



Chapter 12

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National Historic Preservation Act Initiatives Affecting the Natural Resources Industry

Donald J. Kochan¹
Crowell & Moring LLP
Washington, D.C.

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New historic preservation regulations issued by the Advisory Council on Historic Preservation (“ACHP” or “Advisory Council” or “Council”) on December 12, 2000² (after a tortuous 6-plus-year rulemaking process) greatly expand the bureaucratic reach of a regulatory program designed to be only advisory in nature. Historic preservation increasingly intrudes on activities that disturb vacant ground in natural, undeveloped environments. Expenditures in the name of historic preservation may add significantly to — even subsume all other — costs of permitting projects.

For this reason, it is important that the natural resources industry understand this rather arcane area of regulation. This chapter is designed to highlight some of the areas of historic preservation likely to affect the natural resources industry, provide an update on the latest status of this regulatory regime, and outline some of the legal and policy infirmities associated with that regime.

§ 12.01. The Governing Law.

[1] — National Historic Preservation Act.³

The National Historic Preservation Act (NHPA or “Act”) was enacted in 1966 and subsequently amended eleven times, most recently in 1992. The Act tasks Federal agencies and State governments to inventory Federal and nonfederal lands, respectively, for significant historic properties of national, regional and local interest.⁴

It establishes the National Register of Historic Places and calls upon the Secretary of the Interior (“Secretary”) to develop criteria for the designation, and to designate any such significant properties nominated by the Federal agencies, State governments, local governments, or landowners as listed, or as eligible for listing, on the National Register.⁵ An “historic property” is not limited to a “building” or “structure;” it can be an entirely undeveloped, natural “site;” it also can be as large as a

² 65 *Fed. Reg.* 77198 (Dec. 12, 2000).

³ 16 U.S.C. § 470f, *et seq.*

⁴ NHPA §§ 110(a)(2)(B) and 101(b)(3)(B); 16 U.S.C. 470h-2(a)(2)(B) and 470a(b)(3)(B).

⁵ NHPA § 101(a)(1) and (2); 16 U.S.C. 470a(a)(1) and (2).