# *NAT'L AUDUBON SOC'Y, ET AL. V. KEMPTHORNE*: A WIN FOR THE ENVIRONMENT, OR AN EXAMPLE OF NEPA'S SHORTCOMINGS?

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## I. INTRODUCTION

On September 25, 2006, the United States District Court for Alaska announced its decision regarding the sufficiency of the Bureau of Land Manage-

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ment's (BLM) Environmental Impact Statement (EIS).[1] The decision was viewed as a pro-environment decision.[2] It was praised by environmental conservation groups who hoped it would bring renewed protection to environmentally sensitive areas in Alaska.[3] The U.S. District Court held that the BLM's EIS for the Northeast Planning Area (NEA) of the National Petroleum Reserve in Alaska (NPR-A) was inadequate in its evaluation of the effects of oil and gas drilling in the area.[4] BLM was required to redo the statement before the land could be leased for oil and gas exploration.[5] The Court held that BLM must add significant analysis regarding cumulative impacts to their EIS before any leasing in the NEA can occur.[6] Redoing an EIS likely will take a minimum of a year, and environmental activist groups hope to use this time to demonstrate to the government that the impacts of the plan to open more of the northern slope to gas and oil exploration are too severe.[7]

This case along with its counterpart, decided by the same court in 2005 regarding leasing on the west side of the northern slope, are mere baby steps in the long battle over oil exploration in the Northern Slope of Alaska. This note will explore this battle. It will begin with a brief history of the NPR-A, its original purpose, and the decades long battle over its protection versus its development. Next, it will take a closer look at the two most recently decided cases, the decisions, the differences, the connections, and the environmental statutes evaluated in them. Third, it will review the National Environmental Policy Act (NEPA), and how the Bush Administration's use of it, in their push for drilling in the Northern Slope, makes NEPA an ineffective tool in evaluating environmental impacts. The note will conclude by discussing whether this latest decision will actually protect the environment or just delay the inevitable.

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1. *See* Press Release, Northern Alaska Environmental Center, Huge Court Victory for Northern Center Protects Teshekpuk Lake Area From Oil Drilling (Aug. 26, 2006), *available at* http://www.northern.org/artman/uploads/naecpressreleaseteshekpuklakecourtvictory9-26-06.pdf.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Jeannette J. Lee, *Federal Judge Halts Oil Lease Sales In Alaska's North Slope*, ASSOCIATED PRESS, Sept. 26, 2006, *available at* http://www.nrdc.org/news/newsDetails.asp?nID=2311.
7. *Id.*

## II. BACKGROUND OF THE NATIONAL PETROLEUM RESERVE – ALASKA

The NPR-A has been targeted for oil development in the U.S. since its conception.[8] The NPR-A was originally established in 1923 by President Harding as the 4th Naval Petroleum Reserve.[9] During Harding's Presidency, war, as it has today, brought the issue of the U.S.'s dependency on foreign oil to the forefront of political concerns.[10] World War I caused the Navy great concern over U.S. foreign oil dependence.[11] The petroleum reserves were created to supply oil to the Navy in the case of a national emergency.[12]

The holistic importance of the NPR-A was officially recognized in 1976.[13] President Ford and Congress passed the National Petroleum Reserve Protection Act (NPRAPA).[14] The act transferred oversight of the reserves from the Navy to the Secretary of the Interior ("Secretary") and acknowledged that regulations should include protection of this unique area and its wildlife.[15] The NPRAPA directed the Secretary to conduct a study determining the "best uses" for the land.[16] Although assessing minerals (oil and gas) was a top priority of the study, the Secretary was also to account for the effects on the indigenous people who inhabited the land and the environmental importance of the land.[17] This direction allowed the Secretary to designate areas as environmentally sensitive, making much of the northern slope off limits for oil exploration.[18]

The northern slope of the reserve is approximately 23.5 million acres and divided into three regions: the NEA, the Northwest Planning Area (NWPA) and the Artic National Wildlife Refuge.[19] Until the late 1990's little action had occurred in the northern slope, with only four leases being allowed.[20] The four leases allowed only limited exploration and no oil development.[21] Then in 1998, the

