CHAPTER 1

History in the Balance:

Section 106 Compliance and the Impact of the Office of Surface Mining and Federal Energy Regulatory Commission Requirements

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§ 1.01. Introduction.

Among the many environmental issues which must be considered by those involved in the production, sale, and transportation of minerals are the preservation of cultural and historical resources and the impact of a producer's actions on these resources. Although the recovery and preservation of cultural and historical resources can be important to society, cultural resource reservation has become a strenuous requirement imposed upon the mineral industry. The primary piece of legislation intended to protect the historic environment is the National Historic Preservation Act of 1966 (NHPA). Passage of the NHPA reflected a growing perception that, as important and necessary as development might be, the nation was losing the character of its communities and its cultural roots as expressed in historical properties.

§ 1.02. Context and Purpose of the Historic Preservation System.

The NHPA is the strongest statement of government policy favoring preservation of cultural resources, but it was not the first and is not the only statement. Early efforts to preserve cultural resources produced a multitude of protective legislation. In addition, legislators continued to express concern with this issue in legislation passed after enactment of the NHPA.

[1]--Antiquities Act of 1906.

The first legislation to designate historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest was the Antiquities Act of 1906. The Antiquities Act set aside national or historic monuments for preservation and authorized the Secretary of the Interior to accept donations of privately owned sites for national monument designation. Additionally, certain cultural resources located on federal land were protected by the Antiquities Act, regardless of whether they had been designated as a national monument. Any disturbance of these cultural resources was subject to criminal sanctions. Although the Antiquities Act is not directly applicable to the mineral industry, it is cited by preservationists as the beginning of the statutory scheme of historic preservation.

[2]--Historic Sites Act of 1935.

Authority for development of an administrative program to identify and evaluate cultural resources was established by the Historic Sites Act of 1935. The provisions of this Act declare that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." The history of granting the Secretary of the Interior (the Secretary) the responsibility for evaluating cultural resources began in the Historic Sites Act. The Act requires the Secretary to survey historical and archeological sites, buildings, and objects for the purpose of determining those which possess exceptional value as commemorating or illustrating United States history.
The Historic Sites Act went further than the Antiquities Act by including private, as well as federally owned, property within the concept of preservation. Preservation of privately owned cultural resources, however, was not mandatory; the property owner's consent to participate in the program was required. Due to the extensive cost and political considerations in acquiring cultural resources for preservation from private owners, the key protection under the Historic Sites Act was again relegated to publicly owned resources.

[3]--National Trust for Historic Preservation (1949).

The National Trust for Historic Preservation in the United States (National Trust) is a charitable, educational, and nonprofit corporation. It was created in 1949 to further the objectives of the Historic Sites Act. The National Trust is responsible for receiving, preserving, and administering for public benefit donations of sites, buildings, and objects significant in American history and culture. The National Trust is authorized to accept gifts and bequests for these purposes. Congress granted broad discretion to the National Trust in acquiring and conveying real property (in the form of historic sites, buildings, and objects of national significance) and extended this authority to consultations with the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments on the selection of sites.

[4]--The Reservoir Salvage Act (1960).

The preservation of historical and archeological data as mandated by the Historic Sites Act was furthered by adoption of the Reservoir Salvage Act in 1960. This legislation sought to avoid the loss of significant scientific, historical, or archeological data due to flooding, road or railroad construction, or alteration of terrain by the erection of a dam.

The Reservoir Salvage Act specifically requires that notice be given to the Secretary before any federal agency constructs or licenses construction of a dam to avoid irreparable historical loss or destruction. Upon notification, the Secretary must determine the significance of the threatened material. Any party damaged as a result of delay while the Secretary's decision is pending is entitled to compensation.


The National Environmental Policy Act (NEPA) addressed some of the same concerns as the NHPA. Federal agencies are given broad responsibilities to assess the impact of their activities on the environment, including historic properties. Compliance with NEPA requires identification of unresolved conflicts, consideration of alternatives, and identification of any irreversible effects that may accompany a federal action. Studies done by agencies under NEPA are often coordinated with studies and documents prepared under the NHPA. While the NHPA's requirements will not be satisfied simply by complying with NEPA, it is perfectly reasonable to combine the two efforts.

Congress' direction under NEPA to consider the impact an action might have on man's environment is to be embodied in a detailed statement by the responsible federal agency on (1) the environmental impact of the proposed action; (2) any adverse environmental affects which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between long, local, and short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Congress recognized that the NHPA review process did not protect adequately cultural resources discovered after the commencement of construction of a federal or federally approved project. Thus, it adopted the Historic and Archaeologic Data Preservation Act of 1974 (HADPA). The HADPA requires the Secretary be notified by any agency involved in an undertaking when federal action may cause irreparable loss or destruction of significant archeological or historical data. When the affected data is significant, an independent survey of the area must occur along with actions to recover and preserve all worthy data. Because the survey may delay construction, the HADPA authorizes the Secretary to compensate any party damaged as the result of the delay or the temporary loss of use of private or any non-federally owned land.


Congress' attempt to impose criminal sanctions against violators of the Antiquities Act was rejected in United States v. Diaz. In response, Congress passed the Archaeological Resources Protection Act of 1979 (ARPA). ARPA defines "archeological resource" as "any material remains of past human life or activities which are of archeological interest, as determined under uniform regulations promulgated pursuant to this [Act] . . . [which are] at least 100 years of age." ARPA also establishes a procedure for excavation and removal of archeological resources on public and Indian land; criminal penalties for excavation, removal, or damage to an archeological resource without a permit; and sale of artifacts obtained in violation of federal, state, and local law. While the sale of historic artifacts is sanctioned under the Act, mere possession of certain artifacts and collection of other certain artifacts (e.g., arrowheads) are exempt from criminal and civil penalties.

Civil penalties, which may be imposed only by the Federal Land Manager, include restitution of the archeological and commercial value of the resource and the cost of restoration and repair. Indian tribes also may sue in either tribal or state courts for damages or for destruction of archeological resources on Indian lands. Additional penalties include forfeiture of all archeological resources, vehicles, and equipment involved in an ARPA violation.


As an additional protection for sites and artifacts significant to Native American history and culture, the American Indian Religious Freedom Act (AIRFA) was adopted in 1979. AIRFA provides for the protection and preservation of the inherent rights to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiian. Specifically, the right of religious freedom is protected by assuring access to culturally significant sites and use and possession of sacred objects through regulation of federal activity impacting those areas.

§ 1.03. Scope of NHPA and Responsibility for Compliance.

[1]--Legislative History.

Legislative history indicates that state and local governmental interest in cultural and historic preservation was spearheaded in the 1960's by a special committee on historic preservation created by the United States Conference of Mayors. The Congressional committees which reviewed the NHPA prior to its enactment expressed concern that existing federal programs were limited to natural and historical properties determined to be nationally significant.

