

MEMORANDUM FOR DEPUTY UNDER SECRETARY OF DEFENSE
(ENVIRONMENTAL SECURITY)
DEPUTY UNDER SECRETARY OF DEFENSE
(INDUSTRIAL AFFAIRS AND INSTALLATIONS)
ASSISTANT SECRETARY OF THE ARMY
(INSTALLATIONS, LOGISTICS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE NAVY
(INSTALLATIONS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE AIR FORCE
(MANPOWER, RESERVE AFFAIRS, INSTALLATIONS AND
ENVIRONMENT)
DIRECTOR, DEFENSE LOGISTICS AGENCY (D)

SUBJECT: Environmental Review Process to Obtain the Finding of Suitability Required for
Use of Early Transfer Authority for Property Not on the National Priorities List

The attached guidance establishes the process and documentation for obtaining approval from the Governor of a State to transfer DoD real property not on the National Priorities List (NPL) to a non-federal entity prior to completion of all necessary remedial action, and is effective immediately.

The authority to transfer property to a non-federal entity prior to completion of all necessary actions is contained in section 120(h)(3)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 USC 9620(h)(3)(C)). It is DoD policy that this authority be used to the maximum extent possible, upon a request by transferee, when doing so is beneficial both to DoD and the transferee. Use of this authority is not appropriate for transfers where the performance of cleanup and reuse activities will likely result in exposure to CERCLA hazardous substances above permissible levels, or where DoD would be assuming additional liability due to the early transfer. Although this authority allows property to be transferred prior to completion of required environmental cleanup, CERCLA continues to place primary cleanup responsibilities on the Component unless the transferee assumes these obligations. I ask for your support in implementing this policy and working with communities so that they can make informed decisions regarding use of this authority.

Attachment

**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 public benefit transfers where the DoD component assigns property to a sponsoring federal agency, who in turn transfer by deed, to a non-federal party. The guidance should be used in conjunction with any applicable State guidance. The Governor of the State where the property is located must concur with the deferral request for property to be transferred early. The process and documentation established by this guidance is solely for the purpose of obtaining the approval of the Governor of the State for the transfer of property. As such, it is inappropriate to use this guidance or process as the basis for establishing environmental cleanup milestones or to make environmental cleanup decisions. The appropriate legal and regulatory requirements will continue to be used for environmental cleanup efforts on real property prior to and after transfer using ETA.

Separate guidance is being developed by the U.S. Environmental Protection Agency (EPA) for use of ETA for property on the NPL. Any additional DoD guidance for early transfer of NPL property will be included in the DoD transmittal of the EPA guidance.

This guidance should be read to be compatible with and does not supersede other related DoD policy and guidance (such as Policy on Responsibility for Additional Environmental Cleanup After Transfer of Real Property). This guidance will be incorporated in the next revision of the appropriate DoD Instruction.

GUIDANCE

Process:

This section describes the ETA process and the role of the DoD Component. The environmental review process for ETA centers on the signing of the Finding of Suitability for Early Transfer (FOSET), i.e., the documentation package that provides the evidence that the subject property is environmentally suitable for early transfer. Because early transfer of DoD property cannot occur without the Governor's concurrence on the FOSET, it is essential to provide sufficient information in the FOSET package to support an informed decision.

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

- (I) 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;
- (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) [these are the Response Action Assurances specified in Section 120(h)(3)(C)(ii), and are provided later in this guidance];
- (III) 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
- (IV) 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.

For BRAC property, the team should consist of the BRAC Cleanup Team (BCT), the supporting real estate office, and the transferee. For non-BRAC property, the team should consist of installation-level representatives of the Component environmental cleanup office, State environmental regulatory agency, the supporting real estate agency and the transferee. Because property disposal authority for non-BRAC surplus real property is with the General Services Administration (GSA), the supporting real estate office should start coordination once it is known that such property will be transferred under ETA. Even though including GSA representatives as the property disposal agent on this team is appropriate for non-BRAC property, the Component will remain responsible for handling the environmental issues and preparing and submitting 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 documents 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—

- (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 schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and
- (IV) 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.

**Comprehensive Environmental Response, Compensation, and Liability Act (42 USC
BB9620) Section 120(h)(3)(C)**

(C) Deferral

- (iii) 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 of 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 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
 - (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 sections 106, 107 and 120 existing prior to transfer) with respect to a property transferred under this subparagraph.