



Federal Emergency Management Agency

Washington, D.C. 20472

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MEMORANDUM FOR: H. Joseph Flynn, Associate General Counsel
Office of General Counsel
Program Law

FROM: William R. Cumming *William R. Cumming*
David A. Ross *David A. Ross*
Office of General Counsel

SUBJECT: Major Emergency Action Guidelist
(MEAG) Volumes I and II,
September 1991 Version
(GC-92-0670)

We recommend the following comments be sent to Joseph Moreland or Antonio Lopez in response to the December 16, 1991 request from Melissa Howard (NP-OP-PL) concerning the above subject:

"This is in reply to a memorandum from Melissa M. Howard, Chief, Planning Division (NP-OP-PL), dated December 16, 1991, requesting this Office to concur in the release of the subject documents for publication and distribution. The memorandum states that the documents contained in the submitted volumes are "final versions" that the "representatives from the departments and agencies have given us approval for final distribution." The submission also includes the "FEMA MEAs that are proposed for inclusion."

Introduction

Accordingly to the Index, a total of eighty separate Major Emergency Action (MEA) papers have been prepared for review, clearance or publication. These papers are organized under seven functional categories that are apparently based, in large part, on a White House Memorandum signed by Colin Powell on June 27, 1988, "Functional Response To National Security Emergencies". This memorandum appears to implement the National System for Emergency Coordination (NSEC) as approved by President Reagan in January 1988. It's not clear, however, whether these selected categories are consistent with the functional responsibilities assigned by Executive Order No. 12656, of November 18, 1988, "Assignment of Emergency Preparedness Responsibilities". In any event, the MEAG project, as noted, is covered by section 201(a) of this Order.

GCM 92-6-2

We further note that a total of fifteen MEA papers were not submitted for our review. According to the Index, fourteen are "pending final clearance", and one (GO-CP-05 (Provide Military Support of Civil Defense)) is missing and unaccounted for.

Of the sixty-six MEA-papers submitted for review, we note that the "Responsible Agencies Tab" in Volume I assigns FEMA the "lead" responsibility for eleven topics (CO-03; EA-IP-03, -04, -06; GO-GE-02, -04; GO-CP-01, -02, -03, -04, -06) and "support" responsibility for the following seventeen topics:

CO-02 (not included)	HS-AG-01
EA-IP-01 EA-IE-05	
EA-IP-02 EA-IE-10	HS-HE-02
EA-IP-05	HS-HE-03
EA-IP-07	
	HS-HR-02
GO-GE-05(not included)	HS-HR-05
GO-MR-01	
GO-MR-02	HS-SS-03
GO-MR-03	

Considerations

Our primary concern is that the eleven MEA papers for which FEMA has "lead" responsibility are credible and can be relied on by emergency action officers from FEMA and other agencies during exercises and real-world national security emergencies. We have the same concern for all of the other MEA papers, but for now our initial response is limited to the eleven FEMA-lead papers, many of which, regrettably, no longer meet certain credibility and reliability standards. This failure is due, in large part, to the expiration of the Defense Production Act of 1950, as amended on March 1, 1992 (P.L. 102-193) and its implementing Executive Order(10480) and regulations; and the limited scope of the referenced Executive Order No. 12742 of January 8, 1991, which is based only on the authorities in 50 U.S.C. App. 468, 10 U.S.C. 4501 and 9501, and 50 U.S.C. 82.¹

In addition, the omission of fifteen MEA papers, mostly from the "Government Operations" category, makes the MEAG as a whole, critically incomplete and inadequate for "final" use in exercises and real world "emergencies by emergency action officers, the intended users of the MEAG.

¹ We have also identified all other MEA papers which include these references as an authority.

Conclusions

In view of the above concerns and observations and the more specific comments below that address the eleven FEMA lead papers, we are unable, regrettably, to concur in the "release" of the MEAG Volumes I and II at this time.

