



# **CRS Report for Congress**

## **Military Base Closures: Role and Costs of Environmental Cleanup**

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### **Summary**

The upcoming 2005 round of military base closings has stimulated interest among potentially affected communities in how the bases to be selected for closure might be economically redeveloped to replace lost jobs. Environmental contamination can present a challenge to redevelopment, if cleanup of the land to a degree that would be safe for its intended use would be limited because of funding or technological constraints. Most of the lands on bases closed under the previous four rounds have been cleaned up for their intended reuse, and have been transferred for redevelopment. However, some bases have yet to be cleaned up to an extent that would be adequate for the planned land use, presenting an obstacle to replacing lost jobs. Bases closed under the 2005 round could face similar delays in redevelopment, if a community's preferred land use would necessitate a costly and time-consuming degree of cleanup. This report will be updated as events warrant.

### **Introduction**

Following the collapse of the former Soviet Union, Congress authorized four rounds of military base closings and realignments in 1988, 1991, 1993, and 1995.<sup>1</sup> As of the end of FY2001, the Department of Defense (DOD) had completed these actions and reduced its domestic infrastructure by about 20%. Although closure of installations under all four rounds is complete, environmental cleanup and economic redevelopment of some of these properties continues.

The pace and cost of cleaning up environmental contamination on base closure lands has been an ongoing issue, because of concern about human health and environmental risks and the public's desire to redevelop these properties for civilian uses. The completion of cleanup is often a key factor in economic redevelopment, because the land

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<sup>1</sup> For additional information, see CRS Report 97-305, *Military Base Closures: A Historical Review from 1988 to 1995*, by David Lockwood.



cannot be used for its intended purpose until it is cleaned up to a degree that would be safe for reuse. DOD is scheduled to release its recommendations for another round of base closings and realignments in May 2005, subject to review by a specially appointed commission, and approval by the President and Congress.<sup>2</sup> The upcoming round has raised concern among communities as to whether the cleanup of environmental contamination may pose challenges in redeveloping additional bases to replace lost jobs.

This report provides an overview of cleanup requirements for the transfer and reuse of base closure properties, discusses the status of property transfer on bases closed under the four previous rounds, examines past cleanup costs and estimates of future costs, and offers relevant observations for the upcoming 2005 round.

## **Cleanup Requirements for Property Transfer and Reuse**

Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund) generally requires the United States (in this case, DOD) to clean up closed bases prior to transfer out of federal ownership.<sup>3</sup> Property on a closed base is typically transferred to a local redevelopment authority (LRA) responsible for implementing a plan for civilian reuse. To speed redevelopment, CERCLA authorizes early transfer under certain conditions, but cleanup still must be done before the land can be safely reused.<sup>4</sup> For base closure properties listed on the National Priorities List (NPL) of the nation's most hazardous waste sites, early transfer requires the concurrence of DOD, the Environmental Protection Agency (EPA), and the governor of the state in which the property is located. For properties not listed on the NPL, concurrence of only DOD and a governor is required for early transfer.

Whether a property is transferred after cleanup, or transferred early, how the land will be used is a key factor in determining the degree of cleanup. Cleanup standards are generally stricter for land uses that would result in greater risk of human exposure to contamination. For example, cleanup is typically more stringent and more costly for land uses such as residential development, which could pose a higher risk of exposure to sensitive populations including children and the elderly, or schools where children are likely to be exposed to the soil on playgrounds. Cleanup is typically the least stringent and the least costly for industrial land uses, such as manufacturing or commercial warehouses, which could pose less risk of exposure.

At a minimum, DOD must clean up contaminated land to make it suitable for industrial purposes, but is not required to perform cleanup beyond that level if a community prefers another land use that would require a stricter and more costly degree of cleanup. In such cases, DOD may conclude that cleanup for land uses other than industrial purposes is economically or technically infeasible, depending on the availability

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<sup>2</sup> For information on the criteria that DOD is using to select bases for the 2005 round, see CRS Report RS21822, *Military Base Closures: DOD's 2005 Internal Selection Process*, by Daniel Else and David Lockwood. For information on the current status of the 2005 round, see CRS Report RL32216, *Military Base Closures: Implementing the 2005 Round*, by David Lockwood.

