

The Community Guide to Early Transfer



This document is one of many early transfer documents compiled in a three volume set titled *Information Resource for Early Transfer of Federal Facilities*. For a CD, please forward requests to the [Early Transfer Hub](#).

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In 1997, the U.S. Navy determined it no longer needed its weapons plant in Bristol, Tennessee. The operating contractor vacated the facility, and the land and buildings were to be sold to the public. Although the City of Bristol was eager to have the property occupied, they had concerns about the environmental condition. Studies soon made it clear that the land and buildings would be safe to use before environmental cleanup was complete.

Together, the Navy, the General Services Administration, the Tennessee Department of Environment and Conservation and the City of Bristol were able to make the property productive again more quickly than originally thought – without endangering citizens or workers at the site.

So, in 2000 – just three years after announcing the facility’s closure – a new contractor purchased the property from the Navy and began to renovate it for their purposes, creating jobs in a previously vacant building while environmental cleanup continues.

The Bristol, Tennessee example is just one of several cases where ‘Early Transfer’ has allowed former military property to be transferred as soon as possible for the economic benefit of local communities.

This Community Guide to Early Transfer describes Early Transfer and answers some common questions about the Early Transfer process.



The Community Guide to Early Transfer

Naval Facilities Engineering Command

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CONTENTS

	Page
Introduction And Background	1
Common Questions about Early Transfer	3
Contaminants and Contamination, What Are They?	5
Laws On Environmental Contamination	8
Cleanup and Remediation	10
The Navy's Environmental Program For Property Transfer	14
The Heart Of Early Transfer: "Covenant Deferral"	17
The CERCLA Covenant and the New Owner	21
Liability And Insurance	22
A Final Note	25
Appendix A - Remediation Technologies	26
Appendix B - Short List of Property Transfer Documents	29
Appendix C - Early Transfer Information Resources	31

INTRODUCTION

The Background Behind Transferring Navy Property

Technology. Budgets. Glasnost. In the last ten or twenty years, the world has changed, and so have our country's military needs. As the United States military makes changes to focus resources and streamline effectiveness, some military bases and support facilities are being closed. Many bases, from every arm of the Department of Defense (DoD), have been closed under the Defense Base Closure and Realignment Act, also known as BRAC. Separate from the BRAC process, some weapons manufacturing facilities once owned by the U.S. Navy and operated by contractors are no longer needed.

When such a facility is scheduled for closure, the property is usually slated for reuse by the local community. The sooner a site is transferred, the sooner it can go to work creating jobs and money for the local economy. But the process to transfer federal property into the hands of local developers does not mean that the Navy is allowed to ignore or pass on

Here's an example of Early Transfer

- Navy property is to be transferred to a small town.
- The town already has been given the electrical power lines originally used by the Navy.
- The lines are still operating.
- The community doesn't want to become a utility company but wants new land users to have electricity. To do this, the town wants to sell the utility lines to a power company, but they can't unless they own the right-of-way beneath the lines.
- To complicate matters, groundwater beneath the power lines is contaminated.
- The Navy still owns the land, and cleanup of the groundwater will be a part of a larger scale cleanup effort by the Navy, but details on that haven't been decided upon yet.

In this case, the town can accept the right-of-way property from the Navy in an Early Transfer while the Navy's plans for groundwater cleanup are being finalized. Then it can sell the power system and recover funds for its treasury while promoting redevelopment without endangering people or wildlife.



environmental liabilities. The Navy is required by various laws to ensure that environmental contamination will not pose a risk to people using the site in the future. No transfer, early or otherwise, can occur unless and until human health and the environment are protected.

Early Transfer Authority is an outcome of the realization that in certain situations environmental contamination does not pose a direct threat to people or the environment. In those situations, using the Early Transfer Authority enables property transfer to take place – and economic reuse to begin – while environmental cleanup actions are conducted. However, for this Early Transfer to occur, the State Governor and, in some cases the U.S. Environmental Protection Agency (USEPA), must agree.

Why Early Transfer?

Communities can benefit from Early Transfer in several ways.

- Having title to the property makes it far easier to find private companies or individuals willing to make an investment in the property.
- Having clear title enables reuse to take place more quickly and in a more stable environment, creating jobs and a positive impact.

Achieving Early Transfer is a process that's not as complicated as this lengthy document might indicate. In fact, as more and more communities go through the process, it gets easier because the documents and standards are in place. No one has to start from scratch.

Questions about Early Transfer

First: Why would a new owner, particularly a city or county, want property with contamination?

- The main reason is so the property can be redeveloped quickly for the economic benefit of the community. Early Transfer is not considered where contamination might put people or the environment at risk. In an Early Transfer, the nature of the contamination, its extent and impacts would be known. The process of selecting a cleanup solution might still be in progress, but the property can be used with controls in place to prevent exposure to the contamination. In cases like this, the new owner can obtain title and use the property for a community benefit, such as open space or utility right-of-way, before the solution is fully defined. The Navy is still obligated to complete the cleanup.

Second: How can a potential new owner be sure that the Navy will not lose its incentive to clean up the property once the Navy no longer owns it? How can the new owner be sure that cleanup will not slow down or stop?

- Federal law requires that Early Transfer not “substantially delay” the cleanup. It further requires that schedules for investigation and cleanup be identified. Regarding funding, federal law also requires that the Navy request adequate money to complete the cleanup. These assurances do not exist for normal (as opposed to early) property transfers; thus, an Early Transfer actually improves the outlook for timely cleanup at a site.

Third: How does it work?

- Very briefly, the Navy and local community work together to identify parcels of land that are candidates for Early Transfer. Working within the established legal framework, the Navy and community arrange for the transfer before all environmental cleanup activities are complete. While the Navy is financially responsible to clean up its own contamination, the receiving community, the Navy or even a private entity (such as a developer) can actually perform the work.



