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Overview of Federal Real Property Disposal Requirements and Procedures

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Summary

The federal government holds thousands of properties that agencies no longer need to accomplish their missions. When the government disposes of unneeded properties—through transfer, donation, or sale—it generates savings by eliminating maintenance costs. In addition, when state or local governments, nonprofits, or businesses acquire unneeded federal properties, they may be used to provide services to the public, such as temporary housing, or contribute to economic development.

The General Services Administration (GSA) plays a central role in disposing of unneeded property at most federal agencies. The Federal Real Property and Administrative Services Act of 1949 (Property Act) gives GSA the authority to dispose of real property at all federal agencies unless they have independent statutory authority to dispose of their own properties themselves. A number of agencies have independent disposal authority—ranging from limited to broad in scope—including two of the largest federal landholders, the U.S. Postal Service (USPS) and the Department of Defense.

When an agency notifies GSA that it has unneeded real property, GSA first offers to transfer the property to another federal agency, which must pay fair market value for it. If no other agency wishes to acquire the property, GSA may then convey it to a state or local government, or a qualified nonprofit, for up to a 100% discount—provided it is used for an approved public benefit. Should a state or local government or qualified nonprofit wish to acquire the property for a use other than one of the approved public benefits, GSA has the option to sell the property to them at fair market value. Finally, if the property is not sold to a public or nonprofit entity, it is offered for sale to the public.

The disposal of a federal property may be subject to a number of environmental requirements and historic preservation mandates, although which requirements apply depends on a number of site-specific conditions. Three principal federal statutes govern the environmental review process, identification and remediation of hazardous substances, and historic preservation: the National Environmental Protection Act (NEPA), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), and the National Historic Preservation Act (NHPA).

Among the agencies with independent statutory disposal authority, USPS has the greatest autonomy. The Postal Service has, in essence, been granted the authority to dispose of its properties as it deems appropriate, without the assistance of GSA. DOD also has independent statutory disposal authority, but of a more limited scope. DOD must use GSA to dispose of all properties that do not otherwise fall under the scope of special, temporary disposal authorities, commonly referred to as Base Realignment and Closure (BRAC) legislation.

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Introduction

Federal executive branch agencies hold an extensive real property portfolio that includes more than 871,000 buildings and structures, and 40 million acres of land worldwide.¹ These assets have been acquired over a period of decades to help agencies fulfill their diverse missions. Agencies hold properties with a range of uses, including barracks, health clinics, warehouses, laboratories, national parks, boat docks, and offices. As agencies' missions change over time, so, too, do their real property needs, thereby rendering some assets less useful or unneeded altogether. Healthcare provided by the Department of Veterans Affairs (VA), for example, has shifted in recent decades from predominately hospital-based inpatient care to a greater reliance on clinics and outpatient care, with a resulting change in space needs.² Similarly, the Department of Defense (DOD) reduced its force structure by 36% after the Cold War ended, and has engaged in several rounds of base realignments and installation closures.³

Real property disposition is the process by which federal agencies identify and then transfer, donate, or sell facilities and land they no longer need. Disposition is an important asset-management function because the costs of maintaining unneeded properties can be substantial. In FY2013, for example, the government disposed of 21,464 unneeded properties with annual operating costs of \$411 million.⁴ Savings generated by the disposal of unneeded properties might be applied to pressing real property needs, such as improving building security or repairing existing facilities, or towards other pressing policy issues, such as reducing the national debt. Disposition is also important because it is a mechanism by which state and local governments, nonprofit organizations, and businesses may acquire federal property. In the hands of nonfederal entities, the previously underutilized properties may be used to provide services to the public, such as temporary housing, or contribute to economic development.

This report begins with an explanation of the central role played by the General Services Administration (GSA) in the disposal of federal real property at most agencies. It then provides a discussion of the unique disposal processes at DOD and the U.S. Postal Service (USPS), which each have independent statutory authority to dispose of their own properties. It concludes with an overview of the environmental and historic preservation requirements that apply to the disposal of properties at all federal agencies.

¹Federal Real Property Council, *FY2013 Federal Real Property Report: An Overview of the U.S. Federal Government's Real Property Assets*, August 2014, p. 1.

²U.S. Government Accountability Office, *Federal Real Property: Progress Made in Reducing Unneeded Property, but VA Needs Better Information to Make Further Reductions*, GAO-08-939, September 2008, p. 9.

³U.S. Government Accountability Office, *Federal Real Property: Excess and Underutilized Property is an Ongoing Problem*, GAO-06-248, February 2006, p. 3. For more information, see CRS Report R40476, *Base Realignment and Closure (BRAC): Transfer and Disposal of Military Property*, by R. Chuck Mason.

⁴Federal Real Property Council, *FY2013 Federal Real Property Report: An Overview of the U.S. Federal Government's Real Property Assets*, August 2014, p. 15.

Centralized Disposal Through the General Services Administration⁵

The Federal Real Property and Administrative Services Act of 1949 (Property Act) applies to real property held by most federal agencies.⁶ The Property Act gives GSA the authority to dispose of real property that federal agencies no longer need, although some agencies have been granted the authority to dispose of some or all of their own property.⁷ Under the provisions of the Property Act, GSA disposes of federal real property for federal agencies that lack independent statutory authority to do so themselves. Agencies without independent disposal authority generally follow the process described in this section. The disposal processes at two landholding agencies with broad independent disposal authority, DOD and USPS, are also discussed in this report.

Federal Transfer

In order to identify properties that agencies no longer need, each agency is required to conduct an annual survey of its real property holdings. Properties that are no longer needed are reported to GSA as “excess.”⁸ GSA then physically inspects each excess property and hires a licensed appraiser to evaluate its fair market value.⁹ Next, GSA sends a written Notice of Availability describing the property to other federal agencies and posts information about the property on its Property Disposal Resource Center website.¹⁰ Agencies may also identify unneeded assets available for transfer through the Federal Real Property Profile (FRPP), a database of the buildings, structures, and land held by federal agencies.¹¹ If an agency wants to acquire an excess

⁵ This section was written by Garrett Hatch, Specialist in American National Government, x7-7822.

⁶ 40 U.S.C. §101 et. seq. Land reserved for national forest or national park purposes, and Bureau of Land Management properties, are not covered by these disposal rules. Other legislation that governs federal agency real property disposal includes the National Historic Preservation Act (16 U.S.C. §470 et. seq.), which establishes guidelines for agency disposition of historic properties, and the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §11411), which requires agencies to make surplus real property available first for homeless use before making it available for other purposes. In addition, Executive Order 13327, signed in 2004 by President George W. Bush, established (1) Senior Real Property Officers (SRPOs) at 24 of the largest landholding agencies to monitor and manage their agencies’ real property, (2) a Federal Real Property Council, comprised of SRPOs, to evaluate agency real property policies and practices, and (3) the Federal Real Property Profile, a database with information on agency real property holdings, including disposition data.

