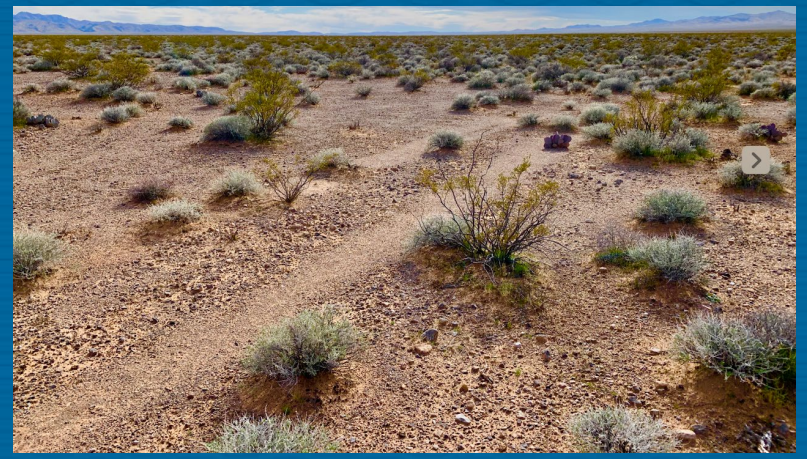
National Trust *for* Historic Preservation



# Defending the National Historic Preservation Act and Section 106

Presented by the Government Relations and Law Divisions

**NOVEMBER 19, 2025 | 12:00 – 1:00 PM ET**

# Today's Agenda

- OVERVIEW
- OBSERVATIONS AND RECOMMENDATIONS
- RECENT COURT DECISIONS AND POLICY CHANGES
- WHAT'S NEXT? PERMITTING REFORM AND CONGRESS
- QUESTION & ANSWER

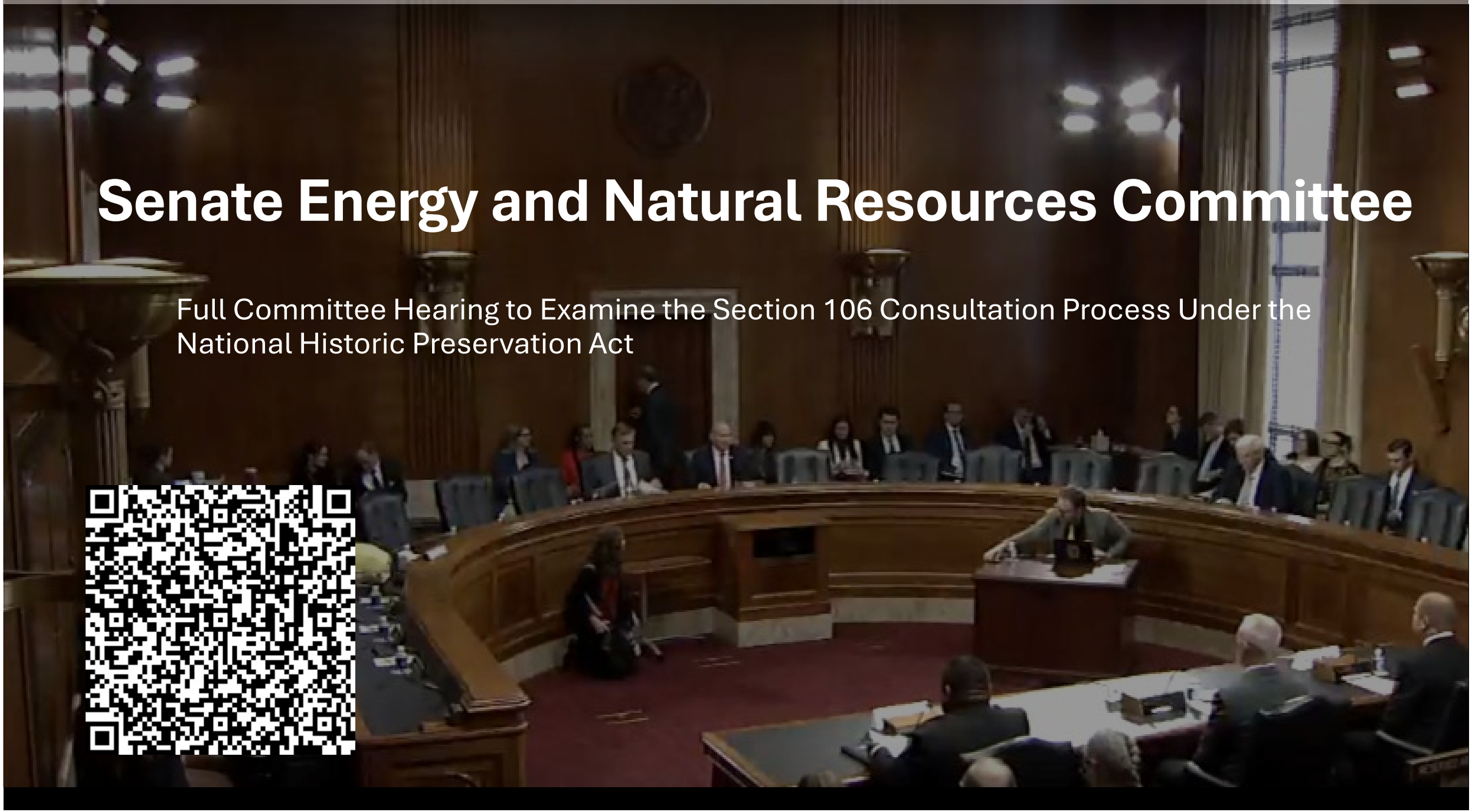
# Origins

The West End, before and after urban renewal c. 1960. Otis House is circled in red.

