Department of Defense

EARLY TRANSFER AUTHORITY

A Guide to Using ETA to Dispose of Surplus Property

October 2004

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Prepared by
The U.S. Department of Defense

October 2004

DOD EARLY TRANSFER AUTHORITY GUIDE

The U.S. Department of Defense (DoD), Office of the Deputy Under Secretary of Defense (Installations and Environment)/Environmental Management (ODUSD([&E]/EM) has prepared this Early Transfer Authority (ETA) Guide to assist Military Components in the disposal of surplus property using the provision for early transfer in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). ETA applies to all federal property but has proven to be especially effective at some base closure sites where its application facilitates accelerated property reuse by streamlining the transfer, cleanup, and redevelopment of environmentally contaminated property.

As environmental restoration and cleanup programs progress, opportunities to return contaminated properties to productive use are increasing. ETA gives DoD the opportunity to dispose of environmentally contaminated property for the purposes of both cleanup and redevelopment faster than traditional transfer methods. DoD currently has surplus property, primarily as a result of military base closures under the base realignment and closure (BRAC) program. Some of this property is environmentally contaminated, and legally, DoD may not transfer property until all necessary environmental remedial actions have been taken. ETA provides an exception to this requirement, authorizing DoD to transfer the property before completing remedial actions, when certain conditions are met.[1] By executing an early transfer, DoD may transfer the property to a redeveloper who can conduct cleanup and redevelopment activities concurrently, saving time and money.

Although ETA is available to any federal agency seeking to transfer federal property, it is particularly useful for property that DoD intends to transfer under the BRAC program. Since Congress granted this authority in 1996, only 21 early transfers of former DoD property have been completed. There are several possible reasons why the Military Components have not used ETA widely up to this point. One primary

[1] CERCLA § 120(h) sets conditions for exercising authority to grant early transfer.

reason is that transferring contaminated property requires understanding, allocating, and managing environmental, legal, and financial risks. Other factors can preclude taking advantage of ETA, such as community adversity to and lack of understanding of the risks, lack of support from state and local environmental regulators, lack of understanding of the legal requirements by state and local regulators, funding constraints, and unfamiliarity with ETA and its potential benefits.

DoD believes that community and environmental regulator concerns with ETA stem from a lack of information regarding what ETA is, how it is used, and how the process ensures the protection of public health, safety, and the environment. Because so few have been completed, the Department believes ETA is underutilized and has prepared this guide to foster a better understanding of ETA's benefits and processes.

Property that makes an ideal candidate for early transfer is compatible with the anticipated future use, has manageable environmental contamination, is marketable, and has community interest and public support. The critical considerations for DoD are the legal, financial, and environmental risks associated with transferring the property before completing environmental remediation. Other factors include real estate and market forces that determine the near-term desirability of the property for reuse and environmental contamination issues. Regulator and community support play a significant role in whether an early transfer is practical or possible. The early transfers achieved to date have been based on building strong relationships between all parties as they work through the site-specific circumstances and weigh the risks and benefits of early transfer opportunities.

CONTENTS

1. ABOUT THIS GUIDE

This guide provides information about early transfer and associated issues and explains how ETA can facilitate the transfer and productive reuse of contaminated DoD property. It provides information for Military Component personnel and state and local environmental regulators on how to recognize situations where early transfer may be beneficial by examining three examples of successful early transfers. This guide also describes the steps necessary to complete an early transfer, explains the early transfer process, and provides a list of resources for additional information about ETA.

This document focuses on the requirements set by CERCLA and DoD guidance. The U.S. Environmental Protection Agency (EPA) (for National Priorities List, or NPL, sites) and individual states, however, may have their own regulations, policies, and guidance on early transfer. Military Components should determine and follow applicable federal and state regulations and policies. This guide is not a substitute for or intended to modify any implementing regulations, policies, or guidance.

While this guide is primarily intended for Military Component personnel who manage environmental cleanup, the roles of other Military Component personnel, including legal counsel and those who manage real estate and other transactions, are discussed as well. This guide also addresses the roles of non-DoD parties who are integral to the ETA process, including EPA, the General Services Administration (GSA), state environmental regulators, prospective purchasers, local government entities, Local Redevelopment Authorities (LRAs), and the public. Community members interested in the mechanics of early transfers may find this useful as an informational resource.

Because property disposal authority for non-BRAC, surplus DoD real property generally rests with GSA, a GSA representative will normally be involved as the property disposal agent for the early transfer of non-BRAC DoD property. The Military Component, however, will remain responsible for handling the environmental issues and preparing and submitting the documentation necessary for the determination of suitability for early transfer.

Selected materials appended to this guide provide additional information and supporting documentation, including statutory language, guidance documents, a glossary, and a roster of early transfers executed to date.

2. WHAT IS EARLY TRANSFER AUTHORITY?

CERCLA requires that federal agencies complete all environmental remedial actions before transferring property by deed to a nonfederal entity. In 1996, Congress amended CERCLA to provide a mechanism by which a state governor, or a governor and the EPA Administrator for sites listed on the NPL, could approve a property transfer before all environmental remediation is completed. The law, as amended, sets the conditions that must be met and the determinations that must be made before such a transfer can occur. Both DoD and EPA have issued guidance on the implementation of this authority. The relevant parts of CERCLA and the federal guidance documents are provided at the end of this guide.

When an early transfer occurs, ownership of the property moves from DoD to another party, but DoD, per CERCLA, retains all legal liability and responsibility for environmental remediation of contamination existing at the time of property transfer. Prior to completing the transfer, the parties will reach an agreement as to whether DoD, the property recipient, or a combination of both parties will finish the cleanup posttransfer.

Property transfer using ETA has several advantages over traditional property transfer methods. This section describes traditional transfers and early transfers, and explains how early transfers integrate cleanup and redevelopment activities, increase investment in property, place property on local tax rolls sooner, and create jobs and revenue for the community.

WHAT IS THE TRADITIONAL METHOD OF TRANSFER?

Under traditional property transfers, DoD may transfer property by deed to a nonfederal entity after all environmental remedial action has been taken, as required by CERCLA. Specifically, CERCLA requires that the federal agency, when transferring property on which any hazardous substance was stored, released, or disposed of, provide a covenant in the deed that warrants that

all remedial action necessary to protect human health and the environment with respect to any hazardous substance remaining on the property has been taken before the date of such transfer.[2] Because CERCLA requires other covenants that are not germane to the early transfer issue, any reference to "the CERCLA covenant" in this guide refers only to this covenant. This CERCLA covenant is not required if the transferee is potentially responsible for causing the contamination.

Under CERCLA, "all remedial action" has been taken when

- Construction and installation of an approved remedial design has been completed, and
- The remedy has been demonstrated to the Administrator of the EPA to be "operating properly and successfully" (OPS). A remedy will be determined to be OPS if a remedial action is operating as designed, and if its operation will achieve the cleanup levels or performance goals delineated in the decision document. Additionally, in order to be successful, the remedy must be protective of human health and the environment. A remedy must receive an OPS determination from EPA in situations where the operation of the remedy is ongoing, such as a pump-and-treat system.

WHAT IS AN EARLY TRANSFER?

"Early transfer," as used in this guide, is the transfer by deed of federal property by DoD to a nonfederal entity before all remedial actions on the property have been taken. CERCLA requires that DoD clean up contaminated property to protect human health and the environment

[2] *CERCLA § 120(h)(3)(A)(ii)(I). Pertinent excerpts for the statute are appended to this guide.*

prior to transferring property by deed. At any one time, DoD may have a significant amount of property to transfer, only a portion of which has environmental contamination. This results in the entire property sitting unused for years while environmental restoration is ongoing. To overcome this problem, Congress amended CERCLA to authorize a deferral of the CERCLA covenant that requires all remedial actions to be completed before federal property is transferred. This allows the community to beneficially reuse property sooner and the redeveloper to integrate cleanup and development, saving time and money.

Either a state governor (for properties not listed on the NPL) or the EPA Administrator[3] with the state governor's concurrence (for sites listed on the NPL) may defer the CERCLA covenant after making the required findings based on DoD's assurances. The specific findings and assurances required for a deferral are discussed in detail in Section 3 of this guide.

Upon approval to defer the covenant, DoD may proceed with the early transfer. After DoD transfers the property and completes all remedial actions, the Department provides a warranty to the transferee that all response actions have been completed. The transferee must then record the warranty with the deed to the property.

[3] *The EPA Administrator, through delegation of authority 14-41, delegated this authority to the EPA Regional Administrators.*

WHAT ARE THE BENEFITS OF EARLY TRANSFER?

DoD has used ETA intermittently since its adoption in 1996. Based on the early transfers to date, using ETA benefits communities and DoD both economically and environmentally. It integrates cleanup and redevelopment, ensuring contamination is remediated to levels necessary for the intended use while simultaneously taking advantage of the inherent cost savings by addressing remediation requirements with planning and construction on the property. Using ETA also increases opportunities for property investment and generation of tax revenues, allows for property reuse sooner, and removes DoD from the business of managing property that is surplus or designated for divestiture.

Increasing the use of ETA will give more communities the opportunity to take advantage of these benefits as well as increase the benefits to DoD. These benefits, however, will not be realized without all involved parties investing time and effort, understanding and accepting a variety of risks, and trusting each other. The following section describes some of the advantages of using ETA for communities and DoD.

Integrating Cleanup and Redevelopment

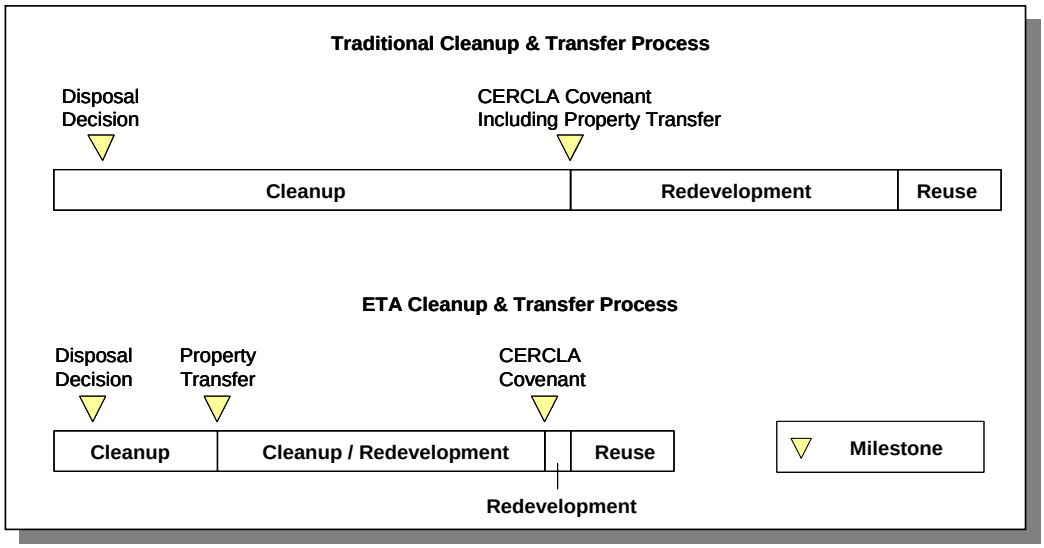
In a traditional property transfer, the remedial action and redevelopment must occur consecutively. ETA allows DoD to divest the property prior to taking all remedial action. This makes it possible for the property recipient to fully integrate environmental cleanup activities with redevelopment activities. Such integration can dramatically increase efficiency, saving time and money. For example, under a traditional

transfer approach, DoD may remove soil contamination by physically digging a ditch, treating the soil, and then replacing the treated soil. Later, a developer may excavate the site in order to build the foundation for a building, install utilities, or change elevations to support redevelopment, again removing the soil. If these activities were integrated, the soil could be removed and shipped off site for treatment or disposal while the redevelopment is ongoing, eliminating the unnecessary step of replacing and again removing the soil. By integrating cleanup and redevelopment, three important outcomes can be realized:

- Planned reuse is aligned with existing conditions
- Cleanup is done just once, and done to the appropriate levels for reuse
- Property will be reused significantly faster.

Figure 1 illustrates how time is saved by overlapping cleanup, transfer, and redevelopment activities with an early transfer as opposed to consecutively conducting these activities in a traditional cleanup scenario.

Figure 1: Traditional vs. ETA Cleanup and Transfer



While saving time is important and has numerous benefits, other potential benefits associated with expediting transfer and reuse include cost savings and achieving environmental benefits sooner. For example, in the excavation scenario mentioned previously, DoD would save money by not replacing the soil, and the redeveloper would save money by not removing the soil.

Remediating to the Level Necessary for the Intended Use

Integrating land use planning and site remediation decisions early in the remedial process and matching the remedy with the reuse can save time and money by establishing contaminant cleanup levels early and remediating to cleanup levels appropriate for the intended land use. For example, property that is intended to be used for industrial purposes does not require the same cleanup levels as property intended for residential use. An April 2002 report issued by the U.S. General Accounting Office (GAO) confirmed this benefit, suggesting that early transfers may reduce difficulties establishing the extent of cleanup required for transfer and minimize the conflict over the property's reuse.[4] This means avoiding spending both time and money remediating beyond what is needed for reuse, and unnecessarily limiting reuse options after remedy selection.

[4] *U.S. General Accounting Office. Military Base Closures: Progress in Completing Actions from Prior Realignments and Closures. GAO-02-433, April 5, 2002.*

Increasing Opportunities for Investment in the Property

Property ownership opens financing opportunities for the transferee. One of the more difficult tasks for a community is finding a redeveloper and financing for the property. Before securing the title to the property, most developers, banks, and other investors are not willing to take a risk and invest their time and money on a venture that may not come to fruition. Whether funding comes from local bond issues, private investors, grants, or other sources, the recipient can more easily get loans for cleanup and redevelopment by using the property as collateral. Developers are also able to attract investors and obtain long-term commitments from industrial or retail lessees because they already own the property.

