

Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and TN. These entities do not fall within the scope of the definition of “small entities” set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

Backfit Analysis

The NRC has determined that the backfit rule (10 CFR 72.62) does not apply to this direct final rule because this amendment does not involve any provisions that would impose backfits as defined in 10 CFR Chapter 1. Therefore, a backfit analysis is not required.

Congressional Review Act

Under the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, OMB.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Hazardous waste, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR Part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for Part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206,

88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–10 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1030 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1030.

Initial Certificate Effective Date:

January 10, 2007.

Amendment Number 1 Effective Date:

March 29, 2011.

SAR Submitted by: Transnuclear, Inc.

SAR Title: Final Safety Analysis

Report for the NUHOMS® HD Horizontal Modular Storage System for Irradiated Nuclear Fuel.

Docket Number: 72–1030.

Certificate Expiration Date: January 10, 2027.

Model Number: NUHOMS® HD–32PTH.

* * * * *

Dated at Rockville, Maryland, this 13th day of December 2010.

For the Nuclear Regulatory Commission.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. 2011–642 Filed 1–12–11; 8:45 am]

BILLING CODE 7590–01–P

ACTION: Final rule.

SUMMARY: This final 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 Department of Defense (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 final rule will facilitate civil authorities’ access to the support they are seeking from the Department by establishing updated policy guidance and assigning the correct responsibilities within the Department for Defense Support of Civil Authorities in response to requests for assistance for domestic emergencies, designated law enforcement support, special events, and other domestic activities.

DATES: *Effective Date:* This rule is effective February 14, 2011.

FOR FURTHER INFORMATION CONTACT: Colonel Brent Feick, 703–697–5415.

SUPPLEMENTARY INFORMATION: The Department of Defense published a proposed rule on December 4, 2008 (73 FR 73896–73900). Eighty-four comments were received and are addressed below:

Comment: Thirty-nine of the 84 public comments question the Constitutionality of the Department of Defense supporting civil authorities domestically. Example: DOD–2008–0085–006 “The U.S. Constitution outlines the use of military force within our borders. We don’t need this. We need leaders who have respect for our Constitution and our Liberty.”

Response: The rule has been thoroughly reviewed by attorneys at several levels of the Departments of Defense, Justice, and Homeland Security and found not to violate any provisions of the Constitution. The Department of Defense (DoD) has historically been requested by civil authorities to provide support or assistance during various types of man-made or natural disasters, support for special events such as the National Political Conventions, the

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 185

[DoD–2008–OS–0085; RIN 0790–AI34]

Defense Support of Civil Authorities (DSCA)

AGENCY: Department of Defense.

Group of Eight Summit, the Inauguration, the Olympics, the Special Olympics, the United Nations General Assembly, and even support to law enforcement to help quell civil disobedience and restore public order, such as the Los Angeles Riots in 1992. Each of these support missions is conducted consistent with the Constitution, applicable law, and National policy. This rule sets forth DoD policy guidance for the execution and oversight of Defense Support of Civil Authorities when support or assistance is requested by civil authorities. The rule, by itself, provides no new, separate, or independent authority to the President, the Secretary of Defense, or anyone else in the Department of Defense.

Comment: Sixteen of the 84 public comments asserted that the rule was in violation of the Posse Comitatus Act (Title 18, United States Code, Section 1385). Example: DOD-2008-0085-010 "The Defense Support of Civil Authorities Plan is a violation of Posse Comitatus and will sink this once great country to the level of a third world dictatorship. The DOD should be fighting for individual freedom in the US, not helping to extinguish it."

Response: The rule has been thoroughly reviewed by attorneys at several levels of the Departments of Defense, Justice, and Homeland Security and found not to violate any current law, including the Posse Comitatus Act.

Comment: Eight of the 84 public comments asserted that the rule was inconsistent with the Second Amendment to the Constitution. Example: DOD-2008-0085-054 "This proposed regulation is an unconstitutional infringement on Second Amendment rights. It also gives excessive power to the U.S. Military to serve as an internal police force."

