

# ELI Summer School 2023

## The National Environmental Policy Act – An Overview

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# OUR AGENDA



- Dipping our toe in the water – A high-level framing and background
- Diving in - The statutory text
- Swimming Laps – NEPA in practice
- Treading Water – What’s to come
- Basking in the Sun – Key Takeaways

*The first rule about NEPA.....*

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**.....is you get the name right!!!**

**National Environmental POLICY Act  
of 1969, as amended.**

42 U.S.C. 4321, et seq.



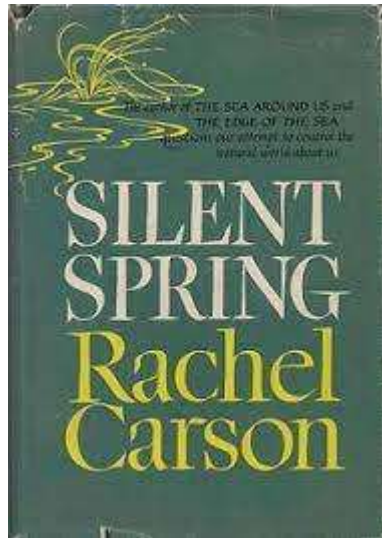
Fight Club (20<sup>th</sup> Century Fox Films, 1999)

# History & Context

# Why do we even have NEPA?



AP Images (*Time*, August 1969)



“The nineteen-seventies absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters and our living environment. It is literally **now** or **never**.”

- Richard M. Nixon, January 1, 1970

# In context -- America's "environmental awakening"

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## 1948

Federal Water Pollution  
Control Act

## 1955

Air Pollution Control Act

## 1966

- National Historic Preservation Act (Section 106)
- Section 4(f)

## 1970

- **National Environmental Policy Act (NEPA)**
- Clean Air Act

## 1972

Clean Water Act

## 1973

Endangered Species Act

## Congress' Statement of Purpose



The purposes of this Act are: 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**.

NEPA Sec. 2 [42 USC § 4321]

# The Statutory Text



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## **National Environmental Policy Act of 1969, as amended**

(42 U.S.C. 4321-4347, Pub. L. 91-190, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975; Pub. L. 94-83, August 9, 1975; Pub. L. 97-258, § 4(b), Sept. 13, 1982; and **Pub. L. 118-5, June 3, 2023\***)

## **Environmental Quality Improvement Act of 1970, as amended**

(42 U.S.C. 4371-4374, Pub. L. No. 91- 224, Title II, April 3, 1970; as amended by Pub. L. No. 97-258, September 13, 1982; and Pub. L. No. 98-581, October 30, 1984)

## **Clean Air Act, Section 309**

July 14, 1955, c. 360, § 309, as added Dec 31, 1970, Pub L 91-604 § 12(a), 42 U.S.C. § 7609 (1970)

*\* We'll get to this...it's the Fiscal Responsibility Act that just passed last week!!*

## CE-who????

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NEPA established the **Council on Environmental Quality** within the Executive Office of the President to ensure that Federal agencies meet their obligations under NEPA. CEQ:



- Oversees NEPA implementation, principally through issuing guidance and interpreting regulations that implement NEPA's procedural requirements.
- Reviews and approves Federal agency NEPA procedures
- Approves alternative arrangements for compliance with NEPA for emergencies
- Helps to resolve disputes between Federal agencies and with other governmental entities and members of the public.
- Develops and recommends national policies to the President that promote the improvement of environmental quality and meet the Nation's goals.

For more information on CEQ initiatives, please visit [WhiteHouse.gov/CEQ](https://www.whitehouse.gov/CEQ).

# What does NEPA Require?



## SECTION 101 - DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

"to use all practicable means and measures, including financial and technical assistance, in a manner calculated to **foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.**"

Congress explicitly recognized that 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.