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8. *See* The National Petroleum Reserve Alaska, www.northern.org/artman/publish/bnpra.shtml (last visited June 28, 2008).
9. N. Alaska Envtl. Ctr. v. Kempthorne, 457 F. 3d 969, 973 (9th Cir. 2006).
10. *See* The National Petroleum Reserve Alaska, *supra* note 8.
11. *See Id.*
12. N. Alaska Envtl. Ctr. v. Norton, 361 F.Supp.2d 1069, 1072 (D. Alaska 2005); *see also* The National Petroleum Reserve Alaska, *supra* note 8.
13. *See* Naval Petroleum Production Act of 1976, Pub. L. No. 94-258, 90 Stat. 303 (showing creation of NPRAPA and its inclusion of Alaska).
14. *Id.*
15. 42 U.S.C. § 6503 (2006).
16. 42 U.S.C. § 6505 (2006).
17. *Id.*
18. *See* Norton, 361 F.Supp.2d at 1072.
19. Brief for Appellant at 4, N. Alaska Envtl. Ctr. v. Norton, No. 05-35085 (9th Cir. May 23, 2005).
20. *Id.* at 6.
21. *Id.*

BLM opened a significant portion of the NEA to development, selling three additional leases.[22] However, even with this substantial opening, a part of the NEA was kept closed as protected special habitat.[23] In 2004, the NWPA, which is approximately double the size of the NEA, was also opened for leasing and exploration.[24] The government opened the entire NWPA to leasing making the amount of territory available for exploration and development much more expansive.[25] This most recent case involves the government's attempt to open the little bit of land which is still protected in the NEA.[26]

Although the area is often referred to as remote and bleak, it is not solely animals or the raw environment that are affected by the plans to drill in the NEA and NWPA.[27] The area is home not only to important habitat and environmental areas, but also to native Alaskan tribes.[28] These tribes practice traditional lifestyles and rely on the undisturbed natural resources of the area to survive.[29] These indigenous people are among the most concerned about this development.[30] They utilize the land, but have primarily left it in its natural form and cause very little disturbance to the wildlife or environment.[31] The technology that will inevitably come into the area could frighten away the animals that they hunt and rely on for food and survival.[32] Health effects are also a concern that comes with a plan for more aggressive drilling.[33] Even with the limited drilling and development currently taking place, the tribes are already seeing their first cases of asthma-related illnesses.[34] Many are also concerned about global warming and how further development may contribute to climate change.[35]

Although many compelling reasons for protecting this area from development exist, the U.S. demand for oil compels the government to slowly contin-

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22. *Id.*
23. *Id.*
24. *Id.* at 7.
25. *See id.* at 17 (explaining that the chosen preferred alternative would open the entire northwest planning area).
26. *Id.* at 6-7.
27. *See* Terry McCarthy, *War Over Arctic Oil*, TIME, Feb. 11, 2001, *available at* http://www.time.com/time/printout/0,8816,999227,00.html.
28. *Id.*
29. Brief for Appellant, N. Alaska Envtl. Ctr., at 4-5.
30. *See* Press Release, Northern Alaska Environmental Center, *supra* note 1 (explaining the reaction of local tribes, citizens and tourist who live and use the area targeted for development).
31. *See* Brief for Appellant, N. Alaska Envtl. Ctr, at 6.
32. Press Release, Northern Alaska Environmental Center, *supra* note 1.
33. *Id.*
34. *Id.*
35. *Id.*

ue to open more and more of this area to oil and gas leasing.[36] Accordingly, the government is less willing to protect the areas vital to many endangered species, the native people, and even possibly the atmosphere.[37]

## III. RECENT CASE DEVELOPMENTS

As noted above, the U.S. District Court for Alaska held the BLM's EIS statement for the NEA inadequate.[38] This is the second case in the battle to stop oil and gas leasing from extending completely through both the northeastern and northwestern slope.[39] The first case heard by the court did not fair as well for the environment, but it did set the posture for the more recent case to be successful.[40]

### A. *First Challenge – North Alaska Environmental Center v. Norton*

#### 1. *History and Issues Presented*

The Secretary concluded, after evaluation of the area through an EIS and Biological Opinion (BiOp), that the entire NWPA would be open to oil and gas leasing.[41] The plaintiffs in this case attacked the sufficiency of both the government's EIS and BiOp.[42] They claimed the analysis in these documents violated both NEPA and the Endangered Species Act (ESA) and that the government did not meet its required burden. [43]

Plaintiffs alleged that the BLM's EIS and BiOp lacked analysis on important ways the NWPA would be affected by the leasing activity.[44] Specifically, plaintiffs claimed that the EIS statement failed in four ways: it failed to consider a middle ground alternative; did not provide site specific analysis, it failed to analyze mitigation measures; and it lacked cumulative analysis.[45] Additionally, the BiOp was insufficient because it did not look at how the *entire* action would affect endangered species and it "ignore[d] the uneven distribution of Steller's eiders and spectacled eiders."[46]

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36. *See* Brief for Appellant, N. Alaska Envtl. Ctr., at 5.
37. *See* Press Release, Northern Alaska Environmental Center, *supra* note 1.
38. *See* Nat'l Audubon Soc'y, et al. v. Kempthorne, No. 1:05-cv-00008-JKS, slip op. (D. Alaska Sept. 25, 2006).
39. *Id.* at 2.
40. *See* Norton, 361 F. Supp. 2d at 1069.
41. *Id.* at 1071.
42. *Id.* at 1071-72.
43. *Id.* at 1072.
44. *Id.* at 1072.
45. *Id.* at 1072.
46. *Id.* at 1072.

