



Department of Defense

INSTRUCTION

NUMBER 4165.72

December 21, 2007

Incorporating Change 2, August 31, 2018

USD(A&S)

SUBJECT: Real Property Disposal

- References:
- (a) DoD Directive 4165.06, "Real Property," October 13, 2004
 - (b) DoD Directive 4275.5, "Acquisition and Management of Industrial Resources," March 15, 2005
 - (c) DoD Instruction 4165.69, "Realignment of DoD Sites Overseas," April 6, 2005
 - (d) DoD Directive 5110.04, "Washington Headquarters Services (WHS)," March 27, 2013
 - (e) through (w), see Enclosure 1

1. PURPOSE

This Instruction:

1.1. Implements policy and assigns responsibility pursuant to Reference (a) for the disposal of real property.

1.2. Re-delegates various statutory and regulatory authorities and responsibilities relating to real property disposal.

2. APPLICABILITY AND SCOPE

This Instruction:

2.1. Applies to the Office of the Secretary of Defense, the Military Departments (including their Reserve components), the Office of the Chairman of the Joint Chiefs of 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").

2.2. Applies to all DoD real property holdings except:

2.2.1. Civil works projects.

2.2.2. The acquisition and management of defense industrial plants that are governed by DoD Directive 4275.5 (Reference (b)).

2.3. Does not apply to DoD real property holdings:

2.3.1. Disposed of pursuant to a base closure law, except for paragraphs 5.1.2., 5.5., 5.8., 5.9., 5.10., and 5.11., which do apply.

2.3.2. Outside the United States with regard to those provisions of law not having extraterritorial application. (See DoD Instruction 4165.69 (Reference (c))).

3. DEFINITIONS

3.1. Consistent with DoD Directive 5110.04 (Reference (d)), for purposes of the Pentagon Reservation, Washington Headquarters Services shall be considered a Military Department and its Director the secretary thereof.

3.2. Other terms used in this Instruction are defined in the DoD Dictionary of Military and Associated Terms (Reference (e)) and section 101 of title 10, United States Code (U.S.C.) (Reference (f)).

4. RESPONSIBILITIES

4.1. The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall establish overarching guidance and procedures regarding the disposal of real property.

4.2. The Assistant Secretary of Defense for Energy, Installations, and Environment (ASD(EI&E)), under the authority, direction, and control of the USD(AT&L):

4.2.1. Shall provide additional guidance and procedures for the implementation of DoD real property disposal policy and this Instruction.

4.2.2. Is hereby re-delegated, with authority to re-delegate, all those authorities and responsibilities delegated or re-delegated, as the case may be, to the USD(AT&L) under paragraph 5.1.3. of Reference (a) that relate to the disposal of real property.

4.3. The Secretaries of the Military Departments shall:

4.3.1. Establish programs and procedures to dispose of real property that conform with applicable law and the policies, guidance, and procedures provided by and pursuant to Reference (a) and this Instruction.

4.3.2. Accurately inventory and account for the real property under their jurisdiction, management, and control in accordance with DoD Instruction 4165.14 (Reference (g)).

4.4. The Heads of the DoD Components shall:

4.4.1. Ensure compliance with this Instruction.

4.4.2. Provide, within 45 days after a Military Department gives notice of the availability of real property for which a DoD Component has a requirement, a firm commitment to take real property accountability for the property in the case of a Military Department, or a firm commitment from a Combatant Command, Defense Agency, or DoD Field Activity that it requires the property and has secured the agreement of a Military Department to accept real property accountability for the property. A Combatant Command, Defense Agency, or DoD Field Activity that is supported by a specific Military Department for its real property requirements will communicate its requirements through that Military Department.

5. PROCEDURES

5.1. Disposal of Real Property. The programs of the Military Departments shall ensure that, after screening with the other DoD Components, real property for which there is no foreseeable military requirement, either in peacetime or for mobilization, and for which the Department of Defense does not have disposal authority, is promptly reported for disposal to the General Services Administration (GSA), or the Department of the Interior in the case of land withdrawals, in accordance with applicable regulations of those agencies.

5.1.1. Real property may be transferred, at no cost, among the Armed Forces, including the Coast Guard, pursuant to section 2696 of title 10, U.S.C. (Reference (h)). Subject to the authority, direction, and control of the Secretary of Defense with regard to the DoD Components, this transfer authority cannot be precluded, directly or indirectly, by any regulatory, program, or policy restrictions issued by any agency or official within the Executive Branch of the Federal Government.

5.1.2. Subject to Reference (h), ensure compliance with part 373 of title 40, Code of Federal Regulations (CFR), "Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property" (Reference (i)).

5.1.3. Subject to Reference (h), ensure compliance with the Federal Management Regulation (Reference (j)) dealing with real property disposal, part 102-75 of title 41, CFR.

