, 457 F.3d 969, 973 (9th Cir. 2006); Department of the Interior, National Petroleum Reserve—Alaska Fact Sheet, <http://www.doi.gov/news/040122cfact.htm> (last visited Sept. 10, 2007).

and migratory birds.¹³ The area also provides subsistence for several villages around its boundaries.¹⁴

The Reserve was originally under control of the Navy, as an oil reserve for national defense use, and was transferred to the Department of the Interior in 1976 in response to the oil crisis.¹⁵ In 1980, Congress passed legislation directing the Secretary of the Interior to undertake an “expeditious program of competitive leasing of oil and gas.”¹⁶ In 1998, after two decades of little activity and the expiration of prior leases, the BLM renewed its efforts to lease portions of the Reserve,¹⁷ in particular the NWPA, which spans 8.8 million acres.¹⁸

For major federal actions “significantly affecting the quality of the human environment,” NEPA mandates the preparation of an Environmental Impact Statement (EIS).¹⁹ The EIS must examine in significant detail the likely environmental consequences of a proposed action, assess reasonable alternatives, and document and present its findings to the public.²⁰ Opening the NWPA to oil and gas leases is a “major federal action” because of the potential for large-scale development if significant oil and gas resources are discovered. However, it is rarely clear where such resources will specifically be found. The BLM generally issues two types of leases: no surface occupancy (NSO) leases, which put restrictions on the lessees’ development of the land, and “non-NSO” leases, which vest lessees with the right to develop the leased land.²¹ The leases at issue in *Kempthorne* are non-NSO leases since the “government cannot . . . forbid all oil and gas development in Alaska’s NWPA” and the “leasing program thus does constitute an irretrievable commitment of resources.”²² Extracting oil and gas from the reserve is such a commitment.

Because all major federal actions must comply with NEPA, the BLM issued a draft report of the EIS for the leasing in early 2003, detailing the proposal’s impacts on the water, wildlife, and climate of the region on an

13. Appellants’ Brief at 6, *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006) (No. 05-35085), 2005 WL 1912173.

14. *Id.* at 4–5.

15. *N. Alaska Envtl. Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005), *aff’d sub nom. N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006).

16. Department of the Interior and Related Agencies Appropriation Act of 1981, Pub. L. No. 96-514, 94 Stat. 2957, 2964 (current version at 42 U.S.C. § 6506a(a) (2006)).

17. *Norton*, 361 F. Supp. 2d at 1073.

18. *Kempthorne*, 457 F.3d at 974.

19. 42 U.S.C. § 4332(2)(C).

20. *Id.*

21. See Thomas D. Mauriello, Comment, *Onshore Oil and Gas Leasing on Public Lands: At What Point Does NEPA Require the Preparation of an Environmental Impact Statement?*, 25 SAN DIEGO L. REV. 161, 167 (1988).

22. *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006).

overall resource-by-resource basis.²³ The EIS considered four alternatives: no action; making 47 percent of the land available for leasing and excluding many of the highest oil potential areas; making 96 percent of the area available for leasing; and making 100 percent of the area available.²⁴ In December of 2003, the BLM issued the final EIS for the NWPA, which adopted a fifth “preferred alternative,” making 83 percent of the NWPA immediately available for leasing, while placing a ten-year moratorium on development of a western tract of the NWPA, because of important bird and marine mammal habitats.²⁵ The EIS did not assess site-specific impacts of the proposed leasing, but rather used a model that made a general projection (a “programmatic analysis”) as to the likely environmental consequences of the leasing without considering the disparate effects on different parcels.²⁶

Plaintiffs, a coalition of environmental advocacy groups, challenged the sufficiency of the EIS on these grounds: it (1) failed to consider a range of reasonable alternatives; (2) provided only a general programmatic analysis, rather than a site-specific analysis of impacts; and (3) failed to assess the likely cumulative impacts of the project and other adjacent development.²⁷ The BLM analyzed hypothetical development scenarios based upon prior large scale developments in Alaska.²⁸ The report analyzed the impact on water, wildlife, and other natural resources in a hypothetical situation where half the parcels in the NWPA were leased but no development occurred, and another situation in which all of the available parcels were leased and developed.²⁹ These analyses estimated the likely aggregate impact of a range of paths of development, but did not analyze particularly damaging impacts on any specific parcels in sensitive areas.³⁰ The plaintiffs argued that since the EIS authorized the immediate lease of 87 percent of the NWPA, a site-specific EIS was required because specific areas could be leased prior to a report on the impact of oil and gas exploration on these specific areas.³¹

The BLM argued that prior to any exploration by potential lessees, it would be impossible to know which parcels would eventually be open to drilling and development.³² Therefore, completing a site-specific EIS would constitute an extravagant expense since many of the potential

23. *Id.* at 974.

24. N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, 1073–74 (D. Alaska 2005), *aff’d sub nom.* N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969 (9th Cir. 2006).

25. *Kempthorne*, 457 F.3d at 974.

26. *Id.*

27. Norton, 361 F. Supp. 2d at 1074.

28. *Kempthorne*, 457 F.3d at 974.

