The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

42 U.S.C. §9601 et seq.

and Federal Real Property Disposal

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U.S. General Services Administration

General Services Administration

- Federal Acquisition Service

- Public Buildings Service
  - Acquisition
  - Construction
  - Leasing
  - Real Property Disposal

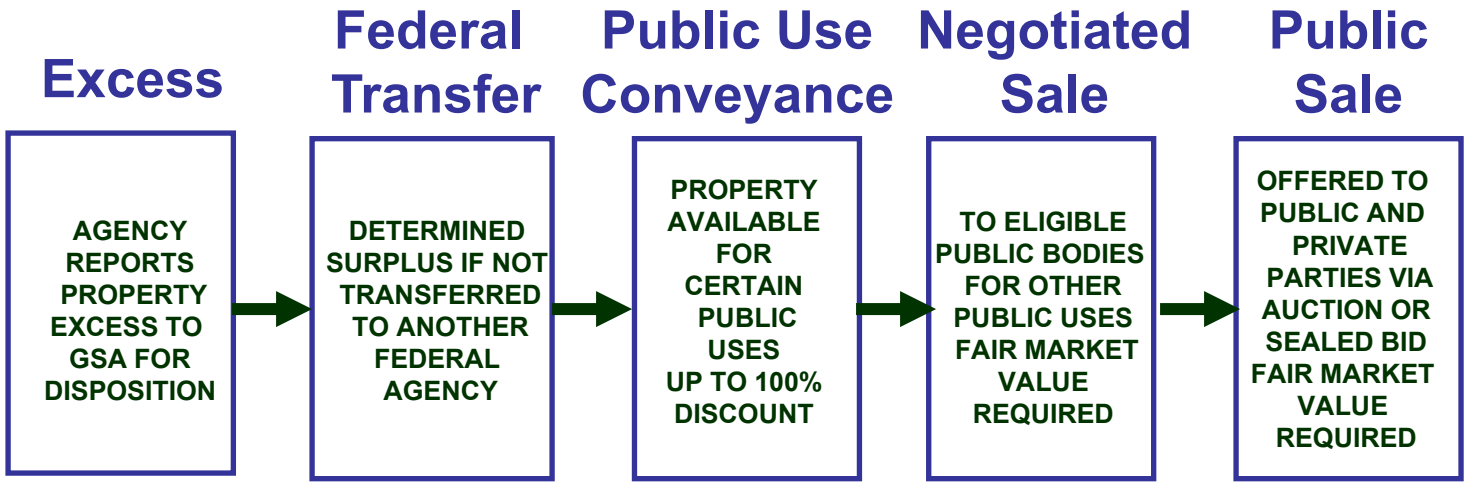
Federal Real Property Disposal Authorities

- Title 40 provides GSA with government-wide authority to reposition federal real property.

- GSA's Title 40 authorities are delegated to the Department of Defense for Base Realignment and Closure (BRAC) properties.

- Numerous agencies also have their own unique real estate authorities specific to properties under their control. Examples:
    - Department of Veterans Affairs (VA)
    - U.S. Coast Guard
    - U.S. Forest Service

Title 40 Real Property Disposal Process



USES:

HOMELESS	SELF-HELP HOUSING
AIRPORT	PARK & RECREATION
CORRECTIONAL	PORT
EDUCATIONAL	PUBLIC HEALTH
HIGHWAY	POLICE / FIRE
HISTORIC	WILDLIFE CONSERVATION

