

National Historic Preservation Act Section 106 Review Under the Comprehensive Environmental Response, Compensation, and Liability Act

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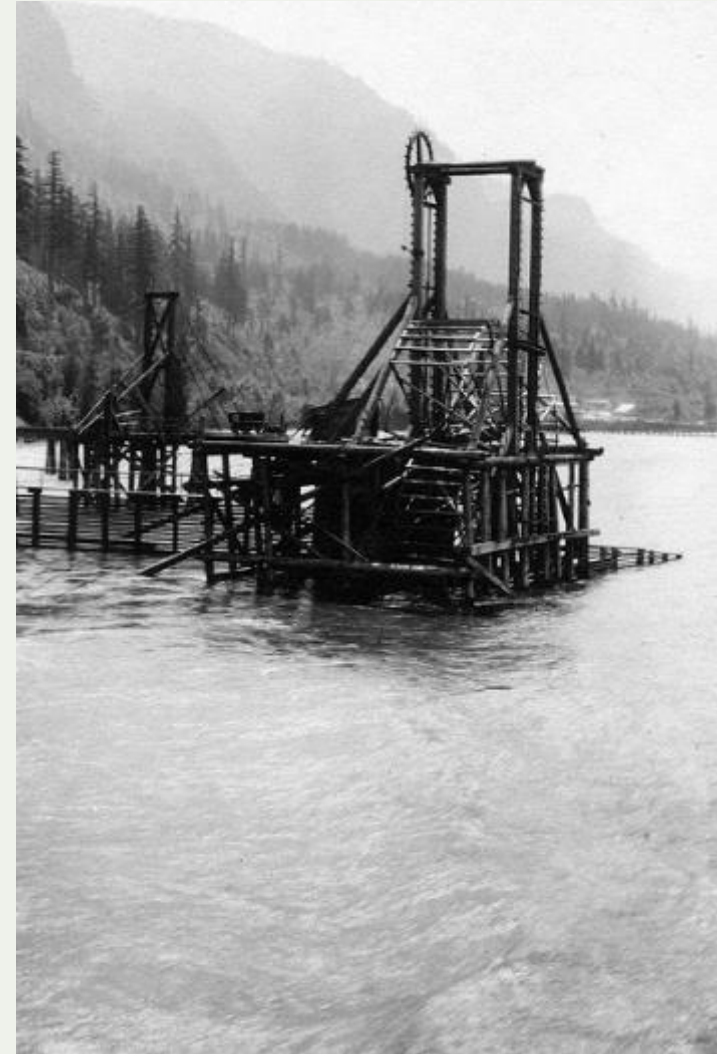
Overview

- ◆ **Course provides participants with an overview of the National Historic Preservation Act (NHPA) and Section 106 requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**
- ◆ **Topics covered:**
 - Overview of the NHPA
 - NHPA under CERCLA
 - Pre-Incident Planning and Emergency Response Under Section 106
 - Comparison of Key Elements of the Section 106 Process under NHPA and CERCLA
 - Section 106 Process: Case Studies Under CERCLA
 - Summary: Compliance with Section 106 Under CERCLA

I. Overview of the National Historic Preservation Act

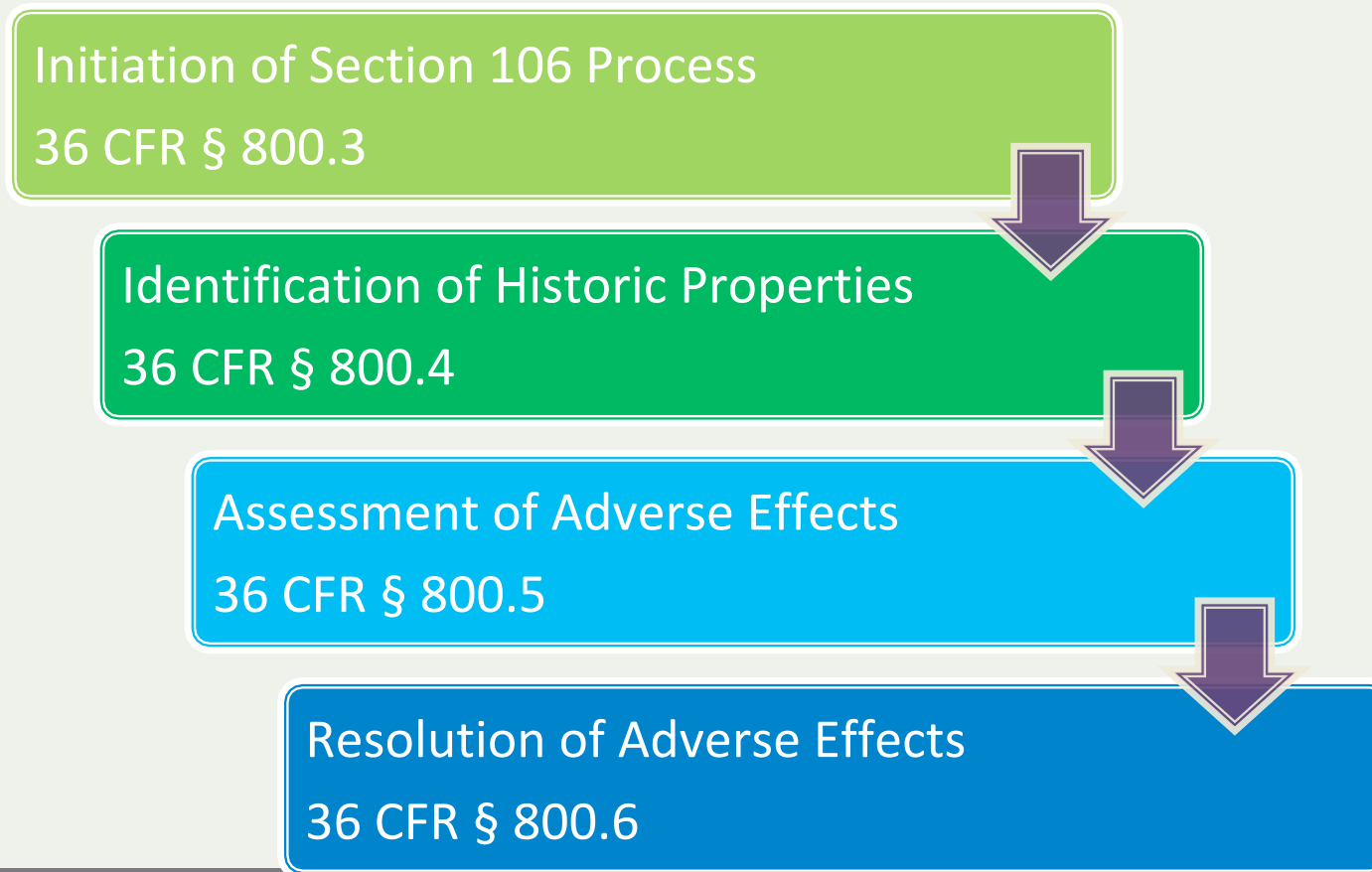
National Historic Preservation Act

- ◆ Environmental review process initiated with passage of the 1966 National Historic Preservation Act (NHPA), as amended (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470)
- ◆ Section 106 requires federal agencies to:
 - » Take into account effects of **undertakings** on historic properties
 - » Provide the Advisory Council on Historic Preservation (ACHP) with a reasonable opportunity to comment
 - » Consult with State Historic Preservation and Tribal Historic Preservation Offices, Indian tribes, and Native Hawaiian Organizations



Overview of the Section 106 Review Process

NHPA applies to your project if your project constitutes an undertaking and will have a potential effect on a property that is eligible for or included in the National Register of Historic Places



Responsibility for Compliance with Section 106

- ◆ **Responsibility for Section 106 compliance lies with the federal agency funding the project or action**

[36 C.F.R. § 800.2]

- ◆ **Section 106 regulations do not mandate a timeframe within which a federal agency must complete its review**

[36 C.F.R. § 800.1]



What is a Federal “Undertaking?”



