

Common Mistakes in Environmental Impact Assessment and How to Avoid Them

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**by
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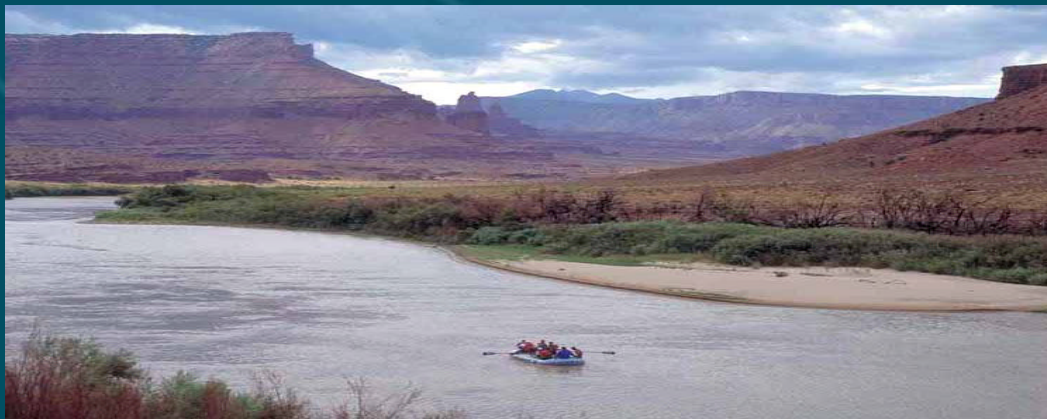
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General Categories of EIA Mistakes

- ◆ **Institutional/Regulatory “Mistakes”** – The mistake is built into the agencies EIA regulations or procedures
- ◆ **Implementation “Mistakes”** – The mistake is made by the person/s preparing the EIA document



Common EIA Mistakes

Forgetting why EIA was necessary

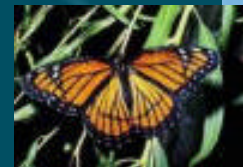
- ◆ Environmental factors rarely considered
- ◆ Little public notification about projects
- ◆ Public comments fell on deaf ears
- ◆ No interagency coordination
- ◆ Decisions made "behind closed doors" with no explanations
- ◆ Limited opportunity for judicial enforcement



Common EIA Mistakes

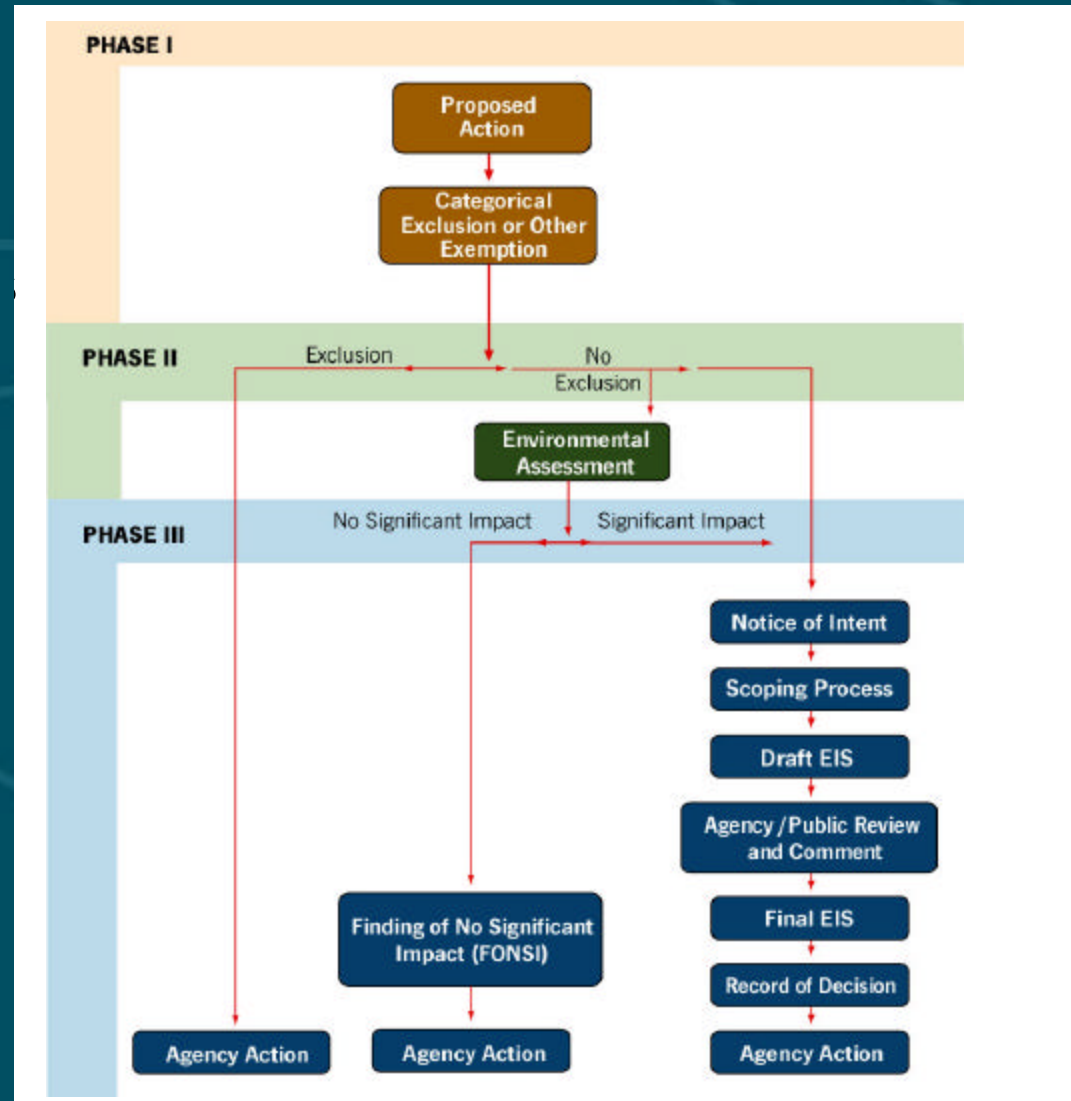
Forgetting the objectives of EIA

- ◆ Disclose to decision makers and public the potential environmental effects of proposed activities before they occur
- ◆ Identify and reduce environmental damage by identifying alternatives or mitigation measures
- ◆ Disclose to public reasons for agency approval of projects with significant environmental effects
- ◆ Foster interagency coordination in review of projects
- ◆ Enhance public participation in planning process



