

ARTICLES

THE NATIONAL ENVIRONMENTAL POLICY ACT: AN ARGUMENT AGAINST REPEAL OR LEGISLATIVE REFORM

BY
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The National Environmental Policy Act (NEPA), the foundational statute of environmental law, is under intense scrutiny with calls from critics on both sides of the political spectrum for repeal or reform. Although calls for NEPA reform are not new, they have intensified recently as the United States attempts to build renewable energy infrastructure to combat climate change. The recent passage of the Inflation Reduction Act highlighted this scrutiny. In order to secure enough votes to pass the bill, Senate Majority Leader Chuck Schumer (D-N.Y.) agreed to submit a series of NEPA and federal permitting reforms authored by Senator Joe Manchin (D-W. Va.) to Congress for a vote.

The clamor for reform is based on a popular misconception that NEPA review causes delay in large infrastructure projects. This Article uses several recent analytical studies to show that this popular perception is incorrect and obscures the real reasons for federal project delays. The Article shows that environmental impact statements (EIS) are not that common and that NEPA analyses do not take an inordinate amount of time. It also reveals that NEPA

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reviews are not litigated often nor does NEPA litigation result in significant delays. It argues that NEPA analyses provide essential benefits that would be reduced or lost if NEPA were reformed. Finally, the paper recommends actions that agencies, the Council on Environmental Quality (CEQ), and Congress can implement, using tools, techniques, and resources currently at their disposal to decrease the burden of NEPA review without requiring an overhaul of the statute.

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I. INTRODUCTION

The National Environmental Policy Act¹ (NEPA) is under intense scrutiny. Referred to as the “Magna Carta” of environmental law, NEPA fundamentally changed the way our federal government does business and is the most widely emulated of environmental statutes.² But the Act is currently the target of critics on both sides of the political aisle, who claim that the law delays or prevents the country from developing critical projects.³

¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2018).

² *Id.*; DANIEL R. MANDELKER ET AL., *NEPA LAW AND LITIGATION* § 1:1 (2nd ed., updated Sept. 2023), Westlaw.

³ See Jake Bittle & Naveena Sadasivam, *Overdue Reform or Underhanded Deal? Here’s What’s in Manchin’s Permitting Bill*, GRIST (Sept. 22, 2022), perma.cc/4MS8-3ZTG (“Many liberal and libertarian thinkers have criticized NEPA and expressed support for the [NEPA reform] bill, saying it would speed up clean energy.”).

There have always been calls for NEPA reform, but these have intensified as the United States looks for ways to combat climate change. The response to climate change requires major alterations to our energy infrastructure, including more renewable energy production, added cross-country transmission lines, and upgrades to the energy grid.⁴ But these types of projects have traditionally been susceptible to permitting delays, and critics claim this is due to NEPA and environmental review.⁵ The debate was renewed when Congress passed the Inflation Reduction Act,⁶ a significant step forward in countering the effects of climate change.⁷ In order to secure enough votes to pass the bill, Senate Majority Leader Chuck Schumer (D-N.Y.) agreed to submit a series of NEPA and federal permit reforms authored by Senator Joe Manchin (D-W. Va.) to Congress for a vote.⁸ The agreement between the Senators garnered significant media interest and again focused attention on NEPA and federal permitting reform.⁹

NEPA criticism is almost always general in nature, lacking specific details or analytical information, which makes it difficult to evaluate the claims or formulate reforms. Fortunately, several authors have recently collected and evaluated analytical data on NEPA analyses to reveal that critics overstate their denunciations and often target the wrong issues.

This Article will show that, contrary to popular perception, NEPA environmental impact statements (EISs) are not common and NEPA analyses do not take an inordinate amount of time. It will also show that NEPA litigation is infrequent and does not usually result in significant delays. It will argue that NEPA analysis provides essential benefits that would be reduced or lost if NEPA was reformed and that the critics' focus on EIS timelines and litigation issues obscures the real causes of NEPA delays.

Part II of this Article provides background on NEPA and discusses the development of congressional and judicial exceptions. Part III reviews

⁴ See OFF. OF ECON. CO-DEV., INVESTING IN CLIMATE, INVESTING IN GROWTH 50 (2017), <https://perma.cc/PR65-SNQV> (noting “transformation of the energy and industrial systems over the next decades is absolutely fundamental to achieving the Paris Agreement’s goal of well below 2°C and will require major structural change to overcome the carbon-intensity that is hard-wired into economies, systems and behaviour”); see also S. THACKER ET AL., U.N. OFF. OF PROJECT SERVS., INFRASTRUCTURE FOR CLIMATE ACTION 14 (2021) (noting that “[s]ubstantial investments in infrastructure across sectors are required to achieve adaptation commitments”).

⁵ See, e.g., Paul Bledsoe, Opinion, *A Modern Electric Grid is Crucial to Reach our Clean Energy Climate Goals*, THE HILL (June 10, 2021), <https://perma.cc/6UWY-ERRU> (noting energy transmission infrastructure as a “key challenge” to clean energy development); Ezra Klein, *Government is Flailing, in Part Because Liberals Hobbled It*, N.Y. TIMES (Mar. 13, 2022), <https://perma.cc/8SF4-5GRF> (arguing that NEPA has curtailed building clean energy infrastructure to tackle climate change).

⁶ Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 50241, 136 Stat. 1818, 2054 (Aug. 16, 2022).

⁷ *Id.*

⁸ Bittle & Sadasivam, *supra* note 3.

⁹ See *id.*

recent analytical studies that evaluate the time required for NEPA analysis and the burden NEPA litigation poses on federal agencies. It will also discuss the root causes for the delays that do occur in NEPA review. Finally, Part IV offers recommendations for streamlining NEPA analysis based on current successful agency practices and available statutory and regulatory tools, which will decrease the burden of NEPA review without requiring an overhaul of the statute.

II. BACKGROUND

NEPA is unlike any other environmental statute and represents unique bipartisan cooperation on environmental issues.¹⁰ The statute was signed by President Richard Nixon to significant fanfare on January 1, 1970.¹¹ The legislation is seemingly simple, beginning with a broad declaration of environmental policy and setting environmental concerns as a top priority for the federal government.¹² But the heart of the statute is the “action-forcing” provision, which requires each federal agency to consider the environmental impacts of its actions prior to acting.¹³ This straightforward prerequisite has forced agencies to change the way they do business and provides the opportunity for environmental groups, the public, and industry to participate in the environmental review process.¹⁴

Senator Henry Jackson (D-Wash.), one of the primary sponsors of the bill, envisioned the EIS as the instrument for implementing the comprehensive policy.¹⁵ Senator Jackson, along with several other Congressmen, felt that federal agencies lacked environmental information and expertise and therefore did not factor environmental issues into their decision making.¹⁶ The EIS resolved this problem by requiring federal agencies to affirmatively collect, document, and evaluate the environmental impacts of their actions and to release this information to the public.¹⁷ Although Congress enacted the statute and provided the overarching policy vision, the courts shaped the statute into its modern form.¹⁸

¹⁰ See Sam Kalen, *NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?*, 50 ENV'T L. REP. 10398, 10400 (May 5, 2020) (discussing the announcement of NEPA as a national policy).

¹¹ *Id.*; RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 68 (2004) (stating NEPA was “signed with great fanfare”).

¹² NEPA, 42 U.S.C. § 4331 (2018).

¹³ *Id.* § 4332; see also LAZARUS, *supra* note 11, at 68.

¹⁴ LAZARUS, *supra* note 11, at 68.

¹⁵ Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RES. J. 243, 246 (1976).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ CHRISTOPHER L. BELL ET AL., *ENVIRONMENTAL LAW HANDBOOK* 584–85 (Thomas F.P. Sullivan ed., 20th ed. 2009).

*Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission (Calvert Cliffs)*¹⁹ was not the first NEPA case, but it is significant because it shaped the Act into an effective environmental cause of action against federal activities.²⁰ The case challenged the Atomic Energy Commission's process of evaluating the environmental impacts of nuclear plants.²¹ The court held that NEPA made environmental protection a part of the mandate for every federal agency and that Section 102 of the Act required a "careful and informed decision-making process," reviewable by courts.²² The court emphasized that Congress intended agencies to affirmatively consider environmental factors when making their decisions.²³ An EIS requires the agency to proactively gather information, assess the environmental impact of its actions, and incorporate the evaluation into any final decision.²⁴ The case cemented the requirement that an agency affirmatively assess environmental consequences before acting, and it focused federal activity on NEPA procedures.²⁵

The *Calvert Cliffs* court envisioned a more extensive and robust NEPA process than Congress.²⁶ Congress apparently intended the EIS as a concise statement of the environmental issues.²⁷ The Council on Environmental Quality (CEQ)²⁸ promulgated regulations that follow this guidance and specify that the content of an EIS should be "concise" and "proportional to potential environmental effects and project size."²⁹ However, the *Calvert Cliffs* court thought federal agencies would gather the environmental information and use it to make a reasoned choice.³⁰ Ultimately, NEPA has become more of an environmental disclosure law and the EIS process has indeed grown lengthier and more robust over time.³¹ This is the crux of the criticism about NEPA—that the environmental review process has become an administrative burden and

¹⁹ 449 F.2d 1109 (D.C. Cir. 1971).

²⁰ *Id.*; A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in ENVIRONMENTAL LAW STORIES 77, 94 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

²¹ Tarlock, *supra* note 20, at 77.

²² *Calvert Cliffs*, 449 F.2d at 1112, 1115.

