FROM PROPERTY LEASE TO PROPERTY TRANSFER – TAKING THE STEPS TO FACILITATE SITE CLOSURE USING THE DEPARTMENT OF ENERGY’S 10 CFR 770 PROCESS

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ABSTRACT

While implementing a successful leasing program for land and facilities at the Department of Energy’s Oak Ridge Operations Office in Oak Ridge, TN, the Department is now transitioning from a leasing program to one of title transfer. The program, called “Reindustrialization”, is the result of a visionary idea to enable the use of excess resources to meet a community’s needs in the wake of continued DOE downsizing. An established process included within the Comprehensive Environmental Response Compensation and Liability Act, tailored to meet DOE-ORO’s objectives, was used to lease. Title transfer, using DOE’s new 10 CFR 770 process, is being undertaken to meet a DOE-HQs directive to close the ORO facility where Reindustrialization is taking place. Title transfer is a key component of the closure effort. However, the process for title transfer is new, it is a DOE process, and it has not yet been completed for any facilities in the DOE complex. Making the transition from a known to an unknown has created opportunities in program design, as well as implementation, coordination and acceptance challenges in a variety of areas, and a host of lessons learned and learning.

BACKGROUND

The focus of the Department of Energy- Oak Ridge Operations Office (DOE-ORO) Reindustrialization program is the East Tennessee Technology Park (ETTP) approximately 8 miles west of the center of City of Oak Ridge. The ETTP had its beginnings as one of the facilities built by the Manhattan District-Army Corps of Engineers as part of “the Manhattan Project”, the massive, all-out effort by the United States to build an atomic weapon to defeat Axis forces in World War II.

The ETTP, originally referred to as the Oak Ridge Gaseous Diffusion Plant, used a “barrier-type” technology to enrich uranium. Large buildings (one group of interconnected enrichment facilities covered nearly 1,021,900 m2 (11,000,000 ft2)) were required, and within them one could find a great deal of uranium, lubricating and hydraulic oils laden with polychlorinated biphenyls (PCBs), and asbestos. Support facilities – a city unto itself - were required to enable this massive process to work. Included on site were machine shops, power plants, radiochemical and other laboratories, development and testing operations, warehouses, rail lines, process utilities supplying pressurized air and other gases, as well as offices, a medical facility, a fire station, and a cafeteria. Housing was provided in immediately adjacent areas. (See Figure 1).

Due to the age of the ORGDP and because of the construction of similar facilities in Ohio and Kentucky, the ORGDP gradually was reduced in its usefulness. By 1987 the ORGDP, then called the “K-25 Site”

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(for the largest enrichment facility on the site), was permanently shut down. By the beginning of the 1990’s, the K-25 Site and the other two Oak Ridge plants and all of the land in between – upwards of 14,165 ha (35,000 acres) - were placed on the National Priority List (NPL) of sites that posed an imminent hazard to human health and the environment. Shut down and dirty, the K-25 Site was a virtual orphan.

In mid-1995, after 10 years of decay, an idea came about that involved the reuse of these stigmatized, underused, but clearly useful, facilities. The idea also created local job opportunities as well. If someone could use something that would otherwise be allowed to deteriorate it must have some value after all…besides, “it” can’t be useless if people keep saying they want it – and people were saying that they wanted land, buildings, and equipment at the K-25 Site.

PART I. THE REINDUSTRIALIZATION STORY

Once DOE-ORO recognized that they had a resource in the K-25 Site and not a liability, things started to happen. Proposal after proposal was received for the buildings and equipment. An “Industry Day” was held
in April 1996 and hundreds of people came from across the country to see the K-25 Site. With them they brought their ideas, questions, and more proposals. It became apparent that the primary means for companies to take advantage of K-25’s resources was for them to lease facilities and equipment. Although the site was undergoing clean up under CERCLA and would be for some time, opportunities for leasing were available provided that DOE used the provisions of CERCLA 120(h) to safely enable others to use the site. With that, the name of K-25 was changed from its “insider”, “government-ese” name to “The East Tennessee Technology Park” – a name with a location and a goal.

