

**ASTSWMO POLICY POSITION PAPER  
ON THE MILITARY BASE REALIGNMENT AND CLOSURE PROGRAM**

**BACKGROUND**

Congress enacted the Base Realignment and Closure Acts of 1988 (BRAC) (P.L. 100-526, 102 Stat. 2623) and 1990 (P.L. 101-510, 104 Stat. 1808) in order to eliminate the costly ongoing operation and maintenance of non-essential military infrastructure. Since 1988, there have been five rounds of military base closure with the BRAC 2005 recently finalized. The environmental investigation, remediation, and restoration of Federal Facilities, including facilities subject to closure and realignment due to the BRAC Acts, is mandated by State laws and Federal laws including 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 an effort to speed the redevelopment of closing bases, on July 2, 1993, the President introduced the five-part Community Reinvestment Program to expedite the economic recovery of communities affected by base closures. The Department of Defense (DoD, including the individual military departments) developed guidance to implement the President's Fast Track plan, which included the establishment of BRAC Clean-up Teams (BCTs) and Restoration Advisory Boards (RABs). With the 2005 round of BRAC, it remains unclear how the DoD intends to continue an expedited base remediation approach. It is anticipated that early transfer/privatization of contaminated parcels will be the norm as DoD attempts to quickly transfer BRAC properties. This approach will directly impact State regulatory agencies, as it will require additional oversight and State resources. In addition, sites that are privatized will no longer be included in the Department of Defense and State Memorandum of Agreement (DSMOA) program, causing drastic changes to reimbursement of State oversight costs.

**DISCUSSION**

In October 1999, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) finalized a survey of the States (Survey) which examined DoD BRAC sites. The BRAC Survey was a tool used to assess the current state of the BRAC program and to obtain recommendations from the States to improve the BRAC program.

The Survey indicates that since the inception of the BRAC program, DoD's emphasis on stakeholder involvement through the formation of BCTs and RABs has generally been successful and has contributed to expediting environmental cleanups and helped build community support for the BRAC process.

The Survey also identified areas in the BRAC program where issues still exist, which need to be addressed in order to improve the overall effectiveness of the BRAC program. In general, the following problem areas were identified:



- Unstable funding and underestimated cleanup costs;
- The need for earlier and more complete State involvement in scoping cleanup programs and development of the overall facility clean-up budgets;
- The lack of recognition by DoD of State clean-up authorities;
- Unrealistic schedules and blurred lead agency/regulatory roles and responsibilities;
- Lack of State approval authority in property transfers; and
- The unresolved issues related to the cost, use, and enforcement of institutional controls.

As stated above, it remains unclear how the DoD will resolve these problems in the 2005 BRAC round.

### **UNSTABLE FUNDING**

Achieving property transfer and site closeout within an expeditious schedule is consistently hampered by inadequate and unstable BRAC funds. 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 inaccurate projected total site clean-up costs. Total clean-up costs, and remediation schedules have been, in the past, developed by DoD through the Environmental Baseline Survey (EBS), when the base is initially closed and without a clear understanding of the environmental condition of the base. The end result in most cases was an underestimation of the nature and extent of contamination resulting in severely deficient total clean-up costs estimates and unachievable remediation schedules. DoD has scrapped the concept of the EBS for the 2005 round, replacing it with an Environmental Condition of Property (ECP) report. How and whether the ECP can improve estimating clean-up costs and remediation schedules will only be determined in the years ahead.

While States expect both annual and total clean-up funding shortfalls to remain at BRAC sites, the impacts can be reduced by improving DoD's contracting process and continued open communication between DoD and State project managers regarding remediation prioritization, scheduling and budgets, and improvements when BRAC budgets are projected. In addition, early transfer/privatized remediation of contaminated BRAC properties has been demonstrated to reduce clean-up costs while expediting remediation schedules. However, these clean-up options also require improved DoD contracting processes along with open and consistent communication between DoD and State project managers.

