

DEPARTMENT OF DEFENSE**Office of the Secretary****32 CFR Parts 174, 175, and 176**

DOD-2006-OS-0020

[RIN 0790-AH91]

Revitalizing Base Closure Communities and Addressing Impacts of Realignment**AGENCY:** Department of Defense (DoD).**ACTION:** Final rule.

SUMMARY: The Department of Defense (DoD) is amending its regulations governing the disposal of property at installations being closed and realigned and how to address the impacts of realignment at receiving installations. This final rule contains amendments to address changes in the laws governing base closure and realignment (BRAC) made since the current regulations were promulgated. This final rule also amends DoD policy and addresses various environmental requirements not previously addressed in the regulations. **DATES:** *Effective Date:* This final rule is effective on February 28, 2006.

FOR FURTHER INFORMATION CONTACT: Mr. Steven N. Kleiman at (703) 571-9085.

SUPPLEMENTARY INFORMATION:**Preamble Outline**

- I. Authority
- II. Background
- III. Summary of Significant Changes to the Final Rule
- IV. Response to Comments
 - A. General
 - B. Definitions
 - C. Policy
 - D. Responsibilities
 - E. LRA and the Redevelopment Plan
 - F. Retention for DoD Component Use and Transfer to Other Federal Agencies
 - G. Screening Properties After Declaration of Surplus
 - H. Economic Development Conveyances
 - I. Leasing of Real Property to Non-Federal Entities
 - J. Leasing of Transferred Real Property by Federal Agencies
 - K. Personal Property
 - L. Maintenance and Repair
 - M. Indemnification Under Section 330 of the National Defense Authorization Act for Fiscal Year 1993
 - N. Real Property Containing Explosive or Chemical Agent Hazards
 - O. NEPA
 - P. Historic Preservation
- V. Administrative Requirements
 - A. Regulatory Impact Analysis Pursuant to Executive Order 12866
 - B. Regulatory Flexibility Act
 - C. Unfunded Mandates
 - D. Paperwork Reduction Act
 - E. National Technology Transfer and Advancement Act

- F. Environmental Justice Requirements Under Executive Order 12898
- G. Federalism Considerations Under Executive Order 13132

I. Authority

This action is authorized by the Defense Base Closure and Realignment Act of 1990, Title XXIX of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510; the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, Pub. L. 103-421; the Military Construction Authorization Act for Fiscal Year 1994, Division B of Pub. L. 103-160; and 10 U.S.C. § 113.

II. Background

The Department of Defense (hereinafter the Department) developed the original rule, which this rule would amend, in conjunction with prior rounds of base closures and realignments. The Department published this amendment in the **Federal Register** as a proposed rule on August 9, 2005, at 70 FR 46116.

In the preamble for the proposed rule, the Department explained that the rule was a counterpart to two Department issuances: DoD Directive 4165.66, Revitalizing Base Closure Communities and Community Assistance, and DoD Instruction 4165.67, Revitalizing Base Closure Communities—Base Closure Community Assistance. The Department further advised that these two issuances were being revised in conjunction with the proposed rule. During the public comment period, the Department further considered the need for such counterpart issuances and determined that there was no need for either the DoD Directive or the DoD Instruction. Consequently, DoD Directive 4165.66 and DoD Instruction 4165.67 have been canceled. For purposes of ensuring the necessary and appropriate delegations of authority, DoD Directive 5134.01, Under Secretary of Defense for Acquisition, Technology, and Logistics (USD (AT&L)), has been revised to include delegation language specific to the base closure process. The cancellations of DoD Directive 4165.66 and DoD Instruction 4165.67 do not affect in any way the validity, applicability, or enforceability of the rule but merely reduces the number of additional internal publications issued by the Department.

The public comment period for the proposed rule ended October 11, 2005. Thirty-one commenters submitted comments on the proposed rule. Several commenters submitted comments after the close of the public comment period; to the extent the Department was able to

respond to these comments without significantly interfering with the timely publication of this final rule, those comments were also considered. The preamble to this final rule consists mainly of an explanation of the Department's responses to these comments. Therefore, both this preamble and the preamble to the proposed rule should be reviewed should a question arise as to the meaning or intent of the final rule.

The preamble to the final rule provides a discussion of each proposed rule section on which comments were received. Where changes in the rule are being made, specific reference is made to those changes in the discussion. Where no such specific reference is made in the discussion, no change to the rule is being made. Revisions to the proposed rule that are simply editorial or that do not reflect substantive changes are not addressed in this preamble.

All comments the Department received are presented in a document available at either <http://www.defenselink.mil/brac/> or <http://www.oea.gov>.

III. Summary of Significant Changes to the Final Rule

The Department made a number of changes to the proposed rule that are reflected in this final rule. A detailed explanation of modifications is provided in the preamble.

IV. Response to Comments

This section contains the Department's responses to the comments received on the proposed rule, organized by the structure of the proposed and final rules.

The primary purpose of the rule is to bring the Department's regulatory framework into line with statutory enactments made subsequent to the promulgation of the existing regulation. Many of the items of concern noted by commenters are, in fact, changes made to comply with the base closure laws as they have been amended, and such changes have been incorporated into the rule whenever applicable and appropriate. The Department does not see the disposal process as a "zero-sum" arrangement. The purpose of the implementation provisions of the base closure laws and associated provisions of law are to provide an ordered process to achieve a number of Congressional goals. Among these goals (and not in any order of importance) is to ensure a meaningful role for local communities in planning the reuse of the installation, ensure efficient use of excess Federal property, provide support to homeless

providers, promote job generation at closing facilities, require appropriate and timely environmental remediation, and recoup the taxpayers' investment in installations. Some of the goals may well be better accomplished if the local redevelopment authority (LRA) is not the transferee but focuses on planning redevelopment. Many of the most contentious provisions in the rule, judging from the comments, actually represent language taken almost verbatim from the base closure laws. The Department has carefully considered the many comments it has received. Its responses follow:

A. General

Several commenters asked the Department to commit to a specific date for publication of the Base Redevelopment and Realignment Manual (BRRM). As a subordinate document to this rule, the BRRM cannot be published in final form until after this rule is published in final form. The Department intends to publish the BRRM as soon as reasonably possible after the publication of this final rule.

Several commenters stated that the rule was directed at maximizing the Department's monetary return, as opposed to promoting economic recovery by transfer of properties to local communities. The Department disagrees. Promoting monetary return to the Department for use either at the particular location or at other locations and rapid property transfer to encourage job generation are not mutually exclusive. The rule conforms with the base closure laws and with other applicable statutes and regulations such as those of the General Services Administration (GSA). Unlike the current regulation which it would replace, the rule does not give any particular preference to one form of disposal over another. It conforms to the base closure laws in its order of actions; *i.e.*, screening with the DoD Components and the U.S. Coast Guard and with other Federal agencies, followed by disposal actions heavily influenced by the local redevelopment plan. Some commenters have observed that, *e.g.*, requiring Federal agencies to pay fair market value for property received is an example of trying to maximize the Department's monetary return. The GSA regulations governing transfers between Federal agencies require such payments unless waived, and the rule complies with this standard. The Department believes that the most likely effect of conforming to this requirement is that more property will be available for transfer to non-Federal entities for redevelopment than

would otherwise be available. The rule also provides, as do the base closure laws, for economic development conveyances (EDCs), either at fair market value or at no cost. The decision regarding making an EDC will normally occur before a property is considered for public sale, and, although this does not represent a preference of one type of disposal over another, it does represent the rules' conformance to the order of disposal actions provided for in the base closure laws. The rule does conform to statutory changes that eliminated the stated preference for no-cost or reduced-cost EDCs; but conforming to those statutory changes does not represent an effort by the Department to seek greater monetary return. It simply represents the Department's effort to conform its rule to the statute.

Several commenters suggested that the Department contract with local entities to take advantage of their special expertise in closing or realigning an installation. The Department's authority to contract is provided for and qualified, as appropriate, in the laws governing the Department's procurement actions and in the Federal Acquisition Regulation. In addition, the Congress has provided a preference for local and small businesses in section 2912 of Pub. L. 103-160. Such preferences are properly addressed in those regulations governing procurement, as opposed to this rule.

Several commenters recommended that the Department commit to adopt or conform to any cleanup standards or levels provided by the local redevelopment plan, even though they might be greater than those required by current use or required by law. Cleanup standards are established pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and its implementing regulation, the National Contingency Plan (NCP). Those legal requirements provide for a thorough list of factors to be considered in determining the cleanup standard at each location and include, among many others, the reasonably anticipated future uses of the property. As with any private party, the Department must comply with these requirements in establishing a cleanup level. This process is overseen by Federal and state environmental regulators. Consequently, the cleanup levels established for any particular site will be in complete conformance with all legal requirements. The Congress has clearly directed the Department to conform to the requirements of CERCLA and the NCP, and the Department will do so in its cleanup program.

Several commenters believe that the local redevelopment plan should be given greater weight in either the environmental analysis process or in the disposal plan. Some would like the local redevelopment plan to be a preferred alternative or the primary factor in developing the proposed Federal action in the National Environmental Policy Act (NEPA) process. The base closure laws are clear on the role of the local redevelopment plan in the NEPA process. The plan is part of the proposed Federal action. This means it is a basis for developing the action to be analyzed. In other words, it is what is being analyzed, so it plays a far greater role than it would if it were merely a preferred alternative (one way to achieve the proposed action) or the primary factor in developing the proposed action. These suggestions would have the unintended consequence of actually diluting the role of the local redevelopment plan, while the governing statute clearly and explicitly states the role that the plan has in the NEPA process.

Several commenters recommended that the rule describe the roles of environmental regulators, the LRA, and others in the restoration program. The roles of these entities in the restoration program are established in the various environmental laws, primarily CERCLA and the NCP. It is outside of the Department's authority to specify the roles of these entities under those laws.

One commenter suggested the desirability of using fixed price remediation agreements with privatized financial assumption, including liability assumption. Agreements to have the property recipient assume responsibility for environmental matters are provided for in section 2905(e) of Pub. L. 101-510. Such agreements would be fixed price with privatized financial assumption, including liability assumption, but would also be subject to the other requirements of that subsection. The rule does not specifically address this matter because the Department has no requirements to add beyond those of the statute.

Several commenters have observed that the rule does not integrate environmental cleanup with property disposal and reuse planning. The Department recognizes the importance of integrating environmental cleanup with property disposal and redevelopment planning. Cleanup standards are tied to future land use and established pursuant to CERCLA and the NCP. Future land use is informed by the property disposal plan. As stated earlier, the local redevelopment plan is a basis for any proposed Federal action.

Therefore, the redevelopment planning, property disposal, and environmental cleanup are integrated. The cleanup process is overseen by Federal and state environmental regulators. Consequently, the cleanup levels established for any particular site will be in complete conformance with all legal requirements. In addition, the public has a chance to comment on proposed cleanup standards in the public participation venues required by CERCLA.

Several commenters suggested that the rule address timely release of environmental information. The Department does not believe that specific regulatory requirements can or should be imposed to create timelines for these activities. The BRRM does provide guidance to the Military Departments and other interested parties as to when and how to release environmental information.