# What does NEPA Require?



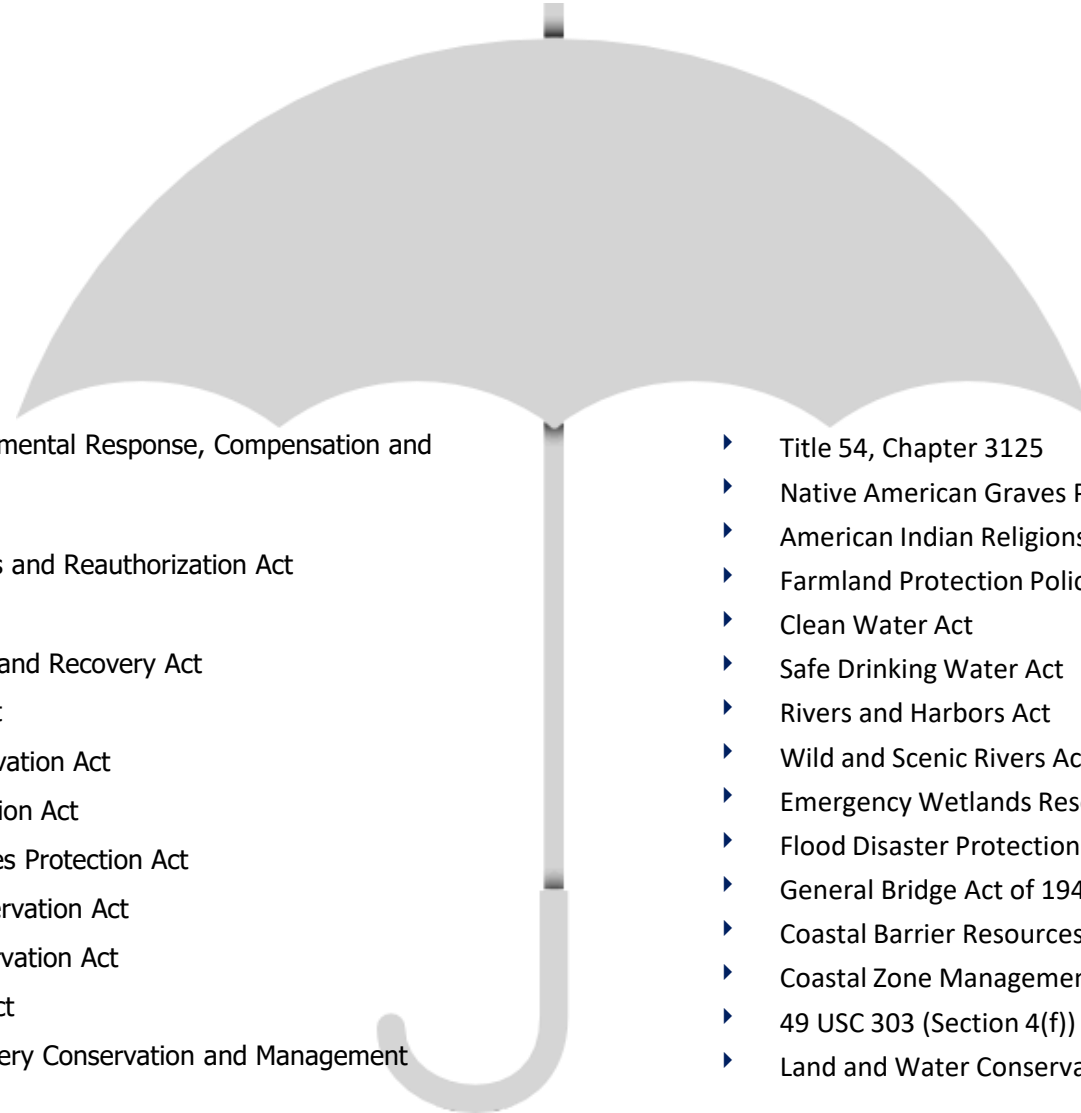
## SECTION 102 – THE PROCEDURAL REQUIREMENTS

NEPA applies to proposals for **major Federal actions** significantly affecting the quality of the human environment by requiring Federal agencies to prepare a detailed statement on:

- (i) **reasonably foreseeable** environmental effects of the proposed agency action;
- (ii) any **reasonably foreseeable** adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) a **reasonable range of alternatives** to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, **that are technically and economically feasible, and meet the purpose and need of the proposal**;
- (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 **Federal** resources which would be involved in the proposed agency action should it be implemented.