LEASING UNDER REINDUSTRIALIZATION

There are two main methods that may be used by DOE to lease facilities. One is a lease for economic development purposes. There have been two economic development leases signed by DOE-ORO, one for a 405 ha (1000-acre) parcel called ED-1 (now referred to as the Horizon Center), and another for ED-2, a barge loading and unloading area. Both were leased to the Community Reuse Organization of East Tennessee (CROET) and consisted of vacant land that would be used for future development. The other type of lease, for furtherance of the clean-up mission, is reliant upon DOE’s regulations under the Atomic Energy Act (AEA) at Section 161(g). Since beginning the Reindustrialization program over 50 leases of this type have been signed. Presently over 35 buildings are leased with a variety of tenants occupying the site. (See Figure 2) Because the 161(g) leasing process is the one more commonly used at ORO and other DOE sites throughout the complex it is the one focussed on in this paper.

Putting a lease in place is a multi-step effort that requires close coordination between DOE, CROET, and DOE’s support contractors, primarily Bechtel Jacobs Company (BJC). Nearly 30 major steps are involved from initial discussions with CROET and their potential tenant, to completion of tenant interviews to gather information, completion of environmental reviews and preparation of environmental baseline documents rely on many individuals covering a variety of disciplines, organizations, and skill mixes. The major activities are described in the subsections that follow. The groundwork for an understanding of the transfer process is found in the leasing process; hence the environmental aspects of leasing are discussed in detail.

NEPA – A Programmatic Review

The first overarching environmental law that applies to the Reindustrialization program is the National Environmental Policy Act (NEPA). NEPA approaches Reindustrialization from the programmatic decision-making level, namely in the case of the ORR, should DOE-ORO have a program that will lease land and facilities. In order to answer this question, in 1997 DOE-ORO prepared an Environmental Assessment (EA) to evaluate that question (1). DOE was able to lease a small number of facilities without the broader NEPA analysis because the particular leases met the criteria of a categorical exclusion available for leases where a property’s use will be unchanged. An example would be the lease of portions of a large machine shop for use by companies engaged in machining, tool and die operations or similar activities.

A subset of the larger NEPA review is the subsequent review that occurs prior to each individual lease. Once a potential tenant has identified a space of interest, the tenant works with members of the leasing team to provide information on what it is that they propose to do in the lease space, what types of wastes or emissions they will generate, any modifications they plan to make to the facility, the types of hazardous materials they will store, use and generate, their lease duration and their typical occupancy patterns. The pieces of information gathered are documented in checklists and they are reviewed against a number of source documents or regulations. These include, for example, the EA, the safety authorization basis for the facility, any stipulations required by the National Historic Preservation Act if the facility is eligible for inclusion on the National Register of Historic Places, as well as a review of the compatibility of the proposed tenant operation with other activities in the lease space whether they are DOE activities or those of another tenant.
Moving from the programmatic question of leasing vs. no leasing to the facility specific question: is this facility suitable for lease by a member of the public - one next refers to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 120(h). Section 120(h) speaks directly to real property to be transferred by federal agencies where hazardous substances have been stored for a year or more, known to have been released, or disposed of (2). The intent of 120(h) is to disclose information on past and/or present uses that have involved the storage, release or disposal of hazardous substances to a future lessee or owner. As the entire ORR is included on the NPL, CERCLA 120(h) clearly applies. Further, in conducting its clean-up of the ORR, DOE has entered into an agreement with the Environmental Protection Agency (EPA) Region 4 and the Tennessee Department of Environment and Conservation, DOE Oversight Division (TDEC/DOE-O) that details the administrative aspects of how the clean-up will be carried out. Land transfer activities, for both lease and title transfer, are also included in that Federal Facility Agreement (FFA)(3).

Other Considerations

Many other regulations and requirements are considered in the leasing process but they are focussed on a facility-specific feature, for example an air permit, a storm-drain, the condition of lead-or-asbestos-based paint that was used in the facility, etc. These items are evaluated and duly noted in the leasing documents, disclosed to the future tenant, and in certain instances may be addressed prior to lease. An example of the latter condition would be one where friable asbestos is found during a facility walkdown for preparation of the CERCLA 120(h) report.
The information would be included in the 120(h) report and the asbestos would be either removed or encapsulated prior to lease.