⁷ The Department of Defense has the authority to dispose of unneeded real property that is subject to the Base Realignment and Closure (BRAC) process, but GSA disposes of non-BRAC real property. The U.S. Postal Service has the authority to dispose of all of its real property. The Departments of State, Veterans Affairs, Education, Health and Human Services, the Interior, and Agriculture also have the authority to dispose of some unneeded real property, although the scope of that authority varies widely.

⁸ 40 U.S.C. §102.

⁹ U.S. General Services Administration, *Customer Guide to Real Property Disposal*, p. 17, at http://www.missionumatilla.com/documents/historical_data/HD0013_PropertyDisposalClosureGuide_GSA.pdf.

¹⁰ The Office of Real Property Utilization and Disposal website address is <https://extportal.pbs.gsa.gov/ResourceCenter/viewproperties.do?noticetype=1>.

¹¹ Only the 24 federal agencies are required to report their real property data annually to the FRPP, although other agencies have the option of reporting. The agencies that are required to report are the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, the Treasury, and Veterans Affairs; Environmental Protection Agency; General Services Administration; National Aeronautics and Space Administration; National Science Foundation; Nuclear Regulatory Commission; Office of Personnel Management; Small Business (continued...)

property, it must respond to the Notice of Availability within 30 days and then submit a formal request for the property to be transferred within 60 days from the date the notice expires. Agencies are required to pay fair market value to acquire excess property, although there are a number of circumstances under which an exception to this requirement may be approved.¹²

Public Benefit Conveyance

If no federal agency wants an unneeded property, it is declared “surplus” and made available to state and local governments, and nonprofits.¹³ These entities may have surplus property transferred to them for a discount of up to 100% of fair market value, provided they use the property for a public benefit.¹⁴ This type of transfer is called a public benefit conveyance, and to qualify, the property must be used for one of the following purposes:

- Homeless services
- Corrections
- Law enforcement
- Public health
- Drug rehabilitation
- Education
- Parks and recreation
- Seaport facilities
- Wildlife conservation
- Highways
- Emergency Management Response
- Historic monuments
- Public airports
- Housing

Each public benefit category has a federal agency, called a sponsor, that oversees conveyances for that purpose. Generally, sponsoring agencies have expertise in the policy areas they sponsor. The Federal Aviation Administration, for example, is the sponsoring agency for public airport conveyances.¹⁵

(...continued)

Administration; Social Security Administration; and United States Agency for International Development.

¹² See 41 C.F.R. §102-75.1275; 41 C.F.R. §§102-75.190-102-75.225; and 40 U.S.C. §522. When an agency is required to pay fair market value for a property, the government does not realize any new revenue since the funds are being transferred from another federal agency.

¹³ 40 U.S.C. §102.

¹⁴ 40 U.S.C. §549.

¹⁵ 40 U.S.C. §550. The agencies that sponsor conveyances are the Departments of Education (education), Health and Human Services (public health, homeless services), the Interior (parks and recreation, historic monuments, wildlife (continued...))

Pursuant to Title V of the McKinney-Vento Homeless Assistance Act, surplus properties must be made available for serving the homeless before being made available for other public benefit uses.¹⁶ The Department of Housing and Urban Development (HUD) is responsible for reviewing surplus property to determine if it is suitable for homeless use. If a property is determined to be unsuitable for homeless use, then it becomes available for other public uses at that time. If HUD determines a surplus property is suitable, however, it publishes a notice to that effect in the *Federal Register*. State and local governments, and nonprofits, are given 60 days to notify the sponsoring agency, the Department of Health and Human Services (HHS), that they are interested in using the property for serving the homeless.¹⁷ If HHS receives an expression of interest within the 60-day window, the property may not be made available for any other purpose until action on the request is complete. If no interest is expressed, then the property becomes available for other public benefit uses.¹⁸ GSA advertises its availability by contacting state and local officials and known nonprofits with an interest in the property. GSA may also post notices in city halls, state capitols, and other appropriate locations.¹⁹ The sponsoring agency is generally responsible for distributing, reviewing, and approving applications; conveying the property to the recipient; and monitoring the use of the property after it has been transferred, although GSA assists some agencies with these duties.²⁰ If the recipient of a conveyed property fails to use the property as agreed—by building a retail center on property conveyed for a public park, for example—then the property may revert back to the federal government.

Negotiated Sale

Surplus property that is not disposed of through the public benefit conveyance process may be sold to state and local governments at fair market value.²¹ In essence, state and local governments are given the right of first refusal—they are allowed an opportunity to purchase surplus property before the property is offered for sale to the general public. Federal real property regulations permit negotiated sales when “a public benefit, which would not be realized from a competitive sale, will result from the negotiated sale.”²² The regulations do not specify what types of activities would qualify, but GSA guidance notes that a state or local government can use property “according to its own redevelopment needs,” including economic development.²³

(...continued)

conservation), Justice (correctional), Transportation (port facility), Housing and Urban Development (housing), Justice (law enforcement), Homeland Security (emergency management response), and the Federal Aviation Authority (public airports).

¹⁶ 42 U.S.C. 11411.

¹⁷ 41 C.F.R. §102-75.1200.

¹⁸ Conveyances, other than McKinney Act transfers, are at the discretion of the agency and are not required by statute.

¹⁹ U.S. General Services Administration, *Surplus Real Property Available for Public Use: Notification Procedure*, GSA website, at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=20146.

²⁰ U.S. General Services Administration, *Customer Guide to Real Property*, p. 25. The General Services Administration is responsible for deeding, conveyance, and compliance monitoring of correctional, law enforcement, and emergency management conveyances, and for just deeding and conveyance of properties to be used for historic monuments, or public airports.

²¹ 41 C.F.R. §102-75.880(d); 40 U.S.C. §545.

²² *Ibid.*

²³ U.S. General Services Administration, Office of Real Property Utilization and Disposal, “How to Acquire Federal Property,” at <https://extportal.pbs.gsa.gov/ResourceCenter/content/acquireFedProp.do>.

Public Sale

Surplus properties that are still available after screening for public benefit conveyance and negotiated sale may be offered for public sale. The property is advertised in local newspapers, regional or national publications, and the U.S. Real Estate Sales list, and may also be found on GSA's website.²⁴ The appraised value of a property is used as a guideline for initial pricing, and properties are sold through sealed bids, physical auctions, and Internet auctions.²⁵

Real Property Disposal at USPS and DOD

DOD and USPS are two of the three largest federal landholding agencies, as measured by owned square feet. DOD is the largest, with more than 1.7 billion square feet of owned space in its inventory, while USPS is the third largest with 197 million square feet of owned space.²⁶ Both DOD and USPS have independent statutory authority to dispose of unneeded real property, although the scope of that authority differs. While USPS has been given autonomy in disposing of all of its properties, DOD's disposal authorities are more limited and more complicated. The remainder of this section discusses the disposal process at each agency.

