

**Preliminary Report on Literature Search
for
Legal Weapons of Mass Destruction Seminars**

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I. Executive Summary

Science Applications International Corporation (SAIC) is pleased to submit to the Advanced Systems and Concepts Office this preliminary report in support of the *Legal Weapons of Mass Destruction Seminars* project of Task Order Requirements Package No. 27, Current Events Research and Seminar Support. In fulfillment of Technical Requirement 3.1.1, this report presents the preliminary results of SAIC's literature search of legal authorities relevant to weapons of mass destruction (WMD) consequence management (CM). A bibliography, which will be used when researching the legal Deskbook, is included in this report.

This report addresses some of the top-level Federal and State statutes and Federal directives that define the roles and responsibilities of various departments and agencies as they relate to consequence management. The report also identifies some of the issues resulting from the interaction of Federal and State departments and agencies that perform similar CM functions, as well as those issues that may arise as the affected agencies transition through the various phases of emergency and consequence management response. The documents and some of the issues addressed in this report are listed below.

Presidential Decision Directive 39 details the policy of the United States in combating terrorism and reaffirms the lead agencies for the management of various aspects of the counterterrorism effort. It recognizes that states have primary responsibility in responding to terrorist incidents, including for WMD events, and the Federal government provides assistance as required. PDD-39 distinguishes between crisis and consequence management, and establishes the Federal government's primacy when responding to crisis management.

The Stafford Act provides for assistance by the Federal government to the States in the event of natural and other disasters. It defines major disasters and emergencies, and addresses disaster relief programs, disaster preparedness and assistance, hazard mitigation, and Federal assistance for losses sustained in disasters. Potential issues arising from this Act are the coordination, interaction, functions, and primacy between Federal and State Coordinating Officers.

Executive Order 12656 assigns national security emergency preparedness responsibilities to Federal departments and agencies, delegating to FEMA primary responsibility for coordinating the efforts of, among other things, federal emergency assistance. This Executive Order identifies several departments/agencies, e.g., Defense, Energy, Health and Human Services, that have an active, and potentially overlapping, role regarding nuclear, biological, and chemical (NBC) assessment and response.

Title 50 Chapter 40 deals with the Federal government's response to the use or threat to use nuclear, chemical or biological WMD or related materials and technologies. The Secretary of Defense has been designated as the DoD Executive Agent. The Department of Energy is directed to designate an Executive Agent for its nuclear, chemical, and biological response. The DoD and DOE Executive Agents are responsible for coordinating assistance to Federal, State, and local officials in responding to threats involving nuclear, chemical, and biological weapons.

The National Contingency Plan (NCP) details the federal response to oil spills and releases (or threats of releases) into the environment of "hazardous substances, and pollutants or contaminants which may present an imminent and substantial danger to public health or welfare of the United States." A potential issue that may occur when transitioning from CM to HAZMAT response is one of coordination and primacy between affected agencies.

The Posse Comitatus Act prohibits the use of the armed forces in a law enforcement role, except when expressly authorized by Congress or the Constitution. Some of the exceptions to this Act include the potential for using the military for a law enforcement response to an NBC event

This report also identifies various provisions of Federal law and other legal authorities that address the authority of the Secretary of Health and Human Services (HHS) to safeguard the public health in the event of a public health emergency. As with most other consequence management functions, State authorities have the primary role in managing public health emergencies. The role of the Secretary of HHS in enforcing quarantines and other containment measures changes from lead to supporting role depending on whether the measures are conducted in an area under Federal jurisdiction. However, the respective areas of responsibility and requisite coordination between Federal entities and the State during a biological WMD terrorist event remain less clearly defined.

These two general areas, department/agency interaction and the sequence of events during the emergency response timeline, warrant further attention and elucidation by the subsequent legal seminars.

II. Introduction

An initial review of the literature reveals that a substantial body of laws, regulations, directives, instructions, and plans is in place for WMD consequence management. The research team identified some of the top-level legal authorities that outline the roles and responsibilities of Federal and state authorities in managing the consequences of a chemical, biological, nuclear, radiological, or high explosive attack in the United States. The research team analyzed a sampling of the laws and other guidelines applicable to WMD consequence management (CM) and this report focuses on the results of the team's analytical efforts. Additionally, this report presents a bibliography that is inclusive of the laws, regulations, directives, instructions, and plans that the team has so far identified as applicable to WMD CM.

This preliminary report presents several of the top-level authorities delegating responsibilities for consequence management in the event of a national emergency, particularly a WMD event. These guidelines include Presidential Directive 39, the Stafford Act, Executive Order 12656 (**Sections A, B, and C**) respectively and related guidelines, which delegate emergency authorities to the President, and to Federal Agencies and Departments.

Section D reviews Title 50, Chapter 40 of the United States Code, which specifically addresses Federal responses in the event of a WMD attack in the United States. Discussion of this provision highlights complementary authorities.

Section E highlights responsibilities for hazardous materials response as outlined in the Superfund or CERCLA legislation and the National Contingency Plan.

Legal authorities related to military support to civil authorities, including the Posse Comitatus Act and related law, and Department of Defense Directive 3025.1 and related manual, *Military Support to Civil Authorities*, are discussed in **Section F**.

The importance of effective public health response in the event of a WMD event in the United States cannot be overstated. **Section G** discusses the relevant provisions of Title 42 of the United States Code and of Part 42 of the Code of Federal Regulations, which detail the authority of Federal agencies, particularly the Department of Health and Human Services, in the management of WMD health consequences.

In *Section H*, the Virginia Emergency Services and Disaster Law is discussed as an example of a State's legal structure for the delegation of emergency management responsibility.

The intent of this preliminary report is to utilize the legal documents described above to outline the emergency support functions of the Federal and State agencies and departments; to provide a sense of the scope and interplay of the various legal authorities; and to highlight issues that may be discussed during the Legal WMD Seminar. The bibliography is a preliminary sketch of the legal authorities that are relevant to WMD consequence management.

III. Legal Issues in WMD Consequence Management.

A WMD attack or accident (collectively "WMD incident") is a man-made emergency involving chemical, biological, radiological, nuclear and/or high-yield explosive (CBRNE) weapons. A WMD attack includes both the actual use and threat to use weapons of mass destruction by hostile persons, States, or other entities. A WMD accident involves the unintentional release of CBRNE weapons, e.g., during securing or transporting a WMD. The potential for chaos, miscommunication, civil disturbances, and abuse of authority after a WMD incident is great; as is the need for effective communication, cooperation, and interoperability between Federal, State, and local authorities in consequence management. A substantial body of laws and implementing authorities is in place to satisfy this requirement.

A. Presidential Decision Directive-39

The President is authorized to delegate functions vested in him by law to the head of any department or agency in the executive branch, or any department or agency official required to be appointed by and with the advice and consent of the Senate.¹ Presidential delegation of emergency management authority to the Federal agencies is substantially accomplished by Presidential Directives 39 and Executive Order 12656.

Presidential Decision Directive 39 details the policy of the United States in combating terrorism and reaffirms the lead agencies for the management of various aspects of the counterterrorism effort.² PDD 39 defines crisis management and consequence management as follows.

- **Crisis Management** includes measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism. The laws of the United States assign primary authority to the Federal Government to prevent and respond to acts of terrorism; State and local governments provide assistance as required. Crisis management is predominantly a law enforcement response.
- **Consequence Management** includes measures to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of terrorism. The laws of the United States assign primary authority to the States to respond to the consequences of terrorism; the Federal Government provides assistance as required.

The Directive recognizes that States have primary responsibility to manage the consequences of terrorist incidents, including WMD threats or acts of terrorism, and the Federal government provides assistance as required. The Directive reaffirms that the Federal Bureau of Investigation (FBI) is responsible for crisis management and the Federal Emergency Management Agency (FEMA) supports States in their consequence management activities. The FBI remains the lead agency in Washington, DC and at the scene of the terrorist incident until the Attorney General transfers lead agency authority from FBI to FEMA. The Directive provides that other Federal agencies have crisis management duties as described in classified documents and consequence management responsibilities as outlined in FEMA's Federal Response Plan.

The Directive highlights that the Federal Response Plan (FRP) is applicable to consequence management activities in response to terrorist attacks “against large U.S. populations,” including attacks involving WMD and directs FEMA to ensure that the FRP and the States’ plans are adequate to meet that task. The Directive also establishes, among other things, the domestic emergency support team, which consists of the FBI as the lead agency and representatives of only the agencies necessary for response to the incident. The emergency support team is authorized to respond to all terrorist incidents, including those involving nuclear, chemical, and biological agents.