One commenter suggested that the Department schedule a meeting with "stakeholders" to discuss the Department's environmental policies before issuing final regulations. The Department has been meeting with various interested parties with regard to its environmental policies, and will continue to do so. However, it cannot delay the realignment and closure implementation process for this purpose.

One commenter complained that the rule only requires the Department to consult with the LRA and others such as the Governor, not obtain their agreement, over future land uses, environmental restoration decisions, etc. Neither the base closure laws nor the various environmental statutes require obtaining agreement from the LRA. Likewise, section 2905(b)(2)(D) of the base closure law explicitly states that the Secretary shall "consult with the Governor of the State and the heads of the local governments" as opposed to obtaining their agreement. The Department will continue to consult with the LRA and other appropriate officials over future land uses, environmental restoration decisions, etc.

One commenter suggested that an additional section be added to clarify the Department's responsibilities regarding environmental contamination under CERCLA. The recommendation was to add language that addressed the Department's continuing liability for contamination on the property. The Department disagrees with the suggestion to add language. The Department's liability under CERCLA (and other applicable environmental laws) will be established for each

location depending on the law and facts of the site. This could include not only numerous Federal laws, but state and local laws as well. The process used to determine liability under CERCLA, including as between the Department and its contractors, is highly complex and virtually impossible to accurately describe in the context of this rule.

Furthermore, the rules governing such liability are found in statutes and regulations for which the Department does not exercise primary authority. It would be inappropriate and likely to create confusion for the Department to attempt to define its CERCLA liability in this rule.

One commenter observed that the rule does not address how the Department will mitigate or resolve effects on base closures and realignments on tribal nations affected by such actions. The Department believes the rule is consistent with the law. We have added text in response to another similar comment to paragraph 174.4(f). Under current law, an Indian tribe may acquire closed real property only through a request for excess property in accordance with section 105(f)(3) of the Indian Self-Determination and Education Assistance Act (which must be made by the Secretary of the Interior on behalf of the tribe) or through the purchase of real property at a public sale. In addition, a tribe may seek to participate in the redevelopment planning process as a member of the LRA, which is primarily a local matter.

B. Definitions

Several commenters suggested that those definitions contained in section 174.3 that are incorporated by reference to other sources be written out in full text. To ensure complete consistency, the rule will continue to incorporate those definitions by reference. However, the BRRM will contain the full text of the sources to facilitate ease of use.

One commenter suggested that a definition for the National Historic Preservation Act be included in the rule. The National Historic Preservation Act is not referred to directly in the rule. The reference in section 174.18 is to the Act's implementing regulations in the Code of Federal Regulations and includes the specific citation to the regulations. Because the Act is not directly referred to in the rule and the only indirect reference is to its implementing regulations for which the citation is provided, there is no need to include a specific definition.

One commenter requested that the term "disposal plan" be defined. The Department does not believe such a definition is necessary or desirable. The

disposal plan can take many forms and will reflect the manner of implementation by each Military Department at each location. The term is not readily susceptible to a meaningful definition because of the wide variety of forms it may take.

C. Policy

Several commenters suggested that the rule may change the focus of disposal actions by not placing paramount importance on economic recovery. The base closure law does not mention economic recovery as one of its goals, but does refer to "job generation" in the case of EDCs. The primary reason for proposing this revision of the rule is to bring it into line with amendments made to the base closure laws. Those amendments reflect a desire by Congress to encourage economic recovery by expediting the transfer (and subsequent redevelopment) of installations. The Department believes the current policy statements in section 174.4, which are taken from the Secretary of Defense's recommendations to the Defense Base Closure and Realignment Commission, accurately reflect both the statutory direction provided by Congress and the policy determinations made by the Secretary of Defense.

One commenter expressed concern that the statements of policy in section 174.4 do not adequately recognize the importance of public benefit conveyances. The Department does not agree. Paragraph 174.4(b) explicitly refers to public benefit conveyances as one of the appropriate means to transfer property. The need for consideration of public benefit conveyances is not overcome by the policy statement of paragraph 174.4(c) relating to reliance on market forces, which, incidentally, refers to "*any anticipated demand* for surplus military land and facilities." [Emphasis added.]

One commenter suggested that section 174.4(d) reflect a more accurate list of the entities with whom the Department must collaborate for successful redevelopment to occur. The Department notes that the intent of this paragraph is to emphasize collaboration with affected local communities regarding the redevelopment of the installation. While the Department does collaborate with the other entities, their role is established in other parts of the rule. The focus of this paragraph of the rule is on the redevelopment planning process and most of our collaboration in this area is with the local community.

One commenter noted that reference to substantial growth in section 174.4(f) is difficult to define and could lead to confusion. The Department agrees and

has struck the beginning clause of the sentence consisting of "If installation growth is substantial, * * *".

One commenter observed that in many places an installation's growth due to realignment may not only affect the immediate locality but may also increase infrastructure demands regionally, requiring coordination with regional as well as local officials. The Department agrees and has further modified paragraph 174.4(f) to refer to regional officials, including, *e.g.*, State and tribal officials, and to regional planning.

D. Responsibilities

Several commenters suggested that the rule delegates too much authority to the Secretaries of the Military Departments, leaves the Office of the Secretary of Defense (OSD) out of the process, and undermines the policy to "speak with one voice." It is essential to the effective implementation of the process that appropriate delegations of authority be provided to the Military Departments, as the implementing agencies, and this is done in the rule. This rule is consistent with other delegations to the Military Departments as installation and real property managers within DoD. The current regulation that is being revised by this rule also delegates, and much more generally, implementation authority to the Military Departments. The delegation language in the rule is actually somewhat less broad than the language it will be replacing. The delegation to the Secretaries of the Military Departments in the rule is subject to the superior delegations to the Under Secretary of Defense for Acquisition, Technology, and Logistics and the Deputy Under Secretary of Defense (Installations and Environment). These OSD officials will retain their oversight roles and, when needed, review disputed matters and enforce uniformity among the Military Departments in their implementing activities.

Several commenters suggested that if an LRA qualifies for a no-cost EDC, the Federal Government should shoulder the cost of recording deeds and other transfer documents as well as associated surveys. The rule in paragraph 174.5(e) only addresses the cost of recording deeds and other transfer documents, which is normally the responsibility of the property recipient in real estate transactions. It does not address the responsibility of paying for any needed surveys. The cost of surveys, in the case of an EDC, will be subject to agreement between the parties.

One commenter suggested that the requirement of paragraph 174.5(e) explicitly include reference to recordation of land use restrictions that are part of an environmental remedy. The Department notes that the paragraph only addresses the cost of recording deeds and other transfer documents; it does not address in detail all the documents that might be included in that category. What documents must be recorded will be determined by State law and local rule and will vary accordingly. To the extent land use restrictions are included in a deed, which would be necessary for them to have meaningful effect, they will be part of the recorded instruments.

E. LRA and the Redevelopment Plan

Several commenters inquired as to what would constitute "appropriate environmental documentation" in section 174.6(c). This reference would include any NEPA environmental analyses, as well as associated documentation that might be required to formulate a disposal plan. Since we cannot predict at this time the entire universe of potential documents, particularly given the great variety of locations where they might be required, the Department chose to use as broad a term as possible.

Several commenters suggested that the 12 months allotted for completion of an environmental impact statement may prove inadequate. Section 174.6(c) qualifies the 12 month requirement with the words "to the extent practicable", taken from the underlying statutory provision of section 2911 of Pub. L. 103-160.

Several commenters observed that the timeframe for the production of the local redevelopment plan is likely to be too short. The language in the rule is in strict compliance and consistent with the base closure laws, section 2905(b)(7)(F)(iv) of Pub. L. 101-510, which also allows an extension of time to be granted by the Deputy Under Secretary of Defense (Installations & Environment), section 2905(b)(7)(N). In all instances, the date arrived at from section 2905(b)(7)(F)(iv) will be after the screening of property by Federal agencies. The Department notes that many, if not most, LRAs begin their planning process shortly after the closure decisions become final, which allows for a much more lengthy period of time than would be available if no advance effort is made.

Several commenters noted that the requirement that there be a single LRA for each installation may be problematic for some installations that have large parcels located in other jurisdictions.

The language in the proposed rule uses the term "generally," which provides flexibility for exceptions where geographic situations warrant, such as distinct, non-contiguous parcels in separate jurisdictions.

Several commenters recommended that the base cleanup team specifically include the LRA as a member. The base cleanup team is not addressed by the rule, nor is it based in statute. Information on environmental cleanup may be found in the BRRM.

F. Retention for DoD Component Use and Transfer to Other Federal Agencies

Several commenters noted that some locations such as Fort Monroe, Virginia, are subject to a reversionary interest in the state or local government and recommended specific language be inserted addressing this situation. The Department cannot dispose of a property interest it does not own. To the extent a location is subject to a reversionary interest, any screening or disposal action can only occur to the extent they are consistent with the reversionary language of the original deed. For instance, screening might be limited to only DoD Components after which the property might then have to be offered back to the reversionary interest holder. Because this will vary at each location depending on the specific provisions of the reversionary interest, it is neither practicable nor necessary to provide specific language dealing with this situation. The Military Departments are expected to know the nature of the real property interests they hold and to act accordingly with regard to any disposal actions.

One commenter suggested that early and widespread communication would be beneficial and specifically objected to language in paragraph 174.7(b) that conditioned release of some information "upon request". The Department determined that it was not going to provide to other Federal agencies a notice of potential availability of property upon submission by the President of his recommendations to the Congress. Consequently, those provisions of section 174.7, and particularly its former paragraph (b), addressing this subject have been deleted from the rule.

One commenter recommended that a firm time period of 6 months be set for the identification of Federal property interests in real property. Section 174.7(m) of the proposed rule does provide a time period of six months from the date of approval of closure or realignment within which a surplus determination should be made, which means that Federal agency interests in

property must be identified prior to that time.

Several commenters suggested that other Federal agencies seeking to obtain excess real property should be required, as opposed to being encouraged, to consult with the LRA. The statute that required consultation has expired [Section 2905(b)(5)(C) of Pub. L. 101-510]. However, because the Department believes it is to everyone's benefit, it encourages consultation. It is to the benefit of a Federal agency to consult with the LRA and any other interested entity when seeking excess real property. The Department believes it unnecessary to require such consultation. In addition, such a requirement could generate legal conflicts as to what constituted consultation in particular cases and at what specific time periods consultation was performed.

Several commenters objected to the requirement that other Federal agencies accept any excess property in its existing condition, viewing this as a burden on their resources or an attempt by Department to avoid its cleanup responsibilities. This is in conformance with the Interdepartmental Waiver Doctrine which notes that all Federal property belongs to the United States and it is the determination of Congress as to the adequacy of funding for individual agencies to perform their missions. See *Matter of: Use of One Agency's Real Property by Another—Liability for Damage*, B-194861, Comptroller General of the United States, 59 Comp. Gen. 93, November 20, 1979. The general rule is that an agency must have the resources to accept property it is voluntarily seeking or forego the opportunity. This is also indicated in other requirements of section 174.7(h) such as the requirement that the request does not establish a new program, current real property holdings cannot satisfy the agency's needs, and that the request be economically viable. The receiving agency must also pay fair market value, unless waived, which would potentially include a reduction of value because of contamination (see the discussion on appraisals and fair market value). Nothing in the requirement that a receiving Federal agency take the property in its existing condition changes the liability of the United States for cleanup.

