

NATIONAL HISTORIC PRESERVATION ACT SECTION 106 AND THE NORFOLK DISTRICT REGULATORY BRANCH

WSSI Workshop

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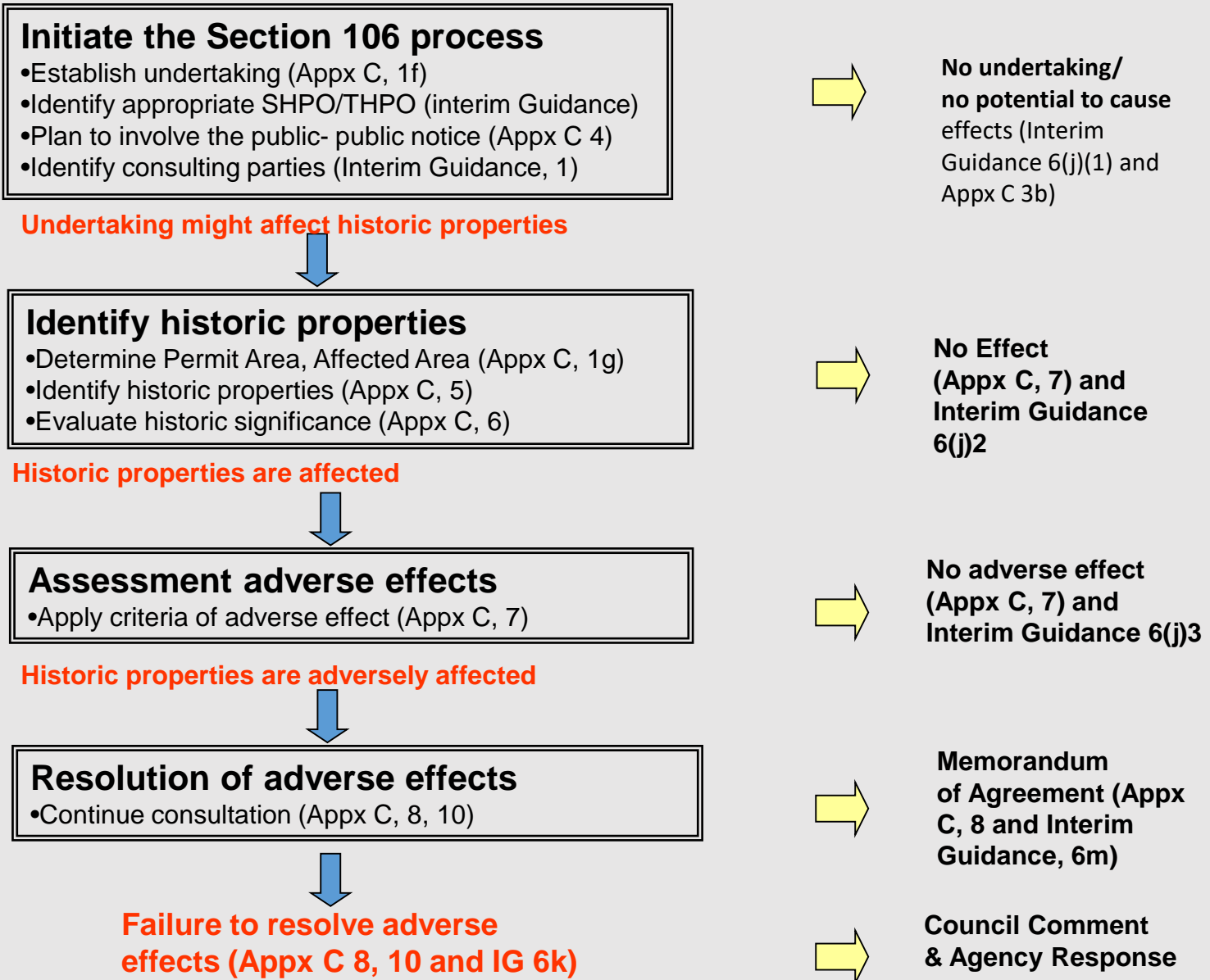
US Army Corps
of Engineers®



Corps of Engineers Regulatory Historic Property Regulations & Guidance

1. Appendix C: 33 CFR Part 325 June 29, 1990
2. Revised Interim Guidance: April 25, 2005
3. ACHP Regulations: 36 CFR Part 800: August 5, 2004 (All Federal Agencies)

