

BROWNFIELDS AND BRAC: A SURPRISING “COMPATIBILITY”

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INTRODUCTION

The title of the Symposium that generated these articles, “Mission Impossible?: The Compatibility of Military and Environmental Goals,” enticed attendees to witness a train wreck-like clash of ideals. Environmentalists, frustrated by what they see as the military’s poor environmental record, would have a chance to blast their foes. Representatives from the Air Force, Army, and Navy would respond by touting their improvements in complying with environmental laws, and their initiatives to become more green, such as increasing use of renewable fuels in aircraft fleets. The day promised to be as entertaining as roller derby, or for a more contemporary audience, ultimate fighting.

The two panels before ours did not disappoint. Thomas Ledvina, the U.S. Navy’s Associate General Counsel for Litigation, and Joel Reynolds, of the Natural Resources Defense Council, offered sharply contrasting perspectives on the Navy’s use of sonar and its impact on marine mammals. Professor Robert Percival’s presentation on “American Exceptionalism” took the military to task for crafting out exceptions for itself from environmental laws, and Professor Marcilynn Burke highlighted the need to protect national treasures from military encroachment.

And then Carolyn White and I stepped up to the plate. Of all the day’s panels, ours was perhaps the one that most demonstrated that military and civilian environmental goals can be compatible. Indeed, we found ourselves in a harmonious position, which made for little debate and few questions from an audience primed from the morning’s panels to expect confrontation. That was no accident. The Base Realignment and Closure (“BRAC”) process was a major focus of Ms. White’s presentation on environmental issues, involving a wide variety of military real

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property transactions (not just those in BRAC), and the central theme of mine. Ms. White and I have studied BRAC from somewhat different perspectives. I have looked at BRAC from an academic, theoretical perspective, comparing BRAC's environmental features to those of state and federal brownfields programs and incentives. Ms. White has extensive transactional expertise involving military real estate, including frontline responsibilities in the BRAC program.

Both of us suggested strongly that lessons learned from the BRAC process over the past decade turn out to be surprisingly useful not only in assessing how the military should remediate sites before transferring them, but also in discussing how the private sector should remediate and reuse real property. This broad agreement between us about BRAC's features and track record made for a comfortable Saturday afternoon, of course. But it led to an even more positive outcome.

In the symposium presentations, Q&A sessions, and discussions afterwards, I found a common ground in our different but complementary approaches to environmental issues in property remediation and reuse. Specifically, I found that the BRAC process, far from being inattentive to environmental concerns in the process of closing surplus bases and transferring them to the private sector, has three "surprises," some of which are positive. Each of these relate directly to one of the areas of main concern that I have expressed in the past about state voluntary cleanup programs: public participation, cleanup standards, and cleanup procedures.

In Part I of this Article, I describe the BRAC process and compare it to the process for remediating abandoned or underused sites in state brownfields programs. I find that while the two systems are different in many significant respects, these differences do not overwhelm the commonalities inherent in comparing two systems that focus on remediating sites and transferring them to their new owners. In Part II, I describe the environmental remediation process of BRAC and positive "surprises" in terms of the statutory preference for finality in remedial actions and for public participation at sites being closed and the more mixed impact of the evolution of BRAC to become more "brownfields-like."

I. COMPARING BRAC AND BROWNFIELDS PROCESSES

A. *The BRAC Process*

BRAC is the well known, high-profile effort where military facilities deemed surplus are being closed ("C") or functionally realigned

(“R”) by the Department of Defense (“DoD”). There have been five waves (or “rounds,” in military-speak) of BRAC: 1988, 1991, 1993, 1995, and 2005. Nearly four hundred installations have been closed or realigned since 1988, and the 2005 BRAC round is the most aggressive ever, contemplating the closing of twenty-two major military installations in a process lasting at least until the year 2011.¹ Congressional enactments governing the BRAC process include the Base Closure and Realignment Act of 1988 (governing the BRAC 1988 round),² the Defense Base Closure and Realignment Act of 1990 (BRAC 1991, 1993, and 1995),³ and the National Defense Authorization Act of 2002 and the subsequent BRAC Commission report (BRAC 2005).⁴

A BRAC site can be the size of a small town or even larger: the Southfield base in Massachusetts was once described as “bigger than Boston”;⁵ the Oakland Army Base occupied 364 acres in a dense urban setting.⁶ The proposed closure of such facilities would have serious impacts on local economies,⁷ not to mention the political future of elected officials who dared to support closures.⁸ For this reason, BRAC Congressional

¹ Donna Miles, *BRAC Deadline Expires, DoD to Begin Closures, Realignments*, AMER. FORCES PRESS SERVICE, Nov. 9, 2005, available at www.defenselink.mil/news/newsarticle.aspx?id=18352.

² Pub. L. No. 100-526, § 2749, 102 Stat. 2623 (1988).

³ Pub. L. No. 101-510, § 2901, 104 Stat. 1808 (1990); see also James W. Moeller, *Arsenic and an Old Base: Legal Issues Associated with the Environmental Restoration of Defense Sites in Washington, D.C., Used for the Development and Disposal of World War I Chemical Munitions*, 54 CATH. U. L. REV. 879, 894-96 (2005) (citations omitted).

⁴ Pub. L. No. 107-107, 115 Stat. 1012 (2001); DEF. BASE CLOSURE & REALIGNMENT COMM’N, FINAL REPORT TO THE PRESIDENT (2005), available at <http://www.brac.gov/finalreport.html>.

⁵ See David Hall, Senior Vice President, LNR Property Corp., Southfield: Redevelopment of Former Naval Air Station South Weymouth, Remarks at Brownfields 2006 Conference: Military Base Redevelopment: General and Major Issues, Strategies, and Successes (Power Point presentation available at <http://www.brownfields2008.org/proxy/SessionDocument.1847.aspx>).

⁶ California Department of Toxic Substances Control, Envirostor, Oakland Army Base, www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=01970006 (last visited Jan. 10, 2008).

⁷ Base Closure and Community Assistance Act, Pub. L. No. 103-160, § 2901(2), 107 Stat. 1907 (1994) (“A military installation is a significant source of employment for many communities, and the closure or realignment of an installation may cause economic hardship for such communities.”); see also INTERSTATE TECH. & REGULATORY COUNCIL, PROPERTY REVITALIZATION—LESSONS LEARNED FROM BRAC AND BROWNFIELDS 25, 26 (2006) [hereinafter ITRC, LESSONS LEARNED], available at http://www.itrcweb.org/Documents/Brnflld_2web.pdf.

⁸ Childs Walker, *Lawmakers Encourage Support for Base Plan*, BALTIMORE SUN, May 24, 2005, available at www.baltimoresun.com/news/local/brac/bal-md.base24May24;0,7886244.story?coll=bal_news_local_brac_xpromo.

enactments are the product of more horse-trading than perhaps any other legislation save for appropriations bills. To bring independence to the process, Congress created a mechanism that was intended to depoliticize the process by way of transferring base closing decisions to independent commissions.⁹ Of course, there are plenty who would argue that the resulting decisions are still heavily influenced by politics and not those of an independent process that examines each individual base closing on its own merits.

