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**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 175**

**RIN 0790-AJ54**

**[Docket ID: DOD-2016-OS-0108]**

**Indemnification or Defense, or Providing Notice to the Department of Defense, Relating to a Third-Party Environmental Claim**

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** The DoD proposes to identify the proper address and notification method for an entity making a request for indemnification or defense, or providing notice to DoD, of a third-party claim under section 330 of the National Defense Authorization Act for Fiscal Year 1993, as amended (hereinafter “section 330”), or under section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, (hereinafter “section 1502(e)"). This rule also identifies the documentation required to demonstrate proof of any claim, loss, or damage for indemnification or defense or for providing notice to DoD of a third-party claim. This rule also provides the mailing address for such requests for indemnification or defense or notice to DoD of a third-party claim to be filed with DoD, Office of General Counsel, Deputy General Counsel for Environment, Energy, and Installations (DoDGC(EE&I)). This will allow for timely review and greater efficiency in screening requests for indemnification or defense by providing clarity to requesters.

**DATES:** Written comments on this proposed rule will be accepted on or before [INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments.

- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Advisory Committee Division, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

*Instructions:* All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mr. Philip Sheerman, 703-692-2287.

**SUPPLEMENTARY INFORMATION:**

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## **I. Legal Authority**

This part is proposed under 10 U.S.C. 113, 5 U.S.C. 301, section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, October 23, 1992, 106 Stat. 2371, as amended, and section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 1014 Stat. 1654A-350, as amended.

## **II. Background**

Sections 330 and 1502(e) provide that, subject to certain exceptions set forth in the statutes, the Secretary of Defense shall hold harmless, defend, and indemnify in full certain persons and

entities that acquire ownership or control of, in the case of section 330, any military installation closed pursuant to a base closure law or, in the case of section 1502(e), certain portions of the former Naval Ammunition Support Detachment on the island of Vieques, Puerto Rico (hereinafter “Detachment”), from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative<sup>1</sup> as a result of DoD activities at any military installation (or portion thereof) that is closed pursuant to a base closure law or the Detachment. (Coverage of pollutants and contaminants was added to section 330 by an amendment contained in the National Defense Authorization Act for Fiscal Year 1994, Public Law 103-160, § 1002.) It also provides that DoD has certain rights in defending third-party claims.

The authority to adjudicate requests for indemnification and process requests for defense under sections 330 or 1502(e) has been delegated from the Secretary of Defense to the DoD General Counsel and re-delegated by the General Counsel to DoDGC(EE&I). Requests for indemnification or defense or notice to DoD of a third-party claim must be sent to DoDGC(EE&I) to be considered.

The DoD recognizes that some real property transfer documents, such as deeds and agreements, entered into in past years provide for notification under sections 330 or 1502(e) being made to, e.g., the local BRAC program office. Until the promulgation of this rule in its final form, DoD has and will continue to honor such notifications made in conformance with those transfer documents. Effective 180 days after promulgation of this rule, while a requester may

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<sup>1</sup> Section 1502(e) does not apply to petroleum or petroleum derivatives.

continue to provide notification in accordance with such transfer documents, a requester must also comply with the notice requirements of this rule in order to comply with the requirements of sections 330 or 1502(e), particularly with regard to when the statutes of limitation in sections 330(b)(1) and 1502(e)(2)(A) begin to run. Nothing in this rule should be construed as requiring amendment of any such transfer documents.

The United States Federal Circuit has interpreted the definition of a “claim for personal injury or property damages” under section 330 to include, under certain circumstances, notice from an enforcement agency to conduct a cleanup. *Indian Harbor Insurance Co. v. United States*, 704 F.3d 949 (Fed. Cir. 2013). Because such notices may constitute a claim under section 330, a requester should carefully evaluate whether failing to provide notice to the Secretary would prevent the Secretary from settling or defending against a claim.