The Section 106 Consultation Process- Regulatory



Definition of Undertaking

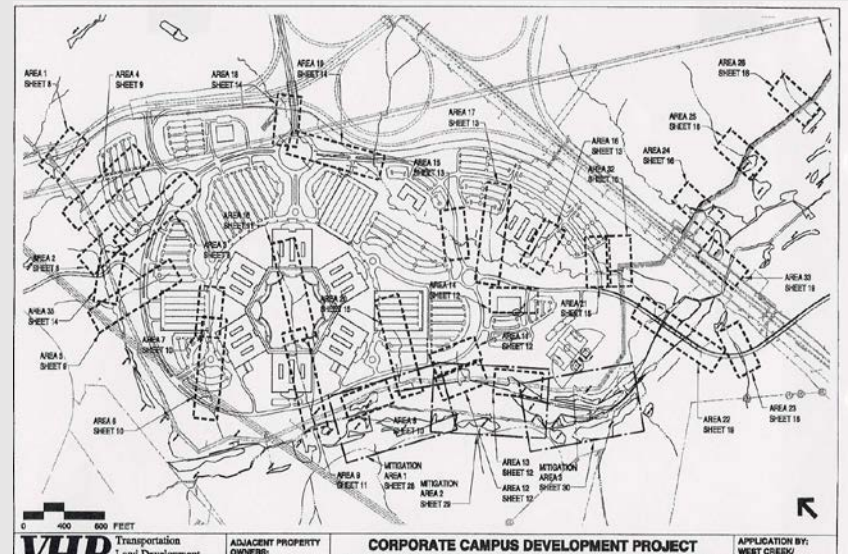
36 CFR 800.16(y)

- ***Undertaking*** means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance and those requiring a Federal permit, license or approval.

33 CFR 325 (Appendix C 1(f))

- The term “***undertaking***” as used in this appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334.
- The Corps determines the undertaking!

Undertaking Examples

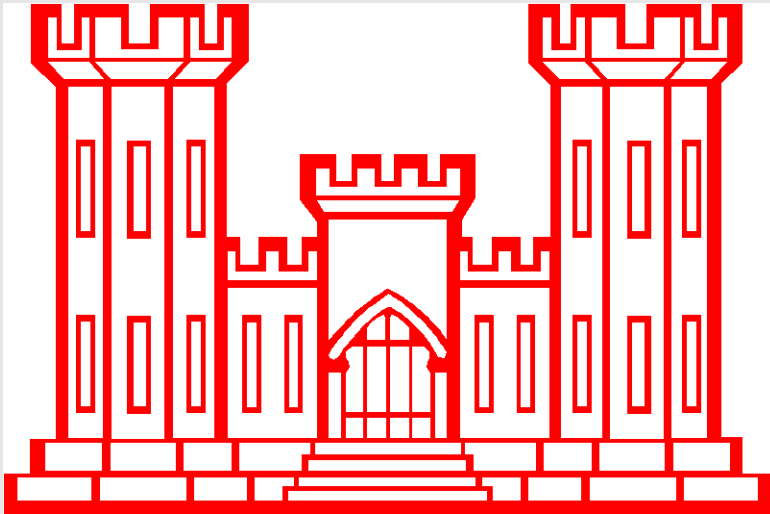


Permit Area (Area of Potential Effects) 33 CFR 325 (Appendix C 1(g))

Permit Area means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures AND UPLANDS directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the “permit area”:

- (i)...activity would not occur *but for* the authorization of the work or structures within WOUS (‘but for’ clause MUST not be used in isolation!)
- (ii)...activity must be integrally related to the work or structures to be authorized within WOUS. OR...the work or structures authorized must be essential to the completeness of the overall project and program.
- (iii) ...activity must be directly associated (first order impact) with the work or structures to be authorized.

WHO Determines Permit Area?



