

Redeveloping BRAC Sites Under CERCLA

Are you up to the challenge?

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Key Differences and Challenges in BRAC Redevelopment

- Unique Environmental Issues
- Economic and Financing Challenges
- Land Use and Local Code Compliance Issues

Environmental Challenges

Unfunded CERCLA covenant and DOD indemnity

Under CERCLA §120(h)(3), deeds that transfer U.S. property to another person or entity must include the following...

- A covenant warranting that all remedial action necessary to protect human health and the environment with respect to hazardous substances remaining on the property has been taken prior to the date of transfer and any additional remedial action found to be necessary after the date of transfer shall be conducted by the United States.
- Under §120(h)(3), a remedial action “has been taken” when the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to EPA to be operating properly and successfully.
- A clause granting the United States access to the property in the event that any additional remedial or corrective action is found to be necessary after the date of transfer
- Finding of Suitability to Transfer – requires “operating properly and successfully” determination by DoD; not necessarily remedy completion.

Environmental Challenges (cont'd.)

In §330 of the National Defense Authorization Act of FY 1993, Congress provided that the Secretary of Defense shall hold harmless and indemnify persons from any claim for personal injury or property damage resulting from the following:

- Ownership or control of any facility at a military installation that is closing pursuant to a base closure law
- Release or threatened release of hazardous substances as a result of Department of Defense (DoD) activities

§330 covenant is no longer included in DoD deeds conveying real property.

Environmental Challenges (cont.'d)

- Limitations on 120(h) and 330:
 - No time requirement
 - No committed funding
 - Covenant limited to CERCLA contaminants (petroleum, emerging contaminants excluded)
 - No defined remedy in covenant (government decides how to fulfill the terms of the covenant)
- ACM and LBP issues
- Emerging Contaminants – not addressed by CERCLA
 - *Differences exist within DOD on extent of liability, assumption, and the means and methods for addressing these contaminants

Economic Challenges

- Development requires the ability to finance – must attract debt and/or equity!!
 - Lack of understanding of BRAC issues among institutional financing sources – BRAC covenant and indemnities, etc.
 - Language used in BRAC deeds and leases – reservations and land use controls are often overbroad
 - “Holes in the donut” make development more challenging and impact value of collateral. CERCLA Finding of Suitability to Transfer required. DoD can subdivide at will and leave gaps.
 - LIFO – Reversion option
 - DoD access rights under CERCLA

Land Use Issues

- Sovereign immunity for DOD – no local code requirements or zoning laws apply to DOD uses during federal ownership.
 - › Local health and safety codes
 - › Zoning and land use
 - › Immediate change upon transfer to private ownership
 - › Requires careful planning and coordination with local authorities prior to transfer
- “Building within buildings” in large DOD sites – issues of ingress, egress and compliance with fire codes.
- Utility and infrastructure systems – must rely on DOD systems until replacements are built and available.

Questions and Discussion