The timely and proper filing of a request for indemnification or defense enables DoDGC(EE&I) to perform its adjudication function for requests, maintain oversight of the implementation of sections 330 and 1502(e), and secure the rights of requesters under sections 330 and 1502(e). Proper notice to DoD of a claim from a third-party is also essential to allow DoD to exercise its right to defend against such a claim pursuant to sections 330(c) or 1502(e).

Under sections 330(c)(2) and 1502(e)(3)(B), the requester must allow DoD to defend the claim in order to be afforded indemnification for that claim. This regulation makes clear that failure to notify DoD immediately of receipt of any claim, or of a release that may lead to a claim, could prevent DoD from settling or defending that claim, and on that basis, DoD may deny indemnification. Failure to provide necessary documents and access will also prevent DoD from exercising its right to settle and defend the claim and, on that basis, DoD may deny indemnification.

In the context of a claim from an enforcement agency or third party seeking to require a cleanup or response action, failure to notify DoD may prevent DoD from exercising its right to defend against the claim. If the requester undertakes a cleanup or response action itself prior to providing immediate notice to DoD, the requestor's actions may interfere with DoD's ability to defend against a claim, which might result in denial of indemnification.

This proposed rule does not affect claims that are made pursuant to other authorities such as under a real property covenant contained in a deed in accordance with section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

### **III. Summary of Proposed Rule**

This proposal identifies the required process for submitting documentation necessary to support a request for indemnification or defense or to provide notice to DoD of a third-party claim under sections 330 or 1502(e). For a notice to DoD of a third-party claim, DoDGC(EE&I) must receive the specified paperwork at the specified address no less than 30 days after a requester receives a third-party claim or before any action is taken, or an agreement is entered into, related to a hazardous substance or a pollutant or contaminant, or petroleum or petroleum derivative covered by section 330 or a hazardous substance or a pollutant or contaminant covered by section 1502(e).

### **IV. Section-by-Section Analysis**

#### ***A. Purpose***

To ensure the proper implementation of sections 330 and 1502(e), requesters and DoD must communicate effectively and in a timely manner. This proposal will provide the necessary information for that interaction to take place.

## ***B. Applicability***

This proposal applies to the DoD General Counsel's Office, to the Military Departments, and to any person or entity making a request for indemnification or defense, or providing notice to DoD, of a third-party claim pursuant to sections 330 or 1502(e).

## ***C. Definitions***

This proposal defines the terms "commercial delivery service", "Deputy General Counsel", "received", "request", "requester", "section 330", "section 1502(e)", and "third-party claim".

## ***D. Responsibilities***

This proposal advises that the responsibilities of the Secretary of Defense under sections 330 and 1502(e) have been delegated to the General Counsel of the DoD who has, in turn, re-delegated certain of those responsibilities, particularly with regard to adjudication of requests for indemnification, to DoDGC(EE&I). DoDGC(EE&I) exercises this responsibility through close communication with the military department that has property disposal responsibility for the closed installation subject of the request for indemnification or defense. Such communication includes obtaining review by, and the recommendations of, the military department on the merits of the request for indemnification or defense. Likewise, DoDGC(EE&I) communicates any notice of a third-party claim to the military department and works closely with the military department in determining what action, if any, the DoD will take in response to the notice. The proposal also contains responsibilities of requesters, delineated in the body of the rule.

## ***E. Requests for indemnification or defense***

This proposal explains the process to be used, timelines that apply, and documentation that must be received by DoDGC(EE&I) for a request for indemnification or defense. The mailing

address and required method of delivery are specified. The proposal also requires a requester to provide DoD with a right of entry at reasonable times for purposes of inspecting the property and obtaining samples. The proposal also provides for reconsideration of a DoD determination.

#### ***F. Third-party claims***

This proposal explains the process to be used, timelines that apply, and documentation that must be received by DoDGC(EE&I) relating to a notice of a third-party claim. The mailing address and required method of delivery are specified. The proposal also requires a requester to provide DoD with a right of entry at reasonable times for purposes of inspecting the property and obtaining samples. The section specifies that a requester must notify DoD within 30 days of receiving the third-party claim or 30 days before taking an action in order to allow DoD to determine what action to take with regard to the claim.

