

2019
Domestic Operations
Law and Policy



National Guard Bureau
Office of the Chief Counsel
Second Edition

2019

Domestic Operations

Law and Policy

National Guard Bureau

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MEMORANDUM FOR DEPARTMENT OF DEFENSE AND NATIONAL GUARD JUDGE ADVOCATES, CIVILIAN ATTORNEYS, AND PARALEGALS

Subject: 2019 Domestic Operations Law and Policy

1. I am pleased to present this 2nd edition of the Domestic Operations Law and Policy Manual! Following the devastating hurricanes and fires of 2017, I tasked our office to develop a policy manual, in collaboration with various state and federal subject matter experts, to incorporate the multitude of issues that the National Guard legal personnel reviewed in support of domestic operations. My intent was to provide a resource for National Guard personnel to use during future incident-response operations within the United States. The manual is designed to provide practitioners with a summary of the legal framework for common issues they may confront, along with statutory and regulatory references for further in-depth analysis.

2. As stated previously, over the years I personally observed myriad response efforts, and there are two realities that pertain to every response: first, an effective whole of government response is dependent on all legal personnel communicating, collaborating, and coordinating with each other and with state and federal agencies. Second, regardless of your level of experience with domestic operations, there is always more to learn and ways to improve.

3. This new edition of the manual goes further than our inaugural edition by incorporating UAS policy changes, mutual aid and assistance agreements, the role of the NGB JET, and several new issue papers. We also incorporated suggestions from the field to make the manual more user-friendly and accessible – I hope you find it to be a valuable tool.

4. Finally, as soon as we sent this manual to the printer, we knew a third edition would be on the horizon, and so we are already preparing to incorporate lessons learned during Hurricanes Florence and Michael, the 2018 Elections and recent Border operations. We will continually update this publication as laws and policies change to ensure we provide the best legal counsel to our clients and the best support to our mission partners and our fellow citizens. Your input is essential and vital for our success so please keep it coming!

We are the National Guard – Always ready, always there.

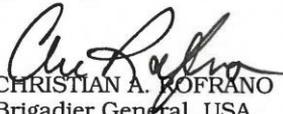

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1. The National Response Framework

Overview of the National Preparedness System

Issue: What is the National Preparedness System (NPS)?

The NPS is the integrated set of guidance, programs, and processes that enables the Nation to meet the national preparedness goal. In 2011, Presidential Policy Directive 8 required DHS to develop: (1) a “national preparedness goal,” and (2) a “national preparedness system” to achieve that goal. DHS, through FEMA, created the national preparedness system which sets out national planning frameworks covering prevention, protection, mitigation, response, and recovery:

Prevention refers to those capabilities necessary to avoid, prevent, or stop a threatened or actual act of terrorism. Prevention capabilities include, but are not limited to, information sharing and warning, domestic counterterrorism, and preventing the acquisition or use of weapons of mass destruction. For purposes of the prevention framework, the term "prevention" refers to preventing imminent threats.

Protection refers to those capabilities necessary to secure the homeland against acts of terrorism and manmade or natural disasters. Protection capabilities include, but are not limited to, defense against WMD threats, defense of agriculture and food, critical infrastructure protection, protection of key leadership and events, border security, maritime security, transportation security, immigration security, and cybersecurity.

Mitigation refers to those capabilities necessary to reduce loss of life and property by lessening the impact of disasters. Mitigation capabilities include, but are not limited to, community-wide risk reduction projects, efforts to improve the resilience of critical infrastructure and key resource lifelines, risk reduction for specific

vulnerabilities from natural hazards or acts of terrorism, and initiatives to reduce future risks after a disaster has occurred.

Response refers to those capabilities necessary to save lives, protect property and the environment, and meet basic human needs after an incident has occurred. Response activities take place immediately before, during, and in the first few days after a major or catastrophic disaster.

Recovery refers to those capabilities necessary to assist communities affected by an incident to recover effectively, including, but not limited to, rebuilding infrastructure systems, providing adequate interim and long-term housing for survivors, restoring health/social/community services, promoting economic development, and restoring natural and cultural resources.

Discussion

The NPS outlines an organized process for the “whole community” to move forward with their preparedness activities and achieve the National Preparedness Goal. This is done by identifying and assessing risk, estimating capability requirements, building and sustaining capabilities, planning to deliver capabilities, validating capabilities, and reviewing and updating all capabilities, resources, and plans.

The NPS uses the National Incident Management System (NIMS) to guide all levels of government, nongovernmental organizations, and the private sector to work together to prevent, protect against, mitigate, respond to, and recover from incidents. NIMS provides stakeholders across the whole community with the shared vocabulary, systems, and processes to successfully deliver the capabilities described in the NPS. NIMS defines operational systems, including the Incident Command System (ICS), Emergency Operations Center (EOC) structures, and Multiagency

Coordination Groups (MAC Groups) that guide how personnel work together during incidents. NIMS applies to all incidents, from traffic accidents to major disasters. The NGB is currently drafting a policy that will require the NG to operate consistent with NIMS as implemented within each state unless doing so would lead to compromising operational missions or disrupting military command authority.

Key Reference(s):

- a) Presidential Policy Directive 8: National Preparedness: <https://www.dhs.gov/presidential-policy-directive-8-national-preparedness>
- b) The National Preparedness System: <https://www.fema.gov/national-preparedness-system>
- c) The National Incident Management System: <https://www.fema.gov/national-incident-management-system>
- d) FEMA's Main Website: www.fema.gov
- e) CNGBI 3000.04, National Guard Bureau Domestic Operations
- f) CNGBM 3000.XX, National Guard Bureau Domestic Operations (*undergoing staffing for publication as of the date of publication of this manual)

Overview of the National Response Framework

Issue: What is the National Response Framework (NRF)?

The NRF is a guide to how the Nation ***responds*** to all types of disasters and emergencies. In 2011, Presidential Policy Directive 8 required DHS to develop: (1) a “national preparedness goal,” and (2) a “national preparedness system” to achieve that goal. DHS, through FEMA, created the national preparedness system which sets out national planning frameworks covering prevention, protection, mitigation, response, and recovery.

“Response” refers to those capabilities necessary to save lives, protect property and the environment, and meet basic human needs after an incident has occurred. Response activities take place immediately before, during, and in the first few days after a major or catastrophic disaster.

The NRF guides how the Nation responds to all types of disasters and emergencies. It is built on scalable, flexible, and adaptable concepts identified in the National Incident Management System to align key roles and responsibilities.

The NRF is composed of a base document, Emergency Support Function (ESF) Annexes, and Support Annexes. The annexes provide detailed information to assist with the implementation of the NRF. ESF Annexes describe the Federal coordinating structures that group resources and capabilities into functional areas that are most frequently needed in a national response. The ESFs with assigned coordinators are:

ESF #1 – Transportation (Department of Transportation)

ESF #2 – Communications (DHS/Cybersecurity and Communications)

ESF #3 – Public Works & Engineering (DoD/USACE)

- ESF #4 – Firefighting (USDA/U.S. Forest Service and DHS/FEMA/U.S. Fire Administration)
- ESF #5 – Information & Planning (DHS/FEMA)
- ESF #6 – Mass Care, Emergency Assistance, Temporary Housing, & Human Services (DHS/FEMA)
- ESF #7 – Logistics (General Services Administration and DHS/FEMA)
- ESF #8 – Public Health & Medical Services (Department of Health and Human Services)
- ESF #9 – Search and Rescue (DHS/FEMA)
- ESF #10 – Oil & Hazardous Materials Response (Environmental Protection Agency)
- ESF #11 – Agriculture & Natural Resources (Department of Agriculture)
- ESF #12 – Energy (Department of Energy)
- ESF #13 – Public Safety & Security (DOJ/Bureau of Alcohol, Tobacco, Firearms, and Explosives)
- ESF #15 – External Affairs (DHS)

The Support Annexes describe other mechanisms by which support is organized among private sector, NGO, and Federal partners. Federal departments and agencies designated as coordinating and cooperating agencies in NRF support annexes conduct a variety of activities to include managing specific functions and missions and providing Federal support within their functional areas. The Support Annexes are:

- Critical Infrastructure
- Financial Management
- International Coordination
- Private Sector Coordination
- Tribal Coordination
- Volunteer and Donations Management
- Worker Safety and Health

State Response. State governments supplement local efforts before, during, and after incidents by applying in-state resources first. If a state anticipates that its resources may be exceeded, the Governor may request assistance from other states or the Federal Government through a Stafford Act Declaration.

The Governor is responsible for the public safety and welfare of a state's residents. The Governor coordinates state resources and provides the strategic guidance for response to all types of incidents. This includes supporting local governments as needed and coordinating assistance with other states and the Federal Government. A Governor has many options in responding, including:

- make, amend, or suspend certain orders or regulations associated with response IAW state law
- coordinate assistance through interstate mutual aid and assistance agreements (EMAC)
- command the state military forces (NG personnel not in Federal service and state militias)

The National Guard is an important state and Federal resource available for planning, preparing, and responding to natural or manmade incidents. National Guard members have expertise in critical areas, such as: emergency medical response, communications, logistics, search and rescue, civil engineering, chemical/biological/radiological/nuclear (CBRN) response and planning, and decontamination.

The Governor may activate elements of the National Guard in a State Active Duty (SAD) status to support state domestic civil support functions and activities. The state adjutant general may assign members of the Guard to assist with state, regional, and Federal civil support plans.

Federal Response. The Federal Government becomes involved with a response in three primary scenarios: (1) when Federal interests are involved, (2) when state, local, tribal, or territorial resources are overwhelmed and Federal assistance is requested, and/or (3) when authorized or required by statute, regulation, or policy. Accordingly, in some instances, the Federal Government may play a supporting role to state, local, tribal, or territorial authorities by providing Federal assistance to the affected parties. For example, the Federal Government provides assistance to state, local, tribal, and territorial authorities when the President declares a major disaster or emergency under the Stafford Act. The lead federal agency in this instance is the Federal Emergency Management Agency (FEMA). In other instances, the Federal Government may play a leading role in the response where the Federal Government has primary jurisdiction or when incidents occur on Federal property (e.g., National Parks, military bases).

Pursuant to 10 U.S.C. §113, SecDef has authority, direction, and control over the DoD. DoD resources may be committed when requested by another Federal agency and approved by the SecDef, or when directed by the President, through DoD Support to Civil Authorities (DSCA). However certain DoD officials and organizations may provide support under the immediate response authority, a mutual aid agreement with the local community, or pursuant to independent authorities or agreements. When DoD resources are authorized to support civil authorities, command of those personnel remains with the SecDef. National Guard personnel respond to DSCA when federalized, or if SecDef, in coordination with the Governors of the affected states, elects and requests to use those personnel in Title 32 U.S.C., status. DoD elements in the incident area of operations coordinate closely with response organizations at all levels.

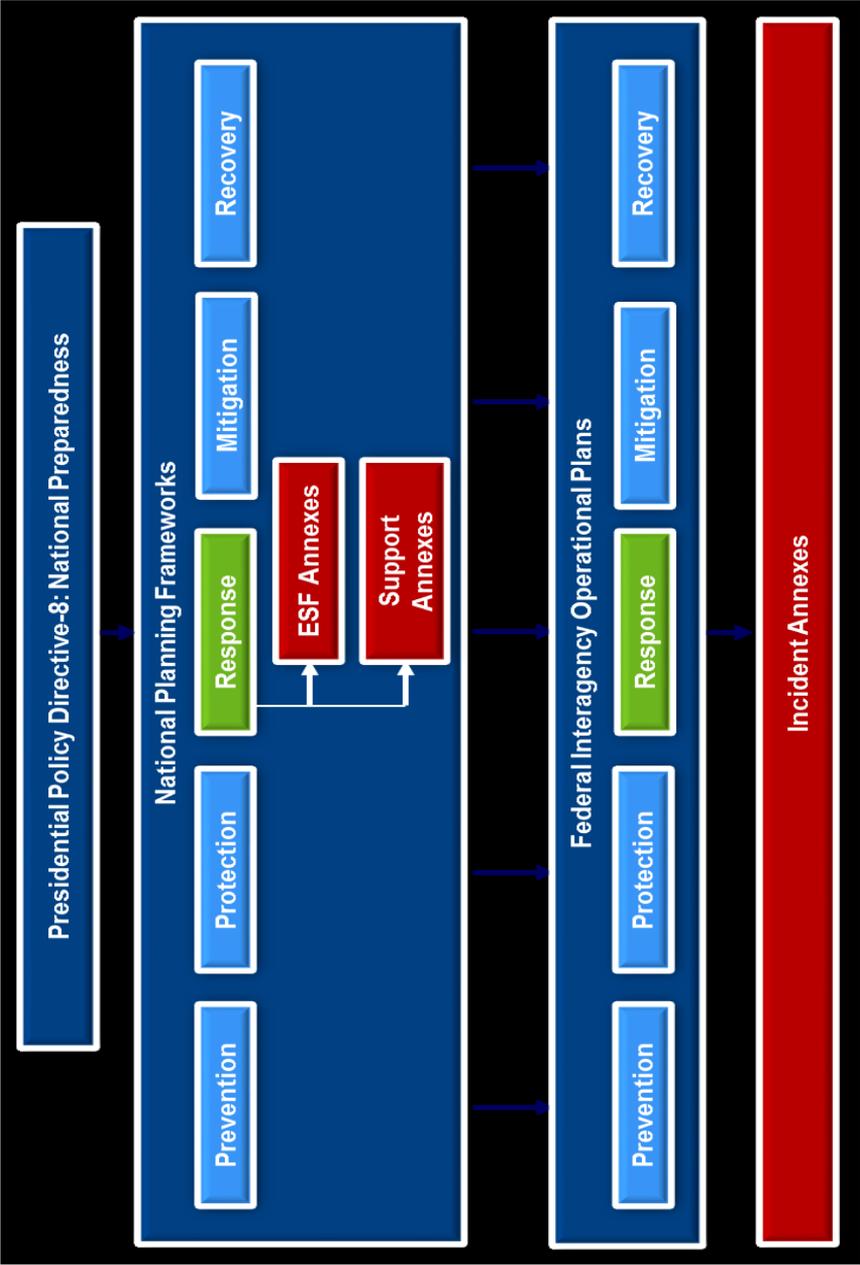
Mission Assignment (MA). ESFs and the assigned coordinator guide which federal agency has responsibility for the requested

assistance. FEMA provides MAs to the Federal Coordinating Official (FCO) for that ESF. For example, if response and recover operations require prisoners to be relocated from one prison to another location, then ESF 13 would have responsibility for the transportation of prisoner's function through the U.S. Marshals Service, FBI, and/or Federal Bureau of Prisons. If that is not an acceptable sourcing solution, the FEMA MA can go to DoD for sourcing to either T-10 or NG. NG might be able to transport prisoners in a T-32 status if it is valid training but other issues such as liability, FTCA, passenger eligibility, and FAA prohibition of firearms on aircrafts would need to also be considered.

NGB. NGB is promulgating policy that will requires the National Guard to consider the National Response Framework in the planning and conduct of domestic operations.

Key Reference(s):

- a) Presidential Policy Directive 8: National Preparedness: <https://www.dhs.gov/presidential-policy-directive-8-national-preparedness>
- b) The National Response Framework, 3rd edition: <https://www.fema.gov/media-library/assets/documents/117791>
- c) FEMA's Main Website: www.fema.gov
- d) CNGBM 3000.XX, National Guard Bureau Domestic Operations (*undergoing staffing for publication as of the date of publication of this manual)



The Stafford Act

Issue: Under the Stafford Act, what are the standards for assistance for an emergency and major disaster?

Guidance

The Stafford Act is the statutory authority to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.

42 U.S.C. §5122(1) the Stafford Act defines an “emergency” as any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

42 U.S.C. §5122(2) the Stafford Act defines a “major disaster” as any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

Discussion

If a State anticipates that its resources may be exceeded, the Stafford Act allows the Governor to request assistance from the Federal Government. The Governor of an affected State may request the declaration of a major disaster or emergency, and must demonstrate, as a prerequisite for receiving assistance, both that the state's response plans have been activated and state and local capabilities are inadequate for effective response. The Federal Government becomes involved with a response when Federal interests are involved; when state, local, tribal, or territorial resources are overwhelmed and Federal assistance is requested; or as authorized or required by statute, regulation, or policy.

FEMA leads and coordinates the Federal response and assistance but the State remains in control throughout the entire response. FEMA focuses its efforts on managing the consequences of disasters and emergencies and its actions are generally driven by requests from state and local governments. Federal agencies provide resources under FEMA mission assignments or their own authorities. A mission assignment is a work order issued to a Federal agency by the Regional Administrator, Assistant Administrator for the Disaster Operations Directorate, or Administrator, directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance.

The Federal share for assistance provided shall be equal to not less than 75% of the eligible costs. Major disaster assistance is a more comprehensive grant of federal aid for long-term consequence management. Emergency assistance is limited in scope and in time than assistance under a major disaster declaration, and total assistance may not exceed \$5M for a single emergency, unless the President determines there is a continuing and immediate risk to lives, property, public health or safety, and necessary assistance will not otherwise be provided on a timely basis.

Key Reference(s):

- a) 42 U.S.C., Chapter 68, Subchapter IV, “Major Disaster Assistance Programs”
- b) 44 C.F.R. Part 206, “Federal Disaster Assistance”
- c) Domestic Operational Law Handbook

NGB All Hazards Support Plan

Topic: What is the NGB All Hazards Support Plan (AHSP)?

The NGB AHSP addresses natural disasters, man-made disasters, and industrial accidents and is nested under PPD-8. It leverages expertise, planning, and authorities to enhance the effectiveness of State domestic All-Hazard responses in two primary areas:

- (1) Supporting the directed All-Hazard response of Governors and TAGs through collective, inter-state mutual aid and through the Emergency Management Assistance Compact; and
- (2) Executing response operations in support of State requirements pursuant to Title 32 and Federal requirements pursuant to Title 10.

CNGB assists SecDef in facilitating and coordinating with the USNORTHCOM, USPACOM, other Federal agencies, and TAGs for the use of NG personnel and resources for missions conducted under State control. NGB coordinates with USNORTHCOM, USPACOM, and the NG JFHQs-State to facilitate the integration and synchronization of Homeland Defense (HD) and Defense Support of Civil Authorities (DSCA)/NG Civil Support and associated planning.

Discussion

NGB involvement is only a small part of an overall disaster response. The majority of the assistance (personnel, equipment, commodities, and resources) is provided at the local level. The scale and the intensity of an event determines the level of involvement and response from the Federal government.

If NG personnel and resources are requested, it is important to review the AHSP to understand the phases of NG involvement pre-incident, during incident response, and post-incident. The NGB

does not possess legal authority or SecDef direction for command and control beyond its assigned staff. The NGB uses its existing organizational authorities to support State-level operations at National Guard Joint Force Headquarters-State (NG JFHQs-State) request.

The AHSP also lines up NG core capabilities with the Emergency Support Functions (ESF) from the National Response Framework. It contains responsibilities of each J-staff during an incident and contains annexes for operations for different types of incidents (for example, earthquake, hurricane, improvised nuclear device, flood).

Key Reference(s):

- a) CNGBI 5200.01, National Guard Bureau All Hazards Support Plan (AHSP)
- b) CNGBI 3000.4, National Guard Bureau Domestic Operations

2. Immediate Response Authority

Immediate Response Authority

Topic: What is Immediate Response Authority (IRA) and how is the authority used?

Guidance

DoDD 3025.18, Defense Support of Civil Authorities (DSCA) provides guidance and conditions on when military resources may be used to provide support to civilian authorities. It applies to, among other entities, the NG when under Federal command and control (Title 10) and to NG personnel when SecDef determines that it is appropriate to employ NG in Title 32 to fulfill a request for DSCA, SecDef requests the concurrence of the Governors of the affected States, and those Governors concur in the employment of NG personnel in such a status. All requests from civil authorities and qualifying entities for assistance shall be evaluated under the “CARRLL” factors:

- (1) Legality (compliance with laws).
- (2) Lethality (potential use of lethal force by or against DoD personnel).
- (3) Risk (safety of DoD personnel).
- (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 other primary missions).

It also authorizes IRA in response to a request for assistance from a civilian authority. IRA is a form of DSCA that allows DoD officials (federal military commanders) to provide an immediate response, 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, to temporarily employ 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 US.

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 under IRA shall reassess whether there remains a necessity for the 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 the request for assistance was received.

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 DoD.

State officials have authority to direct a State immediate response using NG personnel under State command and control (T-32 and SAD) IAW State law, but NG personnel will not be placed in or extended in T-32 status to conduct State immediate response activities.

Discussion

IRA is a successful tool to fill the gap of providing initial response between the flashpoint of an unforeseen circumstance and the marshalling of force/capabilities through other mechanisms such as SAD or FTNGD under 32 U.S.C. §502(f). IRA is limited to actions taken in response to request from civil authorities designed

to save lives, prevent human suffering, or mitigate great property damage. IRA may only be exercised with personnel on-hand at the time of incident; personnel may not be brought on to duty for IRA, nor is IRA a tool for sourcing preplanned requirements. Federal IRA is not appropriate for Law Enforcement Agency (LEA) assistance or civil disturbances that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.

DoDM 3025.01 volumes have comprehensive guidance for IRA, lists key authorities, and cites the DSCA EXORD as the direction and guidance for conducting and reporting IRA activities. Use it as your guide when personnel are in SAD and T-32 status in addition to any applicable state law provisions or policies.

In addition to DoDD 3025.18, CNGB issued specific guidance for the NG when exercising IRA at CNGBI 1302.01 which permits Commanders to direct members in a 32 U.S.C. §502(f) duty status to respond to an emergency under IRA and State law.

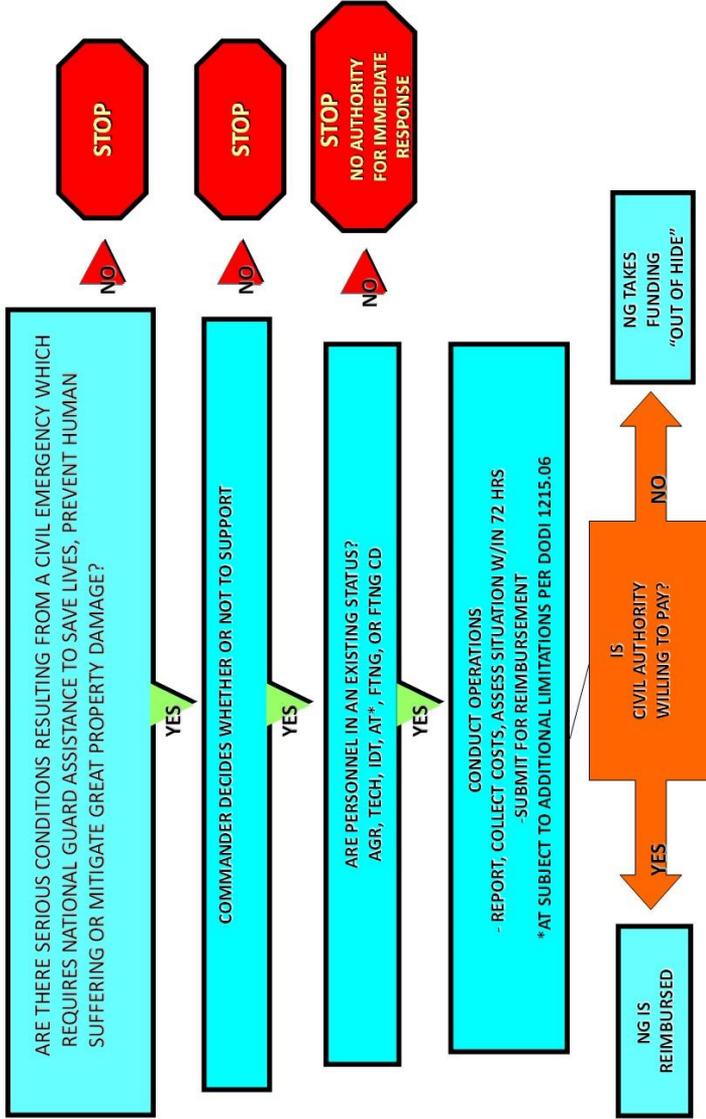
Commanders under this authority must immediately notify the National Guard Coordination Center (NGCC). Further, CNGB must approve the use of NG members in a 32 U.S.C. §502(f) duty status for immediate response activities exceeding 72 hours.

Key Reference(s):

- a) DoDD 3025.18, Defense Support of Civil Authorities (DSCA)
- b) DoDI 3025.22, The Use of the National Guard for Defense Support of Civil Authorities
- c) DoDM 3025.01 series
- d) CJCS DSCA EXORD, 071415Z June 13
- e) CNGBI 1302.01, Guidance for Members Performing Duty Under the Authority of 32 U.S.C. §502(f)

IMMEDIATE RESPONSE AUTHORITY

REQUEST FOR ASSISTANCE MADE BY CIVIL AUTHORITIES



IRA Past 72 Hours

Topic: What actions should be taken when sufficient alternative personnel and capabilities cannot be brought to respond adequately and further IRA is required after the initial 72 hours?

Guidance

DoDD 3025.18, Para 4.i. requires that 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 under IRA shall reassess whether there remains a necessity for the 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 the request for assistance was received.

Para 4.j recognizes authority of State officials to direct a State immediate response using NG personnel under State command and control (including personnel in T-32 status) IAW State law, but NG personnel will not be placed in or extended in T-32 status to conduct State immediate response activities.

CNGBI 1302.01, Para 4.e. permits Commanders to direct members in a 32 U.S.C. §502(f) duty status to respond to an emergency under IRA and State law. Commanders under this authority must immediately notify the National Guard Coordination Center (NGCC).

CNGB must approve the use of NG members in a 32 U.S.C. §502(f) duty status for immediate response activities exceeding 72 hours. All Federally funded costs for immediate response are reimbursable by State and local authorities to the DoD. However,

responses should not be delayed or denied due to inability or unwillingness of the requester to make a commitment to reimburse DoD.

Discussion

When serving in an authorized T-32 status, the NG may exercise IRA to save lives, prevent human suffering, or mitigate great property damage IAW DoDD 3025.18 (immediate response doctrine). There is no requirement to *automatically* terminate IRA 72 hours after a crisis assistance request from civil authorities. However, under the DoDD there exists a requirement to “reassess” whether a necessity for those personnel exist. Any justification for continued IRA should be articulable, reasonable, and supported by the facts.

CNGBI 1302.01 applies to certain NG personnel in a §502(f) status and limits their IRA to 72 hours without CNGB permission, regardless if a determination for continued IRA is made at the state level. This 72 hour rule is a separate and distinct rule from the 72 hour rule to reassess the need for response under IRA.

Key Reference(s):

- a) DoDD 3025.18, Defense Support of Civil Authorities
- b) CNGBI 1302.01, Guidance for Members Performing Duty Under the Authority of 32 U.S.C. 502(f)

IRA – Use of AGRs

Topic: During Immediate Response Activities, what actions may be taken by Active Guard (AGR) personnel?

Guidance

DoDD 3025.18, Para 4.i. gives Federal military commanders IRA 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, to temporarily employ 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.

Para 4.j recognizes authority of State officials to direct a State immediate response using NG personnel under State command and control (including personnel in T-32 status) IAW State law, but NG personnel will not be placed in or extended in T-32 status to conduct State immediate response activities.

AGRs serve in a Title 32 U.S.C. §502(f) duty status and are permitted to perform duties pursuant to 32 U.S.C. §328 including ... additional duties ... to the extent that the performance of those duties does not interfere with the performance of the member's primary Active Guard and Reserve duties of organizing, administering, recruiting, instructing, and training the reserve components.

Discussion

AGRs can respond under IRA on a non-interference basis. AGRs should be replaced by traditional Guardsman (DSG or M-Day) and transitioned back to their primary statutory duties as soon as possible.

Key Reference(s):

- a) 32 U.S.C. §328, Active Guard and Reserve Duty (Governor's Authority)
- b) DoDD 3025.18, Defense Support of Civil Authorities
- c) NGR 600-5, The AGR Program Title 32 Full-Time National Guard Management
- d) ANGI 36-101, Air National Guard Active Guard Reserve (AGR) Program

IRA – Use of Technicians and Title 5 National Guard Civilian Employees

Topic: During Immediate Response Activities, what actions may be taken by Technician personnel and National Guard Civilian Employees?

Guidance

DoDD 3025.18, Para 4.i. gives Federal military commanders IRA 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, to temporarily employ 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 US.

Para 4.j recognizes authority of State officials to direct a State immediate response using NG personnel under State command and control (including personnel in T-32 status) IAW State law, but NG personnel will not be placed in or extended in T-32 status to conduct State immediate response activities.

NG technicians are statutorily limited in the functions they can perform. Their primary functions are to organize, administer, instruct, and train the National Guard of their State. They may also perform certain specified additional duties to the extent that the performance of those duties does not interfere with the performance of their (primary technician) duties.

The Title 5 National Guard civilian employees performing duty with State National Guards are not similarly limited to the functions they may perform. By statute, they may be utilized to “execute the missions of the National Guard.” By DoD policy, CNGB, in coordination with the Adjutant General, may designate

them as “essential personnel.” Designation permits the Title 5 employee to be assigned to duty in preparation for, or in response to, a state emergency or disaster declaration. Designations are time limited to 14 days unless approved otherwise in advance by CNGB.

Discussion

Technicians can respond under IRA under the control of TAG on a non-interference basis. Technicians may perform properly directed IRA activities; however, based on the standards of the TPRs, technicians should be brought onto SAD as soon as possible.

Title 5 NG civilian employees who are not designated as “essential personnel” may perform properly directed IRA activities within the limitations of their position description; or within the limitations of “other duties as assigned” if such terminology is included in their existing position description. Utilization of personnel in this manner should be strictly limited to the immediate time period after state emergency or disaster declaration.

Designated Title 5 National Guard civilian employees may be used, within the time limits of the designation, to prepare for and in response to a state emergency or disaster declaration. The duties assigned under such designation must be within the limitations of their position description; or within the limitations of “other duties as assigned” if such terminology is included in their existing position description.

Consult with the full-time SJAs for use of technician personnel and Title 5 National Guard civilian employees who are covered by a collective bargaining agreement. Be advised that there is usually an ‘emergency exception’ to most collective bargaining agreements.

Key Reference(s):

- a) 10 U.S.C. §10508, National Guard Bureau, General Provisions
- b) 32 U.S.C. §709, Technicians: Employment, Use, Status
- c) DoDD 3025.18, Defense Support of Civil Authorities
- d) Memorandum, Office of the Assistant Secretary of Defense, Manpower and Reserve Affairs: Guidance to Convert Dual Status and Non-Dual Status Military Technician Positions, April 20, 2017
- e) *The governing CNGBI for the management and use of National Guard technician and Title 5 civilian personnel are undergoing rewrite as of the date of publication of this manual.

IRA – Use of Counterdrug Personnel

Topic: During Immediate Response Activities, what actions may be taken by counterdrug personnel?

Guidance

DoDD 3025.18, Para 4.i. gives Federal military commanders IRA 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 to temporarily employ 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 US.

Para 4.j recognizes authority of State officials to direct a State immediate response using NG personnel under State command and control (including personnel in T-32 status) IAW State law, but NG personnel will not be placed in or extended in T-32 status to conduct State immediate response activities.

CD personnel serve in a 32 U.S.C §502(f) status on FTNGD-CD (OS) orders and are funded to (1) perform duties pursuant to 32 U.S.C. §112 for drug interdiction and counter-drug activities as a primary purpose and (2) to perform training and to maintain their military skills under 32 U.S.C. §502(a). CD funding (and CD-funded equipment, aircraft and vehicles) can only be used for CD purposes as defined in 32 U.S.C. §112.

