

# The National Environmental Policy Act: An Overview

Environmental Law Institute

Summer School Series

NEPA & the ESA



THE UNIVERSITY OF UTAH

**S.J. QUINNEY  
COLLEGE OF LAW**

Wallace Stegner Center for Land,  
Resources, and the Environment

Law & Policy Program



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# Agenda

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Birth of NEPA

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NEPA's Contents (big picture)

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NEPA in Action

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NEPA Myth Busting

# The National Environmental Policy Act (NEPA)

Passed by Congress in December of 1969.

Signed into law by President Richard Nixon on January 1, 1970.

“Magna Carta of environmental law.”



Twin aims:  
(1) consider (2) disclose.

“Major federal action  
significantly affecting the  
human environment”

Impacts

Alternatives

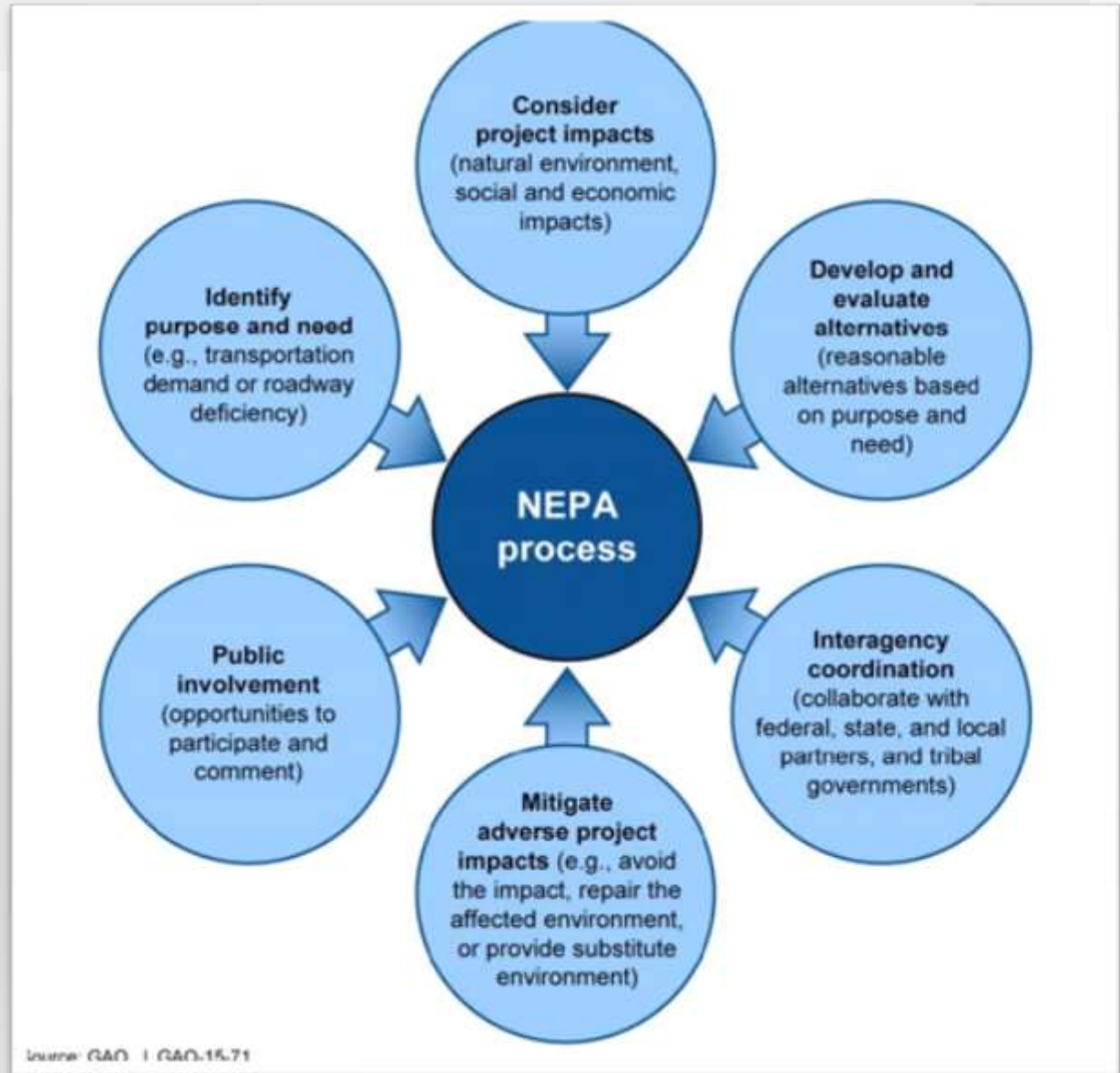
Mitigation

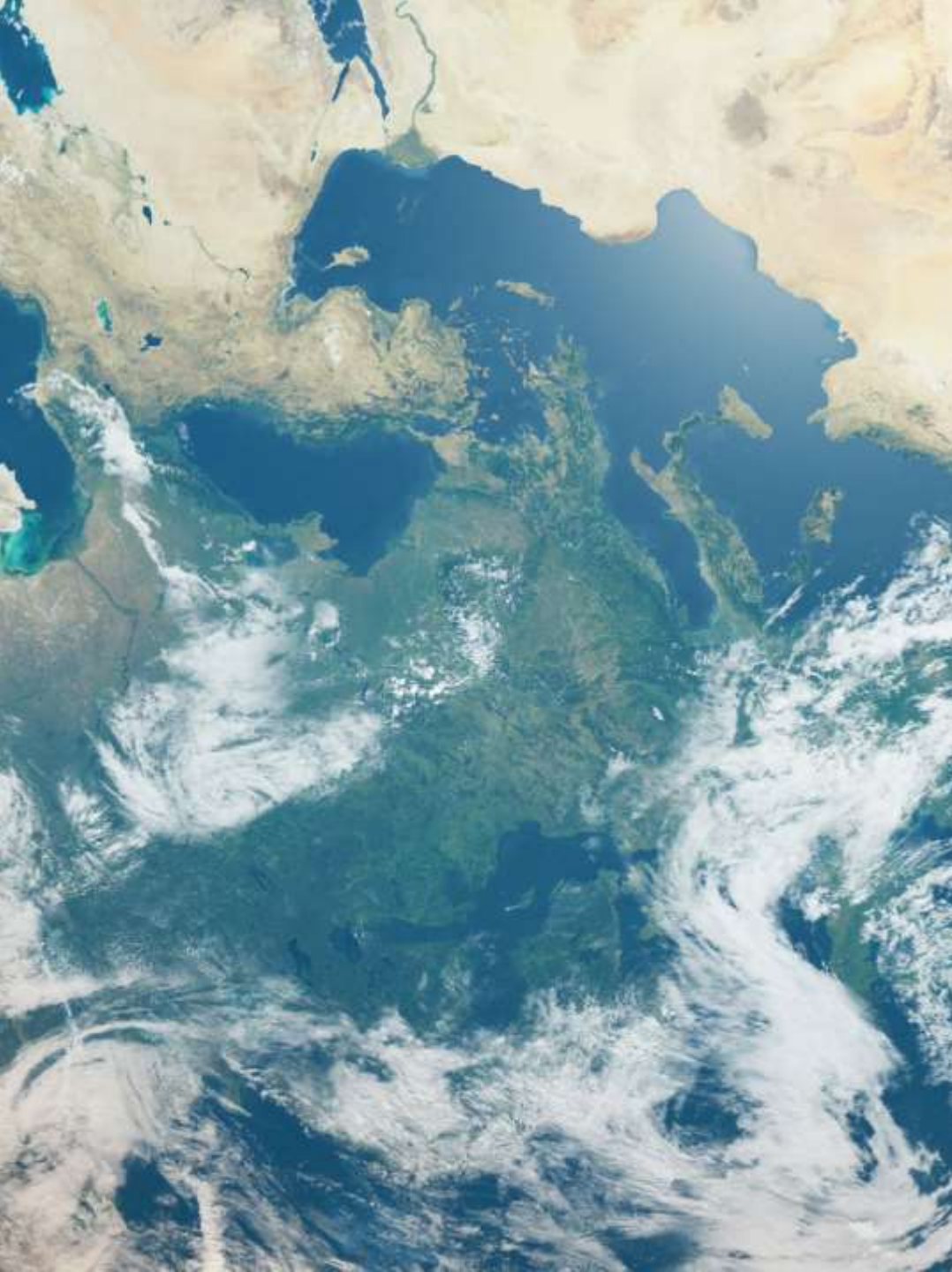
A procedural rather than  
substantive environmental  
mandate.