### **V. Summary of Challenges**

Informing all affected persons and entities about this rule will require communication with relevant non-governmental organizations.

### **VI. Discussion of Other Major Alternatives**

#### ***A. Status Quo***

The current process is unclear, inefficient, and time-consuming, causes delay, and may be ineffective. This lack of clarity contributes to concern that indemnification is not being addressed adequately and creates the potential for impairment of DoD's ability to present an effective defense of claims under sections 330 or 1502(e). The DoD is committed to sound environmental stewardship in all of its activities while meeting the goal of encouraging the development of land for productive use.

## **VII. Costs and Benefits**

### **Cost Analysis**

Based on the relatively small number of claims per year, compliance costs under this regulation are expected to be minimal. In fact, this regulation will reduce compliance costs because it will streamline and clarify the process for the submission of information which would have to be submitted in any case in order to obtain a determination regarding indemnification or defense or provide notice to DoD of a third-party claim under sections 330 or 1502(e).

### **Benefits Analysis**

This proposal will clarify the process for requesters of indemnification or defense and promote efficient protection of the environment by enhancing communication between requesters and DoD. This enhanced and simplified communication process will result in fewer burdens for both requesters and DoD in the form of avoiding unnecessary, inappropriate, or duplicative paperwork. This proposal does not require any greater disclosure of information from a requester than sections 330 or 1502(e) already require. Enhancing DoDGC(EE&I)'s ability to adjudicate requests for indemnification or respond to requests for defense under sections 330 or 1502(e) will reduce the burden of information requests upon those entities requesting indemnification or defense, or providing notice to DoD, of a third-party claim under sections 330 or 1502(e). This proposal will promote protection of requesters' rights by reducing the possibility of a request for indemnification or defense being acted upon by the wrong agency or a statute of limitations running due to failure to provide timely notification to the proper agency.

## **VIII. Administrative Requirements**

### ***A. Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”***

Under E.O. 12866 and E.O. 13563, DoD must determine whether this regulatory action is “significant” and therefore subject to review by the Office of Management and Budget (OMB) and to the requirements of this E.O., which include assessing the costs and benefits anticipated as a result of the proposed regulatory action. E.O. 12866 defines “significant regulatory action” as one that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in E.O. 12866.

This proposed rule will not have an adverse effect on the economy or cost the economy \$100 million or more per year. Requests for indemnification are small in number and do not approach anywhere near \$100 million per year, individually or collectively. c Although not economically significant, this rule has been designated a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by OMB under the requirements of these Executive Orders.

### ***B. Regulatory Flexibility Act***

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601, et seq., requires Federal agencies to

consider “small entities” throughout the regulatory process. Section 603 of the Regulatory Flexibility Act requires an initial screening analysis performance to determine whether small entities will be adversely affected by the regulation. If affected small entities are identified, regulatory alternatives must be considered to mitigate the potential impacts. Small entities as described in the Regulatory Flexibility Act are only those “business, organizations and governmental jurisdictions subject to regulation.” It has been certified that this proposed rule will not add to the current burden for small entities to report their activities based on a request for indemnification or defense under sections 330 or 1502(e). This proposal will benefit small entities by streamlining communication to reduce the cost of making a request for indemnification or defense, or providing notice to DoD, of a third-party claim.

### ***C. Paperwork Reduction Act***

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501, authorizes the Director of OMB to review certain information collection requests by Federal agencies. The recordkeeping and reporting requirements of this proposed rule do not constitute a “collection of information” as defined in 44 U.S.C. 3502(3), the Paperwork Reduction Act of 1995.

### ***D. Environmental Justice***

Under E.O. 12898 (59 FR 7629 (February 11, 1994)), Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Federal agencies are required to identify and address disproportionately high and adverse human health and environmental effects of Federal programs, policies, and activities on minority and low-income populations. Given the application of this proposed rule throughout the entire United States, DoD is soliciting comment and input from all public entities and government agencies, including members of the environmental justice community and members of the regulated community.

