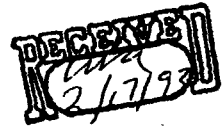




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SUMMARY AND ANALYSIS OF GENERAL STRUCTURE AND DISASTER-RELATED
LEGAL AUTHORITIES
OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY

Part B

This paper examines the statutory aspects of (1) FEMA's general organization and structure, and (2) its authorities connected with major disasters. As statutory authorities, it covers both laws enacted by Congress and Executive orders. Some references are made to the formal published (CFR) regulations of the Federal Emergency Management Agency as they relate to particular statutory provisions, but no effort has been made to summarize these regulations generally or to consider more informal agency issuances, such as the Civil Preparedness Guide. Citations to FEMA's principal legislative and Executive order authorities appear in an appendix at the end.

I. FEMA's General Organization and Structure

A. Types of Legal Authorities: Statutory and Presidential

1. Introduction.

FEMA was established by Reorganization Plan no. 3 of 1978, followed by the activating Executive order 12127 and, in 1979, Executive order 12148. The plan and the Executive orders, as well as subsequent statutes and orders, make FEMA subject to two basic kinds of authorities, according to whether the grant of power to FEMA is statutory or Presidential.

Statutory functions have been granted by or pursuant to Reorganization Plan No. 3 and a number of subsequent statutes. These functions can only be withdrawn or transferred by statute. For this purpose, a statute would include a reorganization plan, but general statutory authority for reorganization plans has expired. (The President could, however, be authorized, by statute, to submit a plan covering a specific subject area, which Congress could approve by joint resolution.)

Presidential functions are largely derived from Executive order 12148 of 1979 which delegated to FEMA various authorities which had been given to the President by statute (including reorganization plans) or by the Constitution. Subsequent Executive orders have added to these FEMA functions. Unlike the statutory functions described above, these Presidential authorities can be withdrawn or reassigned by the President, without changing the authorizing statutes.

In exercising these Presidential authorities, FEMA is in a position much like that of an office or division within a Federal department or agency that has been freely delegated authority by the agency head. The President may be



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considered to have a special interest in and authority over powers that he or she has delegated, distinct from the President's general grant of executive power in Article II, section 1 of the Constitution. If this delegated authority is interpreted by the Attorney General, it is generally safe to assume that, all other things being equal, it will be interpreted broadly in a manner that maintains the breadth of Presidential discretion.⁽²⁾ p. 33

2. Specific Statutory Grants of Authority

Responsibilities that have been directly lodged in FEMA by statute or reorganization plan include the flood insurance and crime insurance programs; fire safety training and research; funding and staff support responsibilities under title III of the Stewart B. McKinney Homeless Assistance Act; coordination, planning and assistance functions under the Earthquake Hazards Reduction Act; approval of State and local emergency plans for nuclear power plant accidents pursuant to several Nuclear Regulatory Commission authorization acts⁽³⁾ and monitoring of State and local training and planning under the Hazardous Materials Uniform Transportation Act. FEMA also has statutory responsibilities relating to disasters in the insular areas under the Omnibus Insular Areas Act of 1992, PL 102-247, which places disaster relief authority in the President but, unlike the Stafford Act, requires that the President Act through FEMA.⁴

3. Specific Presidential Grants of Authority

Most of the important FEMA functions that relate to federal emergencies and disasters involve the exercise of Presidential authority, having been given to FEMA by Executive order, even though the original source of that authority is usually to be found in a statute. This is true of FEMA's disaster and emergency functions under the Stafford Act, civil defense functions under the Federal Civil Defense Act of 1950, and mobilization, preparedness and continuity of government functions under the Defense Production Act, National Security Act, and Executive order 12656 (national security emergencies). Executive order 12148 assigned to FEMA responsibility for coordinating planning to reduce the consequences of major terrorist incidents. Also, that order assigned responsibilities for dam safety, although this role appears to have been substantially limited by subsequent legislation (Pub. Law 99-662) giving dam safety responsibilities to the Secretary of the Army.

FEMA's telecommunications responsibilities under Executive order 12472 are substantially presidential, as is its responsibility under Executive order 12148 for "coordination of natural and nuclear disaster warning systems." Also in this category are: any retained FEMA functions under the Comprehensive Environmental Response and Liability Act of 1980 (Superfund); FEMA's

responsibilities under Executive orders 12241 and 12657 for a "National Contingency Plan" covering emergencies at nuclear power plants and, when those plants are not covered by State or local emergency plans, for approving private utility plans, planning the federal response, and coordinating and exercising "command and control" over that response; and FEMA's responsibility under Executive order 12699 in connection with the carrying out of seismic safety requirements affecting Federal, Federally assisted and Federally regulated building.

B. Status of FEMA as an Executive Branch Agency

1. Introduction

Reorganization Plan No. 3 of 1978 created FEMA as an independent agency and, like other Executive branch agencies, FEMA is of course subject to supervision by the President. But FEMA also has certain powers to control or "coordinate" other federal agencies, and it is also subject to certain special supervision, as provided for in or pursuant to Executive orders.⁵

Generally, the effect of these provisions is --

- to make FEMA, even in its natural disaster role, in large part an agency concerned with planning for and coordinating the actions of other agencies;

but also

- so far as nuclear attack hazards and national security emergencies are concerned, to place FEMA under the National Security Council and Department of Defense. (Note that the Executive orders as described set out the structure; that structure may not in fact be in operation).

2. Special "coordinating" functions. These are primarily granted by Executive orders. Specifically--

Executive order 12148 which originally, in 1979, assigned to FEMA most of its emergency management responsibilities, including responsibility for civil defense under the Federal Civil Defense Act. Under this order:

- the FEMA director is responsible for establishing policies for, and coordinating, "all civil defense and civil emergency planning, management, mitigation and assistance functions of Federal agencies" and for "periodically" reviewing and evaluating "civil defense and civil emergency functions of Executive agencies" and recommending to the President better ways of carrying out these functions.



- the FEMA director is made responsible for "the coordination of (1) planning to reduce the consequences of terrorist incidents and (2) natural and nuclear disaster warning systems.

*Revised by
E.O. 12919
June 1994*

- provision is made for an interagency Emergency Management Council, which is to be chaired by the Director of FEMA and is to include the Director of OMB. This is to advise and assist the President on oversight and direction of Federal emergency management programs and provide guidance to the FEMA director in performance of his or her duties.

- there is delegated to FEMA the President's authority

(1) under the Stafford Act "to direct" other Federal agencies to take certain actions in connection with emergencies and major disasters;
(2) under the Civil Defense Act (sec 201(a) and (b)) to "direct" national plans and programs for civil defense and "review and coordinate civil defense activities" of other agencies with each other and with States and other countries;
(3) under the Defense Production Act and Executive order 10480 "to coordinate all mobilization activities of the executive branch...including activities relating to production, procurement, manpower, stabilization and transport"; and
(4) under Executive order 11912 and section 101(c) of the Defense production act to provide "overall coordination and direction" of the President's power in certain circumstances to allocate and expand production of domestic energy.⁶

Executive order 12656 is the most comprehensive document assigning responsibilities for national security emergency preparedness. These emergencies are defined to include not only those resulting from hostile action but also "any occurrence, including natural disaster...technological emergency, or other emergency, that seriously degrades or seriously threatens the national security...." Under this order:

- FEMA is to assist the National Security Council (NSC) in "the implementation of national security emergency preparedness policy by coordinating with other Federal departments and agencies and with State and local governments and by providing periodic reports to the National Security Council."

- FEMA like other agencies is assigned various



"primary" and "support" functions, some of which call for it to "coordinate" the activities of other agencies or to provide them with "guidance" concerning emergency preparedness plans and programs, continuity of essential domestic emergency functions during national security emergencies, mobilization of resources in response to national security emergencies, use of defense production authorities to meet national security needs, and ("in cooperation with the Secretary of Defense") mutual civil-military support during national security emergencies.⁷

Executive order 12742 delegates to the Secretaries of Agriculture, Energy, Transportation and Commerce the President's authority, under 50 U.S.C. App 486, to secure on a priority basis supplies and materials for the use of the armed services or atomic energy program when this is found by the Secretary of Defense to be in the interests of national security. Under this order, implementing regulations are to be issued by the Secretaries named and also by the FEMA director who is to coordinate the implementing regulations and procedures.

3. Special Supervision and Oversight of FEMA

Executive order 12148. Under this order (sec. 2-204), FEMA is made "subject to oversight by the Secretary and National Security Council" in connection with its civil defense planning in order that this planning "be fully compatible with the National's overall strategic policy, and in order to maintain an effective link between strategic nuclear planning and nuclear attack preparedness planning."

Executive order 12656. As explained above (I.B.2.) this order applies to preparedness for national security emergencies that may include natural or man-made emergencies or disasters other than attacks or threatened attacks if they degrade or seriously threaten national security.

Under this order FEMA, besides being given specific independent responsibilities, and given certain powers to act on behalf of the National Security Council, is also made an advisor and support agency under terms that appear to subordinate it directly to the Council in connection with overall national security preparedness, including FEMA's responsibilities in connection with, among other things, "mobilization preparedness, civil defense, continuity of government and technological disasters...."