The process by which a particular base makes it onto the BRAC list, however, is not the focus of this Article, which takes it as a given that a base has been selected for closure and transfer. Once that decision has taken place, a rigorous multi-step process must be followed, including an environmental remediation “track” governed by a variety of Executive Orders and federal agency documents that interpret and guide cleanups. As noted more fully below, cleanups at BRAC sites must follow the mandates of state and federal environmental laws, including the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), the Clean Water Act (“CWA”), the National Environmental Policy Act (“NEPA”), and the Resource Conservation and Recovery Act (“RCRA”), among others.¹⁰

The DoD’s involvement in addressing environmental contamination at its facilities predates BRAC. In 1986, the Defense Environmental Restoration Program (“DERP”) was created for this purpose.¹¹ Since then, nearly 30,000 sites have been identified for investigation and possible remediation activities.¹² BRAC cleanups are but one aspect of the DERP but a major one, responsible for about \$300 to \$600 million in annual appropriations.¹³

⁹ Pub. L. No. 100-526, § 201, 102 Stat. 2623, 2627 (1988) (establishing the Commission on Base Realignment and Closure).

¹⁰ See generally U.S. DEP’T OF DEF., BASE REDEVELOPMENT AND REALIGNMENT MANUAL (2006) [hereinafter BRRM], available at <http://www.defenselink.mil/brac/pdf/4165-66-M-BRRM-508.pdf>.

¹¹ U.S. Department of Defense, History of the Defense Environmental Restoration Program, <https://www.denix.osd.mil/denix/Public/Library/Cleanup/CleanupOfc/derp/history.html> (last visited Jan. 10, 2008); see also Moeller, *supra* note 3, at 886-93 (citations omitted).

¹² Moeller, *supra* note 3, at 902.

¹³ DEFENSE ENVIRONMENTAL PROGRAMS, FISCAL YEAR 2005 ANNUAL REPORT TO CONGRESS, APPENDIX B: COMPONENT ENVIRONMENTAL PROGRAMS PROGRESS: ARMY, NAVY, AIR FORCE, DLA, FUDS, available at <https://www.denix.osd.mil/denix/Public/News/OSD/DEP2005/appB-component-program.pdf>.

In 2006, the DoD issued a “Base Redevelopment and Realignment Manual” (“BRRM”), a 146-page “cookbook” that prescribes BRAC procedures, including environmental remediation procedures.¹⁴ A central body in the BRAC process is the Local Redevelopment Authority (“LRA”), an entity established by a state or local government, and recognized by the DoD as responsible for developing the site’s redevelopment plan and potentially having a role in its implementation.¹⁵ The LRA “serves as the primary link between DoD and the installation and the community and Federal and State agencies for all base closure matters.”¹⁶ The LRA’s reuse plan for the site to be transferred is intended to be a “reasonably anticipated future land use . . . taking into account factors such as the current land use, zoning classifications and restrictions, property characteristics, and surrounding land areas.”¹⁷ The site’s future use, as identified in the redevelopment plan, in turn helps with the identification of the required cleanup level.

The method of disposing of BRAC surplus property is determined between the DoD and the LRA and can take one of many forms listed in the BRRM “toolbox”: public benefit conveyance, economic development conveyance, public sale, negotiated sale, homeless assistance conveyance under the McKinney Act, or an “environmental responsibilities conveyance,” which is an outright conveyance for the cost of environmental remediation.¹⁸

B. Differences Between BRAC and Brownfields Process

Forty-nine states have programs to promote revitalization of “brownfields”: “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”¹⁹ Many factors have

¹⁴ See generally BRRM, *supra* note 10.

¹⁵ “After redevelopment planning activities are completed, the LRA submits its adopted redevelopment plan to the Military Department.” *Id.* § C2.5.1.

¹⁶ *Id.* § 3.2.2.

¹⁷ ASS’N OF STATE & TERRITORIAL SOLID WASTE MGMT. OFFICIALS, A REGULATOR’S GUIDE TO BASE REALIGNMENT AND CLOSURE 13 (2006) [hereinafter ASTSWMO, BRAC REGULATOR’S GUIDE], available at <http://www.astswmo.org/files/publications/federal-facilities/Final-BRAC-Guide.pdf>.

¹⁸ BRRM, *supra* note 10, §§ C2.6, C5.5.

¹⁹ Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, § 211, 115 Stat. 2356, 2361 (codified as amended at 42 U.S.C. § 9601(39) (2000 & Supp. IV 2004)).

fueled an explosion in the number and size of brownfields programs over the past two decades, including (at the outset in part) a response to the fear of potential owner/operator liability under CERCLA and its state counterparts for becoming associated with sites and a prevalent desire to shift the enforcement model of environmental protection to being more accommodating to those who sought to redevelop abandoned or neglected sites. Today, many states have “voluntary cleanup programs” (“VCPs”) that allow site developers, who are usually not responsible for any contamination at the site, to come voluntarily to the states and conduct cleanups, receiving liability protection in return. Because state VCPs aim to remediate sites with a more streamlined process, the cleanup is typically meant to take less time and have fewer steps than the NCP cleanup process.²⁰

State brownfields programs have successfully processed thousands of brownfields sites, and there are numerous high-profile stories involving the conversion of abandoned or underused sites in urban, rural and suburban locations to productive uses.²¹ At the federal level, one commentator views the 2002 law promoting brownfields reuse and remediation as a positive “exception” to the dismaying recent trend of congressional inaction on environmental issues.²²

Brownfields sites are typically different from BRAC sites, which are identified as surplus in the BRAC process directed by the scheme implemented by Congress. The highly politicized BRAC process yields a prescribed list of sites that become identified for closure and transfer to private sector entities. By contrast, some brownfields sites are identified through centralized processes such as inventories (for example, the New Jersey SiteMart),²³ but usually the site buyer, developer, or local government identifies the site. BRAC sites are, by definition, always owned by the federal government and have usually had multiple uses as military uses of a base changed.²⁴ Often the owner of a brownfields site is not known; in many cases there is no current owner (like “orphan sites” in CERCLA parlance) and cleanup and transfer responsibility may fall to

²⁰ ITRC, LESSONS LEARNED, *supra* note 7, at 25-26.

²¹ See generally Joel B. Eisen, *Brownfields at 20: A Critical Reevaluation*, 34 FORDHAM URB. L.J. 721 (2007) [hereinafter Eisen, *Brownfields at 20*].

²² Richard Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 629 (2006).

²³ State of New Jersey, Brownfields Site Mart, <http://www.njsitemart.com> (last visited Jan. 10, 2008); see also Eisen, *Brownfields at 20*, *supra* note 21, at 729.

