

**Categorical Exclusions Under 32 CFR Part 651**  
A Guide to the Changes  
MAJ Jeanette Stone

**1. Introduction.** On 29 March 2002, the Office of the Deputy Assistant Secretary of the Army published 32 Code of Federal Regulations (CFR) Part 651, Environmental Analysis of Army Actions; Final Rule (hereafter “final rule”), in the Federal Register. The final rule is a revision of policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) regulations, and supersedes the guidance found in Army Regulation (AR) 200-2, Environmental Effects of Army Actions, dated 23 December 1988. The revision of AR 200-2 based on the final rule is currently pending.

Of particular interest to those in the field are the myriad changes made in the area of Categorical Exclusions (CXs). Previously found in AR 200-2, Appendix A, these are now located in Appendix B of the final rule. Notably, they have been loosely regrouped under activity type (e.g., Administration/operation; Construction/demolition; Repair and maintenance; etc.), and the alphabetic and numeric system so familiar to everyone in the environmental community has been adjusted accordingly. Although this is initially disconcerting, once one becomes familiar with the reordering system, it is easier to use than its alphanumeric predecessors A-1 through A-29.

**2. CX Changes in Final Rule.** To aid in pinpointing the changes made, reference to the previous numbering system will be used throughout:

A-1. (Personnel and admin activities). This is now Section II (b)(5). No change; the text is taken verbatim from the previous version.

A-2. (Law and order activities). This is now Section II (b)(1). Little change. The word “routine” now qualifies “law and order activities,” the phrase “military police” has finally been changed to the always-intended “military police,” and, by the addition of a slash mark, it now appears that such law and order activities could be performed by military personnel other than military police. More substantively, civilian natural resources and environmental law officers have also been added under the umbrella of this CX. Finally, the phrase, “excluding formulation and/or enforcement of hunting and fishing policies or regulations that differ substantively from those in effect on surrounding non-Army lands” has been stricken from this CX, but can now be found (and is stated more helpfully in the affirmative) in Section II (d)(3) of the final rule, Implementation of hunting and fishing policies consistent with state and local regulations.

A-3. (Recreation and welfare activities). This is now Section II (b)(6). Little change, except that “routinely conducted” now qualifies “recreation and welfare activities.”

A-4. (Commissary and Post Exchange operations). Omitted from the final rule. Such activities, however, appear to be covered under Section II (b)(4), Activities and operations to be conducted in existing non-historic structures.

A-5. (Repair and maintenance of buildings, etc.). This is now Section II (g)(1) for buildings, airfields, grounds, equipment, and other facilities; Section II (g)(2), in turn, covers roads, including trails and firebreaks. The language excluding hazardous or contaminated materials has been removed from this CX; for guidance on such materials look to Section II (h), Hazardous materials/hazardous waste management and operations. More significantly, the revision of this CX has been expanded to specifically include the removal and disposal of asbestos-containing material and lead-based paint [note, though, that a REC is required whenever either is undertaken, as well as when any repair or maintenance is conducted on an historic structure]. Removal of dead, diseased, or damaged trees is also newly covered under this CX; further, the list of repair and maintenance activities covered specifically indicates that it is not exhaustive.

A-6. (Procurement of goods and services). This is now Section II (e)(1). With the addition of a parenthetical regarding “green” procurement, this CX is now a bit wordier, but essentially the same in terms of content.

A-7. (Construction). Construction activities are now found in Section II (c). The changes here are major ones, in that the previously vague “[c]onstruction that does not significantly alter land use” has been supplanted by highly specific guidance permitting construction of additions to existing structures seemingly without limitation (except as to the facility’s use for solid, medical, or hazardous waste; see Section II (h) for further guidance on this subject area). Even more significantly, new construction that does not involve the surface disturbance of more than five cumulative acres is also now categorically excluded under Section II (c)(1) -- again, provided that the facility’s use does not involve solid, medical, or hazardous waste. Note, though, that this CX cannot be used if the proposed action would affect wetlands, sensitive habitat, or in other special circumstances (see 32 CFR Part 651.29, Determining when to use a CX (screening criteria) and pages 10-11 of this document). Use of a REC under Section II (c)(1) is required.

A-8. (Simulated exercises without troops). This is now Section II (i)(1). It has been expanded to include not only simulated war games, but also on-post tactical and logistical exercises involving up to battalion-sized units, so long as no tracked vehicles are used. A REC is, however, required “to demonstrate coordination with installation range control and environmental office.”

