

## DOE Issues Land Transfer Rule After 13 Years Without Any Input - Adverse Impact to DOE Programs and Communities



Communities are dismayed about the new regulations released by DOE yesterday on land transfer and environmental indemnification for contamination left in the land by DOE.

DOE narrowed the applicability of the land transfer rule beyond the scope of the law and the DOE Interim final Regulations issued in 2000 ("Original Regulations") - without input or discussion from local communities - ([see the new 10 CFR 770 Final Regulations issued yesterday](#)). This change - if it stands - means that a community at a non-downsizing site that acquires environmentally contaminated land can't use the 770 regulations to acquire land and will not be indemnified by DOE (once it acquires the land) if the community is sued for environmental contamination because of the pre-existing environmental contamination - even if the land contained a hazardous waste plume (or was previously contaminated) caused by DOE. This is despite the fact that the community would be covered under existing law and Original Regulations that have been used for the past 13 years.

We can only say that it is disappointing that DOE released these regulations after 13 years with a significant change and DOE could not take the time to seek input on a rule that many communities rely on to acquire property to diversify their economies or to deal with layoffs by DOE and its contractors. We are frustrated that we worked so hard on land transfer issues and DOE decides to potentially cut some communities out of the use of the law if this regulation is allowed to stand. This new interpretation of the law by DOE is wrong - that is the most frustrating part of the newly released regulations.

DOE issued a rule that does not meet the intent of the original law nor does it accomplish the goals of DOE at many of the DOE/NNSA/Office of Science sites. This rule deems to only now apply at closed or downsized sites. This is not what the law states.

The statute - which is the authority for the regulations 50 USC 2811 does not include the term "closed or downsizing." The framers of the law were concerned about downsizing but they were also concerned about the need for communities to diversify their economies and to assist DOE to accomplish its goals and the communities goals jointly. The Senators and Congressman that passed the law specifically did not include the terms.

However, DOE seemed to ignore the fact that the law did not include the term and the new DOE regulations added the term to significantly narrow the applicability of the law -- as follows (DOE's quote from the federal register notice):

*DOE added the phrase "closed or downsized" before the term "defense*

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nuclear facilities" in sections 770.1 and 770.2 to clarify that this rule applies only to unneeded real property assets. DOE added the phrase "and for facilitating local reuse or redevelopment" in section 770.2(b), to emphasize that the purpose of the transfers is to enable reuse or redevelopment of the transferred property.

This quote seems innocuous until you read it with the regulations. The Original Regulations (with the new terms added in brackets and highlighted) are below:

**§770.1 What is the purpose of this part?**

(a) This part establishes how DOE will transfer by sale or lease real property at [CLOSED OR DOWNSIZED] defense nuclear facilities for economic development.

(b) This part also contains the procedures for a person or entity to request indemnification for any claim that results from the release or threatened release of a hazardous substance or pollutant or contaminant as a result of DOE activities at the defense nuclear facility.

**§770.2 What real property does this part cover?**

(a) DOE may transfer DOE-owned real property by sale or lease at [CLOSED OR DOWNSIZED] defense nuclear facilities, for the purpose of permitting economic development.

(b) DOE may transfer, by lease only, improvements at defense nuclear facilities on land withdrawn from the public domain, that are excess, temporarily underutilized, or underutilized, for the purpose of permitting economic development.

The original framers of the regulations at DOE understood the meaning of the law as they started drafting the regulations immediately after the law was passed. Did they include the new terms that DOE just added? No. The Interim Final Regulations (which have been used for the last 13 years) only used the term "downsizing" - and not the term "closed" in (1) the definition of Economic Development and (2) in 10 CFR 770.8 which stated:

**§770.8 May DOE transfer real property at defense nuclear facilities for economic development at less than fair market value?**

DOE generally attempts to obtain fair market value for real property transferred for economic development, but DOE may agree to sell or lease such property for less than fair market value if the statutory transfer authority used imposes no market value restriction, and:

(a) The real property requires considerable infrastructure improvements to make it economically viable, or

(b) A conveyance at less than market value would, in the DOE's judgment, further the public policy objectives of the laws governing the downsizing of defense nuclear facilities.

So the term downsizing only dealt with a part of the regulations - but if a community was installing "...considerable infrastructure improvements to make it economically viable" - the regulations applied.

