

Memorandums of Understanding

Safety and Health Enforcement at Privatized Facilities and Operations.

- **Information Date:** 07/25/2000
 - **Agreement Agency:** Energy Office of Environment, Safety and Health
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MEMORANDUM OF UNDERSTANDING
BETWEEN
THE U. S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
AND
THE U. S. DEPARTMENT OF ENERGY
OFFICE OF ENVIRONMENT, SAFETY AND HEALTH
ON
SAFETY AND HEALTH ENFORCEMENT
AT PRIVATIZED FACILITIES AND OPERATIONS

I. PURPOSE:

This Memorandum of Understanding (MOU) delineates the procedures by which the Department of Energy (DOE) will notify the Occupational Safety and Health Administration (OSHA) regarding the need for the agencies to address occupational safety and health regulatory jurisdiction at certain privatized facilities and operations on DOE sites, and describes procedures and criteria for OSHA's acceptance of occupational safety and health regulatory jurisdiction at these facilities and operations.

II. SCOPE:

This MOU applies only to privatized facilities on DOE sites:

- 1) That have been leased to private business sector enterprises which are not conducting activities for or on the behalf of DOE; and
- 2) Where there is no likelihood that any employee exposure to radiation from DOE sources will be 25 millirems per year (mrem/yr) or more.

Note: In assessing whether facilities potentially meet the requirement in Item II.2, DOE will determine that the facilities meet release without restrictions criteria for property with residual radiological contamination as provided in DOE Order 5400.5 and are not within a controlled area as defined in 10 CFR Section 835.2(a). Additionally, as a matter of DOE policy, a facility is suitable for transfer only if it is demonstrated that the exposure to any employee of the private sector enterprise could reasonably be expected to be less than 25 mrem/year from all DOE sources. This policy is based on the guidance for implementation of DOE Order 5400.5 that releases of property be consistent with the ALARA (As Low As Reasonably Achievable) process and that exposures to the public be limited to one quarter or less of the maximum, which is 100 mrem annually.

III. BACKGROUND:

OSHA exercises regulatory authority relating to the occupational safety and health of private sector workers through the Occupational Safety and Health Act of 1970 (OSH Act). In many States and territories, this responsibility has been assumed by the State under the authority of an OSHA-approved State Plan, as provided by Section 18 of the OSH Act. Section 4(b)(1) of the OSH Act exempts working conditions of certain non-Federal employees from provisions of the OSH Act to the extent that other Federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. DOE is one of those agencies. Pursuant to Sections 161(b) and 161(i)(3) of the Atomic Energy Act (AEA) of 1954, as amended, DOE prescribes and enforces occupational safety and health standards regarding working conditions of contractor employees at its government-owned, contractor-operated (GOCO) facilities, where work under the authority of the AEA and subsequent Acts is conducted. DOE and OSHA formalized their delineation of occupational safety and health authority regarding GOCO facilities in a 1992 MOU that acknowledges preemption of OSHA by DOE under Section 4(b)(1) of the OSH Act at listed DOE GOCO facilities.

In early 1996, DOE began several initiatives to address budget reductions and to facilitate local community stability and revitalization in light of changes to the DOE weapons production mission following the end of the Cold War. These initiatives have resulted in the privatization, re-industrialization, or commercialization of many facilities and operations through various mechanisms, such as leases or sub-leases, and property sales. Certain of these facilities and operations (referred to in this MOU as "privatized") are engaged in private commercial enterprise, and thus, should no longer be subject to DOE worker safety and health regulatory authority under the Section 4(b)(1) exemption. Therefore, it is advisable for DOE and OSHA to establish a formal protocol to effect the transfer of jurisdiction from DOE to OSHA for the regulation of occupational safety and health requirements, and removing these facilities and operations from the list of GOCO facilities referenced in the 1992 MOU.

IV. POLICY:

Public Notification. There should be public notice that OSHA regulatory authority over the tenant employer is being established. For any given facility or operation that was previously occupied and regulated by DOE under the Section 4(b)(1) exemption, this will be accomplished by issuing an addendum to the 1992 MOU and publishing that addendum as a notice in the Federal Register.

State Plan Jurisdiction and Coverage of State and Local Government Employees. A number of DOE facilities and operations are located in state-plan states. While state coverage of entire DOE GOCO facilities has generally been held by the courts to be federally-preempted as Federal instrumentalities, privatized facilities or operations cannot accurately be characterized as GOCO operations and would not be subject to this form of federal preemption. Unless there is some other clear legal prohibition against state coverage (e.g., if the site is located in an enclave over which there is exclusive federal jurisdiction, or if there are state statutory limitations which prevent state OSHA coverage), OSHA will request state plan states to accept jurisdiction over privatized facilities and operations which meet the acceptance criteria set forth in this MOU.

State and local government employees are expressly excluded from Federal OSHA jurisdiction under the OSH Act, while OSHA-approved state plans are required to provide coverage to state and local government employees in their state. Federal OSHA cannot provide coverage to state and local government employees at privatized DOE facilities or operations in state plan or non-state plan states. Working conditions of state or local government employees engaged in work at privatized DOE facilities or operations may be

covered by state plan states. OSHA will request that state plan states provide such coverage.

