

February 2008

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Thomas William "T.W." Bruno, *Bringing Sexy BRAC: The Case for Allowing Local Governments to Control Environmental Cleanup in the Military Base Closure and Redevelopment Process*, 32 Wm. & Mary Env'tl L. & Pol'y Rev. 513 (2008), <https://scholarship.law.wm.edu/wmelpr/vol32/iss2/7>

BRINGING SEXY BRAC: THE CASE FOR ALLOWING LOCAL GOVERNMENTS TO CONTROL ENVIRONMENTAL CLEANUP IN THE MILITARY BASE CLOSURE AND REDEVELOPMENT PROCESS

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INTRODUCTION

On November 9, 1989 the Berlin Wall fell,¹ and as the wall descended, it lifted the Iron Curtain² and signaled the end of a major threat to the security of the United States. Without the threat of all-out war, legislators and military officials could not justify the military's cost.³ In an effort to reduce spending and increase efficiency, Congress enacted the Base Closure and Realignment Act, which vested closure decision-making power with a commission⁴ that came to be designated as the "Defense Base Realignment and Closure Commission" ("BRAC Commission").⁵

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¹ See David Hoffman & Ann Devroy, *Bush Hails 'Dramatic' Decision; President Sees End of 'Iron Curtain Days'*, WASH. POST, Nov. 10, 1989, at A37.

² See Winston Churchill, *Sinews of Peace* (the Iron Curtain Speech), Address at Westminster College (Mar. 5, 1946), available at <http://www.historyguide.org/europe/churchill.html> ("From Stettin in the Baltic to Trieste in the Adriatic an *iron curtain* has descended across the Continent.").

³ See Department of Defense Appropriations Act of 1989, Pub. L. No. 100-463, 102 Stat. 2270 (stating that the Armed Forces spend more than \$78 billion on military installations each year).

⁴ Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, §§ 201-203, 102 Stat. 2623, 2627-28 (1988).

⁵ Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901-2903, 104 Stat. 1808, 1808-12, amended by Pub. L. No. 107-107, 115 Stat. 1342 (2001).

Since the first BRAC Commission in 1988 ("BRAC I"),⁶ there have been closure rounds in 1991,⁷ 1993,⁸ 1995,⁹ and most recently, in 2005.¹⁰ Cumulatively, base closures have saved the government almost \$29 billion.¹¹ After a base closes, the military must first offer the land to other defense agencies,¹² then to other federal agencies,¹³ and finally to state and local governments¹⁴ or a local redevelopment authority.¹⁵

The biggest hurdle the military faces before conveying the property is environmental cleanup.¹⁶ The military must clean up a variety of environmental toxins: unexploded ordnance, hazardous materials, and fuel and oil spills.¹⁷ "Regulatory gridlock" is the largest obstacle facing the

⁶ See generally DEF. SECRETARY'S COMM'N ON BASE REALIGNMENT & CLOSURE, BASE REALIGNMENT AND CLOSURES; REPORT OF THE DEFENSE SECRETARY'S COMMISSION (1988) [hereinafter 1988 BRAC REPORT].

⁷ See generally DEF. BASE CLOSURE & REALIGNMENT COMM'N, 1991 REPORT TO THE PRESIDENT (1991) [hereinafter 1991 BRAC REPORT].

⁸ See generally DEF. BASE CLOSURE & REALIGNMENT COMM'N, 1993 REPORT TO THE PRESIDENT (1993) [hereinafter 1993 BRAC REPORT].

⁹ See generally DEF. BASE CLOSURE & REALIGNMENT COMM'N, 1995 REPORT TO THE PRESIDENT (1995) [hereinafter 1995 BRAC REPORT].

¹⁰ See DEF. BASE CLOSURE & REALIGNMENT COMM'N, 2005 REPORT TO THE PRESIDENT (2005) [hereinafter 2005 BRAC REPORT].

¹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-614, MILITARY BASE CLOSURES: OBSERVATIONS ON PRIOR AND CURRENT BRAC ROUNDS 11 (2005) [hereinafter GAO, OBSERVATIONS ON PRIOR BRAC ROUNDS].

¹² U.S. DEPT OF DEF., INSTALLATIONS & ENV'T OFFICE, BASE REDEVELOPMENT AND REALIGNMENT MANUAL 26 (2006) [hereinafter DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL], available at <http://www.dod.mil/brac/pdf/4165-66-M-BRRM-508.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

A local redevelopment authority is any authority or instrumentality established by a state or local government and recognized by the Secretary of Defense, through the Office of Economic Adjustment, as the entity responsible for developing the redevelopment plan with respect to an installation or for directing implementation of the (land reuse) plan.

GAO, OBSERVATIONS ON PRIOR BRAC ROUNDS, *supra* note 11, at 6 n.8.

¹⁶ U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-95-3, MILITARY BASES: REUSE PLANS FOR SELECTED BASES CLOSED IN 1988 AND 1991, at 18 (1994).

¹⁷ Richard A. Wegman & Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 ECOLOGY L.Q. 865, 867 (1994).

environmental cleanup effort.¹⁸ The military, federal government, federal regulators, state government, state regulators and local officials must work together to facilitate the cleanup and ultimate base redevelopment.¹⁹ Base redevelopment is a key component in assisting with the economic recovery of local communities.²⁰ Officials participating in redevelopment planning must integrate environmental cleanup with the land-reuse plan.²¹ Both the leaving tenant (the military) and the incoming tenant must deal with the environmental cleanup before they can begin the base transfer and economic recovery.²² This Note addresses the environmental and restoration problems facing local, state, and federal officials when a military base closes. This Note offers the solution of increasing local control and oversight along with encouraging privatization to resolve the current gridlock between state and federal regulatory schemes. A similar local solution has been successful in other environmental cleanup projects, and Congress can promote it through its vast power under the Spending Clause.

Section I of this Note outlines the environmental and base closure laws that have led to this problem. Section II examines case studies of closed military bases and focuses on environmental and redevelopment responses. Section III proposes a solution to govern current and future base closures that speeds economic recovery and environmental cleanup. Section IV analyzes the proper method for Congress to retain oversight and ensure complete cleanup by promulgating its regulation of state enforcement under the Spending Clause.

¹⁸ See Major Stuart W. Risch, *The National Environmental Committee: A Proposal to Relieve Regulatory Gridlock at Federal Facility Superfund Sites*, 151 MIL. L. REV. 1, 6, 57-76 (1996).

¹⁹ See DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL, *supra* note 12, at 18-19 (outlining the key characteristics to successful disposal of closing military installations: consultation, cooperation, consider community needs, innovation, common sense, delegate, and growth management principles).

²⁰ U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-99-36, MILITARY BASES: STATUS OF PRIOR BASE REALIGNMENT AND CLOSURE ROUNDS 75 (1998) [hereinafter GAO, STATUS OF PRIOR ROUNDS].

²¹ See MARY KAY BAILEY ET AL., ENVTL. PROT. AGENCY, TURNING BASES INTO GREAT PLACES 9 (2006), available at http://www.epa.gov/smartgrowth/pdf/bases_into_places.pdf.

²² Compare Risch, *supra* note 18, at 6 (noting the competing interests at play), with DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL, *supra* note 12, at 18-19 (outlining how all parties must work together).

I. CERCLA, RCRA, STATE COUNTERPARTS, AND THE BRAC
PROCEDURAL LAWS: TOO MANY COOKS²³ (WITH TOO MANY
LAWS) SPOIL CLEANUP EFFORTS

A. *Complying with So Many Different Laws Leads to Confusion
and Gridlock*

The federal government first embarked on comprehensive environmental legislation in the 1970s.²⁴ Currently, two main federal laws govern environmental liability: the Resource Conservation and Recovery Act ("RCRA"), enacted in 1976,²⁵ and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), enacted in 1980,²⁶ commonly known as the "Superfund."²⁷ Following the federal government's lead, states have enacted their own CERCLA laws that impose varying degrees of liability.²⁸

Confusion and gridlock rest at the intersection of the two federal laws and their state counterparts, as well as the BRAC procedural requirements.²⁹ This leads to delays in base redevelopment and worsens

²³ CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS 669-70 (1997) ("Too many cooks spoil the broth.").

²⁴ Peter B. Prestley, *The Future of Superfund*, 79 A.B.A. J. 62, 62-63 (1993).

²⁵ Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, amended by Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (current version at 42 U.S.C. §§ 6901-6992k (2000)).

²⁶ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (current version at 42 U.S.C. §§ 9601-9675 (2000)). See also Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

²⁷ Risch, *supra* note 18, at 4 n.17 ("The CERCLA initially created a \$16 billion fund for use in responding to releases or threatened releases of hazardous substances at any site nationwide, hence the nickname "Superfund." (citing 42 U.S.C. §9601(11) (2000))).

²⁸ See Joel B. Eisen, "Brownfields of Dreams"? *Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 915-22 (1996) (discussing the number of state CERCLA statutes that have been amended to include voluntary cleanup schemes, and states that have enacted voluntary cleanup schemes independently of their CERCLA statutes).

²⁹ See Risch, *supra* note 18, at 6-7 ("Who controls the cleanup? Who sets the clean-up standards? Who selects the clean-up remedy? Who pays the staggering clean-up costs? The stakes for federal facilities, and our country, are enormous.").

the economic impact of the closing base on local communities.³⁰ The confusion stems from the lack of specific standards for cleanup,³¹ and the question of which law applies.³² The following is a brief introduction to the laws that create this state of confusion and gridlock.

B. The Resource Conservation and Recovery Act (RCRA)

Congress's first attempt to regulate the disposal of hazardous waste was with the Resource Conservation and Recovery Act of 1976.³³ RCRA seeks to "control solid and hazardous wastes from their generation through their disposal. . . . [and] regulat[e] all wastes that are not covered under another statute."³⁴ Congress designed RCRA to act prospectively and the statute requires licensure prior to allowing a facility to handle hazardous wastes.³⁵ Military bases have handled hazardous wastes both before and after Congress passed RCRA, which means RCRA is an incomplete regulation in the military base context.³⁶

³⁰ See CONG. BUDGET OFFICE, ENVIRONMENTAL CLEANUP ISSUES ASSOCIATED WITH CLOSING MILITARY BASES 3 (1992); U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-94-133, ENVIRONMENTAL CLEANUP: TOO MANY HIGH PRIORITY SITES IMPEDE DOD'S PROGRAM 4-5 (1994) (highlighting that only 85 sites out of over 2500 had been completely cleaned up); *Hearings on the DOD Environmental Program Supplemental Appropriation Request Before the DOD Environmental Restoration Program of the H. Comm. on Armed Servs.*, 102d Cong. 5 (1992) (statement of James Werner, Natural Resources Defense Council).