# NEPA's Procedural Goals

**Transparency/ Disclosure**  
+  
**Opportunity for public engagement**  
+  
**Consideration of alternatives including mitigation**  
=  
**Better decisions**





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## The EIA Process is increasingly a global legal norm.

- A survey of the world's 197 jurisdictions revealed that at least 93% (183) have adopted the EIA duty as part of their environmental governance system. Tseming Yang, *The Environmental Impact Assessment Duty as a Global Legal Norm*.
- The UN General Assembly has recognized the right to a clean, healthy and sustainable environment is a universal human right. The procedural elements of this right include:
  - Right of access to information
  - Public participation in environmental assessments and decisionmaking
  - Access to justice and effective remedies.

Martha F. Davis & Solene Kerisit, *The Human Right to a Healthy Environment: A research Guide and Annotated Bibliography*.



# Statement of Purpose 42 U.S.C. § 4321

- To declare a national policy which will:
  - encourage productive and enjoyable **harmony between man and his environment**;
  - to promote efforts which will **prevent or eliminate damage to the environment** and biosphere and stimulate the health and welfare of man;
  - to **enrich the understanding of the ecological systems** and natural resources important to the Nation;
  - and to **establish a Council on Environmental Quality**.

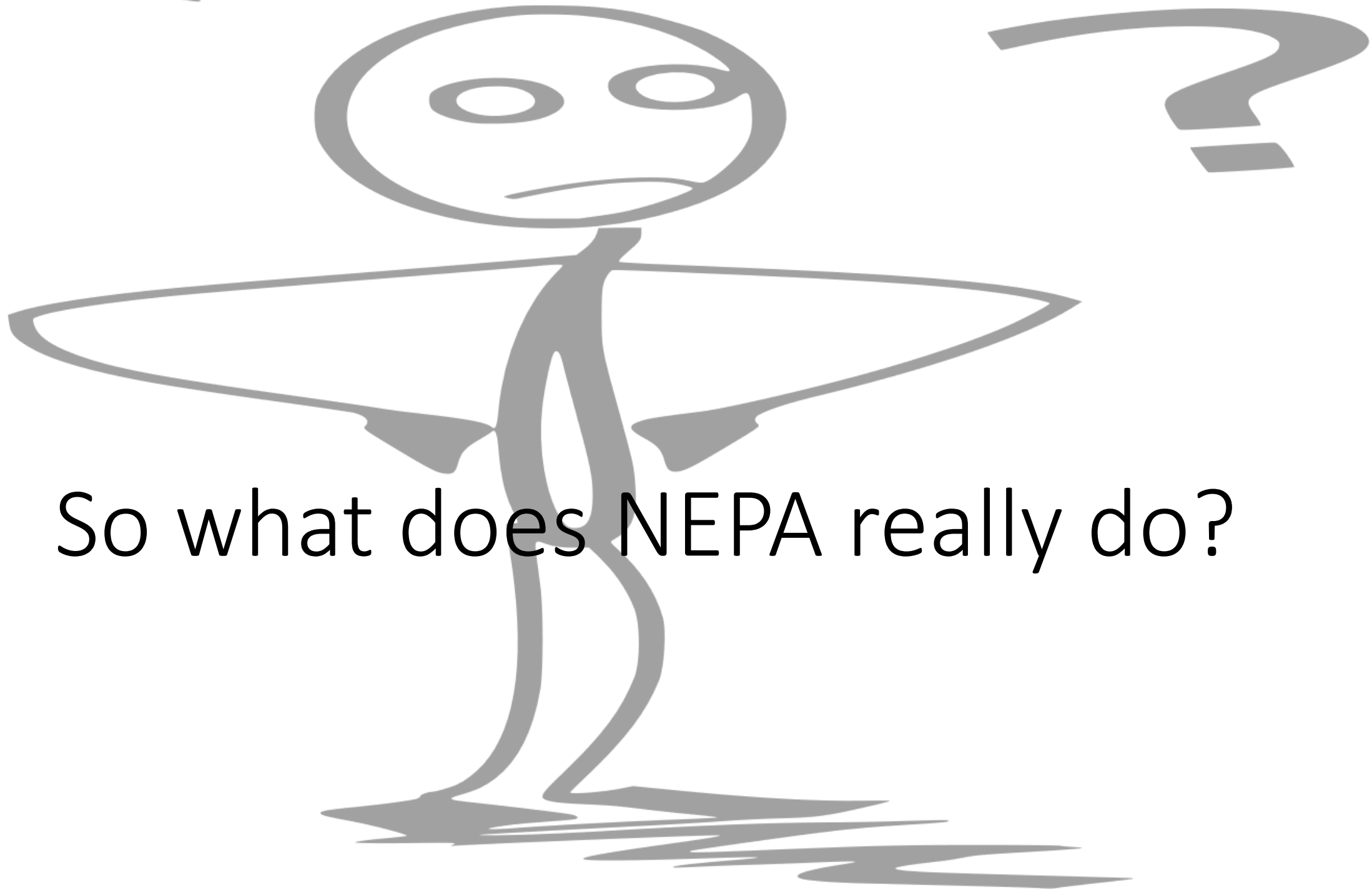


# Congressional Declaration of Policy § 4331

It is the continuing responsibility of the Federal Government to . . .

- (1) Fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations;
- (2) Assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;
- (3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) Preserve important historic, cultural and natural aspects of our national heritage . . .
- (5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities;
- (6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources

**Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.**



So what does NEPA really do?

# Council on Environmental Quality

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- Within the Executive Office of President
- Oversees NEPA implementation (guidance and regulations)
  - Exec. Orders 11514 & 11991
    - Direct CEQ to promulgate regulations applicable to all federal agencies
    - Direct federal agencies to comply with CEQ regulations
    - Direct federal agencies to supplement CEQ's regulations with their own.
- Reviews and approves Federal agency NEPA procedures
- Approves alternative arrangements for compliance
- Develops and recommends national policies to the President that promote the improvement of environmental quality and met the Nation's goals.



# NEPA's Action-Forcing Provision, § 102(2)(c)

“Include in every . . . **major Federal action significantly** affecting the quality of the human environment, a detailed statement . . . on the **environmental impact** of the proposed action. . . .”