**Risk Management Decision-making**

During the environmental review process many business decisions are being made by the potential tenant and CROET such as the establishment of a lease rate, determination of a footprint, parking and material storage arrangements, and approval by the CROET board. At the conclusion of the environmental analysis process the following will have occurred: establishment of the environmental baseline (per CERCLA 120(h)); preparation of a risk assessment (if necessary, depending upon the type of facility to be leased and its location), completion of the NEPA reviews, along with the reviews of the environmental and safety aspects of the proposed operations, and determinations made that the proposed tenant’s activities are compatible with the facility and suitable for ETTP, it is then time for DOE’s decision on suitability to lease.

Up until this time, work has been progressing based on a conditional agreement called a Memorandum of Understanding between DOE, CROET and their proposed tenant to proceed in good faith towards a lease. Very early in the process DOE notified EPA and TDEC of their intent to lease a facility – dependent upon the results of these environmental analyses. DOE’s decision on suitability to lease cannot be made until all of these factors have been weighed and considered. In a few situations over the years DOE has decided not to lease particular facilities after conducting their analyses, or not to lease a facility for a particular use. CROET in turn has decided not to lease to particular companies. And while business elements do enter into DOE’s decision, the suitability to lease decision is primarily one of environmental risk management.

**PART II. THE LEASING PROGRAM MEETS THE DOE-HQ TOP-TO-BOTTOM REVIEW**

In February 2003 DOE HQ issued a Review of the Environmental Management (EM) Program for presentation to the Assistant Secretary of Environmental Management. The report, commonly referred to as the “Top-to-Bottom Review” (4) was very thorough, pointed and focussed on those aspects of environmental clean up that were simply not progressing as DOE EM had committed to in 1998. The Top-to-Bottom Review (TTB) assailed escalating costs, schedule delays, and poor contracting that contributed to these negative performance measures. To summarize, the review team found that “The Environmental Management Program’s focus has been on managing risk, rather than actually reducing risks to workers, the public and the environment. Since the program’s inception in 1989, more than $60 billion has been spent without a corresponding reduction in risk”. Business as usual in any form was not going to be acceptable. In order to accelerate clean up and reduce risks DOE-HQ was going to make more funding available over an abbreviated period of time. Receipt of those funds was predicated by a site’s proposal on how they would develop new means to reach the closer ends.

The DOE-ORO response to the TTB call to action was swift, concise, and pragmatic and can be found in the Oak Ridge Comprehensive Closure Plan that was proposed to DOE-HQ in March 2002 (5). All ORO EM activities were tied into the plan, but the ETTP had an early and major role in making the needed risk-reduction gains. The primary focus of ETTP was now to be closure, wherein facilities would be demolished and risks reduced, and the closure of the site would be accelerated by 8 years. Significant cost savings would be realized as well. Reindustrialization’s role was to “focus efforts in a comprehensive plan” and our efforts were to dovetail with those of the newly defined ETTP closure mission. Certain commitments were made in the Closure Plan that specifically involved Reindustrialization, namely to “implement a focussed ETTP Reindustrialization effort that supports closure”. A Performance Management Plan (PMP) (6) was also prepared and it lays out the method of accomplishment described in the Closure Plan. DOE, EPA and TDEC signed a Letter of Intent (7) on the Closure Plan in April 2002. Now the clock was ticking, with each day a step closer to the desired end – an industrial park.

Up until this point Reindustrialization was a program that took place in parallel with site clean-up activities. Reindustrialization is an alternative means to accelerate site clean up by enabling tenants to conduct certain
of those activities instead of DOE. Other means to accelerate clean up are less direct, for example, the leasing of all of the utilities systems to CROET so that they could retain a company to operate them at a lower cost. In the past the facilities to be leased were mainly determined by those with an interest in them, making our work for Reindustrialization clearly customer-focussed. With the acceptance of the Closure Plan and its implementation as laid out in the PMP, there was now a specific and targeted list of facilities to be transferred. The list had been developed with CROET’s input on the facilities they would like DOE to transfer, but all previous flexibility on timing or priorities was removed. Things had definitely changed.

There was also a responsibility established in the PMP with Reindustrialization’s name on it: “Establish the final process for title transfer of facilities on the Reindustrialization target list.” There was a schedule for each of the facilities to be transferred and there was a consequence if the facilities were not transferred on time – “In accordance with the closure plan, buildings targeted for Reindustrialization for which title transfer has not been accomplished as scheduled will be demolished”. Conversely, successful implementation would have a reward: a remediated industrial park for the region – a tangible measure of success.