**An outcome of the urban renewal era, the National Historic Preservation Act sought to balance progress with preservation.**

# Senate Energy and Natural Resources Committee

Full Committee Hearing to Examine the Section 106 Consultation Process Under the National Historic Preservation Act



# Mr. Andy McDonald
# Montana-Dakota Utilities Co.

“Our issue is not with the intent of Section 106 or the federal employees' efforts to interpret and implement it, but rather the absence of clear, predictable boundaries around what constitutes the relevant APE and what effects must be considered.”

# Dr. Chris Merritt
# Utah, SHPO

The Process is Working:

- Of the roughly **1,500** Section 106 reviews conducted by the Utah SHPO each year, on average only **3.2%** (34) result in an adverse effect determination.
- For 2024-2025, **98%** of all reviews take **7 days** or less.

Digital Data and Workflows in Utah

- Efficiencies created through Investment in GIS spatial database
- Fully digital workflow since 2017 - **$350k** in savings per year.

# Mr. Steven Concho
# Pueblo of Acoma, THPO

**“When consultation begins early and is adequately resourced, it consistently produces better fieldwork, more thoughtful design, fewer conflicts, and decisions that honor tribal sovereignty and the federal trust responsibility while advancing responsible development.”**

- **Hundreds of Section 106 Reviews each year across New Mexico, Colorado, Arizona, and Utah**
- **Annual federal funding of approximately $100k**

SENATE COMMITTEE ON
# ENERGY & NATURAL RESOURCES

**Chairman Mike Lee (R-UT)**

"*Section 106 has a consultation process that has become more like a maze without a map*."

**Ranking Member Martin Heinrich (D-NM)**

"We should always look for ways to make processes, like Section 106 consultation, more efficient and more effective."

**Sen. Catherine Cortez Masto (D-NV)**

"*I think there are opportunities to streamline and it makes sense*."

**Sen. Jim Justice (R-WV)**

"*Please let's quit denying we don't have a problem*!"

# Section 106 Works!

- There are around 120,000 Section 106 consultations per year.
- Over **98%** of Section 106 consultations result in findings of No Adverse Effect.
- All available data from SHPOs shows that reviews are typically conducted in a timely manner, often faster than required by law.
- **Administrative tools already exist that can solve virtually any challenge related to Section 106…**

*Market Street, Charleston, SC*

*Clara Barton National Historic Site, Glen Echo, MD*

# Program Alternatives

**36 CFR § 800.14**

- **Exemptions**
- **Standard Treatment**
- **Alternate Procedures**
- **Programmatic Agreements**
- **Program Comments**

- **https://www.achp.gov/program_alternatives**

# Exemptions

## 36 CFR § 800.14(c)

- A federal agency may seek an exemption from Section 106 review for a specific category of undertakings. The ACHP may also propose an exemption on its own initiative. Exempted actions must have effects that are both foreseeable and likely to be minimal or non-adverse. Exempted categories must also be consistent with the purposes of the NHPA.

*Gerstle River Bridge, AK*

- *Interstate Highway System Exemption (2005)*
- *Natural Gas Pipelines Exemption (2002)*
- *Electric Vehicle Supply Equipment (EVSE) Exemption (2022)*
- *GSA Routine Operations and Maintenance Exemption (2023)*
- *Exemption for Indigenous-Knowledge-Informed Activities by Native Hawaiian Organizations (2024)*

# Standard Treatment

- **36 CFR § 800.14(d)**
- Standard Treatments are a program alternative that allows the ACHP to establish standardized practices for dealing with certain categories of undertakings, effects, historic properties, or treatment options. Standard treatments do not replace the regular review process but can expedite reviews when included in memoranda of agreement or programmatic agreements as mitigation measures or used to support no adverse effect findings in regular reviews.
- There are no current Standard Treatments, but the Veterans Administration is currently developing one with the ACHP for National Cemeteries.

*Fort Rosecrans, CA*

# Alternate Procedures

- **36 CFR § 800.14(a)**
- Alternate procedures are a program alternative that allows federal agencies to streamline the Section 106 process by tailoring the process to the agency's programs and decision-making process. Procedures, approved by the ACHP and adopted by the agency, substitute in whole or in part for the ACHP's Section 106 regulations under Subpart B.

- The only current Alternate Procedure applies to the Army (2001).