²⁴ ITRC, LESSONS LEARNED, *supra* note 7, at 64.

a local government.²⁵ In the case of both types of sites, though, there is one similarity in that historical records are often incomplete.²⁶

The level and types of contaminants are also typically different. Contamination at BRAC sites depends on how the military used the sites and can include such widely diverse and dangerous substances as metals, chlorinated solvents, organic chemicals, unexploded ordnance, and even radioactive wastes.²⁷ Contamination of soil, groundwater, surface water, and sediments may be so widespread and severe that the site may be listed on the National Priorities List (“NPL”). By contrast, under state VCP restrictions, sites typically are not extensively contaminated and usually *cannot* be listed on the NPL or comparable state enforcement site lists.²⁸

Another difference between the two programs is in the level and type of regulatory oversight. One commentator observes that “the regulatory oversight process at a BRAC site can be quite different from that at a private brownfield site.”²⁹ BRAC sites, by law, have multiple state and federal agencies overseeing the cleanup. While the DoD has been given the authority to lead cleanups at BRAC sites, other agencies, including the EPA, are involved.³⁰ Remediation at brownfields sites, by contrast, is typically overseen by one state agency, or even none at all in those states that allow consultant-led cleanups.³¹

Given all these differences, one might wonder why our panel’s discussion of brownfields and BRAC was so harmonious. The answer is not difficult to discern. The BRAC process has a number of safeguards in place with respect to public participation, cleanup standards, and cleanup oversight. However imperfect these safeguards might be (and no one would argue that BRAC cleanups have been perfect), they are intended to ensure that cleanups of sites being transferred are sufficiently protective of those who will use the sites in the future.

²⁵ *Id.*

²⁶ *Id.* at 28, 64.

²⁷ *Id.*; see also Carolyn M. White, Senior Envtl. Counsel, Air Force Office of General Counsel, *Environmental Considerations in Real Property Transactions*, Presentation at the William & Mary Envtl. Law and Pol’y Rev. Symposium: Mission Impossible?: The Compatibility of Military and Environmental Goals 16 (Feb. 10, 2007) (notes on file with author).

²⁸ *Id.*

²⁹ ITRC, LESSONS LEARNED, *supra* note 7, at 25.

³⁰ *Id.*

³¹ *Id.*

From the perspective of an observer and frequent critic of brownfields programs, much of what is built formally into the BRAC program seemed appealing. I have written about drawbacks of brownfields programs in three areas: the lack of public participation in fundamental decisions affecting the future of individual brownfields sites and community land use planning generally; the relaxation of cleanup standards in the name of getting sites back into commerce more quickly; and the relative lack of oversight in state VCPs.³² By contrast, as I describe below, BRAC's environmental safeguards often look more desirable than those of state VCPs. At times, I was surprised to find that they even compare favorably to substantive features I have recommended that states incorporate in their brownfield programs.³³

That, I suppose, was what led friends and colleagues familiar with my work to suggest that I look to BRAC for exemplars of what might work elsewhere. This leads us to a sort of irony, though. As I have come to realize that BRAC might offer constructive lessons for those administering state VCPs, the nature of BRAC environmental remediation itself is changing. Over the course of the five BRAC rounds, and particularly in the fifth round of closings, the BRAC process has moved to become more "brownfields-like."³⁴ The process has begun to adopt the flexibility and methodologies of VCPs, to the extent practicable within the statutory and regulatory framework that governs BRAC. According to a number of commentators, this creates opportunities for getting sites back into commerce more quickly than has been the case in the first four BRAC rounds. If a cleanup at a BRAC site is administered with a major role played by a state agency, it is not much different conceptually from a cleanup at a private site remediated in a state VCP.

II. ENVIRONMENTAL REMEDIATION IN BRAC AND THE THREE "SURPRISES"

So while I found the surprises of looking at BRAC to be mostly positive, I also found that the fifth BRAC round might pose the same sorts of dilemmas that have been present in brownfields remediation and

³² See generally Eisen, *Brownfields at 20*, *supra* note 21; see also Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187 (1998) [hereinafter Eisen, *Sustainable Cities*].

³³ See Eisen, *Sustainable Cities*, *supra* note 32, at 215-19.

³⁴ ITRC, LESSONS LEARNED, *supra* note 7, at 1-2; U.S. Air Force BRAC Q&A, <http://www.af.mil/brac/faq.asp> (last visited Jan. 10, 2008).

reuse since the 1990s. That contrapuntal thinking about the evolution of BRAC led me to split my analysis of its features into two parts. In sections A and B of this Part, I examine two largely positive attributes of BRAC: its insistence on comprehensive remedial action and its structure emphasizing public participation. In section C, I offer a preliminary analysis of the increased use of more “brownfields-like” cleanup procedures in BRAC and consider this to be a more mixed development.

A. *“Clean Means Clean”*

A definite positive surprise in the BRAC program is that at BRAC sites there is a preference for finality of remedial action. The touchstone for a BRAC cleanup is the statutory commitment embodied in CERCLA § 120(h), where “clean means clean,” with strong coordinated multi-jurisdictional and multi-agency oversight to ensure proper cleanup. In particular, CERCLA § 120(h)(3) requires the DoD to ensure that “all remedial action necessary to protect human health and the environment with respect to any [hazardous] substance remaining on the property has been taken before the date of such transfer.”³⁵ The deed transferring title is required to list hazardous substances that were present on the property and remedial actions (if any) taken to address them.³⁶ The BRRM states that “[w]henver a Military Department enters into a transfer of real property outside the Federal government where CERCLA 120(h)(3) . . . hazardous substances were stored for 1 year or longer, known to have been released, or disposed of, Section 120(h) of CERCLA . . . applies, [and that,] “[t]he Department of Defense has no authority under Section 120(h) . . . to increase or decrease the commitment required by that section.”³⁷

If remediation activities are required, the statutory commitment to cleanup leads the DoD to follow a rigorous process for investigation and cleanup whether or not the site is listed on the NPL, as described in the BRRM.³⁸ As one commentator notes, “the structure and process set forth in the NCP for environmental remediation are applicable to all DERP sites regardless of NPL status.”³⁹ The cleanup process follows the

³⁵ 42 U.S.C. § 9620(h)(3)(A)(ii) (2000).

³⁶ White, *supra* note 27, at 18.

³⁷ BRRM, *supra* note 10, § C8.5.2.1.

³⁸ *See id.* § C8.5.4.

