

ENVIRONMENTAL REVIEW OF MILITARY BASE CLOSURES: IMPLICATIONS FOR AFFECTED GOVERNMENTS

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This article analyzes the unique interrelationships between the federal laws and regulations that govern the federal action of closing a military base and the environmental review of that action. These interrelationships present state and local governments with unique opportunities to intervene in the federal closing and environmental review processes. These processes address particular hazardous waste, clean-up and reuse issues that arise when military bases within or adjacent to their jurisdictions are slated for closure.

I. ENVIRONMENTAL REVIEW OF BASE CLOSINGS: THE PROBLEM

By law, the agencies and instrumentalities of the United States are responsible for hazardous wastes on their property in the same manner and with the same liabilities as other property owners.¹ Because hazardous waste contamination of military bases is often extensive, the remediation of this contamination, which must be done before closed bases are transferred to public or private entities, may threaten or delay the transfer and redevelopment of the base.

A. Hazardous Wastes on Military Bases: the Norton Problem

For decades, the different branches of the United States military have used and environmentally abused their bases in the United States. In advancing its mission on most bases, the military generated enormous quantities of hazardous wastes. Like most industries, the military generally employed inexpensive technologies to store and dispose of its wastes.² These technologies included dumping hazardous waste into waste ponds, evaporation ponds, mines and wells; storing wastes in both above- and below-ground storage tanks that later leaked; and dumping wastes into rivers and streams or into the air.³ At least fifty-three military bases are so contaminated that the United States Environmental Protection Agency has listed them on its National Priorities List of sites that pose hazards to human health and the environment.⁴

The Norton Air Force Base in San Bernardino, California, one of the military bases on the National Priorities List,⁵ is an illustrative example. The Air Force contaminated twenty-one sites on the Norton Base with hazardous wastes by storing liquid wastes in leaking drums both above- and below-ground; by dumping hazardous wastes into unlined pits and waste lagoons; by spilling aviation fuel, oil, solvents, polychlorinated biphenyls ("PCBs") and acidic plating solution; by burying low-level radioactive wastes; by using a thirty-one acre area for general refuse and industrial wastes; and by repeatedly

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dumping fire-suppressant chemicals and residue from hydrocarbon combustion on the ground in an area surrounding a spent airplane fuselage used for fire training exercises.⁶

Since their initial storage, wastes from waste pits and tanks have leached into the ground, and the wells on the base are contaminated.⁷ The potential for further contamination has been a matter of concern for the densely populated communities of Redlands, Loma Linda, and Riverside surrounding the base because they depend upon the aquifers that pass directly beneath the base for their drinking water.⁸

B. Closing Contaminated Bases: the Transfer Problem

The problem of contaminated sites on military bases has received wide attention in recent years, in part because of the impending closure and realignment of many military bases. The problem is exacerbated because the closure and realignment of bases pose economic and demographic threats of devastating magnitude to communities adjoining the bases. While it is in the interest of most of these affected communities to transfer and redevelop the bases as soon as possible, speedy transfer and redevelopment are inconsistent with the cleanup and remediation responsibilities imposed on the federal government under current law.

1. The Law of Base Closure

In May 1988, the Defense Secretary's Commission on Base Realignment and Closure ("the Commission") was chartered by Defense Secretary Frank Carlucci to recommend military installations for realignment and closure.⁹ The Defense Authorization Amendments and Base Closure and Realignment Act¹⁰ ("BCRA") was enacted in October 1988 to require the Secretary of Defense to close military

installations in accordance with the Commission recommendations by no later than September 30, 1995.¹¹ In 1990, Congress ordered a second round of base closures and realignments.¹²

The Defense Secretary's Commission used a variety of criteria to identify potential candidates for closure.¹³ However, environmental cost considerations were not a factor because the military recognized that conforming to federal environmental laws would be required in any event.¹⁴ While the impending closure or realignment of a base affected the timing of the clean-up, it did not create an obligation to clean up or remediate that did not otherwise exist.

2. The Law of the Military's Responsibility for Hazardous Waste

The obligation to remediate contaminated property imposed on the different branches of the military is independent of the law authorizing the closure and realignment of bases. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") as amended by the Superfund Amendments and Reauthorization Act of 1986,¹⁵ is the primary federal statute governing the duties and liabilities associated with the clean-up and remediation of hazardous waste sites.¹⁶ Section 120(a) of CERCLA requires federal agencies and instrumentalities to comply with these federal requirements to the same degree as non-federal entities. Section 120(h) of CERCLA requires all federal entities and instrumentalities to remediate any contamination before conveying federal facilities and to certify that any hazardous substance that may have been released or disposed of on the property has been remediated before transfer.¹⁷

CERCLA section 120(h) remediation has tremendous implications for the process of closing or realigning military bases. The requirements of that section

can affect both the timing of any closure and the nature of any reuse. Complete CERCLA section 120(h) remediation can delay the transfer of a contaminated military base to public use. For example, the remediation of groundwater contamination may take decades.¹⁸ Furthermore, associated costs and delays could severely compromise the feasibility of proposed alternatives for the future reuse of any contaminated base or portion of a base.