One commenter asserted that, in transfers between Federal agencies, in order to accurately reflect section 120 of CERCLA, a statement should be added in both subparagraphs (9) and (10) of paragraph 174.7(h) that would exclude the costs for remedies needed to address environmental contamination present

on the property at the time of transfer, unless an agreement has been reached with the other agency to take responsibility for such actions and costs. The commenter further asserted that a Federal agency's ultimate environmental liability cannot be transferred to other agencies of the Federal Government. The Department disagrees. The Department does not believe that section 120(h) of CERCLA has any application to the question of responsibility as between Federal agencies for contamination on Federal real property transferred between them. There is no provision of applicable law or regulation preventing the Department from requiring another agency to accept property transferred "as-is," as a mutually agreed condition of the transfer. If the receiving agency is unwilling to accept responsibility for any needed cleanup, it has no obligation to take the property and Department can proceed to other means of property disposal.

G. Screening Properties After Declaration of Surplus

One commenter suggested specific language be added to the rule relating to the process after a declaration of surplus, and specifically relating to the process for public benefit conveyances and to consultation with the LRA and communities. These aspects of the property disposal process are governed by 32 CFR part 176, which is not being amended by this rulemaking (other than a ministerial change). The Department anticipates that it will propose amendments to part 176 in the future to ensure its conformance to changes in the law. At that time, it would be appropriate for the commenter to raise issues that are relevant to that regulation.

H. Economic Development Conveyances

Several commenters are concerned that the rule requires the Secretary concerned to seek fair market value in an EDC. This is a clear change from the existing regulation which the rule would replace. The requirement to seek to obtain fair market value is clearly stated in section 2905(b)(4)(B) of Pub. L. 101-510. This is a change made by Congress to the law since the publication of the existing regulation. The changes made in the rule are in strict conformance with the statute.

Several commenters noted that the rule does not provide for below-cost EDCs (other than no-cost EDCs). Section 2905(b)(4) of Pub. L. 101-510 addresses the nature of EDCs that can be offered by Department. There is no provision for a "below-cost" EDC. Consequently,

the rule does not provide for such an EDC.

Several commenters objected to the requirements imposed by the rule on those submitting EDC applications, and the Department's consideration of those applications. These, largely information, requirements are necessary to allow the Department to make an informed judgment as to whether the application can meet the statutory requirements for an EDC as well as whether a no-cost EDC, if sought, is appropriate under the circumstances. Given the potentially significant financial impact of EDCs on both the Department and the LRA, it is appropriate to require a reasonable submission of information to ensure the EDC's success. It is understood by the Department that some of the information requested may not be available or available in adequate time and accuracy, but the LRA should attempt to submit as much and as accurate information as it can to address the factors for consideration of an EDC. The Department will use the best information available to evaluate EDC applications according to the statute and rule. This is consistent with prior practice of the Department.

Several commenters objected to the provisions relating to an appraisal of fair market value. Commenters objected to the use of the Uniform Appraisal Standards, to appraisals conducted under criteria set by the Military Department without the LRA's agreement, and to the application of highest and best use criteria. Additionally, it was suggested that an independent entity conduct the appraisal, that the appraisal include liabilities associated with, e.g., environmental contamination or demolition of buildings, that all appraisal information be shared with the LRA, that special consideration be given to rural areas, and that multiple appraisals be accomplished for EDCs based on differing assumptions. Although the Uniform Appraisal Standards were drafted primarily for the acquisition of property by the Federal Government, no cogent reasons have been advanced as to why they would not apply with equal validity to appraising lands being disposed of. The rule does require the Secretary concerned to consult with the LRA about valuation assumptions and other factors, but the base closure laws explicitly provide that the fair market value will be as determined by the Secretary, not by the LRA or an independent entity. The law does not provide, for instance, for multiple appraisals of fair market value, although an entity seeking property is certainly

free to conduct its own appraisal. The rule does seek an appraisal based on the highest and best use, as provided in the Uniform Appraisal Standards and the governing GSA regulations. The Uniform Appraisal Standards include consideration of all relevant valuation factors such as reduction in value due to contamination, existing land use controls that limit potential development, and location.

Several commenters asserted that only by obtaining the property through an EDC can the LRA maintain control to provide job generation. According to the statute, an LRA is any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan. In some instances, taking possession of the property may be one way of furthering this goal, but it is not the only means, or even necessarily the most likely to succeed. Jobs can often be generated by rapid conveyance to private parties at least as effectively as by transfer to the LRA. The statutory framework clearly envisions that the LRA's primary function is the redevelopment planning process. Seeking EDCs is a function to be performed at the LRA's discretion and certainly does not foreclose the LRA or other appropriate local agencies from exercising any necessary controls to ensure job generation.

One commenter noted that subparagraph (7) of paragraph 174.9(e) could be interpreted as requiring an LRA to exercise more authority than it would normally have, *e.g.*, zoning or other approval powers. The Department agrees and has added language to this subparagraph to clarify that the LRA need only demonstrate that it has the necessary approvals for items such as zoning, as opposed to actually having the authority to grant such approvals.

I. Leasing of Real Property to Non-Federal Entities

Several commenters were concerned that the rule would discourage long-term leasing at closed installations, thereby reducing the likelihood of promoting new employment. As with the other provisions of the rule, section 174.11 is designed to expedite property transfer in order to encourage rapid job generation. In the past, long-term leases were primarily the result of difficulty in transferring property that still had environmental contamination. With statutory authority to engage in "early transfers" under CERCLA, it should be

possible to avoid the need for long-term leases in most if not all situations.

J. Leasing of Transferred Real Property by Federal Agencies

Several commenters were concerned that a "lease-back" would be at no rental cost to the Federal agency occupying the leased facility, thereby removing any incentive to engage in this type of transaction. The requirement for a no cost lease is a provision of the statute, section 2905(b)(4)(e)(iii) of Pub. L. 101-510.

One commenter inquired as to how real property will be declared as surplus when a "lease-back" cannot be successfully concluded. The authority to lease to a Federal agency, at no cost, real property that has been transferred to an LRA is a unique alternative form of property disposal. If the process fails to result in agreement, the Department presumes, until shown otherwise, that the requesting Federal agency still requires the property, in which case it is not surplus. If the requesting Federal agency is only willing to accept the use of the real property under a lease and an agreement cannot be reached, the real property would be considered as surplus.

K. Personal Property

One commenter noted the use of "community redevelopment plan" in section 174.13(a). This reference will be changed to "redevelopment plan" to conform to the usage elsewhere in the rule.

One commenter inquired whether the personal property inventory will occur 6 months after the closure decision or 6 months after the actual closure of the installation. Section 174.13(b) provides that the inventory will be compiled 6 months after the date of approval of closure or realignment. The term "date of approval" is defined in section 174.3 and refers to the date the Commission's recommendations become final, as opposed to the date of actual closure of the installation.

One commenter inquired as to the timelines for an LRA's submittal of a request for a personal property EDC as opposed to a real property EDC that includes personal property. The commenter was concerned that the local redevelopment plan might be submitted prior to the completion of the inventory. Since the inventory is required to be completed within 6 months of the date of approval of the closure, and the local redevelopment plan is not required until quite some time later, it would be very unlikely for an LRA to submit the local redevelopment plan prior to completion of the personal property

inventory. This is in part due to the screening period for other Federal uses during the first 6 months after the date of approval.

L. Maintenance and Repair

One commenter inquired as to the citation for the Federal Management Regulations of the GSA, referred to in section 174.14. The regulations can be found at chapter 102 of title 41, Code of Federal Regulations. Additional information on these regulations will be provided in the BRRM. The citation will be added to the rule.

Several commenters expressed concern that the level of maintenance might not be adequate in relation to various locations, *e.g.*, humidity levels left uncontrolled could result in damaging mold. Section 174.14(b)(3) provides that the initial levels of maintenance cannot be "less than the minimum levels required to support the use of such facilities or equipment for nonmilitary purposes; * * *". The Department believes this provision addresses the concern noted by the commenters.

Several commenters noted that maintenance levels provided by section 174.14 should conform to appropriate requirements of the National Historic Preservation Act and any agreements thereunder with, *e.g.*, the state historic preservation officer. Section 174.14 provides maintenance procedures to preserve and protect facilities located on closing installations needed for economical reuse. Nothing in that section should be interpreted as supplanting any requirement of the National Historic Preservation Act or its implementing regulations. The Department expects actions relating to historic preservation to be fully vetted with the interested agencies and organizations in line with both the requirements of the Act and its implementing regulations and the direction of the rule to, *e.g.*, consult with the LRA. As noted in previous responses to comments, it is not the purpose of this rule to replace other statutory or regulatory requirements. Given the limited purpose of section 174.14, the Department is satisfied that it has addressed the issue that needs to be addressed in the context of this rule.

Several commenters asserted that the Department should properly maintain all installation assets until the time of transfer. The rule strictly complies with the statutory requirements for maintenance. Those statutory requirements include specific time limits governing the initial levels of maintenance. The rule provides flexibility in allowing the Secretary

concerned to extend the time period for the initial levels of maintenance and repair for property still under military control if the LRA is actively implementing its redevelopment plan.

Several commenters objected that maintenance requirements would be shifted to the local community even before the installation was closed. This is incorrect. Section 174.14(e) provides that reductions in maintenance levels will not apply to facilities still being used for Department missions, *i.e.*, pre-closure. After facilities are no longer required for Department missions, the minimum standard prescribed by GSA requires that the Government's value be preserved. The community would not be expected to maintain facilities until they have possession through either a deed or lease. The statutory timelines reflected in the rule are designed to encourage rapid transfer to effect productive civilian reuse.

Several commenters suggested that the level of maintenance and repair be linked to the local redevelopment plan. The Department disagrees. Such a requirement would be contrary to the base closure laws' time limitations on maintenance and repair. The rule already provides for an appropriate level of maintenance and repair which will consider, to the extent it is known, the proposed reuses in the local redevelopment plan. The period of maintenance and repair, however, is set by statute.

One commenter expressed concern that any limitations on maintenance and repair might apply to environmental remediation efforts underway on the installation. The Department categorically states that "Maintenance and repair" as used in this section has no application to environmental remedies. An interpretation to the contrary would be entirely inconsistent with the base closure laws and with CERCLA.

M. Indemnification Under Section 330 of the National Defense Authorization Act for Fiscal Year 1993

Several commenters observed that requiring any documents referring to section 330 of Pub. L. 102-484 to be reviewed by the DoD Office of General Counsel would cause delay and, instead, model language should be provided with only deviations being reviewed by the General Counsel's Office. The Department disagrees. The insertion of language even mentioning section 330 in a deed or other transfer document creates a contract right that otherwise would not exist and for which section 330 does not provide.