³⁹ Moeller, *supra* note 3, at 910.

normal multi-step process, that is, from Preliminary Assessment/Site Inspection through Record of Decision, for cleanups conducted under the NCP (or under RCRA procedures if appropriate, as spelled out in the BRRM).⁴⁰ In contrast to the normal process for privately-owned sites being remediated under CERCLA, the DoD (not the EPA or a state environmental agency) has lead authority under Executive Order 12,580 to conduct the cleanup of a BRAC site, with the EPA's signoff required on selection of remedies for those BRAC sites that are also on the NPL.⁴¹ The cleanup is conducted in accordance not only with CERCLA or RCRA, but also with a whole host of other state and federal environmental laws.⁴²

In a "standard" transfer all remediation activities are completed prior to the transfer of the military facility to the private sector. The deed must contain a covenant that "all remedial action necessary to protect human health and the environment . . . has been taken [prior to] transfer," and a covenant that any additional remedial action found to be necessary after transfer will be conducted by the federal government.⁴³ As one commentator notes, this shows that "Congress did not want the federal government to offload the costs of addressing contamination for which it was responsible onto private parties that may not have the resources to undertake proper cleanup."⁴⁴

In the fifth BRAC round, the baseline report on existing environmental conditions at a particular site is an "Environmental Condition of Property" ("ECP") report which includes data on the environmental history of the facility.⁴⁵ As the BRRM states, "[t]he Military Department

⁴⁰ See BRRM, *supra* note 10, § C8.5.2.3.

⁴¹ Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987); White, *supra* note 27, at 16.

⁴² Exec. Order No. 12,580. Federal environmental laws governing the transfer of military sites to private parties include the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act, Coastal Zone Management Act, and Endangered Species Act, among others. BRRM, *supra* note 10 §§ C8.2, C8.4; White, *supra* note 27, at 14. NEPA compliance is a key component of the BRAC process, as spelled out in the BRRM. BRRM, *supra* note 10, § C8.2. A table summarizing the various laws that govern cleanups may be found in ASTSWMO, BRAC REGULATOR'S GUIDE, *supra* note 17, at 25-28.

⁴³ 42 U.S.C. § 9620(h)(3)(A)(ii) (2000); see also White, *supra* note 27, at 18.

⁴⁴ Goodwin Procter LLP, *Next Round of Base Closures Offers New Brownfield Redevelopment Opportunities*, ENVTL. L. ADVISORY 4, Aug. 2004, available at www.goodwinprocter.com/~media/FA0DC812A12F4D2F9DB7185BE1572AB2.ashx.

⁴⁵ BRRM, *supra* note 10, § C8.3; ASTSWMO, BRAC REGULATOR'S GUIDE, *supra* note 17, at 6. While the ECP is not intended to meet the requirements of the "All Appropriate Inquiries" rule detailing what purchasers of real property must do to avert potential liability under CERCLA, it is meant to "[a]ssist prospective new owners in meeting the [rule's] requirements." BRRM, *supra* note 10, § C8.3.1.6.

with real property accountability shall assess, determine, and document the environmental condition of all transferable property in an ECP report.”⁴⁶ There are multiple purposes of the ECP report, including “[p]rovid[ing] the Military Department with information it may use to make disposal decisions regarding the property” and “[p]rovid[ing] the public with information relative to the environmental condition of the property.”⁴⁷

The BRRM outlines the steps in the BRAC cleanup process from that point forward. As in the case of private sector sites investigated under CERCLA, it may be the case that no further action is required, or it may be that a cleanup may be required, depending on the site’s condition.⁴⁸ In the first four BRAC rounds, most cleanups were led by BRAC Cleanup Teams (“BCTs”) consisting of EPA, DoD and state officials,⁴⁹ but the leadership team structure has been modified for the fifth BRAC round.⁵⁰

Both the EPA and the DoD have responsibilities for specific remediation activities.⁵¹ A detailed Memorandum of Understanding between the EPA and the DoD spells out the responsibilities of each for BRAC site cleanups.⁵² One EPA task, besides signoff on remedies for BRAC sites also on the NPL, is “[c]ertifying that remedies are working as they were intended at all sites when remedial actions are complete (known as ‘operating properly and successfully’).”⁵³ This “OPS demonstration,” meets the requirements of CERCLA § 120(h)(3) “if the

⁴⁶ BRRM, *supra* note 10, § C8.3.1.

⁴⁷ *Id.* §§ C8.3.1.1, C8.3.1.2.

⁴⁸ *Id.* § C8.5.4.

⁴⁹ ASTSWMO, BRAC REGULATOR’S GUIDE, *supra* note 17, at 13.

⁵⁰ *Id.* (“According to the BRRM, BCTs will not be created at the BRAC 2005 installations. At many installations, working relationships are already established between DoD personnel and federal and State regulators. This is the case at facilities where the EPA Remedial Project Manager, DoD personnel and state personnel already work together on cleanup decisions. Section [C]8.5.6 of the BRRM states, ‘Existing procedures and relationships related to regulatory oversight should be maintained for closing installations when they facilitate cleanup and redevelopment, and until the property is transferred to the new owner.’ These working relationships do facilitate cleanup, and therefore should continue throughout the BRAC process to address cleanup and property transfer issues.”).

⁵¹ See U.S. Env’tl. Prot. Agency, Federal Facilities Restoration and Reuse Office, Property Transfer at Federal Facilities, *available at* <http://www.epa.gov/fedfac/pdf/baseclosure.pdf>.

⁵² U.S. Env’tl. Prot. Agency & U.S. Dep’t of Defense, Memorandum of Understanding Between the U.S. Environmental Protection Agency and the U.S. Department of Defense, EPA Reference PW97922127-01-0, (2005), *available at* http://www.epa.gov/fedfac/pdf/brac_mou.pdf.

⁵³ U.S. Env’tl. Prot. Agency, Property Transfer at Federal Facilities, *supra* note 51, at 3.

construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to the [EPA] Administrator to be operating properly and successfully.”⁵⁴ The EPA’s approval of an OPS demonstration does not imply that all remedial action has been completed, but only that transfer may take place, for the completion of remedial activities “is defined by the attainment of specific cleanup levels or performance goals that are specified in a decision document, such as a ROD.”⁵⁵

An important step in the transfer or lease of a BRAC site is a Finding of Suitability to Transfer (or Lease) (“FOST” or “FOSL”). This document, prepared at the conclusion of the process, “state[s] the property is environmentally suitable for transfer or lease and contain[s] a description of any long-term remedies (including land-use controls) and responsibilities for their maintenance and reporting.”⁵⁶ This document certifies that CERCLA § 120(h)(3) has been complied with and that all remedial actions have been taken, the CERCLA covenants have been met, and the property is suitable for transfer or lease.⁵⁷

A new mechanism allows so-called “early transfer,” or a transfer before all remedial activities are completed.⁵⁸ In that case the DoD prepares a Covenant Deferral Request/Finding of Suitability for Early Transfer (“FOSET”): request for early transfer, under CERCLA § 120(h)(3) as amended.⁵⁹ This will be covered in more detail below, as it is a critical element of BRAC’s transformation into a more “brownfields-like” system.

As the BRAC cleanup and transfer process is spelled out in this comprehensive fashion in the BRRM, following the mandates of existing state and federal environmental laws, there is a resulting relative uniformity in the cleanup approach. What is also familiar, then, are the imperfections that have dogged the CERCLA cleanup process at private sector sites since the advent of CERCLA, including delays and cost overruns.⁶⁰ Cleanups can be delayed, particularly at BRAC NPL sites,

⁵⁴ 42 U.S.C. § 9620(h)(3)(B) (2000); U.S. DEP’T OF DEFENSE, ET AL., THE ENVIRONMENTAL SITE CLOSEOUT PROCESS GUIDE § 6.1 (1999) [hereinafter DOD, SITE CLOSEOUT GUIDE], available at http://www.epa.gov/fedfac/pdf/site_closeout.pdf.