Identifying hazardous waste problems and potential solutions on military bases is made more complex because the military must follow the requirements of the National Environmental Policy Act¹⁹ ("NEPA") in reviewing the environmental implications of closing bases and transferring closed bases to non-federal entities.

C. Environmental Review of Federal Actions: the NEPA Problem

Once the decision to close or realign a base has been made, the Secretary of Defense is obligated to follow the procedural requirements of NEPA by identifying and analyzing all environmental impacts related to the closure (or realignment), transfer and reuse of military bases.²⁰

While NEPA is generally a procedural statute, NEPA procedures, in conjunction with CERCLA's substantive remediation requirements, impose the substantive obligations of other statutes on the federal government with respect to the transfer and reuse of federal land. These substantive obligations present affected states and local governments with unique opportunities to intervene in the process that will determine the future of military bases.

NEPA is an explicit statement by Congress of the importance of environmental concerns. The United States Supreme Court has recognized

that NEPA embodies "a broad national commitment to protecting and promoting environmental quality."²¹ NEPA mandates a comprehensive evaluation of the direct and indirect environmental impacts of proposed federal projects, alternatives to those projects, and an assessment of the effect of short-term projects on long-term productivity. Congress intended that the rigorous consideration of environmental impacts of federal projects would "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."²²

1. NEPA's Environmental Impact Statement Requirement

To effect a policy of informed decision-making, NEPA requires all agencies of the federal government, "to the fullest extent possible," to:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.²³

The regulations of the Council on Environmental Quality ("CEQ") direct what must be included in an Environmental Impact Statement²⁴ ("EIS") and are incorporated in the military's regulations implementing NEPA.²⁵ The CEQ guidelines emphasize that NEPA's requirements for the preparation and content of an EIS "serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."²⁶ To accomplish this goal, the CEQ regulations mandate that every EIS "provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."²⁷ By focusing an agency's attention on the environmental consequences of proposed projects, NEPA ensures that the potentially adverse impact of a proposal will not be overlooked, only to be discovered "after resources have been committed or the die otherwise cast."²⁸

Because the military has been exempted from analyzing the need for closing bases and alternatives to base closures,²⁹ NEPA's mandate that the military fully identify and analyze all environmental implications of alternatives for future reuse of the base may be of the most importance to affected states and local governments. The universe of alternatives consists of the reuse proposals submitted to the military by interested governmental and private entities and the reuse alternatives available to the military under numerous federal laws. Note that the universe of alternatives is also affected, and may be

narrowed by, the imposition of the remediation obligations under CERCLA. The process begins with "scoping."

2. NEPA's Scoping Requirement

The proposed federal action to dispose of the real and related personal property at military bases to public or private entities begins at the "early and open" stage in the NEPA process known as scoping.³⁰ The purpose of scoping is "to determine the scope of issues to be addressed and to identify significant issues to be analyzed in depth related to the proposed action."³¹

The scoping process does not reach conclusions as to the environmental desirability of a proposal and "is not concerned with the ultimate decision on the proposal."³² Rather, scoping is to

identify the public and agency concerns; clearly define the environmental issues and alternatives to be examined in the EIS including the elimination of nonsignificant issues; identify related issues which originate from separate legislation, regulation, or Executive Order . . . ; and identify state and local agency requirements which must be addressed.³³

Scoping is critical to the environmental impact evaluation process because it can "have a profound positive effect on environmental analyses, on the impact statement process itself, and ultimately on decision-making."³⁴ Consequently, the CEQ and military regulations implementing NEPA place a "significant responsibility on agencies and the public alike during the scoping process to identify all significant issues and reasonable alternatives to be addressed in the EIS."³⁵

The CEQ and military regulations provide that the "scope" of an EIS consists of "the range of actions,

alternatives, and impacts to be considered."³⁸ Because the military need not consider either the need for closure of military facilities or alternatives to closing military bases, the universe of alternatives to closure that the military must consider in its environmental review includes all of the property disposal alternatives available by statute to the military, together with all of the proposals for reuse that the military receives with respect to each base or parcel of a base.