- ◆ **A project, activity, or program either funded, permitted, licensed, or approved by a Federal Agency**
- ◆ **May take place on or off federally controlled property and include new and continuing projects, activities, or programs**

[36 CFR §§ 800.3, 800.16(y)]

Examples of Federal Undertakings

- ◆ EPA conducting Fund-lead cleanup action; EPA oversight of a PRP-lead cleanup action
- ◆ Bureau of Land Management permitting a company to build a road on public land
- ◆ County highway construction financed in part with federal funds
- ◆ Federal Energy Regulatory Commission relicensing of a private hydroelectric facility
- ◆ US Army Corps of Engineers building or modifying a dike
- ◆ US Forest Service building a recreation site on National Forest System land

What is a “Historic Property?”



- ◆ Any prehistoric or historic district, site, building structure, or object included *in or eligible for* inclusion in the National Register of Historic Places (NRHP)
- ◆ Includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization

[36 CFR §§ 800.4(a),(b),(c), 800.16(I)(1)]

Crystal Lake Cemetery



Barlow Road



What is the National 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 properties for the National Register are**
 - » Significance
 - » Age (50 years old or older; ≤ 1916)
 - » Integrity



[36 CFR § 60.4]

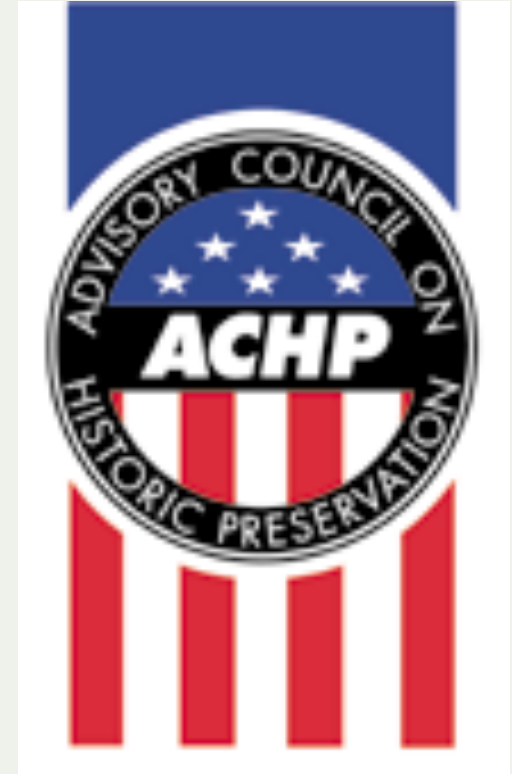


Avery Depot



Advisory Council on Historic Preservation

- ◆ **Advisory Council on Historic Preservation (ACHP) generally oversees Section 106 regulations found at 36 CFR Part 800, *Protection of Historic Properties***
- ◆ **ACHP also consults with and comments to agency officials on individual undertakings and programs that affect historic properties**



State Historic Preservation Officer (SHPO)

- ◆ SHPOs administer the national historic preservation program at the state level; SHPOs advise and assist Federal agencies
- ◆ Most Section 106 consultation takes place between federal agency and SHPO and ACHP (agencies may also consult with THPOs)

[36 CFR §§ 800.2(c)(1)]



Sumpter Valley Gold Dredge

Tribal Historic Preservation Officer (THPO)

- ◆ Section 106 places particular emphasis on consultation with THPOs, Tribes, and Native Hawaiian organizations (NHOs)
- ◆ Federal agencies must consult THPOs, Tribes, and NHOs about undertakings when they may affect historic properties to which a Tribe or NHO attach religious or cultural significance
- ◆ Applies regardless of whether the property is located on or off tribal lands

[36 CFR §§ 800.2(c)(2)]



Lovelock Cave

What is an “Adverse Effect” in Section 106?

- ◆ **An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the property’s integrity**
- ◆ **Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative**

[36 CFR § 800.5]

