DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 211

[Docket ID: DOD–2011–OS–0054; RIN 0790–AI69]

Mission Compatibility Evaluation Process

AGENCY: Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

ACTION: Final rule.

SUMMARY: Section 358 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 required the Department of Defense (DoD) to designate a senior official and a lead organization to serve as a clearinghouse for the coordination of DoD review of applications filed with the Secretary of Transportation. Applications referred to the DoD involve proposals for the construction of structures that may affect navigable air space. Section 358 requires DoD to issue procedures for addressing the impacts of those structures on military operations and determining if they pose an unacceptable risk to the national security of the United States. Section 358 requires the establishment of a comprehensive strategy for addressing military impacts of renewable energy projects and other energy projects and annual reports to Congress; these requirements are not part of this rule and will be addressed separately. Nor does this rule deal with other proposal review processes not included in section 358, such as those applied by the Bureau of Land Management, Department of the Interior.

DATES: This rule is effective on January 6, 2014.

FOR FURTHER INFORMATION CONTACT: Bill Van Houten, (703) 571–9068, or at *DoDSitingClearinghouse@osd.mil*.

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. Authority

This action is authorized by section 358 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111–383, as amended by section 331 of Public Law 112–81.

II. Background

The Department of Defense (hereinafter the ''Department'') published an interim final rule in the **Federal Register** on October 20, 2011, at 76 FR 65112.

The public comment period for the interim final rule ended on December 19, 2011. Two commenters submitted comments on the interim final rule. The preamble to the final rule provides a discussion of each section of the interim final rule on which comments were received. Where changes in the rule are being made, specific reference is made to those changes in the discussion. Where no specific reference is made in the discussion, no change to the interim final rule is being made. Revisions to the rule that are simply editorial or that do not reflect substantive changes are not addressed in this preamble.

All comments the Department received are presented in a document available at *http://www.acq.osd.mil/ie/siting.shtml*.

III. Summary of Significant Changes to the Final Rule

This section contains the Department's responses to the comments received on the interim final rule, organized by the structure of the interim final and final rules.

The primary purpose of the rule is to promulgate the Department's policies and procedures for the external interfaces that are necessary to comply with section 358 of Public Law 111–383. Most of the comments received were recommendations for greater specificity in the rule, particularly with respect to standards, criteria, and communications. The Department has carefully considered the comments it has received. Its responses follow:

A. Definitions

Comment: One comment characterized the definition of ''adverse impact on military operations and readiness'' as overly broad and stated that it is not clear from either section 358 or the interim final rule how an adverse impact that rises to the level of an unacceptable risk to national security differs from an adverse impact that does not. The same comment suggested that the rule distinguish impacts that do not significantly impact military operations from those that could so that further evaluation and discussion of mitigation measures could be focused on the latter.

Response: The Department has made some minor grammatical adjustments to the definition of ''Unacceptable risk to the national security of the United States''. However, the coordinated evaluation process required by section 358 is still not sufficiently mature for the Department to establish more specific quantitative thresholds to distinguish adverse impacts that do not significantly impact military operations and readiness from those that do. The law provides for the Department to establish procedures to ensure that the Secretary of Defense does not object to a project unless the Secretary of Defense or a senior officer designated by the Secretary of Defense determines that the project would result in an unacceptable risk to the national security of the United States. The rule provides that the Deputy Secretary of Defense may make a determination that a particular project would pose an unacceptable risk to national security and it establishes procedures to ensure that, in such cases, the Deputy Secretary of Defense has the benefit of a recommendation from a senior official as well as information about the mitigation measures that were available to both the Department and the applicant. The Department does not believe that further specificity is needed at this time.

Comment: One comment suggested expanding the definition of the term ''requester'' in the rule. Under the rule, a requester is authorized to ask the DoD for an informal review of a proposed project. However, the definition of ''requester'' in the interim final rule did not include landowners, and the comment argued that large landowners are in a position to steer developers to portions of their property that have better resources for renewable energy projects and fewer or more manageable conflicts with DoD interests.

Response: The Department agrees, and the definition of ''requester'' has been expanded in the final rule to include landowners. A definition of the term ''landowner'' has been provided in the rule.

B. Project Evaluation Procedures

Comment: One comment stated that the interim final rule was not clear as to what level of information will be shared with the applicant or with the Federal Aviation Administration to explain a DoD determination that a project will have an adverse impact on military

operations and readiness or pose an unacceptable risk to national security.

