

NSF Large Facility Workshop May 4-7, 2010

Environmental Compliance



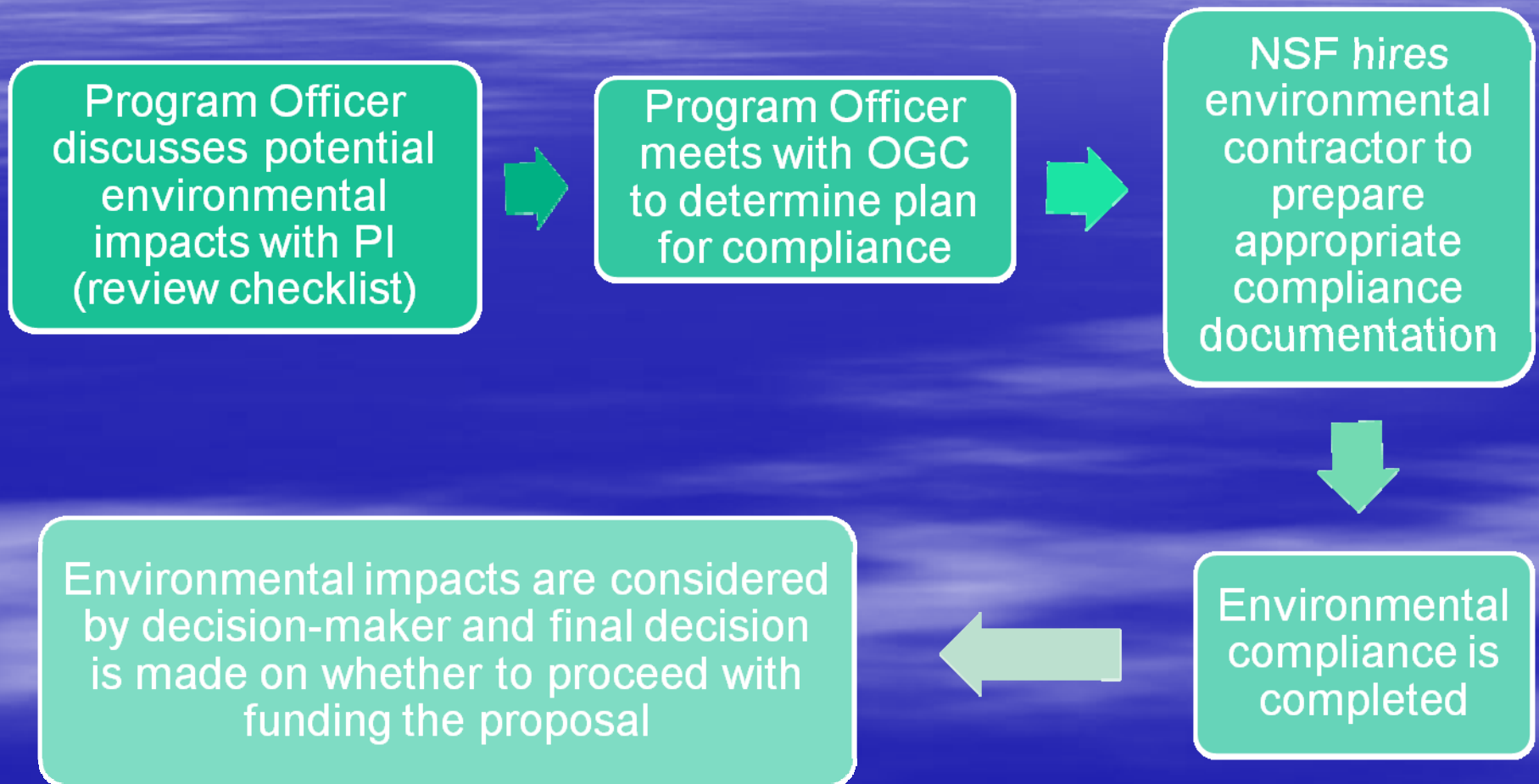
What Is Environmental Compliance?

- NSF is *legally required* to consider the impacts of its activities on the environment *before* making a final decision on funding.
- Most frequently triggered federal statutes requiring evaluation of environmental impacts:
 - National Environmental Policy Act (“NEPA”)
 - National Historic Preservation Act (“NHPA”)
 - Endangered Species Act (“ESA”)
- Permits and other requirements

Threshold Issue:

- Is there a federal hook?
- Environmental compliance is the legal obligation of **NSF**, *not* the obligation of the awardee

Environmental Compliance at NSF



National Environmental Policy Act of 1969, 42 U.S.C. 4321

- ❖ ***Procedural*** statute requiring federal agencies to take a “hard look” at environmental impacts of proposed action and determine if it ***significantly affects*** the quality of the human environment
- ❖ Requires ***informed decision-making***, including consideration of public input ***prior*** to activities being carried out

NEPA Compliance

- ❖ Categorical Exclusions
- ❖ Environmental Assessments
- ❖ Environmental Impact Statement

Categorical Exclusions

- ❖ Agency determines that proposed activity has *no significant* impacts, individually or cumulatively, on the environment
- ❖ NSF's categorical exclusions are set forth in 45 C.F.R. 640.3(b)
- ❖ If proposed activity is categorically excluded, document categorical exclusion in a Record of Environmental Compliance (ask OGC)

NSF's Categorical Exclusions

- NSF's activities are categorically excluded from further NEPA review ***unless*** they involve:
 - Construction of facilities (not interior remodeling)
 - Major disturbance or alteration of the local environment brought about by blasting, drilling, excavation, or weather modification
 - Transition of technology from development to large-scale commercialization
 - Testing and release of biological-control agents for ecosystem manipulation

Environmental Assessments

- ❖ Activity is neither categorically excluded nor expected to have significant environmental impacts
- ❖ Concise public document: briefly provides sufficient evidence and analysis to determine whether further analysis is warranted
- ❖ Result: Finding of No Significant Impact (“FONSI”) or decision to prepare an EIS
- ❖ Document decision

Environmental Impact Statement

- ❖ Detailed written statement of the proposed activity and its anticipated environmental impacts
- ❖ Designed to assist agencies in planning actions and making decisions
- ❖ Prepared in accordance with CEQ regulations

