

**Anticipating Change - A Means to Save Time and Rethink the Implementation of the
10 Code of Federal Regulations 770 Real Property Transfer Process - 15662**

Lesley T. Cusick
Restoration Services, Inc., Oak Ridge, TN
lcusick@rsienv.com

ABSTRACT

The Department of Energy (DOE) issued 10 *Code of Federal Regulations (CFR) 770* in 2000 for the “Transfer of Real Property at Defense Nuclear Facilities for Economic Development.” The rule was issued in order to “offset negative impacts on communities caused by unemployment from related DOE downsizing, facility closeouts and work force restructuring.” There is a sense of urgency implied in efforts designed to address economic conditions, especially in communities that have hosted DOE facilities and are experiencing negative impacts of mission changes. Despite the urgency, the transfer of real property from DOE or any federal agency is a lengthy, complex, iterative, but necessarily diligent effort. After all, the aim of the process is to be able to demonstrate that the property proposed for transfer is protective of human health and the environment for the intended use.

Notwithstanding the efforts of the economic development organization to market, recruit, and prepare a robust proposal to request property, and the efforts of DOE to perform the many due diligence activities in response to that request, the actual results of the evaluations are an unknown until a major portion of the process is completed. Will the property be determined to be suitable for transfer? Will there be deed restrictions? Is indemnification available? Has a mission need for the property arisen while working through the reviews? There are many points along the way that can sidetrack or delay progress and, in the interim, the economic viability of the proposal can collapse. Even without the unforeseen events, the process in and of itself is lengthy. It is often heard (loudly) that it takes far too long to obtain a piece of property once a request is made; that observation/criticism is worthy of serious attention. Rather than revisit old debates, why not learn from them? Why not look at the transfer process from a different point of view and ameliorate it so it can be more responsive to community needs? Why not *anticipate* change, *anticipate* requests, and *make property available* before a request as well as responding to requests to make property available?

There are several ways to rethink and modify the way the transfer process is implemented to reduce the time following a request. The modifications would arise from both internal information sharing, integrated and timely upfront planning and, in particular, by varying how and when certain elements of the process to enable transfer are performed. This paper will address: 1. How a unified overall vision can be created from the cleanup input of Site-Specific Advisory Boards with the Community Reuse Organizations’ planning for economic development and can help inform site cleanup to end state to future use; 2. Why DOE is in the best position to know its site conditions and could determine *ahead of a transfer request* what property is indeed available and notify of that determination; 3. How a range of disposition paths for real property are available to DOE; and 4. Why broadening the understanding of “best interest of the government” to one that is clearly able to recognize non-monetary benefits *is* in the best interest of the government.

Anticipating change helps prepare DOE and their host communities for the future. It creates opportunities for flexibility and time savings. The sooner DOE’s unneeded and underutilized real property can be made available to the communities that need it most, the sooner those communities can work to moderate the adverse effects of DOE mission changes.

SITE-SPECIFIC ADVISORY BOARDS AND COMMUNITY REUSE ORGANIZATIONS – AN OPPORTUNITY FOR THE SUM TO BE GREATER THAN THE PARTS IN SHAPING FUTURE USE

The U.S. Environmental Protection Agency (EPA) has seen the value of the Environmental Management (EM) Program Site Specific Advisory Boards (SSAB) since they were first conceived in the early 1990's. As a party involved in the majority of cleanup of EM sites, they are in a position to know. EPA's guidance [1] on the EM SSAB explains that SSABs are "groups that have a direct role and involvement in Department of Energy (DOE) clean-up decisions. Advisory Boards have great potential to effectively involve the public in the Federal decision-making process." The EPA goes on to state that "Experience shows that local boards have the greatest impact when they are able to focus their efforts on major policy issues [*ibid*]. EPA further states that "what the Department and its regulatory partners need from the Boards is a clear articulation of stakeholder principles, priorities, and values."*[ibid]* Groups such as SSABs and Community Advisory Boards (CAB) have very specific and important roles to play in site cleanup. These groups "should endeavor to be representative of all persons and groups who see themselves as affected or potentially affected by the environmental restoration and waste management issues that, in the boards view, are relevant to environmental quality at the site."*[ibid]* For example, SSABs make recommendations to DOE on how they would like to see particular cleanup tasks executed (e.g., using a certain treatment technology) and identifying (or supporting) their choice of preferred alternatives in decision-making. Over and above each of those examples is the one issue potentially most influential in shaping DOE sites into the future – identifying the particular cleanup end states they would like to see for the DOE site in their community. The end state is not future use, but is a key step towards it.

Community Reuse Organizations (CRO), on the other hand, have a different and unique role since they were created as a result of the 1993 National Defense Authorization Act, [2, § 3161] in response to the negative social and economic impacts of workforce restructuring [3, p.2]. CROs accept and disposition excess personal and real property from DOE for the purpose of industrial, economic, commercial, and civic development within a designated area [*ibid*, p. 3]. CROs across the country often have little to do with site cleanup other than waiting for it to be executed. As noted in the Preamble to the interim final rule for 10 *CFR* 770 [4, pg. 10686] "the CRO coordinates local community transition planning efforts with the DOE Federal Advisory Committees, "Site Specific Advisory Boards," and others to counter adverse impacts from DOE work force restructuring. CROs may act as agent or broker for parties interested in economic development actions, and they can assure a broad range of participation in community transition activities."

