Section 106 of the National Historic Preservation Act

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February 2013

ADVISORY COUNCIL ON HISTORIC PRESERVATION

PRESERVING AMERICA'S HERITAGE

Photo credit: Vito Palmisano courtesy the Michigan Economic Development Corporation

SECTION 106 OF NHPA

Prior to the approval of the expenditure of any federal funds on an undertaking, the NRCS must:

- ***Take into account the effects of the undertaking on historic properties; and***
- ***Afford the Advisory Council on Historic Preservation a reasonable opportunity to comment***

The Section 106 process

CONSULTATION

1. INITIATE the process

- Determine undertaking
- Notify SHPO/THPO, Indian tribes, and NHOs
- Identify other Consulting Parties
- Plan to involve the public

No undertaking/ potential to cause effects

2. IDENTIFY historic properties

- Determine APE
- Identify historic properties
- Consult with SHPO/THPO, tribes, NHOs, and other Consulting Parties
- Involve the public

No historic properties present/affected

3. ASSESS adverse effects

- Apply criteria of adverse effect
- Consult with SHPO/THPO, tribes, NHOs, and other Consulting Parties
- Involve the public

No historic properties adversely affected

4. RESOLVE adverse effects

- Notify ACHP
- Avoid, minimize, or mitigate adverse effects
- Consult with SHPO/THPO, tribes, NHOs, and other Consulting Parties
- Involve the public

Agreement (MOA)/PA) Or ACHP Comment

- STEP 1 -
INITIATING SECTION 106 PROCESS

NRCS:

- determines if there is an undertaking with the potential to affect historic properties
- identifies consulting parties, including SHPO/THPO, Indian tribe(s) or Native Hawaiian organizations
- develops plan to involve public

IS THERE AN UNDERTAKING?

Agency official shall determine whether the proposed federal action is an undertaking, and if so, whether it is the type of activity that has the potential to cause effects on historic properties

assuming such historic properties are present.

IS THERE AN UNDERTAKING?