### 2. *Discussion*

The standard of review the court applies in setting aside a government decision is promulgated under the Administrative Procedures Act (APA).[47] The court may set aside a government decision, if it finds the decision arbitrary and capricious.[48] Although the Alaska court acknowledged and thoroughly analyzed plaintiff's arguments, it did not find the decision so incorrect as to meet the arbitrary and capricious standard.[49] It therefore could not strike down the government's recommendation to open the entire NWPA.[50] In making this determination the court addressed several issues put forth by the plaintiffs.[51]

As part of its environmental evaluation, the government is required to set forth different "alternatives" for the project and make those alternatives available for public comment.[52] In this case, plaintiffs argued that a middle ground (somewhere between opening the whole area and not opening any additional area) was missing from the proposed alternatives.[53] Although the court was somewhat skeptical of the published alternatives, it accepted the government's argument, that the chosen plan did cover the middle ground sufficiently.[54] The court also accepted the government's reasoning for not choosing the alternative plaintiffs saw as reasonable.

> Inconsistency with the overall project is a basis for not considering an alternative. The EIS must be considered as a whole. NEPA requires the BLM to briefly explain its reasoning for eliminating an alternative. An EIS does not need to discuss every conceivable alternative especially when the alternative is not significantly distinguishable from another alternative.[55]

The court next turned its discussion to which type of EIS analysis is required by NEPA at the government's stage of planning: a programmatic EIS or a site specific EIS.[56] Site specific analysis is the more narrow of the two types of evaluation.[57] It is only required by NEPA when an agency is irrevocably committing to the activity.[58] Again, the court accepted the government's argument.[59]

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47. *Id.* at 1073.
48. 5 U.S.C § 706 (2007).
49. Norton, 361 F. Supp. 2d at 1085.
50. *Id.*
51. *See id.* at 1073-84.
52. 40 C.F.R § 1502.14 (2008).
53. Norton, 361 F. Supp. 2d at 1073.
54. *Id.* at 1076.
55. *Id.* at 1077.
56. *Id.* at 1078.
57. *See id.*
58. *Id.* at 1079.

The government claimed that the broader programmatic EIS was less speculative and that attempting a site-specific analysis at this time would not enhance the decision.[60] The court agreed that as long as all risks to the environment were considered, the government's analysis satisfied the site specific requirement.[61]

The court was brief in its discussion of the third issue regarding the sufficiency of the government's analysis of mitigating factors.[62] The court found the government's analysis to be sufficient and not the "mere listing" of possibilities as the plaintiffs alleged.[63]

Finally, the court addressed the issue of cumulative impacts.[64] At the time of this opinion, the BLM had already created a proposal for exploring the further opening of the NEA.[65] Plaintiffs argued that this plan was enough to require the government to discuss, in its EIS statement for the NWPA, cumulative effects of opening NWPA completely and substantially more of the NEA.[66] Although the court agreed with plaintiffs that the steps taken by the government were enough to require them to address these cumulative effects, the court determined it would allow them to address these issues in the EIS of the NEA.[67]

The court seemed to find little merit in the plaintiff's arguments, ruling in favor of the government throughout the opinion.[68] Although the conservation groups appealed the ruling, it was to no avail.[69] The Secretary was given permission to open the entire NWPA to leasing.[70]

### 3. *Significance of Decision*

Two parts of this decision are significant to this discussion. The first is the plaintiff's claim that the EIS failed to consider a middle ground alternative. The Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), and plaintiff environmental groups all commented that the government did not take into account a sufficient middle ground option, however, the court did not find these objections adequate to reach the arbitrary and capricious stan-

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59. *Id.* at 1079-80.
60. *Id.*
61. *Id.* at 1080.
62. *See id.* at 1080-81.
63. *Id.* at 1080.
64. *Id.* at 1081.
65. *Id.*
66. *Id.* at 1082.
67. *Id.*
68. *See id.* at 1073-85.
69. *Kempthorne*, 457 F.3d at 981.
70. *See id.*

dard.[71] Although in the judge's own words, he agreed with the EPA and FWS that this issue was "troublesome," it was not enough to show that the EIS was insufficient.[72] This scenario illustrates a point about NEPA addressed later in this note. The lack of a substantive analysis required under NEPA gives society no recourse to an agency decision that is too harmful to the environment, and allows troublesome projects to go forward without regard to the consequences.[73]