The Corps is ALWAYS ultimately responsible

Corps can seek views of SHPO/THPO

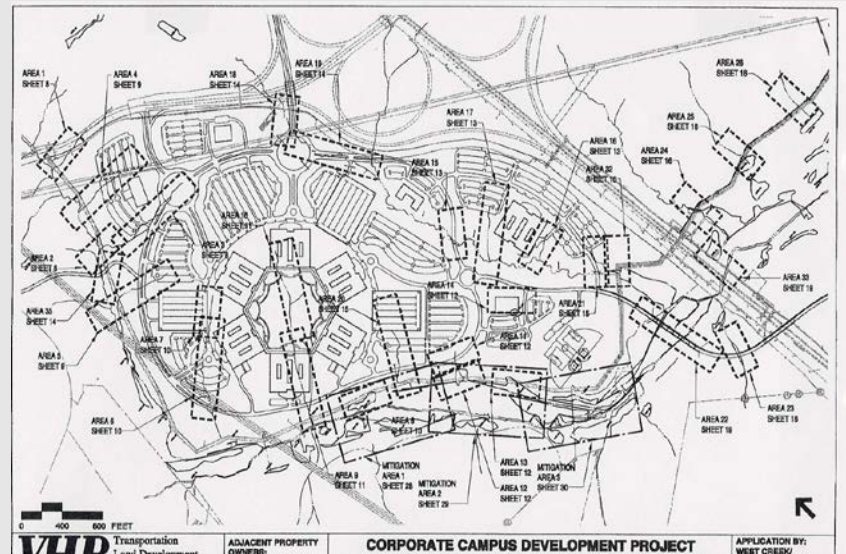
Parties may opine:

- ACHP
- Tribes
- Consulting Parties
- Applicants

Permit Area Examples



Permit Area Examples



Permit Area Examples

Dredged material disposal

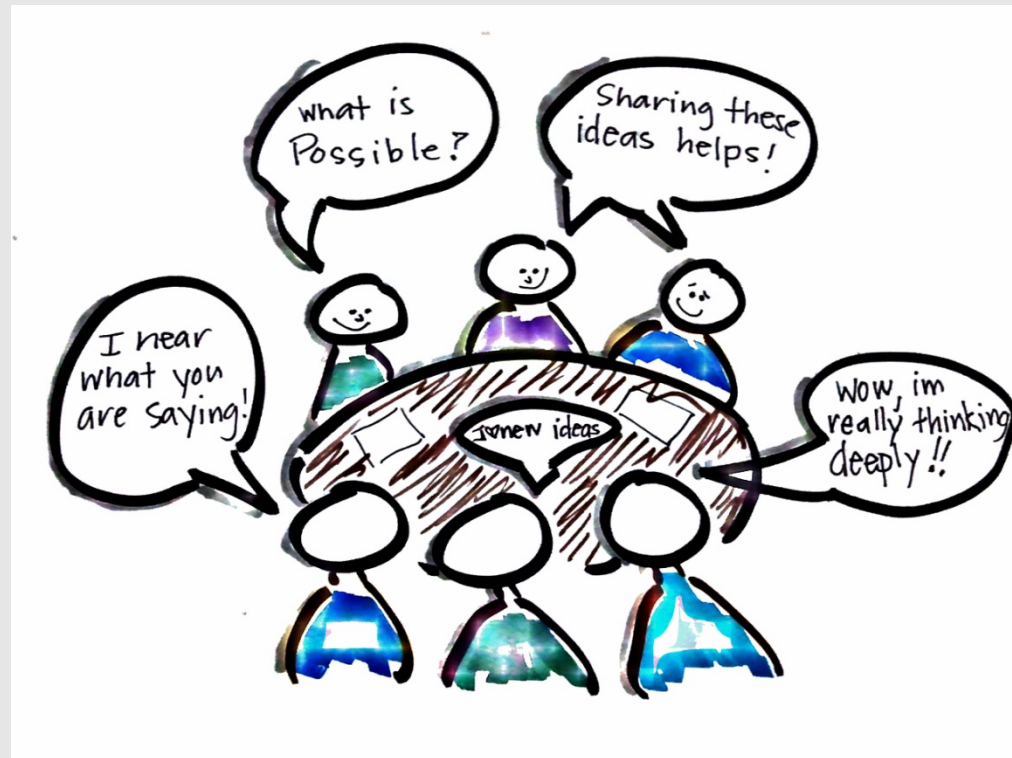


Wetland/Stream Mitigation



Consulting Parties

- VDHR (State Historic Preservation Officer)
- THPO (Tribal Historic Preservation Officer)
- Tribes
- Permit applicant
- Local government representatives
- Parties with demonstrated interest, at agency's discretion (Historic Preservation Groups, etc.)