Response: The rule has been thoroughly reviewed by attorneys at several levels of the Departments of Defense, Justice, and Homeland Security and found not to violate any provisions of the Constitution, including the Second Amendment. There is no attempt to usurp civilian authority or use the military as an internal police force. The rule sets forth policy guidance for the execution and oversight of defense support of civilian authorities when requested by civil authorities.

Comment: Seven of the 84 public comments asserted that National Guard forces were sufficient to fill this support or assistance role under the direction of respective Governors. Example: DOD-2008-0085-002 "There is no reason to involve the forces of the United States

military when each state already has National Guard units which can fill this role and are under the direction of the Governor. I'm a big supporter of a strong US military for the protection of our country from outside threats. This redundancy is not only unwarranted, it runs against the principles of our founding fathers."

Response: The National Guard, when in Federal service or funded by the Department of Defense and in coordination with the Governors, is a vital component of Defense Support of Civil Authorities. In the Department of Defense's Strategy for Homeland Defense and Civil Support, there is a focused reliance on the Reserve Components to support and assist civil authorities. Individual state National Guard units are more capable and better equipped and resourced than during any time in their history. But each state National Guard cannot be manned, equipped, trained, and resourced to meet the needs of every conceivable contingency operation. Most states are part of Regional or National Emergency Management Assistance Compacts, which permit the Governor of one state to commit that state's resources to support another state. This process works very well during localized emergencies or disasters, but mutual aid support between states is not as efficient during special events or incidents other than localized major disasters and emergencies. In the event of multiple, near simultaneous, geographically dispersed terrorist attacks in the United States, or the rapid spread of a pandemic, it is unknown if Governors would release their National Guard capabilities to support another state or a Federal Agency if there is a chance that resources would be needed in their home states. Many emergencies, disasters, or events affect more than one state. It is not realistic to expect Federal Departments or Agencies to coordinate requests for assistance or support with multiple States, Commonwealths, and Territories. Finally, there are some capabilities that are available only in the Active Duty military force or in DoD.

Comment: Five of the 84 public comments asserted that it was the military's role to protect against foreign threats only. Example: DOD-2008-0085-020 "This proposal is ridiculous and in violation of the Constitution. If this is a need that must be met, use the funding it would require and invest it in civil law enforcement and emergency services. The military is for defending us from foreign aggressors."

Response: The rule has been thoroughly reviewed by attorneys at several levels of the Departments of

Defense, Justice, and Homeland Security and found not to violate any provisions of the Constitution. Additionally, a number of statutes provide specific authority for DSCA. This rule sets forth DoD policy guidance for the execution and oversight of defense support of civil authorities. There are no provisions for the DoD components to take over what is inherently a civilian responsibility, but rather provisions for providing support or assistance when requested.

Comment: Five of the 84 public comments asserted that the proposed rule was too broad and gave the military or the President too much power. Example: DOD-2008-OS-0085-0036 "I am opposed to this government regulation 'Defense Support of Civil Authorities'. It gives power to the military to assume civilian law enforcement at the behest of the president with no restriction on this power. This is unconstitutional! This document is too broad and clearly states that the military can intervene at the request of civil authorities OR by presidential executive order. This is a very dangerous rule to individual freedom!"

Response: This rule sets forth DoD policy guidance for the execution and oversight of Defense Support of Civil Authorities when support or assistance is requested by civil authorities. The rule, by itself, provides no new, separate, or independent authority to the President, the Secretary of Defense, or anyone else in the Department of Defense.

Comment: Four of the 84 public comments asserted that the rule violated or erodes the 10th Amendment to the Constitution. Example: DOD-2008-OS-0085-17 "There is no Constitutional basis for any portion of this proposed regulation. Leaving the deployment of our military within our own borders to assist with undefined domestic issues to the whims of the President is dangerous, adds undue stress on the office, and severely erodes the rights afforded to the states under the 10th Amendment."