II. General Categories of FEMA statutory authorities

A. Introduction.

FEMA has a variety of different authorities, which can be divided by function or purpose into different categories. The following discussion covers both authorities which authorize FEMA to do certain things and the statutes which appropriate funds for FEMA's activities. The former require one to distinguish among various FEMA functions which the latter, for funding purposes, lump together so far as statutory restrictions are concerned.

B. Authorizing Statutes.

1. Basic categorization.

In general, FEMA's various authorities can be categorized according to whether they relate primarily to (a) local emergencies and events not individually of federal concern; (b) mobilization and protection of production and related resources in time of war or an energy emergency. (c) protecting citizens by preparing and responding to emergencies or disasters of federal concern that do not result from hostile action; (d) protecting the civilian population in time of war or enemy attack; and (e) assuring continuity of government in the case of attack or national security emergency..

Categories (a) and (b) are relatively distinct from other FEMA functions, but may overlap to some extent other authorities. There is a great deal of overlap between categories (c) and (d). Category (e) overlaps (b) and (d) to the extent that mobilization and protecting citizens after an attack depend upon the ability of the federal government to continue in operation. This problem of continuity is less likely in the event of a natural or technological disaster, that is, category (c).

2. Individual categories of authorizing authority

a. Authorities relating to events not individually of federal concern

Some FEMA activities carried on pursuant to discrete authorities are also functionally distinguishable from the bulk of what FEMA does in that they relate more to a series of continuing, local events and situations than to disasters or emergencies that, in themselves, become matters of federal concern. Thus, hopelessness^{is a} may be a national problem, but the assistance authorized under the McKinney Act is more designed to alleviate a ongoing community problem than to respond to large scale, sudden events. Similarly, the great bulk of fires and property crimes, though unexpected, are local events, even though cumulatively and in certain kinds of disasters or certain circumstances fires and



crimes may be of national concern.

The distinction between these authorities, particularly those of the Fire Administration and Fire Academy, and other FEMA functions may depend upon how they are administered and applied. Fire training, technical assistance and research could relate in substantial measure to emergency response to out-of-the ordinary fires; under current statutory provisions, however, priority is to be given to reducing the incidence of residential fires.⁸

Among other FEMA authorities, the flood insurance program can be considered as locally focused in the sense that most floods do become matters of federal concern. Similarly, Federal assistance to State and local disaster preparedness programs has a "pay off" in connection with events that, more often than not, do not become federal emergencies or major disasters. In both of these instances, however, the programs have a major purpose of preventing -- however effectively or ineffectively -- events from becoming so large or devastating as to require a federal response.

b. Authorities relating to mobilization

"National"
Executive order 12148, delegated to the FEMA director the function under the Internal Security Act of advising the President concerning the coordination of military, industrial and civilian mobilization. Under Executive orders 10480 and 12656 FEMA has responsibilities relating to mobilization that are either specifically tied to or based upon the Defense Production Act.

*N.R.
E.O. 10480
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E.O. 12919*
All of these are war authorities, except for a provision of the Defense Production Act relating to energy emergencies. Moreover, as a practical matter, the "mobilization" authorities that FEMA derives from this Act under Executive orders 12148, 10480 and 12656 would ordinarily not be needed in dealing with a natural disaster or emergency of domestic origin. But there of course could be could be exceptional situations, as when a disaster disrupts production of equipment or supplies considered necessary for national defense. Executive order 12656 in effect recognizes this possibility by referring to a disaster that "seriously degrades or seriously threatens national security."⁹

In addition, Executive order 12742, as described above, gives FEMA certain coordinating jurisdiction over the placing of orders for military supplies in the interest of national security which is not necessarily limited to war or threat of war.

(Note that while this "mobilization" function may be considered to include FEMA's continuity of government responsibilities; however, these are discussed separately as item e. below)

c. Authorities related to emergencies and disasters

As explained above, there is much overlap between FEMA's authorities in connection with emergencies and disasters and its authority related to civil defense against enemy attack. The overlap is noted, where relevant, in the following discussion of specific items.

Earthquake and nuclear power plant hazards. FEMA has specific responsibilities in connection with earthquake and nuclear power plant hazards under specific statutes and Executive orders. Neither of these categories of authority would ordinarily relate to war or defense situations, although a nuclear facility could be the target for sabotage or terrorist activity. These specific authorities overlap FEMA's more general authorities in that FEMA would apparently be authorized -- though not required -- to carry on most of the same activities under its delegated powers under the Federal Civil Defense Act of 1950, the Stafford Act, and Executive orders 12656 (national security emergencies) and 12473 (telecommunications). This would not be true, however, of FEMA's role in enforcing Federal seismic standards.

[sic] "12472"

Flood insurance. This program is carried on pursuant to separate statutes, which authorize many activities that could not be carried on pursuant to FEMA's other, general authorities, although those authorities could be used to support some of the planning and technical assistance associated with flood plain identification and management. As a mitigation authority and source of financial assistance to flood victims, the flood insurance program is closely tied to FEMA's disaster response authorities, a connection reflected in specific statutory provisions in both the Stafford Act and the flood insurance legislation.

Telecommunications. FEMA derives communication responsibilities and authorities from a number of sources, including Executive orders 12148, 12472 and 12656, section 201(c) of the Federal Civil Defense Act of 1950 and 418 of the Stafford Act (both as delegated under Executive order 12148) and sections 203 of Reorganization Plan No. 1 and 103(b) of Executive order 12127. This authority is available for use in either attack or non-attack disaster situations.

The Stafford Act. This is commonly thought of as a "disaster" authority. It has, of course, always been so used in the past and, generally, has been designed to deal with various kinds of disasters, as opposed to national defense or civil defense problems. However, as explained below in connection with FEMA's civil defense authorities, the Stafford Act also serves as a statutory authority that would undoubtedly be employed in the event of enemy attack.



A detailed discussion of Stafford Act authorities appears later in this paper.

The Federal Civil Defense Act of 1950. This statute authorizes "civil defense" actions and defines that term to include both actions related to "natural and manmade" disasters as well as to enemy attack.

The Act requires that FEMA maintain a "program structure" for "attack-related civil defense" and another for "disaster-related civil defense," as well as "criteria and procedures" to allow resources assigned to the two structures "to be used interchangeably"; it specifies a number of "elements" to be considered for the "attack-related" structure; and it requires generally that the use of funds for "natural disasters" be "consistent with," contribute to, and "not detract from attack-related civil defense. Yet most provisions of the Act that authorize specific activities -- financial assistance, training, acquisition and positioning of materials -- are written in terms of "civil defense" generally or "the purposes of this Act," and can be cited in support of either war or non-war preparedness activities.

Executive order 12148. As indicated above, this order gives to FEMA responsibility for establishing Federal policies for, and coordinating, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies. "Civil emergency" is defined to include, not only a wartime emergency, but "any" accidental, natural or man-cause emergency or threat "which causes or may cause substantial damage to or loss of property."

A specific provision of this order also made FEMA responsible for a dam safety program. As noted above, subsequent legislation established a dam safety program to be administered by the Secretary of the Army (33 U.S.C. secs. 467), although the conferees at the time expressed a desire that FEMA continue a modified program.

Executive order 12656. This may be considered a disaster and general emergency authority to the extent that a national security emergency is defined to include a natural or technological disaster if it affects national security. As further noted below, some specific FEMA responsibilities under this order relate expressly to war or attack situations, but others are not so limited. This Executive order, it should be noted, fixes responsibilities but, as with all Executive orders, does not necessarily carry with it the authority to do what it requires. This must be found either in specific statutes (such as the Stafford Act and Federal Civil Defense Act) or in the President's

*The National
Dam Safety Act
uses water
evacuated by
FEMA by the
lead?*

constitutional powers as chief executive and commander in chief.¹⁰

d. Civil Defense (Attack-Related) Authorities

FEMA's responsibilities for civil defense against attack are primarily derived from three sources. The first two are statutes granting powers that were delegated by Executive order 12148. The last is an Executive order that does not itself delegate any authority but fixes responsibilities that depend upon the named agencies, including FEMA, having statutory authority from other sources or being able to rely upon the President's constitutional powers.

The Federal Civil Defense Act of 1950. Originally, this statute contained both preparedness and, in title III, emergency response authorities. The preparedness authorities covered preparedness against both natural disasters and enemy attacks. The response authorities became effective only upon a declaration of emergency by the President in the event of a threatened or actual attack. The title III, response authorities were allowed to expire in 1974. The Act thus remains primarily as a preparedness authority, covering both attack and natural disaster risks.

Most of the authorities under this Act, including those authorizing financial assistance to States for "shelters" and federal purchase of such things as "radiological detection devices, protective devices and gas detection kits" could, literally be applied to various kinds of domestic events as well as enemy attack. However, some provisions demonstrate the original and continuing "attack" focus.

These include a requirement that funds to the States for "shelters and other protective facilities" be distributed according to relative urban population in "the critical target areas" and a similar requirement under which "criticality of the target...areas" is made a consideration in distribution of grants to the States for civil defense personnel and administrative expenses. Further, while the Act requires that there be a separate "program structure" for both "attack-related" and "disaster-related" civil defense, it contains specific requirements only for the "attack-related" structure.

