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Abstract

Incorporating Environmental Justice
Into NEPA Reviews Concerning
Reuse of Former Military Installations
By
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B.A. January 1982, California State University, Sacramento
J.D. May 1988, McGeorge School of Law, University of the Pacific

A Thesis submitted to

The Faculty of

The George Washington University
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for the degree of Master of Laws

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Thesis directed by
Laurent Romain Hourcle'
Associate Professor of Environmental Law

This paper focuses upon the effect that the recent emphasis of incorporating environmental justice concepts into the Federal government's decision making process has had. Specifically, the impact environmental justice considerations will have upon the Department of Defense's (DOD) environmental planning processes during possible future base closure and realignment rounds will be examined.

Environmental justice has been a growing item of concern since 1970. Environmental justice is concerned "about raising awareness of and sensitivity to the issues, and about trying to achieve fairness in U.S. environmental policy and in how environmental policy decisions are made." The concept, in effect, incorporates an equal protection aspect within it concerning the adverse environmental effects, as well as attempting to ensure communities have the ability to provide input into the decision making process concerning "their health, environment, and quality of life."

The so-called "environmental justice movement" gained momentum when studies were published indicating that there was an unequal distribution of adverse environmental effects, with minority and low-income groups primarily bearing the burden. Although it is in dispute why inequities occur, the studies consistently reflect that minorities absorb the brunt of adverse environmental effects resulting from decisions about the environment.

Part II addresses the relevance of environmental justice for the DOD by focusing upon Title VI of the Civil Rights Act, DOD's regulations, and assistance activities. The DOD's role in the base closure and realignment process concerning local community planning activities and local community assistance requires it to be sensitive to the needs of the local community. The Department's sensitivity is required if it is to prepare NEPA documents concerning closure or realignment of former military installations. The DOD regulations and financial assistance activities bring the department within Title VI's requirement to ensure that minority groups are not subjected to discrimination.

Part III provides a general overview of environmental planning. The role of the National Environmental Policy Act of 1969 (NEPA) is reviewed as well as the Council on Environmental Quality's (CEQ) influence through its regulations. The CEQ's regulations are reviewed to determine their treatment of socioeconomic effects on the "human environment," specifically as to consideration of environmental justice concerns in mind. Examination of the case law treatment of socioeconomic effects reveals that such effects, by themselves, have not lead to a conclusion that a NEPA review was required. The courts have consistently required the presence of effects upon the physical or natural environment before determining that an assessment include a discussion of socioeconomic effects. The case law thus provides a clue why President Clinton's Executive Order had to be issued to ensure review of environmental justice considerations by Federal agencies. The Defense Authorization Amendments and Base Closure and Realignment Act of 1988 and the Defense Base Closure and Realignment Act of 1990 are also examined, since these acts only exempted certain decisions and actions from NEPA, but otherwise left in place NEPA's requirements with respect to post-selection closure and realignment activities at identified installations.

Part IV reviews environmental planning now required pursuant Executive Order 12,898. The Executive Order's specific requirements are reviewed as well as the President's cover memorandum accompanying the order. Both documents clearly set a

new direction for Federal agencies to follow with respect to environmental justice concerns.

President Clinton directed Federal agencies to expend a significant amount of time and effort to address any socioeconomic effects from their programs and activities upon minorities and low-income communities. Agencies are now required to implement strategies to identify affected minority and low-income communities, identify programs and activities which affected those communities, collect data concerning environmental risks posed to those communities, and enhance public participation in the decision-making process, especially among minority and low-income groups. The Department of Defense's environmental strategy is also examined, as well as its 1996 report concerning the department's compliance with the Executive Order.

Part V examines the role of the Environmental Protection Agency (EPA) and Council On Environmental Quality (CEQ) in developing environmental justice guidance. The EPA is required by section 309 of the Clean Air Act to review the NEPA documents from other Federal agencies and determine whether they satisfactory. The significance of the EPA's review cannot be understated, since the section gives the EPA the authority to refer unsatisfactory NEPA reviews to the CEQ and thus publicizing a disagreement and delaying a propose action or project. The EPA has developed guidance to govern its reviews of NEPA documents from other agencies as well as its own actions. The CEQ also has issued guidance concerning consideration of environmental justice issues within NEPA documents. Both sets of guidance emphasize the incorporation of environmental justice issues within the present NEPA approach, rather than creating a new analytical process.

Part VI briefly examines the role environmental restoration efforts have with respect to closure or realignment of military installations. Due to the time required to sufficiently clean up installations, as well as the overall scope of environmental restoration that confronts the DOD, local communities frequently experience delays converting former military installations to civilian use. These delays can complicate the socioeconomic issues that may be present during a conversion effort. NEPA planning undertaken by DOD can be complicated as well, since any NEPA analysis will have to account for future civilian uses to which the installations will be put by the local community.

Part VII examines issues concerning the closure of military installations and homeless assistance. The United States Constitution empowers the Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" and to "make all Laws which shall be necessary and proper" to implement this power. Congress has enacted several statutes dealing with the use of surplus military buildings and property during base closures and realignments. It is reasonable to expect more such laws in view of the possibility of additional base closure rounds. Therefore, it is prudent to analyze the course of action the Congress most likely will follow concerning reuse of federal facilities, particularly military installations, if and when future base closure rounds are implemented in view of Congress' strong desire to make homeless assistance a priority item.

Part VII will also focus upon the various statutes Congress has enacted in the past concerning federal facilities with an emphasis upon the homeless assistance provisions and will discuss the procedures and requirements of the two major statutory programs

addressing reuse of federal facilities for the needs of the homeless: The Stewart B. McKinney Homeless Assistance Act of 1987, as amended, (hereinafter "McKinney Act") and The Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (hereinafter "1994 Redevelopment Act").

Incorporating Environmental Justice Into NEPA Reviews Concerning Reuse of Former Military Installations

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Table of Contents

The concept of fairness (or justice) is relevant to decisions affecting environmental quality because the individuals enjoying the benefits from such decisions are often different from those who pay the costs.[1]

Part I. Introduction

This paper focuses upon the effect that the recent emphasis of incorporating environmental justice concepts into the Federal government's decision making process has had. Specifically, the impact environmental justice considerations will have upon the Department of Defense's (DOD) environmental planning processes during possible future base closure and realignment rounds will be examined.

Environmental justice has been a growing item of concern since 1970.[2] Environmental justice is concerned "about raising awareness of and sensitivity to the issues, and about trying to achieve fairness in U.S. environmental policy and in how environmental policy decisions are made."[3] The concept, in effect, incorporates an equal protection aspect within it concerning the adverse environmental effects, as well as

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[1] LEONARD ORTOLANO, ENVIRONMENTAL PLANNING AND DECISION MAKING 14 (1984).

[2] COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY; 25TH ANNIVERSARY REPORT 109 (1995) (hereinafter "CEQ, 25TH ANNIVERSARY REPORT (1995)").

[3] CEQ, 25TH ANNIVERSARY REPORT 110-11 (1995); *See, also*, Richard J. Lazarus, *Fairness in Environmental Law*, 27 Envtl. L. 705, 711 (1997) (Although "fairness" is the clarion cry of the environmental justice movement, Professor Lazarus observes that during the course of the development of environmental law, proponents within the environmental legal arena have stubbornly held fast to their positions to the detriment of others. He states "Fairness matters and requires significant reform." He suggests that reform is required in three interrelated areas of concern with fairness: environmental justice ("unfairness in the distribution of the benefits and costs, including risks, of environmental protection laws"), private property rights ("unfairness of being singled out for restrictions on the use of privately owned land in order to maintain, at private expense, environmental benefits for the public at large"), and environmental crime ("unfairness of promoting compliance by subjecting to possible felony incarceration individuals who lack the *mens rea* historically associated with such severe societal sanctions"). His basic contention is that each area shares a commonality: claims of fundamental unfairness resulting from environmental law's implementation. The danger, he asserts, is that the environmental community's continued position that any reform should be viewed with suspicion may result in the return of legal battles over threshold issues already won and risks loss of the moral force necessary to maintain environmental law itself.).

attempting to ensure communities have the ability to provide input into the decision making process concerning "their health, environment, and quality of life."[4]

The so-called "environmental justice movement" gained momentum when studies were published indicating that there was an unequal distribution of adverse environmental effects, with minority and low-income groups primarily bearing the burden.[5] Although it is in dispute why inequities occur, the studies consistently reflect that minorities absorb the brunt of adverse environmental effects resulting from decisions about the environment.[6]

Part II addresses the relevance of environmental justice for the DOD by focusing upon Title VI of the Civil Rights Act, DOD's regulations, and assistance activities. The DOD's role in the base closure and realignment process concerning local community planning activities and local community assistance requires it to be sensitive to the needs of the local community.[7] The Department's sensitivity is required if it is to prepare NEPA documents concerning closure or realignment of former military installations. The DOD regulations and financial assistance activities bring the department within Title VI's requirement to ensure that minority groups are not subjected to discrimination.[8]

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[4] CEQ, 25TH ANNIVERSARY REPORT 111 (1995).

[5] *Id.* at 109.

[6] *Id.* at 109, 111-12; *See , also, infra*, note 334.

[7] *See, infra*, notes 32-33, 36-38 and accompanying text; *See, also*, notes 218-223 and accompanying text; Part III(C); Part VII(B), (C).

[8] *See, infra*, notes 32-33 and accompanying text.

Part III provides a general overview of environmental planning. The role of the National Environmental Policy Act of 1969 (NEPA) is reviewed as well as the Council on Environmental Quality's (CEQ) influence through its regulations.[9] The CEQ's regulations are reviewed to determine their treatment of socioeconomic effects on the "human environment," specifically as to consideration of environmental justice concerns in mind. Examination of the case law treatment of socioeconomic effects reveals that such effects, by themselves, have not lead to a conclusion that a NEPA review was required.[10] The courts have consistently required the presence of effects upon the physical or natural environment before determining that an assessment include a discussion of socioeconomic effects.[11] The case law thus provides a clue why President Clinton's Executive Order had to be issued to ensure review of environmental justice considerations by Federal agencies.[12] The Defense Authorization Amendments and Base Closure and Realignment Act of 1988 and the Defense Base Closure and Realignment Act of 1990 are also examined, since these acts only exempted certain decisions and actions from NEPA, but otherwise left in place NEPA's requirements with respect to post-selection closure and realignment activities at identified installations.[13]

Part IV reviews environmental planning now required pursuant Executive Order 12,898. The Executive Order's specific requirements are reviewed as well as the

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[9] *See, infra*, Part III(A), (B).

[10] *See, infra*, Part III(D).

[11] *See, infra*, Part III(D)(2).

[12] *See, e.g., infra*, notes 33-34 and accompanying text, and Part IV(A).

[13] *See, infra*, Part III(C).

President's cover memorandum accompanying the order.[14] Both documents clearly set a new direction for Federal agencies to follow with respect to environmental justice concerns.

President Clinton directed Federal agencies to expend a significant amount of time and effort to address any socioeconomic effects from their programs and activities upon minorities and low-income communities. Agencies are now required to implement strategies to identify affected minority and low-income communities, identify programs and activities which affected those communities, collect data concerning environmental risks posed to those communities, and enhance public participation in the decision-making process, especially among minority and low-income groups. The Department of Defense's environmental strategy is also examined, as well as its 1996 report concerning the department's compliance with the Executive Order.[15]

Part V examines the role of the Environmental Protection Agency (EPA) and Council On Environmental Quality (CEQ) in developing environmental justice guidance. The EPA is required by section 309 of the Clean Air Act to review the NEPA documents from other Federal agencies and determine whether they satisfactory.[16] The significance of the EPA's review cannot be understated, since the section gives the EPA the authority to refer unsatisfactory NEPA reviews to the CEQ and thus publicizing a disagreement and delaying a propose action or project. The EPA has developed guidance to govern its

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[14] *See, infra*, Part IV(A).

[15] *See, infra*, Part IV(B).

[16] *See, infra*, notes 228-30 and accompanying text.

reviews of NEPA documents from other agencies as well as its own actions.[17] The CEQ also has issued guidance concerning consideration of environmental justice issues within NEPA documents.[18] Both sets of guidance emphasize the incorporation of environmental justice issues within the present NEPA approach, rather than creating a new analytical process.

Part VI briefly examines the role environmental restoration efforts have with respect to closure or realignment of military installations. Due to the time required to sufficiently clean up installations, as well as the overall scope of environmental restoration that confronts the DOD, local communities frequently experience delays converting former military installations to civilian use.[19] These delays can complicate the socioeconomic issues that may be present during a conversion effort.[20] NEPA planning undertaken by DOD can be complicated as well, since any NEPA analysis will have to account for future civilian uses to which the installations will be put by the local community.[21]

Part VII examines issues concerning the closure of military installations and homeless assistance. The United States Constitution empowers the Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

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[17] *See, infra*, Part V(A), (B), (C).

[18] *See, infra*, Part V(D).

[19] *See, infra*, note 343 and accompanying text.

[20] *See, infra*, note 344 and accompanying text.

[21] *See, infra*, note 357 and accompanying text.

belonging to the United States"[22] and to "make all Laws which shall be necessary and proper" to implement this power.[23] Congress has enacted several statutes dealing with the use of surplus military buildings and property during base closures and realignments.[24] It is reasonable to expect more such laws in view of the possibility of additional base closure rounds.[25] Therefore, it is prudent to analyze the course of action the Congress most likely will follow concerning reuse of federal facilities, particularly military installations, if and when future base closure rounds are implemented in view of Congress' strong desire to make homeless assistance a priority item.[26]

Part VII will also focus upon the various statutes Congress has enacted in the past concerning federal facilities with an emphasis upon the homeless assistance provisions and will discuss the procedures and requirements of the two major statutory programs addressing reuse of federal facilities for the needs of the homeless: The Stewart B. McKinney Homeless Assistance Act of 1987, as amended, (hereinafter "McKinney Act")

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[22] U.S. CONST. art. IV, § 3, cl. 2.

[23] U.S. CONST. art I, § 8, cl. 18.

[24] *See, e.g.*, 10 U.S.C. § 2687 (base realignments and closures); 42 U.S.C. § 11301 *et seq.* (The Stuart B. McKinney Homeless Assistance Act of 1987); The Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. 100-526, October 24, 1988, 102 Stat. 2623, 10 U.S.C. § 2687 note; The Defense Base Closure and Realignment Act of 1990, as amended, Pub. L. 101-510, November 5, 1990, 104 Stat. 1808, 10 U.S.C. § 2687 note; The Base Closure Community Redevelopment and Homeless Assistance Act of 1994, Pub. L. 103-421, October 25, 1994, 108 Stat. 4346, 10 U.S.C. § 2687 note.

[25] Associated Press, *Cohen Wants Pentagon to be a Better Business*, WASH. TIMES, November 11, 1997, at A9; Lisa Daniel, *News in Brief: Round of Base Closures Possible*, A.F. TIMES, April 13, 1998, at p. 2; Ted Bridis, *Cohen Warns of Layoffs, Weapons Cuts*, USA TODAY, April 27, 1998, at p. 1; Scripps Howard News Service, *Base-closing Plan Deadlocks Senate Armed Services Panel: Clinton Seeks Fifth Round to cut costs in 2001*, WASH. TIMES, May 5, 1998, at A4; *Also see*, DEPARTMENT OF DEFENSE, THE REPORT OF THE DEPARTMENT OF DEFENSE ON BASE REALIGNMENT AND CLOSURE (1998) (hereinafter "DOD, BRAC REPORT (1998)").

[26] *See, infra,* notes 362-64 and accompanying text.

and The Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (hereinafter "1994 Redevelopment Act").[27]

Part II. Relevance of Environmental Justice to the Department of Defense

In addition to Title VI of the Civil Rights Act,[28] Executive Order 12,898 requires Federal agencies to implement policies reflecting environmental justice concerns.[29] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[30] Each agency rendering financial assistance is required to develop regulations implementing the statute's goals.[31] The DOD's Title VI regulations generally apply to any program involving payment of funds, property transfers, and financial assistance.[32] DOD regulations provide in part that a "recipient . . . may not . . . on the ground of race, color, or national origin" deny an individual any service, offer different services, subject a person to segregation, restrict a person in any way, treat a person differently, or deny a person an opportunity to participate in a program or planning

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[27] 42 U.S.C. § 11301 *et seq.*; Pub. L. 103-421, 25 Oct 94, 108 Stat. 4346, 42 U.S.C. 11301 note, respectively.

[28] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), 42 U.S.C. §§ 2000d-2000d-7 (1994).

[29] *See, infra*, Part IV.

[30] Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1994).

[31] Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1 (1994). (EPA's regulations provide in part that a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin . . ."(40 C.F.R. § 7.35(b) (1994). DOJ's regulations emphasize that primary enforcement responsibility is with "the head of each department and agency administering programs of Federal financial assistance" (28 C.F.R. § 50.3(b)).

[32] 32 C.F.R. § 195.3 (1996).

body.[33] A difficulty with respect to both Title VI and the implementing regulations is that the "indigent," the "poor," are not specifically named or listed within the statute or regulations, nor are they viewed as a suspect classification for equal protection purposes.[34] This underscores the importance of President Clinton's Executive Order 12,898 and provisions concerning homeless assistance.[35]

The 1990 base closure act authorizes Federal funds for economic adjustment assistance and community planning assistance to local communities affected by a closure or realignment.[36] The Department of Defense's Office of Economic Adjustment (OEA) is charged with the responsibility of assisting local communities planning activities concerning reuse of former military installations to include technical assistance and financial support.[37] It can provide up to $1,000,000 annually for five years for conversion planning to "carry out community adjustments and economic diversification" in areas

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[33] 32 C.F.R. § 195.4(b) (1996); *See, also*, 32 C.F.R. § 195.3 (1996) and Part 195, Appendix A (1996) (DOD regulations provide that the Department's regulations implementing Title VI apply to listed Federally assisted programs and activities which includes "various programs involving loan or other disposition of surplus property.").

[34] S. Doc. No. 103-6, at 1924 (1996) ("Wealth or indigency is not a *per se* suspect classification but it must be related to some interest that is fundamental, ..." discussing San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)).

[35] *See, infra*, Parts IV and Part VI.

[36] Pub. L. 101-510, § 2905(a)(1)(B)(i),(ii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; Benjamin L. Ginsberg, *et al., Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 186 (1994).

[37] *See*, Office of Economic Adjustment (visited May 21, 1998) <http://emissary/ acq.osd.mil/BCCR/ OEA/OEAH>; Roles in Base Reuse (visited May 21, 1998) <http://www.acq.osd.mil/iai/reinvest/sect/ sect_1.html>; Local Redevelopment Authorities (visited May 21, 1998) <http://www.acq.osd.mil/iai/ einvest/sect/sect_3.html>; DOD BRAC Report 37-38 (1998); U.S. DEPT OF HOUSING AND URBAN DEVELOPMENT, GUIDEBOOK ON MILITARY BASE REUSE AND HOMELESS ASSISTANCE 6 (1996) (hereinafter "HUD, REUSE GUIDEBOOK (1996)").

deemed by the Secretary of Defense to experience more than a 5% loss in jobs or "adversely affected" by the closure or realignment of more than one installation.[38]

A Title VI violation may be alleged if the actions of state or local authorities subject minority groups to discrimination, work to exclude them from publicly participating in the decision-making process, or denied the benefits of a program.[39] The net effect of Title VI is to ensure discrimination, with respect to federally funded activities, may be remedied and to provide a means of addressing inequities.[40]

Although it is in dispute among commentators in the legal community,[41] reasonable motivations such as low land costs, economic returns, minimal local regulatory requirements, etc., often may provide the rationale for land use decisions.[42] In addition to the requirements of Executive Order 12,898,[43] DOD components may

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[38] Pub. L. 103-160, §§ 1322(a), 1323, 107 Stat. 1547 (1993), 10 U.S.C. § 2687 note; Pub. L. 102-484, § 4302,106 Stat. 2315 (1992), 10 U.S.C. § 2391 note; Benjamin L. Ginsberg, *et al., Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 187 (1994).

[39] Michael Fisher, *Environmental Racism Claims Brought Under Title VI of The Civil Rights Act*, 25 Envtl. L. 285, 287 (1995).

[40] 28 C.F.R. § 50.3(a) ("objective should be to secure prompt and full compliance").

[41] *Compare*, Vicki Been, *What's Fairness Got to Do With it? Environmental Justice and Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001 (1993); Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 Vill. Envtl. L.J. 121 (1997) *with,* Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 Envtl. L. 285 (1995). The methodology used in data collection is also in contention, *Compare*, Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. Land Use & Envtl. L 1 (1995) *with* Colin Crawford, *Analyzing Evidence of Environmental Justice: A Suggestion For Professor Been*, J. Land Use & Envtl. L. 103 (1996).

[42] Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 Vill. Envtl. L.J. 121, 133-141 (1997); Vicki Been, *What's Fairness Got to Do With it? Environmental Justice and Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001, 1015-27 (1993); Richard J. Lazarus, *Fairness in Environmental Law*, 27 Envtl. L. 707, 714 (1997).

[43] *See, infra*, Part IV(A).

potentially face environmental justice arguments concerning cleanup decisions at their installations or reuse decisions concerning their facilities and buildings.[44] Although actions alleging environmental injustices have generally have proved difficult to pursue and prevail upon by plaintiffs due to the requirement to prove discriminatory intent, a high evidentiary standard,[45] in view of Executive Order 12,898 DOD components may nonetheless may have to confront legal challenges premised upon environmental justice arguments.[46] . The topic of environmental justice has occupied the nation's attention since the 1960's and has recently been energized by President's Clinton's Executive Order and been the subject of various Federal and state initiatives.[47]

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[44] *See*, Vicki Been, *What's Fairness Got to Do With it? Environmental Justice and Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001, 1009, n. 39 (1993) ("Other studies show that the poor and people of color bear a disproportionate share of the general burdens of pollution and of the costs of cleaning up pollution, but do not specifically address the burden of hosting polluting [local undesirable land uses]." (citations omitted)). Although the finding is disputed by another study, Professor Been cites within the footnote an unpublished study for the proposition that "the higher the percentage of blacks within a community, the less likely it was that hazardous waste sites had progressed to a particular stage of cleanup, especially when the community also was relatively poor, but finding that the higher the percentage of Latinos, the more likely the cleanup had progressed." *See also*, Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 Envtl. L. 285, 296-301 (1995) (highlighting the evidence that a disproportionate share of environmental risk is placed upon minority communities); Stacey Hart, *A Survey of Environmental Justice Legislation in the States*, 73 Wash. U. L. Q. 1459, 1460-62 (1995) (same); Vicki Been, *What's Fairness Got to Do With it? Environmental Justice and Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001-1015 (1993) (discussing evidence of disproportionate siting of local undesirable land uses); *See also, infra*, Part VI concerning reuse of former DOD installations for homeless assistance.

[45] *See*, Wesley D. Few, *The Wake of Discriminatory Intent and The Rise of Title VI in Environmental Justice Lawsuits*, 6 S.C. Envtl. L.J. 108 (1997) ("equal protection plaintiff's must prove discriminatory intent"); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 Envtl. L. 285, 303-306 (1995) ("difficult burden of proof . . .likely to continue to frustrate plaintiffs").

[46] *See*, Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 Envtl. L. 285, 306-319 (1995) (discussing the use of citizen suit provisions, NEPA and state counterparts, common law claims, and Title VI); *See also*, Chester Residents Concerned For Quality Living v. Seif, 132 F.2d 925 (3rd Cir. 1997) (private right of action exists under statute for intentional discrimination and regulations concerning disparate impacts).