<sup>3</sup> 42 U.S.C. 9620(h).

<sup>4</sup> 42 U.S.C. 9626(h)(3)(C).

of funding and the ability of remediation technologies. When that is the case, DOD may choose to delay cleanup and seek a property developer who wants the land for a purpose that would present less risk of human exposure, and therefore necessitate a less stringent and less costly cleanup.

In addition to land use, numerous other factors can determine the degree and cost of cleanup, raising other issues. For example, cleanup does not necessarily require the removal of contamination, if a safe method of containing it is available to prevent exposure. Although containment is typically less costly than removal, some of the savings of containment can be offset by the costs of maintaining the containment method over the long term to ensure that it remains effective in preventing exposure.

Tensions may arise between DOD and the community if there is disagreement about the degree of cleanup and the method selected to prevent exposure. Communities frequently prefer removal rather than containment, because of common concerns about lingering risks and continuing costs if the method of containment were to fail over time. However, DOD may prefer containment to save costs, due to limited funding for cleanup of many closed bases across the country.

Once a land use is agreed upon between DOD and the community, DOD generally administers and pays for the cleanup, regardless of whether cleanup is completed prior to transfer, or subsequently under an early transfer. In the case of an early transfer, the property recipient may choose to administer the cleanup as a means to speed the reuse of the land, but DOD typically would still pay the costs.

DOD remains liable after cleanup is complete, if additional contamination is found later that requires remediation. However, DOD is liable for further cleanup only to the extent that the degree of contamination found later would exceed applicable standards for the land use originally agreed upon for the transfer. If a community decides to use the land for another purpose that would require further cleanup, DOD would not be liable for paying for it. In such cases, the additional costs of cleanup to make the land safe for a different purpose would be the responsibility of the property recipient, which may present a challenge for redevelopment, depending on the availability of other financial resources.

### **Status of Property Transfer on Closed Bases<sup>5</sup>**

The Government Accountability Office (GAO) reports that, as of the end of FY2003, 364,000 acres (72%) of the 504,000 acres of land on bases closed during the previous four rounds had been transferred for reuse. Approximately 95% of the transferred acreage had been transferred after cleanup was completed. Although early transfer has the potential to speed redevelopment, it has been used relatively infrequently for several reasons, such as the reluctance of a community to accept property before cleanup is finished and the lack of consensus within a community on reuse. DOD also may be hesitant to agree to early transfer if it would be required to expend more cleanup funds earlier than would be necessary otherwise, to make the land safe for reuse more quickly.

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<sup>5</sup> Government Accountability Office, *Military Base Closures: Updated Status of Prior Base Realignment and Closures*, GAO-05-138, January 2005. See pp. 10-19.

Approximately 91,000 acres (18%) on closed bases had been leased for reuse prior to the completion of cleanup. However, pending cleanup has delayed the permanent transfer of these properties, with reuse limited to purposes that would be safe considering the degree of contamination still present on these lands and the potential risk of human exposure. The remaining 49,000 acres (10%) had not been leased or transferred for reuse primarily because of environmental cleanup challenges. GAO found that some cleanup is necessary before transfer can occur on 98% of Air Force, 82% of Army, and 65% of Navy lands still awaiting transfer.

## Past Cleanup Costs and Estimates of Future Costs<sup>6</sup>

DOD estimates that the closure of bases under the previous four rounds has resulted in an annual savings of \$7 billion in operational expenses. The costs of environmental cleanup have run into billions of dollars, discussed below, and have offset some of these savings gained from a reduced military infrastructure. However, a portion of the cleanup costs would have been incurred regardless, as DOD is required to clean up its operational installations at least to a degree that would be safe for industrial purposes, somewhat reducing this offset. The incremental cost and time to clean up a closed based depends primarily on how extensive the cleanup must be to make the land safe for uses that would be less restrictive than industrial purposes and pose a higher risk of human exposure.