Finally, as already noted (see II.B.2.c, "Federal Civil Defense Act) in its statement of purpose, and provisions for allowing the States to use funds for natural disasters, the Federal Civil Defense Act 1950 gives a priority to attack-related civil defense. Specifically, States may use funds



for natural disaster purposes only "to the extent that ...use...is consistent with, contributes to, and does not detract from attack-related civil defense preparedness."¹¹

The Stafford Act. Generally regarded and used by FEMA as the principal "disaster" authority, this Act also serves as a defense authority. Thus

- **Preparedness.** Both Federal preparedness and assistance for State preparedness under section 201 of the Act clearly can be considered to extend to support of both "war" and "non-war" activities.

- **Disaster Assistance and recovery.** As amended in 1988, the statute specifically covers disasters other than those caused by natural events -- "regardless of cause" -- so long as their effect is produced by "fire, flood or explosion"; in any likely circumstance, therefore, an enemy or terrorist attack, upon the request of one or more governors, could be the basis for a disaster declaration which would make available all the procedures, responses and benefits which the Act provides for major disasters.

- **Emergency and advance response.** The 1988 amendments to the Act established an "emergency" (section 501(b)) category for "Certain Emergencies Involving Federal Primary Responsibility" under which all the Act's emergency response authorities -- but not most of its disaster relief benefits -- can be deployed either before or after a disaster without a governor's request. These areas of "Federal Primary Responsibility" for which this authority could be used obviously include responsibility for national defense and response to attacks, as well as events directly involving major Federal facilities. Also presumably covered are emergencies affecting federally dominated activities, such as control or regulation of atomic energy, and any emergency so severe as to affect national security.

Executive order 12656. Most of the Federal government's war and natural disaster preparedness responsibilities, including those of FEMA, are to some extent blurred under Executive order 12656, which brings together agency assignments in connection with national security emergencies. This order cites as statutory authority the Federal Civil Defense Act of 1950, as well as the Defense Production Act, and the National Security Act -- but not the Stafford Act. It defines a "national security emergency" to include "military attack" as well as a "natural



disaster...technological emergency, or other emergency" if it "seriously degrades or seriously threatens the national security of the United States."

Many of the specific responsibilities assigned to the different agencies under Executive order 12656 are so worded that they could relate to either a war or non-war emergency. This is true of most of FEMA's responsibilities, although some by their terms some are specific to war or attack situations, including:

- developing and coordinating "programs ...for crisis management, population protection, and recovery in the event of attack";
- developing and maintaining, with the assistance of other agencies, "capabilities to assess actual attack damage and residual recovery capabilities, as well as capabilities to estimate the effects of potential attacks";
- providing "guidance to ... Federal ... agencies on the appropriate use of defense production authorities; and
- assisting the Secretary of State...in [providing support] for NATO Wartime Agencies."

Executive order 12148. This order has been described above. As relevant here:

- It gives to FEMA authority to prepare policies for and coordinate Executive agency planning, mitigation and assistance functions in connection with civil defense and civil emergencies that extends to war time emergencies.
- It gives to the Secretary of Defense, along with the National Security Council, oversight covering FEMA's civil defense activities to assure that they are "fully compatible with overall strategic policy" and to maintain an "effective link" between strategic nuclear planning and nuclear attack preparedness.
- It directs the Secretary of Defense to provide the FEMA director with support for civil defense programs "in the areas of program development and administration, technical support, research, communications, transportation, intelligence and emergency operations."
- In addition, this order assigns to FEMA



responsibility for coordinating planning to reduce the consequences of major terrorist incidents.

Telecommunications. FEMA's telecommunications authorities, as described above in connection with its disaster authorities would also be applicable to attack-related emergencies and situations.

e. Continuity of Government

Under National Security Act authority, as delegated by Executive order 12148, FEMA is responsible for advising the President concerning "coordination of military, industrial and civilian mobilization, including...the strategic relocation of...government..., the continuous operation of which is essential to the Nation's security.

Under Executive order 12656, FEMA is assigned lead responsibility for coordinating the development and implementation of plans "for the operation and continuity of essential domestic emergency functions of the Federal Government during national security emergencies." The essential responsibility represented by this assignment may be regarded as one vested in the President by the Constitution.

C. Appropriations Acts

FEMA's budgets. FEMA's budget requests have divided funding estimates and requirements into a variety of categories to accommodate different programs and projects undertaken under FEMA's statutory authorizing authorities, as described above. As agreed to by Congressional appropriations committees, these budget categories are more or less constraining depending upon the degree to which those committees are willing to accept the shifting of funds among them. However, these restrictions are for the most part not statutory; they may be exceeded or changed by agreement without a change in statutory law as contained in appropriations acts.

Appropriations Acts. The statutory appropriations appear to impose relatively few restrictions, override some authorization limitations, such as under the Federal Civil Defense Act, and -- subject to agreements as described in the preceding paragraph -- permit funds to be moved with relative freedom among different FEMA legal authorities to reflect both program needs and overlapping authorities, particularly in connection with the "preparedness" functions that are authorized under different statutes.

Specifically, under Public Law 102-389, the Veterans, HUD,



Independent Agencies appropriation act for fiscal 1993 --

(1) funds are appropriated "for carrying out the functions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act" without a breakdown of specific amounts for particular provisions or purposes, except for limitations on direct loans.

(2) A separate appropriation heading provides a sum for FEMA's "Salaries and Expenses," including attendance "of cooperating officials and individual" at emergency preparedness meetings and transportation in connection with continuity of government functions. Another heading covers expenses of the Office of Inspector General. A "National Flood Insurance Fund" heading covers use of that Fund, with various provisions for transfers and limitation, including a permitted transfer to the emergency planning and management category, described immediately below.

(3) Most significant, the Act also appropriates, in a lump sum, \$253,243,000 "to carry out activities" described under the heading "Emergency Management Planning and Assistance," as authorized under a number of statutes, all of which are listed without description or distinction. These are the Flood Disaster Protection Act of 1973, the Stafford Act, the Earthquake Hazards Reduction Act, the Federal Fire Prevention and Control Act, the Federal Civil Defense Act, the Defense Production Act, section 103 of the National Security Act, and Reorganization Plan No. 3 of 1979. In effect, this appropriation allows funds to be allocated for various kinds of preparedness assistance under these listed statutes substantially according to administrative discretion, except as particular uses or transfers among categories may require negotiation to accommodate committee report language or informal understandings with the appropriations committees.

III. FEMA and Federal Disaster Response and Relief Authorities.

A. Introduction: Terminology.

"Mitigation," "preparedness," "response" and "recovery" have become terms of art for those who study disaster programs of the Federal government. The first two are statutory terms. The latter two, however, while they appear in the Federal Response Plan under the Stafford Act, are generally not used or used in any consistent way in either the Stafford Act or its predecessor laws.

This paper observes the distinction between "response" and "recovery" where it appears that the discussion might otherwise be misleading, but where possible the terms are avoided in favor of the more general terms, "relief" or "assistance."



B. Panoply of Federal Disaster Relief Programs

1. The multiplicity of authorities.

The 1989 digest of "Federal Disaster Assistance Programs" lists more than 90 separate programs -- undivided between the various categories, "mitigation," "preparedness," "response" and "recovery" -- which can be used to help those who are or may be affected by disasters. Only 18 of these are described as FEMA programs. A recent FEMA computer survey that used "time of war" and "national emergency" as search terms produced 135 separate authorities. Of these, it appears that there are two dozen or more not administered by FEMA that either refer specifically to disasters or are of such a character that they might well be used without a war or attack in an emergency or disaster recognized under the Stafford Act.

The Federal Response Plan touches only a few of these authorities and reaches none of those which would ordinarily be considered to fall in the "recovery" category.

One way of looking at these programs would be by kind or degree of emergency or disaster to which they typically relate. Thus, federal programs may be classified and discussed as follows:

Local events: federal actions that assist States and localities to deal with local events that may, cumulatively, be of national significance *but may not individually rise to levels of federal concern.*

Federal mitigation programs and efforts may be considered to fall in this category, as may federal assistance to State and local preparedness programs. The more able States and localities are to deal with emergencies and disasters, the more likely these events are to remain local. And if there is a call for federal action, the scope and cost of that action will be reduced to the extent that States and localities have taken active mitigation measures and are well prepared.

Events of limited federal interest: actions taken by individual federal agencies to help those affected by emergencies and disasters that are not a part of a coordinated or multi-agency effort.

Major emergencies and disasters: federal actions that contemplate a combined or coordinated response by a number of federal agencies but that are not necessarily subject to immediate or personal control by the President.

Presidential Emergencies: coordinated federal actions relating to events of such magnitude or importance that what



is done is made subject to the immediate control of the President, of individuals specially designated to act as personal representatives of the President, or, in the case of national security emergencies, of the National Security Council.

