

6.0 BRAC REQUIREMENTS

At BRAC installations or other installations at which a transfer of property to a non-Federal entity is under consideration, there are additional requirements under CERCLA for site closeout. In particular, CERCLA § 120(h)(3) requires DoD to ensure that “all remedial action necessary to protect human health and the environment with respect to any [hazardous] substance remaining on the property has been taken before the date of such transfer.” This provision has been amended over time to clarify the meaning of “has been taken,” and to allow for leasing and transfer of property before all required remedial action has been completed, provided that an operating properly and successfully (OPS) demonstration has been made. In addition, provisions for “early transfer” have been added. These requirements add to the overall documentation required to complete closeout of BRAC environmental sites, and need to be considered by the BRAC Cleanup Team when developing project schedules and timelines.

6.1 Operating Properly and Successfully (OPS) Demonstration

All required remedial action “has been taken” under CERCLA § 120(h)(3) “if the construction and installation of an approved remedial design has been completed and the remedy has been demonstrated to the [EPA] Administrator to be operating properly and successfully.”

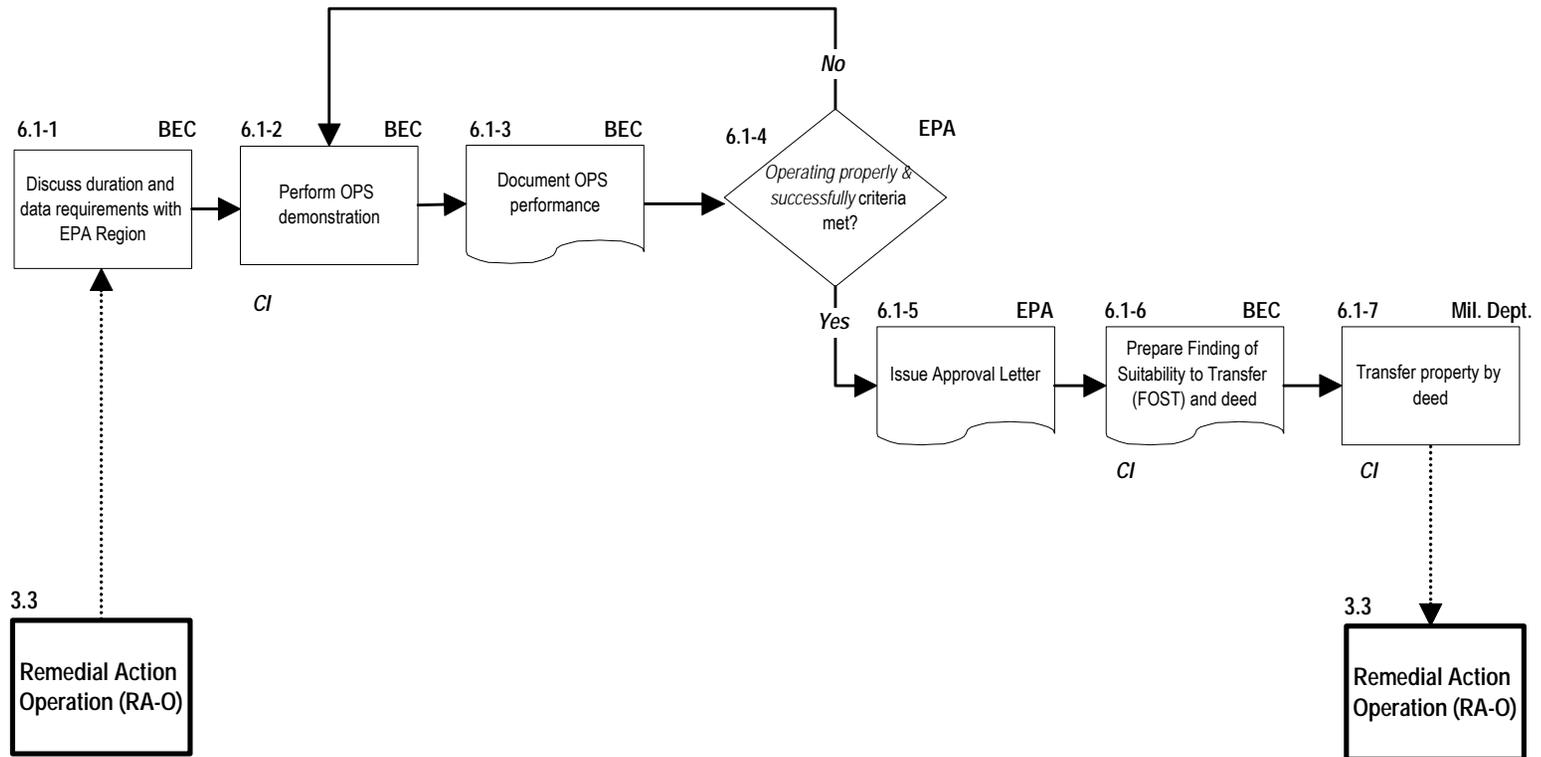
The phrase “operating properly and successfully” involves two separate concepts. A remedial action is operating “properly” if it is operating as designed. That same system is operating “successfully” if its operation will achieve the cleanup levels or performance goals delineated in the decision document. Additionally, in order to be “successful,” that remedy must be protective of human health and the environment. For instance, a pump and treat system may be operating properly according to its design for pumping and extracting groundwater, but not operating successfully because one or more contaminant levels has not been reduced in the aquifer. The success of a particular remedial action will be evaluated based on whether it successfully addresses the particular contaminant(s) it was designed to remediate. Where more than one remedial action is required for a parcel, **all** such actions must operate properly and successfully, and EPA must evaluate the suite of actions comprehensively prior to transfer to determine that all remedial actions have been taken. Thus, EPA interprets the term “operating properly and successfully” to mean that the remedial action is functioning in such a manner that it is expected to adequately protect human health and the environment when cleanup is completed. At this point, it should be reiterated that much of EPA’s current guidance is phrased in terminology aimed at fund-lead or PRP sites rather than Federal facilities. Therefore, it is important to exercise care in the application and usage of EPA’s terminology in the context of a DoD facility’s environmental restoration program.