Publicly vs. Privately-Owned Resources

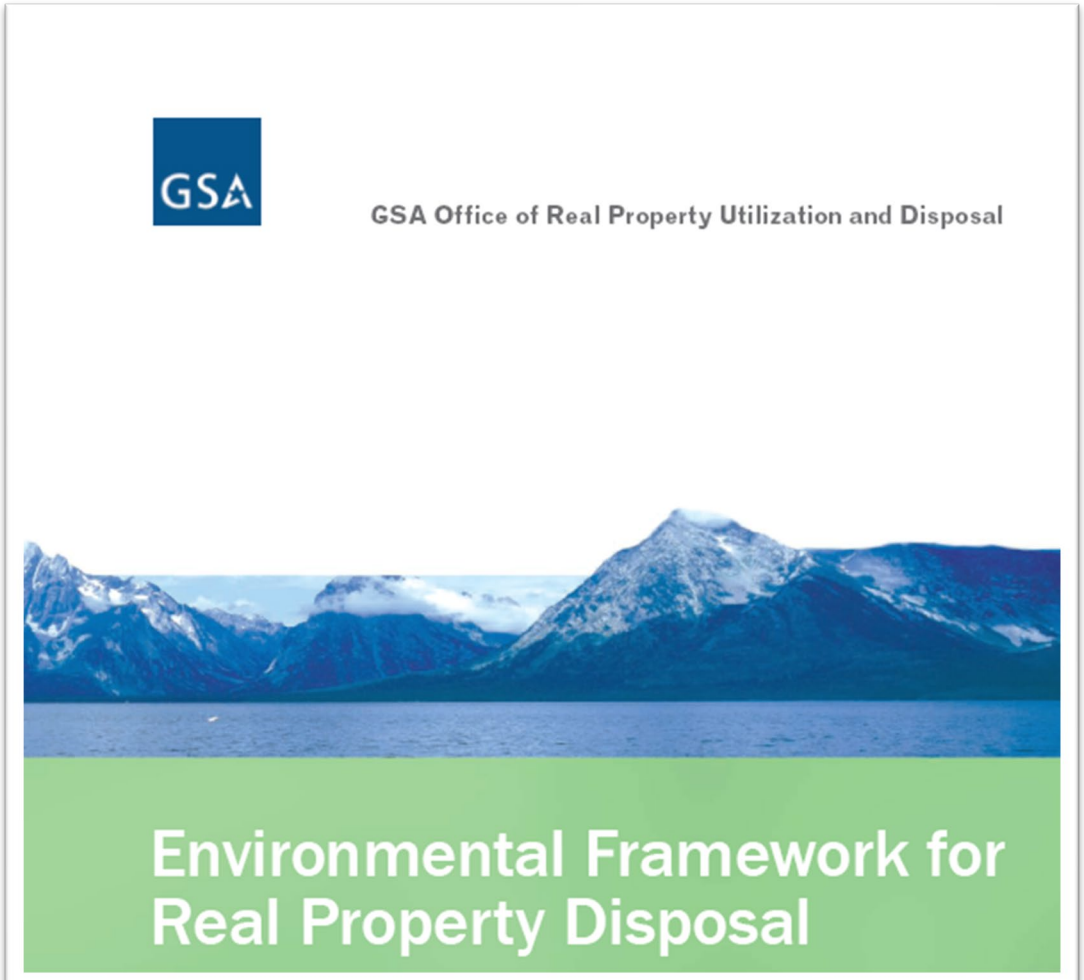
- Expectations of Community, Local Officials, and Congress
- Compliance with Environmental and Cultural Laws
- Balancing Public vs. Monetary Benefits
- Unique Title and Infrastructure Concerns
- Specialized Government Uses Not Easily Adaptable

Environmental Considerations

- NEPA
- Historic and Cultural Resources
- Endangered Species
- Floodplains
- Wetlands
- Coastal Zone Management
- CERCLA
- RCRA permits
- USTs
- Firing ranges
- Asbestos
- PCBs
- Lead-Based Paint

GSA Environmental Framework

http://propertydisposal.gsa.gov



42 U.S.C. §9620(h)(3)

Section 120(h)(3) of CERCLA has unique requirements pertaining to the deeds of real property leaving federal ownership:

- CERCLA 120(h)(3)(A) “Timely Transfer”
- CERCLA 120(h)(3)(B) “Operating Properly and Successfully”
- CERCLA 120(h)(3)(B) “PRP Transfer”
- CERCLA 120(h)(3)(C) “Early Transfer”

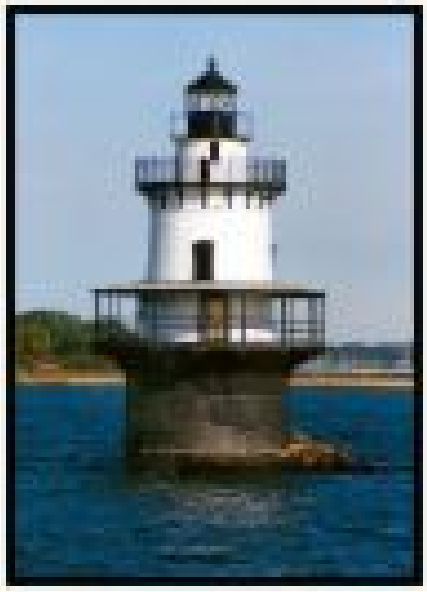
42 U.S.C. §9620(h)(3) Exclusions

Section 120(h)(3)(A):

"…in the case of any real property owned by the United States….each deed entered into for the transfer of such property by the United States to any other person or entity shall contain…."