29. *Id.*

30. *Id.*

31. Appellants’ Brief, *supra* note 13, at 16.

32. N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 976 (9th Cir. 2006).

areas would not be subject to drilling. Further, the BLM argued that an analysis of cumulative impacts could be undertaken at a later stage, when adjacent development was more certain.³³

The District Court of Alaska upheld the final EIS, holding that the BLM had adequately considered a range of reasonable alternatives, and that it did not need to conduct a review of individual parcels because a resource-by-resource analysis was sufficient. The court also held that the analysis of the cumulative impacts of the NWPA project, together with a previously announced project in the adjacent Northeast Planning Area, could be conducted at a later time, since the initial Northeast Planning Area proposal predated the final EIS by only several months.³⁴

B. *The Kempthorne Decision*

The plaintiffs appealed to the Ninth Circuit, stressing the lack of site-specific and cumulative impacts analyses.³⁵ The standard of review in NEPA cases is whether the agency's decision was "arbitrary and capricious."³⁶ In order for plaintiffs to prevail under this standard, the court must find that an agency abused its discretion—and there is a presumption against second-guessing agency expertise.³⁷

The *Kempthorne* court rejected the plaintiffs' argument regarding the EIS's lack of site-specific analysis. The court conceded that the leases at issue represent an "irreversible and irretrievable" commitment of resources, but concluded that does not necessarily mean that the EIS was not sufficiently site-specific.³⁸ The BLM argued that it could not conduct a site-specific parcel-by-parcel analysis, because exploratory work had not yet identified promising parcels.³⁹ The court agreed, concluding that doing a parcel-by-parcel analysis of environmental impacts would present a "chicken or egg" problem because the plaintiffs requested a site-specific analysis before the relevant specific sites were identified.⁴⁰ Thus, the court essentially held that it would be so impractical for the BLM to analyze the site-specific consequences for every parcel available for lease, that requiring such an analysis would make it impossible for the BLM to satisfy NEPA.⁴¹

33. *Id.* at 980.

34. N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, 1082 (D. Alaska 2005), *aff'd sub nom.* N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969 (9th Cir. 2006).

35. *Kempthorne*, 457 F.3d at 976, 979–80.

36. *Id.* at 975 (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

37. *Id.*

38. *Id.* at 976.

39. *Id.*

40. *Id.*

41. *Id.*

The court distinguished *Conner v. Burford*,⁴² a leading case on the issue of site-specific analysis in the context of oil and gas leasing. That case involved BLM leases on parts of large tracts of forest for oil and gas drilling—without an EIS.⁴³ The BLM's NSO leases contained stipulations that the lessees could not physically occupy the leased land without further approval (and therefore further study) from the BLM. The non-NSO leases subjected the lessees to standard environmental regulations, but did not reserve to the BLM the right to prohibit drilling and other development with potential environmental consequences.⁴⁴ The District Court concluded that NEPA required an EIS at the pre-lease stage for all of the leases out of concern that “a piecemeal invasion of the forests would occur, followed by the realization of a significant and irreversible impact.”⁴⁵ The Ninth Circuit agreed with this conclusion with respect to the non-NSO leases, but found that an EIS was not required for NSO leases. The court reasoned that with NSO leases, the government maintains absolute authority to reject any activity by lessees that might cause too great a disturbance to the environment, and thus an EIS is not required at the leasing stage.⁴⁶ For non-NSO leases, however, the court, relying on *Sierra Club v. Peterson*,⁴⁷ held that since the purpose of the leases was exploration of oil and natural gas drilling, and since the government did not retain the absolute right to prevent such drilling, an EIS was required at the outset because those activities would certainly “significantly affect the environment.”⁴⁸ *Conner* is distinct, however, in that the BLM did not conduct any EIS at all, a point which the *Kempthorne* court stressed.⁴⁹

The *Kempthorne* decision distinguished *Conner* on the grounds that the issue in that case was whether an EIS had to be completed in the first place, rather than *when* site-specific analysis was required.⁵⁰ It conceded that the leases of parcels in the NWPA were non-NSO leases requiring an EIS because the government could not deny lessees the right to drill once it granted the leases.⁵¹ The court declared that *Conner* did not address the site-specificity required for an EIS, and cited *North Slope Borough v. Andrus*⁵² for the proposition that large-scale, multi-stage development

42. 848 F.2d 1441 (9th Cir. 1988).

43. *Id.* at 1443; *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006).

44. *Conner*, 848 F.2d at 1444.

45. *Conner v. Burford*, 605 F. Supp. 107, 109 (D. Mont. 1985), *aff'd in part, rev'd in part*, 848 F.2d 1441 (9th Cir. 1988).

46. *Conner*, 848 F.2d at 1447–48.

47. 717 F.2d 1409, 1412–15 (D.C. Cir. 1983).

48. *Conner*, 848 F.2d at 1450.

49. *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006).

50. *Id.* at 976–77.

51. *Id.*

52. 642 F.2d 589 (D.C. Cir. 1980).

projects with highly uncertain consequences do not require a comprehensive EIS in the initial stage.⁵³ Thus, the court ruled that site-specific analysis in an EIS would be required in the future, prior to any actual exploration. At the very least, the court found that the EIS was not arbitrary and capricious.⁵⁴

The *Kemphorne* court also rejected plaintiffs' other principal claim—that the EIS was inadequate due to a failure to address the cumulative impact of the NWPA development together with proposed development in the Northeast Planning Area of the Reserve (an adjacent tract). A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”⁵⁵ The BLM issued a “Notice of Intent” to amend the EIS for the Northeast Planning Area six months prior to issuing the final EIS for the NWPA. The plaintiffs argued, with support from the caselaw,⁵⁶ that the notice constituted a “reasonably foreseeable future action” and thus made it necessary for the BLM to consider the cumulative impacts of both projects.⁵⁷ The court agreed that the Notice of Intent required a cumulative impacts analysis, but nevertheless denied the plaintiffs' claim.⁵⁸ It held that “the issue is one of timing.”⁵⁹ Thus, the court concluded that the BLM could complete the cumulative impacts analysis “at a later stage.”⁶⁰

II. THE KEMPHORNE COURT MISAPPLIES PRECEDENT

The *Kemphorne* decision constitutes a step backward from the applicable Ninth Circuit precedent. The plaintiff's position had considerable Ninth Circuit support in *Conner, Peterson, California v. Block*,⁶¹ and *Bob Marshall Alliance v. Hodel*,⁶² all of which are discussed below. These cases, substantially relied upon in the plaintiffs' brief, held that the issuance of non-NSO leases (i.e. leases without significant usage restrictions) constituted an “irreversible and irretrievable” commitment of resources, and therefore that an EIS was required prior to issuing the leases. The *Kemphorne* court failed to adequately apply this precedent.

