

prevents transactions that resemble sales from qualifying as reorganizations. *Pinellas Ice & Cold Storage Co. v. Commissioner*, 287 U.S. 462 (1933).

The COI requirement requires that, in substance, a substantial part of the value of the target corporation (Target) shareholders' proprietary interests (*i.e.*, stock) in Target be preserved. Section 1.368-1(e)(1)(i); *John A. Nelson Co. v. Helvering*, 296 U.S. 374 (1935). A Target shareholder's proprietary interest in Target is preserved to the extent it is exchanged for either the stock of the acquiring corporation (Acquiror) or, in the case of a triangular reorganization (as defined in § 1.358-6(b)(2)), the stock of a corporation in control (within the meaning of section 368(c)) of Acquiror (in either case, Issuing Corporation stock). To the extent the Target shareholders' proprietary interests are exchanged for money or other property, their proprietary interests are not preserved. Section 1.368-1(e)(1)(i).

To determine whether a substantial part of the Target shareholders' proprietary interests has been preserved, the value of the Issuing Corporation stock the Target shareholders received is compared to the aggregate value of the consideration the Target shareholders received. Prior to 2011, the determination of whether the COI requirement is satisfied had been based on the value of the Issuing Corporation stock "as of the effective date of the reorganization" (Closing Date). Rev. Proc. 77-37 (1977-2 C.B. 568).

On December 19, 2011, the Department of the Treasury (Treasury Department) and the IRS issued final regulations (TD 9565, 76 FR 78540) that include a special rule (Signing Date Rule) that applies if a binding contract to effect a potential reorganization provides for fixed consideration (as defined in § 1.368-1(e)(2)(iii)(A)) to be exchanged for the Target shareholders' proprietary interests. Section 1.368-1(e)(2)(i). If the Signing Date Rule applies, the consideration is valued as of the end of the last business day before the first date there is a binding contract (Pre-signing Date), rather than on the Closing Date.

On the same date, the Treasury Department and the IRS published proposed regulations (2011 Proposed Regulations) (REG-124627-11, 76 FR 78591) that identified situations, other than those covered by the Signing Date Rule, in which the value of Issuing Corporation stock could be determined based on a value other than its actual trading price on the Closing Date. In one of these situations, the 2011 Proposed Regulations would have allowed the parties to use an average of the trading

prices of Issuing Corporation stock over a number of days, in lieu of its actual trading price on the Closing Date, for purposes of determining whether the COI requirement is satisfied.

The Treasury Department and the IRS have determined that current law generally provides sufficient guidance to taxpayers with respect to the COI requirement. Therefore, the Treasury Department and the IRS have decided to withdraw the 2011 Proposed Regulations. However, after considering comments received on the 2011 Proposed Regulations, the IRS has concluded that, in certain circumstances, taxpayers should be able to rely on certain average stock valuation methods for purposes of measuring COI. Accordingly, the IRS issued a revenue procedure effective January 23, 2018, that provides the circumstances under which the IRS will not challenge a taxpayer's use of certain stock valuation methods to value certain Issuing Corporation stock for purposes of determining whether the COI requirement is satisfied. *See* Rev. Proc. 2018-12, I.R.B. 2018-6.

#### Statement of Availability of IRS Documents

Rev. Proc. 2018-12 is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

#### Drafting Information

The principal author of this withdrawal notice is Jean Broderick of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in its development.

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Withdrawal of Notice of Proposed Rulemaking

■ Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG-124627-11) that was published in the **Federal Register** (76 FR 78591) on December 19, 2011, is withdrawn.

#### Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

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## DEPARTMENT OF DEFENSE

### Department of the Navy

#### 32 CFR Part 775

[Docket No. USN-2018-HQ-0001]

RIN 0703-AB01

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

**AGENCY:** Department of the Navy, Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of the Navy (DoN) proposes to revise portions of its internal regulations that establish the responsibilities and procedures for complying with the National Environmental Policy Act (NEPA). An agency may determine that certain classes of actions normally do not individually or cumulatively have significant environmental impacts and therefore do not require further review under NEPA. Establishing these categories of activities, called categorical exclusions (CATEXs), in the agency's NEPA implementing procedures is a way to reduce unnecessary paperwork and delay. This revision clarifies what types of activities fall under CATEXs and normally do not require additional NEPA analysis.

**DATES:** Comments must be received by May 1, 2019.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

*Federal eRulemaking Portal:* <https://www.regulations.gov/>. Follow the instructions for submitting comments.

*Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, Regulatory and Advisory Committee Division, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

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

**FOR FURTHER INFORMATION CONTACT:** Mr. J. Dan Cecchini, Office of the Deputy Assistant Secretary of the Navy (Environment), 703-614-1173.

**SUPPLEMENTARY INFORMATION:****Executive Summary**

This action would revise certain DoN procedures for implementing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). NEPA 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.

The proposed rule revises the DoN's implementing regulations, 32 CFR part 775, that were originally published on August 20, 1990 (55 FR 33898), as revised on February 23, 2004 (69 FR 8108). The 2004 changes revised and added to DoN's list of approved categorical exclusions (CATEXs); revised criteria for disallowing the application of listed CATEXs (*i.e.*, hereinafter "extraordinary circumstances") in which a normally excluded action may have a significant environmental effect; and assigned certain 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.

Over time, through study and experience, agencies may identify activities—such as routine facility maintenance—that do not need to undergo detailed environmental analysis because the activities do not individually or cumulatively have a significant effect on the human environment. Agencies can define and exclude from further review categories of such activities, called CATEXs, in their NEPA implementing procedures as a way to reduce unnecessary paperwork and delay.

**Authority for This Regulatory Action**

Authorities for this rule are 5 U.S.C. 301, NEPA, and 40 CFR parts 1500–1508. Under 5 U.S.C. 301, the head of a military department may prescribe regulations for the government of the department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. As noted above, NEPA requires Federal agencies to analyze their proposed actions to determine if they could have significant

environmental effects. The White House Council on Environmental Quality (CEQ) implementing regulations (40 CFR 1507.3) require Federal agencies to adopt supplemental NEPA implementing procedures, including agency-specific CATEXs, either in the form of agency policy or a regulation, and to provide opportunity for public review prior to adoption.

**Expected Impact of the Proposed Rule**

This rule revises internal procedures allowing for consistent implementation across the DoN for its responsibilities under NEPA. Promulgating CATEXs will reduce government spending on compliance as well as shorten project approval timelines for those activities which do not need detailed environmental analysis. The DoN currently prepares approximately 3,000 CATEXs annually (approximately 2,000 by the U.S. Navy and approximately 1,000 by the U.S. Marine Corps).

**Development Process**

In 2015, the Office of the Deputy Assistant Secretary of the Navy for Environment directed a review of 32 CFR 775.6(e) and (f), which identify the DoN's criteria for excluding application of listed CATEXs and list the DoN's CATEXs, respectively. A review panel (hereinafter "panel") was formed to provide administrative support and expertise to inform the efforts. The professionals comprising the panel were current DoN environmental practitioners with numerous years of NEPA planning and compliance experience, including the preparation of environmental documentation such as CATEX decision documents, environmental assessments (EAs), environmental impact statements (EISs), findings of no significant impact, and records of decision. The panel was supported by a legal working group comprised of experienced environmental law attorneys from the DoN's Office of the General Counsel and Office of the Judge Advocate General with advanced education and experience providing legal and policy advice to Federal agency decision makers, managers, and practitioners on environmental planning and compliance responsibilities.

The panel reviewed and analyzed the supporting rationale, scope, applicability, and wording of each existing CATEX and extraordinary circumstance set forth in 32 CFR 775.6(e) and (f). The panel developed and deliberated on each proposed new CATEX and extraordinary circumstance change, balancing the resulting increase in administrative efficiency in NEPA

implementation and compliance against the risk of misinterpretation and misapplication. During that process, numerous environmental professionals, representing various constituencies within the DoN, supported the panel's review and participated in meetings and conference calls over the course of 18 months to reach agreement on this proposed rule.

In accordance with CEQ's regulations and its 2010 CATEX guidance, "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act," the DoN substantiated the proposed new and revised CATEXs by reviewing EA and EIS analyses to identify the environmental effects of previously implemented actions; benchmarking other Federal agencies' experiences; and leveraging the expertise, experience, and judgment of DoN professional staff. The panel noted that other Department of Defense (DoD) entities and numerous other Federal agencies have CATEXs for activities that are similar in nature, scope, and impact on the human environment as those undertaken by the DoN. The panel reviewed many of those CATEXs before proposing changes to 32 CFR 775.6(e) and (f).

In addition, the panel recognized that all Federal agencies, including the DoD as a whole, with very few limitations, must meet the same requirements to consider environmental issues in decisionmaking with an ultimate goal to protect the environment. Based on experience with, or on behalf of, other Federal agencies, the panel determined that the characteristics of many of the DoN's activities were not significantly different from those performed by other Federal agencies, including other entities within the DoD.