### **STATE INVOLVEMENT**

Many of the delays experienced by the BRAC program may be attributed to the lack of stable funding, unrealistic future reuse considerations, and underestimation of either the extent or duration of necessary clean-up actions. The States, based on their prior history with DoD and private side remedial actions, are able to provide significant and, in some cases, critical input to this planning and budgetary process. Having State input early in the process can only assist DoD in the expeditious and cost effective clean-up and transfer of a BRAC parcel. To ensure expeditious clean up and property transfer DoD should involve affected States in the preliminary assessment of clean-up

needs, including the timing and planning of future restoration activities, and life cycle budgetary cost estimates to ensure that overall clean-up costs are adequately estimated. The process of early transfer or privatization will increase State involvement at BRAC sites. States may be asked by DoD to increase oversight of its contractors throughout the clean-up as DoD takes a less active role in remediation of its BRAC sites.

### **STATE AUTHORITY**

Since the inception of the BRAC cleanup program, considerable confusion and inconsistency exists within DoD and at times within the United States Environmental Protection Agency (USEPA) over the interpretation of the role and regulatory authority of States at BRAC sites, particularly the Non-National Priorities List (Non-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 (E.O. 12580).

Numerous disputes have arisen over the role of States in 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. For example, the BRAC Survey reported that only seven out of twenty-six States believed that DoD clean-ups met State requirements. 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.

Therefore, States strongly support the waiver of sovereign immunity contained in the Federal Facilities Compliance Act of 1992 and urge Congress to include a similar unambiguous waiver in CERCLA.

### **LOCAL REUSE AUTHORITIES**

In 1999, Congress amended the Community Environmental Response Facilitation Act of 1992 (CERFA) to accelerate the transfer of federal property to private parties. This legislation, commonly referred to as No-Cost Economic Development Conveyance or No-Cost NDC, permits property to be transferred to a Local Reuse Authority (LRA) without consideration, provided the property is used for the creation of jobs and that any proceeds from the sale of property is reinvested in economic redevelopment.

A Local Redevelopment Authority (LRA) is formed as soon as the realignment or closure date of the installation is finalized. An LRA can be any authority or instrumentality established by State or local government, and recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan. They represent the local community and become the primary voice for base reuse issues. The LRA develops a land reuse plan, which is the basis for future land use assumptions

of the affected property. The land use plan develops reasonably anticipated future land use while taking into account factors such as the current land use, zoning classifications and restrictions, property characteristics, and surrounding land areas. DoD must consider these land use assumptions, in conjunction with regulatory agencies, when selecting appropriate cleanup standards. DoD, through its Office of Economic Adjustment officially recognizes only one LRA for each base closure or realignment. LRAs are separate and independent from Base Closure Teams (BCT) and Restoration Advisory Boards (RAB) although their land use plans are the basis for planning and coordination by these organizations.

Functions of LRAs include the following:

- Form, be recognized by the Department of Defense, and receive economic adjustment planning assistance;
- Solicit, identify and consider various interests in installation property;
- Conduct outreach activities that focus on community needs, including homeless assistance needs;
- If useful, request interim leases of available installation facilities;
- Identify its own interests in available personal property;
- Develop a comprehensive land-use plan;
- Conduct market research and marketing activities to attract prospective property users; and
- Prepare a comprehensive redevelopment plan and other essential reuse-related planning documents.

Although environmental impacts are important considerations to LRAs in the base realignment and closure process, other factors such as economic redevelopment, job creation, zoning considerations and local community issues may become overriding issues of concern to LRAs. Regulatory agencies should also realize that LRAs would be the primary point of contact even after the military presence is gone from the property.

## **SCHEDULES**

At BRAC sites, a lack of realistic and enforceable schedules has led to delays of clean-up and re-use in a number of instances. To avoid delays, DoD should negotiate agreements with interested States to address this problem through the use of compliance mechanisms such as orders or permits. These agreements, which would include USEPA with the concurrence of the State, would clearly establish the areas and responsibilities of State (and Federal) regulatory authority for environmental remediation and compliance activities, and define the DoD lead agency role, authority and responsibilities. These agreements should address issues including environmental clean-up, compliance milestones based on enforceable schedules, a responsibility for the joint development of DoD funding and budget requests necessary for BRAC actions, the funding of State regulatory oversight costs (including legal counsel) and State approval of property transfers.

