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Terra Firma or Terra Incognita - Western Land Use, Hazardous Waste, and the Devolution of U.S. Federal Environmental Programs

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ABSTRACT

A diverse group of stakeholders has suggested that U.S. federal environmental programs should be integrated more tightly with local land use planning entities to improve environmental decision making and enhance public involvement. Proponents of this argument have been particularly vocal in the western part of the country. This article uses the example of a Superfund site in California to examine several difficulties with marrying federal protection efforts with local land use. Diverse local interests, the existence of non-local stakeholders, and the absence of strong statutory language and adequate funding all complicate efforts at local involvement.

I. INTRODUCTION

In an era when devolution of environmental protection responsibilities from the national to more local levels clearly appears on the ascendancy in the United States,[1] "land use" has been promoted as a means to link distant federal programs to the concerns of local authorities and stakeholders. Proponents claim that by taking local land use features into account in federal environmental programs and using existing local land

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1. See *Monitor Interview, NCSL Environmental Director Melinda Cross: State Legislatures Press Congress, USEPA for Room to Innovate*, STATE ENVTL. MONITOR, July 6, 1998, at 19, 19-20; Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 24-25 (1996); John Pendergrass, *You Say You Want a Devolution*, ENVTL. F., Nov./Dec. 1995, at 8; Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210-12 (1992).

use and economic development institutions, the nation's environmental goals generally can be better met. The purpose of this article is to illustrate some of the typically ignored complexities of locally-based approaches. In particular, it describes a case where competing local interests, the existence of non-local stakeholders whose interests differ from those of local residents, and weak statutory authority and funding militate against the unqualified success of such a devolutionary approach.

To some degree, arguments for greater links between local land use and federal environmental protection reflect the fact that many federal regulatory programs increasingly find themselves having to confront knotty local activities affecting environmental quality. Although federal regulators are looking for creative ways to influence such activities,[2] they traditionally have played a very weak role in regulating more diffuse, non-point sources of pollution, due, in part, to statutory limitations.[3] In addition, the call for greater local involvement in federal environmental decision making also has arisen from the perceived inability of purely scientific and technical endeavors to adequately frame and answer environmental questions.[4] In this vein, "environmental democracy," which entails wider involvement by local communities and lay persons and the introduction of more diverse types of information in the decision making process for protecting the environment, has received increasing support.[5] The set of comparative risk exercises that have been carried out across the nation over the last ten years exemplifies this approach.[6]

Probably the strongest call for greater attention to local land use in federal environmental programs, however, reflects more fundamental concerns both about the appropriate locus, extent, and coerciveness of

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2. For example, at the time of this writing, federal regulators are considering easing stormwater controls on local communities that adopt plans to combat urban sprawl. *See EPA May Ease Stormwater Controls on Areas Embracing "Smart Growth,"* INSIDE EPA WKLY. REP., Mar. 20, 1998, at 1. See Brian J. Pinkowski, *Facilitative Government: An Experiment in Federal Restraint*, 38 NAT. RESOURCES J. 1, 3-4 (1998) for an example of a federal agency promoting a community solution to groundwater contamination.

3. *See generally* J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM (1998). *See also* David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 516-18 (1996).

4. *See generally* ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT (1995).

5. *See Environmental Democracy*, COMP. RISK BULL., Jan./Feb. 1996, at 1; DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES 7 (1994).

6. Since 1989, over 20 states and localities have completed such exercises, another 20 are underway, and a dozen more are in a planning stage. *See Comparative Risk Project Contacts*, SYNERGY, Jan./Feb. 1998, at 4-5.

regulation and about the proper role of government versus private markets in providing environmental protection. Although these concerns are certainly expressed with conviction throughout the United States,[7] they are particularly evident in the western part of the country. For example, western governors recently have adopted a resolution specifically calling for increased neighborhood solutions to environmental problems, heightened reliance on market incentives to environmental problems, and more emphasis on collaboration among stakeholders.[8] On the public versus private dimension, recently renewed efforts to exert stronger local control over federally owned western public lands evidences a strong and apparently growing interest in promoting more decentralized and market-based control of such properties.[9] Perhaps most spectacularly, the U.S. Endangered Species Act[10] has become a favorite target of property rights advocates and those who believe that the Act allows government regulators to run roughshod over private land use prerogatives.

The push for national legislation to temper federal regulatory oversight with local land use considerations also has appeared in federal programs that, although perhaps not traditionally perceived as bearing on western issues, nonetheless may have a significant impact throughout the western states. This is particularly evident in recent discussions in Congress to link local land use with cleanups of properties contaminated with hazardous substances at sites covered under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund),[11] the federal program that addresses the cleanup of sites contaminated with hazardous substances.[12] In the last several Congresses,

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7. For example, an active discussion has emerged in the natural hazards management community on the tension between centralized and decentralized oversight of land use practices to limit development in flood- and hurricane-prone areas, and the utility of a shared governance model based more on cooperation than on a top-down highly prescriptive regulatory process. *See generally* PETER J. MAY ET AL., ENVIRONMENTAL MANAGEMENT AND GOVERNANCE (1996); Peter J. May & Raymond J. Burby, *Coercive Versus Cooperative Policies: Comparing Intergovernmental Mandate Performance*, 15 J. POL'Y ANALYSIS & MGMT. 171 (1996).

8. *See Principles for Environmental Management in the West*, Western Governors' Ass'n Policy Res. 98-001 (Feb. 24, 1998), *reprinted in Western Governors' Adopt New Approach to Environment Regs*, STATE ENVTL. MONITOR, July 6, 1998, at 3, 4-5.

9. *See generally* SCOTT LEHMANN, PRIVATIZING PUBLIC LANDS (1995); Robert H. Nelson, *Government as Theatre: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335 (1994); TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991).

10. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1994).

11. Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. §§ 9601-75 (1994).

12. As of late 1998, 1,413 sites have been listed or proposed for listing on the National Priorities List, the roster of sites that are eligible for Superfund-financed cleanups. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PUB. NO. 9320.7-061, SUPPLEMENTARY MATERIALS: NATIONAL PRIORITIES LIST, PROPOSED RULE

a diverse set of stakeholders—large corporations responsible for cleanup at multiple Superfund sites, small businesses or landowners with cleanup responsibilities at just one property, municipal development and planning officials, state regulatory agencies, local elected representatives and residents, environmental justice advocates, and high-level staff within the U.S. Environmental Protection Agency (USEPA) itself—increasingly have called for setting cleanup standards and selecting remedies at federal Superfund sites in accordance with the intended future land uses at the sites and in concert with local communities. This agreement among many of the parties, at least at the rhetorical level, is remarkable. It contrasts sharply with the battle lines drawn over much of the rest of Superfund.

Using local land use institutions, such as planning and zoning commissions, code enforcement, and private property law, to undergird federal environmental protection efforts in Superfund is not without its own potential difficulties, however. Such a devolutionary approach faces a number of potentially vexing problems, perhaps most notably those associated with ensuring sufficiently broad stakeholder participation, adequate attention to the regional dimension of environmental problems, and robust statutory and financial underpinnings. This article uses the example of an over one hundred square kilometer Superfund site in California where land use has been tied to cleanup to cast such problems in greater relief. Two related rationales underlie this approach.

First, mining the experiences of an actual Superfund cleanup adds a practical concreteness to discussions about the devolutionary model in the Superfund context, one with clear relevance for western states. The virtue of an intensive case study approach is that it adds messy, on-the-ground experiences to what are clearly important, but often idealized or oversimplified, tradeoffs between federal and local involvement in Superfund cleanup, monitoring, enforcement, and site redevelopment.

