

April 20,2000

Mr. James Cayce
U.S. DOE
MA-53
1000 Independence Avenue, SW
Washington, D.C. 20585

RE: Energy Community Alliance's comments on Department of Energy's ("DOE") Interim Final Rule entitled *Transfer of Real Property at Defense Nuclear Facilities for Economic Development*

Dear Mr. Cayce:

Below are the Energy Community Alliance's ("ECA") comments on the Department of Energy's ("DOE") Interim Final Rule entitled *Transfer of Real Property at Defense Nuclear Facilities for Economic Development* which was published in the *Federal Register* on February 29, 2000 (the "Interim Final Rule"). 65 FR 10685 (February 29, 2000).

ECA commends the Department for developing Interim Final Rules on economic development and indemnification. However, DOE must either reconsider modifying the Interim Final Rule or implement clear guidance to its field level staff and field office managers to ensure that the Interim Final Rule is properly implemented for the purpose to which it is developed – to assist communities to become economically self-sufficient and to ensure that the Department does not transfer its environmental contamination legacy and liability to local communities who are redeveloping the property.

ECA is the non-profit organization of the local governments that surround DOE facilities. This Interim Final Rule is critical to our local government and Community Reuse Organization ("CRO") members and the citizens who live in their communities.

Background

In 1997, the Defense Authorization Act for FY 1998 (Section 3158 of the Defense Authorization Act for FY 1998, 42 U.S.C. § 7274q) included a provision requiring DOE to promulgate regulations for the sale or lease of property for the purpose of permitting economic development of the property, and included a provision to permit DOE, at its

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discretion to indemnify individuals or entities to which real property is sold or leased for reuse or redevelopment.

A review of the legislative history of the Interim Final Rule that ECA originally drafted provides an understanding of ECA's concerns with the Department's implementation of the Interim Final Rule. The original legislation was introduced in the House and mirrored Department of Defense (DOD) Base Closure law that allowed for property to be conveyed at less than market value at DOE Defense Facilities and to provide DOE communities who acquired the property with indemnification against environmental liabilities created by DOE.

By the time the legislation passed the House as part of the Defense Authorization Act for FY 1998, (as Section 3152) DOE had changed its long-standing policy against utilizing the Atomic Energy Act Section 161g for conveying property at less than market value for economic development purposes. Hence, DOE informed the defense authorizers in the House and Senate that the legislation was not needed to permit DOE to convey property to a community to support reuse and redevelopment at less than market value.

The House defense authorizers continued to support the indemnification provision of the legislation. The House Bill included indemnification legislation that required DOE to apply the indemnification for a property conveyance (the same as the base closure law), and legislation requiring DOE to develop regulations on economic development of property because the drafters of the legislation were unsure whether DOE would implement property conveyances at less than market value. The Senate had no similar legislation; however, the Senate Defense Authorizers supported the legislation.

The Senate and House conference on the Defense Authorization Act for FY 1998 amended the legislation slightly. Congressional members' final legislation mirrored its original intent: 1) ensure that DOE could and would transfer property to communities at less than market value – similar to Base Closure communities and 2) provide DOE with the authority to indemnify communities who acquire former DOE property for reuse or redevelopment – similar to base closure communities. The Conference Report for the Defense Authorization Act for FY 1998, H.R. 1114 (the "Conference Report"). regarding Section 3158 of the Defense Authorization Act stated (the legislation should be read with the Conference Report):

“ . . . The Senate recedes with an amendment that would direct the Secretary to issue regulations governing the sale or transfer of land at DOE defense nuclear facilities that is excess to DOE needs. The regulations should address when it is appropriate for the Department to transfer or lease real property below fair market value or at fair market value. The DOE should look for guidance from regulations issued by the Department of Defense governing transfers at closing military bases.

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Such leases and transfers would take place to enhance economic redevelopment and reuse activities in the local communities surrounding DOE defense facilities. As DOE downsizes and closes facilities, many of the local communities in the vicinity of a DOE facility will need assistance to transition away from a local economy focused largely on DOE activities, to one based on private sector or other, non-DOE federal activities.