EIS: Step 1 Getting Started

Identify interested members of
the public, Tribes, State and
local agencies



Identify whether agencies
should be invited to participate
as cooperating agencies



Notice of Intent to prepare EIS
published in the Federal
Register

EIS: Step 2

Preparation of the Draft EIS

NSF holds public scoping meetings

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graph TD; A[NSF holds public scoping meetings] --> B[NSF develops reasonable range of alternatives, including one no-action alternative and at least one action alternative]; B --> C[Conduct studies to determine environmental impacts (direct, indirect, and cumulative)]; C --> D[Results of studies are documented in a Draft EIS];
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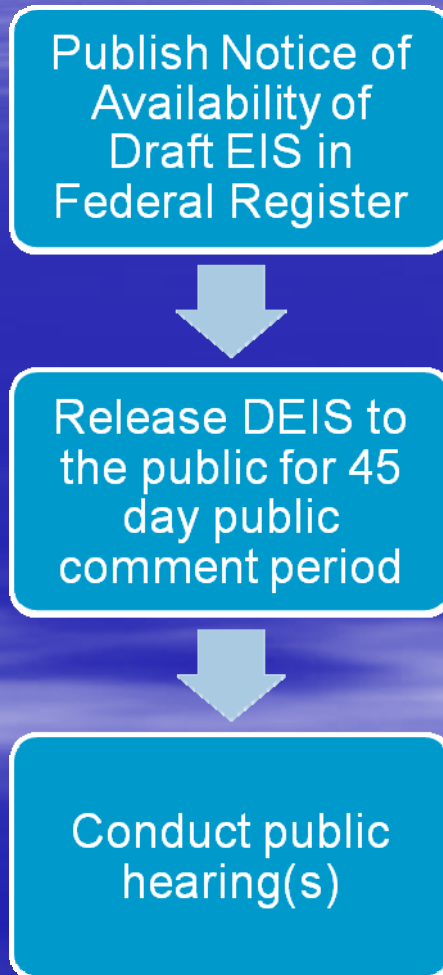
NSF develops reasonable range of alternatives, including one no-action alternative and at least one action alternative

Conduct studies to determine environmental impacts (direct, indirect, and cumulative)

Results of studies are documented in a Draft EIS

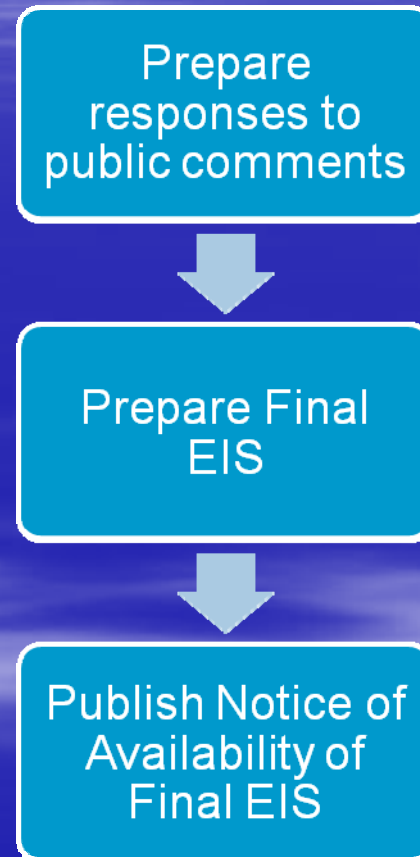
EIS: Step 3

Public Involvement



EIS: Step 4

Preparation of the Final EIS



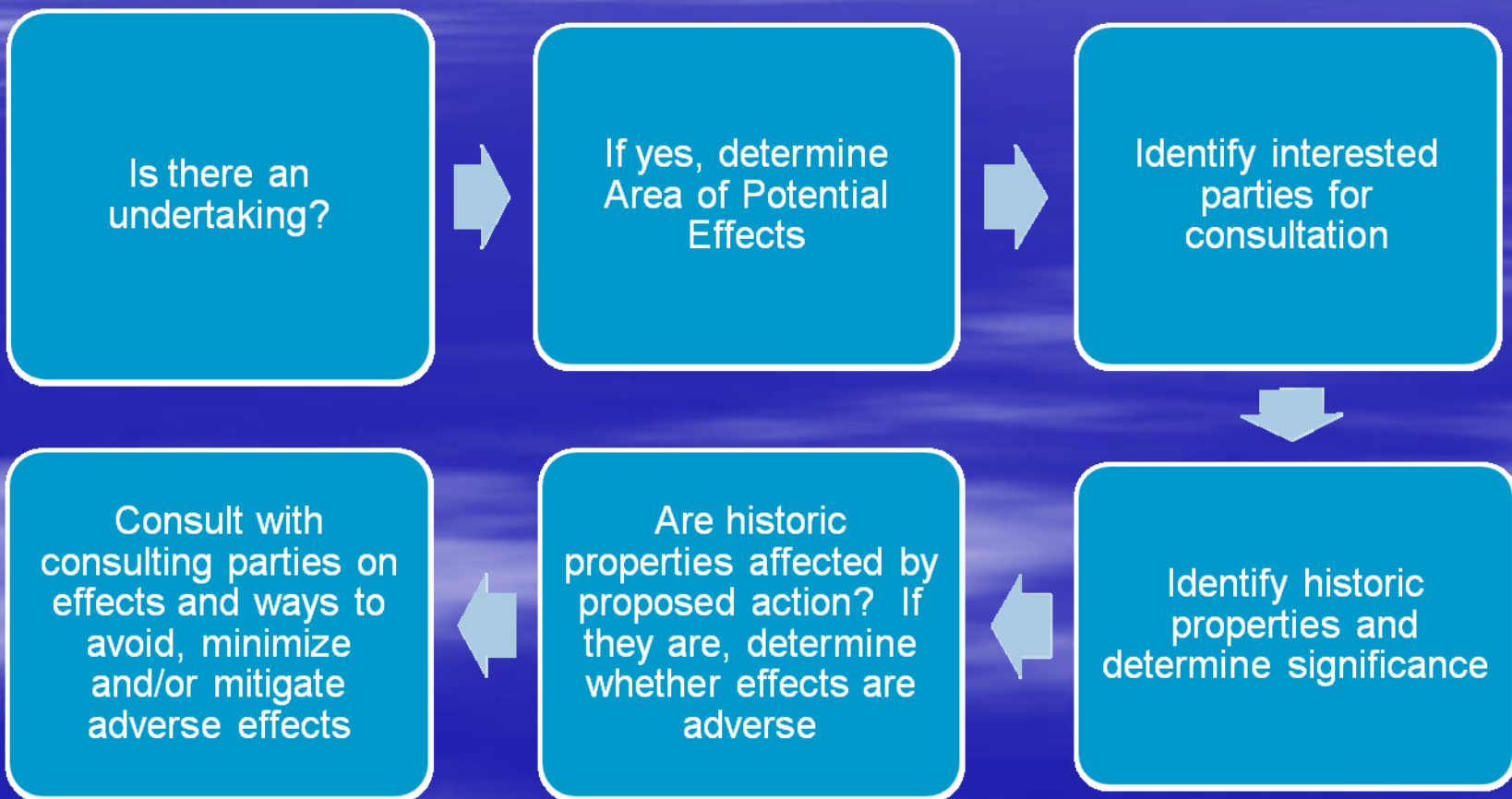
Life After the FEIS:

Wait 30 days before making a final funding decision (the “cooling off period”)

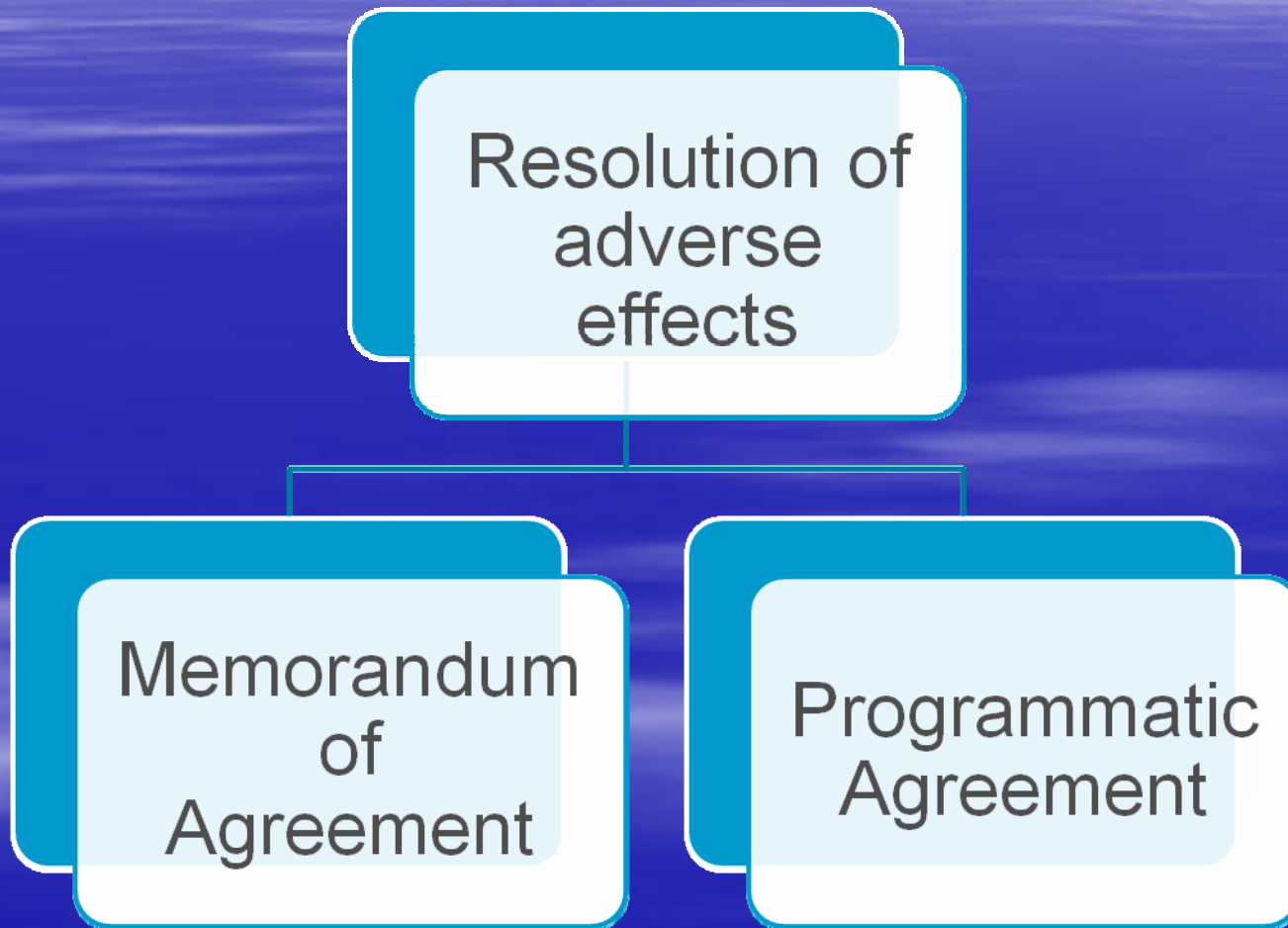


Prepare and publish (in the Federal Register) a Record of Decision

National Historic Preservation Act: the Section 106 Process



National Historic Preservation Act: Final Result of Consultation

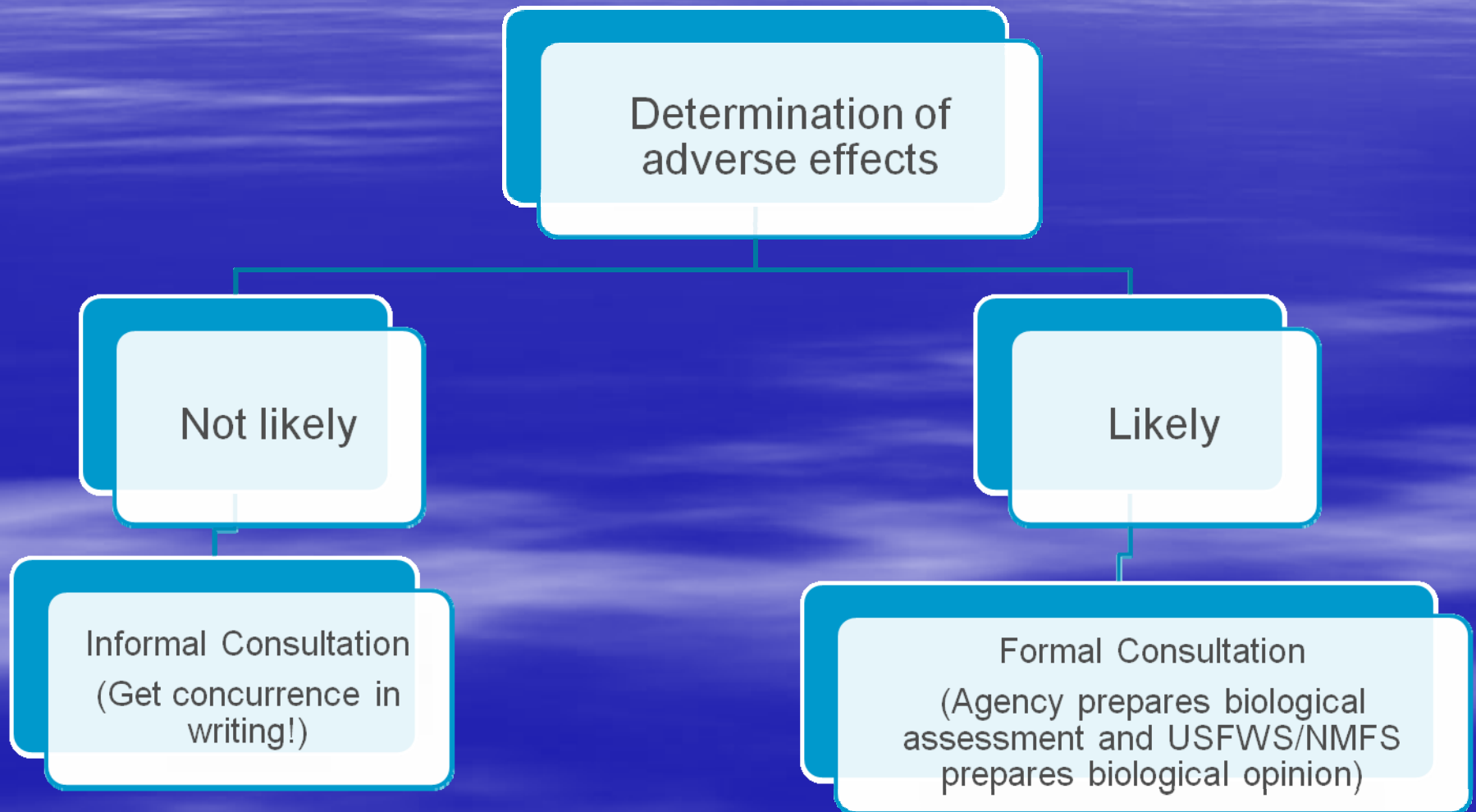


* If a determination of “no effects” is made, obtain SHPO concurrence

Endangered Species Act

- Consider impacts of proposed federal activities on endangered and threatened species, and their habitats.
- Agencies must consult with the U.S. Fish and Wildlife Service/National Marine Fisheries Service regarding whether the proposed activity is likely to jeopardize the continued existence of any endangered or threatened species or result in the adverse modification of habitat of such species.
- Consultation with USFWS/NMFS can be informal or formal.
 - If USFWS/NMFS issues “jeopardy” opinion, reasonable and prudent alternatives are to be suggested by USFWS/NMFS, if there are any.

Endangered Species Act Consultation



Streamlining Environmental Compliance

- ❖ Overlap exists in requirements of compliance statutes such as NEPA, the NHPA, and the ESA --- consider using NEPA document as an umbrella document to demonstrate compliance with other statutes such as the NHPA, and the ESA
- ❖ Use other agencies' NEPA documentation
- ❖ Consider programmatic approaches (i.e., EAs EISs, NHPA consultation)

International Activities

- NEPA (Executive Order 12114):
 - Apply NEPA out to 200 mile EEZ
 - Beyond 200 miles, determine if impacts are significant; if not, document result. If significant, prepare equivalent of an EIS
- NHPA
Determine if cultural resources are deemed significant by host country; if so, consult
- MMPA
Applicable beyond 200 mile EEZ; consult with NMFS