Finally: Why then, you might ask, isn't every transfer an early transfer?

- There are two answers to this question.
 1. In many cases, the community has no developer or immediate ability to use the land. These communities aren't interested in taking on the additional burden of unused property.
 2. Also, a lot of people have to be sure that the property can be used for its intended purpose – before contamination has been remediated – without adversely affecting human health or the environment. The primary players in this determination are the community (which has to agree with the idea), the Navy (which has to convince its own management), the state regulatory agency (which has to agree that the use is consistent with state requirements) and, in some cases, the USEPA. This determination depends on how contaminated the property really is and the intended future use of the property. These factors allow an assessment of whether there is any risk to human health or the environment that cannot be reduced by adequate and acceptable land use controls.

To better understand this, it is important to have some perspective on contamination and risk.



CONTAMINANTS AND CONTAMINATION: WHAT ARE THEY?

“We are victims of our own cleverness.” The economic, agricultural and industrial successes of this century were possible with the help of man-made chemicals. We used chemicals and other compounds to help us fertilize the soil, cool the air, and make durable materials. They were designed to dissolve things, kill pests, or withstand being broken down.

In many cases, the very properties that made these chemicals so attractive, useful, and successful are the same properties that we now know can make them harmful.

Contaminants

The chemicals and compounds that contaminate soil, air and water fall into several categories and come from a wide variety of human activities. Since many Navy facilities were industrial by nature, the materials found there in the soil and groundwater are, by their nature, industrial contaminants.

Contamination

So, *contaminants* are basically hazardous materials. *Contamination* occurs when contaminants are found where we don't want them to be – where they could cause human health or environmental problems. However, contamination can be defined in slightly different ways depending on the situation or the law being used. Regardless, the basic principle remains the same: it begins with an understanding of what effect a certain substance has on humans or other parts of the ecosystem, and at what levels. Researchers in toxicology and pharmacology determine these levels.

Some Categories of Common Contaminants

Volatile Organic Compounds, also known as VOCs, are commonly used chemicals. Many VOCs are solvents, mostly used to clean parts in industrial settings. Household solvents include paint thinner and mineral spirits. Hair spray, nail polish remover and oven cleaners also contain VOCs.

- Solvents such as trichloroethene (TCE) have been commonly used in industrial operations.
- Thinners and solvents containing VOCs were often used in painting operations.

Semivolatile Organic Compounds, are also known as SVOCs. Semivolatiles are common components of asphalt, coal tar, and pitch. One commonly used household SVOC is naphthalene, which is the main ingredient in many furniture stains and finishes.

- Pyrene, chrysene, and other SVOCs are associated with asphalt, waste oil, hydraulic oil, and diesel and jet fuel.
- Phthalate esters are commonly found where plastics have been burned or processed.
- SVOCs are byproducts of fossil fuel combustion (coal, petroleum, etc.)

Metals are naturally occurring elements. The natural properties of metals, combined with their relative abundance, make them valuable to industrial and manufacturing processes. Household items that commonly contain metals include paint, batteries and electrical components. Metals have been used in a wide variety of industrial activities.

- Electroplating operations use cadmium, chromium, lead, and zinc.
- Battery shop operations handled lead, mercury, nickel, and cadmium.
- Lead-based paints and fuels were used for many years.

Pesticides are chemicals used to eliminate insects or weeds. Some pesticides linger for many years in the environment, and many (like DDT) have been banned by the USEPA. Flea collars, powders and sprays; roach and ant killers; and household plant and garden sprays all contain pesticides.

- Pesticides such as chlordane were commonly used for termite treatment in and around buildings.

PCBs, or Polychlorinated Biphenyls, are industrial compounds that were once widely used as insulating and heat exchange fluids in electrical transformers. They are also found in hydraulic fluids used in electrical components and systems. Because of environmental concerns, use of PCBs is now very limited and highly controlled.

Petroleum products were used throughout industrial facilities to operate machinery, trucks, and other equipment. Maintenance and refueling sometimes resulted in spills of petroleum products like gasoline, motor oil, or lubricants. Also, storage tanks and fueling lines sometimes developed leaks.



From this basic concept, the federal USEPA and many states have adopted lists of substances and concentrations that should not be exceeded in soil and groundwater. These levels are generally called *cleanup objectives*. If they are exceeded, they either have to be lowered by treatment (or removal), or a detailed study must show that there is no unacceptable threat to humans or the environment. This study is called a risk assessment, and is discussed later in this document.

For example: In Texas, Protective Concentration Limits (PCL) have been generated for each medium (soil and groundwater); and the methodology to calculate these limits is prescribed in the Texas Risk Reduction Program administered by the Texas Natural Resource Conservation Commission. In New York, Technical Administrative Guidance Memos (TAGM) set the objectives, and risk analyses are administered by the New York Department of Environmental Conservation. Other states have similar programs.

One complicating factor with contamination is that some substances, like arsenic and lead, are naturally-occurring materials. Natural levels of these substances, called *background* levels, can sometimes be higher than the toxicologists recommend as safe. It should be noted that background levels can vary widely from place to place.

Now lets look at the details.

HOW THE LAWS DEFINE ENVIRONMENTAL CONTAMINATION

There are two main laws that govern the environmental cleanup of industrial facilities – private, municipal, or federal – and therefore define ‘contamination.’