ESTABLISHING THE TITLE TRANSFER PROCESS

Establishment of the title transfer process must be a cooperative effort in order to be effectively implemented and needs to be agreed to by EPA and TDEC as they have approval authority on the acceptability of the transfer documentation in most cases. The need for the process was evident; all three parties were to work together but an agreement was needed on how the work philosophies, approaches, etc. of title transfer would be done. The process would establish guidelines, expectations, and schedules and provide something for DOE to use in defining a programmatic baseline. Establishment of the process is ongoing and is proving to be challenging especially when one considers that the leasing process was agreed to by EPA, TDEC and DOE in early 2001, as documented in DOE’s Work Plan Pilot Project on Activities Performed to Support Leasing Decisions (8). This document was issued only after several years of refining the lease process, and also in parallel with conducting it. Due to the timeframe provided for the first year of transfers and the number of facilities to be transferred in the first FY (see Table I, below), DOE again finds itself trying to document and refine a process while performing the process.

Table I. Facilities to be Transferred

<table>
<thead>
<tr>
<th>Building Number</th>
<th>Type of Facility</th>
<th>Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>K-1007</td>
<td>Office Building</td>
<td>12,278 m² (132,168 ft²)</td>
</tr>
<tr>
<td>K-1225</td>
<td>Office Building</td>
<td>2183 m² (23,500 ft²)</td>
</tr>
<tr>
<td>K-1330</td>
<td>Office Building</td>
<td>1338 m² (14,400 ft²)</td>
</tr>
<tr>
<td>K-1400</td>
<td>Office Building</td>
<td>1217 m² (13,104 ft²)</td>
</tr>
<tr>
<td>K-1580</td>
<td>Office Building</td>
<td>3550 m² (38,211 ft²)</td>
</tr>
<tr>
<td>K-1035</td>
<td>Warehouse and Metrics Lab</td>
<td>4434 m² (47,724 ft²)</td>
</tr>
<tr>
<td>K-1036</td>
<td>Warehouse</td>
<td>7443 m² (80,122 ft²)</td>
</tr>
<tr>
<td>K-33</td>
<td>Gaseous Diffusion Facility</td>
<td>258,272 m² (2,780,104 ft²)</td>
</tr>
<tr>
<td>K-1000</td>
<td>Office/Visitor Center</td>
<td>157 m² (1695 ft²)</td>
</tr>
<tr>
<td>K-1039/K-1039-1</td>
<td>Telephone Equipment Buildings</td>
<td>342 m² (3678 ft²)</td>
</tr>
<tr>
<td>K-1515 complex</td>
<td>Water Treatment Plant</td>
<td>604 m² (6500 ft²)</td>
</tr>
<tr>
<td>Parcel 4</td>
<td>Undeveloped Land</td>
<td>392,532 m² (4,225,320 ft²)</td>
</tr>
<tr>
<td>K-31</td>
<td>Gaseous Diffusion Facility</td>
<td>154,179 m² (1,569,628 ft²)</td>
</tr>
<tr>
<td>K-791-B</td>
<td>Shell of a Former Building</td>
<td>373 m² (4020 ft²)</td>
</tr>
<tr>
<td>K-1037</td>
<td>Barrier Plant</td>
<td>31,318 m² (337,115 ft²)</td>
</tr>
</tbody>
</table>
The Framework – What is Title Transfer and How Does it Differ From Leasing?

Simply put, leasing is a temporary contractual relationship between an owner, in the case of ETTP the owner is DOE, and a tenant; at ETTP the tenant is CROET. A lease, which is a type of contract, is entered into between DOE and CROET and CROET in turn, subleases to a tenant of its own. In some situations CROET will remain the prime tenant and not sublease but instead contract for services in operating their facilities; the utilities systems and cafeteria services are examples of these relationships.

A note about lease restrictions - Since DOE is the owner, there are often lease requirements that govern the facility that is leased. Some of the requirements are needed because the property belongs to the federal government while others are necessary because of the contaminated nature of the site or the facility itself. Examples of these restrictions include the need to obtain approvals prior to facility modifications or alterations, a restriction on the use of groundwater, obtaining approvals before making penetrations in the floors or walls, connecting to site utilities, changing operations such that they differ from what was approved in the particular lease space, or entering into posted radiological areas.