Second, exposing some of the complications of tying federal environmental protection responsibilities to local land use in Superfund enhances our understanding of both the firm ground and uncertain terrain of basing federal environmental protection efforts on local land use considerations in the West. Admittedly, lessons from a Superfund site for the wider devolutionary context may at first glance appear scant, since Superfund is hardly a "typical" environmental program. Not only does it focus

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AND FINAL RULE 4 (1998). More than 200 of these are located in the 11 westernmost states of the continental United States. *See id.* at 23. Based on estimates from U.S. Environmental Protection Agency data on a smaller subset of sites, roughly 40 percent of the non-federal sites in the West are located in suburban areas, 30 percent in rural areas, and the remainder in urban areas. For national results, see U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PUB. NO. 9345.1-09-0, SUPERFUND, NPL CHARACTERIZATION PROJECT: NATIONAL RESULTS (1991).

on the consequences of past rather than present or future actions, thus ensnaring an unusually wide range of stakeholders subject to regulation, but it also sets cleanup requirements on a case-specific basis rather than a uniform national standard.[13] However, as perhaps the quintessential top-down federal program—a program that historically has had little formal decision making delegated to the state or local level and little room for stakeholders to appeal USEPA administrative decisions—it offers a fertile tableau for examining an evolving model of sharing deliberations among a wider cast of federal, state, and local stakeholders. Moreover, the selection of an atypically large Superfund site for study amplifies the dilemma for devolutionary approaches posed by the balkanized character of land use planning and management throughout the United States.[14]

The organization of the article is as follows. Section II provides extensive background material. This includes both a brief review of the federal Superfund program, as well as an overview of the rationale for utilizing land use to guide Superfund cleanup efforts. Section III then introduces the Fort Ord Superfund site, emphasizing the role that land use has played in shaping cleanup decisions at that property. This introduction concentrates on the two major cleanup and development planning players and their interaction with each other and with the regulatory agencies and the site owner, the U.S. Army. After this review of Fort Ord, section IV summarizes the three lessons that the site furnishes vis-à-vis using local land use institutions and players to implement federal environmental protection efforts. Finally, section V extends the three lessons of Fort Ord and Superfund to other federal programs and offers concluding thoughts.

II. BACKGROUND ON SUPERFUND

The federal Superfund law was enacted nearly two decades ago, largely in response to local and national outrage about contamination at several notorious sites that many perceived threatened the health of local

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13. *See* Alfred R. Light, *Déjà Vu All Over Again?: A Memoir of Superfund Past*, NAT. RESOURCES & ENV'T, Fall 1995, at 29, 32-33. *See generally* THOMAS W. CHURCH & ROBERT T. NAKAMURA, CLEANING UP THE MESS: IMPLEMENTATION STRATEGIES IN SUPERFUND (1993).

14. The site chosen for this study offers a rare opportunity to examine a case where high local economic redevelopment potential, complex intergovernmental dynamics, local land planning and cleanup institutions, and significant federal environmental protection obligations all intersect. As Yin and numerous others have often pointed out, a single case study approach is appropriate when it represents a critical test of theory, is a rare or unique event, or provides an opportunity to reveal a phenomenon, which has been previously inaccessible to investigation. *See* ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 44 (2d ed. 1994). In this vein, case studies should not be viewed as samples that allow statistical generalizations or inferences, but rather as an approach more analogous to experiments that help to expand concepts through "analytic" generalization. *See id.* at 10.

communities. Since its inception in 1980, perhaps no other environmental program in the United States has borne so much criticism for being inefficient and grossly expensive. The program's detractors can readily point to data to support their case: as of October 1997, after nearly 18 years of the Superfund program, cleanups have been completed at only 37 percent of the 1,353 sites that sit on the National Priorities List (NPL), the roster of sites that are eligible for Superfund-financed cleanups.[15] Of the sites that have been cleaned up, the best estimates of the average cost of remediation run from $25 million to nearly $30 million dollars per site, depending on the source of the figures.[16] Efforts to reform the law have been underway for years, in both Democratic and Republican Congresses and administrations.

As a backdrop to these reform efforts, many have alleged that unrealistic future land use assumptions are being made at Superfund sites (for example, that in the future, individuals will live at a site that currently hosts an industrial use) and that these assumptions have required costly stringent cleanups and a high level of protection that the likely use of the site does not justify. The proverbial child eating contaminated dirt at an industrial site has become something of a posterboy for parties in the reauthorization debate who claim that unrealistic land use assumptions and poor science are "driving" the selection of remedies at Superfund sites.[17] The attention given to land use in Superfund reform efforts also reflects the fact that the existing language in the statute and in accompany-

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15. *See* U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/T-RCED-98-74, SUPERFUND: TIMES TO COMPLETE SITE LISTING AND CLEANUP 2-3 (1998).

16. *See* KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS: WHO PAYS AND HOW? 41-43 (1995).

17. These criticisms have abated in the Superfund literature in recent years as the available evidence suggests that this conventional wisdom is not entirely accurate and the process of remedy selection is more nuanced than many have assumed. *See generally* Robert Hersh & Kris Wernstedt, *Land Use, Risk, and Superfund Cleanups: At the Nexus of Policy and Practice*, PUB. WORKS MGMT. & POL'Y, July 1999, at 31; James T. Hamilton & W. Kip Viscusi, *How Costly is 'Clean'? An Analysis of the Benefits and Costs of Superfund Site Remediations*, 18 J. POL'Y ANALYSIS & MGMT. 2 (1999); U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PUB. NO. OSWER 9355.0-55, EPA/540/R-95/037, PB95-963230, LAND USE DECISIONS IN THE REMEDIAL PROCESS (1995); U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PUB. NO. OSWER 9355.0-56, EPA/540/R-95/038, PB95-9638231, RELATIONSHIP OF PROJECTED FUTURE LAND USE AT COMPLETED SITES TO POST-REMEDIAL LAND USE (1995); Katherine D.Walker et al., *Confronting Superfund Mythology: The Case of Risk Assessment and Management*, *in* ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 25 (RICHARD L. REVESZ & RICHARD B. STEWART eds., 1995). However, a perception that most Superfund sites require extremely stringent cleanups has not died out completely, and some literature in the last five years has continued to foment ambiguity on this point. *See, e.g.*, Renée Twombly, *Urban Uprising*, 105 ENVTL. HEALTH PERSP. 696 (1997).

ing regulations provides few details about the role that land use should play in the cleanup process.

To address these shortcomings, critics have suggested that the Superfund program should move toward making more realistic land use assumptions, and toward tying cleanup standards and remedies to expected land uses. The major argument put forth to justify this is to increase the efficiency of cleanups; that is, to decrease net costs, speed cleanups, or address the most serious risks first. In addition, proponents claim that tying land use more tightly to cleanups also could improve Superfund in two other important respects: by facilitating economic development, and by enhancing local control over cleanups and post-cleanup use.[18]

A. Facilitating Economic Development at Superfund Sites through Land Use

The regulated community and others have often claimed that the Superfund law has greatly inhibited economic redevelopment of areas contaminated with hazardous substances by presenting barriers to potential lenders, developers, or purchasers of such sites.[19] Such barriers derive from the program's well known retroactive, strict, and joint and several liability provisions that many believe present a sharp disincentive for a party to redevelop an NPL site. In short, any party that knowingly purchases contaminated property can be liable for cleaning up the site to an undetermined level, even if the entity has not contributed to the contamination. Moreover, according to many critics, even contaminated sites that are not on the NPL cower under the shadow of Superfund liability. This long shadow, of course, has motivated recent efforts to craft

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18. For a discussion of these three rationales, see generally Kris Wernstedt et al., *Grounding Hazardous Waste Cleanups: A Promising Remedy?*, 16 LAND USE POL'Y 45, 46-48 (1999). *See also, e.g.*, CLEAN SITES BOARD OF DIRECTORS, A REMEDY FOR SUPERFUND: DESIGNING A BETTER WAY OF CLEANING UP AMERICA (1994); U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-94-144, NUCLEAR CLEANUP: COMPLETION OF STANDARDS AND EFFECTIVENESS OF LAND USE PLANNING ARE UNCERTAIN (1994); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, PUB. NO. OTA-ITE-433, COMING CLEAN: SUPERFUND'S PROBLEMS CAN BE SOLVED 3-27 (1989).