RCRA

The Resource Conservation and Recovery Act (RCRA) was passed in 1976. This law governs hazardous waste disposal and provides permits for the legal operation of facilities that generate hazardous waste - such as most industrial facilities. RCRA requires most facilities that want to store, treat or dispose of hazardous waste to get a permit. As part of that process, the facility must review its own site history and identify and clean up any sites of past contamination. At facilities being closed by the Navy, the Navy has identified these sites and has either completed the cleanup or is working on it. The property transfer process is indirectly connected with the RCRA corrective action process. The connection is that that RCRA regulated sites must be cleaned up or undergoing cleanup before property transfer can take place.

CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was passed in 1980, and has been amended several times since. This law governs what happens to contaminated sites that are not covered under RCRA. This law is sometimes called “Superfund” because it provides financing to clean up highly contaminated sites that are abandoned or for which the owner is unable to pay. In such cases, USEPA controls the cleanup. Where a responsible party can be identified, USEPA will dictate what happens and the responsible party will pay for the cleanup. In 1986, amendments to the original law gave DoD the authority to clean up its own contaminated sites, although USEPA and state regulatory agencies are always involved.

While RCRA governs waste as it is generated, CERCLA hazardous wastes are those remaining from past activities. CERCLA provides the framework



for containing, removing or treating these hazardous wastes. Under CERCLA, “contamination” is when any of an ever-changing list of materials (Title 40 of the Code of Federal Regulations, Section 302 – 40 CFR 302) exists in the environment at levels that could negatively impact human health. This list includes materials identified under the Clean Water Act (toxic substances), the Clean Air Act (hazardous air pollutants), the Toxic Substances Control Act (imminently hazardous chemicals), and RCRA. The key to CERCLA is that contamination is risk-based. CERCLA is also important because it is the law that governs federal property transfer.

The Navy’s environmental program must satisfy the requirements of these federal laws before property can be transferred. In addition, the Navy also must comply with individual state laws.

State Rules

The Navy’s cleanup program is always coordinated with the regulatory agency in the state where the facility is located. In most cases these states have been granted authority by the U.S. Environmental Protection Agency (USEPA) to be the lead environmental agency.

This *delegation of authority* means that the state program provides the framework for investigation, and standards for cleanup, that meet or exceed the requirements of an associated federal program.



Delegation of Authority is a complex process. The State agency must document to the USEPA that the State laws and regulations are at least as protective as federal laws and regulations. In addition, the State agency must show that a structure is in place to effectively manage the program. When major regulation changes occur, the State agency must submit an updated application to USEPA to update or add program areas for which the State is seeking authorization.



In the absence of a USEPA-approved RCRA corrective action program at the state level, the Navy would follow an investigation tailored to meet or exceed CERCLA requirements, with oversight by the federal agency. Even then, the Navy



must consider all state and local laws, known generally as “Applicable or Relevant and Appropriate Requirements.”

Example: Texas - In Texas, the Navy is following the framework provided by the Texas Risk Reduction Program (TRRP) to execute environmental cleanup. Data specified by TRRP is used to determine how to remediate sites found to be contaminated. The information gathered through investigation or remediation is formally documented, property classifications changed and cleanup brought to closure as appropriate. The information is then used to determine whether a particular piece of property is environmentally suitable for transfer, Early Transfer or lease.

Example: New York - In New York, the Inactive Hazardous Waste Disposal Site Remediation Program provides the framework for determining site-specific risk to human health or the environment. Technical Administrative Guidance Memos have established standard cleanup objectives, and also the method by which they are implemented.

Generally, decisions about environmental investigations and cleanup are made jointly by technical experts from the Navy, USEPA, and the state environmental regulatory agency. This relationship can be modified to fit the situation.

“CLEANUP” AND REMEDIATION

When hazardous materials enter the environment - especially at levels that threaten human health or the environment - action must be taken to comply with the law. Technologies are employed. People and other resources are brought in. The goal is to remove or limit the effects of the contamination. Generally, this is called the “remediation” or “cleanup” phase. To “clean up” may appear to mean that in the end the site will be free of contamination. That impression comes from the most basic remediation technique called “dig and haul” where everything that is not naturally occurring is totally removed. While that technique is still often used, in most cases such full cleanup isn’t possible or practical.



Usually, as described above, some measurable level of contaminants remains after remediation or cleanup is complete. Since the goal is to prevent the *effects* of contamination, sometimes remedies are selected that keep people away from the contamination or remove enough of the contamination to lower the risk to acceptable levels. For this reason, the word “remediation” is preferred as an umbrella term for tackling the effects of contamination. However, “clean” and “cleanup” are still widely used in conversation.

“Uncontaminated” versus “Clean”

Logic would lead us to the conclusion that “clean” is the lack of contamination, and therefore the same as “uncontaminated.” While this can be true, *uncontaminated* has a specific legal definition in addition to its common

What the Law Says:

The law that governs property transfer from the federal government, CERCLA 120(h), says that “uncontaminated” property is: “real property on which no hazardous substances and no petroleum products or their derivatives were known to have been released or disposed of.”

meaning. In addition, “clean” is often used for a site where contamination has been reduced to a level that is no longer a concern for human health or environment – even though a substance is still measurable. This is a common principle in environmental protection. Laws that govern environmental cleanup acknowledge that cleaning a site to zero contaminants is, in many cases, unreasonable or even impossible.

Examples

In Millington, Tennessee, the pesticide dieldrin was used to combat the white-fringed beetle in the 1950s and ‘60s. Dieldrin is still found in soil throughout the facility, but at very low levels. Removing all the topsoil at the base was considered unnecessary because dieldrin alone does not pose a threat to human health.

Some materials, such as lead and arsenic, can be found naturally. Is soil with a high arsenic level “contaminated?” That depends on the levels of arsenic found naturally in the area, called “background” levels. Soil with arsenic levels at or below the background level is generally not considered contaminated, although this is usually determined on a case-by-case basis.

