

NATIONAL HISTORIC PRESERVATION ACT § 402: INCEPTION, INTERPRETATION  
AND FUTURE USE

by

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(Under the direction of Pratt Cassity)

ABSTRACT

Section 402 of the National Historic Preservation Act was included as part of the 1980 Amendments to the Act. Its language is similar to § 106 governing federal agency actions within the United States, but no formal review process was developed for § 402's federal agency actions abroad. The thesis discusses the development of § 402, interpretation by the United States courts, the difficulties for federal agencies in understanding their § 402 requirements, and concludes by offering suggestions for developing draft regulations.

INDEX WORDS: National Historic Preservation Act, NHPA, Section 402, international, undertaking, federal agency, dugong

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## DEDICATION

To my father, who demonstrated to his children the importance of perseverance and patience.

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## CHAPTER 1

### INTRODUCTION

#### A World Heritage

In 1965, a White House Conference in Washington, D.C. called for the creation of a World Heritage Trust. The goal of the Trust was to coordinate preservation of historical and natural sites for “the present and the future of the entire world citizenry.”<sup>1</sup> At this time the United States was already examining its own domestic policies toward historic preservation, as the following year saw the successful passage of the National Historic Preservation Act (NHPA).<sup>2</sup> By 1968, the International Union for Conservation of Nature created for its members a similar proposal for a World Heritage Trust.<sup>3</sup> In the early 1970s, the United Nations conference on Human Environment was presented with these ideas and helped develop a document known as The Convention concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention).<sup>4</sup> The World Heritage Convention was adopted on November 16, 1972 by the General Conference of the United Nations Educational, Scientific, and Cultural Organization (UNESCO).<sup>5</sup> In 1973, the United States became the first member state to ratify the World Heritage Convention.<sup>6</sup>

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<sup>1</sup> UNESCO: About World Heritage, *available at* <http://whc.unesco.org/en/convention/>.

<sup>2</sup> National Historic Preservation Act, 16 U.S.C. 470.

<sup>3</sup> UNESCO: About World Heritage, *available at* <http://whc.unesco.org/en/convention/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> World Heritage Convention, 27 U.S.T. 37, (Nov. 23, 1972). President Gerald Ford ratified the convention on November 13, 1973. The World Heritage Convention entered into force on December 17, 1975. Ratification of the World Heritage Convention also gives member states access to the World Heritage Fund, a means of funding preservation activities in those member states. UNESCO: About World Heritage, *available at* <http://whc.unesco.org/en/convention/>.

The World Heritage Convention aims to identify and protect “cultural heritage” and “natural heritage.”<sup>7</sup> Certain requirements are also imposed upon member states. Besides convention requirements such as committee formation, fees, organization, and oversight, member states are charged with obligations toward one another. With regard to national obligations, state parties to the convention must adopt planning programs to protect their own heritage.<sup>8</sup> States are also asked to nominate heritage to a World Heritage List.<sup>9</sup> State obligations on the international level echo those found on the national level: aiding in the “identification, protection, conservation, and preservation” of cultural and natural heritage.<sup>10</sup> Member states also must not deliberately damage—directly or indirectly—heritage in its own territory or in other

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<sup>7</sup> “Cultural heritage” consists of

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view. *Id.* at Art. 1.

“Natural heritage” consists of

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.” *Id.* at Art. 2.

<sup>8</sup> *Id.* at Art. 5. Article 5 consists of five “endeavors” for state parties to the convention: adopt preservation planning programs, create services aimed to protect cultural and natural heritage, research threats to heritage, take measures to protect and conserve heritage, and foster the creation of training centers for heritage conservation. *Id.*

<sup>9</sup> *Id.* at Art. 11. Besides nominating heritage to the World Heritage List, Article 11 also creates the World Heritage List and List of World Heritage in Danger. *Id.* Inclusion on the World Heritage List requires state party consent. *Id.*

<sup>10</sup> *Id.* at Art. 6.



member states' territories.<sup>11</sup> The convention recognizes that heritage is being increasingly threatened, and lost or deteriorated heritage is a loss for the entire world.<sup>12</sup> Because of these additional responsibilities, the United States sought to amend the NHPA to implement these new obligations.

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<sup>11</sup> *Id.* Article 6(3) states, “Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage...situated on the territory of other State Parties to this Convention.” *Id.*

<sup>12</sup> *Id.* at preamble.

## CHAPTER 2

### THE NHPA AMENDMENTS OF 1980: THE BIRTH OF § 402

In 1977, President Jimmy Carter addressed the continuing environmental and preservation issues facing the nation in his so-called “Environmental Message.”<sup>13</sup> The result of the President’s message was the creation of the National Heritage Task Force, a group consisting of an array of preservation professionals from across the country.<sup>14</sup> Following the Task Force’s recommendations, several bills were introduced to the 95<sup>th</sup> and 96<sup>th</sup> Congress’ that aimed to strengthen the preexisting National Historic Preservation Act through amendments and additional Acts of Congress.<sup>15</sup> These bills proposed a number of changes to how historic preservation operates in the United States, including eliminating the Advisory Council for Historic Preservation in favor of a Council on Heritage Conservation, creating a Natural Register of Historic Places, and requiring historic preservation programs to be developed by federal agencies.<sup>16</sup>

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<sup>13</sup> *National Heritage Policy Act of 1979: Hearing Before the Subcomm. on Parks, Recreation and Renewable Resources of the S. Comm. on Energy and Natural Resources*, 96th Cong. 26 (1980) (Letter to Walter Mondale, President of the Senate, from Robert Herbst, Secretary of the Interior, Sept. 10, 1979).

<sup>14</sup> *Id.* Specifically, the Task Force consisted of “numerous representatives of Federal and State agencies, private organizations, and individuals.” *Id.* This Task Force worked with the Department of the Interior and President Carter to create the National Heritage Policy Act of 1979, a law heard before Senate and House subcommittees but ultimately not enacted. *Id.*

<sup>15</sup> *See, e.g.* National Historic Preservation Amendments of 1979, H.R. 5139, 96th Cong. (1st Sess. 1979) (remarks by Representative Seiberling on August 2, 1979).

<sup>16</sup> *Compare* National Historic Preservation Act Amendments of 1980, PL 96-515, *with* National Historic Preservation Amendments of 1979, H.R. 5496, 96th Cong. (1st Sess. 1979) (Introduced in the House of Representatives on Sept. 28, 1979 by Representative Seiberling.). The Advisory Council has never ceased to exist, and a *Natural Register* of Historic Places never came into existence. Federal agency preservation program requirements came about by NHPA § 110, part of the 1980 amendments that include § 402. *Id.*

The amendments eventually passed by Congress in 1980 resulted in a national historic preservation program with greater federal guidance.

Title IV of the National Historic Preservation Act Amendments of 1980 (1980 Amendments) was included to specifically address the United States' participation in the World Heritage Convention.<sup>17</sup> The sections under Title IV acknowledge a "World Community... with the common objectives of preserving and managing nationally and internationally significant resources."<sup>18</sup> Section 401(b) sets forth the process through which the United States nominates properties to the World Heritage List.<sup>19</sup> The last section of Title IV, § 402, requires federal actions outside the United States to take into account the effect of the action on any property listed on the World Heritage List or that country's equivalent of the National Register of Historic Places.<sup>20</sup> Section 402 appears to be a nod to Article 6 of the World Heritage Convention, requiring member states to avoid damaging or destroying heritage in another member state's territory.<sup>21</sup>

Section 402 is also interesting for its language. It reads,

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.<sup>22</sup>

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<sup>17</sup> H.R. REP. 96-1457, at 43 (1980) (addressing Title IV's purpose in the 1980 Amendments). The House Report describes each change made to the NHPA by the 1980 Amendments. *Id.* at 25-51.

<sup>18</sup> *Id.* at 43.

<sup>19</sup> National Historic Preservation Act Amendments of 1980, PL 96-515 at § 401(b) (1980).

<sup>20</sup> *Id.* at § 402.

<sup>21</sup> Compare 16 U.S.C. 470a-2 with *supra*, note 11.

<sup>22</sup> 16 U.S.C. 470a-2. See also National Historic Preservation Act Amendments of 1980, PL 96-515 at § 402 (1980).

The wording of § 402 most resembles that found in § 106, the section of the NHPA governing domestic federal agency actions. Section 106 states,

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.<sup>23</sup>

When compared to § 106, § 402 holds fewer requirements for federal agencies. Noticeably absent is § 402's lack of comment opportunity afforded the Advisory Council for Historic Preservation (ACHP).<sup>24</sup> Also lacking are federal regulations for implementing § 402. NHPA § 211 calls for the ACHP to enact "such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety."<sup>25</sup> An examination of the evolution of § 402's language from 1979-1980 yields indications on interpreting what is required by this section of the NHPA.