Response: This rule sets forth DoD policy guidance for the execution and oversight of Defense Support of Civil Authorities when support or assistance is requested by civil authorities. The rule, by itself, provides no new, separate, or independent authority, nor does it violate, restrict, or erode the rights afforded to the states under the 10th Amendment. This rule enables civil authorities (See Joint Publication 1-02)¹ to request and receive support or

¹ Available by downloading at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

assistance from the Department of Defense.

Comment: Three of the 84 public comments expressed concern over the inclusion of “special events” in the rule. Example: DOD–2008–OS–0085–0019 “The role of the US military is to protect us from foreign threats. This regulation is overbroad in that it would allow the use of the US military to suppress any kind of gathering. As an example, consider the Rainbow gatherings, 50–60,000 people exercising their right to gather on public lands. Under this regulation, the military could be called in to quash this. This regulation essentially guts the constitution. Because of clauses like ‘special events’ and ‘other domestic activities’ are broad, they could be interpreted to allow military intervention in any special event, such as concerts, parades, demonstrations, religious conventions, gun shows, political events, etc. This regulation establishes de facto marshal (military) law. Narrowing this regulation to state ‘in response to insurrections only’ would be constitutional. I am adamantly opposed to this rule.”

Response: The rule sets forth policy guidance for the execution and oversight of defense support of civilian authorities when requested by civil authorities. In addition to providing capabilities to assist and support civilian authorities during emergencies or in response to major disasters, DoD is often asked by civilian authorities to provide support and assistance for planned special events. As noted in the Glossary, a special event is 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. Congress has granted to the Secretary of Defense the authority to approve DoD support and assistance for certain specific events such as the Presidential inaugural, the Boy Scout Jamboree, and certain sporting competitions. Each specific authorization establishes necessary oversight and controls. DoD support during other special events, such as the Presidential nominating conventions, such as the United Nations General Assembly, Super Bowls, and the Group of Eight Economic Summit, are in reality, DoD supporting other civil authorities like the United States Secret Service, which is authorized under 18 U.S.C. 3056, when directed by the President, to plan, coordinate, and implement security operations at special events. DoD support at such events is generally in support of other federal

agencies, such as the Federal Bureau of Investigation, as well as state and local entities such as the Colorado Office of Homeland Security, or the San Diego Police Department. DoD has very limited authority to deploy DoD resources in support of event organizers.

In addition to the comments received above, the following has been included in the final rule based on internal comments received on the corresponding DoD instruction: Provisions regarding the “emergency authority” of responsible DoD officials and commanders to use military forces if necessary to prevent loss of life or wanton destruction of property or to restore governmental functions and public order under specified conditions. These provisions were included to bring this rule into consistency with the authorities in DoD Directives 3025.12 and 5525.5, as well as 32 CFR part 215.4.

Regulatory Procedures

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 tribunal 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, Public Law 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 tribunal governments, in aggregate, or by the private sector, of \$100 million or more in any one 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 revises 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: Legal authority includes, 10 U.S.C. sections 113, 331–335, 371–382, 2553, 2554, 2555, and 2564; 31 U.S.C. 1535–1536 (Economy Act); 42 U.S.C. section 5121 et seq. (Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (Stafford Act)); and Public Law 94–524, as amended (Presidential Protection Assistance Act of 1976).

§ 185.1. Purpose.

This part:

(a) Establishes policy and assigns responsibilities for DSCA, also referred to as civil support.

(b) Supplements the regulations (in DoD Directive 5525.5)¹ required by section 375 of title 10, United States

¹ Available for downloading at <http://www.dtic.mil/whs/directives/corresp/pdf/552505p.pdf>

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 or by qualifying entities and approved by the appropriate DoD official, 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.

(d) Authorizes immediate response authority for providing DSCA, when requested.

(e) Authorizes emergency authority for the use of military force, under dire situations, as described in § 185.4(i) of this part.

§ 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 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 within the Department of Defense (hereafter referred to collectively as the “DoD Components”).

(b) Applies to the Army National Guard and the Air National Guard (hereafter referred to collectively as the “National Guard”) personnel when under Federal command and control. Also applies to National Guard personnel when the Secretary of Defense determines that it is appropriate to employ National Guard personnel in title 32, U.S.C., status to fulfill a request for DSCA, the Secretary of Defense requests the concurrence of the Governors of the affected States, and those Governors concur in the employment of National Guard personnel in such a status.