5.1.4. Ensure compliance with chapter 6 of volume 4 of the DoD Financial Management Regulations, DoD 7000.14-R (Reference (k)) relating to valuation of property assets.

5.1.5. Until such time during the disposal process that GSA assumes such responsibility, the holding Military Department will ensure compliance with the McKinney-Vento Homeless

Assistance Act, as amended, section 11411 of title 42, U.S.C., (Reference (l)) with regard to identifying unutilized, underutilized, excess, or surplus property that may be suitable for use by the homeless.

5.1.6. Disposal of real property may include disposing of associated interests in real property such as authorized by section 2668a of title 10, U.S.C. (Reference (m)), including those needed to comply with the requirements of the National Historic Preservation Act, section 470 et seq. of title 16, U.S.C. (Reference (n)).

5.1.7. In the case of withdrawn lands not accepted back by the Department of the Interior, always address disposition of mineral rights during the disposal process. (See part 2720 of title 43, CFR (Reference (o))).

5.1.8. For granting uses of real property such as outgrants, see DoD Instruction 4165.70 (Reference (p)).

5.1.9. Before disposing of real property containing floodplains or wetlands, ensure compliance with Executive Orders 11988 and 11990 (References (q) and (r), respectively).

5.2. Mobilization Requirements. Real property may be held solely to meet a mobilization requirement.

5.2.1. Such property may be made available for interim use in one of the following ways, provided it will not involve modifying the property in a manner that would prevent its timely use in meeting its mobilization requirements:

5.2.1.1. By permit to another Government agency.

5.2.1.2. By outgranting by license, easement, or lease.

5.2.1.3. By declaring it as excess to GSA for disposal subject to adequate provisions for recapture in accordance with existing regulations, instructions, and statutes.

5.2.2. Any property subject to interim use in accordance with paragraphs 5.2.1.1. and 5.2.1.2. shall have a provision in the granting document requiring immediate return of the property, without cost to the Department of Defense, upon the demand of the holding Military Department, after it determines the property is required for mobilization.

5.3. Release of Reverter and Reuse Rights and of Covenants. The release of reverter and emergency reuse (recapture) rights and of covenants retained by the Government may be effected in response to a petition from the current owner to the Secretary of Defense through the original Federal grantor agency, such as the Departments of Interior, Health and Human Services, Housing and Urban Development, and Education; the Federal Aviation Administration; or GSA; if there is no current requirement for the right or covenant by any of the Military Departments.

5.3.1. Upon notification by ASD(EI&E) that such a petition has been received, the holding Military Department shall review:

5.3.1.1. In the case of reverter or reuse rights, plans covering contemplated use of the facility in light of the current and projected physical condition of the improvements.

5.3.1.2. In the case of a covenant, the original reason for the covenant, State regulatory concurrence if applicable, and changed circumstances.

5.3.2. The holding Military Department shall also notify the other DoD Components that the reverter or reuse rights it has reserved may be extinguished and request they provide, within 45 days, their objections, if any, to the release of such rights along with their rationale for objecting.

5.3.3. The holding Military Department:

5.3.3.1. If it was not the grantor agency, shall then make a recommendation to ASD(EI&E) as to whether the reverter or reuse rights or the covenant should be extinguished.

5.3.3.2. If it was the grantor agency and intends to extinguish the reverter or reuse rights or the covenant, shall advise ASD(EI&E) of its intention and wait 15 days before taking further action.

5.3.4 ASD(EI&E) shall, in the case of paragraph 5.3.3.1., then provide the position of the Department of Defense to the Federal grantor agency as to whether the reverter or reuse rights or the covenant should be extinguished.

5.4. Environmental Impacts. The holding Military Department shall accomplish any environmental analysis, including of the environmental condition of the property, required by law or its regulations prior to disposing of property, whether the disposal is done directly or by transfer to another agency for disposal or reuse.

5.5. Clauses Under section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), section 9620(h) of title 42, U.S.C., (Reference (s)).

5.5.1. Reference (s) provides an exception to the prohibitions of the Anti-Deficiency Act by allowing the commitment of a future unfunded obligation, namely the potential return of the United States to conduct a remedial action on former DoD properties. The Department of Defense has no authority to increase or decrease the commitments directed to be provided by section 120(h).

5.5.2. Any deed transferring title to real property shall contain, to the extent they are required by law, the notices, descriptions, assurances, access rights, warranties, and covenants (collectively referred to as "120(h) clauses" in this Instruction) specified in Reference (s) as provided by this Instruction. The 120(h) clauses contained in this Instruction shall not be

inserted into any other real property transfer documents other than a deed transferring real property, nor shall any other versions of such clauses be inserted into such other documents.