U.S. Postal Service²⁷

Congress has given USPS independent statutory authority to dispose of its real estate as it deems proper.²⁸ USPS may

acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor.²⁹

Allowing USPS to make decisions over its real estate and property holdings has been viewed as integral to the concept of the USPS as encapsulated in the Postal Reorganization Act (PRA).³⁰ This 1970 statute replaced the Post Office Department (an appropriations-dependent agency) with the U.S. Postal Service (a financially self-supporting "independent establishment of the executive branch."³¹ The PRA assigned USPS the "general duty" to "maintain an efficient system of collection, sorting, and delivery of the mail nationwide."³² In order to carry out this obligation,

²⁴ General Services Administration, Office of Real Property Utilization and Disposal, Current Sales webpage, at <https://extportal.pbs.gsa.gov/ResourceCenter/PRHomePage/loadPRHomePage.do?type=full>.

²⁵ General Services Administration, *Customer Guide to Real Property Disposal*, p. 27.

²⁶ Federal Real Property Council, *FY2013 Federal Real Property Report: An Overview of the U.S. Federal Government's Real Property Assets*, August 2014, p. 1.

²⁷ This section was prepared by Garrett Hatch, Specialist in American National Government.

²⁸ Thus, for example, Congress exempted USPS from the federal property disposition statutes (40 U.S.C. §101).

²⁹ 39 U.S.C. 401(5).

³⁰ P.L. 91-375; 84 Stat. 725 (39 U.S.C. §101 et seq.)

³¹ 39 U.S.C. 201. With the PRA, Congress relinquished a great deal of control over USPS's operations as that control had proven problematic. Congressional directives often inhibited the Post Office Department from controlling its operating costs and increasing its prices.

³² 39 U.S.C. §403(b).

Congress provided USPS with a number of powers to generate revenue and control its operational costs, including the authority to “determine the need for post offices, postal and training facilities and equipment, and ... provide such offices, facilities, and equipment as it determines are needed.”³³ This authority over real property has helped USPS respond to shifts in population by expanding its presence in areas where the number of people and businesses was growing, and scaling back USPS’s operational footprint in places where population was decreasing. This authority over its property and facilities also permits USPS to alter its logistical (mail-moving) network to accommodate mail volume changes and technological developments in mail processing.³⁴

Disposal of Postal Properties

USPS policy is to dispose of excess real property under the terms and conditions that provide the greatest value to the Postal Service. Disposition may be by sale, exchange, outlease, sublease, or by other means determined to be in the best interest of the Postal Service.³⁵ In addition, USPS has employed private real estate companies to sell some of its excess or unneeded properties.³⁶ The agency also has auctioned some of its properties, including the Chicago Main Post Office, a 14-story property of 3 million square feet.³⁷

Both federal law and the USPS’s rules prescribe a post office closure process, which takes at least 120 days.³⁸ The USPS must notify members of the public who may be affected by the closure, and hold a 60-day comment period prior to closing a post office. Should the USPS decide to close a post office, the public has 30 days to appeal the decision to the Postal Regulatory Commission (PRC).³⁹ Sixty days after USPS has made a closure decision, the agency may shut down a post office, regardless of the outcome of the PRC’s review.⁴⁰ Federal statute does not require USPS to take public comment when it disposes of properties that are not post offices, such as properties utilized as office space.

Department of Defense⁴¹

DOD comprises the Office of the Secretary of Defense (which includes all defense agencies and field activities); the Joint Chiefs of Staff; the Combatant Commands (such as Central Command, Northern Command, and Strategic Command); and the military departments of the Army, Navy,

³³ 39 U.S.C. §404(a)(13).

³⁴ Over the past century, the proportion of mail sorted by postal workers has greatly declined with the advent of machinery that can read the addresses on letters and parcels and sort them according to their destination.

³⁵ U.S. Postal Service, *U.S. Postal Service Facilities Guide to Real Property Acquisitions and Related Services*, Handbook RE-1, October 2008, p. 15, at <https://about.usps.com/handbooks/re1.pdf>.

³⁶ For example, see <http://www.uspspropertiesforsale.com/>.

³⁷ Staff, “Let the Bidding Begin,” *Chicago Tribune*, August 27, 2009, at http://articles.chicagotribune.com/2009-08-27/news/0908260669_1_condos-minimum-bid-requirement-real-estate.

³⁸ 39 U.S.C. 404(d); and 39 C.F.R. 241, “Post Office Organization and Administration: Establishment, Classification, and Discontinuance,” at 76 F.R. 41413-41424, July 14, 2011

³⁹ 39 U.S.C. 404(d) sets the PRC’s role in the appeals process.

⁴⁰ For a more detailed description of the post office closure process, see CRS Report R41950, *The U.S. Postal Service: Common Questions About Post Office Closures*, by Kevin R. Kosar, pp. 6-7.

⁴¹ This section was prepared by Daniel H. Else, Specialist in National Defense.

and Air Force. All real property is placed under the jurisdiction of one of the military departments.

Individual defense facilities fall under the immediate responsibility of a local installation military officer who could be referred to as the garrison commander, the base wing commander, the base commander, or the station commander, depending on the service administering the site.

The following sections will first describe the identification and disposal of military real property under routine practice, then the special procedures that were authorized under the Defense Base Closure and Realignment Act of 1990,⁴² as amended. The latter process is commonly known as a Base Realignment and Closure (BRAC) round.

Routine Disposal of Real Property

The officers entrusted with administration of a defense site are required to periodically review the current and anticipated utilization of its land and facilities. A change in military strategy or doctrine, mission, operations, military equipment, or units based at a given facility could similarly change the need for site infrastructure. If the officer in charge determines that certain real property is no longer needed, he or she forwards a recommendation to “excess” the property up the appropriate chain of command. The final authority for declaring real property to be excess rests with the Secretary of the relevant military department, though the responsibility for managing real property inventory is usually delegated to an Assistant Secretary.

Once defense property is identified as excess, the administering military service submits a report to GSA. Other defense organizations, both active and reserve, may request that all or part of it be transferred to them. GSA then screens the property for potential use by other federal agencies. If no agency expresses interest within a reasonable period, the property is considered surplus, and GSA then directs and supervises the disposal process discussed elsewhere in this report.