Table 1. PDD 39 – Roles, Responsibilities and Issues

PDD-39 details the policy of the United States in combating terrorism and designates the lead agencies for the management of various aspects of the counter terrorism effort	
Departments & Agencies	Roles and Responsibilities
Personal Representative to the President for CM	On-scene Federal authority during recovery, if large-scale casualties and damage occurs.
Department of Justice	Lead Federal agency for counter terrorism
FBI	Lead Federal agency for initial crisis management
FEMA	Lead Federal agency for consequence management in Washington, D.C. and on-scene
All other Federal agencies	As outlined in the Federal Response Plan
Inter-organizational Issues:	
<ul style="list-style-type: none"> • When FBI and FEMA are operating simultaneously, how do the crisis management and consequence management roles dovetail? • When does crisis management transition to consequence management? • Are standards in place to determine when DOJ transfers lead agency authority to FEMA? 	

B. The Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (The Stafford Act) provides for assistance by the Federal government to the States in the event of natural and other disasters.³ With the Stafford Act, Congress has delegated to the President emergency powers he may exercise in the event of a major disaster or emergency. It addresses disaster relief programs, disaster preparedness and assistance, hazard mitigation, and Federal assistance for losses sustained in disasters. It applies in major disasters and in cases of emergency. The Stafford Act defines “emergency” as follows:

any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.⁴

Major disaster is defined as follows:

any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.⁵

The Stafford Act’s definitions of “emergency” and “major disaster” are referenced in many of the legal documents related to consequence management and are used consistently throughout this report.⁶ A

major disaster encompasses natural catastrophes and floods, fires, and explosions, regardless of cause. An emergency is, more broadly, any situation in which Federal assistance is required to save lives, protect health and property, or to mitigate or avert a catastrophe. Neither definition specifically includes a WMD event. Thus, determining whether a WMD incident is a major disaster or an emergency for the purposes of obtaining Federal assistance requires matching the circumstances of the incident to the letter of the law. Generally, the existence or threat of each type of WMD – chemical, biological, radiological, nuclear, and high-yield explosive (CBRNE) – likely would be deemed an “emergency,” if the event or threat overwhelms State and local authorities and warrants the assistance of the Federal government. A chemical, radiological, or biological WMD event in the United States would qualify as a major disaster, only if it results in a fire, flood, or explosion. A WMD event of catastrophic proportions could warrant treatment as both a major disaster and an emergency.

The Stafford Act comprehensively lists the roles and responsibilities of Federal agencies and departments in providing both major disaster and emergency assistance, and delineates the types of assistance the affected State(s) may receive from the Federal government. The Act distinguishes major disaster assistance as a more comprehensive grant of Federal aid for long-term consequence management, while emergency assistance is more limited in scope and in time.

In a major disaster, the President has broad authority to assist States and localities. This includes the authority to provide the following to States and localities: specified technical and advisory assistance; temporary communications services; housing assistance and, in consultation with the state Governor, financial assistance to address other needs; legal services and mental health counseling, and unemployment assistance; emergency public transportation in affected area; and fire management assistance on publicly or privately owned forest or grassland. In addition, he is authorized to direct Federal agencies in providing essential assistance to meet immediate threats to life and property, and to coordinate all disaster relief assistance.

Emergency authority granted to the President is similar to that authorized for handling major disasters, but it is not as extensive. He may coordinate all emergency relief assistance; provide technical and advisory assistance to affected State and local governments to include essential community services; hazard and risk warnings; health and safety measures and information, and; management of immediate public safety threats. He may also direct Federal agencies to provide emergency assistance; remove debris; provide temporary housing assistance; and assist State and local governments in the distribution of food, medicine, and other consumable supplies. In addition, he may direct FEMA to repair, reconstruct, restore, or replace any U.S.-owned facility under its jurisdiction in an emergency. These measures are shorter in duration and do not include services such as counseling services and unemployment and other financial assistance. If these measures are inadequate, the President is authorized to take actions to save lives, protect property and public health and safety, and to lessen or avert a catastrophe.

To facilitate the provision of Federal assistance in both major disasters and emergencies the Act authorizes the President to appoint a Federal Coordinating Officer immediately after declaring that a major disaster or emergency exists to coordinate the relief efforts of all Federal agencies, and mandates that he request that a State Governor delegate a State coordinating officer as a liaison during the emergency. The Federal Coordinating Officer also may utilize relief organizations, such as State relief organizations and the American National Red Cross (ANRC), in the distribution of emergency supplies, such as food and medicine, and in reconstruction or restoration of essential services, *e.g.*, housing and essential. He may coordinate all relief efforts, however, States, localities, and relief organizations must agree that he or his delegate may coordinate their activities. The President is also authorized to form Emergency Support Teams of federal personnel to be deployed to the area of the disaster or emergency.

Under the Stafford Act, the Governor of an affected State may request the declaration of a major disaster or emergency, and demonstrate, as a prerequisite for receiving assistance, both that the State's response plans have been activated and that State and local capabilities are inadequate for an effective response. The Act authorizes the President, upon request from a Governor of an affected State, to provide "emergency work" essential for the protection of life and property, by the Department of Defense for a maximum of ten days before the declaration of either an emergency or a major disaster. The President may also declare an emergency, but not a major disaster, *sua sponte* with respect to emergencies for which the primary response responsibility rests with the Federal Government "because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."⁷ In short, if the State or local government is overwhelmed by the incident or there is an independent Federal nexus to the event, the President may authorize Federal emergency or major disaster assistance.

The National Emergencies Act states that the President must declare a national emergency in order to exercise any emergency power granted to the President by Congress and specify in the proclamation of national emergency or in Executive Orders under which statutory authorities or powers he proposes to act.⁸ The national emergency, and any power or authority exercised because of such, terminates upon the date specified in the legal enactment of a joint resolution terminating it or in Presidential proclamation, whichever is earlier. It may also terminate automatically one year after the President declares it, if the President does not provide timely notification to the Congress that it remains in effect. Assistance under the Stafford Act is also predicated on the President's declaration that a major disaster or an emergency exists. However, the President need not satisfy the requirements of the National Emergencies Act to render assistance under the Stafford Act.⁹ Once an emergency or major disaster is declared pursuant to its procedures, the President may authorize any of the aid specified in the Act.

Table 2. The Stafford Act - Roles, Responsibilities, and Issues

The Stafford Act applies in the event of a major disaster or emergency. It details the emergency functions of the President, which are delegated as per, among others, Executive Order 12656.	
Departments & Agencies	Roles and Responsibilities
Executive Office of the President (President or as delegated)	Major Disaster Assistance, upon request of a State Governor: Provide specified essential services; coordinate disaster relief activities; direct Federal agency assistance to States and localities; take other action as consistent with the Act and within delegated authority.
	Emergency Assistance, upon request of a State Governor or <i>sua sponte</i> : Direct Federal agencies to provide resources and technical and advisory assistance; provide essential services; coordinate all disaster relief assistance.
Federal Coordinating Officer	Major Disaster and Emergency Assistance: establish field offices; coordinate relief efforts; take other necessary actions within authority.
Emergency Support Teams	Assist the Federal coordinating officer in carrying out his responsibilities in a major disaster or emergency.
State Governor(s)	Request declaration by the President that a major disaster or emergency exists.
Federal Agencies	Assistance responsibilities as delegated by the President, and outlined in response plans, within authority; Provide personnel for the Emergency Support Teams on request from the President; On the direction of the President, provide assistance, as specified, to meet immediate threats to life and property resulting from a major disaster or emergency
FEMA	Prepare, sponsor, and direct Federal response plans and programs for emergency preparedness; provide hazard mitigation assistance in the form of property acquisition & relocation assistance
Department of Defense	Upon President’s direction, provide “emergency work” to protect life and property prior to declaration of major disaster or emergency
ANRC and other relief organizations	Major Disaster: As a condition of receiving assistance, comply with regulations relating to non-discrimination and other regulations as deemed necessary by the President for effective coordination of relief efforts.
Issues: <ul style="list-style-type: none"> • Where are the lines drawn in determining that an event is the primary responsibility of the USG? Are there clear guidelines by which to make such a determination? • Do crisis and consequence management constitute emergencies? If so, when are the Federal and State Coordinating Officers activated and how do they interact with the FBI? • Do the definitions of “major disaster” and national “emergency” suffice to deal with the range of WMD threats, e.g., deliberate attack involving biological materials with a slow incubation period? 	