5.5.2.1. Such 120(h) clauses:

5.5.2.1.1. Ensure compliance with Reference (s) when a DoD Component transfers real property to a non-Federal entity.

5.5.2.1.2. Provide uniformity in transaction documents.

5.5.2.1.3. Ensure the liability of the United States is not increased beyond that provided by law.

5.5.2.1.4. Ensure the commitments made by the United States to non-Federal recipients of DoD real property are not less than those required to be provided by Reference (s).

5.5.2.2. Such 120(h) clauses shall contain without change or limitation the applicable language provided in Enclosure 2. Changes or limitations to the language provided in Enclosure 2 are only authorized with the prior written approval of ASD(EI&E).

5.5.2.3. This paragraph 5.5. has limited application:

5.5.2.3.1. It addresses the provision of 120(h) clauses under Reference (s). It does not address all obligations under Reference (s). (See paragraph 5.1.2., for example.)

5.5.2.3.2. Not all property transfers are subject to this paragraph:

5.5.2.3.2.1. Only those transfers by deed (or other agreement in the case of section 120(h)(3)(C)(ii) assurances), i.e., transfer of title outside of the Federal Government, are subject to these 120(h) clauses. Leases and easements are not a transfer of title.

5.5.2.3.2.2. Only those transfers of title that occurred after the enactment of the relevant provisions of paragraphs 120(h)(3) and (4) of Reference (s) would be subject to its provisions relating to 120(h) clauses. For instance, a formerly used defense site transferred before the date of enactment of sections 120(h)(3) and (4) would not have had the 120(h) clauses provided in the deed.

5.5.2.4. No other 120(h) clauses, other than those provided in Enclosure 2, or changed or limited with the permission of ASD(EI&E) pursuant to paragraph 5.5.2.2., shall be used to comply with Reference (s). As a negotiated aspect of a business transaction, the Secretary concerned may agree to other deed provisions that are not inconsistent with the 120(h) clauses in Enclosure 2. Such negotiated provisions shall not increase or reduce the liability of the United States with regard to its section 120(h) obligations. Such negotiated provisions may include, for example, contractual transfer of responsibility for conducting the remedial action in instances of early transfer, contractual agreements relating to insurance to ensure performance of other contractual obligations, and environmental covenants or similar restrictions to ensure

viability of a remedy. As an aid in applying paragraph 5.5., Enclosure 3 contains a table providing a broad overview as to which 120(h) clauses should be used in various circumstances.

5.5.2.4.1. Property subject to paragraph 120(h)(3) of Reference (s). For property subject to paragraph 120(h)(3) of Reference (s), but excluding property subject to deferral under paragraph 120(h)(3)(C) of Reference (s), the following 120(h) clauses shall be used in the deed:

5.5.2.4.1.1. The appropriate option for the 120(h) clause found at paragraph E2.1.1. of Enclosure 2 entitled “Property Covered by Notice, Description, Access Rights, and Covenants Made Pursuant to Section 120(h)(3)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A))”;

5.5.2.4.1.2. The appropriate option for the 120(h) clause found at paragraph E2.1.2. of Enclosure 2 entitled “Notices Pursuant to Section 120(h)(3)(A)(i)(I) and (II) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(I) and (II))”;

5.5.2.4.1.3. The appropriate option for the 120(h) clause found at paragraph E2.1.3. of Enclosure 2 entitled “Description of Remedial Action Taken, if Any, Pursuant to Section 120(h)(3)(A)(i)(III) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(III))”;

5.5.2.4.1.4. The 120(h) clause found at paragraph E2.1.4. of Enclosure 2 entitled “Covenant Pursuant to Section 120(h)(3)(A)(ii) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(ii) and (B))” [this 120(h) clause shall not be provided in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property]; and

5.5.2.4.1.5. The 120(h) clause found at paragraph E2.1.5. of Enclosure 2 entitled “Access Rights Pursuant to Section 120(h)(3)(A)(iii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(iii)).

5.5.2.4.2. Property subject to paragraph 120(h)(3)(C) of Reference (s).

5.5.2.4.2.1. For property subject to paragraph 120(h)(3) of Reference (s) but where the requirement to provide the warranty under paragraph 120(h)(3)(A)(ii)(I) of Reference (s) has been deferred pursuant to paragraph 120(h)(3)(C) of Reference (s), the following 120(h) clauses shall be used in the deed (or other agreement addressing the response action assurances in the case of the 120(h) clause addressed in paragraph 5.5.2.4.2.1.5):

5.5.2.4.2.1.1. The appropriate option for the 120(h) clause found at paragraph E2.2.1. of Enclosure 2 entitled “Property Covered by Notice, Description, Assurances, Access Rights, and Covenants Made Pursuant to Section 120(h)(3)(A) of the Comprehensive

Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A))”;

5.5.2.4.2.1.2. The appropriate option for the 120(h) clause found at paragraph E2.1.2. of Enclosure 2 entitled “Notices Pursuant to Section 120(h)(3)(A)(i)(I) and (II) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(I) and (II))”;