Sections 330 and 1502(e) are intended to reduce specified risks from development of former military land by aiding and legally protecting the entities that take title to land on closed military installations for development purposes. Because this rule will equally affect reporting associated with the development of land on a national basis, a disparate impact on minority and low-income population areas is not expected.

#### ***E. Unfunded Mandates***

Title II of the Unfunded Mandates Report Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Indian tribal governments and the private sector. Under Section 202 of the UMRA, DoD generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and Indian tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year.

The DoD has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Indian tribal governments, in the aggregate, or the private sector in any one year. Thus, this proposed rule is not subject to the requirements of Section 202 of the UMRA.

#### ***F. Executive Order 13132, “Federalism”***

It has been determined that this rule does not have federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### **List of Subjects in 32 CFR Part 175**

## Indemnification, Claim

Accordingly, 32 CFR part 175 is proposed to be added to read as follows:

### **PART 175—INDEMNIFICATION OR DEFENSE, OR PROVIDING NOTICE TO THE DEPARTMENT OF DEFENSE, RELATING TO A THIRD-PARTY ENVIRONMENTAL CLAIM**

Sec.

175.1 Purpose.

175.2 Applicability.

175.3 Definitions.

175.4 Responsibilities.

175.5 Notice to DoD relating to a third-party claim.

175.6 Filing a request for indemnification or defense.

AUTHORITY: 10 U.S.C. 113, 5 U.S.C. 301, section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, October 23, 1992, 106 Stat. 2371, as amended, and section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 1014 Stat. 1654A-350, as amended.

#### **§ 175.1 Purpose.**

This part describes the process for filing a request for indemnification or defense, or providing proper notice to DoD, of a third-party claim pursuant to section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, October 23, 1992, 106 Stat. 2371, as amended (hereafter “section 330”), or section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 1014 Stat. 1654A-350, as amended (hereafter “section 1502(e)"). This process identifies the minimum

information that a request for indemnification or defense or notice to DoD of a third-party claim for indemnification must include, where that information must be sent, how to make such a request or provide such a notice, the time limits that apply to such a request or notice, and other requirements.

**§ 175.2 Applicability.**

(a) This part applies to—

(1) The Office of the General Counsel of the Department of Defense and the Military Departments.

(2) Any person or entity making a request for indemnification or defense, or providing notice to DoD, of a third-party claim pursuant to section 330 or section 1502(e).

(b) In the case of a property that is subject to an earlier agreement containing different notification requirements, the requirement for notice to the Deputy General Counsel in sections 175.5 and 175.6 are in addition to those notification requirements.

**§ 175.3 Definitions.**

(a) *Commercial delivery service.* Federal Express or United Parcel Service, or other similar service that provides for delivery of packages directly from the sender to the recipient for a fee, but excluding the United States Postal Service (USPS).

(b) *Deputy General Counsel.* The Deputy General Counsel (Environment, Energy, and Installations), Department of Defense (DoDGC(EE&I)).

(c) *Received.* Actual physical receipt by the intended recipient.

(d) *Request.* Any request for indemnification or defense made to the Department of Defense (DoD) by a requester pursuant to section 330 or section 1502(e).

(e) *Requester.* A person or entity making a request pursuant to section 330 or section 1502(e). When the requester is acting by way of subrogation, the requester is subject to the same requirements and limitations as though it were the subrogee.

(f) *Section 330.* Section 330 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, October 23, 1992, 106 Stat. 2371, as amended.

(g) *Section 1502(e).* Section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 114 Stat. 1654A-350. (This provision applies only to certain portions of the former Naval Ammunition Support Detachment on the island of Vieques, Puerto Rico.)