CNGBI 3100.01A limits CD personnel in a T-32 status to the following Mission Categories: Program Management, Technical Support, General Support, CD-related Training and Training LEA/Military Personnel, Reconnaissance and Observation, Civil Operations/Coalition Development and State Support.

However, CD assets may be used for non-CD missions under the following conditions: (1) the equipment and/or personnel are needed to search for a lost person(s), where without this support a high probability exists that the person(s) will not survive, (2) the equipment and/or personnel are needed to search for escapees or suspected dangerous felons, who... will likely endanger the welfare of innocent persons, (3) the equipment and/or personnel are needed for support of contingency operations... natural disasters, military support to civilian authorities (now known as DSCA), and National Special Security Event (NSSE). Requests must be made to the CDC by an LEA, Office of Emergency Services, or their equivalent. The CDC...must request reimbursement for flying hour costs, vehicle costs, fuel costs, and personnel costs from...the agency making the request for support. CDCs will...ensure that all available alternate sources of support are considered as possible alternatives to the use of CD assets...and that use does not interfere with CD operations except in valid life/death emergency situations.

Discussion

CD personnel may not be used for any purpose except for the mission categories in their SecDef approved state plans. Under the rarest of circumstances, CD personnel can respond under IRA on an “on occasion” basis for limited IRA activities listed above. Even though a CD personnel may have additional non-CD related skills, such as language translation, an RFA for CD personnel must ensure all available alternate sources of support are considered as possible alternatives to the use of CD assets.

NGB J32 does not have authority to make IR determination for CD personnel. Generally, the IRA determination is decided by the State NG leadership. IRA requests and notifications flow from the State J3/G3/A3 to the NGCC to the J3/7. See CNGBI 1302.01 on authority to order members to perform duty under 32 U.S.C. §502(f) to respond to a RFA pursuant to IRA.

Key Reference(s):

- a) 32 U.S.C. §112, National Guard Drug Interdiction and Counter-Drug Activities
- b) CNGBI 1302.01, Guidance for Members Performing Duty Under the Authority of 32 U.S.C. §502(f)
- c) CNGBI 3100.01A, National Guard Counter-Drug Support
- d) NGR 500-2/ANGI 10-801, National Guard Counterdrug Support (*undergoing rewrite as of the date of publication of this manual)

IRA – State Authority

Topic: Do States have authority to respond using State IRA?

Guidance

32 CFR 185.4(h), DoDD 3025.18, Para 4.j. It is DoD policy that 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 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.

Discussion

State employees may use federal equipment for IR pursuant to State IRA in response to a proper request for assistance from civilian authority. Governors may employ their State assets to provide assistance to an impacted State IAW State laws, including activation, notification, liability, and reimbursement requirements, if any. DoD must be prepared to help civilian authorities save and protect lives during a complex catastrophe. DODD 3025.18, para 4h. Any federal equipment used must be used on a reimbursable basis as tracked by the USPFO.

Key Reference(s):

- a) 32 C.F.R. §185.4, Defense Support of Civil Authorities (DSCA)
- b) DoDD 3025.18, Defense Support of Civil Authorities

3. Mutual Aid and Assistance Agreements

Mutual Aid and Assistance Agreements

Topic: What is a mutual aid and assistance agreement?

Guidance

Mutual aid agreements and assistance agreements are agreements between agencies, organizations, and jurisdictions that provide a mechanism to quickly obtain emergency assistance in the form of personnel, equipment, materials, and other associated services. There are several types of these kinds of agreements, including but not limited to the following:

Automatic Mutual Aid: Agreements that permit the automatic dispatch and response of requested resources without incident-specific approvals. These agreements are usually basic contracts; some may be informal accords.

Local Mutual Aid: Agreements between neighboring jurisdictions or organizations that involve a formal request for assistance and generally cover a larger geographic area than automatic mutual aid.

Regional Mutual Aid: Substate regional mutual aid agreements between multiple jurisdictions that are often sponsored by a council of governments or a similar regional body.

Statewide/Intrastate Mutual Aid: Agreements, often coordinated through the State that incorporate both State and local governmental and nongovernmental resources in an attempt to increase preparedness statewide.

Interstate Agreements: Out-of-State assistance through the EMAC or other formal State-to-State agreements that support the response effort.

International Agreements: Agreements between the United States and other nations for the exchange of Federal assets in an emergency.

Other Agreements: Any agreement, whether formal or informal, used to request or provide assistance and/or resources among jurisdictions at any level of government (including foreign), NGOs, or the private sector.

Discussion

The primary objective of mutual aid and assistance agreements is to facilitate rapid, short-term deployment of emergency support prior to, during, and after an incident. A signed agreement does not obligate the provision or receipt of aid, but rather provides a tool for use should the incident dictate a need. Jurisdictions should be party to agreements with the appropriate jurisdictions and/or organizations (including NGOs and the private sector, where appropriate) from which they expect to receive, or to which they expect to provide, assistance. States should participate in interstate compacts and look to establish intrastate agreements that encompass all local jurisdictions. Authorized officials from each of the participating jurisdictions and/or organizations should collectively approve all mutual aid agreements and assistance agreements.

MOUs and MOAs are needed with the private sector and NGOs, including community-based, faith-based, and national organizations such as the American Red Cross and the Salvation Army, to facilitate the timely delivery of assistance during incidents.

Agreements, preferably written, should include definitions of key terms used in the agreement, roles and responsibilities of individual parties; procedures for requesting and providing assistance; procedures, authorities, and rules for payment,

reimbursement, and allocation of costs; notification procedures; protocols for interoperable communications; relationships with other agreements among jurisdictions; workers' compensation; treatment of liability and immunity; recognition of qualifications, licensure, and certifications; sharing agreements, as required; and termination clause.

A prior written mutual aid and assistance agreement does not need to be in place prior to rendering assistance. States can enter into mutual aid and assistance agreements as needed to provide assistance to a fellow state. Liability, reimbursement, and any expectations of deployment, employment, and redeployment of State personnel and assets should be captured in the agreement.

Key Reference(s):

- a) Federal Emergency Management Agency Website: www.fema.gov (Emergency Management Institute)

Emergency Management Assistance Compact (EMAC)

Topic: What is the EMAC and how is it used?

Guidance

The EMAC is a nationally adopted state-to-state mutual aid and assistance agreement that facilitates the sharing of resources across state lines during times of emergency or disaster. The EMAC is implemented and executed by the state emergency management agencies on behalf of the Governors and was ratified by the U.S. Congress in 1996 through Public Law 104-321.

EMACs include immunity and tort liability protection to incentivize their use. They work in harmony with the National Response Framework, and serve as the primary resource provider when federal support is not warranted. EMAC legislation is comprised of the following thirteen Articles of Agreement:

Article I requires states to declare a state of emergency to implement EMAC during an event.

Article II designates the state emergency management agencies as responsible for implementing EMAC on behalf of their Governor.

Article III lists responsibilities of the states to formulate procedural plans and programs for interstate cooperation. It also describes how a State makes a request for assistance under EMAC.

Article IV identifies the limitations of support. If a state is facing a disaster themselves, they do not have to provide support. Deployed resources can be recalled during a disaster if they are needed to protect their home state. Further, personnel deployed are under the command and control of their home state but under operational control of the receiving state. While deployed, personnel in essence, are an employee of the agency that they are there to support.

Article V recognizes any license, certificate, or permit issued in a state is valid in the Requesting State.

Article VI considers deployed personnel as agents of the Requesting State for tort liability and immunity purposes.

Article VII recognizes the need to enter into supplementary agreements, such as for law enforcement.

Article VIII states that workers compensation and death benefits are the responsibility of the home state.

Article IX requires the receiving state to reimburse an Assisting State for eligible expenses while on an EMAC mission.

Article X discusses evacuation procedures.

Article XI requires a party state to implement the EMAC through the state's legislative process.

Article XII makes the EMAC legislation valid to the extent it is not unconstitutional.

Article XIII prohibits the use of military force by a State NG at any place outside that state in any emergency for which the President is authorized by law to call into federal service the militia, or for any purpose for which the use of the Army or the Air Force would in the absence of express statutory authorization be prohibited under the Posse Comitatus Act.

Discussion

The EMAC is a type of mutual aid and assistance agreement. The EMAC membership includes all states, territories, and the District of Columbia. The EMAC can be used to share any resource one state would like to share with another as long as there is a state of emergency declared by the Governor. A Request for Assistance (REQ-A) documents the support requested under the EMAC and delineates specific personnel and equipment that an affected Requesting State needs. It contains the actual support conducted between the government of the affected State and the State providing the support.

EMAC provisions provide reimbursement authority and liability for personnel and equipment transferred under EMAC. However, delays in reimbursement are a frequent complaint. If eligible for financial assistance under the Stafford Act, the affected Requesting State often delays sending reimbursement to the Supporting State until they receive reimbursement from FEMA under the Stafford Act's provisions.

The International EMAC allows States to enter into state-to-Province mutual aid compacts.

Key Reference(s):

- b) Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact. Pub. L. No. 104-321, 110 Stat. 3877, (1996)
- c) National Emergency Management Associations' Websites: www.nemaweb.org and www.emacweb.org
- d) Agreement on Emergency Management Cooperation, with annex, Jul. 7, 2009, T.I.A.S. No. 09-707.
- e) An Act Granting the Consent and Approval of Congress to an Interstate Forest Fire Protection Compact, Pub. L. No. 105-377, 112 Stat. 3391 (1998).
- f) Joint Resolution Granting the Consent of Congress to the Pacific Northwest Emergency Management Arrangement, Pub. L. No. 105-381, 112 Stat. 3402 (1998).
- g) Joint Resolution Granting the Consent of Congress to the International Emergency Management Assistance Memorandum of Understanding, Pub. L. No. 110-171, 121 Stat. 2467 (2007).
- h) Joint Resolution Granting the Consent of Congress to the State and Province Emergency Management Assistance Memorandum of Understanding, Pub. L. No. 112-282, 126 Stat. 2486 (2013).

EMAC Licensing

Topic: Does the EMAC allow for cross-state practice for medical providers and others requiring a license to operate?

Guidance

Public Law 104–321, Article V provides reciprocal recognition of license, certificates, or other permits.

The party states agree that “whenever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving party state, such person shall be deemed licensed, certified, or permitted by the state requesting assistance to render aid involving such skill to meet a declared emergency or disaster, subject to such limitations and conditions as the Governor of the requesting state may prescribe by executive order or otherwise.”

Discussion

The issue of licensing under an EMAC typically focuses on medical providers. As a general rule, medical providers are limited to providing medical services to the state in which they are licensed. Without the reciprocity provision, the ability to provide medical services by EMAC’d providers would be significantly restrained. NG healthcare providers (HCP) operating in SAD pursuant to an EMAC must ensure that the EMAC includes the reciprocity provision authorized by Public Law set forth above. Ideally, such a provision will be agreed to in advance to prevent state licensing rules from constraining critical medical services in a disaster response/recovery. The state NG’s medical planners play an important role in this process.

Key Reference(s):

- a) Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact. Pub. L. No. 104-321, 110 Stat. 3877, (1996)

EMAC Liability

Topic: Does the EMAC provide liability protection?

Guidance

Public Law 104–32, Article VI considers Supporting State personnel as agents of the affected Requesting State for tort liability and immunity purposes.

“Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the requesting state for tort liability and immunity purposes. No party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith in this article shall not include willful misconduct, gross negligence, or recklessness.”

Discussion

NG healthcare providers (HCP) must have current credentials and be properly privileged before providing health care. Credentialing allows a facility to take on liability of a HCP for services rendered in that facility. A state (or municipality) owned facility is self-insured for malpractice through the State whereas a private facility must carry and pay for its own malpractice insurance or be self-insured and is therefore likely to be more restrictive in credentialing requirements. Tort law of the State will dictate what the medically acceptable practice is in that locality (i.e., supported state).

The authority for NG HCP privileging is dependent on duty status. Credentialing of HCPs in Title 10 or Title 32 is done centrally with final privileging done locally by DoD institutions with appropriate

authority. HCP privileging for a NG HCP activated to Title 10 is done by a Military Treatment Facility IAW AR 40-68 or AFI 44-119. The privileges granted while on Title 10 typically include the provider's full range of skills and are commensurate with his/her MOS or AFSC. HCP privileging for a NG HCP in Title 32 IDT status does not include routine medical care and is usually limited to duties in support of Individual Medical Readiness tasks (e.g., periodic health assessments, immunizations, etc.). HCP privileging for a NG HCP in Title 32 ADT status can include routine medical care, but authorization to do so requires advanced coordination with a Title 10 privileging authority. Both Title 10 and Title 32 have been determined to be federal duty statuses for Federal Tort Claims Act.

The authorities for credentialing and privileging NG HCPs in SAD are entirely a State matter and determined by State law and Governor's orders. FTCA does not cover NG HCPs in SAD. Liability coverage is provided by the State. Personnel "EMAC'd" are treated as employees of the supported state and the process for privileging and credentialing is the same as any other state employee. When operating in SAD, the Supporting State must look to the affected Requesting State's EMAC and any accompanying State laws, Executive orders or conditions to determine restrictions or scope of practice.

Additionally, most states have provisions for liability coverage and credentialing process during emergency circumstances such as Good Samaritan laws or non-liability statutes (except for gross negligence) for military operations by NG which may apply to Supporting State service-members.

Key Reference(s):

- a) Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877, (1996)
- b) AR 40-68, Clinical Quality Management
- c) AFI 44-119, Medical Quality Operations
- d) Federal Tort Claims Act, 28 U.S.C. Chapter 171

EMAC Law Enforcement Activities

Topic: Can law enforcement activities be performed under an EMAC?

Guidance

Although Public Law 104-321 itself does not authorize or permit the use of military force of a nature that would violate the Posse Comitatus Act (PCA) if conducted by Active Component Army or Air Force personnel, supporting State National Guard personnel are not subject to the PCA but are subject to the affected Requesting State's approval by the Governor and subject to the affected Requesting State's criminal laws.

Arrest authority is specifically exempted from the scope of the compact. Article IV of the EMAC states: "Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers, ***except that of arrest*** unless specifically authorized by the receiving state, duties, rights, and privileges as are afforded forces of the state in which they are performing emergency services. Emergency forces will continue under the command and control of their regular leaders, but the organizational units will come under the operational control of the emergency services authorities of the state receiving assistance."

Article XIII of the EMAC states, "Nothing in this compact shall authorize or permit the use of military force by the National Guard of a state at any place outside that state in any emergency for which the President is authorized by law to call into federal service the militia, or for any purpose for which the use of the Army or the Air Force would in the absence of express statutory authorization be prohibited Under the Posse Comitatus Act 18 U.S.C. §1385 of Title 18"

Discussion

States retain the unique state power to police which carries state-specific criminal laws and rules for the use of force. Mutual assistance of certain emergency service functions include law enforcement. The only enumerated limitation in the EMAC is the power of arrest—which can only be authorized by the affected Requesting State.

Further, the EMAC does not authority or permit the use of military force that would violate the PCA. However, “military force” is not defined but should be read consistent with the basis in which the President may federalize the NG: war or national emergency, terror or WMD attack, and insurrection or rebellion. Supporting State NG personnel in SAD are not subject to the PCA but subject to the affected Requesting State’s criminal laws.

Article VII of the EMAC permits supplementary agreements between States, including law enforcement activities and police powers. Therefore, a law enforcement supplementary agreement between the Supporting State and affected Requesting State is required before NG and others can conduct LEAs.

Key Reference(s):

- a) Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877, (1996)

EMAC Compensation

Topic: Are EMAC personnel who are injured while on duty in the affected Requesting State covered under EMAC?

Guidance

Public Law 104–32, Article VIII requires compensation “each party state shall provide for the payment of compensation and death benefits to injured members of the emergency forces of that state and representatives of deceased members of such forces in case such members sustain injuries or are killed while rendering aid pursuant to this compact, in the same manner and on the same terms as if the injury or death were sustained within their own state.”

Discussion

Article VIII requires the affected Requesting State to compensate injured personnel under the worker's compensation procedures of the Sending State. Workers compensation and death benefits are responsibility of the Home State.

Key Reference(s):

- a) Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877, (1996)

EMAC Reimbursement

Topic: What are the affected Requesting State’s reimbursement obligations under Emergency Management Assistance Compact; how is the Supporting State compensated?

Guidance

Public Law 104–32, Article IX requires Reimbursement for the Supporting State. “Any party state rendering aid in another state pursuant to this compact shall be reimbursed by the party state receiving such aid for any loss or damage to or expense incurred in the operation of any equipment and the provision of any service in answering a request for aid and for the costs incurred in connection with such requests; provided, that any aiding party state may assume in whole or in part such loss, damage, expense, or other cost, or may loan such equipment or donate such services to the receiving party state without charge or cost; and provided further, that any two or more party states may enter into supplementary agreements establishing a different allocation of costs among those states.”

Article VI requires the Receiving states to assume the burden to cover any future claims resulting from sending states activities assumed under EMAC, “Officers or employees of a party state rendering aid in another state pursuant to the compact shall be considered agents of the requesting state for tort liability and immunity purposes. No party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith shall not include willful misconduct, gross negligence, or recklessness.”

Discussion

Article IX requires the affected Requesting State to reimburse the Supporting State for eligible expenses (including damaged equipment) while on an EMAC mission. The mission-assigned agency is responsible for ensuring that all activity is properly authorized, goods are received, services are provided, and that costs are reasonable and supported by documentation maintained by the respective agencies. It is imperative that JTF-States memorialize transfers of property and equipment with EMACs during the prepositioning or early response conducted with training authorities. Unless equipment or property is transferred under the EMAC, the cost to transport back to the Supporting State cannot be reimbursed by FEMA if the assisted state is receiving federal assistance IAW the Stafford Act.

Supporting States often end up waiting for reimbursement from the affected Requesting state when that affected Requesting state relies on Stafford Act assistance to provide disaster related compensation. Although FEMA can issue expedited funding to the grantee to support requested logistics requirements, FEMA can only provide disaster funds to the affected Requesting state. IOT expedite funding before work is completed, FEMA writes a project worksheet that includes the SOW detailing what the funding may be used for, a list of what is needed, and the estimated cost. Partial funds are then transferred to the affected Requesting State. Usually, the State / Territorial Military Department must submit a request to the State EMA in order for State EMA to disburse those funds. The State must also complete the project worksheet after work is completed IOT receive the remaining reimbursement.

Key Reference(s):

- a) Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact. Pub. L. No. 104-321, 110 Stat. 3877, (1996)
- b) National Emergency Management Associations' Websites: www.nemaweb.org and www.emacweb.org
- c) Disaster Operations Legal Reference v3.0, FEMA P-1084 (Jan. 20, 2017)

4. Defense Support of Civil Authorities (DSCA)

DSCA Support Framework (CARRLL Factors)

Topic: When responding to an RFA in a domestic operation, what are the criteria that requests should be measured against?

Guidance

Generally, all requests for both emergency and pre-planned DSCA must be written, or if time does not permit, committed to writing at the earliest date. Requests should include a commitment to reimburse DoD/NG as appropriate, except requests for immediate response, and mutual or automatic aid when conducted in accordance with applicable coordinated agreements and authorizations. Support should be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the appropriate official. Unless approval authority is otherwise delegated by SecDef, all DSCA requests shall be submitted to the office of the Executive Secretary of the DOD.

IAW DoDD 3025.18 and in order to ensure legitimacy and compliance, all requests from civil authorities and qualifying entities for assistance shall be evaluated for:

- (1) Cost (cost-effectiveness, the source of funding and the effect on NG funding).
- (2) Appropriateness (whether providing the support withstands scrutiny and is in the interest of the NG).
- (3) Readiness (impact on the NG ability to perform its other primary missions).
- (4) Risk (safety of NG personnel and others).
- (5) Lethality (potential use of non-lethal and/or lethal force by or against NG personnel).
- (6) Legality (compliance with laws, policy and regulations).

National Guard Civil Support missions are generally conducted to assist in:

- (1) Supporting civil authorities whose capabilities or capacity is insufficient to meet current requirements without general purpose, specialized, or unique NG personnel or capabilities
- (2) Protecting the life, property, and safety of U.S. citizens and U.S. persons
- (3) Protecting critical U.S. infrastructure
- (4) Providing humanitarian assistance during disaster response and domestic emergencies
- (5) Providing support to designated law enforcement activities and operations
- (6) Providing support to designated events, programs, and other activities.

Discussion

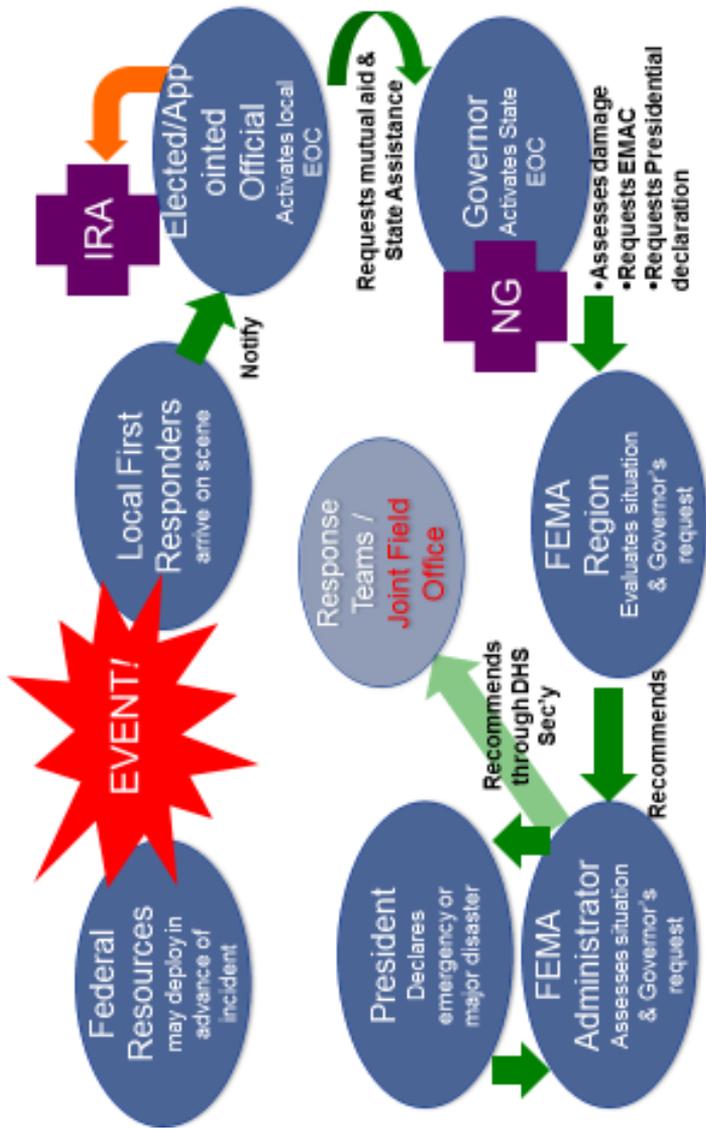
All DSCA operations MUST start with an RFA from the proper civilian authority. IRA is a type of DSCA and must also start with an RFA from the proper civilian authority. Any mission that cannot be formally justified against the CARRLL factors above should not be performed unless approved by SecDef.

Support missions are largely contingent on funding and authorization as it relates to the mission to be performed and the outcome to occur. NG personnel receive equipment and funding across numerous lines of effort. Commanders must ensure the proper utilization of personnel, equipment, and funds at all times.

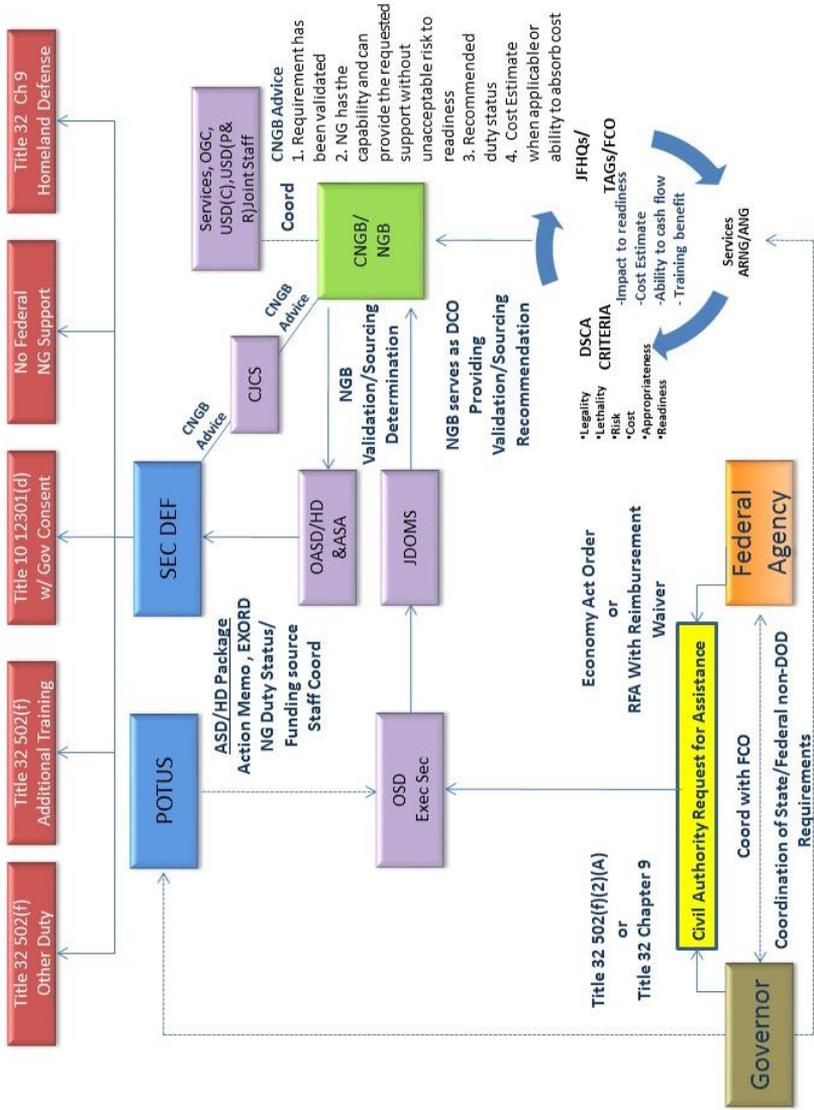
Key Reference(s):

- a) DoDD 3025.18, Defense Support of Civil Authorities
- b) CJCS DSCA EXORD, 071415Z June 13
- c) CNGBM 3000.XX, National Guard Bureau Domestic Operations (*undergoing staffing for publication as of the date of publication of this manual)

OVERVIEW OF DSCA



DSCA RFA PROCESS



Dual Status Commander

Topic: What is a Dual Status Commander (DSC) and how is it requested?

Guidance

A DSC is a commissioned officer of the Regular Army or Air Force (32 U.S.C §315) or a federally recognized ARNG or ANG officer (32 U.S.C §325) authorized, by SecDef, with the consent of the applicable Governor of a state, to exercise command on behalf of, and receive separate orders from, a federal chain of command and exercise command on behalf of, and receive separate orders from, a state chain of command. A DSC is the usual and customary arrangement when multiple DoD components (“Armed Forces and the National Guard”) are employed simultaneously in support of civil authorities in the US.

32 U.S.C §325 authorizes the use of DSC for domestic operations.

Relief from National Guard duty when ordered to active duty

(a) Relief Required.-

(1) Except as provided in paragraph (2), each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty.

(2) An officer of the Army National Guard of the United States or the Air National Guard of the United States is not relieved from duty in the National Guard of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands or the District of Columbia, under paragraph (1) while serving on active duty if-

(A) the President authorizes such service in both duty statuses; and

(B) the Governor of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands, or the commanding general of the District of Columbia National Guard, as the case may be, consents to such service in both duty statuses.

(b) Advance Authorization and Consent. The President and the Governor of a State or Territory, or of the Commonwealth of Puerto Rico, or the commanding general of the District of Columbia National Guard, as applicable, may give the authorization or consent required by subsection (a)(2) with respect to an officer in advance for the purpose of establishing the succession of command of a unit.

(c) Return to State Status. So far as practicable, members, organizations, and units of the Army National Guard of the United States or the Air National Guard of the United States ordered to active duty shall be returned to their National Guard status upon relief from that duty

Discussion

A DSC is a military commander who may, in accordance with the law, serve in two statuses, Federal and State, simultaneously while performing the duties of those statuses separately and distinctly. A commander can be a DSC of only the state he or she is affiliated with. In other words, there cannot exist multi-state DSCs as an officer holds commission in only one State's National Guard.

Prior to any support request of a DSC, a standing memorandum of agreement (MOA) between the State and DoD is required. For the activation of a DSC, the support request process begins with the State Governor providing his or her consent to have his pre-identified trained and qualified officer appointed as DSC. The process should be coordinated in the military chain from the State

TAG to CDRUSNORTHCOM and CNGB. A recommendation for approval of the DSC will be provided to the SecDef via the CJCS and Assistant Secretary of Defense Homeland Defense & America's Security Affairs (ASD-HD/ASA). With the Governor's consent and the SecDef's authorization, the DSC is activated. Upon notification (verbal or written) that a DSC has been authorized, Joint Force Headquarters – State releases State Command Orders for the appointed DSC, if required, and N-NC/J1 provides the federal (T-10) orders.

USNORTHCOM and OSD do not require a new MOA to be accomplished if there are new signatories to the agreement (i.e., new Governor, new SecDef). The preexisting agreement remains in force until terminated or superseded (see termination language in MOA).

Key Reference(s):

- a) 32 U.S.C. §325, "Relief from National Guard Duty When Ordered to Active Duty"
- b) Joint Publication 3-28, "Defense Support to Civil Authorities," Appendix C, "Department of Defense Dual-Status Commander"
- c) National Defense Authorization Act. Pub. L. No. 112-81, 125 Stat. 1298, (2011), Sec. 515

Posse Comitatus Act

Topic: What is the Posse Comitatus Act (PCA)? How does it affect the State National Guard?

Guidance

PCA is a criminal statute codified at 18 U.S.C. §1385 that makes it illegal to “willfully uses any part of the [T-10] Army or the [T-10] Air Force as a posse comitatus or otherwise to execute the laws” unless authorized by the Constitution or Congress. It carries a fine and possible two year prison term.

The term Posse Comitatus is unique and somewhat antiquated. It stems from a common law concept that allowed for local authorities (e.g., county sheriffs) to conscript able-bodied men in that jurisdiction to keep the peace during emergencies. As currently applied, the PCA is designed to prevent the Active Duty (T-10) military from overstepping their constitutional/statutory role by performing policing functions that should be the responsibility of non-federal civilian LEAs.

The law applies without exception within the US and limits direct assistance to civilian law enforcement such as a) interdiction of a vehicle/aircraft; b) search or seizure; c) an arrest, apprehension, stop and frisk; d) engaging in interviews, interrogations, or questioning of potential witnesses or suspects; e) using force or physical violence, except in self-defense or defense of others; f) evidence collection, security functions, crowd and traffic control, and operating, manning, or staffing checkpoints; g) surveillance or pursuit of individuals, vehicles, items, or locations; h) acting as undercover agents, informants, investigators, or interrogators; and i) forensic investigations or other testing of evidence.

Other activities are measured against a three-part test which holds it to be a violation of the PCA if the activity is either, direct and active, pervades the civilian LEA activity, or subjects US citizens to military power that is regulatory, proscriptive, or compulsory in nature (*Yunis v. United States* 924 F. 2d 1086, *United States v. Rasheed* 802 F. Supp 312.). There are exceptions for military purposes, such as emergencies, WMD incidents, and civil disturbances among others. However, it has been held that these exceptions should be narrowly interpreted and cannot be used as a subterfuge for getting around the PCA.