19. *See* U.S. DEP'T HOUSING & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, THE EFFECTS OF ENVIRONMENTAL HAZARDS AND REGULATION ON URBAN REDEVELOPMENT i (1998); Charles Bartsch & Richard Munson, *Restoring Contaminated Industrial Sites*, ISSUES SCI. & TECH., Spring 1994, at 74, 74-75; Mark Glaser, *Economic and Environmental Repair in the Shadow of Superfund: Local Government Leadership in Building Strategic Partnerships*, 8 ECON. DEV. Q. 345 (1994); Rena I. Steinzor & Mathew F. Linterer, *Local Government and Superfund, 1992 Update: Who is Paying the Tab?*, 24 URB. LAW. 51 (1992).

federal and state legislation to promote the redevelopment of brownfield sites.[20]

Thus, the risk of being placed on the NPL may deter the purchase and development of a wide range of sites that are, or are thought to be, contaminated. Linking cleanups to land use, it is argued, would alter the perceptions that stringent and costly cleanups threaten financially any party that is exposed to a contaminated site. This would directly improve the calculated investment return of a prospective developer or purchaser of a contaminated site, making the site more attractive economically for a wider range of activities.

B. Enhancing Local Control at Superfund Sites through Land Use

Basing a federal Superfund cleanup on a site's expected land use should by itself increase local government involvement and influence over cleanups, since the USEPA likely would define future land use in concert with local land use institutions. Indeed, language in recent Superfund reauthorization proposals would require the USEPA to take into account the views of elected local government officials and the affected community in its land use assumptions.[21] This inclusion of local views is seen as desirable from a perspective of local participatory democracy, from both utilitarian and non-utilitarian perspectives.[22] Not only might such additional community-based environmental protection yield more efficient or at least lower cost cleanups, since local players may be more willing to opt for a less stringent cleanup if that cleanup promotes site development, increases tax revenues, or helps create jobs, but local governments may be more accountable, and, therefore, have greater incentives to protect their citizens' health and local environment. In short, they are credited with being more in touch with their residents than are distant federal regulators. In addition, enhancing local control may increase the quantity and quality of public involvement and decision making in federal programs, a long-

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20. Brownfields, by USEPA's definition, are "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, *Brownfields Glossary of Terms* (last modified Sept. 30, 1997) ‹http://www.epa.gov/swerosps/bf/glossary.htm›.

21. *See, e.g.*, Superfund Acceleration, Fairness, and Efficiency Act, H.R. 2727, 105th Cong. § 104 (1997).

22. *See EPA to Use Superfund to Boost Community-Based Cleanup Projects*, INSIDE EPA SUPERFUND REP., Sept. 30, 1998, at 12. *See generally* BRUCE A. WILLIAMS & ALBERT R. MATHENEY, DEMOCRACY, DIALOGUE, AND ENVIRONMENTAL DISPUTES: THE CONTESTED LANGUAGES OF SOCIAL REGULATION (1995); Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy* 86 YALE L.J. 1196 (1977).

standing bone of contention in such programs and a particularly sore point for critics of Superfund.[23]

The criticisms of the Superfund program and recommendations to fix its flaws have not fallen on deaf ears, and major efforts by both political parties to reauthorize and reform the law have materialized in the last several Congresses. Although the liability provisions of CERCLA have dominated the discussion in these reform efforts, land use and its role in cleanup have attracted considerable attention. Since 1994, all major CERCLA reauthorization proposals have included language that gives land use more prominence in remedy selection decisions.[24] In addition, in 1995 the USEPA issued guidance to provide direction on incorporating land use in remedy selection in current practice.[25] Even before issuance of this guidance, however, land use had already in fact played an important role in some cleanups such as the Fort Ord Superfund site in California.

III. THE FORT ORD SUPERFUND SITE[26]

The Fort Ord Superfund site, a former military base that the U.S. Army closed in 1994, occupies over 11,000 hectares of land in California, including some 360 hectares of coastal dunes and over five kilometers of largely undeveloped beachfront (see figure 1). In the mid-1980s, concerns by the state of California that training activities at a fire drill area on the then-active Fort Ord Army Reservation might have contaminated soil and groundwater in the area prompted investigations that led ultimately to the detection of organic compounds in the groundwater. Subsequently, the USEPA placed Fort Ord on the national Superfund list in 1990. At roughly

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23. *See generally* MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS, FROM NIXON TO CLINTON (1994); U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-94-156, SUPERFUND: EPA'S COMMUNITY RELATIONS EFFORTS COULD BE MORE EFFECTIVE (1994).

24. *See* H.R. 2727; Superfund Cleanup Acceleration Act of 1997, S. 8, 105th Cong. § 402 (1998); Accelerated Cleanup and Environmental Restoration Act of 1995, S. 1285, 104th Cong. § 403 (1996); Reform of Superfund Act of 1995, H.R. 2500, 104th Cong. § 102 (1995); Superfund Reform Act of 1994, H.R. 4916, 103rd Cong. § 501 (1995); Superfund Reform Act of 1994, S. 1834, 103rd Cong. § 502 (1995).

25. *See* Memorandum from Elliot P. Laws, Assistant Administrator, U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response to Regional Directors of the U.S. Environmental Protection Agency (May 25, 1995) (on file with Environmental Protection Agency, OSWER) (OSWER Directive No. 9355.7-04, Land Use in the CERCLA Remedy Selection Process).

26. For further details on the Fort Ord cleanup and redevelopment, see Robert Hersh et al., Resources for the Future, Linking Land Use and Superfund Cleanups: Uncharted Territory 40, 56-62 (1997); KRIS WERNSTEDT & ROBERT HERSH, RESOURCES FOR THE FUTURE, LAND USE AND REMEDY SELECTION: EXPERIENCE FROM THE FIELD–THE FORT ORD SITE (1997) (Discussion Paper No. 97-28, on file with Resources for the Future).

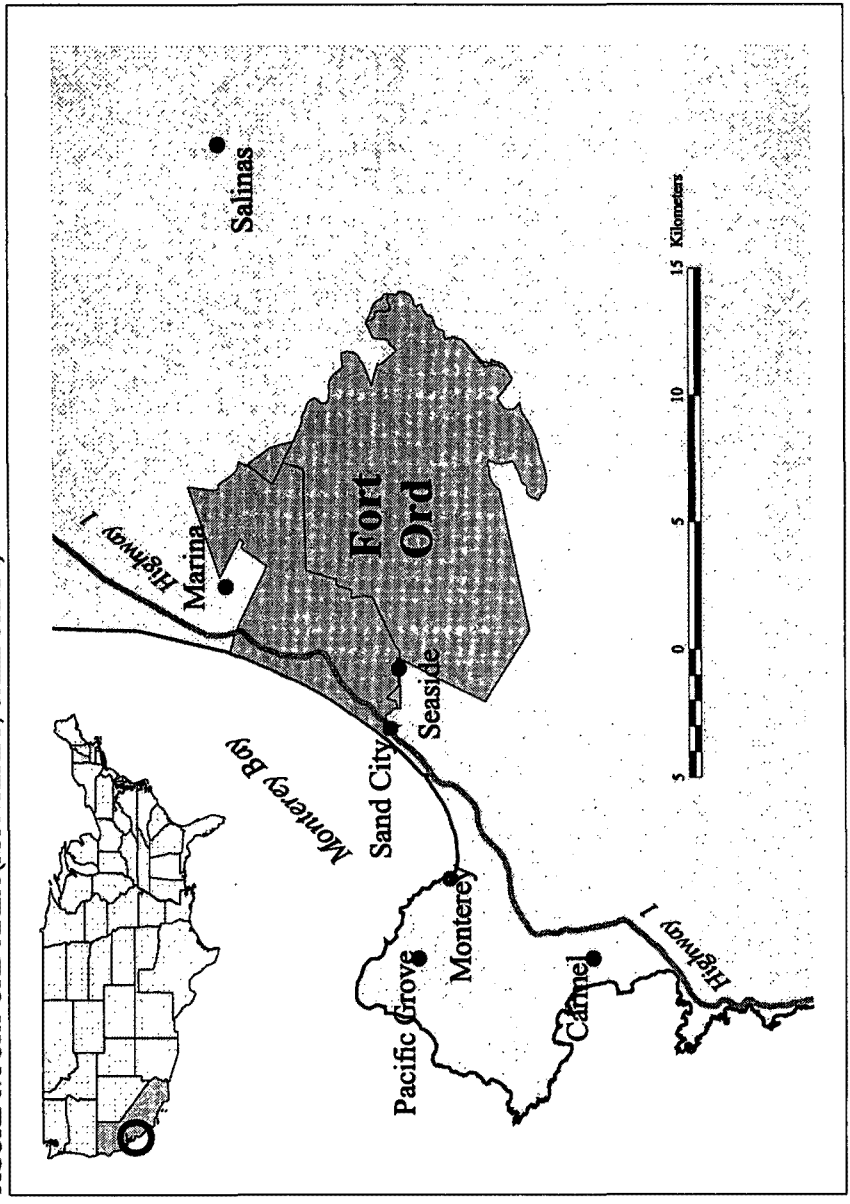

FIGURE 1. FORT ORD AREA (MONTEREY, CALIFORNIA)

the same time, the 1991 base closure commission, set up under the Defense Base Closure and Realignment Act of 1990,[27] confirmed a proposal by the U.S. Secretary of Defense to close Fort Ord (for reasons unrelated to the contamination).