C. Executive Order 12656, Assignment of Emergency Preparedness Responsibilities

Executive Order 12656 assigns national security emergency preparedness responsibilities to Federal departments and agencies, delegating to FEMA primary responsibility for coordinating the efforts of, among other things, federal emergency assistance.¹⁰ This Executive Order identifies primary and support functions to be performed during any national security emergency of the United States; development of plans for performing these functions; and development of the capability to execute those plans. As part of preparedness, the Executive Order mandates that the heads of Federal Agencies plan for continuity of government in the event of a national security emergency, and plan for the mobilization of agency alternative resources. In assigning areas of responsibility for domestic preparedness, the document provides the foundation for the Federal Response Plan, which translates the preparedness activities into operational guidelines.

The Executive Order establishing the Office of Homeland Security¹¹ amended Executive Order 12656 to take into account the responsibilities of the new Office within the functional and legal structure of emergency preparedness. The amended language states that “the Homeland Security Council is the principal forum for consideration of policy relating to terrorist threats and attacks within the United States;” it complements the function of the National Security Council as the principal forum for the consideration of national security emergency preparedness policy. The mandate for Office of Homeland Security did not alter significantly the existing responsibilities for consequence management. **Table 3** highlights the major areas of responsibilities for several of the agencies identified in E.O. 12656.

FEMA used the delegation of roles and responsibilities in Executive Order 12656 as one of the bases for the Federal Response Plan (FRP); the Federal Response Plan translates this legal guidance into operational principles and procedures. The FRP elucidates consequence management primary and support roles and responsibilities by way of the following “emergency support functions”: transportation, communication, public works and engineering, firefighting, information and planning, mass care, resource support, health and medical services, urban search and rescue, hazardous materials, food, and energy. Other guidelines used by FEMA to draft the FRP include the provisions on roles and authorities in the Code of Federal Regulations, such as Title 42, and the National Contingency Plan, discussed below.

While PDD 39, the Stafford Act, Executive Order 12656 and the documents deriving therefrom delegate consequence management and other authority and detail the operational areas in which specific agencies have lead and support roles, they do not specifically tackle the legal standards that are applicable to the conduct of the activities that are assigned. At a top level, these documents necessarily highlight the separation of powers between State and Federal authorities. That is, they reaffirm the fact that States have primary responsibility in responding to WMD events and other emergencies and major disasters, while the Federal government renders assistance upon request from the State(s) and when the State is unable to effectively manage the incident and its effects without Federal assistance. Significantly, though the Stafford Act also authorizes the President, absent a State request, to exercise his emergency powers when the United States government (USG) has primary responsibility to respond to a situation, the Act does not indicate what such a situation might be. Proceeding from basic constitutional premises, it may be assumed that, in a WMD event, the USG would have primary responsibility over incidents involving interstate and foreign effects; the military; and Federal lands and property.

Ambiguity arises when one considers the details of the types of action the President may authorize in responding to an emergency. For instance, a WMD terrorist incident could conceivably destroy or overwhelm the law enforcement infrastructure of a State or States. In addition to providing traditional forms of assistance, such as search and rescue, military equipment, and medical services, the President may be faced with the question of whether to use the military to maintain order or to invoke martial law. Black’s Law Dictionary states that martial law “exists when military authorities carry on government or exercise various degrees of control over civilians or civilian authorities in domestic territory. Such may exist either in time of war or when civil authority has ceased to function or has become ineffective.”¹² As discussed below, the Insurrection Act in Title 10 of the United States Code authorizes the President to call the militia or National Guard into Federal service to quell an insurrection against Federal or State authority. However, there is no statutory or explicit constitutional authority for the invocation of martial law or the use of the military for civil governance, generally. The constitutional mandate of the President to “take Care that the Laws be faithfully executed” and of the Congress to “call forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” have been cited as the authority for the use of martial law, and judicial decisions have indicated that martial law, properly limited in scope and time, is an appropriate tool for exigent circumstances.¹³ The Code of Federal Regulations, 32 C.F.R. §501.4 attempts to define the parameters of martial law; however, even this

elaboration is rife with ambiguities about the authority and procedures for and the limits of martial law. There is an inadequate amount of legal guidance regarding invoking martial law in the event of a WMD attack on the United States that results in the disintegration of social and legal structures.

Notwithstanding troublesome issues such as martial law, a substantial body of legislation, case law, and guidance documents serves to elucidate separation of powers principles and the constitutionally permissible scope of both Federal and State authority. The bibliography includes references to some of these documents. The following Sections focus on several of the more specific guidelines applicable to WMD consequence management, that address potentially difficult issues that will likely arise in the event of a WMD event, e.g., federal quarantine and military support to civil authorities and the limitations applying to the military in the area of law enforcement.

This Executive Order identifies primary and support functions to be performed during any national security emergency of the United States; development of plans for performing these functions; and development of the capability to execute those plans. Some of the roles and responsibilities of the affected Departments/Agencies are listed below.	
Departments & Agencies	Roles and Responsibilities
Department of Agriculture	Continuation of agricultural production, food processing, storage, and distribution; forest products; fires in rural areas; forestry and agricultural services, including control of diagnosis and control of diseases, pests, or biological, chemical, or radiological agents; livestock and poultry or their products; agricultural commodities and land exposed to or affected by hazardous agents. Support: Assist Secretary of Defense in formulating and carrying out plans for stockpiling strategic and critical agricultural materials.
Department of Defense	Military response; national mobilization; damage assessment; support to civil and private sector, including law enforcement, within authority; respond to all hazards related to nuclear weapons, materials, and devices; through the Secretary of the Army, manage and allocate all usable waters within U.S. jurisdiction; stockpile of storage and critical materials. Support: civil and military national mobilization
Department of Energy	Identify, analyze, assess, and mitigate hazards from nuclear weapons, materials, and devices; all emergency response activities pertaining to DOE nuclear facilities. Support: advise, assist, and assess the radiological impact associated with national security emergencies.
Health and Human Services	Mobilize health industry and resources to provide health, mental health, and medical services; allocate health, mental health, and medical services' resources among civilian and military claimants; reduce or eliminate adverse health and mental health effects produced by hazardous agents (biological, chemical, or radiological); minimize property and environmental damage; emergency human services, e.g., feeding, registration and inquiry, social services, family reunification, mortuary services and interment. Support: agricultural health services
Department of Justice	Interdict and respond to terrorism incidents in the United States; advise the President and Departments/Agencies regarding national security emergency powers, plans, and authorities; Coordinate Federal Government domestic law enforcement activities related to national security emergency preparedness, respond to civil disturbances that may result in a national security emergency. Support: the intelligence community in the planning of its counter-intelligence and counter-terrorism programs
Department of Transportation	Meet essential transportation needs; provide direction to all modes of civil transportation; emergency management and control of civil transportation resources and systems; transition the Coast Guard as a service to the Department of the Navy during national security emergencies; coordinate with State and local highway agencies in the management of all publicly owned or other highways, roads, streets, bridges, tunnels; maritime and port control, safety, law enforcement and security. Support: Energy to manage transportation resources involved in the bulk movement of energy materials; Federal Departments/Agencies, State and local governments, the private sector in developing plans to protect essential resources and facilities.
Issues: <ul style="list-style-type: none"> • Are the necessary standards, memoranda of agreements, and operational guidelines in place for interagency coordination of consequence management activities? • Are the lines of responsibility and authority clearly delineated and understood between those Departments/Agencies that have an active role in Nuclear, Biological, Chemical (NBC) assessment and response, e.g., Defense, Energy, Health and Human Services, Agriculture? 	

Table 3. Executive Order 12656 - Role, Responsibilities and Issues

D. Title 50, Chapter 40, Defense Against Weapons of Mass Destruction Act of 1996

Title 50 Chapter 40 deals with the Federal government's response to the use or threat to use nuclear, chemical or biological WMD or related materials and technologies.¹⁴ The provisions direct the Department of Defense to designate a DoD Executive Agent for chemical and biological emergency response. On April 1, 2000, the Secretary of Defense recalled the Executive Agency for domestic CBRNE CM from the Secretary of Army, retaining for himself consequence management authority for domestic chemical, biological, radiological, and high yield explosives incidents. (Details on the new DoD CM structure are provided in Part F below.) The Army's Chemical Corps has a dedicated group of experts in the field of chemical and biological support. The Department of Energy is directed to designate an Executive Agent for nuclear, chemical, and biological response. The Emergency Operations program within DOE's National Nuclear Safety Administration manages the Department's emergency management activities. The Executive Agent for both DoD and DOE are responsible for coordinating assistance to Federal, State, and local officials in responding to threats involving biological or chemical weapons or related materials or technologies and nuclear, chemical, and biological weapons, respectively. The Defense Against Weapons of Mass Destruction Act provides that the emergency response efforts of the two agencies in these areas are to be coordinated with each other through their Executive Agents.

