

FLASH Newsletter

FEMA LAW ASSOCIATES, PLLC
Latest FEMA Law Developments At a Glance



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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

This is another in our series of newsletters on legal developments in emergency management law. Previous issues of our Newsletter can be obtained on the FEMA Law website, www.fema-law.com (click on “e-Newsletters”).

January brought several developments in emergency management law. This newsletter focuses on the recently passed Emergency Disaster Assistance Fraud Penalty Enhancement Act; the National Defense Authorization Act 2008; and repeal of the Insurrection Act.

– Ernie Abbott

Repeal of Change to the Insurrection Act

As noted in our Issue No. 7, in September 2006 Congress included, in the 2007 Defense Authorization Act, an amendment to the Insurrection Act that arguably broadened the President’s authority – absent an invitation by the Governor of a state – to deploy troops and enforce the laws during a natural disaster, epidemic, serious public health emergency, terrorist attack, or other condition, “when the President determines that the authorities of the state are incapable of maintaining public order.” This change – once discovered – was immediately protested by the National Governor’s Association and their vehement efforts led to repeal of the amendment. The repeal was included in the 2008 Defense Authorization Act, which was finally signed into law on January 28, 2008 as Section 1068 of Public Law 110-181.

Readers of our Issue No. 7 will also recall that it was not clear that the 2006 amendment actually changed the President’s authority to use the military to enforce the laws of states; even the amended version required the President to find that the state, due to domestic violence, cannot enforce the laws or protect the Constitutional rights of its citizens. However, the extraordinary opposition which this provision provoked among Governors certainly demonstrates that *they* were concerned that its existence might encourage Presidents to invoke the Insurrection Act more freely. And the speed with which the Congress repealed the provision should cause any President to pause before asserting that a major disaster or emergency provides a basis for taking military control over a State. ■

Fraud Enhancement Penalty Act

On January 7, 2008, President Bush signed into law the Emergency and Disaster Assistance Fraud Penalty Enhancement Act (P.L. 110-179; 121 State. 2556). Stimulated by reports of significant fraud by recipients of federal disaster assistance after Hurricane Katrina, Congress passed this law to create a new federal crime: “Fraud in connection with major disaster or emergency.” Anyone who (1) falsifies, conceals, or covers up by any trick, scheme, or device any material fact or (2) makes any materially false, fictitious, or fraudulent statement or representation...” can be convicted of this fraud if the activities involve either any Stafford Act assistance or any prime or sub-contract providing services to or for the United States related to any emergency or disaster declaration. The new crime is a felony punishable by up to 30 years in prison – 10 years longer than the 20 year prison term specified under the generic fraud statute. The Act also imposes enhanced penalties for “mail fraud” and for “wire, radio, or television fraud” if it occurs “in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a Presidentially declared major disaster or emergency.”

These criminal penalties supplement the Stafford Act’s civil penalties for “misuse of funds” (one and a half times the misapplied amount) and for “knowingly violating any order or regulation issued under the” Stafford Act (not more than \$5,000 for each violation). ■

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Planning Requirement assigned to the Department of Defense

Also included in the National Defense Authorization Act 2008 was a new requirement, in Section 1814, that the Secretary of Defense, not later than June 1, 2008, submit to Congress a plan for coordinating the use of the National Guard and members of the Armed Forces on active duty when responding to natural disasters, acts of terrorism, and other man-made disasters as identified in the

15 National Planning Scenarios used by the Department of Homeland Security to define our National Preparedness Goals: Nuclear detonation; biological attack; biological disease outbreak/pandemic flu; the plague; chemical attack-nerve agent; chemical attack-toxic industrial chemicals; chemical attack-blister agent; chemical attack-chlorine tank explosion; major hurricane; major earthquake; radiological attack-radiological dispersal device; explosives attack-bombing using improvised explosive device; biological attack-food contamination; biological attack-foreign animal disease and cyber attack.

Development of this plan will require that the Secretary determine whether, in any of these scenarios, it might be appropriate to federalize the National Guard rather than leaving them under the command of a Governor. (Recall that in the immediate aftermath of Hurricane Katrina, President Bush sought the consent of Governor Blanco for the federalization of Louisiana's National Guard.) Federalization, of course would convert the Guard from a state militia with law enforcement power into federal troops generally prohibited by the Posse Comitatus Act from law enforcement duty – unless of course, the President invokes the Insurrection Act despite the Congressional repeal discussed above. ■

National Response Framework Issued: Effective March 22, 2008

On January 22, 2008, FEMA/DHS released the National Response Framework and a number of its annexes; FEMA published the notice of its release in the Federal Register on January 28 (73 FR 4887-02), and advised that the NRF will be effective on March 22, 2008. The Framework itself and a vast treasury of annexes and related resources is available at www.fema.gov/nrf. Although much controversy had surrounded the release of a draft NRF last summer, little controversy surrounded the release of the final version. Nonetheless, the NRF continues to require that the Principal Federal Official at a disaster event can never be the Federal Coordinating Officer at a disaster event. Confusion among the roles of these officials led to confusion during Hurricane Katrina – and Congressional concern was so great that, in the Post Katrina Emergency Management Reform Act, the “PFO” was prohibited from exercising any operational authority over the “FCO.” It remains to be seen how the PFO/FCO dichotomy will work in an actual event. The NRF does eliminate another major source of confusion during the Hurricane Katrina response: the Secretary of DHS will no longer declare a response incident to be an “Incident of National Significance.” ■

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