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Enhancing States' Roles in the Early Transfer of Closed Military Bases

Executive Summary

When the US Department of Defense (DoD) wants to transfer title of former military base property before the cleanup is complete, it must first receive the concurrence of the state's governor. DoD will be promoting the use of early transfer¹ when the majority of the 2005 Base Realignment and Closure (BRAC) sites can be considered for transfer in 2011, as well as for remaining property available for transfer under previous rounds. This means that states will face an increasing number of requests for early transfer in the near future. Early transfers are the best available option for states to help put these sites back into productive use, but states need to be both informed and involved as these transfer requests become more frequent. By playing an early and active role in the cleanup and transfer process, states can be better prepared to make these decisions and to achieve a more timely and efficient outcome.

Under federal authorities, DoD can transfer the title of former military base property to a private, public, or government entity. Transfer usually means putting the property into productive use, creating jobs, and generating tax revenue. States and the surrounding communities are eager to reap these benefits, especially in the wake of a base closure that can result in considerable economic loss.

There is a large amount of available land that could be transferred and brought back into productive use. DoD estimates that 112,300 acres remain potentially transferable as a result of previous BRAC rounds in addition to about 102,000 acres potentially available from the 2005 BRAC round, which should be available for transfer by 2011.² This acreage is spread throughout the nation as the 2005 BRAC round included closures and realignments of varying sizes in almost every state and territory.

In a conventional transfer, DoD transfers property only after site environmental cleanup is complete and the state's role is generally limited to oversight of the cleanup process. The 1996 Early Transfer Authority (ETA)³ changed the process of property transfer by allowing it to take place *before* cleanup is complete and permitting DoD to choose whether it will complete the cleanup itself or let the developer assume the cleanup responsibilities (known as "privatization" of the cleanup). Cleanup privatization is the best viable option for many cleanups because it speeds redevelopment of former military bases.

ETA also expanded the responsibility and authority of the states by requiring a governor to concur with any early transfer decision. This means that governors have a key role to play in ensuring that the early transfer cleanup is protective of human health and of the environment, and can put the site back into productive use. A governor's concurrence on early transfers is also the main leverage point a state has in the process to address state concerns.

Early transfers are the preferred route for most cleanup/redevelopment plans, but there are concerns—especially for privatized cleanups—about liability, insufficient funding, and potential future environmental surprises. One major issue concerns what to do when the developer or new owner goes out of business leaving no entity to complete the cleanup. In these cases, DoD must take over the cleanup responsibilities; although, it can be a difficult process to get DoD to reengage its cleanup responsibility, resulting in lengthy delays. Many of these disadvantages, however, can be alleviated when developers or owners purchase private environmental insurance, which provides a source of funds in the event of a cost overrun or the discovery of pre-existing unknown contamination.

Governors must concur with any DoD decision for an early transfer. This compels states to consider a much broader set of development-related issues that extend beyond their traditional cleanup oversight role. States considering an early transfer decision should undertake the following practices to make the process more efficient and timely, and thereby benefit the state as well as DoD, the developers, and surrounding communities:

- Involve senior levels of state government from multiple agencies early in the transfer/redevelopment process. Assign a senior staffer from the state environmental regulator's office as well as a senior staffer from the state economic development office (or, alternatively, one point person from the governor's office) to monitor the site transfer process from the time of the announcement that the base will close. This helps avoid administrative delays, ensures state involvement in the process, and encourages redevelopment along with environmental cleanup;
- Articulate a policy or executive order that defines the terms of a governor's concurrence. Enact a procedure that describes the requirements for early transfers in the state. Information such as an enforceable cleanup plan, delineation of cleanup responsibilities, and plans for land-use restrictions could be required before the governor provides concurrence. This ensures that DoD meets all of the states priorities and requirements, avoiding future delays and miscommunications in the process;
- Enact enforceable agreements with both DoD and the developer. Pursue or encourage each of three agreements: 1) between the state and DoD, 2) between the state and the developer, and 3) between DoD and the developer. These three agreements help enforce and clarify the roles that each party will play in the cleanup and transfer process, avoiding unnecessary confusion and delays; and
- Ensure adequate funding to become more involved in the transfer process. Explore innovative practices to fund the additional costs associated with state involvement in the early transfer process, including the enhanced engagement actions recommended in this Issue Brief. Some options include separate agreements with military service or specific agreements with the developing entity to fund state administrative costs.