Effects Assessments Time Frames

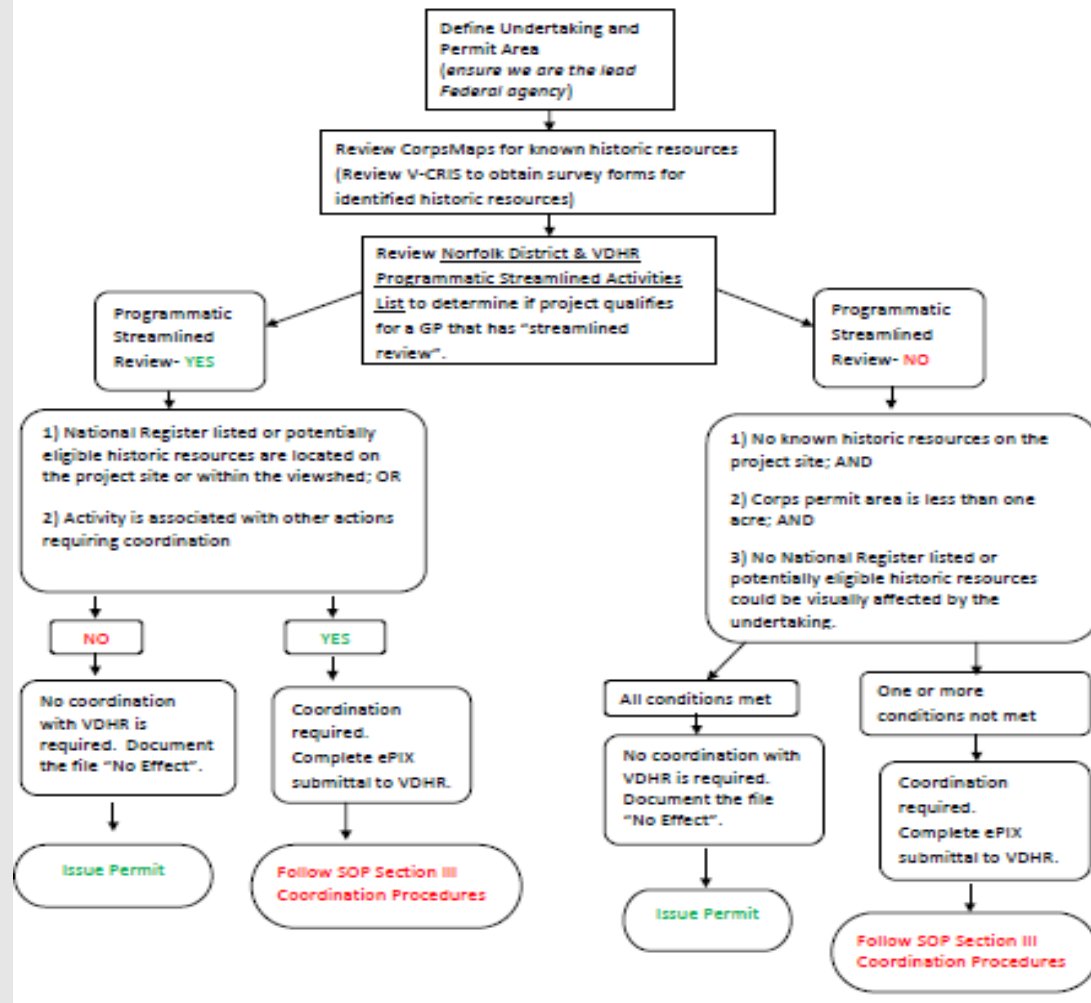
- No historic properties affected (No Effect): 30-day SHPO review (no objection)
- No adverse effect: 30-day SHPO and consulting party review (no objection)
- Adverse effect: no specified timeframes- must consult

Norfolk District Regulatory Programmatic Agreement

- 1996 Programmatic Agreement with VDHR & ACHP
- SOP and Programmatic Streamlined Activity list (updated as needed)
- Review of VCRIS data/viewshed impacts
- Consideration of type of activity and extent of federal handle
- Streamlining process

Norfolk District Regulatory Section 106 Coordination Procedures

NAO Section 106 Project Review Process



Appendix C

ACHP Participation



No historic properties affected: If SHPO has no objection, do not need to consult ACHP.