The Act also requires that DoD establish at least one chemical, biological emergency response team (ERT) and a rapid response information system, which includes information on the inventory that Federal agencies can make available to State and local officials in the event of a WMD emergency. The ERT is to be composed of employees of the DoD and members of the Armed Forces who can assist Federal, State, and local officials in the detection, neutralization, containment, dismantlement, and disposal of weapons of mass destruction containing chemical, biological, or related materials. The ERTs established by the Department of Defense for chemical and biological response, now known as WMD Civil Support Teams, consist of highly trained Army and Air National Guard members. This composition raises issues of jurisdiction. In an emergency in which the National Guard is not federalized (Title 32), the teams support State and local agencies under the jurisdiction of State Governors pursuant to Title 32 provisions and may perform law enforcement functions. If the National Guard is called into federal service by the President pursuant to Title 10, the ability of the Teams to exercise law enforcement authority would be restricted by the Posse Comitatus Act, as discussed below.

All Federal agencies are directed by the Act to develop, maintain, and submit to FEMA for inclusion in its master inventory, an inventory of physical equipment and assets under the agency's jurisdiction that could be made available to aid State and local officials in search and rescue and other disaster management and mitigation efforts associated with a WMD emergency. The inventory system developed and maintained by FEMA must be a comprehensive listing of all Federal agency inventories of physical equipment and assets under the agency's jurisdiction that could be made available to aid State and local officials WMD consequence management and mitigation efforts. The system must include a secure but accessible emergency response hotline to access information and request assistance. **Table 4** highlights the roles and responsibilities as addressed by the provisions.

Different provisions of the United States Code establish guidelines for DoD to follow in carrying out these consequence management responsibilities. For instance, 10 U.S.C. §2670 authorizes the Secretary of the Army (the Executive Agent) to issue a revocable license to the Red Cross to erect and maintain, on a military installation buildings for the storage of supplies to aid civilians in "a serious national disaster. 10 U.S.C. §2692 authorizes the Secretary to permit the use of a military installation for storage, treatment, and disposal for non-defense toxic or hazardous materials, given certain requirements are met. Title 50, §1511, *et seq.* of the U.S. Code mandates that DoD follow strict procedures and timelines for the transportation of lethal chemical and biological agents, to or from military installations or through States, and for their disposal. These requirements must be met unless the President suspends the requirements

during Congressionally declared war, a declared national emergency, or for national security reasons, in the interest of public health.

Table 4. Title 50, Chapter 40 - Defense against weapons of mass destruction

Title 50, Chapter 40 designates the Department of Defense and the Department of Energy to designate Executive Agents for responses to chemical, biological, and nuclear WMD events. It also mandates the creation by DoD of emergency response teams.	
Departments & Agencies	Roles and Responsibilities
Department of Defense	SECDEF is DoD’s Executive Agent for chemical, biological emergency response; Provide ERT
Chemical, Biological Executive Agent (SECDEF)	Coordinate DoD assistance to Federal, State, and local officials’ response to threats involving biological or chemical weapons or related materials or technologies; Coordinate DoD assistance to the DOE in carrying out its responsibilities under this section.
Department of Energy	Designate DOE Executive Agent for nuclear, chemical, biological emergency response.
Nuclear, Chemical, Biological Executive Agent	Coordinate DOE assistance to Federal, State, and local officials in responding to threats involving nuclear, chemical, and biological weapons or related materials or technologies; Coordinate DOE assistance to DoD in carrying out DoD’s responsibilities under this section.
Heads of Federal Response Plan Agencies	Physical equipment and assets to aid State and local officials to support WMD disaster management and mitigation efforts associated with a WMD emergency.
FEMA	Provide State and local officials access to an inventory system of physical equipment and assets under the agency’s jurisdiction that could be made available to aid State and local officials in search and rescue and other disaster management and mitigation efforts associated with a WMD emergency.
Issues: <ul style="list-style-type: none"> • Are the “supported” and “supporting” roles for NBC response between the Departments of Defense and Energy clearly defined and understood? • How is the role and responsibility of the National Guard CST units proscribed when it is Federalized? 	

E. The National Contingency Plan (NCP)

The NCP details the federal response to oil spills and releases (or threats of releases) into the environment of “hazardous substances, and pollutants or contaminants which may present an imminent and substantial danger to public health or welfare of the United States”¹⁵ This preliminary report focuses on the provisions related to hazardous materials response. The C.F.R. references a number of legislative provisions rather than providing a single definition of “hazardous substances.” For example, it broadly includes oil, substances identified in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which includes as part of its definition of hazardous substances the following: “such elements, compounds, mixtures, solutions, and substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment.” These substances include specified pollutants and contaminants and WMD.

Executive Order 12777 mandates that the NCP require the formation of a National Response Team (NRT), composed of representatives of appropriate Federal departments and agencies for national planning and coordination of preparedness and response actions, and Regional Response Teams (RRT).¹⁶ The NRT provides policy guidance and direction to the RRTs. Many of the responsibilities delegated to the numerous federal agencies involved with the NCP are detailed in 40 C.F.R. 300.175 and Executive Order 12777 names the agencies that comprise the NRT and the RRTs, the same agencies that sponsor the

National Contingency Plan. A sampling of the various roles and responsibilities for some of the departments and agencies affected by the NCP are presented in Table 5. The National Response Team takes action when a hazardous substance release overwhelms regional control efforts, “transects regional boundaries; or involves a substantial threat to the public health or welfare of the United States or the environment, substantial amounts of property, or substantial threats to natural resources”¹⁷ (40 C.F.R. 300.110). The NCP operational framework is also applied to international contingency plans. In the event of a release of hazardous substances, the “lead agency” is the EPA, if the release or threatened release is inland. The Department under which the U.S. Coast Guard is operating, i.e., the Department of the Navy or of Transportation, becomes the lead agency if the release or threatened release is in a coastal zone. However, when the facility or vessel is under the authority of another agency, that federal agency assumes the lead agency role. The lead agency is authorized “to act for the United States to take response measures deemed necessary to protect the public health or welfare or environment from discharges of oil or releases of hazardous substances.” With respect to the National Contingency Plan and the Hazmat responses, FEMA’s role is to provide guidance, policy and program advice, and technical assistance in hazardous materials, chemical, and radiological emergency preparedness activities. Its consequence management role is limited to acting within the NRT and RRTs. As designated by 40 C.F.R. §125, the National Response Center serves as the NRT’s communications center, for the receipt and distribution of reports concerning hazardous material release incidents.

The NCP details the federal response to oil spills and releases (or threats of releases) into the environment of “hazardous substances, and pollutants or contaminants, which may present an imminent and substantial danger to public health or welfare of the United States.”	
Departments & Agencies	Roles and Responsibilities
State Governor	Designates state official for RRT and lead state agency for state response operations
Department of Transportation	Expertise: packaging, transporting, handling regulated hazardous waste NRT: Representative; RRTs: Co-chair
U.S. Coast Guard	Command, control and surveillance: facilities for hazardous materials releases; Implement response action: contract with State
Lead Federal Agency: EPA or USCG (Transportation or Navy)	Designate regional On-Scene Coordinators; Designate Remedial Project Manager: coordinator of other remedial and response actions Effect HAZMAT responses: request Attorney General to secure relief or issue administrative orders; Determine response need/response action.
FEMA	Guidance, policy and program advice, and technical assistance: emergency preparedness
Health and Human Services	Determine existing “public health threats”; provide “assistance on worker health and safety issues”; Medical needs assessment and health services
Agency for Toxic Substances and Disease Registry (ATSDR)	Scientific and technical assistance and personnel: 24-hour response capability; On-scene health assessments: to determine response scope
Center for Disease Control	Scientific and technical assistance and personnel: 24-hour response capability
USDA	Directs the following services with the Department of Agriculture to provide capabilities and expertise on the impact of the release: Forest Service; Agricultural Research Service; Food Safety and Inspection; Animal and Plant Health Inspection Service; Soil Conservation Service
EPA	NRT: Chair, when release or threatened release is inland and when not in response action
Department of Justice	Legal expertise: CERCLA issues; Provide expertise to ERTs and Radiological ERTs
Attorney General	Consent to enter: upon EPA or USCG agency request. Secure entry into HAZMAT affected area if entry denied; Effect HAZMAT response: Secure relief or issue administrative orders.
DoD Army Corps of Engineers	Army Corps of Engineers and U.S. Navy Supervisor of Salvage to provide specialized equipment and expertise
Department of Energy	Assistance: radiological material
Department of State	Consultation: international response actions; Coordination: releases that cross international boundaries
Nuclear Regulatory Commission	Responds to releases of radioactive materials by its licensees
GSA	Logistic and telecommunications support to federal agencies
Department of Commerce	NRT: Representative; RRTs: Co-chair; Federal trustee: natural resources
Issues: <ul style="list-style-type: none"> • Do Department and Agency roles and responsibilities change in accordance with the NCP when transitioning from crisis management to HAZMAT response? • What role, if any, do the NRT and RRTs play during consequence management? • Is there a need and a mechanism for the NRT and RRT to interact with the DoD Executive Agent during consequence management? 	

