

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is a non-profit trade organization supporting the environmental agencies of the States and trust territories. The Association's mission is briefly stated: "To Enhance and Promote Effective State and Territorial Waste Management Programs, and Affect National Waste Management Policies".

ASTSWMO's members are the State managers of hazardous waste, solid waste, and cleanup programs, who are engaged full time in the regulatory and remediation activities of their State environmental agencies, and have hands-on familiarity with the implementation of federal and State statutes governing federal facilities.

The mission of the ASTSWMO Federal Facilities Research Subcommittee is to serve as a clearinghouse for States on information relative to federal facilities and the implementation of cleanup and waste management issues at these sites. The Subcommittee also serves to promote policies which preserve and enhance States' rights.

This paper was developed by members of the Base Closure Focus Group of the ASTSWMO Federal Facilities Research Center in order to assist State program managers as they prepare to deal with the environmental cleanup consequences of another round of Department of Defense (DOD) base closures beginning as early as 2005. The purpose of the Base Realignment and Closure (BRAC) paper is to outline the lessons learned from the States in working with DOD; highlight areas of improvements necessary for successful future BRAC rounds; and alert State program staff to probable and possible situations that will arise as they prepare to deal with the cleanup of contaminated sites at closed or closing bases. We are convinced that only straightforward descriptions will convey those experiences.

The Focus Group believes that the experiences of four earlier rounds of BRAC have provided State programs with considerable empirical knowledge of many of the likely problems that may arise. In order to share that knowledge, they developed a discussion draft, to be circulated among State program offices for comment and suggestions for improvement. Following that initial discussion draft circulation, the Focus Group has finalized the paper and it is now available to any interested party via our homepage, www.astswmo.org

The reader will note that this paper is written entirely from the State program manager's perspective. Other participants in the BRAC cleanup process will have different views of the cause and effect of situations described, and have differing interpretations of how statutes, rules, guidances and other procedures have and should apply in these situations.

ASTSWMO recognizes this bias, but because the target audience is State staff members, believes that it is much more important to convey the entirety of State experiences than to try to satisfy all readers that every interest is represented. The Association believes the views of our members are relevant and useful to those involved in the cleanup of BRAC sites and for the future success of the program.

BASE REALIGNMENT AND CLOSURE (BRAC) FUTURES PAPER

PREPARING FOR THE NEXT ROUND OF BRAC: ISSUES FOR CONSIDERATION FROM THE STATE PERSPECTIVE

INTRODUCTION

After four rounds of base closings in the 1990s, the Department of Defense (DoD) estimates that it still maintains approximately 25 percent more facilities than it needs. According to a General Accounting Office Report (GAO-01-971, July 2001), the DoD estimates a net savings resulting from the four BRAC rounds to be about \$15.5 billion through fiscal year 2001. Of the almost 400 Base Realignment and Closure (BRAC) facilities, approximately 206 of these have required some sort of environmental response action under the Defense Environmental Restoration Program (DERP) prior to final disposition. The environmental investigation, remediation, and restoration of federal facilities, including facilities subject to closure and realignment due to the BRAC, is mandated under federal laws including, but not limited to the Resource Conservation and Recovery Act of 1976, as amended (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), the Toxic Substances Control Act (TSCA) and the Clean Water Act (CWA). In addition, most States have their own State law requirements regarding environmental investigation, remediation, restoration and property transfer at federal facilities.

While DoD, the United States Environmental Protection Agency (EPA), States and the communities have made progress in the cleanup of numerous BRAC sites, there is still much work to be done. Over the last 14 years, States have identified successful procedures and methodologies at the vastly different BRAC sites throughout the country. With a potential new round of BRAC in 2005, all the parties involved in BRAC have an opportunity to take advantage of the lessons learned and implement these for an expeditious and cost-effective process. The focus of this paper is not intended to either support or oppose additional BRAC rounds. It is simply intended to outline the lessons learned from States and highlight recommended areas of improvements necessary for successful future BRAC rounds.