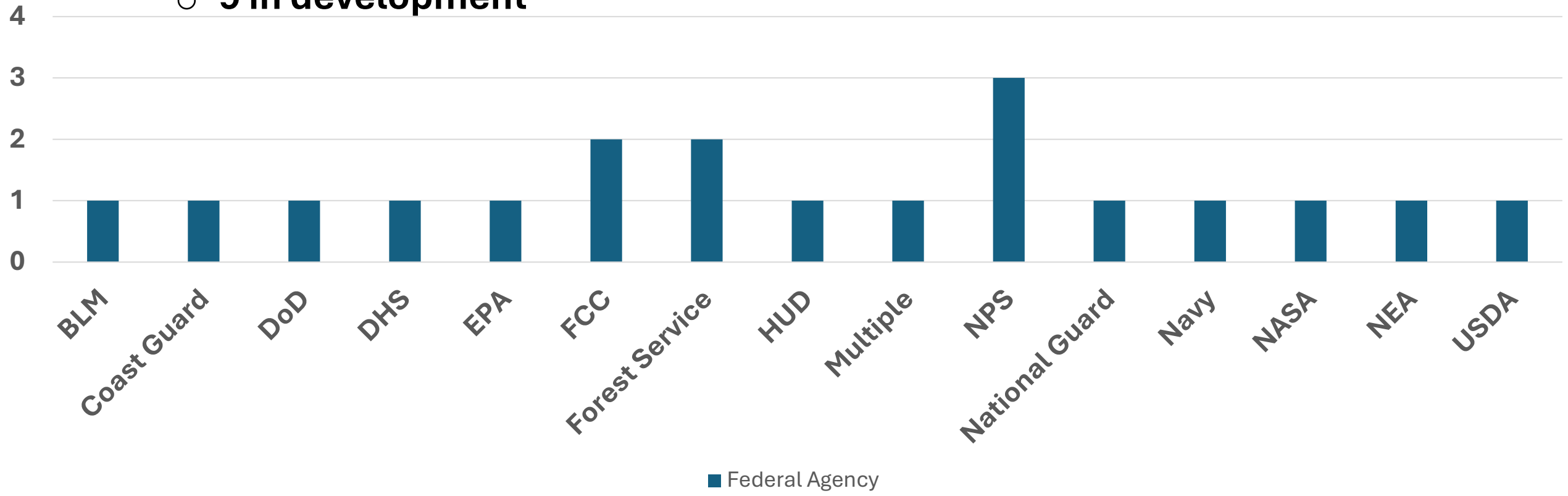
# Programmatic Agreements

- **36 CFR § 800.14(b)**
- Programmatic agreements are the *most commonly used* program alternative. They allow federal agencies to govern the implementation of a particular agency program or the resolution of adverse effects from complex projects or multiple undertakings similar in nature through negotiation of an agreement