Response: Because some explanations may involve sensitive or classified information, it is appropriate to avoid committing the Department to a certain level, or format, for transmitting information about such determinations to either applicants or the Federal Aviation Administration. The language in the rule allows the Department the flexibility to provide explanations in a manner that the Department considers necessary and appropriate as well as to withhold information that could compromise the national security of the United States if it were released. No change was made to the rule to address this comment.

Comment: One comment questioned the provision in section 211.6(b)(1)(ii) of the interim final rule that requires the applicant to amend an application that has been filed with the Secretary of Transportation if the applicant and the Department reach agreement on mitigation measures that remove an adverse impact on military operations and readiness. The comment contends that such an amendment is unnecessary if the agreed-upon mitigation solely involves measures to be taken by DoD.

Response: The Department agrees, and the provision has been modified in the final rule to require the applicant to file an amended application only if the agreed-upon mitigation measures entail modification to the proposed project.

Comment: One comment pointed out that the language in the subpart of the interim final rule that addresses project evaluation procedures could be interpreted as implying a preference for mitigation measures to be taken by the applicant over mitigation measures to be taken by the Department. The comment recommended that the language in question be modified to ensure there is no implied preference for mitigation on the part of the applicant.

Response: The Department does not agree that the language in the rule suggests a preference for mitigation measures to be taken by the applicant. Section 211.6(b)(2)(iii) and Section 211.6(c)(3) provide for consideration of the mitigation actions that are available to the Department as well as those that have been agreed to by the applicant. No change was made in the rule to address this comment.

Comment: One comment raised a question as to whether all adverse impacts must be mitigated or only those that are determined to pose an unacceptable risk to national security.

Response: Since only the senior officer designated by the Secretary of Defense can officially determine that a proposed project poses an unacceptable risk to the national security of the United States and communicate that determination to the Secretary of Transportation, it would not be cost effective to make such determinations relative to each project before deciding whether or not to mitigate the adverse impact of that project. However, in response to that comment, sections 211.6(a)(3)(ii) and 211.7(b)(2)(ii) have been added to provide for determinations that the adverse impact posed by a proposed project is sufficiently attenuated that it does not require mitigation.

Comment: One comment recommended that the procedures in the rule be modified to allow landowners to address mitigation. That comment contended that large landowners in particular would have more flexibility in addressing mitigation than a developer who only has a leasehold interest on a portion of the landowner's property.

Response: In the final rule, section 211.3 has been modified to include the owners of land on which a proposed project is planned among the parties that are eligible to request an informal review from the Department of Defense. Additionally, section 211.7(b)(2)(ii)(B) has been modified to ensure that landowners (when they are requesters) are notified of Clearinghouse determinations.

Comment: One comment recommended that the Department provide quantitative guidance in the rule concerning what constitutes at acceptable level of mitigation.

Response: It is not currently possible to identify objective measures of mitigation with sufficient specificity to enumerate them in a rule. The Department is working to develop guidelines and models, but those guidelines and models are not yet mature. To provide some additional clarity, however, in section 211.9(b) of the final rule, the Department included a provision that an applicant or requester discussing mitigation with the Department should consider limiting the daily operating hours or the number of days that equipment in the proposed structure would be in use along with other possible actions that could be taken to avoid an unacceptable risk to the national security of the United States.

Comment: One commenter expressed concern that section 211.9(b)(3) of the interim final rule urged applicants to consider providing a voluntary contribution to offset the cost of mitigation measures undertaken by the DoD, but did not provide a specific process for the transfer of such funds or a statement of what commitments the Department would make in return for such funds. The comment also requested clarification as to how large a contribution would be necessary to lead the Department to withdraw an objection, whether the only acceptable level of contributions was to pay the full cost of mitigation, or whether a Federal cost share would be available in some circumstances.

Response: It is not possible to specify in a rule what commitments, if any, the Department would make in conjunction with any given voluntary contribution. Certainly, the decision to withdraw an objection based on the existence of an unacceptable risk to national security will not be predicated on the magnitude of a voluntary contribution. A voluntary contribution is in the nature of mitigation since it allows the Department to reduce or eliminate an adverse impact. The effect that a voluntary contribution has on the analysis of adverse impact and unacceptable risk will vary from project to project. In some instances, it may remove an adverse impact; in others, an unacceptable risk may be unavoidable and not subject to mitigation. The facts of each project will determine whether a voluntary contribution will act to mitigate an adverse impact. It is not necessary to specify a method of payment in the rule since that information will be available on the Clearinghouse Web site. No change was made to the rule to address this comment.