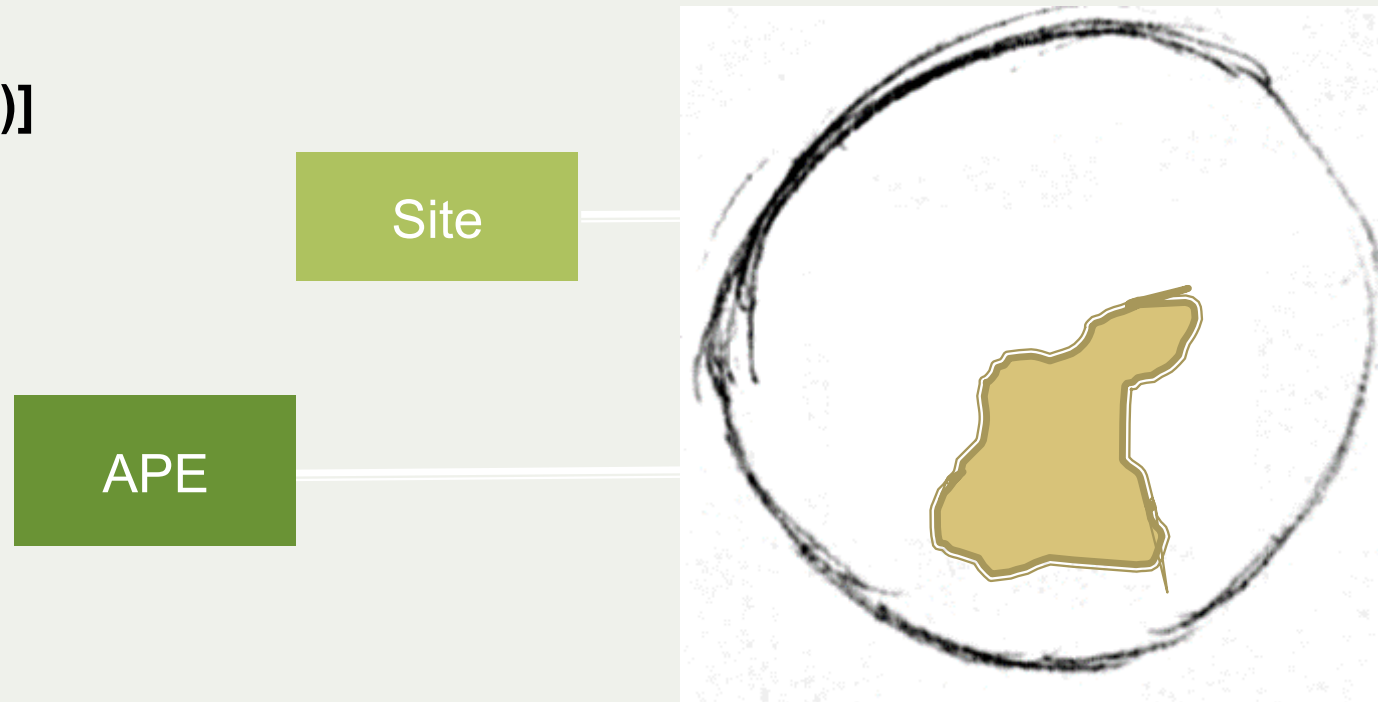
Examples of Adverse Effect Activities

- ◆ **Neglect of a property which causes its deterioration**
 - ◆ **Transfer, lease, or sale of property out of Federal ownership or control without adequate restrictions or conditions to ensure long-term preservation of property's historic significance**
 - ◆ **Physical destruction or damage**
 - ◆ **Relocation of the property**
 - ◆ **Change in the character of the property's use or setting**
 - ◆ **Introduction of incompatible visual, atmospheric, or audible elements**
- [36 CFR § 800.5(a)(2)]

What is an “Area of Potential Effect?”

- ◆ Geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist
- ◆ APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking

[36 CFR §§ 800.4(a)(1), 800.16(d)]



What is Consultation in Section 106?

- ◆ **Process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them regarding matters arising in the Section 106 process [36 CFR § 800.16(f)]**
- ◆ **Agency official should plan consultations appropriate to the scale of the undertaking and scope of federal involvement [36 CFR § 800.2(a)(4)]**

Consultation vs. Concurrence

- ◆ **Section 106 regulations require the Federal agency to make eligibility and effects findings in consultation with the SHPO/THPO; they do not require the Federal agency to obtain the SHPO/THPO's concurrence in those findings**
- ◆ **Regulations prescribe steps that should be followed when a SHPO/THPO disagrees with a Federal agency's findings; if agreement cannot be reached, then the ACHP issues formal comments on the undertaking, which the agency must consider before proceeding**

Other Statutes Defining and Protecting Historic Properties

- ◆ **Archaeological Resources Protection Act, 16 USC § 470aa, which provides for the protection of archaeological sites and other resources**
- ◆ **Native American Graves Protection and Repatriation Act, 25 USC § 3001, which provides for the protection of Native American human remains and other defined classes of cultural items**
- ◆ **National Marine Sanctuaries Act, 16 USC § 1431, which establishes civil penalties for destruction, loss of, or injury to a sanctuary resource, including historic properties**

Other Statutes Defining and Protecting Historic Properties . . .

- ◆ **Antiquities Act of 1906, 16 USC § 433, which establishes criminal penalties for non-permitted appropriations, excavation, injury, or destruction of any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the federal government**
- ◆ **Many States also have laws defining and protecting historic properties**

References

- ◆ The ACHP's web page provides the most comprehensive information about NHPA requirements (<http://www.achp.gov>), including links to contact information for federal, state, and tribal historic preservation officers
- ◆ The National Park Service's web page (<http://www.cr.nps.gov/nr/>) provides additional information on properties listed on the NRHP such as location and historic nature of these properties

Questions

II. NHPA under CERCLA

One Designed to Change Effects, the Other to Effect Change

- ◆ **NHPA was designed to change the effects of progress on the places important to communities**



One Designed to Change Effects, the Other to Effect Change . . .



- ◆ **CERCLA was designed and determined to do the opposite of NPHA – to effect change**

Emergency Response, Removal, and Remedial Actions

- ◆ Each year, EPA responds to hundreds of hazardous substance releases and oil spill discharges and performs long-term actions to protect the public and the environment
- ◆ These decisions may affect historic properties, including those that are of traditional religious and cultural significance



CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan

- ◆ **Section 104(a) of CERCLA directs EPA to be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR Part 300 when implementing any removal action or remedial action**
- ◆ **Section 121(e)(1) of CERCLA states no Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site**



Applicable or Relevant and Appropriate Requirements

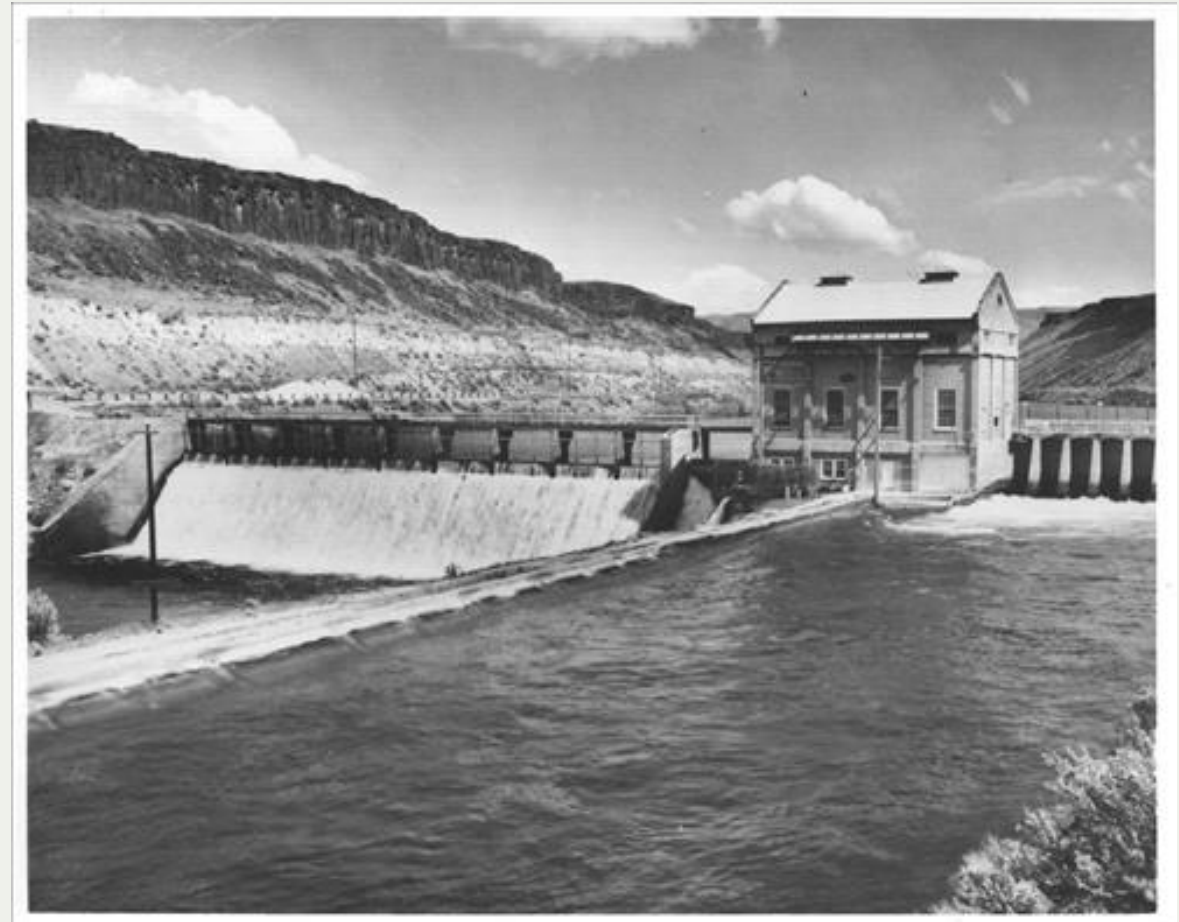


- ◆ NCP requires only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate (ARARs) [§ 300.400(g)(4)]
- ◆ NCP requires removal actions to attain ARARs of Federal and State laws to the extent practicable considering the exigencies of the situation [§ 300.415(j)]
- ◆ NCP requires remedial actions to meet ARARs at the completion of an action (or justify a waiver) [§ 300.435.(b)(1)]

Applicable or Relevant and Appropriate Requirements . .