⁵⁵ DOD, SITE CLOSEOUT GUIDE, *supra* note 54, § 6.1.

⁵⁶ BRRM, *supra* note 10, § C8.5.5.1.

⁵⁷ *Id.*

⁵⁸ *Id.* § C5.6.3.1.

⁵⁹ *Id.* § C5.5.5.3.

⁶⁰ ASS’N OF STATE & TERRITORIAL SOLID WASTE MGMT. OFFICIALS, POLICY POSITION PAPER ON THE MILITARY BASE REALIGNMENT AND CLOSURE PROGRAM 1 (Apr. 19, 2006) [hereinafter ASTSWMO, POSITION PAPER], available at <http://www.astswmo.org/files/publications/>

and a recent analysis by the EPA's Office of Federal Facilities Restoration and Reuse notes that thirty-four sites are still on the NPL.⁶¹

The remediation process compares favorably to that of state VCPs in that it retains a commitment to full cleanups. As the BRAC process becomes more "brownfields-like," this may be a difference without a distinction, but at least in its statutory and regulatory machinery BRAC requires a more thorough remediation process than does the typical state VCP. The formal commitment, however, may not be all that important, as borne out by BRAC cleanups that fall short of the ideal. As the Association of State and Territorial Solid Waste Management Officials ("ASTSWMO") notes, the "DoD has shown an increased reliance on institutional controls as the primary remedy or as a major component in the overall remedies at BRAC sites," and while "[i]nstitutional controls are initially lower in cost as compared to more permanent remedies . . . [they] should not be the sole component of any final remedy."⁶² The ASTSWMO cautions that "[s]tate experiences with institutional controls suggest that permanent remedies are more effective and potentially less expensive over time than high maintenance remedies based predominantly on institutional controls."⁶³

There is another respect in which the BRAC process can inform the state brownfields process: through its feature of a post-cleanup obligation. The DoD is required under CERCLA to perform more cleanup than was completed before the transfer of the site when additional contamination is discovered, when the selected remedy failed to perform as expected, or when an institutional control proved ineffective.⁶⁴ Unfortunately, this may not be the panacea for remedying problems that are not addressed in the initial remediation process. As one commentator notes, "under a worst-case scenario, it may be difficult to make the DoD component return to complete remediation where they are no longer owners [of sites]."⁶⁵

However effective the post-cleanup obligation might be, it stands in contrast to the situation in state VCPs, where there is typically no

federalfacilities/Final%20April%202006%20BRAC%20position%20paper.pdf.

⁶¹ U.S. Env'tl. Prot. Agency, Federal Facilities Restoration and Reuse Office, Mid-Year 2007 BRAC Program Snapshot, <http://www.epa.gov/fedfac/documents/brac2007.htm#5> (last visited Jan. 10, 2008).

⁶² ASTSWMO, POSITION PAPER, *supra* note 60, at 5.

⁶³ *Id.*

⁶⁴ See 42 U.S.C. § 9620(h)(3)(A)(iii) (2000).

⁶⁵ ASTSWMO, BRAC REGULATOR'S GUIDE, *supra* note 17, at 24.

such requirement. Indeed, more than one commentator has suggested that a drawback of VCPs is their insufficient attention to the future.⁶⁶ With states strapped for resources to oversee ongoing cleanups, it is unlikely that they would devote much vigor to checking back on those sites which have already had what the states believed were successful outcomes. This may turn out to be unsound, as the cleanup at a brownfields site may fall short if all existing contamination at sites was not discovered prior to their reuse (particularly if a developer uses institutional controls rather than performing a cleanup), or if sites that have been processed through the programs are contaminated again at a later date. Neither situation is typically addressed in state VCPs. Most state laws have “reopener” features but evidence to date suggests that states do not use them to perform oversight of sites that have been processed through the programs.⁶⁷

B. A Model of Public Participation?

In the early 1990s, when I began writing about brownfields law and policy, some well-meaning friends and colleagues suggested that I look to base closings as a model. At first, I was taken aback by the unusual notion that any military process could stand as a model of public participation. And yet, it turns out that a vital component of DoD cleanup activities at BRAC sites is coordination with local stakeholders. The primary vehicle for this is the Restoration Advisory Board (“RAB”), combined with the availability of funds for training local residents to become active public participants under contracts from the Technical Assistance for Public Participation (“TAPP”) program.⁶⁸ The purpose of TAPP is to provide “support for independent technical advice to assist in clarifying specific scientific and engineering issues that arise when reviewing restoration activities and documents.”⁶⁹ There is nothing comparable in most state VCPs to help ordinary citizens understand the complexities of environmental remediation.

⁶⁶ See Eisen, *Brownfields at 20*, *supra* note 21, at 732 (citing Professor David Dana).

⁶⁷ *Id.* at 746.

⁶⁸ U.S. DEP'T OF DEFENSE, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM FISCAL YEAR 2006 ANNUAL REPORT TO CONGRESS App. O, O-6 [hereinafter DOD, DERP ANNUAL REPORT 2006], available at https://www.denix.osd.mil/denix/Public/News/OSD/DEP2006/App_O_Restoration-Advisory-Boards_osd-draft.pdf. Appendix O details the TAPP process and provides a list of groups receiving TAPP grants.

⁶⁹ *Id.*

As the name implies, the RAB is an entity formed to advise the DoD on decisions involving the closing and transfer of the facility and is meant to be a “continuous forum through which members of affected communities can provide input to an installation’s ongoing environmental restoration activities.”⁷⁰ The RAB is established under statutes and regulations governing the BRAC process.⁷¹ The DoD rule, last updated in 2006,⁷² spells out the circumstances under which a RAB should be established. The rule states that “[a] RAB should be established when there is “sufficient and sustained community interest,” and *any* of the following conditions are met: “(1) [t]he closure of the facility [with] a transfer of property to the community, (2) [a]t least 50 local citizens petition . . . [the facility to create a RAB], (3) [f]ederal, state, tribal, or local government representatives request . . . [it], or (4) the installation determines the need for RAB.”⁷³ Once a RAB is established, it usually includes representatives of the facility, local governments, the EPA, and citizens.⁷⁴ Its proceedings are open to the public, with the facility maintaining an Administrative Record for public review.⁷⁵

There have been some disagreements in situations where community members thought RABs should have been established but were not. This led some commentators to the 2006 RAB rule update to observe that requiring fifty citizens to petition for a RAB was an onerous burden.⁷⁶ The DoD disagreed and maintained the requirement as is.⁷⁷ In any event, the situation where residents seek to have a RAB but are rebuffed is the exception, not the rule, as there are about 310 RABs in operation.⁷⁸

⁷⁰ ASTSWMO, BRAC REGULATOR’S GUIDE, *supra* note 17, at 17. *See also* BRRM, *supra* note 10, § C8.5.1.5 (“RABs bring together people who reflect the diverse interests within the local community, enabling the early and continued flow of information among the affected community, DoD, and environmental oversight agencies.”).