NCAR Wyoming Supercomputer Center

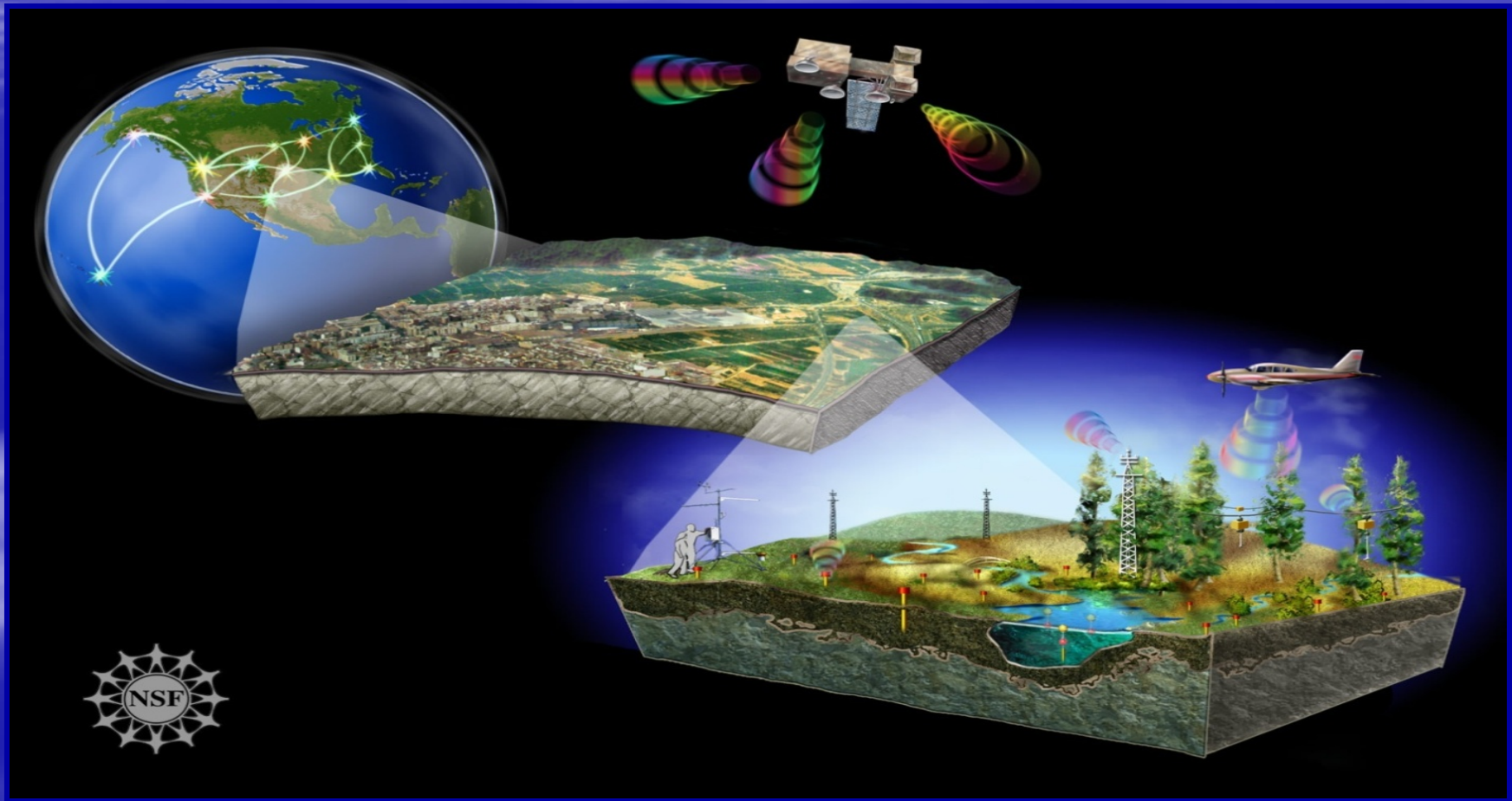
Compliance:

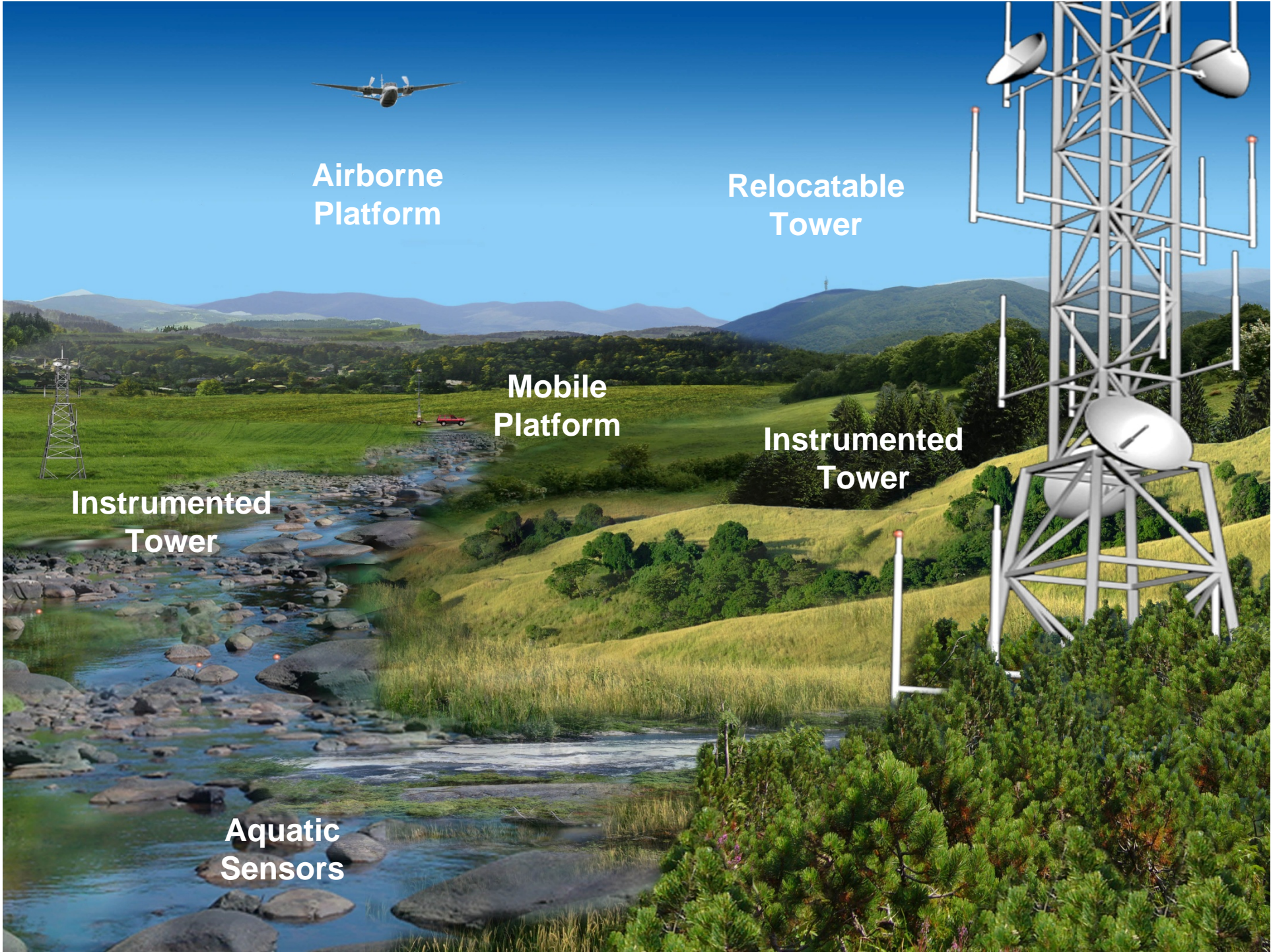
1. Few, if any,
impacts were
anticipated

