Proximate Causation & the No Action Trajectory in Cumulative Effects Analysis

National Land Use Planning Conference

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Opening / Introduction

Origins of Cumulative Effects Analysis under NEPA

Definition of Cumulative Impact

"the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions"

(40 CFR § 1508.7)

Difficulties with Cumulative Impacts

"By now [1989], most federal agencies with much experience in NEPA compliance are reasonably adept at analysis of direct and indirect environmental impacts. Cumulative impacts, however, pose more difficult legal and methodological problems...."

(Dinah Bear, Gen'l Counsel of CEQ)

CEQ Guidance

(*Considering Cumulative Effects*, 1997)

- Three principles of cumulative effects analysis :
  - delineating the cause-and-effect relationships between the multiple actions and the resources … of concern
  - evaluating resource impact zones and the life cycle of effects rather than projects
  - cumulative effects analysis as an integral part of the NEPA process, not a separate effort

Judicial Attempts to Describe Adequate Cumulative Effects

- ***Fritiofson v Alexander*** **(5th Cir. 1985): a meaningful cumulative-effects study must identify:**
  1. the area in which effects of the proposed project will be felt
  2. the impacts that are expected in that area from the proposed project
  3. other actions – past, proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area
  4. the impacts or expected impacts from these other actions; and
  5. the overall impact that can be expected if the individual impacts are allowed to accumulate

Cumulative Effects Analysis is NOT an Exact Science

- **Opportunities for disagreement over:**
  - Methodologies used
  - Resources analyzed
  - Effects caused
  - Resource-specific spatial & time scales delineated
  - Past & present actions assessed
  - Future actions deemed reasonably foreseeable, and
  - Cumulative impact conclusions reached

The Ninth Circuit Weighs In

Cumulative Effects Analysis under NEPA

Lands Council v. Powell
(9th Cir. 2004, amended 2005)

Past timber harvesting has left the watershed in a degraded condition

Lands Council v. Powell

Lands Council v. Powell

Lands Council v. Powell

CEQ

Guidance

Memo

CEQ Guidance

1. **Review of past actions is required only to extent it provides useful information for a decision on the proposed action. Generally this can be provided by describing the current conditions found on the project without historical details of individual past actions.**

2. **Past actions may also be useful as evidence supporting or illustrating predictions of effects of the proposed action**

CEQ Guidance

- CEQ points to "scoping" process as providing an opportunity to focus agency attention on what information from past actions would be useful and relevant to the cumulative effects analysis.

- CEQ regulations do not require agencies to catalogue or exhaustively list and analyze all individual past actions, since in most cases such information would not be useful or relevant.

Developing Oregon's Strategy

Cumulative Effects Analysis under NEPA

Oregon Strategy for Responding to *Lands Council*

We Need Quality NEPA documents to get higher court review

Oregon Strategy for Responding to *Lands Council*

- EA Reviews
- Deficiencies in other aspects of EAs
- Need for intense training on learnings from EA reviews:
  - Nine NEPA “Road Shows”
  - 6-Step Cumulative Effects process evolved

Oregon Strategy for Responding to *Lands Council*

- Applying CEQ language = Finding
- Learning from 9th Circuit "wins" and "losses"
  - Methodology
  - Finding

Favorable 9th Circuit Rulings

- *Native Ecosystem Council v US Forest Service* (9th Cir. 2005)
  - Used methodology (for CI significance)
- *Envi Protection Info Center v US Forest Service* (9th Cir. 2006)
  - Used methodology (CWE process)
- *NW Envi. Advocates v. NMFS* (9th Cir. 2006)
  - Used Finding (*LC* analysis unnecessary)