The ability of the CRO to foster and bring about economic development is inextricably tied to the chartered mission of the advisory groups and the success of their efforts. It is of potential great benefit for the SSABs and CROs to at least be in communication with each other. A distanced relationship or simply a "hand-off" of a baton from the efforts of the SSABs to the CROs could result in missed opportunities for the communities involved. A more integrated working relationship may also enable cost savings to DOE with regard to identifying an end-state, should the groups be in agreement on a less restrictive clean-up level for example. Less-restrictive cleanup levels that factor into future use, such as industrial instead of residential or "free-releasable", would not only save scarce resources, but could facilitate accelerated clean up and nearer-term reuse with economic benefits to host communities.

An understanding of the mission of the DOE EM program is likewise essential because it includes a subtlety that could be misunderstood with regard to end states and future use. Namely, the EM mission is not economic development, but rather to perform cleanup. Property transfer is a way to help accomplish the mission effectively and meet goals for reduction of the EM operating footprint. Clean-up is conducted pursuant to regulatory agreements that specify end states, usually a risk-based exposure (such as industrial or recreational) for a particular site. It is this subtle juncture that can create the integrating relationship

between the two groups. If the SSAB requests or recommends to DOE that they seek (and obtain) regulatory agreement on a particular type of suitably protective end state, and that end state is not inconsistent with the economic development objective of the CRO, the end state could dovetail with the future use. Both the SSABs and CROs are intended to reflect the voices of their communities. To that end, there could be a unified overall vision or, at the very least, a complementary one to attain clean-up objectives that are compatible with the desired future use.

Communities Want and Need Land...Now

When CROs and host communities are asked what they want to have happen with the DOE sites undergoing cleanup, the responses are fairly consistent: economic opportunity, land, and a restored DOE site. The other commonality is likewise not unexpected, they want it now. Stated plainly, for those sites seeking to obtain property, the communities say it takes too long to do so. Given the length of time for some transfers, communities may also be asking if DOE is still committed to transfers for economic development purposes. Both the 2000 interim final rule for 10 *CFR* 770 [4] and the 2013 final rule [5], and their preambles in particular, clearly demonstrate that they were and are committed to these transfers.

The Summary of the 2000 interim final rule for the transfer of DOE real property for economic development purposes [4, p. 10685] sets the stage for the overall basis of the regulation: “Transfers of real property under these regulations are intended to offset negative impacts on communities caused by unemployment from related DOE downsizing, facility closeouts, and workforce restructuring at these facilities.” The Supplementary Information in the 2000 interim final rule [4, p. 10685] in the Background section is an excellent source of process philosophy. “DOE has been engaged in a two-part process in which DOE reexamines its mission need for real property holdings and then works to clean up the land and facilities that have been contaminated with hazardous chemicals and nuclear materials. The end result will be the availability, over time and to widely varying degrees at DOE sites, of real property for transfer.”

The 2000 interim final rule for 10 *CFR* 770 [4, p. 10685, 10690] also provides for indemnification – a unique, significant, and not otherwise available demonstration of the Department’s commitment to economic development transfers. Real property that had been used for defense nuclear purposes does carry a nuclear or nuclear-related process history. “The indemnification provisions in Section 3158 (of the 1998 National Defense Authorization Act) [6] aid these transfers for economic development purposes because, even at sites that have been remediated in accordance with applicable regulatory requirements, uncertainty and risk to capital may be presented by the possibility of as-yet undiscovered contamination remaining on the property.” The 2013 final rule is very clear that indemnification flows with the land and is retroactive to the time of the interim final rule [5, p. 67925, 67927].

THERE ARE OPPORTUNITIES FOR TIME SAVINGS AND FLEXIBILITY IN 10 *CFR* 770

The ordering of the 10 *CFR* 770 rule provides insight on DOE’s intent and priorities regarding property transfer for economic development. ‘Since the end of the Cold War...DOE is engaged in a two-part process to establish mission need and complete cleanup, with the end result of availability, over time and to varying degree at DOE sites, property for transfer for economic development.’ A thorough reading of 10 *CFR* 770, an examination of the sequencing of the sections, and an analysis of the wording suggests that there *are* opportunities to save time in the transfer process.

Some Operative Words

In order to understand the existing process and potential opportunities for improvement it is necessary to understand some frequently used and perhaps misunderstood terms of the process. The following

definitions were developed by the author from both the Preamble and regulation to 10 *CFR* 770 as published in the *Federal Register (FR)* in 2000 [4]. Where modifications to the terms have come about through the 2013 final rule [5], they are pointed out. The terms are presented in the order that they are used in the overall process.

Identification (Notification) is not defined, but the Preamble and the regulation provide context: 65 *FR* 10686, II.3 (Sections 770.5 and 770.6, Identification of Real Property for Transfer). “DOE annually conducts surveys of its real property to determine if the property is being fully utilized. In a related process, DOE annually reviews its real property to identify property that is no longer needed for DOE missions. Real property covered by this part will initially be identified by these two processes. Under this Part, Field Office Managers will provide the established CRO and other interested persons and entities with a list of the real property that may be transferred under these regulations.” The 2013 final rule enhanced the identification aspect to note that local governments and Tribal nations would also be informed of the listing of property that is appropriate for transfer for economic development. [5, p. 67927]

Transfer process is also not included in the definitions, but is described and contextualized in the Preamble [4, p. 10686] as follows: To initiate the *transfer process*, the potential purchaser must prepare and provide to the Field Office Manager a proposal for the transfer of real property at a defense nuclear facility for economic development.