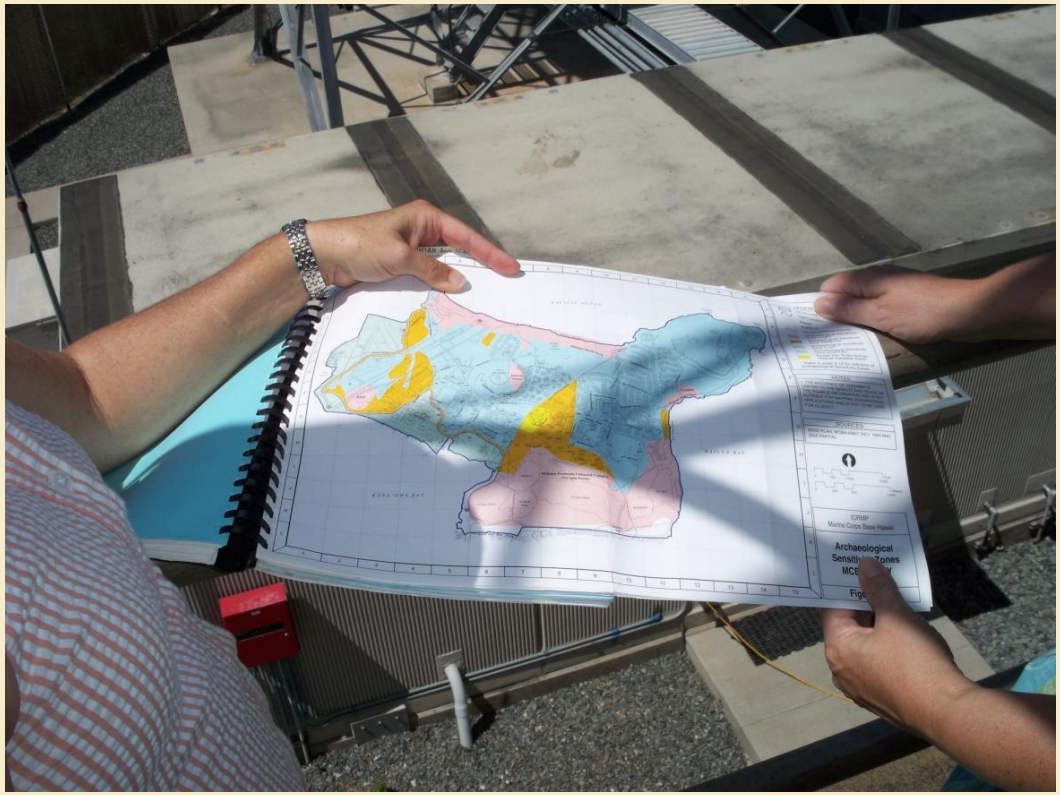
TYPES OF EFFECTS

Effect: alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

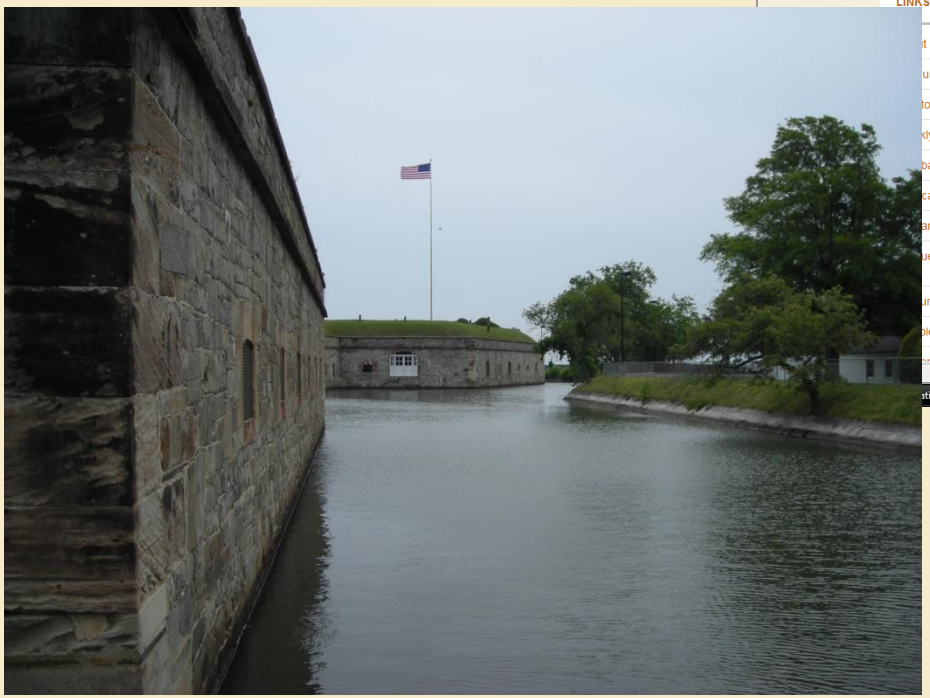
- STEP 2 -
IDENTIFYING HISTORIC PROPERTIES