⁷¹ 10 U.S.C. § 2705(d)(2)(A) (2000).

⁷² Department of Defense Restoration Advisory Boards, 71 Fed. Reg. 27,610 (May 12, 2006) (codified at 32 C.F.R. pt. 202 (2006)). A number of lingering issues were addressed in the 2006 rule update, including criteria for establishment of a RAB, its composition, and logistics (meetings, adjournment, etc.). *Id.*

⁷³ 32 C.F.R. § 202.2(a) (2006).

⁷⁴ *Id.* § 202.4(a).

⁷⁵ *Id.* §§ 202.9(a), 202.11, 202.14.

⁷⁶ *See* 71 Fed. Reg. at 27,612.

⁷⁷ *Id.* (“The Department clarifies that 50 petitioners is not the only way to establish a RAB. The petition is one of four proposed mechanisms to initiate the establishment of the RAB.”).

⁷⁸ DOD, DERP ANNUAL REPORT 2006, *supra* note 68, at O-2; ASTSWMO, BRAC REGULATOR’S GUIDE, *supra* note 17, at 17.

RABs have added value to the BRAC process. A survey conducted by ASTSWMO found that twenty-nine out of thirty-one state environmental agencies viewed RABs as a positive influence.⁷⁹ In this respect, the BRAC process compares quite favorably to public participation in state VCPs. In the two decades since the advent of state brownfields programs, there has been a substantial shift in the level of public participation in remediation and reuse decisions.⁸⁰ Many statutes enacted in what one might term the “first generation” of brownfields laws did not establish mandatory requirements to involve the public in such basic decisions as determining the future uses to which sites would be put, preferring instead to leave these decisions within developers’ control.⁸¹ One apparent reason for this was that states intended to signal that developers who volunteered to remediate and reuse sites should face less bureaucratic red tape than if they were enmeshed in enforcement-driven situations. Since then, developers who are dotting the i’s and crossing the t’s do more to involve the public, often more than is required under state VCP procedures.

However, there are still fundamental differences between public input in state VCPs and BRAC. First is the requirement that an advisory board be formed when citizens request it. This concept is not completely absent from state VCPs, as some states do have mechanisms for forming advisory board-like structures to advise site developers and state regulators (and some boards are of course formed on an ad hoc basis). Still, the majority of states do not require developers to consult with community-based entities.⁸² Also, the requirement that the military give “careful consideration” to the advice of RABs (which may include recommendations on the future use of a military facility)⁸³ is unheard of in state VCPs, where the site developers typically come to the states after having developed their plans for the sites.⁸⁴ This is an important distinction between the two types of programs. Local residents naturally expect that their input will drive decisions about site use, and are often surprised to

⁷⁹ Ass’n of State & Territorial Solid Waste Mgmt. Officials, *Community Involvement: Working Together to Achieve Results* (2007), available at <http://www.astswmo.org/files/publications/federalfacilities/CommunityInvolvementWebversion.pdf>.

⁸⁰ See Eisen, *Brownfields at 20*, *supra* note 21, at 753.

⁸¹ See generally Joel B. Eisen, “*Brownfields of Dreams?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*,” 1996 U. ILL. L. REV. 883 (1996) [hereinafter Eisen, “*Brownfields of Dreams?*”].

⁸² *Id.* at 1004-05.

⁸³ 32 C.F.R. § 202.1(a)(3) (2006).

⁸⁴ See Eisen, “*Brownfields of Dreams?*,” *supra* note 81, at 1003-04.

find out that most VCPs do not give them a voice in this critical aspect of the process. By contrast, the DoD's report on RABs notes that over one hundred RABs advised the military on the future use of BRAC sites.⁸⁵

Local residents are almost always represented on RABs.⁸⁶ So too are residents of the affected base, local environmental groups, members of the local business community, low-income and minority groups, and local government officials.⁸⁷ This broad-based participation is a significant factor in the appeal of RABs as community sounding boards. As the ASTSWMO has found, "since the inception of the BRAC program, DoD's emphasis on stakeholder involvement through the formation of BCTs and RABs has generally been successful and has contributed to expediting environmental cleanups and helped build community support for the BRAC process."⁸⁸

There simply is no comparable requirement in state VCP procedures to draw upon advice from a broad spectrum of the affected community. If the states established boards of this sort at brownfields sites, particularly larger sites that have impacts on entire communities, the resulting decision making might be more in keeping with community visions for urban redevelopment. That in turn, as I have stated elsewhere, is an essential element in achieving sustainability through brownfields reuse and redevelopment.⁸⁹ This is no doubt a positive surprise emerging from the comparison between public participation in BRAC and state VCPs.

C. The Process Is Becoming More "Brownfields-Like" (Increasing Flexibility in Cleanups Through the Use of ETA)

While the BRAC process has been a highly competent means of balancing private sector interests and environmental protection, BRAC cleanups in the fifth round are evolving and becoming more "brownfields-like," with developers seeking cleanup processes that have more of the perceived flexibility inherent in VCPs. As the ASTSWMO notes, "[i]t is anticipated that early transfer/privatization of contaminated parcels will

⁸⁵ DoD, DERP ANNUAL REPORT 2006, *supra* note 68, at O-6.

⁸⁶ *Id.* at O-5 (305 out of 312 RABs in FY 2006 reported having members from the local community and even the other seven might have local residents because they could be counted in other categories).

⁸⁷ *Id.* (citing Figure O-8).

⁸⁸ ASTSWMO, POSITION PAPER, *supra* note 60, at 1.

⁸⁹ See Eisen, *Brownfields at 20*, *supra* note 21, at 753-55 (citations omitted); Eisen, *Sustainable Cities*, *supra* note 32.

be the norm as DoD attempts to quickly transfer BRAC properties.”⁹⁰ This final “surprise” is a more mixed one in its potential impacts for environmental protection.