Table 5: National Contingency Plan: Roles and Responsibilities for Emergencies Involving Hazardous Materials

F. *Military Assistance to Civil Authorities in a WMD Emergency: The Posse Comitatus Act and DoDD 5525.5*

F.1 **The Posse Comitatus Act and Related Authorities: Limitations on the Military's Actions in Rendering Assistance to Civilian Law Enforcement Authorities: DoDD Military Role in Law Enforcement**

The Posse Comitatus Act prohibits the use of the armed forces in a law enforcement role, except when expressly authorized by Congress or the Constitution. The Act states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁸

The law itself prohibits only the use of the Army or the Air Force. Per DoD Directive 5525.5, which discusses the materiel, logistic, communications, and other assistance to law enforcement provided by the military, the act is made applicable to active and reserve components of not only the Army and the Air Force, but also the Marine Corps and the Navy as a matter of DoD policy.¹⁹

Title 10, Chapter 1211 authorizes the President to call the National Guard into Federal service for, among other things, quelling an internal rebellion or a threat against the authority of the Federal government. Because the Chapter states that, once called into Federal service, members of the National Guard are subject to the laws governing the Army and the Air Force, as the case may be, but not laws particular only to the Regular Forces of those services, the Posse Comitatus restrictions are applicable to the National Guard in Federal service. It does not apply to the National Guard when it acts as a State force on State active duty under the command of the State governor. The Act is not applicable to the Coast Guard, nor is it applicable to military police with respect to jurisdiction over military personnel and facilities.

The Courts have had occasion to pass on the meaning of the Posse Comitatus Act. Four seminal cases address what constitutes enforcing or executing the laws for purposes of the Posse Comitatus Act.

- *United States v. Red Feather*²⁰ defined a Posse Comitatus Act violation as "direct active use of Army or Air Force personnel," and the provision of supplies and equipment was found not to be an active use of the military.
- *United States v. Jaramillo*²¹ focused on whether using the military "pervaded the activities" of the civilian law enforcement agencies. The court's inquiry focused on whether the military exercised too much influence over civilian law enforcement decisions regarding use of equipment, negotiations, and use of force policy.
- *United States v. MacArthur*²² found that the Jaramillo was insufficient to establish a violation of the Posse Comitatus Act. The court focused on whether "military personnel subjected . . . citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature."
- *United States v. Yunis*²³ elucidated the elements of the McArthur formulation, defining regulatory power as that which "controls or directs"; proscriptive power as that which "prohibits or condemns"; and compulsory power as that which "exerts some coercive force."

Taken together, the judiciary has determined that, where Congress has not provided a specific exception, direct participation of the military in law enforcement activities, *e.g.*, arrests, searches and seizures, is prohibited. Sections 371 to 381 of Title 10 clarify the Posse Comitatus Act by specifying military support to law enforcement agencies *e.g.*, equipment, technical, advisory, and operations and maintenance assistance that the Act does not prohibit. Additionally, Congress has enacted specific exceptions to the Posse Comitatus Act, which except in unusual and compelling cases, maintain the distinction between

law enforcement activities and military support in the form of technical assistance, advice, and material and equipment. These functions are critical for effective consequence management in a WMD event and Congress wisely excepted them from the posse comitatus prohibition. These exceptions include:

- Title 10, Chapter 15, “The Insurrection Act” (Militia in Federal service to quell insurrection against U.S. or state law, or equal protection)²⁴
- Title 10, Chapter 18, §382 (2000), “Emergency situations involving chemical or biological weapons of mass destruction” (collecting intelligence, authority to arrest, and conduct search and seizure of evidence allowed only when necessary to protect lives and civilian law enforcement authorities are incapable of taking the action)²⁵
- 18 U.S.C. §175 *et seq.*, (1999) reiterates the exception with respect to biological weapons
- 18 U.S.C. §831 (1999), “Prohibited transactions involving nuclear materials” (Attorney General may request military assistance for law enforcement under Title 10, Chapter 18 during a terrorism emergency involving nuclear materials)
- 18 U.S.C. §2332e (1999), (Attorney General may request military assistance in terrorism emergencies involving chemical and biological material for law enforcement assistance under Title 10, Chapter 18)

In the cited provisions, Congress has left relatively unconstrained the potential of the Department of Defense to mobilize resources in support of consequence management activities. Additionally, in an event involving a WMD emergency situation certain provisions allow the military to provide direct law enforcement.

Title 10, Chapter 18 generally authorizes non-law enforcement military support for civilian law enforcement officials, exclusive of law enforcement assistance.²⁶ Such assistance includes:

- Intelligence collected during military operations concerning a violation of State or Federal law;
- The use of military equipment and facilities, training and advising law enforcement officials in the operation and maintenance of military equipment and facilities;
- Maintaining and operating equipment.

In each of the situations described above, Congress has prohibited military participation in arrests, direct participation in searches and seizures for evidence, and the direct collection of intelligence for law enforcement purposes, unless otherwise authorized by law or law enforcement officials are not able to take the action.

Law enforcement roles granted to the military include the use of the militia to suppress insurrections and use of the armed forces for law enforcement in the event of chemical, biological, or nuclear incidents involving WMD. Pursuant to the Insurrection Act, the President, upon request of the State Governor or Legislature, may call the armed forces and federalize the militia (Air and Army National Guard) of other States to quell insurrections against State government and to guarantee equal protection of the laws.²⁷ Such forces also may be used, without the necessity for a request from the State, to enforce Federal authority, and to prevent the State from denying equal protection or obstructing justice.

Title 10, Chapter 18 also allows the Secretary of Defense to authorize the use of the military to enforce criminal law related to an “emergency situation involving a biological or chemical” WMD, upon request from the Attorney General. To authorize such use the following conditions must exist: the situation must pose a serious threat to United States interests, civilian expertise must be unavailable, and military expertise is necessary. Additionally, DoD’s participation would facilitate enforcement of provisions of the criminal code related to prohibitions involving biological WMD and terrorism involving chemical and biological WMD. Assistance includes the operation by DoD personnel of equipment to monitor, contain,

disable, or dispose of the weapon involved or elements of the weapon. With respect to emergency situations involving chemical or biological WMD, the law enforcement action performed by the military must be necessary for the immediate protection of human life.

Title 18, Section 831 permits the Secretary of Defense to render law enforcement assistance to the Attorney General in enforcing the criminal law on prohibited transactions involving nuclear weapons and materials. Notwithstanding the Posse Comitatus Act, the military components may be used in such enforcement activities provided that the situation poses a serious threat to the interests of the United States; and is one in which enforcement of the law would be seriously impaired if DoD personnel did not provide assistance and civilian law enforcement authorities are not capable of enforcing the law.

Table 6 identifies some of the issues involving the Posse Comitatus Act.

Table 6. Inter-organizational Issues Regarding Posse Comitatus

The Posse Comitatus Act prohibits the use of the military for law enforcement purposes, except as authorized by the Constitution and by Congressional Acts.
Inter-organizational Issues:
<ul style="list-style-type: none"> • What are the President’s legal options in the event of civil unrest and civil liberties violation? Are they limited to the Insurrection Act and martial law? • What are the triggers for calling the National Guard into Federal Service, given that they would be less able to provide law enforcement assistance to State authorities? • While the Military has a recognized role in bio-defense, may it be used to enforce a quarantine established by the Center for Disease Control, pursuant to 42 C.F.R. 70, in response to a biological, e.g., small pox, WMD event? • When does the authority for use of the military in chemical, biological, and nuclear WMD law enforcement end? _____

F.2 Department of Defense Directive 3025.1

DoDD 3025.1, “Department of Defense Manual for Civil Emergencies,” focuses on the provision of DoD resources to civilian authorities during civil emergencies arising during peace, war, or transition to war.²⁸ It does not address military support to civilian law enforcement authorities or the use of military resources in the event of civil disturbance. Rather, it restates the policy that the Army and Air National Guard, acting under State authority, have primary responsibility for providing military assistance to State and local government authorities in a civil emergency. This Directive is limited to addressing the responses of DoD components in providing for the civil defense and rendering other assistance to civil authorities in an emergency. The Directive defines “emergency” exactly as does the Stafford Act.