The House Report demonstrated specific concern that only a limited number of properties would meet a
"national significance" standard. While this concern was expressed, however, need for balance between historic preservation and economic growth also was strongly expressed, as the following indicates:

Many others [properties] which are worthy of protection because of their historical, architectural, or cultural significance at the community, State or regional level have little protection given to them against the force of the wrecking ball. Some of them are not even known outside of a small circle of specialists. It is important that they be brought to light and that attention be focused on their significance whenever proposals are made in, for instance, the urban renewal field or the public roads program or for the construction of Federal projects or of projects under Federal license that may involve their destruction. Only thus can a meaningful balance be struck between preservation of these important elements of our heritage and new construction to meet the needs of our ever-growing communities and cities. (25)

The preamble of the NHPA also recognizes the need for preservation by providing that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development." (26) It further recognized the appropriateness of the federal government's taking the lead in giving maximum encouragement to those undertaking preservation and in accelerating historic preservation. (27) To address state and local preservation, NHPA establishes a partnership between the federal government, the states, and the private sector for the protection of cultural resources by authorizing the Secretary to create the National Register of Historic Places (National Register) and coordinating, through the National Park Service, the surveying and nomination of properties for inclusion in the National Register.

As originally enacted, the NHPA required federal agencies to take into account the effect their undertaking would have on a property included on the National Register. Further, after considering this effect, the federal agency was required to provide the Advisory Council on Historic Preservation (Advisory Council), also created by the NHPA, an opportunity to comment on the undertaking. (28)

The scope of properties required to be reviewed by federal agencies was increased extensively by Executive Order 11593, titled "Protection and Enhancement of the Cultural Environment," (29) and issued in 1971 by President Nixon. This order expressly applies only to federally owned properties, but it has also been applied to non-federally owned properties. Prior to this Executive Order, actual entry in the National Register was essential before the protections incumbent in the NHPA could be invoked. Executive Order 11593, however, has greatly expanding the scope of the NHPA, extending protection to any property once eligibility for inclusion in the National Register has been determined.

Under the Executive Order, federal agencies are responsible not only for mitigating damage to cultural resources, but also for taking action to enhance these resources. The enforceability of Order No. 11593 was established in Save the Courthouse Committee v. Lynn. (30) The court found that Order No. 11593 placed an affirmative duty on every federal agency to adopt preservation procedures, either its own or those recommended by the Advisory Council, and apply them to both federally and privately owned cultural resources which would be affected by a federal undertaking.

In response to the enormous interest and participation in the state matching grant program established by the NHPA, Congress amended the Act in 1976 to increase the program's funding level. The amendment recognized the positive impact the NHPA program had on historic structures and the neighboring communities. In addition, the matching formula was altered from 50-50 to 70-30 for planning and inventory purposes in order to complete the inventory of national historic sites. (31)

As a result of the persistent problems with the existing administrative process, Congress again amended the NHPA in 1980. The 1980 amendment offered a more precise definition for cultural preservation programs at
federal, state, and local levels and revised the structure of the Advisory Council. Requirements for state approved programs were adopted, and authority for state involvement in the national program's administration was increased. Finally, the 1980 amendment gave local governments the right to participate in actions by the Advisory Council when the local governments were affected, mandated greater private sector involvement in the review process, and required private owner consent before including privately owned resources on the National Register.


When Congress enacted the NHPA, it wanted to ensure that the cultural resource costs of development were considered as the nation's economic growth continued. Specifically, government policy to be promoted by the NHPA was stated to be as follows:

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organization and individuals to --

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations;

(3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederal owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

To achieve these goals, the NHPA requires all federal agencies to carry out their programs and projects (including federal funding, licensing, and permitting) in accordance with the purposes of the NHPA. It includes the following major provisions: (1) promoting identification and nomination of national, state, and local cultural resources to the National Register; (2) designation of a State Historic Preservation Officer (SHPO) by each governor to coordinate preservation activities in each state; (3) certification by the SHPO of local government historic preservation programs to participate in the national program; (4) establishment of grants-in-aid to create a partnership between the federal government and the states for identifying, surveying, registering, and preserving cultural resources and historic properties; and (5) authorizing the Advisory Council and the Secretary to issue regulations, standards, and guidelines for compliance with the NHPA.

To ensure that the federal government took the lead in preserving cultural resources, Congress outlined federal agency responsibility in four sections of the NHPA. Section 402, added by the 1980 amendments, prescribes federal agency responsibility for protecting historic properties in other nations. Section 111 of the NHPA addresses exchanges and leases of historic properties by federal agencies and the agreements necessary for management of these properties.
Section 110 of the NHPA establishes affirmative responsibilities of any federal agency with respect to historic properties owned by the agency. This section includes requirements to designate a qualified preservation officer, to locate agency-controlled historic properties and nominate the same to the National Register, to use the historic properties rather than construct or lease new facilities, to undertake preservation measures, and, if destruction becomes necessary, to record specific information with respect to the property and deposit the record with the Library of Congress. In order to comply with these responsibilities, Section 110 allows federal agencies to include in project costs, or to charge licensees or permittees, amounts paid to carry out the NHPA preservation activities.

Section 106 of the NHPA established the federal agency obligations which impact the mineral industry. Under this section, each federal agency must take into account the effects of its activities and programs on historic properties as follows:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

Thus, Section 106 has placed two affirmative duties on federal agencies: (1) to take into account the effect of their undertakings on historic properties; and (2) to afford the Advisory Council the opportunity to comment on those undertakings. The language of the section offers little direction on accomplishing these duties, but the Advisory Council's Regulations, issued pursuant to its rulemaking authority, provide procedural and substantive guidance.

Although the NHPA created the Advisory Council and made it responsible for commenting on federal undertakings that affect historic properties, its authority is limited. Federal agencies merely need to "consider" the Advisory Council's comments when reaching final decisions on their undertakings. Further, a federal agency is to "reconsider" the Advisory Council comments if there is a public inquiry to the Advisory Council, but a public inquiry does not suspend the undertaking.

A federal agency may not delegate its duty to comply with the NHPA, but it may use the services of applicants or permittees to prepare the information necessary to determine the effect of the undertaking on historic properties. The directive is not ambiguous; the federal agency must fulfill the responsibilities of Section 106. However, Section 106 does not apply to non-federal entities. The Federal Energy Regulatory Commission, for example, has interpreted this regulation to require applicants to perform all necessary archaeological review, including working with the SHPO in the appropriate states, but it has left the determination of effect of the undertaking to the Commission's staff. This has placed a substantial burden on applicants.

§ 1.04. Application of Section 106 to the Mineral Industry.

