

January 27, 2003

Kurt Kratz
Director
DOD (Environmental Cleanup)
3400 Defense Pentagon
Washington, DC 20301

Dear Kurt:

On behalf of the Association of State and Territorial Solid Waste Management Officials' (ASTSWMO) Base Closure Focus Group, I wish to thank the Office of the Deputy Under Secretary of Defense Cleanup Office for providing us with the opportunity to review the Early Transfer Authority Handbook

We have reviewed the document and attached specific comments, referenced by section, that we hope are given consideration during the revision of this handbook. The word States throughout this document refers to State Managers participating on the ASTSWMO Base Closure Focus Group. Please keep in mind that these comments reflect a general consensus of the State participants on this issue, and that the comments have not been reviewed or approved by the ASTSWMO Board of Directors.

We do have two overall general observations concerning this handbook. First, early and continual involvement of States throughout the entire process is critical. Second, the handbook should not limit itself to military installations that have been closed under Base Realignment and Closure (BRAC). As discussed in the comments for Section 1, there are many properties outside of BRAC that are considered for early transfer.

Again, thank you for providing us with the opportunity to comment. We believe involving States in the development of Department of Defense cleanup policy early in the process will produce a mutually beneficial result. If you have any questions regarding our attached comments, please do not hesitate to contact myself at (217) 524-1655, or Dania Rodriguez of ASTSWMO at (202) 624-5973.

Sincerely,

Clarence Smith, IL
Chair, Base Closure Focus Group

cc: Base Closure Focus Group
Vic Wieczek, DOD
Howard Roitman, CO
Jim Woolford, EPA

GENERAL COMMENTS:

1. Overall the Early Transfer Authority (ETA) Handbook is too generic, omitting important direction and information that could greatly influence if and how early transfer should proceed. Most of the critical omissions are described in the specific comments.
2. The Handbook in various sections briefly touches the surface of remedial privatization, but leaves the Component with little understanding of how this process would work if chosen to be part of the early transfer. The Handbook should be expanded to provide specific detail as to how and when privatization should be considered, the process necessary to achieve remedial privatization, and the roles and responsibilities of all applicable parties if and when privatization is initiated.
3. The State of Florida recently conducted an early transfer where the Navy prepared both a Finding of Suitability for Early Transfer (FOSET) and Finding of Suitability for Transfer (FOST) for the transfer of the same parcels. The FOST was finalized after the Governor approved the FOSET. The State is still not sure why the Navy felt the need to prepare both a FOSET and FOST, but the question was raised since the Navy is currently working on another early transfer. Please note: We didn't notice any language in the document about Department of Defense (DOD) completing a FOST after the Governor approves the FOSET, so perhaps this was a site- specific choice.

SPECIFIC COMMENTS:

SECTION I - ABOUT THIS HANDBOOK

1. **Page 1, paragraph 2, last sentence:** The handbook should not limit itself to military installations that have been closed under Base Realignment and Closure (BRAC). Other types of military installations, in particular ammunition plants, have been declared excess by the military and transferred to non-DOD parties such as local government bodies or private developers. Does DOD plan to draft a separate handbook for early transfer of sites not governed under BRAC?
2. **Page 2, seventh bullet:** Examples of where DOD has not been successful in using ETA to complete early transfers would also be very useful. Success is often built on learning from your mistakes.
3. **Page 2, first paragraph, last sentence:** The handbook should also discuss the role of General Services Administration (GSA) and the National Environmental Policy Act (NEPA) process involved in federal land transfers.

SECTION II – WHAT IS EARLY TRANSFER AUTHORITY

1. **Page 4, What Are The Benefits Of Early Transfer:** The ETA benefits all parties, including the regulators (State & the Environmental Protection Agency (EPA)). We believe that if DOD is going to list benefits they could include the benefits to the regulators.

SECTION III – HOW DOES ETA WORK?

1. **Page 6, What are the legal requirement for an early transfer, first paragraph, first sentence:** The Handbook should acknowledge that individual States may have their own policies and guidance on how early transfers should proceed. These policies may require additional requirements than those identified by Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 120 (h)(3). Components should discuss with the State regulatory agencies whether such guidance exists when considering early transfer.
2. **Page 6, What are the legal requirement for an early transfer, first paragraph, second sentence:** The word "or" should be deleted. The Governor always has a say, either sole approval or concurrence with EPA.
3. **Page 6, What are the legal requirement for an early transfer, #2, second bullet:** DOD states "There will be restrictions on land use..." and the statute does not say "Land" use, rather just "use." The term "land use" is more limited than just "use."
4. **Page 7, What Sites are Suitable for Early Transfer, second paragraph, first sentence:** This sentence is misleading, as there are many criteria in making a site suitable for and consistent with its intended use. The sentence should be revised.
5. **Page 7, What Sites are Suitable for Early Transfer, second paragraph:** The Handbook should direct Components that when determining whether early transfer is appropriate, they should carefully evaluate the quality of the site characterization with State environmental regulators. Inadequate historical searches, outstanding data gaps and incomplete sampling could result in remedial cost overrun, inadequate institutional controls and/or unknown risks to the transferee and the public. The Components and State environmental regulators must be in agreement that the site's characterization is adequate for early transfer to be implemented.
6. **Page 7, What Sites are Suitable for Early Transfer, second paragraph, last sentence:** Transferring the entire property without dividing it into parcels should be emphasized as the best situation for DOD and the community. If the property is divided into parcels, the most desirable parcels may be transferred, and DOD can be left to deal with the more highly contaminated, less desirable parts of the property.