We have no objection, however, that they be published again as revised "draft" versions on condition that they include all or most of the missing papers and that the FEMA-lead papers, as a minimum, are reviewed/corrected by the appropriate FEMA program office. This will at least allow their continued use as informal, unofficial guidance documents.

We also recommend that the next version include a complete "authorities" index that will provide a complete, uniform citation for all referenced authorities and will be cross-referenced or otherwise listed by MEAs, agencies, or some other suitable, reliable system.

DISCUSSION

1. Expiration Of Certain DPA Authorities.

a. Background

On the basis of section 717 of the DPA, as amended, and P.L. 102-193 all DPA provisions expired on March 1, 1992, except for sections 708 (voluntary agreements) and 721 (Exon-Florio). Sections 101(c) and 701 (for energy) expire in September 1994 (P.L. 101-383). As a result of P.L. 102-193, certain delegated authorities, such as those in Executive Order No. 10480, and Title 44 of the Code of Federal Regulations (CFR), also expired.

b. Submitted MEA's Affected By Loss of DPA Authorities

- (1) FEMA-Lead MEA's: EA-OP-03, -06, and GO-GE-02.
- (2) FEMA-Support MEA's: EA-IP-01, -05, -07;
EA-IE-05; HS-HE-03; HS-AG-01; and HS-HR-02, -05.
- (3) Other-MEA's: EA-IP-08, -10, -12; EN-04, -06;
and TR-03, -04, -06, and -09.



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2. Application/Misapplication of E.O. 12742

a. Background

Executive Order No. 12742 only delegates authorities available to the President pursuant to 50 U.S.C. App. 468; 10 U.S.C. 4501, 9501; and 50 U.S.C. 82, which only concern production for the armed forces and provide fewer production-control authorities than the DPA.

b. Proper Reference to E.O. 12742

The above statutory authorities should be covered by only one MEA paper (EA-IP-10), for which the Department of Commerce has lead responsibility. In addition, EA-IP-10 should include a reference to 50 U.S.C. 82.

c. MEAs With Improper Reference to E.O. 12742

The following MEAs, notwithstanding certain language in the Order, should not include this Order as an authority:

- (1) FEMA-Lead MEAs: EA-IP-03, -04, -06.
- (2) FEMA-Support MEAs: EA-IP-01, -05, -07; EA-IE-05; HS-HE-03; and HS-AG-01.
- (3) Other MEAs: EA-IP-12; EA-DE-06; and TR-03, -04, -06.

3. Other Comments:

a. Expiration Of DPA Authorities

Each MEA relying on any temporary DPA authorities should indicate the expiration date, citing the appropriate P.L. authority. Each MEA, e.g., EA-IP-04 (Voluntary Agreements §708, DPA), relying on a permanent DPA authority should indicate that fact and cite section 717 of the DPA (50 U.S.C. App. 2166).

b. Need For Consistent, Uniform Citation System

The current MEAG lacks a reliable uniform, consistent method of citing legal authorities. Citations are often incomplete or use obsolete references. Available U.S. Code citations, though readily available and accessible to most agencies by computer or hard copy, are often not used.

c. Federal Response Plan (FRP)

A reference to the appropriate ESF of the FRP should be added to the MEAs, where applicable.

(c) Add specific information in text on any special requirements or limitations imposed by 12 CFR Part 245 and 32 CFR Part 163, cited above.

(d) Add GO-GE-01 (Declaration of National Emergency) to "Related Actions" section (p.5) as it would allow use of exemptions from DPA "finding" requirements.

(e) Clarify, reconcile, and specify exact basis on which the President's "finding" requirements have been or have not been delegated. Compare statements in authority No. 1, at p.9 and App. C (President) with textual statement in note 2, at p.4 (agencies).

(f) Expand description and scope of E.O. 10480, p.9.