One commenter asserted that the Department does not have discretion with regard to insertion of language dealing with section 330 of Pub. L. 102-484 and suggested changes that would require " * * * Section 330 indemnification language under every instance specified by * * * " section 330. Review of section 330 readily demonstrates that it does not require or even hint at the need to include language relating to its provisions in any document. In fact, section 330 is self-executing and stands alone without the need for additional discussion or exposition in transfer documents. It is even questionable whether such further discussion or exposition has any legal basis since it must, virtually by definition, either expand or contract the rights of a potential claimant under the statute and the Department has authority to do neither.

N. Real Property Containing Explosive or Chemical Agent Hazards

Several commenters recommended that the requirement for review of explosive safety plans under section 174.16 be extended to private entities conducting a remediation in place of the Department. The Department is prepared to review, on a case-by-case basis, those locations where such a safety plan is likely to be required and determine whether the circumstances of that location should require plan review and approval. Such requirements, if found to be necessary, can be included in any contract with the entity conducting the remedial action.

One commenter expressed concern that the language of the rule could allow the submission of an explosives safety plan but not actually require approval of the plan by the DoD Explosives Safety Board prior to transfer of the property. Although the language of the rule could be interpreted as requiring submission but not actual approval of the plan before real property transfer, the uniform practice of the Military Departments has been to wait on actual approval of the plan before proceeding to transfer property. The language of this section has been modified to more accurately refer to the governing DoD Directive as well as the documents being submitted.

O. NEPA

One commenter suggested that the LRA be given the opportunity to serve as a "cooperating agency" during the NEPA analysis. The Department interprets this as a request that the LRA be guaranteed the right to be a cooperating agency if it so desires. (This assumption is based on the fact that an

LRA may already qualify as a cooperating agency under the Council on Environmental Quality regulations implementing NEPA; 32 CFR 1508.5.) Being a cooperating agency in a NEPA analysis carries with it certain obligations and requires certain expertise. The Department does not believe it appropriate to mandate in all circumstances that an LRA be a cooperating agency and believes it more appropriate to allow each situation to be judged on its own merits under existing regulations implementing NEPA.

Several commenters suggested that the NEPA process allow an LRA, if it was not satisfied with the schedule of the Military Department, to enter into an agreement with the Government to conduct the analysis itself but consistent with the Military Department's NEPA regulation. The cost expended by the LRA would qualify as a credit in any future EDC, or, in the case of a no-cost EDC, be attributable to economic redevelopment. This suggestion is premised on the availability, or lack thereof, of funds to pay for the NEPA analysis. There has been no demonstration that such funding has been unavailable in the past, nor is there any indication it will be unavailable in the future. By statute, the Military Departments are required to complete NEPA analysis within 12 months, if possible. The NEPA regulations of the Military Departments have sufficient flexibility to allow those departments to ensure prompt and compliant NEPA analyses.

P. Historic Preservation

Several commenters raised concerns with the lack of more extensive discussion of historic preservation. The provisions in section 174.18 are solely intended to clarify that the Military Departments have authority to engage in the types of preservation activities discussed. Nothing in that section should be interpreted as supplanting any requirement of the National Historic Preservation Act or its implementing regulations. The Department expects actions relating to historic preservation to be fully vetted with the interested agencies and organizations in line with both the requirements of the Act and its implementing regulations and the direction of the rule to, *e.g.*, consult with the LRA. As noted in previous responses to comments, it is not the purpose of this rule to replace other statutory or regulatory requirements. Given the limited purpose of section 174.18, the Department is satisfied that it has addressed the issue that needs to be addressed in the context of this rule.

V. Administrative Requirements

A. Regulatory Impact Analysis Pursuant to Executive Order 12866

Executive Order 12866 (58 FR 51735 [October 4, 1993]) requires each agency taking regulatory action to determine whether that action is "significant." The agency must submit any regulatory actions that qualify as "significant" to the Office of Management and Budget (OMB) for review, assess the costs and benefits anticipated as a result of the proposed action, and otherwise ensure that the action meets the requirements of the Executive Order. The Order 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 adversely effect 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 a 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 the Executive Order.

The Department has determined that the rule is not a significant rule under Executive Order 12866 because it is not likely to result in a rule that will meet any of the four prerequisites.

(1) The rule will not have an annual effect on the economy of \$100 million or more or 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. The major effects of base closure and realignment actions is the result of the decisions to close and realign installations. This rule does not affect those decisions to the extent they were made by the Defense Base Closure and Realignment Commission, approved by the President, and not disapproved by the Congress. This rule only implements those decisions in accordance with applicable law. As such, its requirements do not create a significant economic impact.

For these reasons, the Department has determined that the rule will not 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) The rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

Implementation of the rule will not create a serious inconsistency or otherwise interfere with another agency's action because the Department has lead authority for implementing the base closure statutes and because the rule's requirements do not override, but are in addition to, legal requirements established by other agencies. As discussed in more detail in the response to comments, the rule does not, *e.g.*, establish requirements in place of the Historic Preservation Act, but provides additional authority to the Military Departments to implement that Act in accordance with its terms and with its implementing regulations. Similarly, the rule does not override or provide inconsistent requirements for environmental restoration, but, as discussed in more detail in the response to comments, is premised on applicability of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the National Contingency Plan. Several subjects raised by commenters are not addressed in the rule in order to avoid the possibility of inconsistency with the authorities and actions of other agencies.

(3) The rule will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.

The rule will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof because no entitlements, grants, user fees, or loan programs are invoked in the rule.

(4) The rule will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Finally, the rule does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Congress has provided extensive and detailed guidance for implementation of the base closure and realignment process. The rule is merely a means for the Department to address some areas not addressed by Congress and provide some clarity in procedures to enable potential property recipients and others interested in the base closure and realignment process to harmonize their actions with those of the Department. The Department has identified no novel legal or policy issues

that this rule will create on either a base closure and realignment basis or overall. Nor has the Department identified any novel legal or policy issues arising out of the President's priorities or principles set forth in the Regulatory Impact Analysis.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996), requires that an agency conduct a regulatory flexibility analysis when publishing a notice of rulemaking for any proposed or final rule. The regulatory flexibility analysis determines the impact of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). SBREFA amended the Regulatory Flexibility Act to require federal agencies to state the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

The Department hereby certifies that the rule will not have a significant economic impact on a substantial number of small entities. The nature of the rule provides the factual basis for a determination that no regulatory flexibility analysis is required. The potential for a significant impact on a substantial number of small entities would result, if at all, because of the decision to close or realign an installation. This rule does not address those decisions. No costs are directly imposed on small entities nor is any action directly required of small entities through this rule. Since the Department will apply this rule for the purpose of disposing of real and personal property, the rule does not impose any requirements on small entities. For the foregoing reasons, the Department believes that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, requires Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Section 202 of the UMRA requires that, prior to promulgating proposed and final rules with "federal mandates" that may result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, the agency must prepare a written

statement, including a cost-benefit analysis of the rule. Under Section 205 of the UMRA, the Department must also identify and consider a reasonable number of regulatory alternatives to the rule and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. Certain exceptions to Section 205 exist. For example, when the requirements of Section 205 are inconsistent with applicable law, Section 205 does not apply. In addition, an agency may adopt an alternative other than the least costly, most cost-effective, or least burdensome in those cases where the agency publishes with the final rule an explanation of why such alternative was not adopted. Section 203 of the UMRA requires that the agency develop a small government agency plan before establishing any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. The small government agency plan must include procedures for notifying potentially affected small governments, providing officials of affected small governments with the opportunity for meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The Department has determined that the rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments in the aggregate, or by the private sector in any one year. The term "federal mandate" means any provision in statute or regulation or any Federal court ruling that imposes "an enforceable duty" upon State, local, or tribal governments, and includes any condition of federal assistance or a duty arising from participation in a voluntary federal program that imposes such a duty. The rule does not contain a Federal mandate because it imposes no enforceable duty upon state, tribal, or local governments. The base closure laws provide local governments the opportunity to participate in the implementation of the base closure and realignment process by establishing a LRA. There is no statutory requirement that an LRA be established; it is simply a means to allow the maximum local participation in the planning process for installations being closed. Since the establishment of an LRA and any actions taken by the LRA are entirely within the discretion of the local governments in the vicinity of a closing

installation, there is no mandate involved in this rule, funded or unfunded. The Department does note that virtually all LRAs are provided planning assistance funds by the Department of Defense Office of Economic Adjustment to assist them in establishing and operating the LRA. To the extent that environmental restoration actions taken by the Department at an installation being closed or realigned are subject to state regulatory oversight, that oversight is due to statutory requirements outside of the base closure and realignment process. This rule, itself, does not require such oversight. To the degree such oversight is required, it is required by preexisting law on which the rule has no effect.

D. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. The term "collection of information" includes collection of information from ten or more persons. The Department has determined that the PRA does not apply to this rule because the Department will not be seeking information from the public under the rule. The information that would be collected will be in the form of applications for EDCs and similar property transfers and will, in all instances, be entirely voluntary and be the result of members of the public seeking real or personal property under the disposal process. Therefore, the PRA does not apply to the rule.

E. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, Section 12(d) (15 U.S.C. 272 note), directs Federal agencies to use technical standards developed by voluntary consensus standards bodies in its regulatory activities, except in those cases in which using such standards would be inconsistent with applicable law or otherwise impractical. "Technical standards" means performance-based or design-specific technical specifications and related management systems practices. Voluntary consensus means that the technical standards are developed or

adopted by voluntary consensus standards organizations. In those cases in which a Federal agency does not use voluntary consensus standards that are available and applicable, the agency must provide OMB with an explanation.

The rule does not involve performance-based or design-specific technical specifications or related management systems practices. The rule is therefore in compliance with the NTTAA.

F. Environmental Justice Requirements Under Executive Order 12898

Under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," a Federal agency must, where practicable and appropriate, collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies must then use this information to determine whether their activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

The Department believes that implementation of the rule does not implicate environmental justice concerns. As noted earlier, the significant impact of base closure and realignment is the decision to close or realign, which this rule does not address. This rule does not mandate environmental restoration, which is controlled by other laws outside of the base closure and realignment process, nor does it involve decisions dealing with human health. It may be that during the planning process for disposal and reuse, issues relating to environment and human health may arise, but they would do so in the context of any required analysis under the National Environmental Policy Act and would be fully considered in that document.

At this time, the Department believes that no action will directly result from the rule that will have a disproportionately high and adverse human health and environmental effect on any segment of the population.

G. Federalism Considerations Under Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), establishes certain requirements for Federal agencies issuing regulations, legislative comments, proposed legislation, or other policy statements or

actions that have “federal implications.” Under the Executive Order, any of these agency documents or actions have “federal implications” when they 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.” Section 6 of the Executive Order prohibits any agency from issuing a regulation that has federal implications, imposes substantial direct compliance costs on state and local governments, and is not required by statute. Such a regulation may be issued only if the Federal Government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or the agency consults with state and local officials early in the process of developing the proposed regulation. Further, a Federal agency may issue a regulation that has federalism implications and preempts state law only if the agency consults with state and local officials early in the process of developing the proposed regulation.