Protection from Liability Defined

As part of every transfer of DoD property, the property recipient is afforded protection from liability by a CERCLA §120(h) covenant for environmental contamination caused by DoD. The federal government is responsible for cleaning up any contamination that can be attributed to DoD activities discovered after the property is transferred. For BRAC property, an additional protection is the indemnification provided by the National Defense Authorization Act for FY93. DoD indemnifies transferees and lessees of base closure property from legal action for releases or threatened releases of hazardous substances resulting from DoD activities. In addition to the protections DoD provides by law, the use of commercial environmental insurance may provide added assurance about future liability and assist in attracting financing and stimulating investment in former DoD property.

Reusing the Property Sooner

Early transfers put property back into productive use sooner and benefit the local community by creating new jobs, generating revenue, and putting federal property back on the local tax rolls much earlier.

Removing DoD from the Business of Managing Property

DoD benefits from early transfers because, by divesting the property sooner, DoD reduces expenses associated with maintaining the property and may even gain revenue from the sale. In addition, by transferring rather than leasing the property, DoD reduces both its landlord responsibilities and liability as a federal property owner.

WHAT ARE THE OPTIONS FOR EXECUTING CLEANUP?

Under an ETA scenario, a variety of options for conducting and funding the cleanup are available. Depending on the terms of the cleanup agreement, DoD, the transferee, or another party may conduct or fund the cleanup; however, DoD remains responsible for ensuring that all necessary response actions have been taken. Before transfer, DoD and the transferee must agree about which party will perform or complete the cleanup after the transfer occurs. Three types of agreements are possible:

- DoD executes the cleanup.
- Property recipient executes the cleanup.
- Both DoD and the property recipient execute cleanup activities.

DoD conducts all cleanup activities in full compliance with CERCLA and the National Contingency Plan.

DoD Executes the Cleanup

DoD may execute the cleanup and work with the property recipient to incorporate the redevelopment plans concurrently. The remediation at Grissom Air Force Base, Indiana, is an example of a situation in which DoD conducted the cleanup. Grissom Air Force Base was closed during the 1991 BRAC round. The entire Grissom installation is approximately 2,722 acres, and the portion closed under BRAC is 1,345 acres.

The Air Force negotiated the early transfer of 201 acres to the State of Indiana in June 1997. Contamination included underground storage tanks, a hydrant system, fire training areas, landfills, and a fuel sludge weathering site. During negotiations, the state regulators wanted the Air Force to retain the responsibility and liability for cleanup. The Air Force provided assurances both verbally and in the relevant documents that it would indeed retain these responsibilities.

Indiana redeveloped the property into a state correctional facility. The remaining properties are part of the Grissom Aeroplex complex, catering to several businesses. The Grissom Redevelopment Authority continues to transform the installation into an area that includes housing, retail and office space, industrial facilities, green fields, and an aviation complex. There are over 20 businesses currently in the Grissom Aeroplex complex.

Property Recipient Executes the Cleanup

In some cases, the property recipient may want to conduct the cleanup activities to better integrate cleanup with the redevelopment. Depending on the agreement between the recipient and DoD, DoD may provide funding for some or all of the cleanup activities through an environmental services cooperative agreement (ESCA) or other contract mechanism. The specifics of such an agreement are explained later in this document. Once the property is conveyed, the property recipient works with the appropriate environmental regulators to conduct the cleanup. The property recipient at the U.S. Naval Fleet Industrial Supply Center (FISC) Oakland, California, achieved regulatory closure of the contaminated portions of the property after transfer by addressing site remedies in the context of its $700 million intermodal shipping terminal construction project.

FISC Oakland was designated for closure in the 1995 BRAC round. In June 1999, a 201-acre portion of the property was conveyed via early transfer. The remaining 330 acres were environmentally suitable for transfer and were transferred without early transfer authority. The Navy and the transferee, the Port of Oakland, entered into an ESCA, wherein the Port agreed to complete the environmental remediation and long-term monitoring for a fixed price. This allowed the Port to use portions of its redevelopment project as components of the remediation project. For example, the Port dredged the ship channel and used the dredged material and concrete paving in the container yard to cap the environmental sites. The Navy and Port agreed to two limitations on the Port's

responsibilities for cleanup — the ESCA would apply only during the construction period for the Port's redevelopment project, and the Navy would return in the event the Port encountered unknown conditions of "catastrophic" proportions, including munitions or radiological materials. The Port agreed to be responsible for any unknown environmental problems that could occur during construction to eliminate the risk of costly delays due to the need to call the Navy back for any "noncatastrophic" cleanup.

In addition, the Port acquired insurance to cap its environmental cleanup costs and to cover unforeseen environmental conditions discovered during construction.

To address the state regulators' concerns, the Port of Oakland and the State of California environmental regulators, under the leadership of California's Department of Toxic Substance Control, entered into a Consent Agreement. The Consent Agreement established the requirements and commitments by the parties to manage the post-conveyance cleanup, once the property was no longer federal land. Since then, the Navy has issued a final CERCLA warranty. Now the Port of Oakland is responsible for future monitoring and reporting. In the end, the form and substance of the agreements proved to be a workable framework for the parties to fulfill their responsibilities, goals, and objectives with and clear lines of responsibility and minimum conflict.

Both DoD and the Property Recipient Execute Cleanup Activities

DoD and the recipient may decide to execute cleanup activites together. For example, DoD

and the LRA are executing cleanup activities at Mare Island, California, where the Navy retained responsibility for chemical, biological, and some munitions issues, while the property recipients undertook the routine site remediation efforts.

The Mare Island Naval Shipyard was identified for closure during the 1993 BRAC round. The Mare Island early transfer process comprised two major real estate transactions. The Eastern Parcel (approximately 700 acres) encompasses the main industrial and development core of the base, and the Western Parcel (approximately 2,800 acres) includes some developed areas as well as dredge ponds, tidelands, marshes, and submerged lands that revert to the State of California under legal agreements dating back more than 150 years.

The Navy and LRA entered into an ESCA for the Eastern Parcel, valued at $78 million, to be funded over three years. The Eastern Parcel will be remediated by the City of Vallejo's master developer, Lennar Mare Island, and Lennar's environmental contractor under a development contract with the City of Vallejo. The governor approved the covenant deferral for the Eastern Parcel in 2001, and the Navy transferred the Eastern Parcel by deed to the LRA in 2002.

The Navy and the city agreed to a separate ESCA, funded at $53 million over six years, to complete the regulatory closure process on the 2,800 acres of reversionary lands that were subject to the early transfer, as well as remediation and regulatory closure of additional reversionary lands that will transfer to the state when cleanup actions are completed. The LRA, through a remediation contractor, is remediating

the Western Parcel under a leasing agreement with the state. It will operate the dredge ponds, providing cost-effective uplands disposal sites to support San Francisco Bay-area dredging projects in the near future. As required by the State of California, the LRA obtained environmental insurance under each of the ESCAs to cap its environmental cleanup costs and to cover unforeseen environmental conditions discovered during construction. The Navy retains some cleanup responsibility for adjacent lands as well as funding responsibilities if certain contaminants that were excluded from the ESCAs (such as radiological or biological materials) are encountered during the cleanups. The governor approved the covenant deferral for the Western Parcel, and the Navy transferred this parcel by deed to the State of California in 2002.

The professional commitments, perseverance, technical skills, and cooperation among the Navy, community, state and federal environmental regulatory agencies, and other stakeholders made the early transfer process successful for both the Eastern and Western Parcels, even though the complexity of the agreements required considerably more time than originally anticipated. The stakeholders involved in the process dealt with issues of residual polychlorinated biphenyls, Resource Conservation and Recovery Act (RCRA) permits, asbestos, unexploded ordnance, and other challenges, and addressed them in negotiations. The efforts of the city council and support of the Congressional delegation were especially helpful in making the ETA a success.

The current redevelopment process includes large real estate development firms and world-

class environmental cleanup contractors working for and with the City of Vallejo to implement the community reuse plan. The redevelopment has created more than 1,000 new jobs in fields such as custom metal fabrication, commercial paints and coatings, commercial lumber distribution, and elementary education. The early transfers made it possible to move the industrial areas onto the local tax rolls immediately and to accelerate private investment, economic development, and job generation several years earlier than would have otherwise been possible. The beneficial effects of these precedent-setting agreements will be felt throughout the region and State of California. The LRA is transforming the historic Mare Island Naval Shipyard into a major commercial, retail, and recreational destination located in the northern portion of the San Francisco Bay at the apex of major interstate highways and the entrance to Napa Valley.

The documents required for these agreements are discussed more thoroughly in Sections 4, How to Execute an Early Transfer, and 5, Tools for Executing an Early Transfer.

3. REQUIREMENTS FOR AN EARLY TRANSFER

Although any federal property is eligible for early transfer, the property must meet certain statutory requirements and be a viable candidate for an early transfer. An ideal candidate for early transfer is property that is compatible with the anticipated future use, has manageable environmental contamination, is marketable, and has community support. DoD and the property recipient must place proper restrictions on the property to protect human health and the environment until all necessary response actions have been taken. The recipient and environmental regulators must agree on responsibilities and timetables for remediation after transfer. DoD must demonstrate that it has or will request adequate funding for remedial action. This section discusses the statutory criteria and other factors necessary for an early transfer.

WHAT ARE THE FOUR LEGAL CRITERIA FOR EARLY TRANSFER?

CERCLA requires that the Military Component must demonstrate to the state governor, and the EPA Administrator for properties listed on the NPL, that the contaminated property meets four criteria before ETA may be exercised.[5] These criteria are intended to ensure that the proposed transfer and subsequent reuse do not pose an unacceptable risk to human health and the environment. Once the state governor (and the EPA Administrator when appropriate) determines that these four conditions are satisfied, they may defer the CERCLA covenant and approve the early transfer. To be considered for early transfer, the Military Component must demonstrate that

- The property is suitable for the intended use, and the intended use is consistent with protection of human health and the environment.

[5] *CERCLA § 120(h)(3)(C).*

- The deed or other agreement for property transfer contains the following four assurances:
  - Any use restrictions on the property necessary to ensure the protection of human health and the environment will be implemented.
  - There will be use restrictions necessary to ensure that required remedial and oversight activities will not be disrupted.
  - All necessary response actions will be taken, and the schedules for investigating and completing all necessary response actions, as approved by the appropriate environmental regulatory agency, will be identified.
  - The Military Component will submit to the Director of the Office of Management and Budget (OMB) a budget request that adequately addresses schedules for investigation and completion of all necessary response actions, subject to Congressional authorizations and appropriations.
- The Military Component has published a notice of the proposed transfer and has provided an opportunity for public comment, within a period of not less than 30 days.
- Early transfer will not substantially delay any necessary response actions on the property.

Although there are not specifically prescribed processes to meet the four criteria, DoD has historically compiled a documentation package, otherwise known as the CERCLA Covenant Deferral Request (CDR) package, to meet the legal requirements. This documentation is based on DoD guidance and the Military Components' experience. The CDR package, its development, and approval process are discussed in Section 4.

The four statutory criteria are described below.

Criterion 1: Property Must be Suitable for Intended Use and Consistent With Protections

Whether the intended reuse is compatible with protecting human health and the environment must be considered when determining if the property is suitable for early transfer. Often restrictions on land use may be appropriate to control exposure to existing contamination during the covenant deferral period and, in some cases, after remediation is complete. In such cases, the Military Component, EPA, state environmental regulator, and property recipient must understand the use limitations during and after cleanup. For example, the transferee should understand that it would not be able to use contaminated groundwater or place a child care facility on property suitable for industrial uses. Land use restrictions, whether temporary during the covenant deferral period or permanent after remediation is complete, ensure that users are not subject to exposure pathways. These restrictions can be modified over time as the remediation progresses and exposure pathways change. For example, an area of contaminated soil could be turned into a parking lot, or a building restricted to industrial use could become available for unrestricted use after remediation is completed.

Criterion 2: The Deed or Other Property Transfer Agreement Contains Assurances

All involved parties must understand and consider the legal, financial, and environmental risks associated with transferring the property

before completing environmental remediation. The assurances contained in the deed or other property transfer agreements are one way to build confidence with federal and state regulators that the Military Component will retain ultimate responsibility for the cleanup and protect human health and the environment. These assurances provide for:

- Protection of human health and the environment through any necessary land use restrictions
- Undisrupted remediation and oversight activities
- Complete and timely cleanup
- The Military Component budgeting for the remediation.

Criterion 3: The Public Notice Requirement Is Met

The Military Component is statutorily required to give the public notice and opportunity to comment on an early transfer. The Military Component must place a notice of the proposed early transfer in the local newspaper and give the public 30 days to comment on the suitability of the property for early transfer. While this is the only legal requirement for public participation, DoD policy is to involve the local community in the environmental restoration process as early as possible and to seek continued community involvement throughout the process. This also helps to build the community's trust and support for the early transfer and provides an opportunity to address community concerns prior to the required public review.

Criterion 4: Early Transfer Will Not Delay Response Actions

The last major criterion in determining suitability for an early transfer is the requirement that the CERCLA covenant deferral and property transfer will not substantially delay remedial activity. Early transfer's potential benefits cannot come at the expense of necessary environmental cleanup activities. In some cases where the Military Component is conducting the cleanup, the remediation activities could interfere with the transferee's ability to redevelop the property. For example, extensive soil contamination that requires substantial use of heavy equipment on a site could be problematic for reuse. A property with contaminated groundwater but with access to potable water might require a relatively small area for remediation and be better suited for reuse. Synchronizing cleanup and redevelopment activities requires extensive coordination between the parties and may be best served if the transferee conducts the remediation.