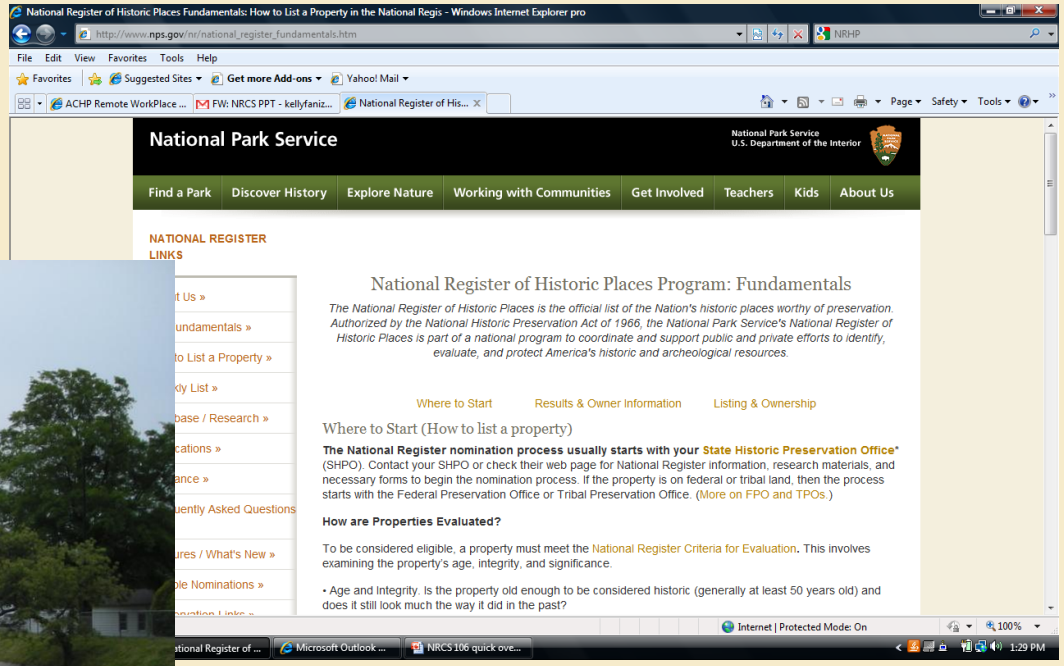
NRCS, in consultation with SHPO/THPO:

- Determines the area of potential effects (APE)



WHAT ARE HISTORIC PROPERTIES?





- STEP 2 -
IDENTIFYING HISTORIC PROPERTIES

NRCS, in consultation:

- Determines scope of identification effort (SHPO/THPO)
- Identifies historic properties (SHPO/THPO, Indian tribes, NHOs)
- Evaluates historic significance (SHPO/THPO, Indian tribes, NHOs)

TERMINOLOGY

- Historic properties vs. cultural resources

IDENTIFYING AND EVALUATING HISTORIC PROPERTIES

- Consultation
- Documentation

CONSULTATION

The section 106 process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation

CONSULTATION WITH INDIAN TRIBES

Government-to-government consultation:

- Agency official (NRCS State Conservationist) consults with the head of the tribe
- Cannot delegate tribal consultation to an applicant without prior written approval from the tribe
- Agreements between tribes and NRCS may be executed outlining consultation parameters

CONSULTATION WITH NATIVE HAWAIIAN ORGANIZATIONS

Federal agency must:

- Make reasonable & good faith effort to identify NHOs that might attach religious and cultural significance to historic properties
- Allow time to identify concerns including confidentiality of sensitive information

HISTORIC PROPERTIES OF RELIGIOUS AND CULTURAL SIGNIFICANCE

Summit of Haleakala, Hawai'i

HISTORIC PROPERTIES AFFECTED?

Apply the definition to an undertaking:

- Does not have to be a certainty
- Does not need to be direct and physical
- Reasonably foreseeable effects must also be considered

NO HISTORIC PROPERTIES AFFECTED KEY POINTS

- Agency conveys its finding to SHPO/THPO in writing with supporting documentation
- Consulting parties notified
- If no objection, agency may proceed with the project following the 30-day review period
- The agency must maintain a record of the finding

OBJECTIONS TO FINDING

- Consult with SHPO/THPO.
- Refer finding to ACHP.
- 30 day review period.
- Respond to ACHP opinion with summary and rationale.
- Final decision.