The CEQ was integral in the process to ensure that proposed changes to the DoN's CATEXs meet NEPA requirements. The DoN provided the CEQ with proposed draft changes and justifications for each proposed change to 32 CFR 775.6(e) and (f). Many of the changes that the DoN is proposing are administrative in nature to clarify application of a particular CATEX. On July 7, 2017, the CEQ concurred with the DoN proceeding to formal rulemaking on these proposed changes.

**Proposed Revisions Generally**

Through the development process discussed in this preamble, the panel determined that the proposed changes to DoN's CATEXs and extraordinary circumstances encompass activities that normally do not individually or cumulatively have a significant impact on the human environment. Only the

provisions discussed below are proposed for substantive revision. In addition, minor clarifications that do not change the CATEX meaning are proposed.

#### **Proposed Revisions to Extraordinary Circumstances [32 CFR 775.6(e)]**

The DoN's criteria for disallowing the application of listed CATEXs are set forth in 32 CFR 775.6(e). This proposed rule substantially revises paragraph (e) to provide specific introductory guidance regarding those circumstances under which use of a CATEX is inappropriate, reflecting a determination by the DoN that further environmental analysis is needed. Under this proposed change, a determination whether a CATEX is appropriate for a proposed action, even if one or more extraordinary circumstances are present, should focus on the action's potential effects and consider the environmental significance of those effects in terms of both context (*i.e.*, consideration of the affected region, interests, and resources) and intensity (*i.e.*, severity of impacts). This proposed change provides discretion that is missing from the current regulation and which can be applied when considering whether a CATEX is appropriate. This proposed change mirrors the extraordinary circumstances introductory language contained in National Oceanic and Atmospheric Administration (NOAA) and U.S. Forest Service NEPA regulations.

The proposed rule adds a new paragraph (e)(2) which states that if a decision is made to apply a CATEX to a proposed action that is more than administrative in nature, the decision must be formally documented per existing Navy and Marine Corps policy. For actions with a documented CATEX where one or more extraordinary circumstances are present, a copy of the executed CATEX decision document (*e.g.*, Record of CATEX or Decision Memorandum) must be forwarded for review to Navy Headquarters or Marine Corps Headquarters, as appropriate, before the action is implemented. This new requirement to send the documented CATEX to headquarters for review will end two years from the date of the final rule implementing the DoN's revised extraordinary circumstances and CATEXs.

The proposed rule would amend and re-number current paragraphs (e)(1) through (5) as (e)(1)(i) through (v). The proposed rule would not revise paragraphs (e)(1) through (4) but they would be re-numbered (e)(1)(i) through (iv). Regarding the enumerated extraordinary circumstances set forth in

paragraphs (e)(5)(i) through (v) (that would be re-numbered (e)(1)(v)(A) through (E)), the proposed rule revises paragraphs (e)(5)(i), (iii), and (iv) (and would re-number them (e)(1)(v)(A), (e)(1)(v)(C), and (e)(1)(v)(D)). Paragraph (e)(5)(i) (which would be renumbered as (e)(1)(v)(A)) would be revised to address those actions that, as determined after coordination with subject matter experts within the agency and, if appropriate with resources agencies (*e.g.*, National Marine Fisheries Service, United States Fish and Wildlife Service), would have more than a negligible or discountable effect on Federally protected species under the Endangered Species Act, or would require issuance of an Incidental Harassment Authorization or Letter of Authorization under the Marine Mammal Protection Act. The current regulation only addresses those actions which have an adverse effect on Federally listed endangered or threatened species or marine mammals without consideration of the degree of effect. This change would provide flexibility to use a CATEX even if impacts under the Endangered Species Act or Marine Mammal Protection Act may be adverse. For the Endangered Species Act, this change mirrors language contained in NOAA's NEPA regulations. For the Marine Mammal Protection Act, this change links the trigger for this existing extraordinary circumstance to the specific regulatory threshold language of Marine Mammal Protection Act guidelines. Specifically, the panel determined that the use of the term "adverse effect" in the current regulation is incongruent with the prevailing resource management handbooks and guidelines of the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS).

Regarding those actions adversely affecting the size, function, or biological value of wetlands, paragraph (e)(5)(iii) (to be re-numbered as (e)(1)(v)(C)) is revised to clarify that general permits are issued on a nationwide, regional, or state basis for particular categories of activities. This administrative change clarifies, but does not change the effect of, the existing extraordinary circumstance.