WHAT SITES ARE SUITABLE FOR EARLY TRANSFER?

While all surplus properties are eligible to be transferred before all remedial action is taken, not every property is a viable candidate for early transfer. There are a variety of considerations that must be evaluated when deciding if property is suitable or desirable for early transfer. The critical considerations for DoD are the legal, financial, and environmental risks associated with transferring the property before completing environmental remediation. Other factors include real estate and market forces, environmental contamination issues, intended reuse, and regulator and community support, all playing a

role in determining whether an early transfer is practical or possible. There is no simple formula or checklist to determine which properties are suitable for early transfer. The early transfers to date have been based on building strong relationships between all parties where good communication and mutual goal setting are paramount to work through the site-specific circumstances. All involved parties must consider the circumstances, weigh the risks and benefits, and work together to find mutually agreeable solutions.

Environmental Impact Analysis Defined

As part of reuse planning, the Military Components must consider all reasonable disposal alternatives and their respective environmental consequences prior to disposing of property. This process, required by the National Environmental Policy Act (NEPA), is intended to help the Military Components make informed and environmentally responsible disposal decisions. NEPA requires analysis of impacts to natural and cultural resources (e.g., historic structures, wetlands, threatened and endangered species, Native American sites, and others), and the Military Component may be required to consult with other federal and state agencies before making final property disposal decisions. For surplus property, the redevelopment plan, if available and to the extent legally permissible, will be the primary factor in the development of the proposed action, reasonable alternatives, and effects analysis in the NEPA process for the disposal action.

Depending on the terms of the cleanup agreement, DoD, the property recipient, or another party may conduct or fund the cleanup. Regardless of who conducts the cleanup, there are legal, financial, and environmental risks associated with transferring the property before completing environmental remediation. DoD's goal is to minimize these risks. Experience to date has also demonstrated that even when risks seem apparent in preliminary proposals for early transfers, the senior decision makers can often find alternatives that better balance risks and benefits through meaningful exchanges of information, including goals and objectives, followed by detailed discussions. Some tools for minimizing risk include environmental insurance, fixed-price contracts for environmental remediation, and consent agreements. The early transfer successes to date have occurred because decision makers on both sides have put considerable effort into working together to find viable and balanced solutions.

The local government entity, redeveloper, or LRA (in the case of BRAC property) examines real estate market forces and determines whether the property is desirable. Such an analysis may include examining whether the real estate market in the area is favorable, whether the property is in a desirable location, or whether a specific site affects the ability to effectively market the entire property. For example, a property may be more marketable if divided into parcels. If the source of contamination is a landfill located in the middle of the property, however, dividing the land into parcels for an early transfer may not be feasible or desirable.

As discussed previously, the type of contamination may also affect whether the property is appropriate for early transfer. The Military Component and prospective transferee should assess whether the condition of the property is compatible with the intended use.

4. HOW TO EXECUTE AN EARLY TRANSFER

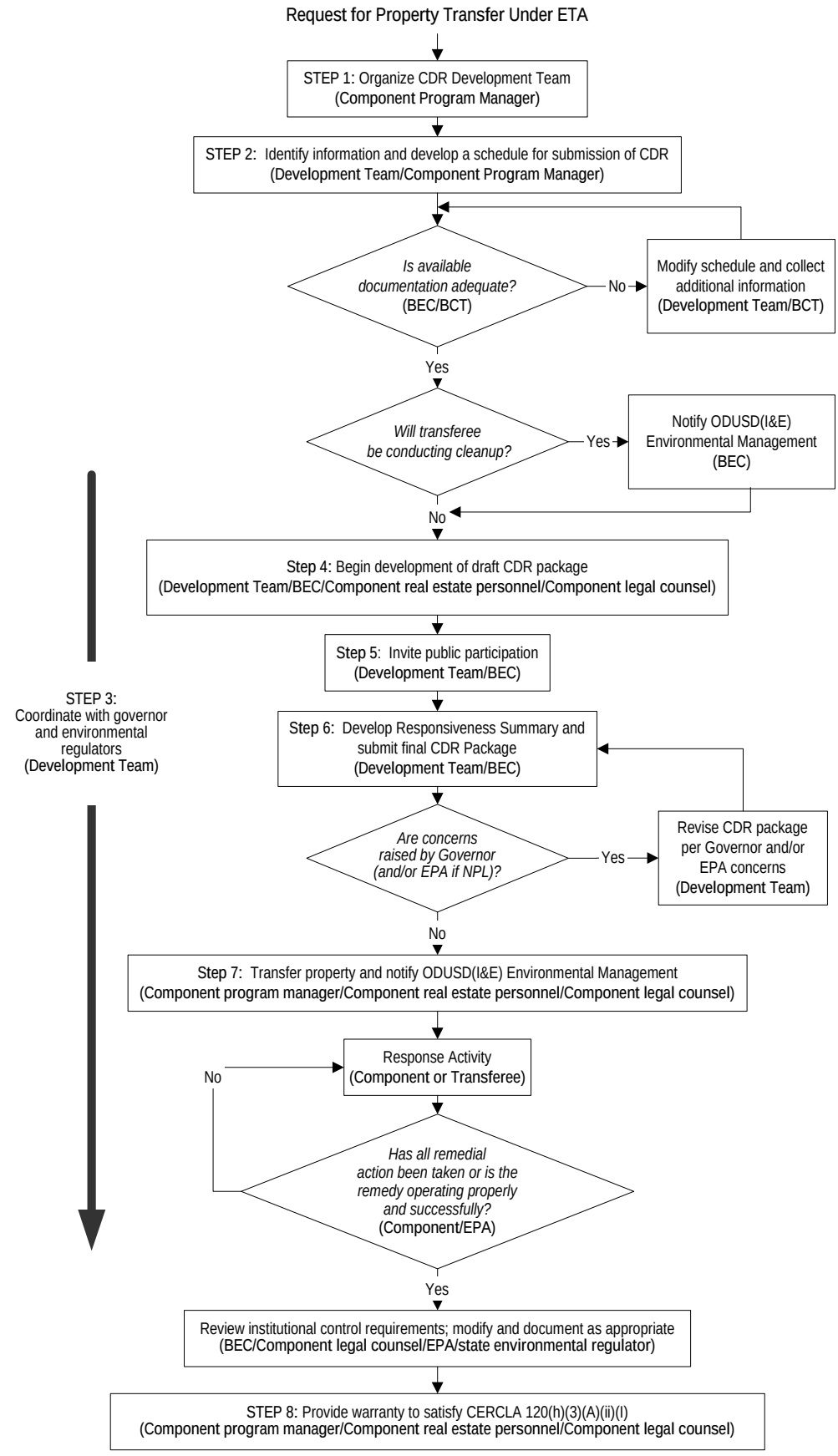
The primary focus of excuting an early transfer is satisfying the four legal criteria in CERCLA that are discussed in Section 3. Although there is not a specifically prescribed process to fulfill the four criteria, DoD has identified some suggested steps to meet the legal requirements based on DoD guidance and the Military Components' previous experience. The eight steps outlined below facilitate compiling documentation for an early transfer. Figure 2 summarizes the steps. Additionally, Military Components should identify and follow any applicable federal and state regulations and policies.

It is DoD policy to involve the local community in the environmental restoration process as early as possible and to continue this involvement throughout the environmental restoration process. DoD is also fully committed to the substantive involvement of federal and state regulators throughout the environmental restoration process. Military Components responsible for environmental restoration activities should take proactive steps to identify and address issues of concern to all stakeholders. These efforts should have the overall goal of ensuring that decisions regarding environmental restoration activities reflect a broad spectrum of stakeholder input. Opportunities to communicate with regulators and the community are identified throughout the process. Adopting a proactive stance toward partnering and taking advantage of these opportunities for communication will increase the probability of a successful early transfer with minimal conflict.

BEFORE TRANSFER

An early transfer cannot occur without a property recipient, support from the Military Component, agreement from regulatory agencies, approval by the governor and, in the case of NPL sites, the EPA Administrator. Either the prospective recipient or the Military Component may initiate discussions on the early transfer process. The prospective recipient may recognize the property's potential for development and will

Figure 2: Process Flow for Transfers Under ETA



contact the Military Component representative to indicate an interest in using ETA. Conversely, the Military Component, during the course of conducting environmental investigation or cleanup activities, may recognize that the site may be suitable for early transfer and will make a recommendation to the prospective recipient. Regardless of who initiates the process, a dialogue between the Military Component and the prospective recipient must be established early in the process to identify the benefits, challenges, and level of effort anticipated for the early transfer.

Step 1: Organize a CDR Package Development Team

Once the Military Component and prospective recipient have come to an agreement in principle that an early transfer is feasible from a business perspective and would be beneficial to both parties, they will need to resolve the technical and financial issues. This resolution typically involves extensive technical and business negotiations and detailed discussions with the regulatory community.

Once the details have been worked out and the parties agree to pursue an early transfer, they will need to compile a package to support a request to defer the CERCLA covenant. This package, known as the CDR package, consists of the Finding of Suitability for Early Transfer (FOSET), the draft deed or agreement containing the CERCLA response action assurances, documentation to support the deferral request, and a cover letter requesting the covenant deferral. The Military Component program manager will assemble a team to develop the

package. Members of the CDR Package Development Team (hereinafter, the Development Team) and their main functions are:

- **Military Component program managers**

  Oversee disposal of DoD property. The Military Component program managers are the primary interface with the property recipient. Their role is to bring all of the appropriate parties to the table to negotiate the property transfer. The Military Component program managers work with the environmental, real estate, and legal personnel to represent DoD interests and concerns in these negotiations.

- **DoD remedial project managers**

  Coordinate environmental cleanup activity at environmental restoration sites. The DoD remedial project manager (RPM) at BRAC sites is the BRAC Environmental Coordinator (BEC). For the purposes of this guide, the BEC will be referred to as the DoD RPM.

- **Military Component real estate personnel**

  Coordinate real estate transfer activities, which includes working with the Military Component's legal counsel to draft the deed, ensuring that all the paperwork for the property transfer is in place, and conducting any real estate-related activities necessary to complete the property transfer, such as surveying the property.

- **Military Component legal counsel**

  Counsels Military Component personnel on legal matters and works with Military Component real estate personnel to draft the deed.

- **Property recipient or transferee**

  Plays an integral role throughout the ETA process, obtains property from DoD through an early transfer, and may conduct the cleanup. The property recipient can be either the LRA or a private developer.

- **State environmental regulatory agency**

  Negotiates with the potential recipient on posttransfer cleanup commitments, which are often embodied in a formal agreement, such as a Consent Agreement. State environmental regulators will play a key role in making recommendations to the governor concerning the CDR. This agency also assists with the CDR package.

- **U.S. EPA**

  Plays a key role in ETA transfers for sites listed on the NPL. The EPA Administrator approves the covenant deferral for NPL sites, along with an affirmative recommendation from the state's governor. EPA will also make OPS determinations at NPL and non-NPL sites.

- **Local government real estate agency**

  Regulates property for local governments. The local government real estate agency (e.g., local zoning authority) should be included on the Development Team and consulted when determining the property's suitability for its intended use.

The DoD RPM will usually serve as the lead DoD representative who develops the required environmental documentation. Because EPA and state environmental regulators are invited to be part of the Development Team, DoD will be able to coordinate with and address the concerns of the environmental regulators throughout the early transfer process.

The Military Component program managerrs must ensure that there is good communication among team members and with their respective agencies, and keep the Military Component chain-of-command apprised of progress. Successful Development Teams have used regular conference calls, face-to-face meetings, Web sites, and e-mails to maintain a dialogue.

For transfers of non-BRAC DoD property, GSA serves as the disposal agent and facilitates the early transfer. DoD and GSA work in close collaboration to prepare the formal package that will request a covenant deferral from the governor or EPA, conduct public outreach, and liaise with the appropriate state staff in the governor's office, state regulators, EPA, and the community. The Military Component will have the primary responsibility for any environmental agreements that must be established during this process. Once the governor (and the EPA Administrator at NPL sites) approves the CERCLA covenant deferral, GSA will prepare the deed and transfer the property.

Step 2: Identify Information and Develop a Schedule for Submission of the CDR Package

The Military Component program managers will be the lead for developing the schedule and tracking progress for the CDR package preparation and submission. Environmental issues may pose the greatest obstacles to the early transfer because of the potential risk to human health and the environment. The DoD RPM needs to work closely with the rest of the Development Team to deliver the necessary environmental documentation.

The Development Team documents the property's environmental condition and then determines what, if any, additional information is needed to draft a defensible FOSET based on the intended use. The DoD RPM should take the lead for assembling the environmental sections of the CDR package. The following sources of information are important during this process:

- Basewide Environmental Baseline Survey (EBS) (at BRAC installations only)
- Supplemental EBSs; environmental studies documents, such as CERCLA preliminary assessments/site investigations or remedial investigation/feasibility studies, RCRA facility assessments, and other environmental agreements, such as a Federal Facilities Agreement
- Monitoring reports
- Findings of Suitability to Lease
- And other similar documents.

At this point in the process it should be clear who will be conducting the cleanup. If the property recipient will be performing the cleanup, DoD policy requires that the Military Component provide notification to the ODUSD(I&E)/EM before submitting the CDR request to the governor or the EPA Administrator and final notification after completing the transfer. The Military Component's Deputy Assistant Secretary will provide notification in a memorandum to ODUSD(I&E)/EM. The initial notice should also include assurances that the transferee has the financial and technical capabilities necessary for performing the required remedial actions and will explain how the Military Component intends to ensure that the property recipient completes the required cleanup. If the Military Component is performing the cleanup, it does not need to notify ODUSD(I&E)/EM until after the property is transferred.