In addition to the criminal provisions found in 18 U.S.C. §1385, 10 U.S.C. §275 requires the SecDef to prescribe regulations that prohibit any T-10 component from direct participation in LEA activities. The SecDef has done so in DoDI 3025.21, which bars DoD personnel from providing direct civilian law enforcement assistance in such areas as those listed above. The regulation also clarifies the scope of incidental benefit which DoD training events may provide to LEAs by allowing the information needs of civilian LEAs to be considered when scheduling routine training missions, but wholly prohibiting the planning or creation of missions or training for the primary purpose of aiding civilian law enforcement officials. Both the statutes and regulation bar the provision of direct assistance to LEAs by T-10 personnel.

DoDI 3025.21 does NOT apply to NG personnel in SAD or Title 32. The PCA has been held not to apply to the non-federalized National Guard. This includes duty under Title 32 and SAD. When the NG is not in federal status, such as operating under 32 U.S.C. §112 or §502, there is no violation of the PCA. *United States v. Hutchings*, 127 F3d 1255 (1997), *Gilbert v. United States*, 165 F3d 470 (1999). “Use of NG to support investigation... did not violate federal law as under law Governor may place NG personnel in state

status to support (criminal) investigations.” *United States v. Benish*, 5 F3d 20 (1993).

DODD 3025.18 restricts T-10 and NG personnel in §502(f)(2) operational status from conducting operations at polling places and activities similar to those prohibited by 18 USC §§592-594 (physical presence, interference, and intimidation).

Discussion

The prohibitions of PCA do not apply to National Guard in T-32 status or SAD. The restrictions would apply in any T-10 status and therefore must be assessed when planning for or converting NG personnel to T-10 under any mechanism. (e.g., hip pocket orders, dual status command, etc.). DoDI 3025.21 provides detailed guidance on what direct assistance provided to LEAs is permissible and prohibited.

Key Reference(s):

- a) 18 U.S.C. §1385, “Use of Army and Air Force as posse comitatus”
- b) 18 U.S.C. Ch. 29, “Elections and Political Activities”
- c) DoDI 3025.18, Defense Support of Civil Authorities (DSCA)
- d) DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies
- e) Joint Publication 3-28, “Defense Support to Civil Authorities,” Chapter III

Insurrection Act

Topic: What is the Insurrection Act and what actions may be taken by NG personnel?

Guidance

10 U.S.C. Ch. 13, The Insurrection Act, allows the President to call the militia or other states into federal service and use the armed forces to, among other things, suppress insurrections, unlawful obstructions, rebellions, domestic violence, or the unlawful combination or conspiracy thereof.

If there is an insurrection in a state, the President, at the request of the state's legislature, or Governor if the legislature cannot be convened, may call militia of other states into federal service as well as use the armed forces to suppress the insurrection.

Whenever the President considers that unlawful obstructions, combinations, or assemblages or rebellion against authority of the US makes it impracticable to enforce the laws of the US in any state or territory by judicial proceedings, the President may call into federal service such of the militia of any state and use such of the armed forces to enforce the laws or suppress the rebellion.

The President can use the militia and/or the armed forces to suppress insurrection, domestic violence, unlawful combination or conspiracy if: (a) it so hinders the execution of law of that State and of the United States and it deprives citizens of constitutional rights (e.g., due process); or (b) it opposes or obstructs the execution of laws or impedes the course of justice. In the event of the deprivation of rights, the State is deemed to have denied its citizens equal protection of laws.

In accordance with the Insurrection Act and 10 U.S.C. §12406, the President may call into federal service members and units of the National Guard of any State in such numbers as he considers necessary whenever the United States, or any of the territories, commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation; there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or the President is unable with the regular forces to execute the laws of the United States to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the Governors of the States or the Commanding General, JFHQ for the District of Columbia National Guard.

Discussion

Under the Insurrection Act, POTUS could order NG to T-10 without their consent and without the consent of their Governor. The NG would maintain its militia status but would take orders directly from the POTUS. This is a unique allowance that can be used only in the limited cases that qualify under the statute above. This authority has been rarely been used and would not be a sourcing solution for disaster relief or national special security event (NSSE) type events.

Key Reference(s):

- a) 10 U.S.C. Ch. 13, “Insurrection”
- b) NGR 500-5/ANGI 10-208, National Guard Domestic Law Enforcement Support and Mission Assurance Operations

5. Status

State Active Duty

Topic: What is State Active Duty (SAD), what are the operating parameters of SAD, and how is it funded and controlled?

Guidance

SAD is a strictly a militia status, funded and controlled entirely by the state. All limits and authorities for utilization are controlled by the states. Generally, DoD and service guidance do not apply unless there is use of federal money, such as equipment.

When National Guard units or personnel are not under federal control, they report to the Governor of their respective state, territory or the District of Columbia. Each of the 54 National Guard organizations is supervised by TAG of the state or territory who normally exercises command of its National Guard personnel for the state Governor. Under state law, the National Guard provides for the protection of life and property as well as preserving peace, order, and public safety.

The requirements, authorizations, and compensation of the National Guard operating in SAD are contained in state law. In this duty status all cost, liabilities and are born wholly by the state itself. The United States Property and Fiscal Officers (USPFOs) are NOT the resourcing solution for SAD missions.

Discussion

SAD has long been a historical operating status of the National Guard governed by state law and a versatile sourcing option. Generally, federal concerns regarding SAD operations are limited to issues of regulatory compliance (such as Intelligence Oversight), and issues of reimbursement for federal property and expenditures. Personnel in SAD are state employees and should be treated as

such. SAD is often used by the Governor as first response for disaster relief and is often reimbursed IAW the Stafford Act for those activities. For national special security event (NSSE), SAD is occasionally funded through the provision of a federal grant.

TAGs may employ their NG in SAD IAW state law, including use as law enforcement but may consider using SAD in a back-up role for LE, rather than in a "front line" role in which there might be increased chance of adverse interaction with civilians, other considerations include armed status, arming orders, and rules on the use of force. TAGs may consider using SAD to provide force protection to critical infrastructure and state facilities, thereby freeing up civilian LE to perform security functions for private enterprise commodity stocks and supplies. SAD use of federal equipment provided by DoD is subject to reimbursement through the USPFO.

Key Reference(s):

- a) NGR 500-5/ANGI 10-208, National Guard Domestic Law Enforcement Support and Mission Assurance Operations
- b) CNGBM 3000.XX, National Guard Bureau Domestic Operations (*undergoing staffing for publication as of the date of publication of this manual)

Title 32 – IDT/AT Duty

Topic: Under what authority is Inactive Duty Training/Active Training (IDT/AT) performed? Can an operational benefit be provide during IDT/AT?

Guidance

IDT and AT are performed under 32 U.S.C. §502(a) – a NG unit shall assemble for drill and instruction at least 48 times each year (IDT); and participate in training or other exercises at least 15 days each year (AT).

Per NGR 350-1, IDT and AT is mandatory duty with a **primary** purpose of training for unit readiness of the federal mission. NGR 350-1 allows for limited DSCA training. Training for these contingencies should be integrated with the training for wartime missions. Per AFI 36-2001, ANG units have a dual mission to develop, maintain, and provide the AF with operationally ready units to augment the Active AF whenever necessary, and support DoD peacetime or contingency operations and to provide units organized, equipped, and trained to function efficiently in the protection of life and property and the preservation of peace, order, and public safety under competent orders of Federal or State authorities.

IDT. There are 3 categories of IDT: Additional Training Periods (ATP), Additional Flying and Flight Training Periods (AFPT), and Readiness Management Periods (RMP). These IDTs are wholly distinct from “additional training” under 32 U.S.C. §502(f)(1). The term “additional training” for 502(a) training should not be used interchangeable with 502(f) training.

ADT. Per DoDI 1215.06, the primary purpose of ADT is to provide individual or unit readiness training. Included in the ADT

category is AT. Requisite training is conducted through an annually approved and published training plan. Planning for AT, to include all administrative and logistical support, is the responsibility of TAGs. Responsible JFHQ staff review and validate each unit's requested AT site, dates and proposed training mission prior to submitting the State AT plan to NGB. All changes to the approved AT plan are submitted to NGB. However, AT will **not** be performed in response to an emergency by order of the Governor in support of civil authorities, including those emergencies when a presidentially declared disaster qualifies a State for reimbursement of associated preparation or recovery costs through a lead federal agency. By exception, AT may be used in response to a State or federal emergency that occurs during a pre-planned annual training event when, at the discretion of TAG, the work performed satisfies or complements the unit's wartime mission or annual training objectives.

Operational Support. DoDI 1215.06, support to mission requirements (operational support) may occur incidental to performing IDT and ADT. The Comptroller General has previously determined that disaster relief duty performed by National Guard units ordered by the state...to aid in the disaster relief necessitated by the extensive flooding in the state may be considered as the annual summer training of the units within the purview of 32 U.S.C. §502 and federal funds [may be] used for pay and allowance purposes. Ordinarily §502 training is conducted IAW established training policies, standards, and programs approved by DA and DAF in coordination with state NG organizations. (52 COMP GEN 35, JUL 17, 1972). In other words, expenditure of §502 funds must still be consistent with established METL training but can provide an incidental operational benefit, such as disaster relief.

Discussion

DoDI 1215.06, Encl 3, Para. 2.a.(1) states “Units or individuals that participate in IDT may provide support to mission requirements (i.e., OS) as a result of the training.” NG assets may be made available under current training plans if applicable under 32 U.S.C. §502(a) or (f)(1). Unlike AT, there is no prohibition in DoDI 1215.06 to rescheduling IDT but it still must be training—OS is incidental. DoDI 1215.06 prohibits rescheduling AT for the purpose of domestic incident response.

The purpose of IDT and AT is to train units to the standards of their assigned METL task, leading to validation and certification at the culmination point. DSCA training is typically a valid component of such training. Accordingly, if this training can be conducted as part of a real-world DSCA operation as an “incidental benefit,” provided that it is in conjunction with properly-scheduled TAG-approved training. However, if unit schedules/locations/tasks/costs of the training are drastically changed, it is difficult to argue that the operational benefit was truly “incidental” to the training. Whether or not the situation fits in with the concept of an “incidental benefit,” is a fact-driven inquiry.

AT support to state emergency response may occur in very rare circumstances. For example, a mobile hospital unit is required to deploy for training and they deploy to support a state emergency. Since their training consequently supports a real mission and they had to deploy for training anyway, this might be authorized use of AT. Another example of potentially authorized use of personnel in AT status to support a state mission is state directed immediate response authority pursuant to DoDD 3025.18 paragraph 4. j. The authority of State officials is recognized to direct a State immediate response using NG personnel under State command and control already in Title 32 (IDT,AT or FTNGD), but NG personnel will

not be placed in or extended in Title 32 to conduct State immediate response activities. Any support using federal dollars is to be reimbursed to the federal government.

The use of federal dollars to support a state emergency response is very limited. State authorities are never authorized to order personnel into or extend orders pursuant to Title 32 authority (IDT, AT, FTNGD) to support a state mission. If they are already on duty they may use for immediate emergency response. Incidental support provided by scheduled training is authorized. Ordering NG personnel to AT to support a state mission is never authorized and is a purpose violation.

NG members should be in operational duty status if (1) the mission involves reasonable likelihood of use of force against civilians, or (2) the security risk is so high that the SMs are armed for force protection.

Key Reference(s):

- a) 32 U.S.C. §502, Required Drills and Field Exercises
- b) 52 Comp Gen 35 B-176491, JUL 17, 1972
- c) DoDI 1215.06, Uniform Reserve, Training and Retirement Categories for the Reserve Components
- d) AFI 36-2001, Personnel Status for National Guard Members During Rescue Missions
- e) NGR 350-1, Army National Guard Training
- f) CNGBM 3000.XX, National Guard Bureau Domestic Operations (*undergoing staffing for publication as of the date of publication of this manual)

Title 32 – 502(f) (FTNGD-OS 502(f) Status)

Topic: What are the duties and limitations of FTNGD-OS personnel during DSCA missions?

Guidance

The purpose of FTNGD-OS is to provide the necessary skilled manpower to support existing or emerging requirements under 32 U.S.C. §502(f). Training may occur incidental to performing FTNGD-OS.

Per 32 U.S.C. §502(f), under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may without his consent, but with the pay and allowances provided by law; or with his consent, either with or without pay and allowances; be ordered to *perform training or other duty*.... The training or duty ordered to be performed may include the following support of operations or missions undertaken by the member's unit at the request of the President or SecDef.

Per CNGBI 1302.01, members performing duty under the authority of 32 U.S.C. §502(f) will not perform duties that are not specific requirements of the mission for which the members were ordered to duty. If circumstances require a change of duty, Commanders must amend/curtail the current order. Commanders may order members performing duty under 32 U.S.C. §502(f) to respond to an emergency in accordance with the Immediate Response Authority and State law. §502(f) orders will not be issued for extended periods if it is known that the member will need to have their orders curtailed during the tour....Orders will not be broken or divided solely to allow the continued payment of temporary duty status (TDY) entitlements, not directly required by the mission.

Discussion

NG personnel in 32 U.S.C. §502(f) Operational Support status may be used for DSCA if the Governor makes a formal request for DSCA authority IAW DoDI 3025.22. If approved by SecDef, support could occur under 32 U.S.C. §502(f)(2). The utilization of FTNGD-OS personnel is largely limited to the underlying purpose and funding for which they were brought onto duty. In many cases, each individual OS Soldier or Airman must be reviewed based on their own orders, mission and funding source. Commanders must be careful in using federally funded OS for solely State purposes.

Key Reference(s):

- a) 32 U.S.C. §502, Required Drills and Field Exercises
- b) DoDI 1215.06, Uniform Reserve, Training and Retirement Categories for the Reserve Components
- c) DoDI 3025.22, The Use of the National Guard for Defense Support of Civil Authorities
- d) CNGBI 1302.01, Guidance for Members Performing Duty Under the Authority of 32 U.S.C. §502(f)

Title 10

Topic: What are the duties and limitations of Reserve Component personnel during DSCA/DOMOPS?

Guidance

Reserve Component includes the Reserve and the NG in Title 10 called as a reserve force to active duty under Title 10 U.S.C. Chapter 1209. When called to active duty, members of the RC fall under the command and control of the T-10 active component Commander to which they are assigned. Outside of the Title 10 warfighting mission, Reserve personnel, including the National Guard, may be called to active duty under several authorities: full mobilization, partial mobilization, Presidential Reserve Call-Up, Invasions and Rebellions, Insurrection Act, Reservists Recalled for Domestic Events, and Active Duty for Preplanned Missions in Support of the Combatant Commands.

RC personnel rarely support domestic operations in Title 10 because of limitations imposed by the Posse Comitatus Act. Generally, the Posse Comitatus Act prohibits federal military personnel from providing direct law enforcement support such as search, seizure, arrest, or other similar activity unless otherwise authorized by law, but permits indirect military assistance to law enforcement such as training or maintaining equipment.

Discussion

T-10 Reserve Components can respond to IRA requests in a training status but cannot intentionally be "placed in or extend" anyone on orders for the specific purpose of IRA IAW DoDI 1215.06. However, drill dates can be rescheduled around for training purposes.

The DSCA response under 10 U.S.C. §12304a is for more enduring situations other than IRA. T-10 Reserve Components can respond to requests for assistance from a lead federal agency, such as FEMA under the Stafford Act. Once a Stafford Act declaration request has been made, T-10 Reserve Components can be recalled for domestic events and become a sourcing solution pursuant to 10 U.S.C. §12304a. When a Governor requests Federal assistance in responding to a major disaster or emergency the SecDef may, without the consent of the member affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request.

Key Reference(s):

- a) For Full Mobilization: 10 U.S.C. §12301(a) which allows for full mobilization in time of war or national emergency declared by Congress or when otherwise authorized by law.
- b) For Partial Mobilization: 10 U.S.C. §12302(a) which allows for partial mobilization with a Presidential declaration of national emergency and invocation of the partial mobilization making up to one million members of the Ready Reserve available for up to 24 consecutive months.
- c) For Presidential Reserve Call Up: 10 U.S.C. §12304 which allows for presidential reserve call-up. This is the involuntary activation of up to 200,000 members for up to 365 days by the President. Such service must be for other than training and may not exceed 365 days. It authorizes ordering members of the RC to active duty without their consent, without declaration of war or national emergency, for operations other than domestic disasters except those involving a use or threatened use

of a WMD or a terrorist attack or threatened terrorist attack in the US that results, or could result, in significant loss of life or property.

- d) Invasions and Rebellions: 10 U.S.C. §12406 which allows the President to call the National Guard into federal service if the US or any US state or territory is invaded, or when: invasion is threatened by a foreign nation, there is a rebellion or danger of rebellion against the US Government, or the President is unable to execute US laws without active forces.
- e) Insurrection Act: 10 U.S.C. Chapter 13 which allows the President to call the militia or other states into federal service and use the armed forces to, among other things, suppress insurrections, unlawful obstructions, rebellions, domestic violence, or the unlawful combination or conspiracy thereof.
- f) Reservists Recalled for Domestic Events: 10 U.S.C. §12304a which allows SecDef to order any member of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to involuntary active duty up to 120 days for domestic events when a Governor requests federal assistance in responding to a major disaster or emergency.
- g) Active Duty for Preplanned Missions in Support of the Combatant Commands: 10 U.S.C. §12304b which allows service secretaries to order members of the Selected Reserve (including National Guard) without their consent onto active duty for no more than 365 days to augment the active forces for a preplanned mission in support of a combatant command.

Benefits

Benefits Eligibility for 32 USC 502(f) Missions

Benefit	502(f)(1)(A) Involuntary	502(f)(1)(B) Voluntary	Involuntary 502(f) ISO Presidential Declaration of National Emergency (DNE)	Voluntary 502(f) ISO a DNE	12304b (Pre-Planned/ Preprogrammed CCDR support) Involuntary
Pre-Mobilization Healthcare (HC) ¹ 10 USC 1074(d)	No	No	No	No	Yes
TAMP Transitional HC ¹ 10 USC 1145	No	No	No	No	Yes
Full BAH rate for less than 30 day orders ² 37 USC 403(b)	No	No	No	No	No
Reduced Age for Retirement ^{3,4} 10 USC 12731	No	No	Yes	Yes	No ⁵
Post 9/11 GI Bill ⁴ 38 USC 3301	No	No	Yes	Yes	Yes
Post 9/11 Duration Protection (if study interrupted) ⁴ 38 USC 3312	No ⁷	No ⁷	Yes	Yes	Yes
USERRA (service does not count toward 5- year limit) ⁴ 38 USC 4312(c)(4)(F)	No	No	Yes	Yes	Yes
SCRA Protections ⁴ 50 USC App. §§501-597b (50 USC 3911)	No	No	Yes	Yes	Yes
Reserve Income Replacement ⁵ 37 USC 910	Yes	No	Yes	No	Yes
Voluntary Sep Pay Repayment Exception ¹¹ 10 USC 1175a	Yes	Yes ¹¹	Yes	Yes ¹¹	Yes
Education Assistance Protections ¹⁰ 10 USC 16131	No	No	No	No	Yes
Training & Rehabilitation benefit protections ¹² 38 USC 3103(f)	No	No	No	No	Yes
Federal Civ Differential Pay ³ 5 USC 5538	No	No	No	No	No ⁸
High Deployment Allowance ⁶ 37 USC 436	No	No	No	No	No ⁸

502(f) orders over 30 days receive the same basic pay, special pays, BAH, healthcare coverage (for self and dependents) and TDY benefits, as T10 Active Duty (see 10 USC 12602). This chart only includes certain benefits that either 502(f) service does not qualify for at all, or qualification would require additional analysis or determinations due to more specific statutory language (for example, mission is in support of a Presidential DNE; involuntary orders; designated as a contingency operation, etc.; See footnotes on next page for conditions). 12304b eligibility is provided for comparison purposes.

6. NGB Role and Capability

CNGB DSCA Responsibilities

Topic: What are the duties and responsibilities of the CNGB regarding DSCA?

Guidance

Per 10 U.S.C. §10502 (c), the Chief of the National Guard Bureau (CNGB) is a principal advisor to SecDef, through the CJCS, on matters involving non-federalized National Guard personnel and on other matters as determined by the SecDef; and the principal advisor to the SecAR and the Chief of Staff of the Army, and to the SecAF and the Chief of Staff of the Air Force, on matters relating to the NG, ARNGUS, and ANGUS.

Per DoDD 5105.77 (NGB Charter) CNGB is a principal advisor to the SecDef through the CJCS on matters involving non-federalized National Guard ...CNGB, shall serve as the principal advisor to the SecAR, the Chief of Staff of the Army, SecAF, and the Chief of Staff of the Air Force, on matters relating to the National Guard. CNGB serves as an advisor to the Commanders of the COCOMS on National Guard matters pertaining to their combatant command missions...In coordination with the supported Commanders of the COCOMS, supporting the development of operational concepts, capabilities, and plans for domestic operations that integrate considerations of the State use of National Guard personnel...Participating in Joint Staff capability-based planning and assessments...and DoD planning, programming, budgeting, and execution process...pertaining to National Guard capabilities, including...defense support of civil authorities.

NGB consists of the Office of the CNGB, NG Joint Staff, Office of the DARNG, and Office of the DANG. NGB is the channel of communications on all matters pertaining to the NG between: (1) DA and DAF with the States; and (2) the SecDef, CJCS, DoD

components other than DA and DAF with the States. The DARNG and DANG assist CNGB in carrying out the functions of NGB (10 U.S.C. §10506).

CNGB has the following additional responsibilities:

- Acts as the **channel of communication** to TAGs.
- Direct the National Guard on matters to include force structure, training, and appropriations.
- Supports, as required, the reporting requirements of the SecDef on National Guard readiness for National Guard Domestic Operations.
- Supports the SecDef in his annual reporting requirement to the Congress on National Guard and Reserve Component Equipment.
- Issues and maintains the additional NG regulations that establish the standards and responsibilities for the National Guard capabilities for domestic operations.
- Develops, maintains, and promulgates NGDO readiness and reporting systems and processes.

Discussion

By statute and policy, CNGB provides advice, communications, and oversight regarding DSCA. Recent operations have seen the CNGB in direct support to SecDef regarding non-federalized National Guard assets. Though statutorily enabled and policy driven, CNGB is not a commander of NG personnel. Additionally, CNGB must ensure adherence to applicable statutes and regulations as mandated.

Key Reference(s):

- a) 10 U.S.C. §§10501-10508, “National Guard Bureau”
- b) DoDD 5105.77, National Guard Bureau
- c) CNGBM 3000.XX, National Guard Bureau Domestic Operations (*undergoing staffing for publication as of the date of publication of this manual)

National Guard Coordination Center (NGCC) and Adaptive Battle Staff (ABS)

Topic: What are the responsibilities of the NGCC and the ABS?

Guidance

The National Guard Coordination Center is a 24/7 communication node that serves as the NGB's primary conduit of information between the JFHQ-State and Federal levels for National Guard matters. It uses an Adaptive Battle Staff (ABS) construct to increase manning structure during increases in operational levels.

The ABS consists of subject-matter experts from across NGB staffs who augment the NGCC's structure and manning as the center's operational level increases. The augmented staff in the NGCC ensures a single reporting system and allows for more effective and efficient sourcing of requirements during increased operational levels.

Discussion

The NGCC functions as primary communications node and focal point for matters involving the National Guard. At the national level, it interface between the NGB and the JFHQ-State's joint operations center (JOC). The NGCC is the National Guard's primary national hub for continuously monitoring situational awareness and is the primary coordination node to optimize National Guard support for domestic operations. NGCC provides NGB leadership with information necessary to make critical management decisions related to National Guard forces and informs DoD and other federal agencies of developing crises and coordinates any National Guard required response. Joint Information Exchange Environment (JIEE) is the official means of

tasking and tracking used by the NGB, ABS, ARNG and ANG Directorates

The NGCC activates the ABS as directed. The ABS is designed to enhance staff collaboration and synchronization efforts during domestic crisis. The ABS builds Shared Situational Awareness (SSA) in support of OSD, the Joint Chiefs of Staff (JCS), Combatant Commands and JFHQs during domestic incidents and planned events to improve coordination and SSA in support of CNGB's advisory role as a member of the JCS and as a channel of communication between TAGs and national mission partners.

NGB ABS is similar to USNORTHCOM's battle staff and includes the CEG, CUOPS (0-24 hours by the J-33), FUOPS (24-96 hours by the J-35), FPC (beyond 96 hours by the J-5), and supporting nodes. Activation levels mirror DHS and FEMA methodology for increasing and decreasing staffing requirements. The ABS operational level and staffing are tailored and scaled depending upon the anticipated magnitude and scope of the incident:

Level 3 - Steady State / Routine Operations (Normal duty hours)

Level 2 - Elevated State / Durational (Normal duty hours to extended)

Level 1 - Crisis State / Full Adaptive Battle Staff (24/7)

Key Reference(s):

- a) ABS SOP
- b) CNGBI 3000.01, Joint Enabling Team

Joint Enabling Teams (JET)

Topic: What is the NGB JET?

Guidance

NGB JET is an on-location coordination cell comprised of NG Joint Staff (J-Staff), ARNG, and ANG SMEs that can augment, support, and enhance NG JFHQs-State staffs as needed.

Per DoDD 5105.77 and DoDD 3025.18, CNGB assists SecDef in facilitating and coordinating with COCOM Commanders of USNORTHCOM and USPACOM, other Federal agencies, and TAGs in the use of NG personnel and resources for missions conducted under State control. The NGB coordinates with USNORTHCOM, USPACOM, and the NG JFHQs-State to facilitate the integration and synchronization of Homeland Defense (HD) and Defense Support of Civil Authorities (DSCA)/NG Civil Support and associated planning.

Part of the All Hazards Support Plan includes NGB JETs who can deploy to provide on-site support to affected Requesting States and territories during an event.

Discussion

The NGB JET provides liaison support to requesting States during domestic operations, which includes natural or man-made incidents, National Special Security Events (NSSE), and major exercises. JETs deploy to affected States to satisfy CNGB's responsibilities.

Upon request, the NGB JET deploys on-location to coordinate, augment, support, and enhance the NG JFHQs-State staffs as needed. The JET establishes a link between the supported State(s) and the NGCC, allowing members of a State's NG JOC to remain

focused on their primary mission. The NGCC relays RFIs, RFAs, and reports from the JETs to the appropriate NGB action officers and senior leadership.

Augmentees to NGB JET teams can be brought on under ADOS-RC (10 U.S.C. §12301(d)) orders. The NGB JET operates under NGB authorities and has Title 10 duties like other NGB personnel. JETs act, in part, as eyes and ears on the ground for CNGB, and are designed to support NGB functions/duties (including those listed in 10 U.S.C. §10503). They are distinguishable from the State personnel flowing in under EMAC to perform the States' direct disaster response missions. If NGB requests augmentees from the States for the NGB JET mission, those augmentees should be brought on Title 10 orders to perform the same mission as the rest of the NGB JET team.

Per, CNGB's 2018 "Guidance Regarding Authority to Conduct Training During National Guard Civil Support (NGCS) Operations for Domestic Disaster Response." States providing staff augmentation to NGB's enhanced Joint Enabling Teams (eJETs) will use Title 10 duty status and funding to ensure appropriate alignment of their activities to NGB's statutory and administrative responsibilities. Augmenting states should submit requests for funding code and duty status to NGB through the Joint Information Exchange Environment (JIEE) system.

Per CNGBI 1301.01A. It is NGB policy that members assigned to the NGB execute Federal responsibilities and serve within a Federal chain of command. All military members assigned to perform duty on behalf of the NGB will be ordered to active duty on a voluntary basis under the programmatic authorities of DoDD 5105.77 or pursuant to ADOS. In each of these cases, the order to active duty is under 10 U.S.C. §§12301(d), 12310, 12402.

This policy applies to permanent change of station or temporary duty status assignments to the NGB. Adherence to this policy will ensure that members are serving in the appropriate command and control status and eligible to receive the benefits and protections dependent on the performance of active duty while utilizing the correct appropriation authority.

Performing duty at the NGB in a Title 32 status is authorized only for training to perform a temporary advisory function, or to represent the member's State in support of a special project of limited duration. These duties will never include management supervision, command, or direction of Title 10 military personnel, Title 5 civilian employees, or contractor personnel performing the work of the NGB.

The determination of whether an exception to the Title 10 would apply should be made based on individual facts in consultation with the G/A/J/ 1 and 3, along with TAG.

Key Reference(s):

- a) DoDD 5105.77, National Guard Bureau
- b) NGB All Hazards Support Plan (AHSP)
- c) CNGBI 1301.01A, Military Duty Status for National Guard Members Assigned to The National Guard Bureau
- d) CNGBI 3000.01, Joint Enabling Team

CBRN Response Enterprise (CRE)

Topic: What are the duties and responsibilities of the CRE?

Guidance

The CRE cover the elements of State and Federal response to a chemical, biological, radiological, or nuclear incidents.

Elements assigned to the State NG are:

Weapons of Mass Destruction-Civil Support Teams (WMD-CSTs);

Chemical, Biological, Radiological, Nuclear and Explosives (CBRNE) Enhanced Response Force Package (CERFPs); and

Homeland Response Forces (HRFs)

Elements allocated to USNORTHCOM are:

JTF-CS (Defense CBRN Response Force or DCRF); and

Command and Control CBRN Response Element (C2CREs)

Discussion

The NG CRE elements identify and mitigate CBRN agents and toxins. Specially trained and certified NG personnel conduct initial assessments of CBRN events, and provide consequence management support as required by civil authorities.

WMD-CST support civil authorities at a domestic incident site during specified events, which include: the use or threatened use of WMD, terrorist attacks or threatened terrorist attacks, an intentional or unintentional release of nuclear, biological, radiological, or toxic or poisonous chemicals, and natural or man-made disasters in the U.S. that result, or could result, in the catastrophic loss of life or property by identifying hazards, assessing current and projected consequences, advising on

response measures, and assisting with appropriate requests for additional support.

HRFs are comprised of a mix of FTNGD and SAD personnel. Use of T-32 HRF personnel is authorized pursuant to the following limitations: 1) T-32 HRF may be used in accordance with current orders. The purpose of the FTNGD personnel is to maintain HRF readiness in order for the HRF to meet its variable scaled timelines; 2) T-32 HRF may be used to support IRA activities; and 3) Non AGR T-32 HRF may be placed on SAD orders to support State Mission. HRF personnel in 32 U.S.C. 502(f) FTNGD-OS may NOT deploy out-of-state for non-primary HRF purposes. They must break orders and go in SAD or other 502(f) orders IAW CNGBI 1302.01. This does not apply to: T-32 CD, T-32 AGR, T-32 WMD-CST.