The other significant action taken by the court was the recognition that the EIS and BiOp for the NWPA did not consider the cumulative effects.[74] Although the court agreed to let the government wait on addressing cumulative effects that will come with a change in the NEA policy, it made a point to stress that cumulative effects would have to be considered when changes to the NEA restrictions were made.[75] The court stated, "The issue is therefore one of timing. Essentially, the agency has in effect given notice that it will consider all impacts cumulative and site specific in any modification to the EIS in the Northeast planning area."[76] This section of the decision, paved the way for the environmental protection which was finally obtained in the Alaska court's latest decision.

### B. *Second Challenge – National Audubon Society, et al. v. Kempthorne*

#### 1. *History*

As the ongoing struggle between the protectionist conservation groups and a government anxious to be less dependent on other nations for energy continued, the Secretary directed that an EIS and BiOp be created for modifications to the restricted areas in the NEA.[77] The modifications open almost the entire 4.4 million acres of the NEA for leasing.[78] This includes opening the previously protected, environmentally sensitive area of Teshekpuk Lake Special Area, which acts, among other things, as a habitat for some of the areas most unique species.[79] The only area not available for leasing under the Final Environmental Impact Statement (FEIS) was "the subsurface land under Teshekpuk Lake itself, which

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71. Norton, 361 F. Supp. 2d at 1076.
72. *Id.* at 1075-76.
73. *See* COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (Jan. 1997).
74. Norton, 361 F. Supp. 2d at 1082.
75. *Id.*
76. *Id.*.
77. Nat'l Audubon Soc'y, No. 1:05-cv-00008-JKS, slip op. at 2.
78. *Id.* at 6.
79. *Id.* at 2.

was deferred from leasing."[80] This new FEIS with its additional openings and lack of information led to the most recent attempt by several conservation groups to halt or restrict the use of the NPR-A for oil development.[81] The Alaska court again took on the task of reviewing the legal sufficiency of the FEIS and BiOp.[82]

### 2. *Issues*

The environmental plaintiffs set forth several issues for consideration.[83] Plaintiffs complained defendants violated NEPA, the APA, and ESA.[84] The main issues addressed in the case concerning NEPA were: whether defendants violated NEPA by failing to submit a supplemental EIS, when a "new alternative" was added to possibilities for leasing options;[85] whether they violated NEPA by failing to consider the cumulative effects of opening both the NEA and NWPA up for leasing;[86] and whether NEPA was violated by the failing to evaluate the effects of development on the increase of global warming.[87] In regards to the government's ESA violations, the plaintiffs argued that ESA was violated because the impact of development on the endangered species population was not fully considered in the context of leasing occurring in both the NEA and NWPA.[88] Finally, plaintiffs argued that leasing in NEA violated the "maximum protection" standard set forth by the NPRPA.[89]

### 3. *Holdings and Effects*

Although the environmental groups were pleased with the outcome of this case, they lost on some issues.[90] On the issue of a supplemental EIS, the court sided with the agency.[91] Plaintiffs complained that the "new alternative," for opening land to leasing, was set forth solely in the FEIS.[92] NEPA requires the public have a chance to offer its comments on the development plan before it is

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80. *Id.* at 6 (describing the new preferred alternative D, as stated in FEIS).
81. *See id.* at 2.
82. *See id.*
83. *See id.* at 2-4.
84. *Id.*
85. *Id.* at 7.
86. *Id.*
87. *Id.*
88. *Id.* at 20.
89. *Id.* at 24.
90. *See id.* (holding in agreement with the agency regarding the supplemental EIS, climate change arguments, and in regard to the maximum protection requirements).
91. *See id.* at 12.
92. *Id.* at 7-8.

finalized.[93] Because this alternative was not reviewed by the public before it was chosen, plaintiffs claimed defendants were in violation of NEPA.[94] The court did not feel that setting forth the exact alternative used in the final statement was required of the agency under its EIS requirement.[95] Although, this exact alternative was not included in the draft of the EIS for which comments were allowed, the court held that the alternative was within possibilities offered and NEPA did not require that every change, made after review of public comment, necessitated a supplemental EIS.[96] The court stated, "agencies have flexibility to modify alternatives discussed in a draft EIS in response to public comments without having to circulate a new draft for comment."[97] The plaintiffs were equally unsuccessful in their climate warming and maximum protection arguments.[98] The court, finding that both issues were considered to an extent, just not to the extent that the plaintiffs found acceptable, chose not to require further evaluation from the government on these issues.[99]