42 U.S.C. § 4332(2)(c)

# Contents of Environmental Impact Statement (EIS)

42 U.S.C. 4332(C).

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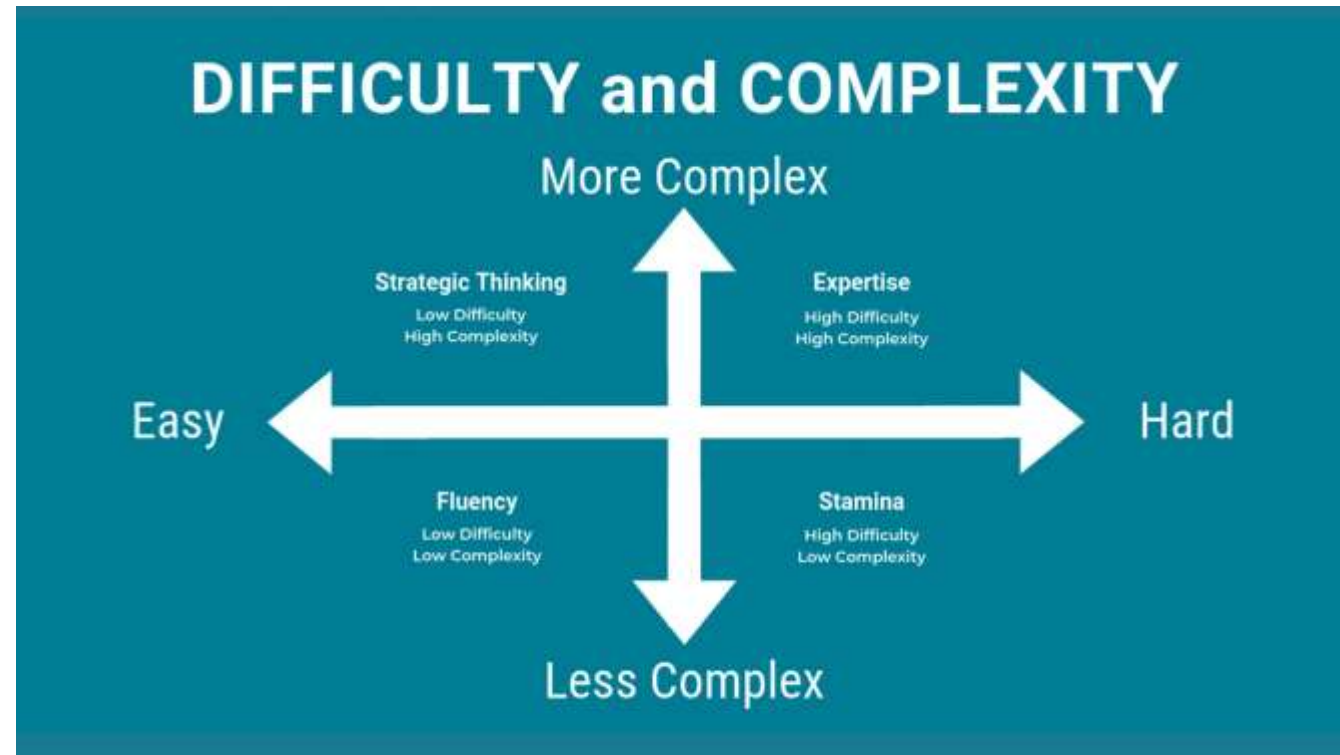
- 1. reasonably foreseeable environmental effects
- 2. reasonably foreseeable adverse environmental effects
- 3. a reasonable range of alternatives
- 4. relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity
- 5. irreversible and irretrievable commitments of federal resources



# NEPA's Analytical Rigor Is Scaled to the Significance of a Project's Impacts

Three possibilities:

- Environmental Impact Statements (EIS)
- Environmental Assessments (EA)
- Categorical Exclusions (CE)





## **Environmental impact statement (EIS)**

- Actions that significantly affect the environment require an EIS

## **Environmental assessments (EA)**

- Actions for which a Federal agency has not yet or cannot clearly establish the significance of the environmental impact.

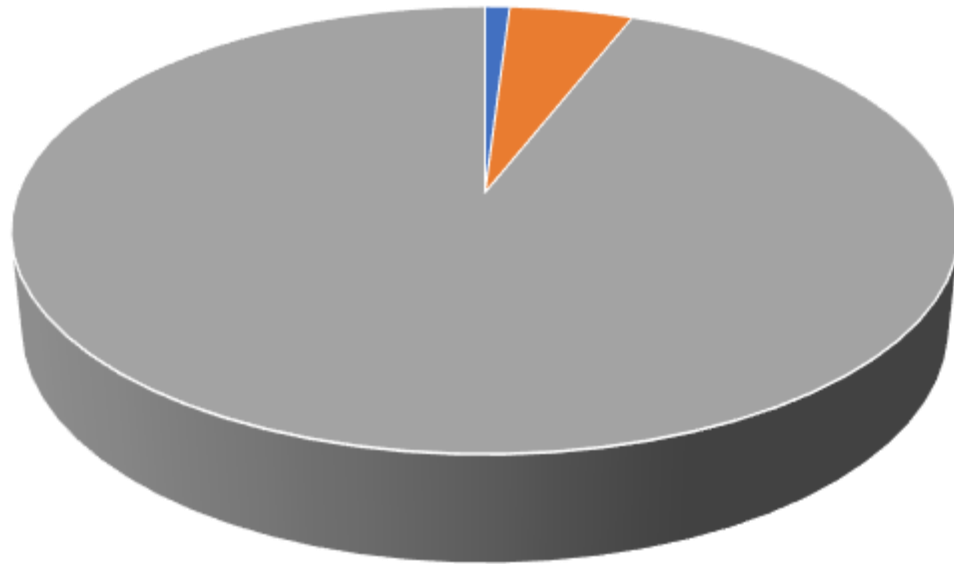
## **Categorical exclusions (CE)**

- Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS
- Many agencies identify these by regulation

# Disconnect between Discourse and Practice

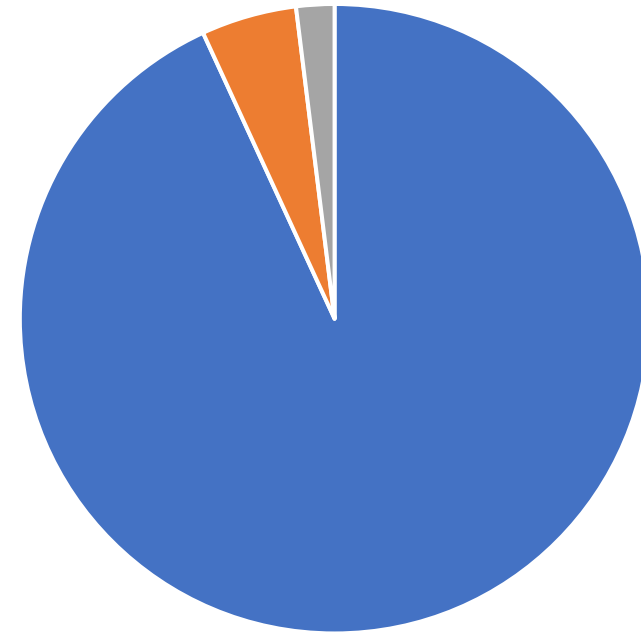
Type of NEPA Document Produced

■ EIS ■ EA ■ CE



Type of Document Discussed

■ EIS ■ EA ■ CE

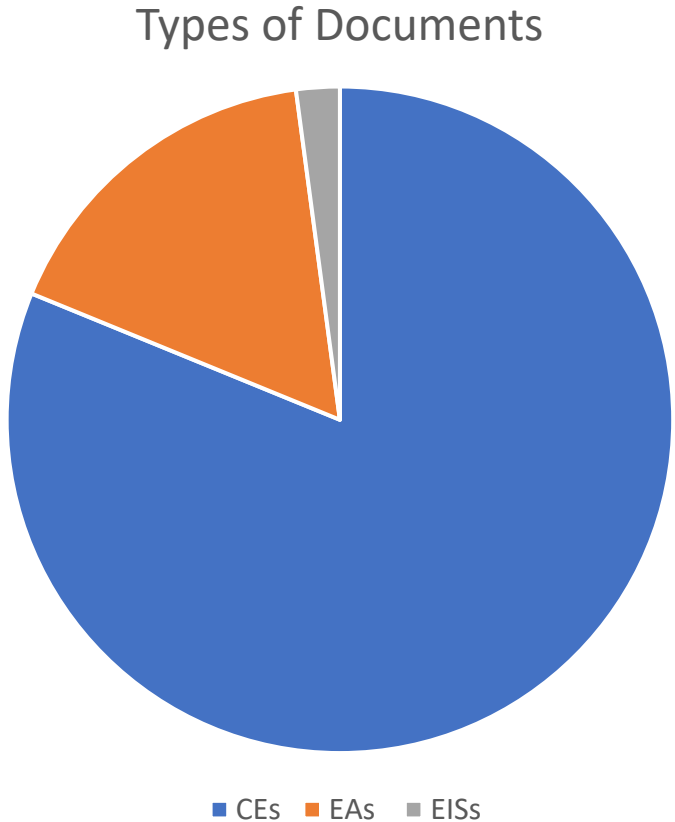


**Less than 100 EISs per year in 2020.  
Only 4 federal agencies issue more than 10 per year.**

- David Adelman, *Permitting Reform's False Choice* (forthcoming)



# Type of NEPA documents being produced.



From 2004-2020

81% CEs (33,443)

16.7% EAs (6,881)

2.1% EISs (870)