(c) Applies to all DSCA (except the specific forms of DSCA listed in paragraph (d) of this section), including but not limited to:

(1) Mutual or automatic aid, also known as reciprocal fire protection agreements (see chapter 15A of title 42 U.S.C.).

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

(3) Support of special events in accordance with applicable laws and DoD policy (see DoD Directive 2000.15)³.

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

(5) Defense support to civilian law enforcement agencies (see DoDD 3025.12⁴ and DoD Directive 5525.5).

(d) Does not apply to the following:

(1) Support in response to foreign disasters provided in accordance with DoD Directive 5100.46⁵.

(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 1000.17⁶.

(4) Counternarcotics operations conducted under the authority of section 1004 of Public Law 101–510 (1991).

(5) Support provided by the USACE when accomplishing missions and responsibilities under the authority of section 701n of title 33, U.S.C. and Executive Order 12656.

(6) Assistance provided by DoD intelligence and counterintelligence components in accordance with DoD Directive 5240.01⁷, Executive Orders 12333 and 13388, DoD 5240.1–R⁸, and other applicable laws and regulations.

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

5410.18⁹ and DoD Instruction 5410.19¹⁰).

(8) Sensitive support in accordance with DoD Directive S–5210.36¹¹.

(9) Activities performed by the Civil Air Patrol in support of civil authorities or qualifying entities when approved by the Air Force as auxiliary missions in accordance with section 9442 of title 10, U.S.C. and DoD 3025.1–M¹² except as restricted by § 185.4(j) of this part.

(10) Innovative readiness training (formerly called “civil-military cooperative action programs”) (see DoD Directive 1100.20)¹³.

§ 185.3. Definitions.

Civil Authorities. See Joint Publication 1–02¹⁴.

Civil Disturbances. See Joint Publication 1–02.

Defense Domestic Crisis Manager. The lead DoD official responsible for DoD’s domestic crisis management response, ensuring the information needs and other requirements of the Secretary of Defense are met, and developing, coordinating, and overseeing the implementation of DoD policy for crisis management to ensure DoD capability to develop and execute options to prevent, mitigate, 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, DoD civilians, DoD contract personnel, DoD Component assets, and National Guard forces (when the Secretary of Defense, in coordination with the Governors of the affected States, elects and requests to use those forces in title 32, U.S.C., status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events. Also known as civil support.

Direct Liaison. An authority for Federal military forces to consult with,

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

⁴ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf>.

⁵ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/510046p.pdf>.

⁶ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/100017p.pdf>.

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

⁸ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/524001r.pdf>.

⁹ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/541018p.pdf>.

¹⁰ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/541019p.pdf>.

¹¹ Document is classified and copies maybe requested by contacting USD(I), USDI.pubs@osd.mil

¹² Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/302501m.pdf>.

¹³ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/110020p.pdf>.

¹⁴ Available by downloading at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

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

coordinate with, and respond to State authorities (including National Guard units and personnel operating in Title 32 status or in State Active Duty status) or Federal civilian authorities in the tactical-level execution of assigned tasks, pursuant to an order by the Secretary of Defense or the President to provide support to those authorities.

Emergency Authority. A Federal military commander's authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because (1) such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order or (2) duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions.

Federal Military Forces. Army, Navy, Marine Corps and Air Force personnel (including Reserve Component personnel) on Federal active duty and National Guard personnel when under Federal command and control.

Immediate Response Authority. A Federal military commander's, DoD Component Head's, and/or responsible DoD civilian official's authority temporarily to employ resources under their control, subject to any supplemental direction provided by higher headquarters, and provide those resources to save lives, prevent human suffering, or mitigate great property damage in response to a request for assistance from a civil authority, under imminently serious conditions when time does not permit approval from a higher authority within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. State immediate response is addressed in § 185.4(h) of this part.

Qualifying Entity. A non-Governmental organization to which the Department of Defense may provide assistance for special events by virtue of statute, regulation, policy, or other approval by the Secretary of Defense or his or her authorized designee.

