

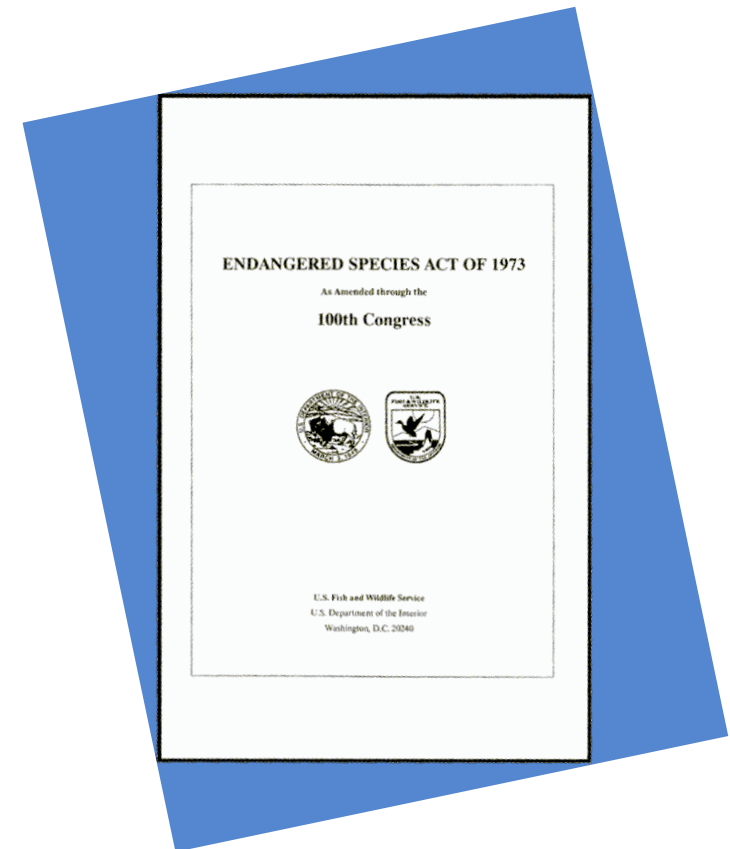
# Endangered Species Act – Section 7 Consultation Under CERCLA

# Overview

The course provides On-Scene Coordinators and Remedial Project Managers with an overview of the Endangered Species Act and Section 7 requirements under EPA's Emergency Response and Removal Program, including a discussion of the responsibility to consider the effects of its actions on listed species and their habitat and the components of Section 7 consultation.

# Endangered Species Act

- Endangered Species Act (ESA) [16 U.S.C. 1531 et seq.] of 1973 provides a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found
- Section 7 of the ESA outlines the procedures for Federal interagency cooperation to conserve Federally listed species and designated critical habitats



# Endangered Species Act . . .

- Section 7(a)(1) directs Federal agencies to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of species listed pursuant to the ESA
- Section 7(a)(2) directs Federal agencies to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat



# Endangered Species Act . . .

- In fulfilling Section 7 requirements, federal agencies shall consult with the lead agencies for implementing ESA - U.S. Fish and Wildlife Service or the National Marine Fisheries Service
- Regulations are published at 50 CFR Part 402



# Select Glossary

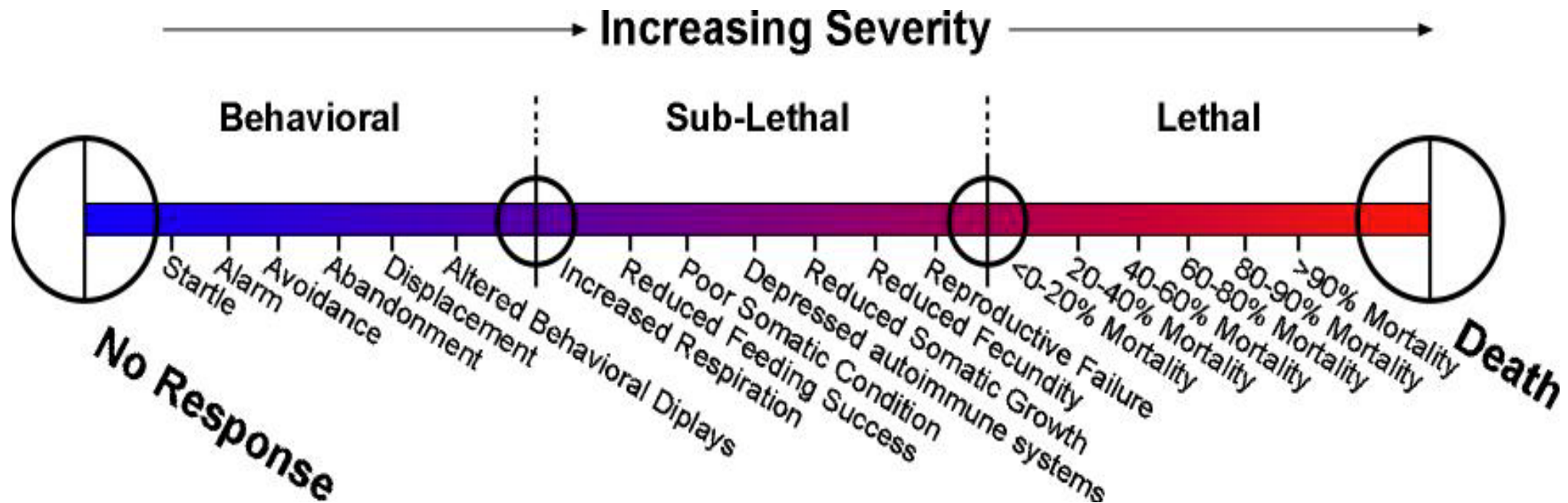
- **Endangered species:** Any species which is *in danger of extinction* throughout all or a significant portion of its range
- **Threatened species:** Any species which *is likely to become an endangered species* within the foreseeable future throughout all or a significant portion of its range
- **Critical Habitat:** Specific geographic areas, whether occupied by listed species or not, that are determined to be *essential* for the conservation and management of listed species
- **Harm:** An act which actually kills or injures wildlife; such acts may include significant habitat modification or degradation when it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering

# Select Glossary . . .

- Effects of the action
  - **Direct effects** are those that are caused by the action and occur contemporaneous with the action
  - **Indirect effects** are impacts that are caused by the action but occur later in time
  - **May affect or no effect** are those that are discountable, insignificant, or completely beneficial
  - **Adverse effect** are those that can be measured, detected or evaluated

# Select Glossary . . .

- Effects of the action (continued):
  - Effect (any response to any stressor) = Exposure (organism and habitat) + Response (what happens)





# Select Glossary . . .

- **Take:** Term means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct
  - **Harass** means an intentional or negligent act or omission which creates the likelihood of injuring wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering
  - **Harm** means an act which actually kills or injures wildlife; such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering

# Select Glossary . . .

- **Incidental take** - take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency
- **Biological assessment** - Document prepared for the Section 7 process regarding: listed and proposed species and designated critical habitat that may be affected by proposed actions; and the evaluation of potential effects of the proposed actions on such species and habitat
- **Biological opinion** - Document stating the opinion of the Service on whether or not a Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat; a summary of the information on which the opinion is based; and (a detailed discussion of the effects of the action on listed species or designated critical habitat

# Listed U.S. Species by Taxonomic Groups

- Animals (1446)
  - Invertebrate (arachnids, clams, crustaceans, insects, snails)
  - Vertebrate (amphibians, birds, fishes, mammals, reptiles)
- Plants (945)
  - Flowering Plants
  - Non-flowering Plants (conifers, ferns, lichen)

# What is an Action?

- All activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas
- Examples include, but are not limited to:
  - Promulgation of regulations
  - Granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid
  - Actions directly or indirectly causing modifications to the land, water, or air

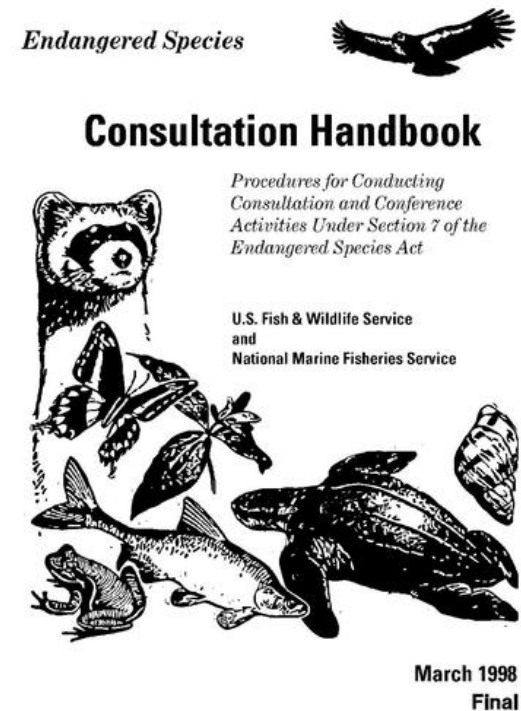
# When is Consultation Required?

- If an action may affect a listed species or critical habitat



# Consultation

- All Federal agencies must consult with the Service when any activity permitted, funded or conducted by that agency may affect a listed species or designated critical habitat, or is likely to jeopardize proposed species or adversely modify proposed critical habitat
- Consultations can be
  - Emergency
  - Informal
  - Formal



# Emergency Consultation

- Section 7 regulations recognize that an emergency may require expedited consultation
- Emergency consultation procedures allow agencies to incorporate endangered species concerns into their actions during the response to an emergency



# Emergency Consultation . . .

- Federal action occurs that may affect listed species or critical habitat
- Step 1. Federal agency Initiates contact with Service to determine if listed species or critical habitat are present
  - If not present, no further action
  - If present, solicit advice on measures for minimizing effects of the emergency response action on those species or their critical habitat