The rule does not have federalism implications because it will 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. The only role the rule assigns to state or local government is for the establishment of an LRA and that action is entirely voluntary on the part of local government and explicitly provided for in the base closure laws. This rule does not change the relationship between the Federal Government and state or local government nor does it change the distribution of power between those entities. To the extent changes in the rule relate to the role of an LRA, those changes are mandated by statute and the rule only reflects the statutory provisions. The rule does not impose direct compliance costs on state or local governments and the Department actually provides grants to state and local governments to support their voluntary participation in the base closure and realignment planning process. Therefore, the requirements of the Executive Order, Section 6, do not apply to the rule.

List of Subjects in 32 CFR Parts 174, 175, and 176

Community development, Surplus Government property.

■ Accordingly, 32 CFR part 174 is revised, part 175 is removed, and part 176 is amended to read as follows:

■ 1. Part 174 is revised to read as follows:

PART 174—REVITALIZING BASE CLOSURE COMMUNITIES AND ADDRESSING IMPACTS OF REALIGNMENT

Subpart A—General

Sec.

- 174.1 Purpose.
- 174.2 Applicability.
- 174.3 Definitions.

Subpart B—Policy

- 174.4 Policy.
- 174.5 Responsibilities.

Subpart C—Working with Communities and States

- 174.6 LRA and the redevelopment plan.

Subpart D—Real Property

- 174.7 Retention for DoD Component use and transfers to other Federal agencies.
- 174.8 Screening for properties covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, cross-reference.
- 174.9 Economic development conveyances.
- 174.10 Consideration for economic development conveyances.
- 174.11 Leasing of real property to non-Federal entities.
- 174.12 Leasing of transferred real property by Federal agencies.

Subpart E—Personal Property

- 174.13 Personal property.

Subpart F—Maintenance and Repair

- 174.14 Maintenance and repair.

Subpart G—Environmental Matters

- 174.15 Indemnification under Section 330 of the National Defense Authorization Act for Fiscal Year 1993.
- 174.16 Real property containing explosive or chemical agent hazards.
- 174.17 NEPA.
- 174.18 Historic preservation.

Authority: 10 U.S.C. 113 and 10 U.S.C. 2687 *note*.

Subpart A—General

§ 174.1 Purpose.

This part:

(a) Establishes policy, assigns responsibilities, and implements base closure laws and associated provisions of law relating to the closure and the realignment of installations. It does not address the process for selecting installations for closure or realignment.

(b) Authorizes the publication of DoD 4165.66–M, “Base Redevelopment and Realignment Manual,” in accordance

with DoD 5025.1–M¹, “DoD Directive System Procedures,” March 2003.

§ 174.2 Applicability.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the “DoD Components”).

(b) Installations in the United States selected for closure or realignment under a base closure law.

(c) Federal agencies and non-Federal entities that seek to obtain real or personal property on installations selected for closure or realignment.

§ 174.3 Definitions.

(a) *Base closure law*. This term has the same meaning as provided in 10 U.S.C. § 101(a)(17)(B) and (C).

(b) *Closure*. An action that ceases or relocates all current missions of an installation and eliminates or relocates all current personnel positions (military, civilian, and contractor), except for personnel required for caretaking, conducting any ongoing environmental cleanup, or property disposal. Retention of a small enclave, not associated with the main mission of the base, is still a closure.

(c) *Consultation*. Explaining and discussing an issue, considering objections, modifications, and alternatives; but without a requirement to reach agreement.

(d) *Date of approval*. This term has the same meaning as provided in section 2910(8) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(e) *Excess property*. This term has the same meaning as provided in 40 U.S.C. § 102(3).

(f) *Installation*. This term has the same meaning as provided in the definition for “military installation” in section 2910(4) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(g) *Local Redevelopment Authority* (LRA). This term has the same meaning as provided in the definition for “redevelopment authority” in section 2910(9) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

¹ Copies may be obtained at <http://www.dtic.mil/whs/directives/corres/pub.html>.

(h) *Military Department*. This term has the same meaning as provided in 10 U.S.C. 101(a)(8).

(i) *National Environmental Policy Act (NEPA)*. The National Environmental Policy Act of 1969, Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*, as amended.

(j) *Realignment*. This term has the same meaning as provided in section 2910(5) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101-510.

(k) *Secretary concerned*. This term has the same meaning as provided in 10 U.S.C. 101(a)(9)(A), (B), and (C).

(l) *Surplus property*. This term has the same meaning as provided in 40 U.S.C. 102(10).

(m) *Transition coordinator*. This term has the same meaning as used in section 2915 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103-160.

Subpart B—Policy

§ 174.4 Policy.

It is DoD policy to:

(a) Act expeditiously whether closing or realigning. Relocating activities from installations designated for closure will, when feasible, be accelerated to facilitate the transfer of real property for community reuse. In the case of realignments, the Department will pursue aggressive planning and scheduling of related facility improvements at the receiving location.

(b) Fully utilize all appropriate means to transfer property. Federal law provides the Department with an array of legal authorities, including public benefit transfers, economic development conveyances at cost and no cost, negotiated sales to state or local government, conservation conveyances, and public sales, by which to transfer property on closed or realigned installations. Recognizing that the variety of types of facilities available for civilian reuse and the unique circumstances of the surrounding communities does not lend itself to a single universal solution, the Department will use this array of authorities in a way that considers individual circumstances.

(c) Rely on and leverage market forces. Community redevelopment plans and military conveyance plans should be integrated to the extent practical and should take account of any anticipated demand for surplus military land and facilities.

(d) Collaborate effectively. Experience suggests that collaboration is the linchpin to successful installation redevelopment. Only by collaborating with the local community can the

Department close and transfer property in a timely manner and provide a foundation for solid economic redevelopment.

(e) Speak with one voice. The Department of Defense, acting through the DoD Components, will provide clear and timely information and will encourage affected communities to do the same.

(f) Work with communities to address growth. The Department will work with the surrounding community so that the public and private sectors can provide the services and facilities needed to accommodate new personnel and their families. The Department recognizes that installation commanders and local officials, as appropriate (*e.g.*, State, county, and tribal), need to integrate and coordinate elements of their local and regional growth planning so that appropriate off-base facilities and services are available for arriving personnel and their families.

§ 174.5 Responsibilities.

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall issue DoD Instructions as necessary to further implement applicable public laws affecting installation closure and realignment implementation and shall monitor compliance with this part. All authorities and responsibilities of the Secretary of Defense—

(1) Vested in the Secretary of Defense by a base closure law, but excluding those provisions relating to the process for selecting installations for closure or realignment;

(2) Delegated from the Administrator of General Services relating to base closure and realignment matters;

(3) Vested in the Secretary of Defense by any other provision relating to base closure and realignment in a national defense authorization act, a Department of Defense appropriations act, or a military construction appropriations act, but excluding section 330 of the National Defense Authorization Act for Fiscal Year 1993; or

(4) Vested in the Secretary of Defense by Executive Order or regulation and relating to base closure and realignment, are hereby delegated to the Under Secretary of Defense for Acquisition, Technology, and Logistics.

(b) The authorities and responsibilities of the Secretary of Defense delegated to the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (a) of this section are hereby re-delegated to the Deputy Under Secretary of Defense (Installations and Environment).

(c) The Heads of the DoD Components shall ensure compliance with this part and any implementing guidance.

(d) Subject to the delegations in paragraphs (a) and (b) of this section, the Secretaries concerned shall exercise those authorities and responsibilities specified in subparts C through G of this part.

(e) The cost of recording deeds and other transfer documents is the responsibility of the transferee.

Subpart C—Working with Communities and States

§ 174.6 LRA and the redevelopment plan.

(a) The LRA should have broad-based membership, including, but not limited to, representatives from those jurisdictions with zoning authority over the property. Generally, there will be one recognized LRA per installation.

(b) The LRA should focus primarily on developing a comprehensive redevelopment plan based upon local needs. The plan should recommend land uses based upon an exploration of feasible reuse alternatives. If applicable, the plan should consider notices of interest received under a base closure law. This section shall not be construed to require a plan that is enforceable under state and local land use laws, nor is it intended to create any exemption from such laws.

(c)(1) The Secretary concerned will develop a disposal plan and, to the extent practicable, complete the appropriate environmental documentation no later than 12 months after receipt of the redevelopment plan. The redevelopment plan will be used as part of the proposed Federal action in conducting environmental analyses required under NEPA.

(2) In the event there is no LRA recognized by DoD or if a redevelopment plan is not received from the LRA within 9 months from the date referred to in section 2905(b)(7)(F)(iv) of Pub. L. 101-510, (unless an extension of time has been granted by the Deputy Under Secretary of Defense (Installations and Environment)), the Secretary concerned shall, after required consultation with the governor and heads of local governments, proceed with the disposal of property under applicable property disposal and environmental laws and regulations.

Subpart D—Real Property

§ 174.7 Retention for DoD Component use and transfer to other Federal agencies.

(a) To speed the economic recovery of communities affected by closures and realignments, the Department of Defense will identify DoD and Federal interests

in real property at closing and realigning installations as quickly as possible. The Secretary concerned shall identify such interests. The Secretary concerned will keep the LRA informed of these interests. This section establishes a uniform process, with specified timelines, for identifying real property that is available for use by DoD Components (which for purposes of this section includes the United States Coast Guard) or is excess to the needs of the Department of Defense and available for use by other Federal agencies, and for the disposal of surplus property for various purposes.

(b) The Secretary concerned should consider LRA input, if provided, in making determinations on the retention of property (location and size of cantonment area).

(c) Within one week of the date of approval of the closure or realignment, the Secretary concerned shall issue a notice of availability to the DoD Components and other Federal agencies covering closing and realigning installation buildings and property available for transfer to the DoD Components and other Federal agencies. The notice of availability should describe the property and buildings available for transfer. Withdrawn public domain lands which the Secretary of the Interior has determined are suitable for return to the jurisdiction of the Department of the Interior (DoI) will not be included in the notice of availability.

(d) To obtain consideration of a requirement for such available buildings and property, a DoD Component or Federal agency is required to provide a written, firm expression of interest for buildings and property within 30 days of the date of the notice of availability. An expression of interest must explain the intended use and the corresponding requirement for the buildings and property.

(e)(1) Within 60 days of the date of the notice of availability, the DoD Component or Federal agency expressing interest in buildings or property must submit an application for transfer of such property to a Military Department or Federal agency. In the case of a DoD Component that would normally, under the circumstances, obtain its real property needs from the Military Department disposing of the real property, the application should indicate the property would not transfer to another Military Department but should be retained by the current Military Department for the use of the DoD Component. To the extent a different Military Department provides real property support for the requesting DoD Component, the application must

indicate the concurrence of the supporting Military Department.