5.5.2.4.2.1.3. The appropriate option for the 120(h) clause found at paragraph E2.1.3. of Enclosure 2 entitled “Description of Remedial Action Taken, if Any, Pursuant to Section 120(h)(3)(A)(i)(III) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(III))”;

5.5.2.4.2.1.4. The 120(h) clause found at paragraph E2.2.2. of Enclosure 2 entitled “Covenant Pursuant to Section 120(h)(3)(A)(ii)(II) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(ii)(II) and (B))” [this 120(h) clause shall not be provided in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property];

5.5.2.4.2.1.5. The 120(h) clause found at paragraph E.2.2.3. of Enclosure 2 entitled “Assurances Pursuant to Section 120(h)(3)(C)(ii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(C)(ii))”;

5.5.2.4.2.1.6. The 120(h) clause found at paragraph E.2.1.5. of Enclosure 2 entitled “Access Rights Pursuant to Section 120(h)(3)(A)(iii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(iii))”.

5.5.2.4.2.2. When all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the following 120(h) clauses shall be provided to the transferee in an appropriate document [these 120(h) clauses shall not be provided in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property]:

5.5.2.4.2.2.1. The appropriate option for the 120(h) clause found at paragraph E2.2.1. of Enclosure 2 entitled “Property Covered by Notice, Description, Assurances, Access Rights, and Warranty Made Pursuant to Section 120(h)(3)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A))”;

5.5.2.4.2.2.2. The 120(h) clause found at paragraph E2.2.4. of Enclosure 2 entitled “Warranty Pursuant to Section 120(h)(3)(C)(iii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(C)(iii))”.

5.5.2.4.3. Property subject to paragraph 120(h)(4) of Reference (s). For property subject to paragraph 120(h)(4) of Reference (s), the following 120(h) clauses shall be used in the deed:

5.5.2.4.3.1. The appropriate option for the 120(h) clause found at paragraph E2.3.1. of Enclosure 2 entitled “Property Covered by Covenant and Access Rights Made Pursuant to Section 120(h)(4)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(4)(D))”;

5.5.2.4.3.2. The 120(h) clause found at paragraph E2.3.2. of Enclosure 2 entitled “Covenant Pursuant to Section 120(h)(4)(D)(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(4)(D)(i))”; and,

5.5.2.4.3.3. The 120(h) clause found at paragraph E2.3.3. of Enclosure 2 entitled “Access Rights Pursuant to Section 120(h)(4)(D)(ii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(4)(D)(ii))”.

5.5.2.5. If a hazardous substance was not stored for one year or more, known to have been released, or disposed of on the parcel, but a petroleum product or its derivative is known to have been released or disposed of on the property, none of the 120(h) clauses under Reference (s) shall be provided.

5.5.2.6. To the extent a deed contains separately identified parcels at least one each of which is subject to any two or more of paragraphs 120(h)(3), 120(h)(3) with deferral, and 120(h)(4) of Reference (s), the deed shall separately designate those parcels under each of those three categories and provide the applicable 120(h) clauses in Enclosure 2 for each of those groupings.

5.5.2.7. Users of the 120(h) clauses found at paragraphs E2.1.2. and E2.1.3. of Enclosure 2 should note that they include the possibility of voluminous attachments. Since the transferee will pay the cost of recording, the transferee should be consulted before voluminous but not necessarily required attachments are included with the deed.

5.6. Release of Leaseholds. Excess leaseholds, if transferable, should be made available to other DoD Components and the Coast Guard as soon as possible.

5.6.1. Immediately upon a determination that a DoD leasehold is no longer required by the DoD Component, the DoD Component concerned shall send a notice of availability to the appropriate offices of the other DoD Components and the Coast Guard, provided the leasehold terms would not prevent their use of the leasehold and there is a reasonable useful life remaining.

5.6.2. Such notices shall include a physical description of the property, terms of the lease, surrender date, and date of contract renewal.

5.6.3. The DoD Component or Coast Guard interested in acquiring such an excess DoD leasehold shall assume responsibility for continuing the leasehold interest, including payment of all rents.

5.6.4. If no DoD or Coast Guard interest is expressed, the DoD Component shall advise GSA of any excess leasehold which has at least 9 months of beneficial occupancy remaining to permit Federal screening.

5.6.5. For GSA leaseholds occupied by DoD Components, the DoD Component will inform GSA as soon as the DoD Component becomes aware that it will no longer require the use of the GSA leasehold.

5.7. Excess Family Housing Units. A Report of Excess Real Property (Standard Form 118) (Reference (t)) to GSA covering mortgaged or unencumbered family housing and related land and improvements or unimproved land acquired for family housing purposes shall include the statement: "Net proceeds from the sale of family housing, including related land and improvements, shall be deposited in the Family Housing Account of the appropriate Military Department."