(h) *Third-party claim.* A claim from a person or entity (other than the requester) to a requester resulting from a suit, claim, demand or action, liability, judgment, cost or other fee, demanding, seeking, or otherwise requiring that the requester pay an amount, take an action, or incur a liability for alleged personal injury or property damage and such payment, action, or liability is eligible for indemnification or defense pursuant to section 330 or section 1502(e). A third-party claim may consist of a notice, letter, order, compliance advisory, compliance agreement, or similar direction from a governmental regulatory authority exercising its authority to regulate the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative if the notice, letter, order, compliance advisory, compliance agreement, or similar notification imposes, directs, or demands requirements for environmental actions or asserts damages related thereto that is eligible for indemnification or defense pursuant to section 330 or section 1502(e).

#### **§ 175.4 Responsibilities.**

(a) The General Counsel of the Department of Defense has been delegated the authorities and responsibilities of the Secretary of Defense under section 330 or section 1502(e), with certain limitations as to re-delegation.

(b) The General Counsel has re-delegated the authority and responsibility to adjudicate requests for indemnification or defense and to process notices to DoD of a third-party claim under section 330 and section 1502(e) to the Deputy General Counsel, Environment, Energy, and Installations, of the Department of Defense or, when the position of Deputy General Counsel is vacant, the acting Deputy General Counsel. The authority to acknowledge receipt of a request has been delegated to an Associate General Counsel under the Deputy General Counsel, Environment, Energy, and Installations.

#### **§ 175.5 Notice to DoD relating to a third-party claim.**

(a) *Where to file a notice to DoD of a third-party claim.* Notice to DoD of receipt of a third-party claim, or intent to enter into, agree to, settle, or solicit such a claim, must be received by the Deputy General Counsel at the following address: Deputy General Counsel, Environment, Energy, and Installations, 1600 Defense Pentagon, Room 3B747, Washington, D.C. 20301-1600. Delivering or otherwise filing a notice of a third-party claim with any other office or location will not constitute proper notice for purposes of this part. Requesters should be aware that all delivery services, and particularly that of the USPS, to the Pentagon can be significantly delayed for security purposes and they should plan accordingly in order to meet any required filing deadlines under this part; use of a commercial delivery service may reduce the delay.

(b) *Individual requests.* A notice to DoD of a third-party claim must be filed separately for each person or entity that is filing the notice. Notices may not be filed jointly for a group, a class, or for multiple persons or entities.

(c) *Means of filing a notice of a third-party claim.* A notice of a third-party claim must be submitted in writing by mail through the USPS or by a commercial delivery service. While the Deputy General Counsel will affirmatively acknowledge receipt of a notice of a third-party claim, it is recommended that a requester, whether using the USPS or a commercial delivery service, mail its notice by registered or certified mail, return receipt requested, or equivalent proof of delivery.

(d) *Information to be included in a notice to DoD of a third-party claim.* A notice to DoD of a third-party claim must include, at a minimum, the following information:

(1) A complete copy of the third-party claim, or, if not presented in writing, a complete summary of the claim, with the names of officers, employees, or agents with knowledge of any information that may be relevant to the claim or any potential defenses. The third-party claim may consist of a summons and complaint or, in the case of a third-party claim from a governmental regulatory authority, a notice, letter, order, compliance advisory, compliance agreement, or similar notification.

(2) A complete copy of all pertinent records, including any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for the facility for which the third-party claim is made.

(3) If the requester is not the first transferee from DoD, a complete copy of all intervening deeds, sales agreements, bills of sale, leases, licenses, easements, rights-of-way, or other transfer documents between the original transfer from DoD and the transfer to the current owner. If the requester is a lender who has made a loan to a person

or entity who owns, controls, or leases the facility for which the request for indemnification is made that is secured by said facility, complete copies of all promissory notes, mortgages, deeds of trust, assignments, or other documents evidencing such a loan by the requester.

(4) A complete copy of any insurance policies related to such facility.

(5) If the notice to DoD of a third-party claim is being made by a representative, agent, or attorney in fact or at law, proof of authority to make the notice on behalf of the requester.