The base employed roughly 14,000 military personnel and 4,000 civilians prior to its closure. Its economic shadow touched at least eight neighboring municipalities, several of which, along with Monterey County, have devised plans to bring a part of the former base into their political and economic orbit.[28] Although the contamination significantly shapes the interaction of stakeholders at the base, the transfer of almost 11,000 hectares of the Fort Ord property has attracted arguably the most interest from the parties involved in post-closure affairs at Fort Ord. The desire to soften the local economic impacts of closing the base certainly has added urgency to the task of finding viable reuses for the site. A number of parcels have been or shortly will be transferred by deed or lease to various municipal and private entities (including golf courses, an airfield, housing for homeless service providers, and, in the classic irony for those familiar with Superfund clichés, a child-care center). In addition, several large tracts have been transferred to state and federal agencies. These include land for the newly-established California State University at Monterey Bay and for facilities of the University of California at Santa Cruz; a 2,800 hectare parcel for the U.S. Bureau of Land Management (with another 3,200 hectares slated for transfer after unexploded ordnance is cleared); and beachfront property for a new state park in the State of California Department of Parks and Recreation system.

The rapid pace of redevelopment at Fort Ord can be explained in part by statutory provisions governing military base cleanups and conversions. For example, CERCLA and base closure legislation require military branches at a Superfund-listed closing military installation to afford the opportunity to relevant state and local officials to participate in the planning and selection of remedial actions and to work with a single designated local redevelopment authority.[29] In addition, several recent annual authorization bills have accelerated the cleanup and property transfer process, as well as provided for the establishment of a restoration

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27. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Division B, tit. XXIX, pt. B, §§ 2901-10, 104 Stat. 1808 (codified as amended at 10 U.S.C. § 2687 note (1994) (Defense Base Closure and Realignment Commission)).

28. The bulk of Fort Ord lies in unincorporated portions of Monterey County and within the borders of the cities of Seaside and Marina. Other municipalities in the surrounding area include Carmel, Sand City, Monterey, Pacific Grove, and Salinas (figure 1).

29. Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. § 9620 (1994); 10 U.S.C. § 2687 note (1994) (Consideration of Economic Needs and Cooperation with State and Local Authorities in Disposing of Property).

advisory board at each closing U.S. Department of Defense facility.[30] Through these latter advisory boards, local citizens and agencies can review and provide comments on cleanup activities. In marked contrast to the local redevelopment authorities that plan for reuse but are to provide little or no official guidance on cleanups, the restoration advisory boards are supposed to have a substantive role in cleanup decisions, but little or no direct or official input on reuse. The fact that the two local reuse and cleanup groups have legislatively prescribed formal roles at Fort Ord, an institutional setting that most other federal environmental programs do not provide, suggests that one may be able to learn something about utilizing land use to achieve environmental goals by looking more closely at the local communities and these two entities.

A. Local Communities at Fort Ord

Notwithstanding the seemingly firm statutory base for the restoration advisory board (RAB) at Fort Ord[31] and for the designated local redevelopment authority (the Fort Ord Reuse Authority or FORA[32]), the relatively clear articulation of the responsibilities of the two groups on land use and cleanup issues belies a process of land use decision making and public involvement that has progressed in fits and starts, and has been anything but straightforward. Among the many communities of the Monterey peninsula, substantial disagreement about the future uses of the site has erupted periodically. These disagreements derive in large part from the different expectations, demographics, and economic alternatives among the surrounding jurisdictions. For instance, the two communities hit hardest by the closure, Marina and Seaside, faced losing one-quarter and one-half, respectively, of their populations as a result of base closure, as well as the economic activity generated by base activities. Not surprisingly, their plans for reuse initially emphasized much more intensive post-closure development.

The diverse population of Seaside (about one-half of whose population is African American, Asian, or of Hispanic origin, the highest

30. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160 § 2902, 107 Stat. 1721; 10 U.S.C. § 2705 (1994).

31. In 1994, the Fort Ord Restoration Advisory Board was created by adding public members to the Fort Ord Technical Review Committee and selecting a public member to co-chair the new Board. The Technical Review Committee had consisted of representatives of federal, state, and local agencies.

32. FORA's governing board consists of three members of the Monterey County Board of Supervisors, two city council members each from the cities of Marina and Seaside (called Mayors and Mayors Protem), and one city council member from each of the cities of Carmel, Del Rey Oaks, Sand City, Monterey, Pacific Grove, and Salinas, plus a number of ex-officio members. *See* FORT ORD REUSE AUTH., FORT ORD BASE REUSE PLAN (1994).

proportion in the Monterey peninsula area) has added an additional layer of complexity to the interactions among the various jurisdictions. More generally, as figure 2 suggests, the areas immediately adjacent to the former base, which have borne the immediate brunt of the base closure, and those east of the former base in Salinas Valley, have a higher proportion of non-whites and Hispanic whites in their population (darker shading) than areas less impacted by the closure. In addition to the different ethnic and racial compositions, income varies significantly among the various communities of the Peninsula as well. According to 1990 U.S. Bureau of the Census data, Monterey County has an average median household income of roughly $38,000 per year. However, as figure 3 shows, the areas immediately adjacent to the base generally have a median annual household income below the county-wide average (darker shading), while those areas to the southeast of the base and on the west side of the Monterey Peninsula and the outskirts of Carmel and Monterey City have a higher median income. These latter communities have been less vulnerable to the drastic effects of the base's closure, particularly Monterey City, which has a more diversified economy. They also typically have been less supportive of intensive development and more supportive of conservation reuses.

FIGURE 2. NON-WHITES AND HISPANIC WHITES AS PERCENT OF TOTAL POPULATION IN AREAS SURROUNDING FORT ORD, CALIFORNIA (1990)