5.8. Timberland

5.8.1. Under the authority of section 2665 of title 10, U.S.C. (Reference (u)), any forest products produced on land owned or leased by a Military Department may be sold without also selling the underlying land, provided, in the case of leased property, that the lease does not prohibit such sales. Since Reference (u) is used to dispose of the forest products, they are not declared excess under title 40, U.S.C., or its implementing regulations.

5.8.2. If forestlands are being considered for disposal, the forest resources should be evaluated to determine the feasibility of harvesting and sale of forest products before disposal of lands. This evaluation must consider the effects of harvesting on the future use and environmental quality of the property as well as its relative diminution of the property's fair market value. With respect to base realignment and closure property, the evaluation should also consider the impact of harvesting on the redevelopment plans of the local redevelopment authority. Planned harvesting may continue on land reported as excess until actual disposal or transfer, provided that the evaluation determines that harvesting and sale of forest products should proceed and any sales agreement does not provide otherwise.

5.9. Property with Military Munitions

5.9.1. Real property known to contain or suspected of containing explosive or chemical agent hazards shall not be transferred out of DoD control (other than to the Coast Guard) unless appropriate protective measures have been taken to ensure the recipient of the property is both fully informed of the actual and potential hazards relating to the presence or possible presence of explosives or chemical agents and restrictions or conditions have been placed on the use of the property to avoid harm to users due to the presence of explosives or chemical agents. Appropriate notice requirements and restrictions on use will be submitted by the disposing

Component to the Department of Defense Explosives Safety Board for its approval prior to transfer. An outgrant such as a lease or permit may constitute transfer out of DoD control if the DoD Component does not retain sufficient control over the property to adequately manage exposure to explosive or chemical agent hazards.

5.9.2. Real property being transferred out of DoD control after explosive and chemical agent hazards have been addressed, but which is adjacent to property where such hazards have not been addressed, will have appropriate restrictions and reservations included in the transfer documents to ensure the use of the transferred property does not obstruct addressing the hazards on the adjacent property ASD(EI&E), after consultation with the Department of Defense Explosives Safety Board, will provide model language for this purpose.

5.10. Retention of Access Rights

5.10.1. Property disposed of but not subject to inclusion of clauses under Reference (s) or paragraph 5.5. should retain a right of entry onto the property for purposes of addressing the possibility of undiscovered contamination. For this purpose, the transfer document should contain a clause similar to or the same as the clause contained at paragraph E.2.3.3., although without including in the clause any reference to Reference (s).

5.10.2. Appropriate access rights should also be retained whenever other laws or provisions of the transfer document could generate an obligation or responsibility on the part of the United States requiring it to return to the property.

5.11. Indemnification Under Section 330 of the National Defense Authorization Act for Fiscal Year 1993 (Reference (v)), as amended. Reference (v) provides for indemnification of transferees of closing DoD 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, transfer document for real or personal property, or cooperative agreement or grant after obtaining the written concurrence of the Deputy General Counsel (Environment and Installations), Office of the General Counsel, Department of Defense.

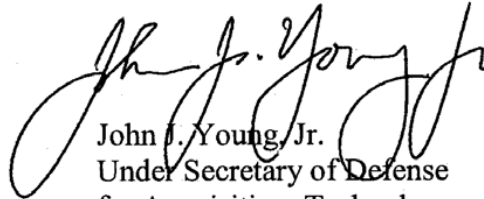
7. SUMMARY OF CHANGE 2. This change reassigns the office of primary responsibility for this instruction to the Under Secretary of Defense for Acquisition and Sustainment in accordance with the July 13, 2018 Deputy Secretary of Defense Memorandum (Reference (w)).

8. EFFECTIVE DATE

This Instruction is effective December 21, 2007.

9. RELEASABILITY

Cleared for public release. This issuance is available on the Directives Division Website at <http://www.esd.whs.mil/DD/>.



John J. Young, Jr.
Under Secretary of Defense
for Acquisition, Technology and Logistics

Enclosures - 3

- E1. References, continued
- E2. CERCLA 120(h) Clauses
- E3. Table of CERCLA 120(h) Clauses

