Use of the Defense Production Act to Reduce Interruptions in Critical Infrastructure and Key Resource Operations During Emergencies

Calendar Year 2009 Report to Congress

July 1, 2010

Homeland Security

Federal Emergency Management Agency

Assistant Secretary for Legislative Affairs
U.S. Department of Homeland Security
Washington, DC 20528

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Homeland Security

Foreword

I am pleased to present the following report, "Use of the Defense Production Act to Reduce Interruptions in Critical Infrastructure and Key Resource Operations during Emergencies" for Calendar Year 2009. This report is required by Subsection 1002(b) of the Implementing Recommendations of the 9/11 Commission Act of 2007 [Public Law 110-53]. The report is an interagency effort led by the Federal Emergency Management Agency on behalf of the Department of Homeland Security that includes the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, and Transportation. Pursuant to congressional requirements, this report is being provided to the following Members of Congress:

The Honorable Christopher J. Dodd
Chairman, Senate Banking, Housing, and Urban Affairs Committee

The Honorable Richard C. Shelby
Ranking Member, Senate Banking, Housing, and Urban Affairs Committee

The Honorable Barney Frank
Chairman, House Financial Services Committee

The Honorable Spencer Bachus
Ranking Member, House Financial Services Committee

The Honorable Joseph I. Lieberman
Chairman, Senate Homeland Security and Governmental Affairs Committee

The Honorable Susan M. Collins
Ranking Member, Senate Homeland Security and Governmental Affairs Committee

The Honorable Bennie G. Thompson
Chairman, House Homeland Security Committee

The Honorable Peter T. King
Ranking Member, House Homeland Security Committee

Please direct inquiries relating to this report to me at (202) 447-5890.

Sincerely,

Chani W. Wiggins
Assistant Secretary
Office of Legislative Affairs

Executive Summary

This is the third annual report to Congress on actions taken by the Federal Government using the priorities and allocations authority provided in Section 101 of the Defense Production Act of 1950 (DPA) to ensure the preparedness of industry to reduce interruption of critical infrastructure and key resource (CIKR) operations under emergency conditions. This report was prepared in accordance with Subsection 1002(b) of the Implementing Recommendations of the 9/11 Commission Act of 2007 [Public Law (P.L.) 110-53]. The Department of Homeland Security (DHS) developed this report in cooperation with the Departments of Agriculture (USDA), Commerce (DOC), Defense (DOD), Energy (DOE), Health and Human Services (HHS) and Transportation (DOT). The reporting period for this report is from January 1, 2009 to December 31, 2009.

Section 101 authorizes the President to require acceptance and priority performance of contracts or orders and to allocate materials, services, and facilities to promote the national defense or to maximize domestic energy supplies. Executive Order (E.O.) 12919 delegates the President's priorities and allocations authorities to USDA, DOC, DOD, DOE, HHS, and DOT with respect to resources within each of these departments' jurisdictions. It provides that the priorities and allocations authorities may only be used for programs that have been determined to be "necessary or appropriate to promote the national defense" by DOD (for military and space programs), DOE (for energy resources), or DHS (for essential civilian needs).

DOC administers the Defense Priorities and Allocations System (DPAS), which provides guidance and procedures for the acceptance and preferential performance of contracts or orders for resources within DOC's jurisdiction, pursuant to the E.O. 12919 delegation to DOC. The DPAS is used by other Federal departments and agencies, foreign governments, and industry, when authorized by DOC, to ensure timely delivery of industrial resources needed to support approved programs.

During 2009, actions were taken by Federal Departments to apply the DPA priorities authority in support of emergency preparedness, response, and recovery activities conducted pursuant to title VI of the Stafford Act, and critical infrastructure protection and restoration. For example, use of DPAS priority ratings was authorized to support: (1) timely equipment upgrades by DOC's Information Technology System Program; (2) anticipated emergency preparedness, response, and recovery activities for the 2009 hurricane season by the Federal Emergency Management Agency's (FEMA's) Federal Coordinating Officers; (3) procurement of certain types of personal protective equipment by DHS components to prepare for the 2009 H1N1 influenza virus outbreak; and (4) the International Safeguards, Second Line of Defense and Nuclear/Counterterrorism Incident Response programs of DOE's National Nuclear Security Administration to procure neutron detectors and associated equipment.