Each federal agency is required to comply with the provisions of the NHPA and the Advisory Council Regulations which interpret the NHPA. Many federal agencies have established their own regulations to be followed by applicants or licensees, which effectively pass on the cost of compliance. Often, there are inconsistencies between the Advisory Council Regulations and the individual federal agency's regulations.
This can create a situation where the SHPO will require compliance with the Advisory Council Regulations and the staff of the federal agency will expect compliance with its own regulations. Practically, the applicant frequently is placed in the position of mediator, with limited decision making authority on the final determination of effect or mitigation. The remainder of this Chapter will deal with the requirements of the Federal Energy Regulatory Commission (FERC) and the Secretary for compliance with the NHPA and the Advisory Council Regulations as they relate to natural gas and coal development.

[1]--Federal Energy Regulatory Commission.

The responsibility for assessing the effects on historic properties applies to all federal agencies and applicants for federal assistance, permits, and license. Some agencies, however, encounter Section 106 more frequently than others. Pipeline companies constructing interstate pipelines have the major exposure to compliance with the NHPA.

Under the terms of the Natural Gas Act (NGA), before constructing and operating any interstate natural gas transportation facility, a pipeline company must receive from the FERC a certificate of public convenience and necessity under Section 7(c) of the NGA. Most natural gas pipeline construction is authorized under the certificate review process established by Subpart A of Part 157 of the FERC's regulations.

Interstate pipeline companies that already have a certificate and rates accepted by the FERC can also obtain a blanket construction certificate pursuant to Subpart F of Part 157. This certificate can be used to construct, acquire, and operate eligible facilities. These blanket certificates cannot be used for main line transmission facilities (including looping and extensions) or for facilities crossing state lines for the primary purpose of transporting natural gas by intrastate pipelines. A blanket certificate may be used for any jurisdictional facility necessary to provide service within existing certificated volumes or any gas supply facility. Facilities authorized under either automatic or prior notice certificates must be constructed in compliance with standard conditions specified in the FERC regulations including, specifically, the requirement of conducting all activities consistently with the NHPA.

In recent years, the most frequently used jurisdictional exemption under the NGPA is that provided by Section 601(a)(2), which specifically exempts transportation performed under Section 311 of the NGPA from the requirements of the NGA. Section 311(a)(1) of the NGPA provides that the FERC may authorize transportation by interstate pipelines under that section by rule or Order. Order No. 234, issued with respect to blanket certificate transportation, established regulation Section 157.206(d), which sets forth environmental compliance requirements. Order 436 subsequently promulgated Section 284.11, which expressly provides that any transportation under Section 311 that involves construction is subject to the environmental provisions of Section 157.206(d) as a condition precedent to commencing any construction. Section 157.206(d)(2) of the regulations also contains an appendix describing specific actions a gas pipeline must take to comply with the NHPA.

As originally adopted, the FERC's environmental compliance regulations did not require pipeline companies constructing facilities under Section 311 to give the FERC notice before construction, merely to comply with the various environmental statutes. On August 2, 1990, the FERC issued an interim rule requiring interstate pipelines to provide notification of construction of facilities under Section 311 at least thirty days prior to commencement of any construction.

The FERC procedures make it the certificate holder's responsibility to identify, or cause to be identified,
listed and unlisted properties located within the area of the project's potential environmental impact which may be affected by the undertaking that satisfy the National Register Criteria for Evaluation.\(^{(58)}\) The FERC regulations also strongly encourage consultation with the SHPO to determine whether unlisted properties are known or are likely to occur within the area and to determine the need for surveys to identify unknown, unlisted properties. If the SHPO declines to consult, the pipeline company may not proceed until the FERC's Environmental Evaluation Branch, Office of Pipeline and Producer Regulation, has designated a consultant.

If the SHPO finds, along with the certificate holder, that no survey is required and that no listed or unlisted properties occur in the area of potential environmental impact, the certificate holder is deemed to be in compliance with the FERC Regulations.\(^{(59)}\) On the other hand, if the SHPO determines that surveys are required, the certificate holder must perform them in a manner sufficient in scope and intensity to identify and evaluate all eligible properties. The results of the surveys must be submitted, along with a statement as to which unlisted properties satisfy the criteria, to the SHPO with a request for comments on the surveys and the conclusions. Upon completion of the surveys, the certificate holder will be in compliance with the FERC regulations when it is determined that there are no listed or unlisted properties in the project's potential environmental impact area.\(^{(60)}\)

When an eligible or listed property is located within the project's potential environmental impact area, the certificate holder, in consultation with the SHPO, must apply the Criteria of Effect specified in the Advisory Council Regulations to determine whether the project will have an effect upon the historical, architectural, archeological, or cultural characteristics of the property.\(^{(61)}\) The FERC's regulations for construction of Section 311 facilities and blanket certificate facilities, however, require more stringent compliance with the NHPA than with the Advisory Council Regulations. To be in compliance with the FERC's regulations, the certificate holder and the SHPO must agree that the project will not affect these historical, architectural, archeological, or cultural characteristics. The Advisory Council Regulations allow an effect if it is not adverse, and even allow mitigation of an adverse effect. A project will not be authorized under the blanket certificate or deemed in compliance with Section 311 unless effects on eligible properties can be avoided by relocation to an area where no eligible properties occur. Upon relocation of the project, the certificate holder or Section 311 pipeline will be in compliance. Any disagreement between the certificate holder or applicant and the SHPO as to the need for a survey, the adequacy of a survey, or the results of application of the criteria, will result in denial of authorization of a project under the blanket certificate or a determination of failure to comply with the conditions precedent of Section 311.\(^{(62)}\)

In addition to its interim rule promulgated in 1990, the FERC also has issued a notice of proposed rulemaking (NOPR).\(^{(63)}\) The NOPR would eliminate the replacement of facilities from the definition of acts which are exempt from public notice or review by the FERC. Replacement of facilities would be subject to NHPA compliance. The NOPR would also increase notification requirements to landowners located near the proposed project by requiring six weeks prior notice of the proposed construction in a daily or weekly newspaper of general circulation in each county in which the project will be located.

In the NOPR, the FERC requested comments regarding modification of the procedures for construction projects pursuant to Section 311 of the NGPA.\(^{(64)}\) The FERC's concern in this area was directed to the need for pre-construction case specific review which may be needed due to the increased size of projects constructed under Section 311. At the time of issuing the NOPR, the FERC was considering adoption of regulations to provide the FERC with some measure of oversight for Section 311 construction.

The most drastic expansion discussed in the NOPR is a requirement that related non-jurisdictional facilities be identified and treated as part of the project. This would subject non-jurisdictional facilities to compliance with the NHPA, even though many of these facilities arguably do not fall within the "undertaking" of a federal agency.
There are aspects of the NOPR which should assist the pipeline companies under Section 311. One is a proposal to develop an expedited procedure for compliance under the NHPA. Another positive aspect is the creation of a method to propose mitigation of an effect on eligible or listed properties, rather than the current provision that any effect will stop the project.