States also can use these principles to enhance their role in conventional transfers (where DoD is not required to obtain state concurrence) as well as in the long-term stewardship of sites post-transfer. Overall greater state involvement can help incentivize the redevelopment, assist in cleanup plans, and speed the transfer process considerably.

Background

The US Department of Defense (DoD) is closing all or part of hundreds of bases and military sites, primarily through the congressionally authorized Base Realignment and Closure (BRAC)⁴ process. Following a closure, DoD generally tries to transfer ownership⁵ of title of the base to another entity, which can move the base back into productive use, through one of two processes: 1) a conventional transfer (i.e., after cleanup is complete) or 2) an early transfer (i.e., before cleanup is complete).

Conventional Property Transfer

Transfer usually means putting the property into productive use, creating jobs, and generating tax revenue. States and the surrounding communities are eager to reap these benefits, especially in the wake of a base closure, which can result in considerable economic loss.

Until 1996, federal property transfer took place only after cleanup was complete under what is known as a conventional transfer. In a conventional transfer, DoD evaluates the environmental condition of the property and provides cleanup to a standard that ensures its reuse is consistent with the protection of human health and the environment⁶. The state's main role is to coordinate with the US Environmental Protection Agency (EPA) on sites on the Superfund National Priorities List (NPL) to oversee environmental cleanup before transfer. Unless states are the recipient of the property after cleanup, they typically do not play a large role in the actual transfer. DoD's must complete a Finding of Suitability to Transfer (FOST) before the transfer can be completed, but state approval of the FOST is not necessary for transfer⁷.

Early Transfer of Property

In September 1996, Congress enacted the Early Transfer Authority (ETA) as an amendment to the [Superfund](#)⁸ law, in an effort to make the transfer of federal property in a more efficient and expedient manner.⁹

ETA changed the process of property transfer by allowing a transfer to take place *before* cleanup is complete. In addition, under the ETA, DoD can choose whether it will complete the cleanup itself or have the developer assume the cleanup responsibilities (known as "privatization" of the cleanup); although, DoD can still pay for the developer's cleanup costs.

When DoD wants to transfer title of former military base property before cleanup is complete, it must first receive the concurrence of the state's governor (at Superfund NPL sites, concurrence is also required from the EPA administrator). This puts states in an important position since there is significant economic and development motivation to transfer property and encourage the early return of closed military bases to productive use as quickly as possible. DoD is also motivated to transfer title of its closed bases as soon as possible. As such, DoD has been encouraging early transfers as part of the latest round of BRAC and for sites remaining from previous rounds. States must be prepared to respond quickly and appropriately to an early transfer request, based on the potential advantages and disadvantages.

A primary advantage of using the ETA is that it makes the property available to the future user sooner by allowing environmental cleanup and redevelopment activities to proceed concurrently. This generally saves time and money and provides the new user with greater control and flexibility over both the cleanup and redevelopment processes. Early transfers can be very

attractive to the communities surrounding the former base because it usually speeds up the process to put property into productive use, creates jobs, and generates tax revenue—benefits that can offset losses associated with base closure.

Early transfers are the preferred route for most cleanup/redevelopment plans because they generally speed up the process. However, there are concerns, especially for privatized cleanups, about liability, insufficient funding, and potential future discovery of pre-existing unknown contamination. These concerns have even greater implications when the developer or new owner goes out of business. In these cases, DoD must take over the cleanup responsibilities; although, it can be a difficult process to get DoD to reengage its cleanup responsibility, resulting in lengthy delays. Many of these concerns, however, can be alleviated when developers or owners use private environmental insurance, which provides a safety net to developers and new owners in case of any environmental or cost surprises.

Prior to the 2005 round of BRAC, early transfers were relatively rare, with DoD usually choosing to transfer property only after cleanup was complete. Only 13 states and one U.S. territory had used the ETA for previous BRAC rounds (as of July 2006).¹⁰ However, for the 2005 (most recent) BRAC round, DoD and the services have all pledged to use early transfers “to the maximum extent possible.”¹¹ In response to a US Government Accountability Office (GAO) recommendation, DoD issued an Early Transfer Guide in May 2004¹² to promote more use of the Early Transfer Authority, prompting a threefold increase in acres transferred under the Early Transfer Authority—from 8,225 acres in 2002 to 26,670 acres in 2006.¹³

DoD estimates that 112,300 acres remain potentially transferable as a result of previous BRAC rounds in addition to about 102,000 acres potentially available from the 2005 BRAC round, which should be available for transfer by 2011, for a total of approximately 200,000 acres.¹⁴ This acreage is spread throughout the nation as the 2005 BRAC round included closures and realignments of varying sizes in many states and territories.