²³ *Id.* at 1117–18.

²⁴ *Id.* at 1118.

²⁵ Tarlock, *supra* note 20, at 102. Professor Tarlock points out that the original purpose of the statute was formulating affirmative environmental policies which has, over time, become divorced from the NEPA process. *Id.*

²⁶ *Id.*

²⁷ See H.R. REP. NO. 91-765, at 8–10 (1969) (Conf. Rep.) (Directing agencies to consult with other agencies on the environmental impacts of a proposed action in a way that does not result in unreasonable delay to the processing of Federal proposals).

²⁸ NEPA established CEQ, which is responsible for coordinating the federal government's efforts to improve, preserve, and protect the environment. COUNCIL ON ENV'T QUALITY, <https://perma.cc/QWB2-QLJE/> (last visited Oct. 30, 2023).

²⁹ 40 C.F.R. § 1502.21 (2022).

³⁰ Tarlock, *supra* note 20, at 102.

³¹ *Id.* at 103.

stands in the way of needed progress without providing significant benefits.

These criticisms are not the first. NEPA, like all regulations, has always had its share of detractors.³² However, complaints have reached a crescendo in the last decade as climate change highlights the need for more renewable energy infrastructure. Conservative commentators have always been critical of NEPA, with groups like Common Good and the Business Roundtable advocating for wholesale changes or eliminating the statute outright.³³ But recently, the call for NEPA reform has also come from progressive and liberal commentators.³⁴ Even New York Times columnist Ezra Klein, a prominent liberal commentator, has complained that NEPA is “doing a lot of harm now.”³⁵ In the past, evaluating these criticisms was difficult because there was limited data on NEPA analyses, such as the number of NEPA reviews conducted by federal agencies, the time to complete the process, and how often NEPA actions were litigated.³⁶ In recent years, legal scholars have begun filling this gap, collecting and reviewing agency information, and assessing NEPA’s burden on federal agencies and the permitting process.³⁷ This research has also revealed some of the underlying reasons NEPA review is often delayed.

³² See, e.g., Diane Katz, *Time to Repeal the Obsolete National Environmental Policy Act (NEPA)*, HERITAGE FOUND.: BACKGROUNDER, Mar. 14, 2018, No. 3293, at 2 (“Four decades of experience have exposed the NEPA’s uncorrectable flaws, including arbitrary standards, politicized enforcement, and protracted litigation.”); Foday Turay, *NEPA: The Barrier to Developing America*, AM. CONSUMER INST. CTR. FOR CITIZEN RSCH., (July 19, 2021), <https://perma.cc/W87J-3ACX> (“Since its inception in 1970, NEPA has impeded America’s infrastructure improvements by significantly increasing costs, time, and red tape.”); Jeremiah Johnson, *The Case for Abolishing the National Environmental Policy Act*, LIBERAL CURRENTS (Sept. 6, 2022), <https://https://perma.cc/498L-CUXV> (“America would be a better, more environmentally friendly place without [NEPA].”).

³³ See *The Case for Permitting Reform*, BUS. ROUNDTABLE, <https://perma.cc/2LZA-X3NA> (last visited Sept. 30, 2023) (arguing that inefficient permitting processes for energy infrastructure projects discourages investment, delays new projects, and undermines the value of taxpayer investments); see also PHILIP K. HOWARD, COMMON GOOD, TWO YEARS NOT TEN YEARS: REDESIGNING INFRASTRUCTURE APPROVALS 1 (2015), <https://perma.cc/K2DE-FE4P> (arguing for a reduction of government red tape so that infrastructure can be approved in two years).

³⁴ See, e.g., Brian Potter et al., *How to Stop Environmental Review from Harming the Environment*, INST. FOR PROGRESS (Sept. 13, 2022), <https://perma.cc/782C-EKJA> (“[T]he NEPA process as it currently exists is slowing down the clean energy transition and is long overdue for reform.”).

³⁵ Klein, *supra* note 5.

³⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSIS 6, 11, 13, 19 (2014) [hereinafter GAO, LITTLE INFORMATION EXISTS ON NEPA]; see also John C. Ruple et al., *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, 47 COLUM. J. ENV’T. L. 273, 279, 292, 342, 344 (2022) [hereinafter Ruple et al., *Evidence-Based Recommendations*].

³⁷ See, e.g., Ruple et al., *Evidence-Based Recommendations*, *supra* note 36.

III. EVALUATING WHETHER NEPA CAUSES SIGNIFICANT DELAYS IN PROJECTS

NEPA criticism usually centers on two primary issues: 1) NEPA environmental reviews take too long to complete, and 2) the statute generates frequent litigation.³⁸ These complaints focus on the preparation of an EIS, implying that every NEPA review results in that type of review. Therefore, it is important to begin evaluation of NEPA analyses with a simple, straightforward threshold question: how common are EISs?

A. Environmental Impact Statements Are Not Common

It may come as a surprise given all the criticism, but EISs are not very common.³⁹ There are several reasons for this, but the primary one is simple: the statute itself significantly limits when an agency must complete an EIS. According to the text, an EIS is only required for “major federal actions significantly affecting the quality of the human environment.”⁴⁰ If the action is not “major” or “federal,” or if it does not “affect the quality of the human environment,” then no EIS is required.⁴¹

Additionally, CEQ regulations also allow federal agencies to identify categories of actions that do not normally significantly affect the quality of the human environment and therefore do not require an EIS.⁴² These Categorical Exclusions (CEs) do not require an agency to go through the assessment process.⁴³ The number of CEs has grown significantly over time and now covers the bulk of NEPA actions taken by agencies.⁴⁴

If an agency is unsure whether or not an action will significantly affect the quality of the human environment, it must perform an environmental assessment (EA).⁴⁵ If the EA indicates there are no significant impacts, then the agency can make a Finding of No Significant Impact (FONSI) and need not produce an EIS.⁴⁶ Federal agencies have taken full advantage of CEQ regulations to limit the number of EISs they must prepare.⁴⁷ However, in many cases, federal agencies do not need to worry about whether or not to complete an EIS because Congress and the courts have exempted a wide range of federal actions from the statute.

³⁸ Potter et al., *supra* note 34 (asserting that NEPA “drags clean energy projects out for years” and is the most litigated environmental statute).

³⁹ See GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at 3.

⁴⁰ NEPA, 42 U.S.C. § 4332(2)(C) (2018).

⁴¹ *Id.*

⁴² 40 C.F.R. § 1501.4(a) (2023).

⁴³ *Id.*

⁴⁴ GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at 7.

⁴⁵ 40 C.F.R. § 1501.5(b) (2023).

⁴⁶ *Id.* § 1501.6(a) (2023).

⁴⁷ See John Ruple & Heather Tanana, *Debunking the Myths behind the NEPA Review Process*, NAT. RES. & ENV'T, July 2020, at 14, 15 (discussing how EISs rarely occur and “account for less than 1% of all NEPA actions”).

Shortly after President Nixon signed NEPA into law, both industry and environmental groups began using it to challenge agency decisions. NEPA's broad mandate, coupled with uncompromising EIS procedural requirements, made it ideal for these challenges and prompted Congress to provide express NEPA exemptions for the next two environmental statutes it enacted. When Congress enacted the modern Clean Water Act⁴⁸ (CWA) in 1972, it included an express exemption from NEPA in section 511(c).⁴⁹ This exemption states that NEPA does not apply to most of the actions EPA takes under the CWA, "[e]xcept for the provision regarding Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281" and "the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316."⁵⁰ Similarly, Congress included an explicit NEPA exemption to the Clean Air Act⁵¹ (CAA) when it enacted the Energy Supply and Environmental Coordination Act⁵² in 1974.⁵³ This section states: "No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969."⁵⁴ These are the only two Congressional statutory exemptions; however, the courts have also created a wide range of exceptions, including some that exempt whole statutes from NEPA compliance.

Courts faced a dilemma shortly after Congress enacted NEPA: NEPA's broad mandate was a double-edged sword that could be used both to protect the environment, but also to slow down or delay those efforts. If EIS requirements applied each time federal agencies attempted to promulgate new standards, then groups opposed to regulations could endlessly delay their implementation. In *Portland Cement Ass'n. v. Ruckelshaus*,⁵⁵ the D.C. Circuit crafted a pragmatic solution.⁵⁶ The case involved a challenge to EPA's stationary-source standards for new and modified Portland cement plants.⁵⁷ The petitioners claimed that EPA had failed to comply with NEPA, since the agency had not completed an EIS prior to promulgating the new standards.⁵⁸ Although the statute appeared to require an EIS, the court resolved the issue by reviewing

⁴⁸ Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251–1388 (2018).

⁴⁹ *Id.* § 1371(c).

⁵⁰ *Id.*

⁵¹ Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q (2018).

⁵² Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 (1974) (codified as amended at 15 U.S.C. §§ 791–798 (2018)).

⁵³ 15 U.S.C. § 793(c)(1) (2018).

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *superseded by statute*, Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, 259, *as recognized in* *Am. Trucking Ass'n v. U.S. Env't Prot. Agency*, 175 F.3d 1027, 1042 (D.C. Cir. 1999).

⁵⁶ *See id.* at 384.

⁵⁷ *Id.* at 378–79.

⁵⁸ *Id.* at 379.