With title transfer at ETTP the contract is a quitclaim deed that literally transfers the title for a facility (land or building) from the DOE to CROET or another party. At that point the property is removed from the federal government’s rolls. Responsibility for maintenance, upkeep and insurance become those of the new owner. Deed restrictions, like lease restrictions, may still be necessary in limited instances but they can only be entered into out of necessity, not out of convenience. For example, DOE will restrict the use of groundwater in a deed, but it cannot require a new owner to advise them when a facility will be modified.

Another aspect of the difference between lease and transfer is that DOE had used their 161(g) authority under the Atomic Energy Act to conduct leasing. With title transfer DOE would be using the new 10 CFR 770 process (9), also a part of the AEA 161(g), which was designed specifically for transfers to facilitate economic development. Its applicability to ETTP’s Reindustrialization was clear.

PART III. REINDUSTRIALIZATION’S TITLE TRANSFER PLAN

First Year Goals

As noted above and illustrated in Table 2, Reindustrialization has a formidable challenge ahead in order to transfer the facilities listed in the timeframe allowed. Notwithstanding the need to develop the 10 CFR 770 title transfer process for ETTP itself, there are simply many considerations that need to be made. The list of facilities focuses on office buildings and already-leased space in the first year. It was assumed that office buildings would be largely free of radiological and chemical contamination and also that they would be the
most desirable for CROET. The warehouses that are included in the FY ’03 list are already completely leased to CROET and are 100% occupied. Further, CROET has spent significant amounts of money to upgrade the facilities making improvements to the heating and air conditioning, removing old floor tiles, painting interior areas and all of the exterior, upgrading electrical service, etc. It was believed by the developers of the title transfer list that the first year would be the year to learn the process on "uncomplicated" or at least "known" facilities, and that the transfer of these particular facilities would give early successes to the program and early fruit for CROET.

Uncertainties

When estimates were made on the amount of time that would be necessary to go through the (not-yet-developed) title transfer process, there were some knowns and some unknowns. Some variables could be gleaned from the title transfer process that was in process for the 405 ha (1000 acre) Horizon Center, an early economic development lease to CROET. However, certain factors associated with the Horizon Center were quite different from the ETTP, so the Horizon Center transfer could only serve as a starting point.

We knew that additional NEPA analysis would be needed to transfer facilities on the ETTP because the initial EA for Reindustrialization considered that only leasing would take place. We knew what had to be done, but we did not know how long it would take to complete that additional NEPA analysis - and for any transfer other than a title transfer where the future use would be unchanged, the new NEPA analysis was a necessity.

Another known, generally, was the amount of time needed to prepare the CERCLA 120(h) documentation. What was not known was the process for regulatory approval or the duration for that approval. The need for regulatory approval is an important difference between leasing and transfer because it is required in all but one approach for property to be transferred but not for property to be leased.

DOE-HQ is required to approve the leasing package (consisting of all of the documentation needed to enable transfer to occur), but a timeframe for their review was unknown. After all, many different organizations within DOE-HQ would be involved and a field office’s activities have to fit into the priorities of DOE-HQ. Obtaining approval such that the Secretary of Energy could sign the package was sure to add additional time. After signature by the Secretary the package would then go to Congress for required notification periods (one of which is 60 days long), whereupon it would return to DOE for action, i.e., title transfer.

When the uncertainties of the individual project schedules began to become apparent in late August 2002, Reindustrialization planned to initiate work on all of the projects virtually at the same time. That approach would be necessary for a number of reasons: despite all efforts, a title transfer process had not been established, further, and an early start would enable the program to make any identified revisions. Recall that all of the FY 03 transfers had to be complete by the end of FY 03, or, as stated in the Closure Plan, “Buildings targeted for Reindustrialization for which title transfer has not been accomplished as scheduled will be demolished.” For some of the facilities scheduled in the future FYs it seemed that we would have to begin in the prior FY – all in all, it was only August and yet we appeared to already be late.

Assumptions

To meet the schedule set forth in the PMP and to secure funding needed to meet it, preparation of baseline assumptions was essential for Reindustrialization at ETTP. The major assumptions and summary of their rationale are as follows:

- **Assumption: All work would be initiated by 1 Oct 2002.**

  Rationale: Although we did not know all of the timeframes for completion of the title transfer process, we knew that getting an early start would be critical to meeting our deadlines.
• Assumption: Only buildings and their underlying land would be transferred initially and surrounding land would be transferred in the future.

