

PART 211—MISSION COMPATIBILITY EVALUATION PROCESS

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AUTHORITY: Public Law 111–383, Section 358, as amended by Public Law 112–81, Section 331.

SOURCE: 78 FR 73088, Dec. 5, 2013, unless otherwise noted.

Subpart A—General

§211.1 Purpose.

This part prescribes procedures pursuant to section 358 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 to provide:

- (a) A formal review of projects for which applications are filed with the Secretary of Transportation under 49 U.S.C. 44718, to determine if they pose an unacceptable risk to the national security of the United States.
(b) An informal review of a renewable energy development or other energy project in advance of the filing of an application with the Secretary of Transportation under 49 U.S.C. 44718.

§211.2 Applicability.

This part applies to:

- (a) The Office of the Secretary of Defense, the Military Departments, the

Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the “DoD Components”).

(b) Persons filing applications with the Secretary of Transportation for proposed projects pursuant to 49 U.S.C. 44718, when such applications are received by the Department of Defense from the Secretary of Transportation.

(c) A State, Indian tribal, or local official, a landowner, or a developer of a renewable energy development or other energy project seeking a review of such project by DoD.

(d) Members of the general public from whom comments are received on notices of actions being taken by the Department of Defense under this part.

(e) The United States.

§211.3 Definitions.

Adverse impact on military operations and readiness. Any adverse impact upon military operations and readiness, including flight operations research, development, testing, and evaluation and training, that is demonstrable and is likely to impair or degrade the ability of the armed forces to perform their warfighting missions.

Applicant. An entity filing an application with the Secretary of Transportation pursuant to 49 U.S.C. 44718, and whose proper application has been provided by the Secretary of Transportation to the Clearinghouse.

Armed forces. This term has the same meaning as provided in 10 U.S.C. 101(a)(4) but does not include the Coast Guard.

Clearinghouse. The DoD Siting Clearinghouse, established under the Deputy Under Secretary of Defense (Installations & Environment).

Congressional defense committees. The—

- (1) Committee on Armed Services and the Committee on Appropriations of the Senate; and
(2) Committee on Armed Services and the Committee on Appropriations of the House of Representatives.

Days. All days are calendar days but do not include Federal holidays.

Landowner. A person, partnership, corporation, or other legal entity, that owns a fee interest in real property on which a proposed project is planned to be located.

Military readiness. Includes any training or operation that could be related to combat readiness, including testing and evaluation activities.

Mitigation. Actions taken by either or both the DoD or the applicant to ensure that a project does not create an unacceptable risk to the national security of the United States.

Proposed project. A proposed project is the project as described in the application submitted to the Secretary of Transportation pursuant to 49 U.S.C. 44718 and transmitted by the Secretary of Transportation to the Clearinghouse.

Requester. A developer of a renewable energy development or other energy project, a State, Indian tribal, or local official, or a landowner seeking an informal review by the DoD of a project.

Section 358. Section 358 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383.

Unacceptable risk to the national security of the United States. The construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure or sanitary landfill that would:

(1) Endanger safety in air commerce, related to the activities of the DoD.

(2) Interfere with the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports, related to the activities of the DoD.

(3) Significantly impair or degrade the capability of the DoD to conduct training, research, development, testing, and evaluation, and operations or to maintain military readiness.

United States. The several States, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, American Samoa, Guam, Midway and Wake Islands, the U.S. Virgin Islands, any other territory or possession of the United States, and associated navigable waters, contig-

uous zones, and territorial seas and the airspace of those areas.

Subpart B—Policy

§211.4 Policy.

(a) It is an objective of the Department of Defense to ensure that the robust development of renewable energy sources and the increased resiliency of the commercial electrical grid may move forward in the United States, while minimizing or mitigating any adverse impacts on military operations and readiness.

(b) The participation of the DoD in the process of the Federal Aviation Administration conducted pursuant to 49 U.S.C. 44718 shall be conducted in accordance with this part. No other process shall be used by a DoD Component.

(c) Nothing in this part shall be construed as affecting the authority of the Secretary of Transportation under 49 U.S.C. 44718.

§211.5 Responsibilities.

(a) Pursuant to subsection (e)(4) of section 358, the Deputy Secretary of Defense is designated as the senior officer. Only the senior officer may convey to the Secretary of Transportation a determination that a project filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718 would result in an unacceptable risk to the national security of the United States.

(b) Pursuant to subsection (b)(1) of section 358, the Under Secretary of Defense for Acquisition, Technology, and Logistics is designated as the senior official. Only the senior official may provide to the senior officer a recommendation that the senior officer determine a project filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718 would result in an unacceptable risk to the national security of the United States.