³¹ See Wegman & Bailey, *supra* note 17, at 883 ("CERCLA differs from many other federal environmental statutes in that it does not prescribe the substantive standards that remediation actions are to attain." (citing 42 U.S.C. § 9621(d) (1994))).

³² See *United States v. Colo.*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 510 U.S. 443 (1994) (holding that Colorado could enforce its state standards against the Rocky Mountain Arsenal); see also Major William Turkula, *Determining Cleanup Standards for Hazardous Waste Sites*, 135 MIL. L. REV. 167, 171-73 (1992) (noting that states have faced difficulty in enforcing stricter cleanup standards under several environmental laws, especially in the context of military bases).

³³ See generally 42 U.S.C. §§ 6901-6992k (2000).

³⁴ Risch, *supra* note 18, at 18-19 (citations omitted).

³⁵ *Id.* at 19-20 ("Congress designed this legislation with the ultimate goal of ensuring the safe handling of wastes throughout their lifecycle.").

³⁶ See *id.* at 42-46 ("The Pentagon's arsenal, assembled over 40 years to keep the lid on superpower conflict, has left deep [environmental] scars on the home front." (quoting Bill Turque & John McCormick, *The Military's Toxic Legacy*, NEWSWEEK, Aug. 6, 1990, at 20)). See generally Wegman & Bailey, *supra* note 17 (describing the toxic effects of the military's history and the cleanup required from it at national and international bases).

C. *Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*

When Congress enacted CERCLA it sought to regulate what RCRA had missed and require the current owner (for our purposes the Defense Department) to "remediate contamination and assume financial liability."³⁷ Congress added to the confusion when it strengthened CERCLA in 1986³⁸ by allowing state environmental law to govern cleanup actions at federal facilities.³⁹ While state law can be stricter than federal law, states could not single out federal facilities with excessive or discriminating liability.⁴⁰ By permitting the states to be proactive with enforcement, CERCLA was supposed to decrease public concern and confusion over cleanups⁴¹ and to emphasize "permanent cleanups,"⁴² but Congress ultimately failed.⁴³ "Due to [Superfund's] new stringent cleanup standards, the cost of cleanup has increased dramatically."⁴⁴ The addition of state standards to the cleanup process increase delays and confusion.⁴⁵

³⁷ Wegman & Bailey, *supra* note 17, at 884 (footnotes omitted) (noting that this standard waives the government's sovereign immunity (citing 42 U.S.C. §§ 9601(21), 9607(a), (1988))). See also Robert C. Davis, Jr. & R.T. McCrum, *Environmental Liability for Federal Lands and Facilities*, 6 NAT. RESOURCES & ENV'T 31, 32 (1991).

³⁸ See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (current version at 42 U.S.C. §§ 9601-9675 (2000)).

³⁹ 42 U.S.C. § 9620(a)(4) (1988).

⁴⁰ See *id.* § 9620(a)(4); David W. Goewey, Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513, 523-25 (1987).

⁴¹ See Wegman & Bailey, *supra* note 17, at 885 (noting that the CERCLA amendments would also permit state enforcement actions against the government).

⁴² Risch, *supra* note 18, at 39 (footnote omitted). See also Timothy B. Atkeson et al., *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Env'tl. L. Rep. (Env'tl. Law Inst.) 10360, 10363-10433 (1986) ("The emphasis in SARA § 121 on permanent cleanups is new and based on very little engineering experience.").

⁴³ See Wegman & Bailey, *supra* note 17, at 885-86 (noting that Congress returned to the issue after many lawsuits and an administration change).

⁴⁴ Kristin M. Carter, Note, *Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA*, 74 CORNELL L. REV. 1152, 1159, 1164 (1989) (citing 17 Env't Rep. (BNA) 778-79 (Sept. 26, 1986)) (indicating that cleanup and litigation costs would soar).

⁴⁵ Ensign Jason H. Eaton, *Creating Confusion: The Tenth Circuit's Rocky Mountain Arsenal Decision*, 144 MIL. L. REV. 126, 142-45 (1994) ("These costs [of involving state regulation in environmental cleanup] are not worth the return of slower cleanups. No evidence exists that the sites will become any cleaner. And taxpayers would end up paying for more of the cleanup as responsible parties go bankrupt from litigation expense.").

D. State Statutes: Pushing Their Own Agenda or Offering More Protection?

State statutes have varying degrees of liability,⁴⁶ oversight,⁴⁷ voluntariness,⁴⁸ structure,⁴⁹ and qualifications of hazardous waste.⁵⁰ The tension between state and federal regulations surfaces when states or citizens sue the government in state court to enforce the state laws.⁵¹ In *United States v. Colorado*, the Tenth Circuit upheld the state's right to compel the federal government to adhere to the stricter state cleanup standards.⁵² Several courts of appeals have distinguished *Colorado* from cases where private citizens bring suit to compel stricter cleanup,⁵³ but as long as the waters remain muddied the varying levels of state regulation will cause problems for developers who cannot properly judge their liability.⁵⁴ Greater state regulation allows local governments to be more accountable,⁵⁵ but also puts local officials under greater pressure from businesses and the public.⁵⁶ In the highly politicized and localized BRAC context,⁵⁷ the involvement of state officials can be a double-edged sword.

⁴⁶ See *id.* at 142-43 (identifying the different coverage and costs of state legislation).

⁴⁷ See R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 ENVTL. LAW. 101, 121 (1995) (noting that states are trending to less oversight).

⁴⁸ Eisen, *supra* note 28, at 917-18 ("Some states . . . have extensive programs tailored to redevelopment . . . whereas others . . . have more limited voluntary cleanup statutes.").

⁴⁹ *Id.* at 918 ("The statutes vary widely in their structure and provisions."). For a listing of different ways states have crafted their environmental regulation statutes, see *id.* at nn.172-78.

⁵⁰ Eaton, *supra* note 45, at 142.

⁵¹ See *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993) (holding that the State of Colorado could enforce its own state regulations against the military and require additional cleanup on a closed military base). See generally Eaton, *supra* note 45 (outlining the ramifications of the Tenth Circuit's decision).

⁵² See *Colorado*, 990 F.2d at 1581.

⁵³ See Eaton, *supra* note 45, at 139-41 (identifying the Eighth, Third, First and Fifth Circuits as having distinguished the Tenth Circuit's *Colorado* decision on grounds that a state brought the action and not an individual).

⁵⁴ See William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 55 (1997) (indicating that states have benefitted from passing their own statutes that mimic the federal statutes because the new state regulations reduce uncertainty and liability fears).

⁵⁵ See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 609-10 (1996).

⁵⁶ Buzbee, *supra* note 54, at 50-54 (detailing how state officials make the decision of what to regulate and how accommodating the officials can be to industry and public needs).

⁵⁷ GAO, OBSERVATIONS ON PRIOR BRAC ROUNDS, *supra* note 11, at 18 ("Closing unneeded

E. The BRAC Procedural Laws and Requirements Impose an Additional Level of Regulation on the Already Confusing Cleanup Process

The BRAC process and subsequent base closure require adherence to a plethora of laws⁵⁸ and the integration of federal, state and local officials and regulatory agencies.⁵⁹ The Base Closure and Realignment Act of 1988⁶⁰ and the Defense Base Closure and Realignment Act of 1990 provide the foundation for the BRAC process.⁶¹ The closure acts require the BRAC process to comply with the many environmental protection laws that govern property cleanup and disposal, like RCRA and CERCLA.⁶²

The BRAC process is a long, sequential, and complex process that requires the Commission to take many steps before it decides to close a base⁶³ and requires additional steps after such a decision has been made.⁶⁴

Once the Commission decides to close a base, the Defense Department ("DOD") must adhere to a complex transfer process.⁶⁵ The DOD must determine whether another military branch or another federal agency like Housing and Urban Development could use the site.⁶⁶ When DOD has determined that the federal government no longer needs the

defense facilities has historically been difficult because of public concern about the economic effects of closures on communities and the perceived lack of impartiality in the decision-making process.").

⁵⁸ DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL, *supra* note 12, at 129-34 (listing over fifty regulations that govern the BRAC closure and environmental cleanup process).

⁵⁹ INTERSTATE TECH. & REGULATORY COUNCIL, PROPERTY REVITALIZATION— LESSONS LEARNED FROM BRAC AND BROWNFIELDS iii (2006) [hereinafter ITRC LESSONS LEARNED], available at http://www.itrcweb.org/Documents/Brnflld_2web.pdf.

⁶⁰ Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988).

⁶¹ National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (codified as amended at 10 U.S.C. § 2687 (2000)).

⁶² ITRC LESSONS LEARNED, *supra* note 59, at 2.

⁶³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-785, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS 30 (2005) [hereinafter GAO, 2005 SELECTION PROCESS] ("The BRAC recommendations, for the most part, resulted from a data-intensive process . . . [that] began with a set of sequential steps by assessing capacity and military value, developing and analyzing scenarios, then identifying candidate recommendations, which led to [final recommendations].").

⁶⁴ See ITRC LESSONS LEARNED, *supra* note 59, at 3.

⁶⁵ See *id.*

⁶⁶ *Id.*; see also Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified as amended in 42 U.S.C. § 11301 et seq. (2000)).

property, a Local Redevelopment Authority (“LRA”)⁶⁷ must develop a reuse plan for the site.⁶⁸

After the LRA has completed its reuse plan, the DOD can commence the transfer process.⁶⁹ The DOD can transfer BRAC property in several different ways: public conveyance, economic development conveyance, conservation conveyance, public or negotiated sale, lease, or early transfer, and privatization.⁷⁰ The DOD cannot transfer property until it, the LRA, or a private contractor addresses the environmental contamination, the extent of future liability, and whether the state or federal government has regulatory control.⁷¹ The DOD has made a priority of quickly transferring property to LRAs because doing so speeds economic redevelopment, but it has failed to follow through because of the multitude of problems facing the BRAC closure, cleanup and redevelopment process.

With the problem of overlapping and excessive regulation established, this Note analyzes the interaction of the laws, the agencies, and the elected officials in two case studies of BRAC-closed military bases. After evaluating the successes and failures of these closed bases, this Note crafts a solution based on increased state and local control, which would speed up cleanup, transfer, and, ultimately, economic recovery.

II. CASE STUDIES: DO SUCCESS STORIES HAVE ANYTHING IN COMMON?

A. *Fort McClellan, Alabama*

1. Background

Fort McClellan, located in Anniston, Alabama, closed in 1999 as part of the 1995 BRAC Commission (“BRAC IV”) recommendations.⁷²

⁶⁷ ITRC LESSONS LEARNED, *supra* note 59, at 3. (“The Local Reuse or Redevelopment Authority is an entity, usually convened by the local government, consisting of business interests and/or local citizens who are concerned about the reuse of the BRAC installation. The LRA is responsible for planning the installation’s reuse.”).