As indicated in the following table, DOD data indicate that \$7.2 billion in cleanup costs had been incurred through FY2003 at bases closed during the previous four rounds. This amount reflects the *actual* costs of the cleanup process, from site identification and investigation to selection, design, construction, operation, and monitoring of remedial actions. About 42% of the \$7.2 billion was spent on cleanup in California, where DOD has identified more contaminated sites on closed bases than any other state. In January 2005, GAO reported \$8.3 billion in cleanup expenses at closed bases through the end of FY2003. This amount reflects funding *obligated* for cleanup, some of which would be paid at a later date upon completion of specific cleanup actions, rather than actual costs incurred through this period. GAO's reported amount also includes other costs related to cleanup, such as program management and support.

Although the majority of the acreage on bases closed under the previous four rounds has been cleaned up and transferred, estimates of future costs to complete cleanup on lands awaiting transfer, and on those transferred early, remain substantial. Also noted in the following table, DOD data indicate that an estimated \$3.7 billion would be necessary to complete cleanup of known contamination on these lands, with 51% of these costs attributed to cleanup in California. However, future costs could be higher than estimated, if new, or more stringent, regulations are issued that require a greater degree of cleanup than anticipated. Future costs also could be more than expected if unknown environmental threats, such as unexploded ordnance or additional hazardous substances, are discovered. On the other hand, costs at some sites may prove lower if more cost-effective cleanup technologies become available. The President's FY2006 budget includes \$378 million for continuing cleanup at bases closed under the previous four rounds, \$112 million more than the FY2005 appropriation of \$246 million.

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<sup>6</sup> Based on CRS compilation of cost data from DOD's *Defense Environmental Restoration Program Report to Congress for FY2003*, April 2004.

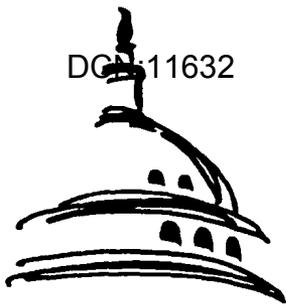
## Environmental Cleanup Costs from Previous Base Closure Rounds

State or U.S. Territory	Past Costs Incurred Through FY2003	Estimates of Future Costs FY2004 to Completion
Alabama	\$227,624,000	\$124,969,000
Alaska	\$260,731,000	\$47,407,000
Arizona	\$67,743,000	\$44,921,000
Arkansas	\$60,208,000	\$1,888,000
California	\$3,067,651,000	\$1,885,967,000
Colorado	\$205,465,000	\$80,224,000
Connecticut	\$18,320,000	\$21,857,000
Florida	\$146,693,000	\$43,764,000
Guam	\$171,855,000	\$48,351,000
Hawaii	\$58,130,000	\$10,178,000
Illinois	\$283,076,000	\$190,477,000
Indiana	\$83,951,000	\$37,520,000
Iowa	\$6,779,000	\$0
Kentucky	\$47,107,000	\$4,113,000
Louisiana	\$34,072,000	\$16,684,000
Maine	\$129,560,000	\$104,719,000
Maryland	\$120,720,000	\$26,895,000
Massachusetts	\$312,939,000	\$49,693,000
Michigan	\$111,995,000	\$56,419,000
Midway Islands	\$21,978,000	\$0
Missouri	\$12,589,000	\$1,352,000
Montana	\$813,000	\$0
Nebraska	\$195,000	\$0
New Hampshire	\$153,393,000	\$50,750,000
New Jersey	\$104,583,000	\$34,004,000
New Mexico	\$34,397,000	\$37,973,000
New York	\$245,016,000	\$162,400,000
North Carolina	\$95,000	\$0
Ohio	\$40,184,000	\$6,654,000
Oregon	\$53,560,000	\$10,290,000
Pennsylvania	\$187,227,000	\$44,404,000
Puerto Rico	\$486,000	\$6,304,000
Rhode Island	\$51,723,000	\$12,973,000
South Carolina	\$103,354,000	\$20,987,000
Tennessee	\$57,098,000	\$35,648,000
Texas	\$495,862,000	\$371,129,000
Utah	\$163,642,000	\$77,992,000
Virginia	\$68,881,000	\$7,793,000
Washington	\$16,301,000	\$1,439,000
<b>Total</b>	<b>\$7,225,996,000</b>	<b>\$3,678,138,000</b>

