# Department of Energy

Washington, DC 20585

March 27, 1998

**MEMORANDUM:** Jennifer J. Fowler
Chief Counsel, Oak Ridge Operations Office

**FROM:** Acting General Counsel

**SUBJECT:** Leasing of Department of Energy Property

In your March 19, 1997 memorandum to Mary Anne Sullivan and Ralph Goldenberg, you requested this office's advice whether the leasing of DOE property to third parties is considered a "transfer" of property within the meaning of section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9620(h). You also requested this office's advice regarding the use of section 161g. of the Atomic Energy Act (AEA), 42 U.S.C. 2201(g), and section 646 of the Department of Energy Organization Act, 42 U.S.C. 7256, as amended by section 3154 of the National Defense Authorization Act for Fiscal Year 1994 (the "Hall Amendment"), as sources of authority for entering into such leases. The latter question appears to have been prompted at least in part by Oak Ridge's experience in seeking to use the interagency coordination process prescribed by the Hall Amendment. This memorandum formalizes the oral advice previously given in response to your request.

## Summary Conclusion

Briefly stated, we conclude that leases are "transfers" within the meaning of section 120(h) of CERCLA. With regard to alternative sources of leasing authority, our review indicates that section 161g. of the AEA provides authority to lease property that has been used, or that under the lease will be used, to carry out functions or objectives of the AEA. The Hall Amendment, in contrast, provides leasing authority relating to economic redevelopment of DOE facilities that are being closed or reconfigured. The Hall Amendment further provides authority, to the extent specified in advance in appropriation acts, for the Department to retain, for certain purposes, rental money received

from a lessee rather than to deposit it into the Treasury pursuant to the "Miscellaneous Receipts" statute, 31 U.S.C. 3302(b). The authority conferred by section 161g., while broad, does not cover all property embraced by the Hall Amendment. Moreover, section 161g. does not provide a statutory mechanism for the Department to retain funds paid by a lessee. Therefore, depending on the circumstances surrounding a particular proposed lease and the proper~y contemplated to be leased, reliance on one or the other statutory authority may be appropriate. A particular lease transaction might be susceptible to use of either authority.

## RELEVANT STATUTORY PROVISIONS

The relevant portions of section 120(h) of CERCLA are set forth in the analysis of application of that provision. The text of the leasing authority provisions is as follows:

Section 161g. Of the Atomic Energy Act authorizes the Secretary to:

> acquire, purchase, lease, and hold real and personal property, including patents, as agent of and on behalf of the United States, . . . and to sell, lease, grant, and dispose of such real and personal property as provided in this Act.

42 U.S.C. 2201 (g).

Section 646 of the Department of Energy Organization Act, as amended by the Hall Amendment, provides:

> (c) The Secretary may lease, upon terms and conditions the Secretary considers appropriate to promote national security or the public interest, acquired real property and related personal property that-
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> 1) is located at a facility of the Department of Energy to be closed or reconfigured;
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> (2) at the time the lease is entered into, is not needed by the Department of Energy; and
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> (3) is under the control of the Department of Energy.

(d)(l) A lease entered into under subsection (c) of this section may not be for a term of more than 10 years, except that the Secretary may enter into a lease that includes an option to renew for a term of more than 10 years if the Secretary determines that entering into such a lease will promote the national security or be in the public interest.

(2) A lease entered into under subsection (c) may provide for the payment (in cash or in kind) by the lessee of consideration in an amount that is less than the fair market rental value of the leasehold interest. Services relating to the protection and maintenance of the leased property may constitute all or part of such consideration.

(e)(l) Before entering into a lease under subsection (c), the Secretary shall consult with the Administrator of the Environmental Protection Agency (with respect to property located on a site on the National Priorities List) or the appropriate State official (with respect to property located on a site that is not listed on the National Priorities List) to determine whether the environmental conditions of the property are such that leasing the property, and the terms and conditions of the lease agreement, are consistent with safety and the protection of public health and the environment.

(2) Before entering into a lease under subsection (c) of this section, the Secretary shall obtain the concurrence of the Administrator of the Environmental Protection Agency or the appropriate State official, as the case may be, in the determination required under paragraph (1). The Secretary may enter into a lease under subsection (c) without obtaining such concurrence if, within 60 days after the Secretary requests the concurrence, the Administrator or appropriate State official, as the case may be, fails to submit to the Secretary a notice of such individual's concurrence with, or rejection of, the determination.