Responsible DoD Civilian. For purposes of DSCA, the Head of a DoD Component or other DoD civilian official who has authority 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 warrant security, safety, and/or other logistical support or assistance from the Department of Defense.

Total Force. See DoD Directive 1200.17¹⁵.

§ 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, DoD issuances, and Secretary of Defense-approved orders.

(c) DSCA is initiated by a request for DoD assistance from civil authorities or qualifying entities or is authorized by the President or Secretary of Defense.

(d) All requests for DSCA shall be written, and shall include a commitment to reimburse the Department of Defense in accordance with the Stafford Act, Economy Act, or other authorities except requests for support for immediate response, and mutual or automatic aid, in accordance with § 185.4(g) and (m) of this part. Unless approval authority is otherwise delegated by the Secretary of Defense, all DSCA requests shall be submitted to the office of the Executive Secretary of the Department of Defense. For assistance provided according to § 185.4(g) of this part, civil authorities shall be informed that oral requests for assistance in an emergency must be followed by a written request that includes an offer to reimburse the Department of Defense at the earliest available opportunity. States also must reimburse the United States Treasury in accordance with section 9701 of title 31, U.S.C. Support may be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the appropriate DoD official.

(e) All requests from civil authorities and qualifying entities for assistance shall be evaluated for:

- (1) Legality (compliance with laws).
- (2) Lethality (potential use of lethal force by or against DoD Forces).

(3) Risk (safety of DoD Forces).

(4) Cost (including the source of funding and the effect on the DoD budget).

(5) Appropriateness (whether providing the requested support is in the interest of the Department).

(6) Readiness (impact on the Department of Defense's ability to perform its primary mission).

(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. DSCA planning will consider command and control options that will emphasize unity of effort, and authorize direct liaison if authorized by the Secretary of Defense.

(g) Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials (hereafter referred to collectively as "DoD officials") have immediate response authority as described in this part. In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.

(1) The DoD official directing a response under immediate response authority shall immediately notify the National Joint Operations and Intelligence Center (NJOIC), through the chain of command, of the details of the response. The NJOIC will inform appropriate DoD Components to including the geographic Combatant Command.

(2) An immediate response shall end 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 and that agency or department has initiated response activities) or when the initiating DoD official or a higher authority directs an end to the response. The DoD official directing a response

¹⁵ Available by downloading at <http://www.dtic.mil/whs/directives/corresp/pdf/120017p.pdf>.

under immediate response authority shall reassess whether there remains a necessity for the Department of Defense to respond under this authority as soon as practicable but, if immediate response activities have not yet ended, not later than 72 hours after the request of assistance was received.

(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) The authority of State officials is recognized to direct a State immediate response using National Guard personnel under State command and control (including personnel in a title 32, U.S.C. (hereafter referred to as "Title 32") status) in accordance with State law, but National Guard personnel will not be placed in or extended in Title 32 status to conduct State immediate response activities.

(i) Federal military commanders are provided emergency authority under this part. Federal military forces shall not be used to quell civil disturbances unless specifically authorized by the President in accordance with applicable law (e.g., chapter 15 of title 10, U.S.C.) or permitted under emergency authority, as described below (See DoD Directive 3025.12¹⁶ and DoD Directive 5525.5¹⁷.) In these circumstances, those Federal military commanders have the authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because:

(1) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order, or,

(2) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect the Federal property or functions.

(j) Except for immediate response and emergency authority as described in

§ 185.4(g) and § 185.4(i) of this part, only the Secretary of Defense may approve requests from civil authorities or qualifying entities for Federal military support for:

(1) Defense assistance in responding to civil disturbances (requires Presidential authorization) in accordance with DoD Directive 3025.12.

(2) Defense response to CBRNE events (see DoD Instruction 2000.18)¹⁸.

(3) Defense assistance to civilian law enforcement organizations, except as authorized in DoD Directive 5525.5.