Since its enactment, CERCLA §120(h)(3) has been amended to allow early transfer of a BRAC site under certain circumstances before all required remedial action has been completed, under the process known as “Early Transfer Authority.”⁹¹ Under early transfer agreements (“ETA”), the statutory mandate for a complete cleanup remains but the private sector takes on more responsibility for remediation activities (particularly in a transferee-led cleanup).⁹² CERCLA § 120(h)(3)(C) allows federal agencies to transfer property before all necessary cleanup actions have been taken.⁹³ The ETA is a *deferral* of the CERCLA covenants, and the Covenant Deferral Request/ Finding of Suitability for Early Transfer (“FOSET”) requires approval from the EPA and from state governmental authorities.⁹⁴ The DoD is still required to issue the covenant required under CERCLA that “all remedial action[s] necessary to protect human health and the environment . . . [have] been taken,” but in an early transfer situation the timing of issuance of this covenant changes.⁹⁵

ETA has been used at a small minority of BRAC sites to date.⁹⁶ In the standard cleanup and transfer model, as noted above, the DoD does the cleanup itself under the procedures spelled out in the NCP.⁹⁷ In the ETA model, options for cleanup activities can be selected in part on the basis of which party is best qualified to perform them.⁹⁸ The model can be more like the standard transfer, with the DoD performing cleanup work and the transferee focusing on redevelopment activities, or the DoD and transferee can share cleanup work.⁹⁹ At the cleanup of the Mare Island Naval Shipyard in California, for example, the DoD focused on

⁹⁰ ASTSWMO, POSITION PAPER, *supra* note 60, at 1.

⁹¹ See 42 U.S.C. § 9620(h)(3)(C) (2000).

⁹² See BRRM, *supra* note 10, § C8.5.

⁹³ See 42 U.S.C. § 9620(h)(3)(C).

⁹⁴ See BRRM, *supra* note 10, § C5.5.5.3.

⁹⁵ 42 U.S.C. § 9620(h)(3)(A)(ii)(I).

⁹⁶ See Victor Wieszek, Office of the Deputy Under Sec’y of Def., Early Transfer Authority: Background and Use for BRAC Rounds I-V, Remarks at the Joint Services Environmental Management Conference and Exhibition 7 (Mar. 2006) (Power Point presentation available at <http://proceedings.ndia.org/JSEM2006/Wednesday/Wieszek.pdf>) (noting that ETA has been used at twenty-one BRAC sites).

⁹⁷ See *id.* at 5.

⁹⁸ See *id.*

⁹⁹ See *id.*

military-specific cleanup issues and left addressing other contamination in the hands of the LRA.¹⁰⁰

In a purely privatized cleanup, the DoD would transfer title early to the LRA, before any cleanup activities had been completed.¹⁰¹ According to the ASTSWMO, it “can be a very successful tool to transfer property because it accelerates remediation, and advances economic development of an area. It also removes the DoD component as an impediment to cleanup to state standards, because the new owner agrees, in the Consent Agreement, to cleanup to state standards.”¹⁰² This recognizes that the private party may do cleanup more efficiently than the government, as it might have more expertise in environmental remediation, and could retain its own remediation contractor and have more control over the process. The LRA may have an existing relationship with state regulators, which may in theory help move the remediation activities along more expeditiously.¹⁰³ Perhaps the most important reason advanced for privatized transfers is the “one dig” principle: integrating cleanup and redevelopment would allow the LRA to perform all of this work at the site at the same time.¹⁰⁴

A notable example of a site that has proceeded to cleanup and reuse under a privatization model is the Oakland Army Base in Oakland, California.¹⁰⁵ This base was located on the Oakland waterfront just south of the eastern entrance to the San Francisco-Oakland Bay Bridge. According to a historical source, “[i]ts mission was to ship the Army’s men and material into the Pacific areas of operation [in World War II and d]uring the war tens of thousands of soldiers and 25 million tons of supplies

¹⁰⁰ See U.S. DEP’T OF THE NAVY, SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIP AT FORMER MARE ISLAND NAVAL SHIPYARD (2006), available at http://deparc.egovservices.net/deparc/pdfs/stories/Navy/BRAC_Mare_Island_Navy_Success_Story_10-16-06.pdf (providing a detailed description of Mare Island cleanup activities); see also U.S. DEP’T OF DEF., DEFENSE ENVIRONMENTAL RESTORATION PROGRAM FISCAL YEAR 1998 ANNUAL REPORT TO CONGRESS app. A, at 124, available at https://www.denix.osd.mil/denix/Public/Library/Cleanup/CleanupOfc/arc/Reports/FY1998/app_a/marei_124.pdf (providing a timeline of the cleanup at Mare Island).

¹⁰¹ ASTSWMO, BRAC REGULATOR’S GUIDE, *supra* note 17, at 20.

¹⁰² *Id.* at 24.

¹⁰³ See Wieszek, *supra* note 96, at 8 (noting that one environmental consideration that influences the merits of using ETA is the relationship between the LRA and state environmental regulators).

¹⁰⁴ See ITRC, LESSONS LEARNED, *supra* note 7, at 5; Wieszek, *supra* note 96, at 3.

¹⁰⁵ See Wieszek, *supra* note 96, at 9; City of Oakland, Site Information, Reports & Analysis, <http://www.oaklandnet.com/government/obra/hp.html> (last visited Jan. 10, 2008).

flowed through this terminal.”¹⁰⁶ After World War II, it functioned as “a major distribution point for war surplus material.”¹⁰⁷ In 1995, it was designated for closure in the fourth BRAC round.¹⁰⁸

In 2000, the appropriate LRA, the “Oakland Base Reuse Authority” (“OBRA”), requested a conveyance using the ETA procedure, so new owners of the site could integrate cleanup and redevelopment.¹⁰⁹ The OBRA developed a reuse plan in 2002 that involved dividing the site between the Oakland Redevelopment Agency (which would receive a conveyance from the OBRA) and the Port of Oakland.¹¹⁰ The part of the site deeded to the Redevelopment Agency would be turned into a “Gateway Development Area.”¹¹¹ Under this reuse plan, the Army transferred 364 acres of base property to the City of Oakland in August 2003.¹¹² The California Department of Toxic Substances Control is the lead agency for base environmental restoration.¹¹³ Cleanup is taking place under a Remedial Action Plan (“RAP”) and Risk Management Plan (“RMP”), as specified in California’s brownfields laws, with site cleanups to be completed within five years of the transfer (that is, by 2008).¹¹⁴ The Army retained a small parcel of about thirteen acres that was intended for transfer to the Department of Interior for use as a park.¹¹⁵

The Oakland Army Base transfer has been described as an “[i]nnovative application of brownfield redevelopment approach at a closed military facility [and the f]irst of its kind for the U.S. Army BRAC

¹⁰⁶ California State Military Museum, Oakland Army Base, <http://www.militarymuseum.org/OaklandArmyBase.html> (last visited Jan. 10, 2008).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ U.S. DEP’T OF THE ARMY, FINDING OF SUITABILITY FOR EARLY TRANSFER FOR OAKLAND ARMY BASE 8 (2003), *available at* http://www.oaklandnet.com/government/obra/foset/FOSET-FINAL_SIGNED_APR-03.pdf.

¹¹⁰ OAKLAND BASE REUSE AUTHORITY, OAKLAND ARMY BASE FINAL REUSE PLAN 2 (2002), *available at* <http://www.oaklandnet.com/government/obra/obrafrp.pdf>.

¹¹¹ *Id.* at 3.

¹¹² California Department of Toxic Substances Control, *supra* note 6.