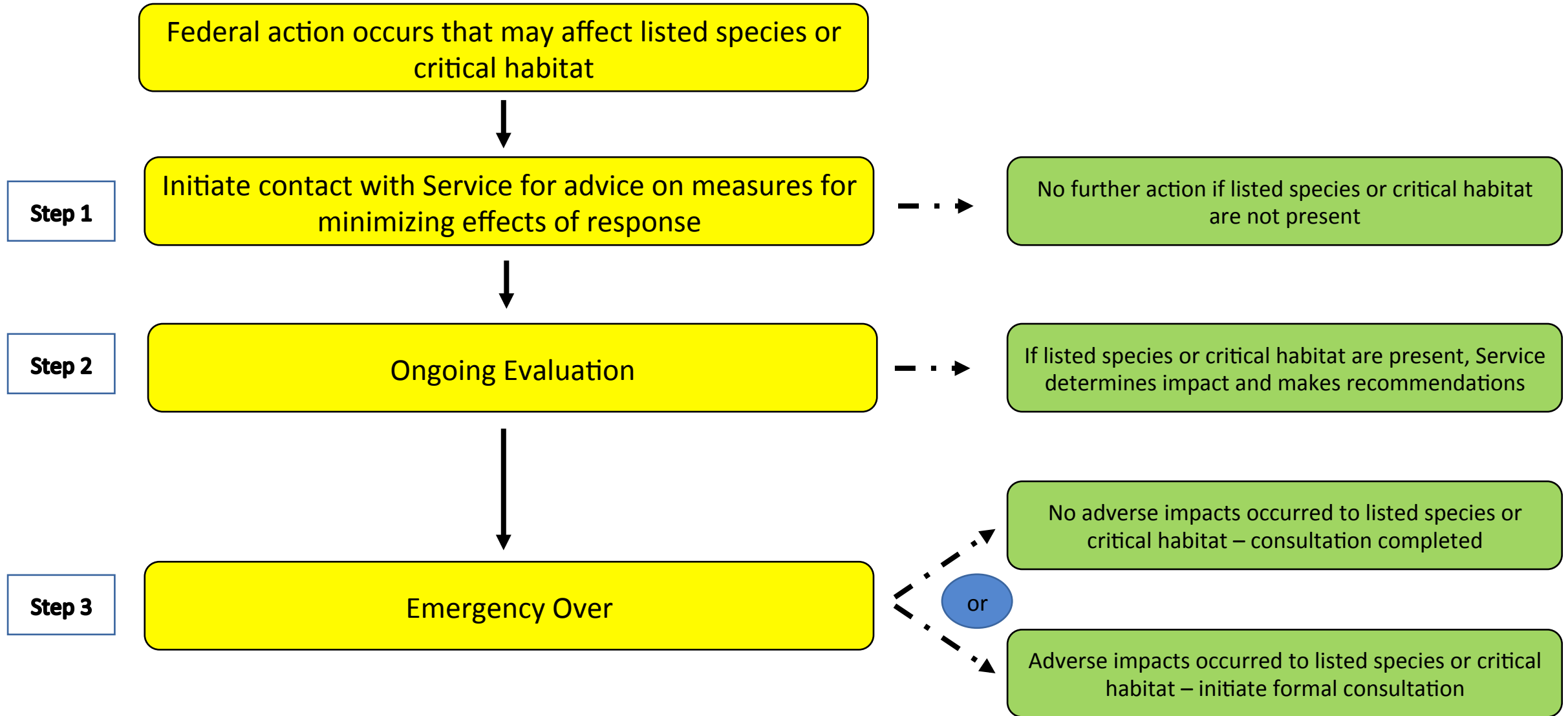
# Emergency Consultation . . .

- Step 2. Continue to evaluate the emergency response action
  - If this evaluation indicates that the emergency response procedures may result in jeopardy/adverse modification, and no means of reducing or avoiding this impact are available, Service will advise the responding agency of this and document this conclusion
  - Service will not stop or delay their emergency response because of this notification; in such a situation, the Federal agency and Service will discuss actions to address the effects following conclusion of the emergency

# Emergency Consultation . . .

- Step 3. Once the emergency is over, the action agency will evaluate the emergency consultation measures
  - No adverse impacts occurred to listed species or critical habitat – consultation completed
  - Adverse impacts occurred to listed species or critical habitat – initiate formal consultation

# Emergency Response Consultation Flow Chart



# Informal Consultation

- Informal consultation is a process through which Federal agencies can quickly evaluate potential effects, if any, on listed species and their habitats
- Informal consultation can also be used to help determine if there is a need to enter into the more extensive formal Section 7 consultation process.

# Informal Consultation . . .

- Contact the appropriate local U.S. Fish and Wildlife Service office to determine if listed species and their habitats are present within the action area
- Service responds to the request by providing a list of species that are known to occur or may occur in the vicinity
  - If the Service provides a negative response, no further consultation is required unless the scope or nature of the project is altered or new information indicates that listed species may be affected

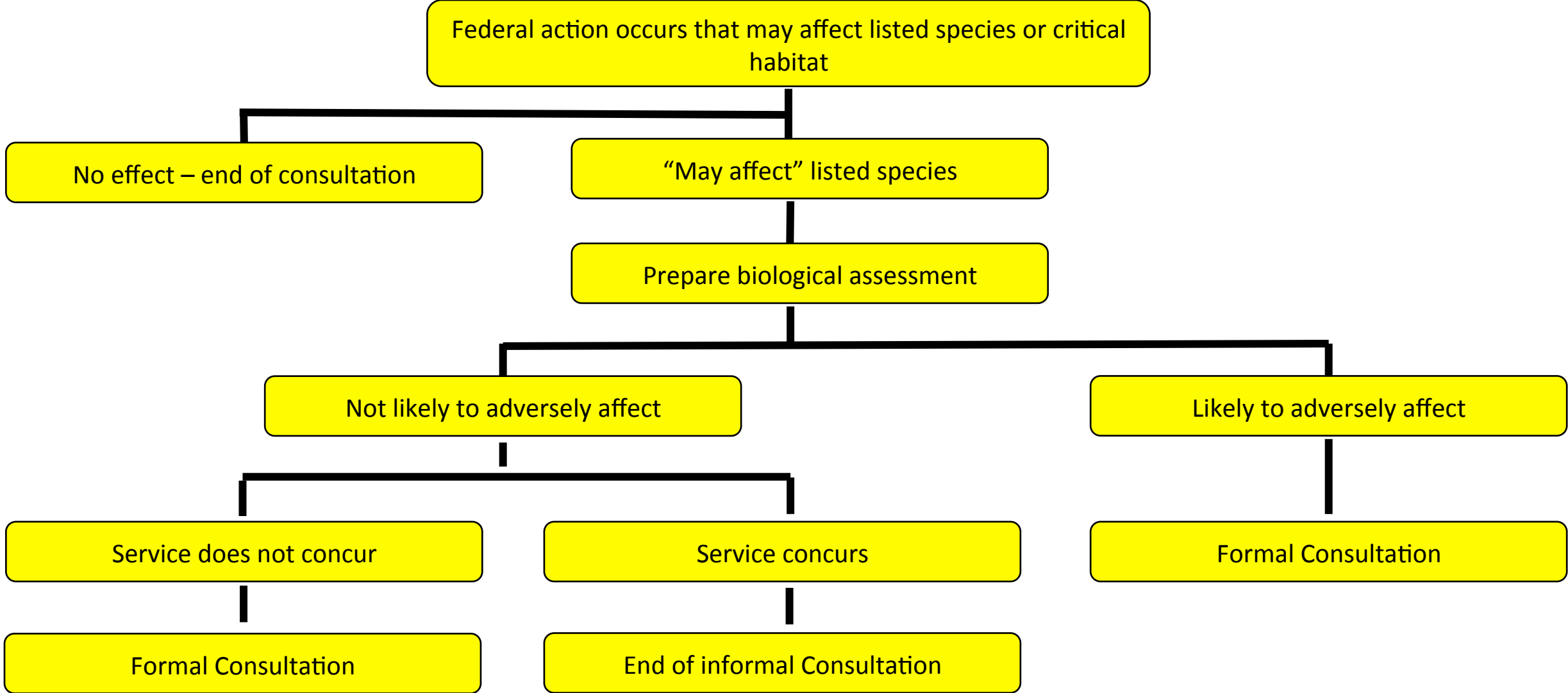
# Informal Consultation . . .