[47] Adam D. Schwartz, *The Law on Environmental Justice: A Research Pathfinder*, 25 Envtl. L. Rep. 10543 (1995) ; Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 Envtl. L. 285, 314-316 (1995); Stacey Hart, *A Survey of Environmental Justice Legislation in the States*, 73

Environmental Justice, Racism, or Equity? Different terms concerning the issue are currently in vogue and usually reflect the perspective of the proponent.[48] "Environmental racism" has been defined to include intentional discrimination against minority groups,[49] as well as policies and directives resulting in disparate impacts upon those groups with respect to enforcement of applicable laws and exclusion from the decision-making process.[50]

"Environmental justice" is typically used by governmental agencies and the term incorporates the concept of environmental equity emphasizing fair treatment for all people irrespective of race, color, national origin, or income and equal exposure to risk of adverse environmental impacts.[51] The focus is not upon shifting the risk from one group

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Wash. U. L. Q. 1459 (1995); Steven A. Herman, *Environmental Cleanup and Compliance at Federal Facilities: An EPA Perspective*, 24 Envtl. L. 1067 (1994); Carol E. Dinkins, *Impact of the Environmental Justice Movement on American Industry and Local Government*, 47 Admin. L. Rev. 337 (1995).

[48] *See, e.g.*, Michael Fisher, *Environmental Racism Claims Brought Under Title VI of The Civil Rights Act*, 25 Envtl. L. 285, 289 (1995).

[49] *See*, Michael Fisher, *Environmental Racism Claims Brought Under Title VI of The Civil Rights Act*, 25 Envtl. L. 285, 289 (1995). ("Environmental racism" is defined as racial discrimination in environmental policy making and unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of life-threatening presence of poisons and pollutants in people of color communities.").

[50] *See*, Michael Fisher, Environmental Racism Claims Brought Under Title VI of The Civil Rights Act, 25 Envtl. L. 285, 289-90 (1995). ("Any policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race, color; [as well as the] exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and staffs.").

[51] ENVIRONMENTAL PROTECTION AGENCY, INTERIM FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES 2 (1997) (hereinafter "EPA, NEPA ANALYSES (1997)"). ("Environmental justice" is the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means no group of people, including racial, ethnic, or socioeconomic group (sic) should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."); *See, also*, NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, WASTE AND FACILITY SITING SUBCOMMITTEE, ENVIRONMENTAL

to another, but rather mitigation of the risk.[52] The term "environmental justice" will be used throughout this paper in lieu of other terms.

Part III. Environmental Planning

A. The National Environmental Policy Act of 1969 (NEPA)[53]

Congress recognized that human activity has an impact upon the environment, as well as human beings themselves, and provided for NEPA as a mechanism to evaluate those impacts.[54] When Congress enacted NEPA, it intended to,

> declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental of Quality.[55]

Generally, Congress requires Federal agencies to accomplish "a detailed statement," before they take action, concerning the affect of their actions.[56] The environmental impact statement (EIS) should address "the environmental impact of the

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JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS, THE SEARCH FOR AUTHENTIC SIGNS OF HOPE: A REPORT ON THE "PUBLIC DIALOGUES ON URBAN REVITALIZATION AND BROWNFIELDS, ENVISIONING HEALTHY AND SUSTAINABLE COMMUNITIES" 16 (1996) (hereinafter, "NEJAC, BROWNFIELDS REPORT (1996)") ("Environmental justice is predicated upon the fact that the health of members of a community . . . is a product of physical, social, cultural, and spiritual factors. It [is] a key to understanding an integrative environmental policy which treats our common ecosystem as the basis for all life . . . and activity . . . .").

[52] EPA, NEPA ANALYSES 2 (1997).

[53] The National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (1970), 42 USC §§ 4321 *et seq.*.

[54] 42 U.S.C. § 4331(a), (b).

[55] *Id.* § 4321.

[56] *Id.* § 4332(2)(C).

proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[57] The EIS is required for "major Federal actions significantly affecting the quality of the human environment."[58]

When developing the EIS, federal agencies are to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment."[59]

NEPA imposes on the Federal government the continuing responsibility to "use all practicable means," consistent with NEPA, among other things, to: ". . . [a]ssure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; [a]ttain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; . . . [and] [a]chieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities. . . ."[60]

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[57] *Id.* § 4332(2)(C)(i)-(v).

[58] *Id.* § 4332(2)(C).

[59] *Id.* § 4332(2)(A).

[60] *Id.* § 4331(b).

B. The Council on Environmental Quality's Regulations[61]

The Council on Environmental Quality (CEQ) regulations state, in part, that NEPA's purpose includes implementation of procedures insuring that "high quality" information is disseminated to government officials and the public.[62] Accurate and critical review of the information and public access are deemed "essential to implementing NEPA."[63]

The CEQ regulations impose several responsibilities upon Federal agencies concerning implementation of NEPA.[64] Among those responsibilities is the need to interpret and implement public policy and law pursuant to NEPA and the CEQ regulations.[65] Federal agencies are also instructed that they should integrate NEPA requirements with other statutory obligations and agency practice in a manner to promote efficiency.[66] Federal agencies are also to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the *human environment,*"[67] as well as to "avoid or

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[61] 43 Federal Register 55,990, November 28, 1978 (codified at Title 40 C.F.R. Part 1500 et seq.).

[62] 40 C.F.R. § 1500.1(b).

[63] *Id.* § 1500.1(b).

[64] Exec. Order No. 11514, 3 C.F.R. p. 902 (1966-1970), as amended by Exec. Order No. 11991, 3 C.F.R. p. 123 (1977); 40 C.F.R. § 1500.2.

[65] 40 C.F.R. § 1500.2(a).

[66] *Id.* § 1500.2(c).

[67] *Id.* § 1500.2(d).

minimize adverse effects upon the *human environment*"[68] and "to restore and enhance the quality of the *human environment* . . . ."[69] (emphasis added)

The CEQ regulations require Federal agencies to apply the NEPA process into their planning as early as possible "to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."[70] Also required is the use of "a systematic, interdisciplinary approach" to ensure "the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making."[71] Analyses should provide enough information in order to be used to "[i]dentify environmental effects and values" which can be used to "[s]tudy, develop, and describe appropriate alternatives" to Federal actions.[72] Federal agencies are also instructed to,

> [p]rovide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that: (1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action. (2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable. (3) The Federal agency commences its NEPA process at the earliest possible time.[73]

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[68] *Id.* § 1500.2(e).

[69] *Id.* § 1500.2(f); *See, also*, Stephen M. Johnson, *NEPA And SEPA's in the Quest For Environmental Justice*, 30 LOYOLA L. A. LAW REV. 565 (1997) (NEPA can be used in its present form to achieve environmental justice goals if the courts and CEQ are willing.).

[70] 40 C.F.R. § 1501.2.

[71] *Id.* § 1501.2(a).

[72] *Id.* § 1501.2(b), (c).

[73] *Id.* § 1501.2(d).

Federal agencies need to determine the issues raised by their proposed actions, in consultation of other state or Federal agencies and persons whose interests may be affected ("scoping").[74] "Scope" is defined to mean "the range of actions, alternatives, and impacts to be considered."[75] The CEQ regulations set forth three types of actions, alternatives, and impacts to be evaluated during the NEPA process.[76] The CEQ regulations require discussion of the environmental consequences which includes, among other things, urban quality.[77]

Although the regulations define "human environment" to "include the natural and physical environment and the relationship of people with that environment," the definition did not bring within it effects which were solely socioeconomic.[78] However, socioeconomic effects are addressed, if "interrelated" with physical or natural effects.[79]

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[74] *Id.* § 1501.7.

[75] *Id.* § 1508.25.

[76] *Id.* § 1508.25(a), (b), (c). They are: (1) connected, cumulative and similar actions; (2) the so-called "no action" alternative, reasonable alternatives, and mitigation measures not in the proposed action; and (3) direct, indirect, and cumulative impacts. (*Id.*)

[77] *Id.* § 1502.16. Also required to be discussed are direct and indirect effects and their significance, "possible conflicts between the proposed action and the objectives of Federal, regional, state, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned, the environmental effects of alternatives including the proposed action, energy requirements and conservation potential of various alternatives and mitigation measures, natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures, and means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))." (citations omitted) (*Id.* §§ 1502.16(a)-(h)).

[78] *Id.* § 1508.14.

[79] *Id.* § 1508.14. The CEQ regulations address both direct and indirect effects. (*See, Id.* § 1508.8) Direct effects are defined as those "which are caused by the action and occur at the same time and place. (*Id.* at § 1508.8(a)). Indirect effects are defined as those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." (*Id.* at § 1508.8(b)). They may include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. . . .

The CEQ regulations attempt to address the issue of what is "significant" within the NEPA evaluation process by analyzing the "context" within which the action is proposed and the "intensity" the proposal brings with it.[80] Context is reviewed from the perspective of the "society as a whole (human, national), the affected region, the affected interests, and the locality," as applicable.[81] Intensity is composed of several factors that are reviewed.[82]

C. The 1988 and 1990 Base Closure and Realignment Acts[83]

When Congress enacted the Defense Authorization Amendments and Base Closure and Realignment Act of 1988 ("1988 base closure act") and the Defense Base

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Effects includes ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." (*Id.* at § 1508.8(b)).

[80] *Id.* § 1501.27.

[81] *Id.* § 1501.27(a).

[82] *Id.* § 1501.27(b). The factors to be considered are: (1) impacts that may be both beneficial and adverse; (2) the degree to which the proposed action affects public health or safety; (3) unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; (4) the degree to which the effects on the quality of the human environment are likely to be highly controversial; (5) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; (6) the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; (7) whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment: Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts; (8) the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural; or historical resources; (9) the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973; and (10) whether the action threatens a violation of Federal, State; or local law or requirements imposed for the protection of the environment (*Id.*).

[83] Defense Authorization Amendments and Base Closure and Realignment Act of 1988, as amended, Pub. L. 100-526, 102 Stat. 2623 (1988), 10 U.S.C. § 2687 note; Defense Base Closure and Realignment Act of 1990, as amended, Pub. L. 101-510, 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

Closure and Realignment Act of 1990 ("1990 base closure act"), it exempted certain decision-making processes within each base closure act from NEPA's requirements.[84]

Congress also enacted 10 U.S.C. § 2687 in 1977 to prohibit the closure of military installations until certain conditions are met.[85] The 1988 and 1990 base closure acts waive section 2687's implementation, thereby avoiding imposition of these conditions.[86] Authority to close or realign bases reverts to section 2687 in the absence of other legislation.[87] NEPA may apply to actions taken pursuant to 10 U.S.C. § 2687 to the extent other base closure and realignment legislation is not in effect and its requirements are met.[88]

The 1988 base closure act exempted the actions of the base closure commission concerning the selection of military installations recommended for closure or realignment, as well as the recommendations concerning installations receiving functions from closure or realigned installations and transmittal of the required report to the Secretary of Defense (DOD Secretary) and Congress.[89] The 1988 base closure act also

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[84] Pub. L. 100-526, § 204(c), 102 Stat. 2623 (1988), 10 U.S.C. § 2687 note; Pub. L. 101-510, § 2905(c), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[85] Pub. L. 95-82, § 612(a), August 1, 1977, 91 Stat. 379; *See, infra*, Part VII(C)(5). (Section 2687 prohibits certain actions depending on the number of employees at the installation or the size of the contemplated cuts. The Secretary of Defense is obligated to notify Congress before reductions or closure takes place and action is restricted for a specified time period until notification to Congress occurs.).

[86] *See, e.g.*, Pub. L. 100-526, October 24, 1988, § 205(2), 102 Stat. 2623, 10 U.S.C. § 2687, note; Pub. L. 101-510, November 5, 1990, § 2905(d), 104 Stat. 1808, 10 U.S.C. § 2687 note; *See, infra*, note 461.

[87] UNITED STATES GOVERNMENT ACCOUNTING OFFICE, MILITARY BASES: LESSONS LEARNED FROM PRIOR BASE CLOSURE ROUNDS 15 (GAO/NSIAD-97-151, July 25, 1997) (hereinafter "GAO, LESSONS LEARNED (1997)"); *See, infra*, note 467.

[88] *See*, County of Seneca v. Cheney, 12 F.3d 8 (2nd Cir. 1994).

[89] Pub. L. 100-526, § 204(c)(1)(A), 102 Stat. 2623 (1988), 10 U.S.C. § 2687 note.

exempted certain actions of the DOD Secretary from NEPA's requirements when they concern the establishment of the commission, the determination whether to accept its recommendations, the selection of installations to receive functions from closure or realigned installations, or the transmittal of the required report to Congress.[90]

However, the 1988 base closure act did apply NEPA's requirements to the DOD Secretary's actions with respect to "the process of the closing or realigning" after selection of military installations for closure or realignment and "the process of relocating of functions" from a closed or realigned military installation.[91] The DOD Secretary did not have to consider necessity of closing or realigning the affected installations and relocation of functions, as well as alternatives to the selected installations, during any NEPA review.[92]

The 1988 base closure act allowed civil judicial actions alleging NEPA violations, but limited such challenges to the applicable actions or omissions of the commission or the DOD Secretary, provided the action was brought within 60 days of such action or omission."[93]

The 1990 base closure act exempted the actions of the President and the commission, and certain actions of the Department of Defense (DOD) from NEPA's requirements.[94] The provisions of NEPA applied to the DOD's actions with respect to

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[90] Pub. L. 100-526, § 204(c)(1)(B), 102 Stat. 2623 (1988), 10 U.S.C. § 2687 note.

[91] Pub. L. 100-526, § 204(c)(2)(A) & (B), 102 Stat. 2623 (1988), 10 U.S.C. § 2687 note.

[92] Pub. L. 100-526, § 204(c)(2), 102 Stat. 2623 (1988), 10 U.S.C. § 2687 note.

[93] Pub. L. 100-526, § 204(c)(3), 102 Stat. 2623 (1988), 10 U.S.C. § 2687 note; *See, infra*, note 98.

[94] Pub. L. 101-510, § 2905(c)(1), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

"the process of property disposal" and "the process of relocating functions" from a closed or realigned military installation, once they had been selected but before the functions actually relocated.[95] The DOD Secretary also did not have to consider necessity of closing or realigning the affected installations and transferring functions, as well as alternatives to the selected installations, during any NEPA review.[96]

The 1990 base closure act likewise permitted civil judicial actions alleging NEPA violations, but limited such challenges to actions or omissions by the DOD Secretary, provided the action was brought within 60 days of such action or omission.[97] The 60-day limitation is, however, limited to challenges to the Secretary's actions or omissions, not reviews required by NEPA for subsequent environmental decisions.[98]

As a result of the interaction among the 1988 and 1990 base closure acts, and 10 U.S.C. § 2687, the following circumstances occur: (1) closures and realignments undertaken pursuant to 10 U.S.C. § 2687 are subject to NEPA and the typical NEPA assessment whether an environmental impact statement is required; (2) a limited NEPA assessment review is available under closures and realignments undertaken pursuant to the 1988 base closure act; and (3) a slightly expanded NEPA review is available for closures and realignments pursuant to the 1990 base closure act.[99]

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[95] Pub. L. 101-510, § 2905(c)(2)(A), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[96] Pub. L. 101-510, § 2905(c)(2)(B), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[97] Pub. L. 101-510, § 2905(c)(3), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[98] Conservation Law Foundation, Inc. v. Department of the Air Force, 864 F. Supp. 265, 283 (D. New Hampshire 1994) (distinction made between Secretary's actions or omissions and subsequent NEPA challenges concerning EIS process based upon legislative history).

[99] *See*, STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 129 (1996).

D. Consideration of Adverse Socioeconomic or Environmental Justice Impacts Pursuant to NEPA and CEQ Regulations

When base closures and realignments are directed pursuant to the base closure acts, they may be easily considered "major federal actions significantly affecting the quality of the human environment," due to their complex nature.[100] However, the question raised is whether socioeconomic effects are required to be evaluated in the NEPA review in view of case law and the CEQ regulations.[101]

1. CEQ Regulations

The CEQ regulations define "human environment" to include the "natural and physical environment and the relationship of people with that environment."[102] Socioeconomic effects are excluded from the definition, if they are the only results of a proposed Federal action, but are analyzed when they are associated with natural or

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[100] 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3; 40 C.F.R. Part 1508; *See, also*, DOD, BRAC REPORT (1998); Benjamin L. Ginsberg, *et al., Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 188 (1994).

[101] *See, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 100 S. Ct. 497, 62 L.Ed.2d 433 (1980); Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 5198, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

[102] 40 C.F.R. 1508.14; *See also*, County of Seneca v. Cheney, 12 F.3d 8 (2nd Cir. 1994) (no showing of threatened environmental damage as opposed to economic effects from reduction if force); Image of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978) (socioeconomic effects alone not sufficient to trigger NEPA analysis); *but, cf.*, Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), (1977) (rejecting claim the term "human environment" includes socioeconomic impacts such as unemployment and revenue loss); *with* McDowell v. Schlesinger, 404 F. Supp. 221 (W. D. Mo. 1975) (socioeconomic effects standing alone can trigger NEPA).

physical effects.[103] Even when socioeconomic effects from a Federal agency's proposed action are present, the agency is only required to obtain "relevant information."[104]

2. Case Law Treatment of Socioeconomic Effects[105]

The Federal courts have declined to give NEPA any substantive effect on agency decision-making.[106] Rather, the statute has been interpreted as having "significant substantive goals,"[107] but NEPA's "mandate to [Federal] agencies is *essentially procedural*."[108] (emphasis added) Federal case law has also noted that the role of the courts is only "to ensure that the agency has taken a 'hard look' at environmental consequences; [they] cannot 'interject [themselves] within the discretion of the executive as to the choice of the action to be taken.'"[109] In addition, a Federal agency is required to consider all reasonable alternatives, even though they may be "outside its jurisdiction or control."[110] Furthermore, notwithstanding that a proposed action may result in beneficial effects, if it nonetheless has a "significant" impact on the environment, it needs to be

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[103] 40 C.F.R. § 1508.14.

[104] Tongass Conservation Society v. Cheney, 924 F.2d 1137, 1144 (D.C. Cir. 1991). (rejecting claim Navy was required to conduct surveys concerning impact upon tourist industry when EIS discussed methods to accommodate operations and testing schedule).

[105] A Westlaw search on June 1, 1998 indicated there are 2,591 Federal cases addressing the National Environmental Policy Act.

[106] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 100 S. Ct. 497, 62 L. Ed.2d 433 (1980); Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

[107] *See, e.g.*, 42 U.S.C. §§ 4331, 4332.

[108] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227, 100 S. Ct. 497, 499-500, 62 L.Ed.2d 433 (1980); Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558, 98 S. Ct. 1197, 1219, 55 L. Ed. 2d 460 (1978).

[109] Kleppe v. Sierra Club, Inc., 427 U.S. 390, 410, n. 21, 96 S. Ct. 2718, 2730, 49 L. Ed. 2d 576 (1976).

addressed pursuant to NEPA.[111] When reviewing issues raised pursuant to NEPA and the CEQ regulations, the regulations are extended "substantial deference" by the courts.[112]

The courts have consistently held that socioeconomic effects alone are not sufficient to require the preparation of an EIS."[113] The CEQ's definition of the term "human environment" emphasizes the "natural and physical environment and the relationship of people with that environment."[114] However, socioeconomic effects by themselves do not trigger an environmental assessment or environmental impact statement by themselves and are not considered, unless interrelated with physical or natural environmental effects.[115]

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[110] Monarch Chemical Works, Inc. v. Exon, 466 F. Supp. 639, 651 (D.C. Neb. 1979).

[111] EDF v. Marsh, 651 F.2d 983, 993 (5th Cir. 1981) ("NEPA requires the discussion of all *significant* environmental impacts, not just adverse ones.") (original emphasis).

[112] Andrus v. Sierra Club, 442 U.S.347, 358, 99 S.Ct. 2335, 2341, 60 L.Ed. 2d 943 (1979). General guidance concerning the Council on Environmental Quality's regulations may be found at 46 Fed. Reg. 18026-18038 (March 23, 1981) and 48 Fed. Reg. 34263-34268 (July 28, 1983).

[113] Como-Falcon Community Coalition, Inc. v. U. S. Department of Labor, 609 F.2d 342, 345 (8th Cir. 1979); Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 476, n. 7 (9th Cir. 1979); Breckinridge v. Rumsfeld, 537 F.2d 864, 866 (6th Cir. 1976); Knowles v. United States Coast Guard, 1997 WL 151397, 44 ERC 2070 (S.D. New York 1997); Mall Properties, Inc. v. Marsh, 672 F. Supp. 561, 571 (D.C. Mass. 1987); Azzolina v. United States Postal Service, 602 F. Supp. 859, 862 (D.C. New Jersey 1985); Little Earth of Tribes, Inc. v. U. S. Dept. of Housing and Urban Development, 584 F. Supp. 1287, 1291 (D. C. Minn. 1983); Citizens Committee Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 534 (S.D. Ohio 1982); Concerned Citizens for the 442nd T.A.W. v. Bodycome, 538 F. Supp. 184, 190 (W.D. Mo. 1982); James v. Tennessee Valley Authority, 538 F. Supp. 704, 709 (E.D. Tenn. 1982); National Association of Property Owners v. U.S., 499 F. Supp. 1223, 1266, n. 28 (D.C. Minn. 1980).

[114] 40 C.F.R. § 1508.14.

[115] 40 C.F.R. § 1508.14; *See also*, Mall Properties, Inc. v. Marsh, 672 F. Supp. 561, 570 (D.C. Mass. 1987) (error for Corps of Engineers to deny a permit solely on consideration of socioeconomic effects upon a town, citing Metropolitan Edison Company v. People Against Nuclear Energy, 460 U.S. 766, 103 S. Ct. 1556, 75 L. Ed. 534 (1983)).

These principles have been applied in litigation concerning reductions in force at and closures of military installations.[116] Significantly, the circumstances concerned issues that typically would be addressed during reviews of environmental justice issues or which are readily analogous to minority or low-income communities.[117] In the one case that appeared to state that a NEPA analysis was required due to relocation of a military unit, and its associated personnel and families, with the subsequent loss of some jobs,[118] the court was apparently concerned about the absence of an analysis concerning unknown environmental impacts.[119] The case's holding is questionable in view of a later and

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[116] *See*, County of Seneca v. Cheney, 12 F.3d 8, 12 (2nd Cir. 1994) (reduction in civilian work force due to termination of mission); Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517, 522-23 (5th Cir. 1978) (elimination of civilian positions at Kelly AFB); Knowles v. United States Coast Guard, 1997 WL 151397, 44 ERC 2070 (S.D. New York 1997) (closure of Coast Guard support center); Concerned Citizens for the 442nd T.A.W. v. Bodycome, 538 F. Supp. 184, 190 (W.D. Mo. 1982) (deactivation of Air Force Reserve unit); *but compare with*, Jackson County, Missouri v. Jones, 571 F. 2d 1004, 1007 (8th Cir. 1978) (Air Force's NEPA document deemed sufficient concerning relocation of military and civilian employees); McDowell v. Schlesinger, 404 F. Supp. 221, 253-55 (W. D. Missouri 1975) (NEPA analysis required for relocation of Air Force unit).

[117] *See*, County of Seneca v. Cheney, 12 F.3d 8, 12 (2nd Cir. 1994) (loss of civilian positions); Jackson County, Missouri v. Jones, 571 F. 2d 1004, 1007 (8th Cir. 1978) (10,000 personnel directly affected with thousands more indirectly impacted); Image of Greater San Antonio, Texas v. Brown, 570 F.2d 517, 522-23 (5th Cir. 1978) (70% of the civilian positions eliminated were filled by Latinos, despite being only 54% at base); Concerned Citizens for the 442nd T.A.W. v. Bodycome, 538 F. Supp. 184, 190 (W.D. Mo. 1982) (deactivation of Reserve unit which subsequent loss of jobs); McDowell v. Schlesinger, 404 F. Supp. 221, 253-55 (W. D. Missouri 1975) (relocation of unit with subsequent loss of positions).

[118] McDowell v. Schlesinger, 404 F. Supp. 221, 253-55 (W. D. Missouri 1975) (NEPA analysis required for relocation of Air Force unit).