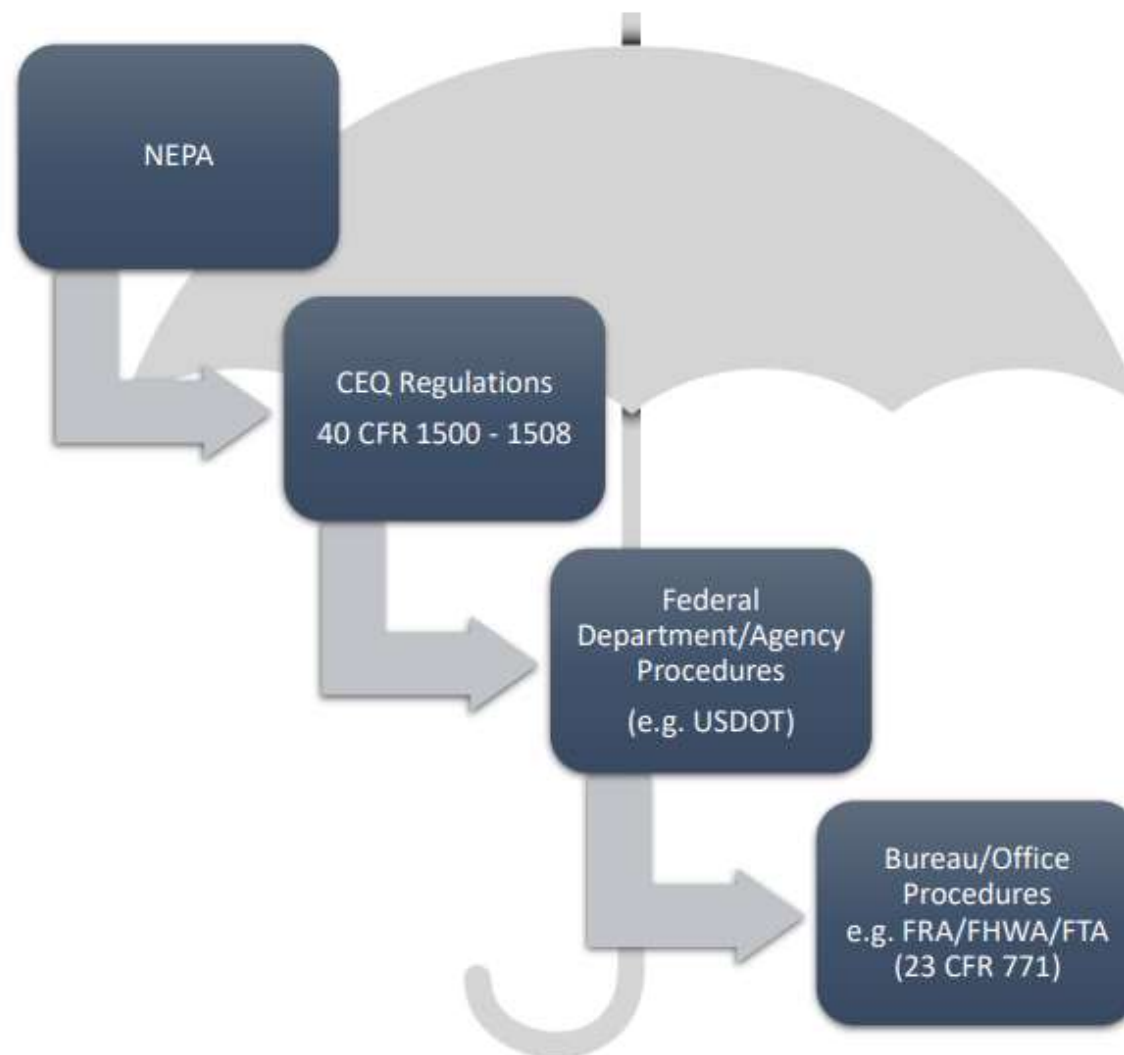
Average Annual Output

2,090 CEs (median 4 months)

430 EAs (median 1.2 years)

54 EISs (median 2.8 years)

# NEPA Implementation is Tiered



The background of the slide is a photograph of a grand, classical building. It features several large, fluted columns made of light-colored stone. In the foreground, there are numerous wide, shallow stone steps leading up towards the base of the columns. The lighting is bright, casting soft shadows and highlighting the texture of the stone.

Two Additional Influences:  
Courts and Caselaw  
Federal Legislation

# Is NEPA Working?

**No!!**

NEPA is the “weapon of choice”—a form of “lawfare,” used by activists for the “manipulation of the legal system” to “stop, delay, restrict, or impose additional costs on all types of federal action.”

Majority Staff of H. Subcomm. on Oversight & Investigations, 115th Cong., Hearing Memorandum on the Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare 1–2 (2018).

**Yes!!**

NEPA “has provided the foundation for countless improvements in our environmental laws. It gives us cleaner water, cleaner air, and a safer and healthier environment.”

Recognizing the Importance of the National Environmental Policy Act, 113 Cong. E1637 (2013) (Statement of Rep. Quigley).

# Anecdotes versus Evidence

Little is known  
about how NEPA  
functions

Minimal record  
keeping (only EISs)

Different practices  
between agencies

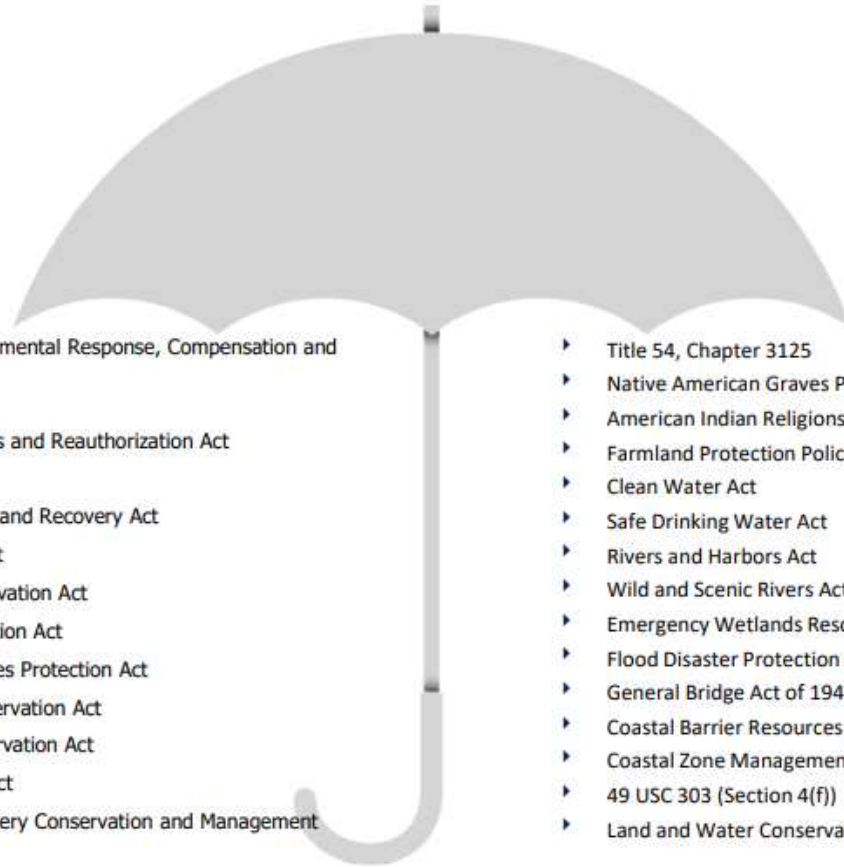
Risk mitigation is  
often invisible

Myth # 1: Permitting and  
NEPA are the same thing.



# Is NEPA the same as Permitting? No!

## NEPA is a procedural umbrella



- Comprehensive Environmental Response, Compensation and Liability Act
- Clean Air Act
- Superfund Amendments and Reauthorization Act
- Noise Control Act
- Resource Conservation and Recovery Act
- Endangered Species Act
- National Historic Preservation Act
- Marine Mammal Protection Act
- Archaeological Resources Protection Act
- Anadromous Fish Conservation Act
- Fish and Wildlife Conservation Act
- Migratory Bird Treaty Act
- Magnuson-Stevens Fishery Conservation and Management Act

- ▶ Title 54, Chapter 3125
- ▶ Native American Graves Protection and Repatriation Act
- ▶ American Indian Religions Freedom Act
- ▶ Farmland Protection Policy Act
- ▶ Clean Water Act
- ▶ Safe Drinking Water Act
- ▶ Rivers and Harbors Act
- ▶ Wild and Scenic Rivers Act
- ▶ Emergency Wetlands Resources Act
- ▶ Flood Disaster Protection Act
- ▶ General Bridge Act of 1946
- ▶ Coastal Barrier Resources Act
- ▶ Coastal Zone Management Act
- ▶ 49 USC 303 (Section 4(f))
- ▶ Land and Water Conservation Fund Act

NOTE: This is a not an exhaustive list



# What is “permitting?”



There is no single “permitting” law.