(4) Assistance in responding with assets with potential for lethality. This support includes loans of arms; vessels or aircraft; or ammunition. It also includes assistance under section 382 of title 10, U.S.C., and section 831 of title 18, U.S.C.; all support to counterterrorism operations; and all support to civilian law enforcement authorities in situations where a confrontation between civilian law enforcement and civilian individuals or groups is reasonably anticipated.

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

(l) Special event support to a qualifying entity shall be treated as DSCA.

(m) All requests for DSCA mutual and automatic aid via the DoD Fire & Emergency Services programs shall be in accordance with DoD Instruction 6055.06.

(n) DSCA is a total force mission (see DoD Directive 1200.17).

(o) No DoD unmanned aircraft systems (UAS) will be used for DSCA operations, including support to Federal, State, local, and tribal government organizations, unless expressly approved by the Secretary of Defense. Use of armed UAS for DSCA operations is not authorized. (See DoD Directive 5240.01, Executive Orders 12333 and 13388, and DoD 5240.1–R.)

(p) Direct liaison between DoD Components and the States should occur only when time does not permit compliance with § 185.5(m)(1) of this part. In each such instance, the Chief, National Guard Bureau, will be informed of the direct liaison.

§ 185.5 Responsibilities.

(a) The Under Secretary of Defense for Policy (USD(P)) shall:

(1) Coordinate DSCA policy with other Federal departments and agencies, State agencies, and the DoD Components, as appropriate.

(2) Establish DoD policy governing DSCA.

(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) shall:

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

(2) Serve as the Defense Domestic Crisis Manager.

(3) As delegated by the Secretary of Defense in accordance with DoD Directive 5111.13¹⁹, serve as approval authority for requests for assistance from civil authorities or qualifying entities sent to the Secretary of Defense, except for those items retained in § 185.4(j) and (o) of this part, or delegated to other officials. This authority may not be delegated further than the Principal Deputy Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs. When carrying out this authority, the ASD(HD&ASA) shall:

(i) Coordinate requests with the Chairman of the Joint Chiefs of Staff, the Commanders of the Combatant Commands with DSCA responsibilities in the matter, and Military Department Secretaries and other DoD officials as appropriate.

(ii) Immediately notify the Secretary of Defense of the use of this authority.

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

(i) Requests for assistance during domestic crises, emergencies, or civil disturbances.

(ii) Domestic consequence management.

(iii) Coordination or consultation, as appropriate, with the Department of Homeland Security and other Federal agencies on the development and validation of DSCA requirements.

(iv) DoD support for national special security events.

(v) DoD support for national and international sporting events, in accordance with section 2564 of title 10, U.S.C.

(vi) Direct the fullest appropriate dissemination of information relating to all aspects of DSCA, using all approved media and in accordance with DoD Directive 8320.02²⁰.

(5) Exercise staff cognizance over DoD Directive 5525.5.

(c) The Assistant Secretary of Defense for Special Operations and Low

¹⁶ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf>.

¹⁷ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/552505p.pdf>.

¹⁸ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/200018p.pdf>.

¹⁹ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/511113p.pdf>.

²⁰ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/832002p.pdf>.

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:

(1) Establish policies and procedures to ensure timely reimbursement to the Department of Defense for reimbursable DSCA activities.

(2) Assist in management of statutory resources for DSCA in support of appropriate international and domestic sporting events.

(e) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall identify, monitor, and oversee the development of integrated DSCA training capabilities and the integration of these training capabilities into exercises and training to build, sustain, and assess DSCA readiness in accordance with DoD Directive 1322.18²¹.

(f) The Assistant Secretary of Defense for Health Affairs (ASD(HA)), under the authority, direction, and control of the USD(P&R), as the principal advisor to the Secretary of Defense for all DoD health policy shall:

(1) Provide guidance and support for all domestic crisis situations or emergencies that require health or medical-related DSCA to ASD(HD&ASA).

(2) Exercise authority in accordance with section 300hh-11 of title 42, U.S.C., and according to DoD Directive 6010.22²², for participation in the National Disaster Medical System.

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

(h) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall establish policies and procedures, in coordination with ASD(HD&ASA), to implement DSCA requirements for DoD Fire and Emergency Services programs and mutual or automatic aid that may be part of that program.