The two issues in which the plaintiffs were successful surrounded the cumulative impact analysis.[100] Again, plaintiffs argued that defendants violated NEPA because they did not consider the cumulative effects of drilling in both the NWPA and NEA.[101] Because this issue was already addressed in the NWPA case, the court now agreed that the defendant's analysis was inadequate as they still had failed to address this issue.[102] The cumulative effects were no longer too speculative or inconsequential, nor were they adequately addressed.[103] The court held that for compliance with NEPA, the cumulative effects need to be considered.[104]

A lack of cumulative effects analysis was also the downfall of the government's evaluation under ESA and the Fish & Wildlife's BiOp.[105] In evaluating the effects of an action in a BiOp, the group evaluating must show the "direct

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93. *Id.*
94. *Id.* at 8.
95. *Id.* at 9.
96. *Id.* at 8.
97. *Id.*
98. *See id.* at 19, 29 (showing Court's holding that the agency adequately addressed that a warming climate could be an issue and holding that because plaintiff's offered no other options than no development at all in order to obtain "maximum protection," the court has no basis for saying the alternative chosen by the agency are an abuse).
99. *Id.*
100. *Id.* at 13-15.
101. *Id.* at 15.
102. *Id.* at 14.
103. *Id*.
104. *Id.* at 15.
105. *Id.* at 23.

and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline."[106] The government argued that the cumulative effects would not materially alter the analysis, but the court said it did not matter, it only needs to be "interrelated or interdependent," therefore, the cumulative analysis had to be done.[107] On both these cumulative effect issues, the court sent the agency back to the drawing board to gather more information on the effects of developing the area basically simultaneously.[108]

## IV. MECHANISMS USED IN EVALUATING ENVIRONMENTAL IMPACTS

In both cases, several environmental law mechanisms were used for evaluating the actual project and the sufficiency of the evaluation. Understanding how these mechanisms work is key to understanding the basis for arguments and decisions reached. Explanations of the NEPA, ESA, and APA are set out below.

### A. *National Environmental Protection Act*

In order to have a way of determining and/or regulating the effects of development on the environment before the project was initiated, Congress passed the National Environmental Policy Act of 1969 (NEPA).[109] NEPA is an extensive statute passed in early 1970 and is considered the beginning of the "environmental decade."[110] NEPA was meant to create a way that nature and humanity could live in harmony, then and in the future.[111] It attempted to accomplish this by requiring government agencies to consider effects of their actions on the surrounding environment and requiring them to allow public comment before moving forward on the project.[112]

The most recognized requirement of NEPA is the EIS: a mechanism used is evaluating the environmental impact of federal projects.[113] The purpose of the EIS is to provide a detailed analysis about the consequences of the devel-

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106. 50 C.F.R. § 402.02 (2008).
107. Nat'l Audubon Soc'y, No. 1:05-cv-00008-JKS, slip op. at 20.
108. *See id.* at 19, 29.
109. 42 U.S.C.A. § 4331 (West 2008).
110. ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 783 (4th ed. 2003) (quoting Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 904 (2002).).
111. *Id.* at 784.
112. *Id.*
113. *See id.*

opment on the environment.[114] It is created so agencies can determine whether the development should proceed in light of the environmental effects on the surrounding area.[115] The analysis put into these impact statements has become quite extensive and they often take many months, if not years, to develop.[116]

Because not every project requires an EIS, when an EIS is necessary it is the source of much debate and tension among the environmental community.[117] NEPA states when an EIS is required, but as in most statutory language, it is open to some interpretation.[118] "An EIS must be prepared for 'proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.'"[119] In considering this definition, most arguments have centered around what constitutes a "major federal action" and when that action is "significantly affecting the quality of the human environment."[120]

A "major federal action" includes "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures."[121] In essence, the phrase "major federal action" has been interpreted to be very broad in scope and therefore the need for EIS assessment, even in situations that only peripherally involve the federal government. As for "significantly affecting the quality of the human environment," this standard has caused much more controversy.[122] Although the definition is still not completely clear, the Center for Environmental Quality (CEQ), the agency charged with oversight of NEPA, has attempted to make its own definition to help clarify, when an EIS is needed.[123] In this definition, CEQ says to look at the context and intensity of the action and within these categories, focus on things such as the uniqueness of area, the controversy of the action, degree of risk involved for substantial damage to the environment, and the precedent it will set.[124]

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114. 61B AM. JUR. 2D *Pollution Control* § 112 (2008).
115. *Id.*
116. PERCIVAL, *supra* note 110, at 785 (explaining the "massive undertaking" that is an EIS).
117. *See id.* at 792-93.
118. *See id.*
119. *Id.* at 792.
120. *Id.* at 792-93.
121. 40 C.F.R. § 1508.18 (2008).
122. PERCIVAL, *supra* note 110, at 821.
123. *Id.* at 827.
124. 40 C.F.R. § 1508.27 (2008) (giving definition and subcategories to elaborate on what elements should be considered).