Importance of a Detailed No Action Alternative

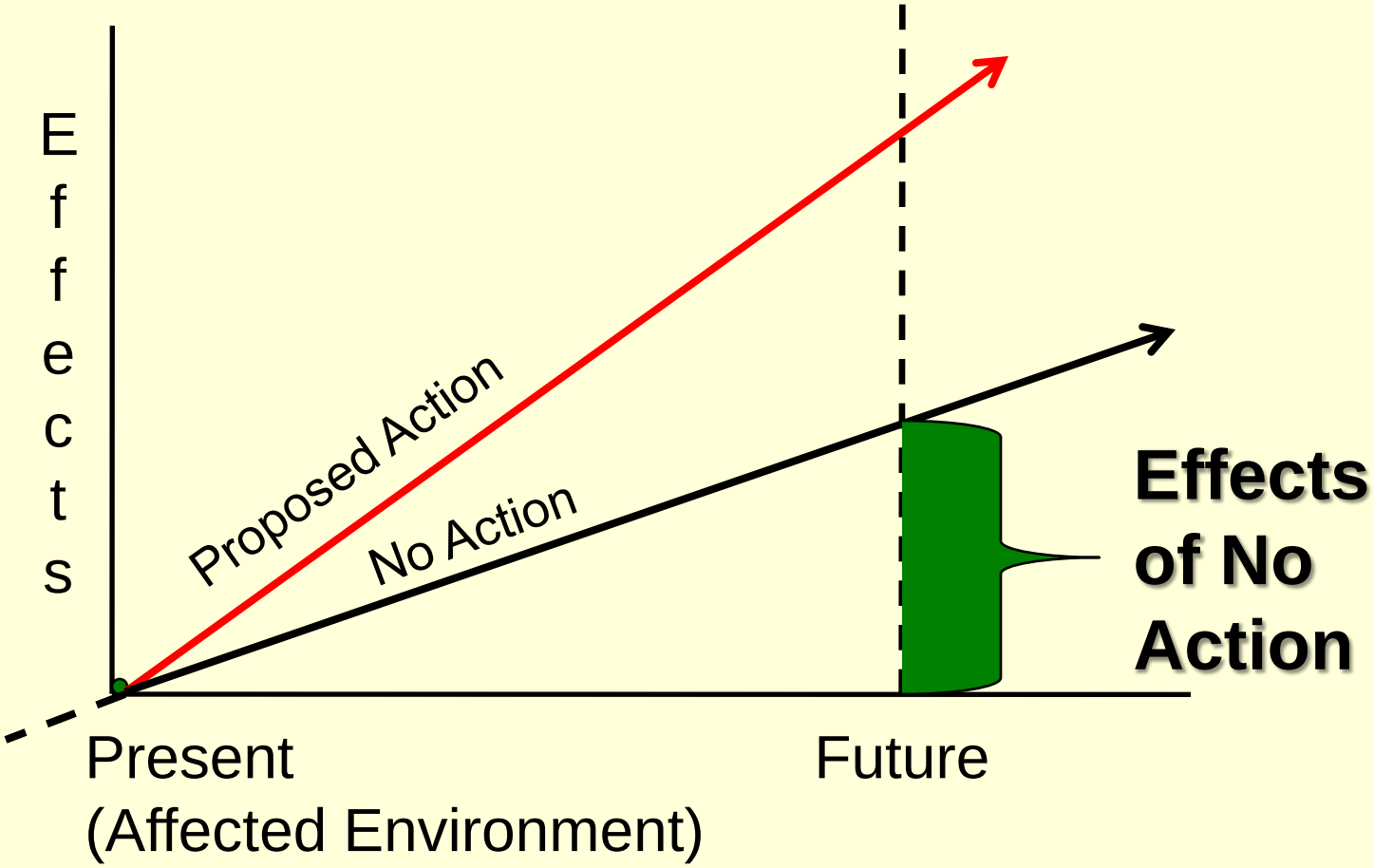
Describing Alternatives

No Action ≠ Nothing Happens

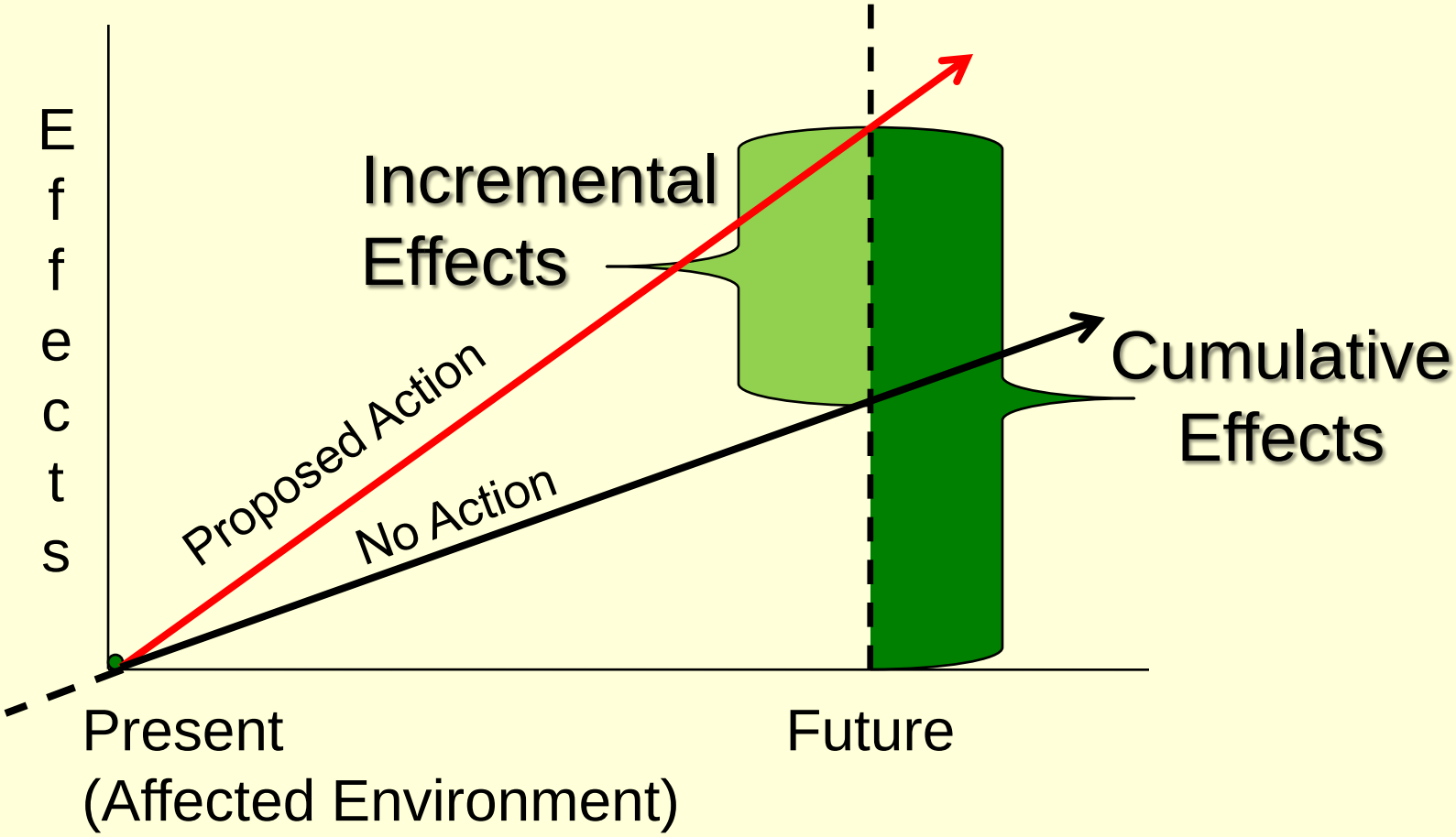
Describing Alternatives

- No action can help demonstrate the need for an action.
- No Action Alternative shows the “baseline” from which an action’s incremental effects can be evaluated