GENERAL AREAS FOR IMPROVEMENT:

- Ensure early State involvement in the BRAC process, especially in the preliminary clean-up scoping activities and budgetary planning;
- Identify lead agency/regulatory roles and responsibilities early in the process, and establish realistic and enforceable schedules;

- Ensure DoD recognition and compliance with State clean-up statutes, regulations, and enforcement authorities;
- Identify statutory language that has broad support that amends Section 120(h) of CERCLA to give States the authority to approve all transfers of BRAC property;
- Ensure consideration of long-term operation and maintenance and institutional control liability in out-year funding and resource allocation; and
- Resolve the inadequacies surrounding the use, application, monitoring and enforcement of institutional controls.

FUNDING AND RESOURCE ALLOCATION

Inadequate and unstable BRAC funds prevent property transfer and site closeout within an expeditious schedule. Funding shortfalls can result from fiscal year budgets where the BRAC budget is cut during a particular year due to unforeseen expenditures within DoD, or shortfalls can be associated with total site clean-up costs. Total clean-up costs and remediation schedules are developed by DoD when the base is initially closed and without a clear understanding of the environmental condition of the base, and in some instances without a well-developed indication of the future land use. The end result in most cases is an underestimation of the nature and extent of contamination resulting in severely deficient total clean-up costs estimates and unachievable remediation schedules.

- **Guaranteed Fixed Priced Remediation**

DoD has begun using Guaranteed Fixed Price Remediation (GFPR) contracts at several BRAC installations across the country in order to establish definitive out-year costs for Congress. The use of this contracting mechanism has raised concerns by some States. One of these concerns is a lack of direct oversight by DoD. In several cases, the service branch has stepped away from the table regarding hands-on oversight of contract implementation and technical decision-making. This results in all DoD on-site personnel being contractors with no decision-making authority. DoD's on-site representative, a contractor, does not always perform the duties that would be expected of an on-site Base Environmental Coordinator (BEC), such as attending weekly construction meetings. Operating in this manner inhibits DoD from assuring regulators that work is being done as specified or required by DoD. It is not the responsibility of States to ensure DoD contractors abide by its contractual obligations or meet the remedial goals of the DoD.

Another concern with the use of the GFPR contracting mechanism is that it can create a dysfunctional BRAC Cleanup Team (BCT) decision-making process. GFPR contracts have, in many instances, removed the DoD from day to day oversight of BRAC cleanups, in light of DoD's continued CERCLA liability to meet State cleanup requirements. In the best case, and as is required by DoD Fast Track Policy, the BEC (a DoD employee) should be able to make timely decisions through the collaborative BCT decision-making process. In certain cases, when the

DoD point of contact is a contractor that is not empowered with the authority or the flexibility to make cleanup decisions regarding a BRAC site in accordance with applicable laws, the remedial response must be stopped and await direction from DoD. Also, the contractor is not always aware of standard operating procedures for the site previously agreed to by the BCT, DoD policies, and established regulator expectations. Consequences of implementing a GFPR contract may include inconsistent DoD interaction with regulators and unilateral actions that contradict federal statutes, regulations, and DoD policy.

Recommended Area for Improvement

For the next round of BRAC, DoD must implement a better process for estimating cleanup costs. This improved process should begin with a more aggressive operational history review, including interviews with military staff, evaluation of aerial photographs, coordination with State environmental regulatory agencies and environmental sampling if deemed necessary. While States expect both annual and total clean-up funding shortfalls to remain at BRAC sites, the impacts can be reduced by improving the DoD contracting process and ensuring continued open communication between DoD and State project managers regarding remediation prioritization, scheduling and budgets, and improvements when BRAC budgets are projected to be initiated.