So, How Clean is “Clean?”

National standards are set by the USEPA. States are delegated the authority to administer state standards, as long as the state standard is not weaker than the federal. In general, the agency responsible for protecting human health and the environment will have default values for at least the common environmental contaminants. These are levels that are considered acceptable for unrestricted use (including residential) and perhaps restricted use (industrial). In addition, there is a way to review the risk at a specific site, possibly resulting in acceptance of different final concentrations of contaminants. In any case, specific methods and approval processes must be followed for assessing this risk.

Risk Assessment

In cleaning environmental contamination, there are many different views of what levels are considered “clean” and therefore when cleanup is finished. Therefore, objective science has been developed to help

Risk assessment recognizes:

“If there is no exposure,
there is no risk.”

environmental agencies decide how much cleanup is needed. In carrying out their responsibilities to the public, regulatory agencies look at the limits of available technologies and probable costs. This information is balanced against the environmental risks from a site as they relate to current and projected exposure to humans, plants or animals. The process of analyzing the environmental contamination and its risk to human health or the environment is called *risk analysis* or *risk assessment*.

Risk assessment evaluates whether there is a risk from a site to human health or the environment *over and above* average risk. For example, the American Cancer Society estimates that the natural chance for contracting some form of cancer is one in four. Where there is excess risk (of cancer or any other harmful effect), a risk assessment helps decision-makers review what measures, if any, are needed to minimize or eliminate the risk.

When reviewing the risk from contamination, decision-makers consider the future use of the site, such as commercial or recreational. The amount of chemicals allowed to remain on the site are calculated to reflect the amount of exposure, which is estimated from the current or proposed land use. Human *exposure* is a measure of how people are using the site, how they come in contact with contamination, how frequently, and their ages.

How Risk Assessment Measures Exposure

In risk assessment, site conditions are evaluated objectively. Real sampling results from the site are used. However, assumptions must be made based on the projected or existing use of a site.

- An Industrial scenario might assume that adults will work at the site for eight hours per day, five days per week, fifty weeks per year, for thirty years. That would be the assumed maximum exposure for site workers. Risk analysis would be based on these assumptions.
- A Residential scenario might assume that families with children live at the site. Because children are smaller, and are developing, they are the focus of these assessments. Children might be at the site (their home) twenty-four hours per day, but they can be assumed to play in the dirt for only six hours per day, seven days per week, fifty-two weeks per year, for six years.
- If contamination is inaccessible, like contaminated soil underneath a parking lot, then no one would be exposed to the contamination unless they were involved in removing or disturbing the concrete. Risk analysis would probably conclude that there is no risk from the soil, except in the event of site construction, because there is no exposure to the soil contamination. If construction were anticipated, a construction worker scenario would be evaluated and workers might be advised to use personal protective equipment.

Risk analysis would be based on these assumptions, and would recommend a maximum contaminant level for the site.

Well, while the above discussion may sound reasonable, how does it apply to Early Transfer of federal property?



Early property transfer will not occur unless the state regulatory agency (and in some cases the USEPA) is satisfied that the transfer will pose no unacceptable threat to human health or the environment. In other words, the contaminants can't be disregarded or written off - they have to be handled in compliance with regulatory standards.

One example might be contaminants in soil under a paved industrial site. These contaminants may still have to be addressed and remediated as required by the state regulations. However, the contaminants may not pose a current threat if the site is used as a parking lot while the determination is being made on how to deal with them. Also, temporary controls on use of the land (e.g., digging restrictions) might be needed to reduce the chance for exposure to the contaminants until the remediation can be determined.

In this example, risk assessment plays an important role in the decision-making process.

THE NAVY'S ENVIRONMENTAL PROGRAM FOR REAL PROPERTY TRANSFER

The Environmental Baseline Survey

The Navy's Environmental Baseline Survey process is designed to identify properties that are suitable for transfer. This study process also obtains the information required for state or federal approval for property transfer; whether cleanup is required, complete, ongoing or still under consideration.

The Environmental Baseline Survey reviews as much information as possible (including information from the RCRA or CERCLA program, other environmental studies, aerial photographs, records, and interviews) to determine the current environmental condition of the facility. The Environmental Baseline Survey classifies areas of the facility according to their current environmental condition, and identifies 'uncontaminated' property as defined in federal law (CERCLA 120(h)(4)).

Each area or site is placed into one of seven color-coded categories to help visualize and prioritize the work ahead.

EBS Color Classification Scheme	
The Environmental Baseline Survey classifies each piece of property into one of seven color-coded categories. The categories indicate the environmental status of the property based on its chemical or petroleum product history.	
<i>Suitable for Transfer</i>	
1 White	Uncontaminated. No known storage, release, disposal or migration of hazardous substances or petroleum products.
	
2 Blue	Release or disposal of petroleum products has occurred.
	
3 Light Green	Storage, release, disposal or migration of hazardous substances or petroleum products has occurred, but at concentrations that don't require action.
	
4 Dark Green	Storage, release, disposal or migration of hazardous substances or petroleum products has occurred, and required remediation actions are complete.
	
<i>Not Suitable For Transfer</i>	
5 Yellow	Storage, release, disposal and/or migration of hazardous substances or petroleum products has occurred, and remediation actions are under way.
	
6 Red	Storage, release, disposal and/or migration of hazardous substances or petroleum products has occurred, but response actions have not yet been taken.
	
7 Gray	Not enough information. <u>Additional investigation is generally needed to classify the property into one of the other categories.</u>
	

By reviewing the environmental history of an entire facility, and documenting the areas of past contamination, the Navy creates a record of the contamination on its property so that it can work out a strategy for handling the site.