CAA procedures and noting that they require EPA to include a statement of environmental consideration and a cost analysis directly reviewable by a court.⁵⁹ This was very similar in both procedure and intent to the NEPA EIS.⁶⁰ Therefore, the court concluded, section 111 of the CAA represented the “functional equivalent” of NEPA’s procedural requirements.⁶¹ As noted above, Congress later created an express NEPA exemption for the CAA, but the functional equivalence doctrine became an important basis for judicial NEPA exemptions from environmental statutes.

Subsequent courts applied functional equivalence to the Federal Insecticide, Fungicide, and Rodenticide Act⁶² (FIFRA), the Resource Conservation and Recovery Act⁶³ (RCRA), and to certain provisions of the Endangered Species Act⁶⁴ (ESA).⁶⁵ Federal agencies are exempt from NEPA analysis when acting under any of these statutes. Functional equivalence is a very broad exemption, but the Supreme Court has added three additional case-specific exceptions to NEPA.

In *Flint Ridge Development Co. v. Scenic Rivers Ass’n of Oklahoma (Flint Ridge)*,⁶⁶ the Supreme Court held that where there was a “clear and unavoidable conflict” between NEPA and an agency’s authorizing statute, NEPA must give way.⁶⁷ Although the *Flint Ridge* decision involved the narrow issue of disclosures under a separate statute, the holding applies more broadly to any situation where there is a clear and fundamental conflict of statutory duty.⁶⁸

The Supreme Court has also held that when an agency lacks discretion in its authorizing statute to act on an EIS, the agency does not need to consider the environmental effects and NEPA does not apply.⁶⁹ The Court dealt with that situation in *Department of Transportation v.*

⁵⁹ *Id.* at 385.

⁶⁰ *Id.* at 381, 384–85 (holding that the Clean Air Act requirements for the EPA Administrator to “take into account counter-productive environmental effects of a proposed standard, as well as economic costs to the industry” amounted to the functional equivalent of the environmental impact statement required by NEPA).

⁶¹ *Id.*

⁶² Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2018).

⁶³ Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2018) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

⁶⁴ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

⁶⁵ See *Env’t Def. Fund, Inc. v. U.S. Env’t Prot. Agency*, 489 F.2d 1247 (D.C. Cir. 1973) (holding that FIFRA pesticide withdrawal procedures were the functional equivalent of NEPA); see also *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975); *Alabama v. U.S. Env’t Prot. Agency*, 911 F.2d 499, 504 (11th Cir. 1990) (holding that RCRA procedures are the functional equivalent of NEPA); *Douglas Cnty. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (holding that ESA procedures for designating critical habitat are the functional equivalent of NEPA). *But cf.* *Catron Cnty. Bd. of Comm’rs, N.M. v. U.S. Fish & Wildlife Serv.* 75 F.3d 1429 (10th Cir. 1996) (holding that the Secretary must comply with NEPA when designating critical habitat under the ESA).

⁶⁶ 426 U.S. 776 (1976).

⁶⁷ *Id.* at 788.

⁶⁸ *Id.* at 791 (stating that “in these circumstances” NEPA’s impact statement requirement is inapplicable).

⁶⁹ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004).

Public Citizen.⁷⁰ Although *Flint Ridge* and *Public Citizen* are relatively narrow holdings, all of the congressional and judicial exceptions taken together exempt federal agencies from NEPA analysis in a wide range of situations. Including CEQ regulations, which allow an agency to use a CE or EA, most federal actions do not require an EIS.⁷¹ Thanks to research and statistical analysis, we can support this opinion with analytical data.

In recent years, several groups have collected and analyzed data on EISs to quantify NEPA's impact. This is much more difficult than it should be because, as the General Accountability Office (GAO) discovered ten years ago, data collection efforts vary a great deal from one agency to another.⁷² In 2012, Congress asked the GAO to review a range of issues associated with NEPA analyses, including cost, time frames, and litigation.⁷³ The report looked across all agencies and found that between 2008 and 2012, 95% of NEPA analyses were CEs, 5% were EAs, and just 1% were EISs.⁷⁴ GAO reported that these statistics were consistent with information previously collected for the American Recovery and Reinvestment Act of 2009.⁷⁵ A similar breakdown in NEPA analyses was reported by other groups. In 2022, Professors John C. Ruple, Jamie Pleune, and Erik Heiny reviewed 41,194 United States Forest Service (Forest Service or USFS) NEPA decisions made between 2004 and 2020.⁷⁶ Of these, 81.2% were CEs, 16.7% were EAs, and 2.1% were EISs.⁷⁷ The authors also noted that the overall number of Forest Service NEPA decisions has decreased since 2009, including the number of EISs.⁷⁸

The statistical breakdown of NEPA analyses from these studies clearly shows that agencies perform very few EISs each year, and by far, the majority of NEPA decisions are CEs. This does not even consider the number of potential EISs the congressional express exceptions or judicial exceptions, like the functional equivalence doctrine, prevented. Therefore, criticism that NEPA results in undue delay due to EIS requirements is misleading. To accurately determine NEPA's burden on federal agencies and projects, all NEPA actions, including EAs and CEs, should be considered.

⁷⁰ *Id.* (finding that NEPA did not require the Federal Motor Carrier Safety Administration to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers "[b]ecause FMCSA lacks discretion to prevent those cross-border operations").

⁷¹ GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at pmb1.

⁷² *Id.*

⁷³ *Id.* at 1–2.

⁷⁴ *Id.* at 7.

⁷⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 304 (2009); *see* GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at 7, 7 n.15 (noting that data for the Recovery Act was available because it was required to be compiled and reported by the President to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days until September 30, 2011).

⁷⁶ Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 289 (2022).

⁷⁷ *Id.*

⁷⁸ *Id.*

B. Federal Agencies Spend Limited Time Performing NEPA Analyses

Several early studies attempted to determine the amount of time it takes to complete NEPA analyses by looking at all categories of NEPA action, but these efforts were complicated by a lack of data and variation in the way agencies track their decisions.⁷⁹ In its 2014 report to Congress, the GAO stated that, based on the National Association of Environmental Professionals (NAEP) 2013 annual report, the average time required to complete an EIS was 4.6 years.⁸⁰ The GAO further reported that DOE's average EA completion time, over a ten year period from 2003–2012, was thirteen months with a median completion time of nine months.⁸¹ They also noted that although little government information is available on CEs, DOE officials stated that they usually take only one to two days.⁸² The GAO, however, accused the NAEP report of large margins of error and sampling issues and noted the lack of reliable data from agencies and variation in collection procedures.⁸³

CEQ, which oversees NEPA, has primarily focused its analyses on EISs.⁸⁴ In June 2020, CEQ calculated the time it took to complete EISs by reviewing publicly available federal agency data from 2010–2018.⁸⁵ It found that across all agencies, it took 4.5 years on average (mean) to complete an EIS, with a median time of 3.5 years.⁸⁶ Time to completion ranged from less than a year (Federal Bureau of Prisons) to over seven years (Federal Highway Administration).⁸⁷ CEQ also found wide variation in the time to complete EISs within agencies.⁸⁸ CEQ calculated and reported average time to complete EISs; however, median time provides a much better reflection of central tendencies than an average

⁷⁹ GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at 13 (noting that most agencies do not collect information on the number and type of NEPA analyses).

⁸⁰ *Id.* (citing NAT'L ASS'N ENV'T PROS., ANNUAL NEPA REPORT 2012 OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 14–15 (Judith Charles et al. eds. 2013)) [hereinafter NAEP NEPA REPORT].

⁸¹ GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at 14.

⁸² *Id.* at 15.

⁸³ The GAO noted that the NAEP report's average EIS time of 1,675 days had a one standard deviation confidence interval of plus or minus 1,247 days and that the number of EISs used to determine the average time (197) did not match the number of final EISs presented in the table in the report. GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at 13 n.28; *see also* NAEP NEPA REPORT, *supra* note 80, at 13–15 (analyzing time to complete EIS).

⁸⁴ *See* NEPA, 42 U.S.C. §§ 4342–4347 (2018); *see also* Council on Env't Quality, *EIS Length*, NEPA.GOV, <https://perma.cc/UYH9-7SVP> (last visited Dec. 5, 2023) (reports and sidebar demonstrate that CEQ has only analyzed data and published reports on EISs).

⁸⁵ COUNCIL ON ENV'T QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2018) 1 (2020), <https://perma.cc/NNW3-FM5L> [hereinafter CEQ TIMELINES].

⁸⁶ *Id.*

⁸⁷ *Id.* at 8–11 fig.5.

⁸⁸ *Id.* at 8–14 figs.5 & 6.

or mean for data that is widely skewed.⁸⁹ CEQ did not analyze the data further to ascertain reasons for the variation in EIS completion within and between agencies.⁹⁰ Additionally, it did not determine the average or median time to complete EAs or CEs.⁹¹ Fortunately, several researchers have looked closer at the data to provide a clearer picture on NEPA analysis time frames.

In 2020, a group of professors from the University of Minnesota and University of California, Davis conducted an in-depth analysis of Forest Service NEPA actions, providing more clarity on the time frame to conduct NEPA actions and broadening the scope of research beyond EISs.⁹² The group was given access to the USFS's planning database used to track NEPA actions, which is not available to the public.⁹³ The USFS maintains thorough records and the database allowed the team of professors to focus on NEPA analysis and filter out any differences in methodology between the agency's regional offices.⁹⁴ The group reviewed Forest Service actions from 2005–2018, finding that the Forest Service documented 33,976 NEPA actions, of which 27,961 (82.3%) were CEs, 5,377 (15.8%) were EAs, and 638 (1.9%) were EISs.⁹⁵

The group found that the USFS completes a single NEPA analysis in 131 days.⁹⁶ This statistic is important because, unlike other reports, the professors' review factored in EAs and CEs while calculating the time it takes to complete NEPA analyses. When considering the times for all NEPA actions, the entire environmental review process takes significantly less time than critics claim.⁹⁷ Relying on the entire dataset of NEPA actions instead of solely focusing on EISs allows for a more accurate calculation of the burden the statute places on agencies and their projects, particularly since EISs make up such a minor component of an agency's NEPA requirements.