Step 3: Coordinate with Governor's Office and Environmental Regulators

The process for seeking concurrence on the CDR package will differ depending on whether the property is listed on the NPL. As stated in

Step 1, EPA and state environmental regulators are invited to be part of the Development Team so that DoD will be able to coordinate with and address the concerns of the environmental regulators throughout the early transfer process.

For non-NPL installations, only the governor's approval is required; however, EPA coordination is advisable. The Military Component will notify the governor of the intent to request a CERCLA covenant deferral and should formally invite the governor's office to participate in the process. In states that have not previously participated in the early transfer process, the Military Component may benefit from educating the governor's office and state regulators about the process and providing reference materials. The governor will likely consult with, or in some instances delegate authority to, the state environmental regulatory agency in determining whether to approve the covenant deferral.

For NPL properties, the EPA Administrator must approve the deferral request, and the governor's office must concur. The state environmental regulatory agency representative may act as the liaison and facilitate communication between the Development Team and the governor's office. As mentioned above, environmental regulators, whether state or EPA, will play a key role in negotiating environmental agreements with the potential recipient for posttransfer remediation.

Step 4: Begin Development of the Draft CDR Package

The CDR package is prepared to support a determination by the governor, or by the EPA with the governor's concurrence, that the covenant

may be deferred. The CDR package includes the FOSET, draft deed, and documentation to support the findings that the property meets the CERCLA requirements for early transfer. Because early transfer cannot occur without the governor's or EPA's concurrence on the request to defer the CERCLA covenant, it is essential to provide sufficient information in the CDR package to support an informed decision. As the Development Team compiles the package, they should rely on existing information to the maximum extent possible rather than researching new information.

Checklist for CDR Package

FOSET

- Military Component Finding of Suitability
- Description of property
- Description of the nature and extent of contamination
- Analysis of intended future land use
- Response and corrective action requirements
- Operation and maintenance requirements
- Language to include in deed

Responsiveness Summary

FOSET

The Finding of Suitability for Early Transfer, or FOSET, is prepared to document the environmental condition of the property and to support a finding that the property is suitable for early transfer. The FOSET is not intended to fully define the nature and extent of contamination; rather, the FOSET should describe investigations completed to date, the areas of suspected

contamination, and the contaminants of concern. Supporting documentation that contains more detailed information on the site, such as the relevant extract from the environmental baseline survey or supplemental environmental baseline survey, should be attached.

The FOSET must address the following information:

- **Military Component Finding of Suitability**

  The DoD RPM will be the lead, working closely with the Military Component legal and real property personnel, in ascertaining whether the property is suitable for use as intended by the transferee, and if this use will be consistent with protection of human health and the environment. The DoD RPM will also consult the state environmental regulator, and EPA for NPL sites, serving as part of the Development Team in ascertaining whether the property is suitable for the use intended by the transferee.

- **Description of the property**

  The Military Component real property personnel will work with legal counsel to provide the description of the property's legal boundaries. They may also ask the DoD RPM to provide a description of past activities conducted on the property. This information is typically available in environmental study documents. The Military Component real property personnel will usually provide maps, although the DoD RPM may provide supplemental maps that show areas of known or suspected contamination or other environmental issues.

- **Description of the nature and extent of contamination**

  The DoD RPM will generally be the lead for this part of the CDR package. In consultation with the Military Component's legal counsel and the

members of the Development Team, the DoD RPM will draft this section from readily available information provided in the sources listed under Step 2. The entire Development Team will review the draft to determine if additional information is required. In some cases, the transferee may request that additional sampling be conducted to satisfy concerns of their respective agencies. The DoD RPM will provide recommendations concerning these requests to the Military Component team members. The Development Team members will then summarize the request and submit their recommendations to the appropriate decision maker. If additional sampling is determined to be necessary prior to submitting the CDR, the early transfer schedule will be delayed and the appropriate parties will be notified.

- **Analysis of intended future land use**

  The potential recipient must specify an intended use for the property. The description of the intended use must clearly demonstrate that the condition of the property and the protections to be implemented during the covenant deferral period will be protective of human health and the environment. The DoD RPM will lead the Development Team's review of the property's intended use to determine whether the anticipated reuse is reasonably expected to result in exposure to hazardous substances either during the covenant deferral period or after completing remediation. If this review results in a determination that exposure to hazardous substances is likely, the Development Team will develop proposed restrictive measures (i.e., institutional and/or engineering controls) to prevent exposure during cleanup of the property and possible land use restrictions for the future. The Military Component and the property recipient will also agree on the responsibility for the operation, maintenance, and enforcement of any restrictions, including any that may be required

by the final remedy. These decisions should be resolved before the public comment period of the review process discussed below. These restrictions should be approved by DoD, the state environmental regulator, and EPA, and agreed to by the transferee prior to submitting the package to the governor. Once finalized, the Military Component real property personnel, in consultation with legal counsel, will ensure that these restrictions are included in the deed for the property. The Military Component should consult with state law or policies to ensure that the use restrictions are appropriately memorialized in the deed.

- **Response and corrective action requirements**

  The DoD RPM, in consultation with the appropriate regulators, will develop a summary of the government's ongoing or planned remedial or corrective actions and the current schedule for these actions, including any operations and maintenance requirements. The documentation should attempt to specify remediation or timetables for work to be performed by the transferee after conveyance, as those will be documented in agreements between the regulators and the potential recipient.

Land Use Controls Defined

Land use controls (LUCs) include any type of physical, legal, or administrative mechanism that restricts the use of, or limits access to property to prevent or reduce risks to human health and the environment. For further information on how Military Components implement, document, and manage LUCs for active installations as well as installations being transferred out of Federal government ownership, see the *DoD Policy on Land Use Controls Associated with Environmental Restoration Activities,* January 2001.

- **Operation and maintenance schedule**

  The Development Team should include a schedule for the Military Component's or (where the transferee will be conducting the cleanup) the transferee's operation and maintenance of the remedy or response action.

- **Language to include in the deed**

  The Development Team, with the assistance of Military Component real property personnel and legal counsel, must include the following language for the deed:

  - Notice language identifying the type and quantity of hazardous substances on the property; the time at which storage, release, or disposal took place; and a description of any remedial action taken. The DoD RPM will normally take the lead to draft notice language. The notice must include the information required by the regulations codified at 40 CFR Part 373, which describe the necessary contents of CERCLA § 120(h) notices.

  - Covenant language required by CERCLA § 120(h)(3) that "any additional remedial action found to be necessary after the date of such transfer should be conducted by the United States" for hazardous substances remaining on the property that were stored, released, or disposed of prior to the transferee's or its tenants' use of the property or the date of transfer, whichever occurred first. The specific covenant language, which is fairly standard, will be drafted by the Military Component legal counsel.

  - Right of access language, required by CERCLA § 120(h)(3)(A)(iii), granting the Military Component access to the property to perform the cleanup for which the deferral is sought, and granting the federal government access to the property if remedial action or corrective action is found to be necessary after the date of property transfer. This

language is required even in those cases where the property recipient conducts the cleanup. The right of access language is fairly standard and will normally be drafted by the Military Component legal counsel.

- Response action assurances required by CERCLA § 120(h)(3)(C)(ii) should be developed by the DoD RPM with the assistance of Military Component legal counsel. These assurances are included in the deed or an agreement to ensure that the transfer does not delay remedial activities; the reuse does not pose a risk to human health or the environment; and, where the Military Component conducts the cleanup, that it will submit a budget request to OMB for adequate funds to accomplish scheduled investigations and response activities. To demonstrate that the Military Component has requested adequate funding for all response activities, a schedule and associated funding profile for response actions may be attached to the FOSET.
- Potential land use restrictions once the response action is complete, if known at the time the CDR package is being developed.

▪ **Responsiveness Summary**

The Military Component is responsible for publishing a notice about the proposed early transfer and giving the public 30 days to comment. After the public comment period, the Development Team will capture the public comments and compile written answers to each of the issues raised in a Responsiveness Summary. The Responsiveness Summary will be attached to the CDR package. For more information on the Responsiveness Summary, see Step 6 below.

The following documents provide further information on the documentation required for a CDR package:

- *Environmental Review Process to Obtain the Finding of Suitability Required for Use of Early Transfer Authority for Property Not on the National Priorities List* (Appendix X), U.S. Department of Defense, April 24, 1998.
- *Management Guidance for the Defense Environmental Restoration Program*, Office of the Deputy Under Secretary of Defense (Installations and Environment), ODUSD(I&E), September 21, 2001, Section 22.3.
- *EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA §120(h)(3) — (Early Transfer Authority Guidance)*, U.S. Environmental Protection Agency. June 16, 1998.

Step 5: Invite Public Participation

The Military Component is statutorily required to give the public notice and opportunity to comment on an early transfer. While this is the only legal requirement for public participation, DoD policy is to involve the local community in the environmental restoration process as early as possible and to seek continued community involvement throughout the environmental restoration process. The Military Component and transferee should use additional outreach methods to educate the community about early transfer, involve the community throughout the process, and address community concerns.

The Military Component must place a notice of the proposed early transfer in the local newspaper and give the public 30 days to comment on the suitability of the property for early transfer. The DoD RPM should work closely with the Military Component's legal counsel and the public affairs office to develop

and publish this notice. At a minimum, this notification should include:

- A description of the property proposed for transfer, the proposed transferee, and the intended use
- A statement indicating that the proposed transfer is pursuant to CERCLA §120(h)(3)(C) and a summary of the ETA decision process requiring the approval of the governor (and the EPA, if the property is on the NPL)
- A brief description of the environmental restoration sites located on the property under consideration and a summary of past and current environmental cleanup efforts associated with those sites
- The location of the administrative record for the installation's environmental restoration program and site-specific information
- The address and telephone number of a point of contact for further site-specific information and for obtaining a copy of the draft CDR package, if available.

This notification can occur concurrently with development of the CDR package. While the draft CDR package is being finalized, interested members of the public should have access to information that will provide the basis of the final FOSET. This information may include, but is not limited to, the intended use of the property, environmental baseline survey or supplemental documents, and environmental investigation or cleanup documents pertaining to the early transfer parcel. Once the draft CDR package is developed, the Military Component may consider exhibiting the draft CDR package at a central location.

How to Involve the Community in the Early Transfer Process

While notification in a newspaper is often an effective to notify the community, the Military Component should use other methods to educate and inform the public about the proposed early transfer. The Military Component program manager should also work with the Restoration Advisory Board, LRA, and other local government organizations or groups that facilitate public involvement to provide information about the early transfer, listen to the community's concerns, and circulate draft documents for comment. Other approaches include fact sheets, direct mailings, briefings, public meetings, e-mail lists, Web sites, and open houses. The selected method should be appropriate for the degree of public interest in or controversy over the proposed early transfer. The Military Component program manager should work with the installation's public affairs office to develop and implement an appropriate outreach strategy.

Step 6: Develop Responsiveness Summary and Submit CDR Package

At the end of the public comment period, the Development Team will consider ways to address the public's questions and comments, implement any necessary changes, and prepare a written summary of the responses to the comments. This written summary is called the Responsiveness Summary. The DoD RPM, with the support of the Development Team, will address the comments focused on environmental issues.

When all the documentation is complete, the Military Component submits the final CDR package to the governor, and to the EPA Regional Administrator for facilities on the NPL. Once the governor (and EPA, if appropriate) concurs on the covenant deferral, the Military Component publishes a notice in the local newspaper to advise the community as to where the CDR package is available for review.

AT TRANSFER

Step 7: Transfer Property

Once the governor, and the EPA Administrator for NPL facilities, have approved the covenant deferral request, the property may legally be transferred. The Military Component program manager and the Military Component's offices of real estate and legal counsel lead the final transfer efforts. The DoD RPM may have a minimal role if environmental questions arise or if additional environmental information is requested. The Military Component must then notify ODUSD(I&E)/EM that

- A property transfer using ETA occurred
- The Military Component requested adequate funding
- The Military Component provided the required response action assurances.

AFTER TRANSFER

Step 8: Provide the CERCLA Covenant

If DoD is conducting the cleanup, the DoD RPM, in consultation with the state and federal regulators, will continue to execute ongoing environmental actions, such as studies or implementation of the final remedy(ies). The DoD RPM is responsible for submitting budget requests to support environmental activities at this early transfer property. The DoD RPM must

also continually assess whether the controls put in place at the time of transfer continue to be adequate as the property is put into reuse.

If the transferee is executing the cleanup, the DoD RPM should monitor the cleanup and review cleanup-related documentation and data to ensure that it is sufficient to issue the CERCLA covenant or meet any other regulatory requirements. The transferee must notify the Military Component that all remedial action is complete and must allow the Military Component to enter the property and inspect the site. The DoD RPM will also coordinate with the state environmental regulatory agency at non-NPL sites and with the EPA at NPL sites to ensure that all remedial action is complete.

In both situations, the DoD RPM must address all requirements related to the property under environmental laws and ensure that the property recipient understands its obligations and responsibilities. For example, if an air or water permit is attached to the property, the DoD RPM must take all necessary steps to terminate the permit or to transfer the permit to the property recipient or obtain an OPS determination, where appropriate.

After all remedial action is completed to the Military Component's satisfaction, the Military Component will provide a document to be recorded in the chain of title, if allowable under state law, with a covenant stating that all remedial action has been taken in accordance with CERCLA. The Military Component must also ensure that the use restrictions necessary for the implementation of the remedy have been included with the covenant document.