## **PROPERTY TRANSFER**

As more States contemplate the transfer of ownership of BRAC sites, a more clear and concise process must be outlined. States have been informed by DoD that in the next BRAC round it will emphasize expeditious property transfer, for both clean and contaminated properties. DoD intends to privatize clean-up, when possible, placing the responsibility of remediation on private entities. States will be asked to oversee the clean-up of these sites. This may result in staff and budgetary strain on State regulators. Because at non-NPL sites the State's Governor needs to concur on "early transfers," this issue can be resolved through the Governor's concurrence. The Governor needs to be prepared to deny early transfers if the State is unable to meet the demands of the privatized cleanup.

For properties targeted as uncontaminated by DoD, there must be a collaborative process to reach that determination. States need the ability to review, comment and approve the ECP report. Delays in property transfer can occur when States do not concur with the clean property designation.

In addition, currently Section 120(h) of CERCLA does not fully cover the covenant requirements found at Section 120(h)(3)(B). Therefore, future BRAC legislation should amend Section 120(h) of CERCLA to give the State the authority, or at a minimum require the concurrence of the State along with the USEPA Administrator, for **all** (emphasis added) of the covenants identified at Section 120(h)(3)(B).

## **CLEAN-UP CRITERIA**

Credible future land uses need to be considered by DoD when setting cleanup goals for BRAC property. There should be no assumption that the current land use of a parcel will remain unchanged. Property that is currently in an industrial or commercial area may change to residential use in the future. Therefore, any evaluation of cleaning up to a restricted land use must include the future liability of being required to perform additional cleanup if the land use changes, in accordance with Section 120(h) of CERCLA. In addition, any policy that supports restricted uses must also address the full range of issues involving land use controls, including the implementability and enforceability of the control and the funding to maintain these controls in perpetuity.

## **INSTITUTIONAL CONTROLS**

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. When institutional controls are used, they are an integral component of the final remedial decisions, and as such, the responsibility belongs to DoD. This responsibility must include the cost of implementing, monitoring, and enforcing the institutional controls for as long as they are necessary to protect human health and the environment against risk from the waste left in-place. Institutional controls are initially lower in cost as compared to more permanent remedies; however, institutional controls should not be the sole component of any final remedy. State experiences with institutional controls suggest that permanent remedies are more effective and potentially less expensive over time than high maintenance remedies based predominantly on institutional controls. The monitoring and enforcement of institutional controls on

transferred property is difficult. Future BRAC legislation should direct DoD to include out-year funding of the implementation, monitoring, and enforcement of institutional controls at closing bases that are part of the final remedy.

**ASTSWMO POSITION:**

ASTSWMO adopts the following improvements to the BRAC program as its organizational goals in order to address problem areas identified by the States:

- Ensure early State involvement in the BRAC process, especially in the identification of clean parcels, preliminary clean-up scoping activities and budgetary planning;
- Ensure early State involvement for those BRAC properties designated for early transfer;
- 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;
- Resolve the inadequacies surrounding the use, application, monitoring and enforcement of institutional controls;
- Ensure consideration of long-term operation and maintenance and institutional control liability in out-year funding and resource allocation; and
- Encourage and support a statutory change to CERCLA 120(h), which gives States the authority to approve the transfer of BRAC property.

The ASTSWMO Board of Directors encourages its membership to pursue these common goals in voicing their support for, or opposition to, specific provisions of the many policy and legislative proposals that relate to federal facilities. The Association will continue to operate in close coordination with other State associations in seeking to realize these goals and is especially cognizant of the Board policy path established by the nation's Governors in their comprehensive position statement on State - Federal environmental roles at federal facilities.

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Retained & Revised by the Board of Directors, April 19, 2006 in Saratoga Springs, NY.