A-9. (Administrative and classroom training). This is now Section II (i)(2). No change; the text is taken verbatim from the previous version.

A-10. (Storage of materials other than hazardous). Omitted from the final rule. Such activities may be covered under Section II (b)(4), Activities and operations to be conducted in existing non-historic structures (REC required).

A-11. (Operations by established laboratories). This is now Section II (h)(5). The language of this CX has been substantially revised, to include the addition of research and testing, and the omission of the qualifier “laboratories” – making this CX generally applicable to any research, testing, or operations conducted at an existing facility, provided that it is enclosed. Although the caveat regarding the necessity of compliance with Federal, state, and local standards (a slight change from the previous reference to “laws and regulations”) remains in place, the prohibition against using captured animals from the wild as research subjects has been removed. Finally, although a REC is no longer specifically required by this CX, it does state that if a given operation within an existing facility “will substantially increase the extent of potential environmental impacts *or is controversial*” (emphasis added) and the facility does not have an existing NEPA analysis, then an EA (and, potentially, an EIS) is required.

A-12. (Developmental and operational testing on a military reservation). Omitted from the final rule. To the extent that this CX had some utility (limited, as it was, by the caveat, “provided that the training and maintenance activities have been adequately assessed... in other Army environmental documents”), an element of what it excluded – the testing of a commercially available item – may be found in Section II (e)(5), Procurement, testing, use, and/or conversion of a commercially available product, or Section II (e)(7), Modification and adaptation of commercially available items and products for military application.

A-13. (Routine movement of personnel/routine handling of non-hazardous and hazardous materials). This is now found, in part, in Section II (h)(4). The preliminary “routine movement of personnel” – never further expounded upon after the semi-colon that followed it in the last version – has been omitted from this one, and the CX now focuses exclusively on the handling, transportation, and disposal of wastes, including asbestos, PCBs, lead-based paint, and unexploded ordnance, as well as hazardous waste that otherwise complies with regulatory agency requirements. In a cross-reference to Section II (c)(1), Construction of an addition to an existing structure/new construction if no more than 5.0 cumulative acres, Section II (h)(4) indicates that it is specifically not applicable to construction of new facilities.

A-14. (Reduction and realignment of civilian and/or military personnel). This is now Section II (b)(12). A seemingly small but actually significant change was made to the language of this CX in that, “Reduction and realignment of civilian and/or military personnel that fall below the thresholds for reportable actions as prescribed by statute *or AR 5-10*” has been revised to strike the italicized portion. That regulatory reference created difficulties in the stationing of military units because it effectively limited the use of a REC to stationing decisions involving less than 200 military

personnel or 50 civilian employees – a wholly arbitrary line inadvertently created by the last update of AR 5-10, Stationing, in March 2001.

A further change to this CX is the addition of explanatory language to make the point that (b)(12) *cannot* be used for related activities such as construction, renovation, or demolition activities that would otherwise require an EA or EIS to conduct – but that it *does* specifically include reorganizations and reassignments with no changes in force structure, unit redesignations, and routine administrative reorganizations and consolidations. With the omission of the problematic regulatory reference and the addition of the above language (as well as a parenthetical reference to the statute governing Base Realignment and Closure), this CX is far more clear and useful than its predecessor. A REC is, not surprisingly, still required.

A-15. (Conversion of commercial activities). This is now Section II (e)(3). The reference to DoD Directive 4100.15 has been updated, and AR 5-20 is now the authority cited for the contracting of services. The CX is now somewhat more limited, though, by the addition of qualifying language indicating that only those actions that do not change the actions or the missions of the organization, nor alter the existing land-use patterns, can be categorically excluded.

A-16. (Preparation of regulations, procedures, manuals, and other guidance). This is now Section II (b)(3). No change; the text is taken nearly verbatim from the old version, except for the addition of an explanatory parenthetical indicating that “environmentally evaluated” means “subject to previous NEPA review,” and the correction of a typographical error (“an” to “and”) from the prior regulation.

A-17. (Acquisition, installation, and operation of utility and communication systems). This is now Section II (e)(2). Little change from a textual perspective (i.e., the addition of “mobile antennas,” a few much-needed commas, and the disjunctive “or”), but there is a significant addition in the requirement of a REC that was *not* previously required under this CX.