Remediating a site can be simple or very complex. The goal of remediation, whether physical cleanup is performed or not, is to protect human health and the environment.

Remediation Technologies

When reviewing methods of remediating a site, specialists must first determine the type of contaminant (chemically), the medium it is contaminating (soil, air, or water), and how it might reach people (by inhaling, ingesting, or through the skin). There are many factors that must be reviewed before an action is selected.

- Certain technologies will not apply. For example, technologies that treat only water will not be reviewed for soil remediation.
- Surface soil can be treated fairly simply because it is easy to reach. Deeper soil is more difficult to treat. Water contamination is always difficult because water can spread contamination quickly. *Surface water* (lakes, ponds, streams) and *groundwater* (water that moves under the ground and collects underground in aquifers) must be treated differently.
- Many materials break down naturally in the environment. When contaminants break down naturally, the process is called *natural attenuation*¹. The breakdown can occur from one or more processes that are physical (e.g., dilution), biological (e.g., breakdown by bacteria), or chemical (e.g., oxidation). Therefore, monitoring natural attenuation – to ensure it is working – is becoming a popular option for treating groundwater.
- Sometimes, new or existing barriers keep people from being exposed to contamination. For example, a parking lot covering soil contamination is a simple but effective way to avoid contact with the soil. While the contamination is still there, it cannot affect people because exposure is effectively prevented. (Groundwater impacted in this situation would require separate action.)

¹ While natural attenuation takes a long time to complete, it is often selected because other, more expensive technologies aren't much more effective. The "pump and treat" method of cleaning groundwater is proving to be less effective than once thought. However, the effectiveness of both natural attenuation and pump-and-treat is very site-specific and cannot easily be compared. Natural attenuation is most effective when used with other technologies that remove or address the source of contamination.



The Navy utilizes all the tools and technologies available to clean contaminated sites. Each technology has its benefits and limitations. Some commonly used technologies are included in Appendix A of this document.

THE HEART OF EARLY TRANSFER: “COVENANT DEFERRAL”

While CERCLA covers historical contamination on all property – public or private – it contains a special section that pertains only to the federal government when transferring federal property to the private sector. This is section 120(h) of CERCLA. Originally this section only allowed transfer of two kinds of property:

- (1) uncontaminated federal property or
- (2) formerly contaminated property that had been cleaned up.

A third case was added by the 1992 amendment, the Community Environmental Response Facilitation Act.

- (3) property that is undergoing remediation but not yet complete is allowed to be transferred if it is shown that the treatment or cleanup process is working.²

Finally, a fourth category was added in 1996:

- (4) property that didn't have cleanup underway but enough was known about it to be confident that human health and the environment would be protected

In this case the USEPA or the Governor of the particular state has to determine that the proper cleanup action will take place and, meanwhile, human health and the environment will be protected. This fourth category became known as “*Early Transfer Authority*” and is spelled out in CERCLA section 120(h)(3)(C).

² A remedy “in place and proven effective” refers to the fact that some technologies take a long time to clean up some kinds of contamination. For example, groundwater contaminated with chlorinated solvents is very difficult to clean quickly. In some cases it will take decades to complete such treatment. If a cleanup technology is proven to be working successfully (e.g., regular monitoring shows decreasing concentrations), and a plan is in place to continue to monitor the remedy until the cleanup is complete, then property could be transferred.



The CERCLA Notice and Covenant

Before 1996, CERCLA did not allow federal property to be transferred to local communities until environmental cleanup was complete, or until cleanup remedies were in place and proven effective. At that point, three things were required. These are spelled out in CERCLA 120(h)(3)(A), and summarized here:

- a notice – required to be placed in the deed with details on the environmental contamination and cleanup;
- a covenant – required to be issued and recorded with the deed. The CERCLA covenant is recorded with the deed in the local probate office. It remains with the deed, serving as notice to future owners that there was once environmental contamination at the site but that all the remedial action necessary to protect human health and the environment has been taken. The covenant also says clearly that any additional remedial action required after transfer (for Navy contamination) will be conducted by the Navy;
- an access agreement – stating that the Navy is allowed access to the property after transfer if they need to carry out any remedial action.

However, environmental cleanups can take many years, thwarting property transfer and positive economic reuse.

Covenant Deferral

Recognizing this problem, the 1996 rule allows the federal government – the Navy in this case – to transfer property *before* “all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken” – IF (and only if) the Administrator of the USEPA or the Governor of the State authorizes the Navy to do so. In this situation, however, the covenant, notice and access agreement are still required, but the covenant can be deferred. This is called *covenant deferral*.