7. **Page 7, What Sites are Suitable for Early Transfer, third paragraph:** The Focus Group agrees with the statement that the type of contamination, such as unexploded ordnance (UXO), may affect property transfer.
8. **Page 7, What Sites are Suitable for Early Transfer, third paragraph:** The Handbook should expand its paragraph on defining the character of the contamination. Other environmental contaminants such as chemical warfare materials, biological warfare and radioactive wastes not only make transfer too complex and time-consuming, but also are likely not covered by environmental insurance.
9. **Page 7, What sites are suitable for early transfer, third paragraph:** One criteria that should be used as a best practice rule is that the nature and extent of contamination at the site should be well understood before attempting an early transfer. From a liability standpoint, it is very important for DOD to understand what it is transferring to the public. From the public's point of view, the lesser amount of questions that there are about the property, the more receptive they will be to the transfer.
10. **Page 7, What sites are suitable for early transfer, fourth paragraph:** The Handbook should read, “shall” instead of “should”. Gauging public support should not be optional. It is essential that the community approve early transfer prior to its initiation.
11. **Page 7, What sites are suitable for early transfer, fifth paragraph:** The Handbook should clarify that not only should restrictions be identified, but monitoring and enforcing these restrictions must also be well defined. If restrictions cannot be monitored and enforced to the satisfaction of State environmental regulators, early transfer should not be initiated.
12. **Pages 7-8, What sites are suitable for early transfer, last paragraph:** The document should provide more detailed information on the selection, establishment, enforcement and monitoring of institutional controls (ICs). The transferee needs to know, early in the process, what land use limitations will be imposed. The State regulatory agency must approve of the IC documents, as it is the State that will track and enforce the institutional controls in the long run.

SECTION IV – HOW TO EXECUTE AN EARLY TRANSFER

1. **Page 9, First Paragraph:** The Handbook should prepare Components for the increase in workload associated with early transfer. Experience has shown that significant staff time and effort is required from initiation through completion of the property transfer, especially if remedial privatization is to occur. The Components in many cases will require additional staffing/contractor assistance during the early

transfer process. The Handbook should provide direction as to how assistance can be provided from within each individual Component.

2. **Page 9, Step 1: Component Program Manager:** The Handbook improperly assumes the BRAC site using this guidance has adequate staffing to implement early transfer. Many BRAC sites are understaffed, without “Component program managers,” “Component real estate personnel” and “Component legal counsel.” The Handbook should provide detail as to how these members can be found within each individual Component.
3. **Pages 9-10, Step 1: Organize a FOSET Package Development Team:** The county or local zoning authority should be included as part of the development team.
4. **Page 10, Step 1: State Environmental Regulatory Agency Representative:** The Handbook should expand the role of State environmental regulatory agency representatives. Additional responsibilities include but are not limited to; 1) assisting the Governor with concurrence of transfer, 2) reviewing and approving the Findings of Suitability for Early Transfer and any State required deferral application, 3) developing enforceable agreements with the Component regarding future liabilities and responsibilities and 4) negotiating legal agreements with the Component and transferee (if remedial privatization is to occur).
5. **Page 10, Step 1, last paragraph, last sentence:** It's important to add "transferee" to this sentence, since in some cases the property will not always be purchased.
6. **Page 11, Step 2, second bullet: Identify Information and Develop a Schedule for Submission of the FOSET Package:** The handbook should mention that sites that have a Resource Conservation and Recovery Act (RCRA) Corrective Action permit must transfer the permit to the transferee along with the property. The transferee must meet and comply with all the conditions of the RCRA permit.
7. **Page 11, Step 2, fourth paragraph: Identify Information and Develop a Schedule for Submission of the FOSET Package:** CERCLA does not provide for State concurrence on the FOSET package; however, if the parcel is contaminated, it is subject to State law and the State has authority over the cleanup. Some of the examples cited at the end of the document involve Consent Decrees or cleanup agreement with the State regulatory agency. This should be made clear earlier in the document.
8. **Page 11, Step 3 – (Ongoing): Coordinate with Governor’s Office (and EPA, if National Priorities Listing (NPL)) and State Environmental Regulators:** The document deals with the roles of the Governor and State regulatory agency separately; but the Governor may delegate his authority to the State agency.
9. **Page 11-12, Step 3: (Ongoing), first paragraph:** The Handbook should be modified to assure that the Components’ coordination with the Governor's Office and

State environmental regulators include resolution as to reimbursement of State costs for its services once the property is transferred. DOD has yet to develop policy as to how the Department of Defense and State Memorandum of Agreement (DSMOA) / Cooperative Agreement program will be implemented if a BRAC site is transferred to a private entity.