Once it is decided that an EIS *is* required, more significant analysis must be done.[125] In an EIS, the agency is required to consider several elements during its analysis.

> [I]nclude[d] in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on – (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternative to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[126]

Once the agency considers the analysis complete, the EIS statement is given to the public for review and comment.[127] The comments are reviewed and a final EIS is prepared setting forth the agencies "preferred alternative" and decisions on the project.[128] Once the entire process is completed for an action, groups can challenge the adequacy of the evaluation.[129] This can be very controversial and upsetting for the agency, who has invested substantial time and money into the process.[130] Because NEPA is a procedural statute, the most significant ramification a court can take is requiring the agency to redo all or part of the EIS.[131] This is a penalty courts are often reluctant to find, but can order if they deem the EIS to be an insufficient evaluation.[132]

### B. *Endangered Species Act*

Another statute analyzed in these cases is the Endangered Species Act (ESA).[133] This statute is used in evaluating effects on wildlife when federal actions are taking place.[134] The ESA requires that federal agencies carry out "programs for the conservation of endangered species and threatened

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125. *See* 61B AM. JUR. 2D *Pollution Control* § 112 (2008).
126. 42 U.S.C.A. § 4332(c) (West 2008).
127. *Id.*
128. *Id.* at § 4332(e).
129. *See* PERCIVAL, *supra* note 110, at 832-33.
130. *Id.* at 785.
131. *See id.* at 838-39.
132. *Id.* at 838.
133. Nat'l Audubon Soc'y, No. 1:05-cv-00008-JKS, slip op. at 3; Norton, 361 F. Supp. 2d at 1072.
134. *See* 16 U.S.C. § 1536(a)(2) (2006).

species . . .”[135] The agency must ensure that these species are not threatened because of the modification to the animal’s habitat by the acting agency.[136] To comply with these requirements of the ESA, an agency must perform a Biological Assessment before beginning action.[137] This Biological Assessment is considered part of the agency’s compliance with ESA and is meant to identify any species that is listed as endangered or threatened and will be affected by the development.[138]

### C. *Administrative Procedure Act*

When an agency decision is challenged, the federal courts are charged with the job of review.[139] The APA is the mechanism used in making this decision.[140] It is “a federal statute establishing practices and procedures to be followed in rulemaking and adjudication.”[141] A court may, under the authority of the APA, set aside agency action, but the standard for these decisions is quite high and gives great deference to the agency.[142] As the cases evaluated above demonstrate, the courts are only willing to strike down a decision, if it was viewed as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”[143]

## V. ALASKA DRILLING CASE: DEMONSTRATION OF THE WEAKNESS OF NEPA.

### A. *The Weakness of the NEPA Procedure*

As discussed above, NEPA is a procedural statute.[144] It sets out a process for an agency to follow to assist the agency in determining if the project’s benefits outweigh the damage it will cause to the surrounding environment.[145] One of the most interesting aspects of NEPA is that there is no statutory way of stopping a project when the damage being done to the environment is too detrimental.[146] NEPA allows the agency that is proposing the project to decide whether the envi-

135. *Id.* at § 1536(a)(1).
136. *Id.* at § 1536(a)(2).
137. *Id.* at § 1536(c).
138. *Id.*
139. PERCIVAL, *supra* note 110, at 785.
140. *See* BLACK’S LAW DICTIONARY 48 (8th ed. 2004).
141. *Id*.
142. 5 U.S.C. § 706 (2007).
143. *Id*; *see also* Nat’l Audubon Soc’y, No. 1:05-cv-00008-JKS, slip op. at 20.
144. *See* PERCIVAL, *supra* note 110, at 838.
145. *See generally* 42 U.S.C. §§ 4321-4370 (2008).
146. *See* PERCIVAL, *supra* note 110, at 785.