53. *Kemphorne*, 457 F.3d at 977.

54. *Id.*

55. *Id.* at 980 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1472, 1478 (9th Cir. 1998)).

56. See, e.g., *Lands Council v. Powell*, 379 F.3d 738, 746 (9th Cir. 2004); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312–13 (9th Cir. 1990).

57. *N. Alaska Envtl. Ctr. v. Kemphorne*, 457 F.3d 969, 980 (9th Cir. 2006).

58. *Id.*

59. *Id.*

60. *Id.*

61. 690 F.2d 753 (9th Cir. 1982).

62. 852 F.2d 1223, 1227 (9th Cir. 1988).

Block involved a U.S. Forest Service categorization of federally-owned land for purposes of forest management.⁶³ The final EIS for the project designated 15 million acres “Wilderness,” 10.8 million acres “Further Planning,” and 36 million acres “Non-Wilderness.”⁶⁴ These designations were challenged for a lack of site-specificity in the agency’s report. The court noted at the outset that “the detail that NEPA requires in an EIS depends upon the nature and scope of the proposed action.”⁶⁵

As in *Kemphorne*, the Forest Service in *Block* claimed that a more detailed and site-specific analysis would be conducted after the first “programmatic” review. The court declared that “the critical inquiry in considering the adequacy of an EIS prepared for a large scale, multi-step project is not whether the project’s site-specific impact should be evaluated in detail, but when such detailed evaluation should occur.”⁶⁶ The key question in determining when a programmatic EIS is sufficient and when a more detailed site-specific EIS is required, is whether a “critical decision” has been reached to proceed with the development or other action in question.⁶⁷ The plaintiffs argued, and the court agreed, that the designation of “nonwilderness” was essentially a license for development and therefore that the designation constituted the requisite “critical decision.”⁶⁸ The court relied on the fact that the Forest Service mandated that nonwilderness areas be “managed for uses other than wilderness”⁶⁹ and thus concluded that the decision was “irreversible and irretrievable” because the agency lacked later discretion to protect lands from nonwilderness uses.⁷⁰ As a result, the court determined that a site-specific EIS was needed, essentially because site-specific analyses at a later stage would have been too late to have any effect on the agency’s choice of designation.⁷¹

Conner also directly addresses the question of what counts as “irreversible and irretrievable” in the context of oil and gas leasing.⁷² The crux of the holding was that once significant property rights (most significantly, the right to drill) were vested in the lessee, an “irreversible and irretrievable commitment of resources” had already taken place.⁷³ The *Kemphorne* court reasoned that site-specific analysis could be

63. *Block*, 690 F.2d at 758.

64. *Id.*

65. *Id.* at 761.

66. *Id.*

67. *Id.*

68. *Id.* at 762.

69. *Id.*

70. *Id.* at 763.

71. *Id.*

72. *Conner v. Burford*, 848 F.2d 1441, 1444 (9th Cir. 1988)

73. *Id.*

completed once it became clear which areas would be developed.⁷⁴ However, this flies in the face of the holding in *Conner*, because at the later stage, the BLM would not have the legal authority to prevent development since that right was ceded in the leases.⁷⁵

However, in *Park County Resource Council v. United States Department of Agriculture*,⁷⁶ the Tenth Circuit addressed much the same issue, and came to a different conclusion. The BLM issued non-NSO leases to oil and gas companies, though with significant usage stipulations.⁷⁷ Environmental groups challenged the issuance of the leases several years later on the grounds that the BLM had not complied with NEPA.⁷⁸ In the meantime, the exploratory drilling was unsuccessful, and a cleanup operation was underway.⁷⁹ The court ruled that an EIS evaluating the environmental impacts of oil and gas development was not required because the prospects of successfully finding oil and gas were too speculative and uncertain.⁸⁰ The court relied on a test articulated in *Trout Unlimited v. Morton*,⁸¹ which addressed the question of when an EIS for subsequent phases of a multi-phase project is required.⁸² The test is whether the phases in question are “so interdependent that it would be unwise or irrational to complete one without the others.”⁸³ Relying on evidence that only about 1 percent of oil and gas leases issued result in full development, the court held that the non-NSO leasing stage and actual oil and gas development stage did not have the requisite interdependence.⁸⁴

The courts in *Conner*, *Peterson*, and *Bob Marshall* all held that the issuance of non-NSO oil and gas leases constitutes an “irreversible and irretrievable commitment of resources.”⁸⁵ The determining factor, most clearly exhibited in *Conner*, was that the agencies had granted vested rights to drill that could not be revoked upon review of adverse environmental impacts. Indeed, the *Conner* court held that an EIS is not necessary for an NSO lease (a lease that does not allow disruption of the

74. N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 977 (9th Cir. 2006).

75. *Id.*

76. 817 F.2d 609 (10th Cir. 1987).

77. *Id.* at 613.

78. *Id.*

79. *Id.*

80. *Id.* at 623.

81. 509 F.2d 1276 (9th Cir. 1974).

82. *Id.* at 1281.