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 4-5.

⁷¹ *Id.* at 6-7.

⁷² Samantha L. Quigley, *BRAC: McClellan Loses ‘Fort,’ Gains 18,000-acre Community*, DEFENSELINKNEWS, Aug. 23, 2005, http://www.defenselink.mil/news/Aug2005/20050823_2513.html.

Fort McClellan's closure eliminated over 2,000 civilian jobs and left almost 20,000 acres of land to the State of Alabama.⁷³ Fort McClellan housed the U.S. Army Chemical School and was the sole site for Chemical Defense Training.⁷⁴ The site is not listed as a Superfund site, but the Commission noted that the environmental damage would leave the community with very little land to reuse.⁷⁵ The economic impact of closing Fort McClellan was the largest of any of the proposed closures during the 1995 round.⁷⁶

2. Environmental Costs of Closure and Effect on BRAC Status

The base's environmental status was so serious that it was a factor in the 1991 BRAC Commission's decision to reject the DOD's recommendation for closure.⁷⁷ The Commission thought the waste management and environmental compliance costs were too high, but surprisingly, the cost of environmental restoration was not prohibitive.⁷⁸

The DOD tapped the base for closure again in 1993.⁷⁹ During the 1993 round, the DOD based its recommendation again on the size of the facility and the financial savings.⁸⁰ Again, the Commission did not accept the DOD's recommendation, but instead decided to keep the fort open.⁸¹

⁷³ GAO, OBSERVATIONS ON PRIOR BRAC ROUNDS, *supra* note 11, at 26, 31.

⁷⁴ 1995 BRAC REPORT, *supra* note 9, at 1-1.

⁷⁵ *Id.* at 1-2.

⁷⁶ *Id.*

⁷⁷ 1991 BRAC REPORT, *supra* note 7, at 5-9.

⁷⁸ *See id.*; GAO, 2005 SELECTION PROCESS, *supra* note 63, at 14, 20 n.24. Environmental restoration costs are not part of the BRAC formula so the high environmental closure cost must come from the immediate need to clean up waste or hazards. The Army, during the first few BRAC rounds, did use environmental compliance costs as a reason to keep bases operational despite the fact it should not consider those costs. U.S. GEN. ACCOUNTING OFFICE, GAO/T-NSIAD-95-107, MILITARY BASES: CHALLENGES IN IDENTIFYING AND IMPLEMENTING CLOSURE RECOMMENDATIONS 4 (1995) [hereinafter GAO, CHALLENGES IN IDENTIFYING AND IMPLEMENTING].

⁷⁹ 1993 BRAC REPORT, *supra* note 8, at 1-1.

⁸⁰ *Id.* at 1-1 (noting that "Fort McClellan has the least amount of facilities and smallest population" of the Army's entry or school facilities).

⁸¹ *Id.* at 1-3. In the 1993 Report the Commission did not mention that environmental costs factored into their decision at all. The decision was based more on military preparedness. However, the Commission alluded to the environmental problems waiting on the base when it did close. The Commission recommended that if the Army was to move the Chemical School and Training Facility, it should pursue the required environmental permits and certification for the new location before the next round of BRAC closures. *Id.*

Unfortunately for Fort McClellan, the third time was not the charm. The base was pegged again for closure during the 1995 BRAC process.⁸² The DOD offered the same justifications and planned to reorganize the chemical facilities on the base.⁸³ During the hearing process, the local community cited the DOD's failure to obtain environmental permits for the new location and the extra \$120 million in costs, including over \$50 million in environmental costs, the military would incur in preparing for demilitarization.⁸⁴ The community also acknowledged that the environmental contamination was so widespread that the community could reuse very little of the land.⁸⁵ Because the environmental permits of the new site were not yet available, the Commission decided the fort would stay operational until the replacement was ready, but would close Fort McClellan at that time.⁸⁶ The Commission gave a portion of Fort McClellan's chemical

⁸² 1995 BRAC REPORT, *supra* note 9, at 1-2.

⁸³ *See id.* at 1-2; 1993 BRAC REPORT, *supra* note 8, at 1-1 to 1-3. Both DOD justification sections provide similar reasons.

⁸⁴ 1995 BRAC REPORT, *supra* note 9, at 1-2. Economic impact and threat to national security were two other defenses that proponents of Fort McClellan used when lobbying the BRAC Commission. Press Release, Congressional Press Releases, Browder Sees California Intervention as Politics Over Security, Says Closing Alabama's Fort McClellan Affects National Security and Economy (July 7, 1995).

⁸⁵ 1995 BRAC REPORT, *supra* note 9, at 1-2. The people of Anniston County, where Fort McClellan is located, were very worried about the chemical and environmental impact of the Army's activities on Fort McClellan. The local residents allowed the Army to build an incinerator that would burn old and unused chemical weapons, which included over five million pounds of sarin nerve gas and other poisons. They voted to approve the incinerator in spite of their concern over its uses because they believed that the incinerator's presence would ensure that the fort remained open. Rick Bragg, *From Trust in the Army to a Sense of Betrayal*, N.Y. TIMES, Apr. 9, 1995, (outlining the fear the community had over the contamination of the land and the community's sense of betrayal). When the incinerator was set to open in 2003, the community's fears were revisited and the Chemical Weapons Working Group and others filed for an injunction to prevent the burning of poisons. *See Families Concerned About Nerve Gas Incineration v. U.S. Dep't of the Army*, 380 F. Supp. 2d 1233 (N.D. Ala. 2005); *Chem. Weapons Working Group v. United States*, No. 03-0645, 2003 U.S. Dist. LEXIS 13795 (D.D.C. Aug. 8, 2003); *Families Concerned About Nerve Gas Incineration v. U.S. Dep't of the Army*, No. CV-02-BE-2822-E, 2003 U.S. Dist. LEXIS 26683 (N.D. Ala. July 8, 2003); *see also Military Incinerator Unnerves Town: Stockpile of Decades-old Chemical Weapons to be Burned at Alabama Site*, SEATTLE TIMES, Aug. 6, 2003, at A4.

⁸⁶ 1995 BRAC REPORT, *supra* note 9, at 1-2; *see also* Tom Uhlenbrock, *Toxic Gas at Fort Leonard Wood Makes Its Neighbors Happy, Environmentalists Nervous*, ST. LOUIS POST-DISPATCH, Mar. 7, 1999, at A10 (noting that the community which was receiving the bulk of Fort McClellan's chemical training activities was accepting it easily).

training area to the Department of Justice, which currently uses it as grounds for chemical and biological anti-terrorism training.⁸⁷

3. The Redevelopment Process: Early Transfer and Private Cleanup

Fort McClellan lowered its flag for the last time on September 30, 1999,⁸⁸ at which time the federal government transferred a portion of the land to the Anniston-Calhoun County Fort McClellan Development Joint Powers Authority ("JPA").⁸⁹ The redevelopment of the fort was voted the most important local news story of the year.⁹⁰

The Army found a private contractor, Foster Wheeler Corporation, to handle the cleanup and environmental restoration of the unexploded ordnance located on portions of the fort.⁹¹ However, state environmental

⁸⁷ Congressional Press Releases, Sen. Shelby Instrumental in Committee Approval of Funding for Terrorism Training Facility at Fort McClellan Facility Will Create Approximately 1000 New Jobs (July 15, 1997).

⁸⁸ Major Kent D. Davis, *A Logistics Perspective on Closing Fort McClellan*, U.S. ARMY LOGISTICIAN 44, 44 (Mar.-Apr. 2000), available at <http://www.almc.army.mil/alog/issues/MarApr00/MS521.htm>.

⁸⁹ Charles Seabrook, *City Rebounds From Base Closing: As More Shutdowns Near, Anniston, Ala., Holds Lesson for Georgia*, ATLANTA J. CONST., June 27, 2005, at 1A (noting the great success of Fort McClellan's transformation to the town of McClellan, but that the JPA still retains title to 12,000 acres of land, more than half of what the military transferred, because of ongoing environmental cleanup efforts).

⁹⁰ Geni Certain, *Fort Redevelopment Tops 2000 News Coverage*, ANNISTON STAR, Dec. 31, 2000, available at <http://www.annistonstar.com/news/2000/as-localnews-1231-gcertain-um315779.htm>. Not only was the fort's redevelopment voted the top local news story, but it beat out news that a Superfund site was being opened nearby as well as news of the coaching change and signing of a top recruit for the University of Alabama football team. *Id.* If you know anything about Alabama football, you know how big a story that is.

⁹¹ *Foster Wheeler Awarded \$50 Million Contract for Ordnance and Explosive Cleanup*, BUS. WIRE, Nov. 30, 1999 (the contract was for \$50 million over the next five years). The contract price may not be entirely accurate as the cost of restoring ranges with unexploded ordnance is higher than what the military initially estimates. U.S. GEN. ACCOUNTING OFFICE, GAO-01-479, ENVIRONMENTAL LIABILITIES: DOD TRAINING RANGE CLEANUP COST ESTIMATES ARE LIKELY UNDERSTATED 4-5 (2001). The Army also noted that the cleanup of hazardous and toxic materials would be costly and possibly lengthy. U.S. DEP'T OF THE ARMY, FINAL ENVIRONMENTAL IMPACT STATEMENT: DISPOSAL AND REUSE OF FORT MCCLELLAN, ALABAMA 5-92 (1998) [hereinafter FORT MCCLELLAN IMPACT STATEMENT]. From the you-get-what-you-pay-for department, allegations soon surfaced that Foster Wheeler was not destroying the unexploded ordnance but illegally hiding it on site. This allegedly occurred at Fort McClellan and other sites where Foster Wheeler was the contractor. Press Release, Senator Richard C. Shelby, Shelby Calls for Army Secretary's

regulators shut down the cleanup efforts when they determined that Foster Wheeler, now Tetra Tech FW, was hiding and not destroying the unexploded ordnance.⁹² The DOD transferred title of the almost 5,000 acres to the JPA before the cleanup project was finished, marking the first time the DOD had transferred a BRAC-closed military base to local authorities before finalizing the environmental cleanup.⁹³ The JPA and DOD believed this would lead to a speedier cleanup and quicker recovery.⁹⁴ Initially, the military was worried that the fast-track privatization would encounter difficulties because the Alabama Department of Environmental Management was unable to provide a full-time employee to supervise the cleanup effort.⁹⁵ However, the Army and state government were able to speed up part of the transfer process and funded a portion of the transfer of Fort McClellan to Fort Leonard Wood a year earlier than expected.⁹⁶

4. Roadblocks to Redevelopment

The Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (BCCRHA) amended the Defense Base Closure and Realignment Act of 1990 to require a Local Redevelopment Authority (“LRA”) to screen the surplus property.⁹⁷ In preparation for the base closure, Fort McClellan’s community received over \$1.7 million in federal grants to plan and implement the community’s redevelopment plan.⁹⁸

Immediate Attention to UXO Case at Ft. McClellan (Aug. 27, 2004), available at <http://shelby.senate.gov/news/record.cfm?id=225591>.