In addition to the push from DoD, the availability of environmental insurance from the private sector will encourage additional early transfers. The entity assuming cleanup responsibilities can purchase environmental insurance coverage to protect itself against possible cost overruns and pre-existing unknown contaminant discoveries during remediation and development as well as the costs associated with lawsuits and other liability concerns. By transferring the risk of lawsuits and liability concerns, especially potential cost overruns, from the property owner and DoD to the insurance provider, contractors may be more motivated to complete the environmental cleanups in a timely and cost-efficient manner.

Governor's Concurrence on Early Transfers

There is one key state responsibility to the Early Transfer Authority: it requires that the governor concur in all early transfers (the EPA administrator must also concur for sites on the Superfund NPL). So unlike a conventional transfer where the state's approval of the FOST is not required, the state *must* concur in the Finding of Suitability for Early Transfer (FOSET). The FOSET documents whether the property is suitable for transfer for the redevelopment planned (as shown on an approved reuse plan) and whether the intended cleanup will be consistent with the protection of human health and the environment.

When a governor receives the FOSET, he or she must decide whether or not to concur in the early transfer. States do not have the ability to choose who will do the cleanup, but they do have the

authority to withhold approval of an early transfer if they determine that the proposed transfer will not protect human health or the environment, or believe that the state has inadequate assurances that the property will be cleaned up in accordance with Superfund provisions¹⁵. The governors' concurrence on early transfers is the main leverage point states have in the process to address state concerns.

Challenges to a Broader State Role in the Early Transfer Process

Apart from the governor's concurrence, states typically have not played an active role in the early transfer process despite the opportunity to achieve faster transfers with better redevelopment results. The challenges to states expanding their role are:

- Most states do not engage in the early transfer process until the very end stages, when asked to concur;
- Most states lack coordination between the economic development and environmental cleanup agencies to encourage redevelopment as a part of cleanup;
- Most states do not inform DoD of the information they need to determine whether or not to concur on an early transfer;
- States do not receive enough clarity and assurances from DoD for the cleanup and redevelopment process; and
- States often lack oversight funding, which limits their involvement in an early transfer.

For the most part, the scope of the state's role in the early transfer of former military bases has been limited to concurring with the FOSET, which is based on a plan designed almost exclusively by DoD, the local redevelopment authority, and the future property owner. In general, states are not involved from the beginning of the early transfer decision-making process. DoD is not statutorily required to involve the state at all, and often only contacts the state once the developer and a redevelopment plan has been selected by DoD and a FOSET is submitted to the state for approval. The absence of early involvement means that states are not able to share both their knowledge of the environmental conditions of the property or their economic development expertise. This can delay the transfer and redevelopment.

While the state is usually an expert in environmental cleanup, states are rarely involved in the redevelopment plans of an early transfer. The coordination between the environmental regulatory agencies and the economic development agencies within a state may vary. Though most states have a number of economic development incentives that can be used to encourage development, these tools are under-utilized as part of the early transfer process. This limits the state role to responding solely to cleanup concerns and not participating in the development of a reuse plan or helping identify economic development opportunities.

In addition, most states do not have a decision-making model to determine whether to approve an early transfer; that is, other than the requirements set forth in the federal [Early Transfer Authority](#), there is not a state-specific list of information and documents that the state needs to review to make an accurate decision on whether or not to concur with the FOSET. This can significantly slow down the approval process.

While the state is in charge of overseeing the cleanup and approving the early transfer, states often do not have binding agreements in place to protect the cleanup process, especially in a

privatized transfer. Under a privatized transfer, if the developer goes bankrupt, states must try and bring DoD back as the responsible party for the cleanup. Without agreements in place that outline the roles and responsibilities of each party (i.e., DoD, the state, and the developer), the project runs the risk of delay and failure.

