SEC. __. UPDATING INDEMNIFICATION OF TRANSFEREES OF CLOSING DEFENSE PROPERTY.

(a) IN GENERAL.—Section 330 of the National Defense Authorization Act for Fiscal Year 1993 (10 U.S.C. 2687 note) is amended—

(1) in subsection (a)—

(A) by striking paragraph (1) and inserting the following new paragraph:

"(1) Except as provided in paragraph (3) and subject to subsection (b), the Secretary of Defense shall hold harmless and indemnify in full the persons and entities described in paragraph (2) from any suit, liability, or judgment arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property) that results from the release of any hazardous substance or pollutant or contaminant as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law."; and

(B) in paragraph (3), by striking "or threatened release";

(2) in subsection (b)(4), by striking "defending or";

(3) in subsection (c)(1)—

(A) by striking "payments to" and all that follows through "referred to in" and inserting "payments under"; and

(B) by striking "or defend"; and

(4) in subsection (d)—

(A) by striking "or threatened release"; and

(B) by striking "or petroleum or petroleum derivative".

(b) SOURCE OF FUNDS.—Subsection (c) of such section is further amended by adding at the end the following new paragraph:

"(3) Notwithstanding any other provision of law, funds made available under section 1304 of title 31, United States Code, shall be available to pay claims in excess of $100,000 that are otherwise payable under this section.".

(c) RELATIONSHIP TO FEDERAL CLEANUP LAW.—Subsection (e) of such section is amended to read as follows:

"(e) RELATIONSHIP TO OTHER LAW.—Nothing in this section shall be construed as affecting or modifying in any way any provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et. seq.). Any claim for environmental remediation or cleanup costs or natural resource damages may not be pursued under this section.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would update and clarify Section 330 of the National Defense Authorization Act for Fiscal Year 1993. It addresses three issues: 1) the duty to defend requirement, 2) funding for indemnification, and 3) cases extending Section 330's requirements to cleanup costs. Since its passage over twenty five years ago, DoD has had a limited number of requests for DoD to "defend" a private party identified in subsection (a)(2). DoD, however, is not authorized to represent these private or State parties, and lacks independent litigation authority in accordance with 5 U.S.C. §3106. The President's signing statement for the FY1993 NDAA contained specific statements concerning Section 330's duty to defend, including that "the Secretary of Defense will 'settle or defend' claims in litigation through attorneys provided by the Department of Justice."[1] The Department of Justice conducts all litigation in which DoD

[1] Presidential signing statement accompanying the 1993 National Defense Authorization Act, Public Law 102-484 ("I also note that section 330, under which the Secretary of Defense may 'settle or defend' certain claims, should not be understood to detract from the Attorney General's plenary litigating authority. Accordingly, to the extent provided in current law, the Secretary of Defense will 'settle or defend' claims in litigation through attorneys provided by the Department of Justice."). See also, 83 Fed. Reg. 34471, 34472 (July 20, 2018) (stating that, for litigation under section 330, "it is understood that the DoD will act through the [DOJ] when appearing before the courts").

has an interest or is a party in accordance with 28 U.S.C. § 516, and has determined that it is unable to defend the enumerated entities in Section 330 due to inherent conflicts of interest. For these reasons, DoD is proposing to delete the duty to defend requirement from subsections (a)(1) and (b)(4) in Section 330, as it cannot be practically implemented. The duty to "hold harmless and indemnify in full" remains in Section 330.

This proposal also provides a specific source of funding. Section 330 and its legislative history are silent as to the source of funds appropriate to cover indemnity requests. While the base closure laws were evaluated by DoD, funds appropriated in accordance with the applicable Base Closure and Realignment Act can only be used for specific purposes that do not extend to the indemnification requests received. The Judgment Fund is a permanent, indefinite appropriation which is generally available to pay amounts owed by the United States, under judgments, compromise settlements and certain administrative awards. 73 Comp. Gen. 46 (1993). Since Section 330's enactment, DoD has certified that no DoD funds are available to settle claims brought pursuant to Section 330, and those claims and judgments were instead paid from the Judgment Fund. In accordance with this historical practice, and consistent with 10 U.S.C. §2733[2], which established a similar structure for personal injury and property damage claims for DoD, DoD proposes to insert a new subsection (c)(3) into Section 330 which allows the use of DoD funds to settle meritorious Section 330 claims up to $100,000, and the Judgment Fund for amounts over $100,000. This limit is needed as DoD recently published regulations at 32 CFR 175.1-.6 to provide for an administrative claims process for Section 330.

This proposal also addresses court cases that have extended Section 330 to cleanup costs, rather than recognizing that this provision is limited to "any claim for personal injury or property damage". Additionally, these cases did not acknowledge that Section 330 already contained a provision concerning the federal cleanup law, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and CERCLA provides its own cost recovery process. Cases such as *Indian Harbor Ins. Co. v. U.S.*, 704 F.3d 949 (Fed. Cir. 2013), and *Richmond Am. Homes of Colo., Inc. v. U.S.*, 75 Fed. Cl. 376 (2007), allowed reimbursement for environmental cleanup costs under Section 330, by pointing to phrases such as "cost or other fee", "economic loss", "demand or action" or "threatened release." In addition to deleting these phrases to clarify the intent of Section 330, subsection (e) of section 330 will clarify that claims for environmental remediation or cleanup costs, must be pursued under CERCLA and not under Section 330. The proposal also deletes "or petroleum or petroleum derivative" in order to make the provision consistent with CERCLA.

Budget Implications: No budget impact.

Changes to Existing Law: This proposal would make the following changes to section 330 of the National Defense Authorization Act for Fiscal Year 1993 (10 U.S.C. 2687 note):

SEC. 330. INDEMNIFICATION OF TRANSFEREES OF CLOSING DEFENSE PROPERTY.

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[2] 10 U.S.C. §2733(d) states that if the Secretary considers that a claim for personal injury or property damage "in excess of $100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in excess of $100,000 to the Secretary of the Treasury for payment under section 1304 of title 31."

(a) IN GENERAL.—(1) Except as provided in paragraph (3) and subject to subsection (b), the Secretary of Defense shall hold harmless~~, defend,~~ and indemnify in full the persons and entities described in paragraph (2) from ~~and against~~ any suit, ~~claim, demand or action,~~ liability, or judgment~~, cost or other fee~~ arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property ~~or economic loss~~) that results from~~, or is in any manner predicated upon,~~ the release ~~or threatened release~~ of any hazardous substance or pollutant or contaminant, ~~or petroleum or petroleum derivative~~ as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

(2) The persons and entities described in this paragraph are the following:

(A) Any State (including any officer, agent, or employee of the State) that acquires ownership or control of any facility at a military installation (or any portion thereof) described in paragraph (1).

(B) Any political subdivision of a State (including any officer, agent, or employee of the State) that acquires such ownership or control.

(C) Any other person or entity that acquires such ownership or control.

(D) Any successor, assignee, transferee, lender, or lessee of a person or entity described in subparagraphs (A) through (C).

(3) To the extent the persons and entities described in paragraph (2) contributed to any such release ~~or threatened release~~, paragraph (1) shall not apply.

(b) CONDITIONS.—No indemnification may be afforded under this section unless the person or entity making a claim for indemnification—

(1) notifies the Department of Defense in writing within two years after such claim accrues or begins action within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the Department of Defense;

(2) furnishes to the Department of Defense copies of pertinent papers the entity receives;

(3) furnishes evidence or proof of any claim, loss, or damage covered by this section; and

(4) provides, upon request by the Department of Defense, access to the records and personnel of the entity for purposes of ~~defending or~~ settling the claim or action.

(c) AUTHORITY OF SECRETARY OF DEFENSE.—(1) In any case in which the Secretary of Defense determines that the Department of Defense may be required to make indemnification payments ~~to a person under this section for any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage referred to in~~ under subsection (a)(1), the Secretary may settle ~~or defend~~, on behalf of that person, the claim for personal injury or property damage.

(2) In any case described in paragraph (1), if the person to whom the Department of Defense may be required to make indemnification payments does not allow the Secretary to settle ~~or defend~~
the claim, the person may not be afforded indemnification with respect to that claim under this section.

(3) Notwithstanding any other provision of law, funds made available under section 1304 of title 31, United States Code, shall be available to pay claims in excess of $100,000 that are otherwise payable under this section.

(d) ACCRUAL OF ACTION.—For purposes of subsection (b)(1), the date on which a claim accrues is the date on which the plaintiff knew (or reasonably should have known) that the personal injury or property damage referred to in subsection (a) was caused or contributed to by the release ~~or threatened release~~ of a hazardous substance or pollutant or contaminant ~~or petroleum or petroleum derivative~~ as a result of Department of Defense activities at any military installation (or portion thereof) described in subsection (a)(1).

(e) RELATIONSHIP TO OTHER LAW.—Nothing in this section shall be construed as affecting or modifying in any way ~~section 120(h)~~ any provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et. seq. ~~9620(h)~~). Any claim for environmental remediation or cleanup costs or natural resource damages may not be pursued under this section.

(f) DEFINITIONS.—In this section:

(1) The terms "facility", "hazardous substance", "release", and "pollutant or contaminant" have the meanings given such terms under paragraphs (9), (14), (22), and (33) of section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, respectively (42 U.S.C. 9601 (9), (14), (22), and (33)).

(2) The term "military installation" has the meaning given such term under section 2687(e)(1) of title 10, United States Code.

(3) The term "base closure law" means the following:

(A) The Defense Base Closure and Realignment Act of 1990 (10 U.S.C. 2687 note).

(B) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note).

(C) Section 2687 of title 10, United States Code.

(D) Any provision of law authorizing the closure or realignment of a military installation enacted on or after the date of the enactment of this Act.