10. **Page 12, Step 3: (Ongoing), last paragraph:** Although not explicitly stated in statute, formal concurrence of State environmental regulators is often necessary. State environmental programs are commonly the lead regulatory agency for sites that are not on the NPL. For sites that are on the NPL, the State environmental agency is often a signatory to the Federal Facility Agreement governing the remedial process at the site. For sites with RCRA permits, the State is often the lead regulatory agency for permitted units on the site, such as hazardous waste storage units or landfills. Formal concurrence of the State will also be required for sites undergoing RCRA Corrective Action in States that have RCRA Corrective Action Authority.
11. **Page 12, Step 4: Begin Development of the Draft FOSET Package, first paragraph:** The Handbook should provide greater detail as to how intended use of the property would be negotiated, defined and memorialized. Because definition of potential risk and development of institutional controls relies on intended uses, it will play a critical role in determining whether early transfer is appropriate. The Handbook should also discuss the impacts to the Components' responsibility if the intended use changes after transfer.
12. **Page 12, Step 4: Begin Development of the Draft FOSET Package, first paragraph, first sentence:** This sentence needs to include "and any State-specific early transfer documents, such as consent agreements, land use covenants, insurance, etc."
13. **Page 12, Step 4: Begin Development of the Draft FOSET Package, first paragraph, second sentence:** Governor and EPA should be switched such that the sentence reads, "The FOSET is the document that summarizes the environmental condition of the property and allows the Governor, or the EPA with the concurrence of the Governor, to make a determination that the covenant may be deferred."
14. **Page 12, Step 4: Begin Development of the Draft FOSET Package – Checklist for FOSET Package, Component finding of suitability:** The Handbook should provide greater detail regarding the regulatory impacts to the Component and transferee if remedial privatization is decided. As described above in comment #12, if the transferee decides to conduct the cleanup, several legal agreements will likely be required. For example, State environmental regulators may require an enforceable agreement with the Component to ensure it retains its legal obligation, an enforceable agreement with the transferee to assure compliance with environmental regulations, and possibly an enforceable agreement between the Component and the transferee to assure adequate funding exists to assure the cleanup is done in a satisfactory manner and within predetermined milestones.

15. **Page 12, Step 4: Begin Development of the Draft FOSET Package – Checklist for FOSET Package, Component Finding of Suitability:** The BRAC Environmental Coordinator (BEC) should also consult with the local zoning authority, such as the county, to determine if the property is suitable for use as intended by the transferee.
16. **Page 13, Step 4: Description of the nature and extent of contamination:** Petroleum may not be subject to CERCLA, however, the manual should provide some guidance.
17. **Page 13, Step 4: Analysis of intended future land use:** Regarding the issue of engineering and institutional controls and deed notices, the group is unclear regarding how this will be applied. The document states that "the Component lead, in consultation with the BEC, Component legal counsel, and the state environmental regulatory agency representative on the Development Team, will develop proposed restrictive measures (i.e., institutional and/or engineering controls) to prevent exposure during cleanup of the property" if it is determined that exposure to contaminants is anticipated. It also states that the restrictions will be agreed to by the transferee prior to submitting the package to the governor. Once finalized "the Component real property personnel, in consultation with the Component legal counsel, will ensure that these restrictions are included in the deed for the property."

For example, in the State of New Jersey, the State requires that the remedial action be completed (either by the original property owner, developer, etc.) prior to the notice being placed on the deed since in many cases the remedial action itself is identified in the deed notice (e.g., a building or parking lot acting as a cap over contaminated soil). By having the remedial action completed, it allows the regulators to inspect the property to determine that what the proposed deed notice stated was done, actually occurred. The State has found that in some cases, the remedial action that was approved and then documented in a proposed deed notice was not implemented as proposed (e.g., the parking lot didn't fully cover the contaminated soil).

Allowing the regulators to have an active role in monitoring land use controls should be a minimum requirement. In New Jersey, the State environmental agency conducts inspections of land use controls every two years and the responsible party or current property owner must send the agency biennial certifications that the engineering control is still in place.