83. Park County Res. Council v. U.S. Dep’t of Agric., 817 F.2d 609, 623 (10th Cir. 1987) (citing *Trout Unlimited*, 509 F.2d at 1285).

84. *Id.*

85. *Conner v. Burford*, 848 F.2d 1441, 1447 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414–15 (D.C. Cir. 1983); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988) (citing *Conner* as binding).

surface of the land).⁸⁶ The *Park County* court made the opposite finding,⁸⁷ but the discrepancy is understandable in light of the temporal circumstances of that case. The plaintiffs brought the challenge several years after the issuance of leases, which turned out to be dry.⁸⁸ The BLM then embarked on a cleanup operation at the sites of the exploratory drilling, which was already completed by the time the case reached the Tenth Circuit.⁸⁹ In any event, *Block* and *Bob Marshall* were Ninth Circuit cases, and therefore should have been controlling precedent.

The D.C. Circuit faced similar circumstances in *Peterson*, where the Forest Service issued oil and gas leases without an EIS. Here, the court explicitly addressed the issue of timing.⁹⁰ The Department of the Interior sought to undertake a two-stage environmental analysis, because the specific sites likely to be impacted could not be ascertained prior to leasing.⁹¹ The court held that such a plan was inadequate due to the committal nature of the leases: "While theoretically the proposed two-stage environmental analysis may be acceptable, in this situation the Department has not complied with NEPA because it has sanctioned activities which have the potential for disturbing the environment without fully assessing the possible environmental consequences."⁹² In order to forego the preparation of an EIS, the agency would have to maintain the authority to preclude any surface-disturbing activity by lessees.⁹³ The court stressed that "NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment."⁹⁴ Thus, like *Conner*, the key fact in the case with respect to timing was that the agency had ceded its right to preclude drilling without preparing an EIS.⁹⁵

The *Kemphorne* court briefly distinguished these cases by pointing out that the issue presented was whether an EIS was required *at all*, whereas in *Kemphorne* the BLM had already prepared a lengthy EIS that was the subject of the litigation.⁹⁶ The court reasoned that since the BLM had issued a programmatic EIS instead of a Finding of No Significant Impact (FONSI), *Conner* was inapposite because it dealt with the question of whether an EIS was necessary in the first place, rather than the temporal point at which the EIS was required.⁹⁷

86. *Conner*, 848 F.2d at 1447–51.

87. *Park County*, 817 F.2d at 624; see also Mauriello, *supra* note 21, at 182.

88. *Park County*, 817 F.2d at 614–15.

89. *Id.*

90. *Peterson*, 717 F.2d 1409, 1413–15.

91. *Id.* at 1414.

92. *Id.* at 1415.

93. *Id.*

94. *Id.* at 1414.

95. *Id.*

96. N. Alaska Envtl. Ctr. v. Kemphorne, 457 F.3d 969, 976 (9th Cir. 2006).

97. *Id.*

The reasoning of *Peterson*, *Conner*, and *Block*, combined with the test in *Trout Unlimited* and *Block* should have been determinative in *Kemphorne*. According to *Block*, a programmatic EIS need not include site-specific analysis unless and until a “critical decision” has been made to proceed.⁹⁸ The critical decision is the point at which there has been an “irreversible and irretrievable commitment of resources.”⁹⁹ According to *Peterson*, *Conner*, and *Bob Marshall*, a non-NSO lease constitutes an “irreversible and irretrievable commitment of resources.”¹⁰⁰ Therefore, the BLM in *Kemphorne* should not have been permitted to delay its site-specific analysis. Issuing the non-NSO leases constituted an irreversible and irretrievable commitment of resources, and according to *Block*, that is the point at which a programmatic EIS will not suffice. However, *Kemphorne* failed even to consider whether a “critical decision” had been reached.¹⁰¹

The court relied on *Andrus* for the proposition that large-scale, multi-stage development projects with highly uncertain consequences do not require a comprehensive EIS in the initial stage.¹⁰² However, the *Andrus* court relied extensively on the protective lease stipulations in that case, which would have required further agency approval for surface disturbing activities.¹⁰³ Further, this is a highly selective reading of timing precedent. The test for the sufficiency of an initial EIS in a multi-phase project that does not address later phases is whether the dependency of the later stages upon the first “is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.”¹⁰⁴ It seems quite obvious that it would be both irrational and unwise to embark on a program of leasing for exploratory drilling on particular tracts of land only to prohibit actual oil and gas development in the event that such resources are discovered.

Finally, the *Kemphorne* court insisted that site-specific analysis would be impractical because the areas that will eventually be developed are unknown at the leasing stage.¹⁰⁵ However, this concern should be foreclosed by *Block*. The Forest Service made a similar argument in that case, but the court held that it could not “rely upon forecasting difficulties or the task’s magnitude to excuse the absence of a reasonably thorough

98. *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citing *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978)).

99. *Id.*

100. *Sierra Club v. Peterson*, 717 F.2d 1409, 1414–15 (D.C. Cir. 1983); *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988).

101. *N. Alaska Envtl. Ctr. v. Kemphorne*, 457 F.3d 969, 976 (9th Cir. 2006).

102. *Id.* at 977; *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

103. *Andrus*, 642 F.2d at 600–01.

104. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974).

105. *Kemphorne*, 457 F.3d at 977.

site-specific analysis of the decision's environmental consequences.”¹⁰⁶ When it comes to NEPA, the relative efficiency of preparing reports at different times is not paramount; instead, the timing of reports must be such that alternative courses of action are still available, since the purpose of NEPA is to provide agencies with information that will inform their decisions.¹⁰⁷ Since the “critical decision” to move forward with the leasing in *Kemphorne* had already been made, a comprehensive EIS should have been prepared.