[119] This view is supported by a reading of Jackson County, Missouri v. Jones, 571 F. 2d 1004, 1007 (8th Cir. 1978) (relocation will "directly and substantially affect the physical and economic environments of two major urban centers"); *See also*, Image of Greater San Antonio, Texas v. Brown, 570 F. 2d 517, 523 5th Cir. 1978) (questioning McDowell); Breckinridge v. Rumsfeld, 537 F. 2d 864 (6th Cir. 1976) cert. denied 429 U.S. 1061, 97 S. Ct. 785, 50 L. Ed. 777 (1977) (declining to accept McDowell holding); Monarch Chemical Works, Inc. v. Exon, 466 F. Supp. 639, 656 (D. C. Nebraska 1979) ("doubt as to whether a direct impact existed in tandem with the socioeconomic impacts"); Metlakatla Community v. Adams, 427 F. Supp. 871, 875 (D.D.C. 1977) (primary and secondary effects present). The circumstances in McDowell were analogous to those facing the court in Hanley v. Kleindeinst, 460 F. 2d 640 (2nd Cir. 1972) which concerned the construction of a 9 story Federal jail in Manhattan. The Hanley court noted that an inadequate environmental assessment had been accomplished concerning potential environmental impacts, despite possible issues concerning water, sewage, garbage, noise levels, air pollution and the like in the

similar case before the same judge in which he chose to distinguish the case from the matter then before him on the basis of the project's minimal effects.[120]

The following cases which would certainty fall well within the scope of President Clinton's Executive Order 12,898, if they were to be examined today, however, courts before 1994 nonetheless refused to require environmental assessments pursuant to NEPA.[121]

a. Image of Greater San Antonio, Texas v. Brown[122]

The Air Force sought to reduce the civilian work force at Kelly Air Force Base (AFB), Texas--one of five Air Force logistics centers within the service--by approximately 1,250 positions as part of an overall reduction of 22,500 Air Force civilian employees.[123] As part of the Air Force's efforts, the Air Force Logistics Command (AFLC) reviewed the mission requirements for its logistics centers and determined that since the maintenance responsibility for the B-52 and C-5 aircraft Kelly AFB maintained was reduced through fewer flying hours, the base would absorb the largest number of

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midst of a high density urban area. The difficulty in the case lay not with the issues which may or may not have been addressed, but rather the "terse" memorandum that had been drafted announcing no adverse impact *(Id.* at 646-47).

[120] Concerned Citizens for the 442nd T.A.W. v. Bodycome, 538 F. Supp. 184, 190 (W.D. Mo. 1982) ("The action planned in the present case affects *far fewer people* and there was no evidence to such serious disruption to the community and surrounding environment.") (emphasis added); *Also, cf.*, McDowell, *supra, note* 118, *with* Metlakatla Indian Community v. Adams, 427 F. Supp. 871 (D.D.C. 1977) (case distinguished from McDowell despite impact upon small Indian community).

[121] Image of Greater San Antonio, Texas v. Brown, 570 F. 2d 517, 523 (5th Cir. 1978); Little Earth of Tribes, Inc. v. U. S. Dept. of Housing and Urban Development, 584 F. Supp. 1287, 1291 (D. C. Minn. 1983); Citizens Committee Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 534 (S.D. Ohio 1982).

[122] 570 F. 2d 517 (5th Cir. 1978).

[123] Image of Greater San Antonio, Texas v. Brown, 570 F. 2d 517, 519 (5th Cir. 1978).

reductions within the command.[124] The reductions were accomplished by job classification without knowledge of the identity of the employees in the targeted positions until the final personnel decision was made.[125] Statistical evidence was presented to the court that although 54.1% of the civilian employees at Kelly were Latinos, 70.3% of the eliminated positions were held by Latinos.[126] Also significant was that 84% of all Latinos employed by AFLC were located at the base.[127]

The reductions prompted a suit in which violations of both Title VII of the Civil Rights Act and NEPA were alleged.[128] The court addressed the Title VII allegation by noting that the Air Force had met its burden to demonstrate that the reductions met a "compelling business interest" and thereby rebutted the plaintiff's *prima facie* Title VII case.[129] Turning to the NEPA issue, the court noted that allegations of an effect on the physical environment were not made; only socioeconomic impacts were alleged.[130] The court determined that "Congress did not intend that a managerial decision to discharge a number of employees would require preparation of an EIS" without more.[131]

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[124] *Id.* at 519. AFLC was required to reduce its civilian manpower by 6,142 positions. Most of its reductions were achieved by attrition and similar means. However, approximately 2,500 positions remained to be eliminated.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 519, 522.

[129] *Id.* at 521-22. Title VII of the Civil Rights Act seeks to prevent discriminatory employment practices.

[130] *Id.* at 522.

[131] *Id.*

b. Little Earth of United Tribes, Inc. v. H.U.D.[132]

The Department of Housing and Urban Development (HUD) initiated judicial foreclosure on a mortgage held by HUD which prompted this action alleging, among other things, violations of Titles VI and VII of the Civil Rights Act and that NEPA required an EIS analysis.[133] Plaintiffs argued that it was national policy to make housing available to low-income persons and that decisions to foreclose on mortgages, in effect, are contrary to national policy.[134]

The plaintiff's NEPA argument was rooted solely on the foreclosure action and did not allege any impacts upon the environment.[135] The court determined that HUD was entitled to protect mortgage funds in order for it to maintain a viable housing subsidy program and use judicial foreclosure to do so.[136] Notwithstanding that a low-income group could possibly face eviction from a federally subsidized project, the court did not feel obligated to require that a NEPA analysis be undertaken.[137]

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[132] 584 F. Supp. 1287584 F. Supp. 1287, 1291 (D. C. Minn. 1983). (D. C. Minn. 1983).

[133] Little Earth of Tribes, Inc. v. U. S. Dept. of Housing and Urban Development, 584 F. Supp. 1287, 1291 (D. C. Minn. 1983).

[134] *Id* at 1290.

[135] *Id.* at 1291.

[136] *Id.* at 1290-91.

[137] *Id.* (Although HUD intended to purchase the property, the agency apparently did not intend to evict the tenants from the property. The possibility did exist that HUD could sell the property to another entity who could then evict the tenants. Similarly, in Metlakatla Indian Community v. Adams, 427 F. Supp. 871 (D.D.C. 1977), an EIS was deemed not to be required when the Coast Guard decided to relocate frame housing to another site which otherwise could have been available to the local residents.).

c. Citizens Committee Against Interstate Route 675 v. Lewis[138]

Action was initiated to enjoin construction of a 13.5 mile portion of Interstate 675 near Dayton, Ohio alleging, among other things, that failure to consider socioeconomic effects upon minorities and the city of Dayton in the final EIS constituted a NEPA violation.[139]

The final EIS provided a review of socioeconomic effects, but it was limited to effects within the highway corridor, which essentially restated the draft EIS' opinion that relocation would not present a problem and predicted a potential increase in the number of jobs in the corridor and observed that "there is no known long range decrease in employment that would result from the construction of the freeway."[140] The city of Dayton was not so sanguine about the EIS' prediction.[141] Nonetheless, the court declined

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[138] 542 F. Supp. 496 (S.D. Ohio 1982).

[139] Citizens Committee Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 506, 528 (S.D. Ohio 1982). Interestingly, out of a population of 57,309, which was located on the proposed route, the minority component was only 53 persons. The affected population was, for the most part, white (*Id.* at 528). The greater concern was directed at the possible effects upon the city of Dayton and its minority and low-income population (*Id.* at 520). The draft EIS for the project had approximately three pages of discussion devoted to socioeconomic effects (*Id.* at 528). The 1978 final EIS "expanded somewhat" the discussion concerning socioeconomic effects, but then-Transportation Secretary Adams was prompted, due to principles within the Carter Administration's urban policy, to request additional information from a local planning commission through the Ohio Department of Transportation concerning, among others, anticipated benefits and adverse impacts upon the city and low-income residents, other "socially disadvantaged" residents, and minority businesses (*Id.* at 511). The commission's response indicated an inability to generate the necessary information due to inadequate assessment methodologies to develop an understanding of possible impacts upon the city's business district, job loss, the housing market, minority business competitiveness versus non-minority businesses, etc., but suggested nine mitigation actions which apparently were implemented in varying degrees. (*Id.* at 511-12). The commission's response was not made part of the final EIS (*Id.* at 512).

[140] *Id.* at 528. The implication of the statement being that the city of Dayton would not suffer adversely from the project. There was one concession of the "possibility of some movement" of jobs from the city's business center to outlying areas but discounted the magnitude (*Id.* at 528).

[141] *Id.* at 529. ("the City cannot recommend favorable review until such time as meaningful mitigating actions can be agreed upon . . . [insuring] equitable distribution of the benefits. . . .").

to find fault with the extent of the socioeconomic analysis found within the EIS holding that "NEPA was not intended to be a national employment act" and that socioeconomic effects are insufficient to require NEPA analysis.[142]

d. Metropolitan Edison Company v. People Against Nuclear Energy[143]

The Supreme Court rejected an assertion that the perception of risk is an effect recognized by NEPA.[144] The Court's evaluation of NEPA § 102(C) lead it to believe that Congress was addressing changes in the "physical" world and to require government agencies to analyze the effects of their proposed actions on it.[145] Although it was recognized that an effect may be "caused by" a change in the natural or physical world, it nonetheless will not be within the scope of the "human environment," because "the causal

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[142] *Id.* at 534-37.

[143] 460 U.S. 766, 103 S. Ct. 1556, 75 L. Ed. 534 (1983)

[144] Metropolitan Edison Company v. People Against Nuclear Energy, 460 U.S. 766, 775, 103 S. Ct. 1556, 1562, 75 L. Ed. 534 (1983) ("risk is, by definition, unrealized in the physical world"); *See, also*, Conservation Law Foundation of New England v. Air Force, 1987 WL 46370, 4, 26 ERC 2146 (D.C. Mass. 1987) (effect of the risk of nuclear war not within NEPA's scope).

[145] Metropolitan Edison Company v. People Against Nuclear Energy, 460 U.S. 766, 774, 103 S. Ct. 1556, 1561, 75 L. Ed. 534 (1983) ("But we think the context of the statute shows that Congress was talking about the physical environment—the world around us, so to speak. NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment."); In Olmstead Citizens For A Better Community v. U.S., 793 F.2d 201 (8th Cir. 1985), the Eighth Circuit questioned whether socioeconomic effects had to be addressed, premised as it is on whether there was a physical effect on the environment or not, after the Metropolitan Edison decision, since the Supreme Court's analysis was based upon evaluation of Congress' intent and the lack of evidence "that Congress contemplated that the process it designed to make agencies aware of the consequences of their actions . . . would be converted into a process for airing general policy objections anytime the physical environment was implicated." (*Id.* at 206). The Eighth Circuit also noted that courts before Metropolitan Edison "had commented on the anomaly of requiring [ ] an agency consider impacts not sufficient to trigger preparation of an ecological statement just because such a statement was required for unrelated reasons." (*Id.*, citing Citizens Committee Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 534 (S.D. Ohio 1982).

chain is too attenuated."[146] Thus, the Supreme Court declined to interpret NEPA to require consideration of "psychological health damage" within the context of a NEPA review.[147]

e. City of New York v. United States Dept of Transportation[148] and NO GWEN Alliance of Lane County v. Aldridge[149]

A circuit court expanded upon the Supreme Court's Metropolitan Edison holding concerning the nature of the risk presented.[150] The Second Circuit held, in a case analyzing the probability of the risk presented by a Department of Transportation regulation allowing the surface shipment of spent nuclear material, that the theoretical possibility of a catastrophic event is not sufficient to create a significant risk requiring the preparation of an environmental impact statement.[151] The court refused to adopt a per se rule requiring the preparation of an environmental impact statement on the low probability that very serious or catastrophic accident may occur, instead deferring to an agency's discretion if otherwise not arbitrary or capricious.[152]

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[146] Metropolitan Edison Company v. People Against Nuclear Energy, 460 U.S. 766, 774, 103 S. Ct. 1556, 1561, 75 L. Ed. 534 (1983) ("Our understanding of . . . congressional concerns [leading] to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in s 102 be read in to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue.").

[147] *Id.* at 777-78; 103 S. Ct. at 1562-63.

[148] 715 F.2d 732 (2nd Cir. 1983)

[149] 855 F.2d 1380 (9th Cir. 1988)

[150] City of New York v. United States Department of Transportation, 715 F.2d 732 (2nd Cir. 1983).

[151] *Id.* at 752.

[152] *Id.* at 752, n. 20.

In a similar vein, highly speculative effects or impacts are also outside NEPA's scope.[153] The Ninth Circuit has recognized that "every conceivable environmental impact [need not] be discussed in an EIS."[154] The court also recognized that evaluating effects or impacts requires that the evaluation have some utility.[155]

Part IV. Environmental Planning Under The Executive Order

A. Executive Order 12,898[156]

On February 11, 1994, President Clinton issued Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," requiring federal agencies to make environmental justice a part of each agency's mission.[157] The order clarified the necessity to review environmental justice concerns as part of the NEPA environmental assessment process.[158] It established an Interagency Working Group that included the Department of Defense (DOD)[159] and was made applicable to agencies on the Working Group.[160] The Executive Order was

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[153] NO GWEN Alliance of Lane County v. Aldridge, 855 F.2d 1380, 1385 (9th Cir. 1988).

[154] *Id.*

[155] *Id.* at 1386 (9th Cir. 1988). ("Detailing [the] results [of a catastrophic event] would serve no useful purpose."); *See, also*, Conservation Law Foundation of New England v. Air Force, 1987 WL 46370, 4, 26 ERC 2146 (D.C. Mass. 1987) (effect of the risk of nuclear war not within NEPA's scope).

[156] Exec. Order No. 12,898, 3 C.F.R. p. 859 (1994).

[157] Exec. Order No. 12,898, para. 1-101, 3 C.F.R. p. 859 (1994). (The DOD's mission includes the expeditious conversion of former military installations for civilian use. (DEPARTMENT OF DEFENSE, BASE REUSE IMPLEMENTATION MANUAL, DOD 4165.66M, 1-1 (1997) (hereinafter "DOD, BRIM (1997)")).

[158] President's Cover Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279 (Feb 11, 1994).

[159] Exec. Order No. 12,898, para. 1-102, 3 C.F.R. p. 859 (1994).

[160] *Id.* at para. 6-604.

intended emphasize conditions within minority and low-income communities in order to achieve environmental justice and promote access to publicly available information and participation within the decision-making process.[161]

Federal agencies were also directed to review their actions, when required by NEPA,[162] to consider effects upon human health and the environment, as well as socioeconomic effects, upon minority and low-income communities.[163] Mitigation measures which are found in environmental assessments or environmental impact statements, as well as records of decision, were to include a discussion of significant and adverse environmental effects upon minority and low-income communities.[164] Federal agencies were also to enhance public participation in the NEPA process with respect to identification of potential effects, mitigation measures, and accessibility by minority and low-income communities.[165]

Federal agencies were given the specific affirmative obligation to conduct their "programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures [they] do not have the effect of excluding persons .

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[161] President's Cover Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279 (Feb 11, 1994).

[162] Interestingly, the cover memorandum references NEPA with respect to when an analysis of potential adverse effects upon minority or low-income communities should occur. It should be observed that both CEQ regulations and case law provide that analysis of such socioeconomic effects are not required by NEPA, unless there exists an effect on the physical or natural environment; *See, supra*, Part III(D)(1), (2).

[163] President's Cover Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279 (Feb 11, 1994).

[164] *Id.*

[165] *Id.*

. . from participation in, denying persons . . . the benefits of, or subjecting persons . . . to discrimination under, such programs, policies, and activities, because of their race, [c]olor, or national origin."[166] The head of each Federal agency was tasked to ensure compliance with the Executive Order.[167]

Federal agencies were also directed to supervise programs and activities that affect human health or the environment and receive Federal funds to prevent the discrimination prohibited by Title VI of the Civil Rights Act of 1964.[168] The Environmental Protection Agency was specifically directed to ensure other Federal agencies fully reviewed the environmental effects in minority and low-income communities, to include health, social and economic effects, during its review of their EISs pursuant to section 309 of the Clean Air Act.[169]

Federal agencies were required to develop an environmental justice strategy "that identifies and addresses disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations."[170]

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[166] Exec. Order No. 12,898, para. 2-2, 3 C.F.R. p. 859 (1994).

[167] *Id.* at para. 6-601.

[168] President's Cover Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279 (Feb 11, 1994).

[169] *Id.*

[170] Exec. Order No. 12,898, para. 1-103, 3 C.F.R. p. 859 (1994). The strategy was required to list agency programs, policies and administrative activities, related to human health or the environment. that required revision to promote enforcement of statutes in minority and low-income communities, greater public participation, better data collection efforts in minority and low-income communities, identification of differing consumption patterns concerning natural resources among minority and low-income communities, and provide a timetable for making changes.

Data were to be collected by Federal agencies to determine environmental and health risks imposed upon minority and low-income communities and used to determine whether Federal programs have had an adverse impact upon those communities.[171] In addition, data were to be collected by Federal agencies concerning "differential patterns of subsistence consumption of fish and wildlife" by humans and information concerning the applicable risk was to be conveyed to the public.[172] Moreover, Federal agencies were required to work together to develop guidance concerning consumption of pollutant-laden fish or wildlife and consider the resultant guidance with respect to their respective policies and rules.[173]

The Executive Order contemplates that Federal agencies consider input from the public concerning incorporation of environmental justice principles into their programs, policies, and rules and convey these inputs to the Working Group.[174] Federal agencies are also obligated to ensure that public documents and hearings are available and understandable to the public.[175]

The directives set forth in the order were designed to "improve the internal management of the executive branch."[176] It also provided that it was not intended to create any rights in third parties, nor to establish a right to judicial review concerning

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[171] *Id.* at para. 3-302.

[172] *Id.* at para. 4-401.

[173] *Id.* at para. 4-402.

[174] *Id.* at para. 5-5(a).

[175] *Id.* at para. 5-5(b), (c).

[176] *Id.* at para. 6-609, (c).

compliance lapses with respect to the order.[177] It is questionable whether the Executive Order, in this respect, will be effective in view of Administrative Procedure Act (APA) provisions concerning judicial review and DOD regulations.[178] These provisions essentially provide for judicial review of agency actions when a person suffers a legal wrong arising from final agency action for which no adequate judicial remedy exists or made reviewable by statute.[179] Courts are authorized to "compel agency action unlawfully withheld or unreasonably delayed" and set aside agency actions pursuant, among other things, if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . in excess of statutory jurisdiction, authority."[180]

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[177] *Id.* at para. 6-609, (c).

[178] 5 U.S.C. §§ 702, 704, 706 (1994); *See, infra*, note 219 and accompanying text. Paragraph 6.609 may be, at best, precatory language with respect to NEPA reviews undertaken by the DOD. DODI 4715.9 requires DOD components to have environmental justice analyses within its NEPA documentation. Therefore, APA standards and requirements would nonetheless apply, if the department deviated from its own regulation. Moreover, the Air Force is proposing to add a requirement to ensure compliance with the Executive Order.

[179] *Id.* §§ 702, 704.

[180] *Id.* § 706; *See, also*, American Forest and Paper Association v. United States Environmental Protection Agency, 137 F.3d 291 (5th Cir. 1998). Since the Executive Order requires consideration of matters not required by NEPA, the effect of the Fifth Circuit's decision requires examination. In the case, the EPA delegated the NPDES permitting program to Louisiana on the condition the state consult with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to determine whether the proposed permit threatens an endangered species reflecting EPA's practice to which the state agreed. (*Id.* at 294). The EPA also retained its veto authority over permits determined by the FWS and NMFS to pose threats to endangered species. (*Id.* at 294). A challenge was filed alleging EPA exceeded its authority under the Clean Water Act (CWA). (*Id.* at 294). The Court observed that the EPA did not have the discretion to deny approval of a state permitting program, if the CWA's requirements were met, and did not have the authority to promulgate additional requirements, since the statute did not give EPA the authority. (*Id.* at 297-98). The court determined that the Endangered Species Act (ESA) did not allow the EPA to expand its authority under the CWA to require the state to consult with the FWS and NMFS, nor did the EPA have the authority under the CWA to exercise its veto authority to protect endangered species. (*Id.* at 298-99). In view of the statutory interpretation placed upon NEPA by the Supreme Court and its consistent application by other Federal courts (*See, supra*, Part III(D)), with respect to the consideration of socioeconomic effects, the Executive Order purports to add the requirement that a socioeconomic effect, *i.e.*, consideration of environmental justice, be included within the NEPA analytical process. (*See, supra*, Part IV(A). At first glance, the Fifth Circuit opinion appears to be applicable, however it is distinguishable on the basis that the President's Executive Order is similar to the CEQ's regulations which administrative

B. Department of Defense (DOD) Environmental Justice Strategy

1. Introduction

The DOD developed its environmental justice strategy in response to Executive Order 12,898 and released its report on March 24, 1995.[181] The DOD report indicates that the department will implement the Executive Order primarily by compliance with NEPA and is premised upon institutional changes for long-term results in lieu of individual projects.[182]

The Deputy Under Secretary of Defense (Environmental Security) is tasked to develop and implement the department's environmental justice strategy.[183] The DOD also established a Committee on Environmental Justice (CEJ) to assist the Deputy Under Secretary of Defense (Environmental Security) and monitor the department's environmental justice activities.[184] The CEJ is also tasked with the responsibility to provide oversight with respect to the implementation of DOD's strategy.[185]

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agencies are obligated to observe. Furthermore, the order is not necessarily inconsistent with NEPA case law, or NEPA, in that the order requires consideration of matters the Federal courts only held *were not mandated* for consideration by the statute, if they were not otherwise interrelated with physical effects on the environment. In any event, it can be argued that the Executive Order did not mandate anything at all. (*See*, Michael B. Gerrard, *The Role of Existing Environmental Laws in the Environmental Justice Movement*, 9 St. John's J. Legal Comment 555-56 (1994)) The difficulty with the order stems from its assertion that it did not "intend create any rights in third parties, nor to establish a right to judicial review concerning compliance lapses with respect to the order" in view of APA judicial review provisions.

[181] DEPARTMENT OF DEFENSE, ENVIRONMENTAL JUSTICE STRATEGY REPORT (1995). An electronic version of the report is available at <http://www.enviro.navy.mil/ejstrat.htm>.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

The DOD views its strategy as a "living document" to allow for changes that DOD either identifies or required by future Executive Orders, statutes, regulations, or directives from the Interagency Working Group.[186] It should be noted that since the department plans to implement its strategy through its application of NEPA's requirements, changes to NEPA or its regulations will naturally shape the DOD's strategy in the future.[187]

2. Implementation

To implement its strategy, the DOD will annually evaluate its activities and issue a report concerning them.[188] The department will undertake internal reviews and monitor its compliance efforts.[189] In addition, the DOD intends to require accountability for compliance with the Executive Order through its review process.[190] The DOD also intends to educate its employees concerning environmental justice issues and incorporate environmental justice into outreach programs.[191] The department anticipates development of a DOD-wide environmental justice curriculum and a video to educate both its military and civilian employees.[192]

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[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

3. Applicability to Closure of Military Installations

The strategy includes measures to collect data for analysis for the DOD's day-to-day operations and closure of military installations.[193] The strategy envisioned the development of case studies evaluating environmental justice issues "to analyze environmental justice impacts in the BRAC program, public participation in the cleanup program, and environmental analysis for NEPA."[194] DOD's strategy document highlights the department's belief that NEPA's procedures provide "a consistent and integrated approach to data management" in order to implement the Executive Order.[195]

4. Data Collection, Analysis, and Research

The strategy document outlines the following categories to develop in order to further the department's environmental justice strategy: (1) identify the affected minority and low-income communities; (2) identify DOD programs that may affect these communities; and, (3) ensure that the affected community's diversity is reflected in DOD's environmental research.[196]

5. Identifying the Affected Communities

DOD's emphasis concerning this element is the collection of data, in cooperation with other governmental entities, relevant to identifying the applicable minority and low-income communities to determine potential adverse impacts.[197] Information to be

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[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

collected are demographic and socioeconomic information concerning race, national origin, income levels, and other relevant information.[198] It is envisioned that the NEPA or another community planning process will be used.[199]

6. Identifying DOD Programs

The focus is upon major Federal actions subject to NEPA in which an environmental assessment or environmental impact statement will address any impacts a proposed Federal action may have upon minority and low-income communities.[200] Within the context of NEPA review processes, an assessment of possible impacts which may result from Federal actions will be undertaken to determine whether they will have a "disproportionately high and adverse . . . effect[] on minority or low-income populations."[201]

7. Diversity

The department's strategy also contemplates that affected communities will have some input into the development of research strategies concerning risk assessments with an emphasis on military installations located among communities who rely upon fish or wildlife for subsistence.[202] The strategy documents sets forth as a requirement that consideration be given to risk assessment methodologies, development of guidance to ensure high risk communities are included within DOD research efforts, and risks

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[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

relevant to different fish and wildlife consumption patterns and informing the affected communities of those risks.[203]

8. Public Participation

The DOD strategy document strongly emphasizes the need for public participation about cleanup at military installation, issues of concern, and avoiding miscommunication.[204] The department intends for the continued use of Restoration Advisory Boards and Technical Review Committees, both reflecting the diversity within the affected communities, as forums for discussion about cleanup activities.[205] The strategy document explicitly states the department "will develop new mechanisms to improve opportunities for minority and low-income populations to participate in decision-making processes that affect them."[206]

C. The DOD's Environmental Justice Report

The DOD's Environmental Justice 1996 Report describes the department's progress towards meeting the Executive Order's goals.[207] It specifically sets out the department's implementation of NEPA as the principal means for it to comply with the order.[208] A principal achievement cited within the report was the development of an

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[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] DEPARTMENT OF DEFENSE, PROGRESS ON ENVIRONMENTAL JUSTICE (1996) (hereinafter, "DOD, PROGRESS REPORT (1996)").