Common EIA Mistakes

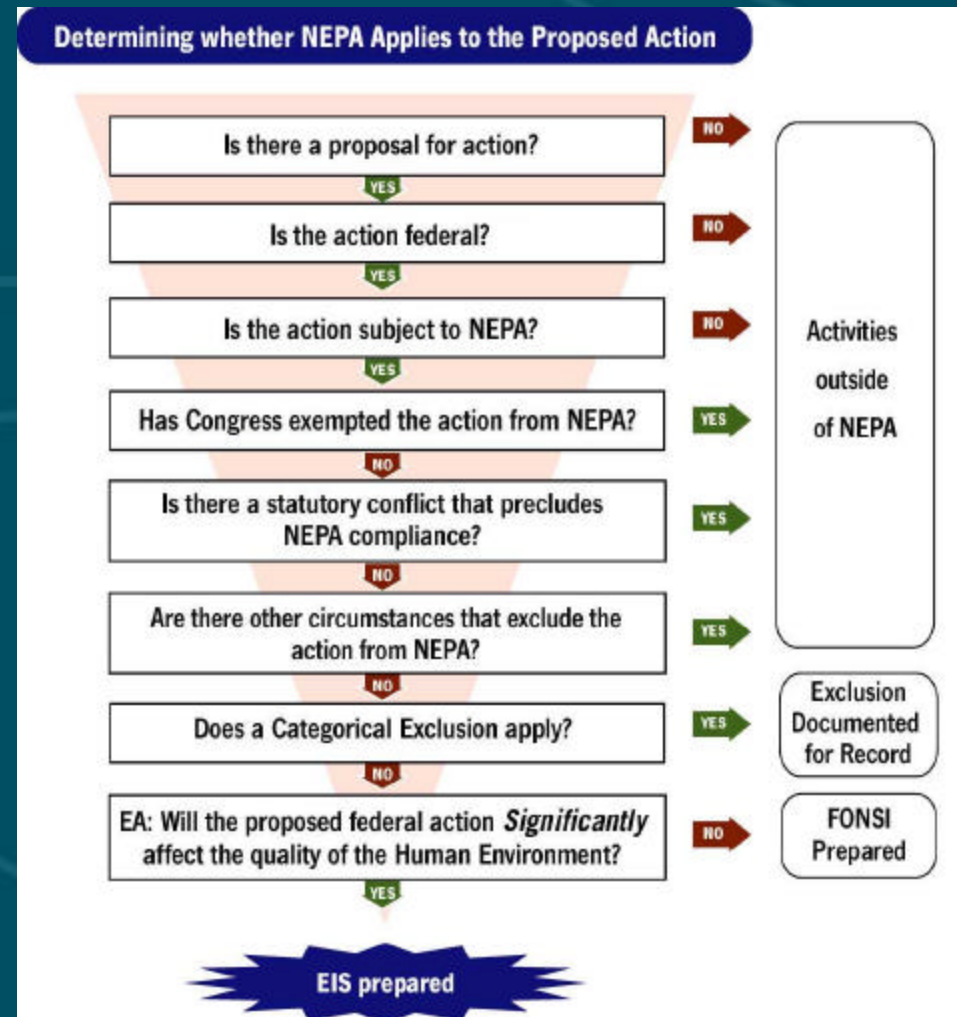
Predetermining that an EIS will not be necessary, then trying to justify such conclusion after the fact



Common EIA Mistakes

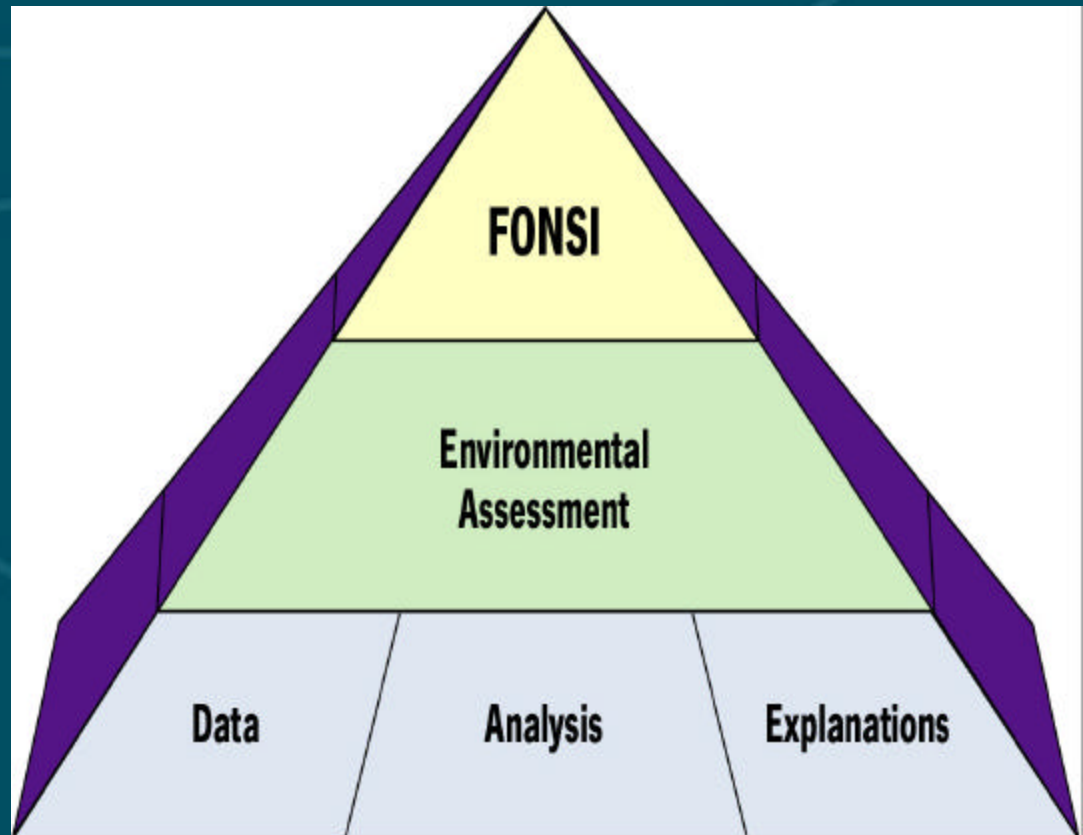
Improper screening

- ◆ Misuse of exemptions
- ◆ “Segmenting” a project into small parts to avoid EIS
- ◆ Inadequate preliminary environmental assessments