⁹² Mary Orndorff, *State Shuts Down McClellan Cleanup ADEM: Contractor Not Destroying Old Ordnance*, BIRMINGHAM NEWS, Aug. 3, 2004, at 1C.

⁹³ Darryal Ray, *5,000 Acres at McClellan Transferred*, BIRMINGHAM NEWS, Sept. 15, 2003.

⁹⁴ *Id.*

⁹⁵ U.S. DEP’T OF THE ARMY, BRAC CLEANUP PLAN ABSTRACT: FORT MCCLELLAN (1996), available at <https://www.denix.osd.mil/denix/Public/Policy/BRAC/Nov96/ftmcccln.html>. The state acted quickly and prevented any significant delay in the fast-track process. See U.S. DEP’T OF THE ARMY, BRAC CLEANUP PLAN ABSTRACT: FORT MCCLELLAN (1997), available at <https://www.denix.osd.mil/denix/Public/Policy/BRAC/BCP/Jun97/note52.html> (failing to mention anything about a state employee, or any action that the state needed to take to ensure a seamless progress through the fast-track process).

⁹⁶ U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-99-149, MILITARY BASE CLOSURES: POTENTIAL TO OFFSET FISCAL YEAR 2000 BUDGET REQUEST 7-8 (1999).

⁹⁷ FORT MCCLELLAN IMPACT STATEMENT, *supra* note 91, at 2-17.

⁹⁸ GAO, STATUS OF PRIOR ROUNDS, *supra* note 20, at 83 (noting that the Office of Economic Adjustment (“OEA”) contributed \$1.2 million and the Economic Development Administration (“EDA”) contributed \$510,000 for a total of \$1.71 million in grants).

The redevelopment group (the Fort McClellan Development Commission, or FMDC) did not face many zoning restrictions when creating its development plan.⁹⁹ Much of the slow progress in reuse planning and disposal process is due to changing local and federal laws and environmental cleanup.¹⁰⁰ Though Fort McClellan did not face challenges from zoning laws, it did face other initial problems during its redevelopment.¹⁰¹ Fort McClellan did not have a redevelopment board in place when the BRAC IV Commission made its final recommendation,¹⁰² so officials created a thirteen-member board of citizens to serve as the redevelopment authority.¹⁰³ Elected state, county, and municipal officials took part in the appointment process, but no elected official was permitted to sit on the board.¹⁰⁴ The state legislature created an oversight committee and the governor sent a representative to several meetings,¹⁰⁵ both of which resulted in further debate over control that slowed redevelopment.¹⁰⁶ Additionally, the JPA did not hold open meetings, which created distrust among citizens and led to a lawsuit.¹⁰⁷

⁹⁹ FORT MCCLELLAN IMPACT STATEMENT, *supra* note 91, at 4-3 to 4-4. Fort McClellan was bordered by Calhoun County to the north and east, and the cities of Anniston to the west and southwest, and Oxford to the south. Calhoun County had no zoning restrictions at the time of the redevelopment plan. The adjacent portions of both Anniston and Oxford were zoned residential, but along the western border a small portion of Anniston was zoned commercial. *Id.*

¹⁰⁰ GAO, CHALLENGES IN IDENTIFYING AND IMPLEMENTING, *supra* note 78, at 6-7.

¹⁰¹ Jerry L. Smith, Editorial, *Community Must Cope With Life After Fort McClellan*, BIRMINGHAM NEWS, Oct. 29, 1995, at 7C. Initial problems included an uncertain closure timetable, uncertain environmental cleanup costs and timetable, National Guard acquisition of land, and multiple jurisdictional voices in redevelopment, as the fort is wholly within Calhoun County but impacts many municipalities. *Id.*

¹⁰² Michael Wallace, *Other Cities That Lost Bases Tell Anniston: Get Over It*, BIRMINGHAM NEWS, June 26, 1995, at 6A. After the official 1995 closure determination the only local authority that had any connection with Fort McClellan was the Economic Assistance Authority, a Plan-A organization tasked with lobbying to keep the fort open. However, political leaders could not agree to assign it the responsibility of handling redevelopment so it was disbanded after the official closure decision. Smith, *supra* note 101, at 7C.

¹⁰³ Smith, *supra* note 101, at 7C.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Rose Livingston, *Fort McClellan Authority Rebuilds Lost Momentum*, BIRMINGHAM NEWS, Sept. 20, 1998, at 18A. Local leaders fought over control and only after the leadership was "overhauled" could the authority take on its goals. One party who was interested in relocating to the base site delayed consideration until the leadership problem was fixed. *Id.*

¹⁰⁷ Rose Livingston, *Settlement Reached on Fort Land Deals*, BIRMINGHAM NEWS, Mar. 24, 2001. The State Attorney General had determined that Alabama's Public Meetings Law

After the Commission approves a closure or realignment list, the affected community must “build community support,” “determine how to properly redevelop the property,” bring in outside consultants, and “partner with the Office of Economic Adjustment”(“OEA”).¹⁰⁸ This understates the lengthy process, however, as planning for and implementing redevelopment can extend for years.¹⁰⁹ Fort McClellan’s redevelopment did not move forward until the JPA fully integrated itself with local authorities and opened itself to public scrutiny.¹¹⁰ With Fort McClellan’s process in mind, this Note evaluates the redevelopment process of Fort Monmouth.

B. *Fort Monmouth*

1. Background

Fort Monmouth, New Jersey, is a major military base located near the shore communities of Monmouth County.¹¹¹ The 2005 BRAC Commission (BRAC V) recommended closing the fort and distributing its diverse set of activities to other locations.¹¹² The fort has been a part of every BRAC round, though typically its duties have been increased rather than

did not apply to the Fort McClellan Development Joint Powers Authority, and so the JPA was not required to disclose any offers or contracts connected with the redevelopment of Fort McClellan. 2000 Ala. AG LEXIS 183 (Ala. AG 2000).

¹⁰⁸ TODD HERBERGHS, NAID, AN ASS’N OF DEF. CMTYS., UNDERSTANDING BASE REALIGNMENT: WHAT COMMUNITIES SHOULD KNOW FIRST 10 (2005) [hereinafter HERBERGHS, WHAT COMMUNITIES SHOULD KNOW], available at http://www.defensecommunities.org/Downloads/Base_Realignment.pdf. The OEA can provide grants to help organize and plan the redevelopment process. *Id.*

¹⁰⁹ *Id.* (noting that redevelopment is a slow process because of complicated environmental issues, and slow military transfer among other problems). The report cites as a case study Grissom Air Force Base in Indiana. The base was realigned (not completely closed) and yet it took years for the military to turn the property over to local authorities in part because of environmental contamination. The contamination was limited to fuel spills and underground storage tanks, which is not as drastic as other locations. *Id.* at 13.

¹¹⁰ Livingston, *supra* note 107.

¹¹¹ Kirk Semple, *Pentagon’s Plan Brings Relief and Dismay*, N.Y. TIMES, May, 14, 2005, at A11; Fort Monmouth, NJ, Local Info, <http://www.monmouth.army.mil/C4ISR/local.shtml> (last visited Jan. 10, 2008).

¹¹² 2005 BRAC REPORT, *supra* note 10, at 10-12. Fort Monmouth houses the U.S. Army Military Academy Preparatory School, the Joint Network Management System for Consumable Items, the Electronic Warfare and Electronics Research & Development, and the Enterprise Information Systems. *Id.*

decreased.¹¹³ In 2005, the community did not voice any concerns over the environmental quality of the fort.¹¹⁴

2. Environmental Costs of Closure and Effects on BRAC Status

The Commission did note the type of environmental restoration the military faced before it could disperse the land to the community.¹¹⁵ At the time of the Commission's 2005 report, \$11 million had already been spent on restoration and the remaining costs were expected to be as high as \$100 million.¹¹⁶ The good news for the fort was that the environmental conditions would not hinder reuse, that cleanup work had already started, and that the Army might complete the cleanup in four years.¹¹⁷

¹¹³ See 1988 BRAC REPORT, *supra* note 6, at 68-69 (indicating that Fort Monmouth would relocate duties assigned to Information Systems Command to Fort Devens, Massachusetts); 1991 BRAC REPORT, *supra* note 7, at 5-6, 5-13 (indicating that the 1988 Commission's recommended move would be abandoned, but that the Electronic Technology Device Laboratory would move to Adelphi Laboratory); 1993 BRAC REPORT, *supra* note 8, at 1-3 to 1-5 (recommending that the U.S. Army Communications Electronic Command (CECOM) be moved onto the base. The Commission also recommended moving elements of the Intelligence Material Management Center (IMMC) to Fort Monmouth from Vint Hill Farms, Virginia); 1995 BRAC REPORT, *supra* note 9, at 1-20 to 1-22, 1-100 (recommending that Fort Monmouth receive the communications and electronics management from Aviation-Troop Command, Missouri, the Military Transportation Management Command (MTMC) from Bayonne Military Ocean Terminal, and the research and development activities from Rome Laboratory).

¹¹⁴ 2005 BRAC REPORT, *supra* note 10, at 11. The community did not raise any environmental concerns during the BRAC process, but it did raise concerns over job loss, economic impact, and the effect on local veterans groups. *Id.* The local community expects to lose over 10,000 jobs because of the closure. *Id.* at O-19. Fort Monmouth was the third largest employer in Monmouth County and thought to be an anchor of an economically growing region. Ann Scott Tyson, *Military Is Consolidating Into Large Installations; Reshuffling of Forces Would Create Big Multi-Service Bases*, WASH. POST, May 14, 2005, at A10. The community raised concerns after the BRAC decision because the Commission recommended that the "movement of organizations, functions, or activities from Fort Monmouth to Aberdeen Proving Ground will be accomplished without disruption of their support to the Global War on Terrorism." 2005 BRAC REPORT, *supra* note 10, at 12; see also Keith Brown, *BRAC Stipulation 'Almost Enhances the Uncertainty'*, ASBURY PARK PRESS, Aug. 25, 2005, at A4 (indicating that locals thought the "without disruption" stipulation meant that they would have no idea when the fort would actually close).