A *transfer proposal* is also not defined, but is referred to many times in the Preamble and regulation. The proposal is a critical element of the transfer and is a go/no-go decision point. It is noted in the Preamble that the proposal must contain enough detail for DOE to make an informed determination that the transfer, by sale or lease, would be in the best interest of the Government (65 *FR* 10686, II, 4). All of 10 *CFR* 770.7 plainly addresses the necessary contents of a proposal. The requirements have added weight when one considers that the purpose of the proposal is the need for DOE to be able to make its best interest of the Government (“BIG”) determination. A best interest determination is required for a transfer agreement, a predecessor action to a future transfer.

Transfer agreement is likewise not spelled out in the definitions, but is described by reference numerous times in both the Preamble and regulation. The transfer agreement and its development follow the receipt of a proposal and a determination by DOE that the transfer is in the best interest of the Government. It is at that point that DOE could begin the development of a transfer agreement. It is also noted in the Preamble [4, p. 10686] to the interim rule that “Agreement by DOE to pursue development of a transfer agreement does not commit DOE to the project or constitute a final decision regarding the transfer of the property...” that final decision comes later. The regulation spells out in 10 *CFR* 770.7(b) that before negotiations on the transfer agreement can be finalized that the Congressional defense committees must be notified.

Analysis of 10 *CFR* 770.5: Identification of Real Property Available for Transfer for Economic Development

The regulation at 10 *CFR* 770.5 [4] uses two different words when describing property that has been reviewed in the annual utilization survey and evaluated against mission needs, namely, “available” and “appropriate.” The order of their use may also provide insight about their meaning. In 10 *CFR* 770.5 it is stated: “How does DOE notify persons and entities that defense nuclear facility real property is available for transfer for economic development? In the reply, it is pointed out that DOE will annually identify property that is appropriate for transfer for economic development.” This suggests that when DOE goes through the effort of making property available, it would first determine if it is appropriate for transfer.

There are two different words at play here – appropriate and available. Appropriateness would come from the work done by the real property professionals as a part of their utilization surveys and reviews and coordination with site programs. On the other hand, “available” can have different meanings and certainly can be understood in different ways, usually based on an element of time. In common usage, available implies “now”, and could be interpreted to mean “I can have property now”, or “it’s ready to transfer now.” With real property transfer though, availability is not that straightforward, there are other steps to be taken. For example, before available property can be transferred, a proposal for its use is needed per 10 *CFR* 770.7. Additionally, there is a component of information associated with available property; some property is actually more available than other property based on what is known about it.

The Preamble discussion of 770.5 and 770.6 [4, p. 10686] also explains that when DOE identifies property that is available, “DOE will provide existing information on the listed property, including its policies under the relevant transfer authority, information on the physical condition of the property, environmental reports, safety reports, known use restrictions, leasing term limitations and other pertinent information.”

The existing information that the Department could provide for available property could span a broad range depending on the location of the property and its past use (or lack of use). Some very large sites may have very little data and information on many areas of their site simply due to their overall size. Small sites may have a robust datasets precisely because of their size. Safety reports may be available for buildings but not for land in general. It can just be a mixed bag of information on these properties, it just depends. Arguably the best source of information that can be had for properties that have been identified as available would be the environmental due diligence details that would come from preparing Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 120(h) [7] reports. These reports, which are required to be prepared (and approved) for the transfer of real property from Federal ownership, include but are not limited to important information on spills, storage, and releases of environmental contaminants, identified clean-up needs or results of prior clean-up completion, and ownership and use history since the property was acquired by the Federal government. These reports also include information that could inform future deed language on use restrictions and limitations. As resources, these reports are quite valuable. As for being useful in providing information sought by 10 *CFR* 770.5 on notification of available property – they are ideal. But...until a property has been evaluated pursuant to CERCLA 120(h), including its aspects of needing to be able to demonstrate protectiveness (e.g., suitability) we don’t know if the property really is available; a Catch-22 to be sure.

An Important Aspect of Availability to Transfer—Environmental *Suitability*

While not mentioned in either the interim rule or the final rule’s preamble or regulation, a very important consideration of available property is its *suitability* to transfer. In the author’s opinion, in order for a property to be available to transfer, it has to be demonstrated to be protective of human health and the environment, e.g., it has to be suitable to transfer. Suitability enters into the 10 *CFR* 770 transfer process via CERCLA 120(h) which is noted in the transfer regulation at 10 *CFR* 770.3, “What general limitations apply to this part?” The response at 10 *CFR* 770.3(a) states: “Nothing in this part affects or modifies in any way section 120(h) of CERCLA.” So, property needs to be protective of human health and the environment; it has to be suitable.

All federal real property transfers undergo a CERCLA 120(h) review, which is, as described earlier, a type of environmental due diligence review. CERCLA 120(h) notes that the EPA requires that EPA, or the Governor of the state for non-National Priority List sites, determine that the real property proposed for transfer is suitable for transfer (CERCLA 120[h][3][C][i]). Suitability is concluded through a determination that the transfer is protective of human health and the environment. Health and environmental protectiveness is presumed for transfers of uncontaminated real property transfers (CERCLA 120[h][4][A]). For transfers where there has either been clean up performed and demonstrated to be operating properly and successfully

(CERCLA 120[h][3][B]), clean up remains to be performed (covenant deferrals, CERCLA 120[h][3][C]), or where contamination exists but it has been demonstrated that the transfer is protective of human health and the environment, protectiveness/suitability must be shown (typically through a risk evaluation) [8]. Properties may be appropriate for transfer with regard to mission and utilization, location, accessibility, etc., but properties need to ultimately pass the test of environmental suitability in order to be available.

