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May 24, 2006

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Department of Defense Inspector  
General's Report on the 2005 Defense  
Base Closure and Realignment  
Commission's Report Recommendation  
#193 Regarding Naval Air Station Oceana,  
Virginia

D-2006-091

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Department of Defense  
Office of Inspector General

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*Quality*

*Integrity*

*Accountability*



INSPECTOR GENERAL  
DEPARTMENT OF DEFENSE  
400 ARMY NAVY DRIVE  
ARLINGTON, VIRGINIA 22202-4704

MAY 24 2006

The Honorable George W. Bush  
President of the United States  
1600 Pennsylvania Avenue, NW  
Washington, D.C. 20500

Dear Mr. President:

The Base Closure and Realignment Commission (the Commission) issued a report of findings and recommendations to you on September 8, 2005, which you approved on September 15, 2005. Congress allowed the report to pass into law on November 9, 2005. The Commission's actions were taken under the authority of Public Law 101-510, "Defense Base Closure and Realignment Act of 1990."

This letter is provided in response to the Commission's conclusions and recommendations related to Naval Air Station (NAS) Oceana, Virginia, in the Commission's Report Recommendation #193, which contained six criteria. The Commonwealth of Virginia (Commonwealth) and the municipal governments of Virginia Beach and Chesapeake, Virginia, (municipal governments) satisfied five of the six criteria prescribed by the Commission for certification. The Commonwealth and the municipal governments have implemented a number of commendable actions to include the Commonwealth's enacting legislation and both municipal governments' adopting a series of ordinances to address the Commission's Report Recommendation #193.

The actions taken, however, did not satisfy the criterion to "enact state and local legislation and ordinances [*sic*] to establish a program to condemn and purchase all the incompatible use property located within the Accident Potential Zone 1 areas for Naval Air Station Oceana, as depicted in the 1999 AICUZ pamphlet published by the US [*sic*] Navy and to fund and expend no less than \$15 million annually in furtherance of the aforementioned program." Therefore, I am not able to certify full compliance with the BRAC criteria.

Recommendation #193 required the Department of Defense Inspector General to certify in writing to you and oversight committees of Congress by June 1, 2006, as to whether the Commonwealth and the municipal governments

had taken specified actions, by the end of March 2006, related to encroachment around NAS Oceana, Virginia. The Commission's Report Recommendation #193, states

Realign Naval Air Station Oceana, Virginia by relocating the East Coast Master Jet Base to Cecil Field, FL, if the Commonwealth of Virginia and the municipal governments of Virginia Beach, VA, and Chesapeake, Virginia, fail to enact and enforce legislation to prevent further encroachment of Naval Air Station Oceana by the end of March 2006, to wit:

- [1]<sup>1</sup> enact state-mandated zoning controls requiring the cities of Virginia Beach and Chesapeake to adopt zoning ordinances that require the governing body to follow Air Installations Compatible Use Zone (AICUZ) guidelines in deciding discretionary development applications for property in noise levels 70 dB Day-Night, average noise Level (DNL) or greater;
- [2] enact state and local legislation and ordinances [*sic*] to establish a program to condemn and purchase all the incompatible use property located within the Accident Potential Zone 1 areas for Naval Air Station Oceana, as depicted in the 1999 AICUZ pamphlet published by the US [*sic*] Navy and to fund and expend no less than \$15 million annually in furtherance of the aforementioned program;
- [3] codify the 2005 final Hampton Roads Joint Land Use Study recommendations;
- [4] legislate requirements for the cities of Virginia Beach and Chesapeake to evaluate undeveloped properties in noise zones 70 dB DNL or greater for rezoning classification that would not allow uses incompatible under AICUZ guidelines;
- [5] establish programs for purchase of development rights of the inter-facility traffic area between NAS Oceana and NALF [Naval Auxiliary Landing Field] Fentress;
- [6] enact legislation creating the Oceana-Fentress Advisory Council.

The full text of the Commission's NAS Oceana Findings and Recommendation #193 is included at Enclosure 1.

The Commission concluded that significant residential and commercial encroachment had continued around NAS Oceana and NALF Fentress for many years. The Report stated that the intent of the Commission was to ensure that the Commonwealth and the municipal governments took immediate and positive steps to halt pending encroachment and to roll back prior encroachment.

A summary of the Commonwealth and municipal governments' actions that serve as the basis for my analysis and my conclusions is provided at Enclosure 2. A map of NAS Oceana and NALF Fentress is included at Enclosure 3.

My office conducted the required analysis in accordance with Generally Accepted Government Auditing Standards. I provided criteria to the

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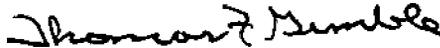
<sup>1</sup> For purposes of the evaluation, BRAC Recommendation #193 is numbered and divided into 6 separate criteria.

Commonwealth and the municipal governments on November 21, 2005, which mirrored Recommendation #193. On March 31, 2006, the Commonwealth and the municipal governments provided my office a "Compliance Demonstration Report,"<sup>2</sup> in response to Recommendation #193. My responsibility was to certify whether the actions complied with Recommendation #193, and not to determine whether the East Coast Master Jet Base should or should not remain in the Commonwealth, nor to determine the viability of alternatives to the Commission's recommendation.

We are also providing copies of the report to the following oversight committees of Congress: Senate Committee on Armed Services, Senate Appropriations Subcommittee on Defense, Senate Appropriations Subcommittee on Military Construction and Veterans Affairs and Related Agencies, House Committee on Armed Services, House Appropriations Subcommittee on Defense, and House Appropriations Subcommittee on Military Quality of Life and Veterans Affairs and Related Agencies.

If there are any questions regarding this matter, please contact me at (703) 604-8300, or Mr. John R. Crane, Assistant Inspector General for Communications and Congressional Liaison, at (703) 604-8324.

Respectfully yours,



Thomas F. Gimble  
Principal Deputy

Enclosures:  
As stated

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<sup>2</sup> Actual title is the "Compliance Demonstration Report Pursuant to Recommendation #193 of the 2005 Defense Base Closure and Realignment Commission Regarding Naval Air Station Oceana and Naval Auxiliary Landing Field Fentress, submitted by Commonwealth of Virginia, City of Virginia Beach, and City of Chesapeake, March 31, 2006" (referred to as the Virginia Compliance Demonstration Report).