E1. ENCLOSURE 1

REFERENCES, continued

- (e) Office of the Chairman of the Joint Chiefs of Staff, “DoD Dictionary of Military and Associated Terms,” current edition
- (f) Section 101 of title 10, U.S.C.
- (g) DoD Instruction 4165.14, “Real Property Inventory and Forecasting,” January 27, 2014
- (h) Section 2696 of title 10, U.S.C.
- (i) Title 40, CFR, Part 373, “Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property,” current edition
- (j) Title 41, CFR, Part 102-75, “Federal Management Regulation,” current edition
- (k) DoD 7000.14-R, “DoD Financial Management Regulations,” current edition
- (l) Section 11411 of title 42, U.S.C., “McKinney Vento Homeless Assistance Act”
- (m) Section 2668a of title 10, U.S.C.
- (n) Section 470, et seq., of title 16, U.S.C., “The National Historic Preservation Act”
- (o) Title 43, CFR, Part 2720, “Conveyance of Federally-Owned Mineral Interests,” current edition
- (p) DoD Instruction 4165.70, “Real Property Management,” January 6, 2005
- (q) Executive Order 11988, “Floodplain Management,” May 24, 1977
- (r) Executive Order 11990, “Protection of Wetlands,” May 24, 1977
- (s) Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (Section 9620(h) of title 42, U.S.C.)
- (t) Report of Excess Real Property (Standard Form 118)
- (u) Section 2665 of title 10, U.S.C.
- (v) Section 330 of Public Law 102-484, “The National Defense Authorization Act for Fiscal Year 1993”
- (w) Deputy Secretary of Defense Memorandum, “Establishment of the Office of the Under Secretary of Defense for Research and Engineering and the Office of the Under Secretary of Defense for Acquisition and Sustainment,” July 13, 2018

E2. ENCLOSURE 2

CERCLA 120(h) CLAUSES

**TEXT OF CLAUSES PROVIDED PURSUANT TO SECTION 120(h) OF CERCLA
(Reference (s))**

[USER NOTE: UPON USE, DELETE MATERIAL IN SQUARE BRACKETS. THE MATERIAL IN BOLD CURLY BRACKETS IS TO BE FILLED IN OR A SELECTION MADE.]

E2.1—DEPARTMENT OF DEFENSE UNIFORM NOTICE, DESCRIPTION, ACCESS RIGHTS, AND COVENANTS FOR SECTION 120(h)(3) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (42 U.S.C. § 9620(h)(3))

E2.1.1. “___ . Property Covered by Notice, Description, Access Rights, and Covenants Made Pursuant to Section 120(h)(3)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)):”

[OPTION #1: FOR USE WHERE THE 120(h) CLAUSES ONLY APPLY TO CERTAIN PARCELS OF THE TOTAL PROPERTY.]

“For parcels _____ of the property, the Grantor provides the following notice, description, and covenants and retains the following access rights:”

[OPTION #2: FOR USE WHERE THE 120(h) CLAUSES APPLY TO THE ENTIRE PROPERTY.]

“For the property, the Grantor provides the following notice, description, and covenants and retains the following access rights:”

E2.1.2. “___ . Notices Pursuant to Section 120(h)(3)(A)(i)(I) and (II) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(I) and (II)):”

[OPTION #1: FOR LENGTHY NOTICES, SET FORTH THE DETAILED INFORMATION IN AN EXHIBIT TO THE DEED AND INCORPORATE IT BY THIS REFERENCE.]

“Pursuant to section 120(h)(3)(A)(i)(I) and (II) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(I) and (II)), available information regarding the type, quantity, and location of hazardous substances and the time at which such substances were stored, released, or disposed of, as defined in section 120(h), is provided in Exhibit __, attached hereto and made a part hereof.”

[OPTION #2: FOR BRIEF NOTICES, SET FORTH THE DETAILED INFORMATION IN THE NOTICE ITSELF.]

“Pursuant to section 120(h)(3)(A)(i)(I) and (II) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(I) and (II)), notice is hereby provided that {INSERT DESCRIPTION OF TYPE, QUANTITY, AND LOCATION OF HAZARDOUS SUBSTANCES} {was/were} {stored/released/disposed of} on the property on or about {INSERT DATES IF KNOWN FOR SUCH STORAGE, RELEASE, OR DISPOSAL OF HAZARDOUS SUBSTANCES}.”

E2.1.3. “ ___. Description of Remedial Action Taken, if Any, Pursuant to Section 120(h)(3)(A)(i)(III) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(III)):”

[OPTION #1: FOR LENGTHY DESCRIPTIONS, SET FORTH THE DETAILED INFORMATION IN AN EXHIBIT TO THE DEED AND INCORPORATE IT BY THIS REFERENCE.]

“Pursuant to section 120(h)(3)(A)(i)(III) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(III)), a description of the remedial action taken, if any, on the property is provided in Exhibit ___, attached hereto and made a part hereof.”

[OPTION #2: FOR BRIEF DESCRIPTIONS, SET FORTH THE DETAILED INFORMATION IN THE NOTICE ITSELF.]

“Pursuant to section 120(h)(3)(A)(i)(III) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(i)(III)), a remedial action consisting of {FILL IN DESCRIPTION OF THE REMEDIAL ACTION} has been taken on the property.”