Congress has imposed several statutory disposal restrictions and reporting requirements on DOD and codified them in a number of sections within Title 10 (Armed Forces) of the United States Code. Included among them are

- 10 U.S.C. 2662, which requires that, for real property with an estimated value in excess of \$750,000, the Secretary concerned report to the House and Senate Committees on Armed Services any (1) transfer of real property to another federal agency or another military department or to a State, or (2) report of excess real property to a disposal agency (such as GSA), wait 30 days (14 days if the report is made by electronic medium) before undertaking the transaction, and report again within 30 days of entering into the transaction;
- 10 U.S.C. 2694a, a section that authorizes a Secretary to convey to a State, one of its political subdivisions, or a nonprofit organization any surplus real property under his jurisdiction that is suitable for conservation purposes, has been made available for a public benefit conveyance,⁴³ and is not subject to a pending

⁴² See 10 U.S.C. 2687 note.

⁴³ State and local governments and certain nonprofit organizations may qualify for a *public benefits conveyance* of surplus public property at reduced or no cost for a number of specified uses.

- request for transfer to another federal agency, after notification of the relevant congressional committees and waiting 21 days;
- 10 U.S.C. 2696, which both allows military department secretaries to transfer real property under their jurisdiction between themselves without compensation and requires the GSA Administrator to screen all defense real property for further federal use before a Secretary conveys it under any provision of law enacted after December 31, 1997, though there are some exceptions and special provisions for land intended for use as a correctional facility.

BRAC: Special Temporary Disposal Authorities and Procedures

The cessation of operations and closing of a major military installation will often entail a significant impact on the economy and social structure of the communities in its vicinity. Therefore, successive Secretaries of Defense have found over the past several decades that a number of statutory and political constraints have rendered the process, and prospects, of significantly reducing the defense real property “footprint” problematic.

Since the waning days of the Cold War, Congress has from time to time granted special temporary authority to the Secretary of Defense to carry out wholesale reviews of domestic defense real property with the intention of evaluating and reducing the inventory deemed excess to defense needs and surplus to federal requirements. All told, five defense real property disposal series have thus far been authorized. Though created under different laws, each series has become commonly referred to as a Base Realignment and Closure, or BRAC, round.⁴⁴ The most recent authorization for a BRAC round expired on April 15, 2006, so any new effort would have to be authorized by the enactment of a new provision of law.

While BRAC rounds have not seen an alteration of the general three-step process (identification, screening, and disposal), the temporary statutes creating them have added a number of features that enhanced oversight of DOD, offered assistance to the communities affected, and increased the transparency of the mechanism by which garrisons are reconfigured and installations are realigned to new missions or shuttered. In addition, many of the provisions of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.) and the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) have been applied to property closed under BRAC much as they do to other federal surplus property.

The differences between the normal real property disposal process carried out by GSA and that initiated by DOD during a BRAC round can be summarized around their three general phases, identification, screening, and disposal. The details following pertain to the processes used during the most recent (2005) BRAC round carried out under the FY2002 reauthorization of the Defense Base Closure and Realignment Act of 1990.

⁴⁴ So-called BRAC rounds were carried out in 1988, 1991, 1993, 1995, and 2005. The 1988 round was authorized by Defense Authorization Amendments and Base Closure and Realignment Act (P.L. 100-526, §1, 102 Stat. 2623). The 1991, 1993, and 1995 rounds were authorized by the Defense Base Closure and Realignment Act of 1990 (part A of Title XXIX of P.L. 101-510). Both acts were codified in 10 U.S.C. 2687 note. The 2005 round was created in a reauthorization of the 1990 law enacted in the National Defense Authorization Act for Fiscal Year 2002 (P.L. 107-107, Division A, Title X, Subtitle E, §1048(d)(2), Division B, Title XXVIII, Subtitle C, §2821(b), Title XXX, §§3001-3007, 115 Stat. 1227, 1312, 1342).

Identification of Property under BRAC

During the 2005 BRAC round, the Secretary of Defense was required to draw up and submit to Congress a “force-structure plan,” based on an assessment by the Secretary of the probable threats to the national security during the 20-year period beginning with FY2005, the probable end-strength levels and major military force units (including land force divisions, carrier and other major combatant vessels, air wings, and other comparable units) needed to meet these threats, and the anticipated levels of funding that will be available for national defense purposes during such period⁴⁵ and a comprehensive world-wide inventory of military installations for each military department, with specifications of the number and type of facilities in the active and reserve forces of each military department.⁴⁶

DOD was required in the statute to use a set of eight “final selection criteria,” divided into “military value criteria” and “other criteria,” in making recommendations for closure or realignment. Roughly paraphrased, the four military value criteria for each installation centered on (1) mission capabilities and readiness, (2) availability of facilities, (3) capacity to absorb mobilization surges, and (4) the cost of operations. Other criteria included (1) timing of potential savings, (2) economic impact on surrounding communities, (3) ability of communities to support the installation, and (4) environmental impact. The statute required that only these criteria be used and that priority consideration be given to the military value criteria.⁴⁷

Once identified by DOD, the Secretary of Defense submitted his list of recommended closures or realignments to an independent nine-member commission for further consideration. Appointed by the President, with congressional input, and confirmed by the Senate, the commission and its staff were required to hold public hearings on the Secretary’s recommendations. During its deliberations, the statute allowed the commission to add a new installation to the closure or realignment lists or increase the extent of a realignment only if it determined “that the Secretary deviated substantially from the force-structure plan and final criteria” specified earlier and concluded that its amendment was consistent with both. The statute required the commission to submit its own report to the President by a date certain.

Approval and Implementation of Closures and Realignments

After receiving the commission’s report, the President was given a finite period of time to submit to Congress and the commission his approval or disapproval of the commission’s recommendations. If he disapproved, in whole or in part, the commission’s list of recommendations, he was instructed to state his reasons for doing so. The commission then had approximately one month in which to revise and resubmit its list. A second disapproval would have halted the process.⁴⁸

Once having received the President’s certification of approval, Congress gave itself a period of 45 days during which it could pass a joint resolution of disapproval using an expedited procedure laid out in the governing statute. If enacted, such a joint resolution would prevent the Secretary of

⁴⁵ Defense Base Closure and Realignment Act of 1990, as amended, Section 2912(a)(1)(A).

⁴⁶ Ibid., Section 2912(a)(1)(B).

⁴⁷ Ibid., Section 2913.

⁴⁸ The President has not yet disapproved any commission’s recommendation list.

Defense from carrying out any recommended closure or realignment.⁴⁹ If not thereby halted, the statute required the Secretary of Defense to initiate all closures and realignments within two years and complete them within six years of the date that the President recorded his approval.

Disposal of Real Property

The statute provided the Secretary of Defense with authority to offer economic adjustment assistance to any community near a closing or realigning military installation and community planning assistance to communities whose local installations absorb functions during the process.⁵⁰ This assistance has usually been channeled through “local redevelopment authorities” (LRA) nominated by the affected communities and so designated by the Secretary of Defense. It is to these LRAs that title to surplus property is usually conveyed.