A-18. (Activities that identify the state of the environment). This CX has been so thoroughly revised as to appear, at least initially, omitted. The essence of what it was meant to exclude, though, can, in part, be found in Section II (d)(4) of the final rule, which covers “studies, data collection, monitoring and information gathering that do not involve major surface disturbance.” After providing certain examples of its inclusiveness (specifically, topographic surveys, bird counts, wetland mapping, and other resource inventories), it, again, adds the requirement of a REC in order to use it. Also of note: wild animals suffered another loss under the final rule, as the language prohibiting their capture was, again, omitted from the new CX.

A second CX that might potentially be used under circumstances in which A-18 could have been is Section II (h)(3), “Sampling, surveying, well drilling and installation, analytical testing, site preparation, and intrusive testing to determine if hazardous

wastes, contaminants, pollutants, or special hazards are present.” As with Section II (d)(4), however, a REC is required for reliance upon this CX.

A-19. (Deployment of military units). This is now Section II (b)(7). Some change; specifically, a clarification of the point that this exclusion can be used only when the existing facilities will be used “for their intended purposes consistent with the scope and size of [the] existing mission.” More significantly, the requirement of a REC for this CX has been eliminated.

A-20. (Grants of easements for existing rights-of-way). The real estate activity exclusions have been so dramatically altered as to make a side-by-side comparison impossible. Some have been subsumed by broader successors, while others have simply disappeared. In the case of A-20, it at first glance appears to have been omitted from the final rule – except that easements generally have been incorporated into Section II (f)(1), Grants or acquisitions of leases, licenses, easements, and permits, a CX that corresponds somewhat to A-21 and which covers the use of real property and facilities where there is no significant change in land or facility use. A non-exhaustive list of examples is included in Section II (f)(1), and a REC is required for its use.

A-21. (Grants of leases, licenses, and permits). This correlates most closely to Section II (f)(1) (see discussion of A-20, above). Section II (f)(1) is more broadly based, however, in that it is not limited to the use of existing Army-controlled property for non-Army activities. Instead, its parameters extend to the leasing of civilian property, so long as there is no significant change in the land or facility use. Further, there is no requirement in Section II (f)(1) that the land at issue have been the subject of an existing and environmentally assessed land-use plan. A REC is still required under Section II (f)(1).

A-22. (Grants of consent agreements to use a Government-owned easement). The disposal of excess easement areas to the underlying fee owner can be found in Section II (f)(2); the granting of agreements to use an easement was subsumed by Section II (f)(1), as discussed above. A REC is also required under Section II (f)(2).

A-23. (Grants of licenses for the operation of [public utilities]). This is now Section II (f)(4). Although it has been completely reworded – it is now the “[t]ransfer of active installation utilities to a commercial or governmental utility provider” – conceptually, it is the same categorical exclusion and its revision only clarifies its meaning. A REC is required.

A-24. (Transfer of real property within the Army or to another agency). This is now Section II (f)(3). Some change, in that the language regarding “leases, licenses, permits, and easements” of excess and surplus property has been excised, and replaced with the far more concise and meaningful “reporting of property as excess and surplus to the GSA for disposal.” A REC, however, remains a requirement under this CX.

A-25. (Disposal of uncontaminated buildings and other improvements for removal off-site). This is arguably found in Section II (f)(6) – but it has been so vastly expanded that the two are nearly unrelated. The new CX covers the disposal of all real property, including facilities, so long as the reasonably foreseeable use will not change significantly. A REC is required.

A-26. (Studies that involve no resources other than manpower). Omitted from the new rule. The newly-added Section II (b)(8), Preparation of administrative or personnel-related studies, reports, or investigations, appears to be the closest match, although manpower is not specifically mentioned in it.

A-27. (Study and test activities within the procurement program for commercial items). This is now further broken down into three CXs: Section II (e)(5) Procurement, testing, use, and/or conversion of a commercially available product; Section II (e)(7), Modification and adaptation of commercially available items and products for military application; and Section II (e)(8), Adaptation of non-lethal munitions and restraints from law enforcement suppliers and industry. The first, Section II (e)(5), unlike A-27, has no REC requirement; Sections (e)(7) and (e)(8) do.

A-28. (Development of table organization and equipment documents). Omitted from the final rule. The closest corresponding CX is now Section II (b)(3), Preparation of regulations, procedures, manuals, and other guidance documents.