Regarding those actions having an adverse effect on archaeological resources or resources listed or determined to be eligible for listing on the National Register of Historic Places (including, but not limited to, ships, aircraft, vessels, and equipment), paragraph (e)(5)(iv) (to be re-numbered as (e)(1)(v)(D)) is revised to include those circumstances where compliance with Section 106 of the National

Historic Preservation Act has not been resolved through an agreement executed between the DoN and the appropriate historic preservation office and other appropriate consulting parties. This proposed change will eliminate the need to prepare an EA for an action whose sole impact is tied to a potential adverse impact on a historic structure. This approach is consistent with guidance contained in the March 2013 CEQ and Advisory Council on Historic Preservation document "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106."

#### **Proposed Revisions to Categorical Exclusions [32 CFR 775.6(f)]**

32 CFR 775.6(f)(1) through (45) lists the 45 CATEXs currently promulgated by the DoN. This proposed rule would revise six CATEXs (*i.e.*, #8, #11, #14, #32, #34, and #36), delete one CATEX (#15), and add five new CATEXs. CATEX #32 would be relocated and re-numbered as CATEX #29. Finally, current CATEXs #1 through #45 would be re-numbered as #1 through #44 as a result of the proposed deletion of CATEX #15 and re-numbering of CATEX #32, and the proposed new CATEXs would be numbered as #45 through #49.

CATEX #8 (32 CFR 775.6(f)(8)): This proposed change would add ranges to the list of items subject to routine repair and maintenance. While the DoN regularly encounters routine repair and maintenance requirements on its ranges, this proposed revision would cover the repair and maintenance of existing range assets; it would not cover the conversion to a new range capability or a change in the use of the range (*e.g.*, adding additional infrastructure to support new targets). The panel also determined that the use of new examples such as "general building/structural repair, landscaping, and grounds maintenance" would further clarify the types of activities covered by this CATEX.

CATEX #11 (32 CFR 775.6(f)(11)): This proposed rule would add submarines and ground assets to the list of mobile asset examples to clarify application of this CATEX. The panel added the term "home basing" to provide the appropriate terminology for aircraft or ground asset reassignment not covered by the term "homeporting," which is used only in reference to ship or vessel reassignments. The panel determined that the use of new examples such as temporary reassignments and dismantling or disposal in this CATEX would further clarify application of this CATEX. CATEX #14 (32 CFR 775.6(f)(14)) and

CATEX #15 (32 CFR 775.6(f)(15)): This proposed change would combine CATEX #14 and CATEX #15 into a single CATEX #14.

CATEX #32 (32 CFR 775.6(f)(32)): This proposed change would delete “renewals” from the current CATEX, because renewal actions are covered by CATEX #31 (to be re-numbered as CATEX #30). Furthermore, the proposed rule would re-number existing CATEX #32 as CATEX #29 so that initial real estate in grants would precede “renewals” in the CATEX list.

CATEX #34 (32 CFR 775.6(f)(34)): The proposed rule would revise CATEX #34 (to be re-numbered as #33) to cover new construction that is similar to or compatible with existing land use (*i.e.*, site and scale of construction are consistent with those of existing adjacent or nearby facilities) 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 and runoff within existing handling capacities). As an example, for the proposed construction of a building in a previously disturbed cantonment area where this would be the first building of its type, as long as the building is generally consistent with the designated land use of the area, this revised CATEX could be applied (assuming no other extraordinary circumstances). The test for whether this CATEX can be applied should focus on whether the proposed action generally fits within the designated land use of the proposed site. This proposed change would clarify the term “similar to existing land use” in the current CATEX, which the panel determined is often confusing and prone to overly narrow interpretation.

CATEX #36 (32 CFR 775.6(f)(36)): The proposed rule would revise CATEX #36 (to be re-numbered as #35) by adding “modernization” and “repair” to clarify application of this CATEX. The panel felt it was important to include these terms to support energy resilience, alternative energy, and renewable energy projects given the DoN’s emphasis on energy management throughout the Department.