The base closure acts have also provided other special authorities. Their provisions have directed the GSA Administrator to delegate to the Secretary of Defense his or her authorities to utilize excess properties and dispose of surplus properties for installations being closed or realigned. In addition to being able to dispose of surplus property at below market value through public benefit conveyances, the Secretary has been able to do the same if the LRA has agreed to apply proceeds from the sale or lease of property to the economic redevelopment of the site.

While DOD retains responsibility for the remediation of environmental contamination at former defense sites, the statute places no time limit on either remediation or on the conveyance of the property from the federal government.

Environmental Requirements and Historic Preservation

The transfer of surplus federal property may be subject to an array of environmental requirements intended to protect human health and safety, natural resources, and cultural resources.⁵¹ Which requirements may apply to the transfer of a property would depend upon the site-specific conditions, such as the presence of wastes, contamination, and other potential hazards. For example, federal facilities that manage hazardous wastes or underground storage tanks are subject to closure requirements similar to private industrial facilities. If contamination is present, remediation may be required to prevent potentially harmful exposures subsequent to transfer. Some federal facilities also may contain more unique hazards, such as unexploded ordnance on DOD installations or radiological wastes from the past production of nuclear weapons at Department of Energy (DOE) facilities. Federal facilities not involved in industrial operations

⁴⁹ For more information on joint resolutions, see CRS Report 98-728, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements, and Uses*, by Richard S. Beth and CRS Report 98-706, *Bills and Resolutions: Examples of How Each Kind Is Used*, by Richard S. Beth. Though resolutions have been introduced in one chamber or the other during every BRAC round, none has survived its initial floor vote.

⁵⁰ The Secretary’s Office of Economic Adjustment has served as the principal organization through which such assistance has been offered.

⁵¹ An overview of environmental requirements that may apply to the transfer of surplus federal property is available in the General Services Administration (GSA) “Environmental Framework for Real Property Disposal” at <http://propertydisposal.gsa.gov/EnvironmentalInfo>.

still may contain hazardous substances from other sources that could present challenges for transfer and reuse, such as asbestos or lead-based paint in buildings. In addition to human health and safety hazards, the potential impacts of a transfer on certain natural or cultural resources (such as historic buildings) also must be assessed. How such resources would be protected by the recipient of a federal property subsequent to transfer may be a potential issue.

The time and resources necessary for compliance with environmental and historical requirements may vary considerably among individual properties depending on applicability. The process of determining which federal requirements may apply and how compliance must be demonstrated is sometimes referred to as the environmental review process (or environmental and historical review). Actions necessary to complete the review process are generally integrated into the broader due diligence process established in federal regulation, during which the landholding agency would be required to assess and determine various details about the property, such as⁵²

- any past activities or present conditions at the site that could pose a human health or safety hazard—the existence of mold hazards, radon hazards, asbestos-containing materials, or lead-based paint in any building; whether pesticides have been applied in the management of the property; or whether past activities at the site resulted in the release of hazardous substances that must be remediated;
- the property’s location—in a federally designated floodplain, wetland, or coastal zone; or in an area that contains federally threatened or endangered species; and
- the property’s historical significance—a site, buildings or fixtures on the site that are historically, architecturally, or culturally significant.

For each criterion, at a minimum, the landholding agency would be required to evaluate the property to determine whether or not such conditions or issues exist. Depending on that evaluation, the agency may be required to comply with certain environmental laws, regulations, or executive orders before they can make a final decision regarding the disposition of the property. Certain federal requirements may apply specifically because the property disposition would involve a transfer from federal ownership. That is, the disposition may be subject to certain requirements that generally would not apply (or could apply differently) to property transfers between nonfederal agencies or private entities. The principal federal statutes that govern the environmental review process, identification and remediation of hazardous substances, and historic preservation are outlined below, followed by a summary of the requirements of each statute. Other federal and state laws also may apply to a property transfer depending on the site-specific conditions.

- The National Environmental Protection Act (NEPA; 42 U.S.C. §§4321 et seq.). Under NEPA, federal agencies must consider the environmental impacts of an action before making a final decision about that action. With regard to surplus property disposal, the responsible federal agency would be required to identify impacts associated with both reporting the property as excess and disposal of the

⁵² GSA regulations identifying the information required from federal departments and agencies for property declared excess to their needs are codified at 41 C.F.R. Part 102-75, Subpart B. The criteria that must be evaluated under these regulations before GSA will accept a property for disposal also are identified in GSA’s “Excess Real Property Checklist” (available at <http://propertydisposal.gsa.gov/FAA>). The checklist is a supplement to its “Standard Form 118, Report of Excess Real Property.” When the Postal Service, DOD, and DOD agencies dispose of their own excess real property, each agency is required to evaluate similar criteria.

property, but not necessarily its future development that would not constitute a federal action itself.

- The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA; 42 U.S.C. §§9601 et seq.). Section 120(h) of CERCLA generally requires federal agencies to clean up contaminated federal property prior to transferring the property out of federal ownership, unless assurances are provided that the cleanup will be carried out subsequent to transfer and certain conditions are satisfied. To ensure compliance with CERCLA, a federal agency would be required to certify whether or not hazardous substance activity took place during the period of federal ownership and whether, as a result, hazardous substances were released that may warrant remediation.
- The National Historic Preservation Act (NHPA; 16 U.S.C. §§470 et seq.). Section 106 of NHPA requires any federal agency with jurisdiction over a proposed federal undertaking to take into account the effect that the undertaking will have on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places (i.e., a property significant in American history, architecture, archaeology, engineering, or culture).

Some level of compliance with NEPA and CERCLA generally would be required for all federal agency actions related to the closure and disposal of federal surplus property, at least to document whether there would be any significant environmental impacts with respect to NEPA and whether hazardous substances may be present with respect to CERCLA. Compliance with NHPA would be required if the property being disposed is included or eligible for inclusion in the National Register or if its disposal would affect such a property. Within the framework of documenting any environmental impacts associated with the property disposal, under NEPA, the responsible agency would incorporate information on how compliance with CERCLA would be demonstrated and whether compliance with any other laws, such as NHPA, would be required.

The National Environmental Policy Act⁵³

Signed into law in 1970, NEPA has been interpreted as having two primary goals—to ensure that federal agencies consider the environmental impacts of their actions *before* a final decision is made about the action, and to require those agencies to inform the public of those impacts. As a procedural statute, NEPA is intended to inform a federal agency’s decision-making process, but does not require that agency to elevate environmental concerns above others.

Regulations implementing NEPA were promulgated by the Council on Environmental Quality (CEQ).⁵⁴ Those regulations identify actions subject to NEPA to include those over which a federal agency⁵⁵ has some control or responsibility.⁵⁶ For example, NEPA may apply to federal agency decisions on the adoption of agency plans and the approval of specific projects. That is, any

⁵³ This section was prepared by Linda Luther, Analyst in Environmental Policy.