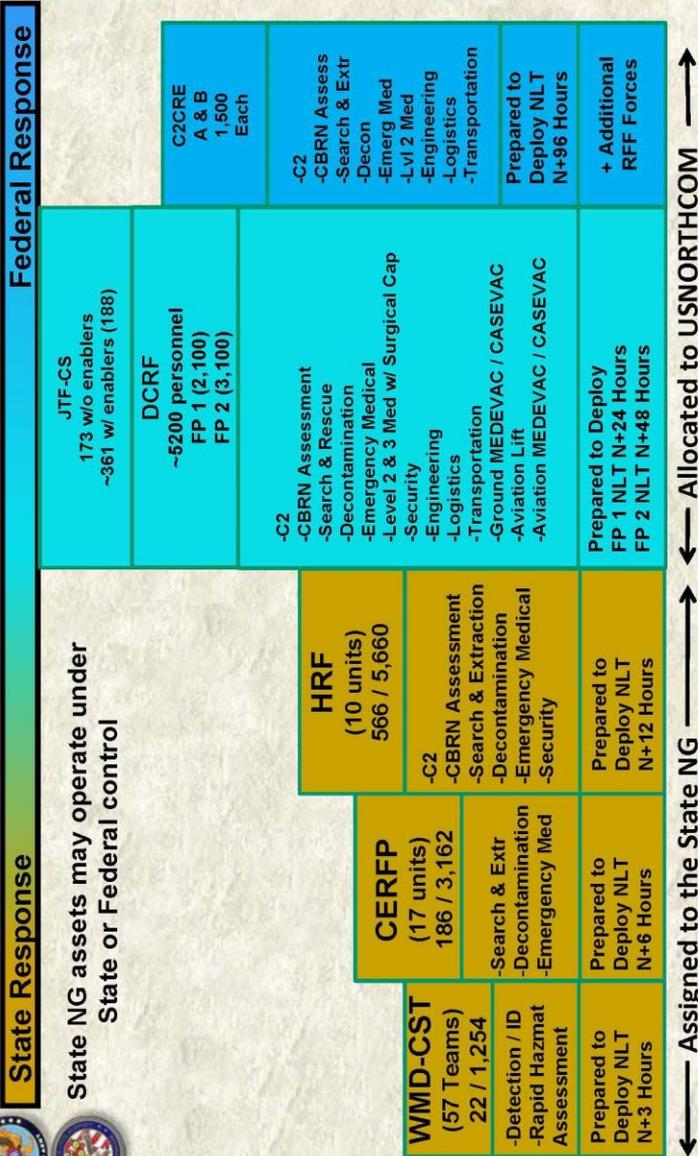
Key Reference(s):

- a) CNGBI 3501.00 (WMD-CST)
- b) CNGBI 3510.01, NG HRF and Chemical, Biological, Radiological, Nuclear, and High-Yield Explosives Enhanced Response Force Package Management
- c) CNGBM 3510.01, NG HRF and Chemical, Biological, Radiological, Nuclear, and High-Yield Explosives Enhanced Response Force Package Procedures
- d) CNGBN 3501, NG WMD-CST Management Guidance
- e) NGB All Hazards Support Plan (AHSP)



JOINT TASK FORCE CIVIL SUPPORT

CBRN Response Enterprise Elements



← Assigned to the State NG → ← Allocated to USNORTHCOM →

UNCLASSIFIED

Weapons of Mass Destruction-Civil Support Teams

Topic: What are the duties and limitations of WMD-CST personnel? For what purpose may WMD-CSTs be utilized?

Guidance

The duties of the WMD-CST personnel governed by 10 U.S.C. §12310(c). No other duty is authorized for WMD-CSTs. WMD-CST duty is restricted to the United States, which in this statute includes, Guam, Puerto Rico and the U.S. Virgin Islands.

Per 10 U.S.C. §12310(c) and CNGBI 3501.00, a Reserve who is a member of the National Guard serving on full-time National Guard duty under 32 U.S.C. §502(f) may while assigned to a reserve component weapons of mass destruction civil support team perform duties in support of emergency preparedness programs to prepare for or to respond to any emergency involving any of the following: The use or threatened use of a weapon of mass destruction in the United States, a terrorist attack or threatened terrorist attack in the United States that results, or could result, in catastrophic loss of life or property, the intentional or unintentional release of nuclear, biological, radiological, or toxic or poisonous chemical materials in the United States that results, or could result, in catastrophic loss of life or property, and a natural or manmade disaster in the United States that results in, or could result in, catastrophic loss of life or property.

Discussion

WMD-CST personnel are a unique kind of AGR performing duties outside those found in 32 U.S.C. §328. WMD-CST personnel while in that status may only perform duties within the US and should only be utilized for the purposes and missions identified in statute and regulation, absent very limited immediate response.

Commanders should be well briefed by their CST personnel in order to fully understand the capabilities and limitations of this crucial asset. In the event of the limited need for IRA, WMD-CSTs should be used as a last resort and then relieved as soon as possible. Certain CST expenditures are made with specific MDEPs limiting the use of those resources to the purpose clarified within.

Key Reference(s):

- a) 10 U.S.C. §12310(c), “Operations Relating to Defense Against Weapons of Mass Destruction and Terrorist Attacks”
- b) CNGBI 3501.00, Weapons of Mass Destruction Civil Support Team Management
- c) CNGBN 3501, National Guard Weapons of Mass Destruction-Civil Support Team Management Guidance

NG Homeland Defense and Homeland Security Activities

Topic: What are allowable NG Homeland Defense and Security activities that may be funded with federal funds under Title 32?

Guidance

Per 32 U.S.C. §902, SecDef may provide funds to a Governor to employ NG units or members to conduct homeland defense activities that the Secretary, determines to be necessary and appropriate for participation by the National Guard units or members, as the case may be.

Per 32 U.S.C. §901, the term “homeland defense activity” means an activity undertaken for the military protection of the territory or domestic population of the US, or of infrastructure or other assets of the US determined by SecDef as being critical to national security, from a threat or aggression against the US.

Per 32 U.S.C. §904, all duty performed under this chapter shall be considered to be full-time NG duty under 32 U.S.C. §502(f).

Per 32 U.S.C. §906, a Governor may request funding assistance for the homeland defense activities of the NG of that State from SecDef. Any such request shall include: the specific intended homeland defense activities, an explanation of why participation of NG in the homeland defense activities is necessary and appropriate, and a certification that homeland defense activities are to be conducted at a time when the personnel involved are not in Federal service.

NG Homeland Defense operations are conducted in the air, land, maritime, and space domains and in the information environment. DoD is the primary federal agency for Homeland Defense, supported by other agencies. On order of the President or SecDef,

NG units may be called to defend the Homeland against external threats. Certain NG units have been assigned roles in support of Homeland Defense missions. The general focus of NG Homeland Defense missions is on deterring and detecting external threats to the Homeland. Homeland Defense missions are typically conducted in Title 10. Training and preparations for Homeland Defense missions may be conducted in Title 32.

Discussion

In certain cases previous, domestic operations have been requested to be performed under the authority of Chapter 9 of Title 32 but such activities are very limited. HD activities consist only of “military protection” of “territory, populace or infrastructure under an “external threat” determined by SecDef himself to be “critical” to the entire nation. Chapter 9 activities should not be viewed as a NG sourcing solution. Any use or request for use of this authority should be well staffed with NGB before any formal action is taken.

Key Reference(s):

- a) 32 U.S.C. Chapter 9, “Homeland Defense Activities”
- b) DoDD 3160.01, Homeland Defense Activities
Conducted by The National Guard
- c) CNGBI 3000.04, National Guard Bureau Domestic
Operations

Continuity of Operations (COOP)

Topic: What is the NG's COOP responsibilities?

Guidance

Continuity of Operations is an effort within individual organizations, such as the National Guard Bureau, to ensure that Component mission-essential functions continue to be performed during a wide range of emergencies, including localized acts of nature, accidents, and technological or attack-related emergencies.

A Continuity of Operations Event triggers the National Guard Bureau to activate its Continuity of Operations Plan and either relocate operations to an alternate facility to assure continuance of its essential functions or to shelter in place. An emergency so severe that the National Guard Bureau facilities are rendered unusable or inaccessible for a period long enough to significantly impact normal operations may require Continuity of Operations Plan implementation.

Discussion

It is DoD policy to maintain comprehensive and effective continuity capabilities within the DoD to ensure the uninterrupted execution of mission-essential functions and support continuity of operations, continuity of government, and enduring constitutional government.

If an event is triggered, the Emergency Response Group, which consists of selected individuals of an organization's staff, is prepared to move to designated relocation facilities and perform mission-essential functions in response to emergencies or contingencies that threaten the organization's operations. The designated relocation facilities are classified.

Key Reference(s):

- a) DoDD 3020.26, Department of Defense Continuity Programs
- b) CNGBI 3302.01, Continuity of Operations (COOP)

7. The Adjutants General DSCA Responsibilities

The Adjutants General DSCA Responsibilities

Topic: What are the DSCA duties and responsibilities for TAGs?

Guidance

In addition to many overall duties, TAGs have several specific DSCA duties:

- Generally exercises the command authority of the Governor over state National Guard units and personnel within their jurisdiction, in accordance with applicable state laws.
- Typically serves, in accordance with state law, as the principal advisor to the Governor on military matters.
- Supports the CNGB in his/her advisory role to senior leaders of the Department of Defense and other federal agencies.
- Supports the SecDef and the CNGB in their requirement to prepare an annual plan for the military response to natural disasters, acts of terrorism, and other man-made disasters by gathering and submitting required information from their respective state or territory.
- Maintains the training and readiness of their assigned personnel to conduct all assigned state and federal missions.
- Complies with the reporting requirements needed for DSCA.
- Prepares and submits plans for National Guard domestic operations.
- Supports the CNGB in his/her role as the channel of communications between the several states and the SecDef on matters relating to the National Guard.
- Operates and maintains a Joint Operations Center (JOC) with the capability to receive and respond to classified messages.

Discussion

TAGs are the commanders, and in almost all cases, the ultimate authority for non-federalized NG personnel. They are vital in the proper performance of and complete accounting for DSCA. When

operating in SAD they answer almost exclusively to the Governors, subject to property accountability, reimbursement standards and applicable state and federal law. The TAGs are key to ensuring the situational awareness needed by the NGCC to enable the CNGB to perform his duties as advisor on the non-federalized NG. Additionally, TAGs must ensure adherence to applicable statutes and regulations as mandated. In certain states, TAG is not only the Chief Military Officer, but may serve as a Senior Executive in Emergency Services as well. It is imperative that TAGs authorized these types of responsibilities perform each duty singularly making sure to adhere to applicable standards when performing their NG related functions.

Key Reference(s):

- a) CNGBI 3000.04, National Guard Bureau Domestic Operations
- b) CNGBM 3000.XX, National Guard Bureau Domestic Operations (*undergoing staffing for publication as of the date of publication of this manual)

8. Rules for the Use of Force (RUF)

NG Domestic Operations Rules for Use of Force (RUF)

Topic: How are the RUF applied in a DSCA/DOMOPS environment?

Guidance

NGR 500-5, Section 4-4. The CJCS Rules of Engagement/Rules for the Use of Force generally do not apply to NG personnel conducting domestic support missions as those missions are not conducted in Title 10. When in Title 32 or SAD, NG personnel follow State RUF.

Use of force by members of the NG in SAD or under Title 32 are governed by state law, usually criminal law. The State J3 develops the RUF in coordination with the SJA. RUF varies from state-to-state because each state has a unique constitution, laws, and legal opinions on the use of force and how it is to be used. Most Title 10 RUF are based on DoD and CJCS promulgations which do not apply to NG personnel in a state status during a NG domestic support operation.

States that provide NG personnel in SAD or Title 32 to another state normally will adopt the RUF of the supported state while deployed to the supported state. Before deployment, States involved will determine which RUF the supporting units and personnel will follow.

Consider the following when drafting state RUF for NG law enforcement, law enforcement support, or security missions conducted in SAD or Title 32: (1) The right of self-defense, (2) The use of force must be restricted to the minimum degree consistent with mission requirements. The use of deadly force can be justified only by extreme necessity, (3) The proper level of force, (4) Force options such as the use of Personnel Protective

Equipment and non-lethal weapons, (5) Arming orders, (6) Actions on apprehension and detention, (7) The force continuum, and (7) Pre-commitment briefing topics and training. This list is advisory, not directive or regulatory by National Guard Regulation.

Failure to provide RUF or train National Guard members in the RUF may result in civil or criminal personal liability for commanders at all echelons resulting from subordinates' unlawful acts, negligence or failure to comply with statutory guidance. Failure to comply with the RUF may result in criminal prosecution.

Discussion

States should maintain a steady state RUF to cover emergency events. Each state's Domestic Operations Plan should have a RUF annex or incorporate the steady state RUF as applicable. Additionally consult the state SJA for the RUF applicable to each specific National Guard domestic operations mission. Each specific steady state mission, (e.g., counter drug, CST, etc.) has specific applicable RUF. RUF should be designed in concert with the Operations Section. All state RUF should also be coordinated with applicable state civilian attorneys.

Key Reference(s):

- a) NGR 500-5/ANGI 10-802, National Guard Domestic Law Enforcement Support and Mission Assurance Operations

Non-Lethal Weapon Sets

Topic: What are the standards for the use of Non-Lethal Weapon Sets?

Guidance

Per NGR 500-5, the National Guard has established nonlethal capabilities to assist civilian authorities. Each state's TAG, in conjunction with the state's Governor and Attorney General, must ultimately determine if state National Guard personnel will utilize nonlethal capabilities during domestic operations. TAGs are responsible for authorizing nonlethal capabilities training in accordance with applicable state laws. Training shall be conducted only on those nonlethal capabilities that are considered legal under applicable state laws.

Proper storage and security of all nonlethal capability equipment is a priority. Nonlethal capabilities and weapons can cause serious injury or death if they are not employed properly. Therefore, it is imperative that all training be conducted by personnel who are properly trained to provide nonlethal instruction. As with any weapons qualification, training is critical to the proper employment and use of nonlethal weapons and capabilities. Unit training should follow the following sequence: instructors complete the Interservice Nonlethal Individual Weapons Instructors Course (INIWIC), followed by unit leaders, unit members, and then unit collective training. Subsequent annual refresher training is required.

Each of the several states should develop nonlethal capability training plans. Training requirements for the nonlethal capability sets of equipment are outlined in FM 3-22.40. Additional training support information may be found in TC 3-19.5. INIWIC is the only formal DoD nonlethal weapons "train-the-trainer" course.

States will ensure that all nonlethal training is conducted by INIWIC certified nonlethal instructors.

The NGB-PM/J-34 Nonlethal Capabilities Branch serves as the central focal point for interagency coordination for the Army National Guard and Air National Guard with other DoD entities for all non-lethal issues that pertain to the National Guard. It has primary responsibility in coordinating, synchronizing, and identifying nonlethal capabilities for the National Guard. Consequence Management Support Center is the logistical hub for the receipt, storage and distribution of nonlethal equipment.

Discussion

Nonlethal capabilities are employed with the intent to compel or deter adversaries while minimizing fatalities and damage to equipment or facilities. They do however, present risk of serious injury and death and must be utilized with great restraint.

Nonlethal capabilities provide an escalation of force option between the mere presence of National Guard personnel at an incident and the use of lethal force. States should review their RUF to ensure that they address inclusion of nonlethal capabilities. RUF development should be a joint effort by the state's SJA and state's attorney general, with concurrence from the state Governor and Adjutant General.

Key Reference(s):

- a) NGR 500-5/ANGI 10-802, National Guard Domestic Law Enforcement Support and Mission Assurance Operations

9. Contracts and Fiscal Law

USPFOs DSCA Responsibilities

Topic: What are the USPFO's duties and responsibilities for regarding DSCA?

Guidance

The National Guard's "United States Property and Fiscal Officers" (USPFO) play an important (and unique) role within the National Guard. They are the T-10 officers in each state (typically O-6) who are responsible/liable for all federal property and funding in the possession of their state's National Guard. The position is established in statute at 32 U.S.C. §708 with DoD-level regulatory implementation at DoDI 1200.18. The USPFOs are part of the NGB staff and are rated by the Chief of the National Guard Bureau. The USPFOs lead an office that is comprised of mostly T-32 personnel who are charged with ensuring that all federal funds and equipment are utilized in accordance with all laws and regulations. This office includes federally warranted contracting officers, grants officer representatives, logisticians, budget analysts, property book officers, and data base administrators.

Per NGR 130-6/ANGI 36-2 USPFOs have a dual responsibility with respect to their working relationships with the CNGB and TAG...USPFOs work for and are responsible to the CNGB to ensure that all applicable laws, regulations, policies, and procedures established by Congress, DoD, DA, and DAF, as implemented by the CNGB, are complied with in their State. On a day-to-day practical basis, USPFOs work directly with TAG to support the Guard Mission. USPFOs must support the AGs and their mission, their programs, and priorities within the limits established by applicable laws and regulations. TAGs are encouraged to fully utilize the expertise of the USPFO...in determining optimal methods of accomplishing their goals.

Since DSCA missions are typically performed by NG in a SAD, the USPFO is not the primary resourcing solution for SAD mission needs, like they are for Title 32 missions/activities. Rather, the state military departments are typically the primary resourcing solution. During a SAD mission, the USPFOs ensure that federal property is used properly and the USPFOs track the use of federal equipment (e.g., vehicles and helicopters) that are used by the State Military Departments to ensure that the appropriate reimbursement is sought for that usage.

Discussion

USPFOs bear the responsibility of accounting for the federal property and funding in the possession of their State's National Guard. Their position is defined by a statute, which is further implemented in regulation. Their oversight responsibilities are shaped by the complex statutory and regulatory structure of contracts and fiscal law. USPFOs represent the CNGB in each state in matters relating to federal funding and property. In light of their significant responsibilities it is essential that the USPFOs have access to timely and accurate operational information on all DSCA operations.

Key Reference(s):

- a) 32 U.S.C. §708, "Property and Fiscal Officers"
- b) DoDI 1200.18, The United States Property and Fiscal Officer (USPFO) Program
- c) NGR 130-6/ ANGI 36-2, USPFO Appointment, Duties, and Responsibilities

Fundamentals of Fiscal Law

Topic: What are the considerations to be aware of when spending federally provided appropriated funds?

Guidance

U.S. Constitution, Art. I, §9, provides that “[N]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.”

United States v. MacCollom, 426 U.S. 317 (1976). “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”

31 U.S.C. §1301. The “Purpose Statute” requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.

GAO has developed a “necessary expense doctrine” to assist federal officials when an expenditure is not specifically provided for in an appropriation. This is a three-part test that asks whether the proposed expenditure (1) bears a logical relationship to the appropriation sought to be charged, (2) is prohibited by law, or (3) is provided for in a separate appropriation or statutory funding scheme.

31 U.S.C. §1502(a). Appropriations are available only for the bona fide need of an appropriation’s period of availability. GAO Principles of Federal Appropriations Law (Red Book), Third Edition, Vol I. “Fiscal Year”. The Federal Government’s fiscal year begins on 1 October and ends on 30 September.

GAO Principles of Federal Appropriations Law (Red Book), Third Edition, Vol I. “Period of Availability”. Defines the period of time in which funds are available for original obligation. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable thereafter for new obligations.

GAO Principles of Federal Appropriations Law (Red Book), Third Edition, Vol I. “Obligation”. An obligation is any act that legally binds the government to make payment.

31 U.S.C. §1341(a)(1)(B). You may not incur an obligation in advance of an appropriation, unless authorized by law. There are limited exceptions.

31 U.S.C. §1342. You may not accepting voluntary services, unless otherwise authorized by law. There are limited exceptions.

Discussion

Appropriated funds may only be used for the purpose for which the appropriations were made. The “necessary expense doctrine” is key to this analysis. The use of personnel, vehicles, and equipment are considered expenditures. An agency may only obligate funds within the time limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year). Some exceptions apply, but generally funds may only be spent within the FY they are provided, and only for expenses that accrue during that fiscal year. For any fiscal law issue, such as using current funds for a future need (next FY), consult with the USPFO to confirm that rules are followed or an exception applies. An Anti-deficiency Act (ADA) violation may occur when fiscal laws are violated.

Key Reference(s):

- a) 31 U.S.C., Chap 13, “Appropriations”

Fundamentals of Contract Law

Topic: What are the considerations an agency should be aware of when contracting for goods and services?

Guidance

The Federal Acquisition Regulation (FAR) covers all federal contracting actions and is comprised of 52 separate “Parts,” codified in Title 48 of the CFR. All statutes that affect contracting are implemented into the FAR. DoD further implements DoD-specific contracting regulation in the Defense FAR Supplement (DFARS) and the Services have further implementation in the Army and AF FAR Supplement (AFARS and AFFARS). The FAR, DFARS, AFARS and AFFARS are the primary sources of regulatory guidance concerning all Guard procurements. Although the NG is comprised of the Army and Air National Guards, all NG contracting falls under the Army’s rules. Contracting officers (and attorneys) are required to ensure that a proposed contracting action is IAW the FAR.

The Competition in Contracting Act of 1984 (CICA) 10 U.S.C. §2304 apply Standards of Conduct principles of competition, transparency, integrity, and fairness to government contracting. FAR §3.101.

FAR 6.101 requires opening the procurement process to the maximum extent practicable in order to allow all capable contractors who want to do business with the Government an equal opportunity to compete. Contracting officers shall provide for Full and Open competition to solicit offers and awards for all government contracts unless they can justify using (a) full and open competition after exclusion of sources (FAR 6.2), or (b) other than full and open competition (FAR 6.3).

FAR 6.301 there are seven statutory exceptions that allow for competition that is less than Full and Open. (i.e. only one source, unusual or compelling urgency, national security, public interest, international agreement, required by statute, industrial mobilization.) A lack of advance planning will not trigger these exceptions.

FAR 6.101 states that an Unfair Competitive Advantage arises when suppliers are not treated equally. Examples include suppliers who are given different guidelines, instructions, information, or time to prepare proposals. Providing different rules or evaluation criteria to a contractor in order to ensure they either win a proposal or lose a proposal is illegal under the Procurement Integrity Act (41 U.S.C. §2101).

FAR Part 18 covers “emergency acquisitions” which sets out additional flexibilities for emergency acquisitions, which typically requires head of agency approval.

Per 15 U.S.C. §631-650 Socioeconomic Policies that provide exceptions to the principals of competition based on a contractor’s socioeconomic status may be allowable.

Discussion

In federal contracting, the warranted contracting officer is the primary official responsible for ensuring that all contracting actions comply with the FAR. Attorneys and JAs support the contracting officer by providing compliance reviews and assisting the contracting officer(s) with any legal questions that arise in a particular contracting situation. When planning for contractor support military planners should consider that contracts can fail for a large number of reasons with little or no advance warning. Critical aspects of your operations should be routinely evaluated for over-reliance on contractors. If a critical mission or capability

will fail without contractors, then you should begin taking steps to mitigate the over-reliance. Some services are considered Inherently Governmental and are not appropriate for contractors. The Request for Service Contract Approval Form is designed to highlight the above risks and prohibitions when contracting for services.

Key Reference(s):

- a) Title 43 CFR, “Federal Acquisition Regulation System”

Use of Federal Arms

Topic: What are the guidelines for the arming NG troops with federally supplied weapons and ammo?

Guidance

Per 32 U.S.C. §702, the service Secretaries may buy or manufacture and, upon requisition of the Governor of any State, issue to its Army National Guard and Air National Guard, respectively, the supplies necessary to uniform, arm, and equip that Army National Guard or Air National Guard for field duty.

The primary authority for federal supplied equipment rests with CNGB per DoDD 5105.77 exercised through the USPFOs 32 U.S.C. §708.

Per NGR 500-5/ ANGI 10-208, Para. 5-5c. Use of Equipment During State Active Duty Missions, State Adjutants General have authority to use federal property issued to the National Guard of their state during periods of civil disturbance and other emergency conditions declared by the Governor. If required, states may coordinate directly with other states for temporary loan of federal property required for a particular emergency response. United States Property and Fiscal Officers (USPFO) are responsible for making coordination including reimbursements and reporting.

The state is liable for reimbursement to the Federal Government through the USPFO when federal property is used by National Guard personnel in SAD, when ordered by the Governor to respond to emergencies related to civil disturbances, natural disasters, or other incidents. Reimbursement or replenishment requirements include: (1) Repair parts expended in the objective area, other than for fair wear and tear, (2) Petroleum, oils, and lubricants expended for direct mission accomplishment, and (3)

Incremental costs attributed to direct mission support. Equipment reimbursement costs are specified in AR 700-131 for the use of ARNG equipment and in AFI 23-119 for use of ANG equipment.

AR 700-131 Chapter 4 establishes that though Loans or leases of arms and accouterments require special processing and handling, loans or leases to DoD and non-DoD activities will be handled as a normal loan or lease according to instructions in this chapter with certain added requirements.

Regarding ammunition, AR 5-13, Para. 2-1(4) identifies Operational Load as a commander's daily operating requirements. They include munitions that Army units require to support or conduct a broad range of day-to-day operational missions; for example, installation EOD, SRT operations, ceremonies, and quarry operations, guard force missions, force protection, SOF, pre-deployment site surveys, and so forth. OPLOAD munitions required to support Army daily operating requirements (e.g., guard personnel, ceremonies, EOD mission support, SOF site surveys, and so forth).

Per NGR 500-5/ ANGI 10-208, Para. 5-6, the only weapons authorized for use in domestic law enforcement support operations while in a Title 32 or Title 10 are federally owned military weapons listed on the unit's property books. The only ammunition authorized for use in domestic law enforcement support operations while in a Title 32 or Title 10 is ammunition issued through the military supply system.

Per AR 700-131, Para. 4-2, The Army may only loan arms and accouterments to civilian authorities and to civilian activities in the following instances: (1) For use by Federal agencies or departments in protection of public money and property (10 U.S.C. §4655); and (2) Obsolete or condemned rifles, slings, and cartridge

belts may be loaned to local units of any national veteran's organization for use by that unit in ceremonies.

Discussion

State NGs may use small arms and operational load ammo in SAD. However, they will need to reimburse DoD for the use of small arms and ammo. Any small arms and ammo expended, lost, destroyed, cost of maintenance, etc. will need to be repaired/replaced by the state to bring their stocks of these federally-owned supplies back up to the level it was at before they were used. AR 700-131, Chapter 5 stipulates the reimbursement policies to ensure no additional cost to DoD for the loan and lease of small arms and accoutrements.

Operational Load requirements must be submitted to NGB for the following FY by the end of second week of March of the current FY. NGB receives authorizations at the TA4C based on the reported valid requirements, supply availability, and usage history. Operational Load is managed in TAMIS similar to Training Ammo. Operational ammo for State Active Duty missions is drawn and stored for extended periods of time (multi-year) within a unit vault or ASP. Requirements must be reviewed by USPFO for QRF type units annually. Currently, authorizations are for one Fiscal Year.

The use of all arms and ammunition must be accomplished with great restraint and must include the provision of and training on an applicable RUF. Commanders should consult with their USPFO, Provost Marshall, and JA before issuing arms and ammunition.

Key Reference(s):

- a) DoDI 1225.06, Equipping the Reserve Forces
- b) AFI 23-119, Exchange, Sale, or Temporary Custody of Non-Excess Personal Property
- c) NGR 500-5/ANGI 10-208, National Guard Domestic Law Enforcement Support and Mission Assurance Operations
- d) AR 700-131, Loan, Lease, Donation of Army Material
- e) AR 5-13, Total Army Munitions Requirements and Prioritization Policy

Use of Durable Property

Topic: What are the guidelines for the loan/use of (non-lethal) federal NG Property by state agencies?

Guidance

Per 32 U.S.C. §702, the service Secretaries may buy or manufacture and, upon requisition of the Governor of any State, issue to its Army National Guard and Air National Guard, respectively, the supplies necessary to uniform, arm, and equip that Army National Guard or Air National Guard for field duty.

Per NGR 500-5/ ANGI 10-208, as Commanders in Chief, Governors can directly access and utilize the National Guard's federally assigned aircraft, vehicles, and other equipment (subject to federal law and regulation) so long as the Federal Government is reimbursed for the use of the equipment and supplies.

Per NGR 500-5/ ANGI 10-208, Para. 5-5c, state Adjutants General have authority to use federal property issued to the National Guard of their state during periods of civil disturbance and other emergency conditions declared by the Governor. If required, states may coordinate directly with other states for temporary loan of federal property required for a particular emergency response. United States Property and Fiscal Officers (USPFO) are responsible for making coordination including reimbursements and reporting.

The state is liable for reimbursement to the Federal Government through the USPFO when federal property is used by National Guard personnel in SAD, when ordered by the Governor to respond to emergencies related to civil disturbances, natural disasters, or other incidents. Reimbursement or replenishment requirements include: (1) Repair parts expended in the objective

area, other than for fair wear and tear, (2) Petroleum, oils, and lubricants expended for direct mission accomplishment, (3) Incremental costs attributed to direct mission support. Equipment reimbursement costs are specified in AR 700-131 for the use of ARNG equipment and in AFI 23-119 for use of ANG equipment.

10 U.S.C. §2667 authorizes the lease of Army materiel to non-DoD elements or individuals when it is determined that the materiel is not, for the period of the lease, needed for public use or excess property and that the lease will promote the national defense or be in the public interest (see AR 360-1). Leases to civilian non-Federal law enforcement agencies will be made when they have been determined to be consistent with national security. ...leases of military equipment will not be made for which a counterpart exists on the commercial market place and is reasonably available for purchase or lease.

AR 700-131 Chapter 4 establishes that Loans or leases of arms and accouterments require special processing and handling. Loans or leases to DoD and non-DoD activities will be handled as a normal loan or lease according to instructions in this chapter with certain added requirements.

AR 700-131, Para. 2-6 states that lease of Active Army and State ARNG-owned military equipment (other than arms, combat/tactical vehicles, vessels and aircraft) for less than 180 days is approved by the...State AG (ARNG equipment). It also provides that the State AG may approve the use of medical equipment for less than 180 days.

Per AR 700-131 para. 2-9 loan or lease agreements are required. Upon approval of a DA Form 4881-6 (Request and Approval for Loan or Lease and Loan or Lease Agreement) and before shipment or issue of the materiel, the approving authority will direct that a

written agreement be completed. In all cases, the statutory basis for the loan or lease will be cited.

Per AR 700–131, Para. 2–10, the lessee shall assume the risk of loss or liability for damage to the leased property. That risk shall be covered either by insurance or the posting of a surety bond on the depreciated value of the equipment being leased ...

Per AR 700-131, Para. 4–2, the Army may only loan arms and accouterments to civilian authorities and to civilian activities in the following instances: (1) For use by Federal agencies or departments in protection of public money and property (10 U.S.C. §4655) and (2) Obsolete or condemned rifles, slings, and cartridge belts may be loaned to local units of any national veteran’s organization for use by that unit in ceremonies.

Per AFI 10-801, Para. 3.5. (Use of Military Equipment and Facilities), in circumstances not immediately threatening to human life, human suffering, or great property damage, requests for equipment and base and research facilities may be made available to federal, state, or local civilian officials to include law enforcement IAW AFI 23-119 and AFI 32-9003.

Per NGR 500-5, Para. 5-5 The National Guard may loan or lease equipment to LEAs.... National Guard personnel may train civilian law enforcement personnel in the use of the equipment provided. National Guard personnel may accompany, and then assist in operating or maintaining the loaned military equipment. State Adjutant Generals have authority to loan equipment with the exception of potentially lethal equipment support. The loan of weapons, combat and tactical vehicles, vessels, and aircraft require approval from the service secretaries or their designee.

Per AR 700-131, Para. 2-8, Equipment may be leased to civilian, non-Federal law enforcement agencies for purposes other than civil disturbances. However, any requests to assist law enforcement agencies that will result in a planned event with the potential for confrontation with named individuals/groups or use of lethal force must be forwarded to the SecDef for approval. Note also that ammunition is an expendable item, cannot be leased to non-Federal agencies.

DoDI 3025.21, 4.A. (4) (a) requests for arms, ammunition, combat vehicles, vessels, and aircraft must be submitted to the SecDef for approval.

Discussion

In almost all cases State NGs may use their federally supplied equipment for state directed missions. Such use may not degrade unit readiness or reduce unit training. All use is subject to reimbursement when such is made necessary through property consumption or alternatively repairable degradation. In certain cases, TAGs may approve the provision of non-lethal property to outside state agencies. In the cases of lethal property approval is limited to the Service Secretaries or the designees. As many property lend/lease needs are immediate, states should not plan on utilizing lethal property through their state NGs but should use other state agencies (i.e., LEAs) as a sourcing solution for lethal property requirements (such a method will also help prevent potential litigation and administrative burdens.) Before lending equipment to outside agencies commanders are advised to consult their JAs and their USPFOS before making any commitments.