Source: Prepared by CRS using data from the Department of Defense, *Defense Environmental Restoration Program Report to Congress for FY2003*, April 2004. The above total amount of \$7.2 billion through FY2003 for all states and territories reflects *actual* costs of cleaning up contaminated lands on bases closed under the four previous rounds combined. Planned cleanup is complete in states with no estimated future costs. In January 2005, GAO reported a total of \$8.3 billion through FY2003 in funding *obligations* for environmental cleanup at base closure sites, which includes costs to be paid at a later time when specific actions are complete, and other costs such as program management and support.

## **Relevant Observations for the Upcoming 2005 Round**

The amount of money and time required to clean up additional bases to be selected for closure in the 2005 round would depend on the type and extent of contamination present on those properties, and the actions that would be necessary to make the land safe for its intended reuse. As in previous base closure rounds, the availability of funding and the capabilities of remediation technologies could limit the degree of cleanup of some properties, making certain land uses infeasible and posing challenges to economic redevelopment. Consequently, communities concerned about the possible closure of a base in their area would be better positioned to develop an effective plan for economic redevelopment, if they are knowledgeable about the contamination on that base and the potential funding and technological limitations that DOD may encounter in cleaning it up for certain alternative land uses.



# CRS Report for Congress

## Base Realignment and Closure (BRAC): Property Transfer and Disposal

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### Summary

The Defense Base Realignment and Closure Act of 1990 and the Federal Property and Administrative Services Act of 1949 provide the basic framework for the transfer and disposal of military installations closed during the base realignment and closure (BRAC) process. This report provides an overview of the various authorities available under the current law and describes the planning process for the redevelopment of BRAC properties. This report will be updated as events warrant.

### Introduction

The nation's military installations have gone through several rounds of base realignments and closures (BRAC), the process by which excess military facilities are identified and, as necessary, transferred to other federal agencies or disposed of, placing ownership in non-federal entities. Since the enactment of the Defense Base Closure and Realignment Act of 1990, transfer or disposal of former military installations has been governed by relatively consistent legal requirements. On December 28, 2001, the most recent changes to the BRAC framework were signed into law (P.L. 107-107)<sup>1</sup>, providing for a new round of base closures in 2005.

The current BRAC law is generally similar to the original statute and retains many of the transfer and disposal authorities that were available in previous rounds. However, significant amendments in 1999 and 2001 altered portions of the law's disposal authorities. This report will provide an overview of the transfer and disposal authorities available under the law for military installations that may be closed during the 2005 round

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<sup>1</sup> National Defense Authorization Act For Fiscal Year 2002, Act of December 28, 2001, P.L. 107-107, 115 Stat 1012 (current version at 10 U.S.C. § 2687 note). For ease of reference, all citations to the 1990 Act are to the relevant sections of the act as it appears in the note following 10 U.S.C. § 2687.



and indicate how recent amendments to the Defense Base Closure Act have altered the property transfer and disposal process.<sup>2</sup> It will be updated as events warrant.

## Transfer and Disposal Authorities

The transfer or disposal of federal property is primarily performed by the General Services Administration (GSA) pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA).<sup>3</sup> The Defense Base Closure and Realignment Act directs the GSA to delegate its statutory authority to the Department of Defense (DOD) with respect to BRAC installations, and DOD has, in turn, delegated this authority to the various military services.<sup>4</sup> Thus, BRAC property transfer and disposal is performed, generally, in accordance with the FPASA and the GSA regulations implementing it. In addition, the Defense Base Closure and Realignment Act authorizes DOD, with GSA approval, to supersede GSA regulations with BRAC-specific regulations.<sup>5</sup> The FPASA process for BRAC properties is discussed below.