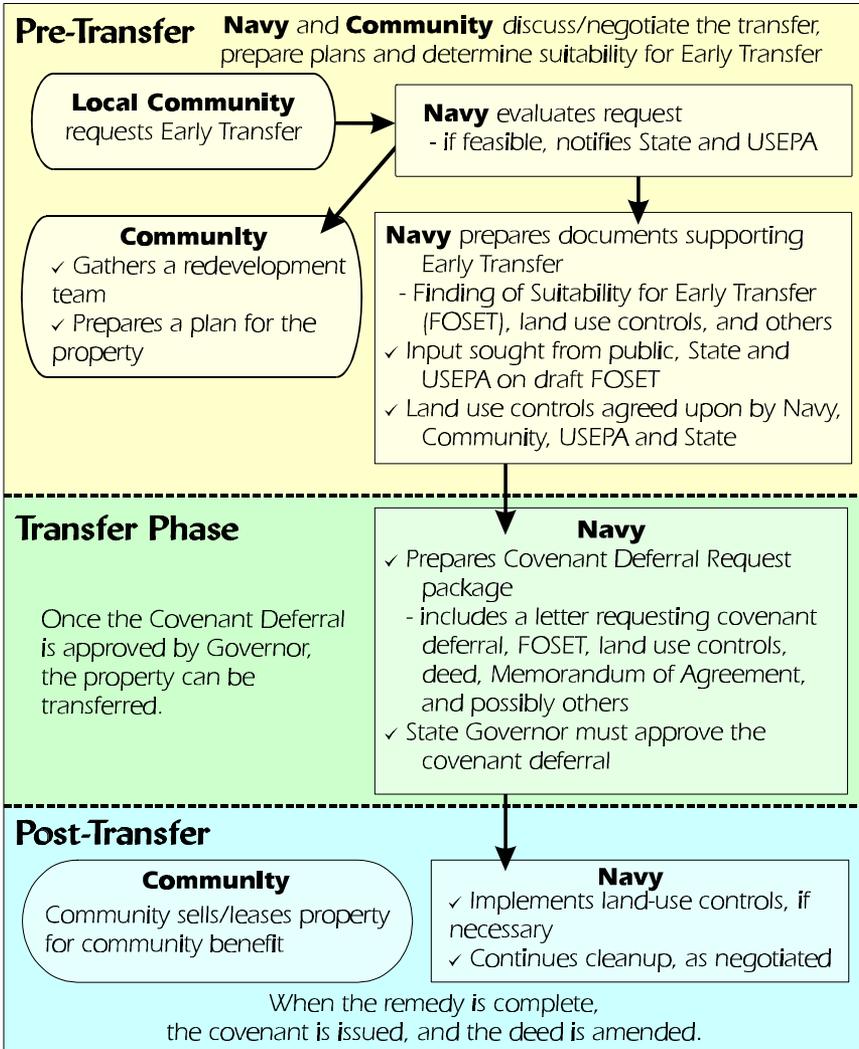
When all remedial action has finally been taken, the Navy must deliver to the new owner a warranty that the action required by the above underlined sentence is done.

To secure covenant deferral, CERCLA requires that the USEPA Administrator (for sites listed on the federal Superfund list) or the state governor (for other sites) determine that the following conditions – identified in CERCLA 120(h) – have been met:

- The property is suitable for transfer for the use intended;
- The intended use is consistent with protection of human health and the environment;
- The deed of transfer contains assurances that:
 - restrictions on use of the property are in place to ensure protection of human health and the environment and that activities required for remediation and oversight will not be disrupted;
 - All necessary response action will be taken;
- The Navy will submit a budget to the federal Office of Management and Budget that adequately addresses schedules for all necessary response action, subject to congressional authorizations and appropriations;
- The Navy has published a notice of the proposed early transfer in a local newspaper and has given the public at least 30 days to provide written comment on the suitability of the property for transfer; and
- Transfer of the property will not substantially delay any necessary response action at the property.

The Early Transfer Administrative Process

To help explain how Early Transfer works, here is an example of the administrative process for Navy sites that are not on the USEPA's list of high priority (Superfund) sites.





At sites listed on the USEPA's Superfund list, USEPA guidance is followed instead of Department of Defense guidance. The covenant deferral request package is almost identical. The differences include:

- the Navy's FOSET is called a Covenant Deferral Request by the USEPA; and
- the USEPA Administrator must approve the covenant deferral, and only with concurrence (agreement) by the State Governor.

The USEPA maintains "lead agency" status for these transfers.

Although the law requires the governor of a state to sign the authorization, the Navy will work with the state's regulatory agency, the regional USEPA, the transferee and the public, generally through an already established local Restoration Advisory Board, to gain general concurrence with the proposed transfer before presenting anything to a governor or administrator.

Restoration Advisory Boards

These boards were established at Navy facilities to bring concerns from the community to the Navy, USEPA and state officials. RABs bring community members, government representatives and environmental regulators together to discuss environmental issues at Navy facilities.

So, what does all this mean for the new owner of Navy property? Let's explore that question.

The CERCLA Covenant and The New Owner

The simplified answer is that the new owner gets title to the property and the Navy continues to conduct cleanup operations. Alternately, the new owner may perform the cleanup using funds provided by the Navy.

- For the new owner, this might mean part of the property would be limited to commercial or industrial purposes, to reduce exposure and therefore risk. It could mean that a portion of the property is fenced off for the Navy to finish cleanup. Or it could mean prohibiting digging or use of groundwater until cleanup is finished. In most cases, underground remediation may go completely unnoticed because surface use is not affected.

Benefits to Early Ownership



There are also certain benefits to accepting property through Early Transfer:

- Having title to the property makes it far easier for a receiving authority to locate developers or other private entities willing to make an investment in the property. History has proven that developers view long-term leases between the Navy and the receiving authority as uncertain. In lease situations, they are often unwilling to make the long-term commitments needed for successful economic revitalization.
- Having clear title enables reuse to take place more quickly and in a more stable environment, creating jobs and a positive impact.
- If a community elects to take control of Navy cleanup responsibilities, they will be in a better position to structure limitations that may need to be placed on the property.
- Communities that elect to control the cleanup may save money and time by combining cleanup and redevelopment activities.

The covenant is just one of several issues that a prospective new owner must understand before they purchase or accept former Navy property. Another common issue is liability.

WHOSE LIABILITY IS IT, ANYWAY?

Briefly, the federal government (DoD or the Navy) will retain responsibility for contamination caused during the time it owned or operated the property. This is one purpose of the Environmental Baseline Survey. The environmental issues identified and documented in the Environmental Baseline Survey are, and will remain, the responsibility of the Navy. Any new contamination (caused after the property has been leased or transferred) is not the responsibility of the Navy. This is clearly laid out in CERCLA and its revisions. However, there are complications, and there are ways of accurately detailing each party's responsibilities.