3. NEPA's "Alternatives" Requirement

Congress has developed a large list of future alternative uses to which federal agencies must give priority in the disposal of excess land. NEPA requires the Department of Defense to consider the environmental impacts of each of these alternatives for future reuse in any EIS analyzing the environmental implications of future uses of a military base slated for closure or realignment.

In closing any military installation pursuant to the BCRA of 1988, the Secretary of each branch exercises delegated authority of the Administrator of the General Services Administration ("GSA");³⁷

(1) "to utilize excess property under section 202 of the Federal Property and Administrative Services Act of 1949" ("the 1949 Act");³⁸

(2) "to dispose of surplus property under section 203 of that [1949] Act;"³⁹ and

(3) "to grant approvals and make determinations under section 13(g) of the Surplus Property Act of 1944" ("the 1944 Act").⁴⁰

The Secretary of each branch of the military is required to exercise such delegated authority in accordance with the GSA Federal Property Management Regulations in effect on October 24,

1988.⁴¹ The Secretary has promulgated additional interim regulations "to carry out"⁴² the delegation of authority.⁴³

The real property transfer and disposal scheme established pursuant to the 1944 Act and the 1949 Act, and incorporated in the BCRA,⁴⁴ gives the Secretary of each of the respective military branches an extraordinary array of alternatives to transfer or dispose of all or portions of the real and related personal property of closed or realigned military bases.⁴⁵ The Secretary of each branch is authorized to take the following actions:

- ▶ to transfer property to any department or instrumentality within the US Department of Defense. Such transfers "take precedence" over any others authorized by law.⁴⁶
- ▶ to convey "to any [s]tate, political subdivision, municipality, or tax-supported institution . . . surplus real or personal property" to be used for the development or operation of a public airport and related businesses.⁴⁷
- ▶ to transfer excess property among federal agencies.⁴⁸
- ▶ to dispose of surplus property by negotiation if the disposal will be to states, political subdivisions thereof, or tax-supported agencies therein.⁴⁹
- ▶ to dispose of surplus property, or portions thereof, after publicly advertising for bids.⁵⁰
- ▶ to dispose of property through authorized contract realty brokers, provided that "wide public notice of availability of the property for disposal be given by the brokers."⁵¹
- ▶ to assign to the Secretary of Education⁵² such surplus real property that she deems is needed

"for school, classroom, or other educational use" ⁵³

- ▶ to assign to the Secretary of Health and Human Services ("HHS") such surplus real property that the Secretary of HHS recommends "for use in the protection of public health, including research." ⁵⁴
- ▶ to assign to the Secretary of the Interior "such surplus real property . . . as is recommended by the Secretary of the Interior. . . for use as a public park or recreation area." ⁵⁵
- ▶ to "convey to any [s]tate, political subdivision, instrumentalities thereof, or municipality . . . any surplus real and related personal property which the Secretary of the Interior has determined is suitable and desirable for use as a historic monument, for the benefit of the public." ⁵⁶
- ▶ to convey to the states, any political subdivision or instrumentality thereof surplus real and related personal property determined by the US Attorney General to be required for correctional facility use by the transferee "under an appropriate program or project for the care or rehabilitation of criminal offenders." ⁵⁷
- ▶ to convey to any state or political subdivision thereof "such interest in such real property as [the Secretary of the military branch] determines will not be adverse to the interests of the United States" for use "in connection with an authorized widening of a public highway, street, or alley. . . ." ⁵⁸
- ▶ to transfer to any state wildlife resources agency "for wildlife conservation purposes" or to the Secretary of the Interior for purposes of "carrying out the national migratory bird management program" excess or surplus real property that can be utilized for such purposes. ⁵⁹
- ▶ to convey to any state highway department or state political subdivision any real property determined by the Secretary of Transportation to be reasonably necessary for the right-of-way of a federally aided highway, "or as a source of materials for the construction or maintenance of any such highway." ⁶⁰
- ▶ to convey to any state or political subdivision thereof any surplus power transmission line and associated right-of-way if the property is needed for any public or cooperative power project. ⁶¹
- ▶ to transfer surplus real property "for the purpose of providing replacement housing" for persons who are to be displaced by federal, or federally assisted, projects. ⁶²
- ▶ to dispose of surplus military chapels (and associated surplus land) for use "as shrines, memorials, or for religious purposes." ⁶³
- ▶ Finally, the Secretary *must* take action to make buildings and property deemed "suitable for use to assist the homeless" available for use through leases of at least one year to private nonprofit organizations, units of local government and states. ⁶⁴

These potential conveyances constitute a universe of alternative transfer and disposal options available to the Secretary to accomplish the proposed federal action, namely, the "disposal of the property to public or private entities" ⁶⁵ for reuse. Every option available by statute with respect to any discrete parcel of a base being closed or realigned must be presumed to be a reasonable disposal alternative, thus each

must be included and analyzed in the military's Disposal and Reuse EIS.

