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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

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Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

This letter is in response to the Office of Management and Budget (OMB) request for the views of the Department of Justice regarding a Federal Emergency Management Agency (FEMA) draft bill entitled "Disaster Relief Act Amendments of 1985." That draft bill proposes amendments to the Disaster Relief Act of 1974, 42 U.S.C. §5122 et seq. ("the Act"). The Department of Justice recommends against submission of this legislation to the Congress absent significant further revision. Whether this legislation should be submitted to the Congress if revised as suggested below involves issues of public policy as to which we defer to those agencies more directly concerned with those issues.

The draft bill purports to expand the coverage of the Disaster Relief Act of 1974 through both the revision of the definition of emergencies covered by the Act and the addition of new federal assistance mechanisms. While the bill is "agency neutral" -- vesting all authority in the President or federal coordinating officer (who is appointed by and represents the President), it is expressly envisioned by FEMA, in its analysis of the proposed legislation, that the President's authority will be delegated to FEMA. After enactment of the legislation, FEMA intends to propose revisions to Executive Order (E.O.) 12148, which Executive Order includes delegations of the President's authority under the current Act to FEMA. FEMA's stated intent in proposing the bill is to cure uncertainty regarding coverage by the existing Act of non-natural disasters, such as mass immigration emergencies. The proposed language, however, reaches significantly beyond that purpose, to any "occasion or instance in which ... federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property, public health and safety or to lessen or avert the threat of a catastrophe in any part of the United States."

The Department believes that the proposed amendments far exceed any revisions necessitated by the Federal Government's experience with the Act which, as described in the proposed FEMA

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report, "has functioned