- STEP 3 -
ASSESS ADVERSE EFFECTS

NO ADVERSE EFFECT KEY POINTS

- If the SHPO/THPO agrees with the agency's finding, it may proceed with the project following the 30-day review period
- If the SHPO/THPO does not respond in 30 days, the agency may proceed
- The agency must maintain a record of the finding

STATE LEVEL AGREEMENTS

CONSULTATION PROTOCOLS

- STEP 4 -
RESOLVING ADVERSE EFFECTS

NRCS:

- Consults to find measures to avoid, minimize or mitigate adverse effects; and
- Enters into an agreement requiring it to ensure those measures are carried out.
- If an agreement can't be reached, NRCS requests ACHP comments

ACHP

ACHP business meeting

ACHP RULES OF ENGAGEMENT: APPENDIX A CRITERIA

1. Substantial impacts on important historic properties
2. Important questions of policy or interpretation
3. Potential for procedural problems
4. Issues of concern to Indian tribes and Native Hawaiian organizations

CONSULTATION TIPS

- Consult before decisions are made
- Use non-threatening venues
- Allow adequate time
- Approach consultation with an open mind
- Be honest and clear about existing parameters
- Be open to suggestions for new alternatives
- Address concerns or explain why you cannot

DOCUMENTING CONSENSUS WITH AN MOA

- Decisions recorded in a Memorandum of Agreement (MOA)
- MOA is a legally binding document
- MOA is the road map for implementation

MEMORANDUM OF AGREEMENT

AMONG THE US DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICE,

THE MISSISSIPPI STATE HISTORIC PRESERVATION OFFICER,

THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,

THE PITSTICK FARMS, THE SUNFLOWER COUNTY FARMS, LLC,

AND

THE CHICKASAW NATION, THE CHOCTAW NATION OF OKLAHOMA, THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE JENA BAND OF CHOCTAW INDIANS, AND THE QUAPAW TRIBE OF OKLAHOMA

REGARDING INSTALLATION OF IRRIGATION PRACTICES AND THE TREATMENT OF ARCHAEOLOGICAL SITE 22SU1019 ON THE NEIL AND MICHAEL PITSTICK TRACT, COAHOMA AND SUNFLOWER COUNTIES, MISSISSIPPI

WHEREAS the Natural Resources Conservation Service (NRCS) is providing technical and financial assistance through the Mississippi River Basin Initiative to Pitstick Farms (*lessee*) for the construction of irrigation storage reservoirs, a tail water recovery system, and irrigation land leveling (*undertaking*) on approximately 995 acres of private land owned by Sunflower County Farms, LLC (*land owner*) in Coahoma and Sunflower Counties, Mississippi; and

WHEREAS, no previously reported historic properties (including archaeological sites) were recorded within the area of potential effect (APE) of the undertaking based on a review of records housed in the Historic Preservation Division, Mississippi Department of Archives and History; and

WHEREAS, a pedestrian visual survey was conducted on June 14, 2011 over a portion of the 995 acre tract, primarily along Black Bayou on the southern tract boundary and along a portion of an old Sunflower River channel in the northwestern portion of the tract, but did not cover the portion of the tract where site 22SU1019 was discovered; and

WHEREAS, the inadvertent discovery of a prehistoric human burial site with at least three (3) individuals represented at archaeological site 22SU1019 was made within the tract on September 9, 2011 during initial construction activities of an irrigation storage reservoir that is part of the referenced undertaking; and

WHEREAS, the NRCS immediately halted construction activities in and around site 22SU1019, and contacted the Mississippi State Historic Preservation Officer (SHPO), Federally recognized tribes with known interest in sacred, historic, and cultural properties in this portion of

WHO SIGNS THE AGREEMENT?

- **Signatories**
  - Federal agency
  - SHPO/THPO
  - ACHP (if participating)
- **Invited Signatories**
  - May include applicants, Indian tribes or NHOs, others assuming responsibilities under the agreement
- **Concurring Parties**
  - Can be invited to concur at NRCS' discretion

