

FACT SHEET

ENVIRONMENTAL SERVICE COOPERATIVE AGREEMENTS AT FORMER FEDERAL FACILITIES

Use of ESCA and Early Transfer Authority to Assume Greater Control of the Remediation Decisions at Former Federal Facilities

- Section 334 of the National Defense Authorization Act for Fiscal Year 1997 amended CERCLA to allow contaminated federal property to be transferred to private parties before all remedial action has been completed. Consequently, the “Section 334 Early Transfer,” allows for the transfer of contaminated federal property prior to the completion of the CERCLA 120(h) cleanup requirements.
- To facilitate an even more rapid transfer of the Base Closure and Realignment (BRAC) portions of federal facilities to the ultimate reusers, the Local Reuse Authority (LRA) proposes entering into an Environmental Services Cooperative Agreement (ESCA). The ESCA will vest increased control and responsibilities for completing the environmental remediation with local governmental entities, utilizing the funding provided by the United States.
- The ESCA allows for the transfer of responsibility for the remediation and other long-term management tasks associated with the environmental conditions at former federal facilities to the LRA in exchange for an obligation to pay or reimburse the LRA according to a negotiated schedule for assumption of these duties.
- The completed ESCA will be a detailed agreement between the responsible federal entity and the LRA that sets forth:
 - The duties of each party
 - The requirements that each party must meet
 - The environmental site conditions and levels of known contamination
 - Levels of remediation that must be achieved
 - The remedy methodology (approved by EPA and MDNR) that must be implemented by the LRA
 - Provisions regarding discovery of unknown contaminants
 - Funding and reporting mechanisms

General Requirements of the Federal Entity Arising From the ESCA

- The federal entity uses the ESCA mechanism to “contract” with the LRA to perform its environmental remediation according to the Technical Specifications & Recommendations Statement (TSRS). The TSRS details the exact technical performance requirements that must be performed to achieve “clean-up” and binds the parties in great detail to their respective roles and responsibilities.
- A key portion of the ESCA is the fact that the LRA’s duty to act is strictly contingent upon the federal entity providing funding for the remediation.
- Specifically, the federal entity duties under the ESCA include:
 - Provide funds agreed upon in the ESCA pursuant to federal regulation
 - Remain as Lead Agent Authority and retain ultimate responsibility
 - Conduct oversight of restoration efforts
 - Retain responsibility for and remediate if necessary, any “Government Retained Conditions” – i.e. continued responsibility
 - Ultimately, grant CERCLA 120(h) Covenant to the Reusers

General Requirements of the LRA Arising from the ESCA

- The LRA must also perform specific duties negotiated through the ESCA to meet technical contamination remediation levels and achieve regulatory closure in exchange for a specific reimbursement pursuant to the ESCA.
- A key component from the local government’s stance, is the fact that the duty to act to complete the remediation is absolutely contingent upon the federal entity providing funding pursuant to the ESCA and the negotiated Cooperative Agreement Award.
- The LRA may then contract with the selected reusers to conduct the detailed remediation activities for the local government. This allows the entity in the best position to achieve a complete and rapid remediation, the ultimate reuser, to leverage synergies for simultaneously conducting the remediation and redevelopment.
- In turn, the reuser performance of the remediation tasks is subject to the oversight of the LRA and the federal entity to ensure that the remediation is performed correctly. This ensures that any residual liability is contained.

- Pursuant to the ESCA, the LRA must:
 - Achieve remediation completion as detailed in the Technical Specifications & Requirements Statement (TSRS)
 - Reach performance-based objectives under federal entity oversight pursuant to TSRS
 - Remediate in accordance with applicable federal and state law
 - Remediate within the up-front negotiated budget (for known and identified site conditions)
 - Ensure compliance with Recipient – Regulator Agreement (if necessary for early transfer)
 - Acquire environmental insurance as condition of the ESCA to cover cost increases arising during the remediation

- The federal entity usually requires environmental insurance to cover cost increases or discovery of unknowns at the sites. Specifically, the federal entity requires that this insurance be purchased and utilized for discovered unknown contamination, despite the fact that the ultimate liability remains with the federal entity. This is considered a “trade-off” by the federal entity in exchange for allowing rapid reuse, and a necessary requirement to ensure that it contains its liability after relinquishing control of the process. The federal entity will include the cost of insuring the unknowns into the negotiated ESCA payout amount.

The practical effect of this environmental insurance requirement, as a condition precedent to entering into an ESCA, is that if unknown environmental conditions are discovered at the site, using the environmental insurance to remedy the situation will allow the reuse to proceed without the three to five year wait that would result while the federal entity begins the cumbersome environmental investigation, federal funding allocation and remediation processes.

The Session Law Firm

The Session Law Firm devotes a significant portion of its practice to the remediation and redevelopment of former Department of Defense and Department of Energy sites. Having received the bulk of their formal, environmental legal training from the Army, two lawyers from The Session Law Firm are intimately familiar with the workings of the BRAC Program. While other environmental lawyers shy away from these sites, The Session Law Firm actively searches for the opportunity to assist local entities with the dizzying complexities presented by these sites.