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1. Introduction

1.1. Purpose and Scope

This report was prepared pursuant to Subsection 1002(b) of the Implementing Recommendations of the 9/11 Commission Act of 2007 [Public Law (P.L.) 110-53]. Subsection 1002(b) directs the Secretary of Homeland Security to submit an annual report to Congress on actions taken by the Federal Government to ensure, in accordance with Subsections (a) and (c) of Section 101 of the Defense Production Act of 1950 (DPA) [50 U.S.C. App. 2071], the preparedness of industry to reduce interruption of critical infrastructure[1] and key resource[2] (CIKR) operations during an act of terrorism, natural catastrophe, or other similar national emergency.[3]

This report was prepared by the Department of Homeland Security's Federal Emergency Management Agency (DHS/FEMA) in cooperation with the Departments of Agriculture (USDA), Commerce (DOC), Defense (DOD), Energy (DOE), Health and Human Services (HHS), and Transportation (DOT). This report is being submitted to the Senate Committees on Banking, Housing, and Urban Affairs and Homeland Security and Governmental Affairs, and the House Committees on Financial Services and Homeland Security.

Development of this report involved: (1) interagency meetings to provide direction and coordination for the drafting of each department's input; (2) preparation of report language by personnel engaged in DPA programs and CIKR protection and restoration activities; (3) consolidation of each department's input into this report; and (4) review and approval of the consolidated report by departments whose actions are described herein.

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[1] As defined in the Defense Production Act of 1950, critical infrastructure means "any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health and safety."

[2] As defined in the Homeland Security Act of 2002, key resources are "publicly or privately controlled resources essential to the minimal operations of the economy and government."

[3] Subsection 1002(b) reads as follows: "(b) Report on Industry Preparedness.--Not later than 6 months after the last day of fiscal year 2007 and each subsequent fiscal year, the Secretary of Homeland Security, in cooperation with the Secretary of Commerce, the Secretary of Transportation, the Secretary of Defense, and the Secretary of Energy, shall submit to the Committee on Banking, Housing, and Urban Affairs and the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Financial Services and the Committee on Homeland Security of the House of Representatives a report that details the actions taken by the Federal Government to ensure, in accordance with Subsections (a) and (c) of Section 101 of the Defense Production Act of 1950 [50 U.S.C. App. 2071], the preparedness of industry to reduce interruption of critical infrastructure and key resource operations during an act of terrorism, natural catastrophe, or other similar national emergency."

1.2. Background

1.2.1. Protection of Critical Infrastructure and Key Resources (CIKR)

Protection of the Nation's critical infrastructure and key resources is one of the core missions of the Department of Homeland Security. Through the efforts of its Office of Infrastructure Protection (DHS/IP), DHS is in the forefront for ensuring industry preparedness to reduce interruption of CIKR operations. DHS works with industry on a daily basis to reduce both the likelihood and consequences of interruptions to CIKR operations due to terrorism, natural catastrophes, or other national emergencies.

DHS is responsible for coordinating interagency CIKR protection and resilience, and emergency preparedness planning efforts including the National Preparedness Guidelines, the National Response Framework (NRF), and the National Infrastructure Protection Plan (NIPP). Together these strategic planning documents provide the context for integrating critical infrastructure protection and resilience as a key component of the Nation's unified approach to homeland Security. They provide a concept of operations and a framework for implementation of the DPA provisions when relevant and appropriate to address processes for reducing interruptions of CIKR operations under terrorist threats and emergency conditions.

Federal Government policies for CIKR protection, resilience, and restoration charge the Secretary of Homeland Security with responsibility for coordinating the national effort to enhance CIKR protection and resilience. Federal Government policy also designates Federal Sector-Specific Agencies (SSAs) with responsibility for coordinating planning, preparedness, and a protection activity within the identified CIKR sectors, and gives the Secretary the authority to designate additional sectors. This approach provides the structure needed to address the unique characteristics and operating models of each of the sectors.

The overarching framework for the critical infrastructure mission is outlined in the NIPP and supporting Sector-Specific Plans (SSPs). The NIPP serves as the foundation for the integrated risk-informed approach used by government and private sector partners to identify, assess, and prioritize risks to CIKR and implement programs to enhance CIKR protection and resilience. In accordance with the triennial review provisions, the NIPP, first issued in 2006, was updated and reissued in 2009.