III. THE *KEMPHORNE* DECISION ON TIMING SUBORDINATES THE SUBSTANTIVE GOALS UNDERLYING NEPA PROCEDURES

NEPA has been interpreted by the courts as strictly procedural in its judicial enforcement.¹⁰⁸ Each federal agency has authority to make the final decision on a given proposal, and the responsibility of reviewing courts is only to ensure that an agency has taken a “hard look” at the environmental consequences of an action.¹⁰⁹ Each EIS must address “the environmental impact of the proposed action,” which includes: unavoidable adverse environmental effects; reasonable alternatives to the proposed action; the relationship between short-term use and long-term productivity; and “any irreversible and irretrievable commitments of resources” resulting from the action.¹¹⁰

Reviewing courts cannot “interject [themselves] within the area of discretion of the executive as to the choice of the action to be taken.”¹¹¹ Thus, agencies are under no obligation to actually weight the environmental consequences of their actions as long as the procedural requirements of section 4332 are met, provided that no other substantive environmental regulations are implicated.

However, while NEPA is not designed to mandate specific outcomes in agency decisionmaking, it is designed to play a meaningful, rather than perfunctory role. Indeed, the statute contains a variety of sweeping policy statements.¹¹² The Act’s preamble directs agencies to use “all practicable means” to satisfy six enumerated policy goals, including safeguarding the environment for future generations and achieving a sustainable balance

106. *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982) (internal citation omitted).

107. See *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) (“[T]he appropriate time for preparing an EIS is *prior* to the decision, when the decisionmaker retains a maximum range of options.”).

108. See, e.g., *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

109. *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

110. *Id.* at 833.

111. *Id.* at 838.

112. 42 U.S.C. §§ 4331–4332 (2006).

between population growth and resource use.¹¹³ Further, it provides that all federal agencies “*shall* utilize a systematic, interdisciplinary approach . . . in planning and in decisionmaking which may have an impact on man’s environment,”¹¹⁴ and “identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.”¹¹⁵ NEPA’s sponsor in the Senate, Henry Jackson, wrote that “adoption of the Act constituted Congressional recognition of the need for a comprehensive policy and a new organizing concept by which governmental functions can be weighed and evaluated.”¹¹⁶ He intended to make agencies adopt a holistic approach to their decisions, thereby “break[ing] the shackles of incremental policymaking in the management of the environment.”¹¹⁷

In light of these broad policy goals, the courts should construe NEPA’s procedural requirements in a way that best ensures that they are in practice a vehicle for the fulfillment of those goals, rather than mere bureaucratic hurdles. As one commentator put it, “[i]t was clear to NEPA’s founders, and it must be clear today, that NEPA’s EIS requirement is in place to ensure that the Act’s normative values and goals be more effectively implemented and enforced.”¹¹⁸ In particular, the courts should apply NEPA with an eye to effectuating four specific goals: (1) making sure (as much as possible) that agencies actually do take a “hard look” at environmental effects; (2) requiring agencies to adopt a holistic rather than piecemeal approach to decisions; (3) providing adequate time for public input; and (4) making sure that timing of EISs results in the best possible information necessary for informed decisions. The *Kempthorne* decision, enabling the delayed reporting of required information, diserves all of these objectives.

A. *The Kempthorne Decision Discourages Actual “Hard Look”*

The most important purpose of NEPA is to integrate environmental considerations into agency decisions that will have a substantial impact on the environment.¹¹⁹ The EIS should be a reflection of the fact that an agency has actually taken a “hard look” at environmental

113. *Id.* § 4331(b).

114. *Id.* § 4332(2)(A) (emphasis added).

115. *Id.* § 4332(2)(B).

116. Henry M. Jackson, *Environmental Policy and the Congress*, 11 NAT. RESOURCES J. 403, 407 (1971).

117. *Id.* at 406.

118. Lindstrom, *supra* note 7, at 249.

119. See 42 U.S.C. § 4331 (2006); see also Lindstrom, *supra* note 7, at 247.

consequences.¹²⁰ In order for this aspiration to be a reality, the environmental impacts of an action must be known *before* the decision to act is made; this goal is codified in the Council on Environmental Quality regulations.¹²¹ The NEPA process should be a routine part of the agency decisionmaking process.¹²² If the courts allow key portions of an EIS to be issued after a critical decision has been made, the process is reduced to meaningless paperwork.

Indeed, even leaving aside the question of programmatic and subsequent EISs, EISs come too late in the process. In practice, planning for major federal actions typically begins well before the NEPA process.¹²³ The courts require that the final EIS be issued when an agency issues “a recommendation or report on a *proposal* for federal action.”¹²⁴ However, this requirement enables the EIS process to be conducted on a different track than the actual decisionmaking procedure. Often, the result is that agencies make their plans without a great deal of consideration for environmental consequences, and then complete the EIS when the decision is foregone.¹²⁵ Thus, in many cases “NEPA is virtually ignored in formulating specific policies and often is skirted in developing programs, usually because agencies believe that NEPA cannot be applied within the time available.”¹²⁶ Allowing agencies to push the EIS process even further back than is currently allowed acts as an invitation to agencies to treat NEPA as an unfortunate perfunctory step rather than as a tool to shape policy.

There are several reasons why an early EIS is beneficial. To the extent that agencies do take into account environmental factors in their decisions,¹²⁷ it allows agencies to plan and possibly reconsider proposals

120. See 40 C.F.R. § 1500.1(c) (2007).

121. See *id.* § 1500.1(b). NEPA established the Council to promulgate rules to guide agencies in compliance. See 42 U.S.C. §§ 4342–4375 (2006).

