



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

3500 DEFENSE PENTAGON
WASHINGTON, DC 20301-3500

SUSTAINMENT

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (ENERGY,
INSTALLATIONS, AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE NAVY (ENERGY,
INSTALLATIONS, AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE AIR FORCE (ENERGY,
INSTALLATIONS, AND ENVIRONMENT)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Guidance on the Use of Easements in Pursuing Energy Resilience

The Secretary of Defense shall, in accordance with 10 U.S.C. § 2911(a), ensure the readiness of the armed forces for their military missions by pursuing energy security and resilience. Further, DoD Instruction 4170.11, *Installation Energy Management*, encourages DoD Components to use alternative financing in the pursuit of energy resilience projects, when those alternative finance projects are life cycle cost effective. The development of energy resilience projects using non-governmental financing with our private sector partners will continue to be a critical element in the Department's energy strategy. One such mechanism to enhance energy resilience project development is through the use of easements.

As provided in 10 U.S.C. § 2668, an easement for a right-of-way may be granted for various purposes, including purposes relating to energy use and transmission. In addition to the specified uses in section 2668, its subsection (a)(13) allows an easement to be granted for any purpose that the Secretary of a military department considers advisable. One such use can, depending on the circumstances of the proposed use, be to assist in providing energy resilience for Department of Defense (DoD) installations.

DoD Directive 4165.06, *Real Property*, its subordinate issuances, and guidance by the military departments also address the use of easements. For energy policy related to outgrants and special agreement authorities, DoD Components should refer to Assistant Secretary of Defense for Energy, Installations, and Environment Memorandum: "*Guidance on Development of Energy Projects*," dated November 3, 2016. The attached guidance complements the 2016 memorandum by providing guidance and best practices to DoD Components on using easements for energy resilience enhancements.

This guidance does not alter the requirements for management of real property, and is intended to direct the attention of DoD Components and energy managers to engage in more comprehensive energy resilience planning (required by 10 U.S.C. § 2911(b)(3)).

The attached guidance assists DoD Components in planning for energy resilience enhancements with respect to easements. DoD Components are encouraged to use the guidance for this purpose. My point of contact is Dr. Ariel Castillo, ariel.s.castillo.civ@mail.mil, (571) 372-6830.

Lisa A. Jung
Deputy Assistant Secretary of Defense for Energy

Attachment:
As stated

GUIDANCE ON THE USE OF EASEMENTS IN PURSUING ENERGY RESILIENCE

I. INTRODUCTION

Easement authority, found at 10 U.S.C. § 2668, allows the use of DoD property for purposes promoting the public good that do not interfere with DoD activities. This guidance document provides additional information for consideration in using easements for cost-effective energy resilience enhancements on DoD installations. It was developed as a best practice guide to ensure energy resilience enhancements are considered when pursuing energy projects and electrical infrastructure upgrades through the use of easements. For example, 10 U.S.C. § 2911(5) provides that, “in selecting facility energy projects that will use renewable energy sources, pursue energy security and energy resilience by giving favorable consideration to projects that provide power directly to a military facility or into the installation electrical distribution network.” DoDI 4170.11 provides that, “when selecting distributed or renewable energy systems . . . [t]heir design shall include automatic transfer switching, inverters, and black-start capabilities to minimize energy resilience risks.”

It is not the purpose of this guidance to advocate using easements as a substitute for leases. Rather, this guidance advocates for comprehensive planning that considers using property already committed to energy infrastructure also, when technically feasible and otherwise in conformance to real estate policy, to support additional capability for energy resilience. For instance, if a DoD installation already has or is planning to grant an easement that can reasonably accommodate additional equipment to support energy resilience, there is little reason to use additional DoD lands for siting such equipment if the new equipment is consistent with the purposes of an already existing or new easement. More importantly, as DoD Components continue to plan for energy projects and electrical infrastructure on easements, they should ensure that these projects appropriately take into consideration energy resilience requirements, as specified under title 10 and DoDI 4170.11.

II. EASEMENT AUTHORITY

Section 2668 authorizes the Secretaries of the military departments to grant easements for various types of rights-of-way across lands under the Secretary’s control so long as such easements are not against the public interest. The statute specifies, among others, the following easement purposes:

- (2) gas, water, sewer, and oil pipe lines;
 - (3) substations for electric power transmission lines and pumping stations for gas, water, sewer, and oil pipe lines;
 - ...
 - (10) poles and lines for the transmission or distribution of electric power;
 - (11) poles and lines for the transmission or distribution of communication signals (including telephone and telegraph signals);
 - (12) structures and facilities for such transmissions, reception, and relay of such signals;
- and
- (13) any other purpose that the Secretary considers advisable.

While paragraphs (2), (3), (10), (11), and (12) are reasonably specific, paragraph (13) is open-ended, allowing easements issued pursuant to section 2668 to be used for any other purpose that the Secretary of a military department considers advisable. Such other purposes might include, when otherwise appropriate to the easement, energy resilience technologies such as inverters, transfer switches, batteries, uninterruptible power supplies (UPS), generation, and microgrids. Such determinations will, of course, be dependent on individual circumstances.