## **Enclosure 1**

# 2005 Defense Base Closure and Realignment Commission Report Recommendation #193

of the Navy Broadway Complex, San Diego, California through the BRAC process. Enough time has lapsed since the 1987 legislation was passed to cause the Commission to act.

## COMMISSION RECOMMENDATIONS

The Commission found that the Secretary deviated from selection criteria 1, 3, and 4. Therefore, the Commission recommends the following: "If the Secretary of the Navy does not enter into a long-term lease on or before January 1, 2007 that provides for the redevelopment of the Navy Broadway Complex, San Diego, California, under the authority granted by Section 2732 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, close Navy Broadway Complex, San Diego, California, and relocate the units and functions on Navy Broadway Complex to other Department of the Navy owned sites in San Diego." The Commission found that this change and the recommendation as amended are consistent with the final selection criteria and the Force Structure Plan. The full text of this and all Commission recommendations can be found in Appendix Q.

## NAVAL AIR STATION OCEANA, VIRGINIA

### RECOMMENDATION # 193 (ADD)

ONE-TIME COST:	\$410.37M
ANNUAL RECURRING COSTS/(SAVINGS):	(\$17.10M)
20-YEAR NET PRESENT VALUE:	\$33.39M
PAYBACK PERIOD:	18 YEARS

## SECRETARY OF DEFENSE RECOMMENDATION

None. The Secretary's proposed list submitted on May 13, 2005 did not include this facility. It was added by the Commission on July 19, 2005 for further consideration.

## SECRETARY OF DEFENSE JUSTIFICATION

None.

## COMMUNITY CONCERNS

The Virginia Beach, Virginia community places high value on the military's contribution to the community and fears the loss of over 11,000 direct jobs would devastate the local economy. The state has invested significant resources in improved roads around the base and moving schools out of the Accident Potential Zones. They acknowledged noise complaints by a small, but vocal, minority of residents but pointed out that planning commissions are developing new community planning overlays to limit encroachment and reduce development in the Accident Potential Zones. They argued funds needed to implement the Commission's consideration to relocate the Master Jet Base to Cecil Field, Florida could be better spent on the Navy's more pressing needs. They believe the Navy has no better or affordable alternative than remaining at NAS Oceana and managing encroachment.

The Jacksonville, Florida community offered to return all of the former NAS Cecil Field property, improved and unencumbered - free and clear. Local governments are prepared to absorb and support the approximately 11,000 personnel that would be associated with the relocation of the Navy's Atlantic Fleet Master Jet Base to Cecil Field. The community has invested \$133 million to upgrade Cecil Field's infrastructure and has secured \$130 million in funding for a high speed access road from Cecil Field to Interstate Highway 10. All required base conversion activities, including a new or updated Environmental Impact Statement, can be completed in time to allow the Navy to establish and occupy a new Master Jet Base within the BRAC timeframe.

## COMMISSION FINDINGS

The Commission found that significant residential and commercial encroachment had continued around NAS Oceana and Naval Auxiliary Landing Fields (NALF) Fentress for many years and was exacerbated when the 1995 BRAC Commission redirected F-18 aircraft and supporting assets from MCAS Cherry Point, NC and MCAS Beaufort, SC to NAS Oceana to

take advantage of the excess capacity at NAS Oceana. It was the sense of the Commission that the encroachment issues were having a detrimental effect on the operations and training of the Navy's Atlantic Fleet Strike Fighter Wings and on the safety and welfare of the citizens of Virginia Beach and Chesapeake, VA. Consequently, the future for NAS Oceana as a Master Jet Base was severely limited, whereas Jacksonville, FL had taken effective and positive measures to protect the Air Installation Compatibility Use Zones (AICUZ) around Cecil Field, FL, and Naval Outlying Landing Field (NOLF) Whitehouse.

The intent of the Commission is to ensure that the State of Virginia and the municipal governments of Virginia Beach and Chesapeake take immediate and positive steps to halt the encroaching developments that are pending before them now and in the future, and also to roll back the encroachment that has already occurred in the Accident Potential Zones (APZ) around NAS Oceana and NALF Fentress, particularly in the APZ-1 areas. The Commission also considers that the more severe encroachment problems were created by the state and local governments by ignoring the Navy's repeated objections to incompatible residential and commercial developments under the AICUZ guidelines. Consequently, the funds to halt and reverse the encroachment should not come from federal funds, but rather from state and local funding sources.

It is the sense of the Commission that the Secretary of Defense deviated from the BRAC criteria by failing to consider NAS Oceana for closure or realignment. The longstanding and steadily worsening encroachment problem around NAS Oceana, without strong support from state and city governments to eliminate current and arrest future encroachment, will in the long term create a situation where the military value of NAS Oceana will be unacceptably degraded. The remedies presented to the Commission thus far have been unconvincing. It is also the sense of the Commission that the future of naval aviation is not Naval Air Station Oceana. The Commission urges the Navy to begin immediately to mitigate the noise encroachment and safety issues associated with flight operations around the Virginia Beach area by transitioning high-density training evolutions to other bases that are much less encroached, such as NOLF Whitehouse, FL, or Kingsville, TX.

The Secretary of Defense is directed to cause a rapid, complete due diligence review of the offer of the State of Florida to reoccupy the former NAS Cecil Field and to compare this review against any plan to build a new master jet base at any other location. This review is to be completed within 6 months from the date that the BRAC legislation enters into force and is to be made public to the affected states for comment. After review of the states' comments, which shall be submitted within 120 days after publishing the review, the Secretary of Defense shall forward to the oversight committees of Congress the review, the state comments, and his recommendation on the location of the Navy's future Atlantic Fleet Master Jet Base.