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<sup>23</sup> 16 U.S.C. 470f. This section of the U.S.C. is commonly called § 106 of the NHPA. The § 106 "process" requires several steps to take place, notably that agencies and State Historic Preservation Officers/Tribal Historic Preservation Officers (SHPO/THPO) initiate the § 106 process, identify properties eligible for or listed in the National Register, assess any adverse effects, resolve the adverse effects, implement the agency's plans or terminate consultation if the parties fail to resolve adverse effects. *See generally* ACHP Section 106 Regulations Summary, *available at* <http://www.achp.gov/106summary.html>. The § 106 process requires consultation with the public and/or tribal groups and Native Hawaiians. *Id.*

<sup>24</sup> The ACHP

serves as the primary federal policy advisor to the President and Congress; recommends administrative and legislative improvements for protecting our nation's heritage; advocates full consideration of historic values in federal decisionmaking; and reviews federal programs and policies to promote effectiveness, coordination, and consistency with national preservation policies. Advisory Council for Historic Preservation, *available at* <http://www.achp.gov/aboutachp.html>.

<sup>25</sup> 16 U.S.C. 470s. The section does not address whether rules and regulations should be written for § 402. *Id.*

## CHAPTER 3

### THE EVOLUTION OF § 402

The earliest published iteration of § 402 appeared in the 96<sup>th</sup> Congress on August 2, 1979 within H.R. 5139. John F. Seiberling (D-OH, 14<sup>th</sup> Cong. Dist.), introduced the bill as the “National Historic Preservation Amendments of 1979,” modeled from legislation Rep. Seiberling introduced in the previous Congress.<sup>26</sup> Section 402 appears as Section 235 under the headline “Comment on International Actions of Federal Agencies”:

Each Federal agency which proposes any undertaking outside the United States which may affect a property which is on the world heritage list or which has been nominated for inclusion on such list shall notify the Administrator prior to commencing such undertaking and shall afford the Administrator forty-five days to comment on the proposed undertaking before commencing such undertaking.<sup>27</sup>

Unfortunately, Rep. Seiberling’s remarks on H.R. 5139 failed to shed much light on § 235’s inception.<sup>28</sup> Of note, however, is the section’s call to notify an Administrator as well as allow an Administrator forty-five days to comment on the proposed undertaking. This review period resembles the § 106 review process afforded the ACHP, likely indicating that the existing § 106 directly influenced the creation of § 402.<sup>29</sup>

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<sup>26</sup> National Historic Preservation Amendments of 1979, H.R. 5139, 96th Cong. (1st Sess. 1979). The bill’s aim was to strengthen the existing historic preservation laws in the United States and promote the economics of preservation. *See id.* (remarks by Rep. Seiberling on H.R. 5139). Rep. Seiberling served Ohio’s 14<sup>th</sup> District in the House of Representatives from 1971 to 1987.

<sup>27</sup> *Id.* at Sub. D § 235. “Administrator” means the “Administrator for Historic Preservation.” *Id.*

<sup>28</sup> “Section 235 requires each Federal agency which proposes any undertaking outside the United States which may affect a property which is on or nominated to the World Heritage List to notify the Administrator prior to commencing such undertaking and give the Administrator 45 days to comment on the proposed undertaking.” *Id.* (remarks by Rep. Seiberling introducing H.R. 5139 on the floor of the House of Representatives).

<sup>29</sup> *See supra*, note 23.

Later that year, Rep. Seiberling introduced another bill, H.R. 5496.<sup>30</sup> H.R. 5496 addressed the same aspects of the NHPA as its predecessor, but included “technical changes to further clarify the language of the bill.”<sup>31</sup> One change the bill sought to accomplish was to combine programs within the Department of the Interior and Advisory Council for Historic Preservation into a single entity—the Historic Preservation Agency.<sup>32</sup> The language of the future § 402 as seen previously in H.R. 5139 remained unchanged.<sup>33</sup> H.R. 5496 would eventually become the bill passed and signed into law as the 1980 Amendments to the National Historic Preservation Act.<sup>34</sup>

By spring 1980, several more bills were proposed that addressed necessary changes and additions to current federal preservation law.<sup>35</sup> The first of this new collection of bills was introduced February 13 by Congressman Phillip Burton (D-CA, 5<sup>th</sup> Cong. Dist.) and was written by the Carter administration.<sup>36</sup> Called “The National Heritage Policy Act of 1979,” the stripped-down bill provided a broad view of needed changes to the NHPA, and once again replaced the ACHP with a new group. A new “Council on Heritage Conservation” was to be established in

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<sup>30</sup> National Historic Preservation Act Amendments of 1979, H.R. 5496, 96th Cong. (1st Sess. 1979).

<sup>31</sup> *Id.* (remarks by Rep. Seiberling while introducing H.R. 5496 on the floor of the House of Representatives on Sept. 28, 1979).

<sup>32</sup> The bill also sought greater flexibility for states to administer their own preservation programs and to create a National Center for the Building Arts in the Pension Building. This center would later be known as the National Building Museum.

<sup>33</sup> National Historic Preservation Act Amendments of 1979, H.R. 5496, 96th Cong. (1st Sess. 1979).

<sup>34</sup> See H.R. REP. 96-1457 (1980), PL 96-515, enacting H.R. 5496, Oct. 10, 1980. The bill underwent significant change following House and Senate subcommittee hearings in the spring of 1980.

<sup>35</sup> See, e.g. The National Heritage Policy Act of 1979, H.R. 6504, 96th Cong. (2d Sess. 1980); National Historic Preservation Amendments of 1980, H.R. 6804, 96th Cong. (2d Sess. 1980); National Heritage Act of 1980, H.R. 6805, 96th Cong. (2d Sess. 1980).

<sup>36</sup> The National Heritage Policy Act of 1979, H.R. 6504, 96th Cong. (2d Sess. 1980). Representative Burton served California’s 5th District in the House of Representatives from 1964 to 1983.

lieu of the ACHP.<sup>37</sup> Though the proposed bill addressed the need for compliance with the World Heritage Convention, no language similar to § 402 was included in the bill.<sup>38</sup>

On March 13, 1980, two bills were introduced simultaneously by Congressman Burton on the floor of the House of Representatives. These two bills, H.R. 6804 “The National Historic Preservation Amendments of 1980” and H.R. 6805 “National Heritage Policy Act of 1980,” both contain language similar to what would become § 402. H.R. 6804 was created based on suggestions and viewpoints of “many local, private organizations, the Coordinating Council of National Archeological Societies, and the State officers who administer historic preservation programs.”<sup>39</sup> Its “future” § 402 language exists as the bill’s § 233 and states,

Each Federal agency which proposes any undertaking outside the United States which may affect a property which is on the World Heritage List or which has been nominated for inclusion on such list shall notify the Council prior to commencing such undertaking and shall afford the Council forty-five days to comment on the proposed undertaking before commencing such undertaking.<sup>40</sup>

Differing slightly from the bills introduced in the fall of 1979, the version in H.R. 6804 required a forty-five day review period from the proposed Council on Heritage Conservation as opposed

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<sup>37</sup> *Id.* at tit. III. The bill also increased the number of Council members. *Id.*

<sup>38</sup> *Id.* at tit. II(h). Instead, the proposed bill stated that the Secretary of the Interior shall . . . ensure and direct United States participation in the Convention Concerning the Protection of the World Cultural and Natural Heritage, approved by the Senate on October 26, 1973, and in other international activities concerning the conservation and preservation of natural areas and historic places, in cooperation with the Secretary of State, the Smithsonian Institution, and the Council on Heritage Conservation. . . *Provided*, That whenever possible, expenditures incurred in carrying out activities in cooperation with other nations and international organizations shall be paid for in such excess currency of the country or area where the expense is incurred as may be available to the United States.

<sup>39</sup> Rep. Burton made these remarks discussing H.R. 6504 while introducing H.R. 6805 on the floor of the House of Representatives on March 13, 1980. Additionally, Mr. Burton announced the upcoming House Committee hearings on each bill introduced up to that time.

<sup>40</sup> National Historic Preservation Amendments of 1980, H.R. 6804, 96th Cong. at §233 (2d Sess. 1980).

to an individual Administrator or no review period at all. This is more similar to the review period afforded the ACHP today under § 106.<sup>41</sup>

H.R. 6805, on the other hand, was an effort spearheaded by the American Heritage Alliance.<sup>42</sup> The bill aimed to blend several pieces of legislation, including Congressman Seiberling's H.R. 5496 and the administration's H.R. 6504.<sup>43</sup> As a result, H.R. 6805 included many of the efforts to combine heritage preservation with natural area conservation.<sup>44</sup> The bill's version of the future § 402 eliminated language specifying a number of days with which to review an agency's undertaking and instead gives the proposed Council on Heritage Conservation a "reasonable opportunity to comment."<sup>45</sup>

Prior to the approval of any Federal undertaking outside of the United States which may adversely affect a property which is on the World Heritage List or which has been nominated for inclusion in such list, the head of any Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for the purpose of avoiding or mitigating any adverse effects. The head of any such agency shall afford the Council on Heritage Conservation a reasonable opportunity to comment with regard to such undertaking.<sup>46</sup>

This shift in language represents the first major change to eliminate entirely the requirement for an ACHP-type review under § 402. Congressman Burton, in his statements introducing H.R.

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<sup>41</sup> See 16 U.S.C. 470f (NHPA § 106).

<sup>42</sup> The American Heritage Alliance was a collection of national conservation and historic preservation organizations. National Heritage Act of 1980, H.R. 6805, 96th Cong. (2d Sess. 1980) (remarks by Rep. Burton).

