

# **BRAC: Expediting Site Closeout**



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# Property Transfer Tools

- ⌚ DoD's Base Realignment and Redevelopment Manual (BRRM)
- ⌚ Transfer Mechanisms available to the Federal Government:
  - Finding of Suitability to Transfer (FOST)
  - Finding of Suitability to Lease (FOSL)
  - Finding of Suitability to Early Transfer (FOSET)
- ⌚ Brownfields Legislation

# Base Realignment and Redevelopment Manual (BRRM)

## ⌘ DoD's BRRM (March 1, 2006)

- Prescribes the procedures / guidelines DoD will follow to reuse and redevelop bases for BRAC 2005 and previous BRAC rounds.
- Provides DoD with guidance to laws and regulations for closing installations.

# Base Realignment and Redevelopment Manual (BRRM)

## Ω BRRM: Policy

- Act expeditiously, whether closing or realigning.
- Fully utilize all appropriate means to transfer property.
- Rely on and leverage market forces.
- Collaborate effectively
- Speak with one voice
- Work with communities to address growth

## Ω BRRM: Chapter 5, Real Property Disposal

# Environmental Condition of Property (ECP)

## ⌚ ECP versus EBS

- ## ⌚ BRRM identifies the following primary purposes of the ECP:
- Provide the Military Department with information it may use to make disposal decisions regarding the property
  - Provide the public with information relative to the environmental condition of the property
  - Assist in community planning for the reuse of the BRAC property
  - Assist federal agencies during the property screening process
  - Provide information for prospective buyers
  - Assist prospective new owners in meeting the requirements under EPA's "All Appropriate Inquiry" regulations
  - Provide information about completed remedial and corrective actions at the property
  - Assist in determining appropriate responsibilities, asset valuation, and liabilities with other parties to a transaction

# Environmental Condition of Property (ECP)

## Recommendations:

- States should promote development of an ECP team and participate in the development of the ECP
- States should provide comments to the ECP, whether or not their comments are requested
- Military component should conduct their extensive interviews with past and present base employees
- Potential new owners should conduct a thorough review of the past uses of the property, through interviews and complete phase I investigation

# Finding of Suitability to Transfer (FOST)

- The FOST guidance provides a process for documenting that real property made available is environmentally suitable for transfer under CERCLA, Section 120(h):
- Notify federal and state regulatory agencies of its intent to transfer
  - Evaluate the condition of the property
  - Determine the suitability for transfer and prepare a draft FOST
  - Notify the regulatory agencies of the intent to sign a FOST along with public notice
  - Finalize the FOST

# FOST – State's Concerns and Recommendations

- ⌚ FOST guidance says “work to resolve comments, as any unresolved comments submitted by the regulatory agencies or the public will be attached to the FOST.”
- ⌚ DoD's BRRM states that “the FOST will be forwarded to the State and, if an NPL site, to EPA, for review and comment. While resolving adverse comments is desirable, such resolution is not required for transfer.”
- ⌚ Recommendations:
  - Make sure that any concerns and unresolved issues are clearly expressed in comments
  - Have open and clear communication with the new owners as to the unresolved issues; and if appropriate, explain the potential risks and liability **BEFORE** they own
  - Consider the possibility of using available dispute resolution

# Finding of Suitability to Lease (FOSL)

## Ω Process similar to FOST process:

- Notify the regulatory agencies at the initiation of the FOSL
- Review ECP, and subsequent environmental reports, and community development plans
- Determine whether the property is suitable to lease for the intended purpose
- Coordinate with the agencies and public
- Sign the FOSL
- Notify the state regulatory agency before entering into a lease that will encumber the property beyond the date of termination of DoD's operations
- Notify the public that the FOSL has been signed
- Provide the ECP and FOSL to each lessee

# Early Transfer Authority And Process

- Ω CERCLA 120(h)(3)(C) allows for early transfer (covenant/warranty deferral; transfer prior to completed remediation)
- Ω An “early transfer” must be approved by EPA and the Governor of the applicable state (NPL) or by the Governor of the state (non-NPL)
- Ω After all remediation is complete, the United States shall deliver the “warranty” that all response actions have been taken

# Early Transfer – Necessary Findings

## Ω Necessary Findings:

- Property is suitable for intended use and the use is consistent with protection of public health and the environment
- Transfer will not delay cleanup
- Necessary restrictions on use of property to protect public health and environment during remediation
- Necessary response actions will be taken and a schedule provided
- Budget requests have been made to cover response actions
- The federal agency has provided public notice and opportunity to comment