(c) Pursuant to subsection (e)(1) of section 358, the Deputy Under Secretary of Defense (Installations & Environment), in coordination with the Deputy Assistant Secretary of Defense (Readiness) and the Principal Deputy Director, Operational Test and Evaluation, shall review a proper application for a project filed pursuant to 49 U.S.C. 44718 and received from the Secretary

of Transportation and provide a preliminary assessment of the level of risk of adverse impact on military operations and readiness that would arise from the project and the extent of mitigation that may be needed to address such risk.

(d) Pursuant to subsection (b)(1) of section 358, the Office of the Deputy Under Secretary of Defense (Installations & Environment) is designated as the lead organization. Under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology, and Logistics, there is, within the Office of the Deputy Under Secretary, a DoD Siting Clearinghouse. The Clearinghouse:

(1) Shall have a governing board organized in accordance with DoD Instruction 5105.18, DoD Intergovernmental and Intragovernmental Committee Management Program.

(2) Has an executive director who is a Federal Government employee, appointed by the Deputy Under Secretary of Defense (Installations & Environment).

(3) Performs such duties as assigned in this part and as the Deputy Under Secretary directs.

Subpart C—Project Evaluation Procedures

§211.6 Initiating a formal DoD review of a proposed project.

(a) A formal review of a proposed project begins with the receipt from the Secretary of Transportation by the Clearinghouse of a proper application filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718.

(1) The Clearinghouse will convey the application as received to those DoD Components it believes may have an interest in reviewing the application.

(2) The DoD Components that receive the application shall provide their comments and recommendations on the application to the Clearinghouse no later than 20 days after they receive the application.

(3) Not later than 30 days after receiving the application from the Secretary of Transportation, the Clearinghouse shall evaluate all comments and recommendations received and take one of three actions:

(i) Determine that the proposed project will not have an adverse impact on military operations and readiness, in which case it shall notify the Secretary of Transportation of such determination.

(ii) Determine that the proposed project will have an adverse impact on military operations and readiness but that the adverse impact involved is sufficiently attenuated that it does not require mitigation. When the Clearinghouse makes such a determination, it shall notify the Secretary of Transportation of such determination.

(iii) Determine that the proposed project may have an adverse impact on military operations and readiness. When the Clearinghouse makes such a determination it shall immediately—

(A) Notify the applicant of the determination of the Clearinghouse and offer to discuss mitigation with the applicant to reduce the adverse impact;

(B) Designate one or more DoD Components to engage in discussions with the applicant to attempt to mitigate the adverse impact;

(C) Notify the Secretary of Transportation that the Department of Defense has determined that the proposed project may have an adverse impact on military operations and readiness, and, if the cause of the adverse impact is due to the proposed project exceeding an obstruction standard set forth in subpart C of part 77 of title 14 of the Code of Federal Regulations, identify the specific standard and how it would be exceeded; and

(D) Notify the Secretary of Transportation and the Secretary of Homeland Security that the Clearinghouse has offered to engage in mitigation discussions with the applicant.

(4) The applicant must provide to the Clearinghouse its agreement to discuss the possibility of mitigation within five days of receipt of the notification from the Clearinghouse.

(b) If the applicant agrees to enter into discussions with the DoD to seek to mitigate an adverse impact, the designated DoD Components shall engage in discussions with the applicant to attempt to reach agreement on measures that would mitigate the adverse impact of the proposed project on military operations and readiness. The

Clearinghouse shall invite the Administrator of the Federal Aviation Administration and the Secretary of Homeland Security to participate in such discussions. The Clearinghouse may also invite other Federal agencies to participate in such discussions.

(1) Such discussions shall not extend more than 90 days beyond the initial notification to the applicant, unless both the designated DoD Components and the applicant agree, in writing, to an extension of a specific period of time.

(i) If agreement between the applicant and the designated DoD Components has not been reached on mitigation measures by that time and no extension has been mutually agreed to, the designated DoD Components shall notify the Clearinghouse of the results of the discussions and the analysis and recommendations of the Components with regard to the proposed project as it is proposed after discussions.

(ii) If agreement between the applicant and the designated DoD Components has been reached on mitigation measures that remove the adverse impact of the proposed project on military operations and readiness, the DoD Components shall notify the Clearinghouse of the agreement. If the mitigation measures entail modification to the proposed project, the applicant shall notify the Secretary of Transportation of such agreement and amend its application accordingly.

(2) If the applicant and the designated DoD Components are unable to reach agreement on mitigation, the Clearinghouse shall review the analysis and recommendations of the DoD Components and determine if the proposed project as it may have been modified by the applicant after discussions would result in an unacceptable risk to the national security of the United States.

(i) If the Clearinghouse determines that the proposed project as it may have been modified by the applicant after discussions would result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect. If the Clearinghouse determines, contrary to the recommendations of the DoD Components,

that the proposed project as it may have been modified by the applicant after discussions would not result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect.