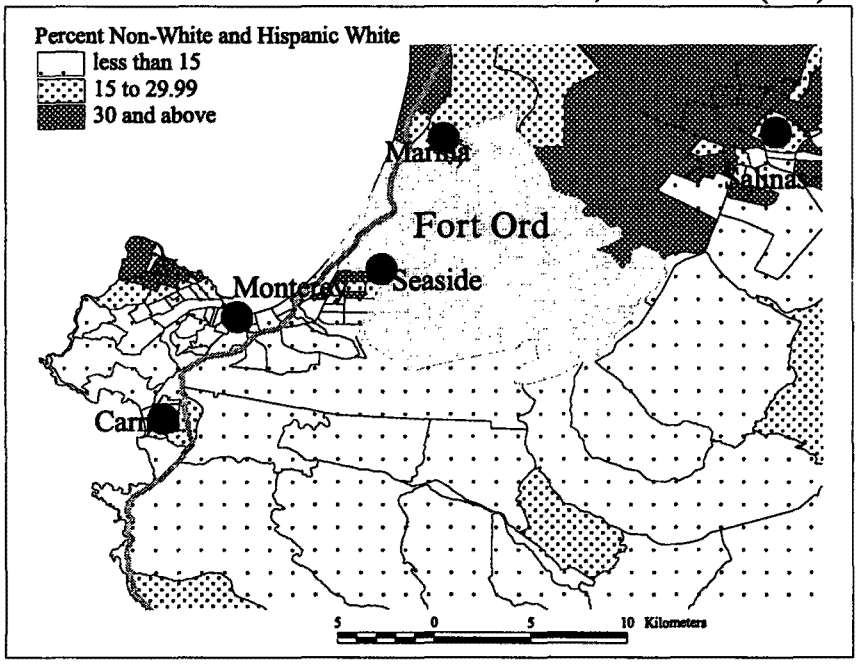
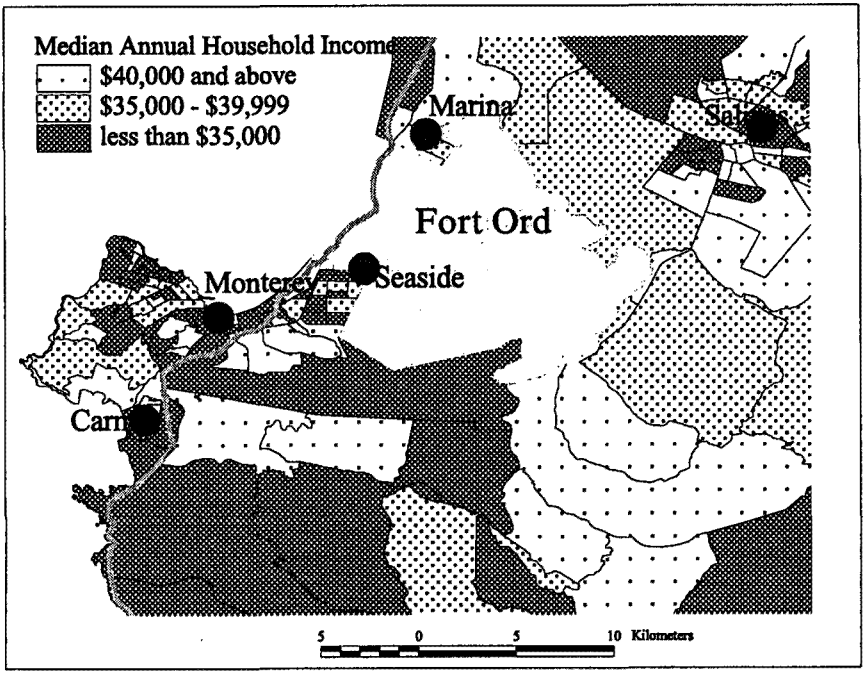


FIGURE 3. HOUSEHOLD INCOME IN AREAS SURROUNDING FORT ORD, CALIFORNIA (1990)



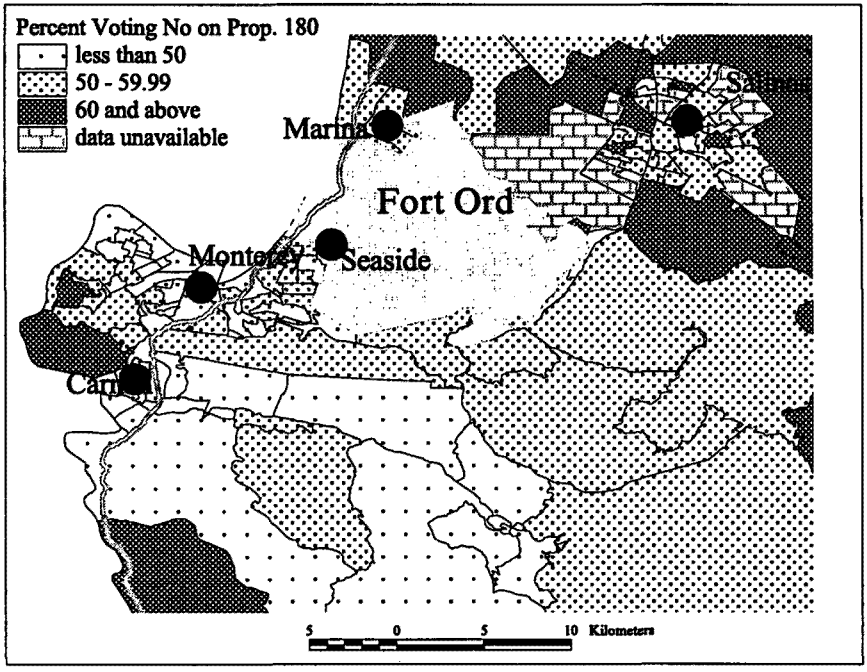
The different levels of concern over development prospects among these communities appear when one looks at voting patterns for Proposition 180, a state-level environmental bill that California residents rejected in 1994. This bill would have authorized a bond issue for park acquisition and conservation in the Monterey area and throughout California. Figure 4 shows that opposition to the initiative, which garnered about 46 percent of the countywide vote, was generally higher (darker shading) in areas closest to the base and east of it than in more affluent parts of the Peninsula further to the south and northwest of the city of Monterey (with the exception of the Carmel area).

These three latter figures bolster the impression gained from ample anecdotes that the communities surrounding Fort Ord are quite heterogeneous.[33] Not surprisingly, the multiple publics surrounding the base have

33. Each of the three variables discussed—proportion of population that is non-white or Hispanic white, median household income, and vote on Proposition 180—show a high degree of positive spatial autocorrelation; that is, the values of each variable do *not* appear to be distributed randomly across space. Using a standard spatial test statistic, Moran's I, one can reject a null hypothesis of no spatial autocorrelation at the 0.01 level of significance for each

had quite different views on what reuses of the Fort Ord Superfund site are appropriate and desirable.[34] This is an important feature of Fort Ord that was particularly trenchant in the acrimonious gestation period of reuse planning before the birth of FORA and the issue of the interim reuse plan.

FIGURE 4. OPPOSITION TO STATE PROPOSITION 180 IN AREAS SURROUNDING FORT ORD, CALIFORNIA (1994)



of the three variables tested independently. For a discussion of this test statistic see P.A. Moran, *The Interpretation of Statistical Maps*, 10 J. ROYAL STAT. SOC'Y SERIES B 243 (1948); A.D. CLIFF & J.K. ORD, SPATIAL AUTOCORRELATION 29-33 (1973).

34. The simple observation that socioeconomic and environmental voting characteristics do not vary uniformly across the area, but instead tend to be clustered, should not imply that environmental awareness and support have a direct and predictable relationship with socioeconomic indicators. In fact, the spatial correlation between household income and voting on Proposition 180 is only weakly significant. Moreover, a vote in 1995 to build and finance a dam that would have enhanced the local water supply and allowed more growth had its strongest support among some higher income communities. *See* Fax from Election Department, *Monterey County*, to Kris Wernstedt, Fellow, Quality of the Environment Division, *Resources for the Future* (Dec. 20, 1996) (on file with author).

B. Conflicts over Future Use at Fort Ord

Although initial regional efforts in the early 1990s to fight against the closure of Fort Ord were relatively harmonious, once the closure was determined, wrangling over different visions of appropriate reuse broke out. In particular, the governments of the cities of Seaside and Marina fought Monterey County over who would shape development. After several failed attempts to forge various alliances, Monterey County and the cities of Marina, Seaside, Del Rey Oaks, Sand City, and Monterey united to form the Fort Ord Reuse Group in 1992.[35] This group, which did not have any independent governing authority and relied on approval *by consensus* of elected officials, did manage to develop a base reuse plan that it submitted to the U.S. Army in 1993.[36] The plan, in many ways a wish list more than a realistic planning document, envisioned intensive development.[37] Negative observers dubbed it "the plan that ate the Monterey Peninsula;" the U.S. Army called it "unreasonable" and rejected it.[38]

In response to this shaky attempt at a unified plan, a local California state senator introduced legislation that ultimately led to the creation of FORA in 1994. Initially, the Seaside Mayor and City Council members unanimously opposed this legislation, arguing that it would lessen the City's ability to control development within its borders. Ultimately, however, the Mayor and Council agreed to support the legislation in exchange for altering the bill's voting language to give each local government more control over redevelopment projects within its own jurisdiction.[39]

Since issuing an initial interim base reuse plan at the end of 1994,[40] FORA has been revising its work, developing recommendations for how to phase reuse, and preparing an environmental impact report for the final plan, which was issued and approved by the FORA Board in mid-1997. Relations among its member governments apparently have remained relatively smooth since its founding. Nonetheless, the plan continues to attract a modicum of controversy. Several public hearings on the June 1996 draft plan (the hearings technically covered the environmental impact report that accompanies the plan rather than the plan itself) were held, and

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35. *See Chronology Lists Milestones on Road to Enactment*, MONTEREY COUNTY HERALD, May 10, 1994, at 10A.