<sup>43</sup> H.R. 2484 (National Cultural Park Act of 1979), a cultural parks bill, was also included in H.R. 6805. Rep. Burton commented on the importance of protecting the nation's natural and cultural heritage while introducing the bill on March 13, 1980.

<sup>44</sup> See H.R. 6805 comments from Rep. Burton on March 13, 1980. "The Heritage Policy Act will provide for the first truly comprehensive search for the remaining natural areas and historic places of significance which have not already been identified and protected." *Id.* The bill also sought to push toward creating a system of cultural parks around the United States. *Id.*

<sup>45</sup> National Heritage Act of 1980, H.R. 6805, 96th Cong. at § 402 (2d Sess. 1980).

<sup>46</sup> *Id.*



6805, also discussed the next step for the proposed legislation. H.R. 6805, H.R. 6804, H.R. 5496, and H.R. 6504—the Administration’s bill that contained no § 402 language—along with other bills, were to be the subject of hearings by the Subcommittee on National Parks and Insular Affairs on March 17-18, 1980.<sup>47</sup> Unfortunately, the transcripts of the hearings provided no discussion of the international aspects proposed by the various pieces of legislation.<sup>48</sup>

While the House of Representatives busily introduced bills amending the National Historic Preservation Act, the Senate took up the Administration’s proposed amendments and discussed the various bills introduced in the House of Representatives. One month after the House subcommittee hearings, the Senate Subcommittee on Parks, Recreation and Renewable Resources held their own hearing on April 17.<sup>49</sup> Fortunately, the transcript from this hearing was published immediately. The number of experts brought for testimony before the Senate Subcommittee ranged from Larry E. Tise and James Biddle to Ray K. Parker and Tersh Boasberg.<sup>50</sup>

As a result of these hearings, ideas to abandon the Advisory Council for Historic Preservation for a Council for Heritage Conservation were dropped, but plans for a National

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<sup>47</sup> *Id.*

<sup>48</sup> *National Heritage Policy Act: Hearing Before the Subcomm. on National Parks and Insular Affairs of the H. Comm. on Interior and Insular Affairs, 96th Cong. (1980).* I visited the National Archives’ Legislative Archives in Washington, DC on March 11, 2011. The hearings were never published and were not available for public viewing until 30 years after the year of the hearings. The House Subcommittee on National Parks and Insular Affairs hearing transcripts on H.R. 5496, H.R. 6504, H.R. 6805, and H.R. 6804 are located in Box 285, Location 9E3/17/3/1.

<sup>49</sup> *National Heritage Policy Act of 1979: Hearing Before the Subcomm. on Parks, Recreation and Renewable Resources of the S. Comm. on Energy and Natural Resources, 96th Cong. (1980).* S. 1842, the Senate version of the Administration’s bill, was the main bill of discussion. *Id.* The various House bills were then brought up for discussion. *Id.*

<sup>50</sup> *Id.* at Table of Contents. Tise was president of the National Council for State Historic Preservation Offices; Biddle, president of the National Trust for Historic Preservation in the United States; Parker, member of the Board of Directors for the American Institute of Architects; Boasberg, president of the National Center for Preservation Law.

Building Museum were to proceed.<sup>51</sup> Interestingly, the language for § 402 was changed to eliminate any review process. The reasons for eliminating the review process are not articulated in the hearing transcript. In fact, the international components of the proposed legislation are given little acknowledgment, save for statements of support given by a few of those testifying.<sup>52</sup> Only the American Institute of Architects' (AIA) representative, Ray K. Parker, highlights the future § 402 and suggests changes to its language:

International Activities. We would suggest that provisions concerning any Federal agency's undertaking outside the United States take into account not only adverse affects on property on, or nominated to, the World Heritage List, but also any properties on another country's equivalent national register system (Title V. Section 502).<sup>53</sup>

No explanation is given regarding why changes to expand the section should include the country's "equivalent national register system."<sup>54</sup> This suggestion proved to become the impetus for later litigation involving § 402.<sup>55</sup>

The proposed change in language by the AIA was included in future drafts of the bill.

Following the hearing in the Senate subcommittee, a consolidated version of the proposed

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<sup>51</sup> See H.R. 5496 as passed by the House of Representatives on Nov. 19, 1980 (now PL 96-515: The National Historic Preservation Amendments of 1980).

<sup>52</sup> See, e.g., *National Heritage Policy Act of 1979: Hearing Before the Subcomm. on Parks, Recreation and Renewable Resources of the S. Comm. on Energy and Natural Resources*, 96th Cong. at 225 (1980). Testimony of James Biddle gives support for U.S. cooperation under the World Heritage Convention. *Id.*

<sup>53</sup> *Id.* at 255. The House Subcommittee hearings also included testimony by an AIA representative, Thomas B. Muths, but Mr. Muths made no mention of needing to change the language of what would become § 402. *National Heritage Policy Act: Hearing Before the Subcomm. on National Parks and Insular Affairs of the H. Comm. on Interior and Insular Affairs*, 96th Cong. (1980). See also Architects Testify Before Congress, L.A. TIMES, Mar. 30, 1980 (noting Muths' testimony at House Subcommittee hearings).

<sup>54</sup> See *National Heritage Policy Act of 1979: Hearing Before the Subcomm. on Parks, Recreation and Renewable Resources of the S. Comm. on Energy and Natural Resources*, 96th Cong. at 255 (1980). The proposal to amend the proposed language of the future § 402 came by way of a submitted statement to the Senate Subcommittee from the AIA. *Id.* No actual discussion of the future § 402 ever took place at the Senate Subcommittee hearing. *Id.*

<sup>55</sup> See *infra*, notes 76-85.

legislation was reported in the Senate and House of Representatives in the fall of 1980.<sup>56</sup> The two bills, S. 3116 and an amended H.R. 5496 contained the final version of § 402:

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.<sup>57</sup>

Eliminated is any language indicating a review process either by the Council for Heritage Preservation or the Advisory Council for Historic Preservation. Also removed for consideration are properties *nominated* for inclusion on the World Heritage List.<sup>58</sup> The language suggested by the AIA to consider a country's equivalent of the National Register of Historic Places completed the changes to § 402.

No further Congressional intent or explanation is provided. In the Senate, the report on the 1980 Amendments failed to provide any insight into § 402. Instead, under the heading "Title IV—International Activities and World Heritage Convention," the report states, "The intent of this title is clear."<sup>59</sup> Though the House of Representatives' report includes more detail of the World Heritage Convention additions to the NHPA, it does nothing more than merely repeat the language of § 402.<sup>60</sup>

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<sup>56</sup> See National Historic Preservation Act Amendments of 1980, S. 3116, 96th Cong. (2d Sess. 1980) (enacted); see also National Historic Preservation Act Amendments of 1980, H.R. 5496, 96th Cong. (2d Sess. 1980) (enacted).

<sup>57</sup> *Id.* at § 402. See also 16 U.S.C. 470a-2.

<sup>58</sup> Compare 16 U.S.C. 470a-2, with H.R. 6805 at §402.

<sup>59</sup> S. REP. NO. 96-943 at 27 (1980).

<sup>60</sup> H.R. REP. NO. 96-1457 at 44 (1980). The section states,

Section 402 requires that when a Federal undertaking outside the United States would directly and adversely affect a property on the World Heritage List, or any nation's equivalent of the National Register of Historic Places, the agency will take into account the effect of the undertaking on the property to avoid or mitigate any adverse effects. *Id.*

Not until 1998 was § 402 once again addressed. *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act* published on April 24 includes a section under Standard 4 addressing “Foreign Historic Properties.”<sup>61</sup> In an attempt to elucidate § 402’s requirements, the Secretary of the Interior’s standards require agencies’ preservation programs to include access to personnel and professionals with expertise to aid in meeting the requirements of § 402.<sup>62</sup> The Secretary of the Interior goes further to require a consultation process—something not included in § 402 or in § 402 explanations.<sup>63</sup> This consultation should include discussions “with the host country’s preservation authorities, with affected communities and groups, and relevant professional organizations.”<sup>64</sup> As a result, the Secretary of the Interior did shed some light on what is required by § 402, although no regulations exist or are required.<sup>65</sup> It is unclear if any substantial actions were taken following the Secretary of the Interior’s statements regarding § 402. What is clear, however, is that no court would be faced with the issue of interpreting § 402 until 2005.<sup>66</sup>

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<sup>61</sup> 63 Fed. Reg. 20,496-01 (Apr. 24, 1998), *available at* [http://www.nps.gov/history/hps/fapa\\_110.htm](http://www.nps.gov/history/hps/fapa_110.htm). Section 110 of the NHPA grants the Secretary of the Interior the ability to create guidelines to assist federal agencies in complying with the NHPA.

<sup>62</sup> *Id.* at Standard 4(n).

<sup>63</sup> *Id.* at Standard 4(o).

<sup>64</sup> *Id.*

<sup>65</sup> The guidelines have “no regulatory effect” and are merely the Secretary of the Interior’s “formal guidance to each Federal agency on meeting the requirements of section 110.” 63 Fed. Reg. 20,496 at introduction (April 24, 1998).