# Examples of Controlling Documents

- Ω **Consent Agreement (Administrative Order on Consent- AOC - if NPL)**
- Ω **Land Use Covenant (LUC)**
- Ω **Federal Facilities Agreement (FFA) / Federal Facilities Site Remediation Agreement (FFSRA)**
- Ω **Insurance Policies (stop loss and unknowns)**
- Ω **Environmental Services Cooperative Agreements (ESCA)**
- Ω **Finding of Suitability for Early Transfer (FOSET)**
- Ω **Miscellaneous federal/local agreements**

# AOC or Consent Agreement

- ⌚ **Enforceable Agreement between regulatory agencies, new owners, party controlling cleanup, and/or party controlling funds**
- ⌚ **Describes, among other things, property covered, known conditions, and tasks necessary to achieve final cleanup**
- ⌚ **Contains specific provisions for access, modification, termination, and penalties for non-compliance**

# Land Use Covenant

- Ω California has specific statutes and regulations for LUCs: California Civil Code §1471, California Code of Regulations, Title 22, §67391.1
- Ω Pre-final remedy decision, therefore generally very restrictive; recordation timing critical
- Ω May be modified or released as part of final cleanup decisions
- Ω Specific access and enforcement provisions

# FFA/FFSRA

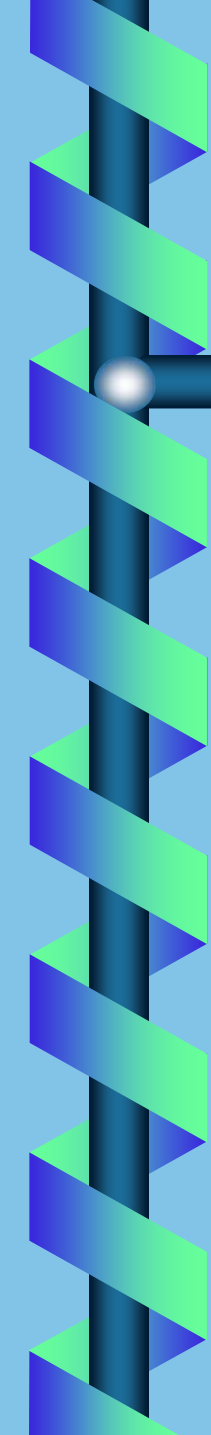
- Ω Agreement between EPA, State regulatory agencies and the applicable federal agency
- Ω Describes federal government's obligations for portions of base not transferred
- Ω Describes federal government's obligations for certain "Retained Conditions"
- Ω Describes federal government's ongoing responsibilities and liabilities under CERCLA and applicable laws

## FFA/FFSRA (cont.)

- Ω Describes current conditions of portions of the site retained by the federal government
- Ω Describes known retained conditions on transferred property
- Ω Describes regulatory process for remediation
- Ω Describes dispute resolution and termination conditions

# Early Transfer – Summary

- Ω Using the “early transfer” provisions, states may have substantial leverage to negotiate effective access and enforcement provisions in the controlling documents.
- Ω Imperative to specify all requirements of various state agencies early in the process
- Ω The transfer can be a great benefit to all parties involved and a very successful tool because it accelerates remediation and advances economic development



# Federal 2002 Brownfields Legislation

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- Ω Also known as the Small Business Liability Relief & Brownfields Revitalization Act.
  
- Ω Title II of Act, Brownfields Revitalization:
  - A. Brownfields Program**
    - Provides funding and grants
  - B. Liability Clarifications**
    - Provides limited liability relief from CERCLA
  - C. State Response Programs**

# California Land Reuse and Revitalization Act of 2004

Ω CLRRRA provides immunity from liability for response costs or damage claims to qualified innocent landowners, bona fide purchasers or contiguous property owners (California Health and Safety Code § 25395.60 et seq.).

Ω To qualify, the entity must:

- Conduct AAI
- Not cause or contribute to the release
- Not be potentially liable or affiliated with any liable party
- Exercise appropriate care with respect to the release
- Provide full cooperation and site access
- Comply with land use controls

# Brownfields Legislation and Federal Facilities

- Ω **Brownfields Legislation that limits a property owner's liability may be used more frequently at federal facilities**
- Ω **May need to pay attention to coordination of different requirements and laws**