(f) To the extent provided in advance in appropriations Acts, the Secretary may retain and use money rentals received by the Secretary directly from a lease entered into under subsection (c) in any amount the Secretary considers

> necessary to cover the administrative expenses of the lease, the maintenance and repair of the leased property, or environmental restoration activities at the facility where the leased property is located. Amounts retained under this subsection shall be retained in a separate fund established in the Treasury for such purpose. The Secretary shall annually submit to the Congress a report on amounts retained and amounts used under this subsection.

42 U.S.C. 7265.

ANALYSIS

Leases As "Transfers" Under CERCLA

Section 120(h) of CERCLA, 42 U.S.C. 9620(h), reflects a general objective by Congress to ensure that, when property is transferred from a Federal agency to a non-federal party, there should be not only notice as to existing contamination, but also a duty on the part of the transferring agency to remediate the property. Pursuant to its authority under section 120(h), the Environmental Protection Agency (EPA) in 1990 promulgated regulations at 40 CFR Part 373 concerning the form and manner of the contractual notice required, but declined to define by rule what constitutes a "transfer." The D.C. Circuit later ruled that EPA did not abuse its discretion by declining to state in its rule whether leases were included among the statutory transfers. Hercules v. EPA, 938 F.2d 276 (D.C. Cir. 1991). Thereafter, in Conservation Law Foundation v. Air Force,864 F. Supp. 265 (D.N.H. 1994), aff'd,79 F.3d 1250 (1st Cir. 1996), the court held that, by entering into a long-term lease, the Air Force had contracted to "transfer" real property within the meaning of section 120(h). That section reads in pertinent part:

> "whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property [it shall incur the specified obligations]."

42 U.S.C. 9620(h) (emphasis supplied).

The narrow question was whether "any. . . transfer" includes leases. In 1996, Congress addressed that question when it included in the National Defense Authorization Act for Fiscal Year 1996 a provision amending section 120(h) to provide that leases need not meet certain of the section's specific requirements. Pub. L. No. 104-106, sec. 2834, 110 Stat. 559 (1996). The clear inference to be drawn from this amendment is that the Congress ratified the First Circuit's threshold conclusion, and therefore the other provisions of section 120(h) do apply to leases.

Before the 1996 amendment was enacted, section 120(h) required that when a Federal agency leased property on which any hazardous substance had been stored for one year or more, or on which a hazardous substance was known to have been released or disposed of, the agency must provide in the contract (i.e. the lease) notice of the type and quantity of hazardous substances, notice of the time at which the storage, release or disposal took place, and a description of any remedial action selected. The leasing agency was also required to notify the host State of any lease of property at which Federal Government operations would be terminated, if the lease would encumber the property beyond the date of termination. In addition, section 120(h) could have been read as requiring the leasing agency to enter into a covenant warranting that all necessary remedial action had been taken prior to the lease, and committing to perform any additional remedial action later found to be necessary. In order to make the necessary warranty, the agency needed to secure a finding by EPA that the remedy was operating "properly and successfully."

Consistent with these pre-1996 requirements, many DOE sites entered into cleanup agreements with EPA and States committing the Department to comply with section 120(h). Some of these agreements, such as the 1992 Federal Facility Agreement for the Oak Ridge Reservation, went beyond a mere incorporation by reference of the requirements of section 120(h), and specifically required DOE to notify EPA and the State "of any such sale or transfer at least ninety days prior to such sale or transfer."

As a result of the 1996 amendment, section 120(h) no longer requires leases to include the covenant described above. Consequently, the leasing agency no longer needs EPA to make a finding that the remedy is operating properly. Thus, the general

language in DOE's cleanup agreements requiring compliance with section l20(h) now requires only that the State be notified of a lease that would encumber the leased property beyond the date of termination of Government operations, and that leases include notice of the time any storage, release or disposal of hazardous substances took place, notice of the type and quantity of hazardous substances, and a description of any remedial action taken. However, the more specific commitments in DOE's cleanup agreements, such as the commitment in the Oak Ridge Federal Facility Agreement to provide EPA and Tennessee with ninety days notice of a proposed transfer, remain in effect, and apply to proposed leases.[1] It is not clear to us that, in most cases, the requirement to provide ninety days notice will present an unreasonable burden to either DOE or potential leaseholders. Should the notice requirement prove impractical to implement in the case of leases, we believe the Department should seek to renegotiate this provision of the cleanup agreements.