Permitting is a touchpoint to enforce legal standards (safety, environmental).

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The complexity of the permitting process depends on the complexity of the project.

Some projects may face multiple legal requirements (ex. CAA, CWA, ESA, OCSLA) administered by different agencies





# There is evidence that NEPA's umbrella function may improve decision-making timelines



- “On average, critical habitat rules that underwent NEPA review were completed more than three months faster than rules that did not undergo NEPA review.”
- Ruple et al., *Does NEPA Help or Harm ESA Critical Habitat Designations?* (2019)

643 designations between 1999-2017. All EAs except 1.

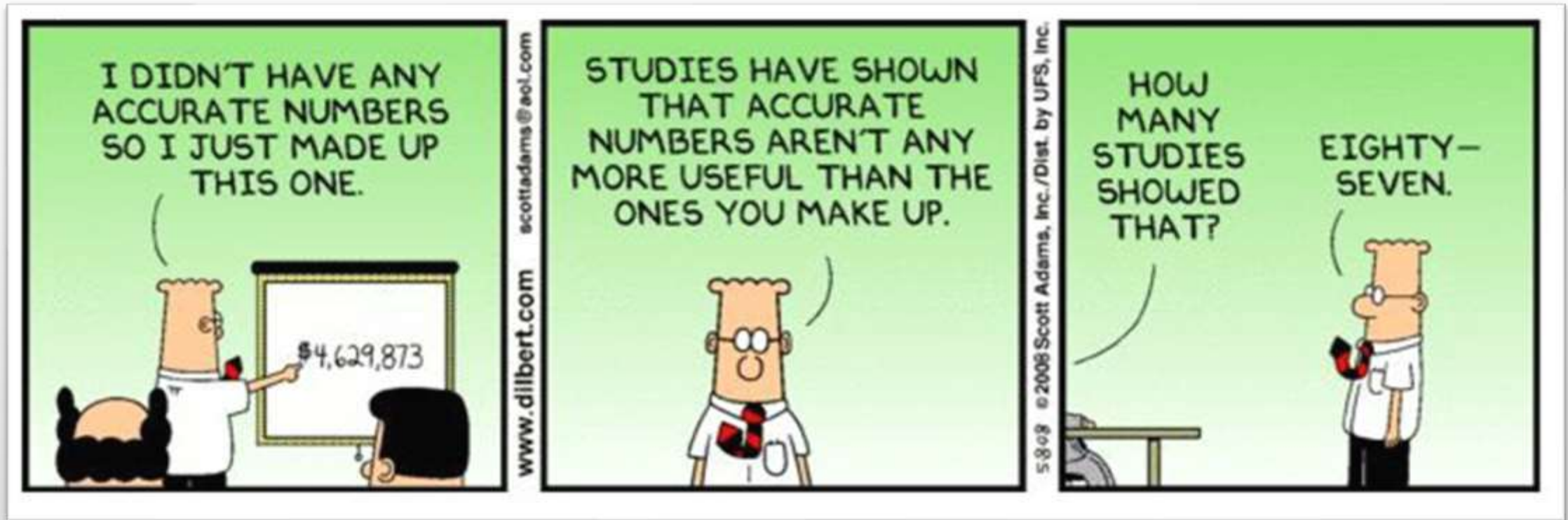
	Mean	Median	Maximum	Minimum	Standard Deviation	Count
With NEPA	596	383	1,757	158	422.7	36
Without NEPA	689	413	2,134	125	447.1	571
All Rules	683	413	2,134	125	445.9	607

Myth # 2: NEPA takes too long and wastes time



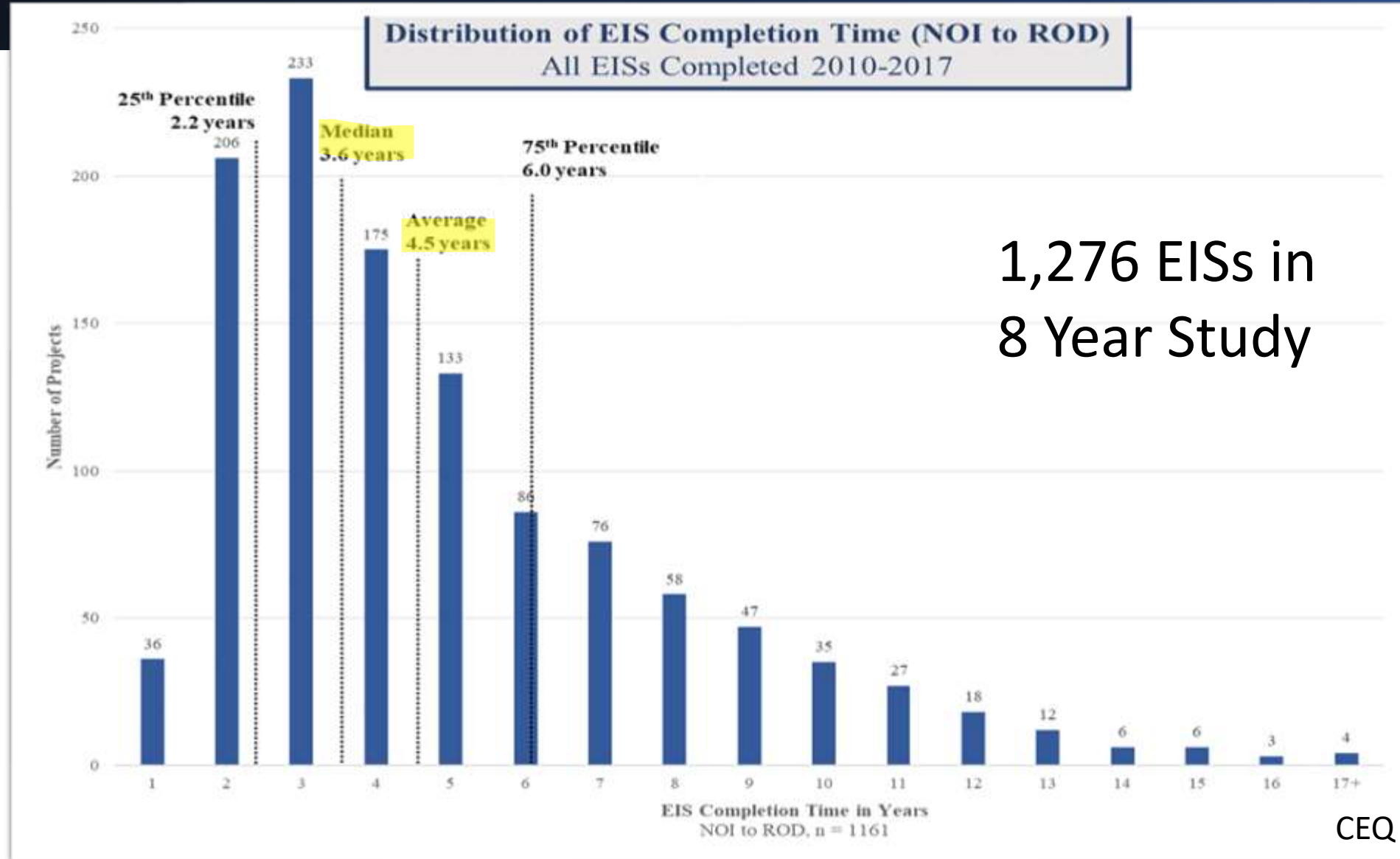
# How long does NEPA take?