Developed by DHS through a collaborative process with CIKR partners at all levels of government and the private sector, the 2009 NIPP captures the evolution and maturation of programs and processes established in 2006. The revised NIPP integrates the concepts of resilience and protection and broadens the focus of NIPP-related programs and activities to the all-hazards environment. Among other enhancements the 2009 NIPP includes an expanded discussion of the Defense Production Act of 1950 and the Defense Production Reauthorization Act of 2003. DHS and the other Sector-Specific Agencies initiated the triennial review of the Sector Specific Plans in 2009. The updated sector plans will be finalized and issued in 2010. The CIKR sectors and the SSAs are listed in Table 1-1.

Table 1-1. Sector-Specific Agencies for CIKR

Sector-Specific Agency	CIKR Sector
Department of Agriculture[4] Department of Health and Human Services[5]	Agriculture and Food
Department of Defense	Defense Industrial Base
Department of Energy[6]	Energy
Department of Health and Human Services	Healthcare and Public Health
Department of the Interior	National Monuments and Icons
Department of the Treasury	Banking and Finance
Environmental Protection Agency	Drinking Water and Water Treatment Systems
Department of Homeland Security	
Office of Infrastructure Protection	Chemical Commercial Facilities Critical Manufacturing Dams Emergency Services Nuclear Reactors, Materials, and Waste Communications
Office of Cyber Security and Telecommunications	Information Technology
Transportation Security Administration	Postal and Shipping
Transportation Security Administration/U.S. Coast Guard[7]	Transportation Systems[8]
Federal Protective Service	Government Facilities

[4] The Department of Agriculture is responsible for agriculture and food (meat, poultry, and egg products)
[5] The Department of Health and Human Services is responsible for food other than meat, poultry, and egg products.
[6] The Energy Sector includes the production, refining, storage, and distribution of oil, gas, and electric power, except for commercial nuclear power facilities.
[7] The U.S. Coast Guard is the SSA for the maritime transportation mode.
[8] As stated in HSPD-7, the Department of Transportation and the Department of Homeland Security collaborate on all matters relating to transportation security and transportation infrastructure protection.

1.2.2. Defense Production Act

The Defense Production Act provides a number of important authorities to expedite and expand the supply of critical resources from the U.S. industrial base to support homeland security, domestic disaster preparedness, response, and recovery, and critical infrastructure protection and restoration, as well as military, energy, stockpiling, and space activities. In 2009, the DPA was reauthorized for five years until September 30, 2014.
The DPA Reauthorization Act of 2009 [P.L. 111-67] broadened the DPA definition of "national defense" to include "homeland security"[9] and "critical infrastructure assistance to any foreign nation." P.L. 111-67 also amends the language in Title III, which provides financial incentives to the private sector to expand production capacity and supply in critical national defense sectors, including critical infrastructure protection and restoration, homeland security and emergency preparedness activities. Specifically, Sections 301 and 302 of the DPA enable loan guarantees and loans to be used in support of private sector critical infrastructure protection and restoration activities. In addition, P.L. 111-67 enables President to waive requirements that could delay the establishment of voluntary agreements, when needed to restore critical infrastructure.

Subsection 1002(b) of the Implementing Recommendations of the 9/11 Commission Act of 2007 specifically refers to the authorities in DPA Subsections 101(a) and 101(c). These subsections authorize the President to: (1) require acceptance and preferential performance of contracts or orders (other than contracts of employment) that he deems necessary or appropriate to promote the national defense or to maximize domestic energy supplies; and (2) allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense or to maximize domestic energy supplies.

The President's priorities and allocations authorities under DPA subsection 101(a) are delegated to the following department heads in subsection 201(a) of E.O. 12919 (National Defense Industrial Resources Preparedness):

- The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer;
- The Secretary of Energy with respect to all forms of energy;
- The Secretary of Health and Human Services with respect to health resources;
- The Secretary of Transportation with respect to all forms of civil transportation;
- The Secretary of Defense with respect to water resources; and

[9] The definition of homeland security is a new definition provided in P.L. 111-67. It includes efforts "to prevent terrorist attacks within the United States; to reduce the vulnerability of the United States to terrorism; to minimize damage from a terrorist attack in the United States; and to recover from a terrorist attack in the United States."