#### **Proposed New Categorical Exclusions**

CATEX #45: (32 CFR 775.6(f)(45)): With the re-numbering of current CATEX #45 as #44, this proposed new CATEX would cover natural resources management actions undertaken or permitted pursuant to agreement with or subject to regulation by Federal, State, or local organizations having management responsibility and authority over the natural resources in

question, including, but not limited to, prescribed burning, invasive species actions, timber harvesting, and hunting and fishing during seasons established by state authorities pursuant to their State fish and game management laws. This proposed new CATEX would require that the natural resources management actions must be consistent with the overall management approach of the property as documented in an Integrated Natural Resources Management Plan (INRMP) or other applicable natural resources management plan. This is a reinstatement of a former CATEX #27 that was eliminated as unnecessary by the DoN in 2004 (69 FR 8108, 8109) that covered routine maintenance of timber stands, including down-wood firewood permits, hazardous tree removal, and sanitation salvage. It was assumed at that time that forest management activities would occur under the auspices of an INRMP for which an EA or EIS had been prepared and a CATEX would therefore be unnecessary. (A memorandum dated August 12, 1998, from the Assistant Secretary of the Navy for Installations and Energy to the Vice Chief of Naval Operations and Assistant Commandant of the Marine Corps required an EA or EIS be prepared for INRMPs.) The DoN prepares INRMPs on its installations and ranges that the USFWS and the appropriate State fish and wildlife agency review and approve. In accordance with DoN policy, a NEPA review (typically an EA) is conducted for each INRMP. Individual projects may receive additional, site-specific NEPA review, and existing CATEX #8 or #42 may apply. Individual projects are typically conducted in a single season, are limited in geographic scope, and benefit native vegetation and species habitat. Any indirect impacts to soils, wetlands, or riparian habitat should be minor and temporary and should result in an overall beneficial effect on the natural resources being managed. Review by the DoN of previous actions, NEPA analyses, and other agency CATEXs shows that no individually or cumulatively significant effects are typically attributable to the types of activities included in the proposed reinstatement of this CATEX. In reinstating this CATEX, the panel noted that INRMP coverage may not be robust or detailed enough with respect to certain practices in the field (*e.g.*, invasive species control or controlled burns), noting that EAs for INRMPs have historically included only general discussions of these activities. This reinstated CATEX would cover certain

natural resources management practices not discussed in detail in an INRMP, but which through experience are known to have no significant impacts on the environment.

CATEX #46 (32 CFR 775.6(f)(46)): This proposed new CATEX would cover minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events that threaten public health or safety, property, or natural and cultural resources, and that are necessary to repair or improve lands unlikely to recover to a management-approved condition (*i.e.*, the previous state) without intervention. Covered activities must be completed within one year of the causal event and may not include the construction of new permanent roads or new permanent infrastructure. Such activities include, but are not limited to the repair of existing essential erosion control structures or installation of temporary erosion controls; replacement or repair of storm water conveyance structures, roads, trails, fences, and minor facilities; revegetation; construction of protection fences; and removal of hazard trees, rocks, soil, and other mobile debris from, on, or along roads, trails, or streams. During the development process summarized above, DoN entities recommended the panel develop a new CATEX that addressed minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events. The DoN is proposing this CATEX which is similar to the Bureau of Land Management’s (BLM’s) categorical exclusion I (Departmental Manual, Part 516, 11.9 [https://www.doi.gov/sites/doi.gov/files/uploads/doi\\_and\\_bureau\\_categorical\\_exclusions\\_feb2018.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/doi_and_bureau_categorical_exclusions_feb2018.pdf)). The DoN consulted with the BLM and found no record of significant impacts, either individually or cumulatively, resulting from the types of activities included in BLM’s CATEX. When wildfires, floods, earthquakes, landslides, and severe weather events occur, the DoN, often on short notice, is required to execute immediate repairs to protect personnel and resources. These repairs typically consist of minor, localized, and temporary actions to stabilize a specific situation. Examples include stabilizing slopes with berms and earthwork after wildfires and heavy rains to preclude large erosion events; fixing culverts, roads, and fences; and removing damaged trees and other debris. In most cases, the intended purpose of the activity is to stabilize a threatening situation so that overall resource impacts are minimized. Any impacts on soils, wetlands, or other natural

resources are typically minor and temporary and should result in an overall beneficial effect on installation resources.

**CATEX #47 (32 CFR 775.6(f)(47)):** This proposed new CATEX would cover the modernization (upgrade) of range and training areas, systems, and associated components that supports current testing and training levels and requirements. It would not cover those actions which would include a substantial change in the type or tempo of operation, or the nature of the range (*i.e.*, creating an impact area in an area where munitions had not been previously used). During the development process described above, DoN entities recommended the panel develop a new CATEX that covered the modernization and upgrade of range and training area systems and components. Rather than provide policy guidance advising environmental planners to use another existing CATEX for such projects (*e.g.*, CATEX #8), the panel determined that a new CATEX would be appropriate and would help to reduce the number of EAs being prepared for activities that DoN has in the past found not to have individual or cumulative significant impacts on the human environment. This CATEX is intended to cover upgrades to range assets within existing range footprints and would complement the proposed change to the DoN's existing CATEX #8, to which this proposed rule adds the term "ranges." Any actions taken under this new CATEX cannot result in a significant change in how the range is used, thus reducing the potential for any new operational impacts. Under this new CATEX, any impacts to soils, wetlands, or other natural resources would be minor and temporary, and the exclusionary criteria set forth in 32 CFR 775.6(e) related to wetlands, endangered species, and cultural resources would require the preparation of an EA or EIS. The DoN's review of previous actions and NEPA analyses shows that no individually or cumulatively significant effects are typically attributable to the types of activities covered by this proposed new CATEX.