The primary change needed in the GFPR contract process is to develop a uniformly defined GFPR contract that reengages the DoD technical decision-maker (a BCT level DoD employee) involved in the collaborative decision-making process with the other BCT members. This involves not only active participation by DoD, but adequate funding of the BCT by the military services. The DoD process of environmental decision-making then would recapture much of its transparency and create a better working relationship among the BCT members. In turn, an improved working relationship would yield a much higher confidence level in DoD. Finally, State regulators must be similarly empowered to make decisions at the BCT level in order for the fast track process to work as intended.

ROLES AND RESPONSIBILITIES

On July 2, 1993, the President announced a base closure community reinvestment program (commonly known as the "Five Point Plan") directed at the revitalization of local communities affected by BRAC actions through economic and fast track cleanup initiatives. The Fast Track Cleanup policy memorandum issued on September 9, 1993 included: procedures for establishing BCTs and conducting comprehensive "bottom up" reviews of cleanup plans and schedules at closing installations; accelerating the National Environmental Policy Act (NEPA) process; involving the public; determining environmental suitability to lease; and implementing the Community Environmental Response Facilitation Act (CERFA) for identification of uncontaminated properties.

- **Support for the BCT**

In most instances, negotiations will proceed smoothly at the BCT level without direct participation of management, primarily due to the strength of the BCT's working relationship. While prudent review, meaningful support and timely direction are all welcomed functions of higher levels of management within each of the stakeholder bureaucracies, there have been numerous times when a BCT member (DoD, State and/or EPA) is constrained from making a decision by their organization. BCT members need to either be delegated adequate decision-making authority or be proactive in briefing their management on potential discord so that resolution of a dispute does not delay execution of the environmental restoration process.

Recommended Area for Improvement

Managers from all agencies must clearly communicate their organization's goals, objectives and bottom line to their BCT member so they are able to negotiate effectively and efficiently.

- **BCT Approach**

Open discussion of issues and concerns establishes trust between BCT members and promotes a more productive work environment. Progress is accelerated when all BCT members can trust each other and work in a cooperative manner. Once all BCT members engage in respectful dialogue, free exchange of stakeholder needs can focus the team on resolutions that satisfy all legitimate stakeholder concerns.

It is understood that there will likely be disagreements on at least some restoration issues at any given BRAC site. Interpersonal frictions often arise from things that are out of the control of the individuals involved, such as organizational policies or procedures. BCT members need to realize many of these situations have a global context and are out of their direct control.

Recommended Area for Improvement

In order for the BCT to be successful, once the BCT understands each agency's organizational needs and policies, sheds personal acrimony, and focuses on solutions that mutually satisfy the needs of each of its members, the BCT will be able to work in a cooperative manner. In some cases this may require the assistance of a neutral facilitator.

- **Need for Documentation of BCT decisions**

BCTs will experience personnel turnover during the remediation and transfer process. While this is the nature of any organization, it can create problems in the management of the site. Turnover can cause a loss of historical knowledge about the site and decisions made. With the current fiscal shortfalls in many States, replacing State personnel can be time consuming and in some cases vacant positions are abolished. At some BRAC sites, due to the comfort and trust built between the members of the BCT, agreements have been made that are built on this trust and not properly documented. While an indication of a positive working relationship, these undocumented agreements are only useful after they are memorialized in minutes, letters, or other documentation. Without any written agreement a State or federal agency may be

compelled to reject past verbal agreements. This will cause delays in project progress while issues must be re-thought and decisions must be potentially re-made.

Recommended Area for Improvement

The BCT needs to determine upfront a means of establishing consensus and closure on issues as well as a method for documenting such decisions. BCT's must be prepared for personnel turnover and inadequate staffing within all agencies. BCTs should develop contingencies to minimize delays due to insufficient staffing.

STATE INVOLVEMENT

The States, based on their prior history with DoD and private site remedial actions, are able to provide significant and critical input to this planning and budgetary process. Having State input early in the process can greatly assist DoD in the expeditious and cost effective cleanup and transfer of a BRAC parcel.