◆ **Scope of ARARs:**

- » Substantive requirements usually specify a level or standard of control
- » Administrative requirements facilitate implementation of substantive requirements



Applicable or Relevant and Appropriate Requirements . . .

◆ **NCP requires that only on-site actions need comply with substantive requirements of ARARs [40 C.F.R. § 300.5]**

◆ **Types of ARARs:**

- » Action-specific
- » Chemical-specific
- » Location-specific



Applicable or Relevant and Appropriate Requirements . . .

- ◆ **Under CERCLA, if NHPA is identified as a location-specific ARAR, the applicable requirements of the NHPA include those that are substantive, rather than those portions that are administrative**



References

- ◆ **Additional information about CERCLA can be found on the EPA Web site: <http://www.epa.gov/superfund-cercla-overview>**
- ◆ **Additional information about the NCP can be found on the EPA Web site: <https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview>**

Questions

III. Pre-Incident Planning and Emergency Response Under Section 106

Pre-Incident Planning

- ◆ **40 CFR 300.210 defines objectives, authority, and scope of Federal Contingency Plans, including the NCP, Regional Contingency Plans (RCPs), and Area Contingency Plans (ACPs)**
 - » ACPs [§ 300.210(c)] have been developed as a reference document for use of all agencies engaged in responding to environmental emergencies in a defined geographic area
 - » ACPs adopt national *Programmatic Agreement*
- ◆ **Under ACPs, Geographic Response Plans (GRPs) guide response actions for a particular shore of waterway, including culturally and historically sensitive sites**

Pre-Incident Planning Flow Chart

Identify historic properties that have been listed in or determined eligible for inclusion in the NRHP that might be affected by response to a release or a spill

Identify specific geographic areas or types of areas where categorical exclusions may apply

Develop a list of parties to be notified in the event of an incident in a non-excluded area

- Develop emergency response strategies that can be reasonably anticipated to protect historic properties

Pre-Incident Planning . . .

- ◆ **May not adequately address federal regional planning and preparedness activities before a response action**



Lochsa River, ID

Programmatic Agreement

- ◆ **NHPA was written for planned actions and does not adequately address federal actions under an emergency response**
- ◆ **To fill that gap for environmental emergencies, ACHP, National Conference of State Historic Preservation Officers, and eight federal agencies, including United States Coast Guard and EPA, developed and signed the**

Programmatic Agreement on Protection of Historic Properties During Emergency Response Under the National Oil and Hazardous Substance Pollution Contingency Plan (Programmatic Agreement)

Programmatic Agreement . . .

- ◆ **Programmatic Agreement provides an alternative process to standard Section 106 procedures that allows agencies to meet their responsibilities to protect public health and safety while considering potential impacts to historic properties**
- ◆ **A copy of the *Programmatic Agreement* can be found on the ACHP Web site: <http://www.achp.gov/NCP-PA.html>**



Emergency Response Actions

- ◆ **Programmatic Agreement defines an “emergency” as that which shall be deemed to exist whenever circumstances dictate that a response action to a release or spill must be taken so expeditiously that normal consideration of the Section 106 process is not *reasonably practicable***
- ◆ **On-Scene Coordinator (OSC) would make determination as to when such an emergency ceases to exist**
- ◆ **Once the emergency response phase is over, the standard 106 process would apply**

What types of adverse effects on historic properties may result from emergency response actions?

◆ **Certain emergency response actions may include**

- » Placement of physical barriers to deter the spread of released or spilled substances
- » Excavation of trenches to stop the spread of the released or spilled substances
- » Ground disturbing shoreline clean up methods
- » Establishment of field camps for personnel
- » Creation of staging areas for materials or equipment
- » Excavation of borrow pits for fill materials
- » Construction of access roads

Examples of Potential Emergency Response “Adverse Effect” Activities



Examples of Potential Emergency Response “Adverse Effect” Activities



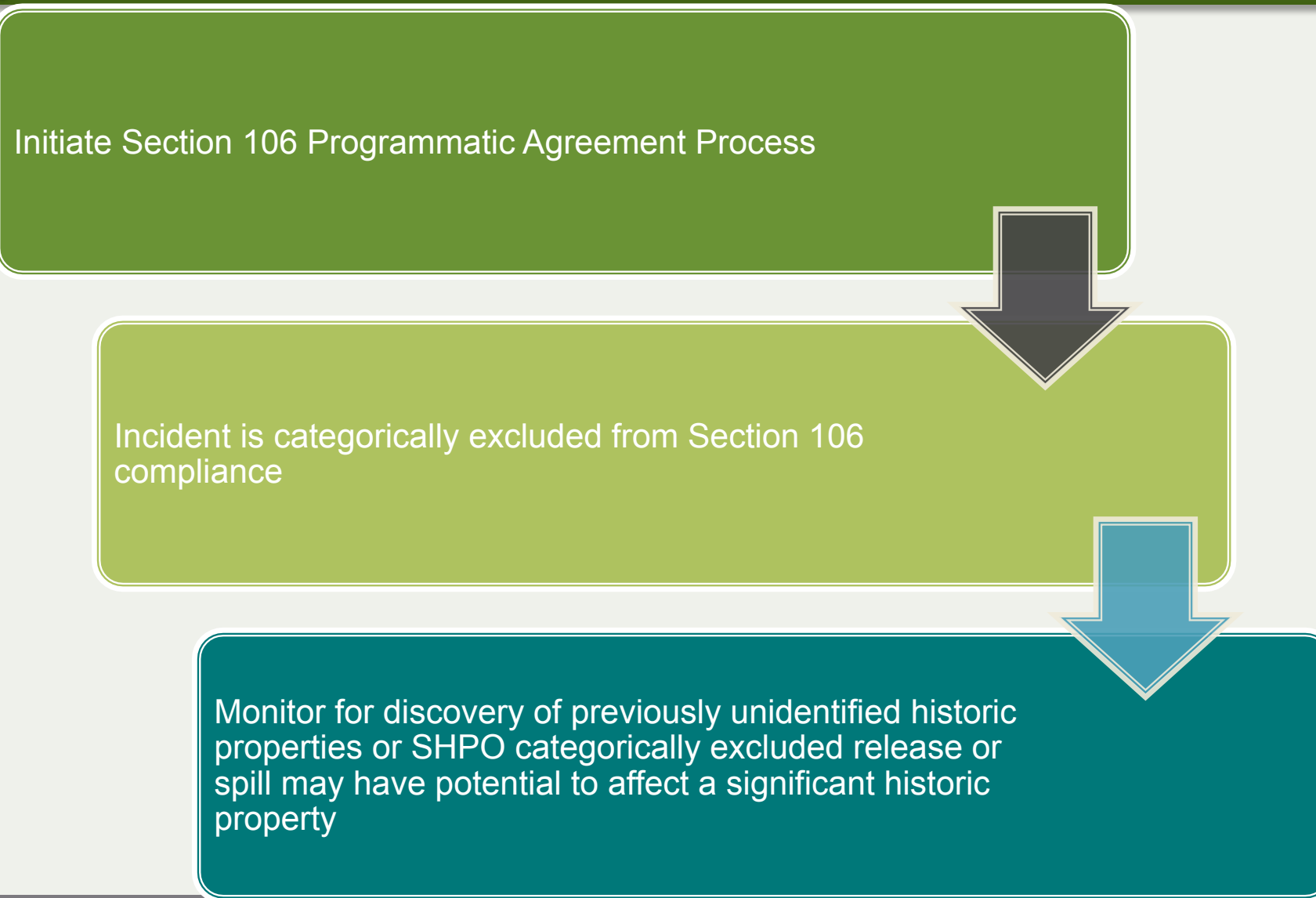
Examples of Potential Emergency Response “Adverse Effect” Activities