The authors also reported that the median time to complete a CE was 105 days, an EA 392 days, and an EIS 882 days.⁹⁸ Importantly, the group found considerable variation in completion times between USFS regions,

⁸⁹ See Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 294–95 (noting that when a distribution is symmetrical, the mean provides a good representation of the central tendency of a data set, however, when a data set is skewed, the central tendency is affected by the outliers and the median provides a better representation).

⁹⁰ CEQ TIMELINES, *supra* note 85, at 1–2.

⁹¹ *Id.* at 1 (explaining that the CEQ's analysis focused exclusively on time to complete EISs, with no attention to EAs or CEs).

⁹² Forrest Fleischman et al., *U.S. Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining*, 118 J. FORESTRY 403, 408 (2020).

⁹³ *Id.* at 403.

⁹⁴ See *id.* at 408.

⁹⁵ *Id.*

⁹⁶ Fleischman et al., *supra* note 92, at 412 (noting that the median time, rather than the mean time, was used since the median was more representative of the central time required to complete a NEPA analysis due to the wide variation in times in the dataset).

⁹⁷ See *id.* (noting that the median time to complete an EIS is 2.5 years).

⁹⁸ *Id.*

forest areas, and even individuals, regardless of the type of NEPA analysis.⁹⁹ The authors noted that their data did not allow them to understand why variations between the different USFS organizational entities existed, but suggested that this might be important and could lead to identifying best practices for the organization to use in the future.¹⁰⁰ The variations *are* important and provide a key to the real reason NEPA analyses take time and why some agencies take several years to perform an EIS.

Overall, the results show that the USFS has been effective at handling its NEPA obligations and is a reliable source for good NEPA management practices.¹⁰¹ The evaluating group made one additional observation that is central to the discussion of NEPA regulatory burdens: there was a significant decrease in the number of NEPA projects being initiated and completed over the course of the study.¹⁰² The group determined that the decline was either because the Forest Service was relying on more programmatic EISs or that appropriations for the agency, combined with a rising outlay for fire suppression efforts, resulted in fewer staff to do NEPA-related work.¹⁰³ However, the available data did not allow them to determine which was the ultimate cause of the decline.¹⁰⁴

These results are supported by one final study conducted by professors from the University of Utah and Utah Valley University that analyzed USFS NEPA data from 2004–2020.¹⁰⁵ During this period, USFS produced 41,194 NEPA decisions of which 33,443 were CEs (81.2%), 6,881 EAs (16.7%), and 870 EISs (2.1%).¹⁰⁶ These authors also found a decline in the number of annual NEPA decisions since 2009.¹⁰⁷ They reported that the timeline to complete any one NEPA analysis was similar to that determined by the University of Minnesota and University of California Davis professors,¹⁰⁸ finding that EISs took an average (mean) of 3.4 years (1240 days) to complete, while the median time was 2.8 years (1006 days).¹⁰⁹ EAs averaged 1.7 years (618 days) with a median of 1.2 years (445 days) and CEs took an average of 7 months (209 days) to complete with a median of 4 months (112 days).¹¹⁰ The group felt that the significant difference between median and mean time was important,

⁹⁹ *Id.* The USFS divides the United States into 9 regions, with 154 national forests and 20 grasslands divided between the regions; NEPA projects can encompass a single forest, multiple forests, or entire regions. *Id.* at 404.

¹⁰⁰ *Id.* at 415–16.

¹⁰¹ *Id.*

¹⁰² *Id.* at 415.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 289.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Compare id.* at 292, with Fleischman et al., *supra* note 92, at 403 (authored by faculty from the University of Minnesota and University of California, Davis).

¹⁰⁹ Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 293.

¹¹⁰ *Id.*

noting that while both indicated a central tendency, the mean value could be skewed by outliers, which was the case with the USFS data.¹¹¹ They also noted that the mean consistently exceeded the median, which showed that the outliers were the long time-frame projects and not the short ones.¹¹²

Summarizing the three studies, a USFS NEPA decision takes roughly 131 days or about one-third of a year to complete. The median time to complete an EIS is 2.8 years; an EA, 1.2 years; and a CE, 4 months. Although additional assessments of NEPA timelines from other agencies should be conducted to make definitive conclusions, the studies of USFS data clearly indicate that the time required to complete NEPA actions is much shorter than that claimed by critics.¹¹³

C. NEPA Decisions Are Not Frequently Litigated

Critics also claim that NEPA litigation is a significant burden on agencies and delays projects.¹¹⁴ This is based on a widespread perception that NEPA decisions are frequently litigated.¹¹⁵ However, a review of analytical data shows this is not the case.

There is no government-wide system for tracking NEPA litigation, but some federal agencies track this information for their own use.¹¹⁶ USFS, for example, has consistently collected NEPA litigation information. In 2014, Amanda M.A. Miner, Robert W. Malmshemer, and Denise M. Keele took advantage of this data to review twenty years of Forest Service land management litigation and learn more about the impact of the legal system on forest management.¹¹⁷ As the authors mention, theirs is not the first study of Forest Service NEPA litigation.¹¹⁸

¹¹¹ *Id.* at 294.

¹¹² *Id.* at 295.

¹¹³ See Eli Duorado, *Why are We so Slow Today? Five Amazing Facts about Environmental Review*, THE CTR. FOR GROWTH & OPPORTUNITY AT UTAH STATE UNIV. (Mar. 12, 2020), <https://perma.cc/HE7G-UD3Z> (claiming that an EIS takes 4.5 years and is growing); see also PHILIP ROSSETTI, R STREET, R ST. POLICY STUDY NO. 234: ADDRESSING NEPA-RELATED INFRASTRUCTURE DELAYS 1 (2021), <https://perma.cc/8HZH-464D> (claiming that NEPA project approval went from 3.4 years in 2010 to 5.2 years in 2016).

¹¹⁴ See Katz, *supra* note 32, at 2, 6 (claiming that the time needed for NEPA analysis is growing, and every procedural step is open to litigation); see also ROSSETTI, *supra* note 113, at 1, 5–6 (claiming NEPA's requirements burden agencies by increasing time to complete projects and subject agencies to litigation).

¹¹⁵ Fleischman et al., *supra* note 96, at 414.

¹¹⁶ John C. Ruple & Kayla M. Race, *Measuring the Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENV'T L. 479, 486 (2020).

¹¹⁷ Amanda M.A. Miner et al., *Twenty Years of Forest Service Land Management Litigation*, 112, J. FORESTRY 32, 32 (2014).

¹¹⁸ See *id.* at 32 (citing Elise S. Jones & Cameron P. Taylor, *Litigating Agency Change: The Impact of the Courts and Administrative Appeals Process on the Forest Service*, 23 POL'Y STUD. J. 310, 310–336 (1995)); see also Robert W. Malmshemer et al., *National Forest Litigation in the US Courts of Appeals*, 102 J. FORESTRY 20, 20–25 (2004) (analyzing national forest litigation); John M. Carter et al., *Cutting Science, Ecology, and Transparency Out of*

However, previous studies focused more on the outcome of Forest Service NEPA litigation and did not compare litigation to the number of NEPA analyses conducted by the agency.¹¹⁹

The University of Minnesota and UC Davis professors also analyzed litigation information when reviewing USFS NEPA decisions made between 2005 and 2018.¹²⁰ They found that less than 1% of USFS NEPA decisions during this period resulted in litigation.¹²¹ The group found that EISs were litigated more often than EAs or CEs, with a breakdown of less than 1% of CEs, 2% of EAs, and 12% of EISs litigated.¹²² This is expected considering EISs are usually performed on larger projects with more environmental impacts.¹²³ The group also found that the USFS prevailed in an overwhelming majority of cases, winning 67%, losing 21%, and settling 12% of the time.¹²⁴

Ruple and Race did the most extensive study of NEPA litigation, reviewing 1,499 cases that were litigated from 2001–2013.¹²⁵ That study looked across all agencies, analyzing CEQ data published between the same time period.¹²⁶ The authors found that very few NEPA decisions are challenged in court and the number that are challenged has decreased over time.¹²⁷ Ruple and Race estimated that agencies make 51,000 NEPA decisions annually, with only 115 NEPA lawsuits filed during the same period, which equated to a very low litigation rate of 0.22%.¹²⁸ They also found that there was roughly a 30% decline in NEPA litigation over the study period and that NEPA litigation represented just 0.04% of all civil litigation in which the federal government was a defendant.¹²⁹ The low number of NEPA lawsuits compared to the total number of NEPA decisions indicates that, contrary to criticism, NEPA litigation is not a significant burden on federal agencies.¹³⁰ The decrease in NEPA lawsuits over the study period also indicates that the burden has lessened over time.¹³¹

Although analytical studies show that NEPA litigation is not particularly onerous to federal agencies, nor does the time required to complete NEPA reviews generally result in significant delays, they do not explain why some EISs take years to complete. A closer examination,

National Forest Management: How the Bush Administration Uses the Judicial System to Weaken Environmental Laws, 33 ENV'T L. REP. 10959, 10959–77 (2003) (reviewing the litigation and policy strategy of the Bush administration).