Issuance of the NOPR and the results of filings at the FERC indicate the FERC's interest in requiring compliance with the NHPA. The FERC has considered the NHPA's environmental compliance regulations when authorizing projects pursuant to its licensing authority. In *Williams Natural Gas Co.*, a gas company filed an application with the FERC seeking authorization for the construction and operation of new facilities. Because the environmental assessment revealed that a portion of the proposed project was located in areas potentially eligible for the National Register, the FERC found that construction could not begin in the affected areas until the required consultation process had been completed. While the FERC granted permission for the project, it denied authorization to begin construction where archeological sites might be disturbed pending the outcome of the Section 106 consultation process.

Projects which proceed without the required consideration of impact on cultural resources face possible delay through injunctive relief. If a company does not comply with the FERC regulations, the FERC has the authority to halt construction of facilities being built under Section 311. Section 501(a) provides the FERC with authority "to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this [Act]."

The FERC is also given explicit authority under Section 504(b) of the NGPA to initiate civil enforcement proceedings in United States district courts. The FERC's authority to order a halt to the construction of projects being built under Section 7 of the NGA is found in Section 16 of that act. While no court has issued an injunction for violation of the NHPA or the regulations promulgated thereunder, courts have responded to violations of such environmental statutes as the National Environmental Policy Act by balancing equities and issuing an injunction.

In addition, the FERC has authority under Section 504 of the NGPA to assess civil penalties for knowing violation of the environmental requirements governing Section 311 construction activities. The FERC is also authorized by Section 20(a) of the NGA to refer evidence of violations of that Act to the Attorney General of the United States who, in his discretion, can pursue criminal proceedings.

The FERC has made use of the civil penalties provided in Section 504 of the NGPA against Transcontinental Gas Pipe Line Corp. (Transco) in Transco's 1987 construction of its Mobile Bay pipeline in southwestern Alabama. Transco was constructing this pipeline pursuant to the exemption from certification provided by Section 311. At the time Transco constructed its Mobile Bay line, it was the largest pipeline constructed under Section 311. The enforcement staff at the FERC alleged that Transco damaged or destroyed forty-eight historic sites eligible for inclusion in the National Register.

The FERC proposed to fine Transco $37 million for these alleged violations of its regulations requiring compliance with the NHPA. In a recent FERC-approved settlement, Transco will pay an $11 million civil penalty, $1 million to cover the FERC's investigation costs, and $13.5 million to the State of Alabama for cultural resource research and protection. The payment to Alabama is in settlement of a law suit seeking $170-million in damages for alleged corporate fraud.

[2]--Secretary of the Interior and Surface Mining Control and Reclamation Act.
The Surface Mining Control and Reclamation Act (SMCRA)\(^{(76)}\) created a nationwide program for surface coal mining operations. The Act allows states wishing to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations to develop and submit state programs to the Secretary for approval.\(^{(77)}\) State programs do not have any direct responsibilities under the NHPA, but the Office of Surface Mining Regulation and Enforcement (OSMRE) is required to comply with its provisions. In order to follow the Section 106 guidelines of the NHPA, OSMRE reviews state program provisions, as well as its own operations, to ensure that adequate consideration is being given to historic properties. While Section 106 does not apply to state programs regulating surface mining, it does apply to federal undertakings directly regulated by OSMRE. Permitting by OSMRE in federal program states and on Indian lands is subject to the requirements of the NHPA.\(^{(78)}\)

The OSMRE has taken the position that in states with OSMRE approved regulatory programs, the permits issued are state, and not federal, undertakings. Accordingly, the provisions of Section 106 do not apply directly to the state-issued permits. State programs are required, however, to be consistent with, and no less effective than, SMCRA and OSMRE regulations.\(^{(79)}\)

Because the Secretary's approval of state regulatory programs and OSMRE's approval of state program amendments are federal undertakings, state assistance in implementing those responsibilities, in accordance with Section 106, is required. In addition, all federal grant recipients, including state regulatory authorities, are required to assure federal agencies of compliance with Section 106 requirements as a condition of receiving federal grants.\(^{(80)}\)

The surface mining program has established its own set of standards under SMCRA to ensure state assistance to OSMRE with respect to compliance with the NHPA. The provisions require that each state include in its program a method for designating areas which are unsuitable for surface coal mining. The process should include (1) public participation in the inventory of state land and (2) an impact statement regarding the coal resources available and the subsequent impact of an "unsuitable" designation. A surface area containing fragile or historic lands in which operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems (including places on the National Register) is specifically eligible under SMCRA for designation as unsuitable.\(^{(81)}\) While the states are given the authority to designate lands as unsuitable for surface coal mining, the Secretary has retained an oversight role, along with the authority to rescind approval and enforce the provisions of SMCRA directly.\(^{(82)}\)

States that have cooperative agreements with OSMRE granting regulatory authority over federal lands are also exempt from compliance with Section 106. If, however, the permit issuance is accompanied by other federal actions, including leasing or mining plan approval, the Section 106 requirements apply. Further, whenever federal lands are involved, the land management agency is responsible to protect historic resources under Section 110.\(^{(83)}\)

Some confusion and disagreement exists as to whether the different OSMRE programs are subject to the NHPA requirements. A suit was filed by several preservationist groups in 1987 for declaratory and injunctive relief for violations of the NHPA, its regulations, and Executive Order 11593 by OSMRE.\(^{(84)}\) The plaintiffs asserted that the regulations promulgated by OSMRE failed to satisfy its duty to promulgate "counterpart regulations" within the meaning of the Advisory Council Regulations.\(^{(85)}\) Specifically, the plaintiffs objected to the lack of protection afforded historic properties eligible but not listed on the National Register.

In *Indiana Coal Council, Inc. v. Hodel*,\(^{(86)}\) the plaintiffs consisted of trade associations, coal producers, and
coal sellers. These plaintiffs also claimed that certain OSMRE regulations were in violation of the law, but from a different viewpoint. The Indiana Coal Council plaintiffs asserted that the regulations were arbitrary and capricious because the NHPA applies to federal undertakings and not to state permitting actions. The plaintiffs also rejected the Secretary's authority to compel information gathering and protective measures by permit applicants under SMCRA to meet the responsibilities under the NHPA. No ruling on the merits has been issued in either case. Thus, the exact application of the NHPA's requirements to surface mining operations remains unclear.

§ 1.05. Compliance with Advisory Council Regulations.

The FERC regulations which compel an applicant's undertakings to comply with the NHPA rely heavily on the Advisory Council's Regulations. Additionally, where inconsistencies exist between the FERC regulations and those of the Advisory Council, and the FERC regulations are more stringent, an argument may be made that the Advisory Council Regulations control. In either situation, it is important to understand the NHPA as interpreted by the Advisory Council.

[1]--Defining a Federal "Undertaking."