▪ State Authorities

Since the inception of the BRAC cleanup program, considerable confusion and inconsistency exists within DoD and at times within the EPA over the interpretation of the role and regulatory authority of States at BRAC sites, particularly at the sites not listed on the National Priorities List (NPL) sites. States, in their attempts to apply State clean-up standards to BRAC sites, are often thwarted by:

- Federal claims of sovereign immunity;
- Narrow readings of State and Federal environmental laws;
- The lack of recognition by DoD of State authorities; and
- DoD's interpretation of their authority under Executive Order 12580.

Numerous legal disputes have arisen over the role of States in all aspects of environmental cleanup, including but not limited to adequacy of site investigation, remedy selection, removal actions, and the selection of clean-up standards. Continued disagreement over these issues will result in a more time-consuming and costly clean-up process and may result in BRAC clean-ups that do not meet State standards and are therefore unprotective/incomplete once the federal government is ready to transfer the property. Therefore, after years of going through the remediation process, the State may have no other recourse but dispute resolution and/or litigation to stop a Finding of Suitability to Transfer (FOST) for a site not adequately characterized or remediated. For example, the 1999 ASTSWMO BRAC Survey reported that only seven out of twenty-six States believed that DoD clean-ups met State requirements.

Recommended Area for Improvement

Rather than allowing funding limitations and transaction cost of property transfers to drive the process, protecting public health and safety and focusing on the technical issues must remain the primary DoD goal. Therefore, effective measures to prevent DoD from preempting State authority to implement State regulations and the primacy for State authority at BRAC sites must be implemented. Specific roles and responsibilities of DoD, EPA and States must be defined early in the BRAC process. Finally, States must have a concurrence role in all property transfers, especially FOSTs.

REGULATORY COMPLIANCE AND OVERSIGHT

DoD needs to have on-site adequate oversight during fieldwork. Despite the large amount of money being spent to address BRAC sites, in some cases DoD has failed to provide a field engineer on-site to oversee remedial action activities. At some instances, DoD's BECs are not located in the same state as the BRAC site, or are not adequately trained in environmental remediation. This in effect forces the contractors to make inherent-governmental decisions, potentially cutting corners, and to take a lead role in a remediation in which their only interest is profit.

Recommended Area for Improvement

DoDs failure to adequately oversee the contractors can promote unwarranted expansion of the scope of work to be conducted (i.e., costing more money), and it can exacerbate communication breakdowns. DoD should ensure that trained, on-site DoD personnel are present at all BRAC sites.

- **Internal Review**

In some instances, DoD should involve qualified technical review teams at BRAC sites. Including outside expertise as a means of checks and balances may result in cost savings and expedited cleanup. However, many States have found the technical review teams to be problematic in assuring a cooperative approach to BRAC cleanups. Although progress frequently improves when technical review teams are employed, there is a significant chance that schedule compliance will become the only metric of concern and the decision-making authority of the BRAC Cleanup Team will be usurped by the technical review team or the DoD component.

Recommended Area for Improvement

When appropriate, the DoD's internal review teams can eliminate time-consuming and costly report reviews by State regulators. However, decision-making authority cannot be transferred to the review team; this authority must remain with the BCT.

- **Accountability**

DoD should hold contractors accountable for their mistakes. At one BRAC site, the Air Force fired contractors and/or required them to pay for mistakes they had made. Contractors now know they must deliver a superior product or face the consequences of termination or having to reimburse for poor quality work. Unfortunately, some contractors view BRAC sites as sources of unlimited funding and work.

Recommended Area for Improvement

DoD needs to hire contractors that realize that a profit can be made by producing a product that will satisfy the goals and objectives of both DoD and the regulatory agencies, while at the same time, a winning philosophy for expeditious closure of BRAC sites is implemented.

PROPERTY REUSE

As with all real estate, the importance of a coordinated land-use plan is a critical factor in the value of the property. This factor will be a driving force in the timing of remediation and reuse of these facilities.