Examples of Potential Emergency Response “Adverse Effect” Activities



Emergency Response Flow Chart: Categorically Excluded



Categorically Excluded Areas from Section 106

Spills/releases onto (which stay on):

- Gravel pads
- Roads (gravel or paved, not including undeveloped right-of-way)
- Parking areas (graded or paved)
- Dock staging areas less than 50 years old
- Gravel causeways
- Artificial gravel islands
- Drilling mats, pads, and/or berms
- Airport runways (improved gravel strips and/or paved runways)

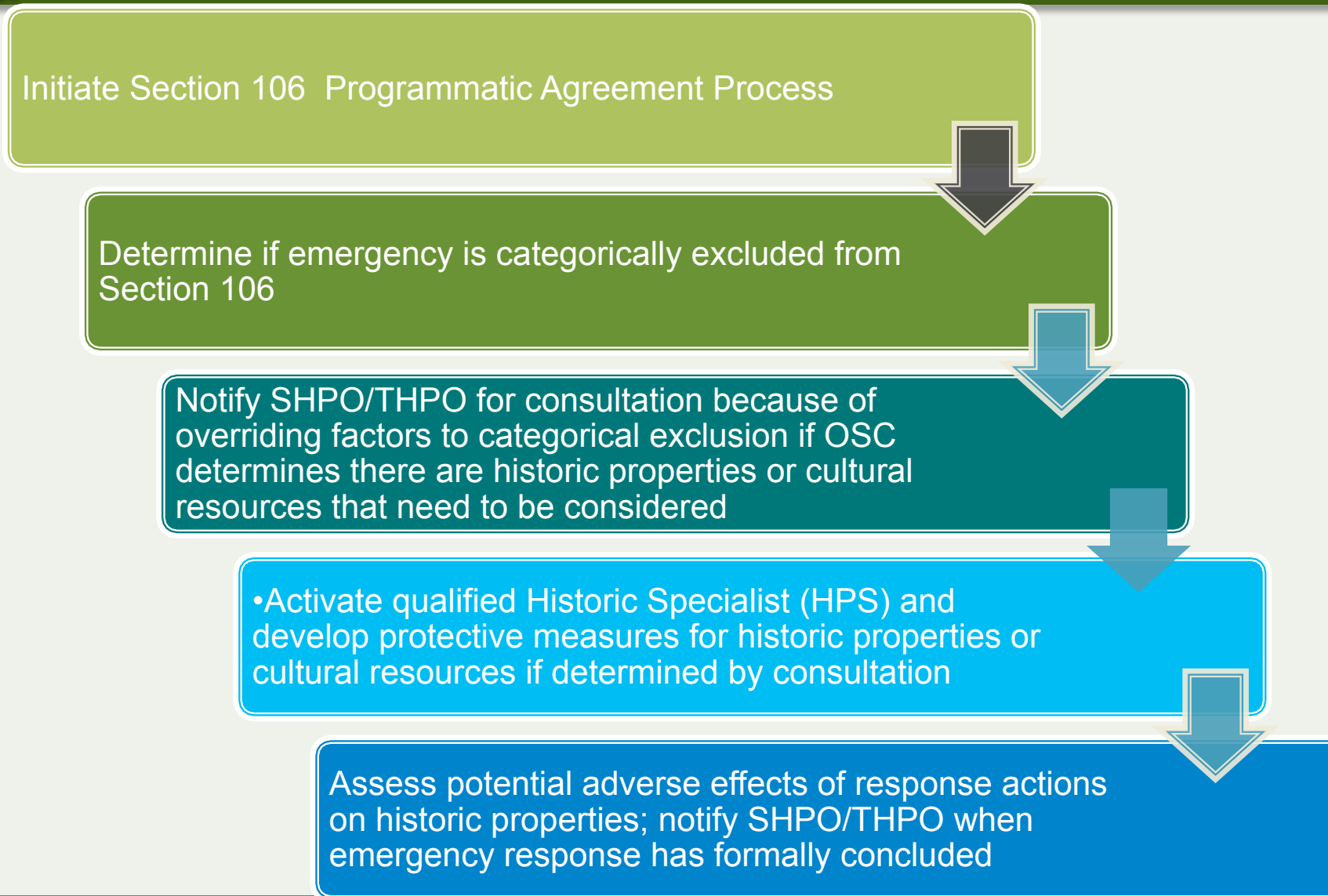
Spills/releases into (that stay in):

- Lined pits (e.g., drilling mud pits and reserve pits)
- Water bodies where releases/spills will not : reach land/submerged land; and include any emergency response activities with land/submerged land-disturbing components
- Borrow pits
- Concrete containment area

Spills/releases of:

- Gases (e.g., chlorine gas)