A particular federal program or system may fall under a different category, depending upon the circumstances. For example, under the Stafford Act, mitigation assistance and mitigation requirements -- rather than being "local" in occasion and purpose -- may accompany a system of relief following a major disaster. Similarly, an agency with a disaster relief authority that could be used individually -- for an event of "limited" federal interest -- could also agree or be required to use that authority in connection with a major disaster or a Presidential emergency. And a coordinated system of agency actions that would normally be taken in connection with a major disaster may rise to the Presidential category if the President acts to take personal control.

Subject to these qualifications, each of the categories is discussed separately below.

2. Specific categories of Federal disaster assistance efforts

a. Mitigation and preparedness assistance

(1) Authorities of agencies other than FEMA.

Several Federal agencies other than FEMA are authorized to grant assistance to States or to State and local agencies to help them prepare for or mitigate the effect of various kinds of disasters. Thus, the Department of Transportation is authorized to make grants to assist States in preparing for accidents involving the transportation of hazardous materials, pursuant to the Hazardous Materials Transportation Uniform Safety Act of 1990 (49 U.S.C. sec. 1815), although this law also places on the Director of FEMA primary responsibility for monitoring local emergency planning and training for response to hazardous materials incidents. Public Law 99-662 (33 U.S.C. sec. 467g) requires the Secretary of the Interior to assist any State that establishes an approved dam safety program.

(2) FEMA authorities.

(A) In general. FEMA is the principal federal agency responsible for assisting State and local governments to prepare for disasters. Its authorities for this purpose include, in addition to fire safety legislation, two statutes providing for activities connected with special hazards -- the program of grants and technical assistance to help States prepare for earthquakes, as authorized by the Earthquake Hazards Reduction Act; and advice,

consultation and public information authorized in connection with the flood insurance program.

Two other major FEMA assistance authorities are available generally to cover various kinds of disaster preparedness, including earthquake hazards, flood hazards, and radiological emergencies. These are the provisions for technical and financial assistance to States in the Federal Civil Defense Act and the Stafford Act. Both of these statutes allow this assistance to be given to State and local governments to prepare for "disasters" or "natural disasters," without specifying the size or scope of the possible events. And while a "major disaster" under the Stafford Act is specifically defined to exclude events caused by human actions that do not involve fire, flood or explosion, this limitation apparently does not extend to the authorization for preparedness assistance. Thus Stafford Act preparedness assistance, as well as that under the Federal Civil Defense Act, could be used to prepare for kinds of radiological emergencies that would not qualify under the Stafford Act as "major disasters."

Although the two statutes substantially overlap in the kinds of preparedness activities that can legally be assisted, generally establish the same federal assistance ratio, and now are funded from a single appropriation, they are nevertheless treated as providing for separate preparedness programs under FEMA's formal regulations. This may be considered to reflect not only policy considerations but statutory differences discussed below -- the Stafford Act's per State limits and the Federal Civil Defense Act's provisions relating to State allocations, State plan requirements, and dual attack-disaster structure.

(B) The Stafford Act. The Stafford Act includes a broad authorization (section 201(b) for "technical assistance" to help States to: develop "comprehensive plans and practicable programs" to prepare for disasters, assist individuals, businesses and local governments after disasters, and provide for recovery of damaged or destroyed public and private facilities -- all of which are activities parallel to the federal assistance the Act authorizes for major disasters. The Act also provides (section 201(d)) for Federal grants for up to half the cost of improving, maintaining and updating State disaster preparedness plans, including mitigation activities, but these so-called improvement grants may not exceed in any year \$50,000 per State. The State plans subject to improvement were to be developed with the assistance of one-time, \$250,000 per-State grants and were to be "comprehensive and detailed," but no conditions were established concerning the subsequent improvement grants. FEMA regulations governing these technical assistance and improvement grant authorities (44 CFR part 300) add little detail to the statute and appear essentially perfunctory, except for a requirement that improvement grants result in "something measurable."



N.B.
Repealed by
Public Law
103-337
Nov 1994

(C) **The Federal Civil Defense Act** This has served as the basis for FEMA grants covering both equipment, including facilities, and salaries and expenses in "civil defense" preparedness. This may include preparation for attack or natural disasters. Grants are generally limited to 50 percent of costs. They are not subject to a fixed per state limitation as required under the Stafford Act, but funds used for administrative (salaries and expenses) grants are allocated among the States by formula, pursuant to some generally-worded statutory requirements, although the formula as set forth in the regulations appears sufficiently flexible to allow the agency to direct funds substantially as it determines most appropriate. While the Act requires that States to receive these grants have approved civil defense plans, and sets certain requirements for these plans, the requirements are quite general, so long as the plan is in effect in all political subdivisions, is administered by a single State agency and provides for employment of a full-time civil defense director or deputy director.

As noted earlier, the Act requires that funds granted for "civil defense" be used for natural disaster preparedness in a way that is consistent with and does detract from preparedness for enemy attack. FEMA's formal regulations (44 CFR part 312) include provisions designed to reflect this requirement, but these are so generally worded that they probably leave control of the limitation largely to FEMA's own year-to-year budgetary and administrative priorities.

b. Single agency authorities.

Many if not most agency authorities relating to disasters and emergencies are independent of any statute, such as the Stafford act, which contemplates a coordinated or multi-agency response. In some instances, the agency authority may make no reference to the Stafford Act or other disaster authority; it may be completely independent. In other instances, the agency may have both an authority to act in the relation to a presidentially declared or Stafford Act emergency or disaster and also authority to act independently according to a determination of the agency head. This is true, for example, of Small Business Administration and Department of Agriculture loans.

Some of these authorities have historical ties to the general Federal disaster legislation now embodied in the Stafford Act. Both Small Business Administration and Farmers Home Administration disaster loan programs, for example, were provided for in the Disaster Relief Act of 1970. However, these and many other authorities can also be invoked independently of the Stafford Act. Thus, an event that is determined not of sufficient magnitude to be a major disaster under the Stafford Act may nevertheless be a disaster for purpose of Department of Agriculture loans. Similarly, a riot considered to be only an



"emergency" under the Stafford Act because the damage was principally caused by other than a fire, flood or explosion could nevertheless be an "other disaster" for the purpose of Small Business Administration loans.

And, as already indicated, an agency authority that can be exercised independently may also, by agreement or Presidential direction, be employed as part of a coordinated agency effort under the Stafford Act or other legislation contemplating such an effort.

Among the independent agency authorities are the authorities of:

- The Department of Transportation for assisting repair or reconstruction of highways, roads and trails seriously damaged by a "natural disaster over a wide area" or "catastrophic" failure from "any external cause." (23 U.S.C. sec. 125).
- The Department of Agriculture for assistance to those engaged in farming, ranching or aquaculture in areas affected by a "disaster" (7 U.S.C. sec. 1961), and to agencies helping migrant or low income farm workers unable to work, stay or return home because of "a local, State or national emergency or disaster" (42 U.S.C. sec. 5177a).
- The Department of the Army, Corps of Engineers, for emergency response to "any natural disaster," for flood fighting, rescue and repair, and emergency shore protection (33 U.S.C. sec. 701n).
- The Department of the Interior, Bureau of Reclamation, for assuring the continued operation of reclamation projects affected by "unusual or emergency conditions," including acts of God, the public enemy, fires, floods, droughts, epidemics and strikes (43 U.S.C. secs. 502, 503).
- The Small Business Administration for loans for repair, rehabilitation or replacement of property, real or personal, damaged as a result of "natural or other disasters," for refinancing any mortgage or other lien against a totally or substantially damaged home or business concern, or for assisting businesses that have suffered substantial economic injury because of "a disaster, as determined by the Administration" of SBA. (15 U.S.C. sec. 636).
- The Department of Defense for use of personnel, equipment or resources in connection with various kinds of emergencies involving civil disturbances, rebellions, or protection of military or other federal installations (see generally 32 CFR sec. 213.10). Also, the President has statutory



authority in certain circumstances when it is impracticable otherwise to enforce the laws to call upon the armed forces. (10 U.S.C. 332, 334).

c. Multi-agency systems other than for Presidential emergencies

(1) Multi-agency authorities in agencies other than FEMA

There are several statutes calling for a coordinated, multi-agency response to specific kinds of disasters that do not depend upon the Stafford Act authorities. Thus, under the Comprehensive Environmental Response and Liability Act of 1980, the Federal Water Pollution Control Act and implementing Executive orders, the Environmental Protection Agency or Coast Guard are to coordinate federal actions in response to hazardous substance or pollution or contaminant releases affecting the environment.

(2) FEMA's Authorities.

(A) FEMA's Authority over other programs independent of the Stafford Act.

(I) In general: Legal theory. FEMA in theory, under Executive order 12148, has very broad authority, as described above, to "establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies." (emphasis added). This includes authority over both civil defense and civil emergencies, defined as "any accidental, natural, man-caused, or wartime emergency or threat thereof, which causes or may cause substantial injury or harm to the population or substantial damage to or loss of property."

The order cites the President's powers under the Constitution, as well as FEMA's various statutory civil defense and disaster authorities. It may thus be considered to be broader than specific authorities delegated to FEMA under the Stafford Act "to direct" agencies to act under that act. It extends, in theory at least, to authority over the various independent authorities described above. It could, therefore, in theory be used to establish a multi-agency response system or several such systems outside of the Stafford Act.