- The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

P.L. 111-67 requires Federal departments with delegated priorities and allocations authority to issue final rules by June 27, 2010, providing standards and procedures for use of this authority and to consult with each other, as appropriate and to the extent practicable, to develop a "consistent and unified Federal priorities and allocations system." FEMA is currently leading an Interagency Working Group (IWG) to coordinate development of standards and procedures for the unified Federal system. Participants on the IWG include: USDA, DOC, DOD, DOE, HHS, DOT, DHS/IP and DHS/FEMA.

Section 202 of E.O. 12919 provides that section 201(a) authority of E.O. 12919 may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense by:

- DOD with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities;

- DOE with respect to energy production and construction, distribution and use, and directly related activities; and

- DHS with respect to essential civilian needs supporting national defense, including civil defense and continuity of government and directly related activities.

In general, proposed uses of DPA Section 101 authority for protection or restoration of most types of critical infrastructure must first be determined by DHS to be "necessary or appropriate to promote the national defense."

1.2.3. Defense Priorities and Allocations System (DPAS)

DPA authority to issue priority ratings to support the timely delivery of industrial resources is implemented through the DPAS regulation [15 C.F.R. Part 700]. This regulation is administered by DOC, in consultation with the heads of the departments and agencies specified in Subsection 201(a) of E.O. 12919, and is used, as authorized by DOC, by other Federal departments and agencies and industry to support programs necessary or appropriate to promote the national defense, including critical infrastructure protection and restoration. The key elements of the DPAS regulation are mandatory acceptance of rated orders, preferential scheduling of rated orders to meet delivery requirements, and extension of priority ratings to lower level suppliers and subcontractors.

DOC has delegated certain priority rating authority with respect to industrial resources to DOD, DOE, the General Services Administration (GSA), and DHS. DOD implements its priority rating authority as a standard clause in most of its contracts and orders for industrial resources. Use of the priority rating authority by the other three agencies is limited. DOE and GSA use their authority, primarily, in support of DOD-approved programs. DHS uses its

authority primarily in support of emergency preparedness and critical infrastructure protection and restoration activities.

Except in cases when a special agreement has been made between DOC and the department with applicable DPA priorities and allocations authority, the DPAS cannot be used to prioritize food, energy, health, water, and civil transportation resources. These resources are under the jurisdictions of USDA, DOE, the Department of Health and Human Services, DOD, and DOT, respectively, in accordance with E.O. 12919.

2. Priorities and Allocations

Federal departments, both individually and collectively, have taken a number of actions to implement DPA Section 101 authorities in support of CIKR protection and restoration in recent years. Representatives of the Federal departments with delegated DPA authorities and responsibilities meet periodically to review DPA delegations and guidance with regard to CIKR protection and restoration. DPA authorities, including the priorities and allocations authority, have been incorporated into Federal emergency preparedness plans. This chapter describes recent and ongoing actions in all of these areas.

2.1. Department of Agriculture

The DPA, the Stafford Act, E.O. 12656 (Assignment of Emergency Preparedness Responsibilities), and E.O. 12919 (National Defense Industrial Resources Preparedness) authorize the Secretary of Agriculture to establish plans to provide for the continuation of agricultural production, food processing, storage, and distribution through the wholesale level and to place priorities on contracts for continuation of agricultural production during times of national emergency.

To address this issue and to support national defense programs, including domestic emergency preparedness and Critical Infrastructure and Key Resources protection and restoration and to fulfill the requirements of E.O. 12919, USDA is in the process of developing plans and regulations to establish and implement an Agriculture Priorities and Allocation System (APAS) pursuant to its DPA Section 101 authority. The APAS will support continuation of agricultural production by ensuring that agricultural producers, processors, distributors, and wholesalers receive preferential scheduling for items and processes necessary to maintain their agricultural operations during times of a declared national emergency. Under APAS, USDA would issue priority orders to private sector processors, distributors, and wholesalers as a means to redirect agricultural commodities to areas of hardship. USDA is also participating in an interagency working group with representatives from the six Federal Departments with delegated priorities and allocations authority to coordinate their E.O. 12919 rulemaking for a consistent and unified Federal priorities and allocation system.