Rationale: The transfer of land requires soil sample data but funding was not in place to sample. Use of existing data would occur but sufficient sampling data might not exist around some of the facilities proposed for transfer. Reindustrialization will wait for the CERCLA Records of Decision (RODs) to be signed and the remediation work completed before transferring land where sufficient data are not available. Once the ROD work is complete, including verification sampling, it is our assumption that no additional sampling will be needed.

• Assumption: Data collected to satisfy CERCLA requirements (per a decision document, for example) would be satisfactory for use in transfers.

Rationale: Sampling data gathered to verify that a CERCLA-required end-point had been reached would also satisfy data needs for transfers. Additional data would not be required, although additional modeling of the verification data might be necessary.

PART IV. THE TITLE TRANSFER PROCESS – STEP-BY-STEP

DOE began exploring the requirements for the title transfer process with EPA and TDEC in June 2002. The topic of discussion was a document that had been prepared for a lease of land where the risks had been modeled for a proposed lessee who suspended their lease interests when the document was being finalized. We were trying to determine how the document could be used to support a transfer since all of the work for leasing had been completed. At a minimum we knew that the exposure scenarios included in the risk model would need to be modified from a duration standpoint; the lease considered a 3 year period whereas a transfer would need to consider a 25-year duration, the standard default value for an industrial worker scenario. The regulators agreed and also went on to suggest other areas where they would look for more information before they could agree on the sufficiency of a document for transfer.

The discussion with the regulators was timely since we were starting to work on a radiological survey plan for an office building (K-1007) that CROET said they would like to have transferred. At that point we began to identify some of the changes that would be needed in the plan and noting them. As with many decision-making processes that require consideration of multiple variables at once, there are sub-processes that contribute to the final pool of data and information. The development of the K-1007 survey plan was going to affect one of the foundation documents for leasing, the one that provides the technical basis for the design and implementation of surveys and sampling (10). The technical basis document, or TBD, was a reference document in the leasing process, so already we were beginning to adjust our perspectives on the changes that would be necessary. We were also realizing that many things would not change and we would be able to take advantage of existing methods and practices. The K-1007 transfer was to be our pilot project, the one we would learn from. As activities progressed we have asked ourselves frequently how an office building can be so complicated.

The following sections are intended to walk the reader through the title transfer process as it is presently proposed by DOE (11). It is worth noting that discussions were initiated with the regulators at press-time and the process has not yet been approved, so the title transfer process proposed by DOE is DOE’s assumption of how it could occur. As noted earlier, much of the leasing process is directly applicable to transfer, some of it requires modification, and some of it has no parallel in title transfer. In order to get the process to the point at which it can be agreed to by EPA and TDEC, DOE will have to be able to support their assumptions in all of these instances. Several years of good working relationships and a DOE Reindustrialization organization that is responsive to the regulators will help that process, as will reasonable and sound application of logic. With regard to those aspects of transfer that do not have parallels in leasing, it will simply be a matter of working through a transfer. The likelihood that a process can be
agreed to without a tangible hands-on experience of it is paramount to having a blind person describe a comet.

A Summary of 10 CFR 770

In February 2000 DOE issued a rule, 10 CFR 770, that was intended to expedite the transfer of the agency’s excess or underutilized facilities for the purposes of economic development. The rule is a process under Section 161(g) of the Atomic Energy Act which is the primary authority used by DOE to transfer land. The rule provides for indemnification to transferees and required a 30-day congressional committee notification. Public participation is also a part of the 10 CFR 770 process. The preamble to the rule points out that use of the process does not remove compliance with other responsibilities that a DOE site may have, for example, compliance with NEPA or CERCLA.

The Request Phase

The 10 CFR 770 review process consists of several phases, which are shown in Figure 3. The Request Phase of the title transfer process is initiated with a proposal by a party interested in transfer of a DOE facility for economic development purposes. The regulation is open-ended in that it does not limit the submittal of a proposal to the community reuse organizations, but includes any entity that has an economic development proposal that meets the criteria of the regulation.