Action & No Action Trajectories with Effects of No Action Alternative



Action's Increment from No Action Trajectory & Overall Cumulative Effects



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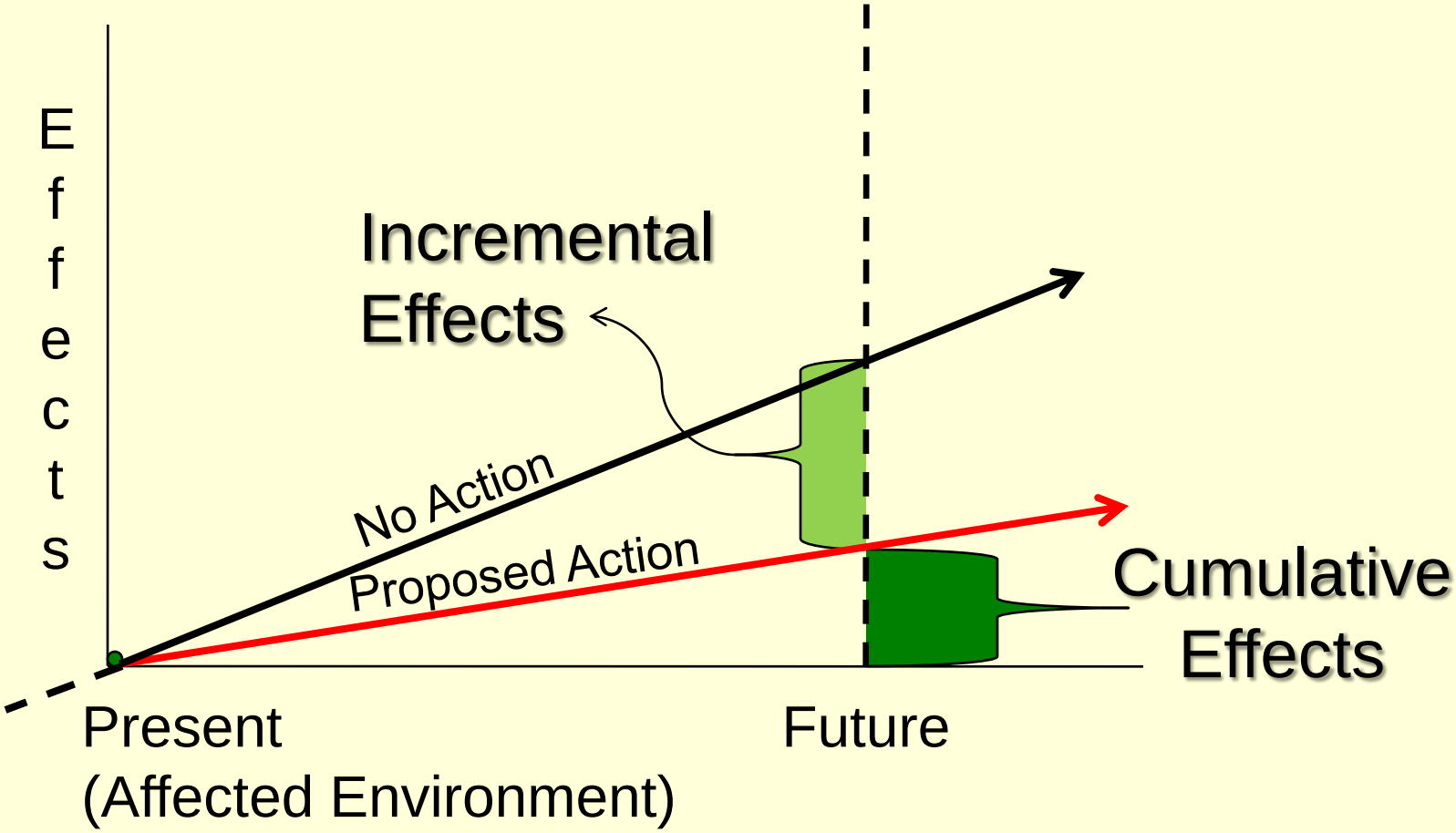
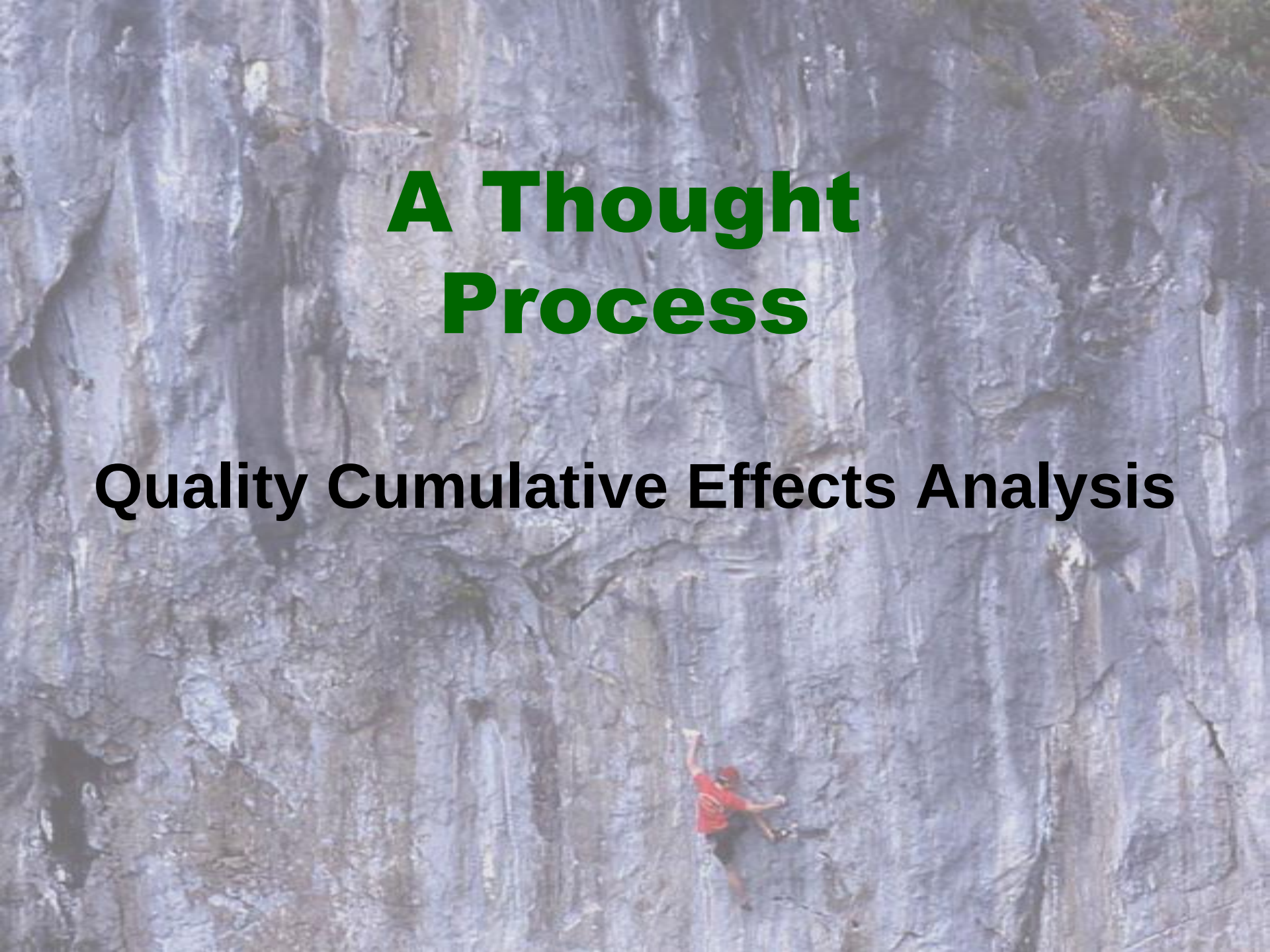