Funding also limits the state role in both cleanup oversight and redevelopment. States rely primarily on the Defense and State Memorandum of Agreement (DSMOA)¹⁶ program for funds, which allows DoD to reimburse states and territories for their oversight costs at environmental cleanups at both active and closed bases. These oversight activities include document review, site visits, ensuring compliance, regulatory oversight, technical review, and attending meetings. The costs for oversight of an expedited cleanup can be high, and many also include long-term monitoring costs of the site after transfer if some contamination is left in place (protected by land-use restrictions). These costs often determine and limit the role states play in this process. States need to look beyond DSMOA for other sources of internal state funding for property cleanup and transfer oversight costs. Some states have successfully encouraged the local reuse authority or private developer pay the state regulator's oversight costs.

When states limit their role to cleanup oversight, DoD and developers do not see state regulators as cooperative partners in the transfer and redevelopment process. This perception could prove problematic for states in the future as DoD has announced that the latest round of base closures will emphasize early transfer for contaminated properties.¹⁷ When possible, DoD also intends to privatize cleanup, placing the responsibility for conducting cleanup on private entities.¹⁸ With this new emphasis on early transfer, states need to seek out ways to move beyond just a regulatory role and need to expand the position they play in the reuse of former military bases.

Improving State Involvement and Decision-Making in the Early Transfer Process

The state role in the early transfer process can be improved through a number of practices that can speed the process and provide beneficial results to state regulators, DoD, developers, and surrounding communities, including:

- Engage state environmental and economic development regulators early in the transfer process;
- Establish a policy or executive order that defines the criteria for a governor's concurrence;
- Enact enforceable agreements with both DoD and the developer; and
- Ensure states have adequate funding to become more involved in the transfer process.

Early, High Level, Multi-Agency Engagement

While states have a limited regulatory role in the early transfer until the time of approval of the FOSET, state input early in the process can help to expedite cleanup and transfer in a cost-effective manner. A state's prior history with private sector remedial actions and their work with DoD allows them to provide critical input in this planning and budgetary process of transferring property. In addition to early involvement, states also have strong economic development expertise, and can look to access this expertise to encourage an early transfer process. For instance, a number of federal agencies beyond DoD provide states with funding, often specifically for BRAC sites.¹⁹

Some examples of early and high level involvement in the early transfer process include:

- Encouraging DoD to follow its own guidance and invite states to help develop the FOSET;
- Involving states in the development and early review of the Environmental Condition of Property (ECP) Report and other preliminary assessments;
- Assigning an environmental Commissioner or another senior environmental agency staff member to be part of the transfer process; and
- Assigning a state economic development agency representative to explore how state financial incentives can be adapted for use to encourage and facilitate early cleanup and transfer.

According to DoD's Early Transfer Authority Guide, DoD's components should invite state environmental regulators to be part of the FOSET development team so that DoD will be able to coordinate with and address the concerns of the environmental regulators throughout the early transfer process.²⁰ DoD also encourages the education of governors and state regulators who have not previously participated in the early transfer process. This guidance notes that "environmental regulators, whether state or EPA, will play a key role in negotiating environmental agreements with the potential recipient for post-transfer remediation."²¹ However, DoD does not always follow this guidance at individual sites. States, therefore, need to work with DoD to ensure they are being included early in the process.

States can get involved even earlier than the development of the FOSET. For sites that are part of the 2005 BRAC round, DoD's procedure to evaluate transferable properties is through an ECP Report. States could promote the development of a state team to participate in the development of the ECP, and proactively provide comments to DoD. Many states feel that their review of ECPs should be funded by DoD.²² States can also pursue involvement in the early assessment of cleanup requirements, including the timing and planning of future cleanup and redevelopment activities, and life-cycle budgetary cost estimates to ensure that overall cleanup costs are correctly estimated.

Once states have made the commitment to early involvement in the transfer process, it is important to engage the correct state officials. Ideally, the governor assigns the state environmental commissioner or another senior staff member from the state environmental regulator's office. These officials should actively participate in the development of the reuse plan as it impacts the level of cleanup. In **Maine**, a senior staff person within the Governor's Office is directly assigned to redevelopment projects. That individual's primary focus is former military base redevelopment. In this way, the governor establishes a central resource at the highest level to coordinate state actions.

In addition, state economic development officials should be involved from the outset. They should be encouraged to explore how economic development incentives can be applied to former military bases to address public infrastructure and other capital costs which may ensure the financial viability of the redevelopment. This brings a development focus to the process and also helps drive and accelerate the FOSET and the actual transfer. Also, since states control numerous economic development grant and loan programs, it would be prudent for the developer to involve the economic development agency early if they intend to seek state incentives.