The Directive states that the Secretary of the Army as the Executive Agent for exercising the emergency response and consequence management responsibilities of the Secretary of Defense. This includes serving as Executive Agent for military medical support to civilian authorities. In April, 2000, the Secretary of Defense restructured the oversight responsibilities for WMD consequence management. A Joint Chief of Staff publication states the changes as follows:

On 1 April 2000, the Secretary of Defense recalled the Executive Agency for domestic CBRNE CM from the Secretary of Army. The Secretary of Defense retains CBRNE CM authority.

On 10 August 2000, the Secretary of Defense determined that certain CBRNE situations may be qualitatively and quantitatively different than other situations, and DOD response might require special

management procedures and channels. The Deputy Secretary of Defense has the responsibility to determine whether or not the CBRNE situation warrants special management. If so, the Joint Staff will translate Secretary of Defense's decision into military orders for those CBRNE events, under the oversight of the ASD(SO/LIC). If not, the Secretary of the Army will exercise authority as the DOD Executive Agent through normal Director of Military Support (DOMS) military support to civil authorities (MSCA) procedures.²⁹

DoDD 3025.1 would thus be applicable to those domestic WMD incidents that do not warrant "special management," as well as to other civil disturbances that require military assistance.³⁰

DODD 3025.1 details the roles and responsibilities of DoD components in responding to civil emergencies. The Directive provides an ALL HAZARDS focus on the assignment and allocation of DoD resources to support civil authorities during civil emergencies arising during peace, war, or transition to war. ALL HAZARDS refers to any number of natural or man-made disasters or emergencies such as hurricanes, earthquakes, forest fires, floods, oil spills, radiological contamination, power outages, nuclear attack, or sabotage emergencies and major disasters. All DoD components must respond to the requirements of the Executive Agent through liaisons, as discussed below.

The Secretary of the Army has designated the Director of Military Support (DOMS) and supporting staff to ensure the performance of all planning and execution responsibilities of the Executive Agent in supporting civil authorities in domestic emergencies and disasters. The DOMS is the DoD primary contact for all Federal Departments and Agencies during periods of domestic civil emergencies or disaster response. The Defense Coordinating Officer (DCO) is a military or civilian official designated by the Executive Agent or responsible DoD Component to coordinate military support for civil authorities (MSCA) activities in accordance with DoD Directive 3025.1. The DCO is the DoD on-scene representative who coordinates civil authority support requirements with the Federal Coordinating Officer (FCO). DoD Emergency Preparedness Liaison Officers (EPLOs) are assigned by the Military Services and selected DoD Agencies to coordinate with the civil requests for the use of DoD resources in support of civil authorities during Presidentially declared disasters and emergencies. EPLOs serve with major civil and military headquarters that have primary responsibility for planning, coordinating, and executing support to civil authority in disasters. When providing assistance in response to a Presidentially declared disaster or emergency, EPLOs represent the DoD Executive Agent and the supported CINC having area responsibility.

In addition to providing support as required by the Executive Agent or his designated representative the Secretaries of the Navy and Air Force must assign personnel to serve as EPLOs within the U.S. Atlantic (currently the U.S. Joint Forces Command) and Pacific Commands. These commands serve as DoD principal planning and operating agents for military support to civilian authorities in their respective jurisdictions. The Commanders in Chief of these commands maintain liaison with FEMA and activate, task, and supervise the EPLOs; they also designate installations that may provide resource support to the response effort.

DoD Component	Roles and Responsibilities
Secretary of the Army (as DoD Executive Agent).	Exercise the authority of the Secretary of Defense to task the DoD Components to plan for and to commit DoD resources in response to requests from civil authorities for MSCA; Serve as executive Agent for Medical Support for military support to civilian authorities; Assign Army personnel to serve as Emergency Preparedness Liaison Officers (EPLOs) in USACOM and USPACOM AORs.
Office of the Under Secretary of Defense for Policy (USD(P))	Exercise policy oversight of MSCA for the Secretary of Defense and ensure compatibility of MSCA with National Security Emergency Preparedness in accordance with DoD Directives 3020.36 and E.O. 12656.
Deputy to the Under Secretary of Defense (Policy) for Policy Support (DTUSD(P)/PS)	Act on behalf of the USD(P) under DoD Directive 3025.1, as required. Coordinate MSCA policy matters to obtain USD (P) and Secretary of Defense approval when appropriate; Develop policy guidance for MSCA; Provide the initial level of policy interface for the Director of FEMA with the Secretary of Defense on routine matters; Interpret authorities and requirements; Monitor response by the DoD Executive Agent to disasters, and emergencies with particular attention to policy and political implications.
Director of Emergency Planning (Within DTUSD(P)/PS)	Provide staff support to the DTUSD(P)/PS for MSCA; Assist Executive Agent with routine contact and coordination with FEMA; Monitor and assist in coordination with the National Guard Bureau; Monitor and assist in coordination with Military Services and Office of Assistant Secretary of Defense (Reserve Affairs) (OASDRA) for the use of RC personnel in MSCA; Provide liaison with FEMA.
Department of Defense Director of Military Support (DOMS)	The DOMS and supporting staff serve to ensure the performance of all planning and execution responsibilities of the DoD Executive Agent for domestic emergency preparedness; DoD primary contact for all Federal Departments and Agencies during periods of domestic civil emergencies or disaster response; Point of contact for Federal departments and agencies requesting DoD medical support under the Federal Response Plan; medical liaison with the Emergency Support Team
Defense Logistics Agency	Provide medical supplies and equipment when directed by DOMS
The United States Transportation Command	Provide aero medical evacuation as required to support validated requirements under the Federal Response Plan; Provide aerial resupply as required to support validated logistics requirements;
Defense Coordinating Officer (DCO).	Validates MSCA requirements requested by the FCO, State Coordinating Officer (SCO), and/or the Emergency Support Function (ESF) representatives. Coordinates and assigns MSCA requirements; Single point of contact for use of DoD resources; Supervises DoD liaison personnel assigned to the Emergency Support Functions staff at the Disaster Field Office (DFO); Ensure liaison with the Federal Coordinating Officer and each emergency support function activated by the Federal Response Plan; public works and engineering and urban search and rescue; Work with the FCO and State Coordination Officer to integrate the taskings of National Guard on State Active Duty (SAD) with active units; Confirm relief priorities established by the FCO and SCO for the disaster area; Develop a priority of work for supporting units; Ensure, in the event of Joint Task Force (JTF) deployment, coordination of the JTF frequency allocation request with the communications emergency support function
DoD Emergency Preparedness Liaison Officers (EPLOs).	Represent all the Services and/or DoD Agencies to provide a balanced capability to respond to the continuum of ALL HAZARDS situations. U.S. Joint Forces Command (USJFCOM), formerly U.S. Atlantic Command (USACOM) and U.S. Pacific Command (USPACOM) will establish a liaison structure within their respective areas of operation down to State level.
Commanders in Chief (U.S. Joint Forces Command; U.S. Pacific Command)	Serves as DoD principal planning and operating agent for military support to civil authorities for all DoD components within respective jurisdictions; maintain liaison with FEMA; Approve activation of, task, and supervise the EPLOs.
Secretaries of the Military Departments	Provide support to civilian authorities as directed by the Executive Agent or designated representative; Assign personnel to serve as EPLOs in USACOM and USPACOM; Provide medical support to the Federal Response Plan in the form of medical units and personnel; provide personnel and facility support to the National Defense Medical System Federal Coordinating Centers

Table 7: DoDD 3025.1M: DoD Assistance to Civil Authorities in Emergencies - Roles and Responsibilities

The Manual treats in detail the command structure for emergency support and sets out the interaction between FEMA, the Services, and the other agencies in the field as well as discuss the use of resources such as the National Defense Medical System, and the Federal Coordinating Centers. However, it is not a comprehensive treatment of all types of incidents. For instance, the provisions with respect to the handling of radiological emergencies focus strictly on nuclear weapons in the custody of the Army, Navy, or Air Force and do not specifically address the handling of radiological emergencies.

G. Quarantine Authorities

Various provisions of Federal law and other legal authorities address the authority of the Secretary of Health and Human Services (HHS) to safeguard the public health in the event of a public health emergency. As with most other consequence management functions, State authorities have the primary role in managing public health emergencies. The role of the Secretary of HHS in enforcing quarantines and other containment measures changes from lead to supporting role depending on whether the measures are conducted in an area under Federal jurisdiction.