But FEMA's authority is in any event subject to exceptions created under subsequent statutes or Executive orders. Thus, FEMA's authority to act in connection with environmental emergencies has in effect been limited by the Federal Water Pollution Control Act, the Comprehensive Environmental Response and Liability Act of 1980, as carried out under Executive orders 12580 and 12777, which designate EPA and the Coast Guard as



agencies with primary authority.¹²

Also, whatever legal authority FEMA may have over the programs of other agencies is of course limited in the case of Presidential emergencies, as described below.

(II) Practical limitations. In practice, absent direct Presidential intervention in its support, FEMA's authority or power over other agencies with independent disaster or emergency authorities will normally depend upon FEMA's ability to pay or reimburse the agencies for what they do. FEMA has specific reimbursement authority only under the Stafford Act "for expenditures under this Act." This ability to reimburse other agencies is central to the Federal Response Plan. Under the Plan and in any other instance when the Stafford Act is invoked, it thus becomes important to determine whether the action of another agency can be considered as having been taken "under this Act" or whether it has been taken under that agency's independent authority. This is discussed further below in connection with FEMA's authority to coordinate under the Stafford Act.

(B) FEMA's Authority in connection with earthquake and nuclear power plant hazards.

FEMA under Nuclear Regulatory Commission authorizing legislation¹³ and Executive orders 12241 and 12657, and under the Earthquake Hazards Reduction Act, has responsibilities for developing coordinated plans to respond to nuclear power plant emergencies and earthquakes. In neither of these is the authority specifically tied to the Stafford Act, but under both, in the event of an actual emergency, operations would probably require use of Stafford act "emergency" authorities or, perhaps, some claimed Presidential authority under the Constitution. For example, in the event of a radiological emergency at a power plant not covered by a State or local emergency plan, Executive order 12657 requires FEMA to assume "any necessary command and control function or delegate such function to another agency." To the extent this may require on-the-ground operations, it is not clear how FEMA would be legally able to carry it out without drawing upon some authority other than that provided by the order itself.¹⁴

(C) FEMA's Authorities in connection with the Stafford Act.

This part of the paper discusses FEMA's basic authorities under the Stafford Act in relation to emergencies and disasters other than national security emergencies or other events for which the President may assume direct responsibility.

(I) Other Federal Statutes Referring to the Stafford Act. A Presidential declaration of emergency or disaster under the Stafford Act may make available certain Federal authorities



outside of the Stafford Act. These may be considered part of the general system of that Act, and FEMA's action in recommending a Presidential declaration has the effect of making these authorities available; they are not, however, necessarily subject to FEMA's control unless covered under some form of prior agreement or understanding.

An instance of this kind of statute would be the Cranston-Gonzalez National Affordable Housing Act which authorizes HUD to provide increased housing assistance (section 8 vouchers and certificates and section 8 moderate rehabilitation assistance) and to direct certain recaptured community development funds to families or areas affected by "a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act."¹⁵ Another example would be the special authority of the Small Business Administration to make loans to a private college or university damaged by a "major disaster" under the Stafford Act without regard to the usual requirement that credit be unavailable from private sources (15 U.S.C. sec. 636(f)).

In addition, even when they do not specifically depend upon references to Stafford Act emergencies or disasters, certain agency authorities by prior agreement of practice may be linked to the Act. This would be true, for example, of both the Small Business Administration and Department of Agriculture Disaster loan programs, both of which were at one time authorized in general disaster legislation preceding the current Stafford Act.

(II) Effect of other agency authorities on FEMA's powers under the Stafford Act.

If other federal agencies act or can act in response to a disaster under independent authority, what effect should this have on FEMA's authority under the Stafford Act? Sections 401 and 501(a) of the Act state that a condition for requesting a declaration of major disaster or emergency is a finding that a response to the event is "beyond the capabilities of the State and affected local governments." These sections do not, however, contain any language relating a decision to provide assistance under the Stafford Act to other assistance that may be available from other Federal agencies under other statutory authorities. FEMA's regulations, however, make the existence of other, independent Federal authorities a consideration affecting FEMA's ability to act under the Stafford Act, depending upon whether the event is considered an emergency or a major disaster.

Major Disasters. FEMA's published regulations (44 CFR 206.37(c)(1)) provide that, among a variety of other matters, FEMA will consider "assistance available from other federal sources" in determining whether to recommend a major disaster declaration. Thus, in disaster situations FEMA may or may not



give significant weight to the fact that another federal agency may have independent authority to respond or may already have acted in response to the situation.

Emergencies. If, however, a governor requests only a declaration of emergency, or the situation does not appear to allow consideration of more than an emergency declaration, FEMA under its regulations (44 CFR section 206.37(c)(2)) states that it will recommend the declaration only "after it has been determined that all other resources and authorities...are inadequate"[Emphasis added]. Clearly, this language reaches other Federal resources. If the incident is one affecting a matter of primary Federal responsibility, the regulations (section 206.37(d)) further state that an emergency declaration will not be recommended if "the authority to respond is within the jurisdiction of one or more Federal agencies without a Presidential declaration"; under this language, if another agency were thought to have jurisdiction, FEMA might consider itself bound not to act even if that other agency's authority was in some respects inadequate. Another, somewhat confusing subsection of the regulations declares, generally, that "It is not intended for an emergency declaration to preempt other Federal agency authorities and/or established plans and response mechanisms in place prior to the Stafford Act (44 CFR 206.35(d)).

These regulation provisions relating to the emergency authority apparently are based upon the legislative history of the 1988 amendments to the Stafford Act, which revised the Act's emergency authorities.¹⁶

(III) Disaster and Emergency Response Authority Under the Stafford Act.

The following parts of this section discuss various specific aspects of FEMA's response and recovery authorities under the Stafford Act.

(i) Actions in Advance or in Anticipation of a Major Disaster.

Generally, in using the Stafford Act, FEMA and other agencies may respond to events only after they have been declared by the President to be "major disasters" or "emergencies." The declarations are to be based on a governor's request, except when an emergency relates to a "subject area for which ... the United States exercises an exclusive or preeminent responsibility and authority."

There are, however, a number of specific or implied exceptions.

Use of other authority. The Stafford Act does not preclude agencies from using any independent authority they may have to provide assistance in anticipation of a disaster. FEMA

itself has authority pursuant to the Federal Civil Defense Act to "procure...lease, transport [and] store materials and facilities for civil defense " that could apparently be used for repositioning purposes.

Preparedness authority. Section 201(a) of the Stafford Act, authorizes a program of Federal preparedness which "includes" certain elements. None of these specifically refers to positioning of resources or damage assessments to determine whether a major disaster has occurred. But it would be illogical to consider that one can prepare for a disaster that may be remote but not one that is imminent. Thus, depending upon fund availability, this provision may provide at least a limited basis for advance action. As explained below in connection with "Coordination" authorities, this would include appointment of coordinating officers.

Damage Assessment. Either in advance of a governor's request known with reasonable certainty to be coming, or before a decision has been made upon a request, FEMA and other agencies have implied authority to take whatever actions are appropriate to determine whether, in their judgment, the circumstances justify or will justify a Stafford Act response. This could include making preliminary assessments of the general level of damage and evaluating, on the scene, State and local capabilities.

Food Stocks. Under the Stafford Act FEMA may -- and, indeed, is required to -- have adequate stocks of food "ready and conveniently available" and thus can acquire and position food in anticipation of a governor's request. A related provision -- apparently permanent -- in the fiscal 1993 appropriation act, Pub. Law 102-389, allows FEMA to "store, stockpile or access" surplus Department of Defense "Ready-to-Eat" meals.

Communications. The Stafford Act permits FEMA to establish temporary communications system, not only during but "in anticipation of" an emergency or major disaster, an authority it would also have pursuant to the Federal Civil Defense Act and Executive order 12472.

Grass or Forest Fires. Another specific Stafford Act authority provides for assistance to States, in the form of money, equipment, supplies or personnel, to suppress forest or grass land fires that "threatens" to become a "major disaster."

Emergency Work. A 1988 amendment to the Act also provides that "[d]uring the immediate aftermath of an incident which may ultimately qualify for assistance" as either an



emergency or a disaster, at a governor's request, Department of Defense resources may be used for the purpose of performing, for not more than ten days, "emergency work" -- defined to "include" clearance and removal of debris and wreckage and "restoration of essential public facilities and service." This provision parallels an earlier, independent authority granted to the Corps of Engineers in 1986 (Pub. Law 99-662) to perform similar services when the Corps is already carrying on emergency work in an area, and the governor of the affected State then submits a request for a declaration of emergency or major disaster. (33 U.S.C. 701n).