(3) EA-IP-04 (Voluntary Agreements)

(a) Add reference to section 717 of the DPA (50 U.S.C. App. 2166), which makes section 708 a permanent provision of the DPA.

(b) Clarify first sentence under "Relevant Conditions" so that the quoted language is made a part of a "finding", as required by section 708(c)(1), that has been delegated to the persons identified in section 501 of E.O. 10480.

(c) Delete all references to inapplicable E.O. 12742.

(d) Correct authority reference No. 5 to read "44 CFR Part 332".

(4) EA-IP-06(Production Resources in Civilian Market)

(a) Add an "Authorities" appendix with complete listing and description of all referenced, legitimate authorities.

(b) Delete all references to inapplicable E.O. 12742.

(c) Delete all references to OEP Circular 8500.5 that was canceled on July 25, 1990. See FPC 1A, Attachment C, December 20, 1991.

(d) Add description of authorities delegated by section 201 of E.O. 10480.



(e) Add description of authorizations in 44 CFR Part 322, including those available after a major disaster declaration under the Stafford Act (44 CFR 322.2(a)(5)) and the delegations made in 44 CFR 322.3.

(5) GO-GE-02 (NDER)

(a) Add the following "authorities":

(i) Section 703(a) of the DPA (50 U.S.C. App. 2153(a)), which provides Presidential activation authority when DPA is in effect;

(ii) 5 CFR 230.402(c)(2), which can provide express OPM activation authority for NDER in event of a declared national emergency, as defined by OPM;

(iii) FPM Chapter 230, Subchapter 4, which defines "national emergency" for purposes of 5 CFR 230.402(c)(2),

(iv) FPC-24, NDER, September 24, 1982, which, however, contains incomplete and incorrect authorities on the NDER program;

(v) FPM Supp. 910-1, Book I, Subchapter 2.D,E;

(vi) FPM Supp. 910-1, Book II, Chapter 30, which provides attack-related guidance on NDERs; and

(vii) 18 U.S.C. 202 et seq., which contain certain conflict of interest prohibitions affecting NDERs.

(b) Add GO-GE-01 (Declaration of National Emergency) to "Related Action" Sections.

(c) Revise/replace entire MEA paper based on precise "activation" and "conflict of interest" authorities described above.

(d) Explain loss of "conflict of interest" exemptions in section 710(e) of the DPA by reason of section 2, P.L. 87-849 (1962), 76 Stat. 1126.

(6) GO-GE-04 (Increase Readiness Levels)

(a) Add and describe OEP Circular 9410.1C, January 19, 1973, which is still current, to all "Authorities" sections. See FPC 1A, Attachment A, Dec. 20, 1991.

(b) Delete unnecessary reference to GO-GE-01 in "Related Action" Section.

(c) Add a description of legal basis for OEP Circular 9410.1c and any draft FPC replacement.

(d) Add a description of GMR response levels and how they relate to CIVCONS. See Vol. I, Tab "Readiness Levels".

(e) Correct citation to FCDA and provide correct Title reference, if any, for CIVCON program. E.g. section 2 (Statement of Policy), Title I, 50 U.S.C. 2251, refers only to "organization". The reference to 50 U.S.C. App. 2061 et seq. is a DPA and not a FCDA citation.

(f) Identify the "NECC" (p.6).

(7) GO-CP-01 (Increased State and Local Readiness Actions)

(a) Add explanation on how sections 2,3,201, and 502 of the FCDA provide "authority" for MEA paper. We note that SLG-100/May 1990 does not mention the FCDA anywhere.

(b) Add CO-02 and CO-03 to "Related Actions" Section.

(c) Add copy of p.133 (FEMA Publications) from SLG 100.

(d) Add references to and descriptions of sections 202 and 418 of the Stafford Act.

(8) GO-CP-02 (Emergency Public Information(EPI))

(a) Add CO-02 and CO-03 to "Related Actions" Section.

(b) Add description of what section 502(b)(12) of the FCDA provides in the "Authorities" Section.