2. EA/FONSI



National Ecological Observatory Network





**Airborne
Platform**

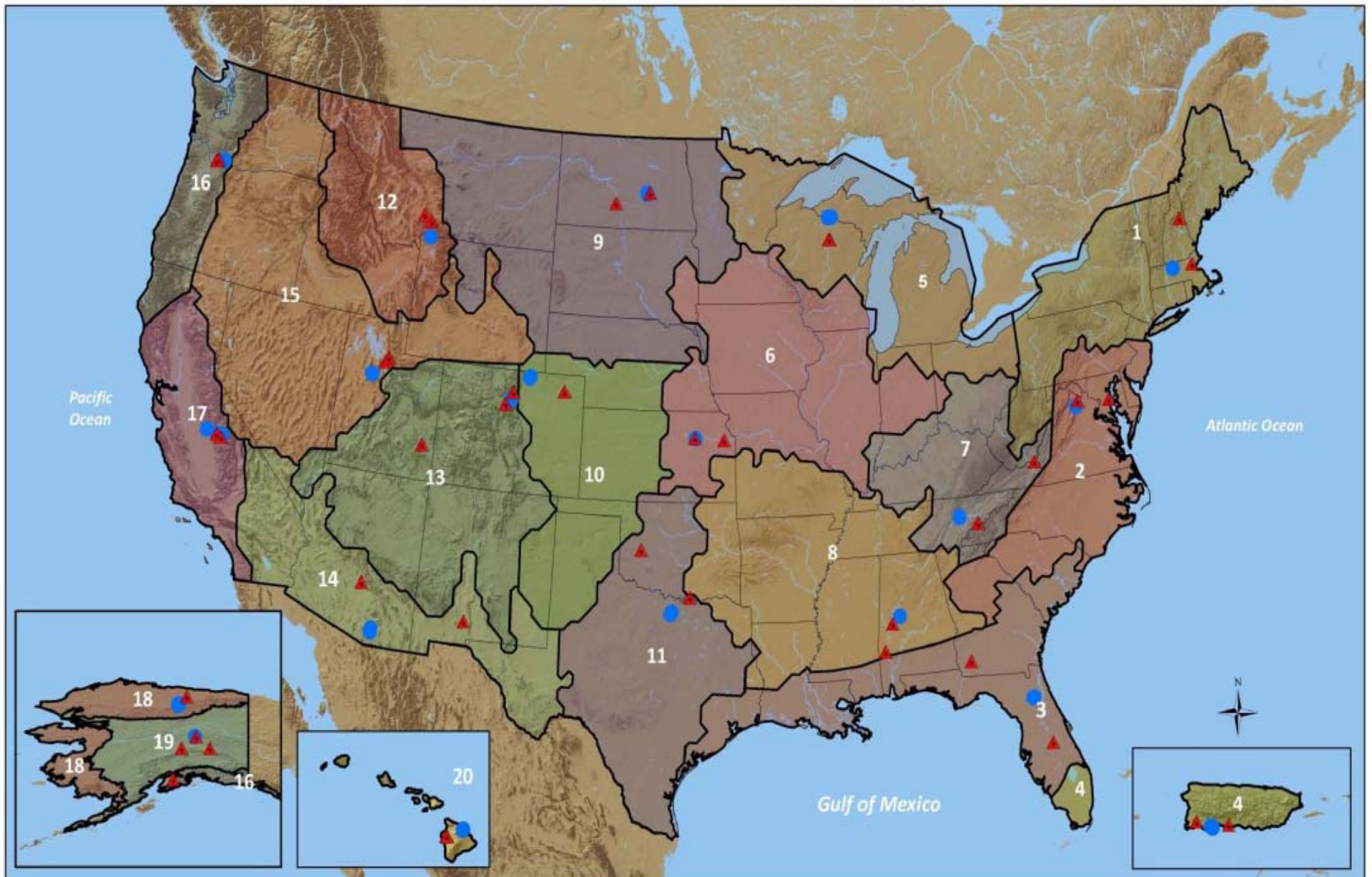
**Relocatable
Tower**

**Mobile
Platform**

**Instrumented
Tower**

**Instrumented
Tower**

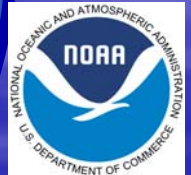
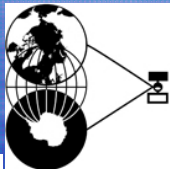
**Aquatic
Sensors**



NEON Domains

- | | | | | |
|------------------------|-----------------------------------|---------------------|--------------------------------------|----------------------|
| 1 Northeast | 5 Great Lakes | 9 Northern Plains | 13 Southern Rockies/Colorado Plateau | 17 Pacific Southwest |
| 2 Mid Atlantic | 6 Prairie Peninsula | 10 Central Plains | 14 Desert Southwest | 18 Tundra |
| 3 Southeast | 7 Appalachians/Cumberland Plateau | 11 Southern Plains | 15 Great Basin | 19 Taiga |
| 4 Atlantic Neotropical | 8 Ozarks Complex | 12 Northern Rockies | 16 Pacific Northwest | 20 Pacific Tropical |