(i) The Heads of the DoD Components shall:

(1) Direct that any DSCA-related DoD issuances, concept plans, interagency

agreements, and memorandums of understanding or agreement with external agencies are in full compliance with this part.

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

(3) When approved by the Secretary of Defense, plan, program, and budget for DSCA capabilities in accordance with law, policy, and assigned missions.

(j) The Secretaries of the Military Departments in addition to the responsibilities in § 185.5(i) of this part, shall:

(1) Establish the necessary policies and procedures to ensure the appropriate personnel are trained to execute DSCA plans as directed by the Secretary of Defense.

(2) Direct that requests for reimbursement of actual DSCA expenditures (performance of work or services, payments to contractors, or delivery from inventory) begin within 30 calendar days after the month in which performance occurred. Final billing invoices shall be submitted to supported departments and agencies within 90 calendar days of the termination of the supported event.

(k) The Chairman of the Joint Chiefs of Staff in addition to the responsibilities in § 185.5(i) of this part, shall:

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

(2) Identify available resources for support in response to DSCA requests and release related orders when approved by the Secretary of Defense.

(3) Incorporate DSCA into joint training and exercise programs in consultation with the USD(P&R), the Chief, National Guard Bureau (NGB), and appropriate officials from the Department of Homeland Security and other appropriate Federal departments and agencies.

(4) Advocate for needed DSCA capabilities.

(l) The Commanders of Combatant Commands with DSCA responsibilities, in addition to the responsibilities in § 185.5(i) of this part and in accordance with the Unified Command Plan shall:

(1) In coordination with the Chairman of the Joint Chiefs of Staff, plan and execute DSCA operations in their areas of responsibility in accordance with this part, the Unified Command Plan and the Global Force Management Implementation Guidance.

(2) In coordination with the Chairman of the Joint Chiefs of Staff, incorporate

DSCA into joint training and exercise programs in consultation with the Department of Homeland Security, other appropriate Federal departments and agencies, and the NGB.

(3) Advocate for needed DSCA capabilities and requirements through the Joint Requirements Oversight Council, subject to § 185.5(i) of this part, and the planning, programming, budgeting, and execution process.

(4) Work closely with subordinate commands to ensure that they are appropriately reimbursed for DSCA in accordance with § 185.5(j) of this part.

(5) Exercise Training Readiness Oversight (TRO) over assigned Reserve Component forces when not on active duty or when on active duty for training in accordance with DoD Instruction 1215.06²³.

(m) The Chief, NGB, under the authority, direction, and control of the Secretary of Defense, normally through the Secretary of the Army and the Secretary of the Air Force, shall:

(1) Serve as the channel of communications for all matters pertaining to the National Guard between DoD Components and the States in accordance with DoD Directive 5105.77²⁴.

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

(3) Report National Guard support of civil authorities or qualifying entities when using Federal resources, equipment, and/or funding to the NJOIC.

(4) Serve as an advisor to the Combatant Commanders on National Guard matters pertaining to the combatant command missions, and support planning and coordination for DSCA activities as requested by the Chairman of the Joint Chiefs of Staff or the Combatant Commanders.

(5) Ensure that National Guard appropriations are appropriately reimbursed for DSCA activities.

(6) Advocate for needed DSCA capabilities.

(7) Develop and promulgate, in accordance with DoD Directive 5105.77 and in coordination with the Secretaries of the Army and Air Force and the

²¹ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/132218p.pdf>.

²² Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/601022p.pdf>.

²³ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/121506p.pdf>.

²⁴ Available by downloading at <http://www.dtic.mil/whs/directives/corres/pdf/510577p.pdf>.

ASD(HD&ASA), guidance regarding this part as it relates to National Guard matters.

Dated: December 22, 2010.

Patricia L. Toppings,
OSD Federal Register Liaison Officer,
Department of Defense.