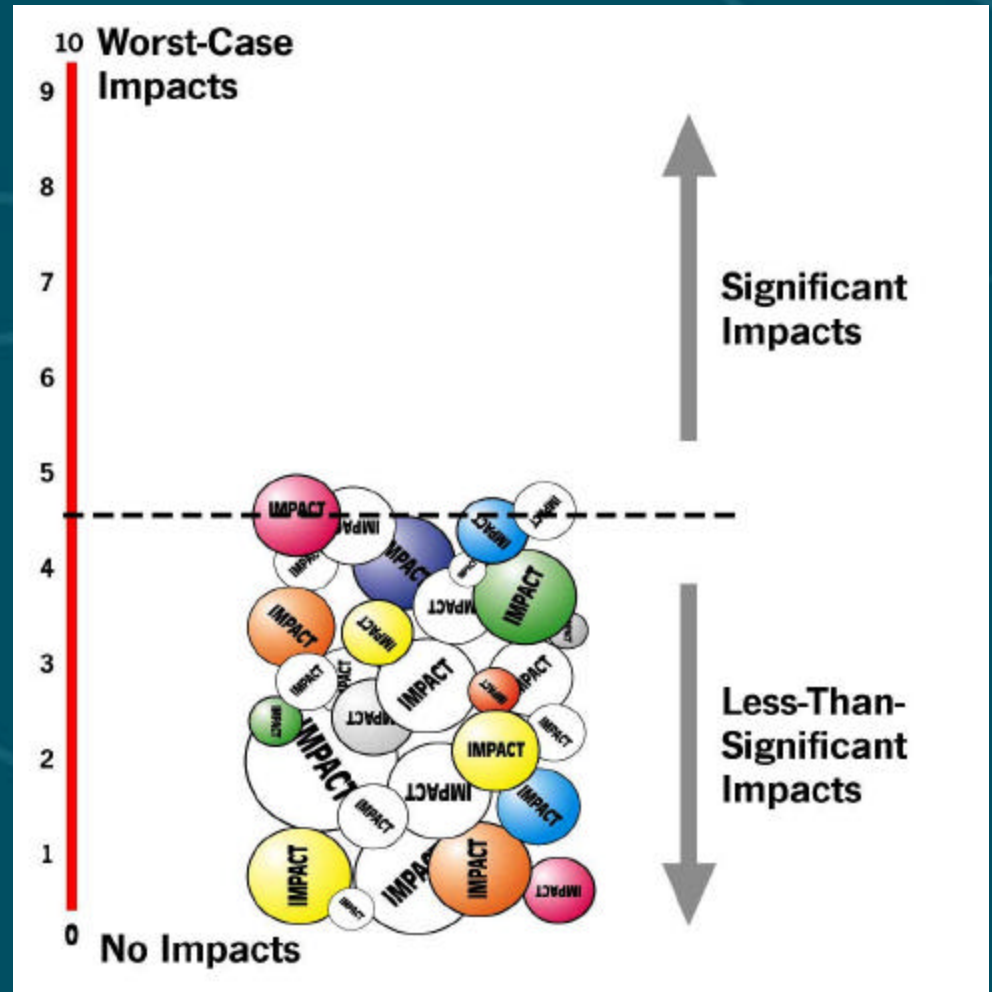
Common EIA Mistakes

Conclusions not supported by the evidence in the EA (or elsewhere in the Administrative Record)



Common EIA Mistakes

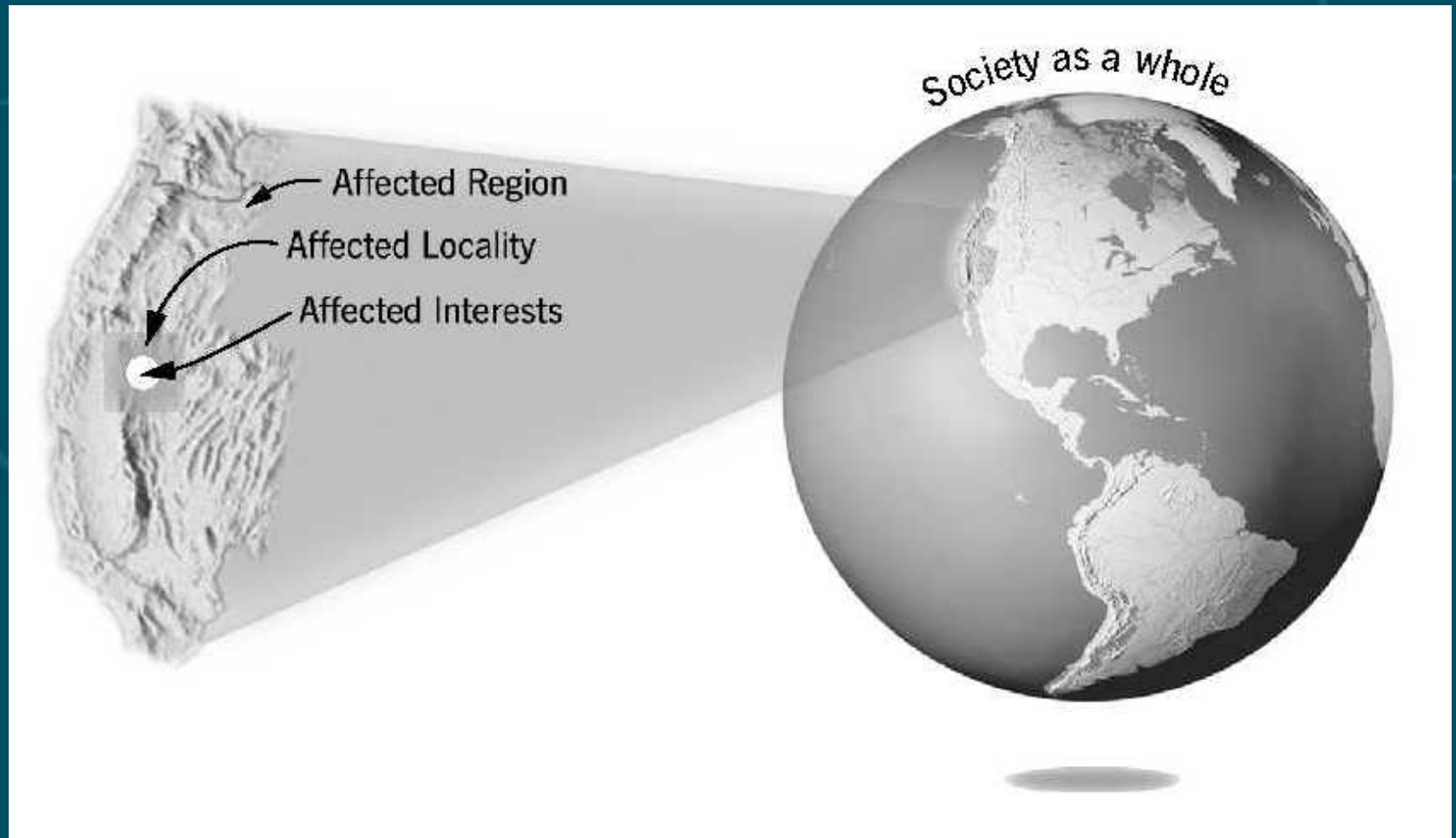
Failure to explain the reasons impacts are not “significant”



Common EIA Mistakes

Misuse or non-use of “Context” and “Intensity” factors in determining whether impacts “significantly affect the quality of the human environment”

Determining the *Context* of an Action



Factors for Determining the *Intensity* of an Impact

- ◆ Beneficial actions may have significant effects
- ◆ Public health effect
- ◆ Unique characteristics
- ◆ Degree of controversy
- ◆ Degree of unique or unknown risk
- ◆ Precedent-setting effect
- ◆ Cumulative effect
- ◆ Cultural or historical resources
- ◆ Special-status species
- ◆ Violations of federal, state, local environmental law