- If listed species are present, the Federal agency must determine if the action may affect them; a may affect determination includes those actions that are not likely to adversely affect as well as likely to adversely affect listed species
- If the Federal agency determines that the action is not likely to adversely affect listed species (e.g., the effects are beneficial, insignificant, or discountable), and the Service agrees with that determination, the Service provides concurrence in writing and no further consultation is required

# Formal Consultation

- Contact the appropriate local U.S. Fish and Wildlife Service office to determine if listed species and their habitats are present within the action area
- If listed species are present, the Federal agency must determine if the action may affect them
- When a Federal action is likely to adversely affect a listed species or its designated critical habitat, the Federal agency involved initiates formal consultation with the Service and concludes with issuance of a biological opinion by the Services

# Consultation Process





# Summary

- Emergency consultation is available to a Federal agency when an emergency response may affect listed species and/or critical habitat and expedited consultation is necessary
- Informal consultation is designed to help the action agency determine whether formal consultation is needed; Federal agencies may use this period to work with the Services on project design and conservation actions that would remove all adverse effects and avoid the need for formal consultation
- Formal consultation is a mandatory process for proposed projects that may adversely affect listed species

# Summary . . .

Early coordination in the project planning process, interagency collaboration on document development, an open exchange of resource information and quick resolution of elevated issues are all trademarks of successful consultations

Questions

# National Historic Preservation Act Section 106 Review And Removal Action Selection Under CERCLA



No 8 ROUND HOUSE AVERY IRON WORKS

# Overview

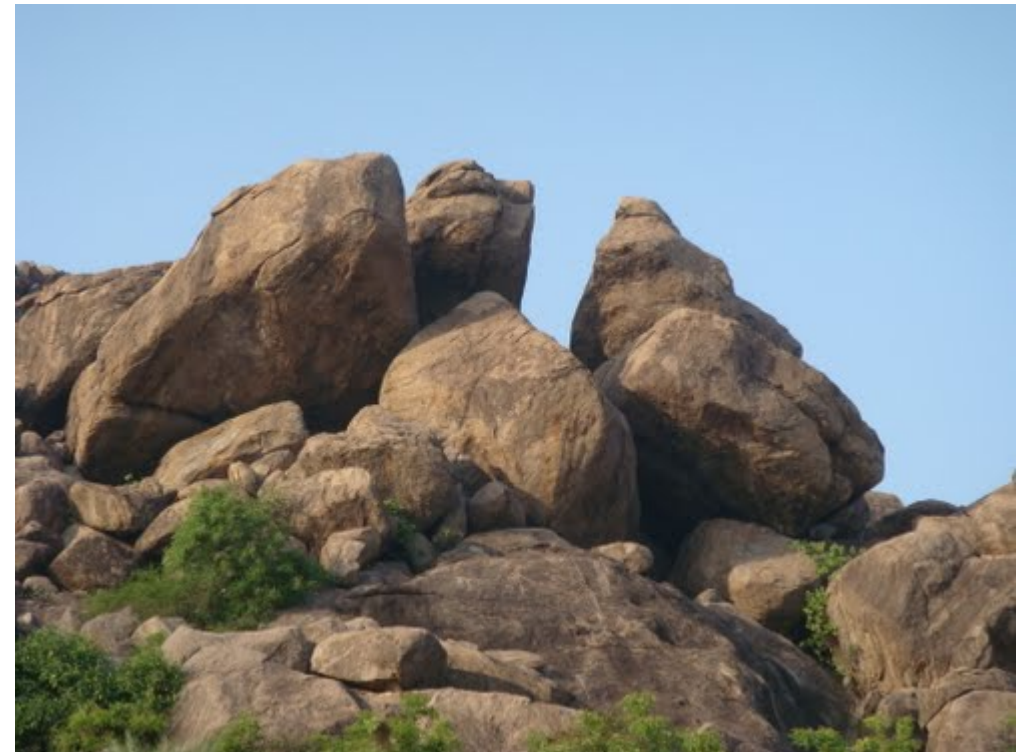
The course provides On-Scene Coordinators and Remedial Project Managers with an overview of the National Historic Preservation Act and Section 106 requirements under EPA's Emergency Response and Removal Program, including a discussion of its responsibility to consider the effects of its undertakings on historic properties and the components of Section 106 review.