122. See Jackson, *supra* note 115, at 406–07.

123. See COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER 25 YEARS 11 (Jan. 1997), available at <http://www.nepa.gov/nepa/nepa25fn.pdf>.

124. See, e.g., Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976).

125. COUNCIL ON ENVTL. QUALITY, *supra* note 123, at 11; see also Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 924 (2002) (“Indeed, given the time and resources required to produce an EIS, we might expect that rational agency managers would commit agency resources to that process only if they were already committed to a course of action that made an EIS unavoidable”).

126. COUNCIL ON ENVTL. QUALITY, *supra* note 123, at 11.

127. The EIS process itself creates some incentive for agencies to reduce or mitigate the environmental impact of projects in order to avoid negative publicity. See Karkkainen, *supra* note 125, at 936.

before major funding is committed.¹²⁸ Further, the preparation of a comprehensive report at the outset of a project, as opposed to a series of tiered reports, results in fewer reports, thereby reducing (or at least not increasing) costs.¹²⁹ To an outside observer, an early EIS offers a better indication that an agency has taken environmental factors into account, which is advantageous since EISs are designed to be an outward reflection of agency decisionmaking processes.¹³⁰ Thus, in many cases it is wise to do an early programmatic EIS, as in *Kemphorne*, with more specific analyses as the project proceeds. However, the crucial difference is that in *Kemphorne*, later site-specific analyses would have little legal or practical effect due to the rights granted to the lessees.

Perhaps most importantly, requiring an early EIS prevents a project's momentum from overtaking any environmental considerations that might otherwise factor into the decision. Once an agency makes a general decision to proceed with a project, the decision in itself makes it more difficult for the agency to later change course. This is particularly true in the context of oil and gas leasing. Once leases are issued to energy companies, should oil or gas be found, it would be extremely difficult to substantially change the program in light of newly revealed environmental hazards. The likelihood is very small that the BLM would take a "hard look" at that stage of the program. Conducting the leasing in a different fashion would be irrational. The companies interested in exploratory drilling would be in a difficult situation if their drilling rights could be revoked after having made a significant investment. In *Kemphorne*, this reasoning is taken a step further, because the proposed leases are such that the agency is legally prohibited from preventing drilling due to the terms of the leases.¹³¹ That is, in fact, the essence of the distinction in *Conner* between the legal status of NSO and non-NSO leases. The fact that the BLM could not reverse itself by the terms of the lease constituted, in the court's mind, an "irreversible and irretrievable commitment of resources."

The *Kemphorne* decision cuts against all of these considerations. Presumably, site-specific analysis is required under NEPA because agencies should know the specific impacts of their programs during the planning process.¹³² However, if site-specific information gathering is not

128. See Jon C. Cooper, *Broad Programmatic, Policy, and Planning Assessments Under the National Environmental Policy Act and Similar Devices: A Quiet Revolution in an Approach to Environmental Considerations*, 11 PACE ENVT'L. L. REV. 89, 136 (1993).

129. *Id.*

130. See *Kleppe v. Sierra Club*, 427 U.S. 390, 417–18 (1976) (Marshall, J., dissenting) (citing COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 628 (1975)).

131. See *N. Alaska Envtl. Ctr. v. Kemphorne*, 457 F.3d 969, 976 (9th Cir. 2006).

132. See 42 U.S.C. § 4332 (2006).

required until the project is underway, the only value the EIS process provides is in assisting in any possible mitigation efforts the BLM might wish to pursue.¹³³ Without a site-specific analysis, the BLM manifestly could not determine which areas within the NWPA are environmentally sensitive. Since NEPA is only judicially enforceable as a procedural statute, the court should make an attempt to see that the procedure serves the statute's underlying goals. To the extent that EISs should reflect actual consideration of environmental factors by an agency, the *Kemphorne* decision is irrational. The court acknowledges that NEPA requires site-specific analysis, yet enables the BLM to conduct this analysis after the crucial decisions have been made.¹³⁴ In effect, the court turned a potentially meaningful procedure into pro forma procedure. The subsequent site-specific EISs for the NWPA, should they even be completed, will merely be reports of what is likely to happen, not constituents of an overall plan, as NEPA was designed to require. Indeed, these considerations are the primary underpinning of the holdings in *Block*, *Peterson*, and *Conner*.¹³⁵

There are several objections lodged against the requirement of an early, detailed EIS. Bradley Karkkainen argues that an early EIS process results in documents that are overly long and uninformative, and that the requirement discourages continued mitigation of environmental harm over the life of a project.¹³⁶ Indeed, the EIS process is so technical and arduous that agencies compartmentalize its procedural demands, which then divorces the EIS from the actual agency decisionmaking process.¹³⁷ Karkkainen argues that the existing NEPA regime should be amended to emphasize an "environmental management" approach, where agencies monitor the environmental consequences of a policy or project throughout its life and take steps to mitigate new harms as they arise.¹³⁸ In his view, relying on early, comprehensive EISs is ineffective because it is both inefficient and not sufficiently dynamic.

These criticisms have some merit, and the current system is indeed flawed. It certainly could be argued that the segmented review called for by the *Kemphorne* court has the advantage that environmental impacts will be assessed over the life of the project.¹³⁹ However, assuming a continuing mitigation regime, early EISs are nevertheless preferable.

133. See, e.g., Karkkainen, *supra* note 125, at 932–34. Still, mitigation is one goal among many.

134. *Kemphorne*, 457 F.3d at 977.

135. *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982); *Sierra Club v. Peterson* 717 F.2d 1409, 1414–15 (D.C. Cir. 1983); *Conner v. Burford*, 848 F.2d 1441, 1447 (9th Cir. 1988).