National Parks and Conservation Association v. Babbitt

- ◆ EA prepared by NPS for increase of cruise ship traffic in Glacier Bay failed to consider “context” and “intensity”
- ◆ Context—one of the most ecologically unique....
- ◆ Intensity—unknown risk (and deferred mitigation)



Anderson v. Evans

- ◆ EA prepared for resumption of whaling failed consider to “context” and “intensity”
- ◆ “Context”—Failure to consider impacts to local whale population
- ◆ “Intensity”
 - “Controversy” and “Uncertainty”—as to size, nature and extent of impacts
 - “Precedent-Setting”—cumulative effect on whale hunting in view of IWC treaties

(9th Cir. 2002) 314 F 3d 1006



Public Citizen v. Department of Transportation

- ◆ EA prepared for regulations allowing Mexican trucks in U.S. failed to consider “context” and “intensity”
- ◆ Context—Failure to consider localized air quality impacts
- ◆ Intensity
 - “Public health and safety”
 - “Uncertainty” of traffic levels; % of high-pollution trucks;
 - “Violation of laws”—Cal. Clean Air Act, Federal CAA
 - “Controversy”—Outpouring of public protest (90% opposed)

(9th Circuit 2003) 316 F 3d. 1002



Common EIA Mistakes

Inadequate
scoping

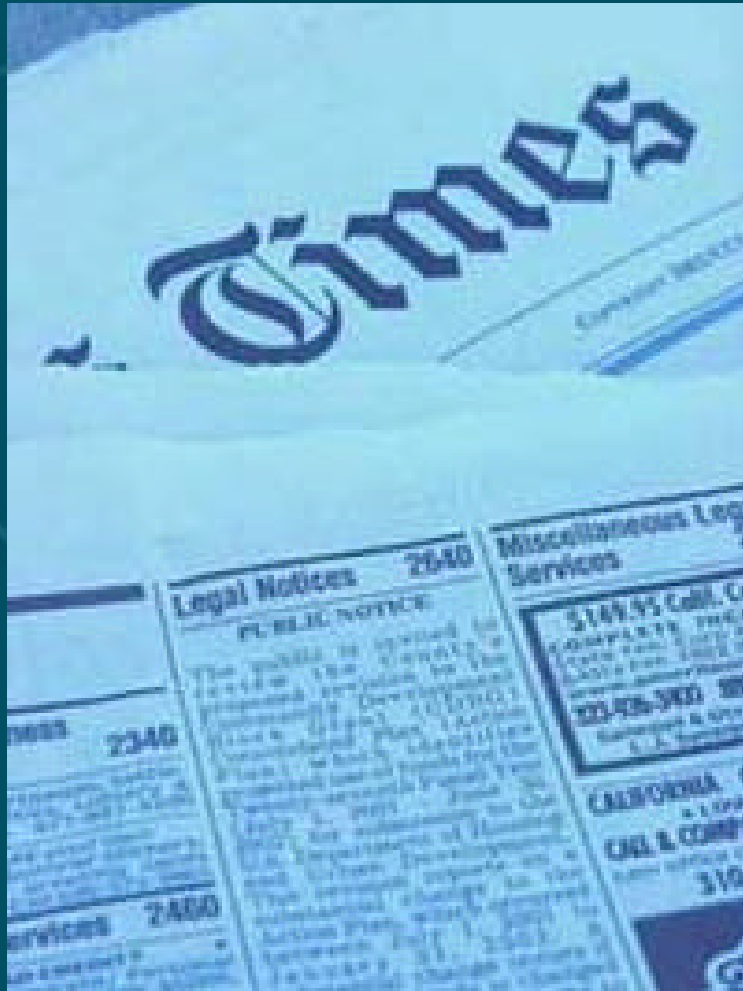


Common EIA Mistakes

Failure to heed the advice of expert agencies



Common EIA Mistakes



Insufficient and inconsistent public notice and review of EIA documents

Common EIA Problems

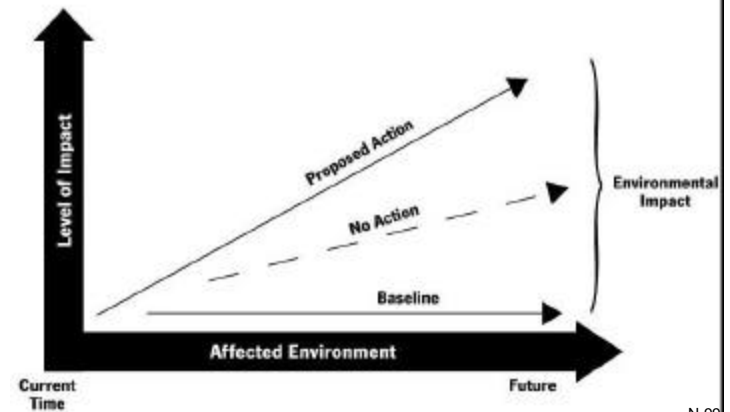
Too much private applicant control over the process

- ◆ EIA is designed to benefit the public and decision makers
- ◆ EIA process and EIA documents “belong” to the Lead Agency, not applicants
- ◆ Applicants must not make key decisions as to scope, content, methods alternatives, mitigation etc.
- ◆ Applicants may be given defined, but limited roles in document preparation and/or review
- ◆ Any applicant-prepared studies must receive independent Lead Agency evaluation

Common EIA Mistakes

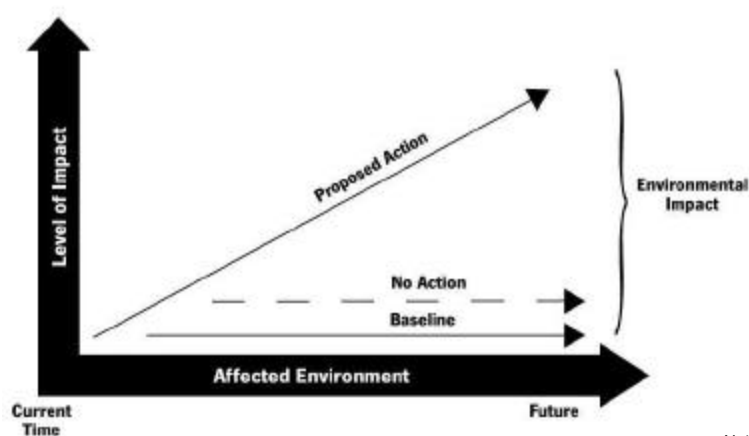
Using an improper baseline for impact analysis