Analysis of 10 *CFR* 770.6: An Alternative to Identification of Available Property—Requesting Property Be Made Available for Transfer

The most common transfer process initiation is when a request is received by DOE from a CRO or other entity before there has been identification of available property. A request is submitted, then the sequence follows that DOE consider mission need and utilization, determine the environmental condition of the property, and identify use restrictions and other pertinent information as the process is worked through.

This “request first” approach is provided for in 10 *CFR* 770.6 wherein any person or entity may request that specific real property be *made available* for transfer, but it goes on to say “pursuant to procedures in 10 *CFR* 770.7.” The author finds this curious because 10 *CFR* 770.7 speaks to proposals to transfer. The requirements for proposals, described below in this analysis, are rather specific and presume that the preparer of the proposal has quite a bit of knowledge about the property - knowledge that would be difficult to know, especially since 770.6 doesn’t refer to a list of available property, it simply notes that parties can request that property be made available. And, unless availability includes the consideration of suitability – which is determined through performing CERCLA 120(h) environmental due diligence, there is very little known about the requested property other than someone wants it. This is a Catch-22 of the highest order. The nature of a "proposal" received at the time of a request to make property available could only be expected to be preliminary or draft due to uncertainty about the property, uncertainty about the results of the property evaluation, and the length of time to determine if the property is indeed available and via what terms. These points are all important to the economic viability of the proposal, and at this juncture they would not be known.

Figures 1 and 2 show the differing processes (overall) in a highly simplified manner. Figure 1, the 10 *CFR* 770.5 Identify Available Property Process is fairly linear, though concurrent efforts can occur if desired. There is a bit of back and forth in the process simply due to the fact that robust proposals are helpful in demonstrating economic viability. As seen in Figure 2, the 10 *CFR* 770.6 Request to Make Property Available Process, several steps happen concurrently and there are instances of back and forth that would be expected because a request would occur without detailed knowledge of the property and its environmental condition. Those uncertainties, and the time taken to resolve them, can affect the quality of proposals, and also the viability of the economic development activity described in the proposals.

A fundamental question for the *make available* (10 *CFR* 770.6) approach is, have the necessary steps occurred in a way that is potentially more beneficial for economic development and reducing the EM footprint in an absolute sense (via transfer)? As explained above, requests that property be made available most often precede the gathering of important information about a piece of property, in particular environmental information that can inform both property value and the need for a proposal to formally request indemnification, it puts the requestor at a disadvantage. It also puts DOE in a situation where they, despite their most dedicated and diligent efforts to be responsive, can never do things fast enough.

With all of that in mind it appears that a transfer could take place in a timelier manner if the demonstration that a property is suitable for transfer via CERCLA 120(h) occurred *before* a property is listed and identified as available. On average, the overall timeframe for all of the steps will likely not change much, though it could (and would be expected to) be made more efficient over time. However, the

key to time is the point at which it is measured, and the measurement of time is most important when it starts with the request. That is the point at which people begin waiting.