36. *See id.*

37. *See id.*

38. *Id.*; Nicole Volpe, *In the Rough*, COAST WKLY., Nov. 18, 1993, at 12.

39. Thom Akeman, *Senate Approves Ord Bill*, MONTEREY COUNTY HERALD, May 4, 1994, at 1A; Kevin Howe, *McClair Digs In for Ord Battle*, THE (MONTEREY COUNTY) SUNDAY HERALD, Mar. 27, 1994, at 1A.

40. *See* FORT ORD REUSE AUTH., *supra* note 32.

a number of individuals continued to express concerns about the impacts of the proposed development on freshwater resources and infrastructure. For example, one citizen commented that the development envisioned in the proposed plan would "damage life on [the Monterey] Peninsula, as we know it," another characterized it as a "slow motion explosion," and a third begged that the Peninsula, "one of the few bastions of California life left on the coast," be left alone.[41]

C. Conflicts over Cleanup at Fort Ord

Although the RAB at Fort Ord has not had such a tortuous past as FORA, relations within its membership have appeared much more strained and its effectiveness much more questionable. This is not surprising, for several reasons.

First, while FORA members are relatively united in their purpose of getting property transferred for development, the RAB members were much less homogeneous in their interests. The RAB included representatives of federal, state, and local agencies, conservation proponents, environmentalists concerned with quality of life issues, and environmental justice advocates, and, some claim, the group served as a platform for local politicians running for office. The selection of members from the community to serve on the Board was contentious at times, and a number of community members either quit in mid-term or were forced to leave the Board against their will. In addition, while some community members of the RAB have developed comfortable working relationships with the U.S. Army, other members were adamant that the U.S. Army and regulatory agencies shut them and other disenfranchised people out of the cleanup and reuse process.

Second, because community members volunteered their time on the RAB, many found it difficult to thoroughly and quickly review documents, attend meetings, and, more generally, keep up with the agency representatives on the RAB who received compensation for much of their time. The Army furnished logistical support (for document copying, for example) and funded a staff position for RAB work at Ford Ord, but it did not provide more direct financial support for RAB citizen members and their activities (to hire an independent technical consultant, for example). Not surprisingly, several of the most active and vocal community RAB members in the early years had retirement pensions or other independent sources of income, and, thus, the flexibility to accommodate the considerable time demanded by Fort Ord cleanup issues.

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41. Thom Akeman, *FORA Plan Gets Extension*, MONTEREY COUNTY HERALD, July 2, 1996, at 1A.

Third, for some members the separation of cleanup from reuse planning has muddled the RAB's mission. It is clear from Department of Defense guidance documents on the establishment of the advisory boards that the RAB was charged with identifying "applicable standards and consistent with section 121 of the Comprehensive Environmental Response Compensation and Liabilities Act, CERCLA, proposed cleanup levels consistent with planned land reuse," yet U.S. Army representatives at Ford Ord have also clearly stated that the actual issue of reuse was not part of the RAB's agenda.[42] At the outset, several RAB members suggested that cleanup decisions should be made in conjunction with reuse decisions. The U.S. Army opposed the efforts of these members to move the RAB toward more active participation on reuse matters. Tensions over this surfaced repeatedly, and were exacerbated by very limited interaction between FORA and the RAB.[43] In addition, the U.S. Army seriously considered dissolving the RAB as early as 1997, following a recommendation from an outside mediator to suspend operations due to its apparent inability to deal substantively with cleanup issues. It carried through on this in 1999 by disbanding the RAB.[44]

IV. LESSONS LEARNED FROM FORT ORD

The success in implementing the federal Superfund cleanup responsibility through local stakeholders thus has been mixed at Fort Ord. What emerges from the case study are three overlapping lessons regarding public involvement in redevelopment and cleanup: the presence of multiple and heterogeneous interests; the necessity of including supra-local

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42. Fort Ord Technical Review Committee, Restoration Advisory Board Meeting, Tr. of Feb. 7, 1994, meeting, at 41, 43 (on file with author).

43. *See* Fort Ord Restoration Advisory Board Meeting, Tr. of Jan. 26, 1995, meeting, at 13 (on file with author). When the project coordinator of FORA appeared at an early RAB meeting and presented the 1994 interim reuse plan, it became painfully obvious that the contaminated sites that the RAB was interested in were not identified on the FORA reuse planning map, a likely bureaucratic oversight but one with obvious symbolic importance. *See id.*

44. *See* Letter from Colonel Daniel D. Devlin, U.S. Dep't of the Army, *Office of the Installation Commander, Presidio of Monterey*, to Fort Ord Restoration Advisory Board Members (May 12, 1999) (on file at CPEO Military List Archive) (visited Aug. 3, 1999) ‹http://www.cpeo.org/lists/military/1999/msg00240.html›. *See also* Letter from Daniel D. Opalski, Chief, Federal Facilities Branch, *U.S. Environmental Protection Agency, Region 9*, to Fort Ord Restoration Advisory Board members (no date) (on file at CPEO Military List Archive) (visited August 3, 1999) ‹http://www.cpeo.org/lists/military/1999/msg00275.html›; *Army Maintains RAB at Fort Ord, while Pressing New Outreach Plan*, INSIDE EPA'S SUPERFUND REP., Feb. 4, 1998, at 19; *In First Ever Decision, Army May Disband RAB at Fort Ord*, INSIDE EPA'S SUPERFUND REP., Nov. 12, 1997, at 18.

stakeholders; and the need for a clear statutory and regulatory base and funding to support public involvement. Each of these is relevant for the broader issue of linking federal environmental programs with local land use institutions in the western United States.

A. Multiple Local Interests

An obvious if understated difficulty with grounding federal environmental protection efforts in local land use institutions is the presence of multiple and often disparate local communities. In the face of these multiple communities, what is the legitimate local interest for managing a federal environmental effort? Within Superfund, for instance, a casual read of the language in a recent reauthorization proposal—to take into account the views of "*the* affected community"—is that a single community belongs at the decision making table.[45] If taken literally, this clearly flies in the face of many situations where multiple communities are affected by Superfund sites. Moreover, even a less damning read of the precise definition of affected community in two recently proposed bills—"any group of 2 or more individuals (including representatives of Indian tribes) which may be affected by a release or threatened release of a hazardous substance, pollutant, or contaminant at a covered facility"—is problematic.[46] Such an interpretation essentially limits community participation to those residents who are physically connected to the contamination. By many measures of public interest, this may limit involvement to a narrow range of interests.

Many types of communities, defined by geographic place, common identity such as ethnicity, or common interest such as the desire to protect a natural environment from further development, may have a stake in environmental outcomes at the local level.[47] In principle, this is not necessarily a fatal flaw for community involvement. Local consensus-based processes can be quite effective at bringing together different communities to define a local public interest, as evidenced by a number of success stories in collaborative local planning of western federal lands.[48] For such processes to work, however, stakeholders frequently need to face a realistic threat of undesirable consequences if local community interests fail to

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45. *See* H.R. 2727, 105th Cong. § 202 (1997) (emphasis added).

46. *Id.* at § 201. The language in this Republican bill is mirrored by Democratic legislative proposals, for example, H.R. 3262, 105th Cong. § 201 (1998).

47. *See generally* Timothy P. Duane, *Community Participation in Ecosystem Management*, 24 ECOLOGY L.Q. 771 (1997).