#### COMMISSION RECOMMENDATIONS

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The Commission found that when the Secretary of Defense failed to recommend the realignment of Naval Air Station Oceana, Virginia Beach, Virginia, he substantially deviated from final selection criteria 1, 2, 3, 4, and 5, and the Force Structure Plan; that the Commission add to the list of installations to be closed or realigned the recommendation:

Realign Naval Air Station Oceana, Virginia by relocating the East Coast Master Jet Base to Cecil Field, FL, if the Commonwealth of Virginia and the municipal governments of Virginia Beach, VA, and Chesapeake, Virginia, fail to enact and enforce legislation to prevent further encroachment of Naval Air Station Oceana by the end of March 2006, to wit: enact state-mandated zoning controls requiring the cities of Virginia Beach and Chesapeake to adopt zoning ordinances that require the governing body to follow Air Installation Compatibility Use Zone (AICUZ) guidelines in deciding discretionary development applications for property in noise levels 70 dB Day-Night, average noise Level (DNL) or greater; enact state and local legislation and ordinances to establish a program to condemn and purchase all the incompatible use property located within the Accident Potential Zone 1 areas for Naval Air Station Oceana, as depicted in the 1999 AICUZ pamphlet published by the US Navy and to fund and expend no less than \$15 million annually in furtherance of the aforementioned program; codify the 2005 final Hampton Roads Joint Land Use Study recommendations; legislate requirements for the cities of Virginia Beach and Chesapeake to evaluate undeveloped properties in noise zones 70 dB DNL or greater for rezoning classification that would not allow uses incompatible under AICUZ guidelines; establish programs for purchase of development rights of the inter-facility traffic area between NAS Oceana and NALF Fentress; enact legislation creating the Oceana-Fentress Advisory Council. It shall be deemed that the actions prescribed to be taken by the Commonwealth of Virginia, and the Cities of Virginia Beach, and Chesapeake respectively, by the end of March 2006 have not been taken in their entirety, unless the Department of Defense Inspector General so certifies in writing to the President and oversight committees of Congress by June 1, 2006; and, if the State of Florida appropriates sufficient funds to relocate commercial tenants presently located at Cecil Field, Florida, appropriates sufficient funds to secure public-private ventures for all the personnel housing required by the Navy at Cecil Field to accomplish this relocation and turns over fee simple title to the property comprising the former Naval Air Station Cecil Field, including all infrastructure improvements that presently exist, to the Department on or before December 31, 2006, if the Commonwealth of Virginia and the municipal government of Virginia Beach, VA, and Chesapeake, VA, decline from the outset to take the actions required above or within 6 months of

the Commonwealth of Virginia and the municipal governments of Virginia Beach, VA, and Chesapeake, VA, failing to carry through with any of the actions set out above, whichever is later. The State of Florida may not encumber the title by any restrictions other than a reversionary clause in favor of the State of Florida and short-term tenancies consistent with the relocation of the Master Jet Base to Cecil Field. It shall be deemed that the actions prescribed to be taken by the State of Florida and the City of Jacksonville respectively by the end of 31 December 2006 have not been taken in their entirety unless the Department of Defense Inspector General so certifies in writing to the President and oversight committees of Congress by June 1, 2007. If the Commonwealth of Virginia and the municipal governments of Virginia Beach, VA, and Chesapeake, VA, fail to take all of the prescribed actions and the State of Florida meets the conditions established by this recommendation, the units and functions that shall relocate to Cecil Field will include but are not limited to all of the Navy F/A-18 strike fighter wings, aviation operations and support schools, maintenance support, training, and any other additional support activities the Navy deems necessary and appropriate to support the operations of the Master Jet Base.

## **Enclosure 2**

# **2005 Defense Base Closure and Realignment Commission Report Criteria and Description of Findings and Results**

## **Background**

**Naval Air Facilities.** Naval Air Station (NAS) Oceana was originally established as an Auxiliary Airfield in 1940, became a Naval Auxiliary Air Station in 1943, and then was designated as a Master Jet Base in 1957. NAS Oceana is located in the eastern portion of the City of Virginia Beach, Virginia. NAS Oceana is one of the Navy's largest air stations and home for F/A-18 C/D Hornet and F-14 Tomcat aircraft squadrons, including F/A-18 C/D squadrons transferred in 1999 from Cecil Field, Florida, following 1993 Base Closure and Realignment Commission (BRAC) recommendations. In 2004, NAS Oceana began stationing F/A-18 E/F Super Hornets to replace the planned retirement of the F-14 and the older model F/A-18 C.

Naval Auxiliary Landing Field (NALF) Fentress was designated an auxiliary field to NAS Oceana in 1951. NALF Fentress is located in the northeast quadrant of the City of Chesapeake, Virginia, and 7 miles south of NAS Oceana. NALF Fentress serves as a major carrier landing training facility for aircraft stationed at NAS Oceana. (See Enclosure 3 for a map of NAS Oceana and NALF Fentress).

**Air Installation Compatible Use Zones.** "Air Installations Compatible Use Zones (AICUZ)," Title 32, Code of Federal Regulations (C.F.R.) Part 256, provides guidelines for achieving compatible use of property in the vicinity of military airfields. Part 256 reflects desirable restrictions on land use to ensure its compatibility with the characteristics, including noise, of air installation operations. The DoD AICUZ Program defines the Accident Potential Zones (APZs) and noise zones that represent areas where land use controls are needed to protect the health, safety, and welfare of those living near the military airport and to preserve the military defense mission. The restrictions were provided for safety of flight and to ensure that people and facilities are not concentrated in areas susceptible to aircraft accidents. The U.S. Department of the Navy issued a 1999 AICUZ pamphlet that included a map of the NAS Oceana and NALF Fentress areas, highlighting noise and land use considerations.

**Accident Potential Zone I.** Accident Potential Zone I (APZ-1) is an area beyond the clear zone which still possesses a measurable potential for accidents relative to

the clear zone.<sup>3</sup> APZ-1 is identified for areas that experience 5,000 or more fixed wing flight tracks annually. APZ-1 extends 8,000 feet beyond the runway with a width of 3,000 feet and may curve to conform to the predominant flight tracks. (Enclosure 3 identifies the APZ-1 areas for NAS Oceana and NALF Fentress).