Liability, Indemnity, and Me

Communities may be concerned about their potential liability in the case of third-party legal action (such as when someone feels harmed by site conditions and takes the property owner to court), their liability for further cleanup, or issues associated with financing a cleanup action. The Early Transfer process includes documents that specify responsibilities for each party. These documents must be completed before transfer. It is here where the receiving community has the opportunity to work out the terms and conditions of the property transfer in a manner that meets their comfort level.

On a federal level, the Navy retains liability for its past contamination. This too is clearly described in CERCLA. However, CERCLA also can complicate matters. Local communities or developers who receive title to transferred property are “owners” under CERCLA, and are therefore technically liable to some degree for past contamination, regardless of its origin. Some communities have been concerned that their state’s law would transfer liability for past contamination entirely to the new owner.

Some states that have worked with Early Transfer (Minnesota, California and others) have specific laws or precedents that keep this from happening. Many are modeled after Brownfields programs that address transfer of liability from private property owners. However, Early Transfer is still a new process. Not all states have dealt with it, and there may be laws that conflict. This is why it is important for state agencies to be closely involved in the Early Transfer process - to identify this kind of conflict.

Because of these, and other kinds of unknowns, the private sector has come up with an excellent solution to the risk of potential future liability: Environmental Insurance.

Environmental Insurance

In the last few years, the quality and cost of environmental insurance products have improved significantly. These products are being used extensively in Brownfields development (redevelopment of abandoned private industrial facilities). DoD recognizes the value of environmental insurance in situations of early transfer or fixed-price remediation (where insurance covers remediation costs that exceed the negotiated funding level).

Insurance is especially applicable to communities that want to take charge of the cleanup and would be used to cover unforeseen elements of environmental cleanup. In these cases, DoD can provide funds to assist communities in purchasing environmental insurance.

It is important to reiterate that insurance does not relieve the Navy of its ultimate liability or its obligations.

Details on Environmental Insurance

When local communities or developers have taken on the Navy's cleanup responsibilities, there are three main types of environmental insurance available.

- **Cleanup Cost Cap.** This insurance protects against cost overruns for remediation expenses based on an approved remedial action plan. It also covers cost overruns due to changes in regulatory standards, applicable laws, and discovery of new contamination both on and off-site.
- **Pollution Legal Liability.** This protects against third-party claims for bodily injury, property damage, or cleanup costs from new or unknown pollution conditions on the property. It also covers claims for diminution of property values, natural resource damages and construction delays.
- **Secured Creditor Insurance.** This product provides protection to a lender in the event a loan default is accompanied by a pollution condition. The policy pays either the remediation costs or the loan balance. This is useful in securing financing with commercial lenders who may be concerned about liability associated with a contaminated property.



Two examples where environmental insurance have been used successfully are:

- the Fleet Industrial Supply Center, Oakland California, for early transfer, and
- the Charleston (SC) Naval Complex, as part of a fixed-price insured environmental restoration contract now in place.

A FINAL NOTE

Communities need to keep in mind that they drive the process. If they don't want to accept an Early Transfer of federal property, they don't have to. Ultimately, though, more and more communities around the country are finding out that Early Transfer is not only a smart use of taxpayer dollars, but also can be a significant economic benefit.

APPENDIX A - Remediation Technologies

Technology	Target Medium	Relative time to completion	Relative Cost*
<p>Excavation and Off-site Disposal This is a straightforward method of removing contaminated soil from a site and disposing of it in an approved off-site treatment or disposal facility. This is usually one of the lower cost options for small volumes of soil. In-place treatment may be more cost effective for larger volumes of material.</p>	<p>Soil.</p> <p>Depth and composition of material requiring excavation can be a limitation.</p>	<p>Very fast.</p> <p>Length of time is dictated only by the amount of soil to remove, and the difficulty in arranging permits and disposal.</p>	<p>\$270 - \$460 per ton.</p> <p>Total cost can vary greatly depending on disposal costs.</p>
<p>Air Sparging/ Vacuum Extraction Some contaminants (such as volatile organic compounds) evaporate very easily. This method treats soil and groundwater contaminated with these compounds in-place by moving huge quantities of air through the contaminated media to “evaporate” contaminants trapped there. Using wells, air is injected on one side of contamination and removed with a vacuum at the other, moving the air through the contaminated medium and removing the contaminant.</p>	<p>Water and Soil.</p> <p>Depth and composition of material requiring treatment can be a limitation.</p>	<p>Slow.</p> <p>Could take from five to ten years to complete.</p>	<p>\$150,000 - \$350,000 per acre</p>
<p>Capping In certain situations, placing a layer of concrete, asphalt, clay or some other material over contaminated soil will achieve the goals set out by the decision-makers. This is often the lowest cost alternative and easiest to implement.</p>	<p>Soil. Shallow or deep.</p>	<p>Fastest.</p> <p>Only limited by the availability of the equipment.</p>	<p>\$75,000 - \$250,000 per acre.</p>

Technology	Target Medium	Relative time to completion	Relative Cost*
<p>Pump and Treat Using recovery wells or trenches, groundwater can be pumped up from the ground and run through a treatment system to remove the contaminants. The treatment could utilize chemical, physical, and/or biological processes. The treated water is either released to a municipal sewer system, a nearby body of water, or is reinjected into the aquifer.</p>	<p>Groundwater.</p>	<p>Very slow. Could take from five to twenty-five years to complete.</p>	<p>Costs vary greatly depending on site conditions, materials being treated and cleanup time.</p>
<p>Chemical Oxidation This technology can be used to treat fuel- or solvent-contaminated soil and groundwater that has been removed or is still in-place. Chemical oxidants such as hydrogen peroxide or potassium permanganate are added to the contaminated media, causing a chemical reaction that changes the contaminants into less harmful compounds (carbon-dioxide, chloride, and water).</p>	<p>Soil and groundwater. Unlike some other technologies, chemical oxidation can be used for free (undiluted) product.</p>	<p>Fast. Generally, chemical reaction will be fast. Length of time will be influenced by ability to apply oxidant to contaminant zone.</p>	<p>Costs vary greatly depending on site conditions, contaminants being treated and cleanup time.</p>