¹¹⁵ 2005 BRAC REPORT, *supra* note 10, at P-2, P-4. The environmental restoration would focus on the eleven operational firing ranges and removing polychlorinated biphenyl spill and hazards within historic buildings. *Id.*

¹¹⁶ *Id.*

¹¹⁷ Todd B. Bates, *Cleanup, Transfer of Property Take Time*, ASBURY PARK PRESS, Aug. 25, 2005, at A4.

3. Local and Federal Government Action

The local community aggressively pursued redevelopment in case the fort ultimately closed.¹¹⁸ Local mayors formed a committee (The Fort Monmouth Reuse Committee), met with OEA, and sought a grant to begin the redevelopment plan—all in advance of the official closure notice.¹¹⁹ Planning in advance typically reduces the time required to redevelop the land, which is already lengthy due to environmental costs and construction.¹²⁰ However, Fort Monmouth's redevelopment time may actually increase because not all interested parties were involved in the committee. Shortly after the closure report, the county government formed its own redevelopment commission (the Fort Monmouth 2010 Commission), and less than a month after the closure decision, one of the mayors (Mayor Tarantolo of Eatontown) moved forward with a redevelopment plan that only benefitted his municipality, to the detriment of his neighbors.¹²¹ He claimed Eatontown could redevelop the land adjacent to the base (Howard Commons) because it was former base housing, sits adjacent to a zoned residential area, and has limited, if any, environmental issues.¹²² The

¹¹⁸ Keith Brown, *Now, to 'Plan B': 3 Mayors Sketch Out Redevelopment Ideas*, ASBURY PARK PRESS, Aug. 25, 2005, at A1. The National Association of Defense Communities recommends starting a "Plan-B" (redevelop planners, instead of "Plan-A" petitioners to keep the base open) before the final decisions are made and they should begin in earnest to see other closed bases, gather information and organize redevelopment plans. YVONNE DAWSON, NAID, AN ASS'N OF DEF. CMTYS., ORGANIZING YOUR PLANNING EFFORT: THE FIRST STEPS IN INSTALLATION REDEVELOPMENT 6-8 (2005), available at http://www.defensecommunities.org/Downloads/Planning_LRA.pdf. While moving forward with Plan-B, the state and local officials continued to pursue Plan-A, even after the Commission announced its findings. See *Corzine v. 2005 Def. Base Closure & Realignment Comm'n*, 388 F. Supp. 2d 446, 450 (D.N.J. 2005) (holding that the Federal Court lacked subject matter jurisdiction over a case requesting judicial oversight of BRAC Commission decisions).

¹¹⁹ Brown, *supra* note 118, at A1.

¹²⁰ Bates, *supra* note 117, at A4 (noting that the environmental cleanup process at Fort Monmouth would be "short" (3-4 years)); Brown, *supra* note 118, at A1 (noting that redevelopment could take up to 31 months from the time of the final decision to shut the fort).

¹²¹ Nina Rizzo, *County Plans Its Own Panel*, ASBURY PARK PRESS, Aug. 26, 2005, at A13; Keith Brown, *Eatontown Eyes Commons Borough Wants to Redevelop Site at Ft. Monmouth*, ASBURY PARK PRESS, Oct. 14, 2005, at B1. Eatontown had commissioned a \$50,000 study of the area in 2003. *Id.*

¹²² See CITY & REG'L PLANNING STUDIO, UNIV. OF PA. GRADUATE SCH. OF DESIGN, FORT MONMOUTH REUSE: RECONNAISSANCE REPORT AND CONCEPT PLAN 56 (2006) [hereinafter CRPS, FORT MONMOUTH REUSE], available at <http://www.boroughofeatontown.com/fmrc/2006FMReuseConceptPlan.pdf>. Howard Commons is contained within the Charles Wood Area, which has several buildings that can be reused, has had many buildings already demolished, and has only one landfill site. See *id.*

redevelopment of Fort Monmouth will require maintaining open spaces and protecting ecosystems.¹²³

4. Roadblocks to Redevelopment

The municipal leaders clashed with state officials over who should control the redevelopment process.¹²⁴ In January 2006, the state quickly responded with a bill that created the Fort Monmouth Redevelopment Authority ("Authority").¹²⁵ The Fort Monmouth Economic Revitalization Planning Authority Act ("FMERPA") asserted state legislative control over the redevelopment process.¹²⁶ The legislature acted to ensure that the redevelopment process benefitted the entire State.¹²⁷ The Act established a committee that was organized so that local, county, and state governments and citizens all had a voice in the process.¹²⁸ Most Authority actions

¹²³ [T]he ecology, hydrology, and coastal location of Fort Monmouth render the site environmentally sensitive and highly vulnerable to extreme weather and foreseen changes in climate. The buried traces of pollution, contained and invisible, yet dangerous if disturbed, also jeopardize the installation's existing environmental conditions. . . . [F]uture development must respect the land's capacity to absorb increased storm, surface and ground water burdens caused by additional impervious surfaces and below-grade building foundations.

Id. at 50.

¹²⁴ Keith Brown, *Fort's Closing May Spark Governmental Tug of War*, ASBURY PARK PRESS, Nov. 15, 2005, at A1. At a conference entitled *Fort Monmouth: Past, Present and in the Future*, state and local officials disagreed over control. The local leaders insisted that the redevelopment project "is not too big of a job," while state officials argued that the project "is bigger than the municipalities" and that the state wants to avoid "serious mistakes." *Id.* (quoting Brendan Tobin, Fort Monmouth Reuse Committee member (the local mayoral committee), and State Senator Joseph M. Kyrillos Jr. respectively).

¹²⁵ S. 1049, 212th Legis. (N.J. 2006) (enacted).

¹²⁶ N.J. STAT. ANN. § 52:271 (West 2007).

¹²⁷ *Id.* § 52:271-2.

¹²⁸ The authority shall consist of ten members to be appointed and qualified as follows:

- (1) Four [public] members appointed by the Governor . . . ;
- (2) The . . . Secretary of . . . New Jersey Commerce . . . ;
- (3) One member, who shall be a resident of Monmouth County, to be appointed by the Monmouth County Board of Chosen Freeholders . . . ;
- (4) The mayors of Eatontown, Oceanport, and Tinton Falls, ex officio and voting; and
- (5) A representative of Fort Monmouth, to be appointed by the Secretary of the United States Department of Defense, who shall be a non-voting member.

Id. § 52:271-6.

require a six-vote majority, which operates to deprive the local mayor bloc of any veto power over redevelopment decisions.¹²⁹ This counters the previously proposed redevelopment authority that would increase the mayors' power over decisions.¹³⁰ Further ensuring the neutrality of the Authority, no member may have a direct or indirect interest in the redevelopment contracts.¹³¹

C. *Analysis of Case Studies*

Fort McClellan's redevelopment is a success story for the BRAC Commission.¹³² The Fort McClellan JPA achieved its success in spite of its rural location, previous reliance on the military for jobs and economic growth,¹³³ local jurisdictional infighting,¹³⁴ and lengthy environmental cleanup.¹³⁵ Fort Monmouth faces redevelopment of a base with similar problems.¹³⁶ Yet the bases responded differently when forming their local reuse authorities.¹³⁷ However, the different types of redevelopment authorities will not lead to a variation in success. Both redevelopment authorities

¹²⁹ See *id.* § 52:27I-7. At the first meeting of the FMERPA, Dr. Robert Lucky was elected Chairperson. Dr. Lucky is a public member, which means he is a governor-appointee. The only other member nominated was Mayor Tarantolo, who received three votes: himself, and his fellow mayors. John G. Donnelly, Fort Monmouth Economic Revitalization Planning Authority, Meeting Minutes from July 14, 2006, at 2 (2006), available at <http://nj.gov/fmerpa/meetings/20060714.pdf>.

¹³⁰ Brian Lee, *Forward March for Fort Reuse Panel*, ASBURY PARK PRESS, Mar. 14, 2006, at 1A ("The mayors had proposed a seven-member authority to include themselves, a member of the [county] freeholder board, two gubernatorial appointments and an unnamed member of the governor's Cabinet."). Dr. Lucky was New Jersey Governor Corzine's choice for chairman. Keith Brown, *Fort Monmouth Redevelopment Panel Picks Leader*, ASBURY PARK PRESS, July 15, 2006, at 1B.

¹³¹ N.J. STAT. ANN. § 52:27I-6(f).

¹³² See Renee Gamela, *Could Its Success Happen Here?*, OBSERVER-DISPATCH, Dec. 11, 2005, at 1A.

¹³³ See 1995 BRAC REPORT, *supra* note 9, at 1-2.

¹³⁴ See Smith, *supra* note 101, at 7C.

¹³⁵ *Id.*

¹³⁶ See 2005 BRAC REPORT, *supra* note 10, at O-19, P-2 (detailing the economic loss due to closing Fort Monmouth and the cost of environmental restoration); CRPS, FORT MONMOUTH REUSE, *supra* note 122, at 2 (Fort Monmouth lies within three separate jurisdictions); N.J. STAT. ANN. § 52:27I (dividing power and control of the Fort Monmouth Redevelopment Authority).

¹³⁷ Compare Smith, *supra* note 101, at 7C (forming Fort McClellan's JPA, which does not permit elected officials to serve, and allowing the JPA to have closed door meetings), with N.J. STAT. ANN. § 52:27I-6 (West 2007) (vesting minority power in local elected officials but allowing the governor to select a majority of members with very open proceedings).

signal a preference for strong local involvement in the process and recognize the need to stimulate redevelopment with a quicker transition period.

As both planning commissions recognized, a redevelopment plan that allows each local municipality to redevelop their respective adjacent base property would be ineffective and economically unsound.¹³⁸ At bases with several surrounding municipalities, a state-run planning authority has been the most common and successful response.¹³⁹ Bases like Fort Monmouth, with several surrounding jurisdictions,¹⁴⁰ have more factors to consider than a single-jurisdiction base—water rights, environmental concerns, different zoning laws, transportation systems, and multiple land conveyances.¹⁴¹ New Jersey Governor Corzine attempted to account for these regional and state-wide concerns when making his appointments to the FMERPA.¹⁴²

Successful redevelopment depends on varying factors.¹⁴³ Leadership and teamwork among officials at all levels of government avoids problems with environmental cleanup.¹⁴⁴ Further, the key component of all base

¹³⁸ CRPS, FORT MONMOUTH REUSE, *supra* note 122, at 59 (noting that a redevelopment plan with power vested in local self-interested municipalities would a) not have the power necessary to guide redevelopment for the benefit of the region, and b) result in long-term damage to the political and environmental climates). In an attempt to remove the self-interest from the redevelopment, FMERPA forbids its members from having an interest in the redevelopment outside their membership in the Authority. See N.J. STAT. ANN. § 52:271-6(f).