42 USC § 4332

# NEPA is a procedural umbrella

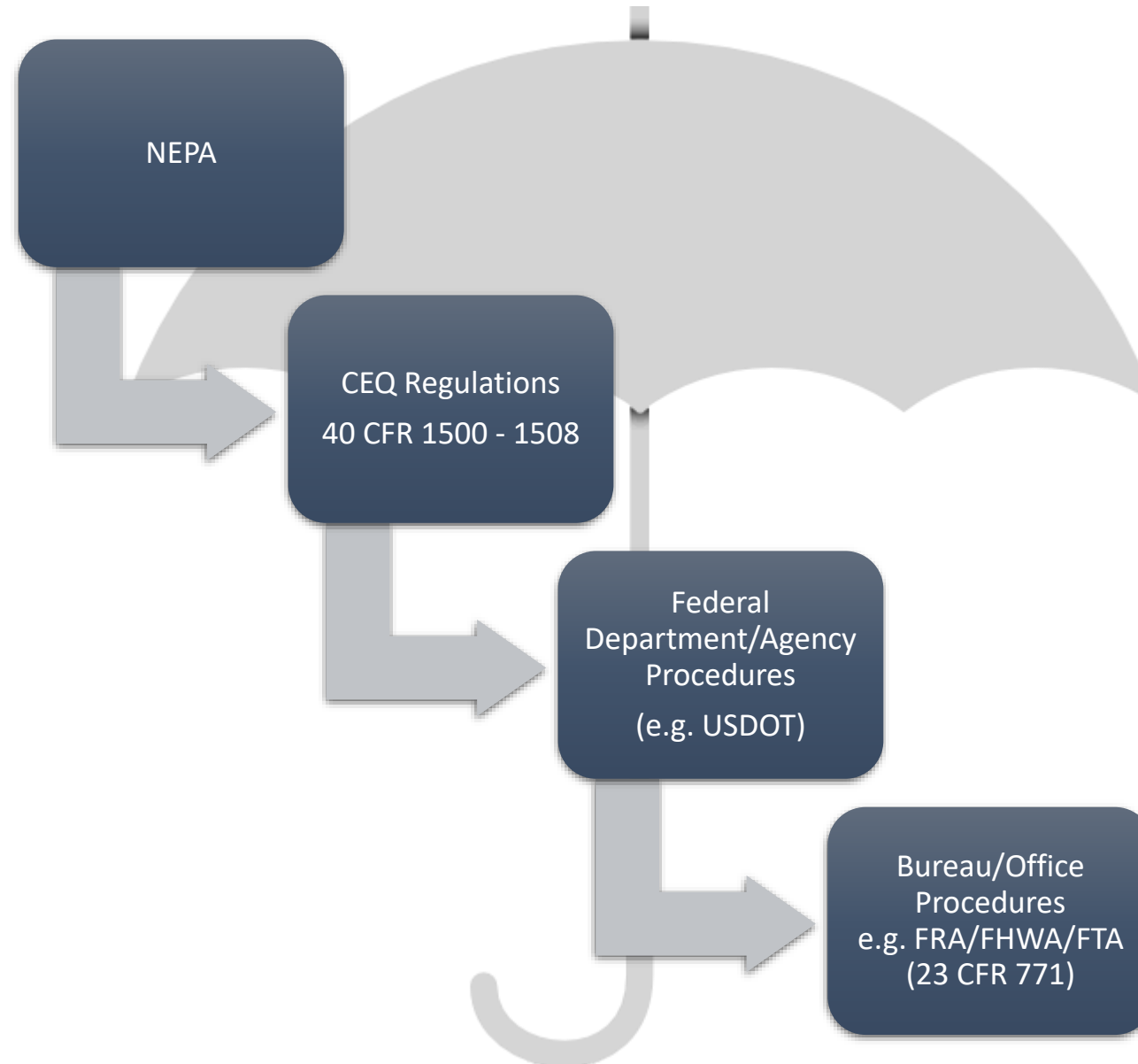


- Comprehensive Environmental Response, Compensation and Liability Act
- Clean Air Act
- Superfund Amendments and Reauthorization Act
- Noise Control Act
- Resource Conservation and Recovery Act
- Endangered Species Act
- National Historic Preservation Act
- Marine Mammal Protection Act
- Archaeological 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

# NEPA Implementation is Tiered



# The Role of the Courts and the Impact of Case Law



*Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972)

- This was one of the first cases interpreting NEPA, and set the tone for all subsequent NEPA cases. The court made several important points regarding NEPA and federal agency compliance with the statute. NEPA makes environmental protection a part of the mandate of every federal agency and department. Agencies are “not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [all] agencies to *consider* environmental issues just as they consider other matters within their mandates.”

*Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976)

- This case stands for the proposition that NEPA is procedural and it must yield to non-discretionary duties.

*Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975)

- These cases addressed the concept of “reasonable alternatives.” The new amendments may spur more litigation on this topic.

*Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974)

- The court addressed the question of “major federal action,” again something Congress has attempted to settle by statute.