EPA’s approval of a Federal agency’s demonstration under CERCLA § 120(h)(3) is solely for the purpose of allowing property transfer to occur and does not imply that all cleanup actions are completed. The completion of a remedial action is defined by the attainment of specific cleanup levels or performance goals that are specified in a decision document, such as a ROD, a Removal Action Memorandum, or RCRA decision document. Regardless of the timing of EPA’s approval of a Federal agency’s demonstration, Federal agencies remain obligated to complete remedial actions pursuant to those performance requirements specified by a ROD or other decision document, and comply with the terms of any site-specific Interagency Agreement or FFA, or similar agreement under RCRA or state RCRA/CERCLA-equivalent laws.

Figure 6.1 and Table 6.1 describe and discuss in greater detail the general considerations and requirements associated with an OPS demonstration. Where OPS demonstrations will be required, the BRAC Cleanup Team should confer well in advance in order to arrive at a consensus regarding site-specific requirements.

Figure 6.1. Demonstration of Operating Properly and Successfully (CERCLA/BRAC)

(For deed transfers; see Section 6.2 for those under Early Transfer Authority)



CI denotes Community Involvement

TABLE 6.1. DEMONSTRATION OF OPERATING PROPERLY AND SUCCESSFULLY (CERCLA)

This Table accompanies Figure 6.1, Demonstration of Operating Properly and Successfully (CERCLA)