[208] *Id.* at 1.

instruction enhancing local community involvement within the environmental planning process.[209] The report also highlighted the department's approach regarding its use of NEPA to review environmental justice issues.[210] Specifically mentioned were the Air Force's use of an environmental justice model to analyze "development of [the] base closure process" at March AFB, California and K.I. Sawyer AFB, Michigan.[211] The report validated the department's approach to ensure that environmental justice issues are addressed in NEPA reviews during the base closure process.[212]

1. Progress Identifying Minority and Low-Income Communities

DOD installations were recognized for their efforts to work more closely with local communities to determine their concerns in evaluating potential adverse impacts of DOD activities.[213] The report noted that DOD installations collected information from the local community, census data, and other information to better understand the demographic makeup of local communities and possible effects.[214]

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[209] *Id.* at 3 (referring to Department of Defense Instruction (DODI) 4715.9 (May 3, 1996)).

[210] *Id.* at 6.

[211] *Id.* at 6. (The model is a prototype designed to analyze "disproportionate impacts of property reuse and disposal activities" and which may prove useful in establishing guidance in the future).

[212] *See, infra*, note 219.

[213] DOD, PROGRESS REPORT 6 (1996).

[214] *Id.* at 6.

2. Progress Identifying DOD Programs

The report noted the DOD's NEPA documents, among other actions, included discussions about potential adverse effects on minority and low-income communities.[215] It also highlighted the DOD's efforts to develop an integrated approach to environmental justice issues concerning the base closure, public participation, and NEPA analysis, as well as identifying installation conservation plans as another mechanism to address these concerns.[216]

3. Progress Ensuring Research Reflects Diversity

The report indicates that although DOD components "are broadening [their] efforts to communicate to affected populations," the department's efforts to date remain prospective.[217] Significant proposals to revise guidelines to ensure environmental justice issues are addressed and documented during NEPA reviews, development and assessment of demographic data during NEPA reviews, and determinations by DOD components with respect to impacts upon minority and low-income communities remain on the table.[218]

4. Public Participation

The report states the department's continued intention to use Restoration Advisory Boards and Technical Review Committees as forums for discussion and

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[215] *Id.* at 7.

[216] *Id.*

[217] *Id.* at 8.

[218] *Id.*

opportunities for input concerning environmental justice issues.[219] The department highlighted its efforts to expand outreach efforts, providing language translations from English, rendering technical documents into an easy to read format, public depositories for information, and using other "non-traditional" means to get information to minority and low-income communities.[220] It also highlighted the department's use of the Internet to disseminate information to the public.[221]

D. Environmental Planning Within the DOD

Department of Defense Instruction (DODI) 4715.9 is the specific regulatory requirement applicable to the DOD with respect to environmental planning.[222] The instruction supplements NEPA and the CEQ requirements and requires integration of environmental planning considerations into DOD activities and planning.[223] Specified organizations within the DOD are required to implement environmental considerations into their activities and planning.[224]

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[219] *Id.* at 9.

[220] *Id.* at 9, 13-14.

[221] *Id.* at 9.

[222] Department of Defense Instruction (DODI) 4715.9, *Environmental Planning and Analysis* (May 3, 1996), para. 1. *See also*, DODI 4715.6, *Environmental Compliance* (April 24, 1996); DODI 4715.7, *Environmental Restoration Program* (April 22, 1996); DODI 4165.68, *Revitalizing Base Closure Communities and Community Assistance - Community Redevelopment and Homeless Assistance* (May 27, 1997).

[223] DODI 4715.9 (May 3, 1996), para. 2.3 & 4.1.

[224] DODI 4715.9 (May 3, 1996), para. 2.1. (The Office of the Secretary of Defense, the military services (Army, Navy, Air Force and Marines), the Chairman of the Joint Chiefs, the DOD Inspector General, the Unified Combatant Commands, DOD field activities, and any other integral DOD organization fall within the scope of the instruction. When attached to the Navy, the Coast Guard also falls within the scope of the instruction.).

Planning requirements with respect to closure of military installations is not excluded from any environmental planning considerations.[225] DOD components are required to incorporate environmental planning for their activities and are specifically required to address outreach activities concerning environmental matters.[226] The instruction specifically requires DOD components to contain an environmental justice analysis concerning any proposed activities that "may have a disproportionately high adverse human health or environmental effects on [minority and low-income communities]."[227]

Part V. The Role Of The Environmental Protection Agency and Council On Environmental Quality

A. EPA's Authority Pursuant to Section 309 of the Clean Air Act[228]

The Clean Air Act provides that the EPA Administrator "shall review and comment in writing on the environmental impact of any matter . . contained in any . . . (2) newly authorized Federal projects for construction and any major Federal agency action . . . to which [NEPA] applies . . .. Such written comment shall be made public at the conclusion of any such review."[229] If the EPA Administrator determines that "any such . . . action . . . is unsatisfactory from the standpoint of public health or welfare or

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[225] DODI 4715.9 (May 3, 1996), para. 2.5 & 3.3.

[226] DODI 4715.9 (May 3, 1996), para. 5.

[227] DODI 4715.9 (May 3, 1996), Enclosure E2, para. E1.1.2; *See also*, 62 Fed. Reg. 67305, December 24, 1997 (Proposed changes to Air Force's Environmental Impact Analysis Process (EIAP) includes proposal that preparation of environmental analyses should ensure compliance with Executive Order 12,898 (*Id.* at 67316).

[228] 42 U.S.C. § 7609 (1994).

[229] *Id.* § 7609(a).

environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality."[230]

B. The Environmental Protection Agency's Section 309 Guidance Concerning Its Review of Other Federal Agency NEPA Documents[231]

The EPA issued "Draft Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews" on July 19, 1995.[232] The guidance is intended to assist EPA reviewers fulfill the requirement set forth in the cover memorandum to the Executive Order to analyze environmental justice issues confronting minority and low-income communities and provide assistance to other Federal agencies in their assessment of their proposed actions.[233]

The EPA considers the scoping portion of NEPA to be deserving of special attention because "key issues and alternatives are identified and addressed" during this stage and scoping presents the most opportune time for the EPA to influence other Federal agencies.[234] The draft guidance recommends to EPA reviewers that, with respect

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[230] *Id.* § 7609(b).

[231] On September 30, 1997, the EPA issued interim final guidance concerning its compliance with NEPA entitled "Interim Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses." This guidance is not intended for the EPA's reviews of other Federal agencies' actions or NEPA documents. Instead, the agency's guidance concerning section 309 reviews is found in a separate document.

[232] Draft Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews, (visited March 25, 1998) <http://es.epa.gov/oeca/ofa/ej_nepa.html>; *See also*, ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998) (guidance intended to provide a framework for processing by the Office of Civil Rights of Title VI complaints concerning issuance of permits by EPA recipients).

[233] Draft Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews, (visited March 25, 1998) <http://es.epa.gov/oeca/ofa/ej_nepa.html>.

[234] *Id.*

to the scoping process, they should: advise other Federal agencies of their responsibilities pursuant to NEPA, the Executive Order, and the Presidential Memorandum; encourage other Federal agencies to promote public participation; recommend to other Federal agencies the consideration of demographic and social effects; and assist other Federal agencies with alternatives, mitigation and monitoring.[235]

While an EPA review does play a role concerning the scope of a Federal agency's environmental review, it also has a greater substantive role concerning proposed Federal actions.[236] NEPA documents submitted to EPA for a Section 309 review should indicate whether an environmental justice issue is raised by the proposed action.[237] Whether such an issue is raised depends on the nature of the proposed action and may not be readily discernible without more information from community groups, another agency, news sources, individuals, or consideration of factors set forth within the guidance to determine if the proposed action will be fully analyzed.[238] The Section 309 guidance's basic premise, with respect to developing information for an adequate review of environmental justice issues, is that the many sources of information that may be available for a review ought to be consulted in order to conduct an accurate assessment.[239]

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[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.* (The guidance lists as factors for the reviewer to use in his/her determination whether a data gap may exist the following: population, demographics, and geographic scale; health and cumulative risk; pollution and exposure routes; indigenous populations; and, social, economic, and cultural impacts.).

[239] *Id.*

Once an issue has been identified, EPA's guidance indicates a "constructive approach" with other Federal agencies to "develop practical solutions" to perceived issues is the preferred approach.[240] The guidance suggests that reviewing NEPA documents with from a particular, negative perspective is both counterproductive and ineffective.[241] The guidance strives to ensure that socioeconomic data are included within the NEPA assessment process and enhance the probability of a complete and accurate assessment of adverse impacts upon minority and low-income communities.[242]

The EPA is authorized to refer to the CEQ any unsatisfactory NEPA reviews, which, in its opinion, fails to meet the requirements of the statute.[243] The EPA has adopted guidelines for review of Federal actions that the agency uses to "grade" NEPA documents submitted to it for review.[244]

The EPA's grading criteria assess the environmental impact the proposed Federal will have and the adequacy information found within draft environmental impact statements (EIS).[245] The agency also informs the agency of the results of its review and

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[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] 42 U.S.C. § 7609(b) (1994); 40 C.F.R. §§ 1504.1 – 1504.3; Draft Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews, <http://es.epa.gov/oeca/ofa/ej_nepa.html>. (It should be noted that only the EPA Administrator may refer matters to the CEQ and this authority has not been re-delegated. (*Id.*)).

[244] *See*, ENVIRONMENTAL PROTECTION AGENCY, POLICY AND PROCEDURES FOR THE REVIEW OF FEDERAL ACTIONS IMPACTING THE ENVIRONMENT (1984).

[245] *Id.* at 4-5 - 4-6 (Environmental impact is assessed by noting whether EPA has any objections or concerns, or whether the proposal is "environmentally unsatisfactory." (*Id.*) The NEPA documentation is reviewed for whether there is enough information assessing potential environmental impacts is contained with it and is assessed as either "adequate," "insufficient information," or "inadequate." (*Id.*))

follows up as necessary.[246] If the Federal agency fails to respond to EPA's comments by revising the draft EIS or supplementing it, or new information comes to light, the EPA will reassess the document.[247] A referral to CEQ may follow, if significant problems remain.[248]

The EPA will refer matters to the CEQ based on whether its criteria, as set out within its guidelines are met, and are "unsatisfactory from the standpoint of public health or welfare or environmental quality" pursuant to section 309.[249]

C. The Environmental Protection Agency's Guidance Concerning Compliance For Its Actions or Programs Under NEPA

On September 30, 1997, the EPA issued interim final guidance to ensure that its actions complied with Executive Order 12,898 concerning environmental justice matters.[250] The EPA noted within the guidance document that it was not intended to provide guidance with respect to the agency's Section 309 reviews of other Federal agency actions or programs. Rather its 1995 draft guidance on Section 309 reviews was to be used for Federal actions.[251] Nonetheless, it is worthwhile to review the EPA's interim guidance concerning review of its own actions or programs for compliance with

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[246] *Id.* at 4-6 - 4-7.

[247] Id. at 6-3 - 6-4 (1984) (Review of final EISs are accomplished by focusing upon the nature of the environmental impact, rather than the adequacy of the document. (*Id.* at 6-2).

[248] *Id.* at 6-3; 40 C.F.R. §§ 1504.1 – 1504.3.

[249] *Id.* at 9-1. (Procedures are set forth in Chapter 9 of its review guidelines.).

[250] ENVIRONMENTAL PROTECTION AGENCY, INTERIM FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES (1997) (hereinafter "EPA, NEPA COMPLIANCE ANALYSES (1997)").

[251] *Id.* at 11.

the Executive Order, since the interim guidance represents the agency's views concerning factors associated with environmental justice as such as they may be also reflected in the agency's Section 309 reviews.[252]

The agency notes that NEPA's reach does not extend to all of its actions and activities.[253] A majority of the agency's programs or activities fall outside the scope of NEPA either because they are exempted by statute or deemed to be functionally equivalent to NEPA.[254] For example, the agency's CERCLA compliance activities are outside NEPA's scope, since the act requires the agency to comply with CERCLA's substantive requirements.[255]

1. Factors to Consider in Environmental Justice Analyses

The EPA's guidance identifies two major factors with respect to evaluation of environmental justice concerns within the NEPA assessment process: (1) identification of minority and low-income communities and (2) consideration of effects upon those communities.[256] The EPA policy states that identification of minority or low-income

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[252] *See*, *Id.* at 2. The agency states part of the purpose for the interim final guidance "is to assist EPA staff responsible for developing EPA NEPA compliance documentation . . . in addressing a specific concern – that of environmental justice. Because analyzing and addressing environmental justice may assist in determining the distributional effects of environmental impacts on certain populations, it is entirely consistent with the NEPA process." It is reasonable to believe the EPA would, by analogy, use the methodology described within its interim final guidance concerning its actions or programs concerning section 309 reviews of other Federal actions or programs, since the document represents the agency's views on the subject.

[253] *Id.* at 5. The EPA lists its research and developmental activities, construction activities, Clean Water Act wastewater treatment construction grants, Federally permitted NPDES permits for new sources subject to new source performance standards as subject to NEPA (*Id.*).

[254] *Id.* at 5-10.

[255] *Id.* at 5.

[256] *Id.* at 12-25.

communities (or populations) should be accurately reflected, when determining the appropriate geographical area, by using demographic data that may be reflected in census data and considering the circumstances such communities may be experiencing.[257] The guidance cautions against "distortions" that may result with respect to some minority communities, e.g., inaccurate reporting of population, pockets of minority or low-income populations, etc..[258]

In other words, while demographic data may indicate that a minority or low-income sub-community represents a small proportion of the overall population in a particular census tract, the possibility exists that a particular action may have a greater disproportionate effect upon the sub-community, if the proposed Federal action or program takes effect in the immediate vicinity.[259] The guidance suggests that "non-traditional data gathering techniques" most likely will be the best approach to identify minority or low-income communities.[260]

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[257] *Id.* at 18.

[258] *Id.* at 18.

[259] *Id.* at 19.

[260] *Id.* at 19-20. The EPA emphasizes the need to enhance the normal public participation or outreach mechanisms, as well as considering state/regional "low-income" and "poverty" definitions to validate traditional methods of data collection such as the census. Specifically suggested by the EPA is "contacting local resources, government agencies, commercial database firms, and the use of locational/distributional tools." (*Id.* at 19-20 & 49-64).

Not surprisingly, concern for environmental justice issues involves a review of cumulative impacts as well.[261] The EPA lists the following as "common variables of concern:"

- Number/concentration of point and nonpoint release sources, including both permitted and unpermitted.
- Presence of listed or highly ranked toxic pollutants with high exposure potential . . . .
- Multiple exposure sources and/or paths for the same pollutant.
- Historical exposure sources and/or pathways.
- Potential for aggravated susceptibility due to existing air pollution (in urban areas), lead poisoning, existence of abandoned toxic sites.
- Frequency of impacts.[262]

"Cultural, health, and occupation-related variables" listed by the EPA include:

- Health data reflective of the community (e.g., abnormal cancer rates, infant and childhood mortality, low birth weight rate, blood-lead levels).
- Occupational exposures to environmental stresses which may exceed those experienced by the general population.
- Diets, or differential patterns of consumption of natural resources, which may suggest increased exposures to environmental pathways presenting potential health risk.[263]

In addition to these variables, there are many more inquiries that must be made when evaluating possible cumulative effects.[264] Notwithstanding the many variables,

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[261] *See*, 40 C.F.R. § 1508.7 (definition); EPA, NEPA COMPLIANCE ANALYSES 22-24 (1997) ("EPA analysts need to place special emphasis on other sources of environmental stress within the region, including those that have historically existed, those that currently exist, and those that are projected for the future."); *See also*, COUNCIL ON ENVIRONMENTAL QUALITY, CONSIDERING CUMULATIVE IMPACTS (1997) (hereinafter "CEQ, CUMULATIVE IMPACTS (1997)").

[262] EPA, NEPA COMPLIANCE ANALYSES 22-23 (1997).

[263] *Id.* at 23.

[264] *Id.* at 13, 28-31 (basic questions/factors to resolve); CEQ, CUMULATIVE IMPACTS 24-25 (1997) (list of issues to address includes "human community structure" component concerning disruption of community mobility, change in community dynamics, and/or loss of community character/neighborhoods valued by minority and low-income communities).

questions, and issues to address and resolve, an adequate discussion of cumulative effects should include the following: "data on the status of important natural, cultural, social, or economic resources and systems; data that characterize important environmental or social stress factors; a description of pertinent regulations, administrative standards, and development plans; and data on environmental trends."[265] As a result, it may sometimes be difficult to determine whether a disproportionate impact falls upon a minority or low-income community.[266]

2. Using the NEPA Process

The EPA places a strong emphasis in its NEPA policy on determining, as early as possible, the potential effects upon minority and low-income communities.[267] It has identified a two step screening process: (1) determine the existence of minority or low-income communities and, if present, (2) "enhance public participation to gain a fuller understanding of the potential environmental justice issues."[268] The screening process is a preliminary step to the NEPA process to sensitize EPA reviewers to potential environmental justice issues.[269] If a minority or low-income community may be affected

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[265] CEQ, CUMULATIVE IMPACTS 24 (1997).

[266] EPA, NEPA COMPLIANCE ANALYSES 23-24 (1997) ("Although cumulative effects analyses commonly involve assumptions and uncertainties, exhausting all applicable analyses will provide the greatest likelihood of accurately depicting the possibility of disproportionately high and adverse effects on low-income and/or minority communities.").

[267] *Id.* at 35.

[268] *Id.* at 35. The EPA requires that its reviewers resolve two questions during the screening process: "Does the potentially affected community include minority and/or low-income populations?" and "Are the environmental impacts likely to fall disproportionately on minority and/or low-income members of the community and/or tribal resources?" (*Id.* at 37-38).

[269] *Id.* at 39.

by the proposed EPA action, the guidance contemplates that it will be reflected accordingly in the EA or EIS process.[270] An important step is understanding what is a minority or low-income community, since subsequent analysis focuses upon that community and analysis is driven by the size and nature of the community.[271] The terms "minority" and "low-income populations" are defined somewhat expansively and imprecisely.[272]

The EPA considers public participation "crucial."[273] The EPA acknowledges that NEPA and CEQ regulations provide for established procedures concerning public participation within the NEPA process.[274] The EPA notes, however, that these procedures have not, for reasons rooted in language, culture, or education, been successful in ensuring that minority or low-income communities have been included.[275] The EPA

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[270] *Id.* at 39-49.

[271] *Id.* at 14-16 (listing of items/factors for analysis).

[272] *Id.* at 17. Incorporating the terms from the CEQ's draft guidance, the EPA provides the following terms:

> *Minority* means "Individual(s) who are members of the following population groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic."
>
> *Low-income populations* mean "Low-income populations in an affected area . . . identified . . . [by] the annual statistical poverty thresholds from the Bureau of the Census' Current Population Reports, Series P-60 on Income and Poverty. In identifying low-income populations, agencies may consider as a community either a group of individuals living in geographical proximity to one another, or a geographically dispersed/transient set of individuals (such as migrant workers or Native Americans), where either type of group experiences common conditions of environmental exposure or effect."

[273] *Id.* at 49.

[274] *Id.* at 49.

[275] *Id.* at 49-50.

advocates that it (and presumably other Federal agencies) "go the extra mile" to ensure minorities and low-income communities are engaged in the NEPA process due to the "challenges" those communities present.[276]

Minority and low-income communities share common characteristics which readily identify them, but likewise make them difficult to locate them, if not specifically investigated.[277] Therefore, adopting an approach typically used in a "normal" NEPA review will, more likely than not, miss arriving at an accurate analysis of a proposed project's or action's impact upon minority or low-income communities.[278] As with attempts to enhance public participation among minority or low-income communities, the analytical approach will have to change to develop an accurate appreciation of adverse impacts.[279]

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[276] *Id.* at 51-56. The EPA, in effect, suggests that it will engage environmental organizations, minority business and trade organizations, civic/public interest groups, grassroots/community-based organizations, homeowner and resident organizations, labor unions, news media, religious groups, schools, colleges, and universities, legal aid providers, rural cooperatives, civil rights organizations, and senior citizen groups to ensure that minority or low-income communities are engaged in the NEPA process. In addition, the agency has provided a matrix with respect to other challenges to public participation by minorities or the poor, e.g., methods to overcome language barrier, schedule conflicts, distance to travel to meetings, etc. (*Id.* at 53-54, Exhibit 5).

[277] Id. at 56. Minority and low-income communities are more dependent on their environment, more susceptible to pollution and environmental degradation, less mobile than other communities, more concentrated in a geographical area within a larger one, and its population may be a small percentage of a larger one (*Id.*); *See, also*, CEQ CUMULATIVE IMPACTS 26 (1997) (discussion of evaluating indicators of biological health or integrity, resource or ecosystem condition, and well being of human communities to status of effected environment).

[278] EPA, NEPA COMPLIANCE ANALYSES 56 (1997).

[279] *Id.* at 57. The suggests that several tools be used to identify areas where minority or low-income communities live (e.g., maps, aerial photos, geographic references or databases, such as ZIP code information, census data, political boundaries and physical information) and compared with data such as the location of hazardous waste facilities, NPL sites, TRI facility sites, wastewater discharge locations and the like to determine the potential impact those communities. The EPA cautions against reaching an assessment without validating the information by securing public participation, using other data sources, visiting the affected communities, or discussing matters with local officials and leaders. (*Id.* at 57-59); *See,*

Another feature within the typical NEPA review process requiring change is the manner risk assessment and risk management is undertaken.[280] Within the context of environmental justice, a tailored risk assessment is required to take into account factor possibly unique to a minority or low-income community.[281] Risk management should incorporate racial, ethnic, and cultural information as well.[282] To summarize, as EPA states within its NEPA compliance guidance,

> " . . . impact assessments and risk management tools should be tailored to reflect the characteristics of these communities and study assumptions should reflect the characteristics of the individuals residing in low-income communities and minority populated communities . . . . differential patterns of subsistence consumption of natural resources should be considered, including differences in rates of consumption of fish, vegetation, water, and wildlife among ethnic groups and cultures."[283]

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also, CEQ, CUMULATIVE IMPACTS 49-57 (1997) (use of such tools and methodology useful in cumulative impact analysis).