The Disposal and Reuse EIS must analyze all of the reasonable alternatives in a manner sufficient to enable the Secretary to make a "reasoned choice" as to whether to transfer or dispose of all or portions of the base to particular entities or by particular means.⁶⁶ For example, with respect to the potential consequences of disposal of specific parcels of the base by public bid,⁶⁷ such a "reasoned choice" necessarily will involve a certain degree of speculation about likely reuses of the property.

It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.⁶⁸

The EIS must therefore include parcel-specific analysis of the environmental impacts of the probable reuses following from disposal by all means. Only in this manner will the Secretary be able to make a reasoned decision whether to transfer or dispose of all or portions of a base by this or by any alternative means.⁶⁹

Moreover, the CEQ regulations require that the "no action alternative must always be considered"⁷⁰ in an EIS.⁷¹ As the CEQ has made clear, NEPA requires "the analysis of the no action alternative even if the agency is under a . . . legislative command to act. This analysis provides a benchmark, enabling

decision-makers to compare the magnitude of environmental effects of the action alternatives."⁷² Further, the "no action" alternative must be evaluated in the Disposal and Reuse EIS "because the EIS may serve as the basis for modifying the Congressional approval. . . in light of NEPA's goals and policies."⁷³ Accordingly, each branch of the military must analyze in detail the alternative that the military base in question will not be transferred or disposed of, in whole or in part, to public or private entities upon its closure or realignment.

Additionally, because the cleanup requirements of CERCLA apply to the decision by any branch of the military to close a base,⁷⁴ the EIS must reflect the potential for delay and transfer prohibition created by compliance with CERCLA. For example, section 120(h)(3) of CERCLA requires the federal government to include in any deed for the transfer of any real property a covenant warranting that all necessary remedial action with respect to any hazardous "substance remaining on the property has been taken before the date of transfer."⁷⁵ Accordingly, ongoing environmental investigation and remedial activities at any base may delay substantially, or preclude entirely, the transfer or disposal of all or significant portions of the facility. The military must, in any Disposal and Reuse EIS, rigorously develop and analyze specific transfer or disposal alternatives that contemplate the delays and/or prohibitions associated with the application of CERCLA section 120(h)(3) and with environmental remediation activities at the base generally.

In addition to the transfer and disposal alternatives, any CERCLA requirements, and the no action alternative, the military must analyze in the Disposal and Reuse EIS "appropriate mitigation measures not already included in the proposed action or alternatives."⁷⁶ The CEQ regulations define "mitigation" to include:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.⁷⁷

Accordingly, the Disposal and Reuse EIS must, for each adverse environmental impact identified with respect to each disposal or reuse alternative, describe appropriate mitigation measures, specify plans for the implementation of such measures, and evaluate the environmental impacts that would flow from the mitigation measures themselves.

Finally, the military has an obligation to monitor the evolution of alternatives. No branch of the military can "shed its responsibility to assess each significant impact or alternative even if one is found after scoping."⁷⁸ To the extent that any branch of the military solicits disposal and reuse proposals by public and private entities before the congressionally-mandated or scheduled closure of the base in question, many, if not all, of the proposals submitted to the branch of the military necessarily will be tentative and conceptual. Such proposals doubtless will be modified substantially, further developed and augmented, or withdrawn altogether, throughout the process of environmental impact analysis. Similarly, other

proposals probably will be submitted throughout the process. Further, environmental investigation and remediation activities at any contaminated base over the years may reveal that specific disposal or reuse proposals are unworkable. Thus, it is imperative that the military continuously evaluate the proper scope and substance of its Disposal and Reuse EIS throughout the environmental impact analysis process. To facilitate informed and reasoned decision-making by the Secretary in conjunction with the actual disposal determinations, the EIS must analyze thoroughly the alternative disposal and reuse proposals as they are ultimately developed and modified.

II. POTENTIAL IMPACT OF BASE CLOSING ON ADJOINING COMMUNITIES

The military bases that are to be closed are rarely surrounded by only one community, and the closure or realignment of the base may have a significant impact on more than one community. These communities often have different interests with respect to the closure and future use of the base. The complex interrelationship between the substantive and procedural requirements of the federal environmental laws and regulations suggests several strategies that affected communities may use to deal with the threat of closure and reuse most effectively.