No adverse effect: If SHPO and consulting parties have no objection, do not need to consult ACHP.

Adverse effect: Need to notify ACHP to determine participation.



Appendix C

ACHP Participation



- Disagreement with SHPO or consulting parties could result in ACHP reviewing determination, and providing its opinion.
- ACHP may provide its opinion to the district engineer, or the Office of Assistant Secretary of the Army (Civil Works) (OASA(CW)).
- District engineer (or OASA(CW)) considers ACHP's opinion, which is advisory in nature.
- District engineer makes final decision.

Appendix C

ACHP Participation- Adverse Effects



- Corps must notify ACHP and provide complete documentation (800.11(e))
Electronic Document Submittal is available “e106 Form”
(<http://www.achp.gov/docs/e106-notice-of-availability.pdf>)
- ACHP has 15 days to determine participation (if meets criteria in Appendix A of 800 regs)
- MUST invite ACHP to participate if adverse effect to a National Historic Landmark

Resolution of Adverse Effects

- Actions taken that reduce or compensate for the damage an undertaking has on historic properties.
- Consulting parties seek ways to avoid, minimize or mitigate the adverse effects.
- Memorandum of Agreement



Resolution of Adverse Effects

Avoidance/Minimization examples:

- limiting the magnitude of the undertaking
- re-designing the project

Mitigation examples:

- rehabilitation or repairing a structure
- documentation & public interpretation
- relocation of historic property
- screening of visual effects
- data recovery of archeological sites
- preservation of an historic property

Final mitigation is very project-specific and depends on what is agreed to by the consulting parties; especially, the signatory parties. No ratios or banks like wetland mitigation.

Memorandum of Agreement (MOA)

- The agreement resulting from consultation that states measures the federal agency will take to avoid or reduce effects on historic properties.
- MOA's are normally signed by the Corps, SHPO, and applicant. ACHP may sign if they participate in consultation (signatory parties).
- Once all signatories sign, an MOA is considered fully executed.
- Other consulting parties may be invited signatories or sign as concurring parties.

Memorandum of Agreement (MOA) Compliance

- Section 106 is complete once the MOA is executed by all signatories.
- If ACHP did not participate, the Corps must provide a copy of the MOA to ACHP before issuing permit.
- The terms of the MOA are likely to require compliance for survey work, documentation, review of reports, etc.