5. TOOLS FOR EXECUTING AN EARLY TRANSFER

Early transfers allow environmental cleanup activities to be planned, taking into consideration redevelopment plans for the property, and conducted concurrently with redevelopment activities. Several tools are available to assist with this method of property transfer.

Environmental insurance and environmental services cooperative agreements (ESCA), two of the available tools to assist with the early transfer of property, allow the property recipient to manage the cleanup while assuming ownership of contaminated property. These tools can be used separately or collectively, depending on whether the Military Component is cleaning up the property or whether the new property owner is undertaking that responsibility. This section describes these tools, how they are applied, and when they should be used.

WHAT IS ENVIRONMENTAL INSURANCE?

Transferring contaminated property requires allocating and managing risk, providing financial assurances, and containing cleanup costs. Although DoD is self-insured and does not buy insurance, property recipients often rely on environmental insurance as a key building block for a successful contaminated-property transaction. Property recipients who assume cleanup responsibilities may purchase insurance to reduce the financial risk associated with remediating property, stimulate investment, protect against increased costs due to unforeseen contamination, and ensure financing for long-term environmental liabilities. If the transferee receives DoD funds to conduct the cleanup, insurance costs may be included in the agreements.

Current environmental insurance products provide coverage for known as well as unknown contamination. Insurance products can be used in the transfer, financing, and development of former federal property. The major insurance policy types available today are pollution legal liability and cleanup cost cap. Pollution legal liability insurance provides coverage for on- or off-site claims against the current or previous owner for bodily injury or property damage arising from contamination. Cleanup cost cap insurance will cover the insured for costs in excess of the approved remediation plan.

Benefits to Property Recipients

Property recipients under the early transfer program can benefit from obtaining an environmental insurance policy. The policy can insulate the property recipient from costs resulting from discovery of further contamination, such as costs to remediate additional contamination, natural resource damages, and business or work stoppages. Such a policy may also reimburse the transferee for remediation expenses exceeding the original cost estimate and expenses resulting from failure of the initial remedy conducted before transfer or failure of institutional controls.

Benefits to DoD

Insurance providers offer services that are helpful in quantifying the risks associated with a property, such as conducting site assessments or reviewing the existing site assessment to characterize conditions; performing risk assessment surveys to determine insurability; and developing cleanup cost estimates. In

addition, the insurance company acts as an independent broker between DoD and the property recipient, which can decrease cleanup cost estimates as risks become quantified and understood. Insurance also provides third-party scrutiny of the transaction, providing further certainty to investors.

Although DoD does not buy the insurance, it can play a role in reviewing the policy. If an ETA agreement utilizes insurance to cover certain risks, the Military Component may assist the property recipient in ensuring that it provides appropriate coverage for the risks that the property recipient has assumed in the transaction.

Insurance Considerations

The following issues are important for DoD to consider when evaluating a property recipient's insurance policy:

- **Insurance Provider** — An environmental insurance policy is only as good as the provider. The property recipient should choose one of the experienced providers and be aware that only a small number of insurance firms sell this product.
- **Exclusions** — Environmental insurance policies contain various exclusions from coverage (e.g., typical policies do not cover radiological, unexploded ordnance (UXO), and biological hazards). Policies must be read and negotiated carefully so that all parties are aware of the risks that are covered, as well as those that are not covered.
- **Waiver of Subrogation** — In most cases, the insurance company must waive its right of subrogation. This means that the insurance company agrees not to sue DoD for certain

claims that might otherwise be recoverable under DoD's statutory liabilities under CERCLA. While the price of the policy goes up for this waiver according to the type of risks involved, DoD must demand that this waiver be part of the insurance policy to protect against paying for cleanup twice.

- **Contractor Bankruptcy** — When early transfers include cleanup by the transferee, and the transferee contracts for certain cleanup services, the cleanup contractor will purchase insurance. In these cases, DoD may be named as an additional insured on the insurance policy. This ensures that if the cleanup contractor goes bankrupt, the property recipient may select another contractor and DoD can retain the benefits of the insurance policy.

Insurance is almost always a part of an early transfer transaction where the transferee assumes the cleanup responsibility. The property recipient may also buy insurance when DoD is cleaning up the property as a way to provide assurance to lenders that if new contamination is found, it will be addressed quickly. In either case, the emergence of affordable and flexible insurance products for environmental risk have contributed significantly to the early transfer successes to date.

WHAT IS AN ESCA?

An ESCA is a vehicle by which the Military Component transfers funds to a property recipient (who can qualify to provide services) on a reimbursable basis to help the Military Component fulfill its environmental cleanup responsibilities. Eligible recipients include states, local governments, Indian tribes, and now nonprofit conservation groups. The funding may

be used for environmental investigations and for cleanup and remediation of both on-site and off-site contamination where DoD is responsible.

The terms of the ESCA are negotiated between the Military Component and the recipient. Funding requirements for completing environmental remediation at the property are based on the known environmental requirements at the site, plans for redevelopment, and allocation of risks between DoD and the recipient. Anticipated costs savings are realized from integrating cleanup and redevelopment.

Using an ESCA versus a contract can be advantageous in an early transfer because of the flexibility in structuring payments, where the recipient can combine federal and private funding to achieve overall development of the property while resolving environmental remediation issues. Federal regulations require that ESCAs be structured on a reimbursable basis and the recipient cannot realize a profit. Flexible payment scenarios can be structured to support unique requirements of specific agreements.

ESCAs may also be structured to provide startup funding that would allow the recipient to pay for insurance premiums and contractor support. The parties may also structure funding according to when the recipient achieves milestones, such as site closeout, and when accelerated funding could be provided if milestones are realized ahead of schedule.

ESCAs typically contain the following sections:

- **Scope and Purpose** — Defines the scope of the environmental services being performed (e.g., LRA achieves regulatory closure).
- **Definitions** — Defines key terms such as regulatory closure, catastrophic events, consent agreement, and FOSET parcels.
- **Obligations of the Parties** — Outlines the roles and responsibilities of DoD and the recipient.
- **Funding Limitation and Budget** — Identifies the cost of the environmental services and defines the "not to exceed" ceiling.
- **Payment Schedule** — Discusses how payments to the recipient will be structured (e.g., reimbursable, lump sum).
- **General Provisions** — Defines the terms of the agreement and how to amend the agreement, and discusses severability, breach, conflict of interest, and changed circumstance issues.
- **Liability and Insurance** — Discusses liability and indemnification, and defines the amount of insurance.
- **Applicable Laws and Regulations** — Defines the applicable laws and regulations governing the agreement.
- **Termination, Enforcement, Claim, and Dispute Resolution** — Discusses the acceptable methods of enforcing the agreement.
- **Legal Authority** — Discusses the authority of the signing parties to enter into the agreement.

HOW DO YOU CONVEY THE PROPERTY?

After the necessary agreements have been negotiated, reviewed, and accepted, the Military Component may dispose of or "convey" the installation property. The Military Component will use conveyance authorities established by federal law. There are multiple conveyance mechanisms; however, the three primary conveyance authorities used for surplus property are:

- Public benefit conveyance
- Economic development conveyance
- Conservation authority.

Public Benefit Conveyance

A public benefit conveyance provides for transferring titles of surplus property to qualified entities, government, or nonprofit organizations, for public uses. The intent of a public benefit conveyance is to support property reuse that benefits the community as a whole. Properties that qualify for a public benefit conveyance can be used to provide educational and health care facilities, improve transportation, and beautify communities through park and recreational improvements. A public benefit conveyance can provide access to property for public and nonprofit entities that may not otherwise have been able to acquire it for community uses. Moreover, public reuse of existing federal facilities reduces the demand for undeveloped green space and the burden on local governments to expand their supporting infrastructure.

Economic Development Conveyance

An economic development conveyance is a tool for transferring property to an LRA, which may be without consideration, where the LRA intends to redevelop the property for a use that will promote local economic development and create jobs. An economic development conveyance is particularly suited to use in conjunction with an early transfer because it provides incentive for an LRA to take ownership of contaminated property.

Conservation Authority

The National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314) includes authorization for DoD to convey property, free of charge, to state or local governments or nonprofit organizations as long as such property is to be used and maintained for the conservation of natural resources in perpetuity. DoD can use this authority in conjunction with ETA to facilitate transfers of DoD property that will be used for conservation purposes. DoD may also use the authority in conjunction with ESCAs to provide funding to a government or nonprofit conservation organization that will conduct cleanup activities.

The property reverts to the United States government if the transferee fails to maintain the property for conservation purposes. DoD may release the transferee from the requirement to use the property for conservation purposes if the transferee pays fair market value for the property.

6. FREQUENTLY ASKED QUESTIONS ABOUT ETA

These questions and answers address the ETA process and the sites eligible for the process.

Q: Does a site have to be listed on the NPL in order to be eligible for early transfer?

A: No. Any federal property to be transferred is eligible for early transfer.

Q: How do I initiate an early transfer of surplus DoD property?

A: The community, LRA, or other potential transferee may approach DoD to express interest in obtaining surplus DoD property through an early transfer. If the community, LRA, or other potential transferee and DoD agree that an early transfer is desirable and financially feasible, DoD may then begin the early transfer process by organizing a Development Team.

Q: What are the options for cleanup under ETA?

A: Either DoD or the transferee may perform cleanup of the early transfer property. DoD may perform the cleanup itself, or it may provide funding to the transferee to perform cleanup in certain circumstances. DoD can provide funding to the transferee if the transferee is eligible for an ESCA or the transferee is selected as the contractor (in a competitive procurement) to perform environmental remediation services. The transferee may use the funding provided by DoD to hire its own cleanup contractor. Often it is more cost effective to have one party conduct both the cleanup and redevelopment so that these activities may be coordinated.

Q: What opportunities does the public have to be involved in a specific early transfer?

A: Members of the public may participate in the development of the CDR package by joining the RAB or other community or stakeholder group. Members of the public will also have the opportunity to submit comments on the draft FOSET.

Q: Under ETA, does DoD retain its liability for the environmental contamination?

A: Yes. Although ETA allows DoD to enter into agreements to have other entities fund and/or perform the cleanup, DoD retains its CERCLA liability.

7. MORE INFORMATION ON ETA

These documents provide additional information about ETA.

DoD Guidance on the Environmental Review Process Required to Obtain the Finding of Suitability for Use of Early Transfer Authority for Property Not on the National Priorities List as Provided by CERCLA Section 120(h)(3)(C), Office of the Under Secretary of Defense (Acquisition and Technology), U.S. Department of Defense, April 24, 1998.

M.C. Bracken, E. T. Morehouse, Jr., R. R. Rubin, *Issues and Alternatives for Cleanup and Property Transfer of Base Realignment and Closure Sites*, Institute for Defense Analysis, IDA Paper P-3538, August 1, 2000.

Early Transfer Authority, BRAC Environmental Fact Sheet, Office of the Deputy Under Secretary of Defense (Environmental Security), U.S. Department of Defense, Spring 1998.

Memorandum from Sherri W. Goodman, *Implementation of Authority to Transfer Property Before Completing Remediation*, Office of the Under Secretary of Defense, September 24, 1996.

Overview of Early Transfer Guidance, U.S. Environmental Protection Agency, EPA505-98-007, January 1999.

EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action has Been Taken Pursuant to CERCLA Section 120(h)(3) (Early Transfer Authority Guidance), U.S. Environmental Protection Agency, June 16, 1998.

Responsibility for Additional Environmental Cleanup After Transfer of Real Property, Office of the Under Secretary of Defense (Acquisition and Technology), U.S. Department of Defense, July 25, 1997.

EPA Guidance for Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully Under CERCLA 120(h)(3) (Interim), U.S. Environmental Protection Agency, August 1996.

DERP Fact Sheet: Early Property Transfer at DoD Installations, U.S. Department of Defense.

The following Web site also contains information regarding early transfer authority: http://www.dtic.mil/envirodod/Policies/PDBRAC.htm

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ACRONYM GLOSSARY

BCT: BRAC Cleanup Team — the team, composed of the BRAC Environmental Coordinator, an EPA representative, and state environmental regulators, that is in charge of coordinating cleanup activities at a BRAC site.

BEC: BRAC Environmental Coordinator — a DoD employee designated to coordinate environmental activities at a BRAC site.

BRAC: Base Realignment and Closure — a program established by the Base Closure and Realignment Act in 1988, through which DoD closes or realigns military installations and then transfers ownership of the property.

CDR: Covenant Deferral Request — documentation package supporting a request to defer the CERCLA covenant. The CDR consists of the FOSET, the draft agreement containing the CERCLA response action assurances, documentation to support the deferral request, and a cover letter requesting the covenant deferral.

CERCLA: The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 et seq., also referred to as Superfund — the federal law that addresses cleanup of past environmental contamination. It requires that all remedial action be taken on federal property prior to its transfer and allows for an early transfer of federal property where certain determinations and assurances are made.

DoD: U.S. Department of Defense — the federal department issuing this guide for use at early transfer sites.

EBS: Environmental Baseline Survey — a survey to document the environmental condition of property at a particular point in time, typically conducted at the time of closure.

EDC: Economic Development Conveyance — the authority granted to DoD to transfer property at no cost to a Local Redevelopment Authority to spur economic redevelopment and job creation.

EPA: U.S. Environmental Protection Agency — the federal agency in charge of administering CERCLA and approving early transfers of NPL property.

ESCA: Environmental Services Cooperative Agreement — the vehicle by which the Military Components transfer funds to other government entities or parties, such as states, local governments (including LRAs), and Indian tribes for environmental cleanup on the property.

ETA: Early Transfer Authority — the authority granted under §120(h)(3)(C) of CERCLA to EPA and state governors to approve the transfer of federal property prior to all remedial action being taken and to defer, until after transfer, the requirement for issuance of a covenant warranting that all remedial action was taken.