Key Reference(s):

- a) DoDI 1225.06, Equipping the Reserve Forces
- b) DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies
- c) AFI 10-801, Defense Support of Civil Authorities
- d) NGR 500-5/ANGI 10-208, National Guard Domestic Law Enforcement Support and Mission Assurance Operations
- e) AR 700-131, Loan, Lease, Donation of Army Material

Tactical & Non-Tactical Vehicles

Topic: What are the limits on the use on tactical and non-tactical vehicles?

Guidance

DoDI 3025.21, 4.A. (4) (a) requests for arms, ammunition, combat vehicles, vessels, and aircraft must be submitted to the SecDef for approval.

Per NGR 500-5/ANGI 10-208, as Commanders in Chief, Governors can directly access and utilize NG federally assigned...vehicles, (subject to some restrictions based on federal law and regulation) on a reimbursable basis for the use of the equipment and supplies.

Per NGR 500-5, Para. 5-5 TAGs, with concurrence of the USPFO, have authority to loan equipment with the exception of potentially lethal equipment support. The loan of ...combat and tactical vehicles requires approval from the service secretaries or their designee. Requests for loan or lease requiring service secretary approval will be reviewed by NGB. (3) Loans and leases of equipment are governed for the ARNG by AR 58-1 and AR 700-131 and for the ANG by AFI 23-119. TAGs have authority to use federal property issued to the NG of their state during periods of civil disturbance and other emergency conditions declared by the Governor.

Per AR 700-131, Para. 2-8, equipment may be leased to civilian, non-Federal law enforcement agencies for purposes other than civil disturbances. However, any requests to assist law enforcement agencies that will result in a planned event with the potential for confrontation with named individuals/groups or use of lethal force must be forwarded to the SecDef for approval. Note also that

ammunition is an expendable item, cannot be leased to non-Federal agencies.

AR 58-1, Ch. 7-2. Interagency support provides that Army NTV may be furnished for short periods (less than 2 months) to other Government agencies only when the Army mission will not be impaired, and the use is for one of the following missions:

(1) Of an emergency, lifesaving nature; (2) Authorized by Federal statute or directive; (3) In direct support of the Defense mission; (4) In the national interest, as certified by the head of an executive department or independent Government office or agency.

Justification for providing Army NTV will include a statement that commercial sources are either not available or cannot satisfy the requirement. Reimbursement will be required unless waived by the Secretary of the Army or the Assistant Secretary of the Army (Financial Management and Comptroller). The amount will cover total costs incurred. Unfunded costs for military personnel and equipment depreciation allowances are excluded. NTVs will not be provided without prior coordinated with HQDA (DALO-TSP), except, in purview of the Installation Commander, when time is of the essence and precludes prior coordination.

Per AFI 10-801, in circumstances not immediately threatening to human life, human suffering, or great property damage, requests for equipment and base and research facilities may be made available to federal, state, or local civilian officials to include law enforcement IAW AFI 23-119 and AFI 32-9003.

Discussion

State NGs may use their federally supplied equipment for state-directed missions. Such use may not degrade unit readiness and is subject to reimbursement. This concept applies to the use of both non-tactical and tactical vehicles (formerly called GSA vehicles) for NG personnel performing state missions. Tactical vehicles

may not be provided to other state agencies absent eventual Service Secretary approval through NGB. Emergency provision of tactical vehicles to state LEAs should not be planned on as definitive sourcing solution. It should be remembered that the option of placing a state NG member qualified to operate the vehicle (potentially one who is a LEA officer in their civilian status), in SAD and having him operate a ground vehicle in support of state law enforcement would preclude the needs for any kind of lease/ loan and obliterate any training requirements needed by the LEA to operate the vehicle. Before lending equipment commanders are advised to consult their JAs and USPFOS.

Key Reference(s):

- a) DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies
- b) AFI 10-801, Defense Support of Civil Authorities
- c) NGR 500-5/ANGI 10-208, National Guard Domestic Law Enforcement Support and Mission Assurance Operations
- d) AR 58-1, Management, Acquisition, and Use of Motor Vehicles
- e) AR 700-131, Loan, Lease, Donation of Army Material

10. MILAIR

Reimbursable Use of ARNG Aircraft

Topic: What types of missions using ARNG aircraft require reimbursement? What criteria must be met before and after performing these missions? What are the exceptions to required reimbursable uses of ARNG aircraft or requirements to process a waiver for reimbursement for use of ARNG aircraft?

Guidance

The following types of missions using ARNG aircraft require reimbursement: (1) Supporting civil authorities whose capabilities or capacity is insufficient to meet current requirements with general purpose, specialized, or unique NG personnel or capabilities such as aviation support; (2) protecting the life, property, and safety of U.S. citizens and U.S. persons; (3) protecting critical U.S. infrastructure; (4) providing humanitarian assistance during disaster response and domestic emergencies; (5) providing support to National Special Security Events (NSSE), programs, and other activities; and (6) providing support to designated law enforcement activities and operations. In order to perform these missions, the request for assistance must be pursuant to DSCA, the Stafford Act, or the Economy Act. The exceptions that allow for a waiver are contained in NG PAM 95-5, Para 1-4 and 10-4.

NG PAM 95-5, Para. 10-1, When approved in advance by proper authority, support missions may be flown in a federally-funded status for other than ARNG purposes to support the following users on a reimbursable basis:

- (1) DoD agencies (i.e. active Army or Army Reserve; or other DoD Services (USAF, USN, USMC));
- (2) Federal agencies (FEMA, Environmental Protection Agency (EPA), Congress, etc.);
- (3) Foreign Military Sales (FMS) cases;

- (4) all other users (public agencies, Community-Based Organizations [CBOs], etc.); and
- (5) SAD

Per NGR 5-2, and NG PAM 95-5, missions requested by Active Army or USAR units (intra-service) will be billed for reimbursement of direct costs (Petroleum, Oil and Lubricants [POL], Depot-Level Repairs (DLRs), and consumables.

Additionally, missions requested by other DoD agencies (inter-service support) will be billed for reimbursement at the full DoD user rate, published annually by the Army ASA Financial Management and Comptroller (FM&C) and posted on GKO. Prior to providing ARNG aircraft mission intra-service or inter-service support to DoD agencies, a DD Form 1144, support agreement between the ARNG and the supported DoD agency must be completed.

ARNG aircraft use in support of non-DoD Federal agencies, FMS cases, and all other users requires a written agreement with the supported activity, and a separate written determination that (1) funding is available to pay for the support; (2) the requested support would be in the best interest of the Government; (3) the ARNG is capable of providing the support; (4) the support cannot be provided as conveniently or cheaply by a commercial enterprise; and (5) it does not conflict with any other agency's authority. Reimbursement charges for ARNG aircraft support to non-DoD Federal activities shall be assessed the same way as reimbursement charges are determined for other DoD activities.

IAW 42 U.S.C. §5121 [Stafford Act]; 31 U.S.C. §9701, and DoDD 3025.18, States must reimburse the U.S. Treasury for all requests for use of ARNG aircraft in DSCA related missions. Support may

be provided on a non-reimbursable basis only if required by law or authorized by law, and approved by the appropriate DoD official.

NG PAM 95-5, Para. 10-2, When ARNG aircraft are used in SAD *immediate response* missions to save lives, limbs, or eyesight, prevent human suffering, or mitigate great property damage under imminently serious conditions, reimbursement of the costs shall be made to the Federal Government at the SAD Emergency Rate

For ARNG aircraft used to support a non-emergency State mission, the States shall reimburse the Federal Government at the SAD Non-Emergency rate.

Unless approved by NGB to be conducted in Title 32, the State shall reimburse the Federal Government for the cost associated with supporting the State and Local civil law enforcement operations (CLEO) at the SAD non-emergency reimbursable rate.

Per NG PAM 95-5, Para. 10-3c, requested transportation for members of Congress or their staff on ARNG aircraft at the invitation of the State TAG or Governor for official duty travel connected with the NG or other DoD activities in and between CONUS, Puerto Rico, Guam, the U.S. Virgin Islands or the States of Alaska or Hawaii requires no reimbursement if approved through NGB-LL to OCLL for the SECARMY.

Per NG PAM 95-5, Para. 10-4b, except where required by law, exceptions to required reimbursements may only be granted by ARNG-AV when aircraft was previously scheduled to perform a bona fide training mission, the minimum training mission requirements are not exceeded, and there is no additional cost to the Government. MILAIR must not be scheduled for training missions for the primary purpose of accommodating other agencies without reimbursement.

To ensure waiver reimbursements are properly staffed and validated, ARNG-AV (or OSAA for FW missions) will only consider requests for waiver from the SAAO that have been endorsed by the State USPFO, the State JFHQ Legal Counsel, and the State Adjutant General.

Discussion

NG PAM 95-5 requires costs associated with missions flown using ARNG aircraft in a federally-funded status for non-ARNG mission purposes to be reimbursed. The USPFO is required by law to seek reimbursement for non-ARNG mission related support provided to the State, DoD, Federal, and other non-governmental organizations (NGOs) for crediting to the appropriate ARNG fund accounts; or process a request for waiver of reimbursement through the State JA, the State Adjutant General and staffed through ARNG-AV or OSAA for approval.

Key Reference(s):

- a) 42 U.S.C., Chapter 68, Subchapter IV, “Major Disaster Assistance Programs”
- b) DoDI 4000.19, Support Agreements
- c) NGR 5-2, National Guard Support Agreements
- d) NG PAM 95-5, Use of Army National Guard Aircraft

Reimbursable Use of ANG Aircraft

Topic: What types of missions using ANG aircraft require reimbursement? What criteria must be met before and after performing these missions? What are the exceptions to required reimbursable uses of ARNG aircraft or requirements to process a waiver for reimbursement for use of ANG aircraft?

Guidance

The following types of missions using ANG aircraft require reimbursement: direct support of non- military activities such as civil relief, mercy missions, health, communications, public works, and others contributing to the economic and social well-being of the state and nation. These missions may include aerial firefighting, hurricane, tornado and flood relief, and/or EMAC supported disaster relief, declared emergencies or civil disturbance operations. In order to perform these missions, the following criteria must be met: (1) AF tasked – the call for airlift assistance will be made from a state Joint Operations Center (JOC) or a federal agency i.e., FEMA or (2) ANG coordinated – the unit is tasked directly by their state headquarters. The ANG Crisis Action Team may expedite the tasking process by coordinating requirements with available resources.

Per ANGI 11-101, Paras. 6, 10 and 16.1 state that sorties (missions) may be flown in a federally-funded status for other than ANG purposes to support the following users on a reimbursable basis when approved in advance by proper authority:

- (1) DoD agencies (i.e. active Air Force or AF Reserve; or other DoD Services (USA, USN, USMC));
- (2) Federal agencies (FEMA, Environmental Protection Agency (EPA), Congress, etc.);
- (3) Foreign Military Sales (FMS) cases;

- (4) all other users (public agencies, Community-Based Organizations [CBOs], etc.); and
- (5) SAD

Per ANGI 11-101, Paras. 10 and 16.1, the ANG flying hour program is budgeted and allocated hour funding: direct O&M (aircrew training), indirect O&M (flying house funded by external DoD and non-DoD Federal agencies; Transportation Working Capital Fund (TWCF)-hours flown funded in support of TACC tasked airlift missions; and incremental contingency-house flown in direct support of HHQ tasked operational missions.

Per ANGI 11-101, Para. 6, annual flying-hour requirements are established by the ANG unit's Flying Hour Work Group (FHWG), forwarded for program and budgeting, annually funded and allocated in three categories of flying hours: O&M-T (Training); Transportation Working Capital Fund (TWCF) Airlift; and O&M-R (reimbursable) flying hours. ANG aircraft flying hours flown in support of intra and inter-service operations and other DoD agency operations are programmed, budgeted, and allocated and approved by Higher Headquarters (HHQs) as funded reimbursable costs.

Per ANGI 11-101, Paras. 1.2.2, units may utilize ANG O&M training flying hours for positioning and repositioning for Domestic Emergency Response within the 54 states and territories. T-4 mission based on Domestic Emergency Response will be executed within the wing flying hour allocation using reimbursable O&M flying hours. Para 10.3, states that when ANG aircraft is used to support a non-contingency exercise, the flying house will be considered O&M-R or TWCF, but if participating and receiving

training, the flying hours funding should be charged from the unit O&M training allocation.

IAW DoDD 4500.56, Para. 4(f), AFI 65-601V1, Para. 7.29, and ANGI 11-101, Para. 12, for purposes of State and Federal directed domestic operations in support of civil authorities, the request for AF tasked airlift assistance missions will be made from a state Joint Operations Center (JOC) or a Federal agency (i.e. FEMA), who may in turn contact Air Mobility Command (AMC) Tanker Airlift Control Center (TACC). TACC will then contact the ANG unit and the mission will be flown as a TWCF reimbursed airlift mission. Pursuant to paragraph 12.1.1.1 of ANGI 11-101, AMC-TACC directed missions will be reimbursed directly from the State or Federal agency to AMC-TACC.

ANGI 11-101, para. 12.1.1.2, ANG flying units directed by their State headquarters to execute ANG coordinated missions ISO State or Federal civil authority during domestic operations will seek reimbursement from the supported States for flying hour expenses at the “Public” rate as defined in AFI 65-503.

Per AFI 10-801, para. 2.11.2, state officials may direct an *immediate response* using ANG aircraft and personnel serving in SAD or Title 32 and IAW State law to save lives, prevent human suffering or mitigate property damage within the United States, but see DoDD 3025.18, para. 9, that they must seek reimbursement at the earliest opportunity.

Per AFI 11-102, para. 1.3, the ANG Director of Operations (NGB/A3) is responsible for processing any reimbursement

exception, reimbursement waiver requests as the office of primary responsibility for the Air Force Single Flying Hour Model (AFSFHM) program.

Discussion

NG PAM 95-5 requires costs associated with missions flown using ANG aircraft in a federally-funded status for non-ANG mission purposes to be reimbursed. The USPFO is required by law to seek reimbursement for non-ANG mission related support provided to the State, DoD, Federal, and other non-governmental organizations (NGOs) for crediting to the appropriate ANG fund account; or process a request for waiver of reimbursement through the State JA, the State Adjutant General and staffed through NGB/A3 for approval.

Key Reference(s):

- a) DoDD 4500.56, DoD Policy on the Use of Government Aircraft and Air Travel
- b) AFI 10-801, Defense Support of Civil Authorities
- c) NG PAM 95-5, Use of Army National Guard Aircraft
- d) ANGI 11-101, Flying Operations – Flying Hour Management

Military Aircraft Passenger Eligibility

Topic: Who is an eligible passenger on National Guard aircraft?

Guidance

Per DoDI 4515.13, eligible passengers include Uniformed Service Members; DoD civilians; Command-sponsored dependents/family members; non-command sponsored dependents; dependents accompanying DoD personnel on official business; employees and dependents of NAF activities; employees of other USG agencies; nonprofit service organizations; invited travelers; foreign nationals; contractors pursuant to a contractual requirement; educators; athletes/entertainers; civil air patrol; ROTC/JROTC; International ROTC; NG Youth Challenge program participants; Naval sea cadets; persons transported under MEJA; civilians not affiliated with the DoD under limited circumstances; patients/medical attendants/nonmedical attendants related to aeromedical evacuation; news media; passengers related to public affairs; and orientation flight passengers.

Per DoDI 4515.13, Sec 10 contains requirements for transport of service animals, pets, and other animals.

Per DoDI 4515.13, numerous individual conditions for each category of passenger exist and are listed in the regulation. These conditions must be met before a passenger is deemed eligible for travel aboard DoD aircraft; generally, eligible passengers must have documentation showing their travel aboard DoD aircraft has been approved and the travel must be for an official purpose.

Per DoDI 4515.13, Sec 12, exceptions to passenger transportation eligibility requirements must meet criteria and be approved by CNGB pursuant to a formal written request by the organization requesting transportation.

Per DoD 4515.13-R; NG Pam 95-5; and AFI 11-401 ANG Supplement, in addition to the conditions that must be met for each category of eligible passengers, use of tactical aircraft (both ANG and ARNG) have additional requirements that must be satisfied in order for an individual to participate in a familiarization or orientation flight using such aircraft. CNGB, or authorized designee, is the authority responsible for monitoring and controlling such flights utilizing NG tactical aircraft.

Discussion

Government aircraft is a premium mode of travel involving high costs and limited resources. Commanders shall make every effort to minimize government aircraft cost to satisfy the mission requirement. Violating travel regulation may subject Commanders to serious consequences including, among other things, investigation, sanctions, reprimand and liability for reimbursement to the government. Additionally, ineligible passengers may not receive the same coverage benefits as eligible passengers in the event of mishaps during travel. If the travel request requires CNGB approval ensure that the request submitted to NGB contains sufficient information and consult with your State SJA and State Aviation Officer before making any air movement commitments.

Key Reference(s):

- a) DoDD 4500.56, DoD Policy on the Use of Government Aircraft and Air Travel
- b) DoDI 4515.13, Air Transportation Eligibility
- c) DoDI 4500.43, Operational Support Airlift (OSA)
- d) Office of Management and Budget Circular No. A-126
- e) National Guard Pamphlet 95-5, Use of Army National Guard Aircraft

Flyovers and Aerial Demonstration

Topic: When can National Guard aircraft perform Flyovers and other Aerial Demonstrations?

Guidance

The NG can perform flyovers and aerial demonstrations for the following events: Per DoDD 5410.18, paragraph 4.3.6.5, to limit interference with the operations and training of aviation units, and to set reasonable limits for their use, approval is required from the Secretaries of the Military Departments for flyovers at the following events: Civilian-sponsored formal observances, open to the public, of Armed Forces Day Memorial Day, Independence Day, POW/MIA Recognition Day and Veterans Day; Aviation-related events; Ceremonies honoring foreign dignitaries; Events held on a military installation; ROTC or Military Service Academy graduation ceremonies; Inaugural ceremonies of Governors when flown by State National Guard resources with a previously scheduled training mission and at no additional cost to the Government.

Per 4.3.6.6. Exceptions to the policies of DoDD 5410.18, subparagraph 4.3.6., requested by the Military Services... shall be considered by the ASD(PA) on a case-by-case basis.

Per 4.3.6.7. Flyovers, including the missing man formation, at memorial or funeral services in honor of rated and/or designated active duty aviation personnel and dignitaries of the Armed Forces or the Federal Government, as determined by the Military Services, are not community relations activities. In those cases, appropriateness of a flyover shall be determined by the Military Services.

As a general policy, the ANG has determined that “aerial events keep the public and military informed of U.S. preparedness, demonstrate modern weapons systems, promote good community and international relations, support Air Force recruiting and retention efforts and render military honors” Per AFI 11-209, 4.2. Flyovers for the following activities are allowable subject to applicable regulations, Patriotic Holiday, Retirement/Change of Command Ceremony, Funeral or Memorial Flyovers, and Missing Man Formation. Participation approval is normally at the MAJCOM level (generally DANG for ANG). In certain cases, retirement change of command and patriotic holidays, aerial demonstrations can take place in lieu of flyovers pending MAJCOM approval.

Per NG PAM 95-5, para 8-10, in order to conserve aviation resources to meet operational and pre-deployment training requirements, current Army policy prohibits all Army National guard aircraft from conducting public affairs missions involving aerial demonstrations in the civilian domain. Flyovers (except for Gubernatorial Inaugurations and Funeral/Memorial Flyovers) are prohibited aerial demonstrations.

Per section 8-12, Exceptions to Policy for aerial demonstrations and other restricted activities currently in effect by HQDA will be granted only in rare circumstances for exceptional high-impact events that meet specific strategic communication requirements and must be approved by the Vice Chief of Staff (USA). Following coordination with the SAAO, Exceptions to Policy will be initiated by the State JFHQ PAO, through the Chief, Community Relations Division, NGB-PA to the Office of the Vice Chief of Staff.

Discussion

Pursuant to regulation and flight regulations (DoDD 5410.18), ANG allows for the performance of a selected number of flyovers and aerial events, largely military or patriotic related events, subject to approval. Outside of those allowances USAF aviation support planned for a public or military event must receive additional MAJCOM, HQ USAF/A3O, and SAF/PA approval before the performance. Based on the complexity of the allowances within the regulations and the need for multiple waivers for events, preplanning is required to garner necessary approvals or to make alternative sourcing decisions.

Generally, flyovers and other such demonstrations are prohibited by Army NG Aviation regulations, only very limited exceptions are allowed. Under certain circumstances waivers to the prohibition may be requested. Waiver authority is often held at higher levels and as such sufficient time for processing of such waiver is a critical component of mission planning. It should also be noted that under the regulations the threshold for such waivers is rather high. As a result, alternative sourcing solutions should be developed, planned for, and resourced. The use NG aircraft for flyovers while in SAD is not addressed and is presumed allowable; subject to personnel being placed in SAD and subject to all reimbursement requirements.

Key Reference(s):

- a) DoDD 5410.18, Public Affairs Community Relations Policy
- b) AFI 11-209 (ANG Supplement), Aerial Event Policy and Procedures
- c) ANGI 10-201, Air Transportation
- d) NG Pam 95-5, Use of Army National Guard Aircraft

11. NG Support to Firefighting

NG Support to Fire Fighting

Topic: What are the requirements for the use of the NG to assist federal agencies in fighting wildfires?

Guidance

Generally, the NG can be used to assist federal agencies in fighting wildfires if the support is pursuant to a validated RFA. State and local governments have primary responsibility to prevent and control wildfires. Normally, as part of the efforts of state and local governments to prevent and control wildfires, NG personnel respond in SAD. The National Interagency Fire Center (NIFC) is the primary federal entity responsible for coordinating the federal response to wildfire and is a joint DOI and USDA operation. DoD policy is to provide emergency assistance to federal agencies by personnel, equipment, supplies, or fire protection service in cases where a fire emergency is beyond the capabilities of available resources. DoD provides reimbursable support pursuant to MOU between DoD, NGB, U.S.D.A and DOI.

The ANG uses USFS-owned Modular Airborne Fire Fighting System (MAFFS), when requested, to assist with wildland firefighting during extreme conditions. Congress established the MAFFS Program in the early 1970s as a wildland fire program, not a military program, to provide emergency capability to supplement the existing commercial air tanker support on wildfires. NIFC activates the MAFFS when all other contract air tankers are committed, or are otherwise unable to meet requests for air operations. The request for MAFFS activation is approved by the national MAFFS liaison officer, who is the USFS director at NIFC. This request is then formally submitted to JDOMS. Governors of states where NG MAFFS units are stationed may activate MAFFS missions within their state boundaries when covered by MOU with the USFS. IAW military requirements for initial qualification and

recurrent training, MAFFS crews are trained every year with Forest Service national aviation operations personnel.

The mobilization of MAAFS resources requires a pre-deployment analysis. Prior to deployment, local foresters are responsible for ensuring that regional, commercially-available assets are unavailable or already committed to a mission. If assets are sought by the NICC, commercial assets must be unavailable at the national level. Payments are governed by the appropriate MOU–Collection Agreements between military and Forestry Service.

Per DoD 3025.1-M, prior to service members being committed to firefighting (ground) it is mandatory that they receive NIFC training. A team from NIFC will travel to the Agency providing troops and conduct orientation training, "cold line" fire training, "mop-up" training, and fireline training. Before fireline assignment, military personnel used for firefighting receive mandatory basic fire training to include introductory fire behavior, fire shelter, and standards for survival. Once the Agency Chief of Party and the military commander agree that the personnel are properly trained and equipped, they may be assigned to hot fireline assignments. Equipment for firefighting is provided by NIFC.

Discussion

Crews supporting firefighting efforts must be in the proper duty status for the mission they are performing for FTCA “scope of employment” and benefits coverage. Military technicians should be operating within their duty description or in a non-interference basis, or in Title 32. Ground personnel fighting wildfires generally perform duties in SAD, subject to reimbursement.

Key Reference(s):

- a) DoD 3025.1-M, Defense Support of Civil Authorities

12. Privacy Act

Privacy Act of 1974 and Personally Identifiable Information Breaches

Issue: What is the Privacy Act?

Guidance

Per 5 U.S.C. §552a, and DoD 5400.11-R, The Privacy Act of 1974 establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies. It covers all records that are “about” individuals that are also filed and/or retrieved by the individual’s name or other unique identifier (SSN, other identifier, phone number, etc.).

Right to Access and Amend Records. Individuals have a right to access the information the government maintains on them and a right to request an amendment to any inaccurate or incomplete records.

Agency Requirements. The PA has a number of requirements that must be complied with before maintaining records on individuals. These include: Records maintained on individuals must be relevant and necessary to accomplish a DoD mission; information should be directly collected from the record subject; inform the individual of the purpose for collecting information, the uses that will be made outside of DoD, and the effects of not providing the information; ensure a System of Records Notice is published in the Federal Register; ensure records maintained are accurate, relevant, timely, and complete; maintain no record describing how an individual exercises First Amendment rights; establish rules of conduct in the handling of PA records; establish appropriate safeguards to ensure the security and confidentiality of records; and ensure any intended changes to PA records systems are published in the Federal Register for public notice and comment.

Disclosure to third parties. The PA prohibits disclosure of a person's record without their consent with 12 exceptions. The most common ones used in DoD are disclosures to DoD employees that have a 'need to know' the information in the performance of their official duties, certain disclosures required by FOIA, disclosures to law enforcement, and disclosures pursuant to a court order. Some disclosures must be accounted for in the person's record.

Violations. The Privacy Act provides criminal penalties that can be imposed on agency employees for violations. Individuals can also seek civil remedies in a civil cause of action

Breaches of Personally Identifiable Information (PII). The OMB has established policy that requires breaches of PII be reported. The DD 2959 must be completed and sent to NGB.Privacy@mail.mil within 24 hours of discovering a PII breach has occurred to meet the 48 hour reporting requirement to DoD.

Discussion

It is critical to ensure compliance with the Privacy Act prior to collecting information on individuals. Key components include providing a proper Privacy Act Statement, ensuring a System of Records Notice is published in the Federal Register, ensuring proper protection of records, ensuring records are not disclosed to third parties without the subject's consent, unless one of the exceptions apply, and ensuring all records maintained are accurate, relevant to accomplishing a federal mission, and timely.

DoDD 5400.11 defines a breach as a loss of control, compromise, unauthorized disclosure, unauthorized acquisition, unauthorized access, or any similar term referring to situations where persons

other than authorized users and for an other than authorized purpose have access or potential access to PII, whether physical or electronic. Any individual discovering a suspected or confirmed breach must report the incident to the NGB Privacy Office.

Each Air Guard Wing Knowledge Operation Manager and JFHQ Army Privacy Manager should develop and implement their own privacy programs to ensure awareness for compliance with Federal Law, DoD, and Service Policies.

Key Reference(s):

- a) 5 U.S.C. §522a, Records Maintained on Individuals
- b) DoDD 5400.11, DoD Privacy Program
- c) DoD 5400.11-R, Department of Defense Privacy Program
- d) OMB Memorandum, "Preparing for and Responding to a Breach of Personally Identifiable Information," M-17-12, January 3, 2012

13. FOIA

Freedom of Information Act

Issue: What is the Freedom of Information Act (FOIA)?

Guidance

Per 5 U.S.C. §522, FOIA is a disclosure statute that provides the right for any person to obtain access to federal agency records, except to the extent the records are exempt from public disclosure.

Per 5 U.S.C. §522, common FOIA exemptions used in DoD are:

- (1) Classified information properly classified under EO 13526;
- (2) Records specifically prohibited from release by statute;
- (3) Trade secrets and commercial or financial information obtained from a person that is privileged and confidential (only for use in contracting-related records);
- (4) Inter-agency or intra-agency memorandums or letters that are part of a decision making process, attorney-work product privileged record prepared in anticipation of litigation;
- (5) Personnel and medical files that would constitute a clearly unwarranted invasion of personal privacy if disclosed. Lists of names of DoD personnel below the grade of O-7 except for those that routinely interact with the public or are Command Spokespersons (Commanders, Chief of Staff, PA, FOIA);
- (6) Records compiled for law enforcement purposes (also used for internal investigations).

Per DoDD 5400.7, it is DoD policy to promote transparency and accountability by making available DoD records requested by a member of the public who explicitly or implicitly cites the FOIA and to “release DoD records to the public unless those records are exempt from disclosure. Additionally, NGB is required to retain all paper, electronic, email, and other formats of records.

A FOIA request must be in writing (includes requests by facsimile, or e-mail); explicitly or implicitly invoke the federal FOIA; reasonably describe the desired record(s); give assurances to pay any required fees or request a fee waiver; provide a full mailing address where a response may be sent; and must not be prepared using federal resources or sent through government e-mail.

FOIA Request Processing

ANG FOIA Requests are all processed by NGB; ARNG FOIA Requests are processed at JFHQ. Any information being denied to the requestor must be referred to NGB for final response with recommended redactions. There is a 20 Day statutory time limit to respond to requests

Discussion

The Supreme Court has explained that “the basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the Governors accountable to the governed.” Generally, State employees cannot be involved in the processing of federal FOIAs and state FOIA requests cannot be processed using federal resources.

Key Reference(s):

- a) 5 U.S.C. §552, Freedom of Information Act
- b) DoDD 5400.07, DoD Freedom of Information Act (FOIA) Program
- c) DoDM 5400.07, DoD Freedom Of Information Act (FOIA) Program
- d) DoDI 5015.02, DoD Records Management Program
- e) Memorandum from Vice Chief, National Guard Bureau, subject: Records Management ‘Do Not Destroy’ Order (25 Nov. 2015)

14. Intelligence Support

National Guard Intelligence Activities

Topic: What intelligence activities may a State National Guard conduct?

Guidance

As a general rule, State National Guard can conduct Incident Awareness and Assessment (IAA), provided that they conducting realistic training and evaluation in core Federal military mission.

Per DoDM 5240.01, information may only be collected about a US person if the information constitutes foreign intelligence limited to persons who have significant foreign power contracts, are engaged in intentional terrorism, are involved in international narcotics trafficking, are victims of international terrorism or are international hostages. In limited circumstances counterintelligence may be performed; the intentional collection of counterintelligence about US persons must be limited to persons who are reasonably believed to be engaged in, intelligence activities on behalf of a foreign power, or international terrorist activities.

Per CNGBI 2000.01B NG intelligence personnel operating in a T-32 will operate as members of the DoD intelligence component and must comply with all DoD guidance and federal laws applicable to the component, to include all Intelligence Oversight (IO) rules:

(1) NG intelligence component personnel and equipment may be used for IAA to fulfill TAG requirements for situational awareness or planning purposes, or upon receipt of an NG JFHQ-S or NGB-validated primary agency/lead federal agency Request for Assistance (RFA). IAA activities will not be used to collect U.S. persons' information.

(2) NG intelligence personnel and equipment may not be used for intelligence activities other than FI or CI unless that use is approved by the SecDef or his designee.

(3) NG intelligence personnel in SAD are not members of the DoD intelligence component, and are prohibited from engaging in DoD intelligence and CI activities, and from using DoD intelligence (IAA) and CI equipment and facilities unless authorized by SecDef (or designee).

(4) NG personnel in SAD are subject to the provisions of state and federal law, to include privacy laws. In most states, the collection, use, maintenance, and dissemination of U.S. persons (USPERs) information is strictly regulated; therefore, NG members in a SAD should seek competent legal advice on state laws before collecting information concerning USPERs.

Per CNGBI 2400.00A the NG is prohibited from acquiring, reporting, processing, and storing information on individuals and organizations not affiliated with the DoD, except in those limited circumstances where such information is essential to the accomplishment of an authorized mission. Information-gathering activities are subject to civilian control, high levels of general supervision, and frequent inspections.

Discussion

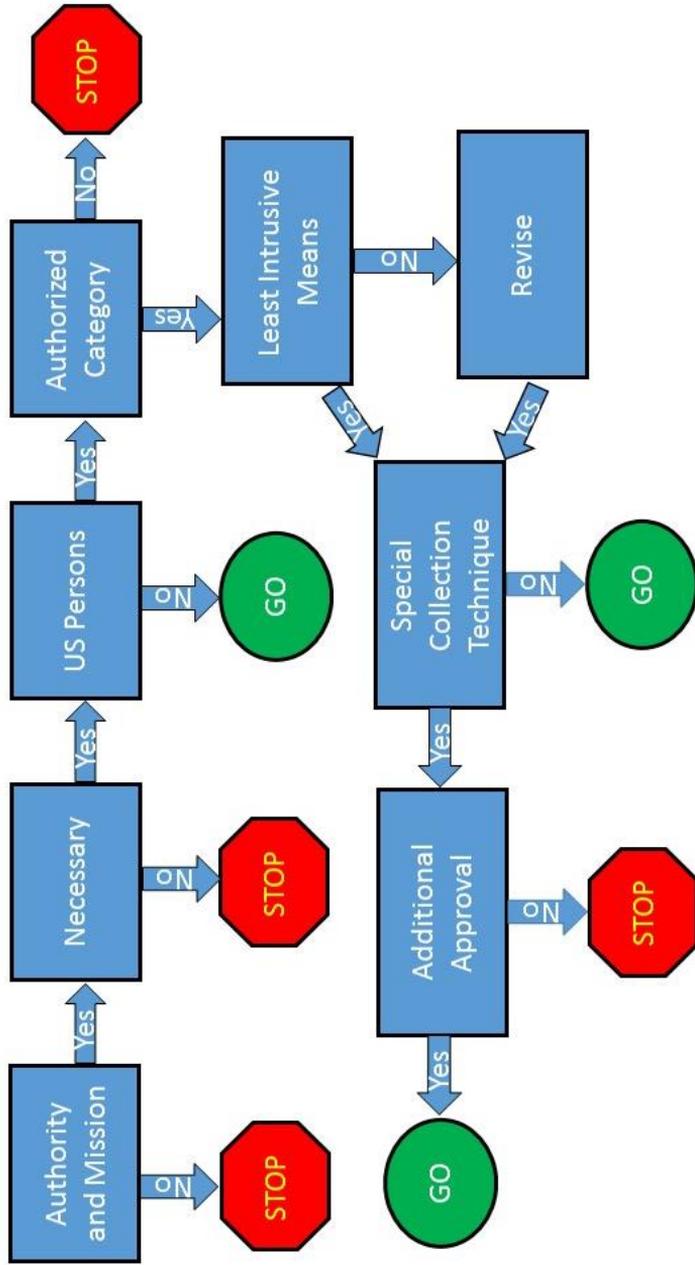
Only those intelligence units and personnel having an authorized mission and authority may lawfully conduct intelligence activity. Do not conduct any unapproved intelligence activities without the express coordination and approval of NGB/CNGB. Maintain an active IO program and utilize the full resources of the J-2, IG and JA prior to making any decisions regarding intelligence activities. If times does not permit a review of proposed intelligence activity, then another sourcing solution outside of the state NG should be utilized until proper review and coordination is conducted.

Key Reference(s):

- a) DoDM 5240.01, Procedures Governing the Conduct of DoD Intelligence Activities
- b) CNGBI 2000.01B, National Guard Intelligence Activities
- c) CNGBM 2000.01, National Guard Intelligence Activities
- d) CNGBI 2400.00A, Acquisition and Storage of Information Concerning Persons and Organizations not Affiliated with the Department of Defense

DoD IC Collecting on U.S. Persons

The Process



National Guard Intelligence Oversight

Topic: What are the State National Guard obligations regarding Intelligence Oversight?

Guidance

CNGBI 2000.01 states that NG intelligence personnel operating in a T-32 status will operate as members of the Department of Defense (DoD) intelligence component and must comply with all DoD guidance and federal laws applicable to the component, to include all Intelligence Oversight (IO) rules.

Per DoDD 5148.13, Inspectors General, as part of their inspection of DoD intelligence components, and General Counsels, as part of their oversight responsibilities shall seek to determine if... components are involved in any questionable activities.

Per CNGBI 0700.01, NG organizations, units, and activities that have an inherent intelligence function, will have an IO Program. The NGB-IGO and State IGs will ensure that IO programs address and document, at minimum... intelligence units, IO monitoring, lawful collection, IO training, IO inspection, intelligence equipment, SAD activities, and peripheral issues such as PAO, CD, CST and Information Operations.

State IGs will:

- (1) Inspect all intelligence and non-intelligence units conducting any intelligence function and/or related activities within their States as directed by their TAG;
- (2) Identify intelligence components and personnel performing intelligence functions;
- (3) Ascertain whether any non-intelligence unit, not specifically identified as an intelligence element, is being used for an intelligence or related purpose;

- (4) Review any planned and on-going NG information collection activities with the SJA;
- (5) Determine if intelligence components... are involved in questionable activities;
- (6) Ensure procedures exist... for the reporting of Questionable Intelligence Activities (QIA);
- (7) Report all QIA through Intelligence and IG channels to NGB-IGO;
- (8) Forward copies of IO related findings/inspection reports to the NGB-IGO office;
- (9) Coordinate with the SJA for interpretation of federal and state law, and applicable directives as they relate to intelligence activities. Unresolved questions should be forwarded to NGB-IGO for coordination, resolution, or additional legal review.

Discussion

By DoD and NGB policy, TAGs through their Inspectors General are responsible to ensure all states have an IO program, conduct routine IO inspections and IO training. Any QIA or highly sensitive matter should be reported immediately IAW with CNGBI 0700.01. Only intelligence units and personnel with mission and authority may conduct any intelligence activities. Coordinate all requests for support with intelligence regulated staff sections, IG, SJA, and NGB.

Key Reference(s):

- a) DoDD 5148.13, Intelligence Oversight
- b) CNGBI 0700.01, Inspector General Intelligence Oversight
- c) CNGBI 2000.01B, National Guard Intelligence Activities

State National Guard Domestic Imagery

Topic: What are the requirements to use NG assets for domestic imagery?

Guidance

As a general rule, the NG can use domestic imagery for providing situational awareness, assessing the existence and extent of damage, and evaluating the effectiveness of damage mitigation efforts, provided that collection complies with Intelligence Oversight, including filing a Proper Use Memorandum (PUM).

Per CNGBM 2000.01, domestic imagery is defined as any imagery collected by satellite (national, tactical, or commercial) or airborne platforms for intelligence or intelligence-related purposes that cover the land areas of the 50 states, the District of Columbia, and the U.S. Territories and possessions, to a 12 nautical mile (NM) seaward limit of these land areas.

Generally valid missions for domestic imagery include responses to natural disasters and civilian emergencies; CI, FI, and security-related vulnerability assessments; requirements in support of environmental/scientific studies, training or navigational purposes, and requirements for imagery in support of LEAs when authorized. Imagery may not be collected for the purpose of gathering any specific information about a U.S. person or private entity, without consent, nor may stored imagery be retrievable by reference to a U.S. person's identifiers.

An approved PUM must be on file with NGB-J2 before airborne platforms (ISR/IAA) can be tasked to collect domestic imagery, the use of intelligence analysts/systems to analyze sensor data, or the use of sensor data for intelligence/IAA purposes. PUMs must be IAW CNGBM 2000.01, DIA policy and guidance, applicable

EOs, and DoD regulations. A PUM is a memorandum that requests use of platforms for a domestic imagery requirement and its intended use. A PUM acknowledges awareness of the legal and policy restrictions regarding domestic imagery collection, retention, dissemination, and use.

Any NG JFHQ-S that owns or has operational control over NG assets that conduct domestic imagery activities within the U.S., Territories, and DC is responsible for creating and seeking approval for a PUM before the execution of a domestic imagery collection mission. The JFHQ-S J2 will route PUMs to NGB-J2 who then forwards the PUM to NGB-JA and NGB-IG for review. If the PUM is sufficient, NGB-J2 will approve the PUM and notify the requesting state.

In a direct and immediate emergency in which time precludes obtaining an approved PUM before collection, TAG may authorize airborne domestic imagery collection when that support is consistent with the Constitution and other laws, regulations, and instructions. The NG JFHQ-S must implement the proper safeguards to ensure all applicable security regulations, guidelines, and other restrictions are followed. A report will be made immediately to the CNGB through the NGCC. A PUM will be filed with NGB-J2 as soon as possible thereafter. Governor and TAGs are now authorized to approve the use of DoD small UAS (sUAS) in a limited circumstance.

Domestic airborne imagery cannot be analyzed or used beyond the purpose identified in the original PUM without obtaining appropriate authorization through an amended PUM. Distribution of domestic imagery to parties other than those identified in the approved PUM is prohibited unless the recipient is reasonably perceived to have a specific, lawful governmental function

requiring it. Adding users to the original PUM is accomplished by submitting an amendment to the PUM.

Unless otherwise approved, domestic imagery must be withheld from all general access database systems and securely held.

Applicable security and classification requirements must be met. NG intelligence components may obtain NGA domestic commercial satellite imagery without higher-level approval when supporting a valid federal mission requirement. NG intelligence components may also use domestic open-source or publicly available imagery. An MFR describing the purpose of the domestic imagery and naming the component official approving the use will be retained on file in all cases.

Discussion

Domestic imagery supports the commander's needs for Incident Awareness and Assessment (IAA). For operational and training requirements NG units may, at times, require newly collected or archived domestic imagery. Domestic imagery is validated through the use of a properly authorized PUM reviewed and approved by NGB. Failure to file a proper PUM may constitute Questionable Intelligence Activity. The proper format for PUMs is found in CNGBM 2000.01. The PUM approval process has become a standard practice for authorizing the use of domestic imagery and addressing the multitude of related issues.

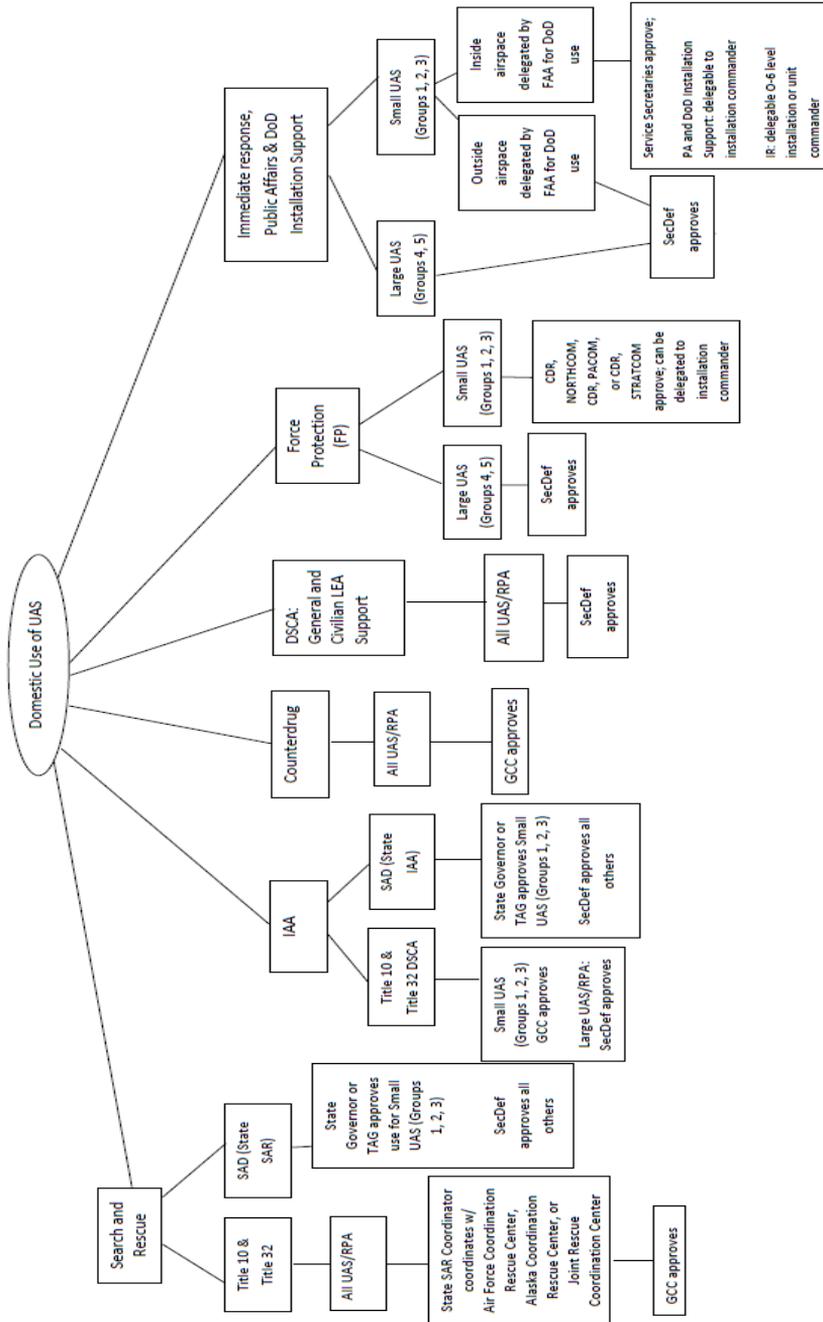
Commanders should ensure the use of approved PUMs as early as possible for training and planned events and as soon as possible for emergency requirements. Commanders should become familiar with CNGBM 2000.01 during steady state and through exercises/training events. Limited authority for TAGs to authorize emergency domestic imagery collection has been provided per CNGBM 2000.01.

In August 2018, SecDef lowered approval authority for domestic use of DoD UASs based on purpose and size of the UAS. The GCC is the approval authority for sUAS for DSCA-SAR and DSCA-IAA. Governor or TAG may approve use of DoD sUAS for State-SAR and State-IAA when requested by the State Governor and not allocated for DoD purposes, USPI not targeted, use is conducted IAW FAA policies and DoD FAA MOA, and NG personnel using or supporting the UAS operations are in SAD. Such use is reportable to NGB. This policy is effective once Service Secretaries promulgate implementation guidance, including interim guidance.

SecDef approval is the default requirement unless approval authority has been specifically delegated. SecDef approval requires Governor's official request in writing with analysis and justification for use that sustained endurance efforts are required, unmanned aircraft provide superior capabilities, physical infrastructure or environmental limitations prohibit the use of manned rotary- or fixed-wing aircraft, and manned aircraft are tasked with other missions (e.g., MedEvac, transport, firefighting) and/or N/A. Also required for staffing is the FAA COA, approved PUM and NGB J2 PUM Approval Memo, 5 x 8 with arming status and background, and powerpoint map of operating area.

Key Reference(s):

- a) DoDD 3025.18, Defense Support of Civil Authorities (DSCA)
- b) SecDef Policy Memorandum, Guidance for the Domestic Use of Unmanned Aircraft Systems in the U.S. National Airspace“, dated 18 August 2018
- c) CNGBM 2000.01, National Guard Intelligence Activities



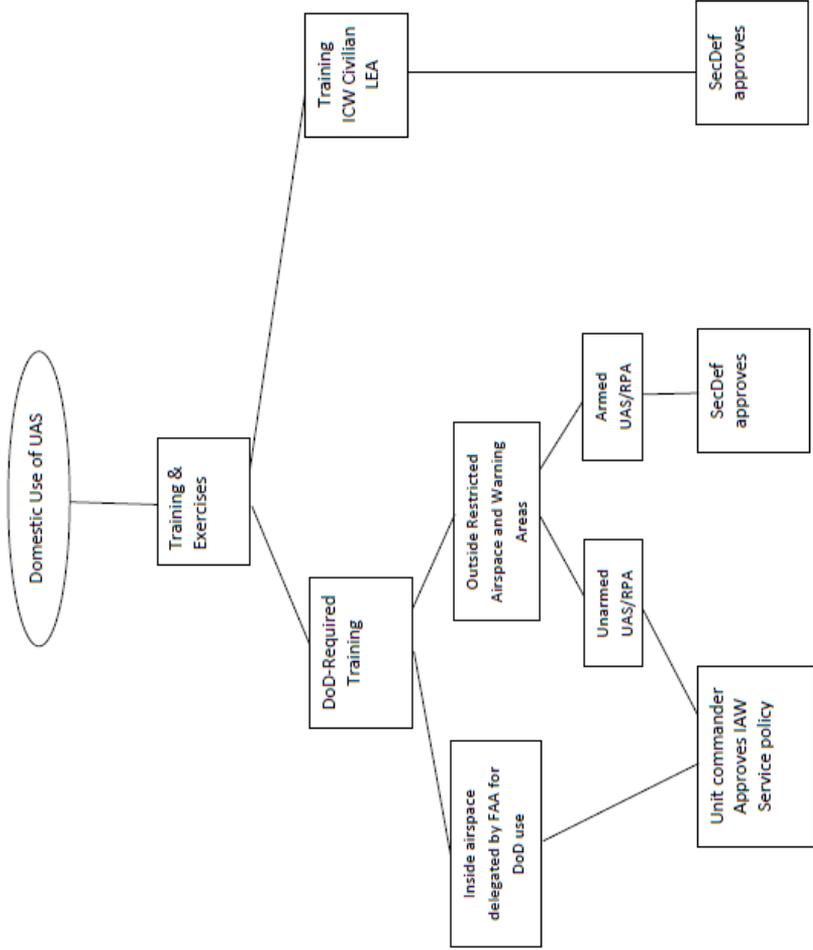


Chart addresses authorized purposes for domestic UAS use IAW SecDef policy memorandum, Guidance for the Domestic Use of Unmanned Aircraft Systems in the U.S. National Airspace”, dated 18 August 2018. All legal, intelligence oversight (including the requirement to obtain a PUM), Privacy Act, and airspace issues remain and must be properly addressed in every mission.

NGB-JA, 22 Aug 18

15. Medical

Medical Licensing

Topic: What are the requirements and authorities for licensing NG Health Care Providers (HCP) during a DSCA event?

Guidance

HCP privileging for a NG activated to Title 10 is done by a Military Treatment Facility IAW AR 40-68 or AFI 44-119. The privileges granted while on Title 10 typically include the provider's full range of skills and are commensurate with the MOS/AFSC.

HCP privileging for a NG HCP in Title 32 IDT status does not include routine medical care and is usually limited to duties ISO Individual Medical Readiness (IMR) tasks (e.g., Periodic Health Assessments (PHAs), Immunizations, etc.). HCP privileging for a NG HCP in Title 32 ADT status can include routine medical care, but authorization to do so requires advanced coordination with a Title 10 privileging authority.

Both Title 10 and Title 32 are Federal duty statuses and professional liability coverage for HCPs in these statuses is provided under the Federal Tort Claims Act. The authorities for credentialing and privileging NG HCPs in SAD are determined by State law and Governor's orders. FTCA does not cover NG HCPs in SAD. Liability coverage is provided by the State.

EMAC Article V Licenses and Permits. The party states agree that "whenever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving party state, such person shall be deemed licensed, certified, or permitted by the state requesting assistance to render aid involving such skill to meet a

declared emergency or disaster, subject to such limitations and conditions as the Governor of the requesting state may prescribe by executive order or otherwise.”

Discussion

NG HCPs must have current credentials and be properly privileged before providing health care. The authority for NG HCP privileging is dependent upon duty status. Credentialing of HCPs in Title 10 or Title 32 is done centrally with final privileging done locally by DoD institutions with appropriate authority. Credentialing and privileging of NG HCPs in SAD is entirely a State matter. Employing NG HCPs in SAD to provide medical care to civilians is possible but must be done with careful advanced planning and done under proper State authorities. NG medical force structure is not designed to support large populations. The NG medical focus is to support line elements. Most NG HCPs provide medical services in the civilian sector. In the event of a large incident, these HCPs would be called upon to assist in their civilian jobs and would not be available for NG duty without negatively impacting local medical services.

Key Reference(s):

- a) Joint Resolution Granting the Consent of Congress to the Emergency Management Assistance Compact. Pub L. No. 104-321, 110 Stat. 3877, (1996)
- b) AR 40-68, Clinical Quality Management
- c) AFI 44-119, Medical Quality Operations

Quarantine

Topic: What is the ability of states to quarantine? Does the federal government affect the states quarantine powers?

Guidance

State authorities have the primary role in managing public health emergencies. Pursuant to their police powers, all State governments may legislate and regulate in the interest of their citizens' health, safety, and welfare. Intra-State Quarantine is a public health measure reserved to the States under the 10th Amendment of the Constitution. Where the communicable disease remains or is likely to remain intra-State, quarantine authority rests with State officials and each State has its own quarantine statute.

The Public Health Service Act (PHSA) authorizes the President to utilize the Public Health Service to promote the public interest, in the event he declares war or a national emergency. Pursuant to 42 U.S.C. §264, the Surgeon General, upon approval of the Secretary of HHS, may make and enforce the regulations he determines are necessary to prevent the introduction, transmission, or dissemination of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. Title 42 U.S.C. §243 provides for State and local assistance from the National Guard.

In 42 CFR Part 70, the government is able to restrict interstate travel of persons suspected of carrying a communicable disease. For individuals to by-pass this restriction, they must receive a permit from the health officer of their state authorizing the travel, if the destination state requires such a permit. If the Director of the CDC believes that the state or local government is not taking adequate measures to contain a communicable disease, the Director may "take such measures to prevent such spread of the

diseases as he/she deems reasonably necessary.” The CDC has broad authority to take any actions deemed “reasonably necessary,” in the event the Director determines that local authorities and controls cannot halt the spread of a communicable disease.

Under the CFR Control of Communicable Diseases Title 21, Parts 1240 and 1250 gives the FDA broad authority to prevent the spread of communicable diseases by way of certain types of interstate traffic. If the Commissioner of Food and Drugs “determines that the measures taken by health authorities” at the State and local levels are “insufficient” to stop the spread of communicable diseases across State lines, the Commissioner is authorized to conduct a range of actions to halt the proliferation of the disease.

Discussion

Quarantine is largely a State responsibility. No current NG duty status allows for members to take part in such activities. Immediate Response Authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory. SAD should be used when making decisions for sourcing such activities.

Key Reference(s):

- a) Title 42 U.S.C., “The Public Health and Welfare”

Immunizations

Topic: What is the authority of NG healthcare providers to immunize members of the Public?

Guidance

NG HCPs can provide immunizations to the Public pursuant to IRA, provided that it is for the purpose of saving lives, preventing human suffering, and/or mitigating great property damage or pursuant to the Stafford Act, provided that there is a validated mission assignment from a lead federal agency.

HCP privileging for a NG activated to Title 10 is done by a Military Treatment Facility IAW AR 40-68 or AFI44-119. The privileges granted while on Title 10 typically include the provider's full range of skills and are commensurate with the MOS/AFSC. However those privileges are generally limited to the DoD population and not authorized for the Public.

HCP privileging for a NG HCP in Title 32 IDT status does not include routine medical care and is usually limited to duties ISO Individual Medical Readiness tasks (e.g. Periodic Health Assessments, immunizations, etc.) HCP privileging for a NG HCP in Title 32 ADT status can include routine medical care, but authorization to do so requires advanced coordination with a Title 10 privileging authority. Title 32 also would be limited to the DoD Population and does not foresee healthcare to the public.

Both Title 10 and Title 32 are Federal duty statuses and professional liability coverage for HCPs in these statuses is provided under the Federal Tort Claims Act.

The authorities for credentialing and privileging NG HCPs in SAD are determined by State law and Governor's orders. FTCA does

not cover NG HCPs in SAD. Any use of NG medical capabilities in SAD is solely and entirely a State issue. Liability coverage is solely a State responsibility and must be addressed prior to the performance off any SAD medical activities.

Discussion

There is no authority for Title 10 and Title 32 NG to vaccinate the general public. Immunizations fall within medical care regulations and Title 10 does not have authority nor is fiscally appropriated to immunize the general public. While MTFs can immunize civilian employees and their dependents, they do not immunize contractors or the general public. Title 32 NG health care providers have limited authority to provide routine health care services to fellow service members when in ADT status (e.g. sick call at AT) and readiness related services during IDT (e.g. PHAs, immunizations). Special categories of Title 32 (502 (f)(2)) would operate within the same limits as Title 10 subject to their funding and authorization for duty. NG health care providers in SAD could provide services to the general public IAW State laws, including authority, liability and cost.

Key Reference(s):

- a) AR 40-68, Clinical Quality Management
- b) AFI 44-119, Medical Quality Operations

Appendix: Information Papers

National Guard Training Activities

1. **Purpose**: To provide guidance regarding legitimate training activities that State National Guards may undertake that provide ancillary support to operational missions or activities, including disaster response.

2. **Discussion**. DoDI 1215.06 recognizes that training activities undertaken by the Reserve Components may support federal operations or missions so long as the training missions are legitimate. The following is a non-exclusive list of authorities already available to the States and examples

a. 32 U.S.C. §502(a).

(1) IDT/AT activities that provide ancillary support to an operational mission.

(2) DCSA training IAW NGR 350-1 for those units assigned a DSCA mission.

b. 32 U.S.C. §502(f).

(1) Mission assurance activities (any and all actions necessary or appropriate to safeguard federal resources (property, equipment, information etc.) provided to the National Guard.

(2) Training or other duty (other than IDT/AT) performed by a member or unit of the National Guard that provides an ancillary benefit to an operational mission. Examples include a no-notice training assembly to train individuals or units on METL tasks that may support an operational mission (medical support, force protection activities, aviation proficiency, etc.).

3. State National Guard units must ensure that NGR 350-1 and ANGI 36-2001 are followed with regard to changes or amendments to their training plan.

4. National Guard members already in a duty status (e.g., FTNGDCD, FTNGDOS, AGR) may provide ancillary support. However National Guard personnel will not be placed in or extended in Title 32 to conduct State immediate response activities.

5. Performance of these training activities does not preclude members of the National Guard from performing immediate response activities IAW DoDD 3025.18.

Immediate Response Authority

1. **Purpose**: To provide guidance regarding the ability of the National Guard to provide immediate response to civil authorities

2. **References**:

- a. DoDD 3025.18, Defense Support to Civil Authorities (DSCA) Dec 29, 2010, incorporating Change 2, 19 March 2018
- b. DepSecDef Memo, Guidance for the Utilization of IRA for DSCA in Complex Catastrophes, 9 December 2013
- c. CNGBI 1302.01, Guidance for Members Performing Duty Under the Authority of 32 U.S.C. §502(f)

3. **Discussion**

a. 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, (most typically installation commanders) may provide an immediate response (IR) 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.

b. As the principle authority for and during State emergencies, the State Governor may direct a State immediate response using National Guard personnel under State command and control (including personnel in Title 32 in accordance with State law, however National Guard personnel will not be placed in or extended in Title 32 to conduct State immediate response activities. Therefore if National Guard personnel were conducting

AT and the IR mission extends beyond the end date of the AT orders, at the end date of the AT order National Guard personnel must come off Title 32 orders to continue the IR activity, if desired, in SAD.

c. By NGB policy, the immediate response must be reported to NGB as soon as possible.

d. 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.

e. 72 hours after the IRA was exercised, the command must provide a reassessment to the CNGB in order to continue the use of personnel in a T-32 status responding in accordance with Immediate Response Authority in excess of 72 hrs. This reassessment must find that continued support is needed to save lives, prevent human suffering, or mitigate great property damage. CNGB must approve immediate response activities which last longer than 72 hrs.

f. All incremental costs involved with military personnel in federal service responding in immediate response are reimbursable to DoD. However, support will not be delayed or denied due to lack of commitment to reimburse.

g. In immediate response situations, maximum efforts must be made to replace AGR members, FTNGDOS/FTNGDCD/CST members, and technicians with traditional members in an appropriate duty status.

4. Notification & Approval Requirement: CNGBI 1302.01, Para. 4.e: Commanders directing members in a 32 U.S.C. 502f duty status must immediately notify the NGCC for 502f operational missions

5. Authorized IRA Missions

a. Anything that entails saving lives, preventing human suffering, or mitigating great property damage, and does not violate the restrictions discussed below. Would include the proposed public facility/infrastructure protection mission set NGCC indicated.

b. Could include transporting the injured, fighting fires, moving critical supplies, distributing food and water, moving rubble or debris (if circumstances qualified), etc. Potentially, mitigating great property damage to private (as opposed to public) facilities and infrastructure may qualify, but the mission set indicated is currently limited to public facilities. Each one should be considered on a case-by-case basis under this analysis.

6. Rule Against Assisting Law Enforcement. DoDD 3025.18, Para 4.g: “Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.” If NG are in SAD, they can be assigned an LE support mission, as they would not fall under the DoDD.

Space-A Transport for Unaccompanied NG Dependents

1. **Purpose**: Guidance for Space-Available flight for NG Family Member

2. **Reference**: DoD Instruction 4515.13, “Air Transportation Eligibility,” 22 January 2016, Change 2, 9 February 2018

3. **Background**. A request has been submitted to provide unaccompanied space-available transport to family members (spouse and children) of an ANG member from the USVI to the State in which the member is stationed and presently located.

4. **Discussion**. The policy for air transportation eligibility aboard MILAIR is governed by the reference. Generally, dependents of drilling Reservist are not eligible for space-available travel and if they were eligible for space-available travel, dependent travel is only authorized when accompanied by the sponsor.¹ Travel not otherwise covered under the reference must be approved by the CNGB IAW the exception to policy requirements set forth in section 12.2 of the reference which provides the following: The request must include (1) the purpose for the transportation being requested, (2) justification explaining why the transportation is in the best interest of the DoD or of the DoD Component concerned, (3) the cost of commercial airlift and a statement explaining why commercial transportation resources are not available or, if available, cannot meet the mission requirement (cost alone is insufficient justification for not using commercial transportation

¹ Reference, sec. 4.9. We note there are some exceptions to this general rule, but the listed exceptions are not applicable to this request.

service), (4) the estimated cost of DoD airlift by aircraft type, and (5) a statement that the requested transportation is on a space-required or a non-interference basis and whether it will be provided on a reimbursable or non-reimbursable basis to the organization or individual receiving the transportation (if the transportation is to be provided on a non-reimbursable basis to the organization or individual, the request must include a justification explaining why the transportation will not be reimbursed).

5. The request that addresses all of the criteria laid out in the guidance is below:

a. The purpose for the transportation requested is to transport the immediate family members of a Guardsman, all of whom are victims of the recent hurricanes affecting the area and who are currently stranded homeless on the island with limited life support resources.

b. The transportation is in the best interest of the DoD and National Guard as it will ensure the readiness and mission-capability of a member who would otherwise be preoccupied with the welfare of his family. Further, the effort will assist in building confidence in family readiness and support programs.

c. The cost of commercial airlift is unknown at this time as there are no flights out of the affected area for commercial passengers. In looking at flights that may be available in the future, the median cost for a one way trip, per passenger is \$XXX one way. Commercial transportation is not available at this time, and estimates indicate it will not be until approximately several months later (XXXXXX date).

d. The unit requests that the transportation, if approved, be provided on a non-reimbursable basis to the organization. The primary justification for providing transportation without reimbursement is that the family of the Guardsman has just suffered a tremendous economic loss as a result of the hurricanes. The unexpected expense of having to pay for air travel at this time, whether commercial or through reimbursement to the organization, would cause additional financial and emotional hardship on the family. Further, any additional cost to the organization by adding XX passengers to an already scheduled flight is de minimis.

5. Travel on a noninterference, non-reimbursable basis may be approved by CNGB subject to his finding that the transportation is in the best interest of the NG.