CERCLA 120(h)(3) only applies to deeds of real property

Hog Island Shoal Lighthouse (RI):
Non-Fee Conveyance so
120(h)(3) DOES NOT Apply



In addition to personal property transfers, the 120(h)(3) deed requirements also do not apply when the United States grants other less-than-fee property interests…permits, licenses, leases, easements.

CERCLA 120(h)(3) only applies to the conveyance from the Unites States to a non-federal entity

St. Elizabeth's Hospital (DC) Federal Transfer for DHS Headquarters

CERCLA 120(h)(3)(A): Required Deed Provisions

- Disclose Hazardous Substance Activity
- Provide Grantee with Covenants:
  - All remedial action necessary has been completed at time of transfer
  - The United States shall conduct any additional remedial action found necessary after transfer (for contamination existing at time of transfer).
  - Access reserved for any additional remedial action found necessary after the transfer.

CERCLA 120(h)(3)(A): Timely Transfer

Bemidgi Federal Building (MN)

https://realestatesales.gov

CERCLA 120(h)(3)(A): Timely Transfer with Land Use Controls

- Land Use Controls can satisfy the requirement that “all remedial action necessary….” has been taken.
- GSA plays the final role in executing that specific remedy, working closely with both the federal landholding agency and the applicable environmental regulatory agency.
- Any LUC included in all purchase and sales documents.
- GSA seeks to comply with state law for land use control language and recordation.
- GSA also works closely with other federal agencies regarding the implementation of activity use limitations on non-excess property.

CERCLA 120(h)(3)(A): Timely Transfer with Land Use Controls

Point Pinos Light Station (CA)

Notice

Pursuant to 40 CFR 373.2 and Section 120(h)(3)(A)(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA)(42 U.S.C. §9620(h)(3)(A)(i)), and based upon a complete search of agency files, the United States gives notice that other than the substances identified in Exhibit B, no hazardous substances have been released or disposed of or stored for one year or more on the Property……

Covenant

The United States warrants that all remedial action necessary to protect human health and the environment has been taken before the date of this conveyance. The United States warrants that it shall take any additional response action found to be necessary after the date of this conveyance regarding hazardous substances located on the Property on the date of this conveyance…..

Access

Grantor reserves a right of access to all portions of the Property for environmental investigation, remediation or other corrective action. This reservation includes the right of access to and use of available utilities at reasonable cost to Grantor. These rights shall be exercisable in any case in which a remedial action, response action, or corrective action is found to be necessary after the date of this conveyance, or in which access is necessary to carry out a remedial action, response action, or corrective action on adjoining property…..

Restrictions

Property shall not be used for any of following purposes: a residence, including any mobile home or factory built housing used as residential human habitation, a hospital for humans, a public or private school, a day care center for children, a playground…..

No activities that will disturb the surface soil to 12 inches below ground surface (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall be allowed on Property without a pre-approved Soil Management Plan and a Health and Safety Plan approved by the California Department…..