FOSET: Finding of Suitability for Early Transfer — the documentation required to establish that federal property is environmentally suitable for early transfer. This documentation is composed of the same items regardless of whether the federal property is listed on the NPL or not. EPA terms the documentation a "covenant deferral request" when the property is listed on the NPL.

GAO: U.S. General Accounting Office — the federal agency in charge of ensuring the Executive Branch's accountability to Congress through evaluations, analyses, legal opinions, financial audits, program reviews, investigations, and other services. This agency issued a report in April 2002 recommending that DoD make more use of the early transfer authority at its BRAC sites.

LRA: Local Redevelopment Authority — a group established by the state or local government and recognized by DoD, through the Office of Economic Adjustment, as the entity responsible for designing the redevelopment plan with respect to the BRAC installation or for directing implementation of the plan. The LRA is also a potential transferee of a DoD property through an early transfer.

NPL: National Priorities List — EPA's list of the nation's priority hazardous waste sites.

ODUSD(I&E)/EM: The Office of the Deputy Under Secretary of Defense for Installations and Environment/Environmental Management — the office within the U.S. Department of Defense that oversees the Defense Environmental Restoration Program and other environmental programs.

OMB: Office of Management and Budget — the federal agency to which the Military Components submit a budget request for investigation and completion of all necessary response actions.

RAB: Restoration Advisory Board — a group that includes representatives from the DoD installation, the EPA, state and local governments, tribal governments, and the affected local community, whose purpose is to provide an expanded opportunity for stakeholder input into the environmental restoration process at the installation.

UXO: Unexploded Ordnance — a type of waste consisting of military munitions that have been primed, fused, armed, or otherwise prepared for action; have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and remain unexploded by malfunction, design, or any other cause.

EXCERPTS FROM THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

42 U.S.C. § 9620. Federal facilities
CERCLA § 120(h)

(h) Property transferred by Federal agencies

(1) Notice

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

(2) Form of notice; regulations

Notice under this subsection shall be provided in such form and manner as may be provided in regulations promulgated by the Administrator. As promptly as practicable after October 17, 1986, but not later than 18 months after October 17, 1986, and after consultation with the Administrator of the General Services Administration, the Administrator shall promulgate regulations regarding the notice required to be provided under this subsection.

(3) Contents of certain deeds

(A) In general

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this

subsection, in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain -

(i) to the extent such information is available on the basis of a complete search of agency files—

(I) a notice of the type and quantity of such hazardous substances,

(II) notice of the time at which such storage, release, or disposal took place, and

(III) a description of the remedial action taken, if any;

(ii) a covenant warranting that—

(I) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and

(II) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States; and

(iii) a clause granting the United States access to the property in any case in which remedial action or corrective action is found to be necessary after the date of such transfer.

(B) Covenant requirements

For purposes of subparagraphs (A)(ii)(I) and (C)(iii), all remedial action described in such subparagraph has been taken if the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to the Administrator to be operating properly and successfully. The carrying out of long-term pumping and treating, or operation and maintenance, after the remedy has been demonstrated to the Administrator to be operating properly and successfully does not preclude the transfer of the property. The

requirements of subparagraph (A)(ii) shall not apply in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property.

The requirements of subparagraph (A)(ii) shall not apply in any case in which the transfer of the property occurs or has occurred by means of a lease, without regard to whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years. In the case of a lease entered into after September 30, 1995, with respect to real property located at an installation approved for closure or realignment under a base closure law, the agency leasing the property, in consultation with the Administrator, shall determine before leasing the property that the property is suitable for lease, that the uses contemplated for the lease are consistent with protection of human health and the environment, and that there are adequate assurances that the United States will take all remedial action referred to in subparagraph (A)(ii) that has not been taken on the date of the lease.

(C) Deferral

(i) In general

The Administrator, with the concurrence of the Governor of the State in which the facility is located (in the case of real property at a Federal facility that is listed on the National Priorities List), or the Governor of the State in which the facility is located (in the case of real property at a Federal facility not listed on the National Priorities List) may defer the requirement of subparagraph (A)(ii)(I) with respect to the property if the Administrator or the Governor, as the case may be, determines that the property is suitable for transfer, based on a finding that—

(I) the property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;

(II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii);

(III) the Federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and

(IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property.

(ii) Response action assurances

With regard to a release or threatened release of a hazardous substance for which a Federal agency is potentially responsible under this section, the deed or other agreement proposed to govern the transfer shall contain assurances that—

(I) provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;

(II) provide that there will be restrictions on use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

(III) provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and

(IV) provide that the Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation

and completion of all necessary response action, subject to congressional authorizations and appropriations.

(iii) Warranty

When all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the United States shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken, and the making of the warranty shall be considered to satisfy the requirement of subparagraph (A)(ii)(I).

(iv) Federal responsibility

A deferral under this subparagraph shall not increase, diminish, or affect in any manner any rights or obligations of a Federal agency (including any rights or obligations under this section and sections 9606 and 9607 of this title existing prior to transfer) with respect to a property transferred under this subparagraph.

(4) Identification of uncontaminated property

(A) In the case of real property to which this paragraph applies (as set forth in subparagraph (E)), the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall identify the real property on which no hazardous substances and no petroleum products or their derivatives were known to have been released or disposed of. Such identification shall be based on an investigation of the real property to determine or discover the obviousness of the presence or likely presence of a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property. The identification shall consist, at a minimum, of a review of each of the following sources of information concerning the current and previous uses of the real property:

(i) A detailed search of Federal Government records pertaining to the property.

(ii) Recorded chain of title documents regarding the real property.

(iii) Aerial photographs that may reflect prior uses of the real property and that are reasonably obtainable through State or local government agencies.

(iv) A visual inspection of the real property and any buildings, structures, equipment, pipe, pipeline, or other improvements on the real property, and a visual inspection of properties immediately adjacent to the real property.

(v) A physical inspection of property adjacent to the real property, to the extent permitted by owners or operators of such property.

(vi) Reasonably obtainable Federal, State, and local government records of each adjacent facility where there has been a release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, and which is likely to cause or contribute to a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property.

(vii) Interviews with current or former employees involved in operations on the real property.

Such identification shall also be based on sampling, if appropriate under the circumstances. The results of the identification shall be provided immediately to the Administrator and State and local government officials and made available to the public.

(B) The identification required under subparagraph (A) is not complete until concurrence in the results of the identification is obtained, in the case of real property that is part of a facility on the National Priorities List, from the Administrator, or, in the case of real property that is not part of a facility on the National Priorities List, from the appropriate State official. In the case of

a concurrence which is required from a State official, the concurrence is deemed to be obtained if, within 90 days after receiving a request for the concurrence, the State official has not acted (by either concurring or declining to concur) on the request for concurrence.

(C)(i) Except as provided in clauses (ii), (iii), and (iv), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made at least 6 months before the termination of operations on the real property.

(ii) In the case of real property described in subparagraph (E)(i)(II) on which operations have been closed or realigned or scheduled for closure or realignment pursuant to a base closure law described in subparagraph (E)(ii)(I) or (E)(ii)(II) by October 19, 1992, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after October 19, 1992.

(iii) In the case of real property described in subparagraph (E)(i)(II) on which operations are closed or realigned or become scheduled for closure or realignment pursuant to the base closure law described in subparagraph (E)(ii)(II) after October 19, 1992, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date by which a joint resolution disapproving the closure or realignment of the real property under section 2904(b) of such base closure law must be enacted, and such a joint resolution has not been enacted.

(iv) In the case of real property described in subparagraphs (E)(i)(II) on which operations are closed or realigned pursuant to a base closure law described in subparagraph (E)(ii)(III) or (E)(ii)(IV), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date on which the real property is selected for closure or realignment pursuant to such a base closure law.

(D) In the case of the sale or other transfer of any parcel of real property identified under subparagraph (A), the deed entered into for the sale or transfer of such property by the United States to any other person or entity shall contain—

(i) a covenant warranting that any response action or corrective action found to be necessary after the date of such sale or transfer shall be conducted by the United States; and

(ii) a clause granting the United States access to the property in any case in which a response action or corrective action is found to be necessary after such date at such property, or such access is necessary to carry out a response action or corrective action on adjoining property.

(E)(i) This paragraph applies to—

(I) real property owned by the United States and on which the United States plans to terminate Federal Government operations, other than real property described in subclause (II); and

(II) real property that is or has been used as a military installation and on which the United States plans to close or realign military operations pursuant to a base closure law.

(ii) For purposes of this paragraph, the term ‘‘base closure law’’ includes the following:

(I) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(II) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(III) Section 2687 of title 10.

(IV) Any provision of law authorizing the closure or realignment of a military installation enacted on or after October 19, 1992.

(F) Nothing in this paragraph shall affect, preclude, or otherwise impair the termination of Federal Government operations on real property owned by the United States.

(5) Notification of States regarding certain leases

In the case of real property owned by the United States, on which any hazardous substance or any petroleum product or its derivatives (including aviation fuel and motor oil) was stored for one year or more, known to have been released, or disposed of, and on which the United States plans to terminate Federal Government operations, the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall notify the State in which the property is located of any lease entered into by the United States that will encumber the property beyond the date of termination of operations on the property. Such notification shall be made before entering into the lease and shall include the length of the lease, the name of person to whom the property is leased, and a description of the uses that will be allowed under the lease of the property and buildings and other structures on the property.

EARLY TRANSFERS TO DATE

These early transfers are completed at the time of publication.

Service	Installation	Acres	Parcels	Transfer Dates
Air Force	Grissom AFB	201	1	June 1997
Air Force	Mather AFB	163	2	June 1998, February 2000
Army	Tooele Army Depot	1,621	1	December 1998
Navy	NAS Memphis	1,863	2	December 1999
Navy	FISC Oakland	676	5	June 1999, July 2000
Air Force	Griffiss AFB	179	3	March 2000, July 2000, August 2001
Navy	NAS Agana	1,798	6	September 2001
Air Force	Lowry AFB	12	1	September 2001
Air Force	Wurtsmith AFB	149	1	January 2001
Navy	NTC San Diego	51	2	February 2001
Navy	Guam - NAVACTS	1,482	8	April 2001
Navy	Guam - PWC	25	2	April 2001
Navy	Mare Island Naval Shipyard	3,486	13	March 2002, September 2002, October 2003
Army	Fort Ord	686	4	March 2002, August 2002, October 2002
Army	Fitzsimons AMC	133	1	July 2002
Army	Bayonne Military Ocean Terminal	192	1	December 2002
Navy	NTC Orlando	3	1	December 2002
Army	Alabama Ammunition Plant	2,235	1	March 2003
Army	Oakland Army Base	364	1	August 2003
Army	Fort McClellan	4,692	1	September 2003
Navy	Louisville–NOS	141	3	February 2004

DoD GUIDANCE ON THE ENVIRONMENTAL REVIEW PROCESS REQUIRED TO OBTAIN THE FINDING OF SUITABILITY FOR USE OF EARLY TRANSFER AUTHORITY FOR PROPERTY NOT ON THE NATIONAL PRIORITIES LIST AS PROVIDED BY CERCLA SECTION 120(H)(3)(C)

PURPOSE

This document provides guidance to the Department of Defense (DoD) Components on the process and documentation needed to obtain the environmental finding of suitability required for the early transfer of DoD property. Section 120(h)(3)(C) of CERCLA, commonly known as “Early Transfer Authority” (ETA), authorizes the deferral of the covenant that requires all necessary remedial action to be completed before federal property is transferred. Section 120(h)(3)(C) is included at the end of this guidance for information. Please note that ETA is not a conveyance authority; an existing conveyance authority, such as an economic development conveyance or a public benefit conveyance, will have to be used in conjunction with ETA for the transfer of property where cleanup has not been completed.

The DoD Components may develop implementation procedures based on their own specific needs and unique requirements but will, at a minimum, include the documentation and procedures specified in this guidance. Copy of the Component-specific guidance is to be provided to the Office of the Assistant Deputy Under Secretary of Defense (Environmental Cleanup) upon issue.

APPLICABILITY AND SCOPE

This guidance applies to transfers of real property not listed on the National Priorities List (NPL) from DoD to non-federal entities, including The Governor's decision to concur with the FOSET and defer the CERCLA covenant must be, as required by CERCLA section 120(h)(3)(C), "based on a finding that

1. the property is suitable of transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;
2. the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii) [these are the Response Action Assurances specified in Section 120(h)(3)(C)(ii), and are provided later in this guidance];
3. the Federal agency requesting the deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and
4. the deferral and the transfer of the property will not substantially delay any necessary response action at the property."

The DoD Component should not forward the FOSET packet to the Governor until the Component has provided evidence that supports all the above findings.

Pre-Transfer:

Once the Local Reuse Authority (LRA) or prospective purchaser has contacted the DoD Component and indicated their interest in obtaining property, the DoD Component should begin to assemble a review team for the FOSET package. It is anticipated that the prospective transferee will have coordinated with the Component to identify potential property that would be suitable for transfer using ETA prior to a formal request for property. In the request the prospective transferee needs to provide an intended use of the property. This intended use will be the basis of the FOSET.