Technology	Target Medium	Relative time to completion	Relative Cost*
<p>Monitored Natural Attenuation Natural attenuation is the reduction of chemical contaminants in the environment through natural processes such as dilution, volatilization, biodegradation, adsorption, and chemical reactions with subsurface materials. To assure everyone that the natural processes are working, groundwater is monitored on a regular basis. Samples from the groundwater are analyzed to make sure the levels of contaminants are decreasing (attenuating).</p>	<p>Soil and groundwater. Mainly used for groundwater (shallow or deep), but some of these processes can occur in soil.</p>	<p>Very slow. Without active intervention, this could take decades. Often this is used along with soil removal to speed the process.</p>	<p>Costs associated with this technology can vary greatly. Site complexity and time required to achieve cleanup goals are factors.</p>
<p>Electrokinetics Remediation This technology uses low intensity direct current between electrodes placed in soil to free contaminants from the soil. Contaminants move to the electrodes where they are removed and treated or treated in-place.</p>	<p>Mainly used for soil, but has been used for groundwater at some sites.</p>	<p>Relatively new technology; therefore, cleanup duration information is unavailable.</p>	<p>Limited information available.</p>
<p>* Note: Costs obtained from <i>Remediation Technologies Screening Matrix and Reference Guide, Second Edition</i>, DOD Environmental Technology Transfer Committee, October 1994.</p>			

APPENDIX B - Short List of Property Transfer Documents

Document	General Description
Memorandum of Agreement (MOA)	Contract-type document. Spells out the terms and conditions of the property transfer in detail, including the rights and responsibilities of both parties.
Quitclaim Deed	<p>Conveys property to the receiving community. Includes</p> <ol style="list-style-type: none"> 1. the hazardous substance notification and response action summary required by CERCLA; 2. a covenant that the Navy will remediate any hazardous substance(s) remaining on the property at the time of conveyance; 3. a warranty that they Navy will conduct any cleanup found necessary after transfer; 4. a clause providing the Navy access to the property in the future; 5. response action assurances - covering land use restrictions needed to protect human health and the environment and to prevent disruption of cleanup activities, cleanup schedules, and funding requirements; 6. lead-based paint, asbestos, PCB, and radon notifications; and 7. indemnifications.
Environmental Services Cooperative Agreement (ESCA)	<p><u>This document is needed only when the receiving community and/or its developer will assume responsibility for environmental remediation of early transfer property.</u> This outlines the terms and conditions of such an arrangement, including funding by Navy. Defined in the ESCA are environmental services to be provided by the recipient; obligations and liabilities of both the Navy and recipient; indemnifications by both the Navy and recipient; funding limitations, payments schedules, insurance requirements, etc.</p>

Document	General Description
Consent Agreement	<p><u>This document is needed only when required by the regulator(s) and the recipient and/or its developer assumes responsibility for environmental remediation of early transfer property.</u> The consent agreement establishes the recipient's understanding of the contamination present at the site and the requirements for achieving regulatory closure. (An ESCA is also needed in this situation.)</p>
Finding of Suitability for Early Transfer (FOSET)	<p>This is a package of documentation that provides the Governor and USEPA the information needed to decide whether the property is suitable for early transfer. The FOSET is based on review of the Environmental Baseline Survey for Transfer, the local reuse plan, environmental investigation reports and other documents.</p>

APPENDIX C - Early Transfer Information Resources

Early Transfer is still a relatively new process. However, there are few widely available resources on the topic. This list is by no means all-inclusive or complete, but is intended as a starting point for communities seeking to understand Early Transfer.

Department of Defense (DOD)

Naval Facilities Engineering Command (NAVFAC) has established an Early Transfer “Hub” to focus on continual improvement of the early transfer process. The Hub has staff dedicated to coordination and development of key documents required for early transfer of property.

contact Jeff Meyers telephone: (843) 820-5609
email: meyersjg@efdsouth.navfac.navy.mil

DoD also maintains a good list of links to Early Transfer guidance, information, documents, and the relevant laws governing DoD’s responsibilities under property transfer:

www.dtic.mil/envirodod/brac/publish.html

United States Environmental Protection Agency

Brownfields. <http://www.epa.gov/swerosps/bf/index.html>

Much of the guidance and direction for transferring property with environmental liabilities grows from the Brownfields initiative

Federal Facilities: www.epa.gov/swerffrr/

USEPA’s fact sheet on Early Transfer:

www.epa.gov/swerffrr/doc/earlytrans.htm

Other

Section 120(h)(3)(C) of the Comprehensive Environmental Response Compensation and Liability Act:

<http://www4.law.cornell.edu/uscode/42/9620.html>

FOR MORE INFORMATION

The information in this document is a summary of many different laws, programs, and regulations. More information on these, and the Early Transfer process in general, may be found by contacting the U.S. Navy's Early Transfer Hub:

David Criswell
Code ES11
Naval Facilities Engineering Command, Southern
Division
P.O. Box 190010
North Charleston, SC 29419-9010
1-843-820-7358

In addition, a great deal of information on Early Transfer is available from the USEPA and on the Internet. Please see Appendix C for a list of resources.

Before



After