48. *See, e.g.*, THE NEXT WEST: PUBLIC LANDS, COMMUNITY, AND THE ECONOMY IN THE AMERICAN WEST (JOHN A. BADEN & DONALD SNOW eds., 1997); "THIS *Special Issue Samples Consensus Efforts across the West*," HIGH COUNTRY NEWS, May 13, 1996.

converge. Moreover, as Putnam implies, solidarity, trust, tolerance, political equality, a sense of reciprocity, and firm historical roots are critical for civic engagement in such a consensus process.[49] Absent these, institutions to promote this engagement can only slowly evolve into being, if at all. At Fort Ord, such traditions were only partly in place. While FORA faced a credible threat of economic disaster if it could not bring its disparate parts together, as well as possessed some tradition of civic engagement, the RAB arguably was neither confronted by an analogous threat nor enjoyed a civic tradition.

As the often-stark lines for environmental protection potentially give way to more blurry conditional lines that lend greater emphasis to local economic and social conditions, some aspects of environmental protection could easily become more susceptible to negotiation. Indeed, such negotiation at the local level is the strength of a local, land-use based process. However, the implications of this for traditionally under-represented publics is troubling. Absent a tradition of civic engagement across a wide range of interests, and in the face of multiple communities (however defined), it may be quite difficult to arrive at a decision that represents a broadly defined local public interest.[50]

As one moves beyond Superfund—a federal program which focuses predominantly on protection of human health and the environment on *private* properties—to the large number of other federal programs or agencies that emphasize management of natural resources or environmental goods on western *public* lands—a broad public interest may become even more difficult to define. "Public lands management," as James Huffman reminds us, "is fundamentally about politics. It is about gaining and losing individual wealth through the political process."[51] In such a setting, leadership of the local effort becomes critical for ensuring broad participation in the social interest.

B. Non-Local and Supra-Local Stakeholders

As suggested in the above point and throughout this discussion, many of the stakeholders at Fort Ord do not reside in jurisdictions that immediately abut the former army base. Such non-bordering populations can either be supra-local, consisting of individuals who reside in the surrounding region but not immediately adjacent to the site, or completely

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49. *See generally* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993).

50. *See* LEHMANN, *supra* note 9, at 190-97.

51. James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 273 (1994).

non-local, consisting of individuals who live in distant areas. In either case, despite their immediate separation from Fort Ord, the closure and the post-closure activities at the former base can greatly influence the well being of the supra-local and non-local populations because the closure and activities can fundamentally affect their interests and values.

From the standpoint of supra-local populations, bringing land use and economic development to center stage in environmental programs may greatly enlarge the spatial locus of decision making. Land use decisions often yield wider, or at least more obvious, regional impacts than do narrower, site-specific environmental remediation or protection decisions, because the economic and social impacts of land use decisions can quickly extend beyond a site's boundaries. They are not limited by hydrology, erosion, air deposition, or other physical processes,[52] but instead can be readily transmitted throughout a region and appear in such forms as taxes, congestion, economic competition, highway construction, shrinking open space, and demand for water.

From the standpoint of non-local populations, oftentimes an environmental decision has regional or national implications, either because the decision directly affects an environmental resource that a wide range of non-local stakeholders perceive as a national good,[53] or because the decision indirectly shapes decisions about other resources in non-local areas. At Fort Ord, for example, a conflict with non-local implications exists over the degree of cleanup required for unexploded ordnance. With over 3.5 million hectares of firing ranges scattered across the United States with potential unexploded ordnance problems, the U.S. Army and interest groups are keenly aware of the precedent that the Fort Ord cleanup may set regarding the authority of Superfund and the Resource Conservation and Recovery Act[54] over unexploded ordnance.

In cases where supra-local stakeholders are evident, and where land use and economic development concerns augur well for the involvement of local and supra-local stakeholders, federal regulators face a difficult task in devising a public involvement strategy that can accommodate the wide range of interests. It is certainly realistic to extend beyond the immediately adjacent communities to involve these regional stakeholders.

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52. Most texts on devolution and federalism note that the presence of these environmental spillover impacts across jurisdictional lines justifies a federal role in environmental protection. *See generally* DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON (1995); ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES AND THE FEDERAL GOVERNMENT 24-25 (1992).

53. *See* Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199.

54. Resource Conservation Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-92 (1994)).

FORA, for instance, has worked effectively to draw a regional plan, notwithstanding its very painful gestation period and somewhat troubled adolescence. However, given the fragmented nature of land use authority in the western United States and the decidedly mixed and roller-coaster record of regional planning and operating entities, one should be less than sanguine about the prospects for effective and inclusive community control over environmental decisions when impacts may be experienced at a regional or metropolitan level.[55]

Moreover, the record of local, consensus-based approaches for accommodating non-local stakeholders in federal land use decision making in the West also is somewhat mixed. These efforts, as represented by such undertakings as California's Inimin Forest Experiment and Quincy Library Group, Oregon's Applegate Partnership, and Montana's Blackfoot Challenge, have had some successes in promoting local control over federal lands in an inclusive process and, in fact, such practices have been championed by the President's Council on Sustainable Development.[56] However, some of these processes have received extensive criticism for excluding any involvement by federal resource management agencies and other non-local stakeholders.[57] As opined by the chairperson of one important and highly visible national environmental group in a memo to his organization's Board of Directors, such community-based stakeholder collaborative processes may promote a "re-distribution of power" that is designed to "disempower" the national group's constituency, which is heavily urban, with no way for distant stakeholders to be "effectively represented."[58] In general, whether devolution of environmental responsibilities to decentralized decision-makers will promote more rational and desirable outcomes of environmental protection continues to be actively debated in the literature.[59]

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55. *See generally* MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 125 (1997); RUTHERFORD H. PLATT, LAND USE CONTROL: GEOGRAPHY, LAW, AND PUBLIC POLICY (1991).

56. *See* PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE ch. 4 (1996).

57. *See* Duane, *supra* note 47, at 784-97; Michael C. Blumm, *Public Choice Theory and the Public Lands: Why 'Multiple Use' Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

58. *See* Memorandum from Michael McCloskey to the Board of Directors, Sierra Club (Nov. 1995) (on file with the Sierra Club), *reprinted in The Skeptic: Collaboration Has Its Limits*, HIGH COUNTRY NEWS, May 13, 1996, at 5.

59. *See generally*, Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failure in Competition among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67 (1996); Nelson, *supra* note 9, at 358-59 (advocates a decentralized decision-making process for federal land management that is integrally linked to the market system). Stewart provided a seminal treatment of rationales for federal *versus* local leads on environmental protection over

C. Adequate Statutory and Regulatory Bases and Funding

At Fort Ord, land use has been given a prominent role in environmental decision making through various U.S. Department of Defense authorization bills, the Community Environmental Response Facilitation Act amendments to CERCLA, base closure legislation, federal property legislation, the Endangered Species Act, and State of California legislation that established the local redevelopment authority.[60] All of these have helped land use and land use institutions to play some hand in influencing the environmental concerns under Superfund, and made this influence more explicit and open.

At the same time, however, the language of the statutes and regulations has in some cases worked against the smooth interplay of land use and environmental objectives. This is best exemplified by the lack of integration between FORA and the RAB. The two groups have been given statutory responsibility to guide *either* reuse *or* cleanup efforts, but at the same time seemingly have been prohibited from working at the interface of these twin processes. Moreover, the legislation and regulations that underlie the groups appear to have created unequal partners. FORA has been given the sole authority to develop the reuse plan (subject to U.S. Army approval) for most of the base, and has managed to rally financial resources to support its work. The RAB, on the other hand, served principally as an adviser to the U.S. Army. Implementing regulations did not provide it with any significant funding, and members of the group managed to raise only modest financial support from other sources.

Given the Fort Ord experience and in the face of pressure for linking federal environmental programs with local land use institutions, it would seem desirable that the interface between land use and environmental protection be clearly established. Even a strong commitment to incorporating local land use concerns into environmental programs risks

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20 years ago. *See* Stewart, *supra* note 22. He recently puzzled over the continued dominance of federal environmental regulations in the face of positivist and normative arguments for more local control and concluded simply that "many Americans regard environmental quality as an important national good that transcends individual or local interest." Stewart, *supra* note 53, at 210.