(2) Within 90 days of the notice of availability, the Federal Aviation Administration (FAA) should survey the air traffic control and air navigation equipment at the installation to determine what is needed to support the air traffic control, surveillance, and communications functions supported by the Military Department, and to identify the facilities needed to support the National Airspace System. FAA requests for property to manage the National Airspace System will not be governed by paragraph (h) of this section. Instead, the FAA shall work directly with the Military Department to prepare an agreement to assume custody of the property necessary for control of the airspace being relinquished by the Military Department.

(f) The Secretary concerned will keep the LRA informed of the progress in identifying interests. At the same time, the LRA is encouraged to contact Federal agencies which sponsor public benefit conveyances for information and technical assistance. The Secretary concerned will provide to the LRA points of contact at the Federal agencies.

(g) DoD Components and Federal agencies are encouraged to discuss their plans and needs with the LRA, if an LRA exists. If an LRA does not exist, the consultation should be pursued with the governor or the heads of the local governments in whose jurisdiction the property is located. DoD Components and Federal agencies are encouraged to notify the Secretary concerned of the results of this consultation. The Secretary concerned, the Transition Coordinator, and the DoD Office of Economic Adjustment Project Manager are available to help facilitate communication between the DoD Components and Federal agencies, and the LRA, governor, and heads of local governments.

(h) An application for property from a DoD Component or Federal agency must contain the following information:

(1) A completed GSA Form 1334, *Request for Transfer* (for requests from DoD Components, a DD Form 1354 will be used). This must be signed by the head of the Component or agency requesting the property. If the authority to acquire property has been delegated, a copy of the delegation must accompany the form;

(2) A statement from the head of the requesting Component or agency that the request does not establish a new program (*i.e.*, one that has never been reflected in a previous budget submission or Congressional action);

(3) A statement that the requesting Component or agency has reviewed its real property holdings and cannot satisfy its requirement with existing property. This review must include all property under the requester's accountability, including permits to other Federal agencies and outleases to other organizations;

(4) A statement that the requested property would provide greater long-term economic benefits for the program than acquisition of a new facility or other property;

(5) A statement that the program for which the property is requested has long-term viability;

(6) A statement that considerations of design, layout, geographic location, age, state of repair, and expected maintenance costs of the requested property clearly demonstrate that the transfer will prove more economical over a sustained period of time than acquiring a new facility;

(7) A statement that the size of the property requested is consistent with the actual requirement;

(8) A statement that fair market value reimbursement to the Military Department will be made at the later of January of 2008, or at the time of transfer, unless this obligation is waived by the Office of Management and Budget and the Secretary concerned, or a public law specifically provides for a non-reimbursable transfer (this requirement does not apply to requests from DoD Components);

(9) A statement that the requesting DoD Component or Federal agency agrees to accept the care and custody costs for the property on the date the property is available for transfer, as determined by the Secretary concerned; and

(10) A statement that the requesting agency agrees to accept transfer of the property in its existing condition, unless this obligation is waived by the Secretary concerned.

(i) The Secretary concerned will make a decision on an application from a DoD Component or Federal agency based upon the following factors:

(1) The requirement must be valid and appropriate;

(2) The proposed use is consistent with the highest and best use of the property;

(3) The proposed transfer will not have an adverse impact on the transfer of any remaining portion of the installation;

(4) The proposed transfer will not establish a new program or substantially increase the level of a Component's or agency's existing programs;

(5) The application offers fair market value for the property, unless waived;

(6) The proposed transfer addresses applicable environmental responsibilities to the satisfaction of the Secretary concerned; and

(7) The proposed transfer is in the best interest of the Government.

(j) When there is more than one acceptable application for the same building or property, the Secretary concerned shall consider, in the following order—

(1) The need to perform the national defense missions of the Department of Defense and the Coast Guard;

(2) The need to support the homeland defense mission; and

(3) The LRA's comments as well as other factors in the determination of highest and best use.

(k) If the Federal agency does not meet its commitment under paragraph (h)(8) of this section to provide the required reimbursement, and the requested property has not yet been transferred to the agency, the requested property will be declared surplus and disposed of in accordance with the provisions of this part.

(l) Closing or realigning installations may contain "public domain lands" which have been withdrawn by the Secretary of the Interior from operation of the public land laws and reserved for use by the Department of Defense. Lands deemed suitable for return to the public domain are not real property governed by title 40, United States Code, and are not governed by the property management and disposal provisions of a base closure law. Public domain lands are under the jurisdiction of the Secretary of the Interior and administered by the Bureau of Land Management (BLM) unless the Secretary of the Interior has withdrawn the lands and reserved them for another Federal agency's use.

(1) The Secretary concerned will provide the BLM with information about which, if any, public domain lands will be affected by the installation's closure or realignment.

(2) The BLM will review the information to determine if any installations contain withdrawn public domain lands. The BLM will review its land records to identify any withdrawn public domain lands at the closing installations. Any records discrepancies between the BLM and Military Departments should be resolved. The BLM will notify the Secretary concerned as to the final agreed upon withdrawn and reserved public domain lands at an installation.

(3) Upon agreement as to what withdrawn and reserved public domain

lands are affected at closing installations, the BLM will initiate a screening of DoI agencies to determine if these lands are suitable for programs of the Secretary of the Interior.

(4) The Secretary concerned will transmit a Notice of Intent to Relinquish (see 43 CFR Part 2370) to the BLM as soon as it is known that there is no DoD Component interest in reusing the public domain lands. The BLM will complete the suitability determination screening process within 30 days of receipt of the Secretary's Notice of Intent to Relinquish. If a DoD Component is approved to reuse the public domain lands, the BLM will be notified and BLM will determine if the current authority for military use of these lands needs to be modified or amended.

(5) If BLM determines the land is suitable for return, it shall notify the Secretary concerned that the intent of the Secretary of the Interior is to accept the relinquishment of the land by the Secretary concerned.

(6) If BLM determines the land is not suitable for return to the DoI, the land should be disposed of pursuant to base closure law.

(m) The Secretary concerned should make a surplus determination within six (6) months of the date of approval of closure or realignment, and shall inform the LRA of the determination. If requested by the LRA, the Secretary may postpone the surplus determination for a period of no more than six (6) additional months after the date of approval if the Secretary determines that such postponement is in the best interests of the communities affected by the closure or realignment.

(1) In unusual circumstances, extensions beyond six months can be granted by the Deputy Under Secretary of Defense (Installations and Environment).

(2) Extensions of the surplus determination should be limited to the portions of the installation where there is an outstanding interest, and every effort should be made to make decisions on as much of the installation as possible, within the specified timeframes.

(n) Once the surplus determination has been made, the Secretary concerned shall follow the procedures in part 176 of this title.

(o) Following the surplus determination, but prior to the disposal of property, the Secretary concerned may, at the Secretary's discretion, withdraw the surplus determination and evaluate a Federal agency's late request for excess property.

(1) Transfers under this paragraph shall be limited to special cases, as determined by the Secretary concerned.

(2) Requests shall be made to the Secretary concerned, as specified under paragraphs (h) and (i) of this section, and the Secretary shall notify the LRA of such late request.

(3) Comments received from the LRA and the time and effort invested by the LRA in the planning process should be considered when the Secretary concerned is reviewing a late request.

§ 174.8 Screening for properties covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, cross-reference.

The Departments of Defense and Housing and Urban Development have promulgated regulations to address state and local screening and approval of redevelopment plans for installations covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Pub. L. 103-421). The Department of Defense regulations can be found at part 176 of this title. The Department of Housing and Urban Development regulations can be found at 24 CFR part 586.

§ 174.9 Economic development conveyances.

(a) The Secretary concerned may transfer real property and personal property to the LRA for purposes of job generation on the installation. Such a transfer is an Economic Development Conveyance (EDC).

(b) For installations having a date of approval for closure after January 1, 2005, the Secretary concerned shall seek to obtain consideration in connection with any transfer under this section in an amount equal to the fair market value of the property.

(c) An LRA is the only entity able to receive property under an EDC.

(d) A properly completed application will be used to decide whether an LRA will be eligible for an EDC. An LRA may submit an EDC application only after it adopts a redevelopment plan. The Secretary concerned shall establish a reasonable time period for submission of an EDC application after consultation with the LRA. The Secretary will review the application and make a decision whether to make an EDC based on the criteria specified in paragraph (g) of this section; such decision will only be made after the Secretary has notified and obtained the concurrence of the Deputy Under Secretary of Defense (Installations & Environment) of the proposed decision. The terms and conditions of the EDC will be negotiated between the Secretary and the LRA.

(e) The application should explain why an EDC is necessary for job generation on the installation. In addition to the following elements, after the Secretary concerned reviews the application, additional information may be requested to allow for a better evaluation of the application:

(1) A copy of the adopted redevelopment plan.

(2) A project narrative including the following:

(A) A general description of the property requested.

(B) A description of the intended uses.

(C) A description of the economic impact of closure or realignment on the local community.

(D) A description of the financial condition of the community and the prospects for redevelopment of the property.

(E) A statement of how the EDC is consistent with the overall redevelopment plan.

(3) A description of how the EDC will contribute to short- and long-term job generation on the installation, including the projected number and type of new jobs it will assist in generating.

(4) A business/operational plan for the EDC parcel, including such elements as:

(A) A development timetable, phasing schedule, and cash flow analysis.

(B) A market and financial feasibility analysis describing the economic viability of the project, including an estimate of net proceeds over a fifteen-year period, the proposed consideration or payment to the Department of Defense, and the estimated present fair market value of the property.

(C) A cost estimate and justification for infrastructure and other investments needed for the development of the EDC parcel.

(D) Local investment and proposed financing strategies for the development.

(5) A statement describing why other authorities, such as public or negotiated sales and public benefit conveyances for education, parks, public health, aviation, historic monuments, prisons, and wildlife conservation, cannot be used to accomplish the job generation goals.

(6) Evidence of the LRA's legal authority to acquire and dispose of the property.

(7) Evidence that the LRA has full authority to perform all of the actions required of it pursuant to the terms of the EDC, can demonstrate through agreements or assurances that the LRA has the appropriate local government approvals to implement the approved

reuse plan, and that the officers executing the EDC documents on behalf of the LRA have full authority to do so.

(8) Proof the LRA has obtained sufficient financing for acquiring the EDC property and carrying out the LRA's redevelopment objectives.

(f) Upon receipt of an application for an EDC, the Secretary concerned will determine whether an EDC is needed for purposes of job generation and examine whether the terms and conditions proposed are fair and reasonable. The Secretary may also consider information independent of the application, such as views of other Federal agencies, appraisals, caretaker costs, and other relevant material. The Secretary may propose and negotiate any alternative terms or conditions that the Secretary considers necessary seeking always to obtain an amount equal to the fair market value.

(g) The following factors will be considered, as appropriate, in evaluating the application and the terms and conditions of the proposed transfer, including price, time of payment, and other relevant methods of compensation to the Federal government.

(1) Adverse economic impact of closure or realignment on the region and potential for economic recovery through an EDC.

(2) Extent of short- and long-term job generation.

(3) Consistency with the entire redevelopment plan.