The amendment would also provide discretionary authority to the Secretary to indemnify transferees of real property at DOE defense nuclear facilities. This provision would establish procedures that are similar to authorities provided to the Secretary of Defense at closing military bases by section 330 of the National Defense Authorization Act of Fiscal Year 1993. The conferees urge the Secretary to exercise the discretionary authority provided under this title only when it is deemed essential for the purposes of facilitating local reuse and redevelopment.”

Discussion

The Interim Final Rule generally spells out the process for DOE to transfer excess property to a non-Federal entity. The development and proper implementation of the Interim Final Rule is critical to the well being of several communities around the country. The comments are both general and technical in nature. My goal is to ensure the establishment of an economic development and property conveyance process that is fair and assists communities to become more self-sufficient.

Current Department of Defense Policy

The Conference Report clearly states that DOE should look toward DOD base closure law when developing its regulations for conveying property at less than market value. With regard to transfers at below fair market value, the Conference Report directs that, "DOE should look for guidance from the regulations issued by the Department of Defense governing transfers at closing military bases." Similarly, conferees directed DOE to establish indemnification procedures, "that are similar to authorities provided to the Secretary of Defense at closing bases by section 330 of the National Defense Authorization Act for Fiscal Year 1993." DOD base closure law currently requires DOD to convey property at *no cost* where a community will reuse the property for economic development purposes. **Further, DOD allows economic development purposes to include residential housing, parks, utilities and any other type of property that is located on closed or realigned military base – not purely job generation transfers. See, 32 C.F.R. Parts 90 and 91.**

When comparing the DOD indemnification law to the DOE indemnification law, Congress unfortunately allowed DOE discretionary authority, by using the word "may"

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instead of "shall" hold harmless. As a result, communities seeking reuse or redevelopment are still subject to the discretion of the DOE field manager, while DOD communities automatically receive the indemnification to protect their liability from environmental contamination. DOD provides its indemnification (which is similar to DOE authority for indemnification) for all property being conveyed. Section 330 requires DOD to indemnify *any* property on the military installation transferred for local reuse. This authority has been used by DOD to indemnify owners or lessees of all properties conveyed to communities and state governments including parks and other recreation areas, utilities, and residential housing. Conversely, DOE has linked the directive to develop guidance for economic development conveyances to its discretionary authority to indemnify property, when in fact, these are separate issues. In other words, the proposed Interim Final Rule may restrict DOE's application of the indemnification to property being transferred for "economic development" (which can be interpreted very narrowly), when it should be following the congressional intent as outlined in the Conference Report which states and DOD guidance to indemnify *any* property transferred or leased for local reuse or redevelopment.

Specifically DOE should do the following:

1) The indemnification should be utilized to protect a community's liability from contamination caused by the Department. The indemnification provision should be provided wherever a community is acquiring former DOE property for reuse and redevelopment to assist the community to diversify its economy and become more self-sufficient. Currently, in some cases around the DOE complex, the DOE field office has denied a local community's requests for indemnification where property is being conveyed to make the community more self-sufficient. This discretion cannot be left to the field manager or realty officer without guidance as to when the indemnification is appropriate.

The indemnification protects a community from the liability associated with DOE's environmental contamination. The liability for DOE's past environmentally degrading activities that polluted the property should not be transferred to a local government and the citizens of the community to shoulder. The Interim Final Rule clearly identifies the reasoning for the indemnification, but fails to identify when it should be applied.

- **The indemnification provision must be applied broadly when a community is acquiring property – it protects a community from the real liabilities of acquiring former DOE facilities. To that end, "economic development" should be defined broadly to include property that assists a community to become self-sufficient.**
- **The Department should modify the proposed Interim Final Rule to extend indemnification to all real property conveyed or leased for local**

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reuse or redevelopment to a CRO , local or state government – including utilities, parks and other activities that promote self-sufficiency or are in the public interest.

- **The Department must develop indemnification guidance for the field offices or amend the Interim Final Rule to ensure that the indemnification law is applied properly – the current process does not work if the goal is to assist communities redevelop property.**
- **Why would DOE refuse to provide indemnification to a community acquiring a former DOE facility that either contains contamination or does not contain contamination for reuse or redevelopment?**

2) The Interim Final Rule Fails to Recognize Local Government Agreements. Several communities have entered into written memorandums of agreement with DOE regarding the disposition of property. However, over the past several years, the communities have experienced problems when DOE has transferred land or transferred management of land that is designated for local economic development to non-local governments. To address this issue, it is recommended that §770.3 of the Interim Final Rule be amended to add the following statement:

(d) Nothing in this part affects commitments in agreements signed with tribal, state or local governments.