Emergency Response Flow Chart: Not Categorically Excluded



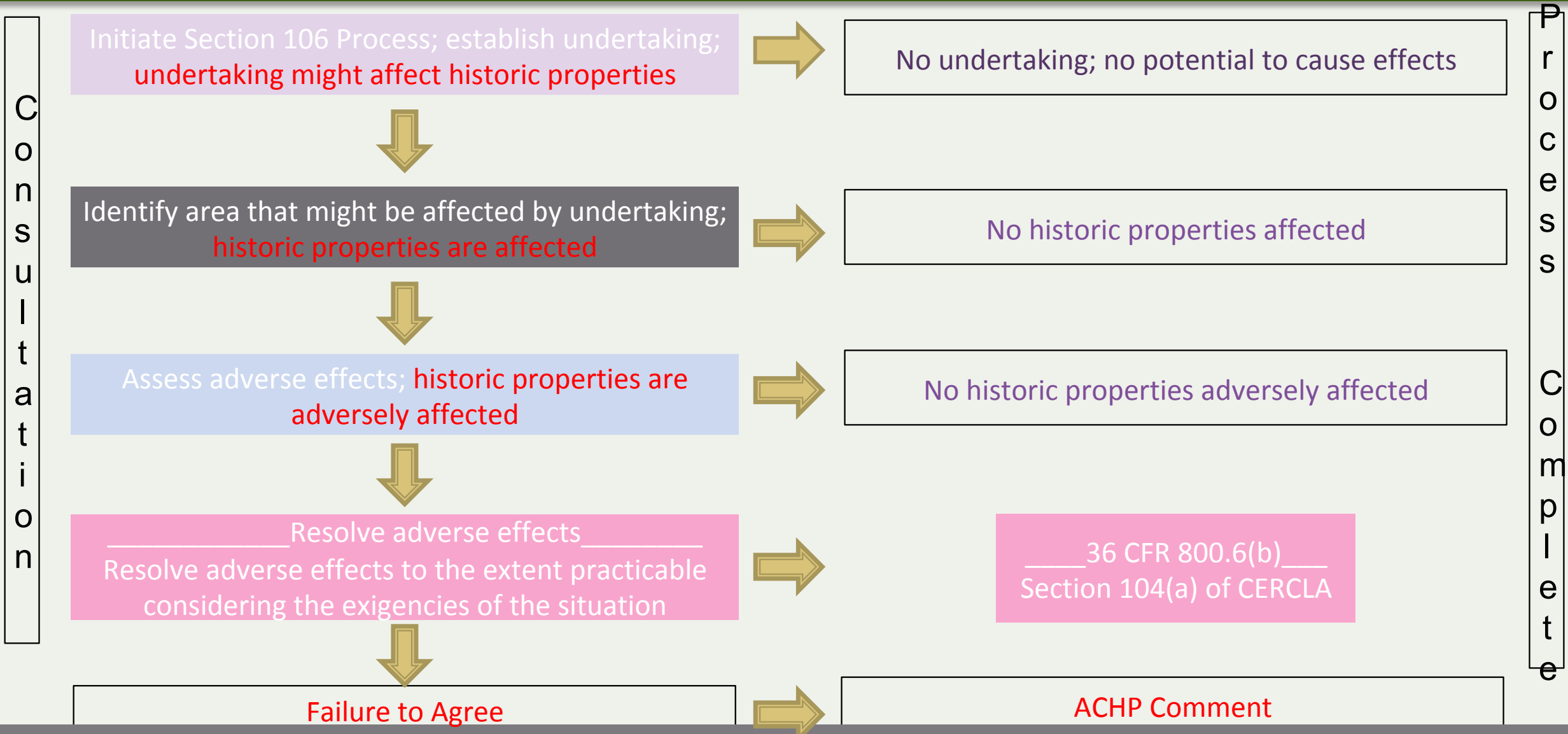
Important Concepts about Section 106 for the Federal On-Scene Coordinator

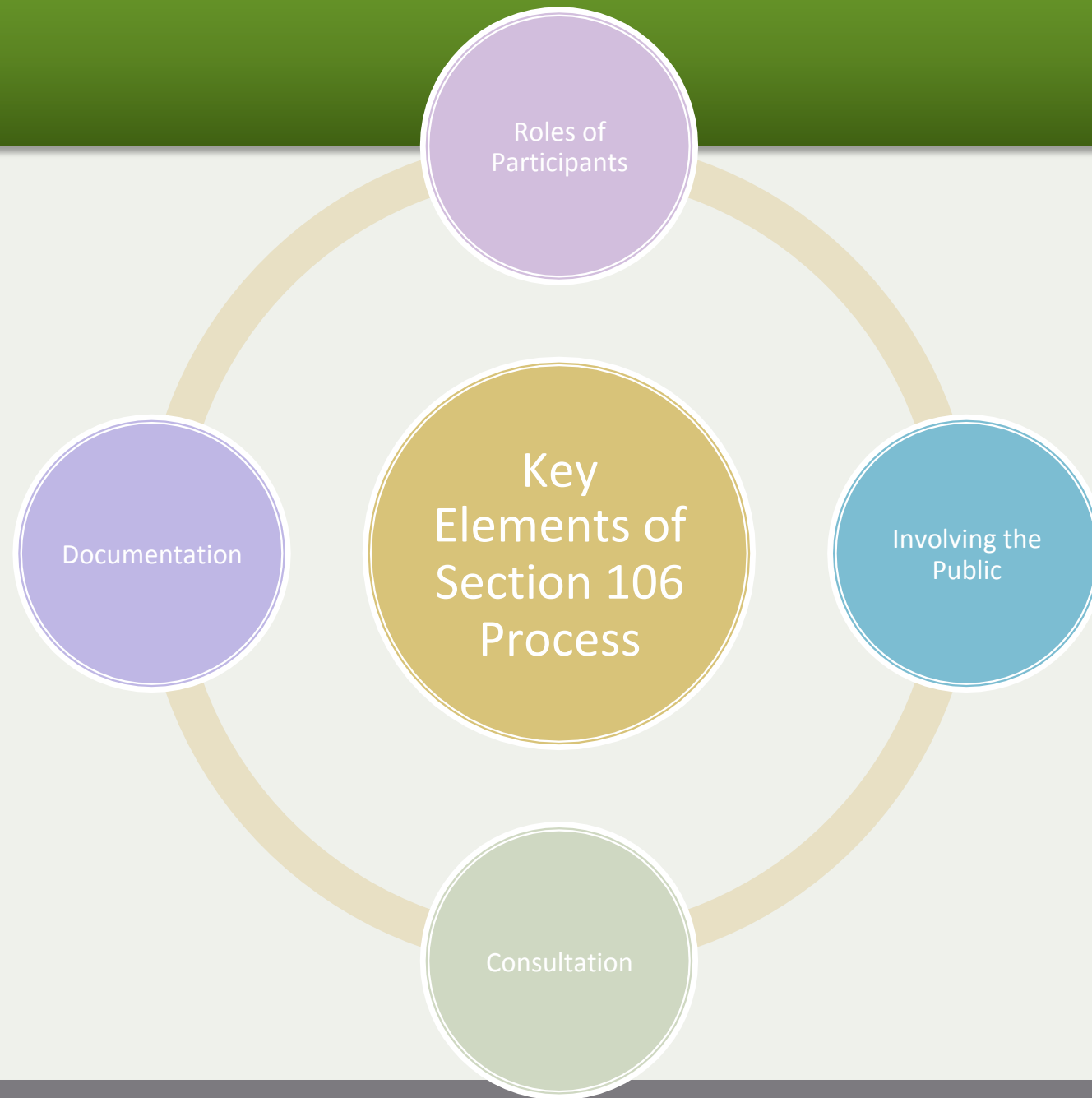
- ◆ **OSC may have to make an emergency response decision that adversely affects historic properties and cultural resources; however, the emergency response decision must be an informed decision**
- ◆ **OSC must conduct formal consultation with the SHPO/THPO on newly discovered or unanticipated potential historic properties or cultural resources encountered and on adverse impacts due to the response on those properties or resources**

Questions

IV. Comparison of Key Elements of the Section 106 Process Under NHPA and CERCLA

Section 106 Process Flow Chart





Comparison of Key Elements: Roles of Participant's

Section 106 Process

- ◆ **§ 800.2 identifies participants in 106 review process and outlines their roles and responsibilities**

NCP

- ◆ **Participants roles and responsibilities in CERCLA response process are stated in the NCP such as §§ 300.135, 300.175 and 300.500, and 300.600**

