

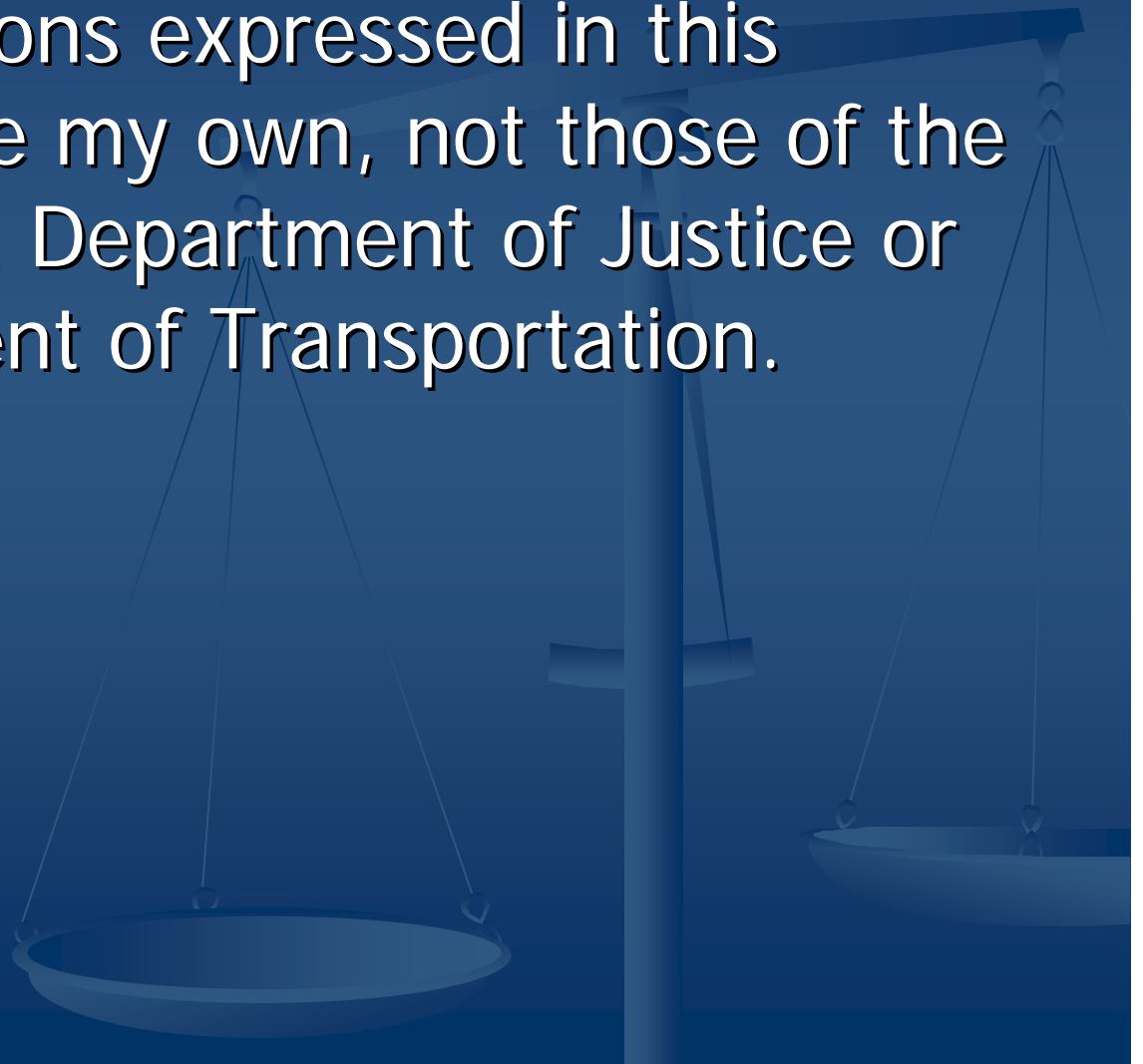


# How to Lose Your NEPA Lawsuit in Three Steps or Less

Lisa C. Glover  
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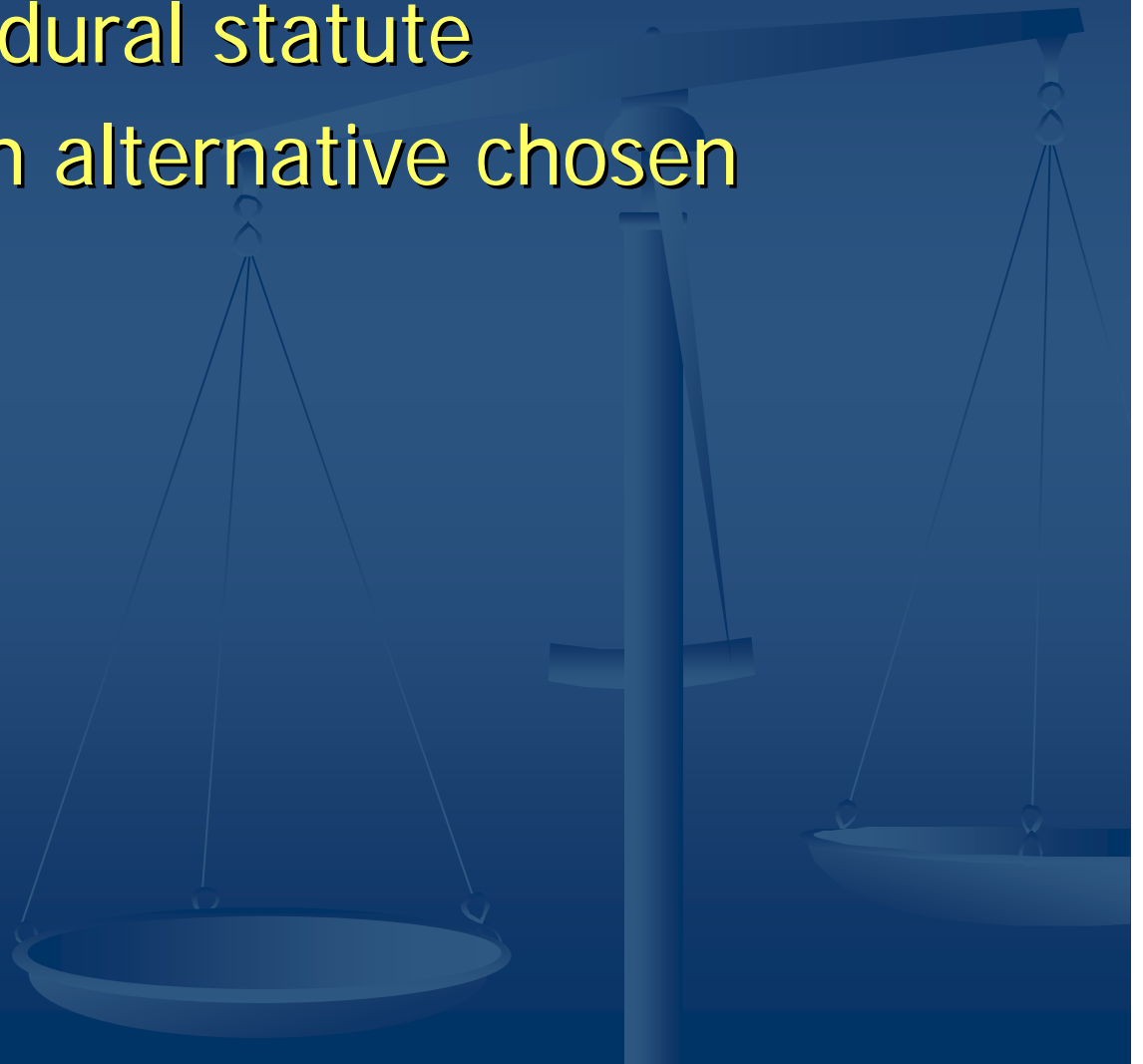
# The Fine Print