**Federal Screening.** The first step in the property transfer process begins when the military service in possession of a BRAC property notifies other DOD branches that property has become available.<sup>6</sup> If another branch of DOD determines that it requires the property and if Secretary of Defense concurs, intragency transfer may occur with or without reimbursement.<sup>7</sup> If no DOD branch requires the property, it is deemed “excess” and a notice of its availability is sent to all other federal agencies.<sup>8</sup> If no federal agency pursues acquisition within the specified time frame or if DOD exercises residual authority to deny the request for transfer, the property is determined to be “surplus” and the disposal process begins.<sup>9</sup>

**Local Redevelopment Authorities (LRAs).** An LRA is “[a]ny authority or instrumentality established by a State or local government and recognized by the Secretary of Defense ... as the entity responsible for developing the redevelopment plan ....” with

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<sup>2</sup> It should be noted that significant issues related to environmental cleanup under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) exist at some BRAC properties and that the use of certain property transfer authorities may be contingent upon adequate performance of CERCLA obligations or agreement by the acquiring entity to accept liability for environmental cleanup. See 42 U.S.C. § 9620(h); P.L. 107-107, § 3006.

<sup>3</sup> Act of June 30, 1949, ch. 288, 63 Stat. 377. Transfer and disposal authority is codified at 40 U.S.C. §§ 521-559.

<sup>4</sup> Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. §175.6 (2004).

<sup>5</sup> Defense Base Closure and Realignment Act, § 2905(b).

<sup>6</sup> 32 C.F.R. § 175.7(4).

<sup>7</sup> Defense Base Closure and Realignment Act, § 2905(b).

<sup>8</sup> “Excess” property is defined as “any property under the control of a Military Department that the Secretary concerned determines is not required for the needs of the Department of Defense.” 32 C.F.R. §175.3(e).

<sup>9</sup> “Surplus” property is defined as “any excess property not required for the needs and the discharge of the responsibilities of federal agencies. Authority to make this determination, after screening with all federal agencies, rests with the Military Departments.” 32 C.F.R. § 175.3(i).

respect to an installation closed under the BRAC process.<sup>10</sup> Briefly, upon the conclusion of the federal screening process, LRAs are to conduct outreach efforts and design a comprehensive plan for reuse of BRAC property, culminating in a redevelopment plan.<sup>11</sup> The redevelopment plan is not binding upon DOD; indeed, DOD is ultimately responsible for preparing an environmental impact analysis under the National Environmental Policy Act (NEPA), in which it must examine all reasonable disposal alternatives, and make its own disposal decisions.<sup>12</sup> However, it is worth noting that DOD is statutorily obligated to give the LRA's redevelopment plan considerable weight in making its own disposal determinations. Specific requirements impacting the planning process and eventual disposal of property are discussed below.

**Homeless Assistance.** The Stewart B. McKinney Homeless Assistance Act<sup>13</sup> allows "excess," "surplus," "unutilized," or "underutilized" federal property to be used as homeless shelters, and has been applicable to BRAC properties closed in prior rounds.<sup>14</sup> A separate process is now provided for properties closed after October 25, 1994 (the date of enactment for Base Closure Community Development and Homeless Assistance Act of 1994).<sup>15</sup> To comply with the older McKinney Act provisions, DOD was required to submit a description of its vacant base closure properties to the Department of Housing and Urban Development (HUD).<sup>16</sup> HUD would then determine whether any of this property was "suitable for use to assist the homeless."<sup>17</sup> The HUD determination would be published in the *Federal Register*, at which time qualified "representatives of the homeless" could apply for and receive the requested property.<sup>18</sup>

As stated, amendments to the Defense Base Closure and Realignment Act now displace the traditional McKinney Act implementation requirements. The Secretary of Defense is now directed to publish notice of the available property and to submit information on that property to HUD and any local redevelopment authority.<sup>19</sup> All interested parties, including representatives of the homeless, are then to submit to the local redevelopment authority a notice of interest in the property.<sup>20</sup> Simultaneously, redevelopment authorities are to perform outreach efforts and provide assistance in evaluating property for various reuse purposes. After complying with these requirements and the statutorily imposed information collection time frames, the redevelopment

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<sup>10</sup> 32 C.F.R. § 176.5.

<sup>11</sup> 32 C.F.R. § 176.20.