DOE Landlord Function. Where DOE performs a landlord function at privatized facilities or operations, DOE may require conformance with landlord safety and health requirements. DOE's exercise of its landlord function, does not preempt the authority of OSHA or the State-Plan State at facilities for which OSHA has accepted jurisdiction. However, DOE, through its exercise of its landlord function, may be able to provide some level of protection to State and local government workers at privatized DOE facilities or operations where OSHA is legally unable to provide such protection.

Acceptance Criteria. Each proposed facility or operation must satisfy the following criteria before a formal transfer is executed:

- **The facility or operation must be operationally independent of DOE activities.** The activities proposed for the facility must be independent of DOE except to the extent that DOE serves solely as the landlord for facilities to which DOE retains title. The lack of such independence could lead to confusion over each agency's jurisdiction, which could increase risks to workers, create undesirable legal ambiguities for all of the institutions involved, and add security-related constraints to the worker complaint/investigation process.
- **The facility must meet release without restrictions criteria for property with residual radiological contamination as provided in DOE Order 5400.5 and must not be within a controlled area as defined in 10 CFR 835.2(a).**
- **A transfer to OSHA should be free from regulatory gaps and must not diminish the safety and health protections of the workers.**

Resolution of Impediments to OSHA Jurisdiction. If DOE or OSHA determines that a legal or regulatory impediment exists to Federal OSHA or a State-Plan State assuming jurisdiction for a facility that otherwise meets the acceptance criteria, jurisdiction for that facility will not transfer until the impediment has been removed. OSHA will determine whether the working conditions at the facility or operation are regulated by another Federal agency that could preempt OSHA under Section 4(b)(1) of the OSH Act.

V. TRANSFER PROCEDURES:

DOE's Deputy Assistant Secretary for Safety and Health will initiate any request for transfer of jurisdiction under this MOU by notifying OSHA of the affected privatized facilities or operations as soon as practicable. DOE will provide information requested by OSHA to assist OSHA in its acceptance verification review. To the extent that such information is available from DOE field offices, the transmittal to OSHA will include information about the business entity for which transfer is requested and will include, but not be limited to, the name of the business enterprise, the potential number of employees, the nature of the business with specific regard to hazards, the business standard industrial classification, and other information agreed to by DOE and OSHA. DOE will assure OSHA that no DOE standards or regulations affecting occupational safety and health apply to working conditions of employees at the privatized facility or operation. When DOE leases a facility or operation using its authority under 42 USC §7256(c)-(f) (the "Hall Amendment"), DOE will provide to OSHA a copy of any concurrence by the Environmental Protection Agency (EPA) or the State. When DOE leases a facility using an authority that does not require concurrence by EPA or the State, DOE will provide to OSHA any views expressed by EPA or the State as a result of informal consultation.

OSHA will review the information and resolve any issues regarding consistency with the acceptance criteria in a timely manner. Requests for additional information, if any are required, will be made as soon as possible, but within 60 days of DOE's request for transfer. A pre-transfer site visit may be conducted within this time period, at OSHA's discretion. DOE's Office of Worker Health and Safety agrees to facilitate such pre-transfer visits.

After reviewing all the information provided, and the results of any pre-transfer visits, OSHA will either agree to accept jurisdiction or notify DOE that it will not accept jurisdiction, noting the basis therefore, and will make every effort to make this determination within 90 days of DOE's original request. While initial requests for the transfer of jurisdiction may require the full use of this time period, it is anticipated that subsequent transfers may be effected more quickly.

OSHA will seek the participation of the affected State-Plan State in all discussions with DOE related to sites located within the States jurisdiction. An additional 30 days will be added to the 90 day timeframe for OSHA's decision on acceptance of jurisdiction when the site is located in a State-Plan State.

For facilities or operations which OSHA agrees to accept regulatory jurisdiction, OSHA will publish a Federal Register Notice as an addendum to the 1992 MOU between DOE and OSHA as soon as possible, but no later than 30 days after OSHA notifies DOE that OSHA will accept jurisdiction. As soon as possible after the publication of the Notice, but no later than the effective date of OSHA's acceptance of jurisdiction established therein, DOE will notify the affected tenant employers, and their employees, of OSHA's acceptance of jurisdiction and the effective date thereof.

VI. INFORMATION SHARING FOR NON-TRANSFERRED SITES:

For planning purposes, DOE will periodically provide OSHA with information on facilities and operations that do not currently fall within the scope of this MOU or fully meet the acceptance criteria noted above, but may qualify for transfer in the future. These facilities include:

- those that are undergoing environmental remediation to remove residual radiological contamination resulting from DOE activities in preparation for commercial operations that would fall within the scope of this MOU; and
- privatized facilities or operations engaged in DOE activities such as mixed waste management, environmental remediation, and deactivation & decommissioning and facilities.

VII. FUNDING:

This MOU shall not be used to obligate or commit funds, or as the basis for the transfer of funds.

VIII. EFFECTIVE DATE, AMENDMENT, AND TERMINATION:

This agreement will become effective when signed by the last of the parties to the agreement. It may be modified or amended by written agreement between the parties. Such amendments shall become part of, and shall be attached to, this agreement. This agreement shall remain effective until terminated by either party upon a 30-day written notice to the other.

The following signatures constitute acceptance by the Department of Energy and the Department of Labor.

U.S. Department of Energy

David Michaels, PhD, MPH
Assistant Secretary
Environment, Safety and Health

Date_____

U.S. Department of Labor

Charles N. Jeffress
Assistant Secretary of Labor
for Occupational Safety and Health

Date_____