Use of NG Title 5 Civilian Directors of Psychological Health Personnel in Hurricane Operations

1. **Purpose:** To provide guidance regarding the use of NGB Title 5 Civilian Director of Psychological Health (hereinafter “DPH”) Personnel in hurricane operations

2. **References:**

- a. 5 U.S.C. “Government Organization and Employees”
- b. 32 U.S.C. §709, “Technicians: employment, use, status”
- c. 10 U.S.C. §10503, “Functions of the National Guard: charter”
- d. 28 U.S.C. §Chapter 171, “Tort Claims Procedure”
- e. 5 C.F.R. “Administrative Personnel”
- f. 20 C.F.R. Part 10 - "Claims for Compensation Under The Federal Employees' Compensation Act"
- g. DoD Instruction 1400.25, “DoD Civilian Personnel Management System,” 25 November 1996
- h. DoD Directive 5105.77, “National Guard Bureau (NGB),” 30 October 2015
- i. CNGBI 1701.01, “Manpower and Organization Policies and Standards,” 07 February 2014

3. **Discussion.** Can one or more title 5 National Guard civilian Wing DPHs be permitted to travel to the Hurricane in support of National Guard members engaged in hurricane rescue and recovery efforts? DPH’s are legally authorized to assist NG military service members engaged in Hurricane operations.

4. **Law.** Title 5 civilians, unlike Title 32 technicians, are not constrained by the statutory [Technician Act] restrictions to organize, administer, instruct, or train the National Guard within their state. Nor are they limited to maintenance and repair of

supplies issued to the National Guard or the armed forces; and the performance of additional duties as assigned by competent authority on a noninterference basis. Therefore, in this context Title 5 personnel have greater potential use for a broad spectrum of missions than Title 32 technicians.

5. The Position Description (PD) for DPH providers states the primary purpose of this position is to provide operations related leadership consultation, direct client services, community capacity building, preventive, remedial and support services aimed at improving and sustaining the psychological health of National Guard Members and their families. The PD also provides that clinical and administrative duties should focus on outreach, education and prevention, and needs based psychosocial assessment, diagnosis and short-term problem resolution. DPHs are also tasked with the provision of or referral for evidence based interventions. Furthermore, the DPH is to ensure clinical mental health services provided are integrated with other counseling and support services available at the installation, Federal, State, and Territorial level, and military and non-military organizations (i.e. Military OneSource, Military and Family Life Consultants, and TRICARE Network). The mission scope appears to be within the terms of the DPH PD.

6. Title 5 civilians are covered by the FTCA. The scope of the mission appears to be within the scope of employment for the DPH PD. Subsequently should a DPH be sued in their official capacity for the performance of their duties they are likely to be scoped, substituted and represented by the Department of Justice (DoJ). DoJ has also historically represented title 5 and title 32

professionals in malpractice and licensure complaints when the professional was acting within the scope of their employment.

7. **Conclusion.** The scope of the DPH mission as outlined by the Joint Surgeon General appears to be within the scope of DPH employment, and legally sufficient.

Use of NG Title 5 Civilian Employees to Perform State Domestic Emergency Response

1. **Purpose:** To provide guidance on use of Title 5 civilian employees for emergency response
2. **References:** 20 April 2017, acting ASD-M&RA memo (“Barna memo”)
3. **Discussion.** The Barna memo provides guidance on designating as “essential personnel” those technician-Title 5 members who were converted to Title 5 civilians. CNGB approves any positions that TAGs recommend to be designated as essential personnel. Such designated essential personnel may be subject to duty in preparation for, or in response to, a state emergency or disaster declaration. Such designation will not exceed 14 calendar days per year unless otherwise approved in advance by the CNGB. To date, CNGB has not issued a formal designation of any converted Title 5 personnel. The position descriptions of T5 personnel subject to designation should adequately reflect the potential spectrum of duties they may be required to perform under such designation. NGB has not issued implementing guidance or control measures regarding how such designated personnel may be used or how TAGs should coordinate extensions beyond the 14 day time limit.
4. ASD M&RA issued policy guidance allowing such designation in order to address TAG concerns regarding the potential impact of the tech-title 5 conversion on emergency response. CNGB designation as “essential employees” is a condition pre-requisite for the utilization of such personnel by the TAGs in preparation for or in response to state domestic emergencies. Designated personnel may be specifically used in preparation for a domestic emergency. Not all position descriptions for NG Title 5 employees adequately incorporate the potential requirement for utilization under such designation.

5. TAGs are the head of agency for all NG Title 5 civilian personnel actions in their state and are responsible for notifying and utilization of any designated personnel. TAGs have the requisite authorities and obligation to identify and resolve any corresponding collective bargaining/union notification requirements. NGB is not party to state CBA and has no role in notification or negotiation of the state's I&I
6. The Barna memo does not have geographic restrictions and given the EMAC context, it would seem counter to the purpose of the designation to impose such a limit. TAG can utilize designated T5 by sending them out of state under the EMAC so long as there is a declared state of emergency or disaster declaration and the time limits (14-calendar days) are met.
7. **Recommendation:** NGB J1 should immediately review the NG Title 5 employee population within the impacted and responding states to determine which are the most appropriate for designation as essential personnel. Nothing in the ASD-M&RA guidance precludes the issuance of a blanket designation of the entire affected NG Title 5 employee population. A list should be immediately compiled, coordinated with the TAGs of the impacted and responding states and presented with the highest urgency for CNGB's consideration/signature. NGB J1 should immediately issue guidance regarding the policies and procedures for notifying and utilizing the designated essential personnel and procedures for coordinating CNGB approval of extensions beyond the 14-calendar day limit.

Use of AGRs in DOMOPS

1. **Purpose**: To provide guidance on the use of AGRS in domestic operations.

2. **References**:

- a. 10 U.S.C. 101, Definitions
- b. 10 U.S.C. 12310, Reserves: for organizing, administering, etc., Reserve Components
- c. 32 U.S.C. 112, Drug Interdiction and Counter-drug Activities
- d. 32 U.S.C. 328(b), Active Guard and Reserve Duty: Governor's authority
- e. DoDD 3025.18, Defense Support of Civil Authorities, September 21, 2012.
- f. NGR (AR) 600-5, The Active Guard Reserve (AGR) Program Title 32m Full Time National Guard Duty (FTNGD) Management, 21 September 2015
- g. ANGI 36-101, Air National Guard Active Guard Reserve (AGR) Program, 3 June 2010
- h. CNGBI 1401, Guidance for Use of National Guard Members in Full Time Duty Programs Title 32 (T-32) Active Guard Reserve, T-32 Full Time National Guard Duty Operational Support (FTNGDOS) and Full Time National Guard Duty Counter Drug (FTNGDCD) Military Technicians for CONUS Contingency Situations, 24 February 2012 (expired)¹
- i. CNGBI 1302.01, Guidance for members performing duty under the authority of 32 U.S.C. 502(f), 23 April 2012

3. **Discussion**. AGRs may perform DOMOPS duties under four categories: primary AGR duties, statutory exceptions such as CST

1. CNGBI 1401 expired and has not been replaced, updated, superseded or rescinded. Therefore, we note what it stated and its expired status.

duties, other than primary duties on a “non-interference” basis, and Immediate Response. Each is fully discussed below.

4. **Primary AGR duties:** AGRs may perform their primary AGR functions during Domestic Operations. These stem from the statutory and regulatory authority of AGRs. Under the provisions of 10 U.S.C. §101(d)(6)(A), AGR duty means active duty or full-time National Guard duty (FTNGD) performed by a member of a reserve component of the Army or Air National Guard or FTNGD performed by a member of the National Guard for a period of 180 consecutive days or more for the purpose of “**organizing, administering, recruiting, instructing, or training the reserve components.**” NGR (AR) 600-5, para. 3-4², ANGI 36-101, para. 7.10.1.³.

5. **Statutory exceptions:** AGRs may perform other duties when specifically authorized by statute, such as when assigned to a Civil Support Team. NGR (AR) 600-5, para. 3-4c (Emergency operations and SAD State Duty) specifies: “[A] request from the President or SecDef is not required for units composed entirely of AGR members or units established by law performing specific functions in emergency situations, such as CSTs. Performing those functions in response to the specified emergency situations falls within their normal AGR duties.” ANGI 36-101, para. 7.10.1.6 provides similar guidance, as did CNGBN 1401, para. 5.a.

2. “When a unit is ordered to operational 32 U.S.C. 502(f) status or state duty status to support an emergency situation, its AGR members may accompany the unit and continue to perform their normal AGR duties.”

3. “[w]hen an AGR Airman’s unit is ordered to operational Title 32 502(f)(2), ... 502(a), or SAD to support an emergency domestic situation, the AGR Airman may accompany his or her unit and continue to perform his or her normal AGR duties.”

6. Other than primary duties, on a non-interference basis:⁴

AGRs may perform other than primary duties on a non-interference basis. 32 U.S.C. 328(b) elaborates on the duties of SMs on Title 32 AGR orders. Additionally, both NGR (AR) 600-5, *The Active Guard/Reserve (AGR) Program*, para. 3-4 and ANGI 36-101, *Air National Guard Active Guard Reserve (AGR) Program*, in para. 7.10.1 similarly specify that AGRs may perform other duties, to the extent that doing so does not interfere with the performance of their primary AGR duties. CNGBN 1401, para. 5.a also specified this non-interference rule.

7. Immediate Response Authority (IR): AGRs may perform IR. DoDD 3025.18 defines "immediate response authority".⁵ While NGR 600-5 is silent on the issue of AGR use in Immediate Response, ANGI 36-101, para. 7.10.2.1, states "AGRs may support an Immediate Response situation. Contingency situations of an emergency nature, where AGR Airmen are employed under the immediate response doctrine, shall be reported to the Chief,

4. Note, 10 U.S.C. 12310 specifies more duties that T10 AGRs may perform on a non-interference basis, such as duty in a multi-component unit (one example would be the Ground Missile Defense (GMD) mission in Alaska); these additionally-specified duties are not enumerated to the same extent in the corresponding 32 U.S.C. 328 language for T-32 AGRs.

5. "a commander's or other responsible DoD or State officials authority, temporarily to employ resources under their control, subject to supplemental direction from higher headquarters, to provide those resources to save lives, prevent human suffering, or mitigate great property damage in response to a request for assistance a civil authority within the United States."

National Guard Bureau (CNGB) as soon as practicable to permit reassessment of whether there remains a necessity to employ them under that authority.” AGR personnel performing Immediate Response must not do so for more than 72 hours unless specifically approved by CNGB.⁶

8. **Conclusion**: AGRs may be used in DOMOPS in four situations:

- a. To perform their primary AGR duties of organizing, administering, recruiting, instructing, and training the reserve components;
- b. To perform Statutory exceptions to AGRs’ enumerated duties (ex. CSTs);
- c. To perform other than primary duties, on a non-interference basis *vis a vis* their primary duties; and
- d. To perform duties under Immediate Response Authority, to save lives, prevent human suffering or mitigate great property damage when requested by civilian authorities.

6. CNGB 1302.01, para. 4(e) notes that 32 U.S.C. 502(f) personnel are limited to 72 hours of IR unless approved by CNGB for longer durations.

NG SMs eligibility for DoD healthcare while on SAD

1. **Purpose**: To provide information and considerations regarding eligibility of SAD¹ members for DoD healthcare during a declared natural disaster²
2. **BLUF**: Members in SAD are not military healthcare beneficiaries. However, as a civilian, members on SAD orders could receive emergency healthcare as a member of the civilian population³ impacted by the disaster at a military treatment facility (MTF) pursuant to a validated FEMA mission assignment.
3. **Discussion**: Eligibility for DoD healthcare is governed by 10 U.S.C. Sec 1074(c) (See Title 10, Chapter 55, generally) and implemented by DoD through DODD 6010.04, Healthcare for Uniformed Services Members and Beneficiaries, 17 August 2015. Healthcare beneficiaries have access to MTFs consistent with sections 1074(c), 1076, 1079, and 1086 of Title 10 and other applicable laws and regulations. Eligibility determinations are recorded in Defense Enrollment Eligibility Reporting System.
4. Exceptions to individuals who are not authorized care and require emergency medical or dental care have been implemented

1. SAD or equivalent Territorial Active Duty (TAD)

2. This IP has been coordinated with NGB-J1 and NGB-SG. We have researched and found no guidance authorizing eligibility of military healthcare for members in SAD with the exception of SAD member being placed on qualifying Title 32 or Title 10 orders.

3. This eligibility would be based on their status as a civilian and NOT based on their status as a SAD member

by the Service Secretaries in AFI 41-210, para 2.35, AR 40-3, para 13-3, and AR 40-400, para 3-55.

5. The Stafford Act provides for assistance from the federal government to states in the event of emergencies or natural and other disasters. Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster, as follows:

a. Medicine, Food, and Other Consumables - Distributing or rendering through State and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations medicine durable medical equipment, food, and other consumable supplies, and other services and assistance to disaster victims; and

b. Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine durable medical equipment, and other essential needs, including movement of supplies or persons.

6. DHS, through the FEMA directs and coordinates the federal response on behalf of the President. DHS has prepared the National Response Framework which defines Emergency Support Functions (ESFs) for which certain federal agencies have either a primary or supporting role. Public health and medical services falls under ESF #8.

7. DODD 3025.18, Defense Support of Civil Authorities (DSCA) authorizes “support provided by U.S. Federal military forces, DoD civilians, DoD contract personnel, DoD Component assets, and NG forces (when SecDef, in coordination with the Governors of the affected States, elects and requests to use those forces in Title 32) in response to requests for assistance from civil authorities for domestic emergencies ... and other domestic activities”. DSCA is initiated by a request for DoD assistance from civil authorities or qualifying entities or is authorized by the President or SecDef (DODD 3025.18, para 4(c)). All requests must contain a commitment to reimburse through the Stafford or Economy Act.

8. DODI 3025.24, DoD Public Health and Medical Services in Support of Civil Authorities, provides guidance and direction for public health, medical incidents, emergency planning, preparedness, and response regarding DSCA and recognizes the ASD(HD&GS) as the lead for DoD on matters related to NRF ESF #8. Medical DSCA is governed by DODD 3025.18. Fatality management and laboratory support are permissible public health and medical support.

9. In a large-scale public health or medical response, DoD could provide civil support to the Department of Health and Human Services, the primary agency responsible for this mission under ESF #8.⁴ DoD may be asked to provide support for casualty

4. Hurricanes Irma and Maria are natural disasters that have devastated, among others, Puerto Rico and the USVI. The President made a Major Disaster Declaration on 10 September 2017 for Puerto Rico as a result of Hurricane Irma (DR-4336) and on 20 September 2017 as a result of Hurricane Maria (DR-4339).

clearing and staging, patient treatment, and services such as laboratory diagnostics. DoD resources may be needed to assist with the protection of food and water, the provision of medical supplies, coordination of patient processing, and/or the management of human remains, among other items. All activities would be coordinated through the mission assignment process. DoD, as a support agency, could, among other actions, provide the use of functional DoD MTFs within or near the incident area for medical care of non-military healthcare beneficiaries.

10. Members in SAD are not military healthcare beneficiaries unless independently eligible under Title 10, Chapter 55. However, in the spirit and intent of the Stafford Act and DSCA policies, members in SAD responding to hurricane relief and recovery efforts could receive emergency healthcare as a member of the civilian population impacted by the disaster at an MTF pursuant to a validated mission assignment from FEMA based on their status as a civilian and NOT based on their status as a SAD member. If further treatment is needed, the member would need to be transferred to a State owned MTF or private provider at the State's expense.

Can Pets/Service Animals be Transported on MILAIR?

1. **Purpose:** Discuss authorities, restrictions, and considerations of ANG transportation of pets/ service animals, accompanied by owners, from disaster areas.
2. **Discussion.** The DoD policy for passenger transportation eligibility on DoD owned or controlled aircraft is set forth in DoDI 4515.13, “Air Transportation Eligibility”. ANGI 10-201 strictly enforces the guidance in DoD 4515.13 (Paragraph 1.3.3).
3. DoD policy permits the transportation of service animals when accompanying a passenger authorized transportation under DoDI 4515.13 (Paragraph 10.1). Service animals are “working animals individually trained to perform specific tasks for people with disabilities, such as guiding people who are blind, alerting people who are deaf, pulling wheelchairs, alerting and protecting a person who is having a seizure, or performing other special tasks.” DoD policy permits the transportation of “emotional support service animals”, with their otherwise approved, eligible owners, provided the passenger has the required documentation as detailed in DoDI 4515.13 (Paragraph 10.2).
4. Passengers with pets (dogs and cats only) may travel in an evacuation authorizing space-required travel. Passengers traveling in a space-available status are not permitted to ship pets. In the event of an evacuation, a uniformed services member or authorized DoD civilian employee is permitted transportation for up to two household pets to and from the safe haven location to a designated place. See DoDI 4515.13 for further conditions and requirements. Other animals, such as horses, fish, birds, and rodents, are

excluded as pets under this authority because of their size, exotic nature, shipping restrictions, host nation restrictions, and special handling difficulties (Paragraph 10.3).

5. DoD policy require commanders at all levels to exercise prudent judgment to ensure that only authorized traffic is transported and that they do not misuse the authority delegated to them. All officials responding to requests for transportation not specifically authorized by DoDI 4515.13 shall make no commitments concerning prospective travelers or cargo until the potential user obtains all required approvals and the flying unit must then obtain the required ANG approval (ANGI 10–201, para. 1.3.3.2).

6. Transportation may be disapproved by the chief of the passenger travel section or the aircraft commander if there is an unacceptable risk to the safety or health of the disabled passenger or other passengers or crew, or if operational necessity, equipment, or manpower limitations preclude accepting a disabled passenger, service animal, or mobility assistance device. The aircraft commander is the final approval authority on all matters relating to flight safety (DoDI 4515.13, para. 4.1(h)).

Can Donated Goods be Transported on MILAIR?

1. **Purpose:** To discuss whether NG can provide airlift of disaster relief supplies, donated by private citizens, to affected areas for hurricane relief.

2. **Discussion.**

a. State Active Duty. Under NGB regulations, the Governor/TAG is empowered to employ ARNG/ANG aircraft on SAD, with State funds, and under the command of the Governor pursuant to State law, to perform disaster relief operations. If State law permits, disaster relief operations on SAD can include the transport of disaster relief supplies donated by private citizens. Use of ARNG aircraft are governed by the requirements of NG PAM 95–5 and ANG aircraft are governed by the requirements of ANGI 10–201.

b. Title 32 Operational Support.

1. The Stafford Act authorizes the President (POTUS) to “direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law” in support of State and local response efforts for emergencies (42 U.S.C. §5192(a)(1)) and State and local response and recovery efforts for major disasters (42 U.S.C. §5170a(1)). This tasking authority, delegated to the FEMA Administrator, is carried out through a Mission Assignment (MA). An MA is a work order issued to a Federal agency directing completion by that Agency of a specific task and citing funding, other managerial controls and guidance (44 C.F.R. §206.2(a)(18)).

2. FEMA issues MAs to DoD to support response and recovery efforts for major disasters once POTUS declared certain hurricane affected regions a major disaster. Assuming FEMA approves an MA to DoD for transport disaster relief supplies donated by private citizens, then DoD would need to determine whether the NG airlift is the best sourcing solution for the MA IAW DoDD 3025.18.

c. Title 32 Training: The transport of disaster relief supplies, donated by private citizens, by NG airlift on Title 32 training orders could raise questions related to the appropriate use of Government resources and the extent to which NG's airlift of private donations may compete with local commercial enterprise. Questions related to the endorsement of non-Federal entities could also arise if the donations were associated to an identifiable private, non-governmental, or corporate group.

d. IAW DoDI 4515.13, Section 6 identifies ten categories of cargo that are eligible for transport on DoD aircraft under the conditions set forth in the DoDI. Transportation eligibility includes “[h]umanitarian cargo transported under the authority contained in Sections 402 and 2561 of Title 10, U.S.C. and similar programs.” Further, “[a]ll other cargo [is eligible] when authorized by the SecDef, or designee, or other approval authority in Section 12 of this issuance or DoDI 4500.57.” You should note “other approval authority” in Section 12 includes the CNGB, or designee. The CNGB may approval “other cargo” but only IAW the requirements set forth in Section 12.2 of DoDI 4515.13 and Table 4, Item 9 therein. Reimbursement may be required. See DoDI 4515.13, Section 11.

e. DANG will likely issue guidance to ensure coordination with affected states and FEMA is conducted and provided through a Mission Assignment Task Order (MATO) for sourcing to DoD. Guidance may also provide consideration against movement of donated goods due to operational considerations and the potential for significant expense and risk, instead recommending movement of such goods in via commercial carriers or via other NGO partners.

Considerations for NG Medical Support conducted in SAD

Licensing/Credentialing/Privileging:

Q: When NG are operating in SAD outside of their state, how can they determine whether their license to practice health care is recognized by the receiving state?

A: Qualified NG military health care professionals (MHCPs) operating in SAD pursuant to EMAC may have their medical licenses recognized in the relevant jurisdiction (drawing from Article VI of Model EMAC); however, the relevant EMAC needs to be referenced to determine whether it covers medical practice, and what, if any conditions or restrictions apply to the scope of practice. When operating in SAD, the supporting state must look to the receiving state's EMAC and any accompanying State laws, Executive orders or conditions to determine restrictions or scope of practice.

Q: How are out-of-state MHCPs credentialed?

A: In addition to having a valid license, an MHCP must have privileges to practice in specific medical disciplines at a designated location. Privileges set forth the MHCP's authorized scope of activity. MHCPs are credentialed at their home Military Treatment Facility (MTF).

When operating outside of their jurisdiction, MHCPs must be granted privileges. When supporting a fixed DoD facility, the MHCP receives privileges from the supported MTF commander. An MHCP serving in the field is granted privileges by the Task Force - Medical Commander. The MHCP is responsible for

providing Inter-facility Credentials Transfer Brief (ICTB) to the receiving privileging authority.

Some private medical facilities grant privileges directly to MHCPs. DoD would likely need a Memorandum of Agreement (MOA) with the facility through which the MHCPs would be granted privileges. MHCPs should be covered under the facility's malpractice insurance coverage.

Liability/FTCA/Feres:

Q: Do out-of-State medical providers have liability protection for providing treatment?

A: Out-of-state military health care providers (MHCP) should not be liable for any negligence as a result of their actions, provided that they are acting within the scope of their duties in response to an actual or potential disaster.

When it is established that they MHCP's actions are within the scope of duties, liability, if any, shifts to either state or federal government. First, under the EMAC, Article VI, out-of-state practitioners are considered "agents of the requesting state for tort liability and immunity purposes; and no party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith." Of course, willful misconduct, gross negligence, or recklessness are outside the scope of the EMAC's coverage.

There is also the possibility that the MHCP is practicing at a privacy medical facility. Should this occur, there must be a memorandum of agreement in place with the facility, and it is likely that the MHCP would receive coverage under the private

facility's malpractice insurance coverage. Prior to allowing military medical personnel to perform duties in civilian facilities, please contact NGB-JA-Litigation to coordinate the details.

Lastly, Good Samaritan Laws generally provides that no person who “voluntarily and gratuitously renders emergency assistance to a person in need thereof, shall be liable for civil damages for any personal injuries or property damage which result from acts or omissions by such person in rendering emergency assistance, which may constitute ordinary negligence; Provided, however, that such immunity does not apply to acts or omissions constituting gross, willful or wanton negligence.

Q: Does status SAD v. T-32 impact medical malpractice coverage?

A: Yes. IAW 28 U.S.C. 2671, military medical practitioners performing duties under 502 may be covered by the FTCA for medical malpractice claims arising from actions-treatment provided within the course and scope of their employment. Military medical providers performing duty under SAD through the EMAC will be extended the same liability coverage as provided under state law to emergency response medical personnel of the receiving state while responding to a state domestic emergency.

Privacy Issues:

Q: Does Health Insurance Portability and Affordability Act (HIPAA) apply?

A: HIPAA may or may not apply, depending upon whether one is a Covered Entity or Business Associate. Assuming that HIPAA

does apply, MHCPs and HCPs may share patient information as necessary to provide treatment; to identify, locate and notify family members, guardians, or anyone else responsible for the individual's care of the individual's location, general condition, or death; or to prevent or lessen a serious and imminent threat to the health and safety of a person or the public -- consistent with applicable law and the provider's standards of ethical conduct.

IAA and Counterdrug Personnel

1. **Purpose.** To provide guidance on counterdrug personnel operating counterdrug platforms during IAA missions under IRA.

2. **References.**

(a) DODI 3025.18

(b) CNGBI 1302.01

(c) CNBGI 7500.00

3. **Discussion.** CD personnel may operate CD platforms in conducting missions under IRA authority. The IRA missions must be valid and any PUMs must be approved in advance of any IAA missions. CD personnel currently in 32 U.S.C. §502(f) status conduct operational CD missions pursuant to 32 U.S.C. §112 authority IAW approved CD State Plans. If a State wants to use these CD crews and platforms to provide IAA during disaster response, a State may do so under the following COAs:

COA 1. CD crews can fly IAA as part of immediate response authority:

Generally, the IRA mission authorization is decided by the State NG leadership. IRA requests and notifications route from the State J3/G3/A3 to the NGCC / J3/7. Further, 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. CD personnel may be tasked with operating CD platforms when supporting valid missions under IRA authority.

COA 2. For non-IRA support/non-CD support situations, CNGBI 1302.01 states "Members performing duty under the authority of 32 U.S.C. §502(f) will not perform duties that are not specific requirements of the mission for which the members were ordered to duty. If circumstances require a change of duty, Commanders must amend/curtail the current order. A member whose tour was amended/curtailed removing the member from duty under 32 U.S.C. §502(f) authority for a specific mission requires a new order to return to the original mission."

COA 3. Even though CD members are already on OS orders with their primary purpose being CD operational support, they are authorized to perform training while on CD orders, which may then provide incidental operational benefits. This training may be pursuant to drill or AT, in which they are legally required to perform while on CD orders. Therefore, they may be able to perform IAA support pursuant to their drill/AT requirements, or, alternatively, if there is a "training opportunity" in which they may be able to increase their METL skills (Aviation, AV support), there may be discretionary authority (State CD leadership, TAG, State Aviation officer) to perform IAA pursuant to primary METL training ISO an IAA support request. In this case, if AT it must have been already scheduled and coincidentally aligned temporally with the IAA mission support requested incidental to it; CD crews cannot be placed in otherwise unscheduled drill/AT for this purpose.

COA 4. Another theory, perhaps more attenuated, is by analogy to the AGR non-interference rules: CD members may perform OS on a limited basis where the performance of that OS does not interfere with their primary duties of performing CD operations. Of course, this is a slippery slope and must be managed accordingly. The spirit of this should be on an occasional basis, not on a regular basis, and be approved by the state and the CD program. Note a critical caveat for this COA: there would be a significant O&M cost associated with it and it is unclear how that could be funded.

COA 5. CD crews can provide IAA if incidental operational benefit associated with primary purpose of CD operational missions being flown, if there are actually CD missions being flown in that area during that time when IAA is requested and could be incidentally provided.

If the CD platforms are UAS, then CNBGI 7500.00, paragraph 4 applies: "SecDef approval is required for all domestic UAS operations unless specified in this instruction, law, or other guidance (including Homeland Defense, Defense Support of Civil Authorities, NG civil support, and Counterdrug operations and missions conducted by NG personnel in a State Active Duty or Title 32 status)." (CNGBI 7500.00, para. 4.f) Also, "Governors in States where UAS assets are fielded may not employ UAS without SecDef approval; however, Governors may consider UAS employment in their planning for disaster response activities." (CNGBI 7500.00, para. 4.g). As long as it is a CD mission being flown w/ CD UAS, they need first need to go to SECEF for approval and the IAA can come about as incidental to the CD-purposed mission.

Conversely, if they are flying for primary IAA purpose, then they would need SECDEF approval to use the CD UAS.

COA 6. States can break CD crew orders and place them on SAD in order to fly the IAA pursuant to EMAC into NC, however, this may have adverse impact to the crews in terms of service-member pay & benefits. This is closely associated with COA 2 above.

NG Support to USNORTHCOM

1. **Purpose.** To identify statutory and DoD policy authorities allowing certain NG personnel in a 10 U.S.C. §12301(d) duty status to provide direct support to USNORTHCOM in furtherance of USNORTHCOM operations and missions.

2. **BLUF:** 10 U.S.C. §12301(d) duty status permits NG personnel on AC-funded ADOS orders to provide direct support to USNORTHCOM and perform any USNORTHCOM mission; NG personnel on ADOS-RC orders could perform certain RC missions, such as the NGB functions listed in 10 U.S.C. §10503, that may relate to USNORTHCOM operations or missions.

3. **Statutory Authorities.**

a. 10 U.S.C. §12301(d) provides the primary statutory authority to issue active duty orders for AGR and ADOS personnel. Whether serving AGR or ADOS under 10 U.S.C. §12301(d), the consent of the individual and the respective governor (or Adjutant General) is required.

b. For AGRs, authorized duties are set out in 10 U.S.C. §§101 and 12310. In addition to AGR's primary function of "organizing, administering, recruiting, instructing, or training the reserve components," as articulated in 10 U.S.C. §§101(d)(6)(A) and 12310(a)(1), 10 U.S.C. §12310(b) provides that AGRs may also:

perform the following additional duties to the extent that the performance of those duties does not interfere with the performance of the Reserve's primary Active Guard and Reserve duties described in subsection (a)(1):

(1) Supporting operations or missions assigned in whole or in part to the reserve components.

(2) Supporting operations or missions performed or to be performed by-

(A) a unit composed of elements from more than one component of the same armed force; or

(B) a joint forces unit that includes-

(i) one or more reserve component units; or

(ii) a member of a reserve component whose reserve component assignment is in a position in an element of the joint forces unit.

c. For ADOS personnel on active duty other than for training under 10 U.S.C. §12301(d), authorized duties are set forth in 10 U.S.C. §12314, which provides:

Reserves: kinds of duty. Notwithstanding any other provision of law, a member of a reserve component who is on active duty other than for training may, under regulations prescribed by the Secretary concerned, be detailed or assigned to any duty authorized by law for members of the regular component of the armed force concerned.

4. Policy Authorities.

a. The primary DoD policy reference is DoDI 1215.06, Uniform Reserve, Training, and Retirement Categories for the Reserve Components (c1, 19 May 15), which lays out the several RC duty categories for Title 10 personnel.

b. DoDI 1215.06 reiterates the AGR statutory limitations wrt authorized AGR duties:

NG or Reserve Service members of the Selected Reserve serving on AGR duty assigned or attached to Selected Reserve units (to include full-time National Guard duty), as defined in [10 U.S.C. §101], for the purposes of organizing, administering, recruiting, instructing, or training the RCs, who may also perform other duties in [10 U.S.C. §12310].”