# NEPA in Practice

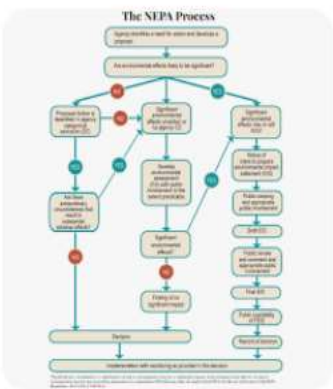




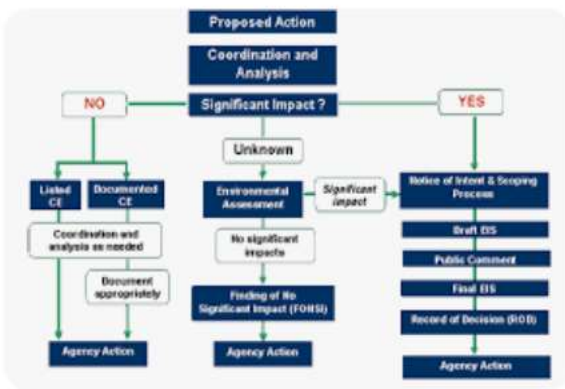
the nepa process

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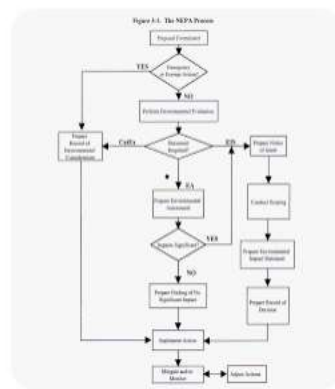
Healthy Forests, Health... NEPA 101: The Nationa...



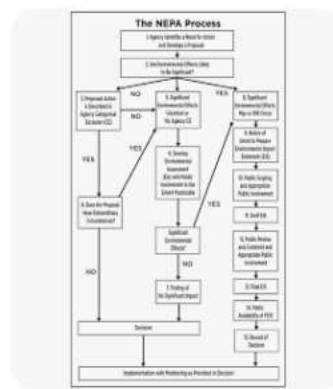
AASHTO Center for Environmental Excellence NEPA Process Overview



Bureau of Land Manage... National Environmental...



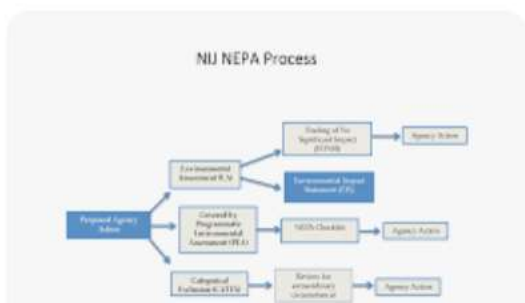
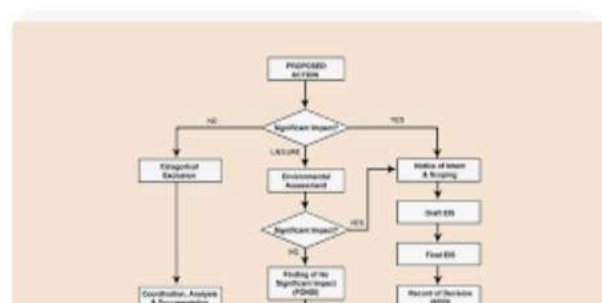
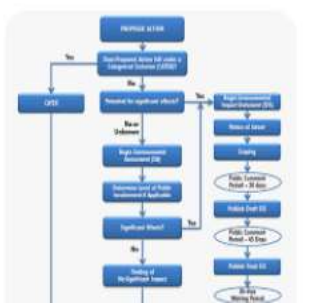
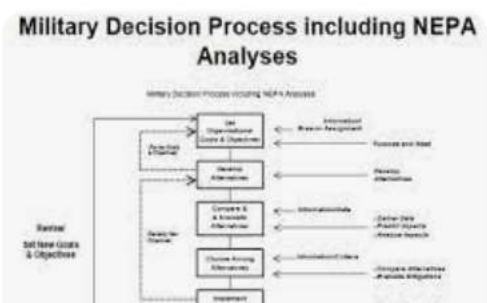
NASA NASA - Implementing ...