TASK NUMBER	TASK NAME	LEAD	COORD./ CONCUR	TASK GUIDANCE AND INFORMATION
	OPERATING PROPERLY AND SUCCESSFULLY (CERCLA)			
6.1-1	Discuss duration and data requirements with EPA Region	BEC	EPA	<ul style="list-style-type: none"> <input type="checkbox"/> Both the length of time a remedial action should operate, and the amount of data that should be collected on system performance may increase with the uncertainty regarding continued protectiveness of a remedial action. <input type="checkbox"/> The factors that should be considered for all OPS decisions are risk to public health and the environment, enforceability, technology reliability, and site characterization. <input type="checkbox"/> For BRAC facilities or facilities where property ownership is transferred, a determination must be made on permit modification (see also Section 4.9).
6.1-2	Perform OPS demonstration	BEC		<p>Community Involvement</p> <ul style="list-style-type: none"> <input type="checkbox"/> For a list of activities you may want to consider, refer to Section 7.0, Community Involvement.
6.1-3	Document OPS performance	BEC		<ul style="list-style-type: none"> <input type="checkbox"/> See Appendix A of the EPA guidance for specific information regarding documentation requirements for RA performance and how requirements may vary depending on the type of remedy (e.g., groundwater treatment vice natural attenuation).
6.1-4	Operating properly & successfully criteria met? <i>[If Yes, proceed to task 6.1-5; if No, return to task 6.1-2]</i>	EPA		<ul style="list-style-type: none"> <input type="checkbox"/> Two types of criteria should be considered for groundwater remedies. Core Criteria should be considered for all remedies for contaminated groundwater. Other Criteria to be considered will depend on the type of remedy selected and site/OU-specific conditions. <input type="checkbox"/> For a discussion of Core Criteria, refer to EPA Guidance for Evaluation of Demonstrations that Remedial Actions are Operating Properly and Successfully under CERCLA Section 120(h)(3).
6.1-5	Issue Approval Letter	EPA		<ul style="list-style-type: none"> <input type="checkbox"/> The EPA Region's approval will be expressed in a letter to the facility which describes the rationale for the approval and includes the following: <input type="checkbox"/> Include the Approval Letter in the Information Repository/Administrative Record.
6.1-6	Prepare Finding of Suitability to Transfer	BEC		<ul style="list-style-type: none"> <input type="checkbox"/> A FOST can be made only after the CERCLA 120(h)(3) criteria have been met. For cases in which the CERCLA Early Transfer Authority will be used, a FOSET is needed. <p>Community Involvement <i>Required</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> Issue public notice of FOST. <input type="checkbox"/> File in administrative record/information repository.
6.1-7	Transfer property by deed	DoD Component		<ul style="list-style-type: none"> <input type="checkbox"/> The DoD component will execute the deed transfer. <input type="checkbox"/> For site transition activities, refer to Section 7.0, Community Involvement. <p>Community Involvement</p> <ul style="list-style-type: none"> <input type="checkbox"/> For a list of additional activities you may want to consider, refer to Section 7.0, Community Involvement.

6.2 Early Transfer Authority

CERCLA was recently amended to include the authority to defer the CERCLA § 120(h)(3)(A)(ii) covenant that all remedial actions necessary to protect human health and the environment have been taken, and to transfer property by deed, subject to certain additional statutory requirements. DoD intends to use this “Early Transfer Authority” (ETA) to assist communities in expediting reuse of former defense facilities. By enabling an LRA and other stakeholders to obtain full ownership of property earlier, those parties gain greater control over the future of their community. One major benefit of ETA is that it allows for the productive reuse of property right away rather than delaying final implementation of a reuse plan until cleanup is completed.

The ETA is a deferral, not a waiver, of the CERCLA covenant requirement. DoD (or any other Federal agency) is still required to issue the warranty required under CERCLA, when all response actions necessary to protect human health and the environment have been taken, or when there has been a demonstration to EPA that the approved remedy is “operating properly and successfully.” The timing of this warranty will depend on the selected remedy and can only occur when one of these two conditions can be met. At that time, the transferring Federal Agency shall execute and deliver to the transferee an appropriate document containing the warranty that all remedial action has been taken.

The ETA is self-implementing and can be used right now. Although no additional authority or regulations are required, the DoD, EPA, and the states have guidance to implement the process. The EPA guidance only addresses property on the NPL, while the DoD guidance extends to property not on the NPL.

Successful implementation of this authority requires that the DoD, the purchaser, the community, and the regulatory agencies work very closely together. Not only is this partnership in the spirit of the BRAC process, but it is mandated by statute. The Governor and EPA Administrator have approval authority to determine if the protections and response action assurances required by statute are in place to allow the property transfer to go forward.