**CATEX #48 (32 CFR 775.6(f)(48)):** This proposed new CATEX would cover revisions or updates to INRMPs that do not involve substantially new or different land use or natural resources management activities and for which an EA or EIS was previously prepared that does not require supplementation pursuant to 40 CFR 1502.9(c)(1). This new CATEX would reduce the number of EAs being unnecessarily prepared for

activities that inherently do not have individually or cumulatively significant impacts on the human environment. This new CATEX would also document (via the CATEX process) that the INRMP update is covered by the original NEPA documentation. Current DoN guidance requires an installation to conduct informal INRMP reviews each year and formal INRMP reviews every five years with the USFWS (and NMFS, as appropriate) and State partners. Necessary INRMP modifications and updates that are identified during an annual review can usually be accomplished under the initial NEPA documentation. Upon presentation of a proposed INRMP update, the NEPA practitioner may consider the proposal as a within-scope modification. Thus, the responsible command would be comparing a proposed revision against the original action as documented (per existing NEPA processes). Under many circumstances, the conclusion may be that the update is not out of scope and the action is covered by the original NEPA documentation. Proposed INRMP updates with significant differences from the original INRMP would call for additional NEPA analysis via revision or new documentation, usually at the EA level. The DoN has prepared comprehensive EAs for INRMPs for all Navy and Marine Corps properties with significant natural resources. In many cases, installations/bases have gone through four or five formal, five-year INRMP reviews and updates. The overall management strategy for most Navy and Marine Corps facilities is well established. After reviewing a number of NEPA documents for INRMP updates and revisions, it is clear that NEPA documents are not uncovering new environmental impacts and are adding little, if any, value to the decision-making process. There should be only minor impacts to natural resources from non-substantial management adjustments. Additionally, there should be an overall beneficial effect on the natural resources from the implementation of an INRMP that has been approved by the USFWS and/or NMFS, as appropriate, and relevant state agencies. The DoN review of previous NEPA analyses shows that no individually or cumulatively significant effects are typically attributable to the types of activities covered by this new CATEX.

**CATEX #49 (32 CFR 775.6(f)(49)):** This proposed new CATEX would cover DoN actions that occur on another Military Service's property where the action qualifies for a CATEX of that

Service, or for actions on property designated as a Joint Base or Joint Region that would qualify for a CATEX of any of the Services included as part of the Joint Base or Joint Region. If the DoN action proponent chooses to use another Service's CATEX to cover a proposed action, the DoN must get written confirmation the other Service does not object to using their CATEX to cover the DoN action. The DoN official making the CATEX determination must ensure the application of the CATEX is appropriate and that the DoN proposed action was of a type contemplated when the CATEX was established by the other Service. Use of this CATEX would require preparation of a Record of CATEX or Decision Memorandum. This new CATEX leverages the thorough administrative record reviews undertaken by other Military Services that perform similar covered actions across the DoD, which is becoming more "purple" (*i.e.*, bases that host multiple Military Services). For Navy and Marine Corps actions that occur on either Army or Air Force property, given that CATEXs were established for categories (or types) of activities, use of the CATEX by another Military Service should not have significant impacts if the activity clearly fits the intent and wording of that CATEX. Currently eight out of twelve joint bases throughout the DoD involve the DoN: (1) Joint Base McGuire-Dix-Lakehurst, New Jersey (Naval Air Engineering Station Lakehurst, Fort Dix, and McGuire Air Force Base (AFB)); (2) Joint Base Andrews-Naval Air Facility Washington, Maryland (Naval Air Facility Washington and Andrews AFB); (3) Joint Base Anacostia-Bolling, DC (Bolling AFB and Naval Station Anacostia); (4) Joint Base Myer-Henderson Hall, Virginia (Henderson Hall (USMC) and Fort Myer); (5) Joint Base Pearl Harbor-Hickam, Hawaii (Hickam AFB, Hawaii and Naval Station Pearl Harbor); (6) Joint Base Charleston, South Carolina (Naval Weapons Station Charleston and Charleston AFB); (7) Joint Expeditionary Base Little Creek-Fort Story, Virginia (Fort Story and Naval Expeditionary Base Little Creek); and (8) Joint Region Marianas, Guam (Andersen AFB and Naval Base Guam). The Department of the Army has a CATEX ((b)(13)) that is very similar to this proposed new CATEX (32 CFR Appendix B to Part 651). The DoN used Army experience with this CATEX as a benchmark.