**We don't really know.**

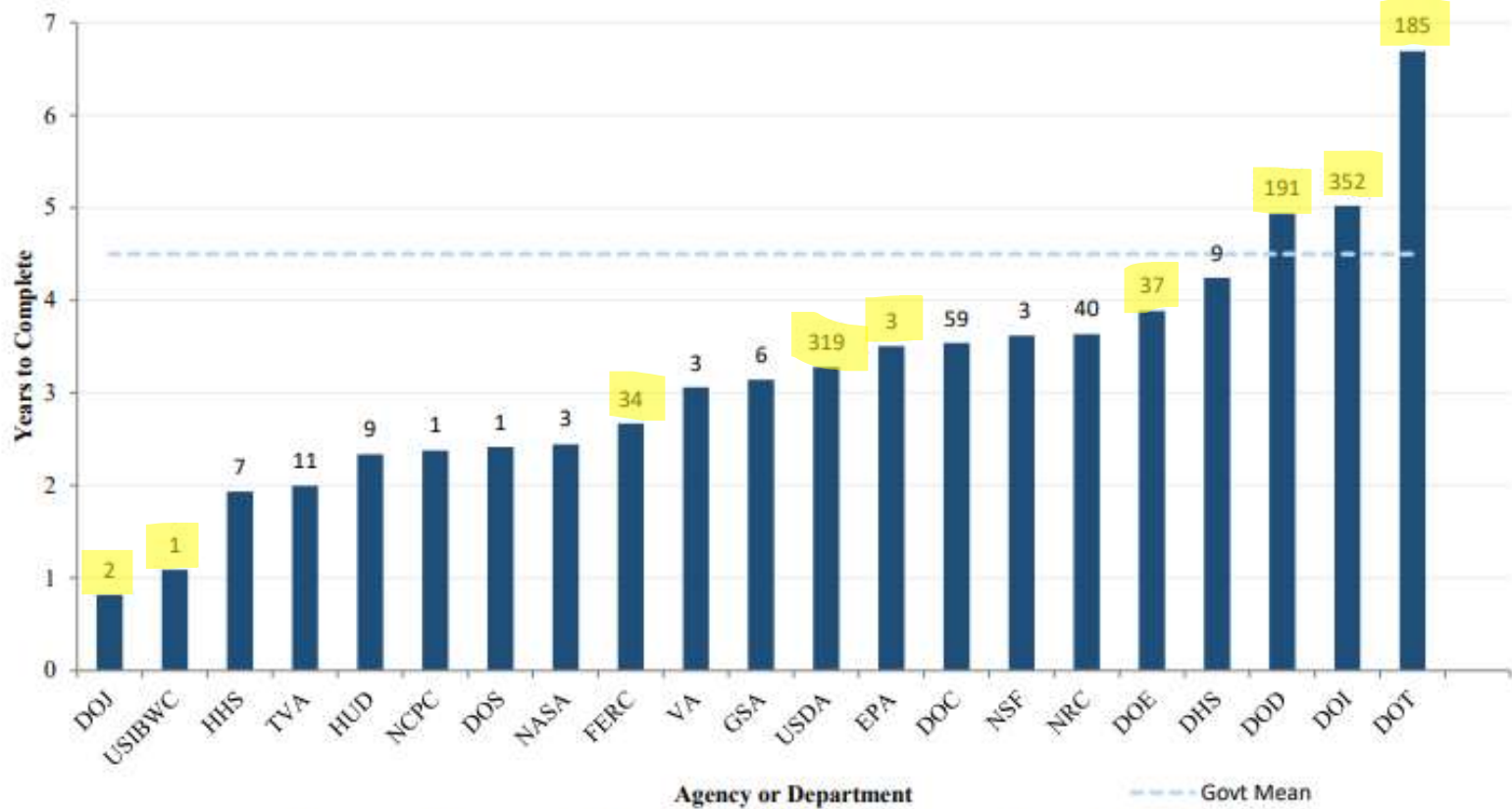


Anecdotes and Assumptions Often Drive the Policy Debates

# The 4.5 Year Statistic



**Average Completion Time (NOI to ROD)**  
 All EISs Completed 2010 - 2018, by Department

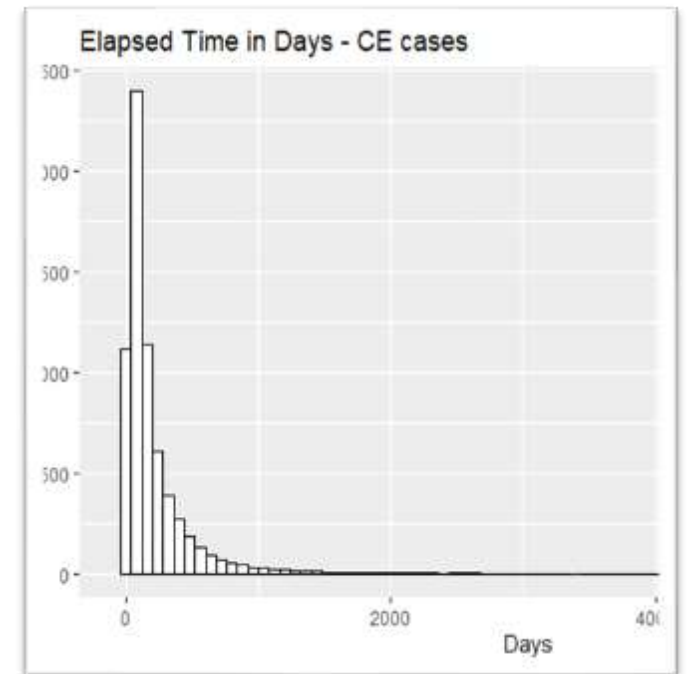
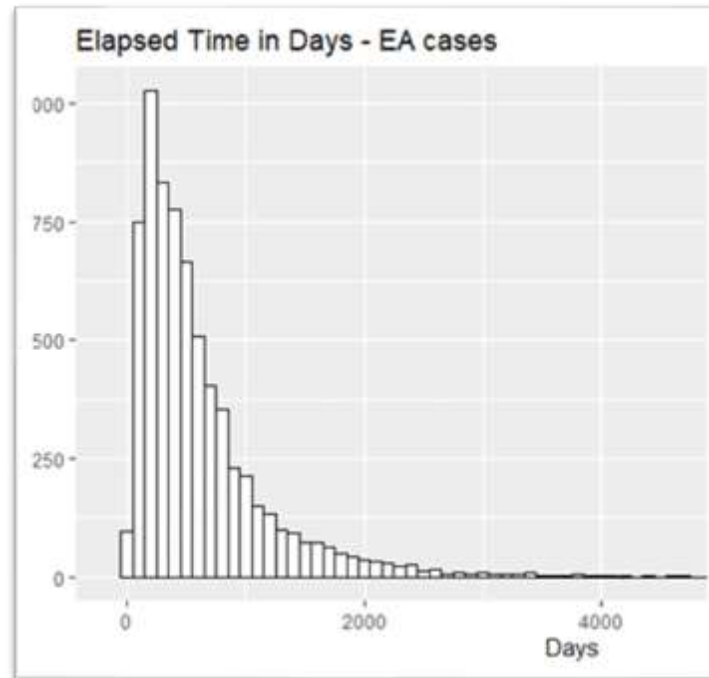
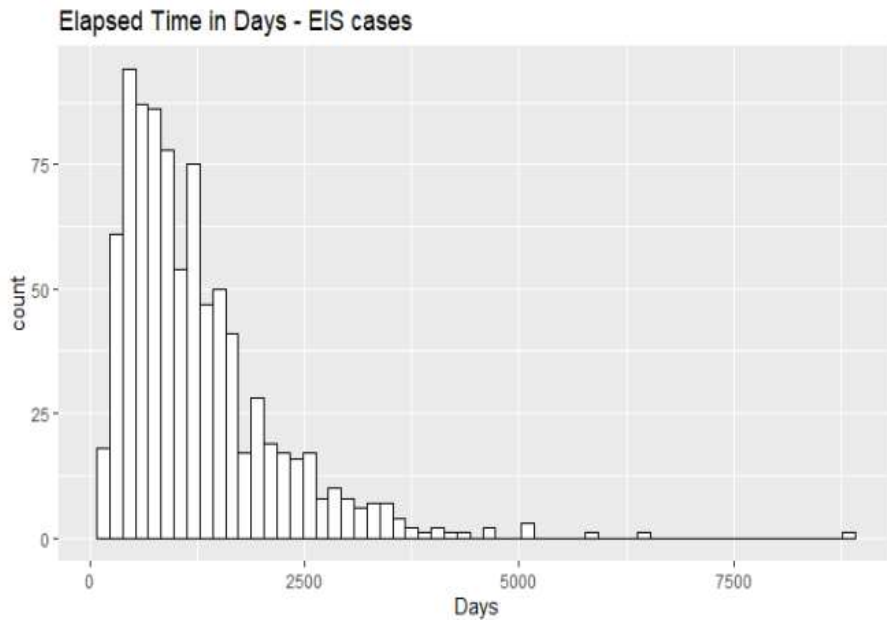


The number of Final EISs published, for which a ROD has been issued, is shown at the top of each bar.