¹³⁹ See BERNARD J. FRIEDEN & CHRISTIE I. BAXTER, FROM BARRACKS TO BUSINESS: THE M.I.T. REPORT ON BASE REDEVELOPMENT 25 (2000) [hereinafter FRIEDEN & BAXTER, M.I.T. REPORT], available at http://www.eda.gov/ImageCache/EDAPublic/documents/pdfdocs/1g3_5f14_5fbarracks_5fbusiness_2epdf/v1/1g3_5f14_5fbarracks_5fbusiness.pdf. In cases where a base closure affected several local communities, the state stepped in and created a planning board, but when a base closure legitimately affects only one municipality, that municipality can create a redevelopment authority and be successful. *Id.* (using the redevelopment of NAS Alameda, which was contained within the city of Alameda, itself an island, as an example).

¹⁴⁰ CRPS, FORT MONMOUTH REUSE, *supra* note 122, at 2 (noting Fort Monmouth lies within three boroughs).

¹⁴¹ FRIEDEN & BAXTER, M.I.T. REPORT, *supra* note 139, at 25.

¹⁴² See Keith Brown, *Four Monmouth County Residents Approved for Fort Redevelopment Panel*, ASBURY PARK PRESS, July 1, 2006, at 3A. Appointed were an environmentalist, a real estate agent, a technology guru, and a labor representative. *Id.*

¹⁴³ See U.S. GEN. ACCOUNTING OFFICE, GAO-01-1054T, MILITARY BASE CLOSURES: OVERVIEW OF ECONOMIC RECOVERY, PROPERTY TRANSFER, AND ENVIRONMENTAL CLEANUP 5 (1999) [hereinafter GAO, OVERVIEW OF ECONOMIC RECOVERY]. The GAO-identified factors that affect the economic recovery of base realignments are strong national economy, diversified local economy, regional economic trends, natural and labor resources, leadership and teamwork, public confidence, government assistance, and reuse of base property.

¹⁴⁴ *Id.* at 6.

reuse is the base redevelopment and its ability to generate economic activity in the local community.¹⁴⁵ Increasing economic activity while redeveloping a site during prolonged environmental cleanup is extremely difficult for any agency, whether local or federal.¹⁴⁶ As cleanup continues, the cost continues to rise.¹⁴⁷

Additionally, federal, state and local property and environmental laws impact the base closure and realignment process.¹⁴⁸ The process involves collaboration from many different parties to fulfill many different obligations.¹⁴⁹ For example, the DOD must undertake several duties under various environmental statutes as well as determine any jurisdictional issues between the state and local governments.¹⁵⁰ Local duties require creating a redevelopment authority, a redevelopment plan (which accounts for the environmental status of the base), and communicating the process to the public.¹⁵¹

The DOD recognizes the importance of transferring title of the closed base to the local community,¹⁵² but it rarely does so.¹⁵³ The

¹⁴⁵ *Id.* As discussed above, this paper has established how the state government, not the local municipalities, will control the redevelopment process at Fort Monmouth. *See supra* notes 125-31 and accompanying text.

¹⁴⁶ *See* GAO, OVERVIEW OF ECONOMIC RECOVERY, *supra* note 143, at 14. Transfer of property to local communities before complete environmental cleanup is a powerful tool, but cleanup must continue before the land can be used. DOD estimates that some sites will require cleanup and monitoring well after 2015. *Id.*

¹⁴⁷ *See id.* at 15 (estimating DOD's costs for environmental cleanup increased \$1 billion between 1999 and 2001).

¹⁴⁸ DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL, *supra* note 12, at 26, 129-34.

¹⁴⁹ Key players in the base closure and redevelopment process include representatives from the Military Department, the Base Transition Coordinator, the OEA, the LRA, local and state governments, and other federal, state and local organizations. *Id.* at 26-27.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* The LRA must prepare a base redevelopment plan, which accounts for the environmental status of the base, before the military undertakes its environmental cleanup report. *Id.* at 33, 103.

¹⁵² The Department of Defense has established four key environmental objectives when closing or realigning installations: [1)] Ensure protection of human health and the environment on BRAC properties. [2)] *Expediently transfer BRAC property to new owners.* [3)] Maximize the utility of BRAC property by making wise public policy and business decisions regarding environmental actions. [4)] Maximize the use of all available tools to expedite response actions and redevelopment, including integration of early transfer authorities and privatization of response actions with redevelopment.

Id. at 97 (emphasis added). The DOD has met the first three provisions successfully but has not been successful with the fourth. GAO, STATUS OF PRIOR ROUNDS, *supra* note 20, at 55.

¹⁵³ GAO, STATUS OF PRIOR ROUNDS, *supra* note 20, at 78-79 ("The most consistent major

government can attempt to engage in fast-track cleanup, but fast-track cleanup requires coordinated interaction between the DOD, EPA, and state environmental agencies that can interfere with property transfer.¹⁵⁴ However, the DOD can avoid this delay by leasing the property to users before conveying it.¹⁵⁵ Local and state authorities have the greatest incentive to ensure successful environmental cleanup and redevelopment.¹⁵⁶ Local, state and federal authorities must look to other contamination and cleanup examples to find ways to expedite and effectively ensure cleanup and successful redevelopment.

III. IMPLEMENTING LOCAL CONTROL OF ENVIRONMENTAL CLEANUP AND REDEVELOPMENT THROUGH THE SPENDING CLAUSE: THE BROWNFIELD EXAMPLE

A. *Background on the Brownfield Redevelopment Problem*

States must not only redevelop closing military bases, but also a whole host of other dangerous, contaminated sites. One such type of site is a "brownfield."¹⁵⁷ Congress recently passed legislation¹⁵⁸ that attempts to

concern cited by officials . . . was that the transfer of property to the reuse authority was slow. . . . DOD officials . . . do not seem to understand that delaying property conveyance is bad for business.").

¹⁵⁴ See ENVTL. CLEANUP OFFICE, U.S. DEPT OF DEF., FAST-TRACK CLEANUP: SUCCESSES AND CHALLENGES 1993-1995 (1996), available at <https://www.denix.osd.mil/denix/Public/Library/Cleanup/CleanupOfc/Documents/BRAC/fast.html>.

¹⁵⁵ GAO, STATUS OF PRIOR ROUNDS, *supra* note 20, at 29.

¹⁵⁶ See ENVTL. CLEANUP OFFICE, *supra* note 154.

¹⁵⁷ Scholars, government, agencies and industry all disagree on the definition of brownfield. See NAT'L ENVTL. POLICY INST., HOW CLEAN IS CLEAN?: WHITE PAPER ON BROWNFIELDS 38 (1995) (declaring "[t]here is no commonly accepted definition of brownfields"); OFFICE OF TECH. ASSESSMENT, STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES 3 (1995) [hereinafter OTA, STATE OF THE STATES] (stating "[b]rownfields have nearly as many definitions as there are interested parties"). For the limited purposes of this Note, the definition of a brownfield is an "abandoned, idled or underused industrial and commercial facilit[y] where expansion or redevelopment is complicated by real or perceived environmental contamination." OTA, STATE OF THE STATES, *supra* at 3 (citing Timothy Fields, Jr., Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Federal Agency Brownfields Initiatives, Presentation at the Environmental Law Institute (Mar. 28, 1995)).

¹⁵⁸ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified at 42 U.S.C. §§ 9601-9675 (Supp. I 2003)).

facilitate brownfield redevelopment by “address[ing] the environmental, economic and environmental justice concerns associated with brownfields.”¹⁵⁹ Problems with brownfield redevelopment include multi-jurisdictional liability,¹⁶⁰ a broad regulatory scheme that scares away redevelopment,¹⁶¹ and local communities suffering economically from slow or non-existent redevelopment.¹⁶² Surprisingly, the problems with brownfield redevelopment exist despite the many success stories.¹⁶³

Brownfields and BRAC-closed bases face similar issues. Both BRAC-closed bases and brownfield sites “share the same goal of cleaning up sites so that they are safe for . . . the environment.”¹⁶⁴ Additionally, brownfields and BRAC-closed bases share the problems of (1) site cleanup, (2) revitalization, and (3) multijurisdictional oversight.¹⁶⁵ BRAC-closed bases and brownfields have striking similarities in the context of environmental liability and regulation.¹⁶⁶ This Note illustrates the similarities between the two cleanup scenarios and highlights the brownfield successes, ultimately concluding that what has worked for brownfields may work for BRAC-closed bases.

B. *Brownfield Redevelopment Positives and Negatives*

Brownfield sites have many qualities that are attractive to developers.¹⁶⁷ Brownfield redevelopment can use the existing water and sewer

¹⁵⁹ Flannary P. Collins, Note, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL'Y F. 303, 305 (2003).

¹⁶⁰ See *Burlington N. R.R. Co. v. Time Oil Co.*, 738 F. Supp. 1339, 1343 (W.D. Wash. 1990).

¹⁶¹ Thomas A. Newlon, *Will Changes Speed Brownfield Cleanups?*, SEATTLE DAILY J. OF COM., Aug. 21, 1997, at 1.

¹⁶² See U.S. Environmental Protection Agency, Brownfields Cleanup and Redevelopment: Brownfields Tax Incentive, <http://www.epa.gov/swerosps/bf/bftaxinc.htm> (last visited Jan. 10, 2008). The goal of the incentive is to create tax incentives that will stimulate investment and ultimately earn high tax revenues after redevelopment. *Id.*

¹⁶³ See generally U.S. Environmental Protection Agency, Brownfields Success Stories, <http://www.epa.gov/brownfields/success.htm> (last visited Jan 10, 2008) (“These accomplishments include transforming brownfields into thriving new centers of commerce and industry; creating jobs through cleanup and reuse; formatting innovative partnerships among federal, state, and local governments and private-sector stakeholders . . . [B]rownfields restoration has positively impacted local economies and the quality of life for neighboring communities.”).

¹⁶⁴ ITRC LESSONS LEARNED, *supra* note 59, at iii.

¹⁶⁵ *Id.* at iv.

¹⁶⁶ See *id.* at 64-68 (charting the similarities between the two types of sites).