## Regulatory Reviews

### *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, it has been reviewed by the Office of Management and Budget (OMB).

### *Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this proposed rule is expected to be related to agency organization, management, or personnel.

### *National Environmental Policy Act*

The CEQ does not direct agencies to prepare a NEPA analysis before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. The DoN NEPA procedures assist in the fulfillment of its responsibilities under NEPA, but are not final determinations of what level of NEPA analysis is required for particular actions. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff’d*, 230 F.3d 947, 954–55 (7th Cir. 2000).

### *Paperwork Reduction Act*

The proposed action does not contain a collection-of-information requirement subject to review and approval by the OMB under the Paperwork Reduction Act.

### *Regulatory Flexibility Act*

The DoN has determined that this action is not subject to the relevant

provisions of the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)).

### *Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This proposed rule does not impose any mandates on small entities. This action addresses the DoN's internal procedures for implementing the procedural requirements of the NEPA.

### *Executive Order 13132: Federalism*

The DoN has determined that this action does not contain policies with Federalism or “takings” implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively. This action does not have federalism implications. 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. This action contains no federal mandates for state and local governments and does not impose any enforceable duties on state and local governments. This action addresses only internal DoN procedures for implementing NEPA.

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

Environmental impact statements.

Accordingly, 32 CFR part 775 is proposed to be amended to read as follows:

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

■ 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.

■ 2. Amend § 775.6 by revising paragraphs (e) and (f) as follows:

#### **§ 775.6 Planning considerations.**

\* \* \* \* \*

(e) A categorical exclusion (CATEX), as defined and listed in this regulation, may be used to satisfy NEPA, eliminating the need for an Environmental Assessment or an Environmental Impact Statement. Extraordinary circumstances are those circumstances for which the Department of the Navy has determined that further environmental analysis may be required

because an action normally eligible for a CATEX may have significant environmental effects. The presence of one or more extraordinary circumstances does not automatically preclude the application of a CATEX. A determination of whether a CATEX is appropriate for an action, even if one or more extraordinary circumstances are present, should focus on the action's potential effects and consider the environmental significance of those effects in terms of both context (consideration of the affected region, interests, and resources) and intensity (severity of impacts).

(1) Before applying a CATEX, the decision maker must consider whether the proposed action:

(i) Would adversely affect public health or safety;

(ii) Involves effects on the human environment that are highly uncertain, involve unique or unknown risks, or which are scientifically controversial;

(iii) Establishes precedents or makes decisions in principle for future actions that have the potential for significant impacts;

(iv) Threatens a violation of Federal, State, or local environmental laws applicable to the Department of the Navy; or

(v) Involves an action that may:

(A) Have more than a negligible or discountable effect on Federally protected species under the Endangered Species Act or involves an action that would require issuance of an Incidental Harassment Authorization or Letter of Authorization under the Marine Mammal Protection Act;

(B) Have an adverse effect on coral reefs or on Federally designated wilderness areas, wildlife refuges, marine sanctuaries, or parklands;

(C) Adversely affect the size, function, or biological value of wetlands and is not covered by a general (nationwide, regional, or state) permit;

(D) Have an adverse effect on archaeological resources or resources listed or determined to be eligible for listing on the National Register of Historic Places (including, but not limited to, ships, aircraft, vessels, and equipment) where compliance with Section 106 of the National Historic Preservation Act has not been resolved through an agreement executed between the Department of the Navy and the appropriate historic preservation office and other appropriate consulting parties; or

(E) 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.

(2) If a decision is made to apply a CATEX to a proposed action that is more than administrative in nature, the decision must be formally documented per existing Navy and Marine Corps policy. For actions with a documented CATEX where one or more extraordinary circumstances are present, a copy of the executed CATEX decision document (e.g., Record of CATEX or Decision Memorandum) must be forwarded for review to Navy Headquarters or Marine Corps Headquarters, as appropriate, before the action is implemented. This new requirement to send the documented CATEX to headquarters for review will end two years from the date of the final rule implementing the DoN's revised extraordinary circumstances and CATEXs.