**Joint Land Use Study.** In 2004 the cities of Chesapeake, Norfolk, and Virginia Beach, Virginia, partnered with the U.S. Navy to conduct the Hampton Roads Joint Land Use Study (JLUS). Completed in April 2005, the Hampton Roads JLUS explored opportunities to address land use decisions and to reduce noise effects on communities surrounding NAS Oceana, NALF Fentress, and other regional Navy bases while also accommodating necessary growth and maintaining regional economic sustainability. Recommendations from this study focused on specific policies to address land use, noise, and economic concerns of the surrounding communities. The goal of these policies was to create a uniform planning policy environment around the installations to help prevent future growth that would be incompatible with continuing military operations.

## **Findings and Results**

The following is a summary of the 2005 Defense BRAC Report criteria as defined in Recommendation #193 of the Report; actions taken by the Commonwealth of Virginia (Commonwealth) and the municipal governments of Virginia Beach and Chesapeake, Virginia, (municipal governments) as identified in the Virginia Compliance Demonstration Report; and a determination whether the actions satisfied the BRAC criteria.<sup>4</sup> Using Generally Accepted Government Auditing Standards, we reviewed the actions taken by the Commonwealth and the municipal governments, including the Virginia Compliance Demonstration Report, as the basis for our conclusions.

**BRAC Criterion (1)** The BRAC criterion language is as follows:

...enact state-mandated zoning controls requiring the cities of Virginia Beach and Chesapeake to adopt zoning ordinances that require the governing body to follow Air Installation Compatibility Use Zone (AICUZ) guidelines in deciding discretionary development applications for property in noise levels 70 dB Day-Night, average noise Level (DNL)<sup>5</sup> or greater.

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<sup>3</sup> The Clear Zone is the area immediately beyond a runway with the greatest potential for aircraft accidents and thus should remain undeveloped.

<sup>4</sup> For purposes of evaluation, BRAC Recommendation #193 is numbered and divided into 6 separate criteria.

<sup>5</sup> The DoD AICUZ program DNL noise metric averages aircraft noise events that occur over a 24-hour period, with increased weight given to nighttime aircraft operations. Decibel (dB) units reflect the relative intensity of sounds on a scale of zero for the average least perceptible sound to about 130 for the average sound induced pain level.

## **Description of Findings and Results for BRAC Criterion (1)**

The Commonwealth of Virginia action satisfied BRAC criterion (1).

On March 30, 2006, the Commonwealth enacted legislation, specifically House Bill (H.B.) 975 and Senate Bill (S.B.) 565<sup>6 7</sup> directing

...the governing body of any locality in which a United States Navy Master Jet Base, or an auxiliary landing field used in connection with flight operations arising from such Master Jet Base, is located shall adopt zoning ordinances that require the governing body to follow Navy Air Installation Compatible Use Zone (AICUZ) guidelines in deciding discretionary applications for property in noise levels 70 dB DNL or greater.

**BRAC Criterion (2)** The BRAC criterion language is as follows:

...enact state and local legislation and ordinances [*sic*] to establish a program to condemn and purchase all the incompatible use property located within the Accident Potential Zone 1 areas for Naval Air Station Oceana, as depicted in the 1999 AICUZ pamphlet published by the US [*sic*] Navy and to fund and expend no less than \$15 million annually in furtherance of the aforementioned program.

## **Description of Findings and Results for BRAC Criterion (2)**

The Commonwealth of Virginia and the City of Virginia Beach took significant actions to address the criterion; however, the actions did not satisfy BRAC criterion (2).

**Commonwealth of Virginia Actions.** The Commonwealth enacted H.B. 975 and S.B. 565, that stated in part

For the purpose of preventing further encroachment, the governing body of any locality in which a United States Navy Master Jet Base is located shall adopt ordinances to establish a program to purchase or condemn pursuant to § 2, incompatible use property or otherwise seek to convert such property to an appropriate compatible use and to prohibit new uses or development deemed incompatible with air operations in the Accident Potential Zone 1 (APZ-1) and Clear Zone areas.

The legislation did not satisfy the BRAC criterion because the legislation allowed for the purchase “or” condemnation of property, the program was dependent on voluntary actions by property owners, and condemnation did not apply to all the incompatible use properties as defined in the 1999 AICUZ pamphlet.

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<sup>6</sup> Commonwealth of Virginia House Bill 975, 2006 Reg. Sess. 1, Va. Code Ann. § 2.2-2666.3 (referred to as H.B. 975) and Senate Bill 565, 2006 Reg. Sess. 1, Va. Code Ann. § 2.2-2666.3 (referred to as S.B. 565).

<sup>7</sup> H.B. 975 and S.B. 565 have exactly the same language.

**Use of Purchase or Condemn.** The use of the words “purchase or condemn” in H.B. 975 and S.B. 565 did not meet the BRAC criterion. The words “condemn and purchase” in the BRAC criterion make both actions mandatory, whereas, under H.B. 975 and S.B. 565, localities have the option of taking either action. Thus, the Commonwealth’s program does not include all required elements of the BRAC criterion because by using purchase “or” condemn the Commonwealth established parameters that do not comply with the BRAC criterion.

**Condemnation Dependent on Voluntary Actions by Property Owners.** H.B. 975 and S.B. 565, state, in part

For the purposes of preventing further encroachment, all localities in which a United States Navy Master Jet Base is located are hereby granted the power to exercise the limited right of eminent domain in acquisition of any lands, easements, and privileges for the purpose of protecting public safety by providing unobstructed airspace for the landing and takeoff of aircraft utilizing such Master Jet Base and preventing incompatible development within APZ-1 and Clear Zone areas surrounding such Master Jet Base. The power to exercise the limited right of eminent domain may only be exercised where 1. The property is located wholly or partially within an APZ-1 or Clear Zone area as described in the United States Navy’s 1999 AICUZ Pamphlet; 2. The property is zoned for residential use, but is undeveloped, and use restrictions imposed by the locality to protect the APZ-1 or Clear Zone areas have left the property without a reasonable use; 3. The locality has made a bona fide offer to purchase the property from the owner and the owner and the locality have not been able to agree on the terms thereof; and 4. The owner of the property has made a written request to the locality that the property be acquired by the locality by eminent domain.