C. Communications and Outreach

Comment: With respect to section 211.12 of the interim final rule, one comment observed that proposed renewable energy projects are competition sensitive. Because of that concern, the comment recommended that the Department refrain from publicizing proposed projects for which a requester is seeking informal review on the DoD Web site, noting that publication of such projects would limit the attractiveness of the early consultation option.

Response: The rule requires only the minimum information necessary to conduct a useful review. An additional provision was added to section 211.7(a) encouraging requestors to mark any documents containing proprietary or competition-sensitive information accordingly when requesting an informal review of a proposed project. However, the DoD must comply with all applicable laws, including the Freedom of Information Act.

In response to this comment, section 211.12 was modified to eliminate the requirement for the Department to include the requests for informal review that the Department is considering on its Web site.

IV. Other Adjustments to the Final Rule

This section identifies and explains minor adjustments that the Department made to the rule that were not the result of public comments.

In the final rule, the applicability of the rule is extended to Indian tribal governments, and they are included in the definition of a ''requester'' so they, like State and local governments, have the authorization to seek informal reviews of proposed projects. It was the Department's view that Indian tribal governments fell within the category of state governments, to which they are somewhat analogous as separate sovereigns. But in order to avoid any doubt, the rule is being changed to clarify this point.

In section 211.7 of the final rule, the Department includes a requirement for requesters that desire an informal review of a project to provide the height of the project as part of the required information. It was the Department's view that the requirement to provide the ''nature of the project'' would necessarily include the project's height. However, to avoid any doubt, the rule is being changed to specifically include a reference to the height of the project.

V. Executive Summary

In section 358 of Public Law 111–383, Congress required, among other things, that the DoD implement new procedures relating to how the DoD reviews and comments on applications filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718. Section 358 also specifies who within DoD may provide such comments to the Secretary of Transportation, that DoD will engage in outreach activities with interested parties, and that Congress must be advised when the DoD objects to an application filed pursuant to 49 U.S.C. 44718.

Section 211.1 of this rule states the two primary purposes of the rule which are to provide for DoD commenting on (1) applications filed pursuant to 49 U.S.C. 44718 and (2) requests for reviews of projects prior to applications being filed pursuant to 49 U.S.C. 44718.

Section 211.2 addresses the applicability of part 211. This part applies to all components of the DoD, those applicants filing applications pursuant to 49 U.S.C. 44718 when those applications are conveyed by the Secretary of Transportation to the Department of Defense, those requesting reviews of projects prior to applications being filed under 49 U.S.C. 44718 (including State, Indian tribal, and local officials and landowners), and those providing comments to DoD relating to its actions in reviewing applications. It also applies, geographically, to the United States.

Section 211.3 provides definitions. The definition of ''adverse impact on military operations and readiness'' provides that a demonstrable impairment or degradation of the ability of the armed forces to perform their warfighting missions constitutes an adverse impact. The definition of ''applicant'' refers to an entity filing a proper application with the Secretary of Transportation pursuant to 49 U.S.C. 44718, and whose application has been provided by the Secretary of Transportation to the DoD. The definition of ''armed forces'' refers to the definition at 10 U.S.C. 101(a)(4), which includes the Army, Navy, Air Force, and Marine Corps, but excludes the Coast Guard. The definition of ''congressional defense committees'' is taken from section 3 of Public Law 111–383, which, in turn, adopts by reference the definition of the term in 10 U.S.C. 101(a)(16). The definition of ''military readiness'' is taken from the definition of the term provided in section 358. The definition of ''mitigation'' provides a general description of the term while leaving to individual actions more specific examples of what may constitute mitigation. The definition of ''proposed project'' is the project as submitted to the Secretary of Transportation pursuant to 49 U.S.C. 44718. The definition of ''requester'' refers to a developer of a renewable energy development or other energy project, a landowner on whose property such project is proposed to be built, or a State, Indian tribal, or local official seeking an informal review of a project by the DoD prior to the project being submitted for formal review pursuant to 49 U.S.C. 44718. The definition of ''section 358'' refers to the authorizing provision, section 358 of Public Law 111–383. The definition of ''unacceptable risk to the national security of the United States'' includes the two existing criteria found in 49 U.S.C. 44718, namely the construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure or sanitary landfill that endangers safety in air commerce or interferes with the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports, but, for purposes of this rule, only when related to the activities of the DoD. The definition also includes an additional criterion consisting of actions that will significantly impair or degrade the capability of the DoD to conduct training, research, development, testing, and evaluation, and operations or to maintain military readiness. The definition of ''United States'' is included to provide the geographical limitation of the part, clarifying that it does not apply outside of the United States.