An activity is subject to the requirements of Section 106 of the NHPA if it qualifies as a federal "undertaking." Thus, the first issue to address in determining the need for compliance with the NHPA is whether the project is an "undertaking" and whether all aspects of the project constitute an "undertaking." The regulations define "undertaking" as:

any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.\(^{(87)}\)

Thus, there are two tests for determining whether an action is an "undertaking": (1) Is the action a federal action by being either "under the direct or indirect jurisdiction of," "licensed by," or "assisted by" a federal agency?\(^{(88)}\) (2) Is the action a "project, activity, or program that can result in changes in historic properties located in the area of potential effect?"

The determination of an undertaking is prospective; it occurs prior to efforts to determine if historic properties exist. Thus, it asks if an action could affect historic properties, if any of those properties were present. The determination of whether an activity is an "undertaking" is made by the federal agency. If there is no "undertaking," no further action is required under the NHPA.

At least one case has interpreted the term "undertaking," and possibly what is included within the area of potential effect, very restrictively. In Ringsred v. Duluth,\(^{(89)}\) a citizen of Duluth brought an action to halt construction of a parking ramp adjacent to a gaming facility operated by the City of Duluth and an Indian band. The Fond du Lac band of Lake Superior Chippewa Indians and the City had formed a commission for the purpose of developing and operating a gaming facility in a former Sears building. The band purchased the building, which was transferred to the United States to be held in trust, and an environmental assessment reviewing the proposed trust acquisition and development of the gaming facility was made. The assessment did not, however, consider the environmental effects of, or alternatives to, the later proposed parking ramp construction. The results of the environmental assessment did conclude that the development of the gaming facility would have beneficial social and economic effects and would not adversely affect the environment.
Appellant, Ringsred, argued that the environmental assessment was deficient because it failed to consider the environmental impact of, and alternatives to, the proposed parking ramp construction as required by NEPA. The court rejected this argument, concluding that the Secretary's actions relating to the parking ramp were so incidental that the project did not constitute part of a major federal action. Because no federal action was a legal condition precedent to the construction of the parking ramp, it was not necessary to consider the entire non-federal project. Further, the court found that approval of Indian contracts by the Secretary was not necessary to construction of the parking ramp. Thus, the Secretary had no role in, or control over, the ramp construction.

Ringsred also contended that the NHPA was violated because the effect of the parking ramp project on historic properties eligible for inclusion in the National Register was not considered. Based upon the analysis of federal involvement under NEPA, the court concluded that the parking ramp construction also failed to constitute a "federal or federally assisted undertaking." Thus, the requirements of Section 470f of the NHPA were not triggered.

In determining whether the degree of government involvement rises to the level of an "undertaking," several courts have stressed the importance of project funding. In *Lee v. Thornburgh*, the monies for a community forensic treatment facility were directly appropriated by Congress. As a result, the court held there was a strong indication of "the presence of `undertaking' under section 106" due to the direct assistance of Department of Justice officials in the funding process.

The ownership of title to the land on which a project is to take place has been considered indicative of "undertaking" status. In *Ringsred*, the court refused to find an "undertaking" due in part to the fact that the proposed parking ramp was to be built on city-owned, not federally-owned, land. Conversely, when the court in *Lee* determined that the District of Columbia's proposed project was to be built on land owned by the federal government, it found federal ownership a "not-insignificant factor to be considered in the equation" in defining an "undertaking."

Government approval of an action or project is an extremely important indication as to whether an "undertaking" exists and has resulted in a broad definition of the term. In *CNG Transmission Corp.*, the FERC found that federal authorization for expansion of service to jurisdictional facilities was directly related and interdependent with similar authorization to non-jurisdictional facilities. As a result, the cultural resource regulations under the NHPA were applied to both facilities as a single "undertaking."

---Defining the Scope of an "Undertaking."

Once a determination that an undertaking is involved has been made, the Advisory Council Regulations will be of great assistance in determining the scope of that undertaking. The scope of the undertaking is limited to historic properties which might be located in the "area of potential effects." The "area of potential effects" is defined as "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist." As with the determination of an undertaking, the area of potential effects is prospective and defined before identification of historic properties begins. Thus, it is not necessary to know whether historic properties exist in an area to define the area of potential effects. It is also important that an area of potential effects is not limited on the basis of land ownership.

Another important concept that has developed with respect to defining the area of potential effects is that an agency must consider both direct results of the project and those which could be indirect consequences, but
are foreseeable at the beginning of the project. On this basis of foreseeability, the scope of the area of potential effects should consider the following: alternative locations for all or parts of the undertaking; locations where the activity may result in changes in traffic patterns, land use, or public access; and locations from which the undertaking, or parts of it, may be visible.

An often used example of foreseeability is the construction of an expressway exit. If it is foreseeable at the time of its construction that commercial development will occur around the exit, an argument can be made that the area of potential effects includes the area where that commercial development is likely. As this indicates, the use of a foreseeability standard, while not explicit in the statute, can expand substantially the area which must be surveyed. An example in pipeline construction is the pad constructed for storage of heavy equipment. Since the pad is often built before the actual commencement of the pipeline construction, it is easily overlooked when determining the area of potential effects. It is my experience that the SHPO, the FERC staff, and the Advisory Council regard the construction pad as within the area of potential effects.

[3]--Participants in the Section 106 Process.

Upon a determination that an undertaking exists, and after defining the scope of the area of potential effects, it is necessary to review those who will be participants in the Section 106 process. These participants include all federal agencies, which may, at their own discretion, involve their applicants in the Section 106 process, the SHPO for the states in which the undertaking will occur, the Advisory Council; the Department of the Interior, through its National Parks System; and, finally, "interested persons."

For purposes of the Section 106 process, the National Park Service becomes relevant as administrator of the National Register. If, during the Section 106 process, it becomes necessary to determine whether a property would be eligible for listing on the National Register, the National Park Service would make this determination.

The group of participants which is the most difficult to define objectively is the group identified as "interested persons." Organizations and individuals concerned with the effect of an undertaking on historic properties are included as "interested persons." "Interested persons" also may include local governments; applicants for federal assistance, permits, and licensees; Indian tribes; and the public. Indian tribes have a specific meaning under the Advisory Council regulations.

Participation by the citizens of neighborhoods affected by projects and by groups concerned with historic and cultural preservation in the Section 106 process is especially encouraged. Criteria for citizen participation plans are set forth in the Regulations and should be considered to ensure that local concerns relevant to historic preservation are fully identified and that potentially concerned citizens are fully involved in the identification of properties which may qualify for the National Register. The Advisory Council Regulations strongly encourage maximum public participation in the Section 106 process. These Regulations do, however, allow the public participation to be coordinated with, and satisfied by, public participation programs carried out under NEPA or other pertinent statutes. Therefore, if other statutes require public notification of a project, this notification will most likely be construed by the Advisory Council as sufficient public notice of the preservation issues involved in the project.