[280] EPA, NEPA COMPLIANCE ANALYSES 60 (1997). (Risk assessment concerns itself with evaluation of the likelihood for adverse health effects to occur and to provide a methodology for determining possible effects upon a community. (*Id.*) Risk management concerns itself minimizing the risk to individuals and determining which actions may proceed, or which mitigation measures may need to be implemented. (*Id.*))

[281] *Id.* at 61. For example, "exposure traits of racial or ethnic groups or accurately account[ing] for actual environmental harm to human health where the population density is low," food consumptive patterns, etc. (*Id.*). In particular, assessing the physical environment requires an awareness that adverse effects need to be fully developed and understood to determine whether the burden of an adverse impact falls upon a minority or low-income community or the overall community as a whole. (*Id.*); CEQ, 25TH ANNIVERSARY REPORT 118 (1995) ("Some minorities are more likely to be exposed to certain chemical contaminants in the food supply due to dietary differences.").

[282] EPA, NEPA COMPLIANCE ANALYSES 61 (1997). ("Human activity patterns governed by customs, social class, and ethnic and racial cultures may be introduced and considered during the risk management process to allow for identification of disproportionately high and adverse effect." (*Id.*)).

[283] *Id.* at 62.

D. The Council on Environmental Quality's Guidance on Environmental Justice

1. Introduction

Since February 11, 1994, when Executive Order 12,898 was issued, the CEQ has been struggling with development of guidance regarding consideration of environmental justice in Federal actions.[284] The CEQ has been consistently criticized for being lackadaisical in promulgating its guidance.[285] A leading CEQ critic has been the National Environmental Justice Advisory Council (NEJAC).[286] NEJAC has continually decried the CEQ's inaction when, in its members' opinion, political considerations are unduly interfering with development of this guidance when environmental injustices are occurring.[287]

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[284] *See, Justice: White House to Issue Guidance on Using NEPA to Attain Goals, Chief of CEQ Says*, Nat'l Envtl. Daily (BNA), at D-12 (July 27, 1995); *Justice: Advisory Group Faults Administration for Failing to Issue Key NEPA Guidance*, Nat'l Envtl. Daily (BNA), at D-8 (December 14, 1995); *Environmental Justice: Advisors Consider Calling on CEQ Over Failure to Issue NEPA Guidance*, Nat'l Envtl. Daily (BNA), at D-16 (December 13, 1996).

[285] *Justice: White House to Issue Guidance on Using NEPA to Attain Goals, Chief of CEQ Says*, Nat'l Envtl. Daily (BNA), at D-12 (July 27, 1995) (CEQ "beating around the bush); *Justice: Advisory Group Faults Administration for Failing to Issue Key NEPA Guidance*, Nat'l Envtl. Daily (BNA), at D-8 (December 14, 1995) (Administration falling short for failing to issue environmental justice guidance); *Environmental Justice: Advisors Consider Calling on CEQ Over Failure to Issue NEPA Guidance*, Nat'l Envtl. Daily (BNA), at D-16 (December 13, 1996) (CEQ should be "taken to the woodshed" for failing to issue environmental justice guidance).

[286] NEJAC is a federal advisory committee chartered on September 3, 1993 as a forum to "integrat[e] environmental justice with other EPA priorities and initiatives." NEJAC produced the EPA's environmental justice strategy for the agency and other products. (*See*, Environmental Protection Agency, Office of Environmental Justice, *Environmental Justice Fact Sheet*, EPA-300-F-97-003 (April 1997)).

[287] *Justice: White House to Issue Guidance on Using NEPA to Attain Goals, Chief of CEQ Says*, Nat'l Envtl. Daily (BNA), at D-12 (July 27, 1995); *Justice: Advisory Group Faults Administration for Failing to Issue Key NEPA Guidance*, Nat'l Envtl. Daily (BNA), at D-8 (December 14, 1995); *Environmental Justice: Advisors Consider Calling on CEQ Over Failure to Issue NEPA Guidance*, Nat'l Envtl. Daily (BNA), at D-16 (December 13, 1996).

On April 15, 1996, the CEQ issued draft guidance entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."[288] On March 31, 1997, the CEQ reissued its draft guidance concerning environmental justice.[289] The CEQ made its final guidance publicly available in June 1998.[290]

2. Purpose

The CEQ developed its guidance "to further assist Federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed."[291] The CEQ highlighted the four main aspects of E.O. 12,898 that Federal

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[288] *Council on Environmental Quality Proposed Report on Guidance For Addressing Environmental Justice Under the National Environmental Policy Act*, June ARMY LAW 68 (1996). The CEQ's draft guidance emphasized early scoping of proposed federal actions to determine whether low-income or minority communities are affected; comprehensive public participation through use of "innovative or adaptive approaches to overcome linguistic, institutional, cultural, economic, historical, or other barriers to effective participation in the decision-making processes;" determinations of the affected environment by obtaining demographic information concerning possible disproportionate impacts upon minority or low-income communities; analysis of the distribution of impacts on the environment with a view towards whether disproportionate impacts occur; development of alternatives to the proposed action with input from the affected minority or low-income communities; agency decisions should be clearly stated with respect to potential disproportionate impacts and mitigation measures implemented to minimize the impact; and mitigation measures should reflect the preferences of the affected communities. (*Id.*).

[289] *See*, EPA, NEPA COMPLIANCE ANALYSES 17 (1997) (references to draft CEQ guidance by EPA).

[290] COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997) (hereinafter "CEQ, ENVIRONMENTAL JUSTICE GUIDANCE"). An electronic version of the CEQ's guidance is available at <http://www.whitehouse.gov/CEQ>. Although the guidance is dated December 10, 1997, it was not made available until June 1998; *See, also, Problems and Issues with the National Environmental Policy Act (NEPA): Oversight Hearing Before the House Committee on Resources*, 105th Cong. (1998) (Statement of Kathleen McGinty, Chair of the Council on Environmental Quality). In her testimony before the House Committee on Resources on March 18, 1998, Ms McGinty commented on several "successes" NEPA enjoyed since its enactment, however, environmental justice was not mentioned. Also, environmental justice was not referenced with respect to her remarks concerning "Planned Next Steps in NEPA Reinvention," thus indicating the CEQ's final version of its environmental justice guidance may not be immediately forthcoming. Her testimony reflects that the CEQ had difficulties as late as the spring of 1998 concerning its environmental justice guidance.

[291] CEQ, ENVIRONMENTAL JUSTICE GUIDANCE 1. Agencies promulgating or revising their regulations concerning their NEPA review processes or "under any other statutory scheme" are advised to consult with the CEQ or the EPA to ensure the guidance's principles are incorporated. (*Id.* at 19). The CEQ does not intend that the guidance be applied retroactively, if an agency has made "substantial

agencies should evaluate in their environmental justice analysis.[292] The CEQ also reiterated methodologies set forth in President Clinton's memorandum to incorporate environmental justice into agency decision making.[293] The Interagency Working Group's (IWG) guidance, with respect to key terms reflecting the consensus of the Federal government, is also included.[294]

The CEQ believes that environmental justice concerns can be addressed and are "wholly consistent" with NEPA.[295] On the face of language found within NEPA, the

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investments" with respect to previous agency actions, if additional costs or delays would be experienced. (*Id.* at 21).

[292] *Id.* at 3-4. The CEQ emphasized the development of environmental justice strategies, the importance of research, data collection, and analysis, patterns of subsistence consumption, and effective public participation.

[293] *Id.* at 4. The CEQ recommends that Federal agencies *should* analyze socioeconomic effects upon minority and low income communities when required by NEPA, address mitigation measures concerning adverse effects upon such communities, provide opportunities for public participation, and ensure that NEPA document have "appropriately analyzed" socioeconomic effects.

[294] *Id.* at 5. The IWG guidance is included as Appendix A to the CEQ's guidance. Appendix A provides, in part, the following definitions:

> *Minority population* means those "identified where either: (a) the minority population of the affected area exceeds 50 percent or (b) the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis." (*Id.* at 25).
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> *Disproportionately high and adverse human health effects* are determined by consideration of the following factors: whether health effects are significant or above generally accepted norms; whether the risk or rate of hazard exposure is significant or appreciably exceeds or is likely to appreciably exceed that for the general population; and whether health effects occur by cumulative or multiple adverse exposures from environmental hazards. (*Id.* at 26).
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> *Disproportionately high and adverse environmental effects* are determined by consideration of the following factors: whether physical impacts significantly and adversely affecting a minority or low income community exist; whether significant environmental effects having an adverse effect on a minority or low income community that appreciably exceeds, or is likely to do so, those on the general population exist; and whether environmental effects occur by cumulative or multiple adverse exposures from hazards. (*Id.* at 26-27).

See, also, supra, note 272 (terms "low-income population" and "minority" discussed).

[295] *Id.* at 7.

CEQ's position is reasonable.[296] However, due to court analysis and interpretation, NEPA's scope has been limited.[297]

3. Guiding Principles

The CEQ developed six principles to guide Federal agency consideration of environmental justice concerns.[298] Federal agencies are cautioned that a "one size fits all" approach can not be utilized because of the various influences that come into play with respect to consideration of environmental justice issues.[299] The principles focus upon the adverse effects on the physical environment and human health having a disproportionately high and adverse effect upon minority and low-income communities, but they are readily adaptable to the "pure" socioeconomic issues that may arise as a result of a base closure or realignment.[300] In order to ensure public participation in the

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[296] *Id.* at 7 (citing 42 U.S.C. 4331(b)(2) – (5)). Lynton K. Caldwell, one of NEPA's drafters, states that the courts, taking a "practical approach," have regarded NEPA as "essentially procedural" because the only "'real' law [are] only those provisions for violation of which penalties may be imposed." (*See*, Lynton K. Caldwell, *NEPA at Twenty: A Retrospective Critique*, 5 NATURAL RESOURCES AND ENVIRONMENT 6 (1990)) Mr. Caldwell asserts that NEPA has not realized its full potential as a result of a failure by the government and the public to incorporate or "internalize" the principles set out in section 101 of NEPA. (*Id.* at 7) He states "[e]ffective administration of law requires internalization of the values it represents and commitment to its objectives." (*Id.* at 49) When viewed in this light, Executive Order 12,898 is a step towards internalizing some of the principles found in section 101 of NEPA.

[297] *See, supra*, Part III(D)(2).

[298] CEQ, ENVIRONMENTAL JUSTICE GUIDANCE at 8-9.

[299] *Id.* at 8. The CEQ notes that the issue "is highly sensitive to the history or circumstances of a particular community or population, the particular type of environmental or human health impact, and the nature of the proposed actions itself." (*Id.*).

[300] *Id.* at 8-9. Agencies are instructed to determine the existence of minority or low-income communities and whether a disproportionate and high human health or environmental impact will befall such communities. (*Id.* at 8) They are also instructed to gather public health data concerning potential adverse exposures to human health or environmental hazards. (*Id.* at 9) Finally, agencies are advised of the role that "interrelated cultural, social, occupational, historical, or economic factors" may play increasing the possible physical or natural environmental impact of proposed actions. (*Id.* at 9) While these principles emphasize the possibility of adverse effects upon human health or the physical environment, they may be

NEPA process, the CEQ suggests that agencies develop public participation strategies.[301] The CEQ further advises that diverse community viewpoints should be represented in the process to ensure "meaningful community representation," that is, the whole community's position with respect to a particular issue should be considered by the agency.[302] The CEQ also believes early participation by the public is necessary as well.[303]

4. Consideration of Environmental Justice Issues

The CEQ guidance notes that Executive Order 12,898 did not alter any existing legal thresholds under NEPA or statutory interpretations pursuant to case law.[304] Rather the guidance indicates that an emphasis or awareness for environmental justice issues should be nurtured in order to identify disproportionate, adverse impacts on minority or low-income communities.[305]

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adapted for consideration of issues which may not be related to a human health or environmental effect, but may be of concern for a minority or low-income community, e.g., use of a former military installation's housing units when local area faces a housing shortage.

[301] *Id.* at 9. The public participation strategy should address "linguistic, cultural, institutional, geographic, and other barriers" that may prevent minority and low-income communities from "meaningful participation" in the process. (*Id.*) With respect to federally-recognized tribes, agencies should obtain tribal representation consistent with a government to government relationship, federal trust responsibilities, and treaty rights. (*Id.* at 9).

[302] *Id.* at 9.

[303] *Id.*

[304] *Id.* at 9; *See, also, supra*, Part IV.

[305] CEQ, ENVIRONMENTAL JUSTICE GUIDANCE 9-10.

5. Using the NEPA Process

The CEQ identified seven steps or phases within the NEPA process as "opportunities and strategies" to consider, as appropriate, environmental justice issues.[306]

a. Scoping

Federal agencies should make a preliminary determination whether their proposed action will affect minority or low-income communities.[307] If so, Federal agencies should bring these communities into the NEPA process as soon as possible to obtain feedback.[308] The strategy envisioned by the CEQ to ensure minority or low-income communities have an opportunity to provide information relies upon enhancing the normal public notification process by contacting local community resources.[309]

The CEQ's guidance recognizes that Federal agencies have to provide an opportunity for proponents of the agency's proposed action, as well as those in opposition to it, to submit their views concerning it, in order to fully consider "the potential environmental impacts of a proposed agency action and any alternatives."[310] The

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[306] *Id.* at 10. The seven are scoping, public participation, determination of the affected environment, analysis, alternatives, record of decision, and mitigation. (*Id.* at 10-16).

[307] *Id.* at 10.

[308] *Id.* at 10-11.

[309] *Id.* at 11. The following entities are examples of resources which are suggested that should be contacted to enhance a Federal agency's outreach: religious organizations, media outlets that target minority or low-income communities, minority business organizations, legal aid providers, civil rights organizations, etc.. (*Id.*).

[310] *Id.*

guidance advises that constituencies concerning a proposed agency action may shift during the course of an agency's evaluation of its proposal.[311]

The CEQ regards the scoping process as the "foundation for the analytical process."[312] Therefore, it views disclosure of sufficient information to the public to ensure "well informed and constructive input," as necessary.[313]

b. Public Participation

If the scoping process is accomplished in an appropriate manner, public participation in the NEPA process will be effective and thus meet NEPA's "paramount goal."[314] The CEQ cautions Federal agencies that engaging the public and encouraging it to participate in the NEPA process will require "adaptive or innovative approaches" to facilitate this goal.[315] The CEQ listed specific measures that Federal agencies may adopt to encourage participation by minority and low-income communities.[316]

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[311] *Id.* at 12. Therefore, agencies should track such changes to keep themselves informed of the affected community's position.

[312] *Id; See, also, supra*, notes 267-269 and accompanying text.

[313] *Id.* The CEQ lists items that it believes should be provided to the public informing it of the nature of the agency's proposed action. They are description of the proposed action, anticipated NEPA compliance schedule, list of alternatives, other actions which may have cumulative impacts, appropriate reference documents, agency points of contact, notice of public meetings and locations, telephone numbers or locations where additional information may be obtained, and examples of past comments. (*Id* at 12).

[314] *Id* at 12.

[315] The guidance is primarily concerned about linguistic, cultural, institutional, historical and other barriers to effective participation by minority or low-income communities. (*Id.* at 13).

[316] *Id.* at 13. For example, major documents to be translated, translators provided at public meetings, document comments by other than the traditional public meeting such as personal interviews, circulation of specialized materials reflecting the concerns of the affected community, and periodic newsletters providing updates on the NEPA process.

c. Affected Environment

Similar to the EPA's guidance on the topic, the CEQ recommends that the "geographic scale" be identified to determine the affected environment.[317] The CEQ also recommends that census data be used to determine the affected community's racial, ethnic, and income distribution.[318] However, demographic analysis may not be required in some cases.[319] A community's "distinct cultural practices" should be identified and analyzed by a Federal agency, since they may play a role in the impact a proposed action may have upon the community.[320]

d. Analysis

In the event a disproportionate and adverse impact upon a minority or low-income community has been identified, the appropriate NEPA document "should state clearly" what is the proposed action and alternatives in concise and understandable terms.[321] The conclusion should be supported by "sufficient information for the public to understand the rationale."[322]

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[317] *Id.* at 13; *See, also, supra*, notes 259-262 and accompanying text.

[318] *Id.* at 14.

[319] *Id.* Specifically when an agency's proposed action will not have any adverse effects and therefore disproportionate and adverse human health or environmental impacts upon minority or low-income communities are absent. (*Id.*).

[320] *Id.*

[321] *Id.* at 14.

[322] *Id.*

e. Alternatives

The CEQ recommends that affected communities be permitted to "help develop" alternatives to the proposed action, as well as comment on them.[323] Citing 40 C.F.R. 1505.2(b), the CEQ states the "distribution as well as the magnitude of the disproportionate impacts in [low-income, minority, and Indian] communities should be a factor in determining the environmentally preferable alternative."[324] Therefore, the views of the affected communities, as well as the alternatives that will have a less adverse effect, should be considered by the agency.[325]

f. Record of Decision

When disproportionate and adverse human health or environmental effects on minority or low-income communities are present, they should be addressed in the agency's record of decision (ROD).[326] Also addressed is whether all practicable means to avoid or minimize environmental and other interrelated effects were adopted.[327] Where necessary, translating the ROD should be accomplished in clearly understandable language.[328]

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[323] *Id.* at 15.

[324] *Id.* 40 C.F.R.2(b) requires Federal Agencies to identify an environmentally preferable alternative in the record of decision.

[325] *Id.*

[326] *Id.* at 15.

[327] *Id.*

[328] *Id.* 16.

g. Mitigation

The views of the affected community should be considered by the agency when identifying and developing mitigation measures.[329] Indeed, the CEQ believes that mitigation measures should "reflect the needs and preferences of affected" low-income, minority, and Indian communities.[330]

6. When an EIS or EA is Not Prepared

In some circumstances, an EIS or EA may not be prepared.[331] In such cases, Federal agencies are advised that they "should augment their procedures as appropriate to ensure that the otherwise applicable process or procedure for a federal action addresses environmental justice concerns" in a manner similar to NEPA.[332]

Part VI. Environmental Restoration

In addition to the "purely" socioeconomic issues, such as homeless assistance, job loss, and the like, closure of military installations also requires the implementation of environmental restoration efforts.[333] Restoration of former military installations may raise concern among nearby minority and low-income communities, when there is a high correlation between the location of hazardous waste sites and hazardous waste facilities and the communities. As such, the communities arguably will assume a

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[329] *Id.*

[330] *Id.*

[331] *Id.* at 16. For instance, a categorical exemption pursuant to regulation allow proposed agency actions to proceed without undergoing a full NEPA review, or another statute provides the "functional equivalent" of a NEPA review.

[332] *Id.*

[333] STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 129-30 (1996).

disproportionately higher burden of risk from closure or realignment of those installations.[334]

Like the socioeconomic questions, environmental restoration efforts are complex and difficult, but they are also very expensive.[335] Although the DOD may close a military installation, its responsibility for cleanup does not end.[336] In view of the fact that the DOD has identified over 21,000 sites at its present and former installations, the restoration effort will be immense.[337]

Base closure activities, from the perspective of environmental restoration, must observe the requirements of both the Resource Conservation and Recovery Act

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[334] *See*, CEQ, 25TH ANNIVERSARY REPORT 116 (1995) (although dispute in the studies, nonetheless important to address concerns); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 Envtl. L. 285, 296-301 (1995) (highlighting the evidence that a disproportionate share of environmental risk is placed upon minority communities); Stacey Hart, *A Survey of Environmental Justice Legislation in the States*, 73 Wash. U. L. Q. 1459, 1460-62 (1995) (same); Vicki Been, *What's Fairness Got to Do With it? Environmental Justice and Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001-1015 (1993) (discussing evidence of disproportionate siting of local undesirable land uses).

[335] *Id.* at 135 (For example, costs for installations closed pursuant to 1988 base closure act alone is at least $900 million. (*Id.*) The DOD had spent over $7.8 billion on restoration activities by the end of FY1993. (*Id.* at 97) In FY1995, DOD anticipated spending $2.2 billion for cleanup activities at active and former military installations with an additional $500 million for closing installations. (*Id.* at 80)).

[336] *Id.* at 129-30 (1996); Pub. L. 101-510, § 2905(a)(1)(C), 104 Stat. 1808 (1990), 10 U.S.C. 2687 note (funds authorized for environmental restoration and mitigation).

[337] STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 95 (1996). (The figure is of the end of 1993 with 19,694 sites located on active installations. (*Id.* at 80) Of that number, 743 sites had been cleaned up and approximately 12,000 sites were deemed by DOD "not to pose [a] threat to human health or the environment." (*Id.*) Approximately 8,000 sites remain for the DOD to cleanup.); *See, also*, Richard A. Wegman and Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 ECOLOGY LAW QUARTERLY 865, 867 (1994) (DOD faces formidable task to clean up military bases).

(RCRA)[338] and the Comprehensive Emergency Response and Compensation Liability Act (CERCLA)[339] and as well as subsequent uses to which the installation is put.[340]

As can be expected, closure of military installations generates litigation concerning the future uses contemplated for the contaminated installations.[341] With respect to the consideration of socioeconomic impacts, a concern is raised with respect to the effect of cleanup efforts upon neighboring minority or low-income communities.[342] The DOD has experienced significant delays cleaning up its installations,[343] which in turn delays conversion of former military installations.[344] Some states have, in turn, responded

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[338] 42 U.S.C. 6901-6992k (1994 & Supp.); *See, also*, STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 82-84 (1996) (general discussion of RCRA's application on military installations).

[339] 42 U.S.C. 9601-9675 (1994 & Supp.); *See, also*, STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 84-94 (1996) (general discussion of CERCLA's application on military installations).

[340] STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 130 (1996).

[341] *See, e.g.*, Conservation Law Foundation, Inc. v. Department of the Air Force, 864 F. Supp. 265 (D. New Hampshire 1994), *aff'd in part and rev'd in part sub nom.* Conversation Law Foundation, Inc. v. Busey, 79 F.3d 1250 (1st Cir. 1996); *See, also*, McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986); McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1989); McClellan Ecological Seepage Situation (MESS) v. Cheney, 763 F. Supp. 431 (E.D. Cal. 1989); McClellan Ecological Seepage Situation (MESS) v. Cheney, 763 F. Supp. 431 (E.D. Cal.); McClellan Ecological Seepage Situation (MESS) v. Perry, 47 F. 3d 325 (9th Cir.); *See, also*, STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 97-99 (1996) (synopsis of cleanup efforts and litigation at McClellan AFB); Richard A. Wegman and Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 ECOLOGY LAW QUARTERLY 865, 871-72 (1994) (background information concerning environmental problems at McClellan AFB): *See, also*, REUSE GUIDANCE 2 (McClellan AFB selected for closure during the 1995 BRAC round and due to close by 2001.); Base Closure and Realignments (visited September 19, 1997) <http://www.defenselink.mil/news/fact_sheets/ baseclose95.html> (same).

[342] *See, supra*, note 44; *See, also*, Benjamin L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 195 (1994) (environmental contamination single greatest impediment for civilian reuse).

[343] Richard A. Wegman and Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 ECOLOGY LAW QUARTERLY 865, 875, 890 (1994).

[344] *Id.* at 868; Benjamin L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 195 (1994).

to the large number of base closures and realignments by enacting legislation to promote reuse and economic development of affected communities.[345]

The number of "brownfields,"[346] contaminated buildings and land nobody wishes to develop, is growing in the United States.[347] The so-called "Brownfields debate" centers around efforts to revitalize centers of urban decay in the United States.[348] The issue of urban decay has been analyzed by the courts within the context of NEPA challenges to agency decision making, e.g., whether urban decay is a item to be considered during NEPA analysis of adverse effects (answer in the negative).[349]

The Brownfields question is viewed as "an intensifying set of systemic problems related to residential segregation, . . . degradation of the urban environment, and the polarization between urban and non-urban communities along lines of age, life style,

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[345] *See, e.g.*, Jason O. Runckel, *The Road to Redeveloping California's Military Bases*, 28 PAC. L. J. 861 (1997) (describing legislation to mitigate the economic and social degradation that communities affected by closure face); Marnie I. Smith, *Review of Selected California 1994 Legislation*, 26 PAC. L.J. 350 (1995) (describing military base reuse authority).

