

## CERCLA Section 120(h)

### What is CERCLA?

CERCLA stands for the "*Comprehensive Environmental Response, Compensation, and Liability Act*" of 1980. CERCLA assigns cleanup responsibilities for releases of hazardous substances to "responsible parties," including federal agencies.

### How does CERCLA affect the Federal Real Property Disposal process?

CERCLA §120(h) imposes several requirements on all transfers of federal real property "owned by the United States" to non-federal entities.

With regard to the Federal Property Real Disposal Process, CERCLA requires the Federal Government to:

- give notice of hazardous substance activity to the grantee,
- include a covenant in the deed that "*all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer,*"
- *include a deed covenant that the United States will return and perform any additional response action that may be required in the future, and*
- *retain a perpetual right of access necessary to do such additional response actions.*

As noted above, these requirements only apply to fee conveyances of real property out of federal ownership. They do *not* apply to interagency federal real property transfers or to leases, licenses, or easements granted for the use of federal land. CERCLA §120(h) also does not apply to personal property disposals.



### What CERCLA-related information must landholding agencies provide GSA with the Report of Excess?

GSA requires that landholding agencies complete GSA's "Hazardous Substance Activity Certification," which is located in GSA's *Excess Real Property Checklist*. Completion of this form enables GSA either to include the required notice and covenants in the deed for a "Timely Transfer" or to work with the landholding agency to pursue one of CERCLA's other transfer mechanisms, described at the end of this document. The Standard Form 118 in GSA's *Excess Real Property Checklist* can be found on the Resource Center Web site at: <http://rc.gsa.gov/ResourceCenter/>

There are two components of the Hazardous Substance Activity Certification:

1. The landholding agency must provide notice of any hazardous substance activity, based upon a complete search of agency files.

The landholding agency must assert either that (a) there is no evidence of hazardous substance activity, or (b) there is evidence of hazardous substance activity that occurred on the property. If (b), the landholding agency has a "due diligence" obligation to provide detailed, accurate information on all "reportable quantities" of hazardous substances stored, released, or disposed of on property that it reports to GSA for disposal. The specific substances that must be reported under CERCLA and their reporting limits are described in 40 CFR §302.4 and 40 CFR §373.

2. If the landholding agency discloses that (b) hazardous substance activity took place on the property, then it must assert whether or not all remedial action necessary to protect human health and the environment has been taken with respect to those hazardous substances.

**What does "all remedial action necessary" mean?**

The term "all remedial action necessary to protect human health and the environment" is not defined in CERCLA. However, it is reasonable to interpret these words to include "removal actions" and thus, all forms of "response action" taken to address potential releases of hazardous substances into the environment. GSA thus includes the CERCLA §120(h) (3) covenant even if no remedial action was ever necessary. For example, the deed covenant is included if a CERCLA preliminary assessment or site inspection has verified that no discernible release has occurred from a past activity or when it has been determined that any onsite contamination is below the "action levels" required for remediation.

EPA has developed specific cleanup standards for individual contaminants. These standards can vary depending on the proposed use of the property. Cleanup standards for commercial or industrial use are in most instances less stringent than those for residential use.

Landholding agencies must report any remedial actions previously completed on the property. If residual contamination remains at levels that can be addressed with land-use controls (LUCs), the landholding agency should describe these LUCs that are required to run with the land to protect cleanup remedies and to prevent exposure to these contaminants.



**What are "land-use controls" (LUCs), and how do they relate to CERCLA cleanup remedies and residual contamination?**

LUCs consist of institutional controls (e.g., restrictive covenants) and engineering controls (e.g., fences and landfill caps) designed to prevent exposure to residual contamination and to protect cleanup remedies. LUCs can apply to a portion of surplus property or to the entire site. They can apply to proposed remedial actions to be completed by the landholding agency or the property's purchaser. Post-transfer LUC management responsibilities vary from state to state and even from one project to another, depending on state statutes and regulators' decisions. Assignment of these LUC responsibilities should be clarified with the landholding agency, the proposed grantee, and with regulators, as necessary. LUCs should be described in the conveyance documents.

**How much due diligence information should landholding agencies provide to GSA with their Reports of Excess?**

This depends on the condition of the property. For all excess parcels, landholding agencies should summarize the results of their records searches and any preliminary assessments, site inspections, remedial investigations, or Environmental Site Assessments they performed. Sites with ongoing or completed response actions should include maps delineating the cleanup areas, evidence of regulators' concurrence, and a summary of the cleanup process.

## What are the different mechanisms in CERCLA §120(h) for conveying real property out of federal ownership?

GSA uses the terms "Timely Transfer," "Early Transfer," and "Clean Transfer" to describe the different authorities contained within CERCLA §120(h) for conveying federal real property out of federal ownership. CERCLA §120(h)(3) provides for the different Timely Transfers as well as the specific provision in CERCLA §120(h)(3)(C) for Early Transfer. CERCLA §120(h)(4) also includes a provision for the seldom-used Clean Transfer.

These six different ways that the Federal Government may comply with CERCLA §120(h) in real property disposal are described below.

### 1. Timely Transfer

This mechanism applies where (a) there is no record of hazardous substance activity, (b) contamination is below actions levels with no restrictions on use, or (c) contamination is above action levels but controlled through LUCs, including deed restrictions.

### 2. Timely Transfer - Operating Properly and Successfully (OPS)

This mechanism can take place when the remedy is not yet complete but EPA has determined that it is "operating properly and successfully" (e.g., an ongoing "pump and treat" groundwater cleanup system).

### 3. Timely Transfer - Petroleum

This mechanism may occur when the only actionable release is petroleum, which is not a CERCLA hazardous substance according to CERCLA §101(14) (unless the petroleum is contaminated with hazardous substances and, thus, would be actionable under CERCLA).



### 4. Timely Transfer - Potentially Responsible Party (PRP)

This mechanism pertains to those transactions when the grantee is also a "potentially responsible party" under CERCLA with respect to the property. CERCLA specifically excludes transfers to PRPs from the requirement that the United States provide the CERCLA §120(h)(3)(A)(ii) deed covenants.

### 5. Early Transfer under CERCLA §120(h)(3)(C)

This mechanism allows federal property to be transferred prior to remedy completion via deferral of the covenant that "all remedial action necessary... has been taken" until post-conveyance. This "Early Transfer Authority" (ETA) requires the concurrence of the State's Governor [and the U.S. EPA for those sites listed on the National Priorities List (NPL)], and regulatory approval of the cleanup schedule. For more information, see GSA's *Fact Sheet on Early Transfer Authority*.

### 6. Clean Transfer under CERCLA §120(h)(4)

This mechanism allows for property transfer when no release of any hazardous substances or petroleum products has occurred. GSA does not use this authority, as the procedures that need to be followed to qualify for a Clean Transfer are more onerous than the requirements for a Timely Transfer. Grantees can obtain the same level of protection from the Government through a CERCLA §120(h)(3) Timely Transfer, which, typically, is available for use in most cases that might otherwise appear to be eligible for transfer under the Clean Transfer provisions.