# National Historic Preservation Act 1966 (16 U.S.C. 470 et seq)

- The National Historic Preservation Act of 1966 (NHPA) established a comprehensive program to preserve the historical and cultural foundations of the Nation
- Before any undertaking associated with a federal agency, you must determine whether any of the NHPA Section 106 requirements apply to your project
- Section 106 of the NHPA requires
  - Federal agencies to take into account the effects of their undertakings on historic properties that are listed in, or eligible for, inclusion in the National Register of Historic Places (NRHP), and
  - Afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings

# Federal Agency Responsibilities under NHPA

- Federal agencies are responsible for initiating Section 106 consultation, most of which takes place between the agency and
  - State (State Historic Preservation Officer or SHPO) and federally recognized Indian tribes (Tribal Historic Preservation Officer or THPO) or
  - Native Hawaiian organization (NHOs) when historic properties of religious and cultural significance to them may be affected



# Federal Agency Responsibilities under NHPA . . .

- There is no explicit obligation to actually avoid or minimize adverse effects; Section 106 review encourages, but does not mandate, preservation (sometimes there is no way for a needed project to proceed without harming historic properties)
- Regulations published at 36 CFR Part 800, “Protection of Historic Properties,” provide a process to consider the effects of agency undertakings on historic properties, to consult with appropriate entities, and to develop and evaluate ways to minimize or mitigate any adverse effects
- If NHPA consultation requirements are applicable to your project, these requirements should be met before and possibly during construction activities



# What is an Undertaking?

- An undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency; the following activities may constitute an undertaking
  - Carried out by or on behalf of the agency
  - Carried out with Federal financial assistance
  - Requiring a Federal permit, license, or approval
  - Subject to state/local regulation administered pursuant to a delegation or approval by a federal agency



# What are Historic Properties?

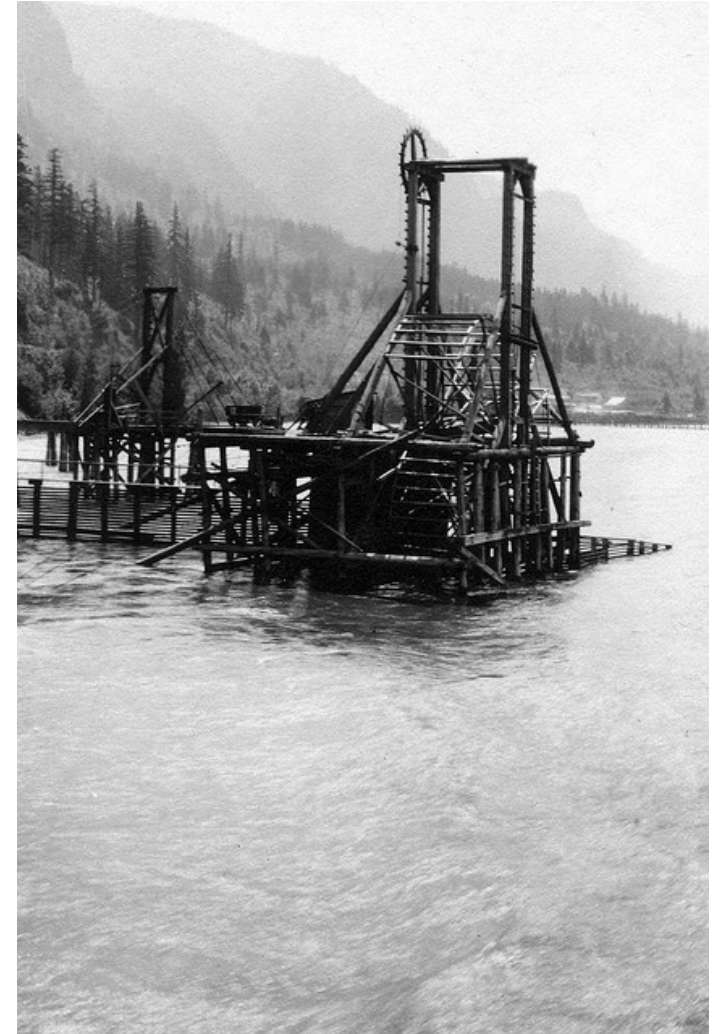
- A prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places (NRHP)
  - Term includes artifacts, records, and remains that are related to and located within these National Register properties





# What is the Register of Historic Places?

- Nation's official list of properties recognized for their significance in American history, architecture, archaeology, engineering, and culture
- Criteria for evaluating the eligibility of for the National Register are
  - Significance
  - Age (50 years old or older)
  - Integrity