A condemnation proceeding is commonly understood to be an action brought by a condemnor in the exercise of its power of eminent domain.<sup>8</sup> An action instituted by the land owner would not constitute condemnation.<sup>9</sup> H.B. 975 and S.B. 565 provide for the property owner to request that the property be acquired by the locality by eminent domain. However, the legislation has no provision for condemnation should property owners not present a request.

**Applicability to All the Incompatible Use Property.** H.B. 975 and S.B. 565, stated that a governing body of any locality with a United States Navy Master Jet Base, shall adopt ordinances to establish a program to prohibit development deemed incompatible with air operations in the APZ-1 areas, as

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<sup>8</sup> Va. Code Ann. § 25.1-100 provides that “*petitioner*” or “*condemnor*” means any person that possesses the power to exercise the right of eminent domain and that seeks to exercise such power under this chapter. The term “*petitioner*” or “*condemnor*” includes any person required to make an effort to purchase property as provided in § 25.1-204.

<sup>9</sup> Under Va. Code Ann § 25.1-204, condemnation proceedings are not even instituted until after the condemnor has made a bona fide but ineffectual effort to purchase from the owner the property sought to be condemned.

depicted in the 1999 AICUZ pamphlet. The following table depicts the “Land Use Compatibility with APZs,” included in the 1999 AICUZ pamphlet. The table identifies the various land uses and those that are considered incompatible within APZ-1. Land uses considered incompatible are identified in **red** under “APZ-1” and include single-family residential, all other residential, assembly areas, hospitals, sanitariums, and nursing homes.

<b>LAND USE COMPATIBILITY WITH APZs</b>			
<b>Land Use</b>	<b>Clear Zone</b>	<b>APZ 1</b>	<b>APZ 2</b>
Single-Family Residential (less than one dwelling per acre)	RED	RED	BLUE
All other Residential	RED	RED	RED
Public Rights-of-way	BLUE	GREEN	GREEN
Assembly Areas-Schools, Churches, Libraries, Auditoriums, Sports Arenas, Preschools, Nurseries, and Restaurants	RED	RED	RED
Hospitals, Sanitariums, and Nursing Homes	RED	RED	RED
Office, Retail	RED	BLUE	BLUE
Wholesale Stores/Manufacturing/Industrial	RED	BLUE	GREEN
Outdoor Uses-Playgrounds, Neighborhood Parks, Golf Courses, Riding Stables	RED	BLUE	GREEN

**Red** = incompatible, **Blue** = conditionally compatible, **Green** = compatible

**Source:** 1999 AICUZ Pamphlet (Table 2) Land Use Compatibility with APZs

The BRAC criterion was very clear in requiring the establishment of a program to condemn and purchase all the incompatible use property as depicted in the 1999 AICUZ pamphlet. H.B. 975 and S.B. 565, however, permitted application of condemnation only for undeveloped residentially zoned property, as follows:

The power to exercise the limited right of eminent domain may only be exercised where: ...2. The property is zoned for residential use, but is undeveloped, and use restrictions imposed by the locality to protect the APZ-1 or Clear Zone areas have left the property without a reasonable use...

As such, because H.B. 975 and S.B. 565 did not address all of the categories identified in the 1999 AICUZ pamphlet, to include “single-family residential” and “all other residential” properties, H.B. 975 and S.B. 565 did not meet the BRAC criterion to address all the incompatible use property. The Commonwealth actions therefore did not satisfy the BRAC criterion.

**City of Virginia Beach Actions.** According to the Virginia Compliance Demonstration Report, the City of Virginia Beach adopted a series of ordinances and implementation plans to establish an “APZ-1 Program” to address the BRAC criteria. According to the Virginia Compliance Demonstration Report, the APZ-1 Program consisted of 3 principal components to accomplish the following:

- Ordinance No. 2907, “APZ-1 Ordinance,” December 20, 2005, to immediately halt all new incompatible development in APZ-1.
- Ordinance No. 2914K, “APZ-1/Clear Zone Use and Acquisition Plan,” December 20, 2005,<sup>10</sup> to target the acquisition of certain properties that were adversely affected by zoning changes under the APZ-1 Ordinance.
- Ordinance Nos. 2934C and 2934D, “Oceana Land Use Conformity Program,” March 28, 2006, that combines a variety of tools including property acquisition, tax incentives, zoning incentives, and financial assistance to encourage the conversion of pre-existing non-conforming<sup>11</sup> uses property in APZ-1 to conforming uses.

The City of Virginia Beach established a limited acquisition program to acquire property located in both APZ-1 and the Clear Zone.<sup>12</sup> However, the program did not satisfy the BRAC criterion. Specifically, the program did not address all the incompatible use property located in APZ-1, as depicted in the 1999 AICUZ pamphlet. In addition, the program relied on voluntary actions by owners and limited the use of condemnation to undeveloped residentially zoned property.

**APZ-1 Property.** According to the Virginia Compliance Demonstration Report, the APZ-1 area includes approximately 1,575 acres of privately owned property with a total estimated current appraised value of \$655 million. Of the 1,575 acres, approximately 360 acres are undeveloped (60 are zoned residential), 385 acres are developed with conforming uses, and 830 acres are currently developed with non-conforming uses of which about 550 acres are developed for residential use totaling approximately 3,400 dwelling units with an estimated value of \$422.7 million.<sup>13</sup>

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<sup>10</sup> Virginia Beach revised Ordinance No. 2914K under Ordinance No. 2923D on February 14, 2006, to include the Clear Zones in addition to APZ-1.

<sup>11</sup> Virginia used the word “non-conforming,” a Virginia Beach zoning term, rather than the word incompatible that is used in the 1999 AICUZ pamphlet and the BRAC criterion.

<sup>12</sup> Virginia Beach expanded the ordinance to include the Clear Zone though not required by the BRAC criterion.

<sup>13</sup> We did not validate the Commonwealth data.