Several of the most successful early transfers have taken place when the state is part of the process from the time of the announcement that the base will close, or takes an active role in

facilitating an early transfer of property at a base that has been realigned. A recent example of this is at the former Fort Devens site in **Massachusetts**. This base was realigned as part of the 1991 BRAC round, resulting in the closure of most of the base and the transfer of approximately 4,000 acres through a conventional transfer in 1996 to [MassDevelopment](#) (a quasi-public state finance and development authority). Today, Devens is a bustling planned community with over 80 companies and 250 full-time residents. In 2006, Massachusetts competed in a world-wide competition to land Bristol Myers Squibb's (BMS's) \$750 million bio-pharmaceutical manufacturing facility. Devens was selected by BMS as the optimal location, but in order to accommodate a facility of this size, MassDevelopment needed to acquire some of the abutting Army property. Through the leadership of the Congressional delegation and former Governor Mitt Romney, an early transfer of this property occurred in less than four months, thereby ensuring BMS's arrival to Devens and creating 400 new jobs (averaging salaries of approximately \$60,000) in Massachusetts.

If states are involved early in the transfer process, they are in a better position to avoid administrative delays and surprises that may slow or derail the process. For instance, by involving state environmental and economic development regulators, states can also ensure that the full range of state's goals (i.e., both a proper cleanup and a new use for the property) are harmonized. Early, high-level involvement means that a governor's concurrence to an early transfer is part of a much broader engagement.

Provide Clarity to the State Concurrence Process

Ideally, states will concur with early transfers as quickly as possible. This requires adequate information and preparation. As early transfers become more common, state environmental departments will need to develop a process to aid the governor in his or her evaluation. States rely on state environmental departments to provide them with detailed recommendations regarding the benefits and challenges of transferring property before cleanup is complete. States base these recommendations on a number of criteria, which may be specific to each state environmental agency. But in most states, there is no formal list of these criteria. Lacking this list, there can be a gap between the information DoD provides and the data the state needs in order to make an accurate decision. States can list the criteria up front so that DoD and developer know that the FOSET must include information such as:

- Is the property suitable for the intended reuse and is cleanup consistent with protecting human health and environment?
- Are there assurances that transfer will not delay cleanup?
- Will land-use restrictions be placed on the property and will they be effective to protect human health and the environment?
- Have budget appropriation requests been made by DoD to cover cleanup actions and state oversight costs? and
- Have all public notice and comment procedures been addressed?

In order to clarify the state's requirements to DoD under the Early Transfer Authority, the state of **Colorado** enacted its own [Early Transfer Policy](#)²³ (established in June 1998). The policy establishes the evaluation guidelines and review procedures for early transfer requests in Colorado. Under the Colorado policy, before an early transfer will be considered, the governor must receive detailed information, including:

- An enforceable cleanup plan;
- Delineation of cleanup responsibilities (including if pre-existing unknown contamination or information is discovered);
- Identification of land-use restrictions that run with the land (and affect future owners);
- A waiver of sovereign immunity by DoD; and
- A payment of state oversight costs in overseeing the cleanup by DoD or the developer.

Another potential model for states to follow would be EPA's Early Transfer Guidance,²⁴ which outlines the requirements that the EPA Administrator needs in order to concur with an early transfer for sites on the Superfund NPL. EPA's Early Transfer Guidance also requires assurance, when the transferee is expected to perform the cleanup, that the transferee possesses the technical (in-house or through appropriate contract management) and financial capacity to conduct the cleanup.

States can implement policies like Colorado's through executive orders or legislation. By formalizing the information required for the state to review an early transfer, states set the stage for their involvement from the time of the announcement that the base will close. DoD and the new user for the property will be aware from the start that they will need to have a number of key elements in place before the state can consider concurring with the early transfer. This information will be invaluable in helping the governor make his or her decision.