A. Military Consideration of Impacts on Adjoining Communities

The laws and regulations that govern the closure and disposal of federal property appear to be based on the assumption that the communities most immediately affected by the federal action will be in agreement with respect to the essential components of the federal action.⁷⁹ For example, the requirement that the Secretary of

Defense must "consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned"⁸⁰ before the disposition of a closed base assumes explicitly that affected local "governments" will have agreed upon a single "plan." This assumption may only rarely be warranted; at best, the federal laws and regulations merely require that the Secretary of Defense specially consider "any official statement from a unit of general local government adjacent to or within a military installation requesting the closure or realignment of such installation."⁸¹

The communities that adjoin military bases usually are economically and demographically dependent upon the base. Thus local interests will often make the agreement upon a single "plan" unrealistic. When more than one community adjoins a base, the potential disruption to each community's economics, infrastructure and population may be quite different. Thus, the interests of each community may be deemed to be competing rather than complementary. Some communities may be residential communities for the base's population. Other communities may suffer an economic disadvantage from the loss of jobs and commercial businesses that support the military's operations and for the population that works on the base. At the same time, the federal requirement that each branch of the military clean up the hazardous waste it left behind may potentially pit communities against one another. For example, one community could gain leverage over negotiations regarding the future use of the base by threatening to delay closure and transfer through the intentional prolonging of investigation and remediation of the waste problem.

In addition, the federal law seems to give leverage to the jurisdiction with land-

use and zoning authority over the facility concerned. When a base is closed on urban lands, the Secretary of Defense is required to notify the local governments with land use and zoning jurisdiction over the area within which the base is located prior to offering to sell the facility.⁸² Similarly, while one jurisdiction may have zoning or land-use control authority over all or a portion of a base, another may provide essential infrastructure services to the base. The threat of cutting off those services to the military may serve as effective leverage in intergovernmental negotiations.

While these economic and demographic forces act to separate affected communities, potentially constructive forces may be working at the same time. The closure and reuse of military bases provides unique opportunities for the economic development of large parcels of real property, many of which have large and sophisticated infrastructure already in place for immediate economic development and integration into surrounding communities.

The procedural requirements of federal base closure and environmental review laws suggest various strategies that affected governments may employ to ensure that their respective complementary or adversarial interests are protected during the process of base closure and environmental review.

B. Opportunities for Affected Governments to Intervene

The complexity of the interplay between the federal laws and regulations governing the closure of military bases, the obligation to clean contaminated federal sites before transfer of the site, and the alternatives available for the future reuse of excess and surplus sites presents unique opportunities for affected states and local governments to participate meaningfully in the process that will determine the future reuse of

closed military bases. Most affected states and communities will have a significant economic incentive to participate because of perceived economic and demographic threats posed by the imminent closure of a military base.⁸³

States and local governments may gain the opportunity to participate in the process by which the military determines the future reuse of military bases at three levels: in the "scoping" process for the military's Environmental Impact Statement; in the submission of a proposal for reuse; and, as noted above, in opportunities presented by CERCLA for affected communities to provide input into the remediation decision-making process.

1. Intervention in Scoping

Any government affected by the potential closure and reuse of a military base may first intervene in the military's environmental review of a closure and reuse decision by submitting scoping comments to the branch of the military concerned. The comments should outline in clear detail the nature and scope of the alternatives to proposals for reuse of the base that the military must consider. One universe of alternatives consists of those proposals for reuse submitted by interested parties (which might include proposals for reuse submitted by a competing jurisdiction); another universe of alternatives consists of those uses described in text section I.C.3, above, which are created by substantive provisions of different federal laws, particularly if the law assigns a priority to be given to a particular transfer by the military.⁸⁴

Optimally, an affected community can identify and support one alternative from the huge array of alternative uses that the military must consider (see text section I.C.3) that would best serve the community's interests. For example, a

community might wish to see the excess federal property developed into a public airport. Likewise, because of the priority given to certain intragovernmental transfers,⁸⁵ should any jurisdiction seek to encourage the military to back one future use over another, the jurisdiction could, for example, favor a use that may be supported by another federal agency in the future. Active participation in scoping by an affected entity can ensure that the military will consider these as potential alternatives required by federal law, even though a particular reuse proposal may not have a federal proponent at the time scoping comments are due. By taking such a position, the affected jurisdiction can enhance the likelihood that these alternatives may be preserved during the environmental review process.