Declaration of emergency at governor's request. The Act defines "emergency" to include any occasion or instance in which action is "needed ... to lessen or avert the threat of a catastrophe."¹⁷ Because a request for an emergency declaration requires less documentation and should, generally, be more quickly obtained than a declaration of major disaster, or in the case of an event of spreading severity, it should be possible to deploy federal resources under the emergency authority as a way of anticipating -- or perhaps avoiding -- a major disaster; the disaster declaration could, in most cases, be declared later if the situation required, provided that the damage resulted either from natural causes or from fire, flood or explosion produced by human action.¹⁸

Federal emergencies. If an emergency event falls within an "area of primary Federal concern" response action can then be taken in advance of or without a governor's request. If the event otherwise qualified as a major disaster, the governor of the affected area could subsequently request a disaster declaration.

(ii) Coordination of Federal Actions.

As pointed out earlier, FEMA in large measure is a coordinating agency. This is true of its disaster planning relief responsibilities as well as those having to do with overall emergency and war preparedness. However, while "coordination" is a term often used in federal laws, it is rarely defined. Under the Stafford Act, the term is used only to describe on-the-scene activities. FEMA's role as a headquarters agency is not specifically addressed.

Local coordination.

Statute and Regulations. The Stafford Act requires that there be appointed an on-the-scene "Federal coordinating officer" "immediately upon the declaration of a major disaster or emergency," but the Act does not specify just



what authority a coordinating officer will have in relation to other Federal agencies, other than generally requiring that he or she "make an initial appraisal of the types of relief most urgently needed," "establish field offices" and "coordinate the administration of relief," including activities of State and local governments and private agencies which agree to operate "under his advice or direction." Also, there is a general catch-all category directing the coordinating officer to "take other action ... as ... necessary to assist local citizens and public officials in promptly obtaining assistance to which they are entitled."

In describing the role of the Federal Coordinating Officer, (FCO) the regulations generally follow the statutory language, except that they say the FCO "shall undertake appropriate action to make certain that all ... Federal agencies are carrying out their appropriate disaster assistance roles under their own legislative authorities and operational policies." This implies that the FCO should have a working knowledge of what other agencies can and cannot do under their laws, regulations and policies.

State coordination. The Statute also requires that the a "request" be made to the Governor to appoint a State coordinating officer to coordinate State and local disaster assistance efforts with those of the Federal government. FEMA's regulations (44 CFR sec. 206.41(c)) make this mandatory -- "the Governor shall designate" --- and also require the Governor to designate a "Governor's Authorized Representative" "to administer Federal disaster assistance programs on behalf of the State and local governments and other grant and loan recipients." (44 CFR sec. 206.41(d))

Advance Action. The statutory provisions just described require that certain actions be taken "immediately upon [a] declaration." If they were not in the law, it would nevertheless be proper to provide for Federal and State coordinating representatives as part of the disaster preparedness provisions of section 201(a). It should therefore also be possible to designate coordinating officers in advance of a declaration, when this appears to be necessary or appropriate.

Headquarters and Regional Coordination.

Theory: Directives. The Act is, of course, written in terms of a Presidential authority and assumes or, in many instances, expressly provides that the President may "direct" Federal agencies to act. This authority has been delegated to FEMA, whose regulations accordingly provide in



various places that a FEMA Associate Director or Regional Director may "direct" or issue "directives" to other Federal agencies," although reimbursement of other agencies is made to depend upon whether they have provided "requested assistance." (44 CFR sec. 206.8(c)).¹⁹

Practice: Reimbursement: In practice, whether in a statute or Executive order, a grant of power enabling a Federal agency to "direct" action by other agencies of similar, or perhaps higher rank, is rarely effective, in itself. Coordinated action rather usually depends upon the expressed immediate interest of the President or upon an advance agreement or understanding among the agencies in question, as expressed either through a multi-agency plan or individual agency agreements. If agencies have independent sources of funding that is to be used for disasters, they may be willing to enter into such an agreement or understanding without securing payment from FEMA. In general, however, the best way of obtaining an agency's agreement to participate in a coordinated effort is to have the ability and funds to pay or reimburse that agency for what it is asked (or "directed") to do.

While authorizing a "program" of "disaster preparedness that utilizes the services of all appropriate agencies," the Stafford Act does not specify just how those services are to be obtained. It does not require the agencies to develop a specific plan or plans, such as those required under the Federal Water Pollution Control Act and Comprehensive Environmental Response, Compensation and Liability Act, or the Earthquake Hazards Reduction Act.²⁰ The promise of reimbursement thus provides FEMA with an inducement it needs to develop a document like the Federal Response Plan, as well as memoranda of agreement or understanding with particular agencies.

The plan or agreement assumes, of course, that agencies can agree to do what they are asked or directed to do -- that is, that they have *legal authority as well as funds*. The Stafford Act specifically authorizes Federal agencies -- not just FEMA -- to provide what are categorized as "essential services" and, through authority granted to the President, to take certain other actions, such as clearing debris and paying unemployment benefits. However, it does not necessarily authorize *all* actions that might be considered desirable or helpful in responding to a disaster or providing disaster assistance, even though these might be provided for in an agreement or plan that has been developed under the Act.

Since, as already described above, many agencies have independent authority to act in connection with a disaster,



they may act under that authority rather than the Stafford Act in responding to an emergency or major disaster declared under the Stafford Act. But FEMA's authority to reimburse other agencies is limited to their expenditures made "under this Act." Thus, if an agency is considered to have acted under its independent authority, even though its action is connected with a declared major disaster or emergency under the Stafford Act, FEMA not only considers that it need not reimburse that agency but, under its regulations, precludes itself from doing so (44 CFR sec. 206.8(b)).²¹

Funding coordination, The effectiveness of these advance understandings on a particular occasion will commonly depend upon whether FEMA has or can be expected to have necessary funds and also upon whether the other agencies concerned have funds that can be used in advance of reimbursement. The Department of Defense has been appropriated funds to be used specifically in advance of reimbursement from other agencies or State and local governments when responding to natural or manmade disasters. (Public Law 101-165) Most agencies, however, depend upon advance assurances of FEMA funding, and, while FEMA may be able to divert funds from prior disasters to fund current ones in expectation of deficiency appropriations, this will not ordinarily be cover the situation of a very large disaster.

Duplication of Benefits. A specific problem in coordination arises from the Stafford Act's prohibition of duplicative benefits. For administrative purposes, in connection with its own provision of assistance to individuals and families, FEMA by regulation recognizes a "delivery sequence" of programs which has the effect of generally requiring that determinations of eligibility or entitlement follow a specified order, beginning with assistance provided by voluntary agencies, and continuing through insurance, temporary housing, SBA loans, FEMA funded family and individual grants, and volunteer agency "additional assistance" programs and the Cora Brown fund. (44 CFR sec. 206.191). The regulation apparently assumes that each agency, in most instances, will decide eligibility or entitlement separately, according to its order in the sequence. There appears to be no mechanism that would allow one agency to decide eligibility or entitlement under another agency's authority.

(iii) Relation of Emergency and Major Disaster Provisions

The Stafford Act provides generally for two classes of events -- emergencies and major disasters. The two are distinguished in part because some kinds of events that qualify as emergencies cannot qualify as major disasters because they are caused by human action or inaction. This is so no matter how serious the



consequences may be. They also differ in that the relief or benefits that can be provided are much more extensive if an event is declared to be a major disaster, rather than an emergency. There are also differences, at least under FEMA's regulations, that depend upon whether assistance under other federal programs is available. Also, there is an overall \$5 million limit on expenditures in connection with any one emergency, although the President can exceed this if he or she determines that it is necessary to do so to meet an immediate need. No similar dollar limitation applies to individual major disasters.

In some instances, an event originally declared to be an emergency may later be declared a major disaster. However, this is not always possible. In other instances, an event that, under FEMA's regulations, could not be declared an emergency may nevertheless be declared a natural disaster.

These various complications are explained below.

Causal Events. If it causes sufficient damage to be beyond State and local capacity to respond, and if the State agrees to pay its requisite share of costs, any natural event may be declared a major disaster. However, if the damage results from human action (including negligence or inaction), then no matter how severe its effects, it cannot be declared to be a major disaster unless those effects come about through fire, flood or explosion.

No such distinction in causes applies to emergencies. An emergency is defined 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 the case of major disasters, the definition -- as revised in 1988 -- makes major disaster benefits unavailable for a variety of events. These include immigration influxes -- a point of earlier dispute -- and also, to the extent that they do not result from fire or explosion, civil disturbances and various kinds of radiological accidents, even though FEMA has specific responsibilities for preparedness planning and plan execution in connection with possible accidents at nuclear facilities. Oil spills apparently have not been regarded as "floods" and so cannot be considered major disasters unless they result from a natural event, like a tidal wave or storm. National security emergencies, however severe, will not necessarily qualify, legally, as major disasters. And a situation exists in which FEMA's very broad "preparedness" authorities allow it to assist States and localities to prepare for events to



which FEMA may not be able adequately to respond.²²

Effect of other agency programs. As already noted, FEMA considers that an emergency should generally not be declared when other federal programs are available. The regulations state that an emergency declaration will be recommended "only after it has been determined that all other resources and authorities available to meet the crisis are inadequate." The availability of other federal disaster assistance programs is only one consideration among others in determining whether to recommend a declaration of major disaster. (44 CFR 206.37 (c) (1)&(2))

Comparison of Benefits. A Federal coordinator is to be appointed, and Federal support teams organized, whether an event is categorized as an emergency or major disaster. Certain other benefits are the same for both. These include:

- emergency assistance to save lives, protect property and preserve public health and safety;
- technical and advisory assistance to State and local governments;
- debris removal;
- providing mass care, emergency medical care, food, and medicine and other emergency assistance through federal agencies or state and local agencies;
- assistance in meeting temporary housing needs;
- emergency communications;
- up-to-ten day use of use of the Department of Defense for emergency work in advance of the declaration.