Alternative Leasing Authority

The next question you have presented is whether the Hall Amendment forecloses resort to section 161g. of the Atomic Energy Act when the Department determines to lease to others realty or personalty in consequence of a "clos[ing]" or "reconfigur[ing] of DOE facilities. Resolving this question requires examination of the text and legislative history of the Hall amendment to understand how it was intended to coexist with section 161g. of

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[1] The foregoing discussion applies to leases of property at which hazardous substances have been stored, released, or disposed of. Under section 120(h)(4), transfers of uncontaminated property at which the United States intends to terminate Federal Government operations are governed by different requirements. EPA (or the State, in the case of property not listed on the National Priorities List) must concur in the transferring agency's determination that the property is uncontaminated, and the deed for the sale or transfer must contain a covenant warranting that the United States will conduct any response action later found to be necessary. These requirements were unaffected by the 1996 amendment and presumably would apply to leases of uncontaminated property at which the leasing agency intends to terminate Government operations.

the Atomic Energy Act, as well as the other property disposal authorities that it might implicate.[2] Section 161g. provides authority for leases of property related to the purposes of the AEA, and the Hall Amendment provides leasing authority to promote economic redevelopment of closed or reconfigured DOE facilities.

Section 161g. authorizes the Secretary to "lease. . . real and personal property as provided in this [Atomic Energy] Act." This office has interpreted “as provided in this Act" to require that any disposition under section 161g. must relate to property that the Department has acquired in connection with carrying out functions under the AEA[3] or property that will be used to carry out objectives the AEA.[4]

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[2] There are additional statutes that authorize the Department to lease property. Section 649 of the Department of Energy Organization Act provides that the Secretary "under such terms, at such rates, and for such periods not exceeding five years, as he may deem to be in the public interest, is authorized to permit the use by public and private agencies, corporations, associations or other organizations or by individuals of any real property, or any facility, structure, or other improvement thereon, under the custody of the Secretary for Department purposes." 42 U.S.C. 7259. Further, the Department may lease property determined to be excess under the Federal Property and Administrative Services Act of 1949. 40 U.S.C. 472(g). However, for purposes of this memorandum, the discussion will be limited to lease authority under section l6lg.

[3] E.g., letter from Robert R. Nordhaus, General Counsel, Department of Energy to Colonel Joseph G. Graf, U.S. Army Engineer District, Forth Worth (Aug. 9, 1994) (realty acquired to construct subsequently-canceled nuclear research complex might be conveyed by DOE under section 161g. because property had been acquired for nuclear research under the Atomic Energy Act).

[4] E.g. memorandum from Ralph D. Goldenberg, Assistant General Counsel, Department of Energy, to James M. Cayce, Office of Project and Fixed Assets Management, Department of Energy

(continued...)

Generally, the purposes and policies of the AEA may be found in sections 1, 2, and 3 of the Act. 42 U.S.C. 2011, 2012, 2013. These provisions set forth the Department's responsibilities, inter alia, for the conduct of research and development activities, and a program for Government control of the possession, use and production of atomic energy. 42 U.S.C. 2013(a),(c). The purposes and policies of the AEA may also be found elsewhere in the Act. For example, the Act directs the Department to encourage the conduct of research and development activities, including those relating to "the preservation and enhancement of a viable environment by developing more efficient methods to meet the Nation's energy needs." 42 U.S.C. 2051(a)(6). When the purposes and policies are considered with specific functions enumerated elsewhere *in* the AEA (e.g., weapon research under section 91, 42 U.S.C. 2121), one may discern the objectives of the AEA.

If property to be leased has been, or will be, used in order to carry out a function or pursue an objective of the AEA, then section 161g. may be utilized as the leasing authority. In contrast, the Hall Amendment provides the Secretary authority to lease real and personal property located at a facility to be closed or reconfigured, irrespective of whether the property was acquired, or is contemplated to be leased, in order to carry out functions under the Atomic Energy Act. The Amendment provides:

> The Secretary may lease, upon terms and conditions the Secretary considers appropriate to promote national security

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[4](...continued)
(Sep. 23, 1996) (sale of surplus realty and personalty at the Department's Mound Plant might be done under sec. 161g. because purchaser's uses would further the public health and military objectives of the Atomic Energy Act); memorandum from Ralph D. Goldenberg, Assistant General Counsel, Department of Energy to Agnes P. Dover, Deputy General Counsel for Technology Transfer and Procurement, Department of Energy (June 5, 1996) (realty and personalty originally acquired to carry out non-nuclear research activities of the Western Energy Technology Center might be conveyed under sec. 161g. in order to have recipient conduct nuclear waste research relating to historical production activities under the Atomic Energy Act).

> or the public interest, acquired real property and related personal property that –
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> (1) is located at a facility of the Department of Energy to be closed or reconfigured;
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> (2) . . . is not needed by the Department of Energy; and
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> (3) is under the control of the Department of Energy.