Title 42, Section 243 of the United States Code, which deals exclusively with public health and welfare issues, encourages Federal and State cooperation in preventing and controlling epidemics and managing other public health emergencies. The section authorizes the Secretary to cooperate with and assist States and localities in enforcing their quarantine regulations and taking other actions to control the spread of communicable diseases and conditions.³¹ If a State or local authority requests, the Secretary may assist the State or locality in meeting public health emergencies that require Federal support. The assistance provided cannot exceed six months, however. The section also authorizes the Secretary of HHS to accept from State and local authorities any assistance they are able and willing to provide to HHS' enforcement of quarantine regulations and to assist States and their political subdivisions in the prevention and suppression of communicable diseases. Additionally, the Secretary is directed to develop and implement a plan for providing personnel, equipment, medical supplies, and other resources of the Public Health Service and other HHS agencies to control the spread of any communicable disease or condition and to meet other health emergencies or problems.

Title 42, Section 247d of the United States Code authorizes the Secretary, after consultation with various agencies within HHS, including the National Institutes of Health (NIH), the Food and Drug Administration (FDA), and the Centers for Disease Control and Prevention (CDC) to declare a public health emergency with respect to a disease or disorder that presents such an emergency or with respect to emergencies in which the Secretary is otherwise authorized to act without solicitation from a State. Generally, HHS is "otherwise authorized to act" and to assume the lead role in directing and enforcing certain quarantine and other containment measures, when the emergency necessitating such measures affects interstate commerce or foreign lands.

The Federal government has the authority to conduct inspections and implement quarantine and containment measures to control the spread of communicable diseases from foreign countries and across State lines.³² The provisions indicate that the States are primarily responsible for quarantine measures within State borders. Thus, in exercising the powers granted under 42 U.S.C. §264, the Surgeon General is prohibited from authorizing containment measures against individuals within a State, who are not traveling to another State unless certain conditions are included in the regulations. Regulations may provide for the apprehension, examination, and detention of any person believed to be in the communicable stage of a specified disease, who may travel across State lines or infect someone who will so travel. The Surgeon General can only promulgate such regulations with respect to diseases that are specified by the President in Executive Orders.

The provisions authorize the Surgeon General to: suspend imports from foreign countries in which a communicable disease is present and to prevent persons from that country to enter the United States; build and maintain quarantine stations designated by the President; approve quarantine anchorages and stations. Customs and Coast Guard officers must aid in the enforcement of quarantine regulations and consular and medical officers must report to the Surgeon General on the health conditions at the place they are stationed. The Surgeon General is also authorized to apply the quarantine provisions to or otherwise regulate civil air flights and navigation to prevent the spread of communicable diseases.

Provisions of Title 21 and Title 42 discussed below are also examples of authority granted to the Federal government to initiate and conduct interstate containment measures. The discussion highlights that it is not entirely clear when the State or the Federal government assume control in a given situation requiring containment measures and what are the limits of the authority to act.

G.1 Interstate Quarantine and Other Restrictions on Movement and Property/Goods

Title 42, Part 70, of the Code of Federal Regulations details procedures for interstate quarantine, detailing measures to halt the spread of communicable diseases across State or Possession lines. “Communicable diseases” is defined broadly to include:

“illnesses due to infectious agents or their toxic products, which may be transmitted from a reservoir to a susceptible host either directly as from an infected person or animal or indirectly through the agency of an intermediate plant or animal host, vector, or the inanimate environment.”³³

It recognizes that local authorities are primarily responsible for the implementation of quarantines within their areas. For instance, Local health authorities have primary responsibility for issuing travel permits to persons within the State for travel from a designated area and for conducting inspections within their borders. However, the CDC has broad authority to take any actions deemed “reasonable necessary,” in the event the Director determines that local authorities and controls cannot halt the spread of a communicable disease³⁴. CDC areas of responsibility covered by these and other provisions of the Code to prevent the spread of communicable diseases include administration of travel restrictions, notification and regulation of vessels in interstate traffic that may be carrying certain communicable diseases, inspection and decontamination of interstate conveyances, and administration of servicing areas.

Title 21, Parts 1240 and 1250 gives the Food and Drug Administration broad authority to prevent the spread of communicable diseases by way of certain types of interstate traffic. These provisions highlight the mitigation aspect of consequence management as well as the interplay between Federal and State proscriptive authority at the State borders. Part 1240 is primarily concerned with the transmission of communicable diseases through interstate traffic via specified media, *e.g.*, psittacine birds, shellfish, garbage, some food and drink. In the event that the Commissioner of Food and Drugs “determines that the measures taken by health authorities” at the State and local levels are “insufficient” to stop the spread of communicable diseases across State (or Possession) lines, the Commissioner is authorized to conduct a range of actions to halt the proliferation of the disease. The mitigating actions include inspecting and sanitizing interstate vehicles; providing for sanitary servicing areas; receiving from and transmitting to localities notifications about the movement or possible movement of communicable disease on the nation’s interstate highways, and; any other measures necessary to halt the spread of the disease. The FDA has the authority to regulate the drinking waters to prevent the spread or threatened spread of a communicable disease across State lines and ensure potable water for the population. However, if the communicable disease is within the State, the State has the lead role within its borders even if it requests a declaration of emergency from the President to ensure Federal disaster assistance and even if the FDA

determines that the State is unable to control the spread of it. This is because the provisions authorize the FDA to manage and control only movement that might impact interstate commerce.

One can imagine a scenario in which a biological agent, dispersed via a WMD and communicable to man, is introduced into the stream of interstate traffic through any number of carriers, some of which these provisions carry. In such a scenario, one relevant question is whether the FDA actions authorized by these Parts as consequence management may not be sufficient, and whether there are other authorities or programs in place for enhancing such response capabilities? The provisions of Parts 1240 and 1250 do not require that an emergency or major disaster be declared for the relevant Federal Agencies to take action. However, the threshold remains the same: the inability of a State to control the situation and the need for Federal assistance. In this situation, waiting until that point may be dangerous, when isolating the carriers as quickly as possible is of paramount importance in containing the threat? Another issue is the division of authority between the Federal responding agency and the State authorities

G.2 Foreign Quarantine

Title 42, Part 71 of the Code of Federal Regulations identifies the Centers for Disease Control and Prevention (CDC) the lead federal agency for ordering and implementing foreign quarantines, with respect to foreign cargo, animals, and persons entering the United States. Title 42 of the United States Code supplements the provisions of Part 70. The CDC is authorized to detain and inspect carriers at U.S. ports, detain individuals carrying or suspected of carrying specified communicable diseases, including smallpox and cholera, disinfect cargo items, and request and monitor the disinfection of specified pests from aircraft. Other issues covered by the Code include detention and quarantine of various types of cargo, approval of watering points for detained vessels at air- and seaports, and the medical examination and treatment of aliens and refugees.

Aliens arriving at a U.S. port are subject to the examination and foreign quarantine regulations.³⁵ The CDC has primary responsibility for aliens and nonimmigrant visa applicants who, upon medical examination by designated CDC personnel, are found to be carrying a “communicable disease of public health significance.” Among other things, medical examiners designated by the Centers for Disease Control are required to notify either consular officers or the INS if an alien is found to be afflicted with or carrying a “communicable disease of public health significance.” The areas addressed by these provisions are those in which the Federal government has traditionally had primary responsibility: foreign relations and interstate commerce.

H. Organization of State Emergency Management Functions

Preliminarily the research team has focused research efforts on the 30 States that have National Guard WMD Civil Support Teams in place. Findings so far are that, generally the States have enacted a particular code that details the structure and function of emergency management within the State. Other states, however, such as Massachusetts, have less robust authorities in place.

The Commonwealth of Virginia Emergency Services and Disaster Law of 2000³⁶ states the legal authorities and responsibilities regarding emergency management procedures and the planning, preparation, and implementation thereof. The Governor is authorized to declare a state of emergency exists when an actual or threatened disaster threatens the welfare and safety of the people of the Commonwealth. The Commonwealth includes within its definition of disasters both natural and “man-made disaster,” which refers to, among other things, any enemy or foreign nation WMD attack on the United States and other environmental contaminations. In this respect, it should be noted that the 34th WMD Civil Support Team, operating under State authority, would likely be one of the first responders in the event of WMD use.