USGEO

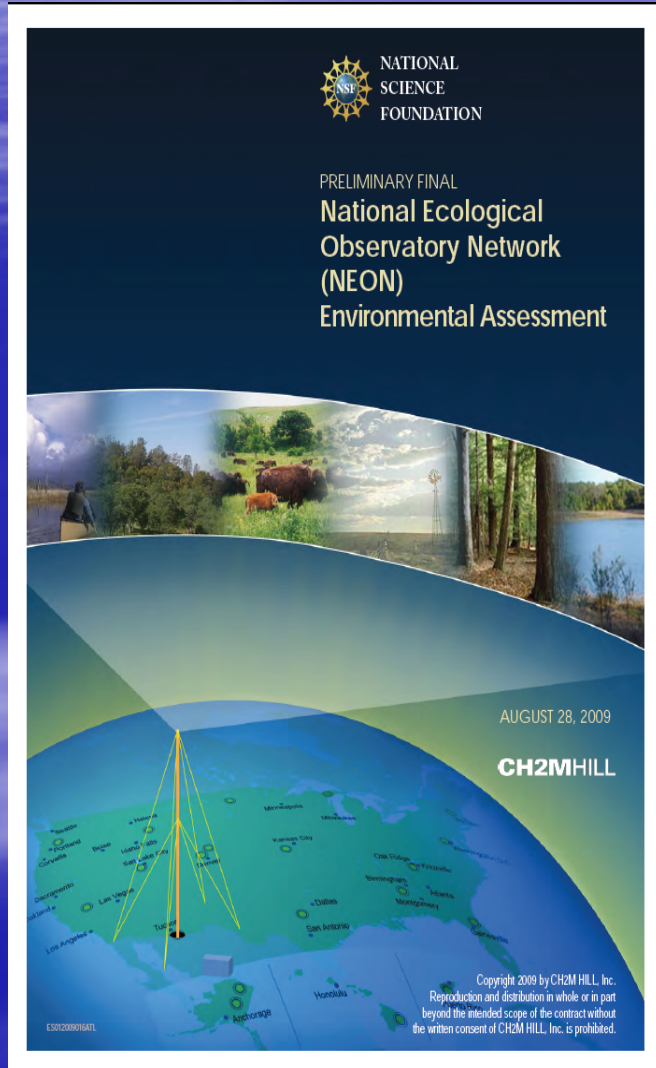


USGS
science for a changing world

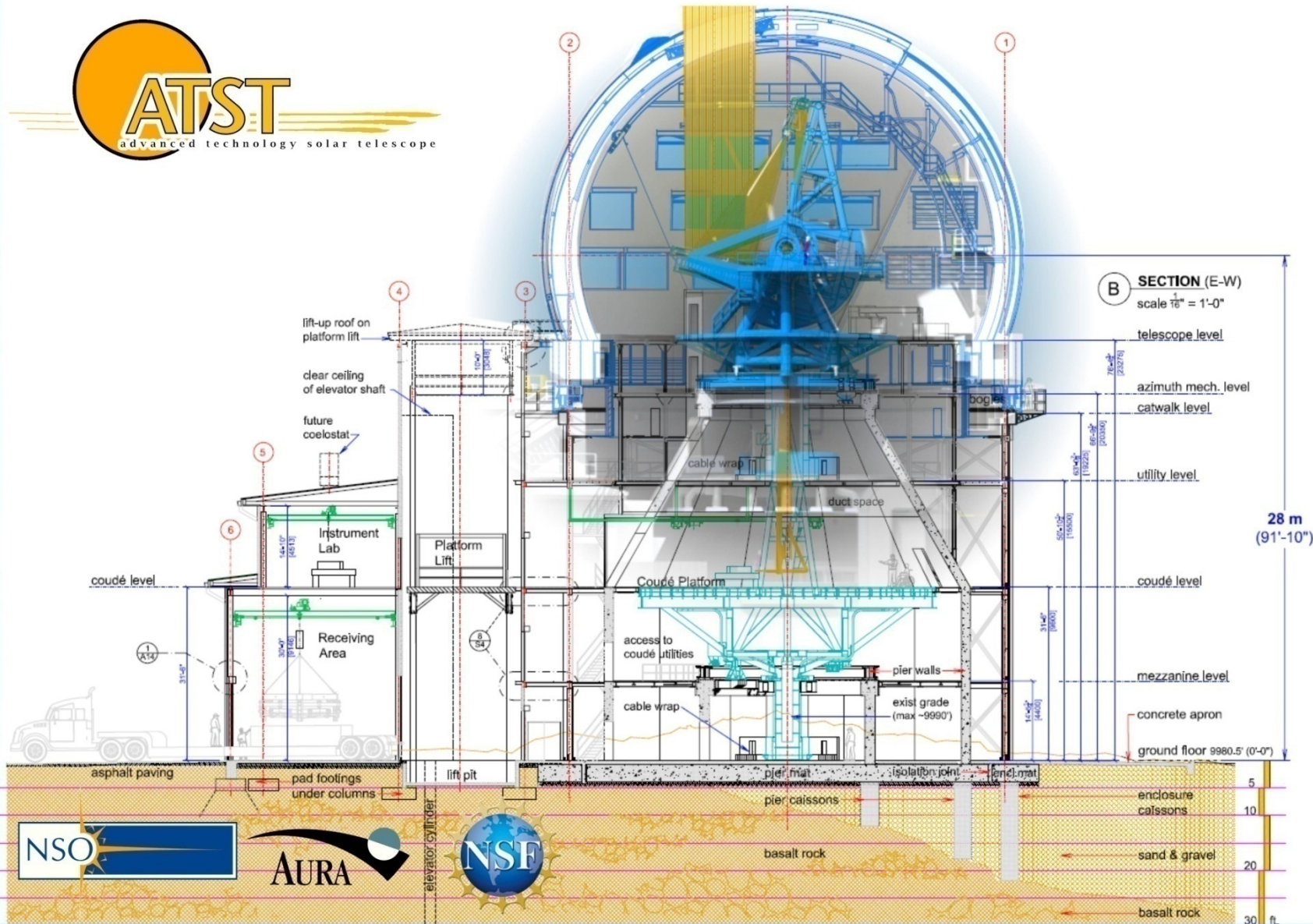
GEO GROUP ON EARTH OBSERVATIONS

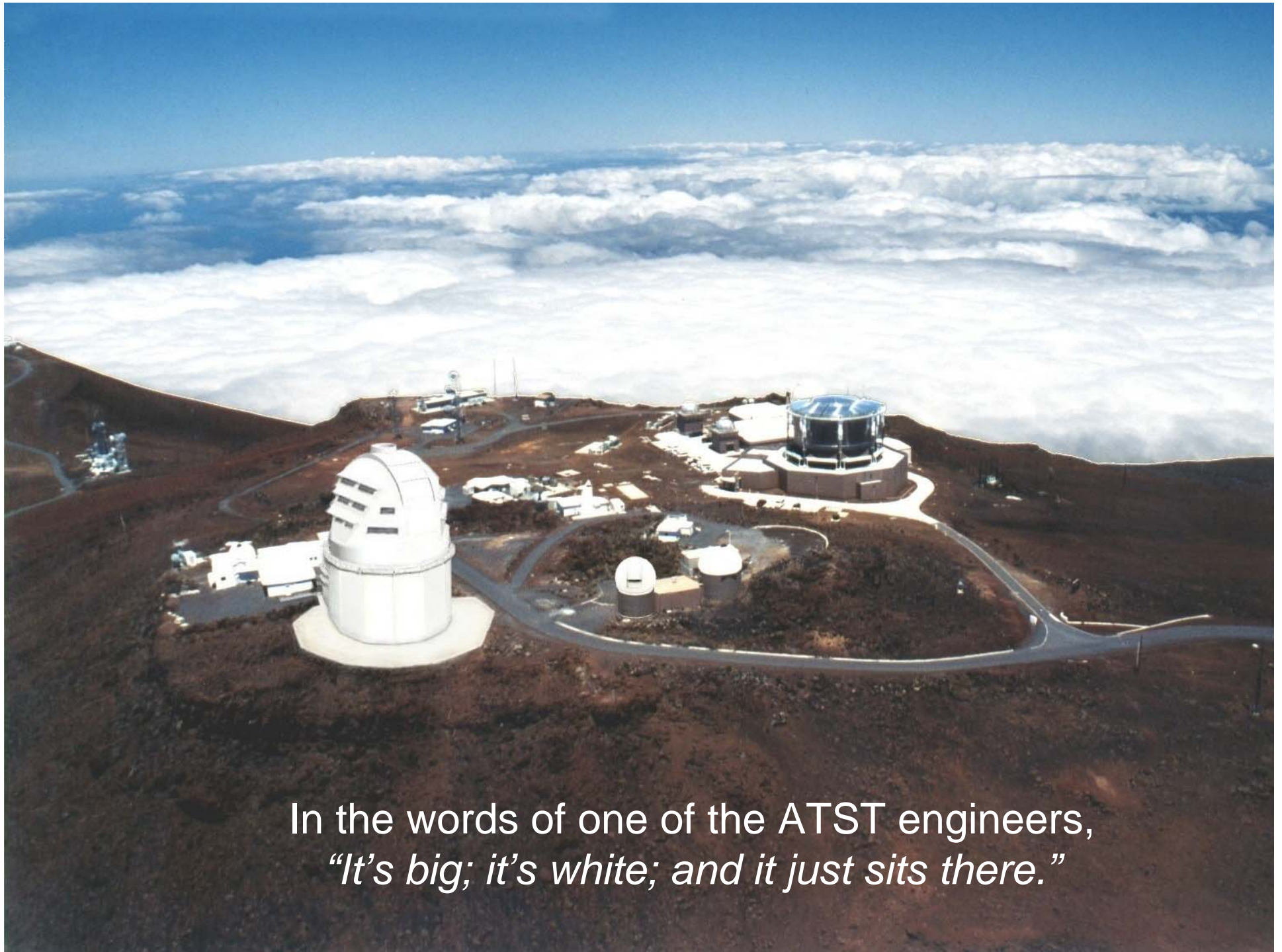
NSF NEON NEPA
Cooperating Agencies

NEON Environmental Compliance: Lessons Learned



1. Form NSF EA Team (OGC, DACCs, LFO)
2. Identify potential impacts and potential cooperating agencies
3. Consider COTR training
4. Develop clear statement of work
5. Develop clear evaluation criteria
6. Include federal partners on Technical Evaluation team
7. Ask, ask, ask your contract officer
8. Obtain clear project management plan from contractor
9. Schedule regular meetings to address problems
10. Involve stakeholders early
11. Schedule float/contingency





In the words of one of the ATST engineers,
"It's big; it's white; and it just sits there."



Haleakala Crater

Haleakala Visitor Center

Haleakala National Park's Red Hill Overlook

Proposed ATST Site

The u'au -- Hawaiian Petrel



ATST Environmental Compliance



Dr. Bement signing the ROD

EIS:

3116 pages, ~\$3.5M.

Preceded by a DEIS and a SDEIS

ROD: Signed in December 2009

NHPA Programmatic Agreement:

SHPO

ACHP

Native Hawaiian Stakeholders

ESA:

USFWS - Biological Opinion

State - Habitat Conservation Plan

Anatomy of a Lawsuit

- Plaintiffs often use “kitchen sink” approach
- Declaratory and injunctive relief usually sought

NGO v. U.S.



Administrative Procedure Act

5 U.S.C. 701, *et seq.*

- APA serves as waiver of sovereign immunity and allows suits against US
- Requires final agency action
 - Record of Decision
 - Issuance of federal license or permit
 - Decision to issue federal funds

Administrative Procedure Act

5 U.S.C. 701, *et seq.*

- Scope of judicial review limited to administrative record