42 U.S.C. 7256(c) (emphasis added).[5]

The Amendment requires that, in exercising this leasing authority, DOE must seek the concurrence of EPA (for leases at sites listed on the National Priorities List) or the host State (for leases at unlisted sites). 42 U.S.C. 7256(e). The concurrence role afforded to EPA and States under the Hall Amendment differs from the role afforded them under the existing cleanup agreements, which require only that DOE provide "notice" of proposed leases. Your memorandum indicated that the more specific coordination process prescribed by the Hall Amendment *is* likely to impede the timely execution of leases, based on Oak Ridge's experience to date in seeking EPA's concurrence.[6]

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[5] The Amendment also authorizes, to the extent provided in advance in appropriation acts, the Department to retain and use for certain purposes rental money received from a lessee. 42 U.S.C. 7256(f). Under section 16lg., any rental money received must be directed to the U.S. Treasury under the "Miscellaneous Receipts" statute, 31 U.S.C. 3302(b).

[6] Although the Hall Amendment allows DOE to proceed with a proposed lease if it does not receive concurrence advice within 60 days, we understand that EPA Region IV has taken the position that the statutory period does not begin to run until EPA determines that DOE has provided "complete supporting materials" in addition to a request for concurrence in executing the lease itself. Enclosure to letter from Camilla Warren, Chief of DOE Remedial Section, Federal Facilities Branch, Region IV, Environmental Protection Agency, to Steve McCracken, Oak Ridge Operations Office, Department of Energy (Feb. 5, 1997).

A review of the statute and its legislative history reveals that the Hall Amendment was intended to supplement, rather than to supplant, the Secretary's already existing lease authorities. The text of the Hall Amendment contains no words of exclusivity or prohibition directed to other property disposal authorities available under prior law, including section l6lg. Instead the Hall Amendment provides that "[t]he Secretary [of Energy] may lease, upon terms and conditions the Secretary considers appropriate. . . real property and related personal property" that is surplus to a DOE-controlled facility that is "to be closed or reconfigured." 42 U.S.C. 7256(c). These are classic terms of discretion rather than mandate, necessarily suggesting that the Secretary could, but was not required to, employ the Hall Amendment in any particular circumstance.[7]

The Hall Amendment's statutory context also suggests that its authority was additive and not limiting. The Amendment was added to section 646 of the Department of Energy Organization Act, a provision that originally dealt generally with contract and leasing authority. Compare 42 U.S.C. 7256 (1982). By grafting the Hall Amendment onto the DOE Act the Congress evidently contemplated that it would function in harmony with the other provisions of the DOE Act, including section 641 that authorizes continued exercise by the Department of "any authority" of laws whose "function[s]" had been transferred to the Department. 42 U.S.C. 7251. Those "functions" include "powers" and "authorities," and they include all those specified in the Atomic Energy Act. DOE Act sec. 2(b), 42 U.S.C. 7101(b) (defining "function"); id. sec. 301(a), 42 U.S.C. 7151(a) (transferring to DOE all "functions vested by law" in Energy Research and Development Administration, which included those of Atomic Energy Act).

From this structure one may infer that the Hall Amendment was intended to coexist with all its companion provisions in the DOE

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[7] Cf. Burglin v. Morton, 527 F.2d 486, 488 (9th *Cir.* 1975), cert. denied sub nom. Burglin v. Kleppe, 425 U.S. 973 (1976) (seemingly exclusive leasing authority under Mineral Lands Leasing Act did not require Interior Secretary to lease otherwise qualifying lands to applicant because of statute's usage of "may").

Act, and not displace them. This view is reinforced by the text of the Hall Amendment that specifies that the leases that will be subject to its procedures, including the requirement for EPA concurrence, are those particular ones done under the Hall Amendment itself (those leases done "under subsection (c)" of section 646 of the DOE Act that was added by the Hall Amendment).

Thus there is nothing in the text of the Hall Amendment that remotely suggests that it limits or curtails other property disposal authorities. Nor is the Hall Amendment rendered superfluous by the continued effectiveness of other property disposal authorities, including section 161g. The Hall Amendment, unlike section 161g., is not linked to prior or future uses of property for Atomic Energy Act functions. And it explicitly authorizes the making of leases at less than market value consideration, while section 161g. *is* silent on this point.[8]

Because the text of the Hall Amendment is not antagonistic to that of section 161g. there is nothing about it that would foreclose the two provisions from coexisting pursuant to their own terms. Moreover, because of the differing coverage of the sorts of property within their respective ambits, the Hall Amendment *is* not coextensive with section 161g. as to the sorts of property it reaches. Given the lack of repugnancy between their terms and instead their ability to coexist, the Hall

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[8] When the Hall Amendment was adopted in 1993 there evidently existed some congressional uncertainty whether section 161g. could authorize the leasing of DOE property for less than full market consideration. This question was not resolved until 1997. Letters from Eric J. Fygi, Acting General Counsel, Department of Energy, to Senator John Glenn and Representatives Tony P. Hall and Doc Hastings (Aug. 7, 1997) (responding affirmatively to inquiry during consideration of 1998 Defense Authorization bill whether the property disposal authority of section 161g. permitted property transfers at less than market value consideration).