[FR Doc. 2011-620 Filed 1-12-11; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DoD-2009-HA-0051]

RIN 0720-AB31

TRICARE; Coverage of National Cancer Institute (NCI) Sponsored Phase I Studies

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule adds coverage of National Cancer Institute (NCI) sponsored Phase I studies for certain beneficiaries. The NCI sponsored clinical treatment trials are conducted in a series of steps called phases. Phase I trials are the first studies conducted in people. They evaluate how a new drug should be given (by mouth, injected into the blood, or injected into the muscle), how often, and what dose is safe.

DATES: *Effective Date:* This rule is effective February 14, 2011.

FOR FURTHER INFORMATION CONTACT: Commander James Ellzy, TRICARE Management Activity, Office of the Chief Medical Officer, telephone (703) 681-0064.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule adds the coverage of a subset of National Cancer Institute (NCI) sponsored Phase I trials for certain TRICARE patients. The NCI sponsored clinical treatment trials are conducted in a series of steps called phases. Phase I trials are the first studies conducted in people. They evaluate how a new drug should be given (by mouth, injected into the blood, or injected into the muscle), how often, and what dose is safe. A Phase I trial usually enrolls only a small number of patients, sometimes as few as a dozen. A Phase II trial continues to test the safety of the drug, and begins to evaluate how well the new drug works. Phase II studies usually focus on a particular type of cancer. A Phase III trial tests a new drug, a new combination of drugs, or a new surgical

procedure in comparison to the current standard. A participant will usually be assigned to the standard group or the new group at random. Phase III trials often enroll large numbers of people and may be conducted at many doctors' offices, clinics, and cancer centers nationwide.

This final rule adds coverage only of NCI sponsored Phase I trials with clinical or pre-clinical data providing a reasonable expectation that the treatment will be at least as effective as the non-investigational alternative. Additionally, only those TRICARE patients for whom standard treatment has been or would be ineffective, does not exist, or there is no superior non-investigational treatment alternative, would be eligible for these additional trials. TRICARE has covered NCI sponsored Phase II and III trials since 1996. The NCI estimates that Phase I trial participants represent about 3.4 percent of overall Phase II and III participants combined. Based on the history of Department of Defense participation in these studies, it is estimated that there would be a maximum of 1,000 new patients annually enrolling in Phase I trials. It is estimated that the net cost to TRICARE of adding Phase I treatment trials will increase costs by 12.8 percent of the total gross costs (approximately \$150,000 in FY09). Currently, ten States mandate coverage of at least some Phase I trials.

B. Public Comments

The DoD published a proposed rule on June 22, 2009 (74 FR 29435-29436). One set of comments was received on the proposed rule. The sole commenter strongly supported the proposed rule and urged the DoD to make it final. We agree with this recommendation and have not made any modifications to the proposed rule.

C. Regulatory Procedures

Executive Order 12866, "Regulatory Planning and Review"

Section 801 of Title 5, United States Code (U.S.C.), and Executive Order (E.O.) 12866 requires certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of \$100 million or more on the national economy, or which would have other substantial impacts. It has been certified that this rule is not an economically significant rule; however, it is a regulatory action which has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866.

Sec. 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been certified that this rule 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.

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

The Regulatory Flexibility Act (RFA) requires each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This final rule will not significantly affect a substantial number of small entities for purposes of the RFA.

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

This rule will not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3511).

Executive Order 13132, "Federalism"

This final rule has been examined for its impact under E.O. 13132 and it does not contain policies that have federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government; therefore, consultation with State and local officials is not required.

List of Subjects in 32 CFR Part 199

Claims, Dental Health, Health Care, Health Insurance, Individuals with Disabilities, Military Personnel.

■ Accordingly, 32 CFR, Part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for Part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. Chapter 55.

■ 2. Section 199.4 is amended by:

■ A. Redesignating paragraphs (e)(26)(ii)(B)(2), (3) and (4) as paragraphs (e)(26)(ii)(B)(3), (4) and (5);

■ B. Adding a sentence to the introductory text in paragraph (e)(26)(ii)(B);

■ C. Revising paragraph (e)(26)(ii)(B)(1)(i);

■ D. Revising paragraph (e)(26)(ii)(B)(1)(iv);