The proposal is unique to 10 CFR 770. If the proposal meets the criteria established in 10 CFR 770 and the facility is excess or underutilized, it will be met with a conditionally favorable response by DOE. The phrase “conditionally favorable” is used because DOE would not be able to make a decision about the particular facility and piece of land until a variety of analyses and reviews are conducted. If a proposal is not received for one of the facilities identified for transfer, then it will be demolished.

An Early Decision Point – Which CERCLA 120(h) approach will be used?

A discussion of the three CERCLA 120(h) compliance approaches is warranted at this point. Although DOE may not have a great deal of detail on the property proposed for transfer at the time they notify EPA and TDEC of the proposal, they should be able to make some early decisions on which CERCLA approach to follow. There are three approaches to be considered: a “clean parcel determination” under CERCLA Section 120(h)(4), a “covenant deferral” with a subsequent “effectiveness determination” under CERCLA Section 120(h)(3)(c), or an “effectiveness determination” following clean up under CERCLA. These different approaches are shown in Figure 4.

DOE-ORO’s preference is to transfer facilities as clean parcels. This should be achievable for a number of the 26 facilities proposed for transfer because of their history, their location, past use, and environmental condition. Most of the office buildings and the land areas that have not been developed in the past should be suitable for transfer as clean parcels.

For properties scheduled for title transfer after cleanup under CERCLA has taken place, DOE can make an effectiveness determination, using the language of the CERCLA Record of Decision (ROD) in the deed. “Effectiveness” refers to the assertion that DOE has effectively met the definition of a clean parcel by meeting the requirements in the ROD. Regardless, DOE must ensure that all of the remedial actions necessary to protect human health and the environment are met before transfer. Also, DOE must retain access rights to the property in case any additional remediation needs are identified post-transfer.

The other approach is covenant deferral, where transfer occurs before cleanup has occurred. DOE would need to place restrictions on use of the property so that human health and the environment are protected. DOE must also submit a budget request that adequately funds the completion of all necessary response actions, subject to congressional authorizations and appropriations. The deferral must not substantially delay any necessary response actions. In the case of ETTP deferrals could not extend beyond 2008, the year
Fig. 3. DOE-ORO Title Transfer Process
set for accelerated cleanup completion in the PMP. As required cleanups occur DOE will need to
demonstrate to EPA that the remedial actions are operating properly and effectively (again, the
“effectiveness determination”). The covenant deferral approach requires concurrence of both EPA and the
Governor.

* Per a ROD
The Analysis and Review Phase

After the Request Phase, the Analysis and Review Phase begins. At this time DOE will begin their coordination with EPA and TDEC, informing them of the proposed transfer via a notification letter. At the time the letter is prepared it is possible that there is little information to provide other than a transfer footprint and a brief building history. In parallel with the regulatory coordination the majority of the environmental analysis will be conducted. The NEPA review will begin, using a checklist as with a lease. A safety review will be conducted if the facility is other than office space. Consultation with the State Historic Preservation Officer will occur if the facility is eligible for inclusion on the National Register of Historic Places, or if modifications are proposed to a non-eligible structure that could affect a nearby register-eligible property. Each of these aspects of title transfer has a parallel in the lease process; the sole difference is that the NEPA review is more thorough. This is the case since it will be the last opportunity to assess the effects to DOE property.

Preparation of the Environmental Baseline Survey (EBS) is also begun. This action is by far the lengthiest of the transfer processes; however, it always occurs in parallel with other actions. Components of the EBS are a radiological survey plan that will enable both free-release of the building and its contents as well as adequate information to satisfy the Multi-Agency Radiation Survey and Site Investigation Manual, or MARSSIM, which serves as the foundation of the Technical Basis Document previously referred to. If sampling is proposed, a sampling plan is drafted for review by EPA and TDEC prior to collecting samples. These steps are the same as those taken for leasing with the exception of (1) the actual (not modified) MARSSIM approach, (2) the quality assurance/quality control review and sign-off to determine if free-release under DOE Order 5400.5 (12) is possible, and (3) the depth of sampling would be to 10’ instead of collecting mainly surface with some subsurface samples.