Scenario 1: Baseline, No-Action, Proposed Action—Typical Situation



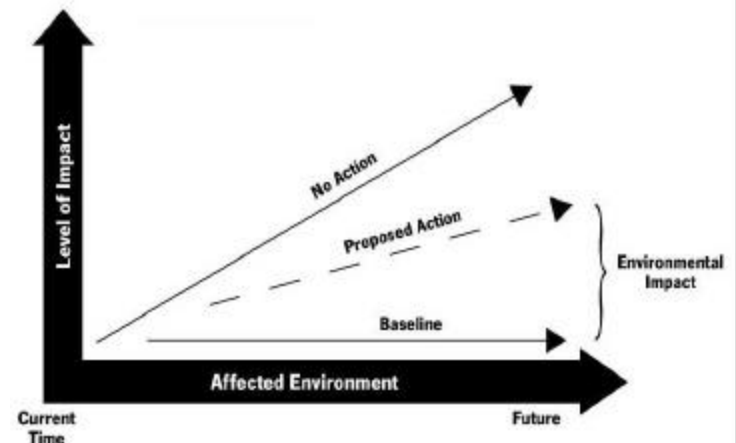
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Scenario 2: No-Action Alternative Same as Baseline



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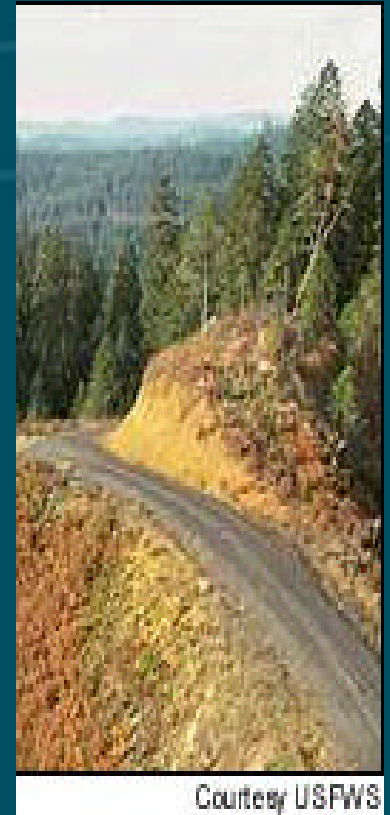
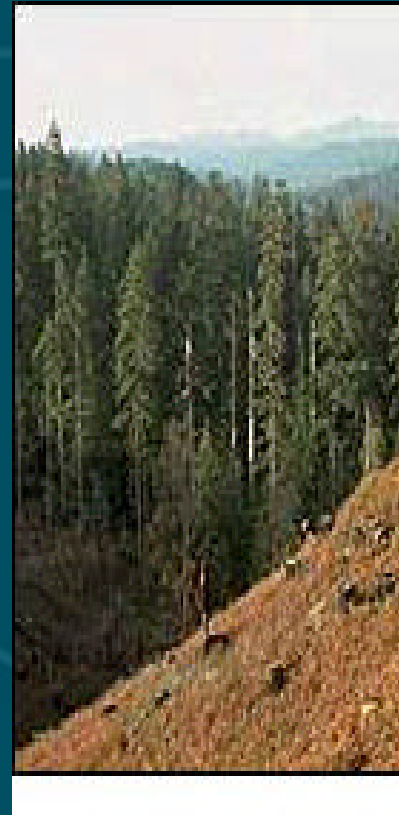
Scenario 3: No-Action Alternative Worse than Proposed Action



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Common EIA Mistakes

Improperly
“segmenting”
proposed actions to
avoid or minimize
review and
evaluation

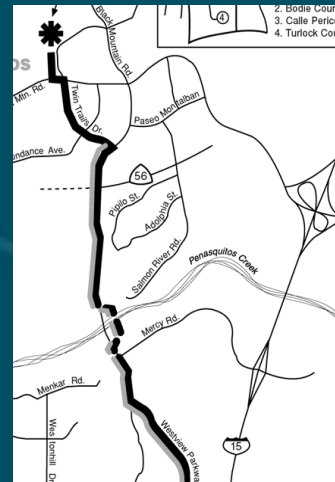


Courtesy USFWS

Common EIA Mistakes

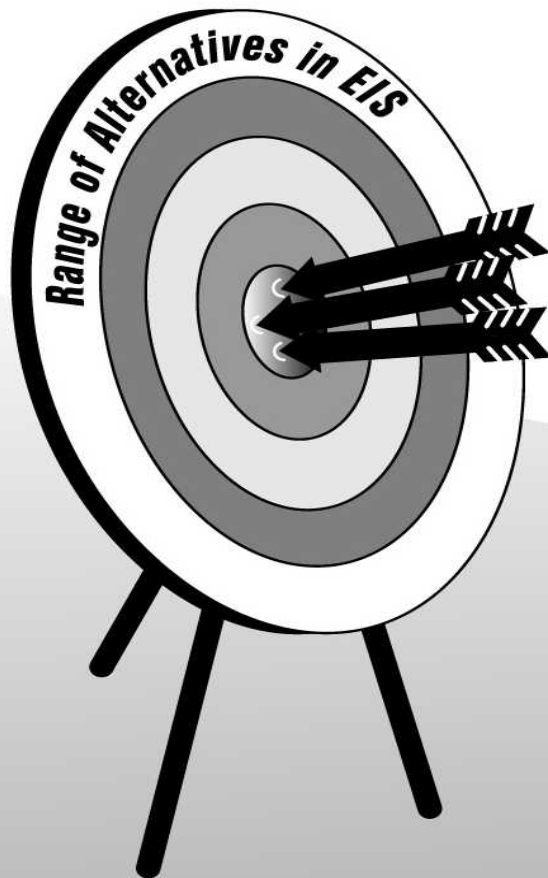
Misunderstanding of alternatives

- ◆ Inadequate range of alternatives
 - Alternative does not satisfy objectives
 - Alternative does not avoid any impacts
 - Alternative not feasible
- ◆ Eliminated alternatives not explained