And that §770.6 be amended as follows:

Any person or entity may request that specific real property be made available for transfer for economic development pursuant to procedures in §770.7 **and §770.3.**

3) Notification of Available Property. While it is important to notify the CRO for the site, it is also just as important to notify the local government entities with jurisdiction over the property. The Interim Final Rule should explicitly direct DOE to notify local governments of the availability of real property appropriate for economic development. To address this issue, it is recommended that §770.5 be amended as follows:

(a) Field Office Managers **shall** annually make available to **appropriate local government jurisdictions** and Community Reuse Organizations and other persons and entities . . .

4) The Transfer Process Described in the Proposed Interim Final Rule is Confusing . In the background information on page 10687, left hand column, the last paragraph of II (4) entitled §770.7 (Transfer Process) states that DOE policy requires public participation in the land and facility planning pursuant to DOE Order 403.1A, Life

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Cycle Asset Management. It also states that because proposals are likely to be generated by or in coordination with a CRO, a separate public involvement process should not be necessary. While it is recognized that NEPA is applicable to transfers, to ensure the early participation of the local government and public in the host jurisdictions, the Department should notify the local governments at the time that a proposal is submitted. To address this issue, it is recommended that §770.7 of the Interim final rule should be amended as follows:

(d) Community Notification and Public Participation. The Field Office Manager shall notify the local government jurisdiction upon receipt of a proposal for the transfer of real property. The DOE will utilize existing policies to ensure public participation in the land and facility planning, management, and disposition decision process.

5) DOE should be required to justify a decision not to transfer real property at less than fair market value. The proposed Interim Final Rule provides DOE with the discretionary authority to determine when a real property transferred for economic development can be sold or leased at fair market value if the statutory authority used imposes no market value restrictions. Thus, the "burden of proof" is placed entirely on the entity or individual seeking the conveyance. If the DOE has determined the availability of the property for economic development conveyance, the Department should be required to explain in writing why the request to convey at below fair market value does not meet the intent of Congress to assist local communities recover from the effects of downsizing of defense nuclear facilities. To address this issue, it is recommended that §770.8 be amended as follows:

(c) If DOE denies the claim, the Field Office Manager shall notify the person or entity by letter of DOE's decision and explain why the request does not meet the intent of Congress to assist local communities recover from the effects of downsizing of defense nuclear facilities.

6) Economic self-sufficiency and economic development should be purposes that allow conveyance under the Interim Final Rule. Section 770.7 requires the entity writing a proposal to describe the economic development to be furthered by the transfer. The section should also allow for transfers that promote economic self-sufficiency within a community, as described in the Conference Report. For example, the conveyance of a DOE owned utility that provides services to a community will assist the community to achieve economic self-sufficiency from DOE.

The Conference Report, as stated above, highlights that the congressional intent is on reuse and redevelopment, not just job creation. The Conference Report states: "Such leases and transfers would take place to enhance economic redevelopment and reuse activities in the local communities surrounding DOE defense facilities. As DOE downsizes and closes facilities, many of the local communities in the vicinity of a DOE

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facility will need assistance to transition away from a local economy focused largely on DOE activities, to one based on private sector or other, non-DOE federal activities.”

7) The terms and conditions of the real property transfer should be favorable to promote economic development and funding for improvements. The Interim Final Rule should address terms and conditions of transfer to the extent that the terms and conditions of transfer should support economic development. Currently, the DOE real property conveyance primarily focuses on conveyances for programmatic purposes and includes several terms and conditions which may hinder reuse or redevelopment of property. For example, the terms and conditions should not include reversion clauses where the property is excess and is to be used for economic development purposes. DOE should include in its Interim Final Rule, a section on developing terms and conditions that will promote – not hinder – redevelopment of the real property.