The opinions expressed in this presentation are my own, not those of the North Carolina Department of Justice or Department of Transportation.

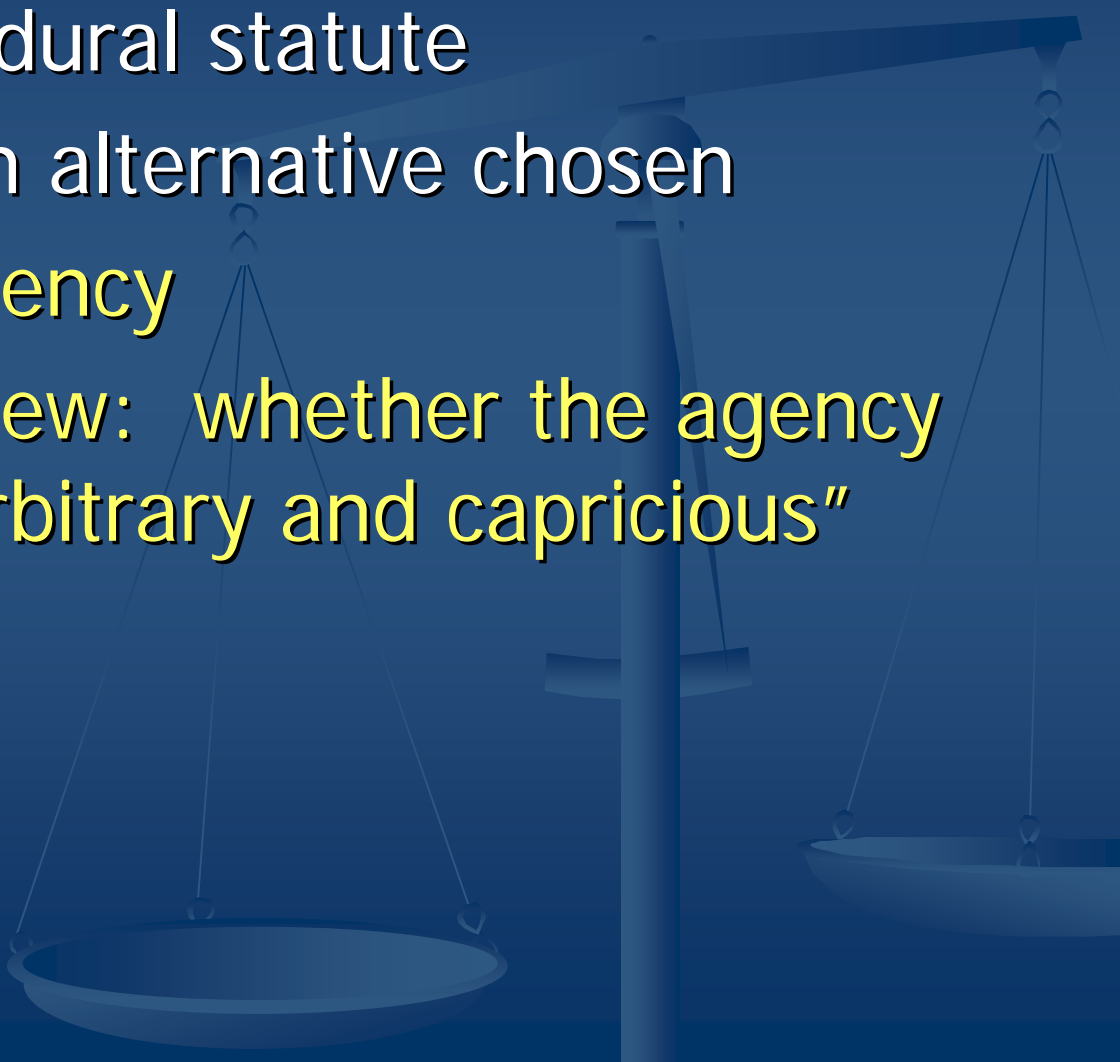


# NEPA Basics

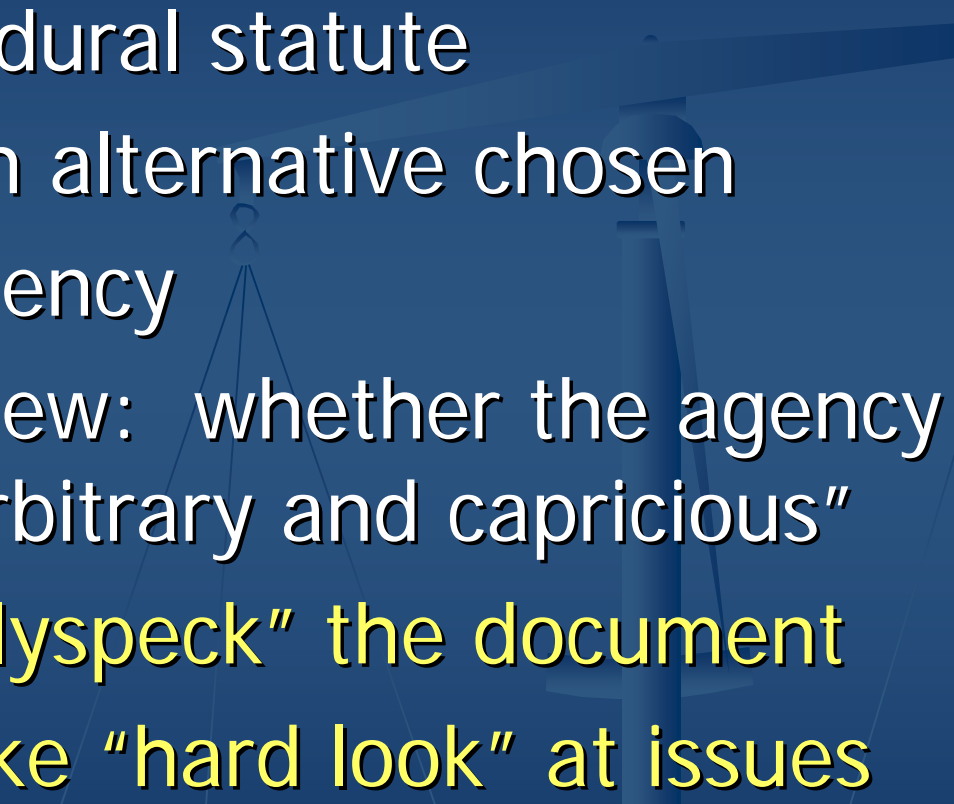
- NEPA is a procedural statute