(4) Financial feasibility of the development, including market analysis and need and extent of proposed infrastructure and other investments.

(5) Extent of state and local investment, level of risk incurred, and the LRA's ability to implement the plan.

(6) Current local and regional real estate market conditions.

(7) Incorporation of other Federal agency interests and concerns, and applicability of, and conflicts with, other Federal surplus property disposal authorities.

(8) Relationship to the overall Military Department disposal plan for the installation.

(9) Economic benefit to the Federal Government, including protection and maintenance cost savings and anticipated consideration from the transfer.

(10) Compliance with applicable Federal, state, interstate, and local laws and regulations.

(h) Before making an EDC, the Secretary concerned shall prepare an estimate of the fair market value of the property.

(1) In preparing the estimate of fair market value, the Secretary concerned

shall use the most recent edition of the *Uniform Appraisal Standards for Federal Land Acquisitions*, published by the Appraisal Institute in cooperation with the U.S. Department of Justice.

(2) The Secretary concerned shall consult with the LRA on valuation assumptions, guidelines, and on instructions given to the appraiser.

(3) The Secretary concerned is fully responsible for completion of the valuation. The Secretary, in preparing the estimate of fair market value shall consider the proposed uses identified in the redevelopment plan to the extent that they are not inconsistent with the highest and best use.

§ 174.10 Consideration for economic development conveyances.

(a) For conveyances made pursuant to § 174.9 of this part, the Secretary concerned will review the application for an EDC and negotiate the terms and conditions of each transaction with the LRA. The Secretary will have the discretion and flexibility to enter into agreements that specify the form of payment and the schedule. The consideration may be in cash or in-kind and may be paid over time.

(b) The Secretary concerned shall seek to obtain consideration at least equal to the fair market value, as determined by the Secretary.

(c) Any amount paid in the future should take into account the time value of money and include repayment of interest.

(d) Additional provisions may be incorporated in the conveyance documents to protect the Department's interest in obtaining the agreed upon consideration, including such items as predetermined release prices, or other appropriate clauses designed to ensure payment and protect against fraudulent transactions.

(e)(1) An EDC without consideration may only be made if—

(i) The LRA agrees that the proceeds from any sale or lease of the property (or any portion thereof) received by the LRA during at least the first seven years after the date of the initial transfer of property shall be used to support economic redevelopment of, or related to, the installation; and

(ii) The LRA executes the agreement for transfer of the property and accepts control of the property within a reasonable time after the date of the property disposal record of decision.

(2) The following purposes shall be considered a use to support economic redevelopment of, or related to, the installation—

(i) Road construction;

(ii) Transportation management facilities;

(iii) Storm and sanitary sewer construction;

(iv) Police and fire protection facilities and other public facilities;

(v) Utility construction;

(vi) Building rehabilitation;

(vii) Historic property preservation;

(viii) Pollution prevention equipment or facilities;

(ix) Demolition;

(x) Disposal of hazardous materials generated by demolition;

(xi) Landscaping, grading, and other site or public improvements; and

(xii) Planning for or the marketing of the development and reuse of the installation.

(f) Every agreement for an EDC without consideration shall contain provisions allowing the Secretary concerned to recoup from the LRA such portion of the proceeds from its sale or lease as the Secretary determines appropriate if the LRA does not use the proceeds to support economic redevelopment of, or related to, the installation for the period specified in paragraph (e)(1) of this section.

§ 174.11 Leasing of real property to non-Federal entities.

(a) Leasing of real property to non-Federal entities prior to the final disposition of closing and realigning installations may facilitate state and local economic adjustment efforts and encourage economic redevelopment, but the Secretary concerned will always concentrate on the final disposition of real and personal property.

(b) In addition to leasing property at fair market value, to assist local redevelopment efforts the Secretary concerned may also lease real and personal property, pending final disposition, for less than fair market value if the Secretary determines that:

(1) A public interest will be served as a result of the lease; and,

(2) The fair market value of the lease is unobtainable or not compatible with such public benefit.

(c) Pending final disposition of an installation, the Secretary concerned may grant interim leases which are short-term leases that make no commitment for future use or ultimate disposal. When granting an interim lease, the Secretary will generally lease to the LRA but can lease property directly to other entities. If the interim lease (after complying with NEPA) is entered into prior to completion of the final disposal decisions, the term may be for up to five years, including options to renew, and may contain restrictions on use. Leasing should not delay the final disposal of the property. After completion of the final disposal

decisions, the term of the lease may be longer than five years.

(d) If the property is leased for less than fair market value to the LRA and the interim lease permits the property to be subleased, the interim lease shall provide that rents from the subleases will be applied by the lessee to the protection, maintenance, repair, improvement, and costs related to the property at the installation consistent with 10 U.S.C. 2667.

§ 174.12 Leasing of transferred real property by Federal agencies.

(a) The Secretary concerned may transfer real property that is still needed by a Federal agency (which for purposes of this section includes DoD Components) to an LRA provided the LRA agrees to lease the property to the Federal agency in accordance with all statutory and regulatory guidance.

(b) The decision whether to transfer property pursuant to such a leasing arrangement rests with the Secretary concerned. However, a Secretary shall only transfer property subject to such a leasing arrangement if the Federal agency that needs the property agrees to the leasing arrangement.

(c) If the subject property cannot be transferred pursuant to such a leasing arrangement (e.g., the relevant Federal agency prefers ownership, the LRA and the Federal agency cannot agree on terms of the lease, or the Secretary concerned determines that such a lease would not be in the Federal interest), such property shall remain in Federal ownership unless and until the Secretary concerned determines that it is surplus.

(d) If a building or structure is proposed for transfer pursuant to this section, that which is leased by the Federal agency may be all or a portion of that building or structure.

(e) Transfers pursuant to this section must be to an LRA.

(f) Either existing Federal tenants or Federal agencies desiring to locate onto the property after operational closure may make use of such a leasing arrangement. The Secretary concerned may not enter into such a leasing arrangement unless:

(1) In the case of a Defense Agency, the Secretary concerned is acting in an Executive Agent capacity on behalf of the Agency that certifies that such a leasing arrangement is in the interest of that Agency; or,

(2) In the case of a Military Department, the Secretary concerned certifies that such a leasing arrangement is in the best interest of the Military Department and that use of the property by the Military Department is consistent

with the obligation to close or realign the installation in accordance with the recommendations of the Defense Base Closure and Realignment Commission.

(g) Property eligible for such a leasing arrangement is not surplus because it is still needed by the Federal Government. Even though the LRA would not otherwise have to include such property in its redevelopment plan, it should include the property in its redevelopment plan anyway to take into account the planned Federal use of such property.

(h) The terms of the LRA's lease to the Federal Government should afford the Federal agency rights as close to those associated with ownership of the property as is practicable. The requirements of the General Services Administration (GSA) Federal Acquisition Regulation (48 CFR Part 570) are not applicable to the lease, but provisions in that regulation may be used to the extent they are consistent with this part. The terms of the lease are negotiable subject to the following:

(1) The lease shall be for a term of no more than 50 years, but may provide for options for renewal or extension of the term at the request of the Federal Government. The lease term should be based on the needs of the Federal agency.

(2) The lease, or any renewals or extensions thereof, shall not require rental payments.

(3) Notwithstanding paragraph (h)(2) of this section, if the lease involves a substantial portion of the installation, the Secretary concerned may obtain facility services for the leased property and common area maintenance from the LRA or the LRA's assignee as a provision of the lease.

(A) Such services and common area maintenance shall be provided at a rate no higher than the rate charged to non-Federal tenants of the transferred property.

(B) Such services and common area maintenance shall not include—

(i) Municipal services that a State or local government is required by law to provide to all landowners in its jurisdiction without direct charge, including police protection; or

(ii) Firefighting or security-guard functions.

(C) The Federal agency may be responsible for services such as janitorial, grounds keeping, utilities, capital maintenance, and other services normally provided by a landlord.

Acquisition of such services by the Federal agency is to be accomplished through the use of Federal Acquisition Regulation procedures or otherwise in

accordance with applicable statutory and regulatory requirements.

(4) The lease shall include a provision prohibiting the LRA from transferring fee title to another entity during the term of the lease, other than one of the political jurisdictions that comprise the LRA, without the written consent of the Federal agency occupying the leased property.

(5)(i) The lease shall include an option specifying that if the Federal agency no longer needs the property before the expiration of the term of the lease, the remainder of the lease term may be satisfied by the same or another Federal agency that needs property for a similar use. ("Similar use" is a use that is comparable to or essentially the same as the use under the original lease, as determined by the Secretary concerned.)

(ii)(B) If the tenant is a DoD Component, before notifying GSA of the availability of the leasehold, it shall determine whether any other DoD Component has a requirement for the leasehold; in doing so, it shall consult with the LRA. If another DoD Component has a requirement for the leasehold, that DoD Component shall be allowed to assume the leasehold for the remainder of its term. If no DoD Component has a requirement for the leasehold, the tenant shall notify GSA in accordance with paragraph (h)(5)(ii)(A) of this section.

(A) The Federal tenant shall notify the GSA of the availability of the leasehold. GSA will then decide whether to exercise this option after consulting with the LRA or other property owner. The GSA shall have 60 days from the date of notification in which to identify a Federal agency to serve out the term of the lease and to notify the LRA or other property owner of the new tenant. If the GSA does not notify the LRA or other property owner of a new tenant within such 60 days, the leasehold shall terminate on a date agreed to by the Federal tenant and the LRA or other property owner.

(B) If the GSA decides not to exercise this option after consulting with the LRA or other property owner, the leasehold shall terminate on a date agreed to by the Federal tenant and the LRA or other property owner.

(6) The terms of the lease shall provide that the Federal agency may repair and improve the property at its expense after consultation with the LRA.

(i) Property subject to such a leasing arrangement shall be conveyed in accordance with the existing EDC procedures. The LRA shall submit the following in addition to the application

requirements outlined in § 174.9(e) of this part:

(1) A description of the parcel or parcels the LRA proposes to have transferred to it and then to lease to a Federal agency;

(2) A written statement signed by an authorized representative of the Federal agency that it agrees to accept the lease of the property; and,

(3) A statement explaining why such a leasing arrangement is necessary for the long-term economic redevelopment of the installation property.

(j) The exact amount of consideration, or the formula to be used to determine that consideration, as well as the schedule for payment of consideration must be agreed upon in writing before transfer pursuant to this section.

Subpart E—Personal Property

§ 174.13 Personal property.

(a) This section outlines procedures to allow transfer of personal property to the LRA for the effective implementation of a redevelopment plan. Personal property does not include fixtures.

(b) The Secretary concerned, supported by DoD Components with personal property on the installation, will take an inventory of the personal property, including its condition, within 6 months after the date of approval of closure or realignment. This inventory will be limited to the personal property located on the real property to be disposed of by the Military Department. The inventory will be taken in consultation with LRA officials. If there is no LRA, the Secretary concerned shall consult with the local government in whose jurisdiction the installation is wholly located, or a local government agency or a State government agency designated for that purpose by the Governor of the State. Based on these consultations, the installation commander will determine the items or category of items that have the potential to enhance the reuse of the real property.