Amendment presents no textual basis to resort to the disfavored interpretative technique of discerning a pro tanto repeal by implication of section 161g.[9]

The Hall Amendment's legislative history reinforces the view that it was intended to enlarge upon, rather than constrain, the Secretary's. authority under current law. As the conferees put it, the Hall Amendment was intended to afford "broad discretion to the Secretary to assist local communities adversely impacted by the reconfiguration of Department of Energy facilities," and to "facilitate the economic recovery of those communities." H.R. Conf. Rep. No. 357, 103 Cong., 1st Sess. 845 (1993). The Conference Report further stated that "(n)othing in this section should be interpreted to affect or constrain the disposal of surplus property by the Department of Energy [under] the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(g))." Id. at 845.

During House floor consideration of the Defense Authorization Act, Representative Hall, the amendment's sponsor, referenced other transfer authorities, stating that "laws and regulations governing the transfer and lease of buildings, equipment, and land create a maze of complicated technicalities" and that "there are no statutes which establish economic development as a justification for transferring or leasing property." He further stated that the "amendment does not override existing Federal environmental laws or property transfer policies." 129 Congo Rec. H7121 (daily ed. Sep. 28, 1993)(remarks of Rep. Hall).

None of this legislative history suggests any congressional intent to truncate any existing property disposal authority. Nor does it suggest any intention to impose new EPA concurrence conditions on the exercise of that existing authority. If anything this legislative history indicates that explicitly specifying "economic development as a justification for transferring or leasing [DOE] property" was the novelty that was being legislated. There was no indication that in legislating to encourage this objective the Congress sought to constrain use of other authorities to achieve it.

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[9] E.g., Morton v. Mancari, 417 U.S. 535, 549-51 (1974).

Thus, the Hall Amendment is a separate, discretionary authority that the Secretary may employ if conditions warrant its usage. The authority conferred on the Secretary by the Hall Amendment was intended to assist communities by expressly allowing disposal of property at less than market value at DOE sites that are being closed or reconfigured, and may be used in those circumstances. Because the Hall Amendment supplements rather than supersedes the Department's other authorities, however, there may be situations in which the use of either section 161g. of the AEA or the Hall Amendment would be appropriate. In determining whether section 161g. may be used, it is necessary to determine whether the property to be leased has been, or will be, used in order to carry out functions or achieve objectives of the AEA.

We note that EPA's March 10, 1997 letter to DOE's Office of Environmental Restoration criticized Oak Ridge's execution of several leases (relying on section l6lg. of the AEA), actions which EPA contended were "in contravention of the Hall Amendment requirements." The letter stated EPA's expectation that the procedures of the Hall Amendment will be applied to all future redevelopment leases "[u]nless EPA is convinced otherwise that DOE authority extends beyond the Hall Amendment. . . ." As the foregoing analysis indicates, that alternative authority exists in section l6lg. in appropriate circumstances, and use of the Hall Amendment therefore is not necessarily required for economic redevelopment leases. DOE counsel should review each proposed economic redevelopment lease to ensure that the authority cited is appropriate for that particular lease, consistent with the analysis set forth above.

With regard to your question about authority within the Department to execute leases under the authority of section l6lg., this office is working with the Associate Deputy Secretary for Field Management to ensure delegations of authority are in place to allow appropriate property management actions to be executed at the field level.

Finally, with regard to your observation that the matters raised in your memorandum may be more appropriate for resolution at the headquarters levels of DOE and EPA, DOE’s Office of Worker and Community Transition is leading a DOE effort to work with EPA Headquarters to formulate a joint policy on transfers of property pursuant to the Hall Amendment. We have advised that office of

the concerns that *you* have raised, and by a copy of this memorandum of our conclusions regarding the alternative leasing authorities available to the Department. We hope that many of your concerns, particularly the need to ensure that concurrence reviews are conducted expeditiously when the Hall Amendment authority is relied upon, can be addressed in the joint policy.

Please let me know if you have additional questions.

Signed by:
Eric J. Fygi

cc: Robert W. DeGrasse, Jr.
Director, Office of Worker
and Community Transition