

Proposed Rules

Federal Register

Vol. 73, No. 234

Thursday, December 4, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF DEFENSE

Office of the Secretary

[DoD–2008–OS–0085; RIN 0790–AI34]

32 CFR Part 185

Defense Support of Civil Authorities (DSCA)

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This proposed rule establishes policy and assigns responsibilities for DSCA, supplements regulations regarding military support for civilian law enforcement, and sets forth policy guidance for the execution and oversight of DSCA when requested by civil authorities and approved by the appropriate DoD authority, or as directed by the President, within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof. Legislative changes over the years have made the existing guidance outdated and inconsistent with current law and the current organizational structure of the Department of Defense. This proposed rule will allow civil authorities access to the correct procedures when they are seeking assistance from the Department by establishing updated policy guidance and assigning the correct responsibilities within the Department for the Defense for support of civil authorities in response to requests for assistance for domestic emergencies, designated law enforcement support, special events, and other domestic activities. Interested persons are invited to submit comments on this proposed rule that will be considered prior to promulgation of the final rule.

DATES: Comments must be received by February 2, 2009.

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

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

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

FOR FURTHER INFORMATION CONTACT: Mr. Richard Chávez, 703–697–5415.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, “Regulatory Planning and Review”

It has been certified that 32 CFR part 185 does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

Sec. 202, Pub. L. 104–4, “Unfunded Mandates Reform Act”

It has been certified that 32 CFR part 185 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 1 year.

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

It has been certified that 32 CFR part 185 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule establishes policy and assigns responsibilities within DoD for DSCA, supplements regulations regarding military support for civilian law enforcement, and sets forth policy guidance for the execution and oversight of DSCA when requested by civil authorities and approved by the appropriate DoD authority, or as directed by the President. Therefore, it is not expected that small entities will be affected because there will be no economically significant regulatory requirements placed upon them.

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

It has been certified that 32 CFR part 185 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

It has been certified that 32 CFR part 185 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 185

Armed forces, Civil defense.

Accordingly, the Department of Defense proposes to revise 32 CFR part 185 to read as follows:

PART 185—DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA)

Sec.

- 185.1 Purpose.
- 185.2 Applicability and scope.
- 185.3 Definitions.
- 185.4 Policy.
- 185.5 Responsibilities.

Authority: 50 U.S.C. 2251, as amended; E.O. 12148, 3 CFR 1979 Comp. p. 412.

§ 185.1 Purpose.

This part:

(a) Establishes policy and assigns responsibilities for Defense Support of Civil Authorities (DSCA) which is also referred to as civil support.

(b) Supplements the regulations required by section 375 of title 10, United States Code (U.S.C.), regarding military support for civilian law enforcement.

(c) Sets forth policy guidance for the execution and oversight of DSCA when requested by civil authorities and approved by the appropriate DoD authority, or as directed by the President, within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof.

§ 185.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff, 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 within the Department of Defense (hereafter referred to collectively as the "DoD Components").

(b) Applies to the Army National Guard (ARNG) and the Air National Guard (ANG) in title 32 status.

(c) Applies to all DSCA (except the specific forms of DSCA listed in paragraph (d) of this section), including:

(1) Military community affairs programs or innovative readiness training (formerly called "civil-military cooperative action programs") (see DoD Directive 1100.20).¹

(2) Mutual or automatic aid (see chapter 15A of title 42 U.S.C.).

(3) DoD fire and emergency services programs (see DoD Instruction 6055.06).²

(4) United States Army Corps of Engineers (USACE) activities as the Department of Defense Coordinating and Primary Agency for the National Response Framework, Emergency Support Function #3, Public Works and Engineering.

(5) Activities performed by the Civil Air Patrol in support of civil authorities

when approved by the Air Force as auxiliary missions.

(6) Support provided by the National Guard, in a federally funded title 32 status to local, State, tribal, and/or Federal civil agencies when employed by a Governor, or provided under Emergency Management Assistance Compacts when that support involves use of personnel operating under the provisions of title 32 U.S.C.

(7) Special Events in accordance with DoD Directive 2000.15³ and/or applicable law.

(d) Does not apply to the following activities conducted in support of civil authorities:

(1) Support in response to foreign disasters provided in accordance with DoD Directive 5100.46.⁴

(2) Joint investigations conducted by the Inspector General of the Department of Defense, the Defense Criminal Investigative Service, and the military criminal investigative organizations with civil law enforcement agencies on matters within their respective jurisdictions using their own forces and equipment.

(3) Detail of DoD personnel to duty outside the Department of Defense in accordance with DoD Instruction 1000.17.⁵

(4) Support provided by State Defense Forces and National Guard activities not covered by paragraph (c)(6) of this section.

(5) Counternarcotics operations.