- Standard of judicial review: agency action upheld unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to statutory right or authority

Administrative Record

- ❖ Definition: The “paper trail” leading up to and including the final decision presented in an organized manner (i.e., chronological, topical, etc.).
- ❖ Contents: Memoranda, correspondence (including letters and e-mails), technical studies, records of public participation, public comments, notes, and other documents relied upon by the agency in making the decision.
- ❖ Privileged documents: Can be excluded, but a privilege log must be prepared.

Applying the Standard of Review

- Agencies entitled to presumption of validity
- Deference accorded to agency's technical expertise
- Court cannot substitute its judgment for that of the agency
- Agency decision must be upheld unless there is no "rational connection between the facts found and the choice made."
Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105 (1983)
- If violation found, remedy is remand

Final Thoughts

- Begin compliance **early on** in the process
- Be careful not to imply that the decision is a done deal; refer to the project as the “**proposed project**”
- Be aware that every e-mail and every document will likely become part of the administrative record
- Try to develop more than one action alternative if possible; if you can't, explain why
- Make friends with your enemies
- Successful compliance is often the result of adherence to a simple rule of human nature – people like to feel respected

Resources

- ❖ NSF: Caroline M. Blanco, Assistant General Counsel, cblanco@nsf.gov, (703) 292-4592
- ❖ NEPA: Council on Environmental Quality (www.NEPA.gov)
- ❖ NHPA: Advisory Council on Historic Preservation (www.achp.gov)