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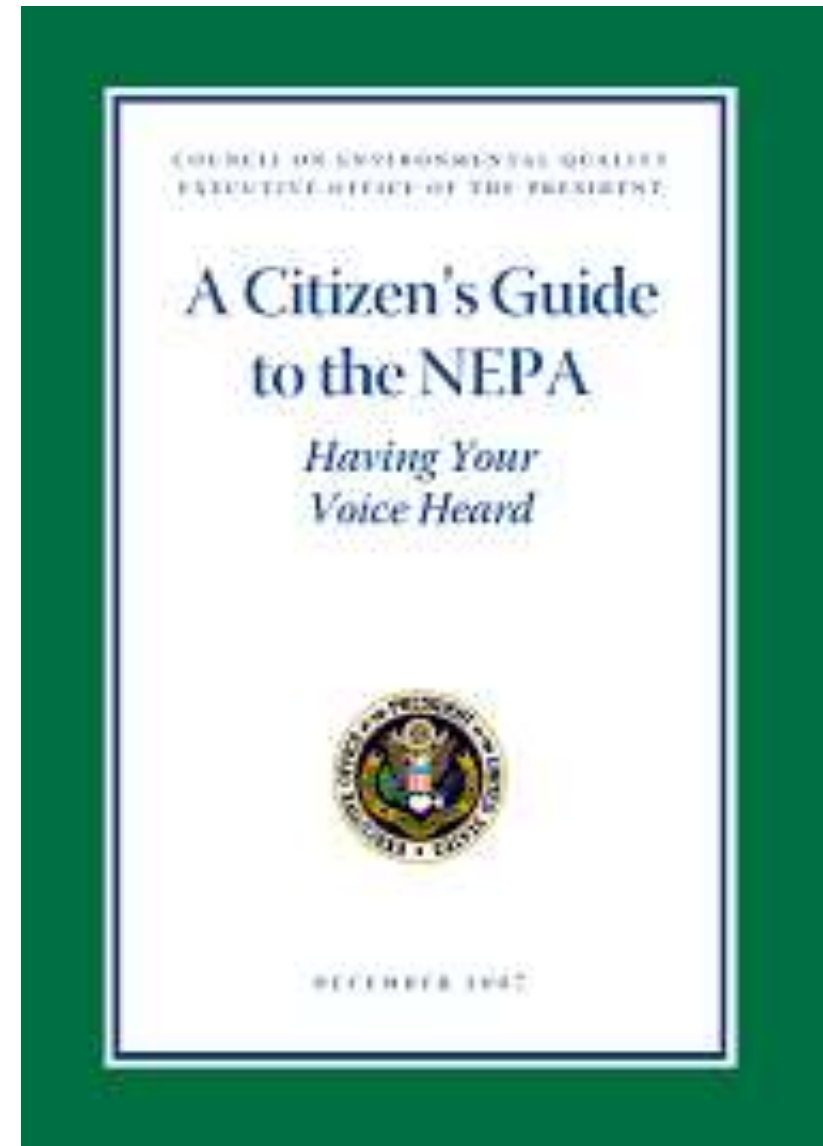
Jasper Ocean Terminal NEPA Process | Jasper ...



Public awareness, involvement, and engagement are the hallmarks of a well-implemented NEPA process.

NEPA is a vital tool for communities – especially to provide a forum for under-represented and under-resourced voices to be heard.

Environmental Justice will remain an integral part of the NEPA process.