PROJECT PROGRAMMATIC AGREEMENT VS. MOA

Format is very similar

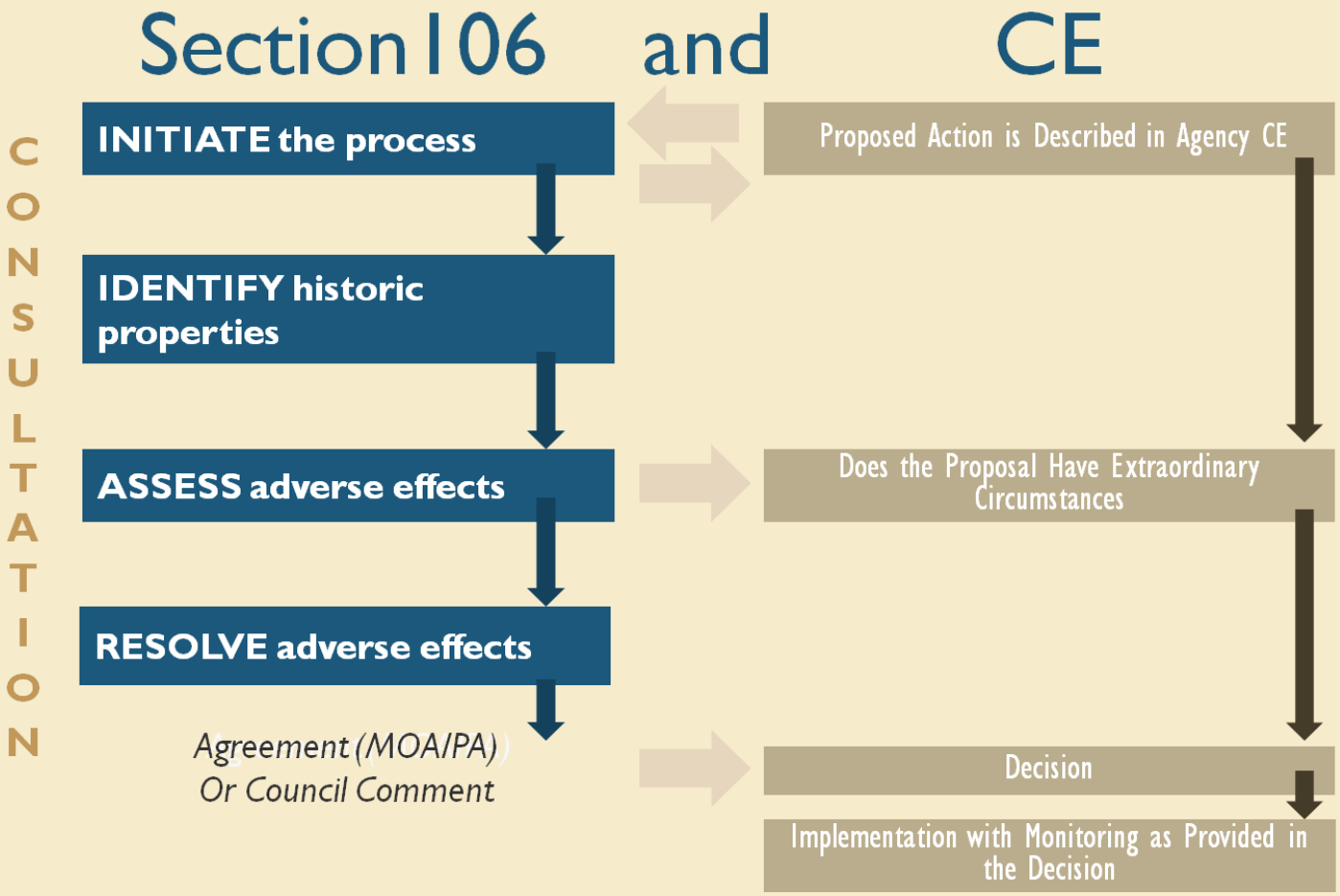
- Preamble
- Stipulations
- Signatures

- Complex project vs. discrete project
- Same consultation process under Section 800.6