[4]--The Five Step Process.

After the determination of an undertaking and the designation of the area of potential effects, the applicant commences the five step Section 106 process. This process consists of identifying and evaluating historic properties, assessing the effects of the project on those properties, consulting with the SHPO and interested persons to resolve any adverse effects, giving the Advisory Council an opportunity to comment, and, finally,
[a]--Identification and Evaluation.

The purpose of this identification and evaluation step is to determine which properties within the area of potential effects are included in, or are eligible for inclusion in, the National Register. If a property is not included in, or eligible for inclusion in, the National Register, it is not a "historic property" for purposes of the NHPA.

To determine whether any "historic properties" may exist in the area of potential effects, first it is necessary to understand the criteria for eligibility. The Secretary has established criteria for evaluating a property's eligibility for listing in the National Register:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association.

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) embody the distinctive characteristics of a type; period or method of construction; or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history. (105)

Thus, five types of properties are eligible for the National Register: buildings, structures, sites, districts, and objects. A property can be eligible for the National Register due to its national, state, or local significance. The four criteria specified for eligibility are: (1) association with significant events, (2) association with significant persons, (3) distinctive characteristics (i.e., work of a master, artistic value, or distinguishable entity), and (4) the information which may be obtained from the property. In addition, integrity is critical to application of the criteria. A qualified property must meet one or more of the criteria and must have integrity of location, design, setting, materials, workmanship, feeling, and association. Integrity is to be evaluated in the context of what makes the property significant; it is not necessary that there be integrity of each criterion, but only those criteria relevant for the specific property.

Recently there has been more emphasis placed on traditional cultural values as a means of meeting the criteria. With respect to the National Register, the word "cultural" is understood to mean the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community; be it an Indian tribe, a local ethnic group, or the people of the nation as a whole. (106) Traditional cultural significance is defined as significance derived from the role the property plays in the traditional, but often continuing, lifeways of a community. Examples of property possessing this significance could include: a location associated with the traditional beliefs of a Native American group concerning its origins and its cultural history of the nature of the world; an urban neighborhood that is the traditional home of a particular ethnic or cultural group and reflects its beliefs and practices; a location where Native American religious practitioners have historically gone, and may still go, to perform ceremonial activities in accordance with traditional cultural roles of practice; or a location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity. (107)
Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic properties, and properties less than fifty years old are not eligible for inclusion in the National Register. Even these properties, however, can qualify if they are within a historic district or have architectural or artistic significance, distinctive features, or exceptional importance to an event or person.

To ensure a positive result for all involved, the SHPO should be contacted and consulted early in the process of locating and evaluating properties. It will be necessary to determine the general background of the area of potential effects, to review any previous archeological or historical studies which have been done on the area, to seek information from interested parties, local governments, and, where applicable, Indian tribes, and generally to perform what is designated as a Phase One archeological study. The specific Advisory Council guidelines require that the federal agency official, in consultation with the SHPO, make a reasonable good faith effort to identify historic properties by following the Secretary's "Standards and Guidelines for Archeological and Historic Preservation." If the size of the project is sufficient to justify hiring a consulting archeologist, that consultant should be hired at this stage, so that early interaction between the SHPO and the consultant can occur. It is also good practice to have the consulting archeologist contact the SHPO by letter to explain the proposed Phase One survey and receive input regarding any additional work the SHPO believes necessary.

When the federal agency has completed its identification efforts, there are two possible outcomes: either no potentially historic properties are located, in which case the federal agency should provide documentation of its finding to the SHPO; or properties are located that may be potentially historic properties and, therefore, should be evaluated. It is also possible, at this stage, for the public to exercise its right to request Advisory Council consideration of the agency's findings. Upon receiving a request, the Advisory Council has thirty days to advise the federal agency, the SHPO, and the person making the request of the Advisory Council's view.

After it has been determined that properties are located in the area of potential effects which may be historic, the federal agency official

[i]n consultation with the SHPO and following the Secretary's Standards and Guidelines for Evaluation, . . . shall apply the National Register Criteria to properties that may be affected by the undertaking. . . . The passage of time or changing perceptions of significance may justify reevaluation of properties that were previously determined to be eligible or ineligible.

There are two possible outcomes at the end of the evaluation: (1) the SHPO may concur in the determination of eligibility, which can occur by actual consensus or by the SHPO's failure to respond to the agency's determination within thirty days (a presumption of concurrence); or (2) the SHPO may disagree with the agency's determination. If the SHPO disagrees, the federal agency official must resolve the disagreement through consultation with the SHPO or send documentation about the property to the National Park Service (through the Advisory Council) and request a formal determination of eligibility from the Keeper of the National Register. In cases where there is a dispute regarding eligibility, the Advisory Council does not make the determination; it simply serves as a conduit for seeking a final determination from the Keeper.

If the outcome of the identification and evaluation process is a determination that there are properties either listed in, or eligible for listing in, the National Register, it is necessary for the federal agency to move to the second step of this five step process – assessing the effect of the undertaking on the historic property. If, however, at the conclusion of the identification and evaluation process, there are no historic properties
located within the area of potential effects, the project may move to step five and proceed.

[b]--Determining Effect.

Although, as currently written, the FERC regulations for Section 311 construction do not allow a project to go forward where there may be an effect on an historic property, the Advisory Council Regulations will allow projects to go forward with a determination of effect, provided it is not an adverse effect. The NOPR proposes provisions to the FERC regulations for Section 311 construction which would allow for mitigation effect, thus allowing a Section 311 project to go forward even with a determination of effect. Mitigation is allowed under the Advisory Council Regulations as a means of resolving an adverse effect, and, therefore, it should assist in a FERC undertaking under Section 311 of the NGPA.

To comply with Section 106, the federal agency must take into account the effects of its undertaking on historic properties. The Advisory Council Regulations define "effect" in two parts: (1) the criteria of effect, which determine whether there will be an effect; and (2) the criteria of adverse effect, which determine whether an effect is harmful.\(114\)

The regulations state the criteria of effect as follows:

An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered.\(115\)

Points to remember when evaluating the effect and applying the criteria include: the effect does not have to be negative to be an effect; the criteria specify that alteration may occur, indicating that certainty is not necessary; and foreseeable alteration which could occur later must be taken into account. Once again, determination of effect is to be done in consultation with the SHPO, giving consideration to the views, if any, of interested persons.\(116\)

When there is a determination of no effect by the federal agency, the agency is to notify the SHPO and any interested persons who have made their concerns known and to document its findings, which are to be made available for public inspection. If the SHPO agrees with the determination of no effect or does not object within fifteen days of receiving the notice from the federal agency official, the federal agency may move to step five and proceed with the undertaking.\(117\) If, however, the SHPO makes a timely objection, the federal agency must reassess the determination in consultation with the SHPO.