136. Karkkainen, *supra* note 125, at 906–07.

137. *Id.* at 906.

138. *Id.* at 941, 945.

139. See *id.* at 948–49.

There is no doubt that EISs are long and unwieldy documents with excess information.¹⁴⁰ But agencies should have the relevant environmental information in the planning stages of a project. Even if the quality of the EIS suffers due to bulk, the information will be available if the agency chooses to act on it, and even if not, it will be available to the public. Early EISs may also be overly speculative and uncertain, but that problem is endemic to environmental planning. It may be difficult to ascertain the environmental impacts of a project before it is implemented, but it is nevertheless necessary to make the attempt to understand the impacts, so that crucial initial decisions are as informed as possible. Further, there is no need for an early EIS to come at the expense of supplemental EISs should new information become available. The key point is that information about a project's environmental impacts must be available at the planning stage, if it is to affect the decision at all.

A second objection to early environmental decisionmaking is reflected in *Kemphorne*'s rationale for not requiring site-specific review: since it was unknown which sites would ultimately be developed, a site-specific EIS would be impractical.¹⁴¹ The NWPA, after all, is 8.8 million acres, making a detailed site-specific analysis a significant undertaking.¹⁴² However, leaving aside the precedent which takes the opposing view,¹⁴³ the court ignores the fact that even though preparation of a site-specific EIS at the leasing stage might be quite burdensome, it becomes pointless at a later stage. Further, the court's claim that the government cannot possibly know which sites will be suitable for drilling rings hollow.¹⁴⁴ When the BLM actually received the bids for leases (it received bids for 120 parcels out of 488 total)¹⁴⁵ it could presumably detect which areas were most likely to be affected based on industry interest. Indeed, the BLM authorized leases at *specific sites*, so it makes sense to evaluate the environmental impact of development at those specific sites. The key point remains, however, that difficult as it might be to conduct site-specific analysis of an area as large as the NWPA, it must be done prior to leasing if NEPA is to have any effect.

The court also noted that it had a responsibility to apply Congress' intent in authorization of a leasing program.¹⁴⁶ However, this argument also misinterprets NEPA. By statute, NEPA is designed to supplement

140. See Carolyn A. Perozzi, Note, *Case Study: Cold Mountain v. Garber and the Effectiveness of Environmental Regulation*, 13 SE. ENVTL. L.J. 71, 74 (2004).

141. N. Alaska Envtl. Ctr. v. Kemphorne, 457 F.3d 969, 976 (9th Cir. 2006).

142. *Id.* at 974.

143. See, e.g., California v. Block, 690 F.2d 753, 760 (9th Cir. 1982).

144. *Kemphorne*, 457 F.3d at 976.

145. *Id.* at 974.

146. *Id.* at 976.

other substantive laws.¹⁴⁷ It is of course clear that Congress intended to promote oil and gas extraction when it authorized the leasing program. However, this fact should not play a significant role in the NEPA analysis because NEPA operates as a constraint on other legislation. Indeed, the Congressional intent to pursue oil and gas development on public lands is what made an EIS necessary in the first place. The fact that Congress's intent was to pursue oil and gas development does not obviate the need for an analysis of environmental impacts.

B. Holistic Analysis

A key goal of the NEPA framers was to take a holistic rather than piecemeal approach to environmental concerns.¹⁴⁸ Senator Jackson sought to "break the shackles of incremental policymaking in the management of the environment."¹⁴⁹ This aspiration can be seen clearly in the text of the Act.¹⁵⁰ It notes at the outset "the profound impact of man's activity on the interrelations of all components of the natural environment,"¹⁵¹ and directs agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."¹⁵² Holistic analysis is particularly appropriate given that many projects affect ecosystems that span wider than the limits of the specific project.¹⁵³ NEPA was intended to ensure that agencies take into account the broad environmental context of their actions. Given this goal, the segmenting of EISs permitted by the courts seems unwise.

The *Kemphorne* court contravened this holistic analysis goal with its decisions regarding site-specific analysis and cumulative impacts analysis.¹⁵⁴ Rather than requiring a comprehensive EIS, covering the range of impacts, the court allowed the environmental assessment to be segmented into separate documents, which will fail to capture the aggregate impact of each project.¹⁵⁵ No single document will provide a comprehensive and holistic review. When subsequent site-specific EISs are eventually issued, their focus will be on the small scale impact of

147. 42 U.S.C. § 4335 (2006).

148. See Lindstrom, *supra* note 7, at 247–48.

149. *Id.* (quoting Jackson, *supra* note 116, at 406).

150. 42 U.S.C. §§ 4431–4432 (2006).

151. *Id.* § 4331(a).

152. *Id.* § 4332(2)(A).

153. See D. Kevin Dunn & Jessica L. Wood, Note, *Substantive Enforcement of NEPA Through Strict Review of Procedural Compliance: Oregon Natural Resources Council v. Marsh in the Ninth Circuit*, 10 J. ENVTL. L. & LITIG. 499, 522 (1995).

154. N. Alaska Envtl. Ctr. v. Kemphorne, 457 F.3d 969, 976, 980 (9th Cir. 2006).

155. *Id.* (because it mandates future EISs).

development, not on the overall project.¹⁵⁶ Similarly, deferring the cumulative impacts analysis to the post-leasing stage divorces such analysis from the crucial decision to open the areas for leasing.

