

October 9, 2003

Kurt Kratz
Office of the Assistant Deputy Under Secretary of Defense
(Environmental Management)
Department of Defense
3400 Defense Pentagon
Washington, DC 20301-3400

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 once again providing us with the opportunity to review the second draft of the Early Transfer Guide. The Focus Group was pleased to see that many of the comments submitted to you on January 27, 2003 were included in this guide.

Attached for your review are brief comments on the second draft of the Early Transfer Guide. As a reminder, 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.

As stated many times before, we believe involving States in the development of DOD cleanup policy early in the process will produce a mutually beneficial result. Again, I would like to thank you for your continued commitment to working with the States and the ASTSWMO Federal Facility Focus Groups.

If you have any questions regarding our attached comments, please do not hesitate to contact myself at (303) 692-3388, or Dania Rodriguez of ASTSWMO at (202) 624-5973.

Sincerely,

Jeff Edson, CO
Chair, Base Closure Focus Group

Cc: Clarence Smith, IL
Base Closure Focus Group



General Comments:

1. Discussions on consent agreements between State regulators and the transferee, cooperative agreements between the transferee and the Component and other enforceable agreements that have been used with early transfer should be included in the text.
2. Although DOD claims that privatization is an enormous topic, which is not addressed in this Guide, the Guide should provide enough detail as to what, how and when privatization should be considered as part of early transfer. This would be most appropriate in the Section "What Are The Options For Executing Cleanup."
3. The groups previous comment, Section 4, #9 needs to be reemphasized.

Original Comment (1/27/03): 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.

The response provided, "This is a policy decision that has been raised to management". Reimbursement of costs need to be explained in the contents of the Guide, therefore, States and DoD need to come to agreement as to how State services will be reimbursed prior to its finalization. This comment is extremely important.

4. Although the responses to ASTSWMO's comment states that the guidebook has been revised, there remain several sections where the acknowledgement needs to be emphasized that some States currently have regulations, policies and/or guidance associated with early transfer. This is particularly necessary in Sections 3 and 4. State requirements may not be mirror images of the requirements in CERCLA, and Components need to fully understand a State's policy prior to deciding whether to pursue early transfer.
5. The Guide identifies several criteria, obligations and liabilities associated with early transfer. These include: 1) use restrictions necessary to ensure that required remedial and oversight activities will not be disrupted; 2) schedules for investigating and completing all necessary response actions; 3) land use restrictions, whether temporary during the covenant deferral period or permanent after remediation is complete, to ensure that users are not subject to exposure pathways; and 4) complete and timely cleanups.

However, the Guide does not identify how such criteria, obligations and liabilities will be memorialized and enforced. The Guide would provide additional value if it contained a Section describing how and what could be used to ensure compliance with these requirements, and specific detail regarding the same.

Specific Comments:

1. Page 6, first paragraph, the referenced footnote should be added to the text.
2. The boxes of information contained on page 6 (Environmental Insurance); 12 (Environmental Impact Analysis); 19 (Checklist for CDR Package); 20 (Land Use Controls); and 23 (How to Involve the Community in the Early Transfer Process) are very distracting in the current format, and do not always seem to be located in the appropriate place of the text. This should be corrected.
3. Page 7, the Section “What Are The Options For Executing Cleanup”: instead of providing case studies, the Guide should identify conditions or circumstances when each of the three options may be appropriate, pros and cons of each option and differing legal/technical responsibilities of DoD and State regulators as they relate to each scenario. This will provide the reader with a better understanding of which path an individual site may wish to take.
4. Page 15 (Step 1): the Covenant Deferral Request (CDR) package should include draft deed restriction language if institutional or engineering controls are to be utilized.
5. Page 15, Step 1, at the bottom of the page: The paragraph describes what the CDR package consists of and lists four documents, but fails to mention: 1) an agreement between the transferee and the component; and 2) the agreement between the state regulator and the transferee recipient (if the property recipient will be responsible for the cleanup) or the component (if they will retain the responsibility for cleanup), related to cleanup and the associated issues. These documents should be mentioned and explained in the text.
6. Page 17 (last sentence of last paragraph of Step 1), and page 24 (Step 7): based on current Navy practice, once the Governor approves the covenant deferral and FOSET, the Navy proceeds with submitting a Final FOST for regulatory approval. Please note, in the General Comments Response, DOD mentioned that it is reconsidering the need for two separate documents. Therefore, we would like for the guidance to reflect what DOD’s expectations are going to be for all of the Services.
7. Page 18, Under the Guidance: Providing the draft CDR to the public is optional and this may circumvent some public participation. The CDR package is to include the FOSET, draft deed and documentation supporting compliance with CERCLA requirements. On page 23, the Guidance states that the public notice

period can occur concurrently with development of the CDR package. Under this scenario, the public wouldn't see the CDR until after property transfer, if at all.

8. Page 18, under Step 3, at the bottom of the 1st full paragraph: it states that "Because the State environmental regulatory agency was involved in the CDR package development and the State's concerns, if any would have already been addressed, the coordination process should be straightforward". This statement appears to be incorrect. In Step 4, (below Step 3), it explains that the CDR package development will begin, and it outlines the process. How would the State have been able to "address its concerns," if it had not yet had an opportunity to review the CDR package, which comes later? Or should the contents of Step 3 be moved to the contents of Step 4, so that the sequencing is appropriate? This should be clarified in the text of the Guide.
9. The checklist for the CDR package, contained on page 19 appears incomplete. See specific comment #2 above.
10. Page 20, regarding "Analysis Of Intended Future Land Use": It would be helpful to indicate that the component should consult with State law or policies to ensure that the use restrictions will be memorialized in the deed, and done so in accordance with state laws or policies. For example, in Colorado the use restrictions will need to be memorialized as an "environmental covenant."
11. Page 21, at the top of the page: The last sentence of the paragraph dealing with "Response and corrective action requirements" (which carried over from page 20) appears to indicate that the components documentation of "schedules" will "not attempt to specify remediation or timetables for work to be performed by the transferee after conveyance..." This is not the understanding of the States and in fact, it is in these documents where the post-transfer schedules should be memorialized, as they should be subject to the response action assurances given by the component. It should also be noted that, in addition to including the schedules in the FOSET, the other agreements between the parties could also include information regarding schedules. This should be clarified in the text.
12. Page 31, in the 4th answer to the "Frequently Asked Questions": it states that members of the public may participate in the development of the CDR package by joining the LRA or the RAB. This answer should be changed to say the "RAB or other community or stakeholder group," not the LRA. LRA's are usually quasi-municipal entities, and do not have the same interests as public stakeholder groups.
13. Page 40 (Early Transfers to Date): an early transfer was conducted at NTC Orlando (3.42 acres) in December 2002. Although the acreage was small, it brings up a question as to how many other early transfers were not included on page 40.