⁵⁴ 40 C.F.R. Parts 1500-1508.

⁵⁵ “Federal agencies” are defined at 40 C.F.R. §1508.12 to include all agencies of the federal government, but not Congress, the Judiciary, or the President.

⁵⁶ 40 C.F.R. §1508.18.

planning decision or approval that must be made by the landholding agency regarding surplus property disposal may be subject to some level of review under NEPA.

For non-BRAC properties, agency actions subject to NEPA generally include those related to decisions regarding the (1) closure of the facility and reporting it as excess; and (2) disposition of the property.⁵⁷ After it accepts a property for disposal from another federal agency, GSA takes responsibility for completing the NEPA process for any subsequent disposal-related activities. However, the landholding agency would be required to complete any necessary NEPA review for actions that pertain to its decision to report the property as excess.

While multiple actions related to surplus property disposal may be subject to NEPA, the analysis required to document compliance is usually limited. The most extensive level of analysis, the preparation of an environmental impact statement (EIS), is rarely required for surplus property disposal. An EIS is required for actions that will significantly affect the quality of the human environment.⁵⁸ Among other requirements, it must identify and analyze any impacts of the proposal and identify all reasonable alternatives to the proposal, as well as the impacts of those alternatives. With the exception of federal actions undertaken as part of the BRAC process, federal real property disposal rarely involves significant environmental impacts.

For federal real estate transactions, significant impacts generally occur (i.e., the preparation of an EIS may be required) when the action is likely to involve major new construction. That may be the case when a federal agency is buying property for development, but not generally when disposing of a property. While a property transferred from federal ownership may be further developed, the landholding agency is not required to determine how a potential buyer may use the property before making a decision to dispose of it. Often property disposal involves the disposition of a property that has already been developed. Implementing the BRAC process, however, involves the closure of one military property and the potential expansion of another. As a result, decisions implementing the BRAC process have been those most likely to require the preparation of an EIS.

Regardless of whether an EIS would be required, agencies are obligated to identify the potential impacts of the disposition to ensure that it would not have significant impacts. If the impact of the proposed disposition is uncertain, an agency may ensure compliance with NEPA by preparing an environmental assessment (EA). The result would be either a decision to prepare an EIS or to issue a finding of no significant impacts (FONSI).⁵⁹ NEPA compliance may also be documented as part of a categorical exclusion (CATEX) determination.⁶⁰ A CATEX is applied to actions that individual agencies have determined, based on their experiences with similar actions in the past,

⁵⁷ Congress, not individual military agencies, identifies military bases that are subject to closure as part of the BRAC process. As a result, base closure decisions are not subject to NEPA. However, the military agency responsible for the base closure may have a certain degree of discretion in implementing the closure, as well as the action that must be taken to realign the activities at the closing base with another facility. Actions taken to implement the base closure are subject to NEPA.

⁵⁸ As required at 42 U.S.C. §4322(2)(C). In accordance with the CEQ regulations, the significance of a proposal's impacts are determined on a case-by-case basis depending on the context and intensity of those impacts (see 40 C.F.R. §1508.27). Also, CEQ defines the "human environment" to include the natural and physical environment and the relationship of people with that environment (see 40 C.F.R. §1508.13).

⁵⁹ See 40 C.F.R. §§1501.3 and 1508.9.

⁶⁰ CATEXs are referred to as such because they are actions that are categorically excluded from the requirement to prepare an EIS or EA.

have no individually or cumulatively significant effect on the environment.⁶¹ CEQ allows an action to be processed as a CATEX as long as it involves no extraordinary circumstances that could result in significant impacts.

Each federal agency's procedures to implement NEPA⁶² explicitly list actions likely to be approved as a CE or, under certain conditions, an EA. For example GSA's NEPA procedures identify specific actions that can demonstrate compliance with NEPA by completing a "CATEX checklist."⁶³ That checklist is used to ensure that a given action would involve no extraordinary circumstances that would result in significant environmental impacts. Included among such action, GSA explicitly identifies property disposal actions undertaken for another federal agency, where that agency has already documented compliance with applicable legal requirements such as NEPA, NHPA, and CERCLA; and disposal of real property required by public law wherein Congress has not specifically exempted the action from the requirements of NEPA.⁶⁴

A determination that the disposal of surplus federal property would result in no significant impacts, under NEPA, is not equivalent to determining that the disposition would result in no regulated impacts. For example, if a federal property is listed on the National Register of Historic Places, the impact of its disposition may be deemed insignificant, but only if there are certain restrictions placed on the future use or development of the property. Within the context of ensuring compliance with NEPA, the landholding agency may be required to identify measures necessary to ensure future protection of the resource. In this instance, the requirement to protect that resource could originate with the NHPA (or any other applicable law intended to protect cultural, archaeological, or historical resources), not NEPA. Still, the NEPA compliance process may not be complete until decisions have been made regarding how the landholding agency will ensure compliance with those other applicable laws.

As noted above, one of NEPA's primary goals is to inform the public of the environmental impacts of a proposed action. CEQ regulations implementing NEPA specify public involvement requirements that apply primarily to actions that require an EIS. However, individual agencies have determined that public participation may also be appropriate in the preparation of an EA/FONSI or when determining whether the action may involve some exceptional circumstances that would prevent the application of a CATEX. Each agency has discretion in determining the level and kind of public participation required for such actions. For surplus property disposal, the level of public participation will likely depend on the nature of property itself and the potential public interest in that property's potential closure and disposition.

There may be public opposition to the closure and disposition of surplus federal property. The reasons for such opposition will be unique to that property. However, opposition could arise if there is public concern that future development of the land would no longer be subject to certain federal requirements. For example, after the property transfers from federal ownership (e.g., to a local or state agency or to a private developer), the impacts of future development would

⁶¹ See 40 C.F.R. §1508.4

⁶² Each federal agency was required to adopt the CEQ regulations implementing NEPA and to supplement them with procedures necessary to implement NEPA that are relevant to the action undertaken by that agency. GSA, USPS, and DOD, as well as each of agency within DOD, have done so.

⁶³ See the "PBS National Environmental Policy Act NEPA Desk Guide," October 1999, Section 5.4 Checklist CATEXs. The NEPA Desk Guide is available at <http://www.gsa.gov/nepadeskguide>.

⁶⁴ See the GSA's NEPA Desk Guide, Sections 5.4(c) and (g).

generally not be subject to federal agency review or public comment under NEPA or NHPA. Another example of such a law is the Archeological and Historical Preservation Act (AHPA). It requires federal agencies to identify and recover data from archeological sites threatened by their actions. Since a nonfederal land owner would not be required to take such action, members of the public may want the landholding agency to ensure that the property has been adequately surveyed to identify archeological sites or to make the sale conditional on a buyer agreeing to implement certain actions if archeological sites are later discovered.