60. Community Environmental Response Facilitation Act of 1992, Pub. L. No. 102-426, 106 Stat. 2174 (codified in 42 U.S.C. §§ 9601 note, 9620 (1994)); Federal Property and Administrative Services Act of 1949, Pub. L. No. 152-288, 63 Stat. 378 (codified as amended in scattered sections of 5, 40, 41, 44 U.S.C.); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.). For California legislation, see Fort Ord Reuse Authority Act (1994), CAL. GOV'T CODE §§ 67650-700 (West 1999).

creating an uneven playing field if resources are not available for all interests to participate meaningfully. At Fort Ord, citizen members of the RAB frequently complained that they had no resources for the simplest things, such as making copies of documents, let alone paying for external technical assistance. Only recently has the U.S. Department of Defense issued final rules to provide funds for technical assistance to community members of a RAB.[61] Not surprisingly, in other contexts, effective, local citizen involvement and participation on land use issues in the regulatory process have required significantly greater staff time and financial resources than traditional, top-down approaches.[62]

V. SUMMARY

The case study on which this article rests, the Fort Ord Superfund site near Monterey, California, richly portrays how local land use and its amalgam of economic development pressures, local politics, planning, competing social interests, and environmental resources can become messily and unpredictably entwined with federal statutory cleanup requirements and the institutions devised to manage cleanup. That local land use policy is complex and prone to uncertain outcomes admittedly is hardly new, but exposing the mixture is nonetheless instructive. In perhaps taking the unruly pot of forces for granted and not acknowledging its implication for local, cooperative based efforts to more rationally manage federal environmental protection, the literature on Superfund cleanups based on local land use considerations, as well as the devolution literature, risks constructing a theoretically appealing vessel that is riddled with pragmatic holes.

The lessons of Fort Ord vis-à-vis public involvement, regional decision making, and the statutory and financial base for heightened local involvement in decision making have analogs in other environmental regulatory arenas. As suggested in the introduction, these same issues have been identified as critical in a number of efforts that draw from the devolutionary principles of increased local involvement in and cooperative approaches to federal environmental decision making in the West and elsewhere. Both positive and negative models of these efforts exist. Three examples will suffice here.

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61. *See Technical Assistance Program Finally Launched*, 5 MIL. & ENV'T 1 (1998).

62. *See* M. Allison Hamm, *The Massachusetts Experience with Nonpoint Sources: Regulators Beware!*, NAT. RESOURCES & ENV'T, Winter 1996, at 47; U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-96-200, URBAN TRANSPORTATION: METROPOLITAN PLANNING ORGANIZATIONS' EFFORTS TO MEET FEDERAL PLANNING REQUIREMENTS (1996).

First, and largely on the positive side, since 1991 federal transportation law has been reworked to give a broader public more central seats at the transportation planning table and metropolitan planning organizations a bigger role in transportation decision making.[63] The legislation has largely been successful on the first score, particularly when transportation-planning entities commit financial resources to support participation. However, substantial involvement from a broad public (that includes minority and low-income groups) rather than just from directly affected special interest groups continues to be a challenge. The broadening of the authority of metropolitan planning organizations also has largely been successful, although the delegation of authority to such organizations remains contentious and may need further legislative changes.[64]

Second, and less encouragingly, commentators have attacked the flagship collaborative program of the USEPA, namely the Agency's Project XL. This is a pilot program that allows regulated firms the opportunity to seek waivers from existing and future regulatory requirements in return for developing site-specific plans for greater environmental benefits. Critics have argued that XL needs a stronger statutory base, both to withstand possible legal challenges from citizen suits as well as to encourage more participation from industry.[65] In addition, according to some, the process of stakeholder involvement in XL has been weakened by lack of financial support to non-industry stakeholders and, more generally, effective public participation has been problematic. Industry apparently has been reluctant to agree to legislation that would furnish prescriptive language for stakeholder involvement.[66]

Finally, the environmental community has expressed a number of concerns with the habitat conservation planning process under the Endangered Species Act.[67] This process, which is provided for by existing

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63. *See* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified in 49 U.S.C. § 101 note (1994)); Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) (to be codified in scattered sections of 23 U.S.C.).

64. *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 62, at 29.

65. *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 117, 147-49 (1998); U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/T-RCED-98-33, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO "REINVENT" ENVIRONMENTAL REGULATION (1998).

66. *See generally* U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-97-155, ENVIRONMENTAL PROTECTION: CHALLENGES FACING EPA'S EFFORTS TO REINVENT ENVIRONMENTAL REGULATION (1997); *Stakeholder Involvement Remains Concern in Talks on Alternative Compliance Plans*, 27 ENV'T REP. (BNA) 229, at 229-30 (1996); Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 ENVTL. L. REP. NEWS & ANALYSIS 10,527, 10,533 (1996).

67. Endangered Species Act of 1973, 16 U.S.C. § 1539 (1994).

language in the Act, provides a means by which the federal government and private or other non-federal landowners reach an agreement that authorizes the landowner(s) to disturb habitat in return for other conservation commitments. It thus represents an example of an effort to accommodate local development concerns within the strictures of a federal program. Notwithstanding the explosion of interest in these plans over the last several years, even supporters of the approach have articulated strong concerns over the lack of broad public participation in the process and the insufficiency of regulatory language under the Act for ensuring that the habitat conservation plans do not endanger species survival.[68] Moreover, the U.S. District Court for the District of Oregon recently ruled it was illegal under the Act for the federal regulating entity to rely on a state's promise to protect imperiled salmon through an unenforceable collaborative, voluntary approach with private landowners.[69]

It is important to emphasize that a traditional, centralized, and highly coercive federal environmental approach by no means necessarily would have avoided the problems identified in the Fort Ord case and these latter two examples of devolved collaboration. Moreover, there is ample evidence that centralized programs can be needlessly controversial, and both costly and of dubious benefit to the natural environment. Therefore, recasting many traditional top-down efforts to new processes where local publics and the regulated entities have more opportunity to participate meaningfully in decision making holds tremendous appeal. To that extent, the apparently increasing interest in integrating hazardous waste cleanups and other federal responsibilities with local land use in the West is on terra firma.

At the same time, however, further integration pushes more deeply into a terra incognita of shared federal and local responsibility for land use and environmental program administration. Local land use already is a complex social phenomenon, and few areas of local government administration have been skewered by charges of cronyism and corruption as have local land use decisions. When coupled with federal environmental responsibilities, property issues will cut across those of public health and the boundaries of a problem will expand, as property law, risk assessment, local zoning, federal regulations, statutory provisions, technical uncer-

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68. *See* John Kostyack, *Reshaping Habitat Conservation Plans for Species Recovery: An Introduction to a Series of Articles on Habitat Conservation Plans*, 27 ENVTL. L. 755 (1997); John Kostyack, *Habitat Conservation Planning under the Endangered Species Act: Time to Give Conservationists and Other Concerned Citizens a Seat at the Table*, ENDANGERED SPECIES UPDATE, July/Aug. 1997, at 51.

69. *See* Michelle Nijhuis, *Salmon Plan Can't Stand Alone*, HIGH COUNTRY NEWS, Aug. 17, 1998, at 3. *See also* Carlotta Collette, *Judge Nixes Salmon Plan*, HIGH COUNTRY NEWS, Aug. 3, 1998, at 2.

tainty, and the values of many publics all leave their mark on an environmental process that itself is open to considerable discretion.

The purpose of this article has been to challenge the political rhetoric that drawing on local land use features and players in federal environmental programs is a straightforward unencumbered process that will result in improved environmental management. Competing local interests, the existence of non-local stakeholders whose interests differ from those of local residents, and weak statutory authority and funding militate against the unfettered success of such a devolutionary approach. Unbridled enthusiasm for greater local control over environmental management in Superfund and elsewhere thus needs to be tempered with serious thought about how to promote statutorily grounded, effective, broad-based, and well-funded participation in the public interest. Perhaps most critically, how can we create or encourage the creation of participatory institutions that are at the center of decision making, institutions that can reach decisions in a timely manner but be responsive to the diverse local and supra-local interests and communities that constitute a pluralistic society?

An appreciation of the complexities of land use challenges conventional thinking on the nexus of federal environmental programs and local land use and economic development. As such, this article offers generalized propositions that can play an important role in motivating, enlarging, and informing policy debates about Superfund and other national-level programs that shape the natural environment in the western United States and throughout the country.