Develop Separate Agreements with all Parties

For privatized early transfers, states need assurances that both the developer and DoD are committed to seeing the cleanup and transfer through to its completion. These assurances are often in the form of a variety of written, enforceable agreements. The ideal is one comprehensive agreement between the redevelopment authority, DoD, and the state, but such an agreement would be difficult to create to all parties' satisfaction. A reasonable alternative is to create three separate agreements between the following parties:

1. DoD and the new owner/developer – This is an essential agreement as it outlines all the provisions for cleanup and transfer between the previous owner (DoD) and the new owner or the developer doing the cleanup. Under current federal policy,²⁵ all private-sector transfers have an agreement between the new owner and DoD. A common type of agreement used is the Environmental Services Cooperative Agreement (ESCA). ESCA's describe tasks to achieve final cleanup and provisions for access, modification, and non-compliance;
2. The state and the new owner/developer – This agreement is important as it outlines how the new owner or developer must adhere to state laws and state enforcement of federal laws during the cleanup and redevelopment. An agreement between the state and the new owner can often be found in the form of a consent agreement (or an "administrative order on consent" if the site is on the Superfund NPL). This enforceable agreement describes the timing and manner of remediation. States often use their Resource Conservation and Recovery Act (RCRA)²⁶ authority for these agreements to ensure a long-term state role in the environmental cleanup. Those states not wishing to use an enforcement-based approach are still encouraged to have a written enforceable agreement with the new owner/developer; and

3. The state and DoD – This agreement helps avoid conflicts and the resulting delays and provides a clear path to redevelopment. An agreement between the state and DoD is often in the form of a memorandum of understanding (MOU) or Federal Facilities Agreements (FFA). It defines the continuing obligations of DoD and acknowledges the other agreements. The MOU usually shows that DoD has sought appropriate funding for the cleanup. This agreement lays the foundation for cooperation and coordination between the state and DoD for all cleanup activities.

These agreements provide the body of information that is supplied to the state and EPA to provide assurance that contamination will be addressed and that the property is suitable for transfer. Each agreement clarifies an essential part of the complicated, multi-jurisdictional early transfer process. Many early transfers have delays because only one or two binding agreements exist as part of an early transfer (an agreement between DoD and the state is most often lacking). Without all three agreements in place, there exists the potential for a major delay.

Use of the three agreements described above, may alleviate some of states' concerns about the privatization of cleanup. Some states are concerned that if a developer takes over a cleanup and finds undeclared, unexpected, and expensive to remediate hazardous waste, the company may expend all of the resources and may become insolvent and declare bankruptcy, abandoning their prior agreements. In that scenario, the state or other parties may be forced to sue DoD to reinstate the cleanup.

At federal Superfund NPL sites, DoD's return to cleanup responsibility is not an issue (though separate agreements between all parties would still help to clarify other issues). EPA requires that FFAs be amended so that in the event the developer does not conduct the cleanup or it is not done properly, DoD is responsible for the cleanup. At the former Fort Ord and the former McClellan Air Force Base in **California**, EPA issued Superfund Administrative Orders on Consent that required the military to return to the cleanup if the redeveloper fails in the cleanup or conducts it improperly. EPA's Administrative Orders on Consent may be a good model for states to use when signing agreements to ensure that DoD is ultimately responsible for the cleanup.

The state of **California** also requires a consent agreement between the state and the developer, the city, and/or the local reuse authority. These consent agreements established the regulatory framework and a schedule for cleanup procedures. California can also require land-use covenants to document the land-use restrictions on the property. Three agreements were successfully used for early transfer agreements at Mare Island, Oakland Army Base, and Oakland's Fleet Industrial Supply Center.

At the Sunflower Army Ammunitions Plant in **Kansas** there were three agreements, which included:

- The Army and the developer;
- The state and the developer; and
- The Army and the state.

The agreements addressed everything from the cleanup plan to environmental insurance. The successful transfer will allow 6,000 acres to be developed into thousands of homes, offices, retail space, and research parks. The development will be surrounded by a 2,000-acre greenbelt that will include parkland and trails.

By signing three separate agreements, states are memorializing their role, which will help to ensure that cleanup of the site is completed. In this way, states are helping to close any loopholes and spell out, in detail, the roles that each party will play in the cleanup and transfer process.

Ensure Adequate Administrative Funding

Funding for oversight of cleanup is a primary concern for many state regulators. States need proper funding in order to use the policy recommendations in this Issue Brief and to become more actively involved in the early transfer process. States must consider funding for states' administrative costs in the cleanup and reuse of military bases. States struggle with the requirements placed on them just for oversight, let alone property transfer, at funding levels that are often insufficient to complete the tasks at hand.