8) Communities should not be required to pay for environmental documentation of the property conveyance. The Interim Final Rule should address whether a community should be required to pay for all of the required environmental documentation of a real property conveyance that DOE is required to undertake. Currently, DOE is demanding that some communities pay for NEPA reviews and environmental base line surveys that outline the environmental contamination on the property. These are costs should be borne by DOE and not passed along to a community. Passing these costs to a community may assist a field manager with their budget but it is completely counterintuitive to assisting a community. Does DOE have a policy regarding whether DOE should pay for the environmental requirements of property conveyance? If so, what is it? If not, why not? Communities should not be required to pay for environmental documentation of the property conveyance – especially where the goal is to assist a community with self-sufficiency.

9) DOE Policy on Assisting Communities. DOE field offices should be given written policy on the Department’s policies regarding assisting communities with self-sufficiency referenced in Section 770.8. Some field managers are proactive in this area, and ECA is supportive of their efforts. Other field offices resist by stating that their site is not closing, and therefore should not be treated like a DOD base closure site. In its guidance to field offices, Headquarters needs to clearly communicate the sites to which the rule applies. Just because a site is not "closing," host and adjacent communities continue to suffer adverse impacts that need to be mitigated.

10) Agreements for Sale. In Section 6 on page 10687, the end of the first paragraph states that, “A claim for injury to person or property will be indemnified only if an indemnification provision is included in the agreement for sale or lease and in subsequent deeds or leases.” [emphasis added] 65 FR 10687. However, several DOE real property officers have either denied or fought requests from communities to enter into agreements for sale or lease in addition to the subsequent deed or lease. Will DOE

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provide guidance to all field realty officers that they must enter into sales agreements before property will be conveyed or will communities be required to negotiate the point? Further, the Indemnification provision should be inserted into the deeds where DOE agreed to do so by agreement for sale before the Interim Final Rule was published. Clear direction must be given to real property officers that they should enter into separate agreements for sale.

11) Hierarchy of who can acquire property. Is there a hierarchy of who is eligible to receive the property first from DOE, similar to that spelled out in the Federal Property and Administrative Services Act of 1949? If so, what is the hierarchy? If a hierarchy does not exist, why not? What is the relationship between the Federal Property and Administrative Services Act of 1949 and transfers of real property under this Interim Final Rule, if any? Further, is the screening described in Section 770.5 in addition to the requirements to screen property under the Federal Property and Administrative Services Act of 1949 and report the results?

12) Conveyance at less than market value. Can DOE under this Interim Final Rule convey real property at less than market value to a non-governmental entity before it offers property for conveyance to a governmental entity?

13) Excess Property disposition. Where DOE identifies property for transfer for economic development but decides not to transfer it to a local community or CRO, will the property be declared excess and be reported to GSA for disposal? Or will DOE dispose of the property itself?

Conclusion

DOE should begin implementing the policies outlined in the Interim Final Rule to assist communities that are impacted by downsizing to acquire property at less than market value for economic development purposes. Further, DOE should educate its real property officers on the true importance of the indemnification provision to the future liability of the community and apply it in all cases where a CRO, local or state government is acquiring the property for reuse or redevelopment.

Currently, at several sites the DOE field manager has categorically denied a local community from acquiring property that is no longer utilized by DOE unless they pay full market value for the property, as determined by DOE, and pay for all of the environmental documentation required by law. The decision does not take into account the impacts of DOE downsizing in the area and the level of investment that must be made in the property. This seems to conflict with the goal of self-sufficiency for these communities, as well as the policies that DOE was required to look at, as defined in the law and the Conference Report. The Interim Final Rule can remedy many of these issues.

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Finally, the application of the Interim Final Rule can assist DOE to accomplish the goal of decreasing its footprint.

ECA commits to continue to work with DOE to ensure the proper applicability of the Interim Final Rule.

Please contact me with any questions or comments at (202) 828-2317 or sethk@energyca.org.

Sincerely,

Seth D. Kirshenber, Esq.
Executive Director

cc: Mayor Pro Tem Samantha Dixon, ECA Chair
Honorable Bill Richardson, Secretary of Energy
T.J. Glauthier, Deputy Secretary of Energy, Chief Operations Officer
Carolyn Huntoon, Assistant Secretary for Environmental Management
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