A-29. (Grants of leases, licenses, and permits to use DA property). This was subsumed by Section II (f)(1), Grants or acquisitions of leases, licenses, easements, and permits for use of real property or facilities. A REC is required under this CX.

**3. New CXs.** Many of the CXs in the final rule are, in fact, completely new. The following is a brief listing of those not previously mentioned in “CX Changes in Final Rule,” above.

**Under Section II (b), Administration/operation activities:**

(b)(2). (Emergency or disaster assistance provided to federal, state, or local entities REC required);

(b)(9). (Approval of asbestos or lead-based paint management plans) (REC required);

(b)(10). (Non-construction activities in support of other agencies/organizations involving community participation projects and law enforcement activities;

(b)(11). (Ceremonies, funerals, and concerts);

(b)(13). (Actions affecting Army property that fall under another federal agency’s list of categorical exclusions)(REC required);

(b)(14). (Relocation of personnel into existing federally-owned or commercially-leased space)(REC required);

**Under Section II (c), Construction and demolition:**

(c)(2). (Demolition of non-historic buildings, structures, and disposal of debris therefrom, including asbestos, PCBs, lead-based paint, and other special hazard items)(REC required);

(c)(3). (Road or trail construction and repair);

**Under Section II (d), Cultural and natural resource management activities:**

(d)(1). (Land regeneration activities using only native trees and vegetation, not including forestry operations)(REC required);

(d)(2). (Routine maintenance of streams and ditches or other rainwater conveyance structures)(REC required);

(d)(5). (Maintenance of archeological, historical, and endangered/threatened species avoidance markers, fencing, and signs);

**Under Section II (e), Procurement and contract activities:**

(e)(4). (Modification, product improvement, or design change that does not change the original impact of the material, structure, or item on the environment)(REC required);

(e)(6). (Acquisition or contracting for spares and spare parts);

**Under Section II (f), Real estate activities:**

(f)(5). (Acquisition of real property where the land use will not change substantially; or, where the land acquired will not exceed 40 acres and where the use will be similar to Army activities on adjacent land)(REC required);

**Under Section II (g), Repair and maintenance activities:**

(g)(3). (Routine repair and maintenance of equipment and vehicles, other than depot or unique military equipment maintenance);

**Under Section II (h), Hazardous materials/hazardous waste management and operations:**

(h)(1). (Use of gauging devices, analytical instruments, and other devices containing sealed radiological sources)(REC required);

(h)(2). (Immediate responses in accordance with emergency response plans);

(h)(6). (Reutilization, marketing, distribution, donation, and resale of items, equipment, or materiel);

**Under Section II (i), Training and testing:**

(i)(3). (Intermittent on-post training activities that involve no live fire or vehicles off established roads or trails);

**Under Section II (j), Aircraft and airfield activities:**

(j)(1). (Infrequent, temporary increases in air operations up to 50% of the typical installation aircraft operation rate)(REC required);

(j)(2). (Flying activities in compliance with Federal Aviation Administration Regulations and normal flight patterns and elevations);

(j)(3). (Installation, repair, or upgrade of airfield equipment); and,

(j)(4). (Army participation in established air shows).

**4. Screening Criteria.** Although no longer found in the same appendix as the CXs themselves, the use of any CX is still contingent upon meeting the relevant screening criteria. Those criteria, now found at Part 651.29, Determining when to use a CX (screening criteria), have been greatly expanded and may be summarized as follows:

- 1) The action has not been segmented;
- 2) No exceptional circumstances exist (of which there are fourteen); and,
- 3) One (or more) CX encompasses the proposed action.

In addition to the three enumerated criteria listed above, if the proposed action would otherwise adversely affect “environmentally sensitive” resources, a CX cannot be used unless the impact has been resolved through another environmental process. Environmentally sensitive resources include such things as listed, threatened, or endangered species; properties listed or eligible for listing on the National Register of Historic Places; wetlands; sole source aquifers; coastal zones; cultural resources; and a dozen other specifically referenced examples, including the

catch-all, “areas of critical environmental concern[,] or other areas of high environmental sensitivity.”

While the expansion of the screening criteria could be viewed as somewhat semantic in nature, as these considerations have presumably always been factors in the environmental assessment process, the fourteen listed exceptional circumstances constitute a significant addition to the screening criteria found in the old AR 200-2.