<sup>66</sup> *See infra*, note 76.

## CHAPTER 4

### THE *DUGONG* CASE: APPLYING § 402

Since 1945, a United States military presence has existed on Okinawa.<sup>67</sup> This presence comprises a number of military bases, including Marine Corp Air Station Futenma.<sup>68</sup> By the mid-1990s, in an effort to relieve the American military's burden on Okinawans, a joint Japanese-American committee recommended relocating Marine Corp Air Station Futenma to a sea-based site.<sup>69</sup> This sea-based facility was determined to be best suited in Henoko Bay in the Department of Defense's (DoD) 1997 document addressing the air station's relocation.<sup>70</sup> By 2002 a "Basic Plan" for the relocated air station was created with Japanese government approval on the size, runway orientation, and location of the new facility.<sup>71</sup>

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<sup>67</sup> *Dugong v. Rumsfeld*, 2005 WL 522106, at 1 (N.D. Cal. 2005). The U.S. completely controlled several islands in Japan until the "Agreement Between the United States and Japan Concerning the Ryukyu Islands and Daito Islands" was signed by Japan and the U.S. in 1971. *Id.* This returned post-World War II administration of the islands to Japan but granted the U.S. use of the military facilities on the islands, including those on Okinawa. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1-2. The Special Action Committee on Okinawa (SACO) made up of Japanese and American officials made this determination. *Id.* at 1.

<sup>70</sup> *Id.* A committee called the Futenma Implementation Group (FIG) created a "detailed implementation plan" that created steps to be taken by DoD prior to a final plan for the proposed facility. *Id.* This plan included a site survey and environmental analysis, and four million dollars was put forth by DoD for the FIG's operation. *Id.* By September 1997, the DoD released its "operational requirements" for relocating the base on Okinawa as well as outlined what required analyses must take place prior to the proposed facility's construction. *Id.* at 2.

<sup>71</sup> *Id.* at 2. In 1999, the governor of Okinawa and mayor of Nago City both approved the proposed location of the new air station. *Id.* The "Basic Plan" was exclusively created by Japanese officials. *Id.* Additionally, a "Consultative Body" was formed in order to minimize construction effects on the local community and environment. *Id.*

The plan for the new air station directly impacted feeding grounds of the Okinawa dugong.<sup>72</sup> A manatee-like animal, the dugong plays a role in traditional Okinawa folklore and is central to Okinawa creation mythology.<sup>73</sup> As a result, the dugong is listed on Japan’s *Law for the Protection of Cultural Properties* as a “natural monument.”<sup>74</sup> A 2002 United Nations report noted the serious impact on the dugong because of the planned air station.<sup>75</sup> DoD’s actions, the report concluded, could seriously impact the dugong’s small population and push the animal closer to extinction in Japanese waters.<sup>76</sup> American and Japanese environmental groups then brought legal action against the DoD.<sup>77</sup> This legal action represents the only court interpretation of § 402.

The *Dugong* case exists in two phases. In 2005, *Dugong v. Rumsfeld* ruled on the threshold argument that the NHPA applied to the Okinawa dugong under § 402.<sup>78</sup> In doing so, the court carefully examined and analyzed the basic requirements of § 402, and concluded that Japan’s *Law for the Protection of Cultural Properties* existed as an equivalent National Register

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<sup>72</sup> *Dugong v. Rumsfeld*, 2005 WL 522106 at 3. The court notes that the area provided “viable sea grass areas” of “potential dugong feeding areas” (emphasis added). *Id.* Habitat range and feeding activity patterns of the dugong are in dispute. *Id.*

<sup>73</sup> *Id.* Dugongs are considered the “ancestor of human beings” in Okinawan folklore and viewed as a “female mermaid spirit” in shrines on Okinawa. *Id.* at 9.

<sup>74</sup> *Id.* The dugong is also listed as endangered under the United States Endangered Species Act. *Id.*

<sup>75</sup> *Id.* at 3. The United Nations report noted that the proposed facility could “destroy some of the most important known remaining dugong habitat in Japan” causing “potentially serious [repercussions]” for the dugong. *Id.* (quoting Plaintiff’s Exhibit 1).

<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.* at 1. Plaintiffs included the Okinawa dugong, three Okinawan residents, and six environmental organizations. *See Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1093-96 (denying standing to Okinawa dugong).

<sup>78</sup> *Dugong v. Rumsfeld*, 2005 WL 522106, at 12. “[§ 402] of the NHPA can apply to the Okinawa dugong, an animal protected for cultural, historic reasons under a foreign country’s equivalent statutory scheme for cultural preservation.” *Id.*

system and the dugong constituted “property” for purposes of § 402.<sup>79</sup> DoD’s central argument focused on Japan’s heritage law, as it allows for the inclusion of “animate” things like animals in its heritage list.<sup>80</sup> The court stated, however, that § 402 merely calls for an “equivalent” National Register property, not an “identical” one.<sup>81</sup> Additionally, Japan’s law and the NHPA serve similar roles in protecting each nation’s heritage.<sup>82</sup> Even though individual animals are not listed in the National Register, animals are found within protected properties of cultural or natural importance—properties eligible for inclusion in the World Heritage List.<sup>83</sup>

DoD’s secondary argument was that the dugong, as an animal, could not qualify as “property” under the NHPA. The court agreed with the DoD’s statement that legislative history fails to clarify Congress’ intent for § 402, but went a step further to examine whether an actual living thing may be included in the National Register.<sup>84</sup> In *Hatmaker v. Georgia Department of Transportation*, the court rejected an argument that an unaltered tree with significance to Native Americans could not qualify for the National Register.<sup>85</sup> The court in *Dugong v. Rumsfeld*

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<sup>79</sup> *Id.* at 8. To aid its decision, the court looked to the statutory definition of “historic property” which failed to explain what is meant by property under § 402. *Id.* The definition of “historic property” in the NHPA includes a reference to “significan[ce] in American history, architecture, archeology, engineering, and culture.” 16 U.S.C. 470w(5). Such a definition could not apply to § 402 because of its reference to foreign countries. *See Dugong v. Rumsfeld*, 2005 WL 522106, at 9 (“Congress clearly intended a different standard to govern the eligibility of properties for protection under [§ 402] as demonstrated by the wording of the section itself”).

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.* The court noted that “equivalent” lists are those similar in “effect or function.” *Id.*

<sup>82</sup> *Id.* at 7.

<sup>83</sup> *Id.* at 7-8. As noted, the World Heritage Convention was the impetus for creating § 402. The court also notes that wildlife refuges are listed in the National Register. *Id.* at 8.

<sup>84</sup> *Id.* at 10. Though DoD referred to dugongs as “wild animals” ineligible for protection under the NHPA, the court noted that dugongs were not simply “wild animals” but instead were animals with “special cultural significance protected under foreign historical preservation laws.” *Id.*

<sup>85</sup> *Hatmaker v. Ga. Dept. of Transp’n*, 973 F. Supp. 1058, 1066 (M.D.Ga. 1997). Prior to *Dugong v. Rumsfeld*, the federal district court in *Hatmaker* was the only other court to consider the issue of whether a living thing may be eligible for listing in the National Register.

compared its situation to that in *Hatmaker*: where both living things at issue existed as cultural heritage.<sup>86</sup> Henoko Bay, the site of the proposed air station, was also protected as a natural environment related to the dugong.<sup>87</sup>

Finally, the court examined whether DoD's actions constituted a "federal undertaking" for purposes of § 402.<sup>88</sup> "Undertaking" is defined by the NHPA, but had never been interpreted in a § 402 context.<sup>89</sup> The court then compared various court interpretations of § 106 undertakings in order to develop an understanding of a § 402 undertaking.<sup>90</sup> Reviewing each phase of the planned air station project, the court determined that a federal undertaking might have taken place, but more information regarding DoD's specific actions was needed.<sup>91</sup> This ruling led to phase two of the *Dugong* case.

Phase two of the *Dugong* litigation, 2008's *Dugong v. Gates*, looked further into the specific actions taken by DoD that are governed by § 402's language.<sup>92</sup> In doing so, the same court concluded that the DoD's actions clearly constituted an "undertaking" that "directly and adversely effect[ed]" the dugong, and that the DoD failed to adequately "take into account" the proposed project's impact on the dugong.<sup>93</sup> *Dugong* has since sat in abeyance following court-

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<sup>86</sup> *Dugong v. Rumsfeld*, 2005 WL 522106, at 10.

<sup>87</sup> *Id.* at 11. Japan's *Law for the Protection of Cultural Properties* allows animals "including their habitats" to be afforded protection. *Id.*

<sup>88</sup> *Id.* at 12.

<sup>89</sup> *Id.* An "undertaking" is "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 16 U.S.C. 470w(7).

<sup>90</sup> *Dugong v. Rumsfeld*, 2005 WL 522106 at 12-13. The court noted the definition of "undertaking" had been written and applied broadly across the country. *Id.*

<sup>91</sup> *Id.* at 18-19. Because the "Basic Plan" was created by Japan and construction of the proposed facility was also to be completed by Japan, DoD argued that its involvement with the project had ended and therefore was no longer a federal undertaking. *Id.* at 14. The court called DoD's assertion of no federal undertaking "disingenuous" since it was being created by DoD specifications and used by the United States. *Id.*

<sup>92</sup> *Dugong v. Gates*, 543 F. Supp. 2d 1082, 1100-01 (N.D. Cal. 2008).