The federal agency does not need to notify the Advisory Council about a determination of no effect, but, once again, any person may request that the Advisory Council review the agency's determination. Upon a request for review, the Advisory Council has thirty days to advise the federal agency official and the SHPO of its view of the federal agency's findings. During this time, it is not necessary that work be stopped on the project; the federal agency is merely to reconsider its findings.\(118\)

When an effect is found, the federal agency, in consultation with the SHPO, must apply the criteria of adverse effect to determine whether the effect of the undertaking should be considered adverse.\(119\) An undertaking is considered to have an adverse effect when the effect may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. These adverse effects can include physical destruction or alteration, isolation of the property, or alteration of its character, if that is the aspect of the property which contributes to its qualification as a National Register property, introduction of elements that are out of character with the property, neglect of the property resulting in its
There are some exceptions to the criteria of adverse effect, including when the value of the historic property is only in its potential contribution to archeological or historical research and this value can be preserved through appropriate research before the adverse effect occurs; when the undertaking is limited to the rehabilitation of buildings and structures in a manner which preserves their historical and architectural value through conformance with the Secretary's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings; and when an undertaking is limited to the transfer, lease, or sale of a property, if there are adequate restrictions and conditions included within the transferring documents.  

There are two possible procedures to follow in making a determination of no adverse effect. The first could occur if the SHPO concurs with the decision of the federal agency or agrees to concur dependent on the agency's complying with specific conditions. In this event, the federal agency would provide summary documentation to the Advisory Council, which has thirty days to concur with the decision of no adverse effect, offer additional conditions to concur, or object to the decision.

Unlike a determination of no effect, which is simply kept on file by the federal agency, a determination of no adverse effect must be sent to the Advisory Council; Section 106 provides that "the agency must take into account the effects of its action and give the Advisory Council an opportunity to comment." The type of summary documentation to be sent to the Advisory Council would include a description of the undertaking, a map or other documentation to show the area of potential effects, a summary description of historic properties subject to the effect, the agency's reasons for believing that the undertaking will have no adverse effect, a copy of the SHPO's letter of concurrence, and copies of the views of interested persons. If the Advisory Council imposes additional conditions for its concurrence, the federal agency has the opportunity either (1) to accept them or (2) to reject them and enter into the consultation process. The Advisory Council's objection, however, is considered an adverse effect.

The second procedure that could be followed in the determination of no adverse effect would commence with the SHPO disagreeing with the federal agency's determination of no adverse effect. The federal agency would then need to provide full documentation to the Advisory Council for its review. The Advisory Council will have thirty days either to agree with the agency's determination of no adverse effect or to require the federal agency to comply with conditions which the agency may agree to accept. If there is agreement between the Advisory Council and the agency, the undertaking may go to step five and proceed. Once again, it is possible that the Advisory Council may object to the finding of no adverse effect, which will result in the need to move to step three, consultation.

[c]--Consultation – Resolving Adverse Effect.  

The purpose of the consultation is to establish a means whereby the federal agency can either avoid or reduce the adverse effect of its undertaking. If the consultation becomes necessary, participating parties become very relevant. Certain participants are considered to be "automatic consulting" parties: the federal agency; the SHPO; the Advisory Council, in the event the SHPO refuses to participate or when a National Historic Landmark is involved; and interested persons, if they ask to participate and are either the local government, an Indian tribe, an applicant for, or holder of, grants, permits, or licenses subject to Section 106 review, or the owner of affected lands within the undertaking's area of potential effect. The Advisory Council may also be a consulting party when asked by either the federal agency or the SHPO, or if it elects to become involved. Optional consulting parties can include traditional cultural leaders, Native Americans who are not part of a recognized Indian tribe, or anyone who falls within the definition of "interested persons."
The consultation, if successful, will result in a Memorandum of Agreement (MOA) which specifies the agreement among the concurring parties, identifies who is responsible for carrying out each element of the agreement, designates the Advisory Council's comments, and provides documentary evidence that the federal agency has met the requirements of Section 106. Possible solutions in the MOA are avoidance of the adverse effect by alternative sites or design, mitigation of the adverse effect through limiting the magnitude of the undertaking, rehabilitation instead of demolition, moving historic properties, or documenting historic properties before they are destroyed. In instances where no mitigation alternatives are available, and the benefits of the undertaking justify, it may be necessary to accept the loss of the historic property or some of its significant characteristics.

If a consultation is to occur, the federal agency must provide each consulting party with the documentation set forth in the Advisory Council Regulations. The purpose of the documentation is to provide all parties with enough information to permit knowledgeable consultation. There are no specific procedures for the actual means of consultation. Instead, this is left to the parties.

The resulting MOA, if any, must be signed by the federal agency and the SHPO, if the Advisory Council did not participate. It then must be submitted to the Advisory Council for acceptance. The Advisory Council has thirty days to review the MOA. The Advisory Council may (1) accept the MOA (concluding the Section 106 process), (2) notify the federal agency of changes which may be subsequently agreed upon by the federal agency and the SHPO, or (3) provide comments within sixty days. If the Advisory Council has been a consulting party, it would also be a signatory to the MOA. If any other consulting party will have specific responsibilities under the MOA, it should also sign the MOA.

It is possible that the SHPO may refuse to participate in the MOA or may fail to respond within thirty days to the federal agency's request for participation. In this event, the federal agency is to consult with the Advisory Council, without the SHPO, to complete the Section 106 process. If an Indian tribe is involved as a consulting party, it must be invited to concur in the MOA. Its refusal to concur, however, does not prevent the Advisory Council and the federal agency from completing the MOA.

If, for any reason, the federal agency discovers that it cannot comply with the MOA, it is to contact the Advisory Council and the SHPO for renegotiation. This will afford the Advisory Council the opportunity to comment on the changed circumstances. The result of this additional comment may be an amended or new MOA.

[d]--Advisory Council Comment.

It is always possible that the consultation can end without the execution of a MOA if the parties fail to agree on an appropriate mitigation of an adverse affect. The Advisory Council Regulations provide for either the federal agency, the SHPO, or the Advisory Council to terminate consultation if any one of them determines that further consultation will not be productive. If this should occur, the federal agency must request the Advisory Council's comments and notify all other consulting parties. When the federal agency requests the Advisory Council's comments, it may request that those comments be provided within sixty days. Absent a request, the Advisory Council will determine the commenting schedule. The Advisory Council will issue its written comments to the head of the federal agency, providing copies to the SHPO and other consulting parties.

If Advisory Council comments are needed, the federal agency must submit sufficient documentation to the Advisory Council to enable it to make an independent review of the undertaking's effects on historic properties. When the Advisory Council comments, the federal agency is required to consider these comments in reaching a final decision concerning the undertaking. The federal agency must report its
decision to the Advisory Council.