between the agency, appropriate SHPO(s) /THPO(s), and the ACHP. In certain circumstances, the ACHP may also designate a specific agency agreement as a ***Prototype Agreement*** that can then serve as a template for the same type of program or undertaking in more than one program or area.

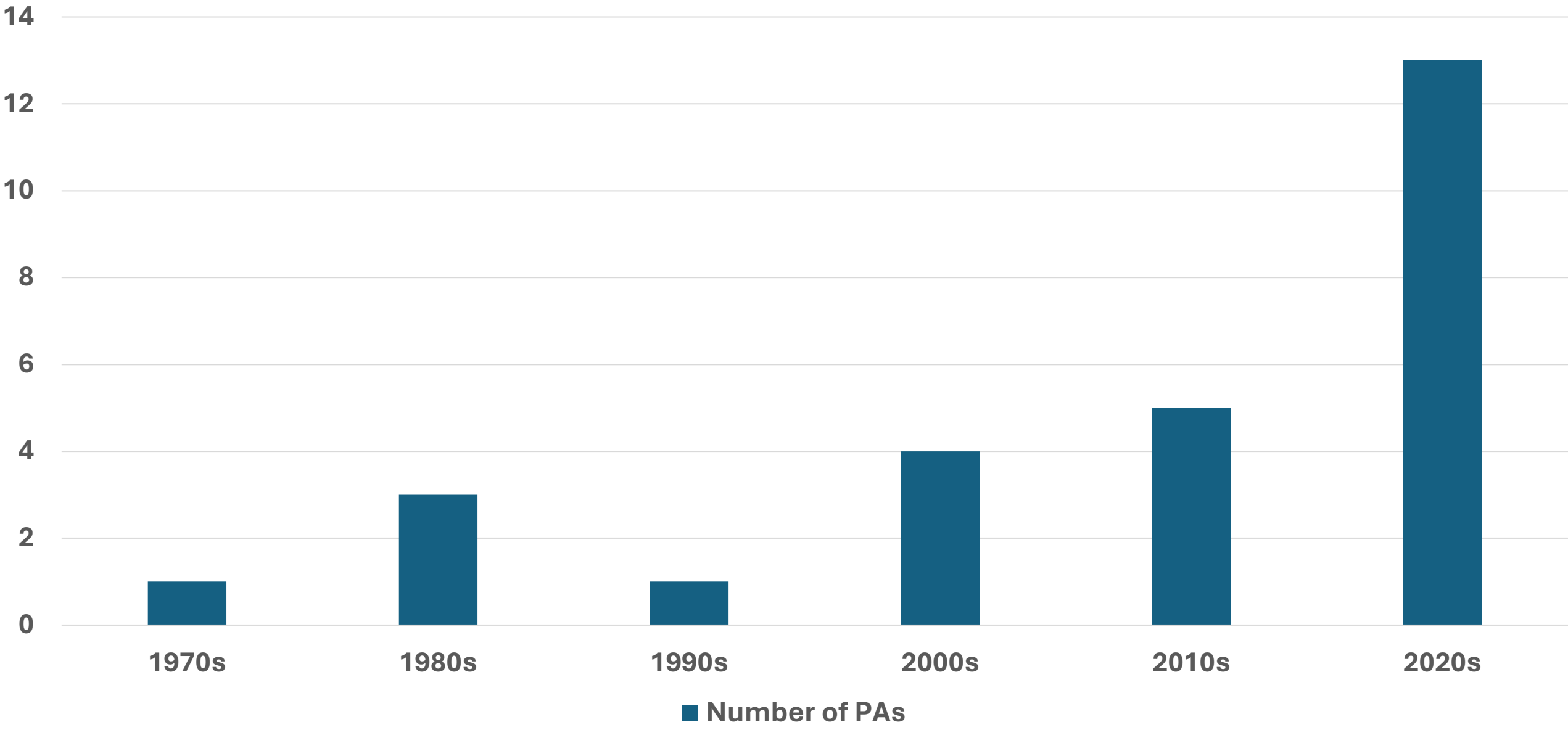
*April 12, 1981: Launch of the First Shuttle Mission - NASA*