**Consideration of All the Incompatible Use Property.** The APZ-1 Ordinance provided that

...no use or structure shall be permitted on any property located within APZ-1 unless such use is designated as compatible in APZ-1 in Table 2 (Air Installations Compatible Use Zones Land Use Compatibility in Accident Potential Zones) of Section 1804; provided, however, that any use or structure not designated as compatible shall be permitted as a replacement of the same use or structure if the replacement use or structure is of equal or lesser density or intensity than the original use or structure.

The APZ-1 Ordinance exempted existing uses and structures, thus allowing existing property considered incompatible under the 1999 AICUZ pamphlet to remain in place. In addition, the APZ-1 Ordinance allowed for the modification, expansion, or rebuilding of existing structures or uses as long as the use or structure is of equal or lesser density or intensity than permitted under the original zoning. At the time the APZ-1 Ordinance was adopted, there was potential for new “by-right”<sup>14</sup> incompatible development and land use in APZ-1 including 60 acres of undeveloped property zoned for by-right development of 460 new residential dwellings, plus 410 residential lots zoned by-right for duplex use but currently developed with only single family residences. The APZ-1 Ordinance effectively reinstated by-right protection for all other developed residential property (except duplex opportunities) thus allowing approximately 3,000<sup>15</sup> incompatible use dwellings to remain in APZ-1.

According to the Virginia Compliance Demonstration Report, the justification for excluding existing structures and uses within APZ-1 from the APZ-1 Ordinance was the use of the phrase “enact and enforce legislation to prevent *further* encroachment of NAS Oceana.” In addition, the Virginia Compliance Demonstration Report stated that “any interpretation of the specific requirements of the BRAC law must give effect to this prefatory language.” Even though the introductory language to the Commission recommendations made reference to further encroachment, the Commission Finding stated, “the intent of the Commission is to ensure that the State of Virginia and the municipal governments of Virginia Beach and Chesapeake take immediate and positive steps to halt the encroaching developments that are pending before them now and in the future, and also to roll back the encroachment that has already occurred in the Accident Potential Zones (APZ) around NAS Oceana and NALF Fentress, particularly in the APZ-1 areas.” In addition, the specific BRAC criterion requires the enactment of state and local legislation and ordinances to “establish a program to condemn

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<sup>14</sup> “By-right” refers to development that the City Zoning Ordinance permits without the need for specific approval by the City Council. By-right uses are referred to in the City Zoning Ordinance as “principal uses” that require only ministerial approvals rather than discretionary development decisions.

<sup>15</sup> The approximately 3,000 is based on 3,400 dwelling units less approximately 410 units that lost the by-right capability to expand to duplex properties under the APZ-1 Ordinance.

and purchase **all** (emphasis added) the incompatible use property located within the APZ-1 areas for NAS Oceana, as depicted in the 1999 AICUZ pamphlet.” The 1999 AICUZ pamphlet identifies the incompatible use property to include residential dwellings and does not distinguish between existing or future.

The Virginia Compliance Demonstration Report further stated that the term “incompatible use” may be interpreted in a manner consistent with the Navy’s practice under Chief of Naval Operations Instruction (OPNAVINST) 11010.36B, “Air Installations Compatible Use Zones Program,” December 19, 2002, as well as the Navy’s position in connection with the Hampton Roads JLUS. Specifically, Virginia Beach considered that OPNAVINST 11010.36B provided that, recommendations regarding compatible land use within each accident potential zone may vary according to local conditions, and local planning authorities may desire to implement different criteria than those included to reflect specific local conditions.

However, the 1999 AICUZ pamphlet, rather than OPNAVINST 11010.36B, was clearly and specifically called out in the BRAC criterion, and the table included in the 1999 AICUZ pamphlet (see above) defines what is considered incompatible uses. Further, although published by the Navy, the 1999 AICUZ pamphlet repeatedly refers to DoD as the originator of the APZ compatibilities depicted in the pamphlet and makes no reference to Navy AICUZ guidelines. Therefore, the 1999 AICUZ pamphlet table is the source for identification of what property uses are considered incompatible in APZ-1 under the BRAC criterion.

The JLUS, officially published by the Hampton Roads Planning District Commission, provided recommendations regarding land development policy and implementation responding to the Navy’s air mission in the region.<sup>16</sup> Although the Navy provided assistance; the document was not a Navy publication. However, regardless of Navy’s position in connection with the study, the 1999 AICUZ pamphlet was the reference designated by the BRAC criterion in determining what should be considered incompatible use property.

According to the 1999 AICUZ pamphlet, incompatible uses include “single-family residential; all other residential; assembly areas; and schools, hospitals, sanitariums, and nursing homes.” Although Virginia Beach ordinances described property that included these uses as pre-existing, non-conforming under city zoning terminology, the 1999 AICUZ pamphlet considered these uses incompatible. As such, references to OPNAVINST 11010.36B or past Navy practices regarding existing incompatible uses around NAS Oceana sidestep the

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<sup>16</sup> Sponsors of JLUS were the Cities of Virginia Beach, Chesapeake, and Norfolk, the Hampton Roads Planning District Commission, and the Department of Defense Office of Economic Adjustment.

unambiguous language of the BRAC criterion to include “all the incompatible use property” in an APZ-1 program. Should an accident occur with a Navy aircraft within APZ-1 at any time in the future, whether a property is considered non-conforming pre-existing or incompatible, the potential for property damage and injury to life still exists.

**Virginia Beach Property Acquisitions Limited to Voluntary Owner Requests.** According to the APZ-1/Clear Zone Use and Acquisition Plan, for those properties considered by Virginia Beach as incompatible uses, acquisition by eminent domain would be limited to those properties where the owner voluntarily initiated an offer for the city to purchase the property. Specifically, the plan stated that, “beginning January 1, 2006, property owners desiring to sell their property consistent with the provisions of the APZ-1/Clear Zone Use and Acquisition Plan shall notify the City Manager by letter.” The Virginia Compliance Demonstration Report, projected voluntary participation at 23 percent of the 1,155 acres designated as eligible for acquisition.<sup>17</sup> As such, due to the voluntary nature of the APZ-1/Clear Zone Use and Acquisition Plan, Virginia Beach has not provided any recourse to purchase property from those owners who do not wish to participate voluntarily.