(ii) If the senior official concurs with the recommendation of the Clearinghouse, the senior official shall make a recommendation to the senior officer that is consistent with the recommendation of the Clearinghouse. If the senior official does not agree with the recommendation of the Clearinghouse, the senior official may make a recommendation to the senior officer to that effect.

(iii) The senior officer shall consider the recommendation of the senior official, and, after giving full consideration to mitigation actions available to the DoD and those agreed to by the applicant, determine whether the proposed project as it may have been modified by the applicant would result in an unacceptable risk to the national security of the United States. If the senior officer makes such a determination, the senior officer shall convey that determination to the Secretary of Transportation, identifying which of the three criteria in §211.3 creates the unacceptable risk to the national security of the United States.

(iv) Any mitigation discussions engaged in by the Department of Defense pursuant to this part shall not be binding upon any other Federal agency, nor waive required compliance with any other law or regulation.

(c) If the applicant does not agree to enter into discussions with the DoD to seek to mitigate an adverse impact, the Clearinghouse shall review the analysis and recommendations of the designated DoD Components and determine if the proposed project would result in an unacceptable risk to the national security of the United States.

(1) If the Clearinghouse determines that the proposed project would result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect. If the Clearinghouse determines, contrary to the recommendations of the DoD Components,

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that the proposed project would not result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect.

(2) If the senior official concurs with the recommendation of the Clearinghouse, the senior official shall make a recommendation to the senior officer that is consistent with the recommendation of the Clearinghouse. If the senior official does not agree with the recommendation of the Clearinghouse, the senior official may make a recommendation to the senior officer to that effect.

(3) The senior officer shall consider the recommendation of the senior official, and, after giving full consideration to mitigation actions available to the DoD and those agreed to by the applicant, determine whether the proposed project would result in an unacceptable risk to the national security of the United States. If the senior officer makes such a determination, the senior officer shall convey that determination to the Secretary of Transportation, identifying which of the three criteria in §211.3 creates the unacceptable risk to the national security of the United States.

(d) The Clearinghouse may, on behalf of itself, the senior official, or the senior officer, seek an extension of time from the Secretary of Transportation for consideration of the application.

§211.7 Initiating an informal DoD review of a proposed project.

(a) An informal review of a project begins with the receipt from a requester by the Clearinghouse of a request for an informal review. In seeking an informal review, the requester shall provide the following information to the Clearinghouse:

(1) The geographic location of the project including its latitude and longitude,

(2) The height of the project,

(3) The nature of the project.

(4) The requester is encouraged to provide as much additional information as is available. The more information provided by the requester, the greater will be the accuracy and reliability of the resulting DoD review. When a request for an informal review

includes information that is proprietary or competition sensitive, requesters are encouraged to mark the documents they submit accordingly.

(b) The Clearinghouse shall, within five days of receiving the information provided by the requester, convey that information to those DoD Components it believes may have an interest in reviewing the request.

(1) The DoD Components that receive the request from the Clearinghouse shall provide their comments and recommendations on the request to the Clearinghouse no later than 30 days after they receive the request.

(2) Not later than 50 days after receiving the request from the requester, the Clearinghouse shall evaluate all comments and recommendations received and take one of three actions:

(i) Determine that the project will not have an adverse impact on military operations and readiness, in which case it shall notify the requester of such determination. In doing so, the Clearinghouse shall also advise the requester that the informal review by the DoD does not constitute an action under 49 U.S.C. 44718 and that neither the DoD nor the Secretary of Transportation are bound by the determination made under the informal review.

(ii) Determine that the project will have an adverse impact on military operations and readiness but that the adverse impact involved is sufficiently attenuated that it does not require mitigation. The Clearinghouse shall notify the requester of such determination. In doing so, the Clearinghouse shall also advise the requester that the informal review by the DoD does not constitute an action under 49 U.S.C. 44718 and that neither the DoD nor the Secretary of Transportation are bound by the determination made under the informal review.

(iii) Determine that the project will have an adverse impact on military operations and readiness.

(A) When the requester is the project proponent, the Clearinghouse shall immediately—

(1) Notify the requester of the determination and the reasons for the conclusion of the Clearinghouse and advise the requester that the DoD would like

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to discuss the possibility of mitigation to reduce any adverse impact; and

(2) Designate one or more DoD Components to engage in discussions with the requester to attempt to mitigate the adverse impact.

(B) When the requester is a State, Indian tribal, or local official or a landowner, notify the requester of the determination and the reasons for that conclusion.

(c) If the requester is the project proponent and agrees to enter into discussions with the DoD to seek to mitigate an adverse impact, the designated DoD Components shall engage in discussions with the requester in an attempt to reach agreement on measures that would mitigate the adverse impact of the project on military operations and readiness.

§211.8 Inquiries received by DoD Components.

