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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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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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).


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Since the first BRAC Commission in 1988 ("BRAC I"), there have been closure rounds in 1991, 1993, 1995, and most recently, in 2005. Cumulatively, base closures have saved the government almost $29 billion. After a base closes, the military must first offer the land to other defense agencies, then to other federal agencies, and finally to state and local governments or a local redevelopment authority.

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

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8 See generally DEF. BASE CLOSURE & REALIGNMENT COMM’N, 1993 REPORT TO THE PRESIDENT (1993) [hereinafter 1993 BRAC REPORT].
10 See DEF. BASE CLOSURE & REALIGNMENT COMM’N, 2005 REPORT TO THE PRESIDENT (2005) [hereinafter 2005 BRAC REPORT].
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 use) plan.

GAO, OBSERVATIONS ON PRIOR BRAC ROUNDS, supra note 11, at 6 n.8.
environmental cleanup effort. The military, federal government, federal regulators, state government, state regulators and local officials must work together to facilitate the cleanup and ultimate base redevelopment. Base redevelopment is a key component in assisting with the economic recovery of local communities. Officials participating in redevelopment planning must integrate environmental cleanup with the land-reuse plan. 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. 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.

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).
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 COOKS\textsuperscript{23} (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.\textsuperscript{24} Currently, two main federal laws govern environmental liability: the Resource Conservation and Recovery Act ("RCRA"), enacted in 1976,\textsuperscript{25} and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), enacted in 1980,\textsuperscript{26} commonly known as the "Superfund."\textsuperscript{27} Following the federal government’s lead, states have enacted their own CERCLA laws that impose varying degrees of liability.\textsuperscript{28}

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

\textsuperscript{23} Christine Ammer, \textit{The American Heritage Dictionary of Idioms} 669-70 (1997) ("Too many cooks spoil the broth.").


\textsuperscript{27} Risch, \textit{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))).

\textsuperscript{28} \textit{See} Joel B. Eisen, \textit{“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).

\textsuperscript{29} \textit{See} Risch, \textit{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. The confusion stems from the lack of specific standards for cleanup, and the question of which law applies. 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. RCRA seeks to "control solid and hazardous wastes from their generation through their disposal. . . . and regulate all wastes that are not covered under another statute." Congress designed RCRA to act prospectively and the statute requires licensure prior to allowing a facility to handle hazardous wastes. 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.

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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).
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." Congress added to the confusion when it strengthened CERCLA in 1986 by allowing state environmental law to govern cleanup actions at federal facilities. While state law can be stricter than federal law, states could not single out federal facilities with excessive or discriminating liability. By permitting the states to be proactive with enforcement, CERCLA was supposed to decrease public concern and confusion over cleanups and to emphasize "permanent cleanups," but Congress ultimately failed. "Due to [Superfund's] new stringent cleanup standards, the cost of cleanup has increased dramatically." The addition of state standards to the cleanup process increase delays and confusion.

41 See Wegman & Bailey, supra note 17, at 885 (noting that the CERCLA amendments would also permit state enforcement actions against the government).
43 See Wegman & Bailey, supra note 17, at 885-86 (noting that Congress returned to the issue after many lawsuits and an administration change).
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,\textsuperscript{46} oversight,\textsuperscript{47} voluntariness,\textsuperscript{48} structure,\textsuperscript{49} and qualifications of hazardous waste.\textsuperscript{50} The tension between state and federal regulations surfaces when states or citizens sue the government in state court to enforce the state laws.\textsuperscript{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.\textsuperscript{52} Several courts of appeals have distinguished Colorado from cases where private citizens bring suit to compel stricter cleanup,\textsuperscript{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.\textsuperscript{54} Greater state regulation allows local governments to be more accountable,\textsuperscript{55} but also puts local officials under greater pressure from businesses and the public.\textsuperscript{56} In the highly politicized and localized BRAC context,\textsuperscript{57} the involvement of state officials can be a double-edged sword.

\textsuperscript{46}See id. at 142-43 (identifying the different coverage and costs of state legislation).
\textsuperscript{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).
\textsuperscript{48}Eisen, supra note 28, at 917-18 ("Some states... have extensive programs tailored to redevelopment... whereas others... have more limited voluntary cleanup statutes.").
\textsuperscript{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.
\textsuperscript{50}Eaton, supra note 45, at 142.
\textsuperscript{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).
\textsuperscript{52}See Colorado, 990 F.2d at 1581.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{55}See Daniel C. Esty, Revitalizing Environmental Federalism, 95 MICH. L. REV. 570, 609-10 (1996).
\textsuperscript{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).
\textsuperscript{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 laws and the integration of federal, state and local officials and regulatory agencies. The Base Closure and Realignment Act of 1988 and the Defense Base Closure and Realignment Act of 1990 provide the foundation for the BRAC process. 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.