Because USNORTHCOM is both a joint and multi-component organization, it follows that a Title 10 AGR assigned or detailed to USNORTHCOM could support USNORTHCOM operations or missions pursuant to the authority of 10 U.S.C. §12310(b)(2) and DoDI 1215.06, encl. 5, para. 2a(1)(b)1.

c. DoDI 1215.06 describes the two relevant types of ADOS, ADOS-AC and ADOS-RC: “ADOS tours are funded through applicable military or Reserve personnel appropriations (ADOS-AC funded or ADOS-RC funded) to support AC or RC programs, respectively.” Similarly, Service-specific policies for ADOS-AC and ADOS-RC essentially state that ADOS personnel on AC-funded orders must perform AC missions, and ADOS personnel on

RC-funded orders must perform RC missions (for ADOS-RC, see AR 135-200, Active Duty for Missions, Projects, and Training for Reserve Component Soldiers (26 Sep 17), and ANGI 36-2001, Management of Training and Operational Support Within the Air National Guard (19 Oct 09); for ADOS-AC, see AR 135-210, Order to Active Duty as Individuals for Other Than a Presidential Selected Reserve Call-up, Partial or Full Mobilization (17 Sep 99), and AFI 36-2619, Military Personnel Appropriation Manday Program (18 Jul 14)).

d. Based on 10 U.S.C. §12314 and the foregoing Service-specific ADOS-AC policies, NG personnel on AC-funded ADOS orders could provide direct support to USNORTHCOM and perform any USNORTHCOM mission.

e. Direct support to USNORTHCOM in furtherance of USNORTHCOM operations and missions by NG personnel on RC-funded ADOS orders would be prohibited because such orders are only authorized to support RC missions. That said, NG personnel on ADOS-RC orders could perform certain RC missions, such as the NGB functions listed in 10 U.S.C. §10503, that may relate to USNORTHCOM operations or missions.

f. To the extent that USNORTHCOM personnel are subject to the DoD Defense Support of Civil Authorities (DSCA) rules prescribed in DoDD 3025.18, Defense Support of Civil Authorities (DSCA) (c2, 19 Mar 18), those NG personnel providing direct support to USNORTHCOM in a 10 U.S.C. § 12301(d) duty status would also be subject to those same rules.

5. **Personnel/Equipment.** “Hip Pocket Activation”

a. “Pursuant to 10 U.S.C. §12301(d), 1st Air Force developed a process to instantaneously “Federalize” ANG members who, upon the occurrence of a specified event, are called upon to perform NORAD missions. This process automatically converts consenting ANG members into Title 10 upon the occurrence of a “triggering” event, known by 1st AF as an “air sovereignty event.” On 11 June 2003, authority “to order into Federal service . . . those members of the Air National Guard who have volunteered to perform Federal active service in furtherance of the Federal mission” was delegated to the Chief of Staff of the Air Force, who has the authority to re-delegate this authority to a MAJCOM Commander who can also re-delegate his authority. This “hip pocket” process is now used for other Air Force missions but not authorized for ARNG missions. ARNG missions such as Ground-based Mid-course Defense (GMD) convert Title 32 AGR members to Title 10 upon arrival at the duty location for that day’s duty and revert to Title 32 status when released from that duty by their commander.”

b. USNORTHCOM has authority to utilize 10 U.S.C. §12301(d) for what is called “Hip-Pocket” activation of ANG units to support NORAD missions. This is a voluntary activation and requires the consent to the applicable state Governors, i.e. consent from the individual member and the respective Governor. This authority has been granted to the respective Service Secretaries. By a series of delegations, the Commander of both 1 AF (AFNORTH) and the Continental United States NORAD Region (CONR) received the authority to recall Air NG members pursuant to §12301(d).

c. In 2008, NORAD and USNORTHCOM sought Congressional support to have the Secretary of the Army delegate his §12301(d) activation authority down to ARNORTH Commander, who could then work with applicable state Governors to obtain consent for contingency operations. This would apply specifically to NG personnel in “previously identified theater enabler Units”, with the consent of their Governors and Adjutant Generals. These units were identified by the U.S. Army and ARNG. These theater enabler units have unique and distinct capabilities and they fulfill vital roles in U.S. Northern Command's Homeland Defense and Civil Support plans. An effective method is required to enable these assets to rapidly transition to Title 10 status, when needed.” (see USNORTHCOM Initiatives to Improve RC Access (22 Jul 08)).

NG Support to USINDOPACOM

1. **Purpose.** To identify whether a territory under the USINDOPACOM AOR requires statutory authority to respond and support disaster response in a Title 32 status.

2. **BLUF:** There are currently no federal policy prohibiting the Governor of a territory from sending that territory's NG in a Title 32 status to other locations under that Governor's authority to accomplish legitimate METL training pursuant to a proper RFA for disaster response.

3. **Statutory Authorities.**

- a. 32 U.S.C. §502
- b. Territorial State Law

4. NG in a Title 32 status may travel from one U.S. territory to another U.S. territory in a Title 32 status to perform training. Generally, NG personnel are required to be in a Title 10 status when traveling OCONUS, but may travel outside of their respective state while in Title 32 if remaining within CONUS. The OCONUS travel policy is based on SOFA considerations with foreign nations, which are not applicable to U.S. territories. Although novel, there appears to be no federal policy restrictions for travel between U.S. territories for purposes of training. However, any proposed movement should be coordinated with the Guam Attorney General and the GUNG State SJA and GUNG JFHQ to address issues of Guamanian law and any applicable federal territorial considerations and policies.

5. DoD's preferred COA is for the CNMI to request assistance through FEMA to issue a MA to Title 10 personnel on CNMI and/or Guam or federalize the GUNG into a Title 10 status to provide DSCA. GU TAG can send NG in territorial active duty (equivalent to SAD) to CNMI if approved by the GU Governor and GU Attorney General IAW GU territorial law. This movement should be coordinated with invitation from CNMI Governor and a mutual aid and assistance agreement. Coordination should be made between the Department of the Interior and the two governments for logistical and operational considerations.

6. The rules for the use of AGRs and technicians, including non-interference basis, for domestic operations apply. AGRs should not be sent as individual deployers for the specific purpose of supporting domestic operations. Technicians should be in a military status when going outside of Guam. This movement should be coordinated with the GUNG JFHQ.

Cyberspace Operations in the National Guard

Cyberspace Operations in the National Guard

KEY REFERENCES:

- Support and services for eligible organizations and activities outside Department of Defense, 10 U.S.C. §2012 *et seq.*
- The Computer Fraud and Abuse Act, 18 U.S.C. §1030 *et seq.*
- The Wiretap Act, 18 U.S.C. §2511 *et seq.*
- The Stored Communications Act, 18 U.S.C. §2701 *et seq.*
- The Pen Trap and Trace Act, 18 U.S.C. §3121 *et seq.*
- Executive Order (EO) 12333 - U.S. Intelligence Activities, December 4, 1981, as amended by EO 13284 (2003), EO 13355 (2004) and EO 13470 (2008).
- National Guard, 32 U.S.C. §502 *et seq.*
- Presidential Policy Directive 41, United States Cyber Incident Coordination, 26 July 2016
- Department of Defense, *Cyber Strategy*, (Washington, D.C. 2015)
- Department of Defense Directive (DODD) 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense, 12 April 2004
- DODD 3025.18, Defense Support of Civil Authorities (DSCA), 29 December 2010, Incorporating Change 2, 19 March 2018
- DODD 5240.01, DOD Intelligence Activities, 27 August 2007, Incorporating Change 1 and Certified Current Through 27 August 2014
- DODD 5148.13, Intelligence Oversight, 26 April 2017
- Department of Defense Instruction (DODI) 1215.06, Uniform Reserve, Training and Retirement Categories, 11 March 2014, Incorporating Change 1, Effective 19 May 2015
- DODI 3025.22, The Use of National Guard for Defense Support of Civil Authorities, 26 July 2013, Incorporating Change 1, Effective 15 May 2017
- DODI 3025.21, Defense Support of Civilian Law Enforcement Agencies, 27 February 2013

- DODI 4000.19, Support Agreements, 25 April 2013, Incorporating Change 1, 30 November 2017
- DOD Manual 5240.01, Procedures Governing the Conduct of Intelligence Activities, 8 August 2016
- DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons, December 1982, Incorporating Change 2, Effective 26 April 2017
- Joint Publication 3-12(R), Cyberspace Operations, 5 February 2013
- Directive Type Memorandum (DTM) 17-007, Interim Policy and Guidance for Defense Support to Cyber Incident Response, 21 June 2017
- Deputy Secretary of Defense (DepSecDef) Policy Memorandum (PM) 16-002, Cyber Support and Service Provided Incidental to Military Training and National Guard Use of DOD Information Networks, Software, and Hardware for State Cyberspace Activities, 24 May 2016
- SecDef Memorandum, Leveraging Military Training for Incidental Support of Civil Authorities, 16 Dec 2013
- National Guard Cyber Strategy, 5 Jan 2018
- National Guard Regulation (NGR) 5-2, National Guard Support Agreements, 14 Oct 2010
- NGR 350-1, Army National Guard Training, 4 August 2009
- Air National Guard Instruction 36-2001, Management of Training and Operational Support within the Air National Guard, 19 October 2009, Certified Current 28 April 2014
- OpJAGAF 2005/36, 28 July 2005, AIR NATIONAL GUARD JAO
- Department of Homeland Security, *National Response Framework*, (June 2016)
- Department of Homeland Security, *National Cyber Incident Response Plan*, (December 2016)

A. Introduction

Cyberspace operations is not the future. It's now. The National Guard faces the same constraints in cyberspace as in the traditional kinetic realm. However, cyberspace presents some unique challenges. For instance, most military equipment is not governed by restrictive licensing agreements, whereas software licensing agreements may restrict who may use a cyber-tool kit and how it can be used. Additionally, cyberspace activities are generally not linear in nature. For example, one computer does not normally interact directly with another computer. Rather, the data is transferred through multiple routers and servers, all of which may not be in the same town, state or even country. As a result, actions intended to have a domestic effect in cyberspace could have international consequences. Additionally, attribution is not as clear as in the kinetic realm. What may appear to be an action taken by a local resident could very well be an action orchestrated by a foreign actor. This complex and evolving battle space requires legal practitioners to have both a basic understanding of how the cyberspace works as well as the laws and policies governing those actions.

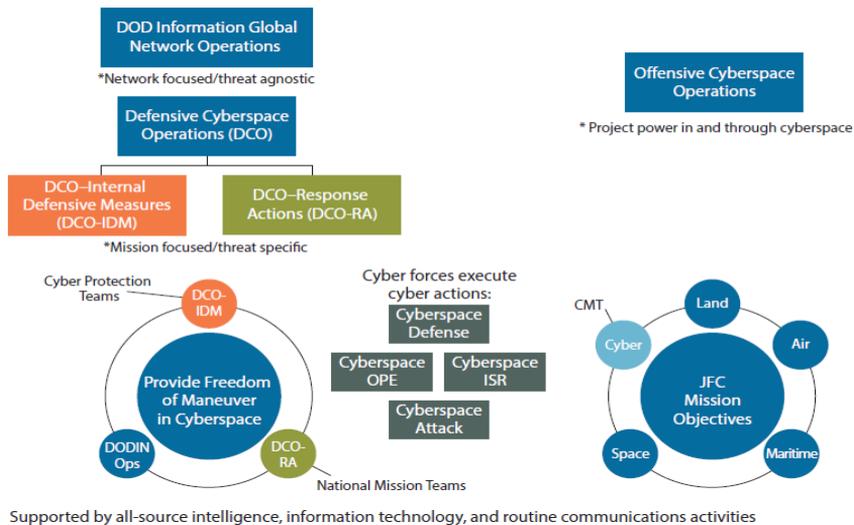
B. DoD Cyber Missions

The DoD has three primary cyber missions: (1) DoD must defend its own networks, systems, and information; (2) DoD must be prepared to defend the United States and its interests against cyberattacks of significant consequences; (3) if directed by the President or SecDef, DoD must provide integrated cyber capabilities to support military operations and contingency plans.¹

1. Department of Defense, *Cyber Strategy*, (Washington, D.C. 2015)

These DoD cyber missions can be categorized as defensive or offensive operations (as depicted in Figure 1. Cyberspace Operations) depending on the capability and the effects of that capability.² It is important to note that capability does not mean authority. Understanding the effects of cyber capabilities is key to determining the necessary authority to perform a DoD cyber mission.

Figure 1. Cyberspace Operations



1. Protect the DoD Information Network (DODIN)

Protecting DODIN is defensive in nature and includes actions such as designing, building, configuring, securing, operating, maintaining, and sustaining the information environment relied upon for operations by activities, such as correcting known IT

2. Brett T. Williams, “The Joint Force Commander’s Guide to Cyberspace Operations,” *Joint Force Quarterly*, Issue 73 (2nd Quarter 2014), <http://www.dtic.mil/doctrine/jfq/jfq-73.pdf>

vulnerabilities, encrypting data, and ensuring user and administrative training and compliance.

2. Defensive Cyberspace Operations (DCO)

The objective of DCO is to ensure freedom of maneuver in cyberspace. DCO are both passive and active cyberspace defense activities that allow the outmaneuvering of an adversary.³ DCO provides the ability to discover, detect, analyze, and mitigate threats, to include insider threats.⁴ DCO is prioritized against key cyber terrain to ensure data moves securely across the information environment. DCO is executed against specific threats that have both malicious capability and intent to affect key cyber terrain.⁵

DCO-Internal Defensive Measures (DCO-IDM) are those actions taken internally to friendly cyberspace.⁶ The essential tasks for DCO-IDM are actively hunting for advanced internal threats as well as the internal responses to these threats.⁷ DCO-IDM respond to unauthorized activity or alerts/threat information within the DODIN, and leverage intelligence, counterintelligence, law enforcement, and other military capabilities as required.⁸ In other words, DCO-IDM include hunting on friendly cyber terrain for

3. See Joint Publication 3-12(R), Cyberspace Operations, 5 February 2013 and Williams, The Joint Force Commander's Guide to Cyberspace Operations

4. Joint Publication 3-12(R), Cyberspace Operations, 5 February 2013

5. Williams, The Joint Force Commander's Guide to Cyberspace Operations

6. Ibid.

7. Joint Publication 3-12(R), Cyberspace Operations, 5 February 2013

8. Ibid.

threats attempting to evade security protocols and directing appropriate internal responses.⁹

DCO-Response Actions (DCO-RA) are taken outside the DODIN to stop or block the attack. An example of DCO-RA is shutting down an external router from which malicious activity is emanating. The essential tasks for DCO-RA are deliberate, authorized defensive measures or activities taken external to the DODIN to defeat ongoing or imminent threats to defend DoD cyberspace capabilities or other designated systems.¹⁰ DCO-RA must be authorized in accordance with the standing rules of engagement and any applicable supplemental rules of engagement and may rise to the level of use of force.¹¹ In other words, DCO-RA include activities outside friendly network space to stop an attack before it reaches our key cyber terrain.¹² To use a metaphor, we “catch arrows” with DCO-IDM and we “kill the archer” with DCO-RA.

3. Offensive Cyberspace Operations (OCO)

OCO project power by the application of force in or through cyberspace.¹³ An example is hacking an adversary’s computer. Authorities governing OCO activities are classified and a detailed description is outside the scope of this handbook. However, briefly stated, OCO represents a synergy between Title 50

9. Williams, *The Joint Force Commander’s Guide to Cyberspace Operations*

10. Joint Publication 3-12(R), *Cyberspace Operations*, 5 February 2013

11. *Ibid.*

12. Williams, *The Joint Force Commander’s Guide to Cyberspace Operations*

13. Joint Publication 3-12(R), *Cyberspace Operations*, 5 February 2013

(national intelligence) authorities to collect signals intelligence, and Title 10 (military) authorities to apply force in that realm. For full situational awareness and to advise on mission capability and authority, Judge Advocates must obtain the appropriate security clearance to fully understand the DoD cyber missions, including classified portions of the missions.

C. DoD Cyber Mission Force (CMF)

The active component CMF is comprised of cyber operators organized into 133 teams primarily aligned as follows: Cyber Protection Team (CPT), National Mission Team (NMT), Combat Mission Team (CMT), and support teams. Combatant commands integrate CMTs and CPTs into plans and operations and employ them in cyberspace, while the NMT operates under the Commander of USCYBERCOM. Teams can also be used to support other missions as required by DoD.¹⁴ Furthermore, the National Guard has Defensive Cyberspace Operations-Elements (DCO-E), which by design do not have an active component CMF mission.

1. Cyber Protection Team (CPT)

The mission of CPTs is to defend priority DoD networks and systems against priority threats by augmenting traditional defensive measures.¹⁵ In other words, CPTs provide mission assurance and threat mitigation support to US Critical

14. DOD *Cyber Strategy*

15. See Special Report: Cyber Strategy at https://www.defense.gov/News/Special-Reports/0415_Cyber-Strategy/ and DOD *Cyber Strategy*

Infrastructure Key Resources (CIKR) and US Military Services and Combatant Commands key terrain.

While in Title 10, CPTs provide surge support to active duty cyber component (such as USCYBERCOM, AFCYBER, or ARCYBER) and support defensive cyberspace operations by removing adversary capabilities, defending the supported commander's key cyberspace terrain and critical assets, and preparing local cyberspace defenders to sustain advanced cyberspace defense tactics, techniques and procedures (TTP). CPTs are the forces tasked with the DCO-IDM mission under USCYBERCOM.¹⁶

While in a Title 32, CPTs train for the federal mission.

2. National Mission Teams (NMT)

NMTs and their associated support teams defend the United States and its interests against cyberattacks of significant consequence.¹⁷ NMTs are the forces tasked with the DCO-RA mission under USCYBERCOM.¹⁸

16. Williams, *The Joint Force Commander's Guide to Cyberspace Operations*

17. DOD *Cyber Strategy*. Key Reference(s) Special Report: Cyber Strategy at https://www.defense.gov/News/Special-Reports/0415_Cyber-Strategy/

18. Williams, *The Joint Force Commander's Guide to Cyberspace Operations*

3. Combat Mission Teams (CMT)

CMTs support Combatant Commands by generating integrated cyberspace effects in support of operational plans and contingency operations.¹⁹

4. Support and Other Teams

Support teams provide analytic and planning support to the NMTs and CMTs.²⁰ Other teams include Cyber Intelligence, Surveillance and Reconnaissance Squadrons; Information Aggressor Squadrons; Cyber Training Squadrons; and Data Processing Units, and have specific mission sets that have a nexus to DoD's cyber mission.

5. DCO-E

Although not part of the CMF, DCO-Es are State assets serving as a military first responder for Governors and The Adjutant Generals (TAG) for cyber emergencies. DCO-Es may provide surge capacity of the same capability of Title 10 assets but are prohibited from being mobilized, as a unit, for Title 10 missions.

D. Title 32 Cyberspace Activities

The National Guard must have both proper fiscal authority and the mission authority to conduct cyberspace activities while in a Title 32.

19. DOD *Cyber Strategy*. Key Reference(s) Special Report: Cyber Strategy at https://www.defense.gov/News/Special-Reports/0415_Cyber-Strategy/

20. Key Reference(s) Special Report: Cyber Strategy at https://www.defense.gov/News/Special-Reports/0415_Cyber-Strategy/

The National Guard is funded by Congress to train for the federal mission. IDTs and annual training are conducted under 32 U.S.C. §502(a) within an existing published training plan.²¹ Chief National Guard Bureau (CNGB) has inherent authority to authorize additional training funds under 32 U.S.C. §502(f)(1). This broad statutory authority allow training activities that also have a significant operational component. However, the broad nature of this authority warrants scrutiny—and cautious analysis—as described immediately below. Finally, the President and the SecDef have authority to authorize operational missions under 32 U.S.C. §502(f)(2).²²

The National Guard is prohibited from conducting DCO-RA and OCO. These activities must be conducted in a Title 10. Therefore, the National Guard can train for the federal mission in a Title 32 but is limited to DODIN operations and DCO-IDM activities.

Nevertheless, Commanders are not limited to computer-based training or exercises on their own systems. Title 32 training authorities can be leveraged to provide support to (1) active component, (2) civil authorities, and (3) other statutorily eligible entities.

1. Support to Active Component. The National Guard can provide an incidental operational benefit while conducting training. The key is that the primary purpose of the activity must be military

21. Training plans must be IAW NGB 350-1 and ANGI 36-2001.

22. Civil support teams, counterdrug, and homeland defense are operational missions authorized by statute that fall under 32 U.S.C. §502(f)(2). There are currently no operational cyber missions.

training.²³ DODI 1215.06, para 6.2 encourages maximum Reserve Component utilization by stating, “all training duty planned and performed by Reserve Components members shall capitalize on Reserve Components capabilities to accomplish operational requirements while maintaining their mission readiness for domestic and overseas operations. RC members may be employed to support active component mission requirements as part of conducting training duty.” Additionally, “support to mission requirements, i.e., operational support, may occur as a consequence of performing training.” The following factors are suggested for Commanders to use when considering whether training which provides an incidental operational benefit is allowed, or in other words, whether the mission is appropriate for the National Guard or active component.

1. Whether performance of the federal operational mission is consistent with the unit's formalized training program.

2. Whether the federal mission can be performed without the National Guard unit. In other words, is the active component capable of performing the mission without support from the National Guard? If not, then the National Guard has moved beyond a support role into an operational role and is exceeding the scope of its authority.

3. Whether the use of full-time Guard personnel is disproportionate.

In order to determine these factors, the necessary facts must be present to identify the proposed task and duration of the task and whether the task fits into required individual or unit training; and if

23. See DoDI 1215.06, Uniform Reserve, Training and Retirement Categories (19 May 2015) para 6.2.

not whether the training will nevertheless benefit DoD. This analysis should consider policy issues with risk assessment and the appropriateness when using the NG.

2-a. Support to Civil Authorities – Generally. The National Guard can provide defense support to civil authorities, commonly referred to as DSCA, when a qualifying entity requests assistance.²⁴ DoD publications on DSCA focus on a response in Title 10 or 32 U.S.C. §502(f)(2) status. Currently, DTM 17-007 is the only publication on DSCA for cyber operations, or Defense Support to Cyber Incident Response (DSCIR).²⁵ DSCIR may be provided for a cyber incident in response to a request for assistance from a lead federal department or agency for asset response or threat response outside DODIN as described in PPD-41. This includes DSCIR for immediate response authority to save lives, present human suffering, or mitigate great property damage. Based on the nature of support, liability waivers, memorandums of understanding or agreements (including permission from asset owner to access appropriate information and information systems), non-disclosure agreements, or other appropriate legal documents requested by DoD must be signed before providing DSCIR. DSCIR does not preclude support to civil authorities in other statuses, such as training which provides an incidental operational benefit.

2-b. Support to Civil Authorities – Intelligence Support to Law Enforcement. Cyber teams likely have intelligence personnel assigned to them. Executive Order 12333 and associated Intelligence Oversight rules and procedures will apply if cyber

24. DOD 3025 series of publications govern providing DSCA to a qualifying entity and primarily apply to response under Title 10 and 32 U.S.C. §502(f)(2).

25. DTM 17-007 is set to expire on 21 June 2018 and will be converted to a new issuance.

intelligence personnel provide support to law enforcement. While any intelligence activities (including collection) must be done in Title 10 with proper mission and authority, SecDef approval is required for the use of intelligence assets for anything other than foreign intelligence, counterintelligence, or intelligence training. This includes training with an incidental benefit. Intelligence support to law enforcement requires SecDef approval IAW Procedure 12 under DoD 5240.1-R.

2-c. Support to Civil Authorities – Economy Act. The Economy Act allows federal agencies to provide support to other federal agencies on a reimbursable basis, unless the support is provided in the normal course of training or operations, or the support results in a substantially equivalent training value.

3. Other Entities. DepSecDef PM 16-002, commonly referred to as the CTAA memo, provided guidance on the National Guard providing cyber support and services incidental to military training through Innovative Readiness Training (IRT) projects.²⁶ IRT projects have traditionally been used for engineering and construction projects (such as building a bike trail for a local government or fixing shelters for the Boy Scouts), or for providing medical care to underserved communities. The CTAA memo clarified that IRT includes cybersecurity projects. Specifically, the CTAA memo provides guidance that coordinating, training, advising, and assisting certain qualifying mission partners must be done IAW IRT eligibility and program requirements under 10 U.S.C. §2012. An example of a cybersecurity IRT project might

26. The CTAA memo will expire on 1 March 2018. It will likely be extended to March 2019 until the overarching policy issues contained in the memo are published in a more permanent document.

be a request from a local government entity to enhance network security measures.

It is important to note that CTAA memo does not preclude consultation or other methods of training under other authorities, such as the Economy Act and the Stafford Act.²⁷

E. National Cyber Incident Response Plan (NCIRP)

The National Preparedness System outlines an organized process for the whole of community to move forward with their preparedness activities and achieve the National Preparedness Goal. The National Preparedness System integrates efforts across five areas – Prevention, Protection, Mitigation, Response, and Recovery.

Presidential Policy Directive (PPD)-41: U.S. Cyber Incident Coordination set forth principles governing the Federal Government’s response to any cyber incident, provide an architecture for coordinating the response to significant cyber incidents, and required DHS to develop the NCIRP to address cybersecurity risks to critical infrastructure. The NCIRP is part of the broader National Preparedness System and establishes the

27. Outside of CTAA activities, the CTAA memo provides guidance that consulting with government entities and with public and private utilities, critical infrastructure owners, the Defense Industrial Base, and other non-governmental entities, as needed, in order to protect DODIN, software, and hardware, enhance DOD cyber situational awareness, provide for DOD mission assurance requirements, and provide cybersecurity unity of effort are **outside** the context of CTAA training activities.

strategic framework and doctrine for a whole-of-Nation approach to mitigating, responding to, and recovering from a cyber incident.

The Department of Justice is the lead federal agency for threat response during a significant cyber incident, acting through the Federal Bureau of Investigation and National Cyber Investigative Joint Task Force. The Department of Homeland Security is the lead federal agency for asset response during a significant cyber incident, acting through the National Cybersecurity and Communications Integration Center (NCCIC). Threat response, asset response, and significant cyber incident are defined by PPD-41.

The NCIRP states that the DoD is responsible for threat response to cyber incidents affecting DoD assets and DODIN. DoD can also support civil authorities for cyber incidents outside the DODIN when requested by the lead federal agency, and approved by the appropriate DoD official, or directed by the President. Such support would be provided based upon the needs of the incident, the capabilities required, and the readiness of available forces.

DHS, in coordination with the heads of other appropriate federal departments and agencies and in accordance with the NCIRP is required to regularly update, maintain, and exercise the Cyber Incident Annex to the National Response Framework (NRF). The NRF is part of the National Preparedness System and is a guide on how the Nation responds to all types of disaster and emergencies. The NRF contains 14 Emergency Support Functions (ESF) and annexes that describe the Federal coordinating structures to group resources and capabilities into functional area that are most

frequently needed in a national response. Cyber capabilities most likely will fall under ESF #2, communications.

F. State Active Duty (SAD)

Personnel in SAD are under the command and control of the Governor. State laws govern issues in discipline, ethics, information protection, privacy, and liability, but certain federal laws may apply in areas, such as HIPAA and Computer Fraud and Abuse Act. States cannot engage in international warfare, i.e. a State cannot attack a foreign country by cyber or kinetic means. Any DCO-RA or OCO activities must be carefully reviewed and should receive a written opinion from the State Attorney General in order to set parameters of activities.

DoD rules generally do not apply to SAD personnel, but may still apply to use of equipment procured through a federal trace, including reimbursement requirements for the use of USG equipment. Some of the cyberspace equipment or programs may be limited to federal use for federal systems and therefore would not be authorized for State use in a State Active Duty status or outside of the DODIN. EOs 12968 and 13549 as amended and DoD implementing guidance govern access and use of DoD information networks, software, hardware, systems, tools, tactics, techniques, and procedures beyond the classification level of SECRET and is prohibited in SAD.

G. Federal Laws Governing Cyber Activities

National Guard personnel may be subject to federal criminal laws if they exceed the scope of their mission.²⁸ This is particularly

28. The Computer Fraud and Abuse Act, Wiretap Act, Pen Trap and Trace Act, and Stored Communications Act are the most common federal laws governing cyber activities. Other federal laws that are relevant include the Privacy Act,

important for National Guard personnel as they may only perform DCO-IDM activities. National Guard personnel may only perform actions on a network when they have permission from the network owner to do so, otherwise, they may be subject to federal and/or state criminal laws.

1. Computer Fraud and Abuse Act (18 U.S.C. §1030)

The Computer Fraud and Abuse Act was added to Title 18, Chapter 47 – Fraud and False Statements in 1984 as fraud and related activity in connection with computers. It prohibits, among other things, the theft of information through unauthorized access or exceeded authorization on a “protected” computer. A protected computer is a computer that is (a) exclusively used by a financial institution or USG; or used by financial institute or USG and conduct that affects that use; or (b) used in or affecting interstate or foreign commerce or communication, including computers outside the US, and conduct that affects that use.

The Computer Fraud and Abuse Act also prohibits damage by (a) knowingly causing the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (b) intentionally accessing a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or (c) intentionally accessing a protected computer without authorization, and as a result of such conduct, causes damage and loss.

HIPAA, and FOIA. For further reading, see Congressional Research Service (CRS) Report R42507, Federal Laws Relating to Cybersecurity: Overview of Major Issues, Current Laws, and Proposed Legislation, by Eric. A Fischer.

2. Wiretap Act (18 U.S.C. §2511)

The Wiretap Act prohibits the intentional interception of any wire, oral, or electronic communication. It also prohibits intentional disclosure or use of the contents of any wire, oral, or electronic communication while knowing or having reason to know that the information was obtained illegally.

3. Pen Register and Trap and Trace Act (18 U.S.C. §3121)

The Pen Register and Trap and Trace Act prohibits the real-time interception of the non-contents of communications by a pen register or a trap and trace device without first obtaining a court order. However, the prohibition does not apply to a service provider for the operations, maintenance, and testing of the service. It also does not apply to a service provider in the protection of the rights or property of such service provider, or to the protection of users of that service from abuse of service or unlawful use of service.

4. Stored Communications Act (18 U.S.C. §2701)

The Stored Communications Act governs unlawful access to stored communications by prohibiting (a) intentionally accessing, without authorization, of a facility through which an electronic communication service is provided; or (b) intentionally exceeding an authorization to access that facility and thereby obtaining, altering, or preventing authorized access to a wire or electronic communication while it is in electronic storage in such system.

H. Judge Advocate Responsibilities

The National Guard can partner with federal agencies, such as Department of Homeland Security, through the Economy Act or

National Response Framework, just like any other incident response preparation through the National Preparedness System. In the cyberspace domain, there are unique rules for the use of cyber that need to be reviewed and agreed upon by the National Guard and the asset owner through Memoranda of Understanding/Agreement and Nondisclosure Agreements. It is key to develop relationships with the State Attorney General's office to be aware of any state specific rules that may apply as well as the constraints that apply to federal equipment. Some of the issues to consider are:

- written permission from asset/network owner to access their system
- scope of assistance to be provided (assessment and report finding; mitigation and remediation; responses outside scope of assistance)
- status of military personnel (SAD, Title 32), command and control, and legal basis for disciplinary actions
- destruction/storage of data obtained, to include privacy and security restrictions
- confidentiality of proprietary data or information (i.e., certain federal cyber equipment may report all data to USCYBERCOM)
- whether the system will only scan or actively respond to the adversary action (i.e., hack or hackback which is prohibited outside of Title 10)
- privacy balanced with required disclosure of criminal/fraudulent activity
- privacy of network users (union, contractor, etc.)
- privacy of business to not publicize discovered activity requiring criminal investigation
- industry regulatory requirements to disclose incident
- liability for unintended impact to operations
- Intelligence Oversight requirements (i.e., collection of USPI)

- payment for services (look to the FAR and DFARS for specific requirements)
- disputes resolution mechanism
- conflicts of interest (use of a proprietary tool in which a National Guardsman may have personal pecuniary interest)
- licensing limitations for use of a cyberspace capability and data rights for TTPs or software developed in conjunction with private entities as part of a cyber response or exercise
- other relevant laws (State specific, Privacy, HIPAA, FOIA, FTCA, etc.)

The laws governing cyber activities are constantly changing in response to new technology and uses of cyber capabilities in warfare. It is critical to ensure the latest laws are examined when advising in this new and ever evolving area of the law. If you are addressing an issue involving the cyber law, you should seek out additional expertise to assist you in this complicated area.

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