Putting the Pieces Together

- CEQ Guidelines
  - Cause & Effect , Life Cycle of Effects, Integrated Effects Analysis
- No Action Alt Trajectory
- The Supreme Court (*Public Citizen)* bounds Cause & Effect as starting point
  - Invokes “proximate causation” from Tort Law

A Thought Process

Quality Cumulative Effects Analysis



Two Most Common Errors Agencies Make in CE Analysis

1. Paint the picture with too broad a brush

2. Confuse cataloguing with analysis

Effects Analysis

What happens if we don’t take action?

What happens differently if we do?

In the Beginning…

- Identify the Resource Issues of Concern.

e.g. Effects of sedimentation from the project on the salmon spawning beds in Jenny Creek

Determine the Incremental Impact of the Project

- Trace the effects from the project to the resource issue of concern
- Describe these effects in quantifiable terms

e.g., Replacement of culverts on road 35-07-19 will likely generate about 100 cubic yards of fine sediment into Jenny Creek, but will remain suspended until reaching the reservoir within 24 hours after entry.

Don’t Forget the Indirect Effects

Even if there is not a direct effect on the resource issue of concern, you will still need to explore whether there is an indirect effect by …

...tracing out the chain of cause and effect...

...to the resource issue at the scale in time and space of concern

IF there are no Incremental Effects
QUIT!

Sometimes the links in the chain can become so convoluted, they will not be considered as “fairly traceable” to the proposed action.

If there are Effects,

Then…

Put them in context

Answer : “What would happen to the Issues of Concern if the Action Alternative does not take place?”

Use the No Action Alternative effects analysis to set a baseline for incremental effects of the Action Alts

Then answer :

What would happen to the Issues of Concern if this Action Alternative takes place?”

Describe this as an alternative future to the No Action Alternative future.

Then ask and answer the following question:

“So What?”

Mitigation

Are there ways to lessen or eliminate adverse effects?