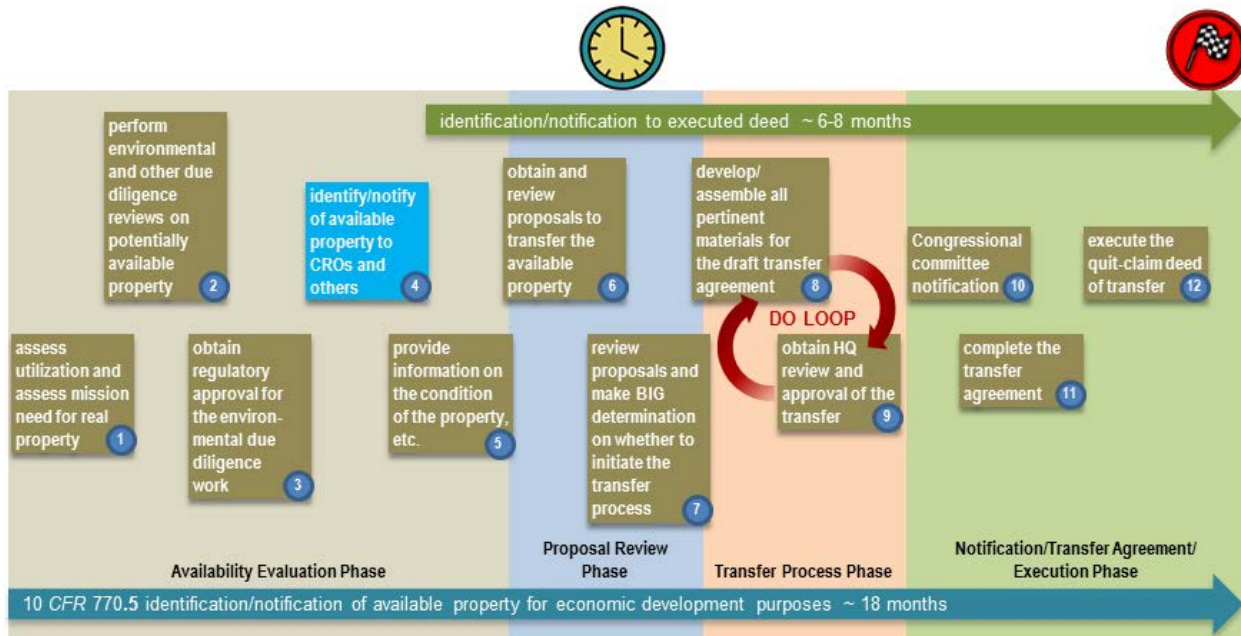


Figure 1. 10 CFR 770.5 - Identify Available Property Process

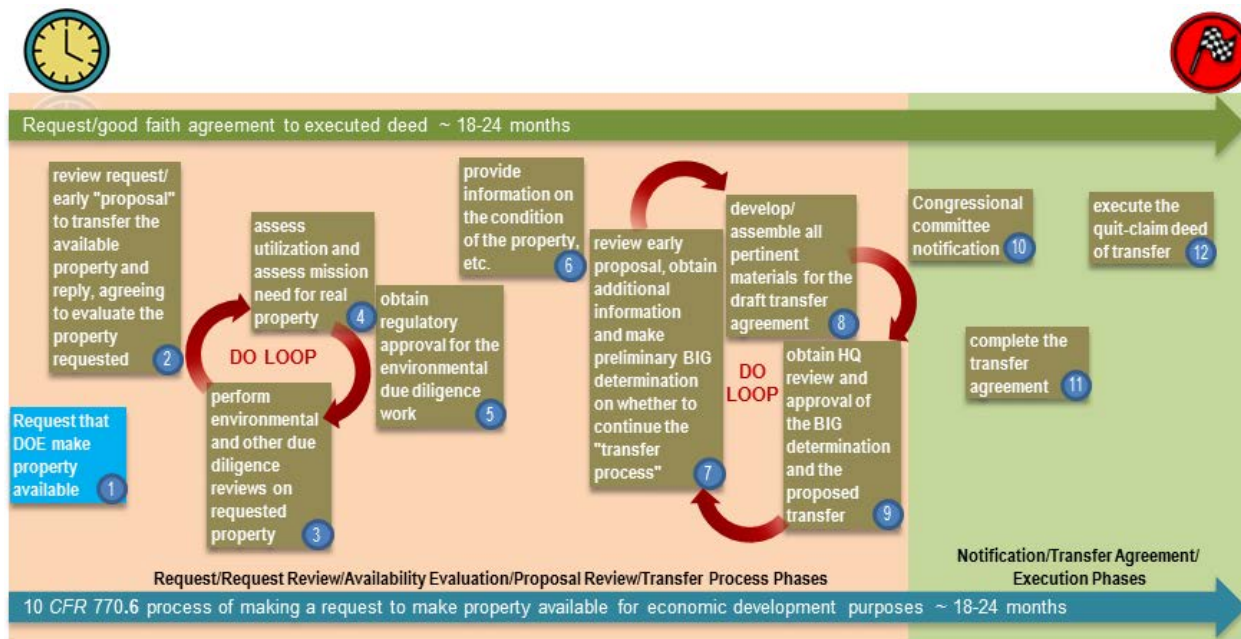


Figure 2. 10 CFR 770.6 - Request to Make Property Available Process

ONCE PROPERTY IS AVAILABLE – THEN WHAT?

The Proposal (10 *CFR* 770.7)

The required contents of a proposal are described in 10 *CFR* 770.7 and are quite specific. They include a description of the economic development that would be furthered by the transfer, such as jobs to be created or retained or improvements to be made; information supporting the economic viability of the proposed development; and the consideration offered and any financial requirements. Important information on property condition that was not previously known prior to DOE's identification of property as available, would be available as part of the determination and it would be provided to the CRO, the local government and Tribal Nations, and others who request it. DOE might also choose to make it available to a wider audience. If a CRO or other party submitted a "preliminary" or draft/conceptual proposal to DOE at an earlier date as a part of their 10 *CFR* 770.6 request, meat could be put on the bones of that early proposal using the information from the environmental and other due diligence work. All parties, including potential users of the hoped-for-transfer property, would have more detail to offer for review and consideration.

The meat on the bones of an economic development transfer proposal could not be more crucial to DOE's decision making. Posit for a moment what the proposal is supposed to enable DOE to do: "to make an informed determination that the transfer is in the best interest of the Government." This is a tall order and it precedes the next decision—the transfer agreement. If DOE cannot work with the information provided in a 770.7 proposal (perhaps recognizing that there may be some back and forth to enable the requestor to supplement and strengthen their proposal), then DOE may not be able to agree to proceed with a transfer agreement.

The Transfer Agreement

The transfer agreement phase offers some latitude to DOE as noted in 10 *CFR* 770.7(b), "DOE may consider a variety of factors in making its decision (on whether or not a transfer is in the Government's best interest), such as the adverse economic impacts of DOE downsizing and realignment in the region, the public policy objectives of the laws governing the downsizing of DOE's production complex, the extent of state and local investment in any proposed projects, the potential for short- and long-term job generation, the financial responsibility of the proposer, current market conditions, and potential benefits to the federal government from the transfer." If a CRO can point out both the tangibles and intangibles of those "potential benefits to the federal government" and think broadly in their definition of government, e.g., DOE overall, the DOE site, the EM program, the EM program in the affected community, and the affected community and its region of influence, that may go a long way towards supporting the needed decision.

[The transfer agreement is not finalized until the Congressional committees are notified (per 10 *CFR* 770.7[c] and [d]) and it is determined that all of the environmental reviews have been completed. At this time, the main environmental review to be considered, if it is not already complete, would be the National Environmental Policy Act (NEPA) review. This review would be based on the descriptions found in the complete proposal.]