<sup>93</sup> *Id.* at 1112.



issued orders to DoD and the plaintiffs, and no new action has been taken on the *Dugong* case since April 2009.<sup>94</sup>

In reaching its decision, the court thoroughly examined what was required by DoD under § 402 to adequately “take into account” the planned air station’s effect on the dugong in order to mitigate any adverse consequences. The court noted that “take into account,” though undefined, had been used in the § 106 domestic process some fourteen years prior to its use in § 402.<sup>95</sup> Section 402, the court stated, is “the international counterpart” to § 106, lending to a strong comparison of the two sections.<sup>96</sup> Here, DoD failed to fulfill its “take into account” requirement. Although the DoD consulted with the Japanese government, the Japanese government conducted its own environmental review and continued its consultation process with community groups, causing Japan to ultimately conduct the “take into account” measures.<sup>97</sup> The court concluded that DoD failed in its obligation to “take into account” the impact on the dugong by failing to gather information and conduct its own analysis.<sup>98</sup> No mitigating measures could therefore be taken.

The result of the *Dugong* litigation is attributed to DoD’s failure in meeting the requirements of § 402, requirements minimally addressed by the *Secretary of the Interior’s Standards and Guidelines*. Complicating matters further, no cases prior to *Dugong* existed in

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<sup>94</sup> *Id.* at 1112-13. Westlaw’s docket feature indicates that the last action on *Dugong* was taken by DoD in April 2009.

<sup>95</sup> *Id.* at 1104. The court then reasoned that the meaning of “take into account” used by the regulations for § 106 must be the same meaning intended for § 402. *Id.*

<sup>96</sup> *Id.* at 1088. “There is no reason to believe that Congress intended the basic framework [created for the § 106 process] to differ depending on the geographic location of the undertaking and the protected property.” *Id.* at 1105.

<sup>97</sup> *Id.* at 1108.

<sup>98</sup> *Id.* at 1108, 1111. See also Associated Press, *Japan: U.S. Base Must Weigh Effect On Revered Creature*, N.Y. TIMES, Jan. 26, 2008, at A6 (noting decision of *Dugong v. Gates*). The Associated Press also noted that “the decision, made Thursday, is the first time the Historic Preservation Act has been applied to an overseas project.” *Id.*

order for DoD to sufficiently understand the measures needed to fulfill § 402 requirements. No federal agency since DoD in *Dugong* has been sued under § 402. Since the decision, however, federal agencies with operations outside the United States must understand how their activities could come into direct conflict with § 402 requirements. A clearer § 402 process needs to be created and defined for future federal agency use.

## CHAPTER 5

### DEVELOPING A § 402 PROCESS: THE NEED FOR REGULATIONS

#### Responding to *Dugong*

Much of the scholarship published following the *Dugong* decision focused on the possible boon to environmental groups hoping to protect animal species worldwide. In 2006, Ingrid Bostrom's article in the *Hastings West-Northwest Journal of Environmental Law and Policy* addressed a new avenue for environmental groups to protect threatened species.<sup>99</sup> With the *Dugong* case, Bostrom discusses how the NHPA provides an opportunity for environmentalists to attach a "cultural significance" tag to wildlife to ensure protection.<sup>100</sup> Another article, written in 2009 by Lauren Schoenbaum and published in the *Texas Environmental Law Journal*, discusses the *Dugong* case potentially leading to an expansion of United States environmental policy to agency actions abroad.<sup>101</sup>

Though the articles note the significance of the *Dugong* decision for environmentalists, the unclear language of § 402 cannot be overlooked in how it affects future agency actions. In planning for the new air station in Okinawa, DoD believed it had met all necessary environmental requirements for the project. The *Dugong* case clearly demonstrates that DoD's

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<sup>99</sup> Ingrid Bostrom, *The Cultural Significance of Wildlife: Using the National Historic Preservation Act to Protect Iconic Species*, 12 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 147 (2006).

<sup>100</sup> Bostrom, at 155-56.

<sup>101</sup> Lauren Jensen Schoenbaum, *The Okinawa Dugong and the Creative Application of U.S. Extraterritorial Environmental Law*, 44 TEX. INT'L L.J. 457, 478 (2009). Another article discussing the *Dugong* case is not addressed because it was written prior to the court's decision in *Dugong v. Rumsfeld*. See generally Mitsuhiko A. Takahashi, *Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act*, 28 ENVIRONS ENVTL. L. & POL'Y J. 181 (Fall 2004) (hypothesizing that NHPA should be able to protect dugongs in Okinawa).

belief was misplaced and highlights at least two elements of § 402 in need of clarification. First, agencies are required to determine whether or not a foreign law is an “equivalent of the National Register.” Second, agencies are unclear of what is necessary to demonstrate they have sufficiently “take[n] into account” effects of the proposed undertaking in order to adequately mitigate adverse effects.

A 2010 article by Emily Monteith in the *DePaul Law Review* discussed the ambiguity surrounding the § 402 “equivalent of the National Register.”<sup>102</sup> Monteith examined the *Dugong* decision for its handling of § 402’s equivalence requirement to find the court comparing the National Register to an entire law: Japan’s *Law for the Protection of Cultural Properties*.<sup>103</sup> As previously discussed, Congress’ intent for including the “equivalent” requirement is unclear as well.<sup>104</sup> Section 402 does, however, state that the World Heritage List (a list) and the host nation’s equivalence to the National Register (a list) are to be used in the planning process.<sup>105</sup> The section makes no reference to a requirement for equivalent laws.

Monteith goes on to note that not every country’s heritage laws include all protected items on lists.<sup>106</sup> Egypt is such an example; the government protects properties without listing every one of them individually.<sup>107</sup> Even more problems with § 402’s language can arise. Spain, for example, has a National Register of Cultural Property, but additionally recognizes that the

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<sup>102</sup> Emily Monteith, *Lost in Translation: Determining the Equivalent of the National Register of Historic Places*, 59 DEPAUL L. REV. 1017, 1032 (2010).

<sup>103</sup> *Id.* Monteith examined whether the court was comparing the two countries’ laws or the two countries’ lists in order to determine equivalency. *Id.*

<sup>104</sup> *See supra*, notes 57-58 and accompanying text.

<sup>105</sup> *See Monteith supra*, at 1032.

<sup>106</sup> *See id.* at 1036-37. Monteith compares France’s system for designating cultural property with Egypt’s system, noting differences between countries that list property individually, like the United States, and others that list property categorically. *Id.* For example, a categorical approach can be one that lists all property 100 years old.

<sup>107</sup> *Id.*

semi-autonomous regions of Spain have their own lists.<sup>108</sup> Which list, then, is the “equivalent to the National Register?” Monteith recognizes that a liberal interpretation of “equivalent of the National Register” is necessary to recognize the differences around the globe.<sup>109</sup> No two countries are exactly alike. UNESCO provides a cultural heritage laws database that may prove useful to federal agencies planning projects outside the United States.<sup>110</sup> Agencies, however, must be given more guidance regarding § 402’s “equivalent of the National Register” language. Until then, the section must be given a broad interpretation.

A second major portion of § 402 that gives federal agencies no guidance is the requirement to “take into account” the proposed project’s effects on heritage property in an international context through cooperation with host nations. DoD provided the court in *Dugong* a number of materials and declarations suggesting that DoD had taken into account the project’s effects on the dugong. Those materials include

- A declaration by Stephen Getlein, the Natural Resource Manager for Marine Corps Base Camp Butler on Okinawa. Getlein acknowledged Henoko Bay as a potential feeding area for dugongs, but stated that the planned site for the air station was “not an attractive habitat for dugongs.”<sup>111</sup>

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<sup>108</sup> European Heritage Network, Spain, § 4.1.2, *available at* <http://www.european-heritage.net/>.

<sup>109</sup> *See* Monteith, *supra* at 1050 (“...The internationalism of § 402...allow[s] foreign nations to determine what properties—and what types of properties—are significant to their history and cultural heritage”).

<sup>110</sup> UNESCO Database of National Cultural Heritage Laws, *available at* <http://www.unesco.org/culture/natlaws/index.php?&lng=en>.

<sup>111</sup> *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1109.

- The declarations of Michael Noah, the DoD Chief Supervisory Biologist in Okinawa. Noah stated that more information was needed to determine what feeding grounds were most suitable for the dugong on Okinawa.<sup>112</sup>
- The declarations of Adam Frankel, private consultant from Marine Acoustics, Inc. Mr. Frankel suggests that dugongs could be impacted by noise disturbances from the proposed air station, but the extent of the impact was unknown.<sup>113</sup>
- A December 2005 report from Geo-Marine, Inc. prepared for the Department of the Navy. The report included information from consulted parties, including “a multitude of individuals, agencies, and databases.”<sup>114</sup>
- A June 2003 report by the Facilities Engineer Environmental Affairs Branch of Marine Corps Base Camp Butler on Okinawa. The report assessed current activities on Okinawa and what impacts those activities had on the island.<sup>115</sup>
- A declaration by Richard Lawless, the DoD official responsible for negotiations with Japan regarding the proposed air station. His statement recognized Japan’s insistence that the air station should have as little harm as possible on the dugong.<sup>116</sup>
- The declaration of Takemasa Moriya, Japanese Administrative Vice Minister for Defense. Moriya insisted the project impact the dugong as little as possible.<sup>117</sup>
- A Japanese environmental assessment in progress. The assessment was required under Japanese law and was subject to public comments used to create the final

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<sup>112</sup> *Id.* at 1110.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1111.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1108.