# Primary Agency Roles in NEPA Review

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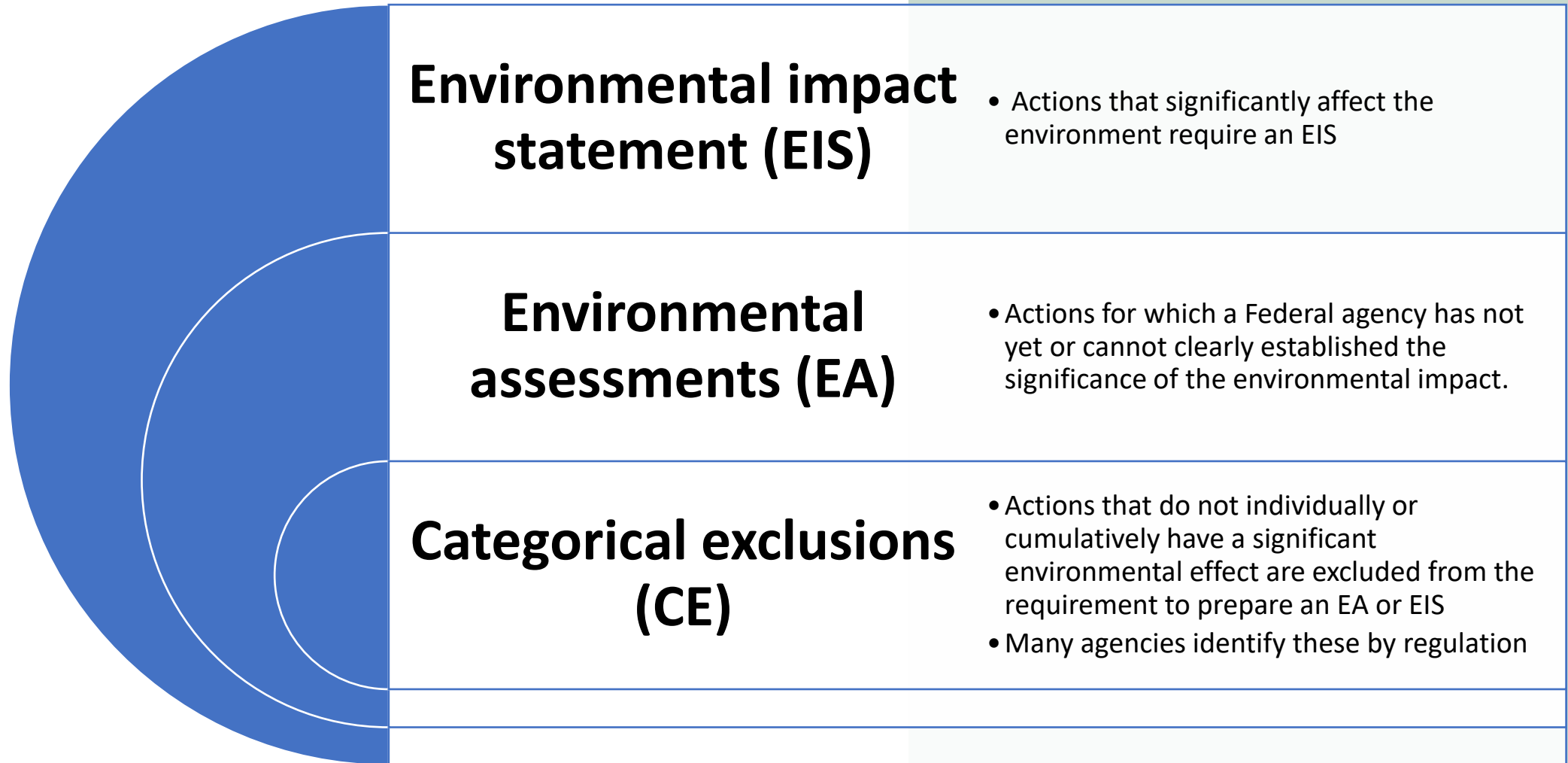
**Lead Agency** – directs the process and prepares the documentation

**Cooperating Agency** – has jurisdiction or expertise on environmental impacts required for decision making

**Participating Agency** – has an interest in the project



# What level of review is needed – “Class of Action” determination



# ESSENTIAL ELEMENTS OF A NEPA ANALYSIS

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- Identification of a project Purpose and Need
- Alternatives Identification and Analysis
- Impacts Identification and Analysis
- Mitigation
- Public Involvement
- Interagency Coordination
- Documentation

# The EIS Process in a Nutshell

## Notice of Intent

- Filed in *Federal Register*, officially starts NEPA

## Scoping and “Purpose and Need”

- Early and open process to determine the scope of issues to address in study
- Identify significant issues related to a proposed action
- Describe the underlying project purpose and the need for agency action which supports the alternatives considered

## Alternatives Analysis

- “The heart of the environmental impact statement”
- Reasonable Range of Alternatives including the No-Action or No-Build

## Draft Environmental Impact Statement

- Typically identifies the Preferred Alternative
- Describes likely impacts and proposed mitigation

## Final Environmental Impact Statement/Record of Decision

- Identifies agency selected alternative
- Enumerates agency commitments to mitigate unavoidable impacts