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

Once the Commission decides to close a base, the Defense Department ("DOD") must adhere to a complex transfer process. The DOD must determine whether another military branch or another federal agency like Housing and Urban Development could use the site. 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).
62 ITRC LESSONS LEARNED, supra note 59, at 2.
63 U.S. GOVT ACCOUNTABILITY OFFICE, GAO-05-785, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGMENTS 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.
property, a Local Redevelopment Authority ("LRA") must develop a reuse plan for the site. After the LRA has completed its reuse plan, the DOD can commence the transfer process. 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. 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. 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.

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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.

Fort McClellan’s closure eliminated over 2,000 civilian jobs and left almost 20,000 acres of land to the State of Alabama.\textsuperscript{73} Fort McClellan housed the U.S. Army Chemical School and was the sole site for Chemical Defense Training.\textsuperscript{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.\textsuperscript{75} The economic impact of closing Fort McClellan was the largest of any of the proposed closures during the 1995 round.\textsuperscript{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.\textsuperscript{77} The Commission thought the waste management and environmental compliance costs were too high, but surprisingly, the cost of environmental restoration was not prohibitive.\textsuperscript{78}

The DOD tapped the base for closure again in 1993.\textsuperscript{79} During the 1993 round, the DOD based its recommendation again on the size of the facility and the financial savings.\textsuperscript{80} Again, the Commission did not accept the DOD’s recommendation, but instead decided to keep the fort open.\textsuperscript{81}

\textsuperscript{73} GAO, OBSERVATIONS ON PRIOR BRAC ROUNDS, supra note 11, at 26, 31.
\textsuperscript{74} 1995 BRAC REPORT, supra note 9, at 1-1.
\textsuperscript{75} Id. at 1-2.
\textsuperscript{76} Id.
\textsuperscript{77} 1991 BRAC REPORT, supra note 7, at 5-9.
\textsuperscript{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].
\textsuperscript{79} 1993 BRAC REPORT, supra note 8, at 1-1.
\textsuperscript{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).
\textsuperscript{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. The DOD offered the same justifications and planned to reorganize the chemical facilities on the base. 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. The community also acknowledged that the environmental contamination was so widespread that the community could reuse very little of the land. 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. The Commission gave a portion of Fort McClellan’s chemical

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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.  

3. The Redevelopment Process: Early Transfer and Private Cleanup

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

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. However, state environmental

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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).
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. 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. The JPA and DOD believed this would lead to a speedier cleanup and quicker recovery. 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. 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.

4. Roadblocks to Redevelopment

The Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (BCCRHAA) amended the Defense Base Closure and Realignment Act of 1990 to require a Local Redevelopment Authority ("LRA") to screen the surplus property. 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.

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


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

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

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"). This understates the lengthy process, however, as planning for and implementing redevelopment can extend for years. Fort McClellan's redevelopment did not move forward until the JPA fully integrated itself with local authorities and opened itself to public scrutiny. 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. The 2005 BRAC Commission (BRAC V) recommended closing the fort and distributing its diverse set of activities to other locations. The fort has been a part of every BRAC round, though typically its duties have been increased rather than...
decreased. In 2005, the community did not voice any concerns over the environmental quality of the fort.

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. 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. 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.

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.

Local and Federal Government Action

The local community aggressively pursued redevelopment in case the fort ultimately closed. 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. Planning in advance typically reduces the time required to redevelop the land, which is already lengthy due to environmental costs and construction. 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. 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. The
redevelopment of Fort Monmouth will require maintaining open spaces and protecting ecosystems.\textsuperscript{123}

4. Roadblocks to Redevelopment

The municipal leaders clashed with state officials over who should control the redevelopment process.\textsuperscript{124} In January 2006, the state quickly responded with a bill that created the Fort Monmouth Redevelopment Authority ("Authority").\textsuperscript{125} The Fort Monmouth Economic Revitalization Planning Authority ("FMERPA") asserted state legislative control over the redevelopment process.\textsuperscript{126} The legislature acted to ensure that the redevelopment process benefitted the entire State.\textsuperscript{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.\textsuperscript{128} Most Authority actions

\textsuperscript{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.

\textit{Id.} at 50.

\textsuperscript{124} Keith Brown, \textit{Fort's Closing May Spark Governmental Tug of War}, \textit{ASBURY PARK PRESS}, Nov. 15, 2005, at A1. At a conference entitled \textit{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." \textit{Id.} (quoting Brendan Tobin, Fort Monmouth Reuse Committee member (the local mayoral committee), and State Senator Joseph M. Kyrillos Jr. respectively).

\textsuperscript{125} S. 1049, 212th Legis. (N.J. 2006) (enacted).

\textsuperscript{126} N.J. STAT. ANN. § 52:271 (West 2007).

\textsuperscript{127} \textit{Id.} § 52:271-2.