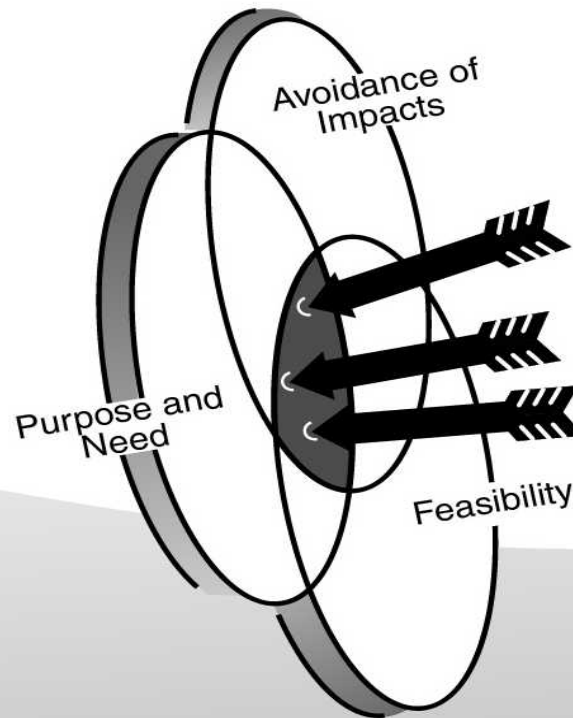


Determining the Range of Alternatives

Reasonable Range of Alternatives



Screening

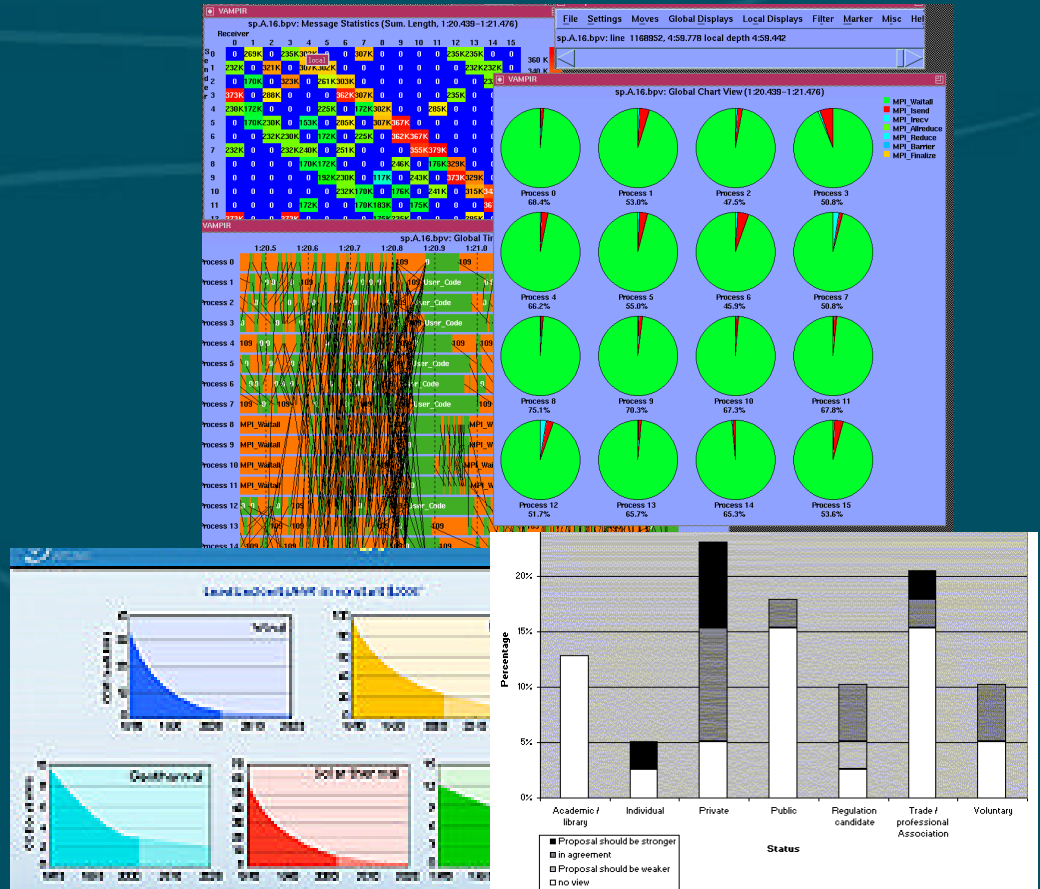


Potential Alternatives

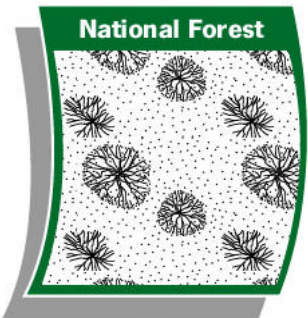

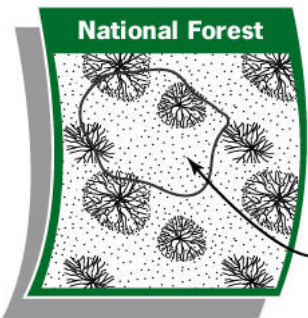
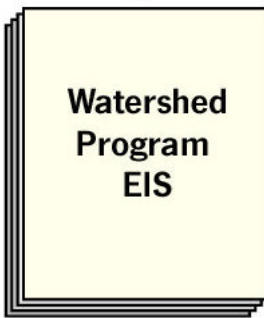
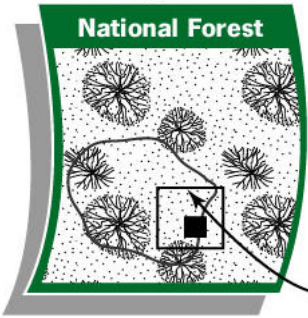
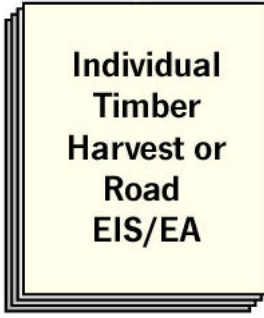


Inadequate impact analysis

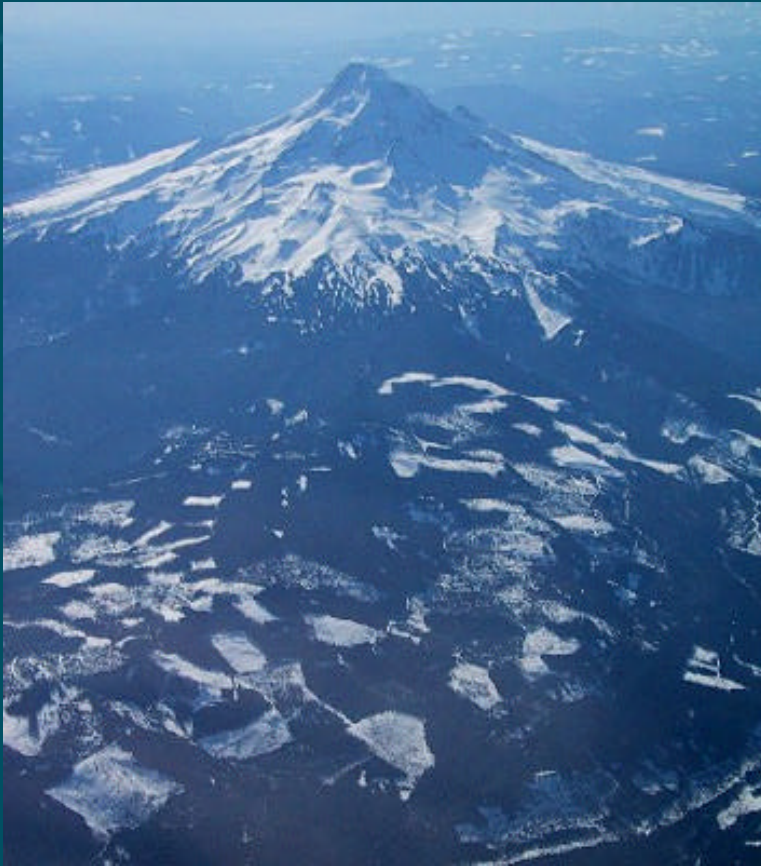
- ◆ Bad data/ old data/ no data
- ◆ Improper methodology
- ◆ Failure to “show your work”
- ◆ Data not properly “incorporated by reference”