¹⁶⁷ See William Tucker, *Industry Goes Where the Grass is Greener: Superfund Sparks Flight to Suburban Locations*, WASH. TIMES, Nov. 30, 1993, at A9 (noting one case in which an

systems.¹⁶⁸ Additionally, brownfield sites often have many potential benefits that would contribute to economic development.¹⁶⁹ Redevelopers can use the existing infrastructure.¹⁷⁰ However, redevelopers face liability under environmental laws such as CERCLA and its state counterparts.¹⁷¹ Many scholars believe that environmental liability is the most serious barrier to redevelopment.¹⁷²

C. *Dealing with the Environmental Liability Problem*

Redevelopers' liability under state environmental laws share some common principles, but often vary greatly.¹⁷³ Most states prohibit voluntary cleanups on the most seriously contaminated sites.¹⁷⁴ In an effort to hasten cleanup and redevelopment, states are developing two types of standards: (1) generic and (2) site-specific.¹⁷⁵ The second standard, site-specific, incorporates the future use of the site into the cleanup plan.¹⁷⁶

urban and suburban site were competing for development and the urban site was "perfect" except that the environmental costs were too high to justify the investment).

¹⁶⁸ See Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 301 (1995).

¹⁶⁹ Eisen, *supra* note 28, at 897-98.

¹⁷⁰ *Urban Land Reclamation: Hearing Before the Subcomm. on Technology, Environment, and Aviation of the H. Comm. on Science, Space, and Technology*, 103d Cong. 25 (June 9, 1994) (testimony of Charles Bartsch, Senior Policy Analyst, Northeast-Midwest Institute).

¹⁷¹ Eisen, *supra* note 28, at 898-959 & n.67.

¹⁷² See Solo, *supra* note 168, at 285; GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM 617 (1995) (stating that "[i]n cities such as Newark, New Jersey, [environmental liability has] had the effect of insuring that old industrial properties could not be converted into new uses").

¹⁷³ Eisen, *supra* note 28, at 920 & n.179.

¹⁷⁴ *Id.* at 923-25 & nn.192-93.

¹⁷⁵ The two types are described as:

(1) standardized state-approved *generic statewide cleanup standards*, based on assumptions about exposure to contamination; and (2) *site-specific standards*, requiring a risk assessment to be performed at every site, but often incorporating consideration of the future use of the site (i.e., industrial, commercial, or residential) and allowing some cleanups that result in a public health risk higher than that currently allowed under CERCLA.

Id. at 937 (footnotes omitted).

¹⁷⁶ OTA, STATE OF THE STATES, *supra* note 157, at 15-16; Mark D. Anderson, *The State Voluntary Cleanup Program Alternative*, 10 NAT. RESOURCES & ENV'T 22, 23-24 (describing three state approaches); Clement Dinsmore, *Recycling Brownfields: The Legislative Climate*, 2 J. URB. TECH. 9, 11. See Eisen, *supra* note 28, at 938-40, for a table of state cleanup standards.

A site-specific standard benefits sites originally deemed too expensive to cleanup and unique sites that have features absent from the average contaminated site.¹⁷⁷ Just as state planning for redevelopment varies, so too does the level of state oversight.¹⁷⁸ Industry and developers affect state oversight because they exert financial pressure on state regulators.¹⁷⁹ State regulators without much public representation face the most stinging criticism.¹⁸⁰ Expanding public representation of the affected communities is critical to redevelopment efforts.¹⁸¹ States must pass legislation governing cleanups to combat problems in state brownfield redevelopment efforts.¹⁸²

The main problems are little public input, the danger of industry capturing state regulators and the lack of incentives that industry has to clean up sites.¹⁸³ To solve these problems, scholars have suggested improving community input, amending state statutory schemes, and establishing legitimate state decision-making bodies.¹⁸⁴ While the solution is a local one, it requires federal interaction to effect it.

D. *Federal Government Involvement and Interaction with the States*

In the 1990s the federal government started to promote state cleanups of brownfield sites.¹⁸⁵ The federal government should involve

¹⁷⁷ See Cliff Tuttle, *The New Hot Properties: Old Industrial Sites: New 'Brownfield' Laws Should Entice Developers, Lenders*, PA. L. WKLY., Oct. 30, 1995, at 13 (concluding that Pennsylvania's site-specific standard "offers the greatest opportunity to renew properties previously considered too expensive for voluntary remediation").

¹⁷⁸ Eisen, *supra* note 28, at 965-70 (chronicling the three categories or levels of state oversight, which include: (1) active state oversight, (2) state-delegated oversight to certified professionals, and (3) state involvement only in the final review of the property to ensure that cleanup is complete).

¹⁷⁹ William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 113 (1995).

¹⁸⁰ See Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 277 (1994).

¹⁸¹ See Anne L. Kelly, *Reinvention in the Name of Environmental Justice: A View from State Government*, 14 VA. ENVTL. L.J. 769, 782 (1995) (stating that "[p]articipation at this [state] level is central to the environmental justice movement and cannot be compromised in such redevelopment efforts.").

¹⁸² Eisen, *supra* note 28, at 1031.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1031-32.

¹⁸⁵ *Id.* at 986-91 (stating that the federal government acted to promote state cleanups by: (1) removing "[l]iability for [s]ites [r]emediated in [a]pproved [s]tate [p]rograms," and; (2) clarifying "the [i]nnocent [l]andowner [d]efense").

itself in the process to improve the efficiency of cleanups¹⁸⁶ and ensure state programs produce clean lands.¹⁸⁷ One solution that would promote state oversight would be for the federal government to permit the states to release developers from future liability, provided the EPA approves the state regulatory program.¹⁸⁸ Federal promotion of state-regulated cleanup efforts allows the local governments to monitor cleanup, and it is the local governments who are best suited to do so.¹⁸⁹ Plus, long-term success is ultimately tied to local government oversight.¹⁹⁰

Local government oversight produces successful environmental cleanup for several reasons.¹⁹¹ Local governments are: (1) in a better position to respond to local conditions; (2) in a better position to make sense of the data; (3) in the best position to initiate, implement, and ensure land use controls that the site-specific environmental problems will require; and (4) permitted to take an adaptable (not centralized) approach to problem solving.¹⁹²

Local control of brownfield redevelopment is successful when authorities and developers know the extent of environmental contamination.¹⁹³ As part of the BRAC procedures, the DOD must prepare detailed environmental impact statements (called EBSs and ECPs).¹⁹⁴ The LRAs and DOD already use the EBSs and ECPs to assist in forming the reuse plan because the report contains information on utility lines, detailed maps, and information on environmental contamination.¹⁹⁵ Thus the BRAC procedure already produces documents that would assist a local controlled solution to redevelopment.

The final concern is determining how to encourage the states to implement the type of regulation and controls that will both satisfy national environmental concerns and promote local, efficient cleanup. The DOD, in partnership with the OEA, already provides BRAC-affected communities

¹⁸⁶ See Buzbee, *supra* note 179, at 110-11.

¹⁸⁷ See *id.* at 115.

¹⁸⁸ Eisen, *supra* note 28, at 986-87.

¹⁸⁹ Matthew D. Fortney, Comment, *Devolving Control over Mildly Contaminated Property: The Local Cleanup Program*, 100 NW. U. L. REV. 1863, 1888 (2006).

¹⁹⁰ *Id.* at 1889.

¹⁹¹ *Id.* at 1886-88.

¹⁹² See generally *id.* at 1886-91 (outlining arguments in favor of local control of brownfield redevelopment).

¹⁹³ See *id.* at 1905.

¹⁹⁴ See ITRC LESSONS LEARNED, *supra* note 59, at 6-7.

¹⁹⁵ *Id.*

with advisors and grants to jump-start the redevelopment process.¹⁹⁶ The DOD does this because it previously recognized that communities have unique aspects and no single template will fit all closure situations.¹⁹⁷ A solution that uses local governments to implement redevelopment is best; however, the federal government must ensure it adheres to some level of national standards. A potential solution is to use grants from the federal government to the states for meeting federal standards, which fits nicely into a potential Spending Power delegation paradigm.

IV. CONGRESS'S SPENDING POWER TO DELEGATE AND ITS POTENTIAL FOR USE WITH BRAC CLEANUP

A. *Congress's Spending Power Is Broad and Provides an Avenue to Delegate, Which the Commerce Power Does Not*

Congress may rely on the states to implement the goals of federal policy so long as it is done within specific bounds.¹⁹⁸ Congress may use federal funds to induce state regulation, require federal agencies to preempt state law if the states do not regulate as desired, delegate powers to the states, and direct states to implement federal programs (without state cooperation).¹⁹⁹ For purposes of federal spending, the important power is the federal government's power to direct the disbursement of funds based on state regulatory actions that Congress could impose.²⁰⁰ Congress has the power to regulate the BRAC process and has done so in the past,²⁰¹

¹⁹⁶ See DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL, *supra* note 12, at 33.

¹⁹⁷ *Id.* at 32.

¹⁹⁸ See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1009-11 (1995).

¹⁹⁹ See *New York v. United States*, 505 U.S. 144, 167, 169-77 (1992) (discussing the forms of intergovernmental relations but applying the term "cooperative federalism" only to backup federal regulation (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981))); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1148-78 (1995) (tracing the various cooperative federalism approaches that Congress historically adopted).

²⁰⁰ See *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (holding that federal spending conditions are constitutional if they: (1) are enacted for the general welfare; (2) are unambiguous; (3) are reasonably related to the purpose of the expenditure; and (4) do not violate other constitutional provisions). See generally U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the . . . general Welfare of the United States . . .").

²⁰¹ See 10 U.S.C. § 2687 (2000).

and Congress would have the power to delegate some BRAC responsibility to the states.²⁰²

Congress might have the power to regulate state involvement in the BRAC process under the Commerce Clause,²⁰³ but current Commerce Clause doctrine limits Congress's ability to regulate intrastate activities.²⁰⁴

B. Potential Disadvantages to Spending Clause Delegations That Implicate Environmental Regulations

Despite the breadth and ease of a Spending Clause delegation, a Spending Power approach that would delegate power to the states does have its disadvantages.²⁰⁵ For instance, delegation imposes accountability concerns, insulates the federal government from scrutiny, may result in state officials not following strict federal regulations, and blurs the line of responsibility for particular policy that clouds the public's view of government.²⁰⁶ The final disadvantage is that states and state agencies acting pursuant to federal directives may not produce laws that federal courts can review.²⁰⁷

C. Advantages to a Spending Clause Delegation of Power and State Control of Environmental Cleanup Regulations

The federal government does have practical reasons for delegating some authority to the states. Congress may wish to rely on the existing resources and local expertise of state bureaucracies that already exist.²⁰⁸

²⁰² See *Dole*, 483 U.S. at 207-08. See generally U.S. CONST. art. I, § 8, cl. 1.

²⁰³ U.S. CONST. art. I, § 8, cl. 3.

²⁰⁴ See *United States v. Lopez*, 514 U.S. 549 (1995).

²⁰⁵ Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 209-10 (1997).