Until APAS is implemented, USDA has a memorandum of understanding in place with DOC that will be executed when conditions warrant delegating USDA's priorities and allocations authority to DOC in response to emergency conditions.

2.2. Department of Commerce

DOC is delegated authority, through E.O. 12919, to implement the DPA priorities and allocations provisions for industrial resources.[10] DOC's Bureau of Industry and Security

[10] For the purposes of DPAS, "industrial resources" includes all materials, services, and facilities, including construction materials, the authority for which has not been delegated to other agencies under Executive Order 12919 (e.g., food resources, food resource facilities, and the domestic distribution of farm equipment and

(DOC/BIS) administers this authority through the Defense Priorities and Allocations System (DPAS) regulation. The purpose of the DPAS is to ensure the timely availability of industrial resources to meet current national defense and emergency preparedness program requirements and to provide an operating system to support rapid industrial response in a national emergency. All companies in the United States must comply with the provisions of the DPAS regulation.

DOC/BIS has delegated authority to DOD, DOE, DHS, and the GSA, to place, in accordance with the DPAS regulation and under the authority of the Defense Production Act and E.O. 12919, priority ratings on contracts or orders for industrial resources to support programs determined by DOD, DOE, or DHS as "necessary or appropriate to promote the national defense." DOC/BIS may also authorize other government agencies, foreign governments, owners and operators of critical infrastructure, or companies to place priority ratings on contracts or orders for industrial resources on a case-by-case basis. Such requests must first be determined as "necessary or appropriate to promote the national defense" by DOD, DOE, or DHS.

DOC/BIS has also authorized other Federal agencies, on a case-by-case basis, to place priority ratings on orders to expedite the delivery of industrial resources needed to enhance the protection of government facilities, a critical infrastructure sector. In addition, DOC's DPAS delegation to DOD provides that DOD may authorize persons to place rated orders for delivery of production or construction equipment required to support DOD-approved programs and projects, when the equipment is necessary for the timely performance or completion of rated contracts or orders when timely delivery of the equipment cannot be obtained otherwise. DOD has authorized companies in the defense industrial base, a critical infrastructure sector, to place priority ratings on orders to expedite the delivery of industrial resources, including to support recovery from industrial accidents that have adversely impacted production capabilities.

In 2009, DOC/BIS took action through the DPAS, in cooperation with DHS/FEMA, to support the protection, restoration, and recovery efforts of Federal owner/operators of critical infrastructure. These actions are listed in section 2.8 of this report.

2.3. Department of Defense

2.3.1. The Defense Priorities and Allocations System

The DPAS provides DOD with powerful authorities to help protect our nation. DOC has delegated to DOD authority under the DPAS to:

- Apply priority ratings to contracts and orders supporting approved national defense programs; and

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commercial fertilizer; all forms of energy; health resources; all forms of civil transportation; and water resources).

- Request that DOC provide Special Priorities Assistance (SPA) to resolve problems involving rated contracts and orders and authorize use of priority ratings by foreign firms.

Except for end items that are commonly available in commercial markets in sufficient supply and for items to be used primarily for administrative purposes, all DOD contracts for industrial resources (including construction contracts and Foreign Military Sales contracts) are rated orders under the DPAS. DOD uses two levels of rating priority, identified by the rating symbols "DO" or "DX." If a contractor cannot meet all required delivery dates because of schedule conflicts, DO-rated orders automatically must be given preference over unrated orders and DX-rated orders automatically must be given preference over DO-rated orders and unrated orders. Such preferential treatment is necessary even if it requires the diversion of items being processed for delivery against lower rated or unrated orders. Only the Secretary and Deputy Secretary of Defense can authorize DOD programs to use a DX rating.

2.3.2. Priority Allocation of Industrial Resources

On occasion, military operations may require increased or accelerated delivery of weapons, supplies, and systems. These emergent requirements may create competing demands within DOD for limited industrial resources. The Department's Priority Allocation of Industrial Resources (PAIR) Task Force is charged to ensure that industrial resources are allocated among DOD programs in a comprehensive and integrated manner, in accordance with operational priorities. The PAIR Task Force's mission is to:

- Determine the industrial resources required to accomplish emergent plans;
- Identify any conflicting DOD demands on these resources; and
- Devise approaches to resolve these conflicts based on warfighting requirements established by the Joint Chiefs of Staff.

The Task Force typically utilizes the DPAS to implement production resource allocation (delivery) decisions as needed to resolve competing requirements among defense-related critical infrastructure for limited resources. The Office of the Under Secretary of Defense for Acquisition, Technology and Logistics usually issues a request for Special Priority Assistance (see 3.3.3) to the Department of Commerce to allocate materials or expedite deliveries of defense items, in accordance with PAIR decisions.

For example, the PAIR process was used to assist an Intelligence, Surveillance and Reconnaissance (ISR) Task Force chartered by the Secretary of Defense with the rapid acquisition and deployment of ISR systems. Particularly noteworthy, the PAIR resolved a delivery constraint that left unaddressed would have significantly delayed operational fielding. Multiple buying activities placed or were about to place competing purchase orders for hundreds of sensor arrays from a single supplier located in a Security of Supply (SoS) partner nation. The Department has established SoS arrangements with some of its closest

allies to provide reciprocal priority and allocation support. The supplier was informed of the arrangement between the U.S. and its government and explained the importance of the requirement. As a result, the supplier agreed to increase production capacity thereby ensuring the simultaneous and on-time delivery of antenna's for multiple ISR systems.

2.3.3. Special Priorities Assistance (SPA)

Although the DPAS is largely self-executing, the contractor or DOD may ask DOC for SPA to resolve any problem that may occur. SPA is a process used to:

- Expedite delivery at any level of the supply chain to meet a specific need or to accelerate delivery under a rated order due to a change in military urgency;
- Resolve delivery conflicts among various rated orders; and
- Authorize an industrial priority rating for foreign nation defense contracts within the United States when such authorization would further U.S. national defense interests.

Any entity within the acquisition or production supply chain of a rated order may request SPA. If SPA requests cannot be resolved within DOD, the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics is authorized to endorse the request for SPA and forward it to DOC for action.

2.4. Department of Energy

2.4.1. DOE Authorities and Procedures Under DPA Subsections 101(a) and 101(c)

DOE derives its authorities and procedures with respect to DPA Subsections 101(a) and 101(c) from several sources:

- E.O. 12919 has several provisions regarding use of priorities and allocations authority with respect to energy resources:
    - Section 201 delegates the President's priorities and allocations authority with respect to "all forms of energy" to the Secretary of Energy;
    - Section 202 states that DPA Section 101 authority may only be used "with respect to energy production and construction, distribution and use, and directly related activities" to support programs that have been determined by the Secretary of Energy to be necessary or appropriate to promote the national defense; and
    - Section 203 of E.O. 12919 delegates the President's authority under Subsection 101(c), which involves maximizing domestic energy supplies, to the Secretary of Commerce but provides that DOC re-delegates to DOE the authority to make the findings described in subsection 101(c)(2)(A) that the

materials (including equipment), services and facilities are critical and essential. The Secretary of Commerce makes the finding described in 101(c)(2)(A) that the materials (including equipment), services, or facilities are scarce, and the finding described in subsection 101(c)(2)(B) that is necessary to use the authority provided by subsection 101(c)(1).

- 10 C.F.R. Part 221 sets forth the procedures to be used by DOE and DOD, pursuant to the DPA, whenever the priority supply of crude oil and petroleum products is necessary or appropriate to meet national defense needs.

- 10 C.F.R. Part 216 describes and establishes the procedures to be used by DOE to make the findings required by DPA Section 101(c)(2)(A). This regulation was updated in 2008.

- Both of the above regulations are subject to change given the recent passage of P.L. 111-67 and its mandate to "issue final rules...that establish standards and procedures by which the priorities and allocations authority under this section is used to promote the national defense." DOE is participating with the Interagency Working Group on reviewing these new rules, which may alter the current regulatory scheme.

- A Memorandum of Understanding between DOE and DOC spells out the respective jurisdictions and responsibilities of these two departments for products and equipment associated with the production of petroleum and gas.

2.4.2. Use of DPA Section 101 Authorities to Reduce Interruption of Energy Resources

It has rarely been necessary to consider use of the priority authority to address emergency supply needs to restore electric power, because it is common industry practice for affected utilities to "borrow" needed components from unaffected utilities, when such components are available. Certain high impact but low frequency events, such as major earthquakes or solar electromagnetic pulse circumstances, may require use of priority ratings to assist utilities with restoration and recovery.

DOE includes priority ratings in its maintenance and operations contracts for national laboratories and other facilities that support DOD nuclear programs. These contracts support efforts to protect and restore operations at these facilities, in the event of a disruption caused by an act of terrorism, natural catastrophe, or other similar national emergency.

2.5. Department of Homeland Security

A delegation from DOC (DPAS Delegation 4) provides DHS a procedure through DOC for handling requests from owners and operators of critical infrastructure to place priority rated contracts and orders for industrial resources in support of critical infrastructure protection and restoration activities. Delegation 4 also provides procedures for use of priority ratings in

support of: (1) approved DHS programs; (2) state, local and tribal government programs that involve disaster preparedness, mitigation, response, and recovery activities; and (3) programs of other Federal department and agencies that involve essential civilian needs determined by DHS to be necessary or appropriate to promote the national defense.

In 2009, DHS/FEMA has completed a number of actions involving priorities and allocations authority:

- Published a FEMA DPAS Directive and FEMA DPAS Manual;
- Developed a FEMA DPA Program Division website; and
- Provided coordination in the development of the Administration's legislation to reauthorize the DPA.

2.6. Department of Health and Human Services

Section 201(a)(6) of E.O. 12919 delegates, to the Secretary of HHS, Presidential authority under Section 101 of the DPA to utilize DPA procedures and require acceptance and priority performance of contracts for health resources. E.O. 12129 Section 901(j) defines health resources as "materials, facilities, health supplies and equipment (including pharmaceutical, blood collecting, and dispensing supplies, biological, surgical textiles, and emergency surgical instruments and supplies) required to prevent the impairment of, improve, or restore the physical and mental conditions of the population." In Fiscal Year (FY) 2009 HHS utilized its delegated authority to award four rated order contracts for needle and syringe units to support vaccination efforts against the 2009 H1N1 influenza virus.

HHS is drafting a regulation that is intended to implement DPA procedures to issue rated order contracts for health resources (the proposed regulation). The proposed regulation will amend the HHS Acquisition Regulation. It will set forth HHS policy on the use of the DPA authority delegated to the Secretary of HHS and offer guidance to agency personnel on the use of those procedures. The proposed regulation is in response to a Government Accountability Office recommendation that HHS prepare a formal regulation implementing DPA procedures.

2.7. Department of Transportation

DOT is delegated DPA Section 101 authority with respect to all forms of civil transportation. Civil transportation is not covered by the DPAS, but the DPAS has been used in the past to expedite the delivery of industrial resources for protection and restoration of transportation facilities and services. DOT has DPA protocols for civil transportation that can be issued quickly in times of crisis. In addition, the Department ensures that senior leadership and necessary decision-makers are briefed on the applicability of the DPA and the DPAS. The Federal Aviation Administration Crisis Management Handbook contains guidance regarding DPAS requests. DOT planning and procedures to address civil transportation preparedness

and response for emergency conditions are addressed in ESF #1 (Transportation) of the NRF, which also addresses use of DPA authorities under emergency conditions.

The U.S. Maritime Administration (MARAD) has four long-established regulations derived from the DPA and relevant executive orders:

- 46 C.F.R. Part 340—Priority Use and Allocation of Shipping Services. This regulation is designed to ensure that DOD will have access, as necessary, to shipping services and port facilities in crisis or war

- 46 C.F.R. Part 345—Restrictions Upon the Transfer or Change in Use or in Terms Governing Utilization of Port Facilities. This regulation requires prior approval of the National Shipping Authority (NSA) – MARAD's emergency operations mode – to transfer or change utilization of port facilities, "to meet the requirements of the national security"

- 46 C.F.R. Part 346—Federal Port Controllers. This regulation prescribes the standard form of agreement between the NSA and port authorities for the appointment and functions of Federal Port Controllers during national defense emergencies

- 46 C.F.R. Part 347—Operating Contract. This regulation prescribes the standard form of contract to be entered into between the NSA and marine terminal operators during civil defense emergencies or national emergencies declared by the President.