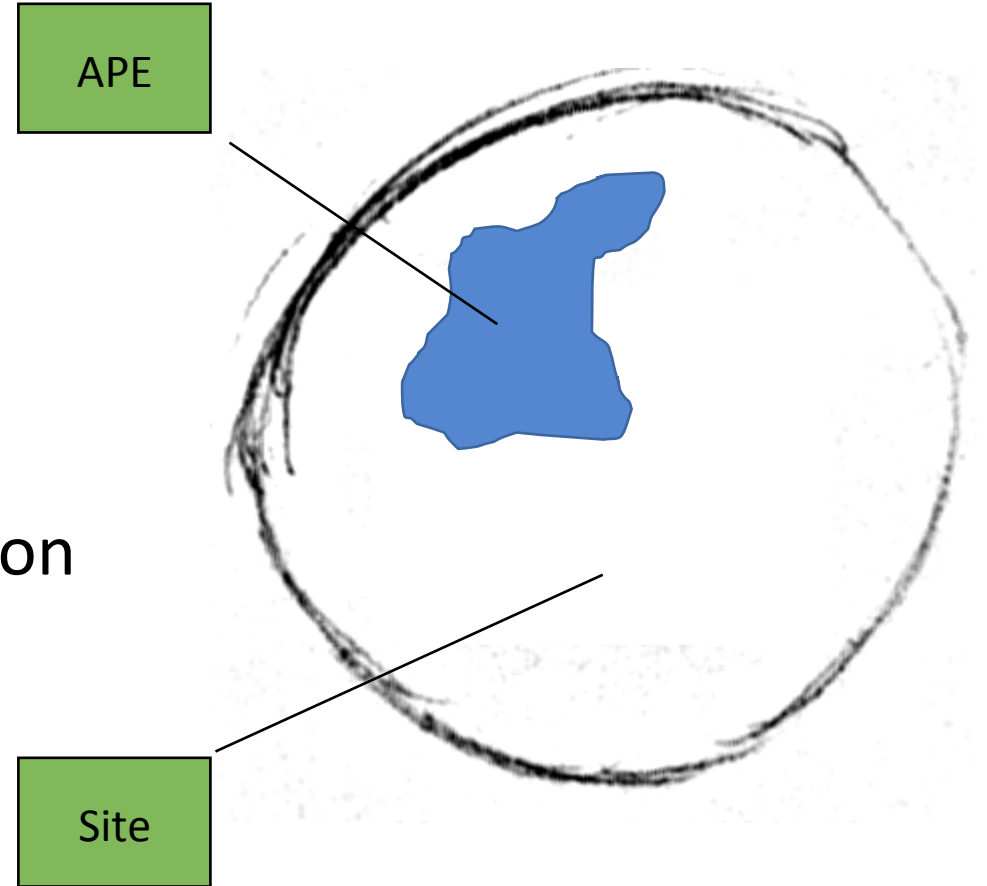
# What is an Adverse Effect?

- A project that may alter characteristics that qualify a specific property for inclusion in the National Register in a manner that would diminish the integrity of the property
- Adverse effects can be direct or indirect and include, but are not limited to, the following:
  - Physical destruction or damage
  - Relocation of the property
  - Change in the character of the property's setting
  - Introduction of incompatible visual, atmospheric, elements
  - Neglect and deterioration



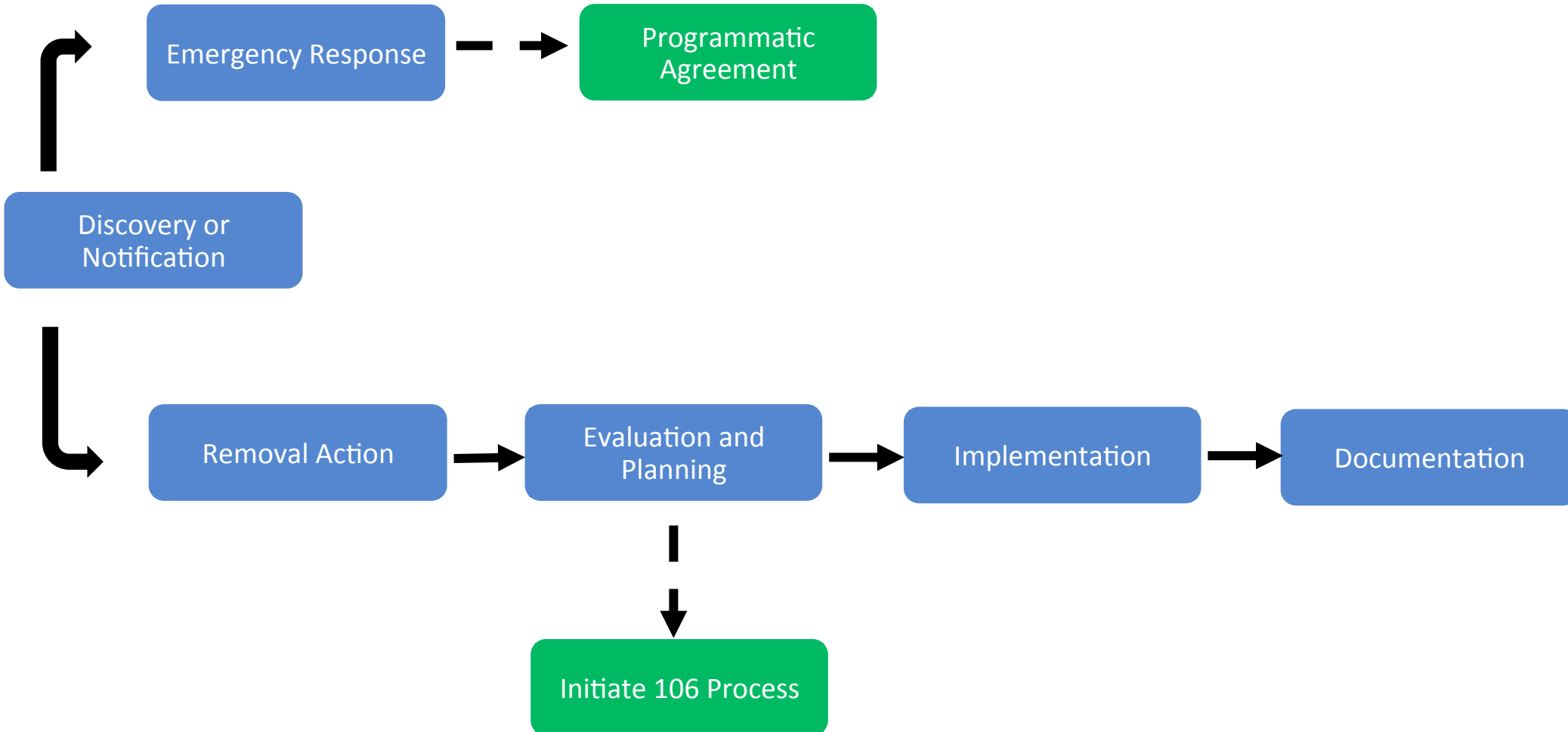
# Determining Area of Potential Effect and Scope of Effort