ronmental impact is too severe to continue and decide which alternative is best for the affected area.[147] It does not direct the agency to choose the most environmentally protective option available.[148] It leaves the decision in the hands of the agency, even though that agency is usually a strong proponent of the project.[149] The drafters of NEPA meant for the statute to assist agencies in implementing the best plan for a project by viewing different alternatives and getting a holistic view before the project began.[150] It was meant to be seen as more than just a regulation on groups who were pro-development.[151] The drafters wanted groups to work together to enhance protection of the environment while continuing the great potential for land development found in the U.S.[152]

Unfortunately, the result of NEPA implementation has been very different than the drafter's original purpose.[153] NEPA is capable of accomplishing the goal of protecting the environment, while continuing with development, if it is used correctly.[154] However, like many laws in our society, instead of viewing NEPA as a decision mechanism, it is often viewed as a hurdle to get over, before the agency can perform its projects.[155] Instead of being seen as a tool, it is seen as one more thing to be done after the destiny of the project has already been decided. [156]

The hope of the CEQ is that this view of NEPA can be changed.[157] In its twenty-five year review of NEPA, CEQ refers to the EIS statement as a "innovation in administrative reform," because its flexible approach allows for evaluation in a non-traditional way.[158] Instead of directing the agency on how to solve a problem, it makes the agency the expert on its own project and allows the agency to decide what issues need addressing.[159] Unfortunately, it is often the case, that NEPA is not used to evaluate if or how the project should be done.[160] It is often involved in the EIS process too late to make a difference in the decision making of the agency.[161]

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147. *See id.* at 784.
148. *Id.* at 838.
149. *Id.* at 850.
150. *See id.*
151. *See* COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 74 at 2.
152. *Id.*
153. *Id.* at ix.
154. *Id.* at 8.
155. *Id.* at 11.
156. *Id.*
157. *Id.* at 12.
158. *Id.* at 11.
159. *Id.* at 12.
160. *Id.* at 11.
161. *Id.*

### B. *Leasing Decision and the Bush Energy Policy*

#### 1. *Policy before Analysis*

The misuse of NEPA could explain the strenuous fight going on in Alaska over the NEA and NWPA. The Bush administration began looking at energy policy almost immediately after entering office.[162] The President appointed a group to develop an energy policy which was finished in 2001.[163] This policy has only gained steam since the 9/11 attacks, which noted for the country, once again, that energy independence was key to our national security.[164] Bush's National Energy Policy and more recently his Energy Policy Act of 2005 seem much more focused on finding domestic sources of oil than in investing in alternatives.[165] The 2001 policy recommended building more refineries and natural gas pipelines and streamlining the approval process for the projects as well as looking at nuclear and other alternative energy forms.[166] Additionally, the 2005 policy directs the Secretary to "undertake a comprehensive survey of oil and natural gas resources . . . and to review leasing and permitting practices with a view of streamlining them."[167] The 2005 Act, signed into law by President Bush, provides oil, coal, and nuclear industries with approximately twelve billion dollars in funding.[168] With this policy, and the limited domestic area in which the U.S. has found oil, it is difficult to imagine being able to effectively use NEPA in deciding what alternative will best protect the environment in the northern slope.

The CEQ recommends having NEPA be part of the discussion during the policy making level of the project and not at the individual project level.[169] These policies, however, were likely decided long before either of the most recent EIS statements for the NEA and NWPA were completed.[170]

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162. Joseph P. Tomain, *Katrina's Energy Agenda*, 20 SPG NAT. RESOURCES & ENV'T 43, 44 (2006).

163. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY viii (2001).

164. Stacey L. Middleton, *How the Petroleum Addict Negotiates with the Dealer: Challenges to the Bush Administration's North American Energy Policy*, 11 CARDOZO J. INT'L & COMP. L. 177, 178 (2003).

165. Tomain, *supra* note 162, at 45.

166. *Id.*

167. *Id.*

168. *Id.* at 46.

169. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 73, at 11.

170. Brief for Appellant, N. Alaska Envtl. Ctr., at 11 (explaining that the EIS statement for the NWPA was completed in January 2003).