E2.1.4. “ ___. Covenant Pursuant to Section 120(h)(3)(A)(ii) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(ii) and (B)):

“Pursuant to section 120(h)(3)(A)(ii) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(ii) and (B)), the United States warrants that—

“(a) all remedial action necessary to protect human health and the environment with respect to any hazardous substance identified pursuant to section 120(h)(3)(A)(i)(I) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 remaining on the property has been taken before the date of this deed, and

“(b) any additional remedial action found to be necessary after the date of this deed shall be conducted by the United States.”

E2.1.5. “___ . Access Rights Pursuant to Section 120(h)(3)(A)(iii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(iii)):

“The United States retains and reserves a perpetual and assignable easement and right of access on, over, and through the property, to enter upon the property in any case in which a remedial action or corrective action is found to be necessary on the part of the United States, without regard to whether such remedial action or corrective action is on the property or on adjoining or nearby lands. Such easement and right of access includes, without limitation, the right to perform any environmental investigation, survey, monitoring, sampling, testing, drilling, boring, coring, testpitting, installing monitoring or pumping wells or other treatment facilities, response action, corrective action, or any other action necessary for the United States to meet its responsibilities under applicable laws and as provided for in this instrument. Such easement and right of access shall be binding on the grantee and its successors and assigns and shall run with the land.

“In exercising such easement and right of access, the United States shall provide the grantee or its successors or assigns, as the case may be, with reasonable notice of its intent to enter upon the property and exercise its rights under this clause, which notice may be severely curtailed or even eliminated in emergency situations. The United States shall use reasonable means to avoid and to minimize interference with the grantee’s and the grantee’s successors’ and assigns’ quiet enjoyment of the property. At the completion of work, the work site shall be reasonably restored. Such easement and right of access includes the right to obtain and use utility services, including water, gas, electricity, sewer, and communications services available on the property at a reasonable charge to the United States. Excluding the reasonable charges for such utility services, no fee, charge, or compensation will be due the grantee, nor its successors and assigns, for the exercise of the easement and right of access hereby retained and reserved by the United States.

“In exercising such easement and right of access, neither the grantee nor its successors and assigns, as the case may be, shall have any claim at law or equity against the United States or any officer or employee of the United States based on actions taken by the United States or its officers, employees, agents, contractors of any tier, or servants pursuant to and in accordance with this clause: Provided, however, that nothing in this paragraph shall be considered as a waiver by the grantee and its successors and assigns of any remedy available to them under the Federal Tort Claims Act.”

E2.2—DEPARTMENT OF DEFENSE UNIFORM 120(h) CLAUSES FOR SECTION 120(h)(3)(C)(iii) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (42 U.S.C. § 9620(h)(3)(C)(iii))

E2.2.1. “___ . Property Covered by Notice, Description, Assurances, Access Rights, and Covenants Made Pursuant to Section 120(h)(3)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)):”

[OPTION #1: FOR USE WHERE THE 120(h) CLAUSES ONLY APPLY TO CERTAIN PARCELS OF THE TOTAL PROPERTY.]

“For parcels _____ of the property, the Grantor provides the following notice, description, assurances, and covenants and retains the following access rights:”

[OPTION #2: FOR USE WHERE THE 120(h) CLAUSES APPLY TO THE ENTIRE PROPERTY.]

“For the property, the Grantor provides the following notice, description, assurances, and covenants and retains the following access rights:”

E2.2.2. “____. Covenant Pursuant to Section 120(h)(3)(A)(ii)(II) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(ii)(II) and (B)):

“Pursuant to section 120(h)(3)(A)(ii)(II) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)(ii)(II) and (B)), the United States warrants that any additional remedial action found to be necessary after the date of this deed shall be conducted by the United States.”

E2.2.3. “____. Assurances Pursuant to Section 120(h)(3)(C)(ii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(C)(ii)):

“Pursuant to section 120(h)(3)(C)(ii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(C)(ii)), the United States provides the following response action assurances:

{(1) INSERT DESCRIPTION AND ASSURANCE OF ANY NECESSARY RESTRICTIONS ON THE USE OF THE PROPERTY TO ENSURE THE PROTECTION OF HUMAN HEALTH AND THE ENVIRONMENT;

(2) INSERT DESCRIPTION AND ASSURANCE OF ANY RESTRICTIONS ON USE NECESSARY TO ENSURE THAT REQUIRED REMEDIAL INVESTIGATIONS, RESPONSE ACTION, AND OVERSIGHT ACTIVITIES WILL NOT BE DISRUPTED;

(3) INSERT ASSURANCE THAT ALL NECESSARY RESPONSE ACTION WILL BE TAKEN AND IDENTIFY THE SCHEDULES FOR INVESTIGATION AND COMPLETION OF ALL NECESSARY RESPONSE ACTION AS APPROVED BY THE APPROPRIATE REGULATORY AGENCY; AND