For emergencies, there is also a generally worded provision of somewhat uncertain significance, section 502(b), stating that "whenever other authorized assistance is inadequate," emergency assistance may include "efforts to save lives, protect property and public health and safety, and lessen or avert the threat of catastrophe."

But many benefits that might be authorized, depending on needs and circumstances, in connection with a major disaster cannot be provided under an emergency declaration:

- federal procurement of construction materials;
- federal agency repair or reconstruction of federal



- facilities in advance of an appropriation;
- unemployment benefits;
 - individual and family grants;
 - distribution of food coupons;
 - grants for repair, restoration or replacement of public or private nonprofit facilities;
 - legal services;
 - professional crisis counseling;
 - emergency public transportation; and
 - contributions for hazard mitigation measures.

(iv) Administration of Major Disaster Benefits

Determining Benefits to be Provided.

A declaration of a "major disaster" does not necessarily make available all major disaster benefits. Generally, the Stafford Act merely authorizes various kinds of assistance but does not specify the conditions under which that assistance should be provided. The regulations (44 CFR sec.206.40(a)) leave the determination of the kinds and types and extent of assistance to be provided to the "discretion" of the Associate Director, unless the benefits are specified in the President's declaration.

State Agreement.

Although not required or mentioned in the statute, the regulations require, as a condition of assistance under a declaration, that the governor for the State enter into a legally enforceable agreement specifying, among other things, the period for assistance, the type and extent of Federal assistance, and the funds the State will provide. The regulations (44 CFR 206.44) provide that "No FEMA funding will be authorized or provided to any grantees or other recipients, nor will direct Federal assistance be authorized, until such time as this agreement for the Presidential declaration has been signed, except where it is deemed necessary ... to begin the process of providing essential emergency services or temporary housing."

Need that Governors Request Specific Kinds of Assistance

Several provisions of the Stafford Act provide for requests or agreements by the governor or other official in addition to the

request for a declaration of emergency or major disaster. Thus, a governor's request is required before Department of Defense resources can be used for emergency work in advance of a declaration. Also, under section 407(a), debris removal can be undertaken only after the affected State or local government has given "an unconditional authorization" and agreed to indemnify the federal government against claims by private property owners.

In addition to these provisions, and the general regulations requirement for an agreement, FEMA's General Counsel this January took the position that all emergency assistance under the Act -- sections 402, 403 and 502 -- must be specifically requested by a governor. This opinion appears to be based on language in the Stafford Act, in legislative history and prior statutes which refers to disaster relief as a program of "assistance" which "supplements" State and local government efforts, as well as upon general concepts of federalism. The specific question at issue was whether FEMA could direct the Department of Defense to provide active duty military forces after a declaration but before specifically requested by a governor. ²³

d. Presidential Emergencies.

In any disaster or emergency, the President may transform the character of the Federal response and relief effort by assuming direct control, either in person or through a personal representative, or through officials or organizations closely associated with Presidential actions.

Ad hoc Presidential participation. The President may act, ad hoc, in response to the circumstances, but without any advance plans or systems. This has been done on a number of occasions. It of course raises questions of the relationship between the person or organizations exercising Presidential authority and those who would be authorized to act without it.

National System for Emergency Coordination. Two documents, one relatively informal and the other an Executive order, contemplate systems of Presidential intervention. The first, in the form of a January 1988 MEMORANDUM FOR THE DOMESTIC POLICY COUNCIL, purports to establish a "National System for Emergency Coordination."

This memorandum applies to what are described "extreme" emergencies. These are not further described or defined. The memorandum generally provides that "interagency functional groups" will be established "to support and coordinate relief operations ... consistent with those called for in existing emergency plans." These groups are organized according to various categories of emergencies, with "lead agencies" designated according to "recognized leadership roles, resources,



inherent authorities, and/or relevant expertise." The memorandum states that in an extreme emergency the President "may" designate a National Coordinator as his representative, who will "ordinarily" be chosen from designated lead agencies.

FEMA under this system is designated as a lead agency only for natural disasters. Also, whenever the President "activates the system," FEMA is to inform the governors of the federal government's "plan of action."

Despite its stated "principle" of consistency with "current emergency plans," this memorandum apparently assigns to FEMA a smaller role than that contemplated by Executive orders 12148 and 12657 (nuclear power plant emergencies). What effect it might have, or might have had, is unclear. It is not a in form a directive. And when it was transmitted by the Chairman Pro Tempore of the Domestic Policy Council, agency heads were merely "encouraged" to ensure that they would be able to carry out "their respective operational responsibilities."

National Security Emergencies. Executive order 12656, which has already been described in this paper, establishes a system of Presidential control, through the National Security Council (NSC), for emergencies affecting national security, which are specifically described to include natural and technological disasters as well as hostile action. FEMA, as already indicated, is designated as an advisor and support agency to the NSC.

This order is apparently comprehensive in that it contains many and detailed assignments to most major agencies. It is, however, entitled "Assignment of Emergency Preparedness Responsibilities" [Emphasis added]. It does not describe a procedure or system for actually carrying out Federal actions in an emergency, except to direct that "Plans and procedures will be designed and developed to provide maximum flexibility to the President for his implementation of emergency action." Thus, even if FEMA is designated to assist the NSC in its preparedness activities, it does not necessarily follow that it would have a similar role in execution once an emergency occurred. And, as earlier indicated, Executive order 12656 does not in itself provide agencies with the authority they may require to carry out their assigned responsibilities.

1. "Freely delegated" excludes the common kind of statutory provision which places authority in an agency head but instructs him or her to "act through" a designated subordinate.

2. But see memorandum, Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, to Rudolph W. Giuliani, Associate Attorney General, Nov. 19, 1982, p. 5, note 7, which explains "some confusion" in the Office of Legal Counsel's



efforts to reach a consistent conclusion on whether the general disaster relief legislation covers events "other than those usually thought of as 'natural.'"

3. FEMA legal staff do not regard this as a permanent authority. However, section 109(b) of Pub. L. 96-295 requires that the Nuclear Regulatory Commission establish by rule a procedure for approving licenses only after approving a State or local radiological emergency response plan "in consultation with the Director of the Emergency Management Agency." This appears to be a permanent requirement in that it does not set a time limit on the applicability of the rule.

4. Not listed are statutes which merely make FEMA a member of some board, commission or task force, such as the National Dam Safety Review Board (33 U.S.C. 467h) or the Market Impact Committee created to advise the National Stockpile Manager under the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98h-1, as amended by sec. 3314 of Pub. L. 102-484, 106 Stat. 2654).

In addition, various statutes establish FEMA organizational structures or assign internal responsibilities. These include general statutes, such as the Inspector General Act. More specific statutory provisions relating to internal organization include the "not more than four" Associate Directors subject to Senate confirmation provided for by Reorganization Plan No. 3 of 1978; the United States Fire Administration, its Administrator and the National Academy for Fire Prevention and Control; and the position of Federal Insurance Administrator. The Earthquake Hazard Reduction Act requires that FEMA's planning and coordination responsibilities under that Act be carried out by a "principal official...at a level no lower than Associate Director; and the Urban Property Protection and Reinsurance Act requires that "Fair Plans" be reviewed through an "Office of Compliance under the Federal Insurance Administrator." PL 102-389, the Veterans-HUD-Independent Offices appropriation act for fiscal 1993 requires that a hazardous materials unit be placed under the United States Fire Administration.

5. No opinion is expressed on just what it means "to coordinate." See memorandum, George W. Watson, Acting General Counsel, to Wallace E. Stickney, Jan 11, 1991, p.3:

FEMA has perennially struggled to make sense of its role as coordinator of Federal emergency response activities. There is no generally accepted meaning of the term within FEMA and no clear understanding of how other Federal agencies view FEMA's coordinating role. Part of the difficulty is inherent in the term -- it can mean many things. However, I suggest that a suitable and sensible interpretation of the role is that FEMA should be a facilitator.

6. Presidents have of course has in fact acted from time to time in disasters or emergencies to appoint personal representatives to handle emergency situations. This action could bolster or limit FEMA's authority, or place it under effective supervision of some other official. The President's power to act in this way has been officially stated on several occasions. For example, in the message explaining Reorganization Plan No 1 of 1973 (5 U.S.C. App.) President Nixon, referring to disaster relief authorities, stated "In emergency situation calling for rapid interagency coordination, the Federal response will be coordinated by the Executive Office of the President. . . ." And a Presidentially approved "National System for Emergency Coordination" provides that in an "extreme emergency" the President may appoint a "National Coordinator" who might but would not necessarily be the FEMA director. (Memorandum, 19 January 1988, Edwin Meese III for The Domestic Policy Council). This question is discussed further at the end of this memorandum under the heading "Presidential Emergencies."