States that have had the most success, both in securing funding from DoD and in using funds to encourage cleanup and reuse, used innovative policies such as:

- Developing a policy establishing responsibilities for oversight costs at the outset of the early transfer;
- Developing oversight funding agreements with individual military services;
- At privatized cleanup, developing agreements with the transferee to fund the state oversight costs; and
- Establishing a trust fund with the reuse authority that includes oversight costs.

To ensure state oversight is funded, many states are including oversight funding as part of their agreements with developers and DoD under early transfers. **Colorado's** [Early Transfer Policy](#) requires the respective parties establish responsibilities to pay the state's oversight costs at the outset of the early transfer, either via the Defense and State Memorandum of Agreement (DSMOA) or directly from the privatization entity through the individual DoD services. Similarly, the ESCA at the former Fort Ord site in **California** between the Fort Ord Reuse Authority and DoD includes funds for EPA and state oversight of the process. In addition, at Fort Ord, the Army agreed to pay "fair and reasonable cost overruns" by EPA and the state agency.²⁷

While the standard policy may be to wait for oversight funding from DoD, a few states (e.g., **Colorado, California**) have been successful in developing agreements with individual services (i.e., Air Force, Navy, Army) to secure their oversight funding.²⁸

By using some of the examples above, state oversight funding, as well as money for state involvement in the transfer process, become less of an issue, and states can focus more on the job of cleanup and reuse of former military bases.

Conclusion

DoD is actively encouraging early transfers as the preferred method to dispose of land from former military bases. There are currently more than 200,000 acres²⁹ potentially transferable as a result of former BRAC rounds (available by 2011). An increase in early transfers means there may be added pressure for governors to approve early transfers as quickly as possible to move the former bases back to reuse. Early and meaningful involvement will help expedite and get better results from the early transfer process. States need to use their expertise, both in environmental cleanup and economic development arenas, to be a valuable part of early transfers.

States also need to be involved in the long-term stewardship of sites after transfer is complete, especially since most former base redevelopment projects do not cleanup to unrestricted levels. State involvement up to the governor's concurrence on the early transfer and through the redevelopment process itself should not be the end of the state's role. Even post-transfer, states have a role in providing guidance on the clarity and certainty of long term stewardship—ensuring that any contamination that has safely been left in place is protected. DoD and EPA place land-use restrictions on property to ensure that this waste poses no threat to human health and the environment. States are often left with the responsibility of monitoring and enforcing these land-use restrictions. There is a significant funding gap for the long-term monitoring of land-use restrictions placed on former military bases at transfer. Unless funding for post-cleanup review is spelled out in an agreement with DoD or, more likely, the developer, these unfunded requirements may not be met.

While states have a statutory role in the early transfer of property, they should also consider a high level of engagement in conventional transfers as well. Since DoD is not required to get state concurrence in these cases, states need to show the value of their involvement to DoD from the start. A state's ability and expertise in both cleanup and in redevelopment are critical to bringing all sites back to reuse.

The requirement of a governor's concurrence on an early transfer is a powerful and important tool. It can be used as a way to encourage state involvement early in the process, as part of the transfer, and after the transfer at all former military bases.

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Endnotes

¹ See [DoD's Early Transfer Authority: A Guide to Using ETA to Dispose of Surplus Property](#), October 2004.

² [Military Base Closures: Opportunities Exist to Improve Environmental Cleanup Cost Reporting and to Expedite Transfer of Unneeded Property](#), GAO-07-166, Government Accountability Office, February 20, 2007.

³ Early Transfer Authority (also known as Covenant Deferral Authority) comes from a September 1996 amendment to [CERCLA](#) (42 U.S.C. 9620(h)(3)(C)).

⁴ BRAC is the process DoD uses to reorganize its military installation infrastructure to support its forces more efficiently and effectively, to increase operational readiness, and to facilitate new ways of doing business. There have been five BRAC rounds: 1988, 1991, 1993, 1995, and 2005. See the NGA [BRAC Fact Sheet](#), (May 2005). Available at <http://www.nga.org/Files/pdf/0104BRACFACTS.pdf>

⁵ The transfer or disposal of federal property is primarily conducted by the General Services Administration (GSA) pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA) (40 U.S.C. §§ 521-559.3). The Defense Base Closure and Realignment Act (§ 2905(b)) directs the GSA to delegate its statutory authority to DoD for BRAC installations, and DoD has, in turn, delegated this authority to the military services.