¹¹⁹ Miner et al., *supra* note 117, at 39–40.

¹²⁰ Fleischman et al., *supra* note 96, at 414.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Ruple & Race, *supra* note 116, at 489.

¹²⁶ *Id.* at 489.

¹²⁷ *Id.* at 500.

¹²⁸ *Id.*

¹²⁹ *Id.* at 501–02.

¹³⁰ *Id.* at 504.

¹³¹ *See id.* at 501–02.

however, reveals that some of the root causes involve issues external to the NEPA process that cannot be resolved by reforming the statute.

D. Root Causes for the Delays in Completing Environmental Impact Statements

The NEPA process is often blamed for the extended time it takes to complete EISs. However, NEPA review does not exist in a vacuum. A project that has extensive environmental impacts will likely have to comply with several environmental statutes other than NEPA.¹³² EISs and the NEPA process are often extended as a result of permitting or analysis required by other statutes such as the CWA, or ESA, although the delay is often blamed on NEPA.¹³³ For example, the Federal Highway Administration (FHWA) observed that many of their project delays could be traced back to failing to coordinate other environmental reviews with NEPA analysis.¹³⁴ The FHWA noted that, in its experience, few agencies understand or practice using NEPA as an umbrella statute for integrating and coordinating all required reviews and consultations, and that this slows down the overall process.¹³⁵

Project participants and stakeholders are also the source of NEPA review delays. The Bureau of Land Management (BLM) reported that delays in the NEPA process for oil and gas projects on western state public lands were attributed to a holdup of information from the operator.¹³⁶ Oil and gas operating companies must submit an Application for a Permit to Drill (ADP) to BLM in order to develop leases on public lands.¹³⁷ BLM must then approve the application before any oil and gas development can occur, and this process is considered part of the NEPA review.¹³⁸ BLM noted that in some years, it waited almost twice as long for the oil and gas operator to provide information as it did to review the permit.¹³⁹ The operator may have reasons for delaying the application, such as receiving additional technical information that forces alterations in the drilling plan or responding to changes in oil and gas prices which affect exploration economics.¹⁴⁰ Regardless of the cause, the operators' failure to provide timely information results in delaying the review of the application and ultimately postpones NEPA review.

¹³² LINDA LUTHER, CONG. RSCH. SERV., RL33267, THE NATIONAL ENVIRONMENTAL POLICY ACT: STREAMLINING NEPA 9 (2006).

¹³³ *See id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 313.

¹³⁷ *Id.* at 313 n.162.

¹³⁸ *See id.*

¹³⁹ *Id.* at 313–14.

¹⁴⁰ *Id.*

Lack of qualified staff and insufficient agency funding also delay the NEPA process.¹⁴¹ In its review of the BLM and Forest Service land exchange process, the GAO found that lack of qualified staff and shifts in agency priorities caused delay in the NEPA review process.¹⁴² Ruple, Pluene, and Heiny also noted that staffing issues delayed agencies' NEPA processes.¹⁴³ The authors relied in part on a series of roundtables conducted in 2018 by the Forest Service in collaboration with the National Forest Foundation.¹⁴⁴ The roundtables found that Forest Service staffing levels were not adequate to meet the current demands of environmental analysis.¹⁴⁵ Similarly, an attorney at the Department of Transportation noted that insufficient staff and resources were the two biggest hindrances to federal agencies meeting their NEPA obligations.¹⁴⁶

Agency funding also plays a role in the NEPA process because agencies often have to prioritize other commitments over NEPA review. For example, the Forest Service routinely missed NEPA timelines because agency staff had to address wildfires emergencies and did not have enough staff to fight fires and perform NEPA reviews at the same time.¹⁴⁷ This is a sign of an overburdened and understaffed agency, not a problem with the NEPA process.¹⁴⁸

Each of these issues cause delays in the NEPA review process and are not easily resolved. It begs the question of whether EISs and NEPA review are worth the resources and possible delays to critical projects. Fortunately, several analytical studies have attempted to quantify NEPA benefits.

¹⁴¹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-611, FEDERAL LAND MANAGEMENT: BLM AND THE FOREST SERVICE HAVE IMPROVED OVERSIGHT OF THE LAND EXCHANGE PROCESS, BUT ADDITIONAL ACTIONS ARE NEEDED 15, 17 (2009) [hereinafter GAO, FEDERAL LAND MANAGEMENT].

¹⁴² *Id.* at 17.

¹⁴³ Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 307.

¹⁴⁴ *See id.* at 273, 307 n.131; *see also* KAREN DIBARI & JULIE ANTON RANDALL, NAT'L FOREST FOUND., EADM, ENVIRONMENTAL ANALYSIS AND DECISION-MAKING REGIONAL PARTNER ROUNDTABLES: NATIONAL FINDINGS AND LEVERAGE POINTS 18 (2018), <https://perma.cc/84D2-ZFMW>.

¹⁴⁵ DIBARI & RANDALL, *supra* note 144.

¹⁴⁶ Aaron Gordon, *Why Doesn't America Build Things?*, VICE (Aug. 22, 2022, 6:00 AM), <https://perma.cc/DCG4-SVKQ> (“[A] former attorney at the Department of Transportation identified ‘insufficient staff and resources’ as two of ‘the biggest hurdles federal agencies face when working to meet their NEPA requirements in a timely manner.’”).

¹⁴⁷ *Id.*; *see also* Fleischman et al., *supra* note 92, at 415 (noting the shift in the proportion of Forest Service Funds towards fire-fighting, from 17% in 1995 to 51% in 2014, “likely affect[ing] the availability of staff NEPA experts” and others needed to complete NEPA documentation).

¹⁴⁸ *See* Gordon, *supra* note 146 (“[R]esearchers found that the cause of [NEPA] delays was not excessive red tape or onerous reviews but understaffed and overburdened agencies.”).

E. NEPA Reviews Result in Better Federal Decisions that Benefit the Environment

Although critics primarily focus on the burdens NEPA imposes, they also occasionally argue that NEPA's benefits are uncertain.¹⁴⁹ Because NEPA is primarily a procedural statute, it is not easy to quantify its effectiveness in protecting the environment. However, several articles have used agency data to determine and assess NEPA's effectiveness in reducing environmental impacts, and this body of scholarship is growing.

For example, Ruple and Capone analyzed oil and gas EISs authorized by the BLM in Colorado, Utah, Montana, and Wyoming to determine what impact NEPA had on these projects.¹⁵⁰ They noted that there was very little scholarship on the substantive benefits of NEPA review, although there is a growing body of research on NEPA analogs in other countries.¹⁵¹ The authors focused on oil and gas projects because they are discrete and the environmental impacts are easy to quantify.¹⁵² The western states were chosen because they have a large amount of federally managed public land with a number of oil and gas projects.¹⁵³ Ruple and Capone hypothesized that NEPA review would reduce the environmental impacts of oil and gas projects as they moved from draft to final EIS.¹⁵⁴ They selected several metrics to identify environmental impacts, including air emissions, water usage, and surface disturbance.¹⁵⁵

After analyzing the data, the authors determined that the NEPA process reduced environmental impacts as the project moved from draft EIS to a record of decision.¹⁵⁶ They found that air quality impacts from particulates and nitrous oxide were reduced by 23% and impacts to wetlands were reduced by 30%.¹⁵⁷ Surface disturbances—such as well pad and road construction, building production facilities, and pipeline construction—were also decreased, due primarily to a reduction in the number of wells drilled.¹⁵⁸ Permanent surface disturbances were reduced by 13% while temporary disturbances were reduced by 10%.¹⁵⁹ Interestingly, though perhaps not surprisingly, the authors also found that the number of alternatives considered in the EIS affected the amount

¹⁴⁹ *E.g.*, Potter et al., *supra* note 34.

¹⁵⁰ John Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 *GEO. WASH. J. ENERGY & ENV'T L.* 39, 39, 41 (2016).

¹⁵¹ *Id.* at 39.

¹⁵² *Id.* at 41.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 43.

¹⁵⁵ *Id.* at 42.

¹⁵⁶ *Id.* at 46.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; Mark K. Capone & John C. Ruple, *NEPA and the Energy Policy Act of 2005 Statutory Categorical Exclusions: What Are the Environmental Costs of Expedited Oil and Gas Development*, 18 *VT. J. ENV'T L.* 371, 384–85 (2017).