Once all of the data are available and they are approved and validated, the risk assessment is conducted. Exposure scenarios are based on a default-value of 25 years for an industrial worker, whereas in the past Reindustrialization risk assessments typically considered an actual exposure scenario based on what a tenant told us about how they would use the space, as well as a reasonable maximum exposure (RME) scenario based upon the facility with a 20 year duration. For leases, workdays were considered to be 8 hours long, instead of the 10-hour duration to be used for office space and the 12-hour duration that will be used for manufacturing space. The longer daily exposure duration and the RME of 25 years (for an industrial end-use of ETTP) are the only differences in the risk assessment area between a lease and a transfer. Note - Reindustrialization has been evaluating risks using residential exposure methods and residential preliminary remediation goals (PRG) for several years, even though we know that the end point is to be an industrial use. These activities conclude the environmental component of the Analysis and Review Phase.

The Intermediate Decision Phase

The Intermediate Decision Phase begins with the compilation of the environmental documentation. If the findings are supportive of a transfer (i.e., if the risks are found to be acceptable) DOE will transmit the reports to EPA and TDEC. This step is the same as DOE making a decision on suitability to lease – the data must support the decision. The goal is approval of the documentation. It is understood that there may be comments and questions and revisions necessary prior to approval. Once regulatory approval has been obtained, the documents will be compiled with other transfer paperwork such as the deed, property survey and legal description, proposal and DOE’s response to the proposal, etc. , and sent to DOE HQ for approval. Note that if the regulatory approval is not obtained or there is no agreement on the deed, work on the transfer will cease and the facility will be slated for demolition. All of these actions are unique to title transfer using 10 CFR 770.
The Final Decision Phase

The Final Decision Phase begins with the transmittal of the ORO approved package to DOE-HQ for approval. As with seeking regulator approval on the EBS and risk assessment, it is understood that there may be comments, questions, and resultant revisions. If OFR-HQ approval us not obtained, the facility will be slated for demolition. Following HQ approval the package will be transmitted to Congress by the Secretary of Energy, where it will remain for 30-days. Barring a negative response, once the 30 and 60-day concurrent notification periods have ended the transfer may take place. All of these steps are unique to transfer via 10 CFR 770.

PART V. PUTTING TITLE TRANSFER INTO PERSPECTIVE

Working with and within a new program always has its share of bright spots, plateaus and challenges. Presently the program is exploring and actively developing new ways of achieving our goals. The program has a “punch-list” of facilities to transfer within set periods of time, providing us with frequent opportunities to measure our work efforts and seek more efficient ways to do each of our tasks. Each activity is being evaluated, beginning with: why are we doing this…what is the driver. If we cannot obtain an answer that supports its continuance then it is being eliminated. Once that test is met we ask: how can we do it more efficiently… how can we save time…when can we start the activity, do we have to wait or may we begin now. Each of our efforts in that regard assists us with each subsequent project. Project schedules and sub-schedules are maintained and used extensively to manage the projects.

As we continue to push forward on the individual transfer projects we understand that there are uncertainties surrounding our work. Several examples of those uncertainties include: what if proposals are not received or are not received in time to meet the end of the FY schedules…what if the regulators have significant changes to the way we are implementing the draft title transfer process… what if there is controversy in the community about the transfers that delays signing of the Finding of No Significant Impact on the NEPA documentation…what if the State Historic Preservation Officer will not concur on the transfers because one of the future actions, after adaptive reuse, includes demolition of a historic structure… Surely some of these will be resolved in the near term and likely be replaced by others. Regardless it is understood by all on the DOE, CROET and BJC team that we are working towards a mutually understood and desired endpoint.

It has been nearly two years since DOE issued 10 CFR 770. An effort to implement it proceeded quite far at the DOE-ORO Portsmouth Gaseous Diffusion Plant but was suspended as a DOE use was identified for the property proposed for transfer (making the land no longer eligible for transfer). Another effort was initiated in late February 2002 (and is still in process) to enable the transfer of 405 ha (1000 acres) of ETTP land called the Horizon Center. This land is presently leased to CROET, and they would like title to it so that development may proceed more quickly. Many investors are reluctant to fund projects on land that is leased; therefore it is deemed essential to the success of Horizon Center for title to the property to be transferred. Based on this experience alone it is clear that there is a need for the 10 CFR 770 process. Issuance of the rule spells out DOE’s willingness to work with communities for furtherance of economic development and growth (or in some cases simply survival) with the continuing reductions in DOE-related employment. The question remains as to whether or not the rule, as written, can be implemented in a timely manner. Reindustrialization will put it to the test.

References

42 U. S. C. § 9601 et seq.