¹¹³ *Id.*

¹¹⁴ *See id.*; OFFICE OF ECONOMIC ADJUSTMENT, U.S. DEP’T OF DEF., BROWNFIELD CASE STUDY: OAKLAND ARMY BASE—REMEDIATION AND REUSE 16 (2006) [hereinafter U.S. DEP’T OF DEF., BROWNFIELD CASE STUDY], *available at* <http://www.oea.gov/oeaweb.nsf/Clough.pdf>.

¹¹⁵ *See* ERLER & KALINOWSKI, INC., DRAFT REMEDIAL ACTION PLAN FOR OAKLAND ARMY BASE 1-2, *available at* <http://www.oaklandnet.com/government/ceda/revised/planningzoning/MajorProjectsSection/RAP/Text/Text.pdf>; California Department of Toxic Substances Control, *supra* note 6.

Program.”¹¹⁶ One commentator identifies two significant benefits from the early transfer through use of a FOSET and remedial action in California’s state brownfields program: (1) “[a] [c]lose working relationship with DTSC staff—[i]ncluding jointly edited documents and working group sessions[; and (2)] [i]ncorporation of significant local community support for brownfield redevelopment under the City of Oakland’s Urban Land Redevelopment Program.”¹¹⁷ This suggests that the purported administrative efficiencies of remediating BRAC sites under the auspices of a state program may in fact have been present in this case.

Yet, overall, there have been relatively few privatized cleanups to date, reflecting the complexity of handing off remediation activities while ensuring that the CERCLA covenants will be met.¹¹⁸ As has been noted, “[s]uccessful implementation of [ETA] requires that the DoD, the purchaser, the community, and the regulatory agencies work very closely together. Not only is this partnership in the spirit of the BRAC process, but it is mandated by statute.”¹¹⁹

As the trend toward privatization is likely to continue,¹²⁰ it is worth paying attention to its potential environmental consequences. Because the process would devolve considerable responsibility for cleanups to the private sector, with oversight by the states, it is subject to the same drawbacks that I have identified previously with state VCPs. As with VCPs, the end result will require vigilance by state agencies that they may not be fully equipped to carry out. The ASTSWMO cautions that “[t]his [privatization] approach will directly impact State regulatory agencies, as it will require additional oversight and State resources.”¹²¹ This could lead to problems in the long run if, as I have observed elsewhere,¹²² states tend to devote fewer resources to their brownfields programs than might be necessary to ensure that cleanups remain protective after they are completed.

¹¹⁶ U.S. DEP’T OF DEF., BROWNFIELD CASE STUDY, *supra* note 114, at 19.

¹¹⁷ *Id.* at 20.

¹¹⁸ See Wieszek, *supra* note 96, at 8 (noting that “ETA is not appropriate for all properties” and listing considerations to be taken into account in deciding whether to use the authority).

¹¹⁹ DOD, SITE CLOSEOUT GUIDE, *supra* note 54, § 6.2.

¹²⁰ ASTSWMO, BRAC REGULATOR’S GUIDE, *supra* note 17, at 1 (“BRAC 2005 cleanups will be more focused toward privatization and Performance Based Contracts, which likely means additional State regulatory oversight.”).

¹²¹ ASTSWMO, POSITION PAPER, *supra* note 60, at 1.

¹²² See Eisen, *Brownfields at 20*, *supra* note 21, at 735-37 (citations omitted).

More specifically, some substantive concerns would linger. If a cleanup is done assuming land uses as specified in the LRA's land use plan, there should be some assurance that additional remediation will take place if land uses change over time. As the ASTSWMO states, "[a BRAC] clean up to restricted use must include the future liabilities . . . should land use change."¹²³ But that sort of long-run vigilance is not a strong suit of state brownfields programs at present, nor, for that matter, is long-term monitoring to ensure that land use controls are appropriately working.¹²⁴ In the words of one observer, "any policy that supports restricted uses must also address the full range of issues involving land use controls including the implementability and enforceability of [land use controls]."¹²⁵ Again, leaving that in the hands of state brownfields programs makes an assumption about long-term efficacy that has yet to be proven.¹²⁶

Another potential problem inheres in the notion that in a privatized cleanup the new property owner might take on the cleanup actions, but in the final instance "CERCLA liability remains with DoD [and a]reas of additional contamination discovered after the property transfer would still be the responsibility of DoD."¹²⁷ Unfortunately, this re-opener (the same one based on CERCLA § 120(h)(3) as discussed above) may be even less useful than it would be in "standard" cleanups and transfers, as one commentator notes that "[t]he downside is that the DoD component is no longer the owner of the property."¹²⁸ This would make it especially difficult to make the DoD return to the site and either supervise or conduct additional remedial activities, as the military would no longer have ownership of the property.¹²⁹

So privatization may be the frontier of BRAC cleanups, but for me it raises many of the same red flags as do brownfields cleanups. Brownfields cleanups are here to stay, of course, so it is no surprise that the BRAC process is moving in this direction. It is too soon, however, to tell whether BRAC sites will turn out to be just like other brownfields sites, and any thoughts I might have about that (besides the programmatic concerns I have expressed about state VCPs generally) would be

¹²³ ASTSWMO, BRAC REGULATOR'S GUIDE, *supra* note 17, at 17.

¹²⁴ See Eisen, *Brownfields at 20*, *supra* note 21, at 735-37 (citations omitted).

¹²⁵ ASTSWMO, BRAC REGULATOR'S GUIDE, *supra* note 17, at 17.

¹²⁶ See Eisen, *Brownfields at 20*, *supra* note 21, at 735-37 (citations omitted).

¹²⁷ ASTSWMO, BRAC REGULATOR'S GUIDE, *supra* note 17, at 21.

¹²⁸ *Id.* at 24.

¹²⁹ *Id.*

conjectural at this point. Still, I wonder, given the larger size and complexity of the typical BRAC site compared to brownfields sites, if the potential problems might even be exacerbated. Time will tell, and so at this point I am wary and can only view this “surprise” (the trend toward increased privatization) as a mixed blessing.

CONCLUSION

The “surprise” of our panel presentation was that the BRAC process, with its complex mechanisms for environmental remediation, can offer lessons for state brownfields officials in the critical areas of public participation and cleanup process and oversight. Because many BRAC sites are complex and have required considerable effort by a number of stakeholders working together to achieve effective environmental remediation, there is a lengthy track record that may not always adhere to the statutory and regulatory ideals. Nevertheless, it can be said that BRAC cleanups at least strive toward an ideal that is not required in any state VCP.

At the same time, though, as BRAC cleanups are becoming more state VCP-like (that is, with more use of ETA and “brownfields-like” methods), challenges about finality of remedial action and long-run oversight will enter more into the BRAC process. We will have to revisit this evolution of the BRAC process in its fifth round as sites are being remediated and transferred to the private sector, and, in particular, we will have to monitor whether state regulators devote the resources necessary to ensure that the sites being transferred are completely safe. Although it is too soon to tell whether this experimentation will yield productive results, it is almost certain to lead to a different model of interaction between the military and the private sector, one which bears watching in the future.