Common EIA Mistakes: Inadequate tiering

Tier	Study Area	Document	Focus of Document
Tier 1			<ul style="list-style-type: none"> • Jurisdiction-wide affected environment • Jurisdiction cumulative impacts • Jurisdiction-wide mitigation measures (policies and programs)
Tier 2			<ul style="list-style-type: none"> • Incorporation by reference • Program area setting • Program area impacts • Program-level mitigation performance criteria
Tier 3			<ul style="list-style-type: none"> • Incorporation by reference • Project site setting • Project site impacts • Project-specific mitigation measures

Common EIA Mistakes



**Inadequate
evaluation of
cumulative impacts**

How to Identify and Evaluate *“Past, Present, and Reasonably Foreseeable Future Projects”*

◆ Start with:

- Projects for which applications have been received (by Lead or other agencies)
- Projects which agencies are proposing
- Projects for which money has been budgeted
- Projects identified in adopted plans
- Projects which are later phases of earlier projects

◆ But also consider:

- Projects which have been publicly “announced”
- Projects for which applications likely to be submitted
- Other reasonably foreseeable projects

Common EIA Mistakes

Failure to evaluate “Induced Growth”

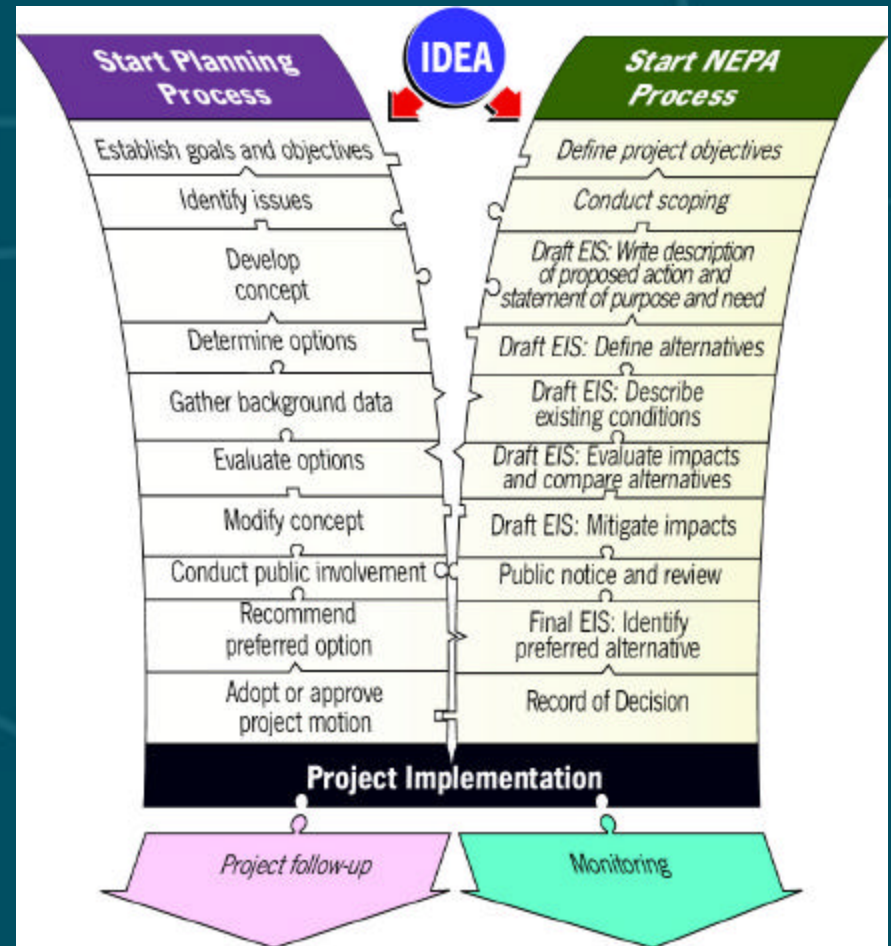


Evaluating Induced Growth


- ◆ What types of future growth are likely to occur as a result of the proposed project?
- ◆ How much is likely to occur?
- ◆ Where and when is it likely to occur?
- ◆ What are the impacts of that growth?
- ◆ How can the impacts be mitigated?
- Use “*reasonably foreseeable*” as the standard -

Common EIA Mistakes

**Failure to integrate
EIA with other laws**



Ten-Step Integration Process

- 
1. Conduct preliminary constraints analysis
 2. Consult with regulatory agencies
 3. Prepare comprehensive environmental compliance strategy
 4. Draft/sign any memorandum of understanding
 5. Evaluate impacts and conduct technical studies
 6. Consolidate results into Draft NEPA document
 7. Conduct joint public and interagency review
 8. Incorporate “lingering” results into Final NEPA document
 9. Approve consolidated document
 10. Ensure consolidated document is used in decision making

Common EIA Mistakes

Inadequate mitigation measures

Adequate



- Avoid
- Minimize
- Rectify
- Reduce over time
- Compensate

Questionable



- Provide funding for
- Hire staff
- Monitor or report
- Comply with existing regulations or ordinances
- Preserve already existing natural area

Inadequate



- Consult with
- Submit for review
- Coordinate with
- Study further
- Inform
- Encourage/discourage
- Facilitate
- Strive to

Developing Adequate and Successful Mitigation Measures Evaluation Checklist



- ☐ Definitional Factors
- ☐ Specificity
- ☐ Feasibility
- ☐ Timing
- ☐ Monitorability
- ☐ Proponent Concurrence FONSI

Doing Too Little or Too Much

◆ “Bare legal minimum”

Do as little analysis as possible to satisfy legal requirements (i.e., create a document that barely meets the “letter of the law”).