(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;

(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, ranges, and equipment associated with existing operations and activities (e.g., localized pest management activities, minor erosion control measures, painting, refitting, general building/structural repair, landscaping, or grounds maintenance);

(9) Training of an administrative or classroom nature;

(10) Routine personnel actions;

(11) Routine movement of mobile assets (such as ships, submarines, aircraft, and ground assets for repair, overhaul, dismantling, disposal,

homeporting, home basing, temporary reassignments; and training, testing or scientific research) 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 and welfare activities;

(14) Alterations of and additions to existing buildings, facilities, and systems (e.g., structures, roads, runways, vessels, aircraft, or equipment) when the environmental effects will remain substantially the same and the use is consistent with applicable regulations.

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

(16) 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;

(17) 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);

(18) 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;

(19) 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;

(20) 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;

(21) 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;

(22) 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;

(23) 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;

(24) 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);

(25) Transfer of real property from the Department of the Navy to another military department or to another Federal agency;

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

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

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

(29) Initial real estate in grants and out grants involving existing facilities or land with no significant change in use (e.g., leasing of Federally owned or privately owned housing or office space, and agricultural out leases).

(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 establish time periods with no significant change in land use;

(32) 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;

(33) New construction that is similar to or compatible with existing land use (*i.e.*, site and scale of construction are consistent with those of existing adjacent or nearby facilities) 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 and runoff within existing handling capacities). The test for whether this CATEX can be applied should focus on whether the proposed action generally fits within the designated land use of the proposed site.

(34) 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;

(35) Acquisition, installation, modernization, repair or operation of utility (including, but not limited to, water, sewer, and electrical) and communication systems (including, but not limited to, data processing cable and similar electronic equipment) that use existing rights of way, easements, distribution systems, and facilities.

(36) Decisions to close facilities, decommission equipment, or temporarily discontinue use of facilities or equipment, where the facility or equipment is not used to prevent or control environmental impacts);

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

(38) 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);

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

(40) 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);

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

(42) Temporary closure of public access to Department of the Navy property in order to protect human or animal life;

(43) 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 Department of the Navy 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;

(44) 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 Department of the Navy 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) Natural resources management actions undertaken or permitted pursuant to agreement with or subject to regulation by Federal, State, or local organizations having management responsibility and authority over the natural resources in question, including, but not limited to, prescribed burning, invasive species actions, timber harvesting, and hunting and fishing during seasons established by State authorities pursuant to their State fish and game management laws. The natural resources management actions must be consistent with the overall management approach of the property as documented in an Integrated Natural Resources Management Plan (INRMP) or other applicable natural resources management plan.

(46) Minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events that threaten public health or safety, security, property, or natural and cultural resources, and that are necessary to repair or improve lands unlikely to recover to a management-

approved condition (*i.e.*, the previous state) without intervention. Covered activities must be completed within one year following the event and cannot include the construction of new permanent roads or other new permanent infrastructure. Such activities include, but are not limited to: repair of existing essential erosion control structures or installation of temporary erosion controls; repair of electric power transmission infrastructure; replacement or repair of storm water conveyance structures, roads, trails, fences, and minor facilities; revegetation; construction of protection fences; and removal of hazard trees, rocks, soil, and other mobile debris from, on, or along roads, trails, or streams.

(47) Modernization (upgrade) of range and training areas, systems, and associated components (including, but not limited to, targets, lifters, and range control systems) that supports current testing and training levels and requirements. Covered actions do not include those involving a substantial change in the type or tempo of operation, or the nature of the range (*i.e.*, creating an impact area in an area where munitions had not been previously used).

(48) Revisions or updates to INRMPs that do not involve substantially new or different land use or natural resources management activities and for which an EA or EIS was previously prepared that does not require supplementation pursuant to 40 CFR 1502.9(c)(1).

(49) Department of the Navy actions that occur on another Military Service's property where the action qualifies for a CATEX of that Service, or for actions on property designated as a Joint Base or Joint Region that would qualify for a CATEX of any of the Services included as part of the Joint Base or Joint Region. If the DoN action proponent chooses to use another Service's CATEX to cover a proposed action, the DoN must get written confirmation the other Service does not object to using their CATEX to cover the DoN action. The DoN official making the CATEX determination must ensure the application of the CATEX is appropriate and that the DoN proposed action was of a type contemplated when the CATEX was established by the other Service. Use of this CATEX requires preparation of a Record of CATEX or Decision Memorandum.

Dated: March 26, 2019.

**M.S. Werner,**

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

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