Comparison of Key Elements: Involving the Public

Section 106 Process

- ◆ **Section 106 requires that agencies provide the public with information about an undertaking and its effects and seek public comment**

[36 CFR 800(d)(2)]

NCP

- ◆ **Activities to inform and encourage public participation in the CERCLA response process are stated in the NCP such as §§ 300.135, 300.415, 300.430, and 300.800**

Comparison of Key Elements: Consultation

Section 106 Process

- ◆ **Seeking, discussing, and considering views of other participants, and where feasible, seeking agreement with them regarding matters arising in Section 106 process**

[36 CFR 800.16(f)]

NCP

- ◆ **Activities to engage in dialogue, consultation, and coordination with communities affected by the CERCLA response process are stated in the NCP such as §§ 300.135, 300.415, 300.430, and 300.800**

Comparison of Key Elements: Documentation

Section 106 Process

- ◆ Agency official shall ensure that a determination, finding, or agreement is supported by sufficient documentation to enable any reviewing parties to understand its basis

[36 CFR 800.11]

NCP

- ◆ During all phases of response, the lead agency shall complete and maintain documentation to support all response actions taken under the NCP

[40 CFR 300.16(a)(1)]

EPA Options for Completing Section 106 Process at Mixed Ownership Sites

- ◆ **Rely solely on another federal agency's Section 106 review and consultation, which likely would be accomplished by adopting the other agency's Programmatic Agreement or Memorandum of Agreement**

- ◆ **Complete a separate Section 106 Process**

References

- ◆ **A copy of the EPA *Superfund Community Involvement Handbook* (2016) can be found at: <http://www.semspub.epa.gov>**
- ◆ **A copy of the Section 106 Regulations Flow Chart and Key Elements of the Section 106 Process can be found on the ACHP Web site: <http://www.achp.gov/regflow.html>**

Questions

V. Section 106 Process: Case Studies under CERCLA

Case Study: Avery Landing



Background

- ◆ **Site (located in Shoshone County, ID) is a former location of a railroad light maintenance and refueling facility used between 1907 and 1977 by the Chicago, Milwaukee, St. Paul & Pacific (Milwaukee) Railroad**
- ◆ **Initial PRP-lead non-time-critical removal action (NTCRA) engineering evaluation/cost analysis (EE/CA) effort pursuant to an Administrative Settlement Agreement and Order on Consent (ASAOC) (08/08), including a cultural resources survey (CRS)**
- ◆ **Due primarily to an excess of deficiencies associated with the EE/CA, EPA assumed responsibility for completion of project documents, including the CRS**

Section 106 Activities

- ◆ **06/04/2011 - 09/11/2012. Initiated and completed substantive requirements of Section 106 Process under CERCLA**
- ◆ **06/04/11. EPA submits two reports to ID State SHPO requesting comments, suggestions, or recommendations regarding report conclusions and recommendations:**
 - » PRP-prepared Cultural Resources Assessment
 - » EPA-prepared Cultural Resources Survey (CRS); recommends pedestrian survey and archaeological field study of Site and finding of **no adverse effect**
- ◆ **08/25/11. SHPO concurs with recommendation and requests additional field activities (any remains associated with CCC camp or Japanese settlement); and other recommendations for additional actions to mitigate effects from cleanup**

Section 106 Activities . . .

- ◆ **08/25/12. EPA submits final CRS report to ID State SHPO; advises EPA initiated cleanup 06/12; additional field activities requested by SHPO were either performed or taken into account during survey and field work**
- ◆ **08/30/12. SHPO responds report is**
 - » CRS is “well done and meets the Secretary of the Interior’s Standard’s.”
 - » “In the future, EPA should have final comments in hand prior to any ground-disturbing activities associated with the project. Without final comments, EPA is not meeting the requirements of Section 106.”
- ◆ **09/11/12. EPA offers government-to-government consultation with Coeur d’Alene Tribe regarding 2012 CRS report; no comments received**

Site Architectural Features Identified During CRS



Site Architectural Features Identified During CRS



Site Artifact Scatters



Case Study: Bonanza Mine and Mill



Background

- ◆ **Former mercury mine and mill that operated from the mid-1860s to the 1960s and produced more than 3,000,000 pounds of mercury**
- ◆ **In 2014 EPA performed a TCRA at the Site located in Douglas County, OR**



Section 106 Activities

- ◆ **06/03/2014 – 09/30/2014. Initiated and completed substantive requirements of Section 106 Process under CERCLA, including**
 - » Consultation with OR SHPO (throughout 106 Process) and interested Tribes
 - » Completion of a Cultural Resources Survey (CRS)
 - » EPA determined that the TCRA had **no potential to have an adverse effect** on historic properties because no such properties remained at the Site
 - » CRS forwarded to OR SHPO, interested Tribes, and Douglas County Historical Society
 - » SHPO concurred with no effect determination

- ◆ **State OSC played an influential consultation role throughout the 106 Process**

Bonanza Mine and Mill: mid-970s



Mine Workings and Mill Site: 2014



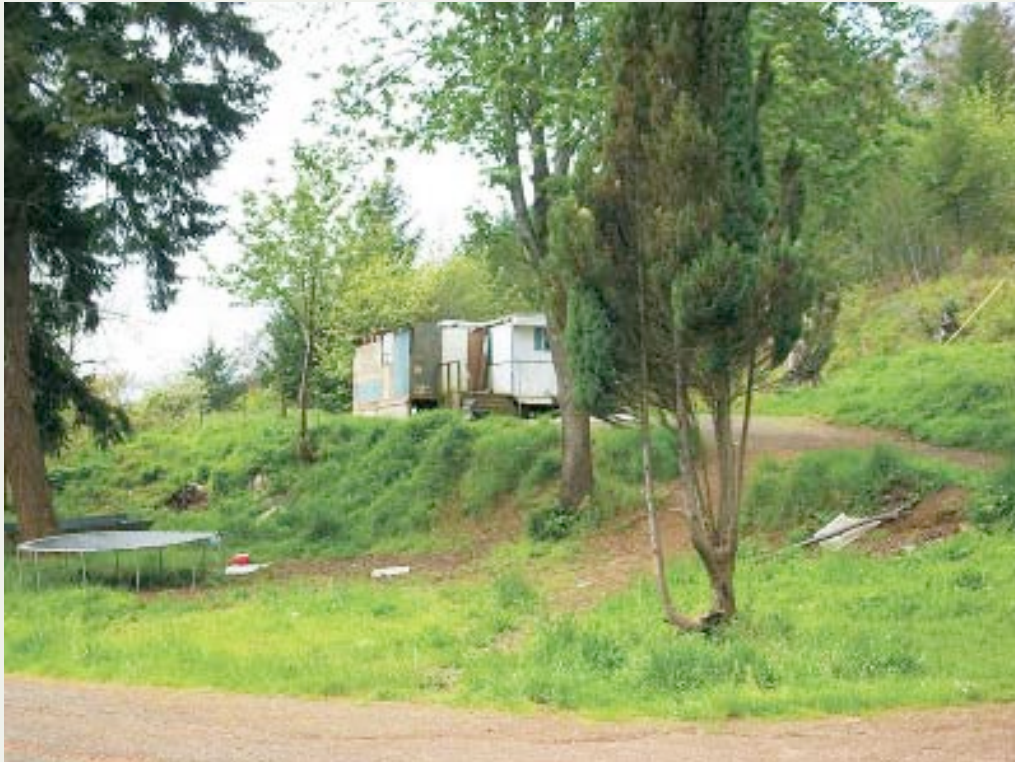
Mine Waste Dumps



On-Site Residences



On-Site Residences . . .