[346] NEJAC, BROWNFIELDS REPORT 5 (1996) (The EPA defines "brownfields" as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." (*Id.* at 5). This definition is broad enough to include former military installations).

[347] CEQ, 25TH ANNIVERSARY REPORT 119 (1995).

[348] NEJAC, BROWNFIELDS REPORT 9-10 (1996); *See, also*, ENVIRONMENTAL PROTECTION AGENCY, SOLID WASTE AND EMERGENCY RESPONSE, BROWNFIELDS TAX INCENTIVE FACT SHEET, EPA 500-F-97-155 (1997) (Pub. L. 105-34 extended tax benefits for cleanup costs of property in targeted areas; NPL sites excluded).

[349] *See, e.g.*, City of Rochester v. United States Postal Service, 541 F.2d 967 (2nd Cir. 1976) (Postal Service neglected to consider effect of the transfer of 1,400 employees had upon environment, including, increased air pollution, economic and physical deterioration of downtown area, and that abandonment of downtown facility may contribute to atmosphere of urban decay); Township of Dover v. United States Postal Service, 429 F. Supp. 295 (D. New Jersey 1977) (City of Rochester distinguished on basis of only 120 employees being transferred and downtown facility essentially remaining in downtown area, but only losing one function).

race, socioeconomic status, and other spatially-related social divisions."[350] There are ecological, as well as social ecosystems that must be addressed, if urban environmental issues are to be adequately confronted.[351] Within the context of the Brownfields/environmental justice debate, for federal facilities, specifically military installations selected for closure, it is a matter of how effectively are decisions concerning cleanup and reuse made in view of issues concerning public health, jobs, housing, pollution prevention and so forth.[352] The NEJAC Report noted that many Federal actions exacerbated existing problems and, in effect, made matters more unequal.[353]

Closure and/or realignment of military installations will require an environmental assessment of restoration efforts and the manner former installations will be used after closure.[354] However, the need to be responsive to local redevelopment needs does not mean environmental standards should be relaxed.[355] Also required for evaluation is analysis of effects resulting from post-closure uses.[356] Complicating this analysis is that

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[350] NEJAC, BROWNFIELDS REPORT 10 (1996).

[351] *Id.* at 11 (social ecosystems are neighborhoods, metropolitan areas, regions, and the like. (*Id.*).

[352] *Id.* at 15.

[353] *Id.* at 29.

[354] Benjamin L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 190 (1994).

[355] NEJAC, BROWNFIELDS REPORT 31-34 (1996).

[356] Benjamin L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 189-90 (1994) (citing Conservation Law Foundation of New England v. GSA, 707 F.2d 626 (1st Cir. 1983).

DOD will have to accomplish a NEPA analysis while decisions are made by local communities.[357]

Part VII. Closing Military Installations and Homeless Assistance

A. Introduction

Since the DOD's environmental reviews pursuant NEPA will be used to implement the President's Executive Order,[358] the McKinney Act and the 1994 Redevelopment Act are important environmental justice considerations for the department.[359] Not only does NEPA require public participation, at several points in the homeless assistance review process, more so pursuant to the 1994 Redevelopment Act, public input or participation is encouraged.[360] Furthermore, the homeless assistance provisions fundamentally address both aspects of President Clinton's Executive Order:

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[357] *Id.* at 190; *See, also*, NEJAC, BROWNFIELDS REPORT 40 (1996) (The relationship between past, current, and future land use[s] should be examined.); *Id.* at 47-48 (intergovernmental coordination should be improved to better integrate revitalization efforts); *Id.* at 20-22 (public participation necessary for meaningful and effective community planning); *See, also*, NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, PUBLIC PARTICIPATION AND ACCOUNTABILITY SUBCOMMITTEE, THE MODEL PLAN FOR PUBLIC PARTICIPATION (1996) (The Model Plan sets forth guidelines for EPA to institutionalize public participation in its programs. The Model Plan also provides useful guidance for other entities to consider as well.).

[358] *See, supra*, Part IV(A).

[359] Both the EPA and the CEQ emphasize appropriate scoping within the environmental justice context and public participation within the process. (*See, supra*, notes 234, 312 and accompanying text.) The McKinney Act and the 1994 Redevelopment Act have public participation aspects within them which will require the department to consider public input concerning future reuse of former military installation.

[360] See, *e.g.*, 42 U.S.C. 11411(c)(3) (release of available properties lists upon public request); 42 U.S.C. 11411(c)(2)(A) (list forwarded to homeless coordinators); 42 U.S.C. 11411(e)(1) (submission of application to use property); Pub. L. 101-510, § 2905(b)(7)(C)(ii), (iii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note (outreach and consultation efforts); Id. 2905(b)(7)(L)(i)(I) (submission of notices to HUD Secretary).

addressing environmental justice issues which may have an effect upon minority or low-income communities.[361]

B. The Stewart B. McKinney Homeless Assistance Act

1. Relationship Between Congress' Intent and Environmental Justice

Among its findings, the Congress found that in the face of many obstacles facing the Nation "the Federal Government has a clear responsibility and existing capacity to fulfill a more effective and responsible role to meet the basic human needs and to engender respect for the human dignity of the homeless."[362] Among Congress' purposes for enacting the statute was "to use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless."[363] The act "made serving the homeless the first priority for use of all surplus Federal properties."[364]

Congress' stated reasons for enacting the McKinney Act readily fall within the scope of environmental justice when it is considered that homelessness affects the

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[361] *See, generally*, Exec, Order No. 12,898, 3 C.F.R. p. 859 (1994). One commentator reports that the number of people living in census tracts where 40% or more of the residents were deemed "poor," doubled from 1980 to 1990 and that costs for rental units exceeded 40% of the working poor's earnings. (*See*, Nancy Wright, *Not in Anyone's Backyard: Ending the "Contest of Nonresponsibility" and Implementing Long Term Solutions to Homelessness*, 2 GEO. J. ON FIGHTING POVERTY 163, 167-68 (1995)) The Department of Housing and Urban Development's definition of affordable housing requires spending no more than 30% of monthly income on housing. (*See*, Stanley S. Herr and Stephen M. B. Pincus, *A Way To Go Home: Supportive Housing and Housing Assistance Preferences for the Homeless*, 23 STETSON L. REV. 345, 349 (1994)). Commentators also have noted that criticism has been leveled against Federal housing programs for fostering hyper-concentration or "ghettoization" of poor tenants. (*Id.* at 347).

[362] 42 U.S.C. § 11301(a)(6).

[363] *Id.* § 11301(b)(2).

[364] Military Reuse and Homeless Assistance (visited March 17, 1998) <http://www.hud.gov/cpd/mbrmain.html>. An electronic version of the GUIDEBOOK ON MILITARY BASE REUSE AND HOMELESS ASSISTANCE (1996) published by the U.S. Department of Housing and Urban Development is available at the website.

minority and low-income communities with much greater effect.[365] Executive Order 12,898 requires the DOD to incorporate environmental justice into NEPA reviews during the closure and realignment process and take into account local minority and low-income communities.[366] The CEQ's environmental justice guidance contemplates that the military departments will factor in the extent of homelessness among the nearby minority and low-income communities into their NEPA reviews concerning reuse of former military installations.[367]

Of particular concern for the military departments will be the need to identify minority or low-income communities, as well as their housing needs, that may be adversely affected by the closure or realignment of a military installation.[368] Another concern will be the need to articulate mitigation measures to address possible housing shortages affecting minority and low-income communities.[369] Since local communities will make the initial choices concerning uses for the former military installations, the DOD will face challenges incorporating environmental justice matters into its NEPA reviews that are based on community preferences.[370]

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[365] *See, supra*, notes 259-62, 317-20 and accompanying text.

[366] *See, supra*, Part IV(A).

[367] *See, supra*, Part V(D)(3).

[368] *See, supra*, notes 317-20 and accompanying text; *See, also, supra*, notes 259-62 and accompanying text.

[369] *See, supra*, notes 329-30; *See, also, supra*, notes 235, 240 and accompanying text.

[370] Benjamin L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 190 (1994).

2. Procedures and Requirements Under the McKinney Act

a. Identification of Suitable Property

In order to accomplish its purpose, Congress provided a mechanism for identifying unutilized, underutilized, excess or surplus federal property.[371] The Secretary of Housing and Urban Development (HUD Secretary) is required to canvass landholding Federal agencies "regarding Federal public buildings and other Federal real properties (including fixtures) that are excess property or surplus property or that are described as unutilized or underutilized" by the agency.[372] "Landholding agency" is a Federal department or agency possessing statutory authority to manage real property.[373] "Excess property" is "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof."[374] "Surplus property" is "any excess property not required for the needs and the discharge of responsibilities of all Federal agencies, as determined by the [General Services] Administrator."[375]

Each Federal agency is obligated to provide information to the HUD Secretary, within 25 days of being requested to provide it, concerning the status of the aforementioned properties.[376] "[B]uildings and other properties . . . suitable to assist the

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[371] 42 U.S.C. § 11411.

[372] *Id.* § 11411(a).

[373] *Id.* § 11411(i)(3).

[374] 42 U.S.C. § 11411(i)(2); 40 U.S.C. § 472(e) (1994).

[375] 42 U.S.C. § 11411(i)(2); 40 U.S.C. § 472(g) (1994).

[376] 42 U.S.C. § 11411(a).

homeless" are then identified by the HUD Secretary.[377] If the property is deemed not suitable to assist the homeless, it is not available for any other purpose for 20 days after the determination of unsuitability to allow for review of the determination at the request of a representative of the homeless.[378]

b. Notification to Federal Agencies

Once property is identified, the HUD Secretary is required to notify Federal agencies concerning any property that has been identified as suitable for the homeless.[379] Each landholding Federal agency, in turn, is required to respond to the HUD Secretary's notification within 45 days after receipt.[380] In the case of unutilized or underutilized property, the agency is required to provide a statement concerning "the property excess to the agency's need" and a statement whether the property is available to the homeless, or a statement setting forth reasons, with an explanation of need, that the property cannot be determined to be excess to the agency's need or made available to the homeless.[381] In the case of excess property, the agency is required to provide a statement "there is no other compelling Federal need for the property," and therefore is surplus property, or a statement "there is further compelling Federal need for the property," with an explanation of the need for the property, and therefore not available for the homeless.[382]

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[377] *Id.*

[378] *Id.* § 11411(d)(3).

[379] *Id.* § 11411(b)(1).

[380] *Id.*

[381] *Id.* § 11411(b)(1)(A).

[382] *Id.* § 11411(b)(1)(B).

c. Availability of Identified Properties

All properties identified pursuant to the survey, other than surplus property, are required to be available for application to assist the homeless.[383] Surplus property is required to be available for application to assist the homeless pursuant to the McKinney Act or for a public health use pursuant to the Federal Property and Administrative Services Act (FPASA).[384]

d. Recordkeeping and Publication of Lists

The HUD Secretary is to maintain a "written public record" of the properties identified by him and the reasons for their identification, as well as the Federal agencies' responses to such identification.[385]

Within 15 days after the end of the 45 day period provided for Federal landholding agencies to respond, the HUD Secretary is required to publish a list of all properties reviewed by him and a list of all properties that are available.[386] Each list of properties will include a description, location information, and the "current classification of each property as unutilized, underutilized, excess property, or surplus property."[387] All information concerning properties not deemed suitable for the homeless is made available to the public upon request, including the rationale for their unsuitability.[388] Similarly, all

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[383] *Id.* § 11411(b)(2)(A)(i).

[384] *Id.* § 11411(b)(2)(A)(ii); 40 U.S.C. § 484(k)(1) & (4) (1994).

[385] 42 U.S.C. § 11411(b)(3).

[386] *Id.* § 11411(c)(1)(A).

[387] *Id.* § 11411(c)(1)(B).

[388] *Id.* § 11411(c)(1)(C).

information concerning properties deemed suitable for the homeless, to include release of environmental assessment information, is made available to the public upon request.[389] A separate list is also to be published on an annual basis concerning all properties deemed suitable for the homeless, but reported as unavailable, with the reasons they are unavailable.[390]

Eventually the list of available properties is forwarded to all state and regional homeless coordinators through the Interagency Council on the Homeless.[391] In addition, the Secretary, the Administrator of General Services, and the Secretary of Health and Human Services (HHS Secretary) are obligated to "ensure the widest possible dissemination of the information on the list,"[392] to include the establishment of a toll-free telephone number.[393] The HUD Secretary is also required to maintain a list of agency points of contact concerning specific properties.[394]

e. Updating Information

Each landholding Federal agency is obligated to update the HUD Secretary by December 31 of each year concerning "the current availability status and the current classification of each property controlled by the agency" that was listed as available to the

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[389] *Id.* § 11411(c)(3).

[390] *Id.* § 11411(c)(1)(D).

[391] *Id.* § 11411(c)(2)(A).

[392] *Id.* § 11411(c)(2)(B).

[393] *Id.* § 11411(c)(2)(C).

[394] *Id.* § 11411(c)(3).

homeless and is available for use.[395] The HUD Secretary publishes this list in the Federal Register by February 15 of the following year, including each property's classification.[396]

f. Priority to Assist the Homeless

Listed properties are not available for any other purpose--other than to assist the homeless--for 60 days beginning on the date the listed is published in the Federal Register.[397] Properties are not considered available after the 60 day holding period, if they receive interest from anybody—in writing—for use for any purpose, or the Administrator of General Services receives a bona fide offer to purchase of the property or has advertised the property for sale.[398] However, if an application to use the property is received after the 60 day holding period, it may be approved provided the property for which it is received is available to assist the homeless.[399] Such properties are given priority for uses to assist the homeless, over other competing uses pursuant to the FPASA, after the 60 day holding period, provided they otherwise remain available.[400] An exception is provided for competing uses "so meritorious and compelling as to outweigh

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[395] *Id.* § 11411(c)(4)(A).

[396] *Id.* § 11411(c)(4)(B).

[397] *Id.* § 11411(d).

[398] *Id.* § 11411(c)(4)(C).

[399] *Id.* § 11411(d)(4)(A).

[400] *Id.*

the needs of the homeless."[401] Surplus property is "assigned promptly" to the HHS Secretary for disposal, if an application has been received.[402]

g. Notice to Use Listed Property

If a written notice to use a property to assist the homeless is received during the 60 day holding period, the property is not available for any other purpose, until action is completed on an application submitted subsequent to the notice.[403] Title 42, U.S.C. § 11411(e) specifies the manner that applications are submitted and processed.

A representative for the homeless may submit an application to the HHS Secretary for any listed property.[404] A "representative of the homeless" may be a state or local government agency, or private nonprofit organization providing services to the homeless.[405]

h. Submission of a Complete Application to Use Property

Applicants are required to submit a complete application to the HHS Secretary within 90 days after giving their preliminary notice to apply for a property.[406] Reasonable extensions of time to submit a complete application are possible, if the HHS Secretary, with the concurrence of the appropriate landholding agency, allows it.[407] The HHS

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[401] *Id.* § 11411(d)(4)(A) & (f)(3)(A).

[402] *Id.* § 11411(d)(4)(B).

[403] *Id.* § 11411(d)(2).

[404] *Id.* § 11411(e)(1).

[405] *Id.* § 11411(i)(4).

[406] *Id.* § 11411(e)(2).

[407] *Id.*

Secretary is obligated to complete review, make determinations, and take action on complete applications within 25 days after receipt, and maintain a written public record of actions taken on such applications.[408]

3. **Transferring Property to the Homeless**

Property for which an application has been approved by the HUD Secretary "shall be made promptly available" to the representative of the homeless that submitted the application concerning the property.[409] With respect to surplus property, the Administrator or the HHS Secretary is to give "priority of consideration" to uses that assist the homeless, unless outweighed by a competing request that is "so meritorious and compelling."[410] If action is taken to convey property for a use that does not address the needs of the homeless, the Administrator or the HHS Secretary is required to notify the appropriate committees of Congress.[411] An explanation setting forth the need satisfied by the conveyance and the reasons why it outweighed the needs of the homeless is required.[412]

4. Department of Defense (DOD) Exemption

The McKinney Act exempts DOD buildings and installations approved for closure under the Defense Base Closure and Realignment Act of 1990 after October 25,

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[408] *Id.* § 11411(e)(3).

[409] *Id.* § 11411(f)(1).

[410] *Id.* § 11411(f)(3)(A); 40 U.S.C. § 484(k); *See also*, National Law Center on Homelessness and Poverty v. U.S. Dept. of Veterans Affairs, 736 Supp. 1148 (D.D.C. 1990) (GSA decision to transfer property to U.S. Navy not arbitrary or capricious nor abuse of discretion, since Navy demonstrated compelling need for property).

[411] 42 U.S.C. § 11411(f)(3)(B).

[412] *Id.*

1994.[413] For DOD installations approved for closure before October 25, 1994, the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 may be controlling ("the 1994 Redevelopment Act").[414]

C. The Base Closure Community Redevelopment and Homeless Assistance Act of 1994

1. Introduction

The Base Closure Community Redevelopment and Homeless Assistance Act of 1994 ("1994 Redevelopment Act") amended the Defense Base Closure and Realignment Act of 1990 ("the 1990 base closure act")[415] by inserting a new section 2905(b)(7).[416] It further provided that notwithstanding the provisions found in the Defense Authorization Amendments and Base Closure and Realignment Act of 1988 ("the 1988 base closure act")[417] and the 1990 base closure act, as they were in effect on the date of its enactment (October 25, 1994), "the use to assist the homeless of building and property at military installations approved for closure" under either base closure act before October 25, 1994 "shall be determined in accordance with" the new section 2905(b)(7) of the 1990 base closure act in lieu of any other provision which may otherwise apply.[418]

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[413] *Id.* § 11411(h)(1).

[414] *Id.* § 11411(h)(2).

[415] Pub. L. 101-510, November 5, 1990, 104 Stat. 1808, 10 U.S.C. § 2687 note.

[416] Pub. L. 103-421 § 2(a), 108 Stat. 4346 (1994), 42 U.S.C. § 11301 note.

[417] Pub. L. 100-526, October 24, 1988, 102 Stat. 2623, 10 U.S.C. § 2687 note.

[418] Pub. L. 103-421, § 2(e), 108 Stat. 4346 (1994), 10 U.S.C. § 2687 note.

The 1994 Redevelopment Act also provided that section 2905(b)(7) applies to installations approved for closure "only if the Local Redevelopment Authority (LRA) or chief executive officer for the state for the installation submitt[ed] a request to the Secretary of Defense (DOD Secretary) not later than 60 days" after October 25, 1994.[419] An exception is provided for buildings or property that had been transferred or leased for use to assist the homeless pursuant to the 1988 or 1990 base closure acts before enactment of the 1994 Redevelopment Act.[420]

The 1994 Redevelopment Act is a community-based planning process in which representatives for the homeless and the local community, acting through a LRA, assume responsibility for base reuse planning for the closed or realigned installation.[421] The LRA represents all of the local jurisdictions affected by the closure or realignment.[422]

2. Background

a. Impact of the McKinney Act Upon Reuse

The 1994 Redevelopment Act was drafted in response to the perceived effect the McKinney Act had upon efforts to effectively redevelop closed military installations up

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[419] *Id.* Some LRAs for military installations identified for realignment or closure pursuant to earlier rounds have decided to opt into the 1994 Redevelopment Act's program. For example, seven LRAs for Air Force bases selected for closure or realignment pursuant to earlier rounds have opted to do so: March AFB, CA, Norton AFB, CA, George AFB, CA, Wurtsmith AFB, MI, Pease AFB, NH, Newark AFB, OH, and Carswell AFB, TX (Air Force Base Conversion Agency, *What Are The Requirements for Homeless Assistance at BRAC Installations Fact Sheet* (visited May 28, 1998) <http://www.afbca.hq.af.mil/factshts/fhomless.htm>); *See also*, DOD BRIM 1-5 (1997).

[420] Pub. L. 103-421, § 2(e), 108 Stat. 4346 (1994), 10 U.S.C. § 2687 note.

[421] Section V: McKinney Homeless Housing Assistance (visited March 11, 1998) <http://www.hud.gov/sec5.html>.

[422] *Id.*

to that point.[423] Senator Pryor remarked that the McKinney Act had a "unnecessary and costly burden [upon] communities nationwide that are working around the clock to redevelop former military installation."[424] Senator Pryor noted that "the local economic development planning efforts that follow the painful base closure announcements are truly massive and comprehensive, consuming millions of State and Federal dollars. These enormous planning efforts are focused on the community's new mission of securing their economic future following the departure of the military."[425] He further noted the McKinney Act became an obstacle to local community redevelopment by allowing homeless assistance groups to cite the act as authority to acquire military installations.[426] These actions were allowed by the McKinney Act often at the expense of government supported redevelopment efforts.[427] When faced by an "unaccommodating approach" by local redevelopment authorities, Senator Pryor observed that an intense adversarial relationship developed between homeless advocates and redevelopment authorities that worked against the interest of both groups.[428]

b. Pryor Amendments.

In 1993, the Congress addressed these issues by enacting legislation designed—in theory—to expedite base closure and reuse without exempting military installations from

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[423] Vol 140 CONG. REC. S14457.

[424] *Id.*

[425] *Id.*

[426] *Id.*

[427] *Id.*

[428] *Id.*

the McKinney Act.[429] The 1993 legislation amended both base closure acts to provide for expedited transferability determinations,[430] but the scope and application of the McKinney Act remained unaffected.[431] The legislation incorporated the President's program to "speed the economic recovery of communities where military bases are slated to close."[432] However, even Senator Pryor admitted that Congress' efforts provided "limited solutions."[433]

3. Purpose and Goals

The McKinney Act was not deemed to be responsive to the base closure process,[434] because it did not adequately consider the myriad of interests associated with closure of military installations.[435] The McKinney Act was enacted before the end of the cold war and the beginning of a major reduction in the number of military installations.[436] Thus, the 1994 Redevelopment Act was drafted with the purpose of exempting military

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[429] *Id.*

[430] Pub. L. 103-160, November 30, 1993, § 2904, 107 Stat. 1909 (1994), 10 U.S.C. § 2687 note.

[431] *Id.* § 2905.

[432] S. Rep. No 103-112, at 224 (1993) (The President's program had five elements to expedite economic recovery: jobs-centered property disposal, easy access to transition and redevelopment assistance, fast-track environmental cleanup, transitions coordinators, and larger economic development planning grants.).

[433] Vol 140 CONG. REC. S14457 (For an overview of the Pryor amendments, *See,* Lauren Hallinan, *Preserving and Expanding the Rights of the Poor in Communities Where Military Bases are Closing*, 27 Clearinghouse Review 1184, February 1994.).

[434] *Id.* S14458.

[435] HUD, REUSE GUIDEBOOK 1 (1996).

[436] Vol 140 CONG. REC. S14457.

installations from the McKinney Act process and to establish a new process to meet the needs of the homeless without interfering local redevelopment efforts.[437]

The 1994 Redevelopment Act would have the needs of the homeless addressed during negotiations within the redevelopment process in a manner that they would be considered in conjunction the needs of the whole community.[438] The legislation was viewed as a "collaborative process between the community and homeless providers" concerning reuse of military installations.[439] Its focus was not to diminish the importance of the issues concerning the homeless, but to minimize the adverse impacts the McKinney Act introduced into the base closure process.[440] In view of another upcoming base closure round in 1995, the proposed legislation was deemed necessary to improve the reuse process.[441]

The 1994 Redevelopment Act was intended to "accommodate the impacted communities multiple interests in base reuses and to meet the national priority to assist homeless individuals and families."[442] Its three-fold goals are: (1) to balance the community's needs with the expressed needs of the homeless; (2) to ensure local involvement in reuse planning; and (3) to promote expeditious reuse of closed or

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[437] *Id.*

[438] *Id.*

[439] Vol 140 CONG. REC. H11159 (Rep Gonzalez' remarks).

[440] Vol 140 CONG. REC. S14457.

[441] *Id.* S14458 (Senator Feinstein's remarks).