<sup>12</sup> 42 U.S.C. § 4321 *et seq.*

<sup>13</sup> 42 U.S.C. § 11411.

<sup>14</sup> *Id.* § 11411(a).

<sup>15</sup> P.L. 103-421, 108 Stat. 4346 (1994).

<sup>16</sup> Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. § 175.6(b).

<sup>17</sup> *Id.*

<sup>18</sup> *See National Law Center on Homelessness and Poverty v. U.S. Dept. of Veterans Affairs*, 964 F.2d 1210, 1212 (D.C.Cir.1992).

<sup>19</sup> Defense Base Closure and Realignment Act, § 2905(b).

<sup>20</sup> *Id.*

authority must prepare a redevelopment plan, which considers “the interests in the use to assist the homeless of the buildings and property at the installation that are expressed in the notices submitted to the redevelopment authority ....”<sup>21</sup> The redevelopment authority next submits the plan to the Secretary of HUD and the Secretary of Defense for review. The Secretary of HUD is authorized to review the plan, to negotiate with the redevelopment authority for changes, and ultimately must determine, based on statutorily prescribed factors, whether the plan is acceptable.<sup>22</sup> Upon HUD approval, the base redevelopment plan, including any homeless assistance component and agreement to implement no cost homeless assistance property conveyances, are submitted to DOD. Again, it would appear that DOD, giving “substantial deference to the redevelopment plan concerned,” may develop its own disposal plan.<sup>23</sup>

**Public Benefit Transfers.** Public benefit transfers are authorized under FPASA and allow for the conveyance of property at a discount for specified public purposes.<sup>24</sup> Various agencies oversee these programs and are authorized to approve a state’s application for acquisition under them.<sup>25</sup> The military departments are required to inform these agencies of potentially available property and transmit any expression of interest to the relevant LRA.<sup>26</sup> LRA’s are encouraged to work with the public benefit transfer agencies and must consider any expression of interest, although they are not required to include it in a redevelopment plan.<sup>27</sup> All the same, it would appear the DOD must consider these options when examining disposal alternatives even though it would not appear that a public benefit transfer proposal must be accepted by DOD with respect to BRAC property.<sup>28</sup>

**Public Auction and Negotiated Sale.** In addition to the public benefit transfer, additional disposal authorities exist. In accordance with FPASA, DOD may dispose of BRAC property via public auction or through a negotiated sale with a single purchaser.<sup>29</sup> The public auction process requires public advertising for bids under such terms and conditions as to permit “full and free competition consistent with the value and nature of the property involved.”<sup>30</sup> Further, if adequate bids are received and disposal is in the public interest, the bid most advantageous to the federal government is to be accepted. A negotiated sale is permissible if a series of conditions are met. Generally, negotiated sales are permissible when: (1) a public auction would not be in the public interest; (2) public auction would not promote public health, safety, or national security; (3) a public

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See 4 U.S.C. §§ 550-554. These include uses for airports, highways, education, wildlife and environmental preservation, and public health purposes.

<sup>25</sup> *Id.*

<sup>26</sup> 32 C.F.R. § 176.20(d).

<sup>27</sup> *Id.*

<sup>28</sup> Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. § 176.45.

<sup>29</sup> 40 U.S.C. § 545.

<sup>30</sup> *Id.*

exigency makes an auction unacceptable; (4) public auction would adversely impact the national economy; (5) the character of the property makes public auction impractical; (6) public auction has failed to produce acceptable bids; (7) fair market value does not exceed \$15,000; (8) disposal is to a state, territory, or U.S. possession; or (9) negotiated sale is authorized by other law.<sup>31</sup> It is also worth noting that even if one of these conditions is met, there is frequently an additional requirement that fair market value and other satisfactory terms can be obtained through negotiation.