¹⁵⁹ Ruple & Capone, *supra* note 150, at 44–46.

of impact reduction.¹⁶⁰ EISs that considered a broader range of alternatives were more effective in reducing environmental impacts, however these also took longer to complete.¹⁶¹ The researchers concluded that NEPA is effective in its goal of encouraging agencies to evaluate environmental impacts prior to acting.¹⁶²

Ruple and Capone further reviewed what impact expedited NEPA review, such as CEs, had on the environment by evaluating BLM oil and gas projects from 2011 to 2015.¹⁶³ In particular, the authors considered the impact of Section 390 of the Energy Policy Act of 2005,¹⁶⁴ which created several statutory CEs for oil and gas projects.¹⁶⁵ During the study period, BLM made 176 oil and gas NEPA decisions, which resulted in 82 EAs and 94 CEs.¹⁶⁶ Of the 94 CEs, 77 were the most common version, Type 3.¹⁶⁷ The authors focused their statistical analysis and comparison on this version and found that CE projects resulted in almost four times more surface disturbance than projects requiring an EIS and almost twice as much as projects requiring an EA.¹⁶⁸ Therefore, CE projects were more likely to cause environmental impacts than either EA or EIS projects.¹⁶⁹ They concluded that NEPA review was beneficial to the environment, and expedited NEPA procedures like CEs are likely to result in more adverse environmental impacts.¹⁷⁰

Scholars have also looked at the impact of NEPA analysis on critical habitat designation under the ESA. Ruple, Tanana, and Williams reviewed 643 critical habitat decisions by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service between 1999 and 2017.¹⁷¹ A circuit split between the Ninth and Tenth Circuits created a unique opportunity for the authors to compare critical habitat rules prepared with and without NEPA to determine its effects.¹⁷² The authors found that NEPA analysis did not delay critical habitat designation and, contrary to popular perception, resulted in decisions that were roughly three months *faster* than rules that did not go through NEPA analysis.¹⁷³

¹⁶⁰ *Id.* at 51.

¹⁶¹ *Id.*

¹⁶² *Id.* at 47.

¹⁶³ Capone & Ruple, *supra* note 158, at 373.

¹⁶⁴ Energy Policy Act of 2005, Pub L. No. 109-58, § 390, 119 Stat. 594, 747–48 (codified primarily in scattered sections of 42 U.S.C.); Energy Policy Act of 2005, 42 U.S.C. § 15942 (2018).

¹⁶⁵ 42 U.S.C. § 15942.

¹⁶⁶ Capone & Ruple, *supra* note 158, at 387–88.

¹⁶⁷ *Id.* at 386.

¹⁶⁸ *Id.* at 386, 389.

¹⁶⁹ *Id.* at 393.

¹⁷⁰ *See id.* at 399 (“In light of these findings, we urge caution when considering proposals to expedite the NEPA process because expedited review may come at the cost of increased environmental harm.”).

¹⁷¹ John C. Ruple et al., *Does NEPA Help or Hurt ESA Critical Habitat Designations? An Assessment of Over 600 Critical Habitat Rules*, 46 *ECOLOGY* L.Q. 829, 840 (2019).

¹⁷² *Id.* at 839.

¹⁷³ *Id.* at 848.

Additionally, critical habitat designations that underwent NEPA analysis saw less reduction in habitat size from the proposed to final designations than those where the agency did not conduct NEPA analysis.¹⁷⁴ Therefore, NEPA review better preserved critical habitat designations from proposed to final rule than those that did not go through the process.¹⁷⁵

Each of these studies indicates empirically that NEPA reviews result in better federal decisions that protect the environment. The studies support the position that NEPA is performing its intended function as set out by Congress. However, that does not mean that NEPA review cannot be improved. Several studies, statutory resources, and current agency practices suggest ways to enhance the process.

IV. RECOMMENDATIONS FOR STREAMLINING THE NEPA PROCESS

Although the analytical data indicates that critics are incorrect in their perceptions about NEPA, the studies do not address the delays that do occur because of the NEPA process. These concerns are especially critical for projects responding to climate change, such as transmission line upgrades and renewable energy projects. Fortunately, there are a number of actions and reforms that can streamline the NEPA process without new legislation.

A. Federal Agency Actions and Reforms

Federal agencies can take a wide range of internal actions to improve and streamline the NEPA analysis process. Expanded use of programmatic EISs is one example.

The concept of programmatic NEPA review comes from CEQ regulations on “broad actions.”¹⁷⁶ Programmatic EISs allow agencies to address common issues associated within a broad decision or program in a single “programmatic” EA or EIS, and then analyze site- or proposal-specific issues or decisions in a subsequent, narrower EA or EIS.¹⁷⁷ The concept of considering broad, general impacts at an early stage of the proposal and subsequently conducting narrower, decision-focused reviews is known as “tiering” and is addressed specifically within the CEQ regulations.¹⁷⁸ Programmatic NEPA analysis allows an agency to

¹⁷⁴ *Id.* at 861–62.

¹⁷⁵ *Id.*

¹⁷⁶ See 40 C.F.R. §§ 1502.4(b)–(c) (2020); see also Michael Boots, Council on Env’t Quality, Memorandum on Effective Use of Programmatic NEPA Reviews 11–12 (Dec. 18, 2014), <https://perma.cc/H5XG-P8VR>.

¹⁷⁷ Boots, *supra* note 176, at 10; see also 40 C.F.R. §§ 1502.4(b)–(c) (2022); Boots, *supra* note 176, at 13–14 (noting that programmatic EISs are flexible and can be applied to a wide range of circumstances including: 1) adopting official agency policy, 2) adopting formal agency plans, 3) adopting agency programs including new missions or redesigning existing programs, and 4) approving multiple actions).

¹⁷⁸ See 40 C.F.R. § 1501.11 (2022).

reduce repetition, saving the agency time and resources by addressing common aspects of a project in a broad document that will apply to several subsequent sites or projects.¹⁷⁹ For example, the Forest Service used a programmatic EIS for its Invasive Plant Program that covers all national forests in Washington and Oregon.¹⁸⁰ In the EIS, the Forest Service examined a range of options, such as herbicide use and species removal, to address combatting invasive species and referenced this analysis in site-specific plans, which applied to specific units or regions.¹⁸¹

Analytical data indicate some federal agencies are using programmatic EISs to streamline their processes. For example, Fleischman et al. noted a decline in the number of NEPA analyses initiated over the fourteen years of their study.¹⁸² They further found that the number of NEPA analyses finalized by senior Forest Service officials, such as forest supervisors and regional foresters, decreased at a lesser rate than those from district foresters.¹⁸³ The authors speculated that this may indicate consolidation of NEPA analysis into programmatic EISs, since these are generally finalized by more senior agency officials.¹⁸⁴ Programmatic EISs and tiering are highly effective and underutilized methods of reducing NEPA processing time and accelerating projects.¹⁸⁵

The FHWA and Colorado Department of Transportation's (CDOT) project to relieve congestion in the I-70 Mountain Corridor provides another example of effective use of programmatic NEPA analysis.¹⁸⁶ FHWA and CDOT prepared a joint programmatic EIS to improve the I-70 mountain corridor and then used tiering for specific projects, such as tunneling and specific highway sections.¹⁸⁷ This reduced the NEPA timeline by half its normal duration, accelerating the overall project completion.¹⁸⁸ The I-70 corridor project is an impressive endeavor considering its high visibility and public interest, not to mention the project's complexity.¹⁸⁹

In combination with tiering, programmatic NEPA analysis could be an effective method for all federal agencies to shorten their NEPA processes. Many federal agency actions could be covered under an umbrella programmatic EA or EIS and several agency renewable energy

¹⁷⁹ Boots, *supra* note 176, at 7, 10.

¹⁸⁰ See *id.* at 49–55 (table showing sample programmatic and tiering analysis).

¹⁸¹ *Id.*

¹⁸² Fleischman et al., *supra* note 92, at 410–411.

¹⁸³ *Id.* at 412.

¹⁸⁴ *Id.* Authors did not see an increase in the number of EAs or CEs which should occur if programmatic EISs were the cause but instead a decrease. *Id.* The authors speculated this decrease could indicate a difference in resources between higher- and lower-level officials instead of a shift to programmatic NEPA analysis. *Id.*

¹⁸⁵ Boots, *supra* note 176, at 7–8.

¹⁸⁶ Colleen Kirby Roberts & Mandy Whorton, *NEPA Strategies for Accelerating Project Delivery: Every Day Counts, Tiering, and Alternative Delivery in the I-70 Mountain Corridor*, 17 ENV'T PRAC. 278, 278 (2015).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 280, 289.

¹⁸⁹ *Id.* at 278, 289.

programs already use programmatic EAs or EISs to streamline their NEPA processes.¹⁹⁰ For example, the Department of Interior's Bureau of Ocean Energy Management used a programmatic EIS for the development of its alternative energy program.¹⁹¹ The EIS covers all alternative energy projects on the Outer Continental Shelf, including wind, wave, and ocean current energy activities.¹⁹² The Department of Energy (DOE) also utilized a programmatic EIS for solar energy development on public lands in six southwestern states.¹⁹³ The EIS evaluated several alternatives the agency was considering for developing utility-sized solar projects, using existing solar energy policies and a comprehensive Solar Energy Program.¹⁹⁴

In addition to using programmatic EAs and EISs, federal agencies can streamline NEPA review by standardizing NEPA procedures across their offices to make the process more efficient. In their study, Fleischman et al. noted a wide variation in completion times between Forest Service regions, forests and units.¹⁹⁵ Although the data did not indicate the cause, the authors speculated that the variation might be attributed to agency and regional offices using different procedures to process NEPA actions.¹⁹⁶ Using different NEPA procedures in different parts of a federal agency is inefficient and complicates review. Fortunately, several agencies have standardized their procedures. For example, the Federal Aviation Administration (FAA) issued Order 1050.1F in July 2015, standardizing NEPA procedures and processes across the agency.¹⁹⁷ The DOE also standardized its NEPA procedures in Policy 451.1.¹⁹⁸

In addition to standardizing procedures, federal agencies should also develop best NEPA practices and share these with other agencies to improve performance.¹⁹⁹ As discussed above, the FAA developed best practices and provides training on these procedures through NEPA

¹⁹⁰ See Boots, *supra* note 176, at 6 (describing agency NEPA responsibilities for site-specific and programmatic projects).