The Comprehensive Environmental Response, Compensation, and Liability Act⁶⁵

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is the principal federal statute that addresses releases of hazardous substances into the environment on both federal and nonfederal lands.⁶⁶ Section 120(h) of CERCLA generally requires the United States to clean up contaminated federal property prior to transferring the property out of federal ownership.⁶⁷ The policy premise of this provision is that the United States should assume full responsibility for the cleanup of contamination caused by federal activities, and not shift the burden of that responsibility to the recipient merely as a consequence of acquiring the property.

Section 120(h) applies to all contaminated federal property declared surplus to the needs of the federal government. The agency with administrative jurisdiction over a surplus federal property generally is responsible for performing and paying for the cleanup of contamination to fulfill the financial liability of the United States. In some cases, the recipient may voluntarily agree to pay for the cleanup of a contaminated surplus federal property in exchange for a discounted purchase price to acquire the property, or other conditions of ownership that the recipient may desire.

As is the case with federal facilities that remain in federal ownership, funds available for the cleanup of surplus federal properties are subject to the availability of appropriations to the federal agencies that administer those properties. For example, the Department of Defense (DOD) performs and pays for the cleanup of surplus federal property on military installations closed under a consolidated Base Realignment and Closure (BRAC) round out of funds appropriated to the DOD Base Closure Account. Federal facilities generally are not eligible for cleanup funds appropriated to the Environmental Protection Agency (EPA) under the Superfund program, which addresses nonfederal sites elevated for priority federal attention. However, EPA oversees the cleanup of federal facilities through the Superfund program in conjunction with the states, in a manner similar to the enforcement of cleanup liability at nonfederal sites. At federal facilities, the administering federal agency serves as the responsible party on behalf of the United States.

Section 120(h) of CERCLA does not bind the United States to cleaning up a surplus federal property for any one particular land use. As a result, the reuse of a property is negotiated between the administering federal agency and the recipient of the property. Disagreements over reuse can arise if the recipient intends to use the property for a purpose that would necessitate a level of

⁶⁵ This section was prepared by David M. Bearden, Specialist in Environmental Policy.

⁶⁶ 42 U.S.C. §9601 et seq. For a broader discussion of CERCLA, see CRS Report R41039, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, by David M. Bearden.

⁶⁷ 42 U.S.C. §9620(h).

cleanup that the federal agency may consider too costly, relative to available appropriations to fund the cleanup. The capabilities of cleanup technologies also could constrain the reuse of a surplus federal property, if it would be impractical to achieve a level of cleanup that would be needed to make the property suitable for a use that the recipient may desire.

Continuing Liability of the United States

Consistent with the policy premise of Section 120(h) of CERCLA and retroactive liability under Section 107⁶⁸ of the statute, the United States remains responsible for contamination found not to have been sufficiently remediated after the property is transferred out of federal ownership. Section 120(h)(3) requires the continuing liability of the United States to be specified through a “covenant” incorporated into the deed transferring the property out of federal ownership.⁶⁹ The covenant must warrant that all remedial actions necessary to protect human health and the environment have been taken before the date of transfer, and that the United States shall conduct any additional remedial actions found to be necessary after the date of transfer. A clause also must be included in the deed granting the United States access to the property to perform cleanup actions for which it may be responsible.

In practice, the contents of a deed can place certain limitations on the continuing responsibility of the United States. A deed to a transferred federal property typically warrants cleanup only to a level suitable for the land use negotiated prior to transfer. In some cases, a deed may include a restriction prohibiting certain uses that would be considered unsuitable relative to the level of cleanup performed by the United States. Under such deed restrictions, the United States typically assumes responsibility for additional cleanup only to the extent that more work is found to be needed to make the originally agreed-upon use suitable.

If the new owner later decides to use the property for a different purpose, the new owner typically must assume responsibility for the additional cleanup costs to make the property suitable for the desired purpose. In some instances, a deed may prohibit certain land uses even if the new owner is willing to pay the cleanup costs. For example, a deed to a decommissioned military training range may prohibit residential or other land uses because of limitations on cleanup technologies to detect and remove unexploded ordnance. Cleanup capabilities may be constrained especially when ordnance is located beneath the surface, or concealed on the surface by dense vegetation.

Transfer of Uncontaminated Parcels

Some surplus federal properties may contain a mix of contaminated and uncontaminated parcels of land. Although the clean parcels may be ready for reuse, the requirement to clean up the contaminated parcels under Section 120(h) of CERCLA prior to transfer could delay the conveyance of the property as a whole. To address such situations, the 102nd Congress enacted the Community Environmental Response Facilitation Act (CERFA; P.L. 102-426) in 1992. This law amended Section 120(h) by adding a new subsection (4) that authorizes the transfer of uncontaminated parcels on a surplus federal property while cleanup continues on the contaminated parcels.⁷⁰ This parcel-by-parcel approach is intended to avoid potential delays in the

⁶⁸ 42 U.S.C. §9607.

⁶⁹ 42 U.S.C. §9620(h)(3).

⁷⁰ 42 U.S.C. §9620(h)(4).

transfer of “clean” surplus federal lands for reuse, especially such lands on closed military installations where economic redevelopment is desired to replace lost jobs. In the event that previously unknown contamination is later discovered after transfer out of federal ownership, Section 120(h)(4)(D) requires that a deed to an uncontaminated parcel still include a covenant warranting that the United States shall conduct cleanup actions that may become necessary to address contamination attributed to past federal activities.⁷¹

Early Transfer of Contaminated Parcels

The cleanup of a contaminated parcel may take several years or more, depending on the type and level of contamination, technical feasibility of cleanup actions, and availability of appropriations to pay for the cleanup. In such situations, the requirement to complete cleanup prior to transfer out of federal ownership could result in delaying the transfer. Enacted in the 104th Congress, Section 334 of the National Defense Authorization Act for FY1997 (P.L. 104-201) amended Section 120(h)(3) of CERCLA to add a new subsection (C) that allows the transfer of a contaminated parcel on a surplus federal property before cleanup is complete, if certain conditions are satisfied.⁷² Although Congress enacted this amendment in annual defense authorization legislation, this authority applies to any surplus federal property administered by any federal agency, not just surplus U.S. military property.

Section 120(h)(3)(C) specifically authorizes a deferral of the cleanup covenant to allow the transfer of title to a contaminated parcel on a surplus federal property before cleanup is complete. Federal agencies often refer to this deferral of the covenant as an “early” transfer, although the statute does not use this term. The deed to a contaminated property transferred out of federal ownership must contain assurances that the cleanup still will be carried out after the property leaves federal ownership. The federal agency responsible for the performance of the cleanup also must identify the funding needed to carry out the cleanup in its annual budget requests.