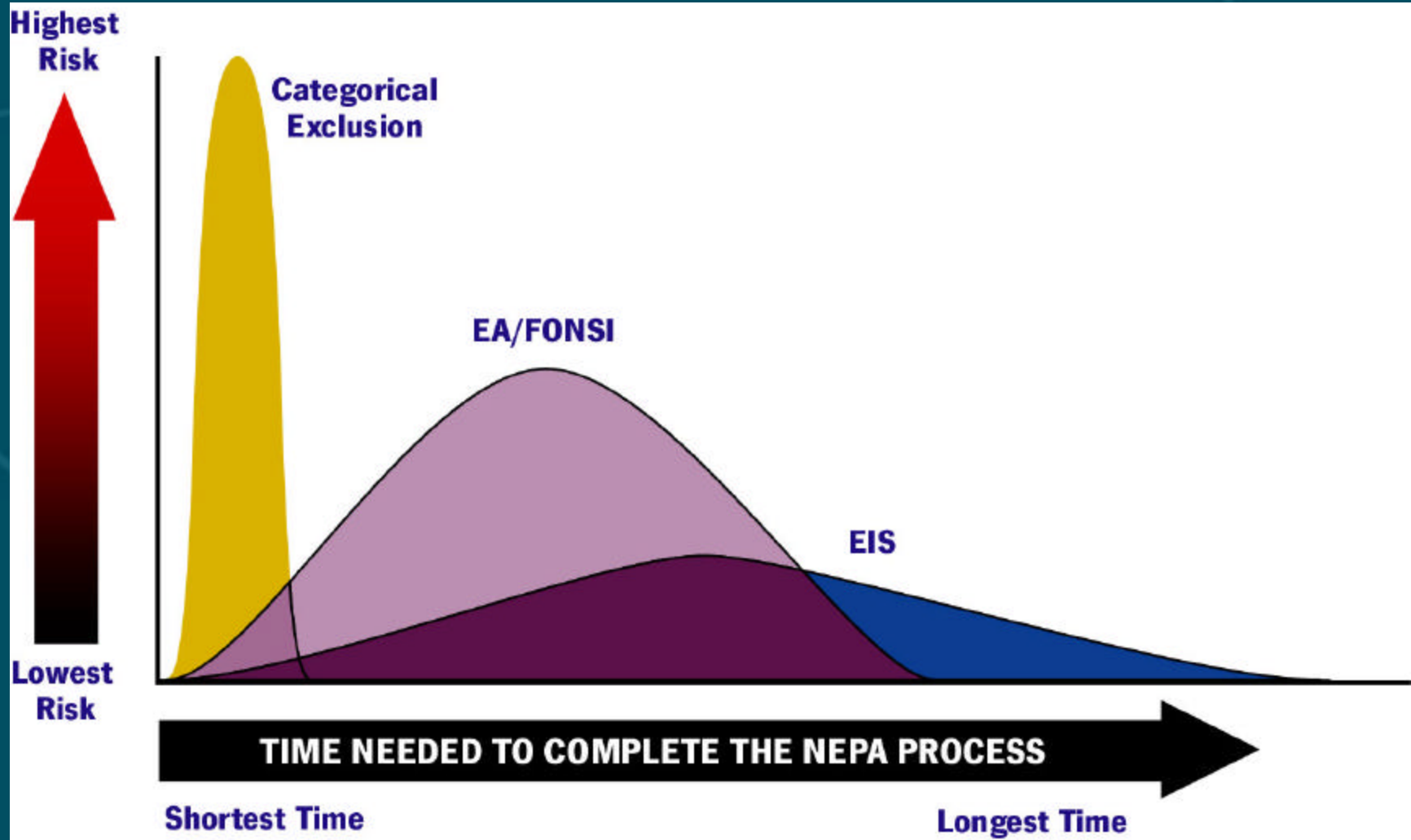
◆ “Good practice”

Fully integrate EIA into its decision process, focusing on issues that are important to the decision process and relevant to the potential environmental effects of the proposed action (create a document that meets the “spirit of the law”).

◆ “Overkill”

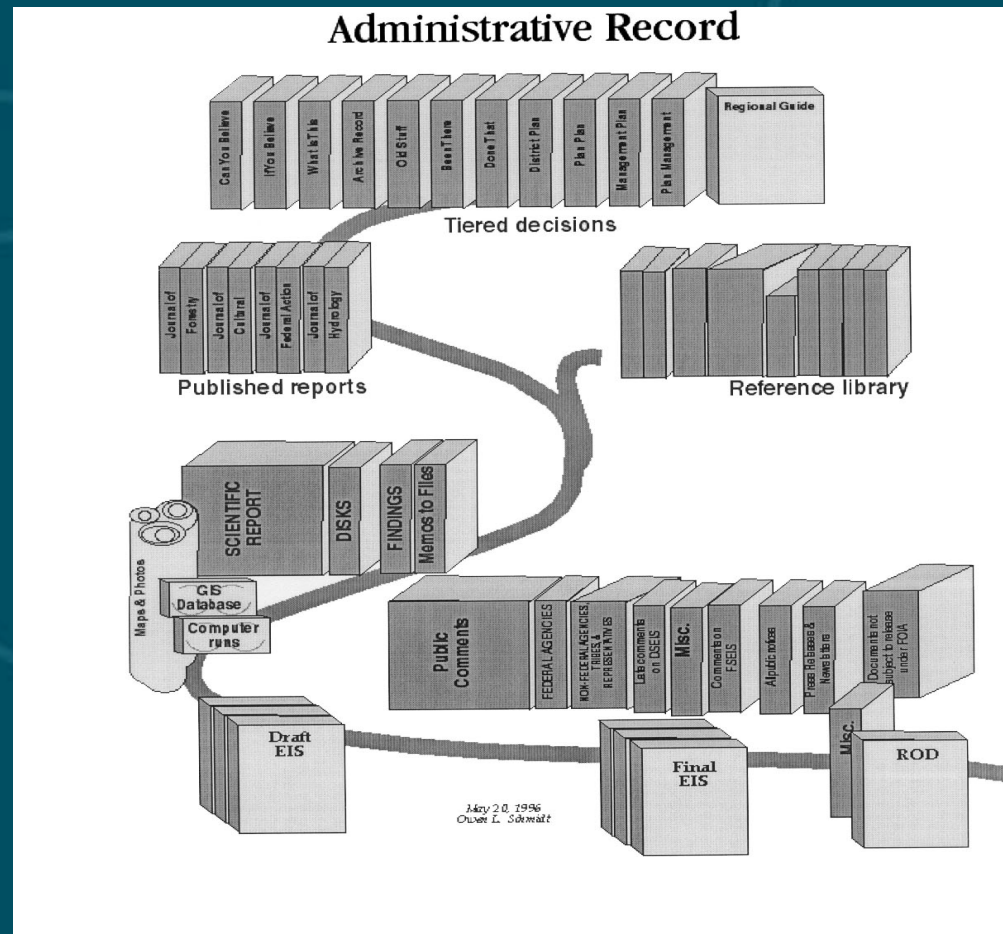
Study everything you can, in as much detail as possible, often under the belief that this will ward off legal challenges (i.e., create a “bulletproof” document).


Failure to Consider the Risk v. Time Factor in the EIA Compliance Process



Common EIA Mistakes

Failure to maintain
an adequate
Administrative Record



A photograph of a desert landscape. In the foreground, there is a large, gnarled, and bleached dead tree trunk lying on the reddish-brown sand. The ground is sparsely covered with small green desert shrubs. In the background, there are tall, layered red rock formations under a clear blue sky. The text is overlaid in the center of the image.

**Don't just comply with
the letter of the law,
but, also the SPIRIT
of the EIA**

Thank you for attending

Common EIA Mistakes and How to Avoid Them

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