National Historic Landmarks

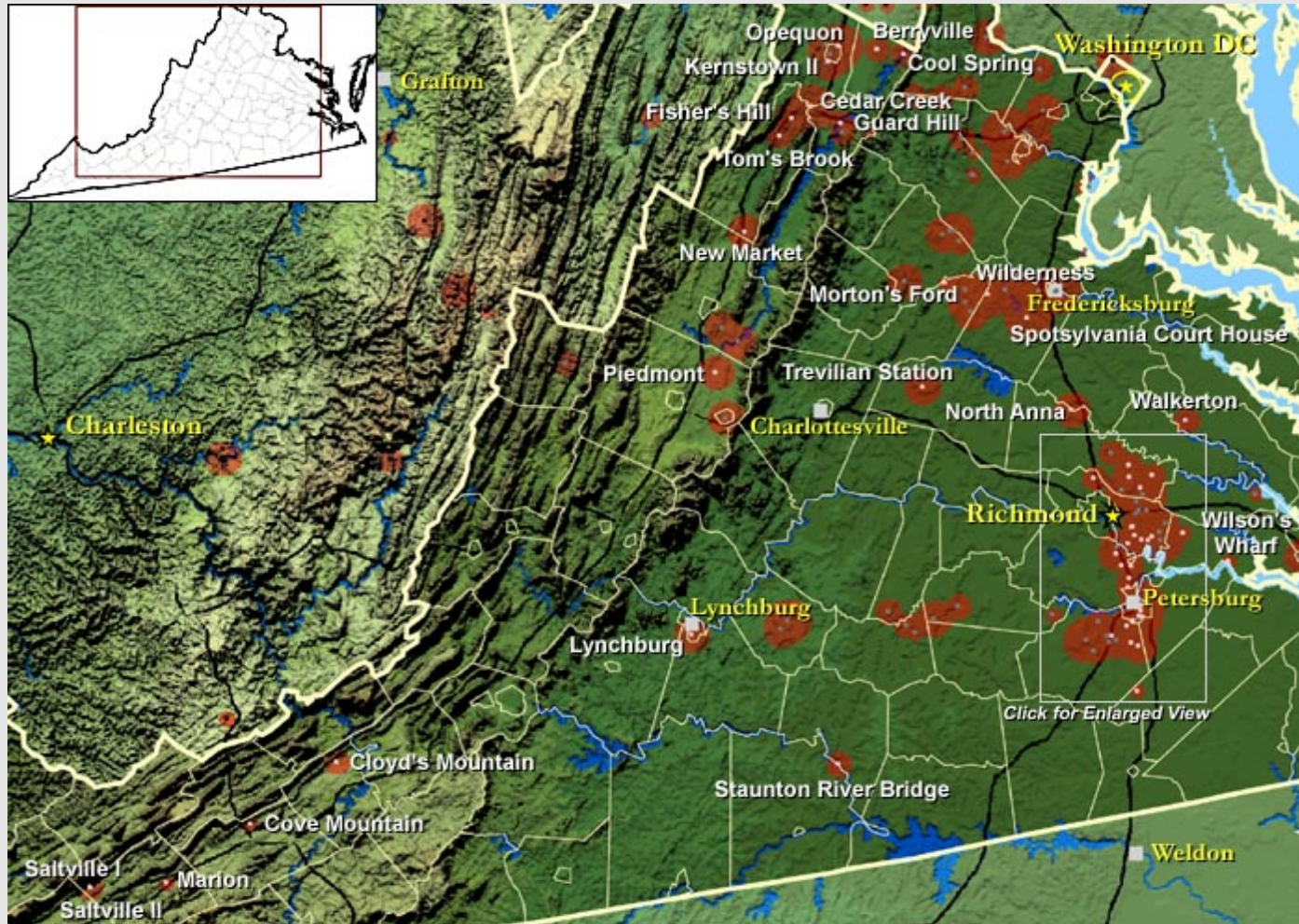


National Historic Landmarks

Special Procedures:

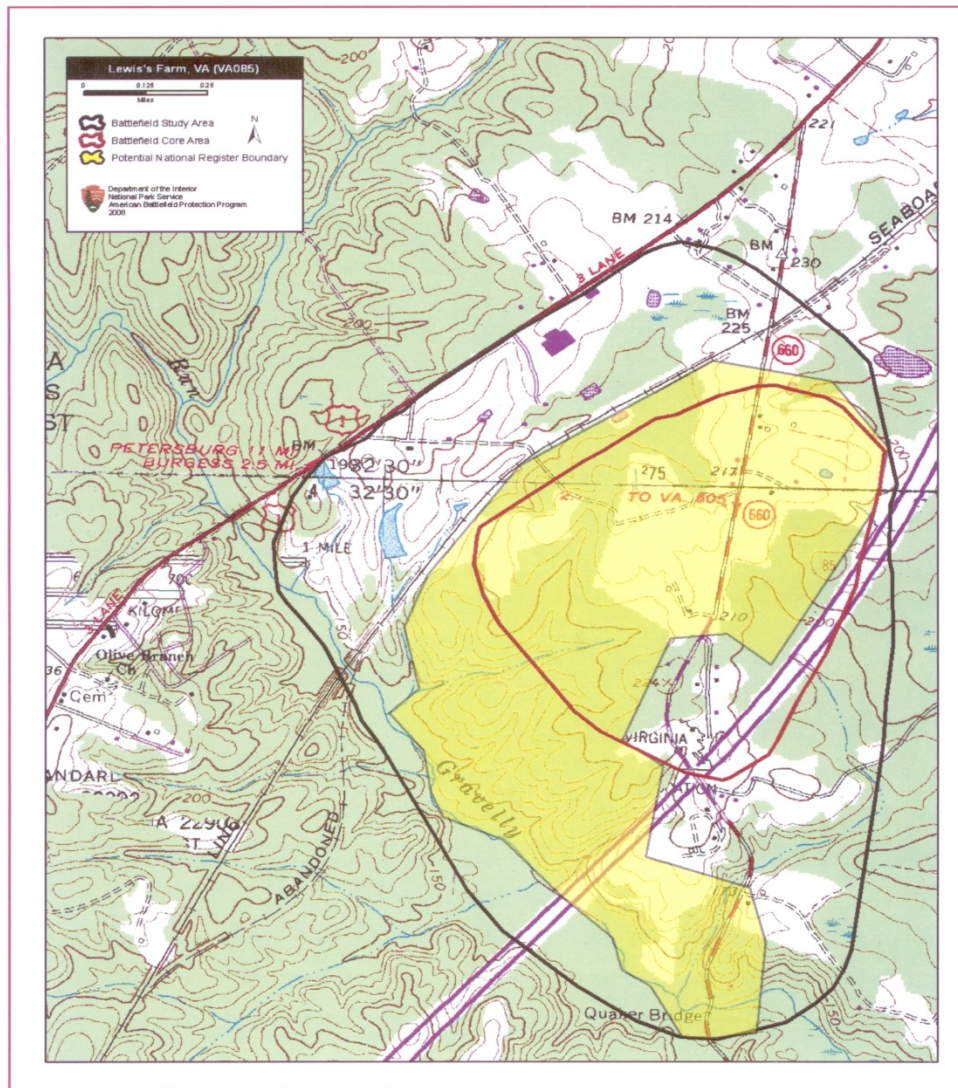
- Section 110(f) of NHPA
- Must request ACHP participation to resolve adverse effects
- Must notify Secretary of the Interior (acting through National Park Service)
- ACHP, if participating, must report outcome to Secretary and OASA(CW)