The team should identify what information is currently available on the property and should determine what additional information is needed for the FOSET, based on the intended use of the property. The team should develop a plan and schedule for developing the draft FOSET and discuss post-transfer responsibilities. These include: when and how property use restrictions (e.g., institutional controls) will be applied and eventually discontinued during the cleanup period; the manner in which the warranty required by CERCLA section 120(h)(3)(A)(ii)(I) will be conveyed upon completion of the cleanup; and the development and implementation of any institutional controls required by the final remedy decision. It is anticipated that the Component will retain the right to impose any institutional controls required by the final remedy. DoD policy and guidance (such as the July 25, 1997, policy on Responsibility for Additional Environmental Cleanup After Transfer of Real Property) and published tools (such as the February 1998 Guide to Establishing Institutional Controls at Closing Military Installations), are to be used for developing and implementing any institutional controls required for transfer of both BRAC and non-BRAC property using ETA. The responsibility for the operation, maintenance and enforcement of any institutional controls, including any that may be required by the final remedy, should be negotiated between the Component and the transferee before the transfer and inserted in the deed or agreement governing the transfer.

The DoD Component should then notify the Governor of the intent to request a deferral of the CERCLA covenant and invite the State's participation in the development of the FOSET. The relevant parties (DoD, the State and the transferee) should prepare a schedule to coordinate the review of the FOSET. The schedule should include the proposed date to obtain the Governor's concurrence on the FOSET.

If the transferee will be performing the cleanup of the property, the DoD Component must provide prior notification to the Office of the Deputy Under Secretary for Environmental Security/Cleanup Office (ODUSD(ES/CL)) before submitting the ETA request to the Governor. This is in addition to the final notification after the transfer of property. In the initial notification, the DoD Component will provide the ODUSD(ES/CL) with assurance that the transferee has the financial and technical capabilities for performing the required remedial actions, and explain how the

Component intends to ensure that the transferee will meet environmental cleanup milestones and complete the required cleanup. The Component should also require the transferee to provide a surety bond , insurance, or other financial instrument to ensure that cleanup will be completed, without cost to the United States, if the transferee fails to do so. If the transferee is not performing the cleanup, the DoD Component need not notify the Cleanup Office until after the property is transferred.

Public Participation Requirements

A notice of the proposed early transfer should be placed in the local newspaper and the public must be given 30 days to comment on the suitability of the property for early transfer. This notification can occur concurrent with completion of the FOSET. At a minimum, this notification should include:

- the identity of the property proposed for transfer, the proposed transferee, and the intended use;
- a statement indicating that the proposed transfer is being pursued pursuant to CERCLA 120(h)(3)(C), and a summary of the ETA decision process requiring the approval of the Governor;
- a brief description of the environmental cleanup sites located on the property under consideration, and summary of past and current environmental cleanup efforts associated with those sites;
- the location of the administrative record for the installation restoration program and site specific information; and
- the address and telephone number for further site specific information and for obtaining a copy of the draft FOSET.

While the draft is being finalized, interested members of the public should be provided access to information that will provide the basis of the FOSET; this information includes the intended use of the property, the EBS, and environmental cleanup documents pertaining to the early transfer parcel. The draft FOSET should also be made available to the RAB, community groups or individuals expressing interest, and the State environmental regulatory agency.

After the comment period has ended, the DoD Component should respond in writing to the public comments received on the suitability of the property for transfer. The final FOSET and the responses to any public comments (known as the Responsiveness Summary) should be submitted to the Governor's Office. The local community should be informed through publication in a newspaper when the Governor has concurred on the FOSET and where it is available for review.

At Transfer:

Once the Governor has concurred on the FOSET, the property may be transferred. The property transfer documents containing the response action assurances will be provided to the transferee. The quitclaim deed for the property must contain the right of access clause (as provided for in CERCLA section 120(h)(3)(A)(iii)) which preserves DoD's right to enter the property after transfer for purposes of environmental investigation, remediation or other corrective action. The response action assurances will indicate the restrictions on the property to ensure that environmental cleanup investigations, response actions, and oversight will not be disrupted.

The FOSET and the Responsiveness Summary will be included in the transaction file for the property that is maintained by the Real Estate office performing the disposal action.

The Component needs to notify ODUSD(ES/CL) that a property transfer using ETA has occurred, and that the Component has requested adequate funding and provided the required response action assurances.

Post-Transfer:

When remedial actions have been completed or when the approved remedy for the site has been implemented and is operating properly and successfully , the DoD Component shall provide a warranty document to the transferee which states that all remedial actions have been taken in satisfaction of the requirement in CERCLA section 120(h)(3)(A)(ii)(I). This warranty, amending the deed, will be recorded by the Component.

If the transferee has performed the cleanup of the property, the transferee must notify the DoD Component that all remedial activities have been completed and allow DoD to enter the property and inspect the site. The transferee must also give DoD access to all remedial action reports and sampling data. Once DoD has reviewed the available documentation, inspected the site, and agreed with the transferee's assessment, the DoD Component will record the warranty to amend the deed.

At this time, the DoD Component will also ensure, regardless of who performed the cleanup, that the institutional controls necessary for the implementation of the remedy (e.g., land and water use restrictions, structural controls) are incorporated in the deed or otherwise are in place. These institutional controls must be binding on the transferee and any future owner of the property. Other interim institutional controls or use restrictions that were necessary for remedial activities will be reviewed, and removed if no longer needed.

Documentation:

The final FOSET packet consists of a cover letter asking for deferral, a Finding of Suitability for Early Transfer (FOSET) which will contain the response action assurances, and the Responsiveness Summary. These document are described in more detail below.

FOSET Packet

1. Cover Letter to State asking for Deferral

2. Finding of Suitability for Early Transfer (FOSET)

- Component Finding of Suitability
- Property Description
- Nature and Extent of Contamination
- Analysis of Intended Future Land Use
- Response/Corrective Action & Operation and Maintenance Requirements
- **Deed Language**
  - Notice

- Covenant
- Access Clause
- Response Action Assurances
- Other

3. Responsiveness Summary

1. Cover Letter: The cover letter should be addressed to the Governor or appropriate State official (if the Governor has delegated the early transfer authority) and request deferral of the CERCLA covenant requiring all remedial action to be performed before property transfer.

2. The FOSET is a short document, generally 6-7 pages, that focuses on the environmental condition of the property. The FOSET is not intended to fully define the nature and extent of contamination (because remedial activities may not have been completed, this may be unknown); rather, the FOSET should describe the areas of suspected contamination and the contaminants of concern. Supporting documentation that contains more detailed information on the site, such as the relevant extract from the environmental baseline survey (EBS) or supplemental EBS, should be attached. The FOSET must address the information described below:

Component Finding of Suitability: Finding by the Component that property is suitable for transfer for the intended use, and that Component believes that the requirements of CERCLA section 120(h)(3)(C) have been satisfied with the supporting evidence being provided in the FOSET package.

Property Description: A description of the real property to be transferred. A map should also be attached.

Nature and Extent of Contamination: A description of the nature and areal extent of contamination which impacts the property being transferred. The DoD Environmental Condition Category of the property should also be included. An extract from an existing EBS or a supplemental EBS, which more fully delineates the areas of contamination, should be attached to the FOSET packet.

***Analysis of Future Use*:** A description of the intended use of the

property and a determination of whether the anticipated reuse is reasonably expected to result in exposure to CERCLA hazardous substances. If it is determined that exposure to hazardous substances is likely, the analysis must discuss restrictive measures (i.e., institutional controls) to prevent exposure during the cleanup of the property. These restrictions must also be included in the deed for the property.

Response/Corrective Action and Remedial Action-Operations Requirements: A description of any ongoing or planned remedial or corrective actions. The schedule for such actions, including the dates of certain milestones (e.g., the implementation of the remedy) should be included. The schedule should also contain the dates for the operation and maintenance of the remedy or response action.

Deed Language*:* The following environmental cleanup information that will be required in either the deed or contract for sale should be included in the FOSET packet for review:

- ***Notice***: a copy of the notice language required by CERCLA section 120(h)(1) and (3) that will be inserted in the deed identifying:
  - the type and quantity of hazardous substances on the property,
  - the time at which storage, release or disposal took place, and
  - a description of the remedial action taken, if any.

  This information may be displayed in matrix form for ease of use.
- ***Covenant***: a copy of the covenant language required by CERCLA section 120(h)(3)(A)(ii)(II) stating, with respect to hazardous substances existing on the property as of the date of transfer, that:

  > "any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States"

- ***Right of Access***: a copy of the language required by CERCLA section 120(h)(3)(A)(iii) granting the United States access to the property if remedial action or corrective action is found to be necessary after the date of property transfer; as well as providing access to the property to perform the cleanup for which the deferral is being sought.
- ***Response Action Assurances***: a copy of the response action

assurances required by CERCLA section 120(h)(3)(C)(ii) (listed below) that will be included in the contract for sale. These assurances are included in the deed to ensure that the transfer does not delay remedial activities; the reuse does not pose a risk to human health and the environment; and that the Component will request adequate funds to address schedules for investigation and completion of all response actions.

CERCLA section 120(h)(3)(C)(ii) Response Action Assurances: "…the deed or other agreement that shall govern the transfer shall contain assurances that-

1. provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;
2. provide that there will be restrictions on the use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;
3. provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and
4. provide that the transferring Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately address schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations."

To demonstrate that the Component has requested adequate funding for all response activities, a schedule and associated funding profile for response actions may be attached to the FOSET. Any specific language required to ensure that cleanup activities will not be disrupted, and to implement institutional controls or impose use restrictions during the cleanup period and that may be required for by the final remedy decision can either be included or attached to the FOSET.

- ***Other***: other language, such as Anti-Deficiency Act language, that may need to be included in the deed or contract for sale.

3. Responsiveness Summary: The Component's written answers to each of the issues raised during the 30-day public review is called the Responsiveness Summary. The Responsiveness Summary shall be attached to the FOSET package that is submitted to the Governor.

In addition, to ensure a prompt response from the Governor on the FOSET, the DoD Component may also insert in the FOSET package a document containing the proposed findings for early transfer for the Governor to sign after review of the FOSET request and a quitclaim deed for the property.

EPA GUIDANCE ON THE TRANSFER OF FEDERAL PROPERTY BY DEED BEFORE ALL NECESSARY REMEDIAL ACTION HAS BEEN TAKEN PURSUANT TO CERCLA SECTION 120(H)(3) — (EARLY TRANSFER AUTHORITY GUIDANCE)

I. PURPOSE

This guidance addresses the transfer by deed, under Section 120(h)(3)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), of real property listed on the National Priorities List (NPL) held by a federal agency (landholding federal agency[1]) where the release or disposal of hazardous substances has occurred, but where all necessary remedial action has not yet been taken. This document provides guidance to the EPA Regions that have received a request from a landholding federal agency for the deferral of the covenant mandated by CERCLA Section 120(h)(3)(A)(ii)(I) that all necessary remedial action has been taken prior to the date of transfer. This guidance establishes EPA's process to determine, with the concurrence of the Governor, that the property is suitable for transfer prior to all necessary remedial action being taken.

II. EPA's REQUIREMENTS FOR APPROVING A DEFERRAL REQUEST

When a federal agency transfers to another person (i.e., an entity other than another federal agency) real property on which hazardous substances have been stored for one year or more, known to have been released, or disposed of, the deed must contain a covenant warranting that "all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of transfer" (the CERCLA 120(h)(3)(A)(ii)(I) Covenant) and that "any additional remedial action

found to be necessary after the date of the transfer shall be conducted by the United States."[2] EPA, with the concurrence of the Governor of the State in which the facility is located, may defer the CERCLA Covenant for parcels of real property at facilities listed on the NPL.[3]

The Agency's general current view is that it will seek the concurrence of federally recognized Indian tribes for purposes of determining whether the covenant requirement under CERCLA 120(h) should be deferred pursuant to CERCLA 120(h)(3)(C) for property located in Indian country within tribal jurisdiction. However, the Agency will only make a final determination as to the appropriate tribal role under CERCLA 120(h)(3)(C) in the context of an actual Covenant Deferral Request made for property located in Indian country within tribal jurisdiction. The Agency's determination should be made in light of the specific facts and circumstances surrounding a particular Covenant Deferral Request. If the EPA Regional office receives a Covenant Deferral Request concerning a transfer of property that is located in Indian country with tribal jurisdiction, the EPA Regional office should contact EPA Headquarters, the American Indian Environmental Office and the Federal Facilities Restoration and Reuse Office, for specific guidance.

In order for EPA to defer the covenant requirement, CERCLA Section 120(h)(3)(C)(I)(I)-(IV) requires that EPA determine that the property is suitable for transfer based on a finding that:

1. the property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;
2. the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the Response Action Assurances described in section IV of this guidance;
3. the federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and
4. the deferral and the transfer of the property will not substantially delay any necessary response action at the property.

These findings are intended to assure that there is a sound basis for the proposed transfer based on the finding that the particular reuse of the property identified by the transferee does not pose an unacceptable risk[4] to human health or the environment. As stated in Section 120(h)(3)(C)(iv), all statutory obligations required of a federal agency remain the same, regardless of whether the property is transferred subject to a covenant deferral.

III. APPLICABILITY AND SCOPE

This guidance applies to all early transfers by deed under CERCLA Section 120(h) of contaminated real property owned by a federal agency and listed on the National Priorities List (NPL), regardless of the statutory authority underlying a cleanup, including transfers of property at DoD installations selected for closure or realignment.

This guidance does not apply to federal-to-federal transfers of property or to transfers of uncontaminated property. A federal agency that is sponsoring a public benefit conveyance may use this guidance as a model for obtaining useful information. Under a public benefit conveyance, a sponsoring federal agency acts as a conduit through which title will ultimately pass from the United States to a public benefit recipient. For further information regarding the relationship between a sponsoring federal agency and the Department of Defense (DoD) for Base Realignment and Closure (BRAC) property (a landholding federal agency), please see the Memorandum of Agreement signed by DoD and the federal agencies that sponsor public benefit transfers (dated April 21, 1997).