[442] HUD, REUSE GUIDEBOOK 1 (1996).

realigned installations.[443] In response to the 1994 Base Closure Community Redevelopment and Homeless Assistance Act, the DOD has promulgated regulations and guidance in order to expedite the re-use of former military installations.[444]

Unlike the CEQ's guidance concerning consideration of environmental justice issues--that is, socioeconomic impacts--the 1994 Redevelopment Act requires that the needs of the homeless be factored into reuse decisions.[445] This is an improvement from the McKinney Act requirement placing homeless advocates in the role of applicants to the HHS Secretary in competition with other applicants who had other uses in mind for the military installation in question.[446]

4. Procedures and requirements[447]

a. Identification of property

The 1994 Redevelopment Act provides for a mechanism to identify excess or surplus federal property.[448] Notwithstanding any other provision governing the disposal

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[443] *See id.* at 5.

[444] *See*, Revitalizing Base Closure Communities, 32 C.F.R. Parts 174 and 175 (1996); DOD, BRIM (1997); Guidance to Assessing Reuse and Remedy Alternatives at Closing Military Installations (visited March 25, 1998) <http://www.dtic.mil/envirodod/ brac/guide.html>; Finding of Suitability to Transfer for BRAC Property (visited March 25, 1998) <http://www.dtic.envirodod/ brac/fostmem.html>; Fast Track to FOST (visited March 25, 1998) <http://www.dtic.envirodod/brac/fostfast/intro.html>; and Fact Sheet – Field Guide to FOSL (visited March 25, 1998) http://www.dtic.envirodod/brac/fostfast/factsht.html>.

[445] *Compare, e.g.*, CEQ, ENVIRONMENTAL JUSTICE GUIDANCE at 16 ("agencies *should* carefully consider community views in developing and implementing mitigation strategies") (emphasis added) *with* Pub. L. 101-510, § 2905(b)(7)(H) & (L), 104 Stat. 1808 (1990), 10 U.S.C. § 2687, as amended by Pub. L. 103-421 § 2(a), 108 Stat. 4346 (1994), 42 U.S.C. § 11301 note (HUD Secretary required to review redevelopment plans and ensure homeless needs have been addressed).

[446] *See, supra*, Part VII(B)(2)(g) & (h).

[447] *See, generally*, HUD, REUSE GUIDEBOOK (general guidance concerning procedures and requirements).

[448] Pub. L. 103-421 § 2(a), 108 Stat. 4346 (1994), 42 U.S.C. § 11301 note.

of unutilized, underutilzed, or surplus federal property, "[d]eterminations of the use to assist the homeless of buildings and property located at installations approved for closure" will be made pursuant to section 2905(b)(7) of the 1990 base closure act.[449] Pursuant to that section, the DOD Secretary is tasked to identify buildings and property for which another Federal agency will accept a transfer,[450] take action to identify any excess or surplus building or property not previously identified,[451] submit information to the HUD Secretary, the LRA, or the chief executive officer of the state in which the installation is located concerning previously unidentified buildings or property,[452] and publish in the Federal Register and a newspaper of general circulation in local communities the information provided to the HUD Secretary.[453]

b. Notification to LRA and its Initial Obligations

State and local governments, representatives of the homeless, and other interested parties are obligated to notify the LRA of any interest they may have in the excess or surplus buildings or property at the installation and described their need for the building or property.[454] The LRA is instructed to assist state and local governments,

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[449] Pub. L. 101-510, § 2905(b)(7)(A), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; HUD, REUSE GUIDEBOOK 7 (1996).

[450] Pub. L. 101-510, § 2905(b)(7)(B)(i)(I)), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note (Federal agencies and departments had to decide whether they wished to use excess military installations within 60 days of the closure approval date pursuant to 32 C.F.R. part 175.).

[451] *Id.* § 2905(b)(7)(B)(i)(II).

[452] *Id.* § 2905(b)(7)(B)(i)(III). (The appropriate military department is obligated to "recognize" the LRA "as soon as practicable" after the closure approval date pursuant to 32 C.F.R. § 176.20(b).).

[453] *Id.* § 2905(b)(7)(B)(i)(IV).

[454] *Id.* § 2905(b)(7)(C)(i).

representatives of the homeless, and other interested parties concerning evaluation of the buildings and property.[455] In addition, the LRA is required to consult with representatives of the homeless and undertake outreach efforts to provide information to representatives of the homeless, other entities, and other interested parties.[456] The outreach effort should include one workshop on the installation.[457] The workshop is designed to help homeless advocacy groups learn about the reuse process, as well give them the opportunity to tour the installation, learn about the LRA functions, and determine any land use issues concerning the installation.[458] Congress wished that outreach efforts be conducted as soon as practicable.[459]

c. Notice of Interest

The notice concerning the advertised property should be filed with the LRA before the date specified by it.[460] The required deadline will be within 3 to 6 months after the determination pursuant to section 2905(b)(5) is completed, in cases where a LRA had been recognized as of that date, or within 3 to 6 months after a LRA is recognized, in cases where a LRA did not exist at the time of the determination.[461] The LRA is required to provide public notice of the deadline in a newspaper of general publication and notify

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[455] *Id.* § 2905(b)(7)(C)(ii).

[456] *Id.* § 2905(b)(7)(C)(iii); 32 C.F.R. § 176.20(c); HUD, REUSE GUIDEBOOK 8 (1996).

[457] 32 C.F.R. 176(c)(3)(ii) (1996); HUD, REUSE GUIDEBOOK 10 (1996).

[458] 32 C.F.R. § 176.20(c)(3)(ii) (1996).

[459] Pub. L. 101-510, § 2905(b)(7)(C)(iv), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[460] *Id.* § 2905(b)(7)(D)(i).

[461] *Id.* § 2905(b)(7)(D)(ii).

the DOD Secretary of the date.[462] The notice is required to set forth the certain items within it, to include: a program description and the need for it; the program's extent or a description of coordination with other such programs; description of the financial plan as well as the organization and its capacity to carry it out; and an assessment concerning when the program will begin.[463]

d. Redevelopment Plan

The LRA is required to draft a redevelopment plan for the installation and "shall . . . consider the interests in the use to assist the homeless of the buildings and property at the installation that are expressed in the notices submitted to the [LRA]."[464] The LRA and representatives for the homeless may enter into "legally binding agreements"[465] providing for the use of buildings, property, resources, and assistance in conjunction with the redevelopment plan, subject to the HUD Secretary's approval on review of the plan.[466] Public comment on the redevelopment plan is required before submitting it to the DOD Secretary and the HUD Secretary.[467] The LRA has 9 months to complete the plan.[468]

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[462] *Id.* § 2905(b)(7)(D)(iii); 32 C.F.R. § 176.20(c)(1) (Notice should be published within 30 days the availability list is published in the Federal Register).

[463] *Id.* § 2905(b)(7)(E)(i); 32 C.F.R. § 176.20(c)(2)(ii) (Financial information and associated information concerning the organization may not be released without the organization's consent, unless Federal and State or local law authorizes its release pursuant to Pub. L. 101-510, § 2905(b)(7)(D)(ii) (1990), 10 U.S.C. § 2687 note).

[464] Pub. L. 101-510, § 2905(b)(7)(F)(i), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[465] Pursuant to Pub. L. 101-510, § 2905(b)(7)(F)(ii)(II), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note, the agreements are required to have a reversion clause in favor of the LRA or other homeless representative in the event the buildings and property ceased to be used for the homeless. *See*, HUD, REUSE GUIDEBOOK 23 (1996) (summary of elements).

[466] Pub. L. 101-510, § 2905(b)(7)(F)(ii)(I), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[467] *Id.* § 2905(b)(7)(F)(iii); 32 C.F.R. § 176.30(c).

e. Application to Secretary of Defense and Secretary of HUD

When completed, the LRA submits an application to the DOD Secretary and the HUD Secretary.[469] The application is required to contain a copy of the redevelopment plan with a summary of any public comments received about the plan, a copy of all notices of interest the LRA received concerning use of the buildings and property for the homeless, a summary of the outreach undertaken by the LRA, a list of representatives of the homeless consulted and the results of such consultations, an assessment of how the plan balances the needs of the homeless with the community's needs, and copies of the agreements the LRA entered into with the representatives of the homeless.[470]

f. Housing and Urban Development Review

The HUD Secretary is required to complete his/her review within 60 days of receiving the application.[471] The plan is reviewed to determine whether it takes into consideration certain elements in view of the interests and requests of the representatives for the homeless.[472] The plan is reviewed to determine whether the plan takes into consideration the size and nature of the homeless population, the availability of existing services to meet the needs of the homeless, the suitability of the buildings and property

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[468] Pub. L. 101-510, § 2905(b)(7)(F)(iv), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[469] *Id.* § 2905(b)(7)(G)(i); 32 C.F.R. § 176.20(c)(5) (1996).

[470] Pub. L. 101-510, § 2905(b)(7)(G)(ii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note. 32 C.F.R. § 176.30(b) also lists other items which should be part of the application.

[471] *Id.* § 2905(b)(7)(H)(i); *Also see*, 32 C.F.R. 176.35 for further discussion concerning the department's review.

[472] Pub. L. 101-510, § 2905(b)(7)(H)(i), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

for then needs of the homeless, and the economic impact of the homeless assistance upon the affected community.[473]

The plan is also reviewed to determine whether it appropriately balances the needs of the community with the needs of the homeless;[474] whether the representatives for the homeless were consulted;[475] and, whether it outlines the manner the buildings and property will be made available to the homeless.[476] In response to difficulties incurred during previous base closure rounds, Congress directed the HUD Secretary to "take into consideration and be receptive to the predominant views on the plan of the communities in the vicinity of the installation covered by the plan."[477] In the event the HUD Secretary's review indicates the plan does not meet any of the elements set forth above, s/he is authorized to negotiate and consult with the LRA to resolve any discrepancies.[478] The LRA has an opportunity to modify the plan after such negotiations and consultations.[479] When the review is completed, the DOD Secretary and the LRA are notified of the HUD Secretary's determinations.[480]

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[473] *Id.* § 2905(b)(7)(H)(i)(I), (II).

[474] *Id.* § 2905(b)(7)(H)(i)(III).

[475] *Id.* § 2905(b)(7)(H)(i)(IV).

[476] *Id.* § 2905(b)(7)(H)(i)(V).

[477] *Id.* § 2905(b)(7)(H)(ii), 104 Stat. 1808, 10 U.S.C. § 2687 note.

[478] *Id.* § 2905(b)(7)(H)(iii), 104 Stat. 1808, 10 U.S.C. § 2687 note; 32 C.F.R. § 176.35(c)(1).

[479] Pub. L. 101-510, § 2905(b)(7)(H)(iii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.35(d)(1) (1996).

[480] Pub. L. 101-510, § 2905(b)(7)(H)(iv), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.35(c)(1) (1996).

g. Post-Review Actions

i. Actions When Original Plan Meets Statute's Requirements

When the DOD Secretary receives notice that the plan meets the requirements set forth in the statute, the DOD Secretary is required to dispose of the buildings and property identified for use to assist the homeless pursuant to the plan's provisions.[481] The buildings and property may either conveyed to the representatives of the homeless or the LRA.[482]

ii. Required Actions When Original Plan Does not Meet Statute's Requirements

When a redevelopment plan does not meet the requirements set forth in the statute, the HUD Secretary is require to notify the DOD Secretary and the LRA of his/her determination and the steps necessary to address the determination.[483] The LRA has an opportunity to revise the plan concerning the determination and submit a revised plan to the HUD Secretary.[484] The revised plan is required to be submitted within 90 days of receiving notice of the HUD Secretary's determination.[485] The HUD Secretary has 30 days to review the revised plan and determine if it meets the requirements of section

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[481] Pub. L. 101-510, § 2905(b)(7)(K), 104 Stat. 1808 (1990); *See also*, 32 C.F.R. § 176.45 (1996) (describing DOD's actions concerning disposal).

[482] Pub. L. 101-510, § 2905(b)(7)(K), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[483] *Id.* § 2905(b)(7)(H)(v); 32 C.F.R. § 176.35(c)(1) (1996).

[484] Pub. L. 101-510, § 2905(b)(7)(I)(i), 104 Stat. 1808, 10 U.S.C. § 2687 note; 32 C.F.R. § 176.35(d)(1) (1996).

[485] Pub. L. 101-510, § 2905(b)(7)(I)(ii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. 32 C.F.R. § 176.35(d)(1) (1996).

2905(b)(7)(H)(i).[486] If the revised plan meets the requirements, the DOD Secretary may proceed to dispose of the buildings and property as set forth above.[487] If the revised plan does not meet the requirements or has not been submitted, the HUD Secretary is required to undertake additional review of the original or revised plan as applicable.[488]

iii. Required Actions When Revised Plan Does Not Meet Requirements or Has Not Been Submitted

The HUD Secretary undertakes further review of the original redevelopment plan previously submitted to him/her, as well as any notices submitted by representatives of the homeless.[489] The representatives of the homeless are consulted to evaluate any continuing interest they have concerning the buildings and property.[490] In addition, the HUD Secretary may request information concerning the program for the homeless, the use the buildings and property they are to be put, financial capacity of the organization to implement the program and ensure compliance with federal environmental and discrimination laws, and a certification concerning the adequacy of police, fire, water, and sewage services in the affected community for the program.[491] Based upon his/her actions and any information submitted by the representatives of the homeless, the HUD

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[486] Pub. L. 101-510, § 2905(b)(7)(J)(i), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.35(d)(2) (1996).

[487] Pub. L. 101-510, § 2905(b)(7)(K), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[488] *Id.* § 2905(b)(7)(L)(i); 32 C.F.R. § 176.40 (1996).

[489] Pub. L. 101-510, § 2905(b)(7)(L)(i)(I), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.40(a)(1) (1996).

[490] Pub. L. 101-510, § 2905(b)(7)(L)(i)(II), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.40(a)(2) (1996).

[491] Pub. L. 101-510, § 2905(b)(7)(L)(i)(III) & (L)(ii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.40(a)(3) (1996).

Secretary is then required to indicate to the DOD Secretary the buildings and property which meet the requirements set forth in section 2905(b)(7)(H)(i) of the 1990 base closure act.[492] This notification is to take place within 90 days after a revised plan had been submitted to the HUD Secretary.[493] In circumstances where a revised plan has not been submitted for review, the statute is silent with respect to the time frame for notifying the DOD Secretary.[494] Once notified, the DOD Secretary is required to convey the affected buildings and property to either the LRA or entities identified by the HUD Secretary pursuant to instructions from the HUD Secretary.[495] The conveyance is to be made without payment of consideration.[496]

5. Base Closures and Realignments Pursuant to 10 U.S.C. § 2687

In addition to specific legislation authorizing closure or realignment of military installations and facilities,[497] Congress enacted 10 U.S.C. § 2687 in 1977 to prohibit the closure of military installations until certain conditions are met.[498] Prior to the enactment

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[492] Pub. L. 101-510, § 2905(b)(7)(L)(i)(IV), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.40(b) (1996) (criteria for the HUD Secretary's consideration).

[493] Pub. L. 101-510, § 2905(b)(7)(L)(iii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.40(d) (1996).

[494] Pub. L. 101-510, § 2905(b)(7)(L)(iii), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. 176.35(c)(2) (failure to submit an application triggers adverse determination by HUD effective on the date of the elapsed deadline); HUD, REUSE GUIDEBOOK 28 (1996) (direct dealing with homeless assistance providers," if a revised plan is not submitted).

[495] *Id.* § 2905(b)(7)(L)(iv); 32 C.F.R. § 176.45 (1996) (post approval activities).

[496] Pub. L. 101-510, § 2905(b)(7)(L)(iv), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note; 32 C.F.R. § 176.45(c) (1996).

[497] Pub. L. 100-526, 102 Stat. 2623 (1988), 10 U.S.C. § 2687, note; Pub. L. 101-510, 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[498] Pub. L. 95-82, § 612(a), 91 Stat. 379 (1977).

of section 2687, the Secretary of Defense regularly closed military installations with little interference from Congress.[499] In addition to fears of adverse economic impact that base closures and realignments brought to local communities, Congress enacted the statute in response to the perception that political influences played a role in the base selection process up to that point.[500] The statute effectively halted base closures from 1977 until 1988 with the passage of the 1988 base closure act.[501] This resulted from the interference of "traditional legislative politics [which] . . . "stalled the democratic process" and necessitated that an outside commission, presumably free from political influences, to determine which bases would be closed or realigned.[502] The closure and realignment of military installations and facilities pursuant to the 1988 and 1990 base closure acts resulted from waivers of section 2687's coverage in the closure acts, thus avoiding

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[499] Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 COLO. L. R. 331, 334-35 (1991).

[500] STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 128 (1996). Ironically, political considerations continue to intrude into the base closure and realignment process notwithstanding the BRAC process implemented by the 1988 and 1990 base closure acts. Two Air Force logistics centers were selected for closure in the 1995 base closure round, but the administration decided during the 1996 Presidential campaign to privatize the work being accomplished at the two centers, instead of closing the two bases outright. Significantly, the bases were located in states with a large number of electoral votes: California and Texas. As a result, administration calls for additional base closure rounds are meeting resistance on the basis that the administration has "politicized" the process. (*See*, Ernest Blazar, *Inside The Ring: No Respect*, WASH. TIMES, May 4, 1998 at A9; Scripps Howard News Service, *Base-closing Plan Deadlocks Senate Armed Services Panel: Clinton Seeks Fifth Round to Cut Costs in 2001*, WASH. TIMES, May 5, 1998, at A3).

[501] GAO, LESSONS LEARNED 14 (1997).

[502] Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 COLO. L. R. 331, 355 (1991).

imposition of these conditions.[503] When the1990 closure act expired, procedures and authority to close or realign bases reverted to section 2687.[504]

Section 2687 prohibits action concerning closure of military installations employing at least 300 civilian employees, realignment of military installations reducing the number of civilian employees by either 1,000 employees or 50% of the civilian workforce, or any required construction, conversion, or rehabilitation activity at other military installations resulting from the relocation of civilian employees from closure or realignment installations, until its provisions are observed by the DOD Secretary or the secretary of the military department concerned.[505] Action is conditioned on the DOD Secretary or the service secretary notifying specified Senate and House oversight committees as part of DOD's annual authorization request and providing them an analysis concerning "the fiscal, local economic, budgetary, environmental, strategic, and operational consequences" of closing and/or realigning military installations.[506] Action is additionally restricted for a period of 30 legislative days or 60 calendar days after the Senate and House committees are notified and the analysis is provided to them.[507] Any actions taken during either the 30 or 60 day period, whichever is longer, may be considered to be tentative actions pending expiration of the applicable time period.[508]

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[503] *See, e.g.*, Pub. L. 100-526, § 205(2), 102 Stat. 2623 (1988), 10 U.S.C. § 2687, note; Pub. L. 101-510, § 2905(d), 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[504] GAO, LESSONS LEARNED 15 (1997).

[505] 10 U.S.C. § 2687(a) (1994).

[506] *Id.* § 2687(b).

[507] *Id.* § 2687(c).

[508] *Id.* § 2687(b)(2).

Closures or realignments necessitated by national security concerns or the result of military emergencies are exempted from the statute's coverage, if the President certifies to Congress these reasons for closure or realignment.[509] Action may also be taken when the applicable time period expires.[510]

Significantly, the statute does not contain provisions concerning reuse or conversion of military installations found in the 1988 and 1990 base closure acts.[511] Surplus property may be transferred or leased pursuant to other Federal statutes.[512] However, when examined, these provisions do not provide any assistance to communities affected by base closures in the manner provided by other law.[513] Other transfers to Federal agencies are possible for "public benefit discount" purposes.[514]

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[509] *Id.* § 2687(c).

[510] *Id.* § 2687(d)(1).

[511] *Cf.,* 10 U.S.C. § 2687 *with,* Pub. L. 100-526, October 24, 1988, 102 Stat. 2623, 10 U.S.C. § 2687, note *and* Pub. L. 101-510, November 5, 1990, 104 Stat. 1808, 10 U.S.C. § 2687 note.

[512] *See, e.g.*, The Surplus Property Act of 1994, 50 U.S.C. App. § 1622; Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 484; 10 U.S.C. § 2667 (leasing of non-excess property from the military departments).

[513] *Cf., e.g.*, The Surplus Property Act of 1994, 50 U.S.C. App. § 1622; Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 484; and 10 U.S.C. § 2667 (leasing of non-excess property from the military departments) *with,* Pub. L. 100-526, 102 Stat. 2623 (1988), 10 U.S.C. § 2687, note and Pub. L. 101-510, 104 Stat. 1808 (1990), 10 U.S.C. § 2687 note.

[514] *See*, Benjamin L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 193 (1994); *See also*, DOD BRIM, Chapters 4 & 7 (1997) (personal property transfers and economic development conveyances). Furthermore, in order to facilitate DOD cooperation with local authorities dealing with the consequences of local disasters, 10 U.S.C. § 2546 authorizes the military departments to allow the use of military installations "to persons without adequate shelter" and provide bedding to "shelters for the homeless" operated by non-DOD entities. The military departments are also instructed to "use the services and personnel of such entities and organizations in determining to whom and the circumstances" that shelter will be provided. Congress authorized the military departments to open up their installations to people requiring shelter or provide incidentals, provided that military preparedness or ongoing military operations are not adversely affected. Furthermore, the military departments may provide bedding without reimbursement to homeless shelters, provided their military requirements were not

6. Discussion

a. Litigation Concerning Homeless Assistance

Notwithstanding the statutory authority for a base closure, the DOD will undertake a NEPA review of a base closure or realignment action concerning environmental justice issues pursuant to either statutory requirements or regulations.[515] Actions filed pursuant to the McKinney Act addressed various aspects or requirements of the act challenging reuse decisions for former federal facilities. [516] The following cases illustrate the concern that Congress had when it enacted the 1994 Redevelopment Act addressing the delays experienced by local communities following base closure and other problems.[517] These cases also highlight the viewpoint of some homeless advocates that litigation is a bona fide tool to resolve homeless issues.[518] In view of the issues litigated in these cases, incorporating environmental justice into the NEPA review process will provide fertile ground for additional litigation.[519] A series of decisions involving

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adversely affected. DOD regulations concerning sheltering the homeless pursuant to 10 U.S.C. § 2546 may be found at 32 C.F.R. Part 226 (1996).

[515] *See, supra*, Part III(C) and Part IV(D).

[516] *See, e.g.*, House the Homeless, Inc. v. Widnall, 94 F. 3d 176 (5th Cir. 1996) (title to former Air Force base); U.S. v. Village of New Hempstead, N.Y., 832 F. Supp. 116, 99 Ed. Law Rep. 137 (S.D.N.Y. 1993) (local zoning ordinance); National Law Center on Homelessness and Poverty v. U.S. Veterans Administration, 819 F. Supp. 69, (D.C. Cir. 1993) (scope of HUD canvassing effort).

[517] Vol 140 CONG. REC. S14457.

[518] Lauren Hallinan, *Preserving and Expanding the Rights of the Poor in Communities Where Military Bases are Closing*, 27 Clearinghouse Review 1184, 1194, February 1994.

[519] *See, supra*, Part V. Since the EPA's and the CEQ's environmental justice guidance requires identification of minority and low-income communities, and disproportionate and adverse impacts upon those communities, failure to adequately address those issues during the NEPA review process will prompt litigation. Furthermore, the 1994 Redevelopment Act encourages public participation (at least by homeless advocates) which, when coupled with the need to solicit the views of the minority and low-income

several Federal agencies showed the Federal government's less than stellar efforts in conveying surplus property to homeless advocacy groups and the persistent nature of certain issues arising under the McKinney Act, as well as the impact the litigation had upon reuse of Federal facilities.[520] The decisions reflect the Federal government's inability to meet, among other things, the McKinney Act's timetables,[521] to comply with the court's injunction, [522] and, to implement adequate outreach efforts.[523] Significantly, the Federal defendants were enjoined from disposing of property eligible under the McKinney Act, until they had complied with the terms of the injunction, which was substantially modified over time.[524] Notwithstanding widespread interest in obtaining

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communities pursuant to environmental justice principles, failure to solicit and consider those views will also prompt litigation.