(6) Evidence or proof of any claim, loss, or damage alleged to be suffered by the third-party claimant which the requester asserts is covered by section 330 or by section 1502(e).

(7) In the case where a requester intends to enter into, agree to, settle, or solicit a third-party claim, a description or copy of the proposed claim, settlement, or solicitation, as the case may be.

(8) To the extent that any environmental response action has been taken, the documentation supporting such response action and its costs included in the request for indemnification.

(9) To the extent that any environmental response action has been taken, a statement as to whether the remedial action is consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (Part 300 of title 42, Code of Federal Regulations) or other applicable regulatory requirements.

(10) A complete copy of any claims made by the requester to any other entity related to the conditions on the property which are the subject of the claim, and any

responses or defenses thereto or made to any third-party claims, including correspondence, litigation filings, consultant reports, and other information supporting a claim or defense.

(e) *Entry, inspection, and samples.* The requester must provide DoD a right of entry at reasonable times to any facility, establishment, place, or property under the requester's control which is the subject of or associated with the requester's notice of third-party claim and must allow DoD to inspect or obtain samples from that facility, establishment, place, or property.

(f) *Additional information.* The Deputy General Counsel will advise a requester in writing of any additional information that must be provided to defend against a claim. Failure to provide the additional information in a timely manner may result in denial of a request for indemnification or defense for lack of information to adjudicate the claim.

(g) *When to file a notice to DoD of a third-party claim.*

(1) A requester must, within 30 days of receiving a third-party claim, file with DoD a notice of such claim in accordance with this part. Failure to timely file such a notice, if it in any way compromises the ability of DoD to defend against such a claim pursuant to section 330(c) or section 1502(e)(3), will result in denial of any subsequent request for indemnification or defense resulting from such a claim. Requesters who take action in compliance with any such third-party claim, or any part of such claim, without first providing DoD with a notice of such claim in accordance with this section do so at their own risk.

(2) A requester must, at least 30 days prior to the earlier of entering into, agreeing to, settling, or soliciting a third-party claim, file a notice to DoD of such intent in accordance with this part. Failure to file such a notice will compromise the ability of DoD to defend against such a claim pursuant to section 330(c) or section 1502(e)(3) and will

result in denial of any subsequent request for indemnification or defense resulting from such a claim.

(h) *No implication from DoD action.* Any actions taken by DoD related to defending a claim do not constitute a decision by DoD that the requester is entitled to indemnification or defense.

(i) *Notice also constituting a request for indemnification or defense.* Notice of receipt of a third-party claim may constitute a request for indemnification or defense if that notice complies with all applicable requirements for a request for indemnification or defense.

#### **§ 175.6 Filing a request for indemnification or defense.**

(a) *Where to file a request for indemnification or defense.* In order to notify DoD in accordance with section 330(b)(1) or section 1502(e)(2)(A), a request for indemnification or defense pursuant to section 330 or section 1502(e) must be received by the Deputy General Counsel at the following address: Deputy General Counsel, Environment, Energy, and Installations, 1600 Defense Pentagon, Room 3B747, Washington, D.C. 20301-1600.

Delivering or otherwise filing a request for indemnification or defense with any other office or location will not constitute proper notice of a request for purposes of section 330(b)(1) or section 1502(e)(2)(A). Requesters should be aware that all delivery services, and particularly that of the USPS, to the Pentagon can be significantly delayed for security purposes and they should plan accordingly in order to meet any required filing deadlines under this part; use of a commercial delivery service may reduce the delay.

(b) *When to file a request for indemnification or defense.* A request for indemnification must be received by the Deputy General Counsel within two years after the claim giving rise to the request accrues. A request for defense must be received by the Deputy General Counsel in

sufficient time to allow the United States to provide the requested defense.

(c) *Means of filing a request for indemnification or defense.* A request for indemnification or defense must be submitted in writing by mail through the USPS or by a commercial delivery service. While the Deputy General Counsel will affirmatively acknowledge receipt of a request for indemnification or defense, it is recommended that a requester, whether using the USPS or a commercial delivery service, mail its request by registered or certified mail, return receipt requested, or equivalent proof of delivery.