The deed also must restrict the use of the property to purposes that would be protective of human health and environment, while the cleanup proceeds. For example, at the time of transfer, a property may be suitable for industrial use because the risks of exposure to contamination may be within an acceptable range, whereas other land uses that would result in potentially harmful exposure would be restricted until the property is cleaned up sufficiently for that purpose. Once cleanup is complete, the United States remains obligated to provide a covenant at that time, warranting that all necessary actions to protect human health and the environment have been taken to make the property suitable for its intended, eventual use.

The early transfer of a contaminated surplus federal property that EPA has designated on the National Priorities List (NPL) for cleanup purposes is subject to the concurrence of the Administrator of EPA and the governor of the state in which the facility is located. The early transfer of a contaminated surplus federal property that is not listed on the NPL still requires the concurrence of the governor of the state in which the facility is located, but not EPA. Federal agencies proposing an early transfer also must provide the public at least 30 days advance notice and an opportunity to comment on the proposed transfer before it is executed.

⁷¹ 42 U.S.C. §9620(h)(4)(D).

⁷² 42 U.S.C. §9620(h)(3)(C).

National Historic Preservation Act⁷³

When federal property is sold, a review under the National Historic Preservation Act⁷⁴ (NHPA) may be required to determine whether the action will adversely affect historic properties and how to mitigate those effects. Courts describe NHPA as a “stop, look, and listen” statute that directs an agency to consider the effects of its action on historic sites, but does not require an agency to stop a project that would harm that property.⁷⁵ Instead, NHPA requires an agency to make an informed determination following a decision making process that is known as a Section 106 review.⁷⁶

Federal agencies conduct a Section 106 review when their actions, known as *undertakings*, may affect a historic property. An *undertaking* is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.”⁷⁷ The Section 106 process begins before federal funding is provided or a federal license issued.⁷⁸ Starting a Section 106 review early in the project development process ensures that agencies consider “a broad range of alternatives” during the planning process.⁷⁹

When a federal agency finds an action is an undertaking, its first step is to identify the parties required to be involved in the decision making process, who are known as *consulting* parties. NHPA regulations define who must be invited as a consulting party,⁸⁰ including the State Historic Preservation Officer (SHPO), the Tribal Historic Preservation Officer (THPO), local and tribal officials, and, if the federal undertaking involves issuing a permit, the applicant. Other *interested* parties may participate, such as historic associations and general members of the public, but do not have the same standing in the decision making process as the consulting parties.⁸¹

Next, the agency identifies the area of potential effects (APE), defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.”⁸² At this stage, the action agency, with the consulting parties, identifies historic properties that may be affected. Historic properties are defined as those listed or eligible for listing in the National Register of Historic Places.⁸³ If no historic properties are within the APE, the Section 106 process concludes.

⁷³ This section was prepared by Kristina Alexander, Legislative Attorney.

⁷⁴ P.L. 89-665, 80 Stat. 915; 16 U.S.C. §§470 et seq.

⁷⁵ See *Safeguarding the Historic Hanscom Area’s Irreplaceable Resources, Inc. v. Federal Aviation Administration*, 651 F.3d 202, 214 (1st Cir. 2011); *Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999); *Illinois Commerce Commission v. Interstate Commerce Commission*, 848 F.2d 1246, 1261 (D.C. Cir. 1988).

⁷⁶ It is named after the section within the public law enacting NHPA, P.L. 89-665, §106, but is codified at 16 U.S.C. §470f.

⁷⁷ 16 U.S.C. §470w(7); 36 C.F.R. §800.16(y).

⁷⁸ 16 U.S.C. §470f.

⁷⁹ 36 C.F.R. §800.1(c).

⁸⁰ 36 C.F.R. §800.2(a)(4).

⁸¹ For example, the agency is not required to confer with interested parties, unlike consulting parties, on key issues such as resolving any adverse effects, as discussed later in this section.

⁸² 36 C.F.R. §800.16(d).

⁸³ 36 C.F.R. §800.4.

When historic properties are found within the APE, the agency will coordinate with the consulting parties to determine whether the undertaking will adversely affect the property. If no adverse effects are found, the Section 106 process ends. The undertaking does not have to touch a historic property physically for an agency to find an adverse effect, as the NHPA regulations state that the agency must consider both direct and indirect effects of the project,⁸⁴ as well as reasonably foreseeable effects that may occur later in time or at some distance, or are cumulative.⁸⁵ Accordingly, NHPA would apply not only to selling federally owned historic buildings but may also apply when the sale of a non-historic building would adversely affect historic properties. For example, if the sale of a non-historic federal building could change the character of a historic area, that might be considered an adverse effect and would require further analysis.

If adverse effects on historic properties are found, NHPA does not require the agency to reject the undertaking. Instead, the agency is required to compile adequate documentation of its adverse effects findings, make the documentation available to the public, and provide an opportunity for comment.⁸⁶ An additional consulting party may be invited at this stage—the Advisory Council on Historic Places (ACHP or the Council).⁸⁷ The agency, with the cooperation of the consulting parties, shall “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”⁸⁸ When the parties agree on avoidance and/or mitigation of the adverse effects, the agency and the SHPO/THPO will enter into a binding agreement known as a Memorandum of Agreement (MOA),⁸⁹ and consulting parties are invited to concur.⁹⁰ Completion of a MOA concludes the Section 106 process.

If the parties cannot reach an agreement on the adverse effects, the agency, the SHPO/THPO, or the Council may terminate the Section 106 process.⁹¹ The terminating party must notify the others in writing of the basis for ending consultation, and the ACHP will provide the opportunity for the parties (including itself) and the public to comment. However, termination of the Section 106 process does not mean that the project must also be terminated. If the agency decides to continue the undertaking, the agency must document its rationale and demonstrate that it considered the comments of the Council.⁹² The agency must give a copy of this document to the consulting parties and make it available to the public.⁹³ Then, the agency may advance its project despite any harm to historic properties, taking any mitigation measures it chooses.

⁸⁴ 36 C.F.R. §800.16(d).

⁸⁵ 36 C.F.R. §800.5(a)(1).

⁸⁶ 36 C.F.R. §800.6(a)(4).

⁸⁷ The ACHP is an independent federal agency. It is required to be invited to participate in developing an MOA under three circumstances: if a National Historic Landmark will be adversely affected (36 C.F.R. §800.6(a)(1)); if a programmatic agreement affecting multiple agency undertakings is being prepared (36 C.F.R. §800.6(a)(1)); or if the parties fail to come to terms on a MOA (36 C.F.R. §800.6(b)(1)(v)).

⁸⁸ 36 C.F.R. §800.6(a).

⁸⁹ 36 C.F.R. §800.6(c)(1).

⁹⁰ 36 C.F.R. §800.6(c)(3).

⁹¹ 36 C.F.R. §800.7.

⁹² 36 C.F.R. §800.7(c)(4).

⁹³ 36 C.F.R. §800.7(c)(4).

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