¹⁹¹ U.S. DEP'T OF THE INTERIOR MINERALS MGMT. SERV., MMS 2007-046, PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR ALTERNATIVE ENERGY DEVELOPMENT AND PRODUCTION AND ALTERNATE USE OF FACILITIES ON THE OUTER CONTINENTAL SHELF ES-1 (2007).

¹⁹² *Id.* at ES-2.

¹⁹³ BUREAU OF LAND MGMT. & U.S. DEP'T OF ENERGY, DOE/EIS-0403, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (PEIS) FOR SOLAR ENERGY DEVELOPMENT IN SIX SOUTHWESTERN STATES ES-1 (2012).

¹⁹⁴ *Id.* at 1-1.

¹⁹⁵ Fleischman et al., *supra* note 92, at 412.

¹⁹⁶ *Id.* at 415.

¹⁹⁷ FED. AVIATION ADMIN. ORDER 1050.1F, ENVIRONMENTAL IMPACTS: POLICIES AND PROCEDURES 1-3 to 1-4 (2015), <https://perma.cc/V74K-ACMZ>.

¹⁹⁸ See DEP'T OF ENERGY, DOE P. 451.1, NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE PROGRAM (2017), <https://perma.cc/2QXU-H444>.

¹⁹⁹ See Fleischman et al., *supra* note 92, at 415 (observing that successful NEPA practices "could be studied and shared in order to improve NEPA practices across the agency").

workshops.²⁰⁰ Agencies should further invest in training dedicated personnel to perform NEPA analysis, developing NEPA teams to improve and streamline the process. These teams could be centrally located and either perform or consult on all NEPA analysis within the agency. The DOE adopted this strategy and developed the Office of NEPA Policy and Compliance, which provides a central location for all guidance.²⁰¹ In addition to guidance documents and regulations, the Office also provides NEPA DOE lessons learned and points of contact.²⁰²

Federal agencies also need to significantly improve their collection of NEPA data. The GAO report found that a majority of agencies failed to collect and analyze information on NEPA actions.²⁰³ In order for agencies to adjust and improve their NEPA analyses, they need to set up monitoring and collection processes and review this information on a regular basis. Otherwise, they cannot identify and correct inefficiencies. It is important to note that, at the time of writing, the Forest Service collects the most complete NEPA analysis data and appears to be one of the most efficient at NEPA processing.²⁰⁴

Finally, federal agencies should take full advantage of the Fixing America's Surface Transportation Act, known as FAST-41.²⁰⁵ Enacted in 2015, the FAST-41 program incorporates several of the recommendations listed above and establishes a unique governance structure, set of procedures, and funding authorities to improve federal review and permitting for "covered" infrastructure projects, including renewable energy production and electricity transmission.²⁰⁶

The program provides several significant benefits to directly streamline NEPA review and the federal permitting process.²⁰⁷ For example, it sets the expectation that all covered projects complete permitting and environmental reviews within two years, regardless of complexity.²⁰⁸ To facilitate this timeline, the statute requires that the project's lead agency develop a Comprehensive Project Plan (CPP) in consultation with other coordinating and participating agencies that

²⁰⁰ See, e.g., Jaclyn Johnson, *Best Practices for NEPA Documents and Timing*, presentation for: 2022 Southern Region Airports Virtual Workshop (June 28, 2022), <https://perma.cc/K6SV-RCS2>.

²⁰¹ Office of NEPA Policy and Compliance, *Active NEPA Reviews: Latest Documents and Notices*, DEP'T OF ENERGY, <https://perma.cc/QF2N-S346> (last visited Oct. 10, 2023).

²⁰² *Id.*

²⁰³ GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at pmb1.

²⁰⁴ *Id.* at 30.

²⁰⁵ Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (codified as amended in scattered sections of 42 U.S.C.).

²⁰⁶ See *id.* § 1441(d); see also Federal Permit Improvement Steering Council *FAST-41 Fact Sheet*, <https://perma.cc/RW59-3JY5> [hereinafter *FAST-41 Fact Sheet*].

²⁰⁷ See Nathan Eady et al., *Streamlining the Federal Environmental Review Process: The Pros and Cons of FAST-41*, 35 NAT. RES. & ENV'T 18, 21 (2020) ("The goals of FAST-41 to streamline and expedite permitting have already benefitted many types of infrastructure projects across the country.").

²⁰⁸ NEPA, 42 U.S.C. § 4370m-1(c)(1)(C)(i)-(iii) (2018); see also *FAST-41 Coordination*, ENV'T PROT. AGENCY, <https://perma.cc/PL8T-QBHF> (Sept. 11, 2023).

includes specific milestones approved by the FAST-41 Permitting Council.²⁰⁹ If there are any disputes with the timeline, the FAST-41 Executive Director mediates between the agencies.²¹⁰ Once the timeline is set, the lead agency cannot modify it without permission of the Executive Director and the coordinating agencies.²¹¹ These rules add structure to the review and permitting process and drive completion of environmental reviews according to the CPPs.

The program also increases transparency and coordination by mandating that the Executive Director of the FAST-41 program maintain a “permitting dashboard” to track the status of federal environmental reviews and authorizations for any covered project.²¹² The dashboard is available online and includes all pertinent information regarding the covered project, allowing the coordinating agencies, as well as the public, to track its progress.²¹³

FAST-41 also provides enhanced legal protection for covered projects.²¹⁴ The Act reduces the statute of limitations from six years to two and mandates that only a party that submitted a comment during the environmental review can file a claim.²¹⁵ FAST-41 also limits the ability of parties to employ injunctions to disrupt a project.²¹⁶

Finally, FAST-41 program benefits may also trickle down to local and state governments.²¹⁷ Although FAST-41 cannot force local and state jurisdictions to participate, these entities may choose to do so in order to garner aid that applies to the project as a whole.²¹⁸ A state may want to participate in the streamlined process in order to expedite its own environmental review or take advantage of the all-inclusive nature of FAST-41 to coordinate its own agency’s review under other environmental statutes.²¹⁹ FAST-41 has already been successfully employed to coordinate local, state tribal, and federal actions for one of the more contentious types of renewable projects: energy transmission lines. Construction began on the Ten West Transmission Line Project in July 2022 and will facilitate renewable energy development in Arizona

²⁰⁹ 42 U.S.C. § 4370m-2(c); *see also* Eady et al., *supra* note 207, at 1 (“[F]ederal agency staff, with assistance from the Permitting Council, must develop a Coordinated Project Plan . . .”).

²¹⁰ 42 U.S.C. § 4370m-2(c)(2)(C).

²¹¹ *Id.* § 4370m-2(c)(2)(D).

²¹² *Id.* § 4370m-2(b).

²¹³ *See All Projects*, PERMITTING DASHBOARD, <https://perma.cc/3R7H-YC5U> (last accessed Oct. 19, 2023) (searchable database of projects); *see also FAST-41 Fact Sheet*, *supra* note 206. *See generally Title 41 of the Fixing America’s Surface Transportation Act (FAST-41)*, PERMITTING DASHBOARD, <https://perma.cc/G89J-AGKW> (Nov. 15, 2021) (describing the FAST-41 Program and database).

²¹⁴ Eady et al., *supra* note 207, at 19.

²¹⁵ 42 U.S.C. § 4370m-6(a)(1).

²¹⁶ *Id.* § 4370m-6(b); *see also* Eady et al., *supra* note 207, at 19.

²¹⁷ Eady et al., *supra* note 207, at 20.

²¹⁸ *Id.*

²¹⁹ *Id.* at 20–21.

and California.²²⁰ The project was permitted under the FAST-41 program and included robust participation by state and local organizations.²²¹

However, FAST-41 participation is entirely voluntary and agencies must submit projects to the Permitting Council for approval to take advantage of the program.²²² Participation commits the lead agency to the administrative burden of developing a CPP and subjects it to the aggressive timelines of the program.²²³ Therefore, unfortunately, some agencies choose not to submit their projects to the rigors of the program, since it reduces agency flexibility and discretion.²²⁴ But there are some actions and reforms that can be made on a federal level to fill the gaps with these missed streamlining opportunities.

B. CEQ Actions and Reforms

The Council on Environmental Quality (CEQ) is the federal agency in charge of NEPA.²²⁵ CEQ is further responsible for advising the President and conducting investigations and studies on issues of environmental quality.²²⁶ This high-level authority provides CEQ with the opportunity to refine and improve the NEPA process.

CEQ could immediately improve the NEPA process by requiring federal agencies to maintain data on NEPA compliance, such as information on cost, timelines, and litigation issues, in an effort to standardize NEPA data collection across agencies. This would provide each agency with the information necessary to evaluate its own NEPA program and CEQ with data for broad scope evaluation purposes.²²⁷

Congress also tasked CEQ with reviewing and appraising the federal government's NEPA programs.²²⁸ Although the agency has promulgated guidance and regulations on a range of NEPA topics, it has not evaluated its various NEPA programs.²²⁹ The information from data collection

²²⁰ See *Ten West Transmission Line Project Receives FAST-41 Approval*, PERMITTING DASHBOARD (Aug. 3, 2022), <https://perma.cc/2E2K-24WH>; see also *Ten West Link 500-kilovolt Transmission Line Project and Potential Amendment to the Yuma Field Office Resource Management Plan*, U.S. DEP'T INTERIOR, BUREAU LAND MGMT., <https://perma.cc/65BY-AGHF> (July 14, 2022).