2. Intervention Through Proposals

As noted above, different requirements of federal law authorize the transfer of closed military bases to state and local governments for particular purposes. To the extent that communities adjoining a military base being closed mutually favor a particular reuse that is also favored by one of these provisions of federal law, the communities may enjoy an advantage in acquiring the base. For example, federal policy allows surplus property that has the potential to be converted into an airport to be acquired by adjoining jurisdictions for reuse as an airport in a public benefit transfer, that is, without the payment of monetary consideration to the United States for the property.⁸⁶ This provision applies whenever the Federal Aviation Administration supports the reuse of the airport as "essential, suitable, or desirable," a standard which may be easily met.⁸⁷

By the same token, a community that will be affected by the closing of a military base may wish to impede a particular reuse proposed for the base by

other communities. For example, a predominantly residential community may oppose a proposed airport because of the noise pollution it would create. If that community can develop a reuse proposal that is supported by another federal agency, it may be able to exploit the provisions of federal law favoring transfer of surplus and excess property to other federal entities before transfer to state and local governments or to private entities can be realized.⁸⁸

State and local governments may employ similar strategies with respect to the requirements imposed by CERCLA regarding the remediation of hazardous wastes on military bases. One strategy might be to favor a particular alternative that would permit speedy transfer and redevelopment. Conversely, a state or local government could favor remediation alternatives that, because they cause substantial delay, may make transfer of a base for a use that it opposes impossible.

C. Strategic Considerations for Affected Governments

The interplay of federal environmental laws, the procedures implemented by these laws, and the substantive provisions of other federal laws that dictate the priority of particular reuse proposals suggests strategies for state and local governments affected by impending closures of military bases. First, it is in the interest of all parties concerned to develop a single plan for the future development of any facility facing closure. Early cooperation and coordination between affected governments ensure that individual jurisdictions do not threaten a use that is favored by a majority of the affected jurisdictions. At an early planning stage, communities should develop intergovernmental agreements that define a desired reuse, the responsibilities of the parties as to the sponsorship and support of the proposal to the military, and the

parties' financial and infrastructure support for the future reuse.

Second, individual governments that oppose particular reuse proposals may intervene in the military's disposal and environmental review processes to ensure that all requirements of federal law favoring competing proposals are followed. The affected government may sponsor a favored reuse on its own or in conjunction with another federal agency or instrumentality. The CERCLA requirement that the federal government consult with local governments affected by the remediation of hazardous wastes on federal facilities provides other avenues of intervention to protect local interests. For example, a local government could intervene by identifying remediation concerns that may jeopardize the transfer of all or a portion of a contaminated base for a future reuse that the affected government opposes.

III. CONCLUSION

The federal environmental laws define procedural requirements that the military must follow in analyzing the environmental implications of closing a military base and in transferring the base for a future use. At the same time, numerous other federal laws provide substantive alternatives that the military must consider.

For states and local governments that will be affected by the closure of military bases, prompt identification and support of a particular alternative will generally be favored in the military's review and disposal processes. By contrast, affected governments that oppose particular reuses will find procedural opportunities to intervene in the military's processes to exploit substantive provisions of federal law that support competing reuse proposals. In short, state and local governments have numerous

opportunities under federal law to intervene in and shape the reuse process for the purposes of serving their best interests.

1. The Comprehensive Environmental Response, Compensation and Liability Act, 42 USC §§ 9601-9675 (1988), applies to each "department, agency, and instrumentality of the United States . . . in the same manner and to the same extent" as to any nongovernmental entity. 42 USC § 9620(a)(1).

2. There is an enormous quantity of writing that describes the history and magnitude of the hazardous waste problems faced by the military. For an introduction to this field, see David Morrison, *Caught Off Base*, Natl J 801 (Apr 1, 1989). In some cases, the government employed highly sophisticated methods to dispose of certain classes of wastes, such as highly radioactive wastes and byproducts related to the production of nuclear weapons and technology. See, for example, *Environmental Restoration and Waste Management: Five Year Plan 150-69 (1988)* (prepared by US Dept of Energy) (describing radioactive waste disposal technologies) ("Environmental Restoration").

3. *Environmental Restoration* (cited in note 2). Note that until recently, federal national security laws and regulations often prohibited the dissemination of information regarding the nature or quantity of wastes generated on particular sites because of the perception that doing so could compromise the secrecy necessary to national security. It is now beyond dispute that there is no "national defense" exception that would exempt the military from the federal laws. *Concerned About Trident v Rumsfeld*, 555 F2d 817, 823 (DC Cir 1977).

4. See *Inside EPA's Superfund Report*, Inside Washington 1-26 (Jan 2, 1991) (special supplement listing sites).

5. EPA, National Priorities List for Uncontrolled Hazardous Waste Sites, 52 Fed Reg 27620, 27642 (1987).

6. Airport Master Plan for the Reuse of Norton Air Force Base: Final Report 7-2 to 7-7 (Jan 1991) (prepared by P & D Technologies).

7. Tests of water from wells on site at the base found that trichloroethylene concentrations in some samples exceeded California drinking water standards. Final Environmental Impact Statement for the Closure (Withdrawal of Units) of Norton Air Force Base, California 3-23 & 3-25 (July 1990) (prepared by Dept of the Air Force).