Section 211.4 provides the general policy of the part, taken from section 358(a). It also limits the participation of DoD in the Federal Aviation Administration's process under 49 U.S.C. 44718 to the process provided in this rule.

Section 211.5 specifies the officials with authorities and responsibilities under the part pursuant to section 358. The Deputy Secretary of Defense is designated as the senior officer who is authorized to provide a determination to the Secretary of Transportation that a project filed pursuant to 49 U.S.C. 44718 would result in an unacceptable risk to the national security of the United States. The Under Secretary of Defense for Acquisition, Technology, and Logistics is designated as the senior official who may make a recommendation to the Deputy Secretary of Defense that such a project would result in such a risk. The Deputy Under Secretary of Defense (Installations & Environment) is designated as the official who, in coordination with the Deputy Assistant Secretary of Defense (Readiness) and the Principal Deputy Director, Operational Test and Evaluation, reviews such a project and provides 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. The Office of the Deputy Under Secretary of Defense (Installations & Environment) is designated as the lead organization, and the DoD Siting Clearinghouse is established and organized under the Deputy Under Secretary.

Section 211.6 provides the procedures for formal DoD review of a project filed by an applicant with the Secretary of Transportation pursuant to 49 U.S.C. 44718.

Section 211.7 provides the procedures for informal DoD review of a project submitted by a requester prior to submitting a formal application pursuant to 49 U.S.C. 44718.

Section 211.8 directs DoD Components to forward any inquiries or

requests they may receive to the Clearinghouse so as to avoid unauthorized action by a Component outside of the process established by this rule.

Section 211.9 provides some of the types of mitigation to be considered by the DoD and the applicant/requester when discussing mitigation.

Section 211.10 provides for the notification to Congress required by section 358 when the senior officer makes a determination that a project presents an unacceptable risk to the national security of the United States.

Section 211.11 provides for a public Web site where the public can review the actions being considered by DoD, track their progress, and offer comments.

VI. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improving Regulation and Regulatory Review

It has been certified that this rule is not an economically significant rule that will result in an annual effect of $100 million or more on the national economy or which will have other substantial impacts. This rule has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866.

B. Section 202, Public Law 104–4, Unfunded Mandates Reform Act

It has been certified that 32 CFR part 211 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

C. Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

The Congress enacted the Regulatory Flexibility Act (RFA) of 1980, as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The RFA requires agencies to analyze the economic impact of regulations to determine the extent to which there is anticipated to be a significant economic impact on a substantial number of small entities. DoD anticipates that the rule could potentially affect a few entities that might otherwise have located structures on public or private lands that would present an unreasonable risk to the national security of the United States. DoD further anticipates that some of these entities will be small entities as defined by the Small Business Administration; however, DoD does not expect the potential impact to be significant because this rule provides procedures to mitigate the impact of such an unreasonable risk to the benefit of both the proponent and the DoD.

D. Public Law 96–511, Paperwork Reduction Act (44 U.S.C. Chapter 35)

It has been certified that the Paperwork Reduction Act applies. This rule contains information collection requirements under OMB Control Number 0790–0005 titled, ''Informal DoD Review of Energy Projects.''

E. Executive Order 13132, Federalism

It has been certified that this part does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 211

Energy, Evaluation.

Accordingly 32 CFR part 211 is revised to read as follows:

PART 211—MISSION COMPATIBILITY EVALUATION PROCESS

Subpart A—General

Subpart B—Policy

Subpart C—Project Evaluation Procedures

Subpart D—Communications and Outreach

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

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, contiguous 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, 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 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.

Dated: November 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

[NPS–NERI–14336; PPNENERIP0, PPMPRLE1Z.Y00000]

RIN 1024–AD95

Special Regulations; Areas of the National Park System, New River Gorge National River, Bicycling

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This rule authorizes bicycle use on new and existing multi-use trails and administrative roads within the New River Gorge National River. The rule is necessary because the National Park Service general regulation for bicycle use requires publication of a special regulation when new trails are constructed outside of developed areas.

DATES: The rule is effective January 6, 2014.