\textsuperscript{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.

\textit{Id.} § 52:271-6.
require a six-vote majority, which operates to deprive the local mayor bloc of any veto power over redevelopment decisions.\textsuperscript{129} This counters the previously proposed redevelopment authority that would increase the mayors' power over decisions.\textsuperscript{130} Further ensuring the neutrality of the Authority, no member may have a direct or indirect interest in the redevelopment contracts.\textsuperscript{131}

C. Analysis of Case Studies

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

\begin{footnotes}
\item[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.
\item[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.
\item[131] N.J. STAT. ANN. § 52:27I-6(f).
\item[132] See Renee Gamela, Could Its Success Happen Here?, OBSERVER-DISPATCH, Dec. 11, 2005, at 1A.
\item[133] See 1995 BRAC REPORT, supra note 9, at 1-2.
\item[134] See Smith, supra note 101, at 7C.
\item[135] Id.
\item[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).
\item[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).
\end{footnotes}
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 develop their respective adjacent base property would be ineffective and economically unsound. At bases with several surrounding municipalities, a state-run planning authority has been the most common and successful response. Bases like Fort Monmouth, with several surrounding jurisdictions, have more factors to consider than a single-jurisdiction base—water rights, environmental concerns, different zoning laws, transportation systems, and multiple land conveyances. New Jersey Governor Corzine attempted to account for these regional and state-wide concerns when making his appointments to the FMERPA.

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

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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. § 52:27I-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.\textsuperscript{145} Increasing economic activity while redeveloping a site during prolonged environmental cleanup is extremely difficult for any agency, whether local or federal.\textsuperscript{146} As cleanup continues, the cost continues to rise.\textsuperscript{147}

Additionally, federal, state and local property and environmental laws impact the base closure and realignment process.\textsuperscript{148} The process involves collaboration from many different parties to fulfill many different obligations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{151}

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

\textsuperscript{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 \textit{supra} notes 125–31 and accompanying text.

\textsuperscript{146} See \textit{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. \textit{Id.}

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

\textsuperscript{148} DOD, \textit{BASE REDEVELOPMENT AND REALIGNMENT MANUAL}, \textit{supra} note 12, at 26, 129-34.

\textsuperscript{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. \textit{Id.} at 26-27.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{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. \textit{Id.} at 33, 103.

\textsuperscript{152} The Department of Defense has established four key environmental objectives when closing or realigning installations: \textbf{[1]} Ensure protection of human health and the environment on BRAC properties. \textbf{[2]} \textit{ Expedi-tiously transfer BRAC property to new owners.} \textbf{[3]} Maximize the utility of BRAC property by making wise public policy and business decisions regarding environmental actions. \textbf{[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.

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

\textsuperscript{153} \textit{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. However, the DOD can avoid this delay by leasing the property to users before conveying it. Local and state authorities have the greatest incentive to ensure successful environmental cleanup and redevelopment. 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.” Congress recently passed legislation that attempts to

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facilitate brownfield redevelopment by “address[ing] the environmental, economic and environmental justice concerns associated with brownfields.”

Problems with brownfield redevelopment include multi-jurisdictional liability, a broad regulatory scheme that scares away redevelopment, and local communities suffering economically from slow or non-existent redevelopment. Surprisingly, the problems with brownfield redevelopment exist despite the many success stories.

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.” Additionally, brownfields and BRAC-closed bases share the problems of (1) site cleanup, (2) revitalization, and (3) multijurisdictional oversight. BRAC-closed bases and brownfields have striking similarities in the context of environmental liability and regulation. 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. Brownfield redevelopment can use the existing water and sewer...
systems. Additionally, brownfield sites often have many potential benefits that would contribute to economic development. Redevelopers can use the existing infrastructure. However, redevelopers face liability under environmental laws such as CERCLA and its state counterparts. Many scholars believe that environmental liability is the most serious barrier to redevelopment.

C. Dealing with the Environmental Liability Problem

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

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).


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


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).

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

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. To solve these problems, scholars have suggested improving community input, amending state statutory schemes, and establishing legitimate state decision-making bodies. 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. The federal government should involve

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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).