²²¹ See Press Release, U.S. Dep't of the Interior, Biden-Harris Administration Approves Clean Energy Transmission Project in Arizona and California with Potential to Lower Costs for Consumers (July 14, 2022), <https://perma.cc/KS6S-JAHR> (discussing the transmission project approval).

²²² *FAST-41 Fact Sheet*, *supra* note 206.

²²³ Eady et al., *supra* note 207, at 1.

²²⁴ See *id.* at 21 (describing the burdens that may keep agencies from applying).

²²⁵ See NEPA, 42 U.S.C. §§ 4342, 4344, 4347 (2018); *Council on Environmental Quality*, WHITE HOUSE, <https://perma.cc/UT9P-ZDWV> (last visited Oct. 19, 2023).

²²⁶ 42 U.S.C. §§ 4344(1), (5).

²²⁷ See Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 333–35 (describing the methods and benefits of collecting NEPA data).

²²⁸ 42 U.S.C. § 4344(3).

²²⁹ See *CEQ Guidance Documents*, U.S. DEP'T OF ENERGY, OFF. OF NEPA POL'Y & COMPLIANCE, <https://perma.cc/Q4DT-NPYX>.

would assist CEQ in evaluating agency programs and develop better guidance and practices.

CEQ could also assist federal agencies with their NEPA process by collecting, developing and promulgating best practices. As discussed above, several federal agencies have developed their own NEPA best practices.²³⁰ These are generally agency-specific requirements, such as anticipated timelines and document structures to help standardize agency practice and streamline the review process.²³¹ However, organizations other than federal agencies have compiled more agency-neutral best NEPA practices in an attempt to collect and disseminate universal lessons learned. NAEP developed a best practices guide by soliciting input from NEPA practitioners across multiple agencies to capitalize on lessons learned from these experienced personnel.²³² As established above, federal agencies are understaffed and underfunded²³³ and therefore unlikely to take time and reach out to other practitioners to gather best NEPA practices.²³⁴ CEQ can facilitate dissemination of best practices by serving as the central collection point of these practices and then promulgating them to all agencies. This would help streamline the NEPA process both within each agency and between agencies. Finally, CEQ could encourage cross pollination between agencies by periodically hosting training conferences for agency NEPA representatives, who could share best practices and receive training on the latest NEPA developments.

C. Congressional Actions

Congress can also help federal agencies streamline NEPA analysis to be more productive without overhauling the statute. Congress controls agency funding, which has a major impact on NEPA processing.

As noted previously, the number of NEPA actions conducted by the USFS has declined over the last several years, and one reason is attributed to declining annual appropriations combined with dramatically rising fire suppression costs.²³⁵ Fire suppression costs vary

²³⁰ See Fleischman et al. *supra* note 92, at 415 (showing USFS effectively handled its NEPA obligations and served as a reliable source for good NEPA management practices); Robert & Whorton, *supra* note 186, at 278, 289 (showing how FHWA and CDOT's programmatic NEPA process facilitated NEPA project delivery and shortened design and construction schedules).

²³¹ See Fleischman et al., *supra* note 92, at 415; Robert & Whorton *supra* note 186, at 289.

²³² See NAEP NEPA REPORT, *supra* note 80, at 1. NAEP's guidance applies to all agencies. *Id.* In contrast, the FAA and FHWA documents discuss agency specific practices. See Fed. Aviation Admin., *supra* note 197; *Environmental Review Toolkit*, FED. HIGHWAY ADMIN., <https://perma.cc/EM4Z-GUMS>.

²³³ See discussion *supra* Part III.D.

²³⁴ COUNCIL ON ENV'T QUALITY, COLLABORATION IN NEPA—A HANDBOOK FOR NEPA PRACTITIONERS 4, 9 (2007), <https://perma.cc/U37E-EJZE> (providing examples of why an agency might resist collaboration with other agencies). perma.cc/V6LW-CTZV.

²³⁵ See *supra* Part III.B; Fleischman et al., *supra* note 92, at 415.

from year to year and have a significant impact on the Forest Service budget.²³⁶ If there are a large number of non-budgeted forest fires in a given year, the Forest Service must resort to shifting funds from other programs, such as NEPA.²³⁷ In 2014, for example, 51% of Forest Service funding was spent on firefighting.²³⁸ Lack of funding affects the availability of NEPA staff experts and other staff that could contribute to NEPA analyses.²³⁹ Congress can mitigate this impact and make sure NEPA analyses and other essential agency functions continue by providing more funds during heavy fire suppression years or setting contingent funding that can be used in bad fire years.

Federal agency staffing issues are not just the result of fire suppression efforts, though. In 2009, the GAO reported that the BLM and USFS experienced delays in land exchanges due to a lack of staff.²⁴⁰ Although the report examined land exchange contracts, staffing constraints likely affected NEPA processing as well.²⁴¹ Officials from both agencies stated that declining budgets affected personnel numbers and prevented replacing lost staff.²⁴² Congress can increase NEPA processing capacity by ensuring consistent agency funding.

Congress should also continue to fund and otherwise support the FAST-41 program. As mentioned above, Congress created this program in 2015 for the purpose of reforming the permitting process.²⁴³ The program covers a wide range of major programs, including renewables and energy transmission and production, and provides a coordinated and streamlined permitting process.²⁴⁴

D. Further Study

As discussed above, federal agencies, CEQ, and Congress have a wide range of actions they can employ to make NEPA analyses more efficient without the need for legislative reform. The discussion also highlights the importance of empirical data when evaluating NEPA and its impact. Over the last decade, the number and scope of empirical NEPA studies have increased significantly, but more data and additional studies are needed—particularly regarding the NEPA process for agencies other than the Forest Service. Researchers should prioritize those agencies that perform NEPA analyses on renewable energy and energy transmission

²³⁶ See U.S. FOREST SERV., THE RISING COST OF WILDFIRE OPERATIONS: EFFECTS ON THE FOREST SERVICE'S NON-FIRE WORK 2, 3 (2015), <https://perma.cc/U557-59YD>.

²³⁷ See *id.* at 3; Fleischman et al., *supra* note 92, at 407, 415.

²³⁸ Fleischman et al., *supra* note 92, at 415.

²³⁹ *Id.*

²⁴⁰ GAO, FEDERAL LAND MANAGEMENT, *supra* note 141, at 15–17.

²⁴¹ Ruple et al., *Evidence-Based Recommendations*, *supra* note 36, at 307–09.

²⁴² GAO, FEDERAL LAND MANAGEMENT, *supra* note 141, at 17.

²⁴³ See *supra* note 206 and accompanying text.

²⁴⁴ *Id.*

projects, since these are the focus of much of the current process-related NEPA criticism.²⁴⁵

Data should also be collected, and studies performed on the monetary cost of NEPA analyses. As the GAO noted in its 2014 report, little information exists on the cost of completing NEPA analyses.²⁴⁶ It would also be helpful to study the impact of FAST-41 on projects that require a full EIS. But agencies themselves must systematically collect NEPA data for further evaluations to be meaningful.

V. CONCLUSION

NEPA, the United States' foundational environmental statute, has fundamentally changed the way the federal government does business by requiring federal agencies to evaluate the environmental consequences of their actions before acting. The statute has come under increasing criticism from those who claim that NEPA causes delay and prevents essential projects, especially those for renewable energy, from moving forward.²⁴⁷ Some critics have even called for legislative reform or repeal of the statute.²⁴⁸

However, a review of the NEPA's history and empirical data reveals that full EISs are uncommon, and federal agencies spend only a limited time performing NEPA analyses. NEPA actions are also rarely litigated and those that are involve more complex projects that could result in environmental harm. Additionally, forces external to the process, which cannot be corrected by statutory or regulatory reform, are often the cause of delays in NEPA review.

Finally, NEPA review results in better federal decisions that benefit the environment. Therefore, the statute is accomplishing the goals and objectives Congress had intended when it enacted NEPA over fifty years ago.

Instead of repealing or legislatively reforming NEPA, there are several changes that federal agencies, CEQ, and Congress can make to streamline the NEPA process, making review more efficient and effective. Agencies need to implement programmatic EISs and tiering to reduce environmental assessment redundancy. They can also standardize NEPA assessments and dedicate staff to improve consistency and efficiency. Agencies must also take advantage of the FAST-41 program, which provides an expedited and streamlined process for budgeted projects. CEQ must play a strong role in improving the process as well, requiring federal agencies to maintain data on NEPA actions and utilize that resource to develop best practices. CEQ must also exert its statutory

²⁴⁵ Lee Harris & Julia Rock, *Permitting Reform is a Decoy for Ramping Up Gas*, AM. PROSPECT (Sept. 21, 2022), <https://perma.cc/M4PF-CSWG>.

²⁴⁶ GAO, LITTLE INFORMATION EXISTS ON NEPA, *supra* note 36, at 11.

²⁴⁷ Harris & Rock, *supra* note 245.

²⁴⁸ See BUS. ROUNDTABLE, *supra* note 33; see also Potter et al., *supra* note 34; Klein, *supra* note 5.

authority to review federal agency programs and do more to assist agencies in streamlining their processes. Lastly, Congress can also assist by fully funding federal agency NEPA efforts and supporting the FAST-41 program.

NEPA continues to perform well and provide important environmental protections. Agency and CEQ reforms could strengthen its effectiveness, while allowing the statute to continue to fulfill its central role of safeguarding the environment. Weakening or repealing NEPA would likely be an action we as a nation would later come to regret.