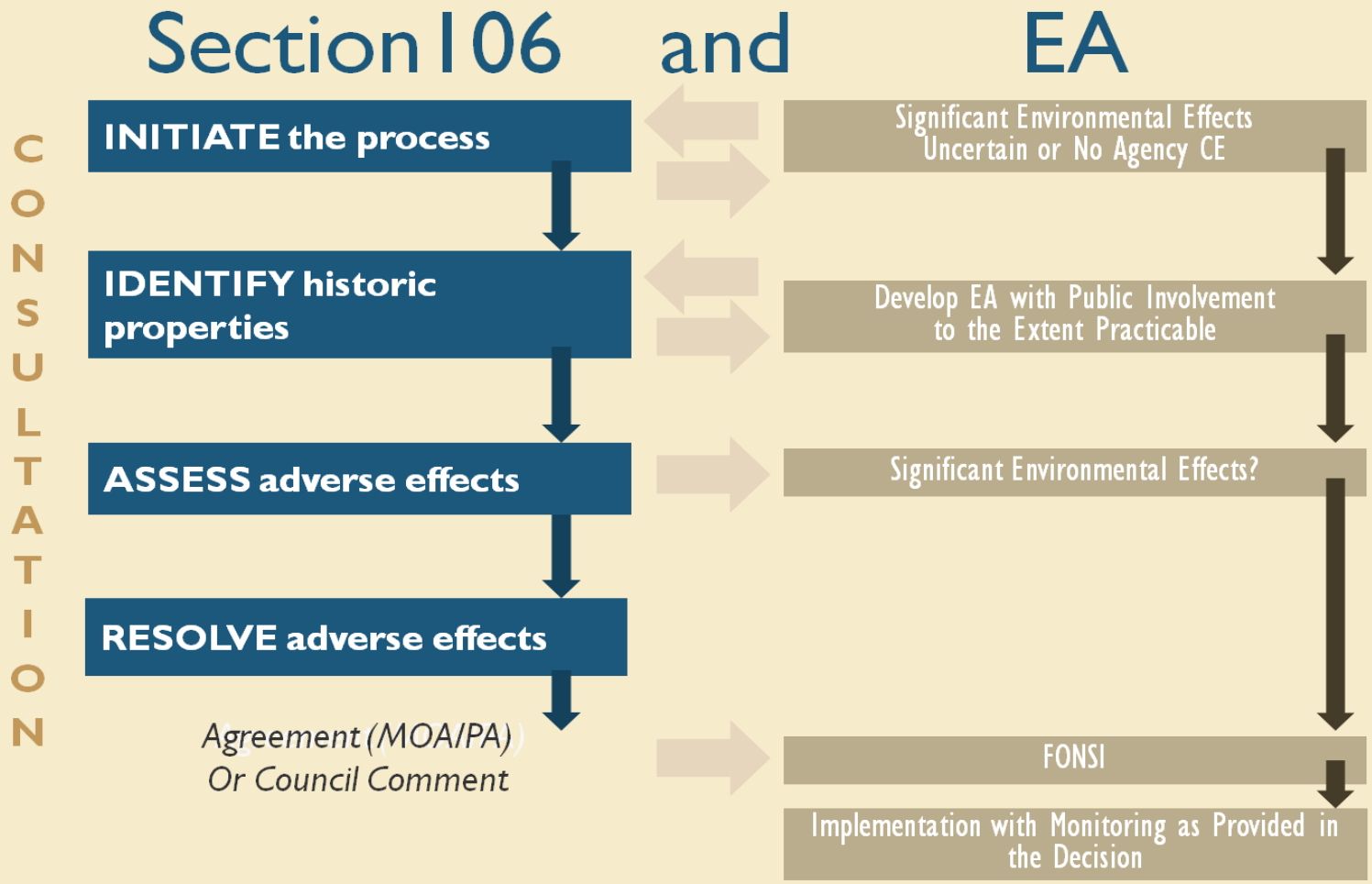
QUESTION:

- Is an action categorically excluded from NEPA also categorically excluded from Section 106?