CERCLA 120(h)(3)(A): Timely Transfer with Land Use Controls/Easement

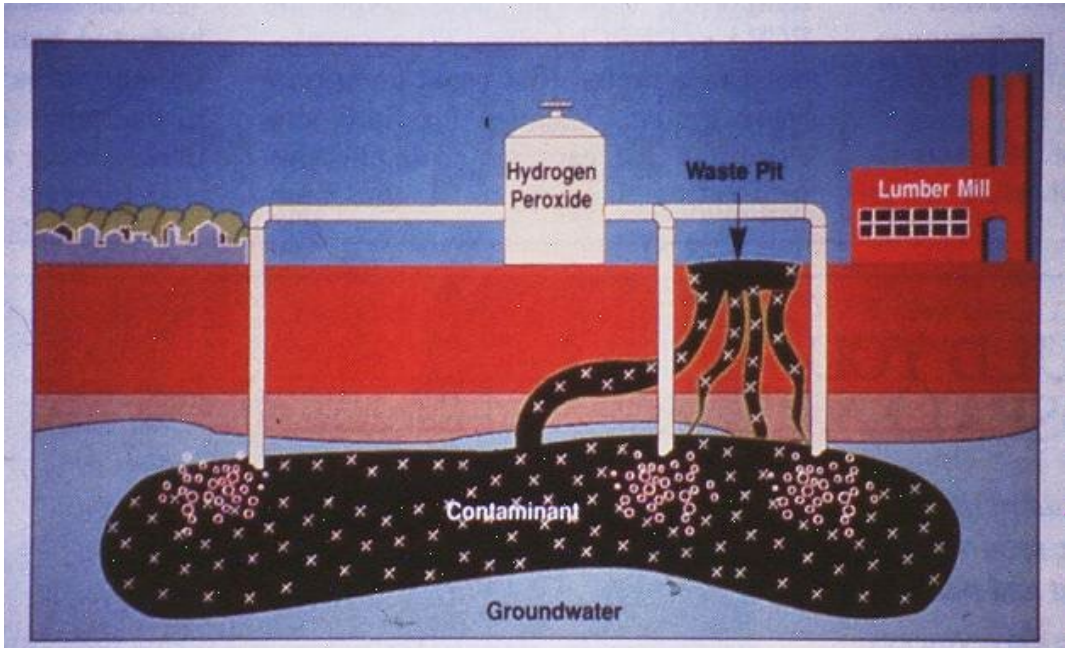
Scotia Depot (NY)

CERCLA 120(h)(3)(B): Operating Properly and Successfully

*" **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…."*

CERCLA 120(h)(3)(B): Property with a remedy deemed "Operating Properly and Successfully (OPS) by U.S. EPA can receive the 120(h)(3)(A) deed covenants

"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."



Treating contaminated aquifers with hydrogen peroxide allows a high degree of flexibility and quick restoration. Photo courtesy Woodward-Clyde Consultants.

CERCLA 120(h)(3)(B) cont'd: PRP Transfer

…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…

CERCLA 120(h)(3)(B): PRP Transfer

Square 62 (DC)

CERCLA 120(h)(3)(C): Early Transfer Authority

- CERCLA 120(h)(3) amendment authorized in the FY'97 *DOD Authorization Act*
- Allows property conveyance prior to remedy completion via the "deferral" until post-conveyance of the deed covenant that "all remedial action necessary… has been taken."
- Requires concurrence of the State's Governor [and the U.S. EPA for NPL sites], and regulatory approval of the cleanup schedule, as well as assurances that:
  - The property is *suitable for transfer for the use intended* by transferee.
  - Intended use is consistent with protecting human health and the environment.
  - Remediation will be completed and deferral will not substantially delay the cleanup.
  - Public notice provided with and public comment opportunity on the suitability of the property for early transfer.

CERCLA 120(h)(3)(C): Early Transfer Enables Cleanup by Grantee

Belle Mead Depot (NJ)

CERCLA 120(h)(3)(C): Early Transfer for NPL Site

Twin Cities Army Ammunition Plant (MN)

“Delayed” Transfer

- CERCLA 120(h)(3) does not apply to less-than-fee instruments.
- GSA can provide a non-federal entity occupancy via a license or lease prior to remediation completion and deed execution (with the CERCLA 120(h)(3)(A) “timely transfer” covenants.)
- Can apply to entirety of a site or only contaminated areas.

Tucson Motor Pool (AZ)

“Delayed” Transfer License

- Provided access for demolition and remediation to high bidder.
- Buyer assumed known and unknown conditions.
- Cleanup to unrestricted use of site.
- Obligation satisfied upon issuance of No Further Action determination from State of Arizona.
- Licensee indemnified and held GSA harmless.

CERCLA 120(h)(3) and Post-Conveyance Federal Liability

Post Transfer CERCLA Sec. 120 Claim: Waltham, MA