THE VALUE AND THE PLACE FOR ANTICIPATION IN PROPERTY TRANSFERS

Anticipation in any endeavor is a hallmark of intuition and can be evidence of experience. Anticipation is not the sole proprietorship of the private sector. DOE can, and surely does, anticipate interest in land at

their sites, especially closure sites, using the knowledge and insight of the site and field office managers and others at DOE sites that know and are engaged with their communities. Both DOE and CROs and others can be anticipators of opportunities for footprint reduction and of future economic needs and prospects, respectively. By taking steps to complete the environmental due diligence on one or two properties at a site that are appropriate for transfer, the end result could be that they are not only appropriate, but available, and not just generally available, but available within a shorter period of time.

Transfers literally reduce DOE's real property inventory and reduce the EM footprint, and do so in a way that benefits affected communities. Transfers can also be viewed as a type of clean-up in and of themselves: CERCLA 120(h) does not require clean up, it requires that transfers be demonstrated to be protective of human health and the environment for the intended use. That is a data review/collection and evaluation effort, a shovel may not be required. (A shovel is even less likely to be required if the end state considers a future use that is not residential, but is industrial or recreational.) This is a non-traditional way of viewing transfers, but if the end result is the same – a reduced clean-up footprint – perhaps it is a worthwhile consideration. It is certainly an alternative way to reach an ultimately desired goal.

Anticipating by Planning *and* Doing

A worthwhile and productive means of anticipating change could also be undertaken through a bit of broad-brush planning/screening. A type of “availability forecast” could be developed wherein DOE could determine areas appropriate for economic development and then sort them into availability categories based on the projected timing of their availability. Existing data could be used to identify and evaluate the site area or areas of sites that are or will be most readily appropriate, available, and suitable for transfer using simple opportunity and constraint methods. DOE knows their sites and they can turn that knowledge into a very useful tool with some targeted planning. Resources such as knowledgeable long-time site operations and environmental personnel would be particularly valuable to this effort, helping to identify properties that are appropriate and possess the highest potential to be able to be made available. These steps could help DOE to identify and map general areas for potential transfer by eliminating areas where remediation and/or demolition is known to be needed, as well as the areas adjacent to them so that clean up can proceed unimpeded.

If desired, a CRO or other economic development interests could convene a charette to work with the results of the screening for a site. It is suggested that the CRO convene the group since the topic would be transfer for economic development/future use planning. A small working-level group of experienced development and planning professionals could use the DOE screening information to help fine tune the planning process with the goal of identifying a “first-cut” of properties that could - pending due diligence review - be made available for transfer for economic development. This “first-cut” would be based on the facts of clean-up and other mission needs (for multi-mission sites), and the economic development considerations brought to the table by the economic development professionals re: opportunities and constraints to development, market indicators, long-term regional demands, etc. The participation of the CRO is paramount to the effort as they, and/or their partners, would be responsible for the long-term vision for the site. The keys to the process are two-fold – objectivity, and recognition that this planning effort is highly focused. It *is* a planning effort but for this purpose it is not intended to be a long-term, paper-intensive, protracted and tedious effort.

With regard to planning, NEPA is an excellent planning tool and well-suited to incorporating the analysis that goes into identifying areas appropriate for economic development and applying the aspects of timing, all in relation to coordinating with DOE missions. With the value of using NEPA as a means of “big picture” planning, DOE could prepare a site-wide NEPA document. Community and CRO input on future use, information on the EM end-state goals, could be layered on DOE's knowledge base; a sitewide approach. This approach could both capture and bring together the concepts of the end-state, on-going

clean-up needs, and future use with the overarching aspect of timing. This approach integrates well with the wording found in the Preamble to the interim rule [4, p. 10685): “The end result will be the availability, *over time and to widely varying degrees at DOE sites*, of real property for transfer.” All of this would take advantage of the work performed by the SSAB to assist DOE EM with helping to shape the site cleanup decisions, setting priorities and determining end states.

The “Now and/or Later” of data

Environmental characterization data, collected with the purpose of defining the nature and extent of contamination has been collected at DOE sites. These are the type of data, considered at the appropriate broad level that would be able to be used to proceed with the focused charrette process described above. Presuming that the end state and the proposed transfer use is the same from a risk perspective – for example, industrial, and that the contaminants of concern are the same; the data needed to demonstrate that final remediation levels (FRLs) have been attained would be the same as for demonstrating that the transfer is protective of human health and the environment for the intended use. DOE could engage with their regulators to both explain the transfer objective and how attaining FRLs and demonstrating protectiveness are designed to meet the desired end state.

Once data are analyzed and risks considered for a potentially available site, the environmental due diligence process could be completed by seeking regulatory approval via the CERCLA 120(h) path. Using the data in support of a transfer could also mean meeting a mission need at a lower cost when you consider the net present value of money, and benefitting the community by adding to the property tax base, and increasing the economic development opportunity for the community.

Alternatively, the information could simply be added to the existing dataset for the area that was evaluated pending a future need. In the broadest sense, the data could be used to reduce uncertainties about site conditions. Areas deemed not available by virtue of new data and analysis could then be folded back into the cleanup queue, and, have more information at hand for that future work.