8. Base Reuse Plan: Norton Air Force Base 4-1 (Feb 1991) (prepared by URS Consultants, Inc. & Management/Development Associates).

9. Charter of the Defense Secretary's Commission on Base Realignment and Closure (May 3, 1988), in *Base Realignments and Closures: Report of the Defense Secretary's Commission*, Appendix A (Dec 1988) (prepared by the Commission on Base Realignment and Closure) ("1988 Base Closure Report").

10. Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub L No 100-526, 102 Stat 2623, codified at 10 USC § 2687 note (1988) ("BCRA of 1988").

11. Id at § 201, 10 USC § 2687 note. In December 1988, the Commission recommended Norton AFB for closure "primarily because of air traffic congestion, inadequate facilities, and because of excess capacity within the category." 1988 Base Closure Report at 77 (cited in note 9).

12. Defense Base Closure and Realignment Act of 1990, Pub L No 101-510, 104 Stat 1808, codified at 10 USC § 2687 note (Supp II 1990) ("BCRA of 1990").

13. See 1988 Base Closure Report (cited in note 9).

14. Id at 17.

15. 42 USC §§ 9601-9671.

16. 42 USC § 9620(a).

17. 42 USC § 9620(h).

18. See Report of the Defense Environmental Response Task Force 13 (Oct 1991).
19. National Environmental Policy Act of 1969, Pub L No 91-190, 83 Stat 852, codified at 42 USC §§ 4321-4370 (1988).
20. BCRA of 1988 at § 204(c)(2), 10 USC § 2687 note. This section provides that NEPA shall apply to the actions of the Secretary of Defense during the process of closing a military installation selected for closure by the Commission. In applying NEPA, however, the Secretary is exempted from considering the need for closure and the need for transferring military functions to other military installations. Moreover, the Secretary need not consider alternatives of closing military installations other than those selected by the Commission.
21. *Robertson v Methow Valley Citizens Council*, 490 US 332, 348 (1989).
22. 42 USC § 4331(a).
23. 42 USC § 4332.
24. 40 CFR §§ 1500-1517 (1991).
25. See, for example, Dept of the Air Force Reg No 19-2 at § 1, in 32 CFR § 989.1 (1991) ("AFR 19-2").
26. 40 CFR § 1502.1.
27. *Id.*
28. *Methow Valley*, 490 US at 349.
29. See discussion in note 20.
30. 40 CFR § 1501.7.
31. AFR 19-2 at § 12(c), in 32 CFR § 989.12(c) (cited in note 25). See also 40 CFR § 1501.7.
32. CEQ Memorandum: Scoping Guidance (Apr 30, 1981), 17 ELR 35031, 35033 (1981) ("Scoping Guidance").
33. CEQ Memorandum: Guidance Regarding NEPA Regulations, 48 Fed Reg 34263 (1983) ("NEPA Guidance").
34. Scoping Guidance, 17 ELR at 35031 (cited in note 32).
35. NEPA Guidance, 48 Fed Reg at 34264 (cited in note 33).
36. 40 CFR § 1508.25.
37. "The Deputy Secretary of Defense re delegated authority from the Administrator of the General Services Administration" to the Secretaries of the respective branches of the military "with respect to excess and surplus real and related personal property located at" military installations "to be closed or realigned under the Base Closure and Realignment Act" of 1988. See Dept of the Air Force, Interim Rule: Utilization and Disposal of Real Property, 56 Fed Reg 13286 ("Disposal of Real Property").
38. BCRA of 1988 at § 204(b)(1)(A), 10 USC § 2687 note. Federal Property and Administrative Services Act of 1949, Pub L No 81-152, 63 Stat 377, codified at 40 USC §§ 471-544 (1988).
39. BCRA of 1988 at § 204(b)(1)(B), 10 USC § 2687 note.
40. *Id.* at § 204(b)(1)(C), 10 USC § 2687 note. Surplus Property Act of 1944, Pub L No 78-457, 58 Stat 765, codified at 50 USC app § 1622 (1988).
41. BCRA of 1988 at § 204(b)(2)(A), 10 USC § 2687 note. See also 41 CFR § 101.47 (1991) (regulations governing the utilization and disposal of US government-owned real property).
42. BCRA of 1988 at § 204(b)(2)(B), 10 USC § 2687 note.
43. See Disposal of Real Property, 56 Fed Reg 13286 (cited in note 37).
44. BCRA of 1988 at § 204(b), 10 USC § 2687 note.
45. The disposal alternatives enumerated in the text are the most significant under the property management scheme incorporated in the BCRA of 1988. The list of alternatives, however, is not necessarily exhaustive.