- **Reuse Plans**

A well-developed re-use plan is critical to timely remediation and serves as guidance to prioritize BCT work. For example, success at a Navy BRAC site was due in large part to the community's vision of property re-use. The re-use plan, once established, changed very little, although priorities were revisited often during the first 2-3 years. Their vision included not only the types of land uses they wanted, but also the standard for how clean is clean (essentially, unrestricted use for all property, regardless of planned land use). In two instances, Navy policy would not allow remediation of the site to the community's standards. The local community recognized this and, through a MOA, agreed to provide labor and/or funds to reach their desired goal.

Remediation was hindered at another Navy site that lacked a reuse plan from the community, resulting in no Navy funding and extensive delays in completion of cleanup. Another example comes from an Army BRAC site. Seven years after being listed as a BRAC site, the stakeholders continue to "swap" acreage, thus changing the planned re-use. This, in turn, has caused re-use priorities to change, with the BCT continually working on projects that may or may not represent the greatest need.

Recommended Area for Improvement

Coordinating and communicating a BRAC site's re-use plan is vital for a successful, expeditious cleanup. Having a schedule showing parcel breakdown and target date for transfer (which includes not only the CERCLA documentation process, but public comment periods and the service branch's real estate requirements) has proven to be a helpful tool, even if it needs continual revision. Such a schedule helps keep the team focused and cognizant of which tasks must occur in which order. Once fieldwork is finished and data reviewed, it is difficult for communities to understand why they cannot have the property right away. Base Transition Coordinators (BTC) and BCTs need to clearly communicate, between each other and the public, timelines for completion of all tasks before property can be transferred. A detailed schedule can provide a check and balance against giving a community a false sense of the property transfer timeline.

- **DoD Priority Setting**

Re-use plans rest largely in the hands of local government, the Redevelopment Authority and the community. DoD cannot pursue alternate remedial actions at a BRAC site if a community is not unified in its vision for the property. In lieu of a well-developed re-use plan, the BCT should insist on a facility-wide implementation plan. DoD can still make progress if it decides on one priority (i.e., environmental cleanup, or readying property for transfer) and supports that priority throughout the management chain. For instance, at one site the Army has waited for the Local Reuse Authority (LRA) and another federal agency to work out land re-use issues, while they have been conducting investigations, cleanup and determining what property is eligible for transfer. The Army BRAC Office (BRACO) is concerned primarily with property transfer and reuse, since the Army focuses on parcels that need no further action. The BEC is primarily concerned with obligating money, keeping contractors working, and focusing on parcels that need additional investigation or remediation. These two needs have not been reconciled within the Army, which has resulted in the BCT receiving mixed signals regarding work priorities. This site has been "closed" for seven years, and has not yet transferred any property largely due to a lack of a facility-wide approach to reach DoD's goals.

Recommended Area for Improvement

The Army should explore the need to establish separate Army offices that focus on the different priorities and coordination efforts as they relate to BRAC cleanup and property transfer. This could lead to a more effective prioritization system that would expedite the cleanup and transfer of federal properties.

- **Early Transfer**

CERCLA Section 120(h)(3)(c) allows Federal agencies to transfer contaminated property outside the Federal government before all necessary remedial actions have been taken. Under this "early transfer authority", the required deed covenant warranting that all remedial action has been taken is deferred until a later date. While there are undoubtedly situations where early transfer may be

appropriate for the redevelopment of BRAC properties by local redevelopment authorities, concerns exist about the transfer of contaminated property prior to the completion of nature and extent investigation, baseline risk assessments, and binding commitments on the part of DoD to fund long-term response actions.

In addition, the early transfer of BRAC properties may require lengthy negotiations to add local redevelopment authorities to RCRA permits and consent orders and require local redevelopment authorities to post financial assurance should they agree to take on the responsibility to conduct required response actions. For facilities subject to RCRA permits, the transfer of contaminated property prior to the completion of corrective action may limit a local redevelopment authority's ability to market this property as all successive transferees will also be subject to the RCRA permit. Additional concerns are that DoD components may be moving towards utilizing this early transfer as the preferred transfer vehicle for future BRAC property transfers rather than utilizing more traditional transfer/redevelopment approaches in order to remove DoD from the obligation to retain and manage property contaminated by DoD activities.