The direction in 10 U.S.C. § 2911(a) provides that “[t]he Secretary of Defense shall ensure the readiness of the armed forces for their military missions by pursuing energy security and energy resilience.” As a result, the DoD Components should pursue energy and electrical system enhancements when such enhancements improve energy resilience and are consistent with the Installation Energy Plan (IEP), including promoting energy reliability or availability. IEP guidance and requirements can be found in the 2018 memorandum titled “Installation Energy Plans – Energy Resilience and Cybersecurity Update and Expansion of the Requirement to All DoD Installations.” Easements can be a useful tool in furthering energy resilience enhancements when used under appropriate circumstances and in conformance with real property policy.

Before requesting issuance of a new easement by the servicing military department, to integrate energy resilience more cost-effectively, a DoD Component should consider issuing a modification of an existing easement if such an easement can accommodate an additional use.

DoD Components should also consider energy resilience enhancements in the planning stages of all energy-related easement uses and fully coordinate in advance with the servicing military department. Early planning, evaluation, and coordination, such as minimizing the redesign of technical specifications, administrative modifications of contracts, or rejection of the easement request by the servicing military department, will save time and resources.

This guidance does not change the rules governing the use of easements vis-a-vis leases. An easement is not a substitute for a lease. The November 3, 2016, ASD(EI&E) memorandum *Guidance on Development of Energy Projects* provides a more detailed discussion of the difference between using a lease and an easement in the context of energy infrastructure.

III. GUIDANCE

Types of Technologies and Siting

Types of energy resilience technologies that may be considered for placement on new or existing easements on DoD lands include inverters, transfer switches, batteries, UPS, generation, and microgrids. Whether such additional uses are compatible with the new or existing easement and applicable real property policy is subject to a determination by the Secretary of the military department. A DoD Component should assess the cost effectiveness of adding these technologies when an existing easement is modified or a new replacement easement is sought. Another consideration is to assess land availability and constraints for siting energy resilience technologies. Seek guidance from the servicing military department as to allowable land uses. If additional land is required for integration of future energy resilience enhancements, the DoD

Component should pursue a new easement, if appropriate, through its normal real estate procedures and processes.

Real Estate Procedures and Processes

Whether pursuing a modification of an existing easement or creating a new easement under section 2668, a DoD Component shall continue to follow all existing military department real estate policies, requirements, standards, and processes. For example, a Component should continue to:

- Ensure mission deconfliction and readiness are considered throughout the process.
- Coordinate with Installation Environmental Management to—
 - Evaluate the direct and indirect adverse effects on natural and cultural resources.
 - Comply with applicable environmental regulations (e.g., the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, Archaeological Resources Protection Act, Native American Graves Repatriation Act).
 - Evaluate potential impacts to existing DoD cleanup sites.
- Ensure that new structures or facilities will be constructed, operated, and maintained in compliance with all applicable Federal, State, interstate, and local laws.
- Certify land appraisal values, and obtain the fair market value (FMV) or in-kind consideration for the certified land value.

If proceeds or in-kind-consideration is received by a military department for an easement, section 2668(e) provides that section 2667(c) and (e) shall apply with respect to such consideration in the same manner as such subsections apply to in-kind consideration and money rentals received pursuant to leases entered into by that Secretary.

Of particular importance, section 2667(c)(1)(D) states that in-kind consideration may include provision or payment of utility services for the Secretary concerned; such in-kind consideration, when obtained, shall ensure, when possible, that the installation has the necessary priority in the event of commercial grid outages.

Best Practices for Engagements to Promote Cost-Effectiveness

DoDI 4170.11 provides that DoD Components shall pursue opportunities that reduce energy life cycle costs, to the maximum extent practical, such as participation in peak shaving, demand response programs, ancillary services markets, and other financial incentive programs.

DoD Components should conduct market research to uncover industry and utility programs that may align their strategic planning efforts with the IEP and energy resilience assessments (always remaining cautious about engaging in what could be considered actions in restraint of trade). Industry and DoD planning already include energy resilience infrastructure improvements. However, such planning efforts are not presently aligned to the maximum extent practicable to enhance energy resilience. Adding easements as an alternative to investment will

strengthen DoD planning efforts and potentially reduce the costs of energy resilience solutions. DoD Components should also consider the current or potential use of easements in their review of vulnerabilities and gaps found during black start exercises.

As an example, utility service company integrated resource plans (IRPs) are already approved by public utility commissions for utility generation and infrastructure upgrades. These plans may affect utility rates and reliability for DoD installations. They also present an opportunity for DoD Components to partner with utility and energy service providers in selecting the location of approved generation and infrastructure to improve the energy resilience posture of DoD installations. Such siting actions may require use of easements in conjunction with leases. By partnering with local utility and energy service providers and aligning IRPs with IEPs, DoD installations can increase their ability to cost-effectively pursue energy resilience.

IV. DEFINITIONS

In this attachment, the following definitions apply:

availability. The availability of an item – under combined aspects of its reliability, maintainability, and maintenance support – to perform its required function at a stated instant of time or over a stated period of time.

energy. Electricity, natural gas, oil, steam, chilled water, and heated water.

in-kind consideration. Payment, distribution, or substitution of goods or services in lieu of money.

reliability. The ability of a component or system to perform required functions under stated conditions for a stated period of time.

V. POINTS OF CONTACT

Office of Deputy Assistant Secretary of Defense for Energy (ODASD(Energy))

Ariel Castillo, Ph.D.
Director, Installation Energy Resilience
571-372-6830
ariel.s.castillo.civ@mail.mil