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 cleanups,\textsuperscript{186} and ensure state programs produce clean lands.\textsuperscript{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.\textsuperscript{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.\textsuperscript{189} Plus, long-term success is ultimately tied to local government oversight.\textsuperscript{190}

Local government oversight produces successful environmental cleanup for several reasons.\textsuperscript{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.\textsuperscript{192}

Local control of brownfield redevelopment is successful when authorities and developers know the extent of environmental contamination.\textsuperscript{193} As part of the BRAC procedures, the DOD must prepare detailed environmental impact statements (called EBSs and ECPs).\textsuperscript{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.\textsuperscript{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

\textsuperscript{186} See Buzbee, supra note 179, at 110-11.
\textsuperscript{187} See id. at 115.
\textsuperscript{188} Eisen, supra note 28, at 986-87.
\textsuperscript{189} Matthew D. Fortney, Comment, Devolving Control over Mildly Contaminated Property: The Local Cleanup Program, 100 NW. U. L. REV. 1863, 1888 (2006).
\textsuperscript{190} Id. at 1889.
\textsuperscript{191} Id. at 1886-88.
\textsuperscript{192} See generally id. at 1886-91 (outlining arguments in favor of local control of brownfield redevelopment).
\textsuperscript{193} See id. at 1905.
\textsuperscript{194} See ITRC LESSONS LEARNED, supra note 59, at 6-7.
\textsuperscript{195} Id.
with advisors and grants to jump-start the redevelopment process.\textsuperscript{196} The DOD does this because it previously recognized that communities have unique aspects and no single template will fit all closure situations.\textsuperscript{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. \textbf{CONGRESS'S SPENDING POWER TO DELEGATE AND ITS POTENTIAL FOR USE WITH BRAC CLEANUP}

A. \textit{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{200} Congress has the power to regulate the BRAC process and has done so in the past.\textsuperscript{201}

\textsuperscript{196} See DOD, BASE REDEVELOPMENT AND REALIGNMENT MANUAL, supra note 12, at 33.
\textsuperscript{197} Id. at 32.
\textsuperscript{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). \textit{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 . . . “).
and Congress would have the power to delegate some BRAC responsibility to the states.\textsuperscript{202}

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

\textbf{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.\textsuperscript{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.\textsuperscript{206} The final disadvantage is that states and state agencies acting pursuant to federal directives may not produce laws that federal courts can review.\textsuperscript{207}

\textbf{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.\textsuperscript{208}

\begin{footnotesize}
\textsuperscript{202} See Dole, 483 U.S. at 207-08. See generally U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{203} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{206} Id.
\textsuperscript{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. State agencies may be better situated than federal bureaucrats to assess local conditions and citizen preferences. Also, a delegation allows for the government that is more accountable to make the important decisions. Some scholars question whether these factors actually benefit local communities. Despite the scholarly attack, Congress continues to delegate and states continue to succeed in cleaning up.

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

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

\text{Caminker, supra note 198, at 1043 (quoting Saikrishna B. Prakash, Field Office Federalism, 79 VA. L. Rev. 1957 (1997)).}\
\text{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).}\
\text{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).}\
\text{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).}\
\text{Esty, supra note 55, at 609-10 (longings for direct democracy and distrust of elite decisionmaking by republican representatives fuel claims for more decentralized decisionmaking); 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 ofjurisdictions increase, democratic referenda “now yield[!] the lowest aggregate utility and proportional representation now performs second best”).}\
\text{Sarnoff, supra note 205, at 214-15.}\
\text{See Esty, supra note 55, at 605 (noting the trend in legal scholarship and political action toward decentralization of environmental regulation).}\
states and federal agencies. The Court, in *Union Electric Co. v. EPA*, preserved the rights of states to exercise stricter regulations. The Court construed the statute at issue so as to avoid an unconstitutional legislative delegation. The Court does its best to avoid making the tough delegation calls in many of these cases and leaves many delegation questions unanswered.

Environmental regulation, one of the most far-reaching assertions of federal authority, produces additional ambiguities and questions for the Court. While constitutional questions that federal environmental regulation raise often center around federalism, a regulation passed under the Spending Clause avoids federalism concerns and challenges. A change in the Court's jurisprudence would result in a substantial effect on all federal environmental legislation. 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. When determining whether a statute coerces a state,

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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).
223 Id. at 440-47.
courts can look to the amount of money Congress distributes. 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. Whether in waste site cleanup or brownfield redevelopment, states have been proactive while the federal government has not. 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. The framework that supports the "race to the bottom" argument has several weaknesses. The "race to the bottom" argument centers around the belief that corporations are attracted to states with less costly environmental regulations.

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.").
The argument fails in the base redevelopment context because no one wants to redevelop on a contaminated site.\textsuperscript{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.\textsuperscript{231} State and local governments are more accountable to their constituents and more motivated to see the redevelopment project succeed.\textsuperscript{232} States will not be able to avoid general federal environmental regulations despite a federal delegation of power.\textsuperscript{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.\textsuperscript{234} The BRAC process already requires detailed

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\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{232} See Fortney, supra note 189, at 1886-91 (outlining arguments in favor of local control of brownfield redevelopment).
\item \textsuperscript{233} See Adler, supra note 219, at 472-73 (describing state subordination to federal environmental regulation despite a congressional delegation).
\item \textsuperscript{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 Rucker's local authority had received over $1.7 million in grants to plan its redevelopment process).
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environmental reports that aid in local brownfield redevelopment. 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).