Although no private right of action has been created under the NHPA, there is the implication that a private citizen could bring an action against a federal agency for failure to comply with the Section 106 process. There is precedent where a private citizen brought a mandamus action against a federal agency demanding that the agency be ordered to comply with Section 106.\(^{133}\) The court, however, denied the mandamus request.

§ 1.06. Conclusion.

As recent actions by the FERC indicate, compliance with Section 106 of the NHPA must be taken seriously by those in the mineral industry. The states may also have historic preservation statutes which must be considered. Early planning and consultation are the most cost effective means of ensuring the necessary compliance.


5. 4. 16 U.S.C. § 461.


7. 6. 16 U.S.C. § 468d.


12. 11. See, e.g., Goodman Group, Inc. v. Dishroom, 679 F.2d 182, 186 (9th Cir. 1982).

13. 12. Id.


16. 15. 499 F.2d 113 (9th Cir. 1974).


21. See, for example, Northwest Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982) (road construction did not violate Indian religious rights under the Act when adverse visual and audible impacts minimized); New Mexico Navajo Ranchers Ass'n v. I.C.C., 850 F.2d 729 (D.C. Cir. 1988) (no sites along proposed railroad route were of sufficient tribal significance to warrant change in construction plans).


23. 2. Id. at 3309.

24. 3. Id.


32. 11. 16 U.S.C. § 470-1.


40. 19. 36 C.F.R. § 800.6(c).

41. 20. 36 C.F.R. § 800.01(c)(1)(i) (1990).

42. 21. Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); See also Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741, 751 (N.D. Ga. 1978) (the court held that "while joint participation by Federal and State officials may, under the proper circumstances, be totally consistent with Congressional intent behind [§ 106], the Court holds that this statute requires that the determinations of effect, adverse effect, and no effect by the appropriate Federal agency be an independent one and not simply a 'rubber stamp' of the State's work.")
44. 1. 36 C.F.R. § 800.1(c)(1)(i).


46. 3. 18 C.F.R. §§ 157.5 - 157.21.

47. 4. 18 C.F.R. §§ 157.5 - 157.21.


49. 6. 18 C.F.R. § 157.206.


54. 11. 18 C.F.R. § 284.11.


56. 13. 18 C.F.R. § 284.3(c).

57. 14. 55 Fed. Reg. 33,027 (1990) (to be codified at 18 C.F.R. § 284.3(c)).

58. 15. 18 C.F.R. pt. 157, subpt. F, Appendix II.


60. 17. 18 C.F.R. pt. 157, subpt. F, Appendix II.

61. 18. 18 C.F.R. pt. 157, subpt. F, Appendix II.


64. 21. Id.

65. 22. 44 FERC ¶ 61,254 (8/19/88).

66. 23. Id. See also CNG Transmission Corp., 45 FERC ¶ 61,298 (11/28/88) (certificate for expansion of service conditioned upon determination as to whether a cultural resource survey was necessary, and if so, upon conclusion and approval of survey).


70. 27. 15 U.S.C. § 717o.


75. 32. *Id.*


77. 34. 30 U.S.C. § 1253.

78. 35. 52 Fed. Reg. 4,244, 4,249 (1987).


80. 37. 30 C.F.R. § 731.14(g)(17).

81. 38. 30 C.F.R. §§ 762 and 764.


83. 40. 52 Fed. Reg. 4,250.


85. 42. 36 C.F.R. § 800.15.


87. 1. 36 C.F.R. § 800.2(o).


89. 3. 828 F.2d 1305 (8th Cir. 1987).

90. 4. *Id.* at 1308, 1309, citing Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272 (8th Cir. 1980), *cert. denied*, 449 U.S. 836.

91. 5. *See* Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 644 n.9 (5th Cir. 1983), *reh’g denied*, 718 F.2d 1096 (5th Cir.) (a private act does not become a federal act, albeit a "major" one, merely because of some incidental federal involvement).

92. 6. Ringsred, 829 F.2d at 1309. *See also* Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990) (local bridge project not under the direct or indirect jurisdiction of the Federal Highway Administration or any other federal agency was not an "undertaking" subject to the provisions of the NHPA) and Paulina Lake Historic Cabin Owners Ass’n v. U.S.D.A. Forest Serv., 577 F. Supp. 1188 (D.C. Cir. 1983) (assertion of ownership by the Forest Service of structures built in national forest was not an "undertaking" for purposes of the NHPA).

8. *Id.* at 605–606. *See also* Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976) ("proposed demolition is not federally funded . . . `in any respect'" and thus, is not "federally assisted" within the meaning of the NHPA).

95. 9. *Ringsred*, 828 F.2d at 1308.


97. 11. 45 FERC ¶ 61,298 (11/28/88).

98. 12. *Id.* at ¶ 61,298.

99. 13. 36 C.F.R. 800.2(c).

100. 14. 36 C.F.R. § 800.1(c)(2).

101. 15. "Indian tribe" is defined as:

the governing body of any Indian tribe, band, nation, or other group that is recognized as an Indian tribe by the Secretary of the Interior and for which the United States holds land in trust or restricted status for that entity or its members. Such term also includes any Native village corporation, regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act.

36 C.F.R. § 800.2(g).

102. 16. 24 C.F.R. § 570.431(c) (1990).

103. 17. 36 C.F.R. § 801.8.

104. 18. 36 C.F.R. § 800.1(c)(2)(iv).


107. 21. *Id.* at 2.

108. 22. 36 C.F.R. § 60.4.


110. 24. 36 C.F.R. §§ 800.6 (e)(1), (2).

111. 25. 36 C.F.R. § 800.4(c)(1).

112. 26. 36 C.F.R. §§ 800.4 (c)(2), (3) and (5) (1990).

113. 27. 36 C.F.R. § 800.4(c)(5).

114. 28. 36 C.F.R. §§ 800.9(a), (b).

115. 29. 36 C.F.R. § 800.9(a) (emphasis added).

116. 30. 36 C.F.R. § 800.5(a).
31. 36 C.F.R. § 800.5(b).

118. 32. 36 C.F.R. §§ 800.6(e)(1), (2).

119. 33. 36 C.F.R. § 800.5(c).

120. 34. 36 C.F.R. § 800.9(b).

121. 35. 36 C.F.R. § 800.9(c).

122. 36. 16 U.S.C. § 470f (emphasis added).

123. 37. 36 C.F.R. § 800.5(e).

124. 38. 36 C.F.R. § 800.1(c).

125. 39. 36 C.F.R. § 800.1(c).

126. 40. 36 C.F.R. § 800.8(b).

127. 41. 36 C.F.R. § 800.1(c).

128. 42. 36 C.F.R. § 800.6(c)(1).

129. 43. 36 C.F.R. § 800.5(e)(6).

130. 44. 36 C.F.R. §§ 800.5(e), (6).

131. 45. 36 C.F.R. § 800.8(d).

132. 46. 36 C.F.R. § 800.6(c)(2).