- **Most EISs**-USFS completes more NEPA decisions than any other agency.
- **Best data**-USFS has better data than any other agency—the Multi Year Trend Report Database (MYTR), including data about lower levels of analysis.
- **MYTR Database**-Information on 41,194 unique Forest Service NEPA decisions from 2004 through 2020.



# How long does NEPA take?



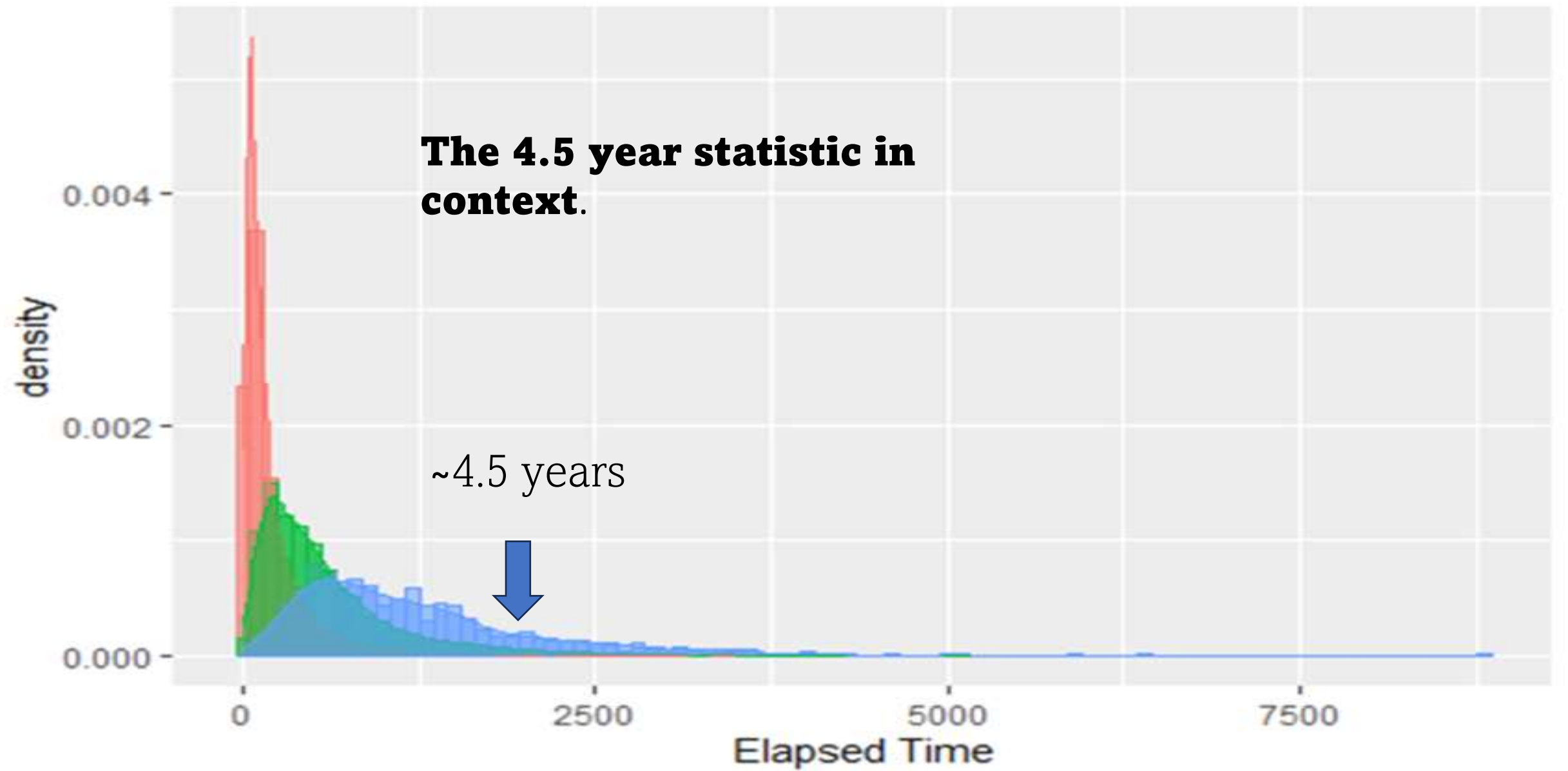
**It depends.**



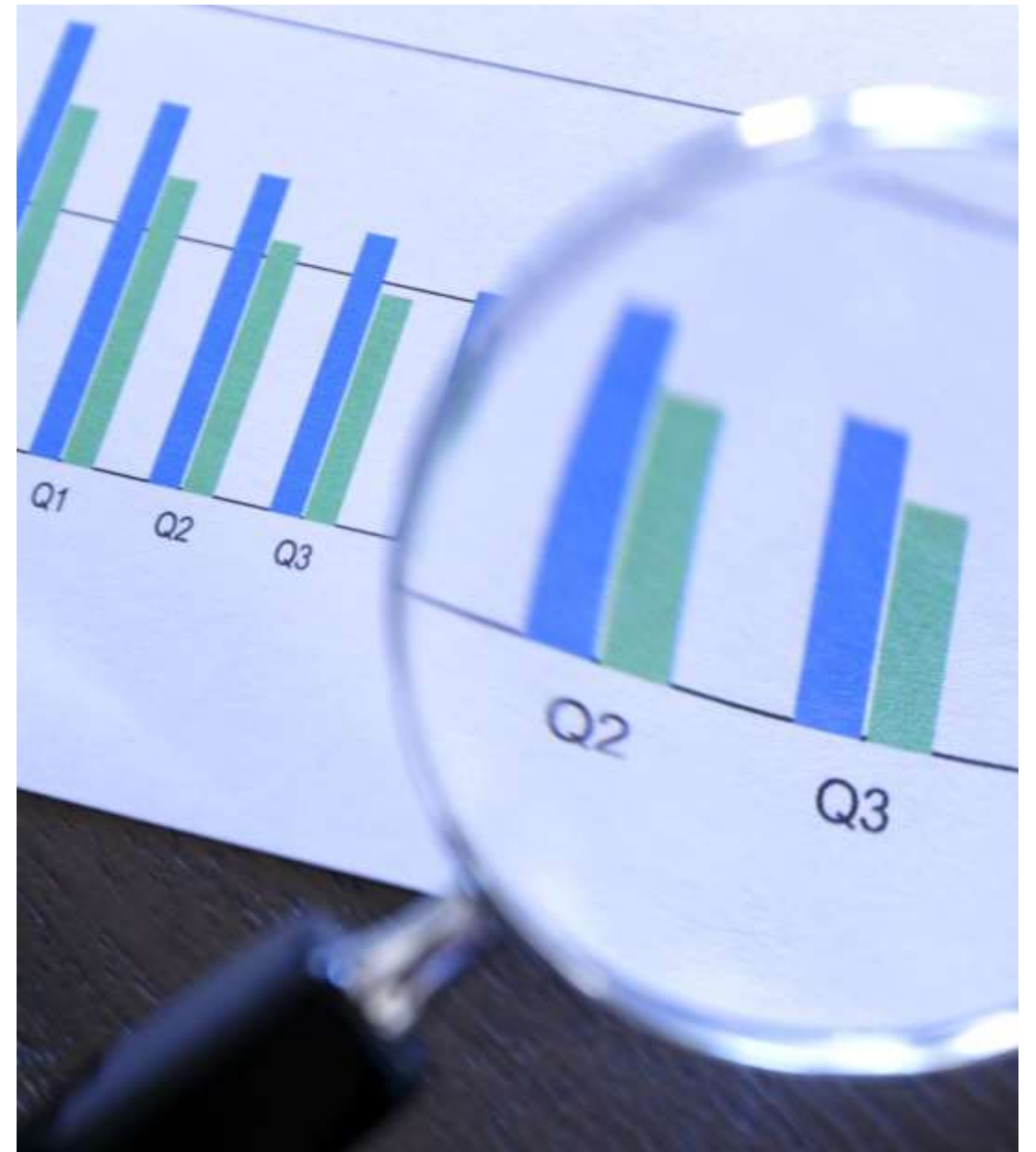
L.Analysis CE EA EIS

**The 4.5 year statistic in context.**

~4.5 years



Focusing on the average decision-making time ignores important data about what is possible and what is causing delay.