Furthermore, the issue of timing is once again paramount. The BLM should analyze the cumulative impacts of any future development that arises out of the leasing program, because such an analysis might affect decisions regarding which portions of the NWPA to make available for leasing. The BLM made a specific decision to lease a particular 87 percent of the NWPA land.¹⁵⁷ It is clear that environmental factors played a significant role in this final decision, since the BLM elected to put a ten-year leasing moratorium on the remainder of the NWPA land, which is thought to be more environmentally sensitive.¹⁵⁸ Many of the environmental concerns had to do with animal populations sharing an ecosystem in the leased and nonleased tracts.¹⁵⁹ The BLM's court-sanctioned delay in the issuance of the cumulative impacts analysis obviously reflects the fact that cumulative impacts were not considered in the BLM's decision to make 87 percent of the land available for leasing—despite the court-acknowledged requirement that cumulative impacts be considered.¹⁶⁰ The future EIS that *does* address cumulative impacts will be completed long after the BLM makes the critical decision regarding development, rendering it a purely procedural step devoid of purpose. The *Kempthorne* court unwisely found it sufficient that the BLM made a commitment to analyze cumulative impacts at a later date.¹⁶¹

A better alternative can be found in the judicial enforcement of the California Environmental Quality Act (CEQA).¹⁶² In California, the government must analyze the cumulative impacts even of small projects that have limited effect.¹⁶³ The purpose of this regime is to ensure that the broad environmental picture is taken into account when assessing projects, so as to prevent incrementalism.¹⁶⁴ Despite a particular project's relatively minor impact, the courts recognize that all small impacts may amount to a significant aggregate impact.¹⁶⁵ The values of NEPA would be better served with such a system.

156. *Id.* at 977.

157. *Id.* at 973.

158. N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, 1074 (D. Alaska 2005), *aff'd sub nom.* N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969 (9th Cir. 2006).

159. See Dunn & Wood, *supra* note 153, at 522.

160. *Kempthorne*, 457 F.3d at 980.

161. *Id.* at 980.

162. CAL. PUB. RES. CODE §§ 21000–21178.1 (2007).

163. See Gail Kamaras, *Cumulative Impact Assessment: A Comparison of Federal and State Environmental Review Provisions*, 57 ALB. L. REV. 113, 131 (1993).

164. *Id.*

165. *Id.*

C. The Kempthorne Decision Restrains Public Input Required by NEPA

Another important goal of NEPA is to encourage public input and participation in the planning process.¹⁶⁶ The text of NEPA provides that agencies must collaborate with the public, and that “each person has a responsibility to contribute to the preservation and enhancement of the environment.”¹⁶⁷ It also requires that EISs be made available to the public.¹⁶⁸ Senator Jackson hoped that public disclosure of environmental consequences would pressure agencies to avoid such consequences.¹⁶⁹ Indeed, there is some evidence that agencies often choose less destructive policies in order to avoid having to complete an EIS, due to cost and bad publicity.¹⁷⁰

In practice, EISs are too long and unwieldy to be accessible to individual members of the public. However, public interest groups are capable of sifting through the documents, and they play a significant role in the EIS process.¹⁷¹ These groups can raise public awareness and challenge agency action if the agency has not complied with NEPA procedures. The disclosure requirement creates a powerful incentive for agencies to either reduce impacts (so as not to have to issue an EIS), or to comply with NEPA in order to ward off litigation. If the information is publicly available, local communities affected by a given project have an opportunity to participate.¹⁷² NEPA and similar state statutes have impressed upon the public that it is an important part of the process.¹⁷³

The *Kempthorne* decision diserves the public participation objective of NEPA, because information that may be of interest to the public will not be released until after the critical decision to proceed with leasing has been reached.¹⁷⁴ The BLM issued a provisional EIS for public comment, but without an analysis of site-specific or cumulative impacts.¹⁷⁵ Thus, public input is imperiled on two levels. First the public does not have the opportunity to argue against the proposed policy with the totality of available facts. Second, the BLM is not required to disclose, and thereby open up to public scrutiny, various likely environmental impacts that might prove unpopular. Delaying the site-specific and

166. Lindstrom, *supra* note 7, at 251.

167. 42 U.S.C. § 4331(c) (2006).

168. *Id.* § 4332(C).

169. Karkkainen, *supra* note 125, at 912.

170. See SERGE TAYLOR, MAKING DEMOCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 251 (1984).

171. *Id.*

172. See COUNCIL ON ENVTL. QUALITY, *supra* note 123, at 17.

173. *Id.*

174. N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 976 (9th Cir. 2006).

175. *Id.* at 974.

cumulative impacts analyses reduces the transparency of the process—transparency that can lead agencies to adopt policies that are more environmentally friendly.¹⁷⁶ Further, when subsequent EISs are issued, the public will have significantly less leverage with which to pressure the BLM to change course, since committal decisions have already been reached. The financial momentum of the transaction is likely to win the day.

CONCLUSION

The *Kemphorne* court should have taken greater stock of NEPA's purposes. Ideally, the EIS should be produced earlier in the process. As it stands, NEPA functions as an indirect mechanism for environmental protection. Agencies have an incentive to minimize environmental impacts in order to bypass the EIS process or to avoid bad publicity. However, to fulfill NEPA's purpose, environmental concerns should be a larger part of the decisionmaking process. Accordingly, the courts should disregard *Kemphorne* and follow precedent that requires a comprehensive EIS to be prepared before crucial decisions are reached. *Kemphorne* essentially enabled the BLM to avoid taking a "hard look" at the environmental consequences of the leasing program.

When courts enforce NEPA's procedures, they should be guided by the purposes found in the statute. Courts should base EIS timing decisions on whether the agency has substantially complied with those purposes such that it is evident that environmental concerns were in fact considered during the decisionmaking process. Otherwise, the courts—as the *Kemphorne* decision demonstrates—only encourage agencies to bypass the spirit of NEPA, and instead do as little as possible to comply.

176. See Karkkainen, *supra* note 125, at 914.