A Mid-course Review

Pending regulator approval of a CERCLA 120(h) report, other questions related to real property transfer will arise. An approved document would enable a new phase of property evaluation to occur, referred to in this paper as a “mid-course review.” The mid-course review would involve an informed multi-disciplinary team. At this time questions such as “does the property warrant indemnification,” “what is the value of the property,” “what use restrictions or limitations are there” could be asked. Uses other than economic development may be identified based on sampling data. For example, sites with “good” characterization data may turn out to have a high water table and therefore might be better used for resource banking such as for Natural Resource Damage Assessment [7, §101 *et. seq.*] purposes.

After consideration of all of the input of the team the Field Office Manager would be able to determine if the property is truly available for economic development and would notify of its availability and seek proposals. After notification to the CRO, the community, Tribal nations and others, DOE would be able to assess whether or not there was interest in the property and how serious it was by reviewing any submitted proposals. After reviewing any proposals received, DOE would be able to decide whether or not to initiate the transfer process, which would include a decision as to whom and how the rest of the process would be carried forward. The best interest of the Government determination would arise at this juncture.

In a related manner, some may wonder about what happens to land after clean up and assume that the “destination” for remediated land is that it is simply “retained” by EM or that it would go to the Legacy

Management (LM) program. The EM mission is cleanup, not land management in that regard, and the LM program is the long-term steward of remediated sites that need some level of management and monitoring, such as disposal cells, landfills, and pump-and-treat systems. LM isn't the general repository of DOE land that has been cleaned up, and the programmatic transfer of land to LM has a rather stringent set of internal environmental and other due diligence requirements as would be needed for disposal to another party [9]. Underutilized, unneeded land is supposed to be disposed. What other option for disposal is there if not 10 *CFR* 770, or a transition to LM pending their disposal of the land, or something else specific to DOE? The General Services Administration (GSA) – the government's landlord and property disposal authority.

Other Routes for Disposal

DOE is an agency with its own authority for property disposals. The authority is broad and is found in the Atomic Energy Act of 1954 (AEA) [10]. Given that authority and the familiarity of its sites and missions, the "can do" performance ethic of its site and program managers, and the skills of its real estate professionals, it is not surprising that DOE is in the best position to perform its own property disposal actions. However, self-performance is not required and may actually be the less than ideal choice in some situations. What is important to realize is that there are choices available.

When the phases of a transfer are considered it is useful to assess who the optimal performers are for a certain phase. Whether the transfer process being followed for a specific parcel is one where availability has been determined up front or one where DOE is responding to a request to make something available, the overall components are the same. The evaluation of utilization and mission need are made by DOE, pursuant to DOE Order 430.1B [11]. After that, the determination of availability is really one of suitability (e.g., is the transfer protective of human health and the environment). This determination is reached through the CERCLA 120(h) environmental due diligence review and is definitely best reached by DOE and in coordination with each site's regulators. Given the nature of DOE's mission and the security and classification aspects, DOE is again in the best position to evaluate these criteria of a transfer as well.

In an ideal situation a site could prepare a type of disposition framework ahead of the efforts to make property available that factored in the results of the objective analysis and the possible pathways (i.e., 10 *CFR* 770, AEA Section 161(g), GSA) or retain pending a future need. The framework could simply "sort" possible pathways based on the various types of transfer, not individual parcels (e.g., covenant deferrals, clean parcels, public benefit conveyances, conservation, etc.). If time-phasing for availability for economic development is factored in, that disposition framework could be a type of "availability forecast." Flexibility is needed all around to account for the variability of the market and DOE's missions at the time property is identified as available. A disposition framework could work in an integrated manner with the "availability forecast" suggested earlier.

THE "BIG" DETERMINATION AND WHY IT COULD BE BIGGER

The "BIG" determination of the best interest of the Government can be read narrowly or broadly. After all, it includes words like "best interest" and "Government," which are ripe for interpretation. DOE is specifically called upon to make "an informed determination that the transfer, by sale or lease, would be in the best interest of the Government" (65 *FR* 10686, II, 4). Is "best interest" simply a dollar value at the end of a cost-benefit analysis? Is the best interest equal to the appraised value? There truly are a lot of questions; the answers to the questions could result in the preparation of better and more robust transfer proposals.

“Best interest” can be based on who you ask, when, and where you ask. “Government” is based on how you define it—is it Washington, D.C. and the executive branch and its leadership, is it the Treasury, perhaps it is the local DOE office, or is it the people who elect representatives to be their voices in Washington? In 10 *CFR* 770 the BIG determination appears to focus on the proposal, using it as the test of “best interest” considerations. A good proposal deemed to be in the best interest of the Government can render a decision to proceed with the transfer process. However, that decision precedes the separate DOE decision to prepare a transfer agreement, the execution of which would follow a Congressional committee review. Each of these unique and weighty decisions are affected and influenced by several variables, almost all of which are subjective and fluid.

A Thought About Fair Market Value

The Preamble to the 10 *CFR* 770 interim rule and the regulation itself (10 *CFR* 770.8) both speak to fair market value. Inasmuch as the regulation notes that DOE generally seeks fair market value (FMV), FMV is not required for economic development transfers from DOE. Emphasis is added to the following information to highlight the language that affords DOE flexibility with regard to FMV and best interest of the Government. From 10 *CFR* 770.8: “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 for less than fair market value would, in *DOE’s judgment*, further the public policy objectives of the laws governing the downsizing of defense nuclear facilities. DOE has the authority to transfer real and personal property at less than fair market value (or without consideration) to help local communities recover from the effects of downsizing of defense nuclear facilities.”