Battlefields



Battlefields- Key Terms

- **Study Area:** represents the historic extent of the battle as it unfolded across the landscape. Includes approach/retreat routes, assembly areas, command centers, hospital locations, etc.
- **Core Area:** represents those areas of the field where fighting actually occurred.
- The limits of the **Study and Core Areas** are based on the interpretation of historic events.
- **Potential National Register Boundary:** represents the ABPP's assessment of those portions of a battlefield which currently retain good condition and integrity (i.e. surviving landscape and associated features that still convey the site's historic sense of place).
- Depending on the battlefield's location and the amount of modern development that has occurred, the NRHP Boundary may include some or all of the study and/or core areas.



Termination and Foreclosure

Termination: non-productive consultation may be terminated by Corps, SHPO/THPO or ACHP

Foreclosure: Corps “forecloses” ACHP opportunity to comment- when agency fails to complete requirements of Section 106 prior to approval of an undertaking.

Tribal Consultation

Federally Recognized Tribes located in Virginia:

- Chickahominy Indian Tribe
- Chickahominy Indian Tribe-Eastern Division
- Monacan Nation
- Nansemond Indian Tribe
- Pamunkey Tribe
- Rappahannock Tribe
- Upper Mattaponi Tribe

Interested Tribes located outside Virginia:

- Absentee-Shawnee Tribe of Indians of Oklahoma
- Catawba Indian Tribe
- Cherokee Nation
- Delaware Nation
- Delaware Tribe of Indians
- Eastern Band of Cherokee Indians
- Eastern Shawnee
- Oneida Nation of New York
- Oneida Nation of Wisconsin
- United Keetoowah Band of Cherokee Indians

Three Cornerstones of Federal American Indian Law & Policy

Unique historical and political relationship between the federal government and American Indians:

- **Government-to-Government relationship**
Based on principal that Federally recognized tribes are sovereign nations
- **Trust responsibility**
- **Consultation (Pre-decisional)**

Tribal Issues- Consultation Triggers

- National Historic Preservation Act (NHPA) *
- Native American Graves Protection and Repatriation Act (NAGPRA)
- Archaeological Resources Protection Act (ARPA)
- Executive Order 13007 (Sacred Sites)
- Executive Order 12898 (Environmental Justice)
- Executive Order 13175 (Consultation w/Tribal Governments)
- Trust and Treaty Obligations (Tribal Specific)
- Department of Army American Indian & Alaska Native Policy*
- USACE Tribal Consultation Policy*
- USACE Tribal Policy Principles*

Questions???