⁶ "Human health and the environment" is a term from the Superfund statute (Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 120(h))

⁷ While states approval of a Finding of Suitability to Transfer (FOST) is not required, states are generally given the opportunity to review and comment on the document.

⁸ 42 U.S.C. 9601

⁹ Early Transfer Authority (also known as Covenant Deferral Authority) comes from a September 1996 amendment to [CERCLA](#) (42 U.S.C. 9620(h)(3)(C)).

¹⁰ States that had completed Early Transfers as of July 2006 include Alabama, California, Colorado, Florida, Indiana, Kentucky, Massachusetts, Michigan, New Jersey, New York, South Carolina, Tennessee, Utah, and the territory of Guam. [Military Base Closures: Opportunities Exist to Improve Environmental Cleanup Cost Reporting and to Expedite Transfer of Unneeded Property](#), GAO-07-166, Government Accountability Office, February 20, 2007.

¹¹ Quote from Philip W. Grone, deputy undersecretary of defense for installations and environment, speaking at the [Defense Base Closure and Realignment Commission Hearing on Environmental Stewardship of Installations Recommended for Closure or Realignment](#),” August 11, 2005.

¹² [DoD's Early Transfer Authority: A Guide to Using ETA to Dispose of Surplus Property](#), October 2004. Available at: <http://www.oea.gov/OEAWeb.nsf/LIBbyTitle?readform#E>

¹³ [Military Base Closures: Progress in Completing Actions from Prior Realignments and Closures](#) GAO-02-433, Government Accountability Office, April 5, 2002; and [Military Base Closures: Opportunities Exist to Improve Environmental Cleanup](#), GAO-07-166, Government Accountability Office, February 20, 2007.

¹⁴ [Military Base Closures: Opportunities Exist to Improve Environmental Cleanup Cost Reporting and to Expedite Transfer of Unneeded Property](#), GAO-07-166, Government Accountability Office, February 20, 2007.

¹⁵ See [EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120\(h\)\(3\)--\(Early Transfer Authority Guidance\)](#).

¹⁶ For more information on DSMOA, see the [NGA Website](#) at <http://nga.org/center/cleanup>.

¹⁷ Philip W. Grone, deputy undersecretary of defense for installations and environment, pledged that DoD will use early transfers “to the maximum extent possible,” speaking at the [Defense Base Closure and Realignment Commission Hearing on Environmental Stewardship of Installations Recommended for Closure or Realignment](#),” August 11, 2005.

¹⁸ Ibid.

¹⁹ See [NGA fact sheet](#) (August 2008) on “Federal Agency Funding Resources for the Reuse of Former Military Bases.” Available at: <http://www.nga.org/Files/pdf/0808FEDFUNDING.PDF>

²⁰ [DoD's Early Transfer Authority: A Guide to Using ETA to Dispose of Surplus Property](#), October 2004.

²¹ Ibid.

²² DoD has informed some states it will not fund state review of ECPs in cases where it determines no cleanup is necessary.

²³ [Colorado's Early Transfer Policy](#) is available at: <http://www.cdph.e.state.co.us/HM/eartrans.pdf>

²⁴ “[EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120\(h\)\(3\)](#).”

²⁵ [DoD's Early Transfer Authority: A Guide to Using ETA to Dispose of Surplus Property](#), October 2004.

²⁶ Through the issuance of permits by states under RCRA (42 U.S.C. 6901-6992k), states also have authority to participate in, and concur on, cleanup decisions at regulated military facilities. See the [NGA fact sheet](#) (August 2008) on “Major Federal Laws Which Affect the Cleanup of Former Military Bases.” Available at: <http://www.nga.org/Files/pdf/0808FEDCLEANUPLAWS.PDF>

²⁷ See the [Fort Ord Environmental Services Cooperative Agreement \(ESCA\)](#). Available at: <http://www.fora.org/esca.htm>

²⁸ See the [NGA Fact Sheet](#) (September 2008) on oversight funding (DSMOA) and some alternatives. Available at: <http://www.nga.org/Files/pdf/0809BASECLEANUPREIMBURSEMENT.PDF>

²⁹ 112,000 acres from previous BRAC rounds and 102,000 acres from BRAC 2005. [Military Base Closures: Opportunities Exist to Improve Environmental Cleanup Cost Reporting and to Expedite Transfer of Unneeded Property](#), GAO-07-166, Government Accountability Office, February 20, 2007.