**Economic Development Conveyances (EDCs).** In addition to FPASA authorities, the Defense Base Realignment and Closure Act has since its enactment provided for EDCs in one form or another. Under its EDC authority, DOD may dispose of BRAC property for less than fair market value.<sup>32</sup> From 1994 until the 1999 and 2001 amendments to the Defense Base Closure and Realignment Act, the Secretary of Defense was authorized to “transfer real property and personal property located at a military installation to be closed ... to the redevelopment authority ... for consideration at or below the fair market value of the property transferred or without consideration.”<sup>33</sup> The reduced or no cost conveyance was authorized when it was determined to be necessary to support economic development and when DOD could show that other transfer authorities were insufficient.<sup>34</sup>

The 1999 and 2001 amendments<sup>35</sup> significantly altered the requirements of the EDC. Under section 2905(b) of the Defense Base Closure and Realignment Act, the broad discretion of the Secretary of Defense to authorize reduced or no consideration economic development conveyances has been replaced by what is arguably a more restrictive scheme. The law now states: “the transfer of property of a military installation. . . may be without consideration” but only when the transferee agrees to specified terms.<sup>36</sup> These terms include a requirement that a transferee use the proceeds from certain future sales or leases of the acquired property to support economic redevelopment at the former installation.

Further, under the new legislation, while no consideration transfers remain a possibility as described above, the Secretary is also now required to “seek to obtain consideration in connection with any transfer . . . in an amount equal to the fair market

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<sup>31</sup> *Id.*

<sup>32</sup> Additionally, a no consideration transfer was required when a closure was to take place in a rural area and would cause “a substantial adverse impact (as determined by the Secretary) on the economy of the communities in the vicinity of the installation and on the prospect for economic recovery . . .” P.L. 103-160, § 2903, *amended by* P.L. 106-65). For a thorough discussion of the policy behind the EDC, see Randall S. Beach, *Swords to Plowshares: Recycling Cold War Installations*, 15 *PROB. & PROP.* 58 (2001).

<sup>33</sup> P.L. 103-160, § 2903 (1994).

<sup>34</sup> *Id.*

<sup>35</sup> Act of October 5, 1999, P.L. 106-65, 113 Stat 512; P.L. 107-107, § 3006. Bases closed under previous BRAC law but still owned by the Department of Defense may be included under the new statutory framework, and certain existing contracts may be modified to comply with the updated law.

<sup>36</sup> P.L. 106-65, § 2821, *amended by* P.L. 107-107.

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<sup>35</sup> Act of October 5, 1999, P.L. 106-65, 113 Stat 512; P.L. 107-107, § 3006. Bases closed under previous BRAC law but still owned by the Department of Defense may be included under the new statutory framework, and certain existing contracts may be modified to comply with the updated law.

<sup>36</sup> P.L. 106-65, § 2821, *amended by* P.L. 107-107.

value of the property, as determined by the Secretary.”<sup>37</sup> The provision does not explicitly state what the Secretary must do to fulfill this requirement. However, when read in conjunction with the authorization for no consideration transfers, the requirement to seek fair market value would appear to leave open the possibility of a no consideration transfer so long as a reasonable attempt to find or negotiate another transaction is unsuccessful. Another significant change is the apparent elimination of the statutory requirement that DOD justify its decision to use its EDC authority and not a public auction or negotiated sale.<sup>38</sup> Exactly how this change would affect procedures when read in conjunction with the requirement that DOD seek fair market value must be deemed an open question at present.

## **Conclusion**

In sum, the transfer and disposal process for 2005 round BRAC properties is primarily governed by the Defense Base Closure and Realignment Act, as amended, and the Federal Property and Administrative Services Act. The process first requires screening to determine if other DOD branches or federal agencies have a need for the property. In the event that property is not transferred in this manner, it is deemed surplus and may be disposed of pursuant to other authorities. Compliance with these disposal authorities will generally require some form of homeless assistance screening and public benefit transfer analysis. DOD is directed to take into consideration multiple factors in determining which authority to use but would appear to be ultimately responsible for making final determinations. Public auctions and negotiated sales are generally available, although it would appear that fair market value must generally be obtained under these authorities. Economic development conveyances may be authorized as well, which may be made for no consideration, contingent upon certain conditions of transfer.

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<sup>37</sup> P.L. 107-107, § 3006.

<sup>38</sup> P.L. 106-65, § 2821(a)(3).