### 2. *Involving the Public*

Another strength of the NEPA analysis is the involvement of people who live in the environment that is being affected.[171] When an EIS is created, public comment on the issues is required before a decision on the project can be finalized.[172] The idea is that the agency will reach out to those most affected by the project, gather information, and apply that information when considering alternatives.[173] However, the groups most affected by the NEA and NWPA projects are four native Alaskan tribal groups who inhabit the area and practice a very traditional way of life.[174] The environment in its natural form is key to this practice and has already seen some disruption from the leasing and exploration currently taking place.[175] Unfortunately, this is not a group with strong political clout.[176] When the government came out with their final decisions for both areas, it was clear that protection of the environment or the Alaskan tribal groups way of life was not the government's priority as they attempted to open almost all of the protected areas in both regions to oil and gas exploration.[177]

### 3. *Fighting in Court*

When early decision-making and public input are ignored in policy determination, the only other avenue that the environment has under NEPA is the federal court system.[178] As seen above, however, this is a very difficult avenue to travel.[179] Courts give much deference to the agency in charge of the project and will not substitute its decision for the agencies without strong evidence of mismanagement.[180] A finding by the court of arbitrary and capricious is the only way to stop final agency action.[181] Even if the courts dislike the agency decision, this is a level of incompetence seldom found.

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171. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 73, at 17.
172. 42 U.S.C. § 4332 (2008).
173. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 73, at 19.
174. Brief for Appellant, N. Alaska Envtl. Ctr., at 4,5.
175. *Id.*
176. *See id.*
177. *See* Nat'l Audubon Soc'y, No. 1:05-cv-00008-JKS, slip op. at 6 (showing that the new alternative, first presented in the FEIS, opens almost 4.4 million acres or the total 4.6 acre area to leasing).
178. PERCIVAL, *supra* note 110, at 832-33.
179. *See* 5 U.S.C. § 706 (2007); *see also* Nat'l Audubon Soc'y, No. 1:05-cv-00008-JKS, slip op. at 29.
180. *See* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1984).
181. 5 U.S.C. § 706 (2007).

## VI. CONCLUSION

Surprisingly, the court found that the lack of cumulative effects analysis in the NEA-EIS constituted an arbitrary and capricious level of decision-making.[182] The court has required that the EIS be redone before any action modifying the area open for leasing may occur.[183] This process will be very time consuming and expensive for the government, but they have already laid the groundwork for moving forward.[184] The day after the decision was announced by the District Court, the government proceeded with its sale of leases in the NWPA and the BLM has already published a Notice of Intent to do a supplemental EIS statement for the NEA.[185] It does not appear that the government has any plans of slowing down its process. Although the government is delayed by having to consider cumulative effects, because of the structure of NEPA, that is all the environmental groups and courts can require.[186] Once the supplement EIS and BiOp are completed and the agency is in compliance with NEPA, no matter how severe the impact is on the environment, the Secretary may decide that leasing is the right decision, and there is very little that can be done to stop them.[187]

Modifications of NEPA have been suggested for situations such as this one currently facing the northern slope.[188] Some suggest that independent groups should prepare the EIS, hoping that a group with less interest in the outcome than the agency piloting the project would be more objective in the impact assessment.[189] Others have suggested some sort of follow-up mechanism.[190] A mechanism, where after the project has begun monitoring, continues so that different mitigation techniques can be adopted if necessary.[191] This would allow changes once the project's true effect on the environment is clear.[192] With no movement towards these evaluation alternatives, the optimists hope that the fed-

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182. Nat'l Audubon Soc'y, No. 1:05-cv-00008-JKS, slip op. at 29.

183. *See id.*

184. Press Release, Bureau of Land Management, Companies Bid $13.8 Million for Leases in National Petroleum Reserve-Alaska (Sept. 27, 2006), *available at* http://www.blm.gov/ak/npranw/ak_06_21.pdf.

185. Notice of Intent to Prepare a Supplement to the Northeast National Petroleum Reserve-Alaska Amended Integrated Activity Plan/Env't Impact Statement, 71 Fed. Reg. 232, 70422 (Dec. 4, 2006).

186. *See* COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 73, at 11.

187. *See* Norton, 361 F. Supp.2d at 1072 (showing that agencies look at NEPA as simply a procedural assessment, and a guaranty of approval as long as those procedures are met).

188. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 73 at 31.

189. *Id.*

190. *Id.*

191. *Id.*

192. *See id.*

eral government will realize that the cumulative impacts on the NPR-A are to severe and that the Secretary will require more protection.[193] Unfortunately, although the CEQ has continued to look at modifications to NEPA in an attempt to improve its implementation, there are no guarantees. It is still left to the agency to make the final decision and in this case the agencies are caught between conflicting policies of aggressively exploring for oil and protecting environmentally sensitive areas.[194] At this time, it appears that the exploration for oil will win priority over the environment. It will then likely be many years before we understand whether the costs were worth the benefits received.

193. Press Release, Northern Alaska Environmental Center, *supra* note 1.

194. Paul B. Smyth, *Interior's Role in the Nation's Energy Development*, 2003 A.B.A. SEC. ENV'T, ENERGY & RESOURCES 219.