18. **Page 14, Step 4: Analysis of intended future land use, third sentence:** The handbook should require that restrictive measures be developed in time for public comment. Without development of the restrictive measures, much of the public comment will be directed at the absence of restrictive measures. In turn, DOD will not be able to respond to the comments and will have to go back and develop the restrictive measures and start the process over again.

19. **Page 14, Step 4: Analysis of intended future land use, last sentence:** The handbook should discuss who enforces the restrictions on the property.
20. **Page 14, Step 4: Response and corrective action requirements:** The Handbook should clarify that in many instances this information may not be available. Early transfer can occur prior to development of a feasibility study, making development of a summary of all ongoing or planned remedial or corrective action pre-decisional. In addition, scheduling for remedial actions are based on DOD budgets, which, in many instances, will not be available when early transfer, is proposed. Finally, if the property undergoes remedial privatization, this information, along with the operation and maintenance requirements, cost estimates for site characterization and remediation and the schedule for site characterization and remediation will likely be negotiated between State environmental regulators and the transferee, not the BRAC Cleanup Team (BCT).
21. **Page 14, Step 4: Response and corrective action requirements:** EPA certifies the remedy as Operating Properly and Successfully (OPS) when the remedial design is complete, not when the remedial action is complete. A remedial action for groundwater could take many years to complete once it has been certified OPS. Please clarify.
22. **Page 14, Step 4: Response and corrective action requirements:** Perhaps elsewhere in the document, language needs to be added discussing the need for a Consent Order with the State when the transferee is going to perform the cleanup (see NAVY: Fleet Industrial Supply Center Oakland example, top paragraph on p.33).
23. **Page 14, Step 4, Cost estimates for site characterization and remediation:** Cost to complete estimates may be highly inaccurate. If the transferee is going to conduct the cleanup, the handbook should stress that the transferee acquire insurance to cover unknown contamination.
24. **Page 14, Step 4: Cost estimates for site characterization and remediation:** Where remedial privatization is implemented, financial assurance will likely be negotiated between State environmental regulators and the transferee, not the Development Team.
25. **Page 14, Step 4: Language to include in deed – second bullet:** In most cases the CERCLA covenant is granted by DOD. However, in Maine at least only the property owner can record a covenant on the deed. The handbook should at least recommend that the team research various State laws on this matter.
26. **Page 15, Step 4: Language to include in deed, third bullet:** If the transferee conducts the cleanup, or if development occurs prior to implementation of the remedy, land use restrictions may need to be in place and enforced long before the CERCLA covenant is included.

27. **Page 15, Step 4: Language to include in deed, 4th bullet, last sentence:** There is not a subsection A in Section III.
28. **Page 16, Step 5: Invite Public Participation:** The Handbook should be modified to place the responsibility of the public participation on the Development Team, not the BEC, legal counsel and the public affairs office. State environmental regulators have strong ties with community members and can provide significant assistance with public participation.
29. **Page 16, Step 5: Invite Public Participation:** The Handbook should be modified to state that under no situation should public participation be requested: 1) without a draft FOSET available for public review, and 2) after the FOSET has been finalized. Active, meaningful public input throughout this process is critical to its success. The public should participate early and often.
30. **Page 17, Step 5: Invite Public Participation, fourth paragraph:** The Handbook should delete the reference that the LRA “includes community leaders and developers that are chartered to represent the community’s interest in the transfer and reuse of excess military properties.” In many instances community leaders and developers are not part of the LRA and are not chartered to represent community interest.
31. **Page 17, Step 5: Invite Public Participation, sixth paragraph:** County commissions should also be included under public involvement.
32. **Pages 18-19, Step 8: Provide the CERCLA Covenant:** The Handbook improperly assumes that if the transferee assumes responsibility for the cleanup, the cleanup will be done under CERCLA. Once the property is transferred, it will be the decision of the State environmental regulators as to what environmental laws will govern completion of the site's remediation.

SECTION V. TOOLS AND STRATEGIES FOR EXECUTING AN EARLY TRANSFER

1. **Page 21, fourth paragraph, last sentence “three types of agreements...”:**
There may also need to be agreements between the transferee and the component that defines responsibilities for remedial action. For example, DOD is generally the only body qualified to do UXO or ordnance cleanup and there must be agreements to define those types of issues.
2. **Page 21, example 3:** At Mare Island, for the portion of Mare that underwent early transfer, the Local Reuse Authority (LRA) assumed all cleanup responsibility. DOD did not retain any cleanup responsibility for the property that transferred. Also, under "Documents required:", a land use covenant, new/revised

Federal Facilities Site Remediation Agreement (FFSRA) should be added to the list. Finally, the insurance, in the Mare deal, was not optional as far as the State of California is concerned. In general it is part of what the State looks for as the assurances.

APPENDIX A: ACRONYM GLOSSARY

1. **Page 38, Words were left out of the definition of OPS.** Change to: . . .by EPA that the remedy is functioning as designed.