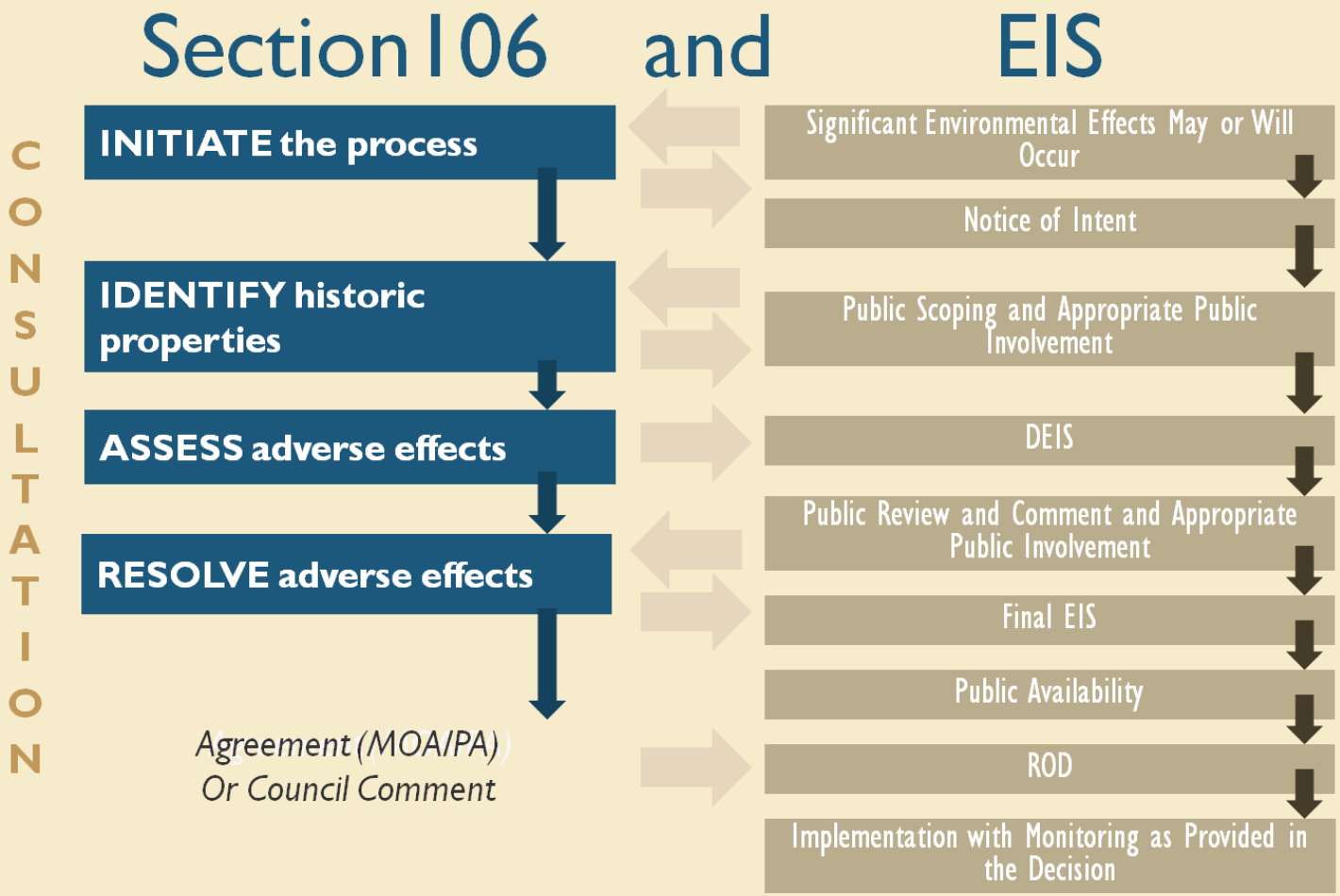
Coordinating Section 106 and NEPA Review- Categorical Exclusions



Coordinating Section 106 and NEPA Review-Environmental Assessments



Coordinating Section 106 and NEPA Review-Environmental Impact Statements



SPECIAL SITUATIONS

- Emergencies (36 CFR 800.12)
- Post-review discoveries (36 CFR 800.13)
- Anticipatory demolition (36 CFR 800.9(c))
- Foreclosure (36 CFR 800.9(b))

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