# Programmatic Agreements

- State vs. Prototype vs. Nationwide
- Nationwide PAs
  - 19 currently
  - 9 in development



# Nationwide PAs By Decade (Including  PAs Currently in Development)



# Program Comments

- **36 CFR § 800.14(e)**
- Program Comments allows a federal agency to request the ACHP comment on a category of undertakings in lieu of commenting on a case-by-case basis. The ACHP may also propose a Program Comment on its own initiative. Program Comments historically focused on streamlining compliance for repetitive management actions on large numbers of similar historic properties and for agency actions that generate large numbers of similar undertakings.
- Program Comments today are also being used as vehicles for policy goals and to achieve cost-savings for federal agencies.

*5G Cell Towers, Phoenix and New York City*

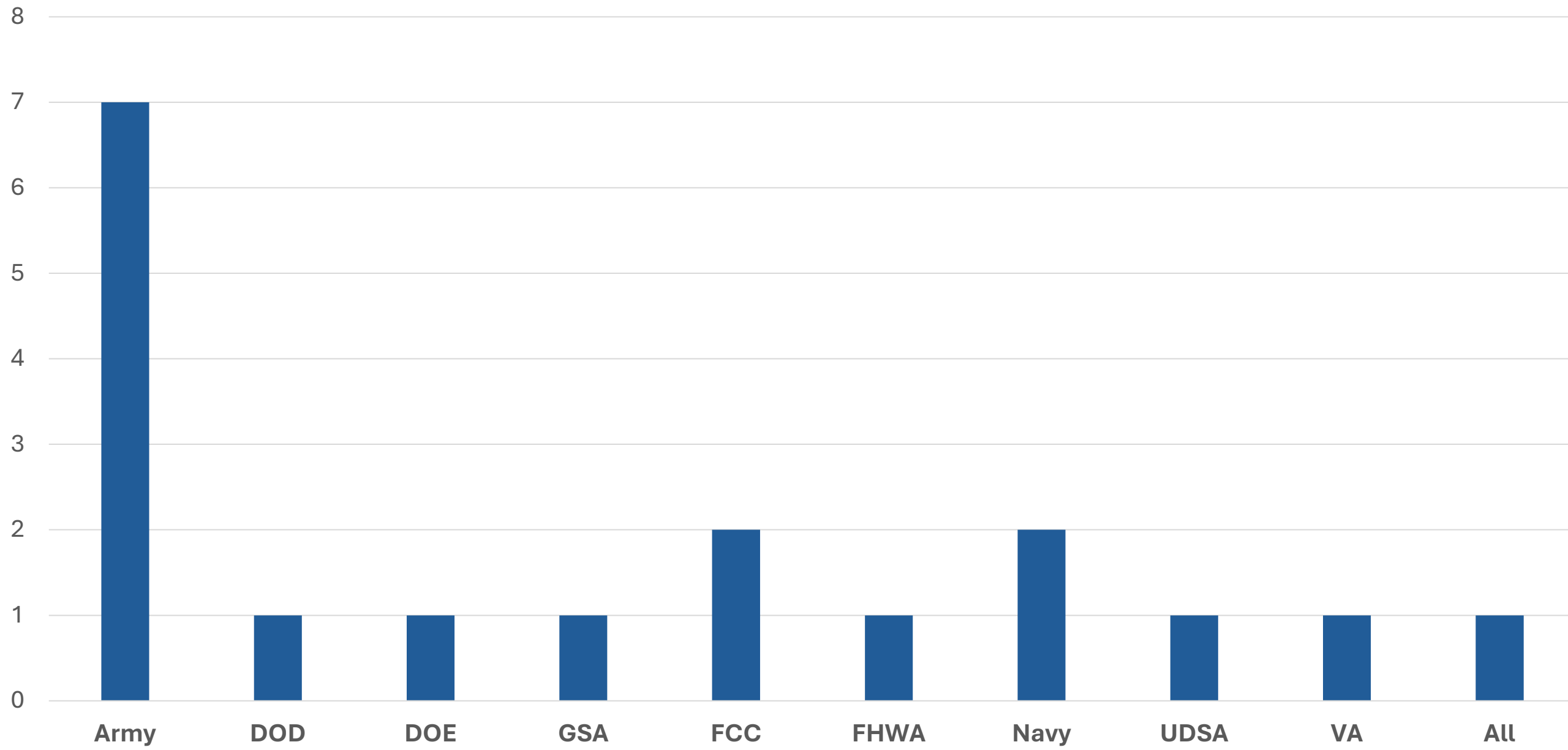
# Existing Program Comments

- Army Capehart Wherry Military Housing (2002)
- Navy & Air Force Capehart-Wherry Military Housing (2004)
- Extension of Programmatic Agreements Based on DOE's Prototype (2005)
- Army WWII and Cold War Ammunition Storage Facilities (2006)
- Army Cold War Era Unaccompanied Personnel Housing (2006)
- Army Ammunition Production Facilities and Plants (2006)
- Disposal of Navy Vessels (2010)
- FHWA Projects Affecting Post-1945 Bridges (2012)
- FCC Positive Train Control (2014)
- GSA Select Repairs and Upgrades (2018)
- USDOT Effects to Rail Properties Within Rail Rights-of-Way (2018)
- VA Program Comment for Vacant and Underutilized Properties (2018)
- FCC Wireless Communication Facilities (2020)
- Army Program Comment for Inter-War Era Historic Housing (1919–1940) (2020)
- Army Program Comment for Vietnam War Era Housing (1963-1975) (2023)
- Army Program Comment for Pre-1919 Historic Army Housing (2024)
- Federal Communications Projects (2024)
- Accessible, Climate-Resilient, Connected Communities