<sup>117</sup> *Id.* at 1107.

environmental impact statement.<sup>118</sup> Additionally, Moriya stated that the government of Japan, along with the United States, would take mitigation measures by “taking...into account various factors including the opinions of the local communities, the need to meet the operational requirements of the U.S. forces, and the need to give due consideration to the natural environment.”<sup>119</sup>

The court in *Dugong* discounted each of these items. Declarations by individuals and reports connected to DoD were discounted because none addressed what qualitative impact the planned air station would have on the dugong.<sup>120</sup> Actions undertaken by Japan failed to meet § 402 requirements because, although useful, the assessment was not conducted or reviewed by DoD. Thus, Japan’s actions to “take into account” did not relieve DoD of its obligations to do the same.<sup>121</sup>

Language in the NHPA states that the Act’s purpose is to “provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations” through “cooperation with other nations [and the Federal Government].”<sup>122</sup> It is clear from *Dugong* that DoD’s planning for the air station project took place with the cooperation and input of Japan. Throughout the entire planning process, Japan was present and provided environmental and impact analyses. The court, however, ruled that § 402 required DoD to act independently to “take into account” even though the NHPA requires

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1110-11. Though the information provided by DoD gave plenty of “scientific information” on the dugong, little was done—outside of Japan’s environmental assessment—to evaluate the proposed project’s effect on the dugong. *Id.* at 1111.

<sup>121</sup> *See supra*, notes 97-98 and accompanying text.

<sup>122</sup> 16 U.S.C. 470-1(2).

cooperation with foreign nations.”<sup>123</sup> Federal agencies must receive clearer direction on how to proceed with § 402 “take into account” requirements while working in foreign nations.

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<sup>123</sup> Dugong v. Gates, 543 F. Supp. 2d 1082, 1108.



### Agencies Acting on Their Own

Without regulations, agencies are forced to create their own guidelines for purposes of following § 402. DoD has already created its own guidelines for treatment of cultural resources outside the United States. The *Overseas Environmental Baseline Guidance Document* (OEBGD) “contains criteria for required plans and programs needed to ensure proper protection and management of historic and cultural resources, such as properties on the World Heritage List or the [Host Nation] list equivalent to the U.S. National Register of Historic Places.”<sup>124</sup> The OEBGD also requires that host nation lists of heritage properties be evaluated “to determine if they are equivalent with the National Register of Historic Places.”<sup>125</sup> OEBGD guidelines require installation commanders to “take into account” effects of proposed projects.<sup>126</sup> Beyond a resource management plan created by personnel with cultural resource expertise, little information is provided on how to meet the “take into account” requirement.

The OEBGD still does not do enough to fulfill all that is asked under § 402, and even with the OEBGD in place, there have been instances of military error.<sup>127</sup> In 2003, the United States invasion of Iraq caused severe damage to Babylon, the site of one of the Seven Wonders of the Ancient World.<sup>128</sup> Following the invasion, a report by UNESCO described the damage done to the site. Forces constructed Camp Alpha on the ruins of Babylon by building

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<sup>124</sup> *Overseas Baseline Guidance Document*, DoD 4715.05-G, Ch. 12.1 (May 1, 2007). This edition of the OEBGD was created in 2007, after the first phase of the *Dugong* case. An earlier edition from March 2000 uses largely the same language as the 2007 edition, indicating that DoD was likely aware of § 402 requirements prior to *Dugong*.

<sup>125</sup> *Id.* at 12.2.5. This language in section 12.2.5 of the OEBGD did not exist in the 2000 edition, and was likely added in response to the *Dugong* case.

<sup>126</sup> *Id.* at 12.3.1.

<sup>127</sup> The OEBGD does not address consultation with affected community groups, a requirement under the Secretary of the Interior’s Guidelines published in 1998. For further discussion of these guidelines, see *supra* notes 61-65 and accompanying text.

<sup>128</sup> Nada Bakri, *Babylon’s Ancient Wonder, Lying in Ruins*, THE WASH. POST, July 29, 2009.

embankments to protect the base, digging trenches for fuel tank storage, and driving heavy vehicles over the ruins.<sup>129</sup> Making matters worse, soldiers also filled sandbags with soil from the site containing archeological fragments.<sup>130</sup> It has been argued that § 402 should have applied to the construction of Camp Alpha in Iraq. Patty Gerstenblith's 2006 article in the *Georgetown Journal of International Law* discusses the effects of warfare on preserving world heritage.<sup>131</sup> In the article, Gerstenblith argues that the DoD failed to meet its § 402 requirements by failing to properly consult before constructing Camp Alpha.<sup>132</sup> Such action could have resulted in another lawsuit against DoD under § 402, but since work is no longer taking place at the site, there is little likelihood for success.<sup>133</sup>

The DoD is not the only federal agency that should be concerned with § 402. Currently, the United States Department of State (State Department) is in the midst of the Iraq Cultural Heritage Project launched in 2008.<sup>134</sup> The project began with a \$700,000 State Department grant to the World Monuments Fund to create a preservation and management plan for Babylon.<sup>135</sup> As of January, 2011, work has begun to restore structures at the Babylon site.<sup>136</sup> The State Department funded the work with a \$2 million grant. It is unclear whether or not the State Department's role in the project is significant enough to invoke § 402.

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<sup>129</sup> *Id.* See also UNESCO, *Final Report on Damage Assessment in Babylon* (June 26, 2009) available at <http://unesdoc.unesco.org/images/0018/001831/183134e.pdf>.

<sup>130</sup> *Id.*

<sup>131</sup> Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245 (2006).

<sup>132</sup> *Id.* at 315.

<sup>133</sup> *Id.* at 316. Gerstenblith recommends U.S. funding to reconstruct damage done at the site. *Id.*

<sup>134</sup> United States Department of State, *Iraq Cultural Heritage Initiative*, available at <http://exchanges.state.gov/heritage/iraq.html>.

<sup>135</sup> *Id.*

<sup>136</sup> Barry Neild and Mohammed Tawfeeq, *Iraq Tourism Hangs in Balance at Babylon*, CNN WORLD, Jan. 13, 2011, available at [http://articles.cnn.com/2011-01-13/world/babylon.iraq.archaeology\\_1\\_ancient-sites-babylon-archaeological-sites?\\_s=PM:WORLD](http://articles.cnn.com/2011-01-13/world/babylon.iraq.archaeology_1_ancient-sites-babylon-archaeological-sites?_s=PM:WORLD).

The State Department has also been actively involved in Haiti relief following the January 2010 earthquake.<sup>137</sup> Upwards of \$1.75 billion was appropriated by Congress for Haiti relief and reconstruction in 2010.<sup>138</sup> Since the earthquake, the United States has been actively removing rubble, as well as constructing much-needed housing.<sup>139</sup> Recently, the United States work in Haiti has changed its “focus to assessment and repair of damaged structures.”<sup>140</sup> Once again, it is unclear whether § 402 is being followed. The earthquake caused severe damage to a number of historic structures in and around Port-au-Prince.<sup>141</sup> It is the State Department’s responsibility, along with the United States Agency for International Development (USAID), to follow § 402 as it applies to their federal undertakings in Haiti.

Examples from the State Department and DoD pursuing international development and construction projects demand sensitivity to the host nation’s heritage resources. These two federal agencies are not alone. USAID, through humanitarian assistance projects, the Department of the Interior, through a joint United States-Canada national park, and the Department of Agriculture’s National Institute of Food and Agriculture’s overseas projects, all participate in federally-funded projects outside the United States.<sup>142</sup> In an era of globalization, agency actions outside the United States are bound to increase. Without a uniform process for § 402, federal agencies are forced to enact their own guidelines for meeting § 402 requirements.

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<sup>137</sup> United States Department of State, *Haiti: One Year Later*, available at <http://www.state.gov/s/hsc/rls/154255.htm>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Kimberly Adlerman, *Haiti Struggles to Save Cultural Property and Historic Buildings*, CULTURAL PROP. AND ARCHAEOLOGY L. BLOG, Feb. 11, 2010, <http://culturalpropertylaw.wordpress.com/2010/02/11/haiti-struggles-to-save-cultural-property-and-historic-buildings/>.

<sup>142</sup> USAID, <http://www.usaid.gov/>. Department of the Interior, <http://www.nps.gov/history/worldheritage/glacier.htm>. Department of Agriculture, <http://www.csrees.usda.gov/globalengagement.cfm>.

These guidelines run the risk of future court action similar to *Dugong*, where the agency simply did not do enough.