FOR FURTHER INFORMATION CONTACT: Jamie Fields, Outdoor Recreation Planner, New River Gorge National River, P.O. Box 246 (104 Main St), Glen Jean, WV 25846, (304) 465–6527, *Jamie_Fields@nps.gov.*

SUPPLEMENTARY INFORMATION:

Administrative Background

The New River Gorge National River (NERI or park), a unit of the National Park System located in West Virginia, encompasses approximately 72,000 acres within a 53-mile corridor along the New River, extending from Hawks Nest State Park to Hinton. Congress established NERI as a unit of the National Park System, largely in response to a 20-year grassroots effort organized by local community leaders. In 1978, President Jimmy Carter signed legislation establishing the park, ''for the purpose of conserving and interpreting outstanding natural, scenic, and historic values and objects in and around the New River Gorge and preserving as a free-flowing stream an important segment of the New River in West Virginia for the benefit and enjoyment of present and future generations'' (Pub. L. 95–625, sec. 1101, 1978). Subsequent legislation concerning the park states in its findings that NERI ''has provided the basis for increased recreation and tourism activities in southern West Virginia due to its nationally recognized status and has greatly contributed to the regional economy'' (Pub. L. 100–534, sec. 2(a)(1)–(2), 1988).

Park Planning

The park's 1982 General Management Plan (1982 GMP) anticipated accommodating an expanding array of recreational pursuits, including off-road bicycling. It states that ''[l]evels of use of new or unusual forms of recreation (such as hang gliding, rock climbing, dirt bicycling) will be managed to avoid problems of visitor safety, conflicts between uses, or resource impacts.''

The 1982 GMP also anticipated trail construction as funding became available. A subsequent park-wide Trail Development Plan (1993) recommended that the park develop a trail system emphasizing multiple uses, including hiking and bicycling. Both of these plans can be viewed by going to the NERI park planning Web site, *http://www.nps.gov/neri/parkmgmt/planning.htm,* then following this path: Click the link for ''Environmental Assessment: Design and Build Two Stacked Loop Hiking and Biking Trail Systems . . .''; click the link to the Document List on the left; click the link to either the ''1982 NERI General Management Plan'' or the ''1993 NERI Trail Development Plan''; then download the documents on their respective pages.

The park began developing a new, updated general management plan in 2005 to respond to changes in park boundaries, land acquisitions, and park and public needs and priorities that had occurred since the 1982 GMP was approved. The park's updated 2010/2011 GMP and Environmental Impact Statement (2010/2011 GMP/EIS) process revealed substantial and consistent public support for authorizing bicycle use on trails during public scoping (February 2004 through October 2007) and public comment (January 13, 2010 through April 16, 2010).

The 2010/2011 GMP/EIS proposed that, after promulgation of the required special regulations and proper compliance with the National Environmental Policy Act (NEPA), bicycle use would be an appropriate use on new and existing trails. This would include bicycle use in frontcountry zones, in backcountry zones on single track trails, and on a limited basis on a variety of trail types in historic resource, river corridor, and park development zones. The Record of Decision (ROD) for the 2010/2011 GMP/EIS was signed, and the Notice of Availability was published in the **Federal Register** (77 FR 12877, March 2, 2012). The 2010/2011 GMP/EIS can be viewed by going to the NERI park planning Web site, *http://www.nps.gov/neri/parkmgmt/planning.htm,* then following this path: Click the link for ''General Management Plan''; click the link to the Document List on the left; click the link to the ''Draft General Management Plan and EIS/Draft Foundation Plan''; then download the documents at the bottom of the page (corrections to the 2010/2011 GMP/EIS are located in the ''Abbreviated Final General Management Plan . . .'', also in the Document List).

As a result of the public support for bicycle use expressed early in the 2010/2011 GMP/EIS process, the park developed an Environmental Assessment (Trails EA) to evaluate the impact of the construction of new trails and designation of new and existing park trails as routes for bicycle use. Public scoping for the Trails EA, which occurred from November 10, 2009 until January 15, 2010 (with a public focus group on November 10, 2009 and a public open house on December 8, 2009), confirmed there was overwhelming support for bicycle use on trails. Only one of approximately 400 scoping comments from residents of 32 states was opposed to bicycle use at NERI.

The Trails EA

The Preferred Alternative that became the NPS Selected Action upon approval of the Finding of No Significant Impact (FONSI) provided for the designation of some existing park trails and administrative roads as routes open to bicycle use, and for the construction and designation of three new trails for