(6) Support provided by the United States Army Corps of Engineers when accomplishing missions and responsibilities under Pub. L. 84-99, as amended.

(7) Intelligence assistance provided by DoD intelligence and counterintelligence components (see DoD Directive 5240.01,⁶ Executive Orders 12333 and 13388, DoD 5240.1-R,⁷ and other applicable laws and regulations).

(8) Military community relations programs and activities administered by the Assistant Secretary of Defense for Public Affairs (see DoD Directive

5410.18⁸ and DoD Instruction 5410.19⁹).

(9) Sensitive support in accordance with DoD Directive S-5210.36.¹⁰

§ 185.3 Definitions.

Civil Authorities. See Joint Publication 1-02.¹¹

Civil Disturbances. See Joint Publication 1-02.

Civil Support. See Joint Publication 1-02. Also known as Defense Support of Civil Authorities (DSCA).

Defense Domestic Crisis Manager. The DoD official responsible for overseeing, advising, and making recommendations to the Secretary of Defense on the use of resources and DoD personnel needed to prevent or respond to a potential or actual domestic crisis. The Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)) serves as the Defense Domestic Crisis Manager.

Defense Support of Civil Authorities (DSCA). Support provided by U.S. Federal military forces, National Guard forces performing duty under title 32, U.S.C., DoD civilians, DoD contract personnel, and DoD component assets, in response to requests for assistance from civil authorities for special events, domestic emergencies, designated law enforcement support, and other domestic activities. Support provided by National Guard forces performing duty under title 32, U.S.C., is considered DSCA but is conducted as a State-directed action. Also known as Civil Support (CS).

Imminently Serious Conditions. Emergency conditions in which, in the judgment of a military commander or responsible DoD civilian official, immediate and possibly serious danger threatens the public and prompt action is needed to save lives, to safeguard public health or safety, or to prevent or mitigate great property or environmental damage. Under these conditions, timely prior authority from higher headquarters to provide DSCA may not be possible before action is necessary for effective response.

Responsible DoD Civilian. For purposes of DSCA, the head of a DoD Component (or designee) or other DoD civilian official or National Guard Federal technician who have authority

¹ Available by downloading at <http://www.dtic.mil/whs/directives/corres/html/110020.htm>.

² Available by downloading at <http://www.dtic.mil/whs/directives/corres/html/605506.htm>.

³ Available by downloading at <http://www.dtic.mil/whs/directives/corres/html/200015.htm>.

⁴ Available by downloading at <http://www.dtic.mil/whs/directives/corres/html/510046.htm>.

⁵ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/100017p.pdf>.

⁶ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/524001p.pdf>.

⁷ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/524001r.pdf>.

⁸ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/541018p.pdf>.

⁹ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/541019p.pdf>.

¹⁰ Document is classified and copies maybe requested by contacting USD(I), USDLPubs@osd.mil.

¹¹ Available by downloading at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

over DoD assets that may be used for a DSCA response.

Special Event. An international or domestic event, contest, activity, or meeting, which by its very nature, or by specific statutory or regulatory authority, may require security, safety, and/or other logistical support or assistance from the Department of Defense.

§ 185.4 Policy.

It is DoD policy that:

(a) This part shall be implemented consistent with national security objectives and military readiness.

(b) Unless expressly stated otherwise, the provisions of this part should not be construed to rescind any existing authorities of the Heads of DoD Components, commanders, and/or responsible DoD civilians to provide DSCA in accordance with existing laws, Department of Defense issuances, and Secretary of Defense approved orders.

(c) DSCA is initiated by a request for DoD assistance from a civilian agency or is ordered by the President or Secretary of Defense.

(d) All requests for DSCA shall be written and include a commitment to reimburse the Department of Defense. Waivers or exceptions to reimbursement must be consistent with the law and/or DoD policies. For assistance provided under paragraph (g) of this section, civil authorities shall be informed that oral requests for assistance in an emergency must be followed by a written request at the earliest available opportunity.

(e) All requests for assistance from civil authorities shall be evaluated for legality, lethality, risk, cost (including the source of funding and the effect on the DoD budget), appropriateness, and effect on readiness.

(f) DSCA plans shall be compatible with the National Response Framework; the National Incident Management System; all contingency plans for operations in the locations listed in § 185.1(c) of this part; and any other national plans (approved by the President or Secretary of Defense) or DoD issuances governing DSCA operations.

(g) Commanders, (including National Guard Commanders), heads of DoD Components and/or responsible DoD civilian officials may provide Immediate Response to a request for assistance from a civilian authority, under imminently serious conditions. This Immediate Response Authority is exercised when time does not permit approval from higher headquarters. Responsible DoD civilian officials may employ the resources under their control, subject to any supplemental

direction provided by higher headquarters, and provide those resources to save lives, to safeguard public health or safety, or to prevent or mitigate great property or environmental damage.