**Use of Condemnation.** The BRAC criterion requires that Virginia Beach enact ordinances to establish a program to condemn and purchase all incompatible use property located within the APZ-1 areas for NAS Oceana, as depicted in the 1999 AICUZ pamphlet. The APZ-1/Clear Zone Use and Acquisition Plan stated that eminent domain would be used only to acquire undeveloped property zoned for residential use, and then only if the property has no other reasonable use and efforts to voluntarily purchase the property have failed. In such cases, eminent domain would be used to compensate the owner. The APZ-1/Clear Zone Use and Acquisition Plan further states that eminent domain would not be used for developed residential property or either developed or undeveloped non-residential property.

According to the Virginia Compliance Demonstration Report, a property condemnation program does not require condemnation of fee interests. Rather, it is sufficient to condemn easement interests that preclude new incompatible uses. Thus, the Virginia Compliance Demonstration Report considers that condemnation was accomplished by the APZ-1 Ordinance, because the ordinance “was the equivalent of condemning and purchasing restrictive easements over all privately owned property in APZ-1.”

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<sup>17</sup> We did not validate the Commonwealth data or the projection.

The APZ-1 Ordinance was a zoning change to make future development compliant with provisions patterned after OPNAVINST 11010.36B. Although a taking of property through eminent domain could be accomplished using a restrictive easement, the APZ-1 Ordinance made no provision for condemnation, which is a BRAC requirement. Even if the APZ-1 Ordinance is considered the equivalent to condemning and purchasing privately owned property in APZ-1, the ordinance does not cover “all the incompatible use property” because it is restricted to 60 acres of undeveloped residentially zoned property the city valued at \$15.6 million. Moreover, the APZ-1 Ordinance only provided partial restrictions on property rights and did not halt all the incompatible uses because the ordinance exempted existing structures and uses from its provisions. By doing so, the ordinance allowed 3,000 dwellings to remain as residential property and potentially be replaced as long as the land use density did not increase. The BRAC criterion did not require re-zoning the vicinity of NAS Oceana, but rather to condemn and purchase all the incompatible use property.

The BRAC criterion is very clear in requiring that Virginia Beach establish a program to condemn and purchase **all** the incompatible use property as defined in the 1999 AICUZ pamphlet. Virginia Beach actions do not address all the incompatible use property within APZ-1 since they permit approximately 3,000 existing dwelling units to remain within the APZ-1.

**Funding Uses.** The BRAC criterion requires the Commonwealth and the City of Virginia Beach to enact state and local legislation and ordinances to establish a program, and to fund and expend no less than \$15 million annually in furtherance of the program.

Both the Commonwealth and the City of Virginia Beach satisfied the funding portion of the BRAC criterion by appropriating and designating funds of \$15 million annually in furtherance of the program. Specifically, H.B. 975 and S.B. 565 stated,

...the governing body of any locality in which a United States Navy Master Jet Base is located shall adopt ordinances to establish a program to purchase or condemn pursuant to § 2, incompatible use property or otherwise seek to convert such property to an appropriate compatible use and to prohibit new uses or development deemed incompatible with air operations in the Accident Potential Zone 1 (APZ-1) and Clear Zone areas, as depicted in the Navy’s 1999 AICUZ Pamphlet, and fund and expend no less than \$15 million annually in state and local funds in furtherance of the program, to the extent that properties or development rights are reasonably available for acquisition or their use reasonably may be converted. Further, such funding and expenditures shall be subject to annual appropriations from the state and locality, and shall continue until such time as all reasonably available properties or development rights have been acquired in the designated areas.

The City of Virginia Beach established funding through the following means:

- The APZ-1/Clear Zone Use and Acquisition Plan directed the City Manager, each fiscal year, to include in the city's annual budget, funds for the purpose of acquiring properties within APZ-1 and Clear Zones designated for acquisition in the amount of \$15 million, or such greater amount as circumstances may warrant.
- Virginia Beach Ordinance 2928B established Capital Improvement Project #9-060, "Conformity and Acquisition Fund – APZ-1 and Interfacility Traffic Areas," for the purpose of purchasing land or interests in land and facilitating the conversion of nonconforming property uses to conforming uses in the APZ-1 areas surrounding NAS Oceana, and for the purpose of purchasing land or interests in land or property in the Interfacility Traffic Area.
- Virginia Beach Ordinance No. 2934G, stated that the Virginia Beach City Council appropriated \$15 million, in advance of approval of the fiscal year 2006-07 budget, to be transferred into Capital Project #9-060, on May 9, 2006.

**BRAC Criterion (3)** The BRAC criterion language is as follows:

...codify the 2005 final Hampton Roads Joint Land Use Study recommendations.

**Description of Findings and Results for BRAC Criterion (3)**

The Commonwealth of Virginia action satisfied BRAC criterion (3).

The Commonwealth enacted H.B. 975 and S.B. 565 directing,

...the governing body of any locality in which a United States Navy Master Jet Base, or an auxiliary landing field used in connection with flight operations arising from such Master Jet Base, is located, to adopt such ordinances or take such other actions as may be recommended in any Joint Land Use Study that has been officially approved by the governing body of the locality.

In addition, prior to the Commonwealth legislation, on May 10, 2005, the Virginia Beach City Council adopted Resolution No. 03123 accepting the final Hampton Roads JLUS Report. On May 24, 2005, the Chesapeake City Council adopted Resolution No. 05-R-027 adopting the Hampton Roads JLUS.

**BRAC Criterion (4)** The BRAC criterion language is as follows:

...legislate requirements for the cities of Virginia Beach and Chesapeake to evaluate undeveloped properties in noise zones 70 dB DNL or greater for rezoning classification that would not allow uses incompatible under AICUZ guidelines.

**Description of Findings and Results for BRAC Criterion (4)**

The Commonwealth of Virginia actions satisfied BRAC criterion (4).