(d) *Individual requests.* A request for indemnification or defense must be filed separately for each person or entity that is making the request. Requests may not be filed jointly for a group, a class, or for multiple persons or entities.

(e) *Information to be included in a request for indemnification or defense.* A request for indemnification or defense must include, at a minimum, the following information:

(1) A complete copy of the third-party claim, or, if not presented in writing, a complete summary of the claim, with the names of officers, employees, or agents with knowledge of any information that may be relevant to the claim or any potential defenses.

(2) A complete copy of all pertinent records, including any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for the facility for which the request for indemnification or defense is made.

(3) If the requester is not the first transferee from DoD, a complete copy of all intervening deeds, sales agreements, bills of sale, leases, licenses, easements, rights-of-way, or other transfer documents between the original transfer from DoD and the transfer to the current owner. If the requester is a lender who has made a loan to a person or entity who owns, controls, or leases the facility for which the request for indemnification

is made that is secured by said facility, complete copies of all promissory notes, mortgages, deeds of trust, assignments, or other documents evidencing such a loan by the requester.

(4) A complete copy of any insurance policies related to such facility.

(5) If the request for indemnification or defense is being made by a representative, agent, or attorney in fact or at law, proof of authority to make the request on behalf of the requester.

(6) Evidence or proof of any claim, loss, or damage covered by section 330 or by section 1502(e).

(7) In the case of a request for defense, a copy of the documents, such as a summons and complaint, or enforcement order, representing the matter against which the United States is being asked to defend.

(8) To the extent that any environmental response action has been taken, the documentation supporting such response action and its costs included in the request for indemnification.

(9) To the extent that any environmental response action has been taken, a statement as to whether the remedial action is consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (Part 300 of title 42, Code of Federal Regulations) or other applicable regulatory requirements.

(10) A complete copy of any claims made by the requester to any other entity related to the conditions on the property which are the subject of the claim, and any responses or defenses thereto or made to any third-party claims, including correspondence, litigation filings, consultant reports, and other information supporting a claim or defense.

(f) *Entry, inspection, and samples.* The requester must provide DoD a right of entry at

reasonable times to any facility, establishment, place, or property under the requester's control which is the subject of or associated with the requester's request for indemnification or defense and must allow DoD to inspect or obtain samples from that facility, establishment, place, or property.

(g) *Additional information.* The Deputy General Counsel will advise a requester in writing of any additional information that must be provided to adjudicate the request for indemnification or defense. Failure to provide the additional information in a timely manner may result in denial of the request for indemnification or defense.

(h) *Adjudication.* The Deputy General Counsel will adjudicate a request for indemnification or defense and provide the requester with DoD's determination of the validity of the request. Such determination will be in writing and sent to the requester by certified or registered mail.

(i) *Reconsideration.* Any such determination will provide that the requester may ask for reconsideration of the determination. Such reconsideration shall be limited to an assertion by the requester of substantial new evidence or errors in calculation. The requester may seek such reconsideration by filing a request to that effect within 30 days of receipt of determination. A request for reconsideration must be received by the Deputy General Counsel within 30 days after receipt of the determination. Such a request must be sent to the same address as provided for in paragraph (a) of this section and provide the substantial new evidence or identify the errors in calculation. Such reconsideration will not extend to determinations concerning the law, except as it may have been applied to the facts. A request for reconsideration will be acted on within 30 days from the time it is received. If a request for reconsideration is made, the six month period referred to in section 330(b)(1) and section 1502(e)(2)(A) will commence from the date the

requester receives DoD's denial of the request for reconsideration.

(j) *Finality of adjudication.* An adjudication of a request for indemnification constitutes final administrative disposition of such a request, except in the case of a request for reconsideration under paragraph (i) of this section, in which case a denial of the request for reconsideration constitutes final administrative disposition of the request.

Dated: December 2, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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