- No restriction on alternative chosen



# NEPA Basics

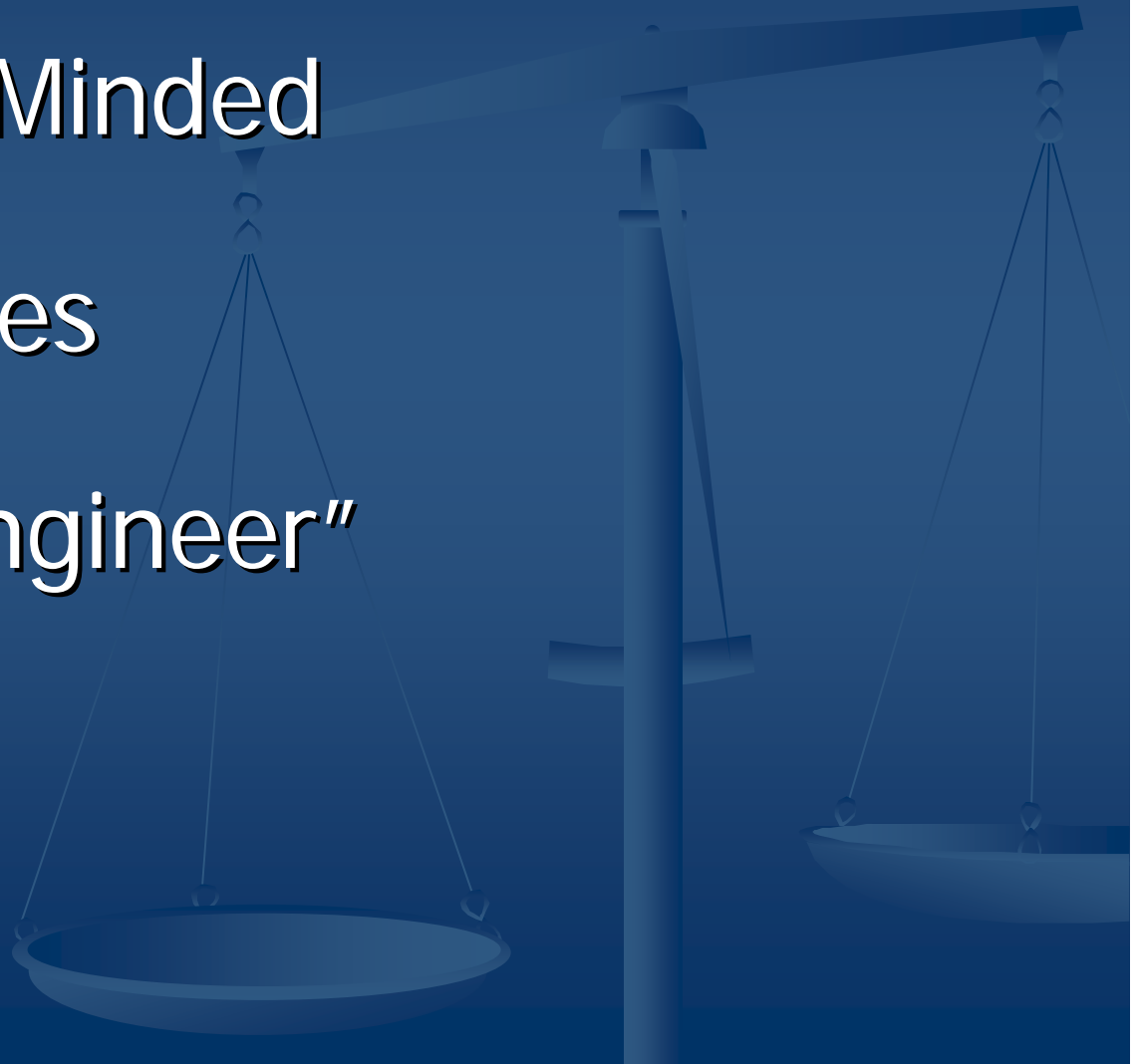
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  - Standard of review: whether the agency decision was “arbitrary and capricious”
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# NEPA Basics