***18 Total Program Comments***

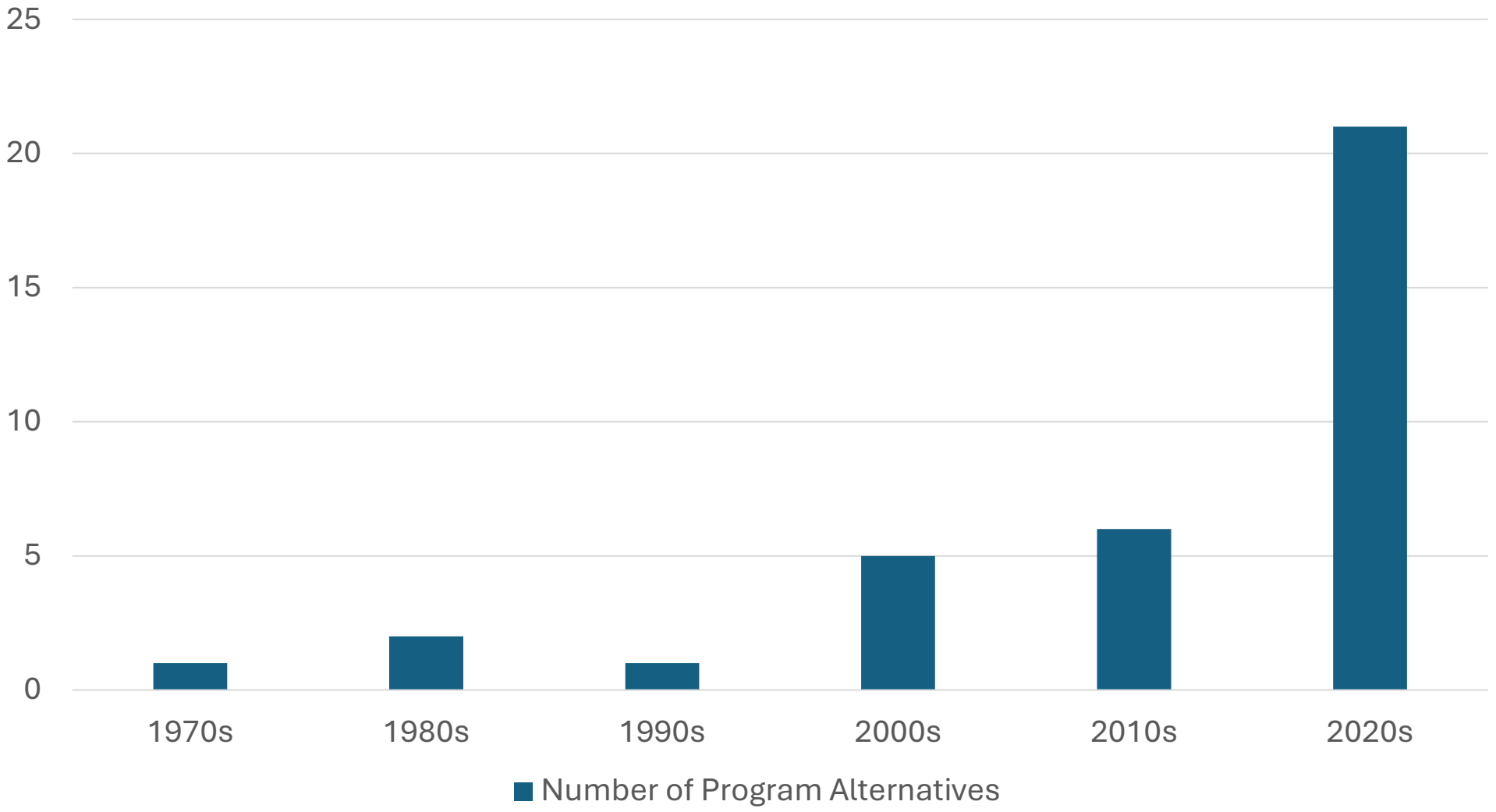
***2 Currently in Development***

# Program Comments by Agency



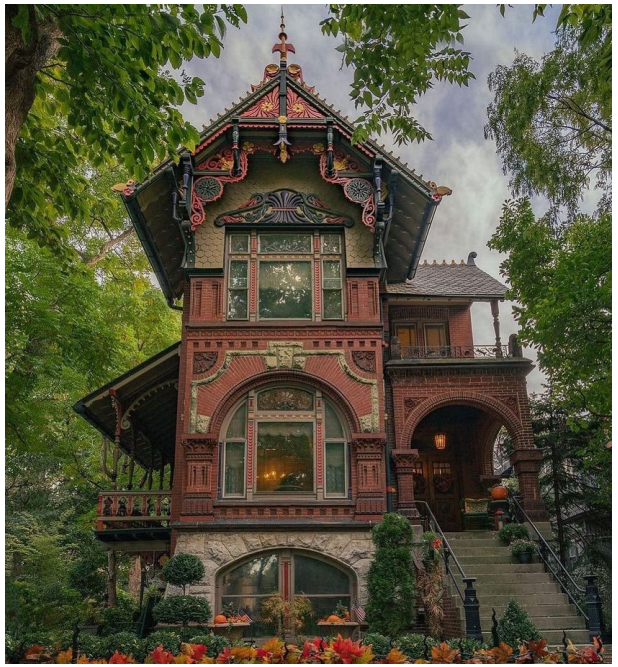
# Program Alternatives by Decade (Including in Development)

**1970s: 1**
**1980s: 2**
**1990s: 1**
**2000s: 5**
**2010s: 6**
**2020s: 21**



# So, What's The Problem?

- Capacity constraints for SHPOs, THPOs, and the ACHP due to limited staff and resources.
- Lack of Federal Agency staff, resources, and expertise.
- Late initiation of consultation, when agencies treat Section 106 as an end-step rather than early planning.
- Technology and data gaps, including non-digitized or inaccessible historic property records.
- Complex, multi-jurisdictional projects that cross agency or state lines without clear coordination, which leads to inconsistent implementation among federal agencies.



*Hermann Weinhardt House, Chicago, IL*

*Evergreen Plantation, Wallace, LA*

# So, What's The Problem?

- Inconsistent APE and identification actions, sometimes due to federal agency policies
- Unpredictable mitigation requirements, as opposed to more easily quantifiable environmental mitigation options.
- Submittal requirements and expectations differ in every state, with some SHPOs requiring more or different information than others.
- Unrealistic applicants who deny the significance of historic resources and/or take an adversarial approach to the Section 106 process.
- Misconceptions about Section 106, including that it's an environmental review or the same as NEPA