- Area of Potential Effect (APE)
- Consultation with SHPO in determining APE
- Specific requirement to gather information from Indian tribes



# CERCLA Removal and NHPA Section 106 Processes

# Overview

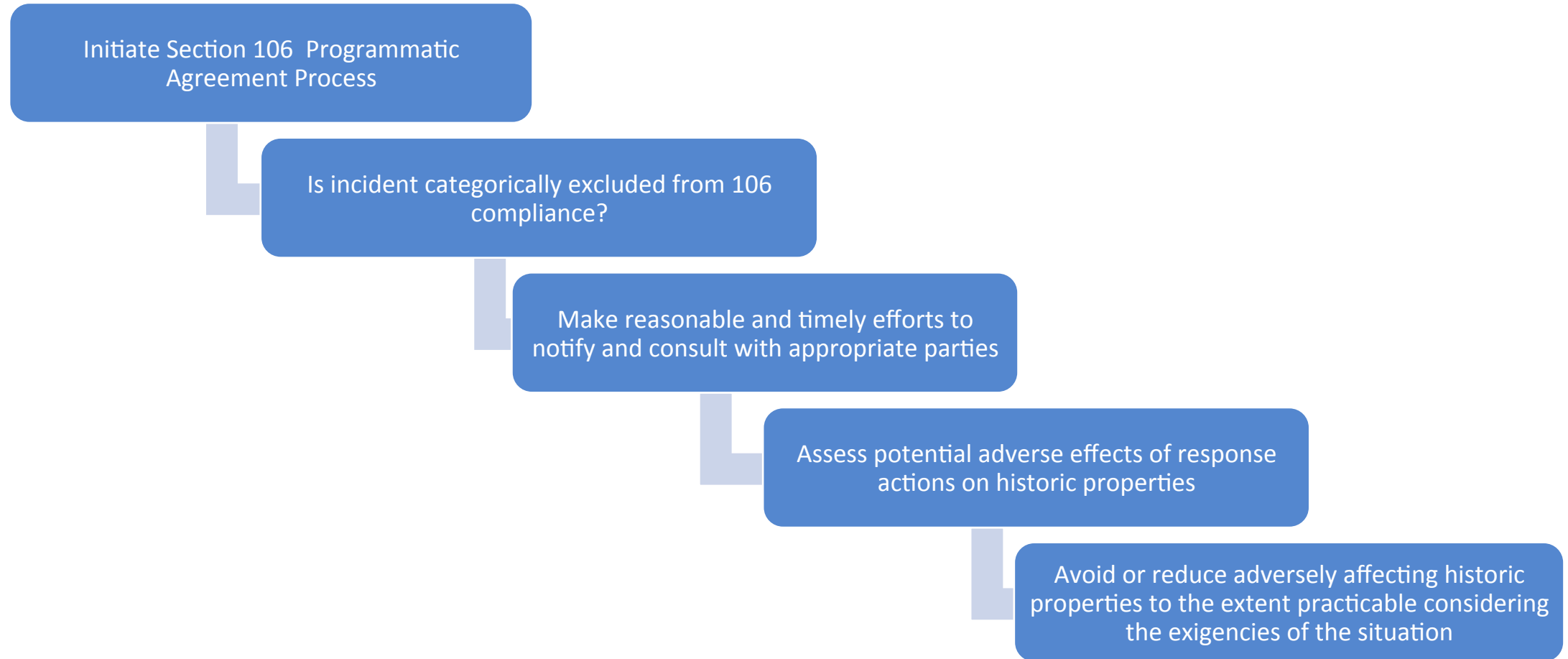




# NHPA Section 106 Programmatic Agreement on Historic Properties and Emergency Response

- Programmatic Agreement (PA) provides an alternative to Section 106 requirements to ensure appropriate consideration of historic properties during emergency response actions
- Neither Section 106 or the PA are intended to interfere with an emergency response; rather they require that the potential effects of undertakings on historic structures be considered