Further, the definition of Economic Development in the Original Regulations included the term "downsizing" but not as a method to circumvent all other uses of the law. The definition states in part "Economic Development means the use of transferred DOE real property in a way that enhances the production, distribution, or consumption of goods and services in the surrounding region(s) and furthers the public policy objectives of the laws governing the downsizing of DOE's defense nuclear facilities." The term does not state that the land transfer benefits and the indemnification are not applicable unless DOE is closing or downsizing a facility. Instead it discusses elements that are economic development and that further the public policy objectives of the specific laws (that existed at the time) related to downsizing facilities.

These Original Regulations went through public comment and discussion. DOE at the time worked with ECA and the communities. Why the change after 13 years? We have no idea. We just read the federal register yesterday like everyone else. What is the policy change at DOE that caused this new interpretation?

It seems DOE may have cut out several communities from using 10 CFR 770--no comment and a significant narrowing of the law. The new regulations circumvent the intent - to transfer land for economic reuse - period - not just at closed or downsized facilities. Just as the original drafters of the law and the Original Regulations - over 13 years ago -- intended.

So - can someone tell ECA why this is not a significant change requiring notice and comment? When was this new policy adopted that is not in the law nor in the previous version of the regulations?

ECA will provide a more detailed analysis after it digests all of the changes and has been briefed by DOE on its thoughts.

For reference - the full 50 USC 2811 is set forth below:

**§2811. Transfers of real property at certain Department of Energy facilities**

**(a) Transfer regulations**

(1) *The Secretary of Energy shall prescribe regulations for the transfer by sale or lease of real property at Department of Energy defense nuclear facilities for the purpose of permitting the economic development of the property.*

(2) *The Secretary of Energy may not transfer real property under the regulations prescribed under paragraph (1) until--*

*(A) the Secretary submits a notification of the proposed transfer to the congressional defense committees; and*

*(B) a period of 30 days has elapsed following the date on which the notification is submitted.*

**(b) Indemnification**

(1) *Except as provided in paragraph (3) and subject to subsection (c), in the sale or lease of real property pursuant to the regulations prescribed under subsection (a), the Secretary of Energy may hold harmless and indemnify a person or entity described in paragraph (2) against any claim*

for injury to person or property that results from the release or threatened release of a hazardous substance or pollutant or contaminant as a result of Department of Energy activities at the defense nuclear facility on which the real property is located. Before entering into any agreement for such a sale or lease, the Secretary shall notify the person or entity that the Secretary has authority to provide indemnification to the person or entity under this subsection. The Secretary shall include in any agreement for such a sale or lease a provision stating whether indemnification is or is not provided.

(2) Paragraph (1) applies to the following persons and entities:

(A) Any State that acquires ownership or control of real property of a defense nuclear facility.

(B) Any political subdivision of a State that acquires such ownership or control.

(C) Any other person or entity that acquires such ownership or control.

(D) Any successor, assignee, transferee, lender, or lessee of a person or entity described in subparagraphs (A) through (C).

(3) To the extent the persons and entities described in paragraph (2) contributed to any such release or threatened release, paragraph (1) shall not apply.

#### **(c) Conditions**

(1) No indemnification on a claim for injury may be provided under this section unless the person or entity making a request for the indemnification--

(A) notifies the Secretary of Energy in writing within two years after such claim accrues;

(B) furnishes to the Secretary copies of pertinent papers received by the person or entity;

(C) furnishes evidence or proof of the claim;

(D) provides, upon request by the Secretary, access to the records and personnel of the person or entity for purposes of defending or settling the claim; and

(E) begins action within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the Secretary.

(2) For purposes of paragraph (1)(A), the date on which a claim accrues is the date on which the person asserting the claim knew (or reasonably should have known) that the injury to person or property referred to in subsection (b)(1) was caused or contributed to by the release or threatened release of a hazardous substance, pollutant, or contaminant as a result of Department of Energy activities at the defense nuclear facility on which the real property is located.

#### **(d) Authority of Secretary of Energy**

(1) In any case in which the Secretary of Energy determines that the Secretary may be required to indemnify a person or entity under this section for any claim for injury to person or property referred to in subsection (b)(1), the Secretary may settle or defend the claim on behalf of that person or entity.

(2) In any case described in paragraph (1), if the person or entity that the Secretary may be required to indemnify does not allow the Secretary to settle or defend the claim, the person or entity may not be indemnified with respect to that claim under this section.

**(e) Relationship to other law**

*Nothing in this section shall be construed as affecting or modifying in any way section 9620(h) of title 42.*

**(f) Definitions**

*In this section:*

*(1) The term "defense nuclear facility" has the meaning provided by the term "Department of Energy defense nuclear facility" in section 2286g of title 42.*

*(2) The terms "hazardous substance", "release", and "pollutant or contaminant" have the meanings provided by section 9601 of title 42.*