(c) Except for property subject to the exemptions in paragraph (e) of this section, personal property with potential to enhance the reuse of the real property shall remain at an installation being closed or realigned until the earlier of:

(1) One week after the Secretary concerned receives the redevelopment plan;

(2) The date notified by the LRA that there will be no redevelopment plan;

(3) 24 months after the date of approval of the closure or realignment of the installation; or

(4) 90 days before the date of the closure or realignment of the installation.

(d) National Guard property under the control of the United States Property and Fiscal Officer is subject to inventory and may be made available for redevelopment planning purposes.

(e) Personal property may be removed upon approval of the installation commander or higher authority, as prescribed by the Secretary concerned, after the inventory required in paragraph (b) of this section has been sent to the LRA, when:

(1) The property is required for the operation of a unit, function, component, weapon, or weapons system at another installation;

(2) The property is uniquely military in character and is likely to have no civilian use (other than use for its material content or as a source of commonly used components). This property consists of classified items; nuclear, biological, and chemical items; weapons and munitions; museum property or items of significant historic value that are maintained or displayed on loan; and similar military items;

(3) The property is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary concerned and the LRA);

(4) The property is stored at the installation for purposes of distribution (including spare parts or stock items) or redistribution and sale (DoD excess/surplus personal property). This property includes materials or parts used in a manufacturing or repair function but does not include maintenance spares for equipment to be left in place;

(5) The property meets known requirements of an authorized program of a DoD Component or another Federal agency that would have to purchase similar items, and is the subject of a written request by the head of the DoD Component or other Federal agency. If the authority to acquire personal property has been delegated, a copy of the delegation must accompany the request. (For purposes of this paragraph, "purchase" means the DoD Component or Federal agency intends to obligate funds in the current quarter or next six fiscal quarters.) The DoD Component or Federal agency must pay packing, crating, handling, and transportation charges associated with such transfers of personal property;

(6) The property belongs to a nonappropriated fund instrumentality (NAFI) of the Department of Defense; separate arrangements for communities to purchase such property are possible

and may be negotiated with the Secretary concerned;

(7) The property is not owned by the Department of Defense, *i.e.*, it is owned by a Federal agency outside the Department of Defense or by non-Federal persons or entities such as a State, a private corporation, or an individual; or,

(8) The property is needed elsewhere in the national security interest of the United States as determined by the Secretary concerned. This authority may not be re-delegated below the level of an Assistant Secretary. In exercising this authority, the Secretary may transfer the property to any DoD Component or other Federal agency.

(f) Personal property not subject to the exemptions in paragraph (e) of this section may be conveyed to the LRA as part of an EDC for the real property if the Secretary concerned makes a finding that the personal property is necessary for the effective implementation of the redevelopment plan.

(g) Personal property may also be conveyed separately to the LRA under an EDC for personal property. This type of EDC can be made if the Secretary concerned determines that the transfer is necessary for the effective implementation of a redevelopment plan with respect to the installation. Such determination shall be based on the LRA's timely application for the property, which should be submitted to the Secretary upon completion of the redevelopment plan. The application must include the LRA's agreement to accept the personal property after a reasonable period and will otherwise comply with the requirements of §§ 174.9 and 174.10 of this part. The transfer will be subject to reasonable limitations and conditions on use.

(h) Personal property that is not needed by a DoD Component or a tenant Federal agency or conveyed to an LRA (or a state or local jurisdiction in lieu of an LRA), or conveyed as related personal property together with the real property, will be transferred to the Defense Reutilization and Marketing Office for disposal in accordance with applicable regulations.

(i) Useful personal property not needed by the Federal Government and not qualifying for transfer to the LRA under an EDC may be donated to the community or LRA through the appropriate State Agency for Surplus Property (SASP) under 41 CFR part 102-37 surplus program guidelines. Personal property donated under this procedure must meet the usage and control requirements of the applicable SASP.

Subpart F—Maintenance and Repair

§ 174.14 Maintenance and repair.

(a) Facilities and equipment located on installations being closed are often important to the eventual reuse of the installation. This section provides maintenance procedures to preserve and protect those facilities and items of equipment needed for reuse in an economical manner that facilitates installation redevelopment.

(b) In order to ensure quick reuse, the Secretary concerned, in consultation with the LRA, will establish initial levels of maintenance and repair needed to aid redevelopment and to protect the property for the time periods set forth in paragraph (c) of this section. Where agreement between the Secretary and the LRA cannot be reached, the Secretary will determine the required levels of maintenance and repair and its duration. In no case will these initial levels of maintenance:

(1) Exceed the standard of maintenance and repair in effect on the date of approval of closure or realignment;

(2) Be less than maintenance and repair required to be consistent with Federal Government standards for excess and surplus properties as provided in the Federal Management Regulations of the GSA, 41 CFR part 102;

(3) Be less than the minimum levels required to support the use of such facilities or equipment for nonmilitary purposes; or,

(4) Require any property improvements, including construction, alteration, or demolition, except when the demolition is required for health, safety, or environmental purposes, or is economically justified in lieu of continued maintenance expenditures.

(c) Unless the Secretary concerned determines that it is in the national security interest of the United States, the levels of maintenance and repair specified in paragraph (b) of this section shall not be changed until the earlier of:

(1) One week after the Secretary concerned receives the redevelopment plan;

(2) The date notified by the LRA that there will be no redevelopment plan;

(3) 24 months after the date of approval of the closure or realignment of the installation; or

(4) 90 days before the date of the closure or realignment of the installation.

(d) The Secretary concerned may extend the time period for the initial levels of maintenance and repair for property still under the Secretary's control for an additional period, if the

Secretary determines that the LRA is actively implementing its redevelopment plan, and such levels of maintenance are justified.

(e) Once the time period for the initial or extended levels of maintenance and repair expires, the Secretary concerned will reduce the levels of maintenance and repair to levels consistent with Federal Government standards for excess and surplus properties as provided in the Federal Management Regulations of the GSA, except in the case of facilities still being used to perform a DoD mission.

Subpart G—Environmental Matters

§ 174.15 Indemnification under Section 330 of the National Defense Authorization Act for Fiscal Year 1993.

Section 330 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, as amended, provides for indemnification of transferees of closing Department of Defense properties under circumstances specified in that statute. The authority to implement this provision of law has been delegated by the Secretary of Defense to the General Counsel of the Department of Defense; therefore, this provision of law shall only be referred to or recited in any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for real or personal property after obtaining the written concurrence of the Deputy General Counsel (Environment and Installations), Office of the General Counsel, Department of Defense.

§ 174.16 Real property containing explosive or chemical agent hazards.

The DoD Component controlling real property known to contain or suspected of containing explosive or chemical agent hazards from past DoD military munitions-related or chemical warfare-related activities shall, prior to transfer of the property out of Department of Defense control, obtain the DoD Explosives Safety Board's approval of measures planned to ensure protectiveness from such hazards, in accordance with DoD Directive 6055.9E, *Explosives Safety Management and the DoD Explosives Safety Board*.

§ 174.17 NEPA.

At installations subject to this part, NEPA analysis shall comply with the promulgated NEPA regulations of the Military Department exercising real property accountability for the installation, including any requirements relating to responsibility for funding the analysis. See 32 CFR parts 651 (for the Army), 775 (for the Navy), and 989 (for

the Air Force). Nothing in this section shall be interpreted as releasing a Military Department from complying with its own NEPA regulation.

§ 174.18 Historic preservation.

(a) The transfer, lease, or sale of National Register-eligible historic property to a non-Federal entity at installations subject to this part may constitute an "adverse effect" under the regulations implementing the National Historic Preservation Act (36 CFR 800.5(a)(2)(vii)). One way of resolving this adverse effect is to restrict the use that may be made of the property subsequent to its transfer out of Federal ownership or control through the imposition of legally enforceable restrictions or conditions. The Secretary concerned may include such restrictions or conditions (typically a real property interest in the form of a restrictive covenant or preservation easement) in any deed or lease conveying an interest in historic property to a non-Federal entity. Before doing so, the Secretary should first consider whether the historic character of the property can be protected effectively through planning and zoning actions undertaken by units of State or local government; if so, working with such units of State or local government to protect the property through these means is preferable to encumbering the property with such a covenant or easement.

(b) Before including such a covenant or easement in a deed or lease, the Secretary concerned shall consider—

(1) Whether the jurisdiction that encompasses the property authorizes such a covenant or easement; and

(2) Whether the Secretary can give or assign to a third party the responsibility for monitoring and enforcing such a covenant or easement.

PART 175—[REMOVED AND RESERVED]

- 2. Part 175 is removed and reserved.

PART 176—REVITALIZING BASE CLOSURE COMMUNITIES AND COMMUNITY ASSISTANCE—COMMUNITY REDEVELOPMENT AND HOMELESS ASSISTANCE

- 3. The authority citation for part 176 continues to read as follows:

Authority: 10 U.S.C. 2687 *note*.

§ 176.20 [AMENDED]

- 4. Section 176.20(b) is amended by revising "32 CFR part 175" to read "32 CFR part 174".

Dated: February 24, 2006.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, DoD.

[FR Doc. 06-1902 Filed 2-24-06; 12:08 pm]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DOD.
ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General of the Navy (Admiralty and Maritime Law) has determined that Causeway Ferry Power Modules (CFPM) and Warping Tugs (WT) are vessels of the Navy which, due to their special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with their special function as naval ships. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: *Effective Date:* September 9, 2005.

FOR FURTHER INFORMATION CONTACT:

Commander Gregg A. Cervi, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, 1322 Patterson Avenue, Suite 3000, Washington Navy Yard, DC 20374-5066, telephone 202-685-5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR part 706. This amendment provides notice that the Deputy Assistant Judge Advocate General of the Navy (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that Causeway Ferry Power Modules (CFPM) and Warping Tugs

(WT) are vessels of the Navy which, due to their special construction and purpose, cannot fully comply with the following specific provisions of the 72 COLREGS without interfering with their special function as naval ships: Rule 21(a), pertaining to the placement of masthead lights over the fore and aft centerline of the vessel; Rule 23(a)(i) and Annex I paragraph 3(c), pertaining to placement of the masthead light in the forward part of the ship; Annex I, paragraph 3(b), pertaining to the placement of sidelights aft of the masthead light and at or near the side of the vessel; and Annex I, paragraph 2(i)(i), pertaining to placement of task lights in a vertical line not less than 2 meters apart. The Deputy Assistant Judge Advocate General of the Navy (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on these vessels in a manner differently from that prescribed herein will adversely affect the vessels' ability to perform their military functions.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), and Vessels.

- For the reasons set forth in the preamble, amend part 706 of title 32 of the Code of Federal Regulations as follows:

PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

- 1. The authority citation for 32 CFR part 706 continues to read as follows:

Authority: 33 U.S.C. 1605.

- 2. Table Two of § 706.2 is amended by adding, in numerical order, the following entries for CFPM (class) and WT (class):

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *