

=====

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 775

RIN 0703-AA51

Policies and Responsibilities for Implementation of the National  
Environmental Policy Act Within the Department of the Navy

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

-----

SUMMARY: The Department of the Navy (DON) is revising portions of its internal regulations that establish the responsibilities and procedures within the DON for complying with the National Environmental Policy Act (NEPA). This revision clarifies when certain DON actions must be studied to determine their effect on the human environment and what types of activities are excluded from the NEPA analysis and documentation requirements.

DATES: Effective February 23, 2004.

ADDRESSES: Interested parties should request copies of the rule from: Mr. Thomas Egeland, Office of the Assistant Secretary of the Navy (Installations and Environment), 1000 Navy Pentagon, Washington, DC 20350-1000.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Egeland, Office of the Assistant Secretary of the Navy (Installations and Environment), 703-614-5913.

SUPPLEMENTARY INFORMATION: The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) establishes national policy and goals for protection of the environment. Section 102(2) of NEPA contains certain procedural requirements directed toward the attainment of such goals. In particular, all Federal agencies are required to give appropriate consideration to the environmental effects of their proposed actions in their decision making and to prepare detailed environmental statements on recommendations or reports significantly affecting the quality of the human environment.

Executive Order 11991 of May 24, 1977, directed the Council on Environmental Quality (CEQ) to issue regulations to implement procedural provisions of NEPA. Accordingly, CEQ issued final NEPA regulations (40 CFR parts 1500-1508) on November 29, 1978, which are

binding on all Federal agencies as of July 30, 1979. These regulations require each Federal agency, as necessary, to adopt implementing procedures to supplement the CEQ regulations. Section 1507.3(b) of the CEQ regulations identifies those sections of the regulations that must be addressed in agency procedures.

The final rule revises DON's implementing regulations that were originally published in 55 FR 33898 on August 20, 1990. Significant changes that these amendments bring about include: Revision of and additions to the DON list of approved categories of actions excluded from further analysis and documentation under NEPA; revised criteria for disallowing the application of listed categorical exclusions; and assignment of responsibilities to the Assistant Secretary of the Navy (Research, Development and Acquisition), the General Counsel of the Navy, and the Judge Advocate General of the Navy.

The DON published the proposed rule in 64 FR 37069 on July 9, 1999, and granted a 60-day comment period. DON received comments from one Federal agency, one state agency, one local government agency, and one private party. DON coordinated the proposed rule with Council on Environmental Quality (CEQ). DON carefully considered the comments received. Most comments focused on two general areas: The discussion of policies and responsibilities and the revision of DON categorical exclusions. In response to comments on policies and responsibilities: The rule was modified to more clearly reflect the relationship among internal DON regulations and between the rule and internal Department of Defense directives; the phrase ``environmental analysis'' was substituted for the term ``NEPA document'' where appropriate; and definitions and other discussions perceived as inconsistent with the regulations promulgated by CEQ were deleted.

The discussion of categorical exclusions was also modified in response to comments. Based upon a recommendation from CEQ that routine documentation of categorical exclusions was not necessary, the two-group approach to categorical exclusions contained in the draft rule was eliminated. As a result, the categorical exclusions were placed in a single group and renumbered. The consolidation into a single grouping also reemphasized that, even though a proposed action generally is covered by a listed categorical exclusion, a categorical exclusion will not be used if the proposed action categorical exclusion involved any one of several enumerated conditions.

Several categorical exclusions were modified to reflect that they were

[[Page 8109]]

intended to apply to routine actions of the nature described in the particular exclusion. Categorical exclusion XXVII, addressing natural resource management actions covered by an Environmental Assessment (EA) or Environmental Impact Statement (EIS) on the underlying management plan, was eliminated as unnecessary. Categorical exclusion XXXII, addressing actions similar in type, intensity, and setting to other actions for which it had been determined in an EA or EIS that there were no significant impacts, was revised and is now presented as two separate and more specific categorical exclusions. The first of these two exclusions applies to routine testing and evaluation of military equipment on existing military reservations, ranges, and operating areas. This exclusion is intended to encompass routine categories of tests conducted in areas designated for or historically used for military operations, training, and testing. Examples of this categorical exclusion are captive-carry tests, weapons stores separation tests, and minor component survivability tests. The second of these two exclusions applies to routine military unit level training or minor training exercises conducted by two or more units. As with all

DON categorical exclusions, these two exclusions cannot be used if they involve any of the enumerated conditions set out in Section 775.6(e).

The Department of the Navy has determined that this regulation is not a significant rule as defined by Executive Order 12866 and is not subject to the relevant provisions of the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)).

#### List of Subjects in 32 CFR Part 775

Environmental impact statements.

0

Accordingly, Part 775 of Chapter VI of title 32 of the Code of Federal Regulations is amended as follows:

#### PART 775--POLICIES AND RESPONSIBILITIES FOR IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT WITHIN THE DEPARTMENT OF THE NAVY

0

1. The authority for Part 775 continues to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 4321-4361; 40 CFR Parts 1500-1508.

0

2. Section 775.1 is revised to read as follows:

#### Sec. 775.1 Purpose and scope.

(a) To implement the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA, 40 CFR 1500-1508, and the Department of Defense Instruction on Environmental Planning and Analysis, DODINST 4715.9, and to assign responsibilities within the Department of the Navy (DON) for preparation, review, and approval of environmental documents prepared under NEPA.

(b) The policies and responsibilities set out in this part apply to the DON, including the Office of the Secretary of the Navy, and Navy and Marine Corps commands, operating forces, shore establishments, and reserve components. This part is limited to the actions of these elements with environmental effects in the United States, its territories, and possessions.

0

3. Section 775.2 is revised to read as follows:

#### Sec. 775.2 Definitions.

(a) Action proponent. The commander, commanding officer, or civilian director of a unit, activity, or organization who initiates a proposal for action, as defined in 40 CFR 1508.23, and who has command and control authority over the action once it is authorized. For some actions, the action proponent will also serve as the decision-making authority for that action. In specific circumstances, the action proponent and decision maker may be identified in Navy Regulations, other SECNAV Instructions, operational instructions and orders, acquisition instructions, and other sources which set out authority and

responsibility within the DON.

(b) Environmental Impact Statement (EIS). An environmental document prepared according to the requirements of Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500-1508) for a major action that will have a significant effect on the quality of the human environment.

(c) Environmental Assessment (EA). A concise document prepared according to the requirements of 40 CFR parts 1500-1508 that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS. An EA aids compliance with NEPA when no EIS is necessary and facilitates preparation of an EIS when one is necessary.

(d) Categorical Exclusion (CATEX). A published category of actions that do not individually or cumulatively have a significant impact on the human environment under normal circumstances, and, therefore, do not require either an environmental assessment or an environmental impact statement.

(e) Record of Decision (ROD). An environmental document signed by an appropriate official of the DON. A ROD sets out a concise summary of the final decision and selected measures for mitigation (if any) of adverse environmental impacts of the alternative chosen from those considered in an EIS.

(f) Finding of No Significant Impact (FONSI). A document that sets out the reasons why an action not otherwise categorically excluded will not have a significant impact on the human environment, and for which an EIS will not therefore be prepared. A FONSI will include the EA or a summary of it and shall note any other environmental documents related to it. A FONSI may be one result of review of an EA.

0

4. Section 775.3 is revised to read as follows:

#### Sec. 775.3 Policy.

(a) It is the DON policy regarding NEPA, consistent with its mission and regulations and the environmental laws and regulations of the United States, to:

(1) Initiate the NEPA processes at the earliest possible time to be an effective decision making tool in the course of identifying a proposed action.

(2) Develop and carefully consider a reasonable range of alternatives for achieving the purpose(s) of proposed actions.

(3) Assign responsibility for preparation of action specific environmental analysis under NEPA to the action proponent. The action proponent should understand the plans, analyses, and environmental documents related to that action.

(b) NEPA is intended to ensure that environmental issues are fully considered and incorporated into the Federal decision making process. Consequently, actions for which the DON has no decision-making authority and no discretion in implementing the action, such as those carried out under a non discretionary mandate from Congress (e.g., congressional direction to transfer Federal property to a particular entity for a particular purpose that leaves DON no discretion in how the transfer will be implemented) or as an operation of law (e.g., reversionary interests in land recorded at the time the property was obtained and that provide no discretion in whether to trigger the reversion or how the reversion will be implemented), require no analysis or documentation under NEPA or its implementing regulations.

0

5. Section 775.4 is revised to read as follows:

Sec. 775.4 **Responsibilities.**

(a) The Assistant Secretary of the Navy (Installations and Environment) (ASN (I&E)) shall:

(1) Act as principal liaison with the Office of the Secretary of Defense, the Council on Environmental Quality, the Environmental Protection Agency, other Federal agencies, Congress, state governments, and the public with respect to significant NEPA matters.

(2) **Direct the preparation of appropriate environmental analysis and documentation** and, with respect to those matters governed by SECNAV Instruction 5000.2 series, advise the Assistant Secretary of the Navy (Research Development and Acquisition) (ASN (RD&A)) concerning environmental issues and the appropriate level of environmental analysis and NEPA documentation needed in any particular circumstance.

(3) Except for proposed acquisition-related actions addressed in paragraph (b)(2) of this section, review, sign, and approve for publication, as appropriate, documents prepared under NEPA.

(4) **Establish and publish a list of categorical exclusions for the DON.**

(b) The Assistant Secretary of the Navy (Research, Development and Acquisition (ASN (RD&A))) shall, in accordance with SECNAV Instruction 5000.2 series:

(1) Ensure that DON acquisition programs, research programs, and procurements comply with NEPA.

(2) Review, sign, and approve for publication, as appropriate, environmental documents prepared under NEPA for proposed acquisition or research and development related actions.

(c) The General Counsel of the Navy and the Judge Advocate General of the Navy shall:

(1) Ensure that legal advice for compliance with environmental planning requirements is available to all decision-makers.

(2) Advise the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps as to the legal requirements that must be met, and the conduct and disposition of all legal matters arising in the context of environmental planning.

(d) The Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) shall:

(1) Implement effective environmental planning throughout their respective services.

(2) Prepare and issue instructions or orders to implement environmental planning policies of the DON. Forward proposed CNO/CMC environmental planning instructions or orders to ASN (I&E) and, when appropriate, ASN (RD&A) for review and comment prior to issuance.

(3) Make decisions on environmental assessments as to whether a Finding of No Significant Impact is appropriate or preparation of an environmental impact statement is required.

(4) Ensure that subordinate commands establish procedures for implementing mitigation measures described in NEPA documents.

(5) Provide coordination as required for the preparation of NEPA documents for actions initiated by non-DON/DOD entities, state or local agencies and/or private individuals for which service involvement may be reasonably foreseen.

(6) Bring environmental planning matters that involve controversial issues or which may affect environmental planning policies or their implementation to the attention of ASN (I&E) and, where appropriate, ASN (RD&A) for coordination and determination.

(7) Notify ASN (I&E), and when appropriate, ASN (RD&A) of any proposed EIS, and of any EA that may involve potentially sensitive

public interest issues. EIS notification shall occur prior to commencing NEPA document preparation or receiving any public or regulatory agency involvement. EA notification shall be made as soon as it becomes apparent that potentially sensitive public issues are involved.

0

6. Section 775.6 is amended by revising paragraphs (a), (b), (e) and (f) to read as follows:

Sec. 775.6 Planning considerations.

(a) An EIS must be prepared for proposed major Federal actions that will have significant impacts on the human environment. The agency decision in the case of an EIS is reflected in a ROD.

(b) Where a proposed major Federal action has the potential for significantly affecting the human environment, but it is not clear whether the impacts of that particular action will in fact be significant, or where the nature of an action precludes use of a categorical exclusion, an EA may be used to assist the agency in determining whether to prepare an EIS. If the agency determination in the case of an EA is that there is no significant impact on the environment, the findings will be reflected in a FONSI. If the EA determines that the proposed action is likely to significantly affect the environment (even after mitigation), then an EIS will be prepared. An EA also may be used where it otherwise will aid compliance with NEPA.

\* \* \* \* \*

(e) A categorical exclusion (CATEX), as defined and listed in this regulation, may be used to exclude a proposed action from further analysis. Even though a proposed action generally is covered by a listed categorical exclusion, a categorical exclusion will not be used if the proposed action:

- (1) Would adversely affect public health or safety;
- (2) Involves effects on the human environment that are highly uncertain, involve unique or unknown risks, or which are scientifically controversial;
- (3) Establishes precedents or makes decisions in principle for future actions that have the potential for significant impacts;
- (4) Threatens a violation of Federal, state, or local environmental laws applicable to the Department of the Navy; or
- (5) Involves an action that, as determined in coordination with the appropriate resource agency, may:
  - (i) Have an adverse effect on Federally listed endangered/threatened species or marine mammals;
  - (ii) Have an adverse effect on coral reefs or on Federally designated wilderness areas, wildlife refuges, marine sanctuaries, or parklands;
  - (iii) Adversely affect the size, function or biological value of wetlands and is not covered by a nation-wide or regional permit;
  - (iv) Have an adverse effect on archaeological resources or resources (including but not limited to ships, aircraft, vessels and equipment) listed or determined eligible for listing on the National Register of Historic Places; or
  - (v) Result in an uncontrolled or unpermitted release of hazardous substances or require a conformity determination under standards of the Clean Air Act General Conformity Rule.

(f) Categorical exclusions. Subject to the criteria in paragraph (e) above, the following categories of actions are excluded from further analysis under NEPA. The CNO and CMC shall determine whether a

decision to forego preparation of an EA or EIS on the basis of one or more categorical exclusions must be documented in an administrative record and the format for such record.

(1) Routine fiscal and administrative activities, including administration of contracts;

(2) Routine law and order activities performed by military personnel, military police, or other security personnel, including physical plant protection and security;

[[Page 8111]]

(3) Routine use and operation of existing facilities, laboratories, and equipment;

(4) Administrative studies, surveys, and data collection;

(5) Issuance or modification of administrative procedures, regulations, directives, manuals, or policy;

(6) Military ceremonies;

(7) Routine procurement of goods and services conducted in accordance with applicable procurement regulations, executive orders, and policies;

(8) Routine repair and maintenance of buildings, facilities, vessels, aircraft, and equipment associated with existing operations and activities (e.g., localized pest management activities, minor erosion control measures, painting, refitting);

(9) Training of an administrative or classroom nature;

(10) Routine personnel actions;

(11) Routine movement of mobile assets (such as ships and aircraft) for homeport reassignments, for repair/overhaul, or to train/perform as operational groups where no new support facilities are required;

(12) Routine procurement, management, storage, handling, installation, and disposal of commercial items, where the items are used and handled in accordance with applicable regulations (e.g., consumables, electronic components, computer equipment, pumps);

(13) Routine recreational/welfare activities;

(14) Alteration of and additions to existing buildings, facilities, structures, vessels, aircraft, and equipment to conform or provide conforming use specifically required by new or existing applicable legislation or regulations (e.g., hush houses for aircraft engines, scrubbers for air emissions, improvements to storm water and sanitary and industrial wastewater collection and treatment systems, and installation of fire fighting equipment);

(15) The modification of existing systems or equipment when the environmental effects will remain substantially the same and the use is consistent with applicable regulations;

(16) Routine movement, handling and distribution of materials, including hazardous materials/wastes that are moved, handled, or distributed in accordance with applicable regulations;

(17) New activities conducted at established laboratories and plants (including contractor-operated laboratories and plants) where all airborne emissions, waterborne effluent, external ionizing and non-ionizing radiation levels, outdoor noise, and solid and bulk waste disposal practices are in compliance with existing applicable Federal, state, and local laws and regulations;

(18) Studies, data, and information gathering that involve no permanent physical change to the environment (e.g., topographic surveys, wetlands mapping, surveys for evaluating environmental damage, and engineering efforts to support environmental analyses);

(19) Temporary placement and use of simulated target fields (e.g., inert mines, simulated mines, or passive hydrophones) in fresh, estuarine, and marine waters for the purpose of non-explosive military training exercises or research, development, test and evaluation;

(20) Installation and operation of passive scientific measurement devices (e.g., antennae, tide gauges, weighted hydrophones, salinity measurement devices, and water quality measurement devices) where use will not result in changes in operations tempo and is consistent with applicable regulations;

(21) Short-term increases in air operations up to 50 percent of the typical operation rate, or increases of 50 operations per day, whichever is greater. Frequent use of this CATEX at an installation requires further analysis to determine there are no cumulative impacts;

(22) Decommissioning, disposal, or transfer of Navy vessels, aircraft, vehicles, and equipment when conducted in accordance with applicable regulations, including those regulations applying to removal of hazardous materials;

(23) Non-routine repair and renovation, and donation or other transfer of structures, vessels, aircraft, vehicles, landscapes or other contributing elements of facilities listed or eligible for listing on the National Register of Historic Places which will result in no adverse effect;

(24) Hosting or participating in public events (e.g., air shows, open houses, Earth Day events, and athletic events) where no permanent changes to existing infrastructure (e.g., road systems, parking and sanitation systems) are required to accommodate all aspects of the event;

(25) Military training conducted on or over nonmilitary land or water areas, where such training is consistent with the type and tempo of existing non-military airspace, land, and water use (e.g., night compass training, forced marches along trails, roads and highways, use of permanently established ranges, use of public waterways, or use of civilian airfields);

(26) Transfer of real property from DON to another military department or to another Federal agency;

(27) Receipt of property from another Federal agency when there is no anticipated or proposed substantial change in land use;

(28) Minor land acquisitions or disposals where anticipated or proposed land use is similar to existing land use and zoning, both in type and intensity;

(29) Disposal of excess easement interests to the underlying fee owner;

(30) Renewals and minor amendments of existing real estate grants for use of Government-owned real property where no significant change in land use is anticipated;

(31) Land withdrawal continuances or extensions that merely establish time periods and where there is no significant change in land use;

(32) Renewals and/or initial real estate in grants and out grants involving existing facilities and land wherein use does not change significantly (e.g., leasing of federally-owned or privately-owned housing or office space, and agricultural out leases);

(33) Grants of license, easement, or similar arrangements for the use of existing rights-of-way or incidental easements complementing the use of existing rights-of-way for use by vehicles (not to include significant increases in vehicle loading); electrical, telephone, and other transmission and communication lines; water, wastewater, storm water, and irrigation pipelines, pumping stations, and facilities; and for similar utility and transportation uses;

(34) New construction that is similar to existing land use and, when completed, the use or operation of which complies with existing regulatory requirements (e.g., a building within a cantonment area with associated discharges/runoff within existing handling capacities);

(35) Demolition, disposal, or improvements involving buildings or structures when done in accordance with applicable regulations

including those regulations applying to removal of asbestos, PCBs, and other hazardous materials;

(36) Acquisition, installation, and operation of utility (e.g., water, sewer, electrical) and communication systems (e.g., data processing cable and similar electronic equipment) which use existing rights of way, easements, distribution systems, and/or facilities;

(37) Decisions to close facilities, decommission equipment, and/or temporarily discontinue use of facilities or equipment, where the facility or

[[Page 8112]]

equipment is not used to prevent/control environmental impacts);

(38) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site;

(39) Relocation of personnel into existing Federally-owned or commercially leased space that does not involve a substantial change affecting the supporting infrastructure (e.g., no increase in vehicular traffic beyond the capacity of the supporting road network to accommodate such an increase);

(40) Pre-lease upland exploration activities for oil, gas or geothermal reserves, (e.g., geophysical surveys);

(41) Installation of devices to protect human or animal life (e.g., raptor electrocution prevention devices, fencing to restrict wildlife movement onto airfields, and fencing and grating to prevent accidental entry to hazardous areas);

(42) Reintroduction of endemic or native species (other than endangered or threatened species) into their historic habitat when no substantial site preparation is involved;

(43) Temporary closure of public access to DON property in order to protect human or animal life;

(44) Routine testing and evaluation of military equipment on a military reservation or an established range, restricted area, or operating area; similar in type, intensity and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the DON was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment;

(45) Routine military training associated with transits, maneuvering, safety and engineering drills, replenishments, flight operations, and weapons systems conducted at the unit or minor exercise level; similar in type, intensity and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the DON was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment.

0

7. Section 775.12 is revised to read as follows:

Sec. 775.12 Delegation of authority.

(a) The ASN (I&E) may delegate his/her responsibilities under this instruction for review, approval and/or signature of EISs and RODs to appropriate Executive Schedule/Senior Executive Service civilians or flag/general officers. ASN (I&E), CNO, and CMC may delegate all other responsibilities assigned in this instruction as deemed appropriate.

(b) The ASN (RD&A) delegation of authority for approval and signature of documents under NEPA is contained in SECNAV Instruction 5000.2 series, which sets out policies and procedures for acquisition programs.

(c) Previously authorized delegations of authority are continued until revised or withdrawn.

Dated: February 13, 2004.

S.A. Hughes,  
Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy,  
Federal Register Liaison Officer.

[FR Doc. 04-3590 Filed 2-20-04; 8:45 am]

BILLING CODE 3810-FF-P