46. See BCRA of 1988 at § 204(b)(3), 10 USC § 2687 note.
47. See 50 USC app § 1622(g).
48. See 40 USC § 483; 41 CFR § 101.47 subpart 203.7.
49. "[T]he estimated fair market value of the property and other satisfactory terms of disposal [must be] obtained by negotiation." See 40 USC § 484(e)(3).
50. See 40 USC § 484(e)(1).
51. See 40 USC § 484(e)(4).
52. This article does not address the NEPA obligations of a transferee federal agency.
53. Such disposal is permitted, provided that the disposal is to a state, political subdivision or instrumentality thereof, or other tax-exempt eligible institution. See 40 USC § 484(k)(1).
54. *Id.*
55. See 40 USC § 484(k)(2).
56. See 40 USC § 484(k)(3).
57. See 40 USC § 484(p)(1).
58. See 40 USC § 345c(a) (1988).
59. See 16 USC § 667b (1988).
60. See 23 USC §§ 107 & 317(a) (1988).
61. See 50 USC app § 1622(d).
62. See 42 USC § 4638 (1988).
63. See 41 CFR § 101.47 subpart 308.5.
64. See 42 USC § 11411 (1988).
65. Dept of the Air Force, Intent to Prepare Environmental Impact Statement for Disposal and Reuse of Norton AFB, California, 56 Fed Reg 6626 (1991).
66. See, for example, *Lange v Brinegar*, 625 F2d 812, 818 (9th Cir 1980). Note also that at the time of this writing, Congress is considering at least two bills that would allow the Department of Defense to parcel out "clean" portions of a contaminated military base that is being closed, and to transfer an ownership interest in those portions while retaining title to contaminated portions pending a final CERCLA § 120(h) remediation. Both HR 2179, 102d Cong, 1st Sess (May 1, 1991) and HR 4024, 102d Cong, 1st Sess (Nov 26, 1991) would permit the Department of Defense to parcel out contaminated property, irrespective of whether the property is listed on the EPA's National Priorities List.
67. See 40 USC § 484(e)(1). Disposal by bid is merely one example of a "reasonable disposal." All means of transfer or disposal in which the identities of potential transferees are unknown at the time the decision must be made will similarly require the Secretary to make "reasoned choices" involving a degree of speculation.
68. CEQ Memorandum: Questions and Answers About the NEPA Regulations, 17 ELR 35020 (1981) ("NEPA Questions and Answers").
69. See, for example, *Conservation Law Foundation of New England v GSA*, 707 F2d 626 (1st Cir 1983).
70. AFR 19-2, in 32 CFR § 989.9(f)(2) (cited in note 25).
71. See 40 CFR § 1502.14(d).
72. NEPA Questions and Answers, 17 ELR at 35021 (cited in note 68). Note that the "no action" alternative is not a consideration for the purposes of deciding to close the base as closure is legislatively mandated. "No action" is merely an alternative use for the closed base.
73. *Id.*
74. See text accompanying notes 15-16.
75. 42 USC § 9620(h)(3).
76. 40 CFR § 1502.14(f).
77. 40 CFR § 1508.20.

78. Scoping Guidance, 17 ELR at 35032 (cited in note 32).

79. For example, the federal law governing the closure of military bases includes no provisions for deciding intergovernmental disputes regarding the numerous dispositional or jurisdictional questions and claims that will frequently arise.

80. BCRA of 1990 at § 2905(b)(2)(E), 10 USC § 2687 note (cited in note 12).

81. *Id.* at § 2924, 10 USC § 2687 note. There is no requirement that the Secretary of Defense consider statements of communities opposed to closure, or to consider statements by governments adversely affected by closure.

82. 41 CFR § 101.47 subpart 4906a.

83. The military has stressed that the perceived adverse economic impact of a base closure on adjoining communities may well be exaggerated. In many instances in the recent past, military facilities have been converted into thriving public and private educational, transportation and industrial facilities. See 1988 Base Closure Report, Appendix I (listing and describing twenty successful redevelopments) (cited in note 9).

84. Defense Authorization Act of 1989 at § 2819(b), Pub L No 100-456, 102 Stat 1918, 2119-2120, codified at 10 USC § 2391 note (Supp I 1989) (for example, the Presidential Commission on Alternative Utilization of Military Facilities must seriously consider facilities for reuse as prisons and drug treatment facilities).

85. See, for example, text accompanying notes 46, 48, 53-55, & 57-59.

86. 50 USC app § 1622(g).

87. *Id.*

88. Transfer to departments or instrumentalities of the Department of Defense, for example, "take precedence" over any other transfers of closed or closing military bases authorized under federal law. BCRA of 1988 at § 204(b)(3), 10 USC § 2687 note.