Case Study: Josephine Mill No. 1



Background

- ◆ **Josephine Mill No. 1 Site is an inactive mill located in northeast WA**
- ◆ **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**
- ◆ **EPA overseeing performance of PRP-lead non-time-critical removal action; PRP is owner of Site**

Overview of Mill Site:



Overview of Mill Site:



Overview of Mill Site: Wood Flume Remnant



Section 106 Activities

◆ **01/2010. PRP-prepared Cultural Resources Survey (CRS):**

- » Identified three features likely to be adversely affected by removal action (JM-1, JM-2, JM-3)
- » Recommended development of an Memorandum of Agreement (MOA) between State of Washington Department of Archaeology and Historic Preservation (DAHP) and EPA, and preliminary excavation at these three features be monitored by qualified archaeologist

◆ **09/2010. Project monitoring of features did not identify cultural resources that would significantly add to knowledge of mill; no further cultural resources work recommended for removal action**

- » DAHP agreed to allow removal action to proceed with preliminary excavation into three features being monitored by a qualified archaeologist

Site Architectural Features: JM-1 Collapsed Wooden Building; JM-3 Remnant Wood Crib Structure

JM-1



JM-3

Site Artifact Scatter: JM-2 Trash Scatter

JM-2



A Tale of Two Perspectives: SHPO

◆ **SHPO asserts EPA:**

- » Is required to comply with the administrative and the substantive requirements of Section 106 of NHPA and its implementing regulations, and counterpart State statutes
- » Failed to comply with Section 106 by not entering into MOA with DAHP, and not obtaining an permit from the Department enabling it with the capacity to assure appropriate treatment of archaeological resources at the Site

A Tale of Two Perspectives: EPA

◆ EPA asserts:

- » It has been following the dictates of CERCLA and NCP; EPA has sought to have the removal action comport with substantive aspects of NHPA

Specific Concerns/Issues - ARARs

- ◆ **NCP requires removal actions to attain ARARs of Federal and State laws to the extent practicable considering the exigencies of the situation [40 CFR § 300.415(j)]**
 - » Need for prompt and thorough response to contamination which presents an ongoing risk to public health and environment, short work season and need to conserve limited work resources

- ◆ **NCP requires only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be ARARs [§ 300.400(g)(4)]**
 - » No comments were received from SHPO (or anyone else) about historic preservation laws during early planning, review of the CRE and engineering evaluation/cost analysis (EE/CA) (both produced in March 2010), or in response to listing NHPA as an ARAR in the Action Memorandum (produced 08/26/10)
 - » Comments were received from SHPO about State historic preservation laws on 09/14/2010
 - › SHPO did not provide a satisfactory explanation as to why the historic preservation laws were substantively more stringent than NHPA

Specific Concerns/Issues – MOU and Permits

- ◆ **Section 121(e)(1) of CERCLA states no Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site**
- ◆ **NCP requires that only on-site actions need comply with substantive requirements of ARARs [40 CFR § 300.5]**
 - » Approval by or consultation with administrative bodies, application for permits, documentation, reporting, recordkeeping are examples of administrative requirements

ACHP Review of Section 106 Compliance

- ◆ **SHPO notifies ACHP about alleged inadequacy of EPA's compliance with the NHPA**
- ◆ **EPA and SHPO provided documentation to ACHP; ACHP held a hearing/conference call with EPA and SHPO to discuss compliance issues; EPA and SHPO provided additional information as requested by ACHP**
- ◆ **ACHP issued a decision basically stating that EPA had not followed proper protocol under the NHPA regulations by failing to timely consult with the SHPO; but that this failure did not require any further consideration because EPA had already mitigated for the loss of potential historic properties by providing SHPO with appropriate documentation and historic evaluation of the properties**

Questions

VI. Summary: Compliance with Section 106 Under CERCLA

Section 106 Process under CERCLA: SHPO Survey

- ◆ **Article titled, *Integrating the Preservation of Cultural Resources with Remediation of Hazardous Materials: An Assessment of Superfund's Record*, presents findings of a survey circulated among SHPOs in December 1999**
 - » Survey asked SHPOs to describe experiences with EPA and its willingness to administer Superfund in compliance with NHPA
- ◆ **About 30 SHPOs responded to questionnaire**

Section 106 Process under CERCLA: SHPO Survey . . .

◆ Conclusions:

- » Are you aware of one or more Superfund projects in state that have (potentially) had an effect cultural resources?
 - › **12/30 Yes; 17/30 No; 1/30 Unaware**
- » Has EPA complied with section 106 NHPA and related regulations while planning to implement Superfund remediation in your state?
 - › **8/29 Yes; 7/29 No; 14/29 Other (unknown)**
- » If so, did EPA step forward voluntarily?
 - › **6/11 Yes; 4/11 No; Other 1**

Section 106 Process under CERCLA: SHPO Survey . . .

- ◆ **Has your office had difficulty convincing EPA personnel that EPA is required to comply with section 106?**
 - » **8/25 Yes; 6/25 No; 11/25 Other**

- ◆ **If EPA complied has complied with section 106 on one or more Superfund projects in your state, how would you rate EPA's performance compared with other agencies which your office works?**
 - » **Determinations of Eligibility: Poorer 4/13; Typical 8/13; Better 1/13**
 - » **Determinations of Effect: 4/11; Typical 6/11; Better 1/11**
 - » **Considerations of Alternatives: Poorer 7/11; Typical 4/11; Better 0/11**
 - » **Mitigation of Adverse Effect: Poorer 4/11; Typical 4/11; Better 3/11**

Observations About Section 106

- ◆ **NHPA applies to your project if your project constitutes an undertaking and will have a potential effect on a property that is eligible for or included in the Register of Historic Places**
- ◆ **Federal agencies retain the responsibility for final decisions regarding the impacts of cleanup activities on cultural resources**
- ◆ **Anticipate having to explain to SHPOs and others the legal parameters of CERCLA such as Section 104(a) and Section 121(e)(1), and the NCP, including 40 CFR § 300.415(j)**

Observations About Section 106 . . .

- ◆ **NHPA does not prohibit federal agencies from having an adverse effect on cultural resources included on (or eligible for inclusion on) the National Register; rather, the act requires agencies to *consider* the effects of their undertakings**

There is no substantive requirement to actually avoid or minimize adverse effects

- ◆ **Initiate the Section 106 process as early as possible with the SHPO/THPO**
- ◆ **Carefully screen archaeological consultant and draft documents (e.g., definition of APE, recommendations, anything outside of context of CERCLA)**

Observations About Section 106 . . .

- ◆ **Federal agencies have an obligation to consult with tribes that may attach religious or cultural significance to historic properties that may be affected by an undertaking**
- ◆ **See *also* EPA Policy on Consultation and Coordination with Indian Tribes (Policy), available at <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>**
 - » This policy describes a separate obligation to consult with federally recognized tribes based on the federal government's trust responsibility

Questions