*Consumers Building, Chicago, IL*

*Ames Monument, Laramie, WY*

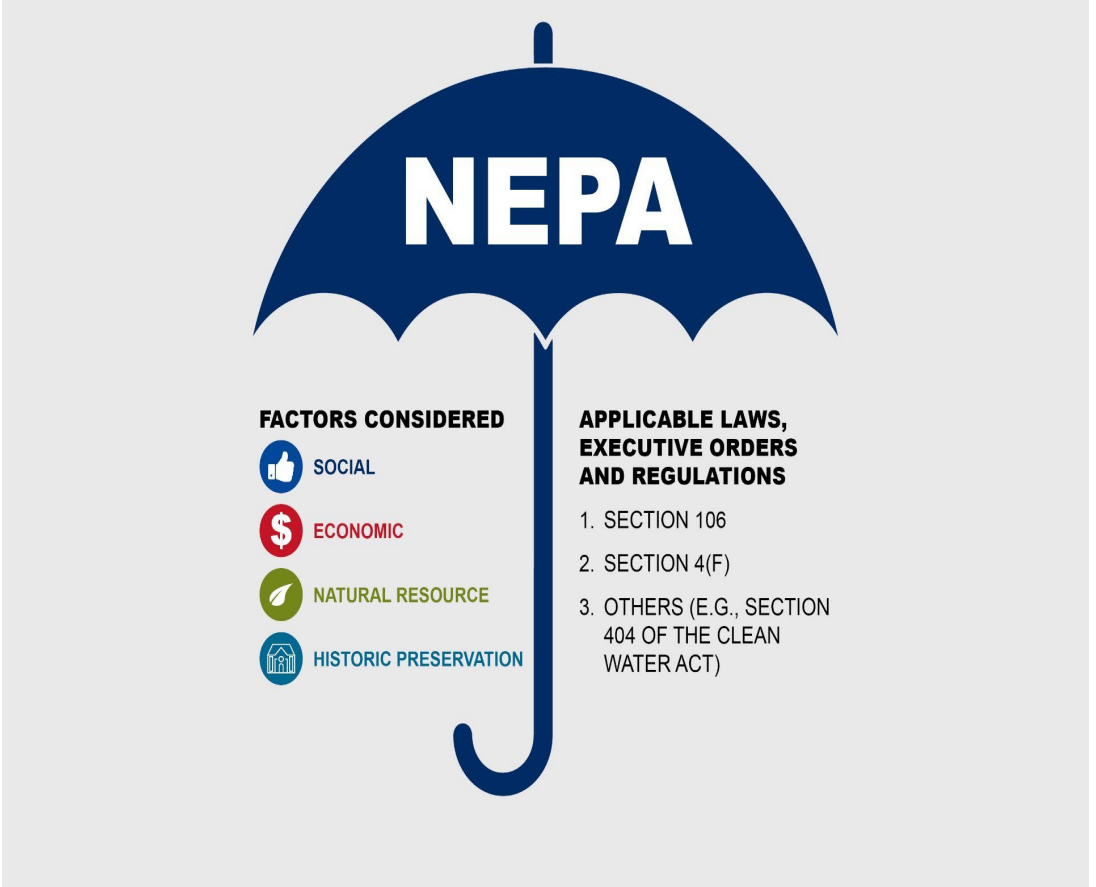
# NEPA vs. Section 106

**NEPA**

- Applies to "major federal actions"
- Broad consideration of many factors
- NEPA documents include Environmental Assessments, Environmental Impact Statements, and Records of Decision
- EIS is required for actions "significantly affecting the quality of the human environment"

**SECTION 106**

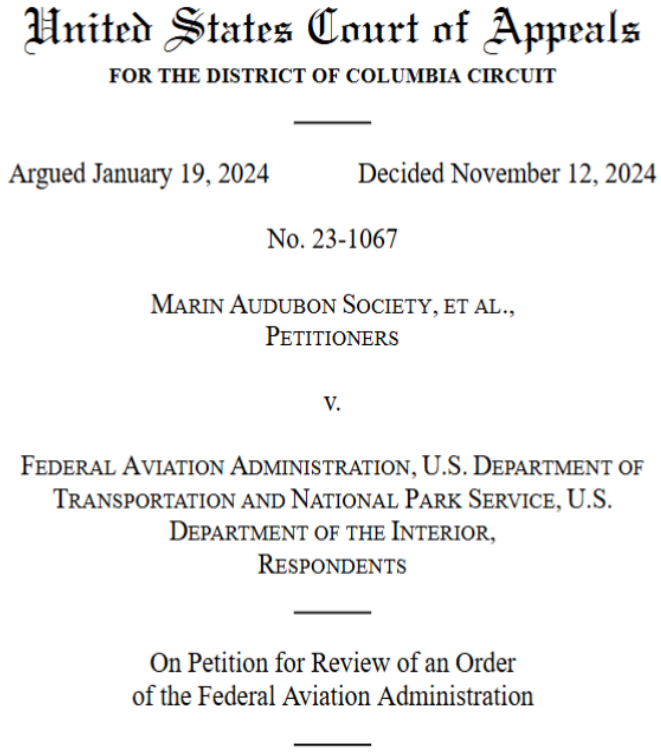
- Applies to all "undertakings," including non-federal undertakings with federal funding, permits, or approval, not just "major federal actions"
- Only considers impacts to cultural resources
- Assessment of cumulative effects is explicitly required
- Must be completed "prior to" the agency's final decision. NEPA review must be informed by the outcome of Section 106



# Recent Changes to NEPA

***Marin Audubon Society v. Federal Aviation Administration***, 121 F.4th 902 (D.C. Cir. 2024)

- Court ruled that CEQ did not have the authority to create NEPA regulations and that their existing regulations were void.
- CEQ revoked its NEPA regulations on April 11, 2025.
- All federal agencies previously used CEQ's regulations for their NEPA compliance. Now every federal agency is promulgating new, agency-specific NEPA regulations.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 19, 2024 Decided November 12, 2024

No. 23-1067

MARIN AUDUBON SOCIETY, ET AL.,
PETITIONERS

v.