DOT is developing internal rules and is participating in the inter-agency working group developing a consistent and unified rulemaking for the execution of Federal priorities and allocations authorities as required under the DPA Reauthorization Act of 2009.

2.8. Use of Priorities and Allocations for Protection and Restoration of CIKR Operations

DPAS Delegation 4 authorizes DHS to place priority rated contracts and orders in support of DHS and State, local, and tribal government programs determined eligible by DHS for DPAS support. During 2009, the DHS Chief Procurement Officer was authorized to use DPAS priority ratings to support procurement of personal protective equipment to protect DHS personnel against the 2009 H1N1 influenza virus and FEMA Regional and Deputy Administrators and Federal Coordinating Officers were authorized to use DPAS rated orders to prepare for and respond to the 2009 hurricane season.

Both FEMA and DOC are involved in DPAS actions involving use of priority ratings by other Federal agencies or owners and operators of critical infrastructure for civilian programs involving emergency preparedness or critical infrastructure operations. For these non-DHS organizations, FEMA determines if a program is "necessary and appropriate to promote the national defense" and DOC authorizes use of a DPAS priority rating to support the civilian program, as appropriate. During 2009, FEMA made determinations that the following programs were eligible to be supported using DPA priorities authority:

- DOC's Information Technology program (to ensure timely equipment upgrade);

- HHS' Health Resources Influenza Medical Countermeasures program (to procure items for the production of 2009 H1N1 influenza vaccine);

- DOE National Nuclear Security Administration' Safeguards, Second Line of Defense and Nuclear/Radiological Incident Response programs (to procure neutron detector and associated equipment); and

- DHS Office of the Chief Procurement Officer to procure FDA-approved Personal Protective Equipment (to prepare for and protect against the 2009 H1N1 influenza outbreak).

- DHS Office of the Chief Procurement Officer to procure security technology (to support the mission-related activities for border and transportation security, counter-terrorism, and critical infrastructure protection and restoration).

Appendix A. Acronyms

APAS	Agriculture Priorities and Allocation System
ASD (HD&ASA)	Office of the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs
ASPR	Assistant Secretary for Preparedness and Response
CAL	Critical Asset List
CIKR	Critical Infrastructure and Key Resources
CIPAC	Critical Infrastructure Partnership Advisory Council
CIPR	Critical Infrastructure Protection and Resilience
DCIP	Defense Critical Infrastructure Program
DFOs	Defense Food Orders
DHS	Department of Homeland Security
DHS/FEMA	Department of Homeland Security/Federal Emergency Management Agency
DHS/IP	Department of Homeland Security/Office of Infrastructure Protection
DIB	Defense Industrial Base
DOC	Department of Commerce
DOC/BIS	Department of Commerce/Bureau of Industry and Security
DOD	Department of Defense
DOE	Department of Energy
DOE-OE	Department of Energy -Office of Electricity Delivery and Energy Reliability
DOT	Department of Transportation
DPA	Defense Production Act of 1950
DPAS	Defense Priorities and Allocations System
E.O.	Executive Order
ESF	Emergency Support Function
FAR	Federal Acquisition Regulation
FDA	Food and Drug Administration
FY	Fiscal Year
GAO	Government Accountability Office
GCC	Government Coordinating Council
GSA	General Services Administration
HSPD	Homeland Security Presidential Directive
HTS	High Temperature Superconductor
ISER	Infrastructure Security and Energy Restoration Division
ISR	Intelligence, Surveillance, Reconnaissance Systems
MARAD	Maritime Administration
NIPP	National Infrastructure Protection Plan
NRF	National Response Framework

NSA	National Shipping Authority
PAIR	Priority Allocation of Industrial Resources
P.L.	Public Law
SCC	Sector Coordinating Council
SoS	Security of Supply
SPA	Special Priorities Assistance
SSAs	Sector-Specific Agencies
SSPs	Sector-Specific Plans
USACE	United States Army Corps of Engineers
USD (AT&L)	Undersecretary of Defense for Acquisition, Technology, and Logistics
USDA	United States Department of Agriculture
YBCO	Yttrium Barium Copper Oxide