Thus far each and perhaps all of the conditions referred to above have enabled transfers for no consideration. A review of the 10 *CFR* 770 language found that the phrases about needing to address the effects of downsizing are repeated no fewer than three times in the Preamble and regulation, yet none of these excerpted phrases touches upon another factor that is also subject to interpretation. Each and every one of the defense nuclear communities comes to the table with the knowledge that their land was used, and negatively affected, precisely for the best interest of the Government (which in that context would appear to refer to all of the people, collectively). Consider as well, that if natural resource stakeholders are seeking and obtaining damages from DOE for the residual environmental effects of defense nuclear operations, it stands to reason that there *are* effects and that no consideration transfers should be able to continue to be the norm. It is also worth considering that if there are natural resource damage land “set-asides,” those set-asides would be taking land out of the inventory of real property that could potentially be made available for transfer for economic development. All of these points, coupled with the fact that communities often need to *give land away* to attract industries and bring jobs, support the rationale that land transfers at no cost/no consideration are inherently valuable and do indeed assist communities in overcoming the adverse effects of DOE downsizing.

CROs, working independently or in partnership with other economic development entities, were created for and are dedicated to economic growth or at least the stabilization of the economies that host or have hosted defense nuclear facilities. Their marketing and recruitment job is challenged because of a number of negative factors arrayed against them, including, but not limited to, facilities that are not up to present codes, aging infrastructure, abandoned infrastructure that needs to be removed to optimally utilize land, remote or less than optimally accessible locations, a lack synergistic economic opportunities, and the intangible of unknowns that may be present just below the surface that create uncertainty to occupants, buyers, and lenders. A property that is determined to be appropriate, suitable and available for transfer may be found not to be contaminated, but that doesn’t mean it isn’t stigmatized. The economic viability of a proposal, which is required to be demonstrated per 10 *CFR* 770.7, could very well collapse if fair

market value was needed. That would not appear to help overcome the adverse effects of downsizing experienced by host communities that 10 CFR 770 was intended to address.

CONCLUSION: THE DETERMINATION OF THE ENVIRONMENTAL SUITABILITY OF PROPERTY THAT IS APPROPRIATE AND AVAILABLE FOR TRANSFER IN ANTICIPATION OF A REQUEST WOULD REDUCE TRANSFER WAITING TIMES

If site reuse for the productive benefit of affected communities is desired it is suggested that, where funding allows, DOE identify appropriate and available real property at their sites and seek opportunities to make property available for transfer ahead of a request. The end result would be community recognition that DOE anticipates their needs and that there is a partnered effort to bring about mutual benefits. After all, transfers do serve to reduce the EM footprint. This approach is not proposed as an “instead of,” but rather as a selected “*in addition to*” responding to requests for property. Some of the measures to help realize these goals and concepts include:

- There are benefits in a unified vision of the clean-up end-state and future use by the SSABs/CABs and CROs, respectively; and the desire for that unified vision, should it exist, should be communicated to DOE as early as possible.
- SSABs/CABs could engage with CROs to obtain their input on reuse options, seeking a unified vision of those groups to the greatest extent practicable.
- If not already underway, DOE could seek input from their host communities on their vision for the DOE site in their community.
- SSABs and CABs could consider recommending an end state that is less restrictive than residential and reflects a future use that is similar to the present use – industrial or otherwise controlled, provided that is what the community wants. It will enable a lower cost clean up and potentially an accelerated one.
- Understanding that property is not truly available until it has been determined that it is suitable.
- Notification of available property that has been evaluated to determine its environmental suitability would result in better economic development proposals. These proposals would also be able to include more information supporting economic viability since uncertainty about property conditions would be reduced or eliminated.
- A framework disposition options approach could be developed by DOE sites for the various types of transfer situations that could occur, e.g., clean parcel and covenant deferral, and could include a GSA disposition option.
- A “best interest of the Government” evaluation should be broad enough to consider the environment, site, setting, situation and history of the property under consideration, and the tangible and intangible obstacles to be overcome for successful reuse.

REFERENCES

- [1] Site-Specific Advisory Board Final Guidance, EPA,
<http://www.epa.gov/swerffrr/documents/oem196.htm>
- [2] 42 *U.S.C.* 7274h, Department of Energy Defense Nuclear Facilities Workforce Restructuring Plan
- [3] Savannah River Site Community Reuse Organization Presentation to Savannah River Site Community Advisory Board, Combined Committee Meeting, November 16, 2009
- [4] 10 *CFR* 770, Transfer of Real Property at Defense Nuclear Facilities for Economic Development, Interim final rule, 65 *FR* 10685-10691, *Federal Register*, February 29, 2000.
- [5] 10 *CFR* 770, Transfer of Real Property at Defense Nuclear Facilities for Economic Development, Final rule, 78 *FR* 67925-67927, *Federal Register*, November 13, 2013.
- [6] Public Law 105-85, Section 3158, National Defense Authorization Act of 1998
- [7] 42 *U.S.C.* 9601 et. seq., Comprehensive Environmental Response, Compensation, and Liability Act of 1980
- [8] EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3) – (Early Transfer Authority Guidance), EPA, <http://www.epa.gov/swerffrr/documents/hkfin.htm>
- [9] DOE Legacy Management Program Fact Sheet “Site Transition Process Upon Cleanup Completion,” May 19, 2009
- [10] 42 *U.S.C.* §2011, Section 161(g), Atomic Energy Act of 1954
- [11] DOE Order 430.1B, Real Property Asset Management