# FOR THE NEPA NERD CATEGORY AT BAR TRIVIA NIGHT:

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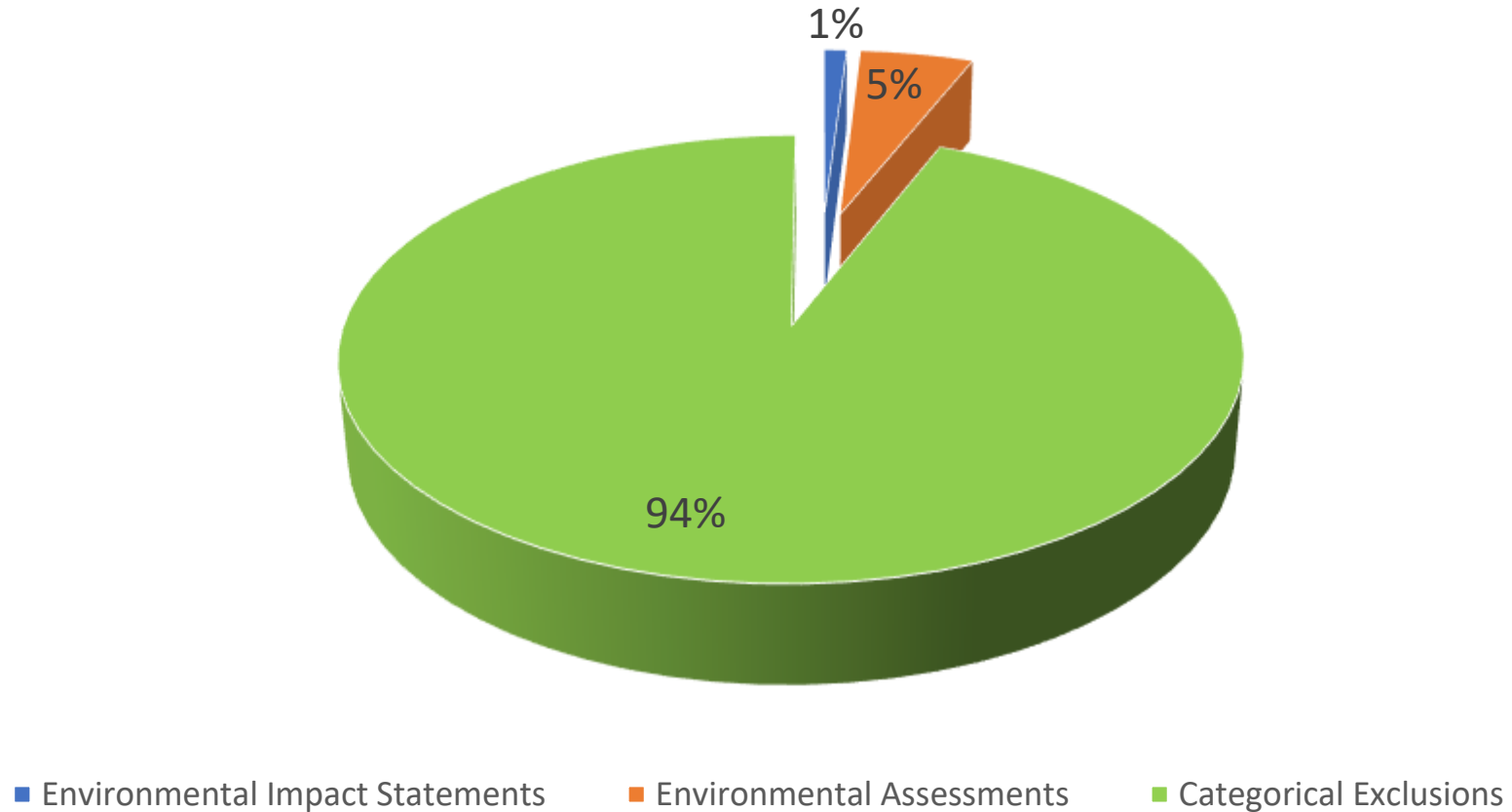
**Federal Permitting:** 60+ Federal permitting/review processes across 15+ federal agencies (e.g. Endangered Species Act; Section 106 historic properties review; Section 404 Clean Water Act; rights-of-way authorizations; special use permits; etc.)

## **Duration of Environmental Review Process:**

- From 2010-2018, an EIS took an average of 4.5 years (median = 3.5 years). Wide variation, with some taking 10+ years, some taking <2 year.
- EAs generally take less time; CEs often take just a few months. But wide variation here too.

# What percentage of all NEPA reviews are Environmental Impact Statements?

Distribution of Environmental Reviews



Source: GAO Report: *National Environmental Policy Act : Little Information Exists on NEPA Analyses*, April 2014



# NEPA Documentation

Documenting environmental review decisions, and making that documentation publicly available, is fundamental to the purpose of NEPA.