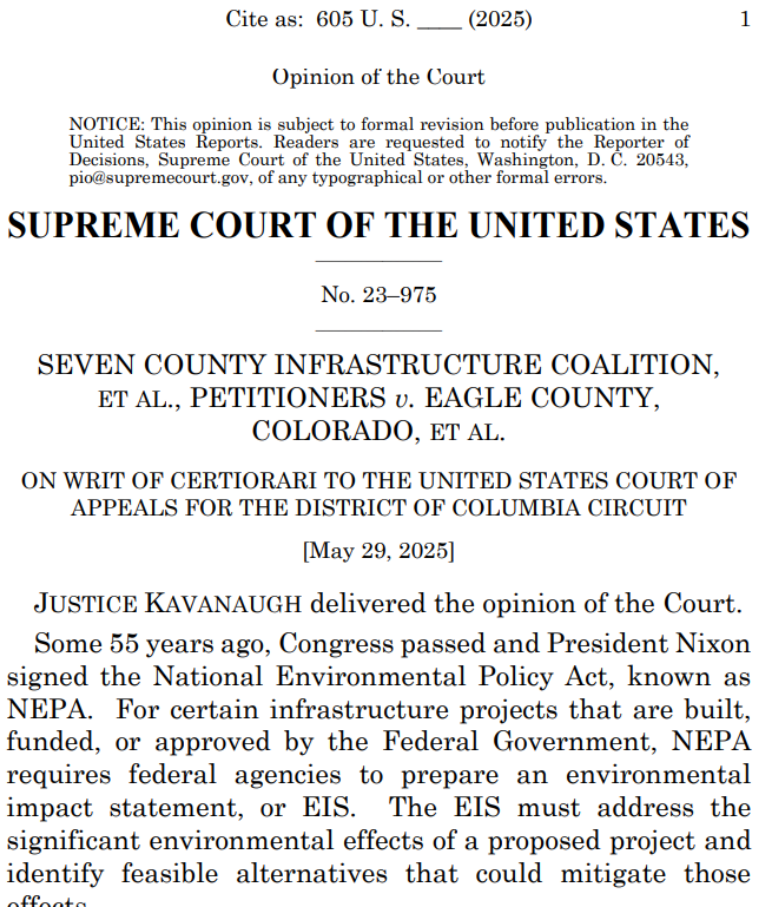
FEDERAL AVIATION ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION AND NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR,
RESPONDENTS

On Petition for Review of an Order
of the Federal Aviation Administration

# Recent Changes to NEPA

***Seven County Infrastructure Coalition v. Eagle County,*** 605 U.S. ____(May 29, 2025)

- Requires Courts to give "substantial deference" to agency decisions regarding the scope of an EIS.
- Flaws or omissions in an EIS do not require its vacation unless the errors would have affected the agency's decision.
- Limits analysis to effects caused by the project itself, ending the consideration of cumulative effects.



Cite as: 605 U. S. ____ (2025) 1

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 23–975

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL., PETITIONERS *v.* EAGLE COUNTY, COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May 29, 2025]

JUSTICE KAVANAUGH delivered the opinion of the Court.

Some 55 years ago, Congress passed and President Nixon signed the National Environmental Policy Act, known as NEPA. For certain infrastructure projects that are built, funded, or approved by the Federal Government, NEPA requires federal agencies to prepare an environmental impact statement, or EIS. The EIS must address the significant environmental effects of a proposed project and identify feasible alternatives that could mitigate those effects.

# Permitting Reform in Congress

- **Sustained interest in permitting reform**
  - 118th Congress (and over 20 pieces of legislation)
  - President Trump's Executive Orders
  - House and Senate Committee activity
- **Areas of examination**
  - NEPA and NHPA
  - Themes raised by Members of Congress
- **Legislative activity**
  - Forecast for legislative activity
  - **TOMORROW**: House Natural Resources Committee markup:
    - SPEED Act (H.R. 4776)
    - Other legislation

# Permitting Reform in Congress

**“The shutdown has given us a lot of time to review the legislation, to work with other members”**
House Natural Resources Committee Chair Bruce Westerman (R-AR)

- **Forecast heading into 2026**
  - Momentum sustained through government shutdown
  - Multiple variables before final bill passage
- **Reaffirming the public value of preservation**
  - History of NHPA/Section 106 and their importance
  - America 250 and historic preservation
    - “250 in 250”: $250 million for the Historic Preservation Fund for America 250
    - $25 million for survey and digitization
- **We need your engagement and participation!**

# Question & Answer

# Resources

- Review the National Trust's Commentary and Testimony
- Familiarize yourself with the ACHP's Section 106 Guidance
- Use our Advocacy Toolkit and Checklists

# Thank You!

**Please reach out with additional questions or to continue the conversation at policy@savingplaces.org or forum@savingplaces.org**

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Get Involved with our Action Center