Recommended Area for Improvement

DoD has suggested that early transfers are beneficial because they will allow local redevelopment authorities to integrate cleanup and development and thereby reuse properties that would have otherwise gone unused because without early transfer, environmental restoration and redevelopment must occur consecutively. While there are undoubtedly situations where early transfer may be advantageous to the redevelopment of BRAC properties, the suggestion that redevelopment and environmental restoration cannot take place concurrently outside of early transfer is unfounded.

The successful integration of environmental restoration and redevelopment is most dependent upon the early identification of a detailed reuse plan by the local redevelopment authority, close coordination and cooperation between the BCT and the local redevelopment authority, and early and adequate funding of response actions by DoD. Early transfer should be viewed not as the default mechanism for property transfer, but as one of a number of options for property transfer and redevelopment such as parcelization, operating properly and successful demonstrations and leases in furtherance of conveyance.

INSTITUTIONAL CONTROLS

Many if not most base closures, because of the nature of the contamination and the often-remote locations, result in contamination left in place because it poses no current risk to human health and the environment. DoD has shown an increased reliance on institutional controls as the primary remedy or as a major component in the overall remedies at BRAC sites. In most instances, institutional controls are lower in initial costs as compared to permanent remedies and are a valid component of many final remedial decisions. However, institutional controls/environmental covenants should not be the sole component of any final remedy.

State experiences with institutional controls suggest: 1) permanent remedies are more effective

over time than high maintenance remedies such as institutional controls and/or environmental covenants; 2) monitoring and enforcement of institutional controls on transferred property is difficult; 3) ICs that are left to monitor themselves fail; and, 4) public input into the selection and use of ICs is crucial to successful implementation.

Lessons learned from similar risk-based cleanup decisions at other federal facilities, particularly DOE sites, have taught us all the importance of building Long-Term Stewardship (LTS) into closure and cleanup plans at the outset. Institutional controls are one aspect of long-term stewardship. LTS includes tracking mechanisms and an established commitment to resources for ongoing tracking and enforcement.

Recommended Area for Improvement

Future BRAC sites should include out-year funding for the monitoring and enforcement of institutional controls that are part of the final remedy. As a lesson learned, all parties should ensure that the proper NCP process is followed and that all alternatives be evaluated, not just no further action, environmental covenants or institutional controls. Finally, dialogue on LTS should be included as part of the larger ongoing discussions on BRAC. DoD should refer to language from the Environmental Council of the States (ECOS) MOU on LTS as it relates to transferring BRAC properties.

CONCLUSIONS

Perhaps the most pervasive challenge at BRAC sites has been to accelerate transfer of bases into economically viable civilian uses. Over the past 14 years, it has become evident that two of the underlying needs in the BRAC process are providing assistance to local communities economically impacted by base closures, particularly at sites with little inherent land value, and establishing a rapid, cost-effective program of environmental clean-up at bases prior to their ultimate disposition. The executive branch articulated a formal policy to address these issues fairly early on in the BRAC program.

In order for the BRAC program to be effective, there must be a commitment of thorough coordination between DoD parties associated with base closure and the public from early in the process through site closure and property transfer. The next BRAC round can be improved by ensuring stable funding, hands-on DoD management of GFPR contracts, recognition of land use limitations due to location, early State involvement in the BRAC process, DoD recognition of State authority, adequate community involvement, and funding for monitoring and enforcement of institutional controls. States believe that State participation in reviewing the BRAC budget and land transfer documents, and more training and better communication between all parties involved, will improve the BRAC process and hopefully will be a part of future BRAC rounds. States are prepared to discuss each of the recommendations described above in detail to ensure such improvement in the BRAC process.