Proper documentation of the NEPA process supports and complements public involvement and interagency coordination

- “If it isn’t written down, it didn’t happen”

Documenting the NEPA process

- provides for complete disclosure to the public
- allows others an opportunity to provide input and comment on proposed undertakings, alternatives, and environmental impacts
- provides the appropriate information for the decision maker to form a reasoned choice among alternatives

The “class of action” usually determines the level of documentation for assessing impacts under NEPA

- The point is to include the relevant and necessary information in a clear way
- Consider page limits

**Forecasting the Future,  
Informed by the Past:  
Recent Amendments  
CEQ Rulemaking**

# QUIZ TIME!!!!

What do these things have in common??

toad

adder

newt

blind-worm

frog

lizard

bat

howlet

dog

salt-sea shark



# “The Builder Act” – Div. C, Title III (Permitting Reform), Sec. 321 of the Fiscal Responsibility Act of 2023

## KEY CHANGES

- Analysis limited to reasonably foreseeable environmental impacts
- Alternatives must be reasonable
- Scope of required analysis narrowed
- New requirements for professional/scientific integrity and data reliability
- Addition of a new Section 106 providing procedures for level of review (environmental impact statement vs. environmental assessment)
- Addition of a new Section 107 imposing page and time limits, allowing third-party/project sponsors to prepare NEPA documentation; and requiring reports to Congress
- Designation of “lead agency” to establish and enforce a schedule
- Use of programmatic reviews
- Provides for “borrowing” of other agencies’ categorical exclusions
- Changes to fundamental NEPA definitions (including “Major Federal Action”) and list of excluded Federal actions

# CEQ's Regulations

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- CEQ is responsible for developing procedures for Federal agency implementation of NEPA.
- Procedures were initially promulgated in 1971 as guidelines, and were then issued as regulations in 1978.
- In July 2020, CEQ made wholesale revisions to the NEPA regulations for the first time in more than 40 years.
- CEQ is now engaged in a comprehensive review of the 2020 rule pursuant to E.O. 13990 (January 20, 2021) and is using a phased approach.
- CEQ issued an Interim Final Rule on June 29, 2021.
- On April 20, 2022, CEQ issued the Phase 1 Final Rule. The rule finalizes a narrow set of changes to generally restore regulatory provisions that were in effect for decades before the 2020 rule modified them for the first time.
- The Phase 2 rulemaking is currently underway, but CEQ will have to consider the newly amended statutory text.

# Managing Litigation Risk

## Projects will be sued

- Respect the process

## Which “final agency action”?

- ROD
- Decisions not to supplement (re-evaluations)
- Federal approvals/permits

## Differing statutes of limitations

- Decisions at different times means a moving target on litigation
- E.g., 150 days for FHWA/FTA (23 U.S.C. 139(l)) vs. 6 years (28 U.S.C. § 2401)

# Key Takeaways

[aka How to answer the question:  
*What did you learn about NEPA  
from ELI Summer School?* ]

# National Environmental POLICY Act



# NEPA

- Established the President's Council on Environmental Quality
- Applies to any "major Federal Action significantly affecting the human environment"
- Provided a Congressional Declaration of National Environmental Policy

Under NEPA, each Federal agency:

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Has responsibility and power to protect environmental resources when carrying out its duties

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Must act not only to preserve but also to **restore and enhance the environment**

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Should use a planning process that considers environmental values and amenities

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Has a mandate to "act" to protect the environment

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Must make decisions to achieve "a **productive harmony between people and nature**"

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President Nixon signed the National Environmental Policy Act (NEPA) into law on January 1, 1970.



Numerous environmental laws, executive orders, and agency policies and guidelines have been put into place to help interpret the mandates of NEPA



As part of the NEPA process, federal agencies must also comply with a wide range of other federal environmental review and approval laws, regulations, and orders.



# The Importance of Complying with NEPA

- Requires a documented "hard look" at the potential effects of a proposed project
- Creates understanding of potential environmental impacts
- Provides decision makers and the public with important information



# Hold fast to these principles

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- The ultimate goal of the NEPA process is to foster the most appropriate federal action that protects, restores, and enhances our environment by providing clear, concise and transparent information.
- The purpose of NEPA is to provide federal decision-makers and the public with accurate and accessible information to make better decisions.
- The NEPA process as it stands today, if done right, can result in high-quality projects, informed by substantive public engagement and reflecting the needs and desires of the people the projects serve.

NEPA does not dictate a particular outcome or even the most environmentally preferable outcome.



**THANK YOU!!!!!!**

**nepa.gov**