Myth # 3: Eliminating the NEPA analysis is the only way to transition to renewable economy efficiently.



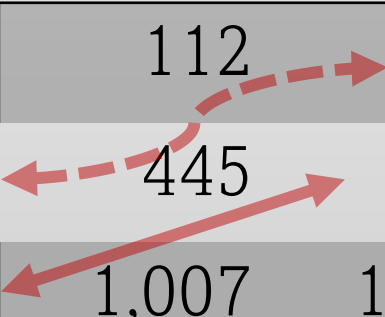
Analytical Rigor Does Not Appear to Be The Sole Cause of Delay

# Frequently, a more robust analysis produces a *faster* decision

*The fastest 25% of EISs finish more quickly than the longest 25% of EAs.*

*The fastest 25% of EAs are completed faster than the longest 25% of CEs.*

Level	Min.	25 <sup>th</sup>	50 <sup>th</sup>	75 <sup>th</sup>	80 <sup>th</sup>	90 <sup>th</sup>	Max.
CE	1	54	112	245	297	481	6,056
EA	1	235	445	779	887	1,306	7,498
EIS	77	595	1,007	1,584	1,769	2,408	8,844



# Why do some projects get delayed?



CAPACITY




OPERATOR



COMPLIANCE WITH OTHER LAWS/  
PERMITTING COORDINATION

Myth # 4: NEPA causes  
excessive litigation and  
delays renewable energy  
projects



## Actual Rates of Litigation

- **Less than 1% result in litigation. (0.22%)**
- The % of NEPA decisions challenged in court is declining
- Environmental plaintiffs win in court at higher rates than other kinds of plaintiffs—a statistic unlikely if litigation were frivolous.

- John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENVTL. L. 479 (2020).



# Rates of Litigation for Renewable Energy Projects

- 1,882 wind and solar projects between 2010-2021
- Only 5% required an EIS or project-specific permit
- Only 29 projects were challenged in litigation (21 wind and 8 solar)
- Rate of 1.5%
- David Adelman, *Permitting Reform's False Choice* (forthcoming).

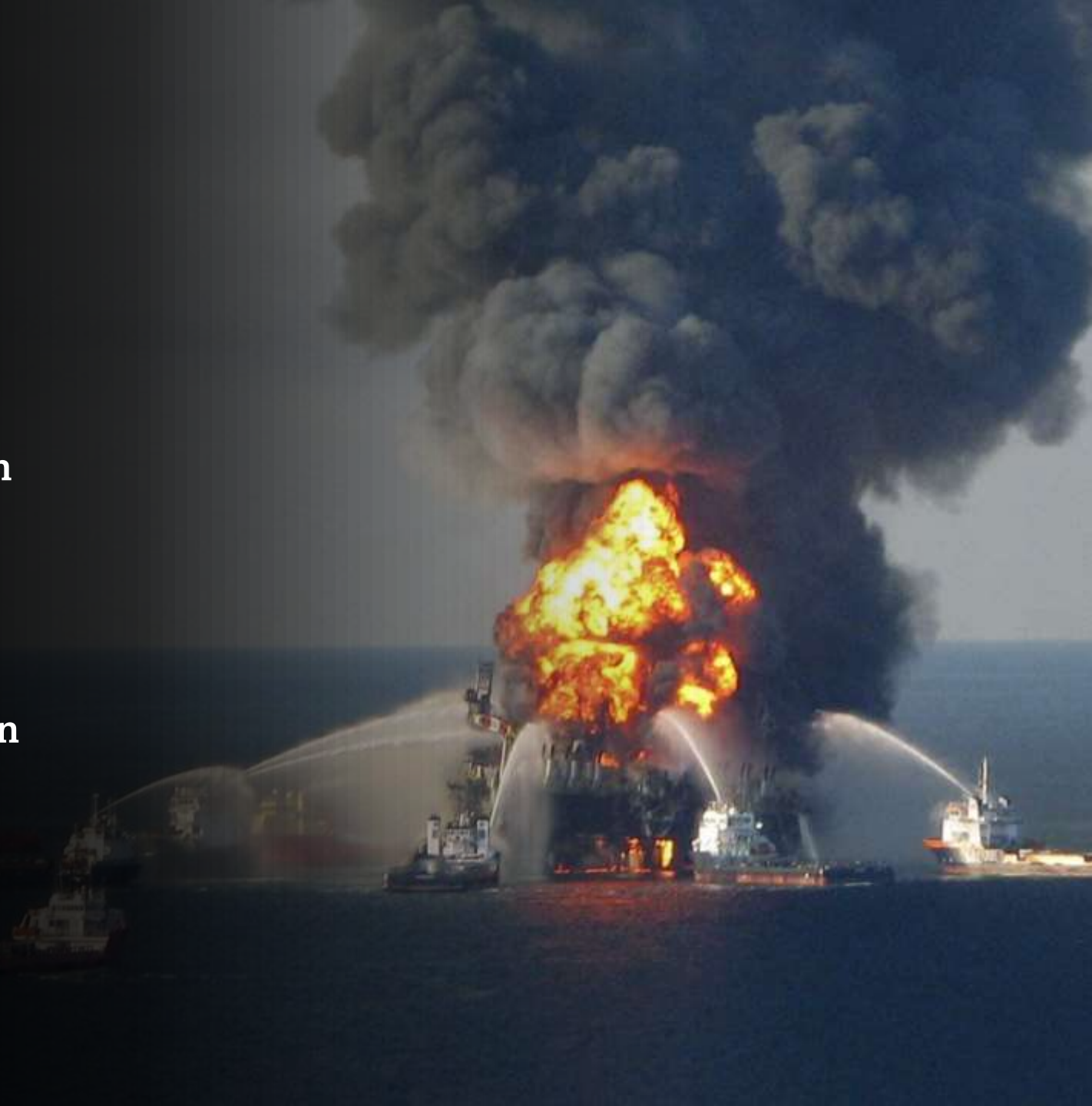




## Conclusion

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- Time is not the only relevant metric when we think about authorizing large projects with significant potential consequences.
- A fast decision is not always a good decision.
- Disclosure is a time-worn and well-proven risk mitigation strategy.
- NEPA's disclosure requirements can co-exist with fast, efficient, and thoughtful renewable energy build out.



# Resources supporting this slideshow.

David Adelman, *Permitting Reform's False Choice*, \_\_ *Envtl. L. Q.* \_\_\_\_ (forthcoming).  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4540734](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4540734)

*Evidence-Based Recommendations for NEPA Implementation*, 47 *COLUMBIA J. ENVTL. L.* 273 (2022)  
(providing examples of ways to improve the environmental assessment process in outcome and efficiency)

Tseming Yang, *The Environmental Impact Assessment Duty as a Global Legal Norm*, 70 *Hastings L. J.* 525 (2019)

Ruple et al., *Does NEPA Help or Harm ESA Critical Habitat Designations?* 46 *Ecology Law Quarterly* 829 (2019)

John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 *ENVTL. L.* 479 (2020).

*This Permit Reform Works. Why Aren't Mining Projects Using It?* 53 *ELR* 10463 (June 2023) (FAST-41 Process)

*Playing the Long Game: Expediting Permitting Without Compromising Protections*, 52 *ELR* 10893 (Nov. 2022)  
(Developing tools to make the regulatory system more transparent)