IV. GUIDANCE

EPA should generally not consider deferral of the covenant request for real property unless the landholding federal agency submits a Covenant Deferral Request (CDR) containing the information recommended by this guidance.

While the statute does not explicitly require a signed Interagency Agreement (IAG) to be in place as a prerequisite for deferring the covenant requirement, EPA believes that the existence of an IAG will significantly aid the Agency in making the covenant deferral decision.

A. Covenant Deferral Request

As discussed in Section II, EPA may defer the CERCLA Section 120(h)(3) covenant requirement if EPA determines that a property is suitable for transfer based on certain findings. To commence the process, the landholding federal agency should submit information of a sufficient quality and quantity to EPA to support its request for deferral and provide a basis for EPA to make its determination. This information should be submitted to EPA in the form of a Covenant Deferral Request (CDR). EPA should consider a CDR complete when it includes all of the following components.

1. *Property Description*

   A legal description of the real property or sufficient information which clearly identifies the property for which the CERCLA Covenant is requested to be deferred.

2. *Nature/Extent of Contamination*

   A description of the nature and areal extent of contamination (with supporting documentation) which affects the property to be transferred and which will not be remediated prior to transfer. There is a presumption that the Covenant Deferral Request should include the results from a completed Remedial Investigation (RI) for the parcel that will be transferred. However, the landholding federal agency should have an opportunity to demonstrate why such data and findings are not necessary before the land is transferred.

   When determining what information is necessary, the EPA Region should take into consideration, at a minimum, the degree of uncertainty regarding the nature and extent of contamination; the future use of the property prior to completion of the response action; who is to perform future work; and any existing information or data on the parcel under consideration. Generally, the greater the uncertainty about any of these factors, the more information the EPA Region may require to make the determination. As noted below, the landholding Federal agency remains responsible for all necessary response actions including the remedial investigation and the cleanup remains subject to the requirements of
   Section 120.

3. *Analysis of Intended Land Use During the Deferral Period*

Contents of the Covenant Deferral Request:

- Property Description
- Nature/Extent of Contamination
- Analysis of Intended Future Land Use During the Deferral Period
- Risk Assessment
- Response/Corrective Action Requirements
- Operations and Maintenance Requirements
- Contents of Deed
- Responsiveness Summary
- Transferee Response Action Assurances and Agreements

A description of the intended land use of the property during the deferral period and an analysis of whether the intended use is reasonably expected to result in exposure to CERCLA hazardous substances at sites where response actions have not been completed. This analysis should be based on the environmental condition of the property and should consider the contaminant(s), exposure scenarios, and potential and actual migration pathways that may occur during the future use. Where a potential or actual unacceptable exposure to hazardous substances is identified, the analysis should identify what response actions should be taken to prevent such exposure. Treatment, engineering controls and use restrictions (see Section 6.d - Response Action Assurances), may be considered as a means of limiting unacceptable exposures to hazardous substances while allowing for property reuse. Any other response actions necessary to protect human health and the environment should be included in the deed (or other agreement governing the transfer) as described in Subsection 6 of this policy. The land use during the deferral period cannot be inconsistent with any necessary response actions.

4. *Results From A Risk Assessment*

Results from a CERCLA risk assessment, taking into consideration reasonably anticipated future land use assumptions. There is a presumption that the Covenant Deferral Request include the results from a completed risk assessment, as defined in the National Contingency Plan (NCP) and EPA guidance. However, the landholding federal agency should have an opportunity to demonstrate why a risk assessment does not have to be completed before the land is transferred.

When determining whether a completed risk assessment is needed before the early transfer, the EPA Region should take into consideration, at a minimum, the degree of uncertainty regarding the potential risks posed by the contamination; existing analyses; certainty about future use; and who is conducting the response. The greater the uncertainty about the risk from the contamination, the more information EPA may require. As noted below, the landholding Federal agency remains responsible for all necessary response actions, including the risk assessment.

In the absence of the completed risk assessment, at a minimum, EPA Regions should examine potential exposure(s) during the deferral period, taking into account any proposed restrictions to ensure the protectiveness of human health and the environment.

5. *Response/Corrective Action and Operation and Maintenance Requirements*

A description of any ongoing or planned response or corrective action, including a projected milestone date for the selection and completion of the action, and/or projected date for the demonstration that a remedial action is "operating properly and successfully." Also, it will be necessary to provide adequate information regarding ongoing or planned response actions and operation and maintenance of the response or corrective action.

6. *Contents of Deed/Transfer Agreement*

a. Notice

A copy of the notice to be included in the deed as required by CERCLA Section 120(h)(1)and(3) and in accordance with regulations set forth at 40 CFR Part 373.

b. Covenant

A copy of the covenant warranting that any additional remedial action found to be necessary after the date of transfer shall be conducted by the United States as required by CERCLA Section 120(h)(3)(A)(ii)(II).

c. Access

A copy of the clause which reserves to the United States access to the property in any case in which an investigation, response, or corrective action is found to be necessary after the date of transfer as required by CERCLA Section 120(h)(3)(A)(iii).

d. Response Action Assurances

A copy of the Response Action Assurances that must be included in the deed or other agreement proposed to govern the transfer as required under CERCLA Section 120(h)(3)(C)(ii). As required by statute, these assurances shall:

i. provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;

ii. provide that there will be restrictions on the use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

iii. provide that all necessary response action will be taken and identify the schedule(s) for investigation(s) and completion of all necessary response action(s) as approved by the appropriate regulatory agency; and

iv. provide that the landholding federal agency has or will obtain sufficient funding through either: (a) submission of a budget request (or budget requests in the event multi-year funding is needed) to the Director of the Office of Management and Budget that adequately addresses schedule for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations; or (b) sufficient current appropriations to accomplish investigation(s) and completion(s) of all necessary response action(s). In addition to (a) or (b), the landholding federal agency may also have an agreement with the transferee to fund and/or accomplish all or part of the remediation.

The Response Action Assurances should include a description of requirements to assure the protectiveness of the response action and shall specify the mechanisms for assuring that such measures remain effective. These measures should reflect discussions among the reuse entity, the community, the landholding federal agency and any appropriate federal, State, or local government.

7. *Responsiveness Summary*

The final CDR should include a response to comments document which contains the landholding federal agency's responses to the written comments received during the public comment period under Section 120 (h)(3)(C)(I)(III) and to the written comments received from the regulatory agencies on the draft CDR.

8. *Transferee Response Action Assurances and Agreements*

A transferee may agree to conduct response actions on the property. However, the landholding Federal agency remains responsible for ensuring that all necessary response actions including , as appropriate, investigations and requirements under an IAG are done.

When property is transferred prior to completion of the cleanup, the landholding federal agency should include in each deed provisions notifying the transferee of the requirement for, and status of, an Interagency Agreement or other enforceable environmental cleanup agreement or order, as appropriate.

The landholding federal agency should also notify the transferee that EPA and the State and their agents, employees and contractors, will have rights of access as necessary to implement response actions and oversight responsibilities at the facility.

Where the transferee has agreed to fund and conduct the cleanup or portions of the cleanup as a condition of the transfer, the landholding federal agency should provide to EPA documentation demonstrating that the transferee has or will become legally obligated to conduct the required response actions in accordance with the existing IAG. Should the transferee become unable or unwilling to complete the cleanup or order under its agreement with the landholding federal agency, EPA expects the landholding federal agency will complete the cleanup. Nothing in this guidance shall be interpreted to affect EPA's or the landholding federal agency's authority or responsibility under CERCLA or any other federal statute to enforce the terms and conditions of an existing IAG or to limit EPA's authority to impose requirements necessary to protect public health and the environment.

If the transferee is expected to perform any response action (e.g., excavation of contaminated soil in an area where facilities are to be constructed), then EPA should receive assurance from the landholding federal agency that the transferee has:

a. the technical capacity (in-house or through appropriate contract management) to perform anticipated investigations and response or corrective actions; and

b. the financial capacity to execute environmental cleanup activity requirements that are known or can reasonably be anticipated, based on current information available.

Financial capacity may be an especially sensitive area for a transferee and/or the landholding federal agency. While the assurance does not need to contain the actual documentation of the financial capacity, the EPA Region may request such information from the landholding federal

agency if there are questions in this regard.[5] Any proprietary or confidential business information should be handled as required under Federal regulations.

If the landholding federal agency submits information supporting the technical and financial assurances, but the EPA Region disagrees with the adequacy of such assurances, and they cannot resolve their differences, there will be the opportunity to elevate the disagreement to the federal agency headquarters and EPA Headquarters. The EPA Region should contact the Federal Facilities Restoration and Reuse Office in OSWER and the federal agency should elevate the issue to its headquarters component when resolution cannot be reached at the Senior Manager level. EPA Headquarters and the headquarters of the landholding federal agency will resolve the disagreement in an expeditious fashion so as not to delay transfer.

The transferee should agree to conduct all necessary environmental response actions in accordance with CERCLA and the National Contingency Plan (NCP). In the case where the transferee does not perform cleanup in accordance with CERCLA and the NCP or the terms of a cleanup agreement, then the United States may enter the property and perform any necessary response action.

B. Process for Requesting Covenant Deferral

Before preparing a CDR, the landholding federal agency should notify the Administrator of EPA or designee and the Governor of the State of the intent to request a CERCLA Covenant Deferral and invite participation in the development and review of the draft CDR. This notice should allow sufficient time for EPA, and State agencies, to participate in the development and review and comment on a draft CDR.

As required by Section 120(h)(3)(C)(I)(III), the landholding federal agency must provide notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer. The notice should include:

1. The identity of the property proposed for transfer, the proposed transferee and the intended use of the property;
2. A statement that the property is listed on the National Priorities List and that the proposed transfer is pursuant to CERCLA 120(h)(3)(C) which allows the transfer of federal property before remedial action is completed when certain conditions are satisfied;
3. An assessment of whether the transfer is consistent with protection of human health and the environment will be made only after a comprehensive evaluation of the environmental condition of the

property in consultation with the U.S. EPA and the appropriate State agencies;

4. A summary of the decision-making process, e.g., that the property will not be transferred until U.S. EPA determines, with the Governor's concurrence, that the transfer of the property for use as intended is consistent with protection of human health and the environment and that the federal agency has provided assurance that response actions will be taken;
5. The address and telephone number of the agency office which may be contacted for obtaining a copy of the draft Covenant Deferral Request, site- specific information and the address of the location of the administrative record for the response program; and
6. A statement that interested members of the public may comment on the suitability of the property (the draft Covenant Deferral Request) for transfer and must submit such comments to the agency before a date not less than 30 days from the date of the publication of the notice.

It is also recommended that the draft CDR be made available to any existing Restoration Advisory Boards (RAB), Site Specific Advisory Boards (SSAB), affected local governments, and/or other interested community-based groups. Specific efforts should be made to involve tribes surrounding the property that is to be transferred. As stated in the notice requirement, the public shall be provided with at least a 30 day period in which to submit comments on the suitability of the property for transfer. It may be appropriate under certain circumstances (i.e., large and/or complicated land transfers) to extend the public comment period beyond 30 days.

After the public comment period has expired, the landholding federal agency may then submit the final CDR to the appropriate EPA Regional office and State representative. Property cannot be transferred by deed until the CERCLA Covenant is explicitly deferred by EPA and the State. The request to defer the CERCLA Covenant should be made simultaneously to the EPA and the State. EPA and the State should work closely to assure careful evaluation of the request. EPA Regional offices are encouraged to take steps to streamline the coordination process to avoid unnecessary delay.

C. Completion of Response Actions After Transfer

When all response actions necessary to protect human health and the environment have been taken, e.g., when there has been a demonstration to EPA that the approved remedy is "operating properly and successfully[6]" pursuant to CERCLA Section 120(h)(3)(B) (regardless of whether the landholding federal agency or the transferee has taken the action), the landholding federal agency shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken. This warranty will satisfy the requirement of CERCLA Section 120(h)(3)(A)(ii)(I).

V. NOTICE

This guidance and internal procedures adopted for implementation are intended solely as policy for employees of the US EPA. Such guidance and procedures do not constitute rule making by the Agency and do not create legal obligations. The extent to which EPA applies this guidance will depend on the facts of each case.

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1. A landholding federal agency is the federal agency that holds custody and accountability for the property on behalf of the United States. 41 CFR 101-47.103.7

2. CERCLA Section 120(h)(3)(A)(ii) sets forth the two components of the covenant that shall be contained in each deed. For purposes of this policy and the request for deferral, the term "CERCLA Covenant" refers only to the first component contained in Section 120(h)(3)(A)(ii)(I).

3. For non-NPL sites, the Governor of the State in which the facility is located may defer the CERCLA Covenant.

4. See, 40 CFR 300.430(d)(4) and U.S. EPA 1989a. Risk Assessment Guidance for Superfund *(RAGS):* Volume 1: Human Health Evaluation Manual *(HHEM),* Part A, Interim Final and Part B, Development of Risk-Based Preliminary Remediation Goals. *Office of Emergency and Remedial Response, Washington, D.C. EPA /540/1-89/002, NTIS PB90-155581/CCE and Publication 9285.7-01B NTIS PB92-963333.*

5. Financial capacity may be demonstrated through, but not limited to: reasonably anticipated cash flows, existence of appropriate insurance, posting of a construction/ indemnity bond, authority of the transferees to issue revenue bonds for such purpose, or assets, excluding the real property to be transferred. Obtaining a security interest in the transferee's assets may be used as a means of assuring project completion.

6. See, "Guidance for Evaluation of Federal Agency Demonstrations That Remedial Actions Are Operating Properly and Successfully Under CERCLA Section 120(h)(3)," *August 1996, NTIS PB97-143770; http://www.epa.gov/swerffrr.*

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