## CHAPTER 6

### PROPOSED REGULATIONS FOR § 402

#### Using Available Sources to Create Regulations

In order to gain a clearer sense of § 402's requirements, existing sources analyzing § 402 should be used to determine federal agencies' obligations under the section. The court's opinion in *Dugong* interpreting § 402, the Secretary of the Interior's 1998 Standards, and the extent to which the language of § 402 indicates what is required under the section must be used in developing draft regulations. Thus, the following issues must be addressed by the regulations:

1. Determining the basic requirements of § 402 as expressed in *Dugong*
2. Deciding what is an "equivalent National Register"
3. The extent of "take into account" requirements while cooperating with and working within a host nation
4. Using the Secretary of the Interior's 1998 Standards to fulfill § 402 obligations
5. The format and language the regulations should use

The court in *Dugong* noted the similarity between § 106 and § 402, using four basic parts of the § 106 process that are applicable to § 402:

(1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property, (3) a determination as to whether there will be adverse effects or no adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.<sup>143</sup>

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<sup>143</sup> 543 F. Supp. 2d 1082, 1104.

The *Dugong* court noted that at minimum, DoD should have at least accomplished those four steps. In addition, the court's determination for National Register equivalency is another nation's law that is "corresponding or virtually identical in effect or function" to the NHPA.<sup>144</sup> *Dugong* made it clear that an identical list would not make sense, and a broad reading of "equivalent National Register" is therefore necessary.<sup>145</sup>

Federal agencies' "take into account" requirement cannot be met by allowing host nations to solely make those determinations. The *Dugong* court clearly stated that although DoD could rely on Japan's environmental assessment and other analyses, DoD must also "take into account" the gathered information in order to make its own determination of adverse effects. It was not enough that Japan took its own "take into account" steps and appears as though this level of cooperation is what was intended by § 402.<sup>146</sup>

The Secretary of the Interior's 1998 Standards require a consultation process to take place by federal agencies.<sup>147</sup> This process should include historic preservation authorities, affected communities and groups, and professional organizations in the host nation.<sup>148</sup> Finally, the format of the proposed regulations may be similar to those found in § 106. The court in *Dugong* cites specific portions of the § 106 regulations from 1980 that are relevant for determining how to proceed under § 402.<sup>149</sup> Following the format and language of the

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<sup>144</sup> *Dugong v. Rumsfeld*, 2005 WL 522106, at 7.

<sup>145</sup> Monteith, *supra* at 1050.

<sup>146</sup> *See supra*, notes 97-98 and accompanying text.

<sup>147</sup> 63 Fed. Reg. 20,496-01, 20,504.

<sup>148</sup> *Id.* The Secretary of the Interior's 1998 Standards also notes that property *eligible* for inclusion in the host country's National Register equivalent should be taken into account. *Id.* As discussed earlier, tremendous difficulty exists already in determining a National Register equivalent. Through a proper consultation process, however, properties of cultural importance in the host nation may be identified and protected.

<sup>149</sup> *See id.* at footnote 5 (noting 36 C.F.R. 800, 800.4(a), 800.4(b), 800.4(c), 800.6 (b) to be relevant sections).

regulations governing § 106, the following section proposes draft regulations for implementing a § 402 process. The regulations governing § 106 may be found at 36 C.F.R. 800. As previously noted, no language exists in the NHPA calling for regulations to be created for § 402.<sup>150</sup> Thus, the NHPA may need to be amended to allow the ACHP the ability to promulgate regulations for § 402 and possibly review § 402 undertakings.<sup>151</sup> Using the discussed sources, regulations for § 402 may be created that more clearly address the issues faced by federal agencies outside the United States.

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<sup>150</sup> NHPA § 211, calls for regulations to be implemented for § 106. Section 211 states, The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety. The Council shall, by regulation, establish such procedures as may be necessary to provide for participation by local governments in proceedings and other actions taken by the Council with respect to undertakings referred to in section 106 of this Act which affect such local governments. 16 U.S.C. 470s.

<sup>151</sup> It is clear, however, that the host nation would have the ultimate determination whether or not a federal undertaking may take place.

Draft Regulations for § 402

PROTECTION OF HISTORIC PROPERTIES OUTSIDE THE UNITED STATES

Subpart A – Purposes and Participants  
Sec.

1. Purposes.
2. Participants in the Section 402 process.

Subpart B – The Section 402 Process

3. Initiation of the section 402 process.
4. Identification of historic properties.
5. Assessment of adverse effects.
6. Resolution of adverse effects.
7. Failure to resolve adverse effects.
8. Coordination with the National Environmental Policy Act (NEPA).<sup>152</sup>
9. Documentation standards.
10. Emergency situations.
11. Post-review discoveries.

Authority: Regulations for Section 402.

Subpart A-Purposes and Participants

§ 1. Purposes.

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<sup>152</sup> It is still unclear whether NEPA applies outside the United States. The NEPA process is similar to that of the § 106 process. *See, e.g. Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (C.A.D.C. 1993). Though *Massey* focused on NEPA’s ability to apply to actions effecting the “environment and biosphere,” the court explicitly stated it was not deciding how NEPA should apply in “an actual foreign sovereign [since the cause of action arose in Antarctica].” *Id.* at 536-37, quoting 42 USC § 4321. *See also NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993). The relationship between the United States and Japan is based on a series of treaty arrangements that are both complex and long-standing. *Id.* *NEPA Coalition* states that the plaintiff failed to show that Congress intended NEPA to apply extraterritorially “in situations where there is a substantial likelihood that treaty relations will be affected.” *Id.*, citing *Natural Resources Defense v. Nuclear Regulatory Commission*, 647 F.2d 1345, 1366-67 (The court in *Natural Resources Defense* found that Congress intended cooperation, not unilateral action in US relations overseas.). Thus, the court in *NEPA Coalition* concluded that “U.S. foreign policy interests outweighed the benefits of preparing an [Environmental Impact Statement],” but concluded that NEPA may apply “in other factual contexts.” *Id.* at 468.



(a) Purposes of the section 402 process. Section 402 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on properties outside the United States listed on the World Heritage List or the host nation's equivalent of the National Register of Historic Places. The procedures in this part define how Federal agencies operating abroad meet these statutory responsibilities. The section 402 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify listed historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) Relation to other provisions of the act. Section 402 is related to other provisions of the act designed to further the national policy of historic preservation and compliance with the World Heritage Convention. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 402 process.

(c) Timing. The agency official should complete the section 402 process prior to the approval of the expenditure of any Federal funds on the undertaking. This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 402, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on

listed historic properties. The agency official shall ensure that the section 402 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 2. Participants in the Section 402 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 402 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 402 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 402 compliance. The agency official may be a federal government official who has been delegated legal responsibility for compliance with section 402 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their

collective responsibilities under section 402. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation.<sup>153</sup> The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 402 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council.<sup>154</sup> The Council issues regulations to implement section 402, and provides guidance and advice on the application of the procedures in this part.

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<sup>153</sup> Consultation under § 402 is required under the Secretary of the Interior's Standards and Guidelines, published in 1998. 34 F.R. 20496-01.

<sup>154</sup> "Council" means the ACHP. As previously mentioned, the ACHP currently has no involvement with § 402. The proposed regulations assume the ACHP's § 402 role will be a limited, consulting one.

(1) Council assistance. Participants in the section 402 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, even though the Council is not formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 402 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 402 process.

(1) Host nation government and historic preservation authorities. The host nation governmental authorities reflect the interests of the host nation and its citizens in the preservation of their cultural and natural heritage. The host nation preservation authorities assist and advise Federal agencies in carrying out their section 402 responsibilities, and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development.

(2) Representatives of host nation local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party.

(3) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public.

(1) Nature of involvement. The views of the public are essential to informed Federal decision-making in the section 402 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on listed historic properties, the likely interests of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on listed historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decision-making.

Subpart B-The section 402 Process

§ 3. Initiation of the section 402 process.

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking, and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on listed historic properties, assuming such historic properties were present, the agency official has no further obligations under section 402 or this part.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 402 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required by host nation authorities.

(c) Identify the affected property on the host nation's equivalent of the National Register of Historic Places or World Heritage List. As part of its initial planning, the agency official shall determine the appropriate National Register of Historic Places equivalent for the host nation. The equivalent list need not be identical to the National Register of Historic Places, but the host nation's heritage law should be corresponding or virtually identical in effect or function.<sup>155</sup> The host nation's equivalent National Register should also parallel the United States National Register in its goal to protect human and natural resources.<sup>156</sup>

(d) Plan to involve the public. In consultation with host nation authorities, the agency official shall plan for involving the public in the section 402 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 2(d).

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<sup>155</sup> Dugong v. Rumsfeld, 2005 WL 522106, at 7.

<sup>156</sup> *Id.*

(f) Identify other consulting parties. In consultation with host nation authorities, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 402 process. The agency official may invite others to participate as consulting parties as the section 402 process moves forward.

(1) Involving local governments. The agency official shall invite any local governments that are entitled to be consulting parties under § 2(c).

(2) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the host nation authorities, determine which should be consulting parties.

#### § 4. Identification of historic properties.

(a) Determine scope of identification efforts. In consultation with host nation government authorities, the agency official shall:

(1) Determine and document the area of potential effects;

(2) Review existing information on listed historic properties within the area of potential effects listed on the host nation's equivalent to the National Register of Historic Places or the World Heritage List.