[520] National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran's Affairs, 964 F.2d 1210, 296 U.S. App. D.C. 89 (D.C. Cir. 1992); National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran's Administration, 819 F.Supp. 69 (D.D.C. 1993); National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran's Administration, 765 F.Supp. 1 (D.D.C. 1991), *aff'd* 964 F.2d 1210 (D.C.Cir. 1992), *modified*, 819 F.Supp. 69 (D.D.C. 1993); National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran Affairs, 736 F.Supp. 1148 (D.D.C. 1990); National Coalition for Homeless v. U.S. Veteran's Administration, 715 F.Supp. 392 (D.D.C. 1989), *modified*, 819 F.Supp. 69 (D.D.C. 1993); National Coalition for Homeless v. U.S. Veteran's Administration, 695 F.Supp 1226 (D.D.C. 1988). These cases indicate that litigation concerning defects within the NEPA review process concerning environmental justice issues will most likely follow and further complicate reuse of former military installations.

[521] National Coalition for Homeless v. U.S. Veteran's Administration, 715 F.Supp. 392, 394 (D.D.C. 1989).

[522] National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran's Administration, 765 F.Supp. 1, 5 (D.D.C. 1991), *aff'd* 964 F.2d 1210 (D.C.Cir. 1992).

[523] National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran's Administration, 819 F.Supp. 69 (D.D.C. 1993) and National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran's Administration, 765 F.Supp. 1, 11-12 (D.D.C. 1991), *aff'd* 964 F.2d 1210 (D.C.Cir. 1992).

[524] National Coalition for Homeless v. U.S. Veteran's Administration, 695 F.Supp 1226, 1234, 57 USLW 2204 (D.D.C. 1988) and National Law Center on Homelessness and Poverty v. U.S. Dept. of Veteran's Administration, 819 F.Supp. 69 (D.D.C. 1993).

surplus Federal property for the homeless, only a small number of properties were used to assist the homeless under the McKinney Act.[525]

In United States v. Village of New Hempstead, New York,[526] the United States brought an action for declaratory and injunctive relief against the village and the Rockland Community Action Council, Inc. (ROCAC). The U.S. Army had leased property to ROCAC pursuant to the McKinney Act and the action arose from ROCAC's attempts to settle homeless families on the property.[527]

An implementing regulation found at 45 C.F.R. § 12a9(b)(10) provided that ROCAC "is not required to comply with local zoning requirements," although it otherwise was required to comply with local building codes and use restrictions.[528] The United States and ROCAC argued the regulation preempted the local zoning laws.[529]

The court noted that "a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and render . . . unenforceable . . . local laws that are otherwise not inconsistent with federal law" to determine whether the regulation was an "accommodation . . that Congress would have

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[525] Nancy Wright, *Not in Anyone's Backyard: Ending the "Contest of Nonresponsibility" and Implementing Long-Term Solutions to Homelessness*, 2 GEO. J. ON FIGHTING POVERTY, 163, 202 (1995).

[526] 832 F. Supp 76 (S.D.N.Y. 1993).

[527] United States v. Village of New Hempstead, New York, 832 F. Supp 76, 77 (S.D.N.Y. 1993). The Village of New Hempstead (Village) filed suit alleging, among other things, that ROCAC's use of the property violated the Village's zoning ordinances and restrictions. In response, the United States filed its federal action naming as defendants the Village, Village officials, and ROCAC. ROCAC's interests coincided with the Federal government's and it had filed cross claims against the Village defendants.

[528] *Id.* at 78.

[529] *Id.*

sanctioned."[530] The court also reviewed the McKinney Act's directive that "priority of consideration to uses" must be given unless a "meritorious and compelling" alternative exists.[531] The court concluded that the McKinney Act's explicit language and goals made it "impossible" for it to conclude that the Congress would not have sanctioned the accommodation and held the regulation was "a reasonable exercise of the promulgating agencies' authority under the Act," thus preempting the zoning ordinance.[532]

An attempt was made to apply the McKinney Act's homeless assistance provisions to other HUD housing programs, most notably its single family housing sales program under the National Housing Act.[533] The attempt failed due to plaintiff's failure to establish that the act "was intended to apply to [the department's] single family inventory, since the inventory is not subject to a survey requirement."[534]

Even when Federal property is leased to homeless advocacy entities pursuant to the McKinney Act, Port Gibson, Mississippi, Whitman "Grady" Mayo Scholarship Foundation v. U.S.[535] illustrated the need for vigilance by the Federal government to ensure that the terms of the lease are observed and the needs of the homeless are being addressed. Notwithstanding lease provisions requiring the lessee to maintain the leased federal building and to maintain insurance coverage on the premises, the lessee failed to

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[530] *Id.* at 79.

[531] *Id.*

[532] *Id.* at 79, 80.

[533] Lee v. Pierce, 698 F.Supp. 332 (D.D.C. 1988).

[534] *Id.* at 340-341. An argument can be made that Executive Order 12,898 is likewise not applicable to the single family housing sales program.

[535] 922 F.Supp. 1162 (S.D. Miss. 1996).

do so prompting the government to terminate the lease.[536] The court determined that a "continuous course of neglect" had occurred and provided a laundry list of deficiencies which included missing covers from electrical sockets, non-functioning and unsanitary bathroom facilities, and inoperable smoke detectors and fire extinguishers.[537] It concluded that "any fair minded inspection of the premises would lead to the inescapable conclusion that . . . this federal building had deteriorated far beyond ordinary depreciation and was in a state of negligent disrepair . . . and in places was unhealthy, unsafe and unsanitary.[538] The court ultimately concluded that "any reasonable landlord under these conditions would be justified in cancelling the lease contract."[539]

An out-of-the-ordinary aspect of the case is the lessee's installation of a "for profit" business in the building for which the Federal partially subsidized.[540] The lessee installed a radio station in the building without prior approval from the government that the government later approved apparently on the basis that the station would assist the homeless residents.[541] A troubling issue for the court, since an ongoing dispute concerning which party would be responsible for paying the utilities was in play at the

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[536] Port Gibson, Mississippi, Whitman "Grady" Mayo Scholarship Foundation v. U.S., 922 F.Supp. 1162, 1163-1164 (S.D. Miss. 1996).

[537] *Id.* at 1166.

[538] *Id.*

[539] *Id.* at 1167.

[540] *Id.* at 1167-1168.

[541] *Id.* at 1167.

time,[542] was the apparent payment by the Federal government of the station's utility costs.[543] The court remarked,

> The government found itself in the position of providing utilities for private enterprise which was housed in a homeless shelter. This was unfortunate as it is irresponsible. Governmental response to the needy is the moral obligation of any society, especially so in this land of plenty. But, unfettered governmental largess to private enterprise in the form of free rent, utility free housing for private enterprise has no explanation in the record of this case and is therefore as suspect as it is unexplained.[544]

The case highlights that the government's obligations may continue after conveyance of the property to a homeless advocacy group and may prove to be just as troublesome as identifying surplus property to assist the homeless.

Although the litigation did not directly concern requirements within the McKinney Act, a court has addressed the role that neighborhood or community opposition to the siting of a homeless shelter should have concerning the siting decision.[545] The City of Providence ("City") decided to develop a homeless shelter for homeless women and families which, in part, used McKinney Act funding for purchase and renovations.[546] Opposition to the proposed project developed in the neighborhood where the shelter was to be located on the basis of fears that "the economic and racial

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[542] *Id.* (Although the lessee obtained a lease for the property in question, the U.S. Post Office continued to use a portion of the building. Separate metering would have been very expensive. The parties apparently reached a verbal agreement to share utility costs. Despite the government's demands for payment, the lessee did not pay for its share of the utilities which was determined to exceed $923.00 per month.).

[543] *Id.* at 1167-1168.

[544] *Id.* at 1168.

[545] Project B.A.S.I.C. v. City of Providence, 1990 WL 429846 (D.R.I. 1990).

[546] *Id.* at 1 (D.R.I. 1990). The City implemented the program through the Providence Community Action Program (Pro-CAP) which received city funds to develop homeless shelters in the city. (*id.* at 7, fn 3).

diversity of the neighborhood would be upset by the shelter" which prompted the City to relocate the shelter.[547] In addition to delaying the opening of the shelter, the relocation also resulted in the loss of some grant money for the shelter.[548] The plaintiff asserted that the City's decision to bow to "racially motivated opposition" violated the Fair Housing Act (42 U.S.C. §§ 3601 *et seq.*).[549]

In addressing the City's argument the plaintiff did not have standing to bring the action, the court noted that the purpose for the Fair Housing Act was that there would "be 'fair housing throughout the United States.' . . . Congress intended this Act to . . . end . . . all discrimination in housing."[550] Thus, the court determined that if the City had, even in part, based its relocation decision on race or fears of "white flight," the plaintiff stated an "injury sufficient to withstand constitutional challenge."[551] After observing that the plaintiff's ability to prove its case may be difficult, the court noted that the requisite intent need not be "heinous," but may reflect a decision which has a disparate impact on minorities or "inspired by others whose motivations are not free from racial bias."[552] In a case the court observed had similar undertones, Residency Advisory Board v. Rizzo,[553]

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[547] *Id.* at 1.

[548] *Id.* at 2.

[549] *Id.* at 2, 5.

[550] *Id.* at 4.

[551] *Id.*

[552] *Id.* at 6.

[553] 567 F.2d 123 (3d Cir. 1977).

the court cited language in the Third Circuit's opinion as support for its conclusion that racially motivated pressures states a cause of action under the Fair Housing Act.[554]

Similarly, in City of Peekskill v. Rehabilitation Support Services, Inc.,[555] a case concerning transitional housing for homeless, mentally disabled persons, the court addressed the city's argument that its application for a preliminary injunction, seeking to prevent the defendant from acquiring condominium units for the homeless, should be granted on the basis, among other reasons, that the city faces a decline in its tax base due to the departure of families and businesses.[556] The defendant wished to purchase three condominium units for nine homeless mentally disabled persons and had applied for funding from a component of the Supportive Housing Demonstration Program to do so.[557] Ironically, the city had a strong history of supporting similar facilities in the past.[558] In the court's view, however, the city's past support did "not create grounds for refusing to provide any more such housing."[559] The court noted that the city's argument that it had already provided more than it s fair share came "perilously close to violating the Fair Housing Act . . .[which] prohibit[ed] actions 'that discriminate in the sale or rental, or

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[554] Project B.A.S.I.C. v. City of Providence, 1990 WL 429846, 6 (D.R.I. 1990) (Citing Residency Advisory Board v. Rizzo at p. 144, ". . . the circumstances of a sudden shift in the City's position from passive acceptance to active opposition, in the face of protests by demonstrators manifesting racial bias, provides some indication of an improper motive or purpose.").

[555] 806 F.Supp. 1147 (S.D.N.Y. 1992).

[556] City of Peekskill v. Rehabilitation Support Services, Inc., 806 F.Supp. 1147, 1151 (S.D.N.Y. 1992).

[557] *Id.* at 1150. (The Supportive Housing Demonstration Program is another component of the McKinney Act which may be found at 42 U.S.C. §§ 11381 *et seq.*).

[558] *Id.* at 1155-1156.

[559] *Id.* at 1156.

[that] otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap.'"[560] The city argued it had been made a "dumping ground" to which the court observed that if the city "feels it is wrongfully being treated by the state or county as a dumping ground for public housing, its political beef is with the state and the county."[561]

b. The 1994 Redevelopment Act and the Future of Federal Facility Re-Use

Future base reuse planning most likely will be patterned after the Base Closure Community Redevelopment and Homeless Assistance Act based upon the concerns Congress expressed in 1993 when enacting the 1994 Redevelopment Act.[562] One commentator has indicated that litigation can be used to create access to the reuse planning process in the event homeless and low income communities are excluded.[563] This possibility of confrontation was one factor which influenced Congress when it enacted the 1994 Redevelopment Act.[564]

As a result, the 1994 Redevelopment Act was intended to facilitate discussions between the LRA and homeless providers/representatives.[565] During development of a base reuse plan, "a community works in a collaborative process. . . . it is a strategy developed by [community-based, nonprofit and] religious organizations, local government, and interested regional agencies working together to effect change and

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[560] *Id.*

[561] *Id.* at 1156-1157.

[562] Vol 140 CONG. REC. S14457-14458.

[563] Lauren Hallinan, *Preserving and Expanding the Rights of the Poor in Communities Where Military Bases are Closing*, 27 Clearinghouse Review 1184, 1194, February 1994.

[564] Vol 140 CONG. REC. S 14457.

[565] Pub. L. 101-510, § 2905(b)(7)(C)(ii), (iii), 104 Stat. 1808 (1990), 10 U.S.C. 2687 note.

enhance the quality of life in their communities."[566] As noted above, the LRA is obligated to engage in an outreach process to disseminate information to homeless assistance providers.[567] The LRA is also obligated to ensure the community has an opportunity to get involved in the planning process.[568]

Furthermore, the HUD Secretary is required to specifically address the homeless assistance element in redevelopment plans submitted for approval and consult with homeless advocates concerning deficient plans.[569]

The litigation discussed above illustrates the problems facing conversion efforts under the McKinney Act and possible issues brought up by litigation under the 1994 Redevelopment Act, which would further complicated by addressing environmental justice issues.[570] Presumably the LRAs would take the lead in resolving differences with low income and homeless advocates when balancing their needs with those of the community.[571]

Part VIII Conclusion

A CEQ study concerning NEPA's effectiveness over the act's first 25 years concluded that although the implementing the act's requirements sometimes fell short of

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[566] HUD, REUSE GUIDEBOOK 15 (1996).

[567] *See, supra*, notes 456-57 and accompanying text.

[568] *See, supra*, notes 462, 467 and accompanying text.

[569] *See, supra*, notes 472-76, 489-490 and accompanying text; HUD, REUSE GUIDEBOOK 28 (1996).

[570] *See, supra*, Part VII(C)(6).

[571] *See*, Pub. L. 101-510, § 2905(b)(7)(C)(ii) & (iii), 104 Stat. 1808 (1990), 10 U.S.C. 2687 note; 32 C.F.R. § 176.20(c) (1996); HUD, REUSE GUIDEBOOK 8, 10 (1996) (consultation and outreach requirements).

the mark, study participants "felt that NEPA's most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of agency decisions."[572]

The act assisted Federal agencies in accomplishing their respective missions by giving them "a structured, analytical framework within which to make decisions integrating environmental, social, and economic factors."[573] The act forced Federal agencies to change and adapt to NEPA's decision making process.[574]

The act also opened up the decision making process to the public and allowed for increased public input which, in turn, became an educational process for the public as well.[575] Coordination among Federal agencies improved since NEPA's enactment which made the government's decision making process more efficient than it had been before its enactment.[576] NEPA's requirement that an interdisciplinary approach be used in the decision making process "anticipated the trend toward integrated and ecosystem thinking that is now recognized as critical to sustaining the environment in the 21st century."[577] NEPA also forced environmental planners to realize that evaluating the potential impacts

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[572] COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: ASTUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 7 (1997) (hereinafter "CEQ, NEPA STUDY (1997)).

[573] *Id.* at 11.

[574] *See, Problems and Issues with the National Environmental Policy Act (NEPA): Oversight Hearing Before the House Committee on Resources*, 105th Cong. (1998) (Statement of Lynton K. Caldwell, Professor of Public and Environmental Affairs, Indiana University).

[575] CEQ, NEPA STUDY 17 (1997).

[576] *Id.* at 21.

[577] *Id.* at 25.

from agency actions required more than a "one time" assessment.[578] Rather, due to changing conditions monitoring of anticipated impacts should be implemented to guard against "surprises" which can offset mitigation efforts.[579]

Notwithstanding shortfalls within implementation of NEPA's requirements and continuing problems concerning the environmental review process, the act has been successful.[580] The CEQ intends to initiate proposals to strengthen NEPA concerning the planning process, public participation measures, coordination requirements, the decision making process and management approaches.[581] Other commentators also have called for amendments to "fulfill NEPA's potential."[582]

Restoration efforts at installation will likewise continue to receive attention and attract litigation.[583] The time required to sufficiently clean up installations, as well as the overall scope of environmental restoration confronting the DOD could force local communities to experience delays converting former military installations to civilian use.

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[578] *Id.* at 32-32. ("The old paradigm for environmental management was 'predict, mitigate, and implement.' The new paradigm has emerged: predict, mitigate, implement, monitor, and adapt.").

[579] *Id.* at 32.

[580] *Id.* at iii; *See, also, Problems and Issues with the National Environmental Policy Act (NEPA): Oversight Hearing Before the House Committee on Resources*, 105th Cong. (1998) (Statement of Lynton K. Caldwell, Professor of Public and Environmental Affairs, Indiana University) ("Relative to many other statutory policies NEPA must be accounted an important success.").

[581] CEQ, NEPA STUDY 37 (1997).

[582] Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 204 (1998) (proposals include amending NEPA to clarify and expand statute, establishing a special court to adjudicate environmental controversies, amending the Constitution to place environmental protection on par with property rights); *See, also*, Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. OF L. A. LAW REV. 565, 604-5 (1997) (proposals include changes in public participation regulations, requirement to consider specific data, including environmental justice issues, and amending NEPA to cover environmental justice issues).

[583] *See, supra*, note 343; *See, also,* Part III(D)(2).

These delays can complicate the socioeconomic issues that may be present during a conversion effort.

NEPA planning undertaken by DOD can be complicated as well, since any NEPA analysis will have to account for future civilian uses to which the installations will be put by the local community. Since DOD environmental reviews are now required, by regulation, to comply with Executive Order 12,898, environmental reviews undertaken during the closure and realignment process will also have to take into account local minority and low-income communities. As a result, environmental reviews will have to factor in the characteristics of those communities and evaluate, in view of local community choices, available reuse options. Since the local communities normally will select the uses for the former military installations,[584] it will be a challenge for the DOD incorporating environmental justice issues.

If additional base closure rounds are in the Department of Defense's future, the procedures and requirements found in the 1994 Redevelopment Act should be adopted for reuse planning concerning the affected military installations and their corresponding communities. In view of the increasing concern for adverse and disproportionate impacts upon minorities and/or low-income communities, homeless assistance will be a significant issue. Adoption of the 1994 Redevelopment Act for future closure rounds would ensure local objectives in economic redevelopment are met, as well as ensure that

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[584] Benjamin L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L. J. 169, 190 (1994).

environmental justices issues are at least addressed in part, and would disentangle the federal government from disputes which are essentially local in nature.

The 1994 Redevelopment Act provides an excellent prototype for future base closures. When compared to the McKinney Act, the 1994 Redevelopment Act provides ample opportunity for low income and homeless advocacy groups to present their case before local officials and organizations, allowing the community to balance those needs with its overall economic recovery and redevelopment. The procedures provided in the McKinney Act do not minimize the possibility that litigation will follow due to the belated opportunities for low income and homeless representatives to present their views, and increases their fears that the needs of their constituencies will not be considered.[585] The 1994 Redevelopment Act supports, in contrast to the McKinney Act, both the CEQ's and the EPA's environmental justice guidance, since the act requires input from the homeless community, thus facilitating consideration of this issue pursuant to NEPA.

The 1994 Redevelopment Act ensures that the local community has more input concerning a military installation's future use.[586] In contrast, the McKinney Act emphasizes decision-making by Federal officials with respect to identifying the properties and reuse to assist the home.[587] Since the local community or communities will bear the

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[585] *See*, Lauren Hallinan, *Preserving and Expanding the Rights of the Poor in Communities Where Military Bases are Closing*, 27 Clearinghouse Review 1184, 1186, February 1994 ("[T]he entity that controls the land and planning will control community participation, the type of development, and allocation of tax revenue. If the entity that gains control is a high-income suburb with an intense commitment to preserving homeowner's perception of property values, development will be very different from if the redevelopment authority is a large county with high unemployment, lack of affordable housing, and unsheltered families.").

[586] *See, supra*, notes 462, 467 and accompanying text.

[587] *See, supra, e.g.*, notes 379, 385, 408 and accompanying text.

economic brunt of the closure decision, the decision concerning the reuse of former military installations is rightfully theirs.[588] The issues addressed in court decisions had an element of local interest that is more appropriately addressed at the local, not Federal, level. The not-in-my-back-yard mentality represented in the cases arguably could have been addressed or anticipated during the LRA's outreach efforts and resolved without litigation.[589] Presumably, the LRA would engage in a dialogue with minority or low-income communities that was prompted by inputs received by those communities during procedures set forth by the 1994 Redevelopment Act.[590] The parties would have an opportunity to resolve any disagreements without going to court.

Case law also illustrates why the Federal government may want local authorities dealing with people or organizations wishing to obtain former military installations.[591] Although the Federal government would not be able to directly ensure that environmental justice concerns are addressed, the 1994 Redevelopment Act provides the Federal government with the ability that any redevelopment plan does address environmental justice issues.[592] Also, in many cases, local authorities are in better position to ensure that agreements entered into between a LRA and a homeless provider are observed. Due to

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[588] Vol 140 CONG. REC. S14457 (Senator Pryor's comments concerning local communities' "new mission [to secure] their economic future").

[589] *See, e.g.*, Project B.A.S.I.C v. City of Providence, 190 WL 429846 (D.R.I. 1990); City of Peekskill v. Rehabilitation Support Services, Inc., 806 F. Supp. 1147 (S.D.N.Y. 1992).

[590] *See, supra*, Part VII(C)(4). Inputs would also be received by the appropriate Federal agency during the NEPA review process concerning possible reuses for former military installations.

[591] Port Gibson, Mississippi, Whitman "Grady" Mayo Scholarship Foundation v. U.S., 922 F. Supp. 1162 (S.D. Miss. 1996).

[592] *See, supra*, Part VII(C)(4)(g). The NEPA review process would also provide a Federal agency an opportunity to address environmental justice issues.

the large number of military installations closed during the last four closure rounds,[593] Federal officials may not be able to adequately monitor leases for these properties.[594]

In short, the 1994 Redevelopment Act presents the good model example to follow concerning reuse planning and providing for homeless assistance. The act attempts to strike a happy medium between the needs of the community and the needs of the homeless at the local level. In view of litigation that ensued concerning installations closed under the auspices of the McKinney Act, the 1994 Redevelopment Act offers a better solution, since the 1994 act facilitates reuse decisions concerning former military installations and promotes consideration of environmental justice issues.

The DOD believes the 1990 base closure act provided the "best tool" to make decisions concerning closures and realignments,[595] and offers a better alternative to 10 U.S.C. § 2687.[596] The Government Accounting Office previously reached the same conclusion,[597] and recommended that future rounds, if any, be modeled after the 1990 base realignment and closure legislation.[598]

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[593] GAO, LESSONS LEARNED 2 (1997) (97 of 495 major domestic installations closed as well as many smaller ones).

[594] *See*, UNITED STATES GOVERNMENT ACCOUNTING OFFICE, MILITARY BASES: UPDATE ON THE STATUS OF BASES CLOSED IN 1988, 1991, AND 1993 (GAO/NSIAD-96-149, August 6, 1996) (discussion of the adverse impacts upon resale values for former military installations closed during 1988, 1991, and 1993 closures).

[595] DOD, BRAC REPORT 23 (1998).

[596] *Id.* at 25.

[597] GAO, LESSONS LEARNED 36 (1997).

[598] *Id.* at 42.

It is inevitable that there will be more closure and realignment rounds, due to the DOD's pressing need to reduce the military infrastructure and save money.[599] If they occur, it can be expected that environmental justice issues will be interwoven into the decisions concerning reuse and restoration of the former military installations during the requisite NEPA review process associated with closure and realignment actions.

[599] DOD, BRAC REPORT 5 (1998). The DOD estimates it presently has 23% excess infrastructure capacity for all of DOD; 20-28% for the Army; 21-22% for the Navy/Marine Corps; and 20-24% for the Air Force. (*Id.* at 17). Estimated net cumulative savings of $14.0 billion through 2001 is expected, with $5.6 billion anticipated annually in 2002 and thereafter. (*Id.* at 45).