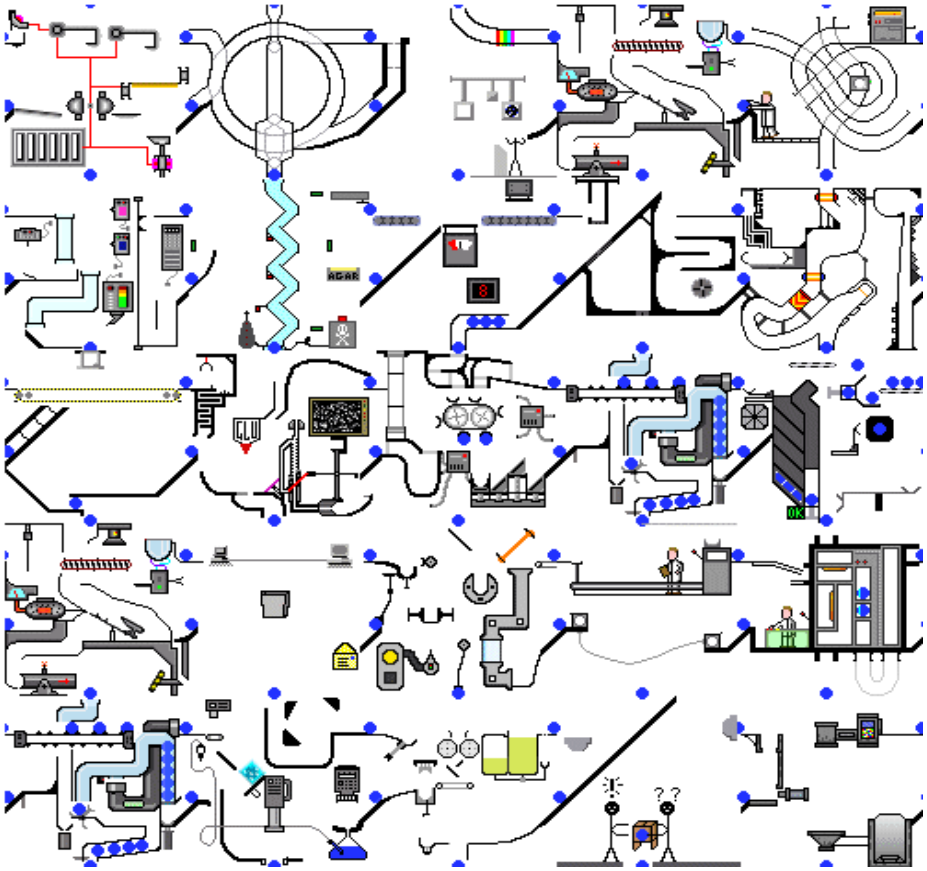
Process Sequence Summary

Integrated Effects Analysis

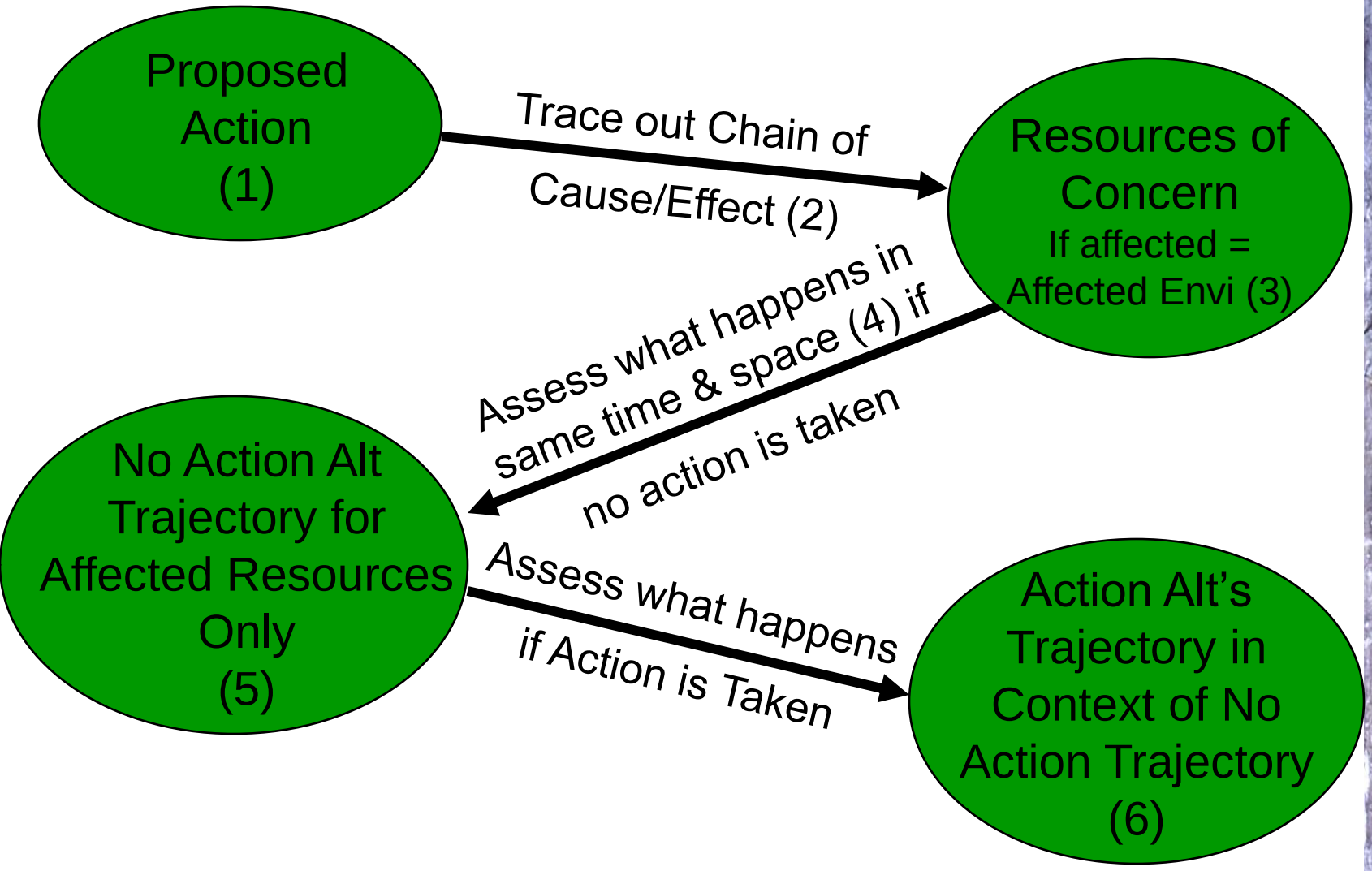
Process Sequence for Integrated Effects Analysis:

- Different than traditional layout of a NEPA document
  - NEPA doc = Affected Envi before Envi consequences
  - NEPA doc = Effects of No Action before effects of Action
- Integrated effects analysis process starts with proposal's potential effects on a particular resource of concern…

It's simple, really



Process Sequence for Integrated Effects Analysis



Recent Court Trends

Bearing on Cumulative Effects Analysis under NEPA

Some Recent Rulings

- "Mission Brush" 9th Circuit *en banc* opinion
  - Deference to agency methodologies, reasoned analyses and conclusions
- "Snow Cr ROW" in District Court – using CEQ past actions guidance
- Pending cases (e.g., "Five Buttes")

Questions?

Thank You

Enjoy the rest of the Conference