(1) The DoD official directing a response under Immediate Response Authority shall immediately notify the National Military Command Center (NMCC), through the chain of command, of the details of the response. National Guard officials shall inform the NMCC through the National Guard Bureau. The NMCC will inform appropriate DoD components.

(2) Immediate Response Authority ends when the necessity giving rise to the response is no longer present (e.g., when there are sufficient resources available from State, local, and other Federal agencies to respond adequately), when the initiating DoD or National Guard official or a higher authority directs an end to the response, or when an appropriate authority approves a request from another Federal department or agency based on other authorities. The DoD or National Guard official directing a response under Immediate Response Authority shall reassess whether there remains a necessity for DoD to respond under this authority as soon as practicable but, if immediate response activities have not yet ended, not later than 72 hours after resources have been employed.

(3) Support provided under Immediate Response Authority should be provided on a cost-reimbursable basis where appropriate or legally required but will not be delayed or denied based on the inability or unwillingness of the requester to make a commitment to reimburse the Department of Defense.

(h) Federal military forces shall not be used to quell civil disturbances or perform civilian law enforcement functions (e.g., search, seizure, arrest, and surveillance) unless specifically authorized by the President or the Secretary of Defense in accordance with applicable law (e.g., chapter 15 of title 10, U.S.C.).

(i) Only the Secretary of Defense, or a designated representative, may approve requests from civil authorities for defense assistance during civil disturbances; defense response to chemical, biological, radiological, nuclear, and/or high yield explosive events; defense assets when there is a potential for lethality (unless otherwise authorized in law or DoD policy); and potentially lethal support of civilian law enforcement agencies. Lethal support includes: loans of arms; vessels, or aircraft; or ammunition. It also includes:

all requests for assistance under section 382 of title 10 and section 831 of title 18, U.S.C.; all support to counterterrorism operations; and all support to law enforcement when there is a potential for confrontation between law enforcement and specifically identified civilian individuals or groups.

(j) Only the Secretary of Defense, or a designated representative, may authorize DoD Components to procure and maintain supplies, materiel, and/or equipment exclusively for providing DSCA.

(k) Programming and budgeting for DSCA shall be in accordance with existing laws, Department of Defense issuances, and Secretary of Defense authorization.

(l) Federal military forces employed for DSCA activities shall remain under Federal military command and control at all times.

(m) Special event support to non-governmental organizations is a DSCA activity.

§ 185.5 Responsibilities.

(a) The Under Secretary of Defense for Policy (USD(P)) shall facilitate the coordination of DoD policy governing DSCA with Federal Departments and Agencies, State agencies, and the DoD Components, as required.

(b) The Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs (ASD(HD&ASA)), under the authority, direction, and control of the USD(P) exercising policy oversight of homeland defense activities of the Department of Defense and performing other duties as directed by the Secretary of Defense shall:

(1) Serve as the principal civilian advisor to the Secretary of Defense and the USD(P) on DSCA.

(2) Serve as the Defense Domestic Crisis Manager in accordance with DoD Directive 3020.44.¹²

(3) Serve as approval authority for requests for assistance from civil authorities sent to the Secretary of Defense, except for those items retained in section 185.4(h) and (i) of this part, or delegated to other officials. Such matters shall be coordinated with the Chairman of the Joint Chiefs of Staff. In the absence of the ASD(HD&ASA), the Principal Deputy Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs may exercise the authority of the ASD(HD&ASA) to approve such requests. This authority may not be further delegated. The

¹² Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/302044p.pdf>.

Secretary of Defense shall be notified immediately of the use of this authority.

(4) Develop, coordinate, and oversee the implementation of DoD policy for DSCA and shall:

(i) Through the Chairman of the Joint Chiefs of Staff as it pertains to DSCA matters, monitor the activation, deployment, and employment of Federal military forces (including Reserve Component forces), the National Guard, DoD civilian personnel, and all facilities, equipment, fiscal accounts, supplies, and services owned by, controlled by, or under the jurisdiction of a DoD Component in response to requests for DSCA and for Department of Defense support to special events; and provide oversight of DSCA training, exercises, and resources.

(ii) In coordination with the General Counsel of the Department of Defense, develop policies and procedures for DSCA support to civil law enforcement authorities; coordinate long-range policies and procedures that govern the provision of non-emergency support to civilian law enforcement agencies; promote Department of Defense cooperation with public safety agencies; and ensure that assistance is in compliance with applicable law, Presidential Directives, Executive orders, and Department of Defense policy.