7. This listing is not necessarily exhaustive. The order itself (Part 17) lists twelve primary FEMA responsibilities. Those mentioned in the text of this paper do not include FEMA responsibilities to "coordinate with" or "coordinate among" other agencies. Of course, as suggested in note 5. above the term "coordinate" in itself has no set meaning; it may mean much or little, depending upon circumstances.

However they are interpreted, FEMA's authorities under Executive order 12656 appear to have been considerably reduced from those granted to it under the predecessor Executive order 11490. That order, among other things, made the Director of FEMA responsible for determining national preparedness goals and policies for performing agency preparedness functions. It also required that the Department of Defense perform many of its functions jointly with FEMA or in cooperation with FEMA.

8. See Pub. l. 102-522, sec. 102, "Priority Activities of the United States Fire Administration," 106 Stat. 3410. The discussion in the text relates only to the relationship of these authorities to other FEMA programs; it is not intended to suggest that a different focus would necessarily be desirable.

9. This order fixes responsibilities; the statutes it cites -- including the National Security Act and the Defense Production Act -- would not appear to provide FEMA with mobilization authority in connection with a non-war disaster. The same is true of Executive order 10480, which refers to the Defense Production Act only. If a mobilization of productive national resources were required in response to the non-attack disaster of great magnitude, the most persuasive authority would probably be the constitutional power of the President.



10. Executive order 12580, sec. 2(c), delegated to the Director of FEMA relocation and temporary housing responsibilities under the Comprehensive Environmental Response and Liability Act of 1980. With certain exceptions for ongoing operations, these responsibilities were redelegated to the Administrator of the Environmental Protection Agency in the fall of 1990.

11. Sec. 207. The "Declaration of Policy" covering the Act (sec. 2) recites a Congressional recognition that the jointly Federal-State civil defense "organizational structure" can be used for natural disasters "without adversely affecting ... attack-related civil defense...."

The section 207 language quoted in the text was added in 1981 as part of the fiscal 1982 Defense Authorization Act and was explained as follows in the conference report (H.Rep. 97-311, U.S. Code Cong. and Ad. Serv., 1981, III, pp. 1858-9):

The Senate conferees were concerned that under the House provision funds could be expended in a manner that would not in fact permit dual use, i.e. that funds allocated for natural disaster preparedness would have limited or no utility in the event of a nuclear attack. Consequently, the Senate proposed a modification ... which permits that use of attack-related civil defense resources for natural disaster preparedness so long as such use ... is consistent with, contributes to, and does not detract from attack-related preparedness.

This suggests a stringent test -- any disaster use would also have to serve attack civil defense purposes. FEMA's regulations (44 CFR part 312) do not appear, however, reflect such a test. Generally, they contemplate that FEMA will determine the program mix between attack and disaster activities and communicate it to the States, presumably in connection with the budgeting and fund allocation process (see 44 CFR sec. 312.4(a)). The only specific requirement is that "[f]inancial contributions will not be made unless substantive activities and projects in preparation and response to attack-related disasters are identified, and progress is indicated in the submissions and recorded in program reporting systems." (44 CFR sec. 314(c))

12. FEMA nevertheless might be considered to retain overall coordinating authority even in connection with environmental emergencies, to the extent that other agencies are not specifically authorized to act in this capacity. For example, if an environmental emergency were also recognized as a major disaster under the Stafford Act, the coordination of the two systems would most logically be a FEMA responsibility. This assumes that the environmental event would fall under the major disaster definition, a point considered later in this paper.



13. See note 3.

14. "'[C]ommand and control' ... has generally been taken to include police-type power to direct movement of persons and traffic and otherwise control evacuations and maintain order, backed by coercive authority." Memorandum, Congressional Research Service, Library of Congress, American Law Division, to Hon. Edward J. Markey, Feb. 7, 1989, p. 1.

15. Pub. L. 101-625, secs. 931-934, 104 Stat. 4403-4404. This statute also authorizes the Secretary of Agriculture to make special allocations for rural housing to areas affected by a natural disaster declared under the Stafford Act.

16. In 1989, in hearings before its Senate appropriations subcommittee, FEMA cited Senate committee report language explaining the emergency authority to support its contention that it was legally barred from invoking that authority in connection with the Exxon Valdez oil spill because other agencies could act under the Federal Water Pollution Control Act. S. Hrg. 101-345, p. 619. In its Federal Register explanation of the rule, FEMA stated:

FEMA feels that the Congressional intent is clear. However, where there are significant unmet needs of sufficient severity and magnitude, not addressed by other assistance, which could appropriately be addressed under the Stafford Act, the involvement of other agencies would not preclude a declaration of emergency under the Act. Fed. Reg., Jan. 23, 1990, Vol. 55, No. 15, p. 2286.

17. "Catastrophe" is sometimes used to refer to a super disaster. It is not so used here or elsewhere in the Stafford Act. A major disaster, for purposes of that Act, is a "catastrophe."

18. The Disaster Relief Act of 1970 (sec. 221, 84 Stat. 1751) provided that:

If the President determines that a major disaster is imminent, he is authorized to use Federal departments, agencies, and instrumentalities and all other resources of the Federal Government to avert or lessen the effects of such disaster before its actual occurrence.

The 1974 amendments which created the "emergency" category appear to have been intended to preserve at least a part of this authority. The Conference Report stated:

It is the intention of the conferees that [this section] shall allow the President to undertake whatever action he

considers necessary to avert a disaster when conditions do not warrant the full application of assistance under a major disaster declaration or when a major disaster threatens and special expedient actions can be taken to avert or lessen its probable effect. Such action is intended to provide the President with authority to act before a disaster strikes....The purpose of such section is to make available emergency assistance which, because of the pressures of time or because of the unique capabilities of a Federal agency, can be more readily provided by the Federal Government [emphasis added].

U.S. Code Cong. and Ad. Serv., 1974, pp. 3096-97.

19. See Jan. 11, 1991 memorandum, George W. Watson to Wallace E. Stickney, also cited in note 5, which states, at p. 3:

It is tempting to suppose that FEMA's role as 'coordinator' means that FEMA will be in charge of an emergency response. FEMA will give orders and other agencies will carry them out. However, that kind of power does not accrue to an agency, especially one as small as FEMA, simply because the President signs an Executive order. FEMA, as an institution, does not command the kind of attention that ensures its directives or advice will be carried out promptly....When an emergency arises, if enforcement becomes an issue, the system has already broken down.

20. However, according to the conference report on the 1974 legislation, the federal preparedness provisions were seen by Congress as having a major coordination purpose:

Other Federal agencies ... have preparedness missions and provisions which provide substantial collateral benefits for meeting situations covered by this legislation. The conferees wish to make sure that these direct and collateral preparedness efforts are part of a coordinated whole under the overall policy guidance and coordination of the agency selected by the President to carry out the operating programs authorized by this legislation.

Conf. Rep. 93-1037, 1974 Cong. and Ad. Serv., p. 3093.

21. Apparently, FEMA may consider an agency to be acting under its independent authority even though it is responding to a mission assignment under the Federal Response Plan. See memorandum, Patricia Gormley, General Counsel, to Grant C. Peterson, April 21, 1992, pp 1-2.



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22. Prior to 1988, the disaster relief legislation (now the Stafford Act) had been used for a variety of non-natural disasters, including "the Teton Dam failure, toxic waste incidents at Love Canal, a Louisville sewer explosion and the Cuban refugee influx." These declarations had been based on an interpretation of the definition -- then in this respect the same for both emergencies and disasters -- which listed a variety of natural events, such as hurricanes and earthquakes, followed by "or other catastrophe." A human-caused event was an "other catastrophe."

This interpretation may not not always have been accepted as a legal matter but appears to have prevailed more often than not. It was not, however, popular with everyone, and FEMA in the mid-1980's began seeking legislation to revise the emergency and major disaster definitions, explaining that "[s]ome members of Congress have objected to the use of the variety of disaster assistance authorities, which have been developed over the years primarily to address natural disasters, to respond to non-natural events."

The amendments FEMA sought were included in the 1988 legislation. These (1) changed the definitions, as described in the text, in order to draw a distinction between recognizable causes of emergencies and major disasters; and (2) narrowed the potential range of assistance in the case of emergencies by eliminating a provision which allowed the President (FEMA) to provide to any assistance under the Act deemed appropriate.

See memorandum, Nov. 19, 1982, Larry Simms, Office of Legal Counsel (Department of Justice) to Rudolph W. Giuliani, FEMA General Counsel Memorandum, 82-11-19; Jan. 18, 1983 memorandum, Craig Annear to Lee Thomas, FEMA General Counsel memorandum 83-1-18; and 1985 letter, Phillip D. Brady, Acting Assistant Attorney General, to David Stockman, FEMA General Counsel Memorandum 85-5-24. The copy of this last in the file is unsigned and it is not clear that it was ever sent.)

23. Memorandum, Patricia M. Gormley to Russell F. Miller, Jan. 15, 1993.