The Commonwealth enacted H.B. 975 and S.B. 565 directing,

...the governing body of any locality in which a United States Navy Master Jet Base, or an auxiliary landing field used in connection with flight operations arising from such Master Jet Base, is located shall undertake an evaluation of undeveloped properties located in noise zones 70 dB DNL or greater to determine the suitability of such properties for rezoning classifications that would prohibit uses incompatible under AICUZ guidelines.

**BRAC Criterion (5)** The BRAC criterion language is as follows:

...establish programs for purchase of development rights of the inter-facility traffic area between NAS Oceana and NALF Fentress.

**Description of Findings and Results for BRAC Criterion (5)**

The Commonwealth of Virginia actions and actions by the municipal governments of Virginia Beach and Chesapeake satisfied BRAC criterion (5).

The Commonwealth enacted H.B. 975 and S.B. 565 directing,

...the governing body of any locality in which a United States Navy Master Jet Base, or an auxiliary landing field used in connection with flight operations arising from such Master Jet Base, is located, to establish programs to purchase land or development rights in the corridor of land underneath the flight path between the Master Jet Base and the auxiliary landing field known as an interfacility traffic area.

On December 20, 2005, the Virginia Beach City Council adopted the Interfacility Traffic Area Property Acquisition Plan, dated December 15, 2005. On February 28, 2006, the Chesapeake City Council adopted the Interfacility Traffic Area Property Acquisition Plan, dated January 23, 2006, and approved it for immediate implementation. Both plans provided for a program for the cities to buy either the development rights or fee simple title of the property, with the preferred acquisition being the fee simple title.

**BRAC Criterion (6)** The BRAC criterion language is as follows:

...enact legislation creating the Oceana-Fentress Advisory Council.

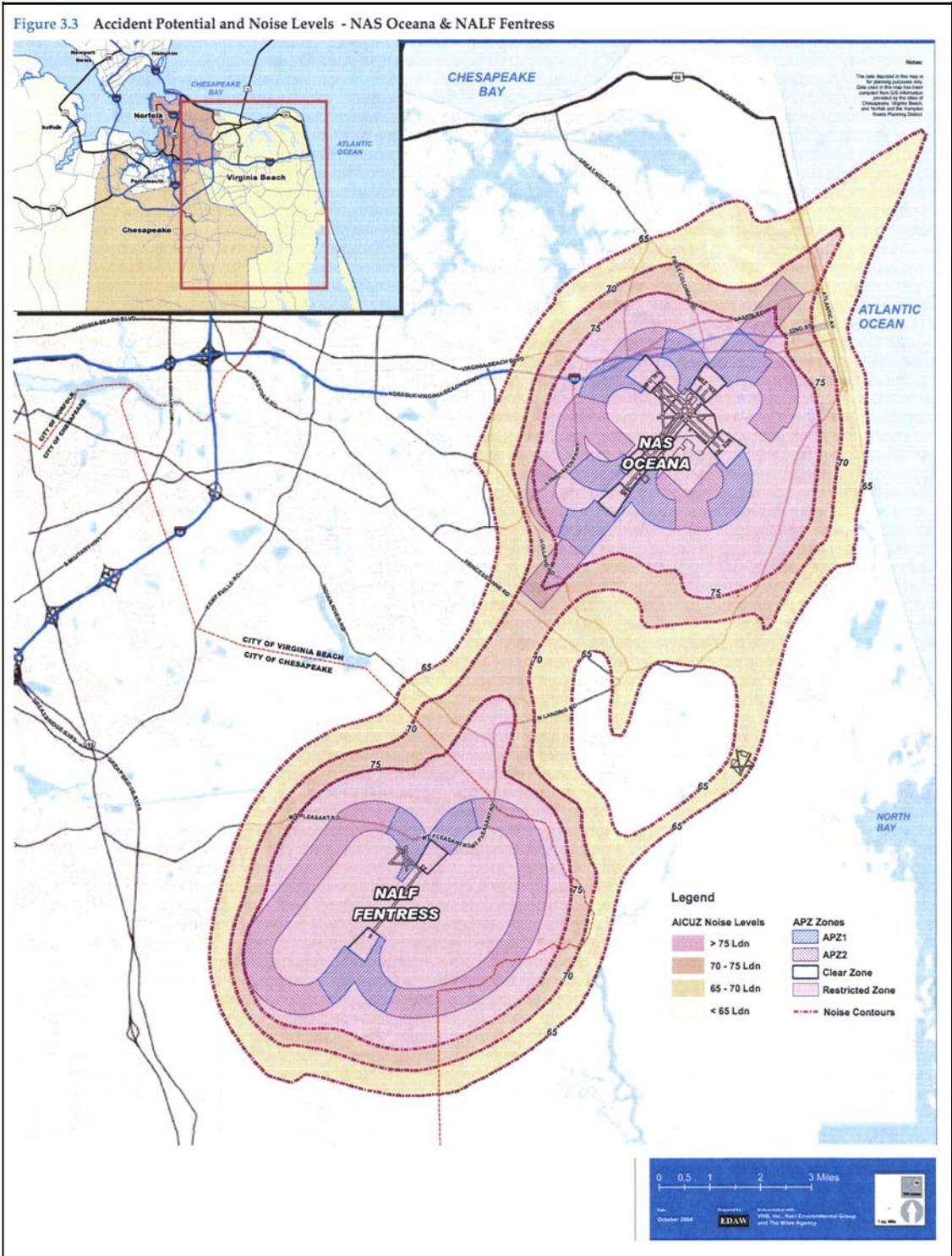
**Description of Findings and Results for BRAC Criterion (6)**

The Commonwealth of Virginia actions satisfied BRAC criterion (6).

The Commonwealth enacted H.B. 975 and S.B. 565, which created the Oceana-Fentress Advisory Council. The advisory council, a sub-unit of the Virginia Military Advisory Council, would include representation from the City Councils of Virginia Beach and Chesapeake, the Virginia General Assembly, and the U.S. Navy. The advisory council would identify, study, and provide advice and comments to the Virginia Military Advisory Council on issues of mutual concern to the Commonwealth and the Navy concerning NAS Oceana and NALF Fentress.

## **Enclosure 3**

# NAS Oceana and NALF Fentress



Source: Hampton Roads Joint Land Use Study, April 2005