(iii) Ensure that information relating to all aspects of DSCA receives the broadest possible dissemination utilizing all approved media as appropriate and in accordance with Department of Defense Directive 8320.02.¹³

(c) The Assistant Secretary of Defense for Special Operations and Low Intensity Conflict and Interdependent Capabilities, under the authority, direction, and control of the USD(P), shall support planning by the Defense Domestic Crisis Manager during DSCA operations, as required.

(d) The Under Secretary of Defense (Comptroller)/Chief Financial Officer shall establish policies and procedures to ensure timely reimbursement to the Department of Defense for reimbursable DSCA activities.

(e) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall:

(1) Assist the ASD(HD&ASA) by providing recommendations, guidance, and support for all domestic crisis situations or emergencies that may require health or medical-related DSCA, including situations involving

coordination with the components of the National Disaster Medical System.

(2) Assist the ASD(HD&ASA) by providing recommendations, guidance, and support on the use of the Reserve Components to perform DSCA missions.

(3) Identify, monitor, and oversee the development of integrated DSCA training capabilities and the integration of these training capabilities into exercises and training to build and sustain DSCA readiness.

(f) The Assistant Secretary of Defense for Reserve Affairs, under the authority, direction, and control of USD(P&R), shall assist the ASD(HD&ASA) by providing recommendations, guidance, and support on the use of the Reserve Components to perform DSCA missions.

(g) The Secretaries of the Military Departments shall:

(1) Support DSCA operations as directed and in accordance with this Directive, and shall ensure the readiness of the Military Departments to execute plans for DSCA.

(2) Ensure compliance with financial management guidance related to support provided for DSCA operations, including guidance related to tracking costs and seeking reimbursement.

(h) The Chairman of the Joint Chiefs of Staff shall:

(1) Advise the Secretary of Defense on the effects of requests for DSCA on national security and military readiness.

(2) Identify and coordinate available resources for DSCA requests and release related execute and deployment orders when approved by the Secretary of Defense.

(3) Incorporate DSCA into joint training and exercise programs in consultation with the Department of Homeland Security, other appropriate Federal Departments and Agencies, and the National Guard Bureau.

(i) The Commanders of Combatant Commands with DSCA responsibilities in accordance with the Unified Command Plan shall:

(1) Through the Chairman of the Joint Chiefs of Staff, plan and execute DSCA operations in their areas of responsibility in accordance with this Directive, and in accordance with their authorities assigned by the Unified Command Plan and the Forces for Unified Commands Memorandum.

(2) Incorporate DSCA into joint training and exercise programs in consultation with the Department of Homeland Security, other appropriate Federal Departments and Agencies, and the National Guard Bureau.

(3) Advocate for validated DSCA requests for domestic operations through the Joint Requirements Oversight Council, subject to section

185.4(j) and (k) of this part, and the Planning, Programming, Budgeting, and Execution (PPBE) process.

(4) Provide the Secretary of Defense an implementation plan for ensuring DSCA support is emphasized in command assessments.

(j) The Chief, National Guard Bureau, under the authority, direction, and control of the Secretary of Defense through the Secretaries of the Army and the Air, shall:

(1) Serve as the channel of communication on all matters pertaining to National Guard DSCA activities between the Secretary of Defense and the Heads of the DoD Components (including the Secretary of the Army and the Secretary of the Air Force) and the States. Direct liaison between both entities should occur only in an emergency when time does not permit compliance with this Directive. In each such instance, the Chief, NGB, should be informed of the communication.

(2) Annually assess the readiness of the National Guard of the States to conduct DSCA activities and report on this assessment to the Secretary of Defense, the Secretaries of the Army and the Air Force, the USD(P&R), the ASD(HD&ASA), the ASD(RA), the Chairman of the Joint Chiefs of Staff, and appropriate Combatant Commanders.

(3) Participate in the Joint Staff capability-based planning and assessments, the Joint Capabilities Integration and Development System, and the DoD PPBE assessment for all actions pertaining to National Guard capabilities required for DSCA.

(4) Facilitate and deconflict the planning and use of National Guard forces among the States to ensure that adequate and balanced forces are available and responsive for DSCA missions, consistent with national security objectives and priorities.

(k) The Heads of the DoD Components, in addition to the responsibilities in paragraphs (g), (h), (i), and (j) of this section, as applicable, shall:

(1) Ensure that any DSCA-related Department of Defense issuances, concept plans, interagency agreements, and memorandums of understanding or agreement with external agencies are in full compliance with this Directive.

(2) Ensure compliance with financial management guidance related to support provided for DSCA operations, including guidance related to tracking costs and seeking reimbursement.

¹³ Available by downloading at <http://www.dtic.mil/whs/directives/corresp/pdf/832002p.pdf>.

Dated: November 26, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer,

Department of Defense.

[FR Doc. E8-28706 Filed 12-3-08; 8:45 am]

BILLING CODE 5001-06-P