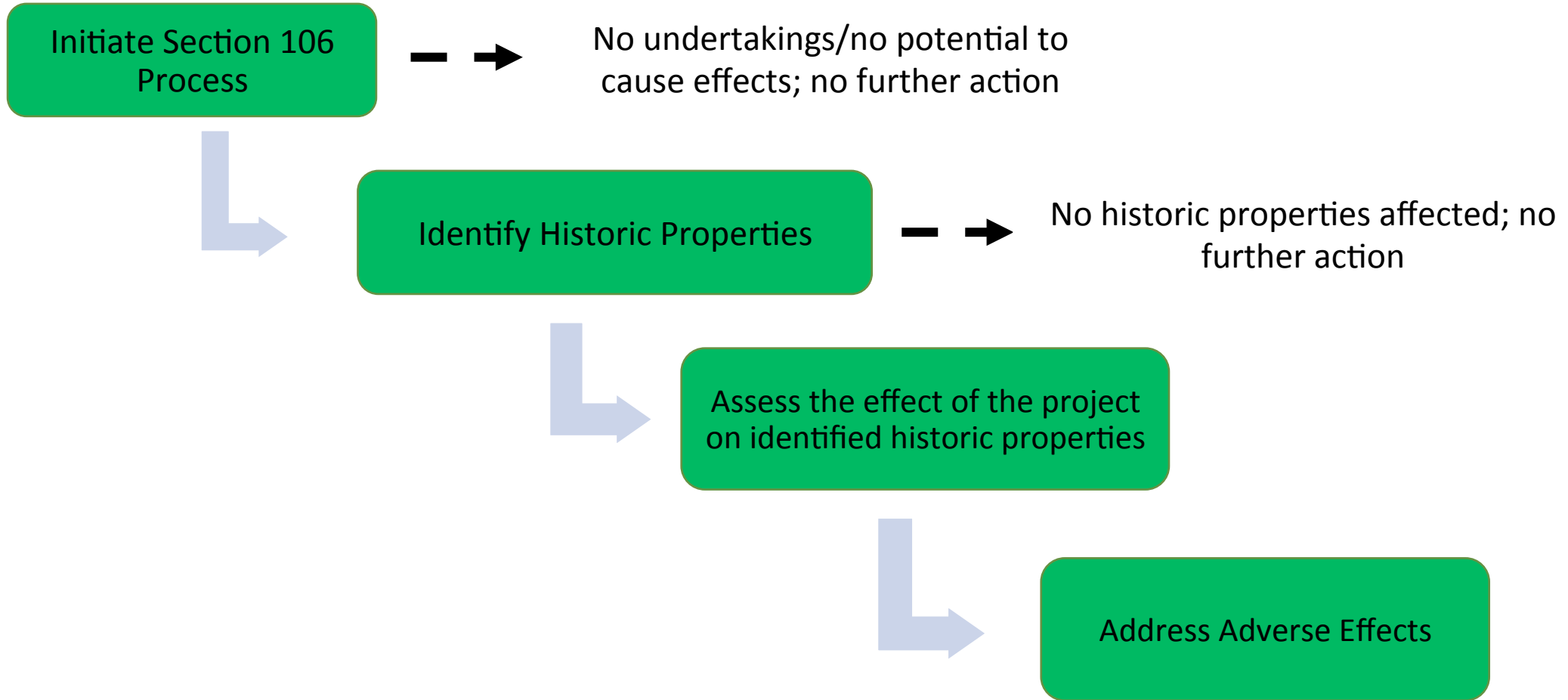
# Programmatic Agreement Flow Chart



# NHPA Section 106 Consultation Process

- Gather information to decide which properties in the area that may be affected by the project are listed, or are eligible for listing, in the NRHP
- Determine how those historic properties might be affected
- Explore measures to avoid or reduce adverse effect to historic properties
- Address adverse effects, to the extent practicable considering the exigencies of the situation

# Section 106 Flow Chart



# Case Study: Josephine Mill No. 1



# Background

- Josephine Mill No. 1 Site is an inactive mill located in northeast Washington state, approximately 1.5 miles northwest of Metaline Falls, Pend Oreille County, Washington
- Site consists of approximately 5.3 acres of land that contains a partially forested steep rock slope with remnant wood and concrete mill structures, tailings and waste rock piles, and miscellaneous metal
- Processing at the mill ended in the mid-1930's and the mill has generally been abandoned since that time.

# Overview of Mill Site



# Overview of Mill Site . . .





# Wood Flume Remnant



# Wood and Cable Crib Structure



# Collapsed Wooden Building





# Chronology of Site Events

- 12/09. Approval Memorandum for Conduct of an Engineering/Evaluation Cost Analysis
- 01/10. Cultural Resources Survey
- 03/10. Engineering/Evaluation Cost Analysis
- 09/10. Action Memorandum
- 09/10 – 11/10. Potentially responsible party performs removal action with EPA oversight

# Protection of Historic Properties

- 08/10. Cultural Resources Survey submitted to Washington State Department of Archaeology and Historic Preservation (DAHP or SHPO)
  - EPA makes a finding that there was no potential effect for adverse effect to historic property within the area of potential effect at Josephine Mill No. 1
  - DAHP disputes this finding and EPA and DAHP were not able to resolve this dispute
- 08/10 – 06/11. Multiple correspondence exchanged and conference calls held between EPA, DAHP, WA Attorney General, and ACHP to resolve interpretation of NHPA in context of CERCLA

# Summary: NHPA Section 106 Review And Removal Action Selection Under CERCLA

- NHPA is an ARAR (applicable, relevant or appropriate requirement). Under the NCP (National Oil and Hazardous Substances Pollution Contingency Plan) for removal actions, EPA must take into account the NHPA to the maximum extent practicable considering the exigencies of the situation.
  - While this could exempt EPA during emergencies from engaging in NHPA consultation, in all other instances, when at all possible, EPA should initiate and participate in the consultation process.
- Eligibility for the NRHP is the purview of the ACHP and SHPO, and EPA is best off respecting that authority, and although EPA has final say so in determinations of no adverse effect and litigation measures in cases of adverse effect, when at all possible such determination should be made taking into account the views and opinions of the SHPO/ACHP/Tribes.

Questions