

FLASH Newsletter



Volume 2
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FEMA LAW ASSOCIATES, PLLC

Latest FEMA Law Developments At a Glance

FEMA Law Associates is a private law firm that specializes in Emergency Management and Homeland Security issues. For more information on our services please visit our website at www.fema-law.com.

Message From the President of FEMA Law Associates

This Newsletter is the fifth in our series summarizing recent amendments to Federal emergency management statutes. This issue principally discusses provisions in the John Warner Defense Authorization Act for Fiscal Year 2007 (PL 109-364, October 17, 2006, 120 Stat. 2083). Previous issues of our Newsletter can be obtained on the FEMA Law website, www.fema-law.com (click on "e-Newsletters"). – *Ernie Abbott*

Warner Defense Authorization Act

The John Warner Defense Authorization Act for Fiscal Year 2007 contains three sections applicable to major disasters and other emergencies.

Sec. 833. Use of Federal Supply Schedules by State and Local Governments for Goods and Services for Recovery from Natural Disasters, Terrorism, or Nuclear, Biological, Chemical, or Radiological Attack. This provision (now codified at 40 USC 502) allows State and local governments to use Federal supply schedules in the event of a major disaster under the Stafford Act. This section is to be implemented in a two-step process. First, the Secretary of DHS is to determine what goods and services are used "to facilitate recovery from a major disaster declared by the President... or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack." Then the FEMA Administrator may "provide for the use of the [designated] Federal supply schedules... by State or local government." The new law is silent as to how it interacts with new statutory requirements enacted two weeks earlier in the PKEMPRA (See FEMA Flash Newsletter Issue 5) directing the Administrator to encourage States to enter into pre-disaster contracts. A natural reading of the provision is that Federal supply schedule contracts – which are created through a lengthy process designed to assure "reasonable" prices – can serve as 'pre-disaster' contracts available to State and local governments without further competitive processes. However, it is not yet known whether FEMA will adopt this interpretation and deem the selection of Federal supply schedule contracts as satisfying the normal requirement for competitive procurement.

Sec. 1076. Use of the Armed Forces in Major Public Emergencies.

Background. In the aftermath of Hurricane Katrina, some observers asserted that the Federal government should have 'taken over' and placed the military "in charge" of immediate response – including response by state and local governments. The Stafford Act has long provided that federal response efforts should be "in support of" State and local response efforts – but has also authorized unilateral Federal response action (in declared emergencies and major disasters) when "essential to meeting immediate threats to life and property." The Stafford Act has also long authorized the President to direct "any federal agency" – including the Department of Defense – to perform virtually any disaster response mission. Indeed, the Stafford Act even allows the President to use the military (on request of a Governor) *before* a declaration. However, there were important restrictions on the use of military. The Posse Comitatus Act, enacted in reaction to Federal use of the military during post-Civil War Reconstruction, prohibited the use of the army for law enforcement except when authorized by specific statute. One such statute was the Insurrection Act, codified at 10 USC 331-335. This Insurrection Act authorized the President, on the request of the State legislature (or Governor where the legislature cannot be convened) to use the military to "order insurgents to disperse and retire peaceably to their abodes." The President could also, without the request of a state, direct the military and the National Guard to:

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“take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it -

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.”

Section 1076(a): The John Warner Defense Authorization Act amended the quoted section (10 USC § 333), which is renamed **Major Public Emergencies; Interference with State and Federal Law**, to allow the President to employ armed forces, including the National Guard in Federal Service, “to restore public order and enforce the laws when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, the President determines that “domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order.” However, it is unclear how much new authority is provided by this section, since the President can only use this authority if it results in the same condition specified in the prior law: that is, the domestic violence “(A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. The President must also notify Congress of the determination as soon as practicable and every 14 days thereafter during the duration of the exercise of that authority. Nonetheless, The National Governors Association has expressed concern with this apparent expansion of Federal authority over the States and it may be revisited in the current Congress.

Section 1076(b): The John Warner Defense Authorization Act also added a curious provision to Title 10: new **Sec. 2567. Supplies, Services, and Equipment: Provision in Major Public Emergencies**. This section allows the President to direct the Secretary of Defense to provide “supplies, services, and equipment” to persons affected by a “major disaster, epidemic, or other serious public health emergency, terrorist attack or incident” in which the President exercises the new authority in 10 USC 333. These supplies and services are defined as “food, water, utilities, bedding, transportation, tentage, search and rescue, medical care, minor repairs, the removal of debris, and other assistance necessary for the immediate preservation of life and property.” The curious aspect of this provision is that it appears unnecessary; the President could have so directed the Secretary of Defense under the Stafford Act (after declaring an emergency or major disaster). The new provision does state that the supply of services in this situation “shall not be subject to the provisions of section 403(c) of the Robert T. Stafford Act” – presumably because Section 403(c) is triggered by a Gubernatorial request. But Section 403(c) only applies in situations where the President has not declared an emergency or major disaster. The Stafford Act authorized the President to direct any agency (including the Department of Defense) to provide supplies, equipment, facilities, and personnel in support of emergency missions before this amendment – and it still does so.

Sec. 1406. Database of Emergency Response Capabilities – this provision designates the Secretary of Defense to maintain a database of response capabilities, which shall include “the types of emergency response capabilities each State’s National Guard... may be able to provide in response to a domestic natural or manmade disaster, both to their home States and under State-to-State mutual assistance agreements.” The database will also include the types of emergency response capabilities to be provided by the Department of Defense.

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Firearms Amendment. Sec. 577 of the Department of Homeland Security Appropriations Act (PL 109-295, October 4, 2006, 120 Stat 1355) added a new section to the Stafford Act: (**Sec. 706 Firearms Policies**) broadly prohibiting government officials (including Federal officers or employees, the military uniformed services, and State or local officials receiving Federal funds) from temporarily or permanently seizing, confiscating, requiring registration, or barring possession of otherwise lawfully held firearms during a major disaster or emergency. (Temporary surrender of firearms as a condition to entry to a mode of public transportation is permitted.) The scope of the section is surprising: a person otherwise authorized to carry firearms “under Federal, State or local law” cannot be prohibited from carrying firearms solely because such person is “operating under the direction, control, or supervision of a Federal agency in support of relief from the major disaster or emergency.” This provision may make it very difficult for incident managers to adopt a consistent policy on firearms when responders are drawn from different states and different State and Federal agencies. Note that this provision applies even in situations so out-of-control that the President has directed the military, under the new authority of 10 USC §333 described above, to “restore public order and enforce laws” to quell domestic violence.

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