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, the listed historic property, and identify issues relating to the undertaking's potential effects on listed historic properties; and

(b) Identify listed historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with host nation authorities, the agency official shall take the steps necessary to identify listed historic properties within the area of potential effects.

(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on the listed historic properties, and the likely nature and location of listed historic properties within the area of potential effects. The agency official should also consider other applicable professional, national, or local laws, standards, and guidelines.

(d) Results of identification and evaluation.

(1) No listed historic properties affected. If the agency official finds that either there are no listed historic properties present or there are listed historic properties present but the undertaking will have no effect upon them, the agency official shall provide documentation of this finding, as set forth in § 9(d), to the host nation. The agency official shall notify all



consulting parties, and make the documentation available for public inspection prior to approving the undertaking.

(2) Listed historic properties affected. If the agency official finds that there are listed historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, and invite their views on the effects and assess adverse effects, if any, in accordance with § 5.

#### § 5. Assessment of adverse effects.

(a) Apply criteria of adverse effect. In consultation with the host nation authorities, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects that have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a listed historic property that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, and hazardous material remediation

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features; and

(vi) Neglect of a property which causes its deterioration.

(b) Finding of no adverse effect. The agency official, in consultation and cooperation with the host nation authorities, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 9.

(1) Agreement with, or no objection to, finding. The agency official may proceed if the host nation has agreed with the finding and not objected to the undertaking. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) Disagreement with finding. If the host nation or any consulting party notifies the agency official that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall consult with the host nation or consulting party to resolve the disagreement.

(d) Results of assessment.

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 9(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 402 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 1.6.

§ 6 Resolution of adverse effects.

(a) Continue consultation. The agency official shall consult with the host nation authorities and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.

(1) Involve consulting parties. In addition to the consulting parties identified under § 1.3(c), the agency official and the host nation authorities may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(2) Provide documentation. The agency official shall provide to all consulting parties the documentation specified in § 1.9(e), subject to the confidentiality provisions of § 1.9(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(3) Involve the public. The agency official shall make information available to the public, including the documentation specified in § 1.9(e), subject to the confidentiality provisions of § 1.9(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon listed historic properties, the likely effects on listed historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the host nation public at earlier

steps in the section 402 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 1.2(d) are met.

(b) Resolve adverse effects.

(1) The agency official shall consult and cooperate with the host nation authorities and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official and the host nation authorities agree on how the adverse effects will be resolved, the undertaking may proceed. The agency may not proceed without an agreement by the host nation.

§ 7. Failure to resolve adverse effects.

(a) Termination of consultation. After consulting to resolve adverse effects, the agency official and the host nation authorities may determine that further consultation will not be productive and terminate consultation. The undertaking shall not take place.

§ 8. Coordination With the National Environmental Policy Act.<sup>157</sup>

§ 9. Documentation standards.

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<sup>157</sup> See *supra*, note 148. Coordination of § 402 with NEPA may be necessary in the future, and regulations may need to be drafted to realize that change.

(a) Adequacy of documentation. The agency official shall ensure that a determination or finding under the procedures in this subpart is supported by sufficient documentation to enable any party to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds.

(b) Format. The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) Confidentiality.

(1) Authority to withhold information. Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) Other authorities affecting confidentiality. Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on

listed historic properties. Where applicable, those authorities shall govern public access to information developed in the section 402 process.

(d) Finding of no historic properties affected. Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, host nation involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify listed historic properties, including, as appropriate, efforts to seek information pursuant to § 4(b); and

(3) The basis for determining that no listed historic properties are present or affected.

(e) Finding of no adverse effect or adverse effect. Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, host nation involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify listed historic properties;

(3) A description of the affected listed historic properties;

(4) A description of the undertaking's effects on listed historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

#### § 10 Emergency situations.

(a) Agency procedures. The agency official, in consultation with the host nation authorities and the Council, is encouraged to develop procedures for taking listed historic properties into account during operations which respond to a disaster or emergency declared by the President, the host nation Head of State or other host nation governmental authority which respond to other immediate threats to life or property. If approved by the host nation, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 3 through 6. The Council's role exists as explained in § 2(b).

(b) Alternatives to agency procedures. In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, the host nation Head of State, or other host nation governmental authority, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 402 by notifying the host nation and afford them an



opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the host nation and invite any comments within the time available.

(c) Applicability. This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 402 and this part.

## CHAPTER 7

### CONCLUSION

#### Protecting Our World Heritage

Section 402 of the NHPA sought to meet United States obligations under the World Heritage Convention. Reliance on § 402, however, has proved difficult for at least one federal agency and is likely to create further confusion in the future. Agencies operating abroad have little guidance for § 402 and are forced to create their own standards to enforce the section. With only the *Dugong* decision and Secretary of the Interior's 1998 guidelines to follow, little light has been shed on what is required by § 402. Only regulations or detailed guidelines from the Secretary of the Interior would satisfy the § 402 clarification that agencies acting abroad demand.

Section 402 is not going away. In October 2010, the Lawyers' Committee for Cultural Heritage Preservation (LCCHP) held a day-long conference devoted to § 402.<sup>158</sup> The conference attempted to shed some light on the language and purpose of § 402 as well as discuss the difficulties involved in applying § 402. In closing, the conference held an open discussion suggesting ways to improve implementation of § 402. No published report from the conference is yet available for viewing.

The United States in general has also continued its push in improving its protection of foreign heritage properties. In September 2008, the United States Senate voted to ratify the 1954 Hague Convention on the Protection of Cultural Property During Times of Armed Conflict

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<sup>158</sup> Lawyers' Committee for Cultural Heritage Preservation, *International Historic Preservation in Context with the National Historic Preservation Act*, available at <http://www.culturalheritagelaw.org/2010fallconference>.

(Hague Convention).<sup>159</sup> Such a move on the part of the United States demonstrates to other nations that the United States is serious in its efforts to preserve cultural heritage.<sup>160</sup> By ratifying the Hague Convention, the United States has reaffirmed its commitment to preserving the world's heritage—a commitment made at the time of the World Heritage Convention's conception.

Times are changing. The word “globalization” is used casually to describe the current status of world trade, markets, economies, and environment. Globalization has been described as “merely the rise of worldwide networks of interdependence and a resulting shrinking of distances.”<sup>161</sup> Crises affecting one part of the world have an impact in the United States. This “interdependence” and “shrinking of distances” forces the United States to take action and self-reflect on its own policies toward other nations. With worldwide economic and environmental pressures mounting, it is important that the United States address its agencies' active roles abroad. The World Heritage Convention stated that the loss of a nation's cultural heritage is a loss for the entire world. By creating a § 402 process, the United States would take one step in consciously preserving the world's heritage.

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<sup>159</sup> See Society for Historical Archaeology, *U.S. Ratifies Treaty to Protect Cultural Property in Time of War*, available at <http://www.sha.org/documents/USRatifiesTreatytoProtectCulturalPropertyinTimeofWar.pdf> (noting that U.S. policy long followed Hague Convention prior to its adoption). The United States became the 123<sup>rd</sup> country to ratify the treaty. UNESCO, Legal Instruments, available at <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E>.

<sup>160</sup> See *id.* (“Most importantly, it sends a clear signal to other nations that the United States respects their cultural heritage and will facilitate U.S. cooperation with its allies and coalition partners in achieving more effective preservation efforts in areas of armed conflict”).

<sup>161</sup> Joseph S. Nye, Jr., *The Paradox of American Power*, Lecture at Princeton University, available at [http://www.princeton.edu/lisd/events/talks/Nye\\_Lecture.pdf](http://www.princeton.edu/lisd/events/talks/Nye_Lecture.pdf).

### For Further Consideration

In the near future, agencies may be faced with a § 402 undertaking without clearer guidelines or regulations written to help the agencies involved understand what is required of them. Through an agency's NHPA § 110 preservation program, agencies may develop their own methods for working outside the United States. The Secretary of the Interior's Standards and Guidelines clearly note § 402 and some of its basic requirements for agency preservation programs.<sup>162</sup> Thus, some might believe it best that agencies deal with § 402 on their own. This, however, does little to clarify what is actually required under § 402 and does not eliminate the possibility of court action. Another possibility is clearer guidelines from the Secretary of the Interior on what is required by § 402. Such guidelines could reach a level of force similar to regulations.

If regulations are needed, a question arises as to which agency is best to promulgate them. It can be argued that by virtue of the NHPA's creation of the ACHP and the ACHP's requirement to create regulations for § 106, the NHPA impliedly authorizes the ACHP to create regulations for § 402. However, the National Parks Service, in cooperation with the Department of the Interior and United States Committee, International Council on Monuments and Sites (US/ICOMOS), runs the World Heritage Sites in the United States.<sup>163</sup> Perhaps the best solution is cooperation between the ACHP and these groups in order to form a clearer, more streamlined § 402 process.

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<sup>162</sup> See *supra*, notes 61-65 and accompanying text.

<sup>163</sup> US World Heritage Sites, *available at* <http://www.cr.nps.gov/worldheritage/index.htm>.

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