(c) Add reference to and description of Public Information Annex to Federal Response Plan.

(d) Add references to and descriptions of sections 202 (Disaster Warnings) and 418 (Emergency Communications) of the Stafford Act, 42 U.S.C. 5132 and 5185.

(9) GO-CP-03 (Civil Defense Surge)

(a) Replace reference to NSDD 259 in all "Authorities" sections with NSD 66, dated March 16, 1992.

(b) Include description of NSD 66 in text.

(c) Add and describe appropriate statutory and other authorities governing budgeting, reallocation, reprogramming, and supplemental budget actions mentioned in text.

(d) Describe specific acquisition authorities contained in section 201(h) of the FCDA.

(e) Add references to P.L. 85-804, 50 U.S.C. 1431 et seq. and Executive Order No. 10789 of November 14, 1958, as amended, "Contracting Authority of Government Agencies in connection with National Defense Functions." (50 U.S.C. 1431 note) This contracting authority is exempted from the National Emergencies Act by section 502(a)(6) thereof (50 U.S.C. 1651 (a)(6)).

(f) Update "Publication" reference (Surge Budget Handbook).

(10) GO-CP-04 (Civil Defense Emergency)

(a) Withdraw and revise this MEA so that the alternatives to reenactment of Title III of the FCDA are fully developed. Such alternatives include (1) use of federal emergency (§ 501(a)), major disaster (§401), and emergency (§501(a)) declaration authorities in the Stafford Act (42 U.S.C. 5191(b), 5191(a), and 5170) and the related Federal Response Plan; (2) use of the national emergency declaration process (50 U.S.C. 1621 et seq.); and (3) use of the President's express Constitutional authority as Commander-In-Chief.

(b) Revise "Relevant Conditions" Section to indicate that (1) Title III of the FCDA need not be reenacted before President can take Title III-type-actions in response to an actual of imminent attack with or without a declaration of a national emergency and (2) any Executive order used for civil defense purposes need not cite the FCDA as a specific authority if it is in response to an actual or imminent attack.

(c) Revise "Alternative Levels of Implementation" Section in accordance with above comments.

(d) Revise "Authorities" Sections in accordance with above comments.

(e) Revise "Appendix B" materials to include other available authorities.

(11) GO-CP-06 (Evacuation)

(a) Add specific description of evacuation elements identified in section 502(b)(1) and (8) of the FCDA (50 U.S.C. App. 2302(b)(1) and (8)). The first involves program authority for "more rapid population relocation during times of international crisis". The second concerns "development of emergency evacuation plans for areas in which nuclear powerplants are located."

(b) Add description in text of Presidential Directive 41 and NSDD 47 of July 27, 1982 referred to in "Authorities" Section, if current. If not, delete.

(c) Replace all references to NSDD 259 with NSD 66 of March 16, 1992.

(d) Add reference to and description of SLG 100/May 1990, which includes "crisis evacuation" guidance (section 7).

(e) Add to "Related Action" section the following MEAs:

CO-02
CO-03

GO-GP-01
GO-GP-02

(11) GO-CP-06 (Evacuation)

(a) Add specific description of evacuation elements identified in section 502(b)(1) and (8) of the FCDA (50 U.S.C. App. 2302(b)(1) and (8)). The first involves program authority for "more rapid population relocation during times of international crisis". The second concerns "development of emergency evacuation plans for areas in which nuclear powerplants are located."

(b) Add description in text of Presidential Directive 41 and NSDD 47 of July 27, 1982 referred to in "Authorities" Section, if current. If not, delete.

(c) Replace all references to NSDD 259 with NSD 66 of March 16, 1992.

(d) Add reference to and description of SLG 100/May 1990, which includes "crisis evacuation" guidance (section 7).

(e) Add to "Related Action" section the following MEAs:

CO-02
CO-03

GO-GP-01
GO-GP-02