For both defining the conditions for “major disaster assistance” and articulating the threshold for declaring a “state of emergency” necessitating State-level response action – the Commonwealth’s Act mirrors the language of the Stafford Act, *i.e.*, “of sufficient severity and magnitude to warrant disaster assistance” by the Commonwealth. In fact, major disaster assistance is a verbatim transcription of the same under the Stafford Act. Additionally, the same interests that can trigger emergency Federal response under the Stafford Act – saving and protecting life, health and property, and averting catastrophe - are cited in the Act’s definition of “emergency,” which triggers State-level response.³⁷

The Act is very much focused on the provision of State aid to localities. It references the Federal government directly only in authorizing the Governor to request a major disaster declaration from the President for the purposes of “certifying the need for federal disaster assistance” under the Stafford Act.³⁸ Interestingly, the Act does not authorize the government to request emergency assistance, which means the Governor is, by this Act, solely authorized to access the “major disaster provisions” of the Stafford Act, which is more akin to the consequence management aspect of emergency response.

The Act reorganizes the Commonwealth’s emergency services organizations in the Virginia Department of Emergency Management, designating the Governor as the head of emergency management operations within the State. Though he is directed to appoint a State Coordinator of Emergency Management, the Department reverts to the Governor’s control when he declares an emergency. The Governor is directed to prepare and implement Virginia’s Emergency Operations Plan, which is a “framework” that localities and other entities may use as the basis for drafting more detailed emergency management plans and procedures. In an emergency, the Governor has broad authority, including the discretion to take necessary measures to control goods, services, and other resources administered under State or Federal emergency services programs and to coordinate the use of business and facilities during the State of emergency. Additionally, the government may enter mutual aid agreements with other States and with its localities and institute incident command system guidelines. The Governor is authorized to conduct partial or total evacuations and otherwise restrict movement. The Act gives the Governor’s Executive Orders declaring a state of emergency, and directing the force and effect of law, such that failure to comply with actions is a criminal act.

The State Coordinator of Emergency Management provides incident command system guidelines for state agencies and local emergency response organizations. The Coordinator determines relief and recovery assistance required, maintains liaison with the localities, and coordinates the disaster response actions of Federal, State and volunteer relief agencies, organizations. Thus, the State Coordinator would interface with the Federal Coordinating Officer, as envisioned by the Stafford Act. The Act also sets out guidelines for the “political subdivisions,” or localities, within the Commonwealth. Localities may also create and maintain their own emergency management agency for local disaster preparedness, mitigation, response and recovery. The local agency may declare a “local emergency” and manage the emergency response actions only within the locality. The Act authorizes the localities to bypass legal formalities, excepting constitutional formalities, related to performing public work, entering into contracts, incurring obligations, purchasing supplies and materials, and other functions necessary for an effective response.

IV. Summary

Many of the issues identified in this preliminary report center upon two primary factors, the interaction between departments and agencies, and an evolving emergency response timeline. The roles and responsibilities and interaction between departments and agencies often overlap. Many of the departments and agencies involved in consequence management perform similar functions as part of their CM response. For example, both the Department of Defense and the Department of Energy respond in the event of a nuclear or radiological related emergency. Similarly, both the Department of Defense and

the Health and Human Services Agency respond in the event of a chemical and biological incident. Sorting out the responsibilities and the lines of demarcation between the “supported” and the “supporting” organization becomes even more complex when State agencies are thrown into the mix. While the States have primacy in consequence management response, their area of responsibility and authority become less clear when multiple states are affected by the same event, or when the event spills over U.S. international borders. Different agencies and the primacy of those agencies may vary depending upon the location and circumstances of the event.

The evolving emergency response timeline is another area that raises coordination and control issues between departments and agencies. Consequence management is but one phase along a continuum of response in preparation for and reaction to a catastrophic event. The phase prior to the event is characterized by a period of public health and safety maintenance, (e.g., workplace and public health monitoring, and environmental protection) as well as consequence management preparations (e.g., training and exercises). The introduction of the catastrophic event initiates the crisis management phase where the Federal Government has primary authority to respond to acts of terrorism per PDD-39. Crisis management will transition to consequence management, where the States have primary response authority. Roles and responsibilities change for affected departments and agencies during consequence management and a new set of “supporting” and “supported” organizations are established. At some time after the event consequence management will transition back to a period of public health and safety maintenance, where once again concerns such as worker safety and environmental protection will raise to the forefront. However, while the emergency response timeline is easy to describe it is difficult, with the exception of the catastrophic event, to identify the transition points and the resulting changing roles and responsibilities of the affected agencies.

These two general areas, department/agency interaction and the sequence of events during the emergency response timeline, warrant further attention and elucidation by the subsequent legal seminars. In addition to those issues identified throughout this report the seminars may elect to address the following:

- Are quarantine authorities at the Federal level sufficient to deal with the range of possible situations in a domestic WMD incident?
- Given that the law enforcement capacity of the National Guard is limited when it is a Federalized service, what are the determinants for whether the National Guard should be federalized in a particular crisis?
- For biological response to terrorism: has the law adequately provided for the surge capacity that would be necessary to deal with a mass-scale biological catastrophe?
- Are current legal authorities sufficient to cover a situation in which civil law enforcement authorities are incapable of maintaining law and order?
- What is the best way to go about refining the presentation of the variety of legal materials so that their existence and usefulness is made more apparent?
- Are legal tools in place for containment, quarantine and mitigation in the event of a biological attack? What if the agent has a long incubation period?

- At what stage is the transition from consequence management activities to pre-emergency public health and safety functions? Will it be different depending on the type of WMD event involved?

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¹ 3 U.S.C. §301 (2000)

² Presidential Decision Directive 39, “U.S. Policy on Counterterrorism,” June 21, 1995, White House Press Release, found at <http://www.ojp.usdoj.gov/odp/docs/pdd39.htm>.

³ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.*, as amended by Public L. No. 106-390 (2000) (hereinafter The Stafford Act)

⁴ The Stafford Act, §5170

⁵ The Stafford Act, §5191

⁶ See, *e.g.*, discussion of Florida’s Emergency Management Act.

⁷ The Stafford Act, §5191(a)

⁸ 50 U.S.C. §1601, *et seq.*

⁹ See The Stafford Act, §§ 5170 and 5191. An additional exception to the Act is the President’s authority to order into active duty certain members of a reserve component without a declaration of war or national emergency, under 10 U.S.C. §12302.

¹⁰ Executive Order 12656, “Assignment of Emergency Preparedness Responsibilities,” 53 F.R. 47491, November 18, 1988. See also Executive Order 12148, “Federal Emergency Management”, which transfers to FEMA responsibility for coordinating Federal response to civil emergencies at the regional and national level.

¹¹ Executive Order Establishing the Office of Homeland Security, October 8, 2001, White House Press Release.

¹² Black’s Law Dictionary, 6th Ed.

¹³ United States Constitution, article II, §3 and article I, §8, respectively.; 32 C.F.R. §501.4

¹⁴ 50 U.S.C. §2301, *et seq.* (2000)

¹⁵ 40 C.F.R. 300.3.

¹⁶ Executive Order 12777 (October 18, 1995) amends Executive Order 12580

¹⁷ 40 C.F.R. 300.110

¹⁸ 18 U.S.C. §1835 (1999).

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²⁰ *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975)

²¹ *United States v. Jaramillo*, 380 F. Supp. 1375, 1381 (D. Neb. 1974), appeal dismissed 510 F.2d 808 (8th Cir. 1975).

²² *United States v. MacArthur*, 419 F. Supp. 186 (D.N.D. 1975) *aff’d sub nom.*, *United States v. Red Feather*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied sub nom.*, *Casper v. United States*, 430 U.S. 970 (1977).

²³ *United States v. Yunis*, 681 F. Supp. 891 (D.D.C. 1988)

²⁴ 10 U.S.C. §331, *et seq.* (2000)

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²⁸ DoDD 3025.1, “Military Support to Civil Authorities,” January 15, 1993

²⁹ CJCSI 3125.1, “Military Assistance to Domestic Consequence Management Operations in Response to a Chemical, Biological, Radiological, Nuclear, or High-Yield Explosive Situation,” 3 August 2001.

³⁰ To date, the Directive has not been revised in light of the Secretary of Defense’s guidance.

³¹ 42 U.S.C. §243 (1999), “General grant of authority for cooperation.”

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- ³² 42 U.S.C. §264, *et seq.*, (1999)
³³ Interstate Quarantine, 42 C.F.R. 70 (2000)
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³⁶ 44 Va. Code Ann. §§146.13-146.40 (2000)
³⁷ 44 Va. Code 146.16
³⁸ 44 Va. Code 146.17