(a) An inquiry received by a DoD Component other than the Clearinghouse relating to an application filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718 shall be forwarded to the Clearinghouse by the DoD Component except when that DoD Component has been designated by the Clearinghouse to engage in discussions with the entity making the inquiry.

(b) A request for informal DoD review or any other inquiry related to matters covered by this part and received by a DoD Component other than the Clearinghouse shall be forwarded to the Clearinghouse by that Component except when that DoD Component has been designated by the Clearinghouse to engage in discussions with the entity making the request.

§211.9 Mitigation options.

(a) In discussing mitigation to avoid an unacceptable risk to the national security of the United States, the DoD Components designated to discuss mitigation with an applicant or requester shall, as appropriate and as time allows, analyze the following types of DoD mitigation to determine if they identify feasible and affordable actions that may be taken to mitigate adverse impacts of projects on military operations and readiness:

(1) Modifications to military operations.

(2) Modifications to radars or other items of military equipment.

(3) Modifications to military test and evaluation activities, military training routes, or military training procedures.

(4) Providing upgrades or modifications to existing systems or procedures.

(5) The acquisition of new systems by the DoD and other departments and agencies of the Federal Government.

(b) In discussing mitigation to avoid an unacceptable risk to the national security of the United States, the applicant or requester, as the case may be, should consider the following possible actions:

(1) Modification of the proposed structure, operating characteristics, or the equipment in the proposed project.

(2) Changing the location of the proposed project.

(3) Limiting daily operating hours or the number of days the equipment in the proposed structure is in use in order to avoid interference with military activities.

(4) Providing a voluntary contribution of funds to offset the cost of measures undertaken by the Secretary of Defense to mitigate adverse impacts of the project on military operations and readiness.

§211.10 Reporting determinations to Congress.

(a) Not later than 30 days after making a determination of unacceptable risk pursuant to §211.6, the senior officer shall submit to the congressional defense committees a report on such determination and the basis for such determination.

(b) Such a report shall include—

(1) An explanation of the operational impact that led to the determination.

(2) A discussion of the mitigation options considered.

(3) An explanation of why the mitigation options were not feasible or did not resolve the conflict.

Subpart D—Communications and Outreach

§211.11 Communications with the Clearinghouse.

All communications to the Clearinghouse by applicants, requesters, or members of the public should be addressed to: Executive Director, DoD Siting Clearinghouse, Office of the Deputy Under Secretary of Defense (Installations and Environment), Room 5C646, 3400 Defense Pentagon, Washington, DC 20301–3400, or, if by electronic mail, to DoDSitingClearinghouse@osd.mil. Additional information about the Clearinghouse and means of contacting it are available at the following URL: <http://www.acq.mil/ie/sch>.

§211.12 Public outreach.

(a) The DoD shall establish a Web site accessible to the public that—

- (1) Lists the applications that the DoD is currently considering.
- (2) Identifies the stage of the action, e.g., preliminary review, referred for mitigation discussions, determined to be an unacceptable risk.
- (3) Indicates how the public may provide comments to the DoD.

(b) The Clearinghouse shall publish a handbook to provide applicants, requesters, and members of the public with necessary information to assist them in participating in the Mission Compatibility Evaluation Process.

PART 212—PROCEDURES AND SUPPORT FOR NON-FEDERAL ENTITIES AUTHORIZED TO OPERATE ON DEPARTMENT OF DEFENSE (DOD) INSTALLATIONS

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APPENDIX A TO PART 212—NON-FEDERAL ENTITIES HAVING STATUTORY AUTHORIZATION FOR PARTICULAR SUPPORT

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 2554; 10 U.S.C. 2606; and 36 U.S.C. 300110

SOURCE: 73 FR 59506, Oct. 9, 2008, unless otherwise noted.

§212.1 Purpose.

This part:

- (a) Implements 32 CFR part 213.
- (b) Updates responsibilities and procedures to define and reestablish a framework for non-Federal entities authorized to operate on Department of Defense (DoD) installations.

§212.2 Applicability.

(a) This part applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the “DoD Components”).

(2) Non-Federal entities authorized to operate on DoD installations.

(b) This part shall not apply to:

- (1) Military relief societies.
- (2) Banks or credit unions according to 32 CFR part 230.
- (3) Support provided under Innovative Readiness Training according to DoD Directive 1100.20.¹

§212.3 Definitions.

DoD installation: As used in this instruction, a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility or, in the case of an activity in a foreign country, under the operational control of the Department of Defense. This term does not include any facility used primarily for civil works, rivers and harbor projects, or flood control projects.

Non-Federal entities. A self-sustaining organization, incorporated or unincorporated, that is not an agency or instrumentality of the Federal government. This part addresses only those entities that operate on DoD installations with the express consent of the

¹Copies of unclassified DoD Directives, Instructions, Publications, and Administrative Instructions may be obtained at <http://www.dtic.mil/whs/directives/>.