²⁰⁶ *Id.*

²⁰⁷ See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986) (upholding Article I court power to adjudicate private rights as counterclaims to public rights adjudication, because the Commission could not enforce its own orders but was required to file an action in an Article III court); *Thomas v. Union Carbide Prods. Co.*, 473 U.S. 568, 583 (1985) (upholding legislation authorizing administrative arbitration of factual disputes without providing for Article III judicial review); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-76 (1982) (plurality opinion of Justice Brennan).

²⁰⁸ See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1196, 1201(1977); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1192-93 (1995); Kirsten Engel, *Reconsidering the National Market in Solid Waste:*

State authorities may be able to coordinate specific policies with other activities such as zoning and planning.²⁰⁹ State agencies may be better situated than federal bureaucrats to assess local conditions and citizen preferences.²¹⁰ Also, a delegation allows for the government that is more accountable to make the important decisions.²¹¹ Some scholars question whether these factors actually benefit local communities.²¹² Despite the scholarly attack, Congress continues to delegate and states continue to succeed in cleaning up.²¹³

D. Supreme Court Precedent Protects State Regulations, Which Are Stricter than Federal Standards

While scholars may attack delegation to the states,²¹⁴ the Supreme Court has upheld federal laws that vest regulatory supremacy to the

Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy, 73 N.C. L. REV. 1481, 1523-24 & nn.174-77 (1995).

Both Hamilton and Madison envisioned federal use of state executives to administer the new federal laws that were to be applied to individuals.' They recognized that the new federal system might engender diseconomies to the extent that federal law enforcement efforts would substantially duplicate or overlap with existing state operations.

Caminker, *supra* note 198, at 1043 (quoting Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1997)).

²⁰⁹ See Dwyer, *supra* note 208, at 1198-1208; cf. Caminker, *supra* note 198, at 1006, 1014-15 (stating for similar reasons that federal directives to states may be more effective and efficient than federal regulation).

²¹⁰ See Dwyer, *supra* note 208, at 1185 & n.10; Percival, *supra* note 199, at 1175; cf. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 341-42 (1994).

²¹¹ Esty, *supra* note 55, at 609-10 (longings for direct democracy and distrust of elite decisionmaking by republican representatives fuel claims for more decentralized decision-making); cf. Ken Kollman et al., *Political Institutions and Sorting in a Tiebout Model*, 87 AM. ECON. REV. 977, 983-85 (1997) (stating that economic models of the benefits of local governmental autonomy depend both on citizen and governmental choices; when a single jurisdiction exists, democratic referenda perform best; as the number of jurisdictions increase, democratic referenda "now yield[] the lowest aggregate utility and proportional representation now performs second best").

²¹² Sarnoff, *supra* note 205, at 214-15.

²¹³ See Esty, *supra* note 55, at 605 (noting the trend in legal scholarship and political action toward decentralization of environmental regulation).

²¹⁴ See Stewart, *supra* note 208, at 1212. See generally William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861 (1996).

states and federal agencies.²¹⁵ The Court, in *Union Electric Co. v. EPA*, preserved the rights of states to exercise stricter regulations.²¹⁶ The Court construed the statute at issue so as to avoid an unconstitutional legislative delegation.²¹⁷ The Court does its best to avoid making the tough delegation calls in many of these cases and leaves many delegation questions unanswered.²¹⁸

Environmental regulation, one of the most far-reaching assertions of federal authority, produces additional ambiguities and questions for the Court.²¹⁹ While constitutional questions that federal environmental regulation raise often center around federalism,²²⁰ a regulation passed under the Spending Clause avoids federalism concerns and challenges.²²¹ A change in the Court's jurisprudence would result in a substantial effect on all federal environmental legislation.²²² However, a change is unlikely because the Court's recent Spending Clause decisions have struck down federal statutes only when the action rose to the level of "coercion" under the *Dole* test.²²³ When determining whether a statute coerces a state,

²¹⁵ See *Union Elec. Co. v. Env'tl. Prot. Agency*, 427 U.S. 246 (1976).

²¹⁶ *Id.* at 264-65.

²¹⁷ See *id.* at 256.

²¹⁸ See generally Sarnoff, *supra* note 205, at 264-70 (chronicling the Court's avoidance of tough delegation calls through various measures).

²¹⁹ Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 379-80 (2005). See generally MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* (1996).

²²⁰ See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1722 (2002).

²²¹ Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 502-04 (2003); see also Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U. L. REV. 843, 857 (2000) ("Given the broad sweep of the spending power as currently construed, the federal government would quite clearly have the ability to evade the direct limits on its Commerce Clause powers."); David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1199 (2004) ("[F]oreclosure of federal regulation of states through Congress's other enumerated powers has made the spending power a much more attractive source of federal authority."); Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 190-91 (2002) (suggesting that the Court "virtually has invited Congress to use its Spending Power to circumvent Tenth Amendment limitations.").

²²² Adler, *supra* note 219, at 435-36.

²²³ *Id.* at 440-47.

courts can look to the amount of money Congress distributes.²²⁴ Environmental legislation that conformed with *Dole* would likely not be coercive and thus upheld. If Congress can require states to update environmental regulations, the BRAC closure process lends itself to that solution because of the current procedural requirements.

E. Spending Clause Success Stories in Environmental Regulation and Why a Spending Clause BRAC Solution Would Succeed Too

1. Concerns Generic to Locally Controlled Environmental Cleanup Do Not Apply in the BRAC Context

Environmental regulation on the state and local level is growing in number and success rate.²²⁵ Whether in waste site cleanup or brownfield redevelopment, states have been proactive while the federal government has not.²²⁶ The concerns that come with a Spending Power delegation and state-run regulations do not apply in the BRAC context. The main concern is that allowing state environmental regulation has the potential for a “race to the bottom” of environmental safeguards.²²⁷ The framework that supports the “race to the bottom” argument has several weaknesses.²²⁸ The “race to the bottom” argument centers around the belief that corporations are attracted to states with less costly environmental regulations.²²⁹

²²⁴ See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

²²⁵ See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 636 (2001) (noting that “states, not the federal government, produced the most innovation in pollution control legislation in the 1990s.”).

²²⁶ *Id.* at 636. For additional examples of state-level experimentation, see generally Alexander Volokh et al., *Race to the Top: The Innovative Face of State Environmental Management* (Reason Pub. Policy Inst., Policy Study No. 239, 1998), available at <http://www.reason.org/ps239.html>.

²²⁷ Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271, 274 (1997); Esty, *supra* note 55, at 597-99 (1996); Stewart, *supra* note 208, at 1212; see Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 69 (1996).

²²⁸ See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233-44 (1992); see also Adler, *supra* note 219, at 467-69.

²²⁹ See generally Wayne B. Gray, *Manufacturing Plant Location: Does State Pollution Regulation Matter?* (Nat’l Bureau of Econ. Research, Working Paper No. 5880, 1997) (determining that states with stricter environmental regulation have fewer new manufacturing plants).

The argument fails in the base redevelopment context because no one wants to redevelop on a contaminated site.²³⁰ If no one will redevelop without appropriate environmental cleanup, states have corporate investment as an incentive to require base cleanup to be as strict as possible.

2. States Have Incentives to Regulate BRAC Cleanup Aggressively

States have other incentives to regulate BRAC cleanup aggressively. States have the incentive to plan the cleanup and redevelopment because state-run plans have had the most successful response.²³¹ State and local governments are more accountable to their constituents and more motivated to see the redevelopment project succeed.²³² States will not be able to avoid general federal environmental regulations despite a federal delegation of power.²³³

3. Current BRAC Procedures Would Easily Accommodate a Spending Clause Delegation of Power to Affect State Regulatory Change

The current BRAC procedures have many details in place that are important to a successful local solution to environmental cleanup. State and local governments already receive federal funds as part of the closure and redevelopment process.²³⁴ The BRAC process already requires detailed

²³⁰ See Todd S. Davis & Kevin D. Margolis, *Defining the Brownfields Problem*, in *BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY* 5 (Todd S. Davis & Kevin D. Margolis eds., 1997); Benjamin Krass, *Combating Urban Sprawl in Massachusetts: Reforming the Zoning Act Through Legal Challenges*, 30 B.C. ENVTL. AFF. L. REV. 605, 617 (2003).

²³¹ In cases where several local communities are affected, the state steps in and creates a planning board, but when a base closure legitimately affects only one municipality, that municipality can create a redevelopment authority and be successful. FRIEDEN & BAXTER, M.I.T. REPORT, *supra* note 139, at 25 (using the redevelopment of NAS Alameda, which was contained within the city of Alameda, itself an island as an example).

²³² See Fortney, *supra* note 189, at 1886-91 (outlining arguments in favor of local control of brownfield redevelopment).

²³³ See Adler, *supra* note 219, at 472-73 (describing state subordination to federal environmental regulation despite a congressional delegation).

²³⁴ DOD, BASE REDEVELOPMENT AND REALIGNMENT AND MANUAL, *supra* note 12, at 33; see also GAO, STATUS OF PRIOR ROUNDS, *supra* note 20, at 83 (noting that Fort McClellan's local authority had received over \$1.7 million in grants to plan its redevelopment process).

environmental reports that aid in local brownfield redevelopment.²³⁵ To encourage quicker, more efficient redevelopment without a depreciation in quality, the federal government should use the Spending Clause to encourage states to enact specific regulations that would control contaminated base cleanup for closed military bases.

CONCLUSION

The ultimate redevelopment success of currently contaminated BRAC sites requires fast, efficient, and effective coordination among federal, state and local officials. The bureaucracy of the BRAC process increases regulatory confusion, cleanup delays and redevelopment problems. Sites that have successfully redeveloped have one major similarity: a strong local redevelopment authority that implemented a locally controlled cleanup plan.

To better reproduce these results in the future, the federal government should consider adapting the BRAC procedures to endorse a locally controlled environmental solution conditioned on meeting strict, but malleable, requirements. The current BRAC process produces tools helpful to a locally controlled redevelopment authority and also provides funding to the redevelopment process. Congress's conditioning of those funds on the enactment of environmental cleanup legislation specific to the BRAC sites would be a proper Spending Power delegation. BRAC-related regulations similar to what occurs in brownfield redevelopment would remove the regulatory gridlock and potential liability that currently surrounds environmental restoration on BRAC sites. By returning power to the local level, the federal government will place communities in the best position to cleanup, move on, and successfully redevelop.

²³⁵ See DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL, *supra* note 12, at 33; FORT MCCLELLAN IMPACT STATEMENT, *supra* note 91, at 5-92 (including an analysis of the potential environmental cleanup as well as the zoning restrictions facing the redevelopment effort, both of which the JPA used in making their redevelopment decisions).