(4) INSERT ASSURANCE THAT THE DoD COMPONENT WILL SUBMIT A BUDGET REQUEST TO THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET THAT ADEQUATELY ADDRESSES SCHEDULES FOR INVESTIGATION AND COMPLETION OF ALL NECESSARY RESPONSE ACTION, SUBJECT TO CONGRESSIONAL AUTHORIZATIONS AND APPROPRIATIONS. }”

[USER NOTE: THE FOLLOWING 120(h) CLAUSE GRANTED PURSUANT TO SECTION 120(h)(3)(C)(iii) IS GRANTED WHEN ALL RESPONSE ACTION NECESSARY TO PROTECT HUMAN HEALTH AND THE ENVIRONMENT WITH RESPECT TO ANY SUBSTANCE REMAINING ON THE PROPERTY ON THE DATE OF TRANSFER HAS BEEN TAKEN:]

E2.2.4. “___ . Warranty Pursuant to Section 120(h)(3)(C)(iii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(C)(iii)):

“Pursuant to section 120(h)(3)(C)(iii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(C)(iii)), the United States warrants that all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken.”

E2.3—DEPARTMENT OF DEFENSE UNIFORM 120(h) CLAUSES FOR SECTION 120(h)(4) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (42 U.S.C. § 9620(h)(4))

E2.3.1. “___ . Property Covered by Covenant and Access Rights Made Pursuant to Section 120(h)(4)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(4)(D)):”

[OPTION #1: FOR USE WHERE THE 120(h) CLAUSES ONLY APPLY TO CERTAIN PARCELS OF THE TOTAL PROPERTY.]

“For parcels _____ of the property, the Grantor provides the following covenants and retains the following access rights:”

[OPTION #2: FOR USE WHERE THE 120(h) CLAUSES APPLY TO THE ENTIRE PROPERTY.]

“For the property, the Grantor provides the following covenants and retains the following access rights:”

E2.3.2. “___ . Covenant Pursuant to Section 120(h)(4)(D)(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(4)(D)(i)):

“Pursuant to section 120(h)(4)(D)(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(4)(D)(i)), the United States warrants that any response action or corrective action found to be necessary after the date of this deed for contamination existing on the property prior to the date of this deed shall be conducted by the United States.”

E2.3.3. “___ . Access Rights Pursuant to Section 120(h)(4)(D)(ii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(4)(D)(ii)):

“The United States retains and reserves a perpetual and assignable easement and right of access on, over, and through the property, to enter upon the property in any case in which an environmental response or corrective action is found to be necessary on the part of the United States, without regard to whether such environmental response or corrective action is on the property or on adjoining or nearby lands. Such easement and right of access includes, without limitation, the right to perform any environmental investigation, survey, monitoring, sampling, testing, drilling, boring, coring, testpitting, installing monitoring or pumping wells or other treatment facilities, response action, corrective action, or any other action necessary for the United States to meet its responsibilities under applicable laws and as provided for in this instrument. Such easement and right of access shall be binding on the grantee and its successors and assigns and shall run with the land.

“In exercising such easement and right of access, the United States shall provide the grantee or its successors or assigns, as the case may be, with reasonable notice of its intent to enter upon the property and exercise its rights under this clause, which notice may be severely curtailed or even eliminated in emergency situations. The United States shall use reasonable means to avoid and to minimize interference with the grantee’s and the grantee’s successors’ and assigns’ quiet enjoyment of the property. At the completion of work, the work site shall be reasonably restored. Such easement and right of access includes the right to obtain and use utility services, including water, gas, electricity, sewer, and communications services available on the property at a reasonable charge to the United States. Excluding the reasonable charges for such utility services, no fee, charge, or compensation will be due the grantee, nor its successors and assigns, for the exercise of the easement and right of access hereby retained and reserved by the United States.

“In exercising such easement and right of access, neither the grantee nor its successors and assigns, as the case may be, shall have any claim at law or equity against the United States or any officer, employee, agent, contractor of any tier, or servant of the United States based on actions taken by the United States or its officers, employees, agents, contractors of any tier, or servants pursuant to and in accordance with this clause: Provided, however, that nothing in this paragraph shall be considered as a waiver by the grantee and its successors and assigns of any remedy available to them under the Federal Tort Claims Act.”

E3. ENCLOSURE 3

Table of CERCLA 120(h) Clauses

Categories of CERCLA 120(h) clause requirements:		
120(h)(3) ¹	120(h)(3)(C)	120(h)(4)
Applicable clauses for each category:		
E2.1.1.	E2.2.1.	E2.3.1.
E2.1.2.	E2.1.2.	E2.3.2.
E2.1.3.	E2.1.3.	E2.3.3.
E2.1.4. ²	E2.2.2. ²	
E2.1.5.	E2.2.3.	
	E2.1.5.	
	After all response actions have been taken:	
	E2.2.1. ²	
	E2.2.4. ²	

¹ But excluding those properties subject to deferral under paragraph 120(h)(3)(C).

² These clauses shall not be provided in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property.