- NEPA is a procedural statute
  - No restriction on alternative chosen
  - Deference to agency
  - Standard of review: whether the agency decision was “arbitrary and capricious”
  - Court will not “flyspeck” the document
  - Agency must take “hard look” at issues
- 

# The Top Three Ways to Lose

1. Be Narrow Minded
2. Ignore Issues
3. "Reverse Engineer"



# 1. Be Narrow Minded

- Project Definition
- Range of Alternatives



# 1. Be Narrow Minded

- Project Definition
  - FHWA requires that project
    - Have logical termini;
    - Have independent utility;
    - Not restrict consideration of alternatives for reasonably foreseeable projects



# 1. Be Narrow Minded



- Project Definition
  - FHWA requires that project
    - Have logical termini;
    - Have independent utility;
    - Not restrict consideration of alternatives for reasonably foreseeable projects
  - CEQ requires that “connected” and “cumulative” actions be examined in one document

# 1. Be Narrow Minded

- Project Definition
- Range of Alternatives



## 2. Ignore Issues

- From agency/public comments



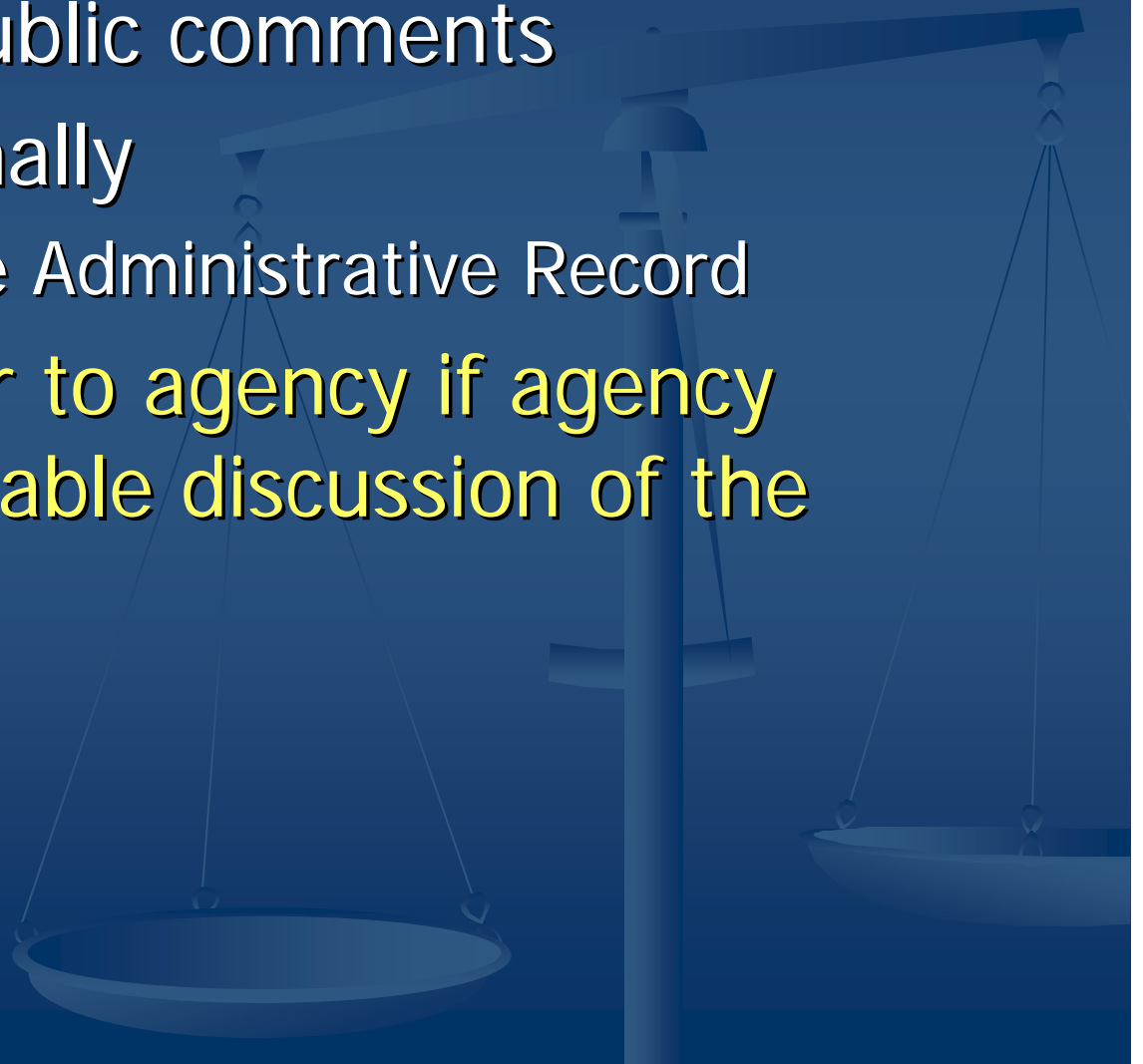
## 2. Ignore Issues

- From agency/public comments
- Identified internally
  - Don't forget the Administrative Record



## 2. Ignore Issues

- From agency/public comments
- Identified internally
  - Don't forget the Administrative Record
- Courts will defer to agency if agency provides reasonable discussion of the issue



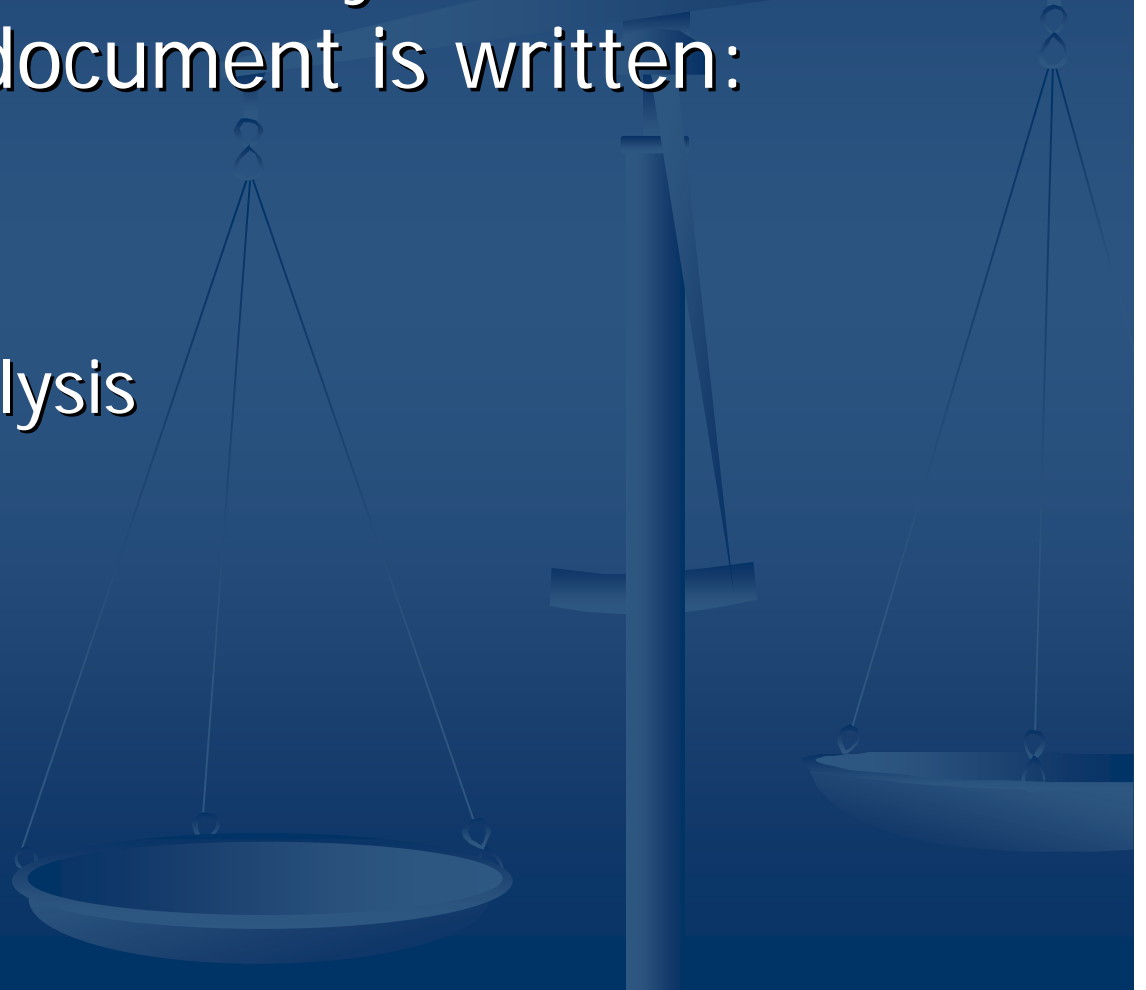
# 3. “Reverse Engineer”



### 3. “Reverse Engineer”

Hard to prove, but usually manifests itself in the way the document is written:

- Inconsistencies
- Sugarcoating
- Incomplete analysis



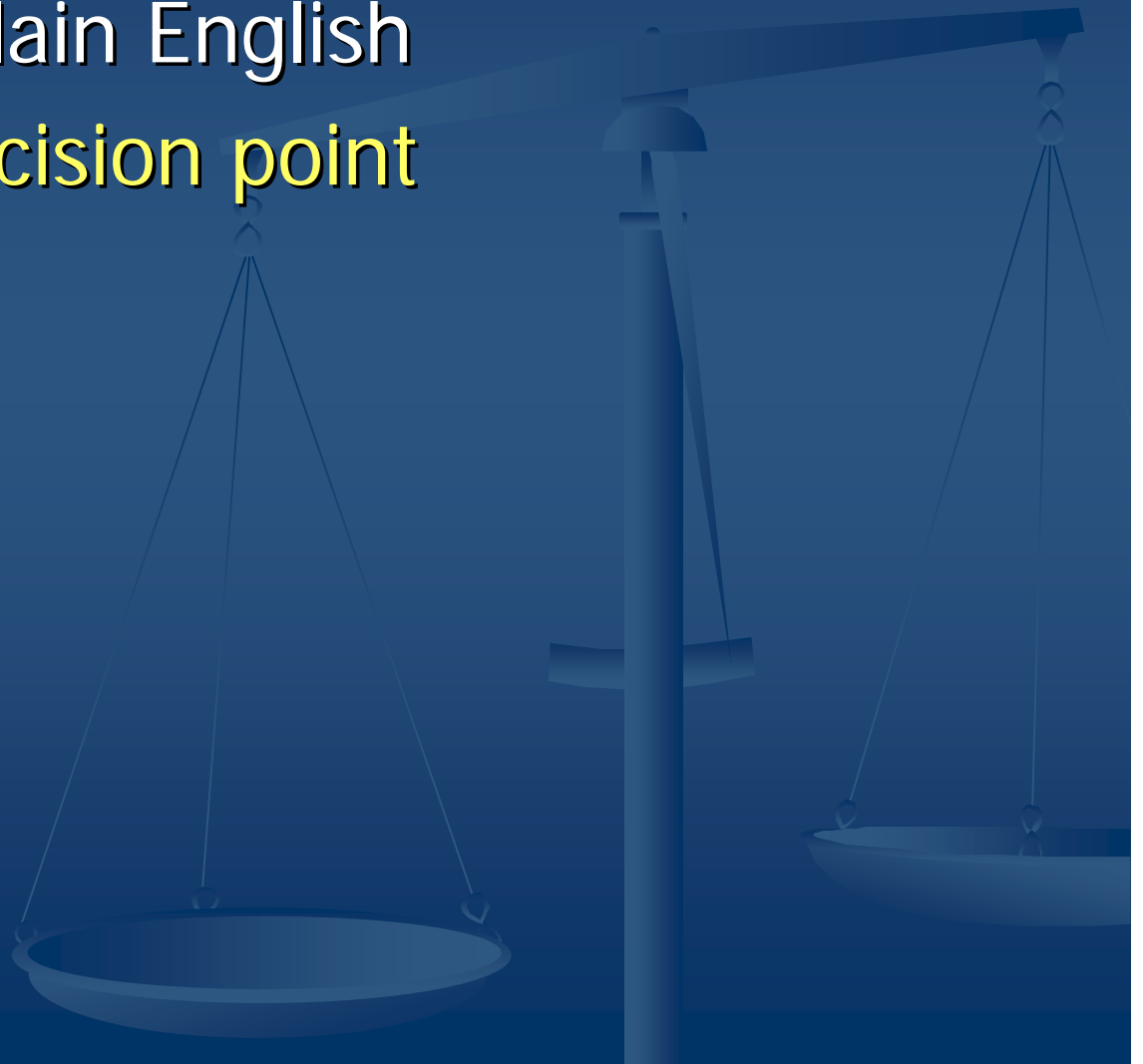
# The Best NEPA Documents:

- Are written in plain English



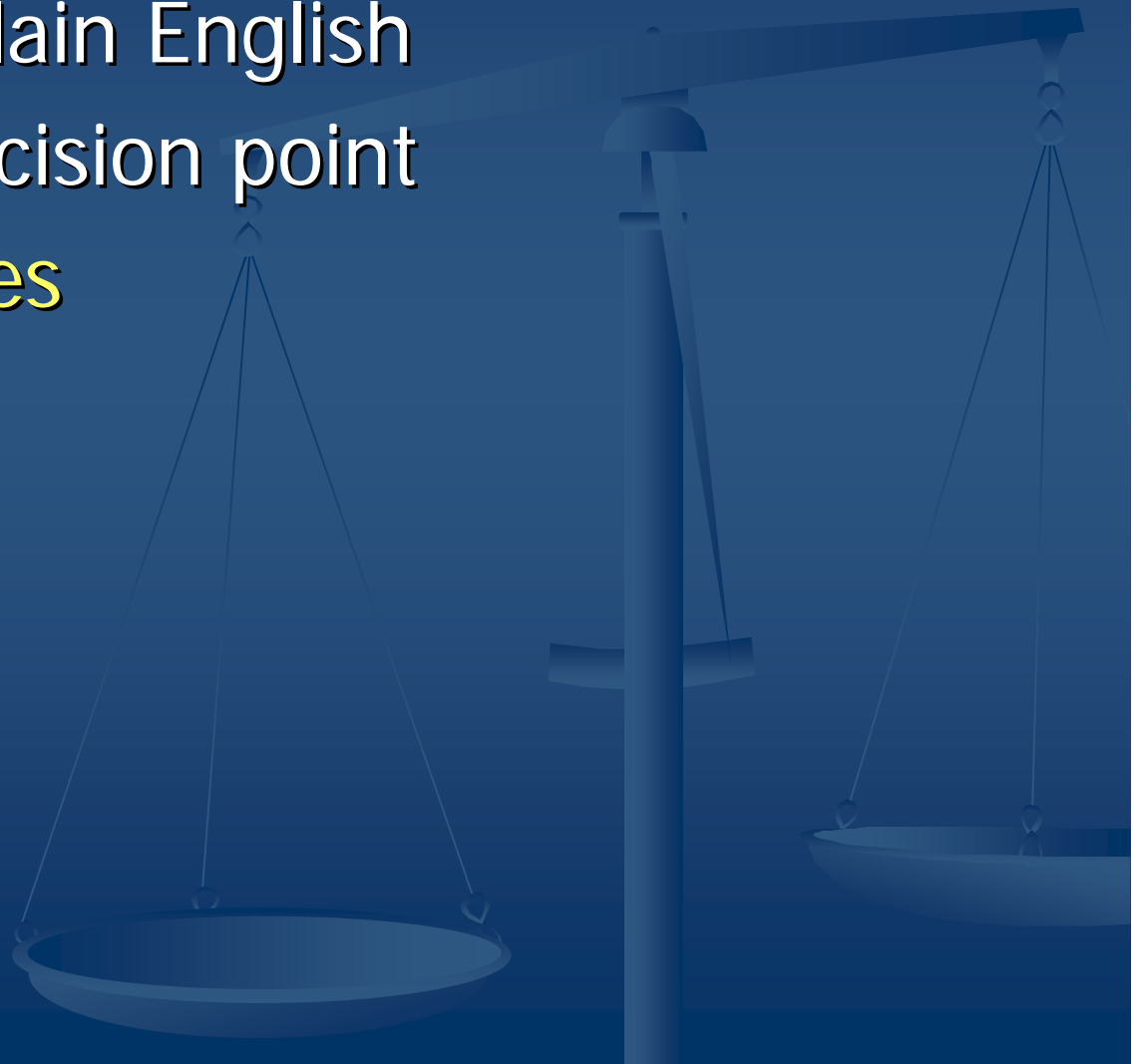
# The Best NEPA Documents:

- Are written in plain English
- Explain each decision point



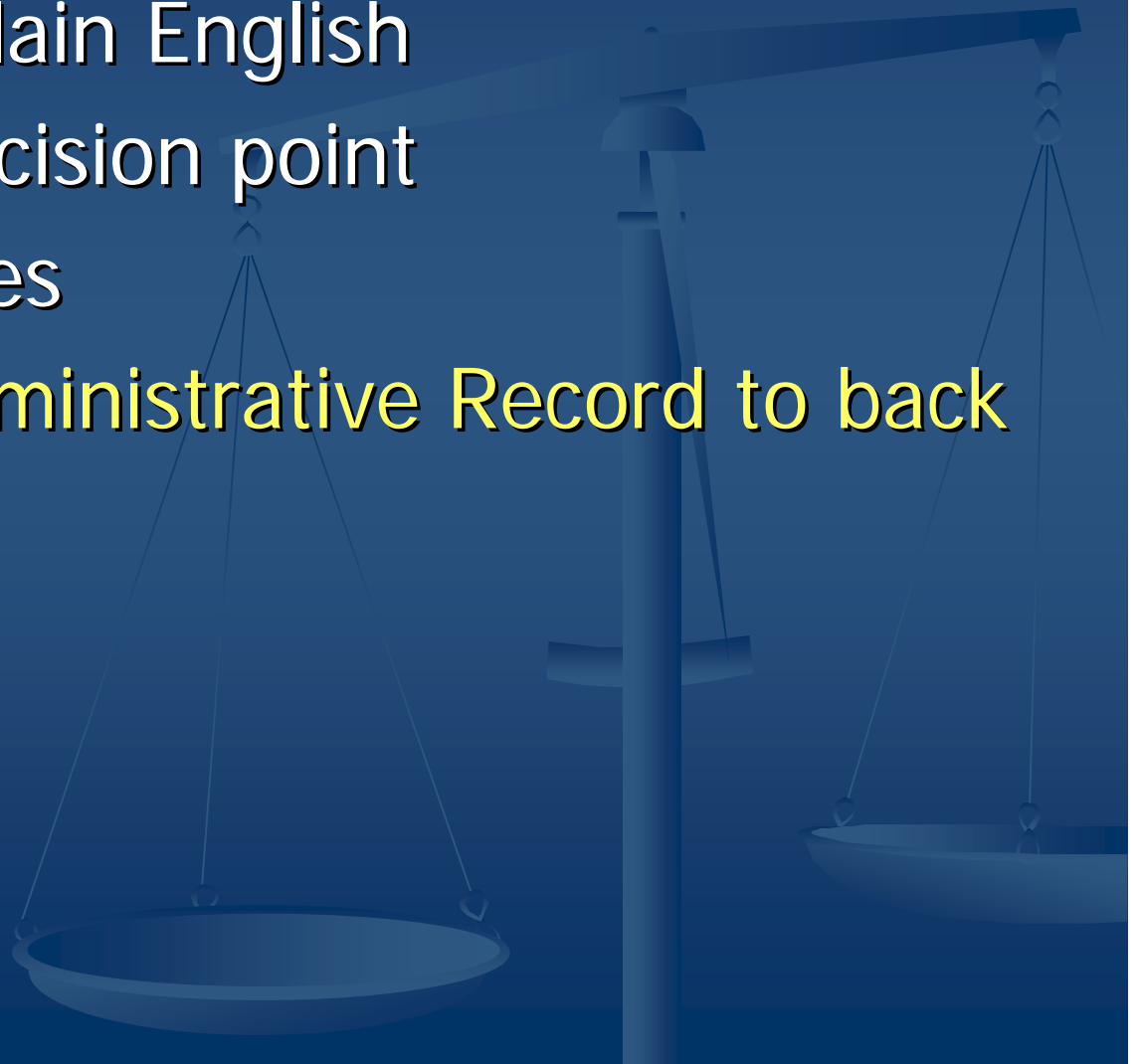
# The Best NEPA Documents:

- Are written in plain English
- Explain each decision point
- **Address all issues**



# The Best NEPA Documents:

- Are written in plain English
- Explain each decision point
- Address all issues
- **Have a solid Administrative Record to back them up**



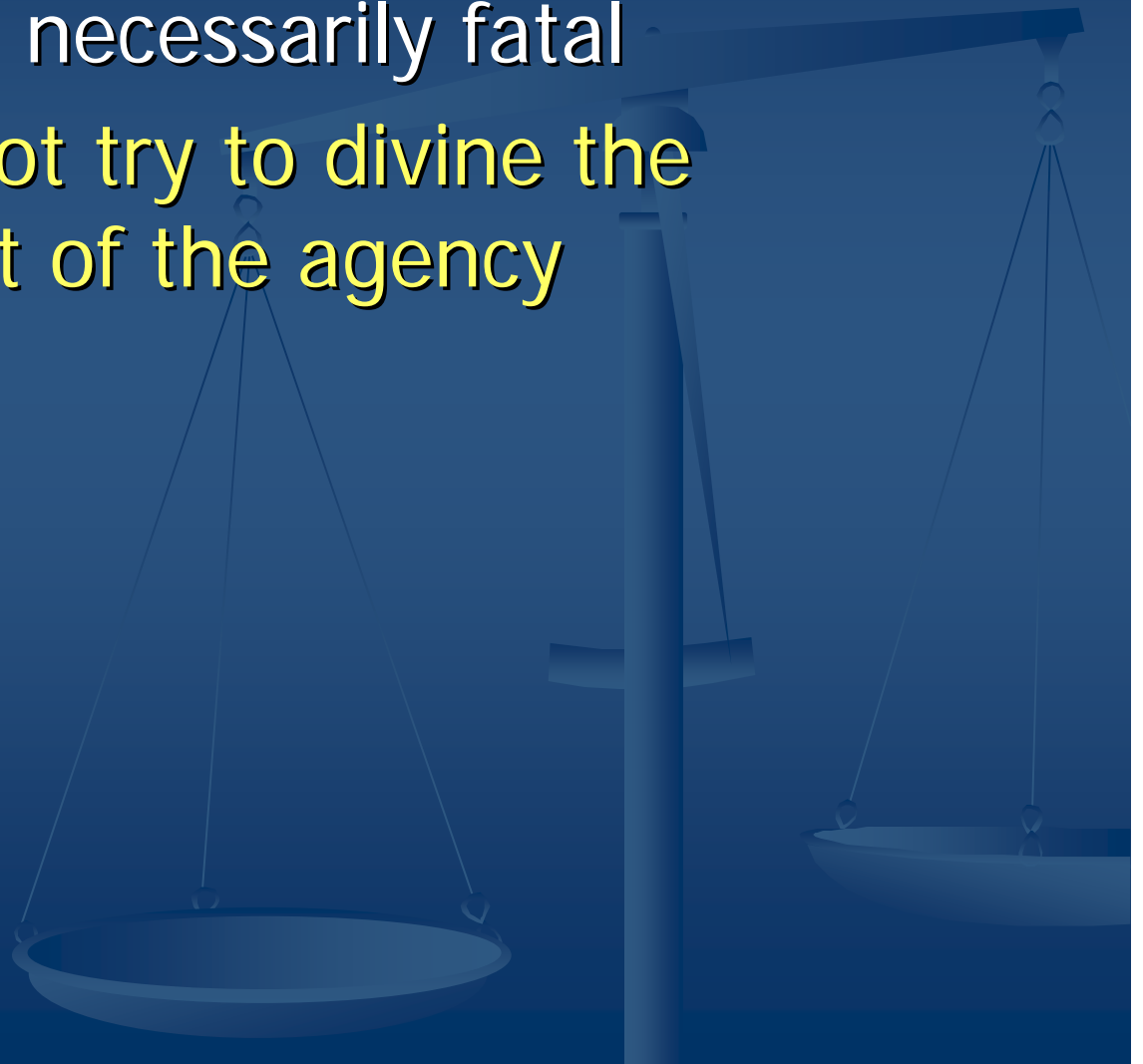
# Good News from the OLF Case

- One error is not necessarily fatal



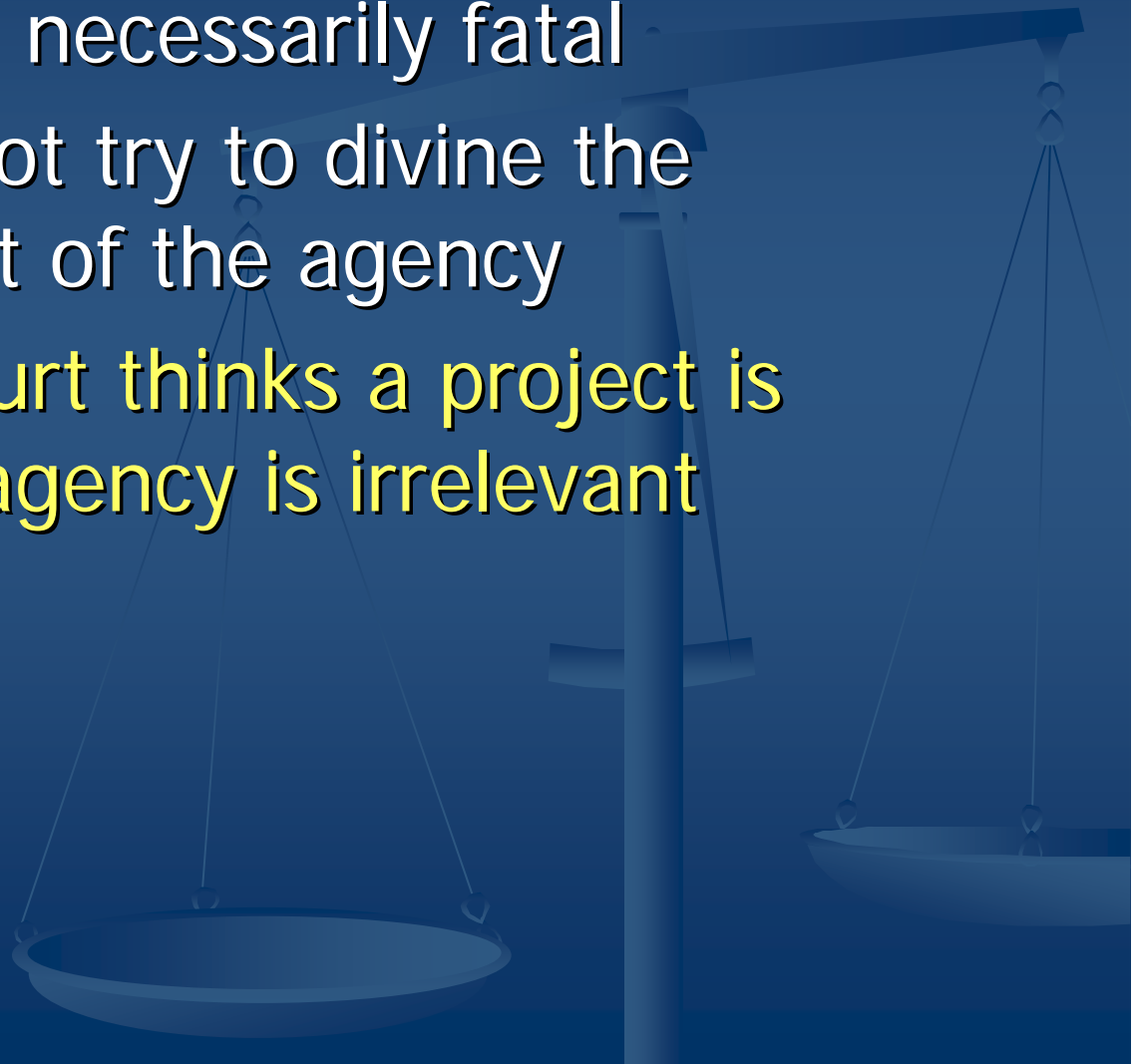
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- Courts should not try to divine the subjective intent of the agency



# Good News from the OLF Case

- One error is not necessarily fatal
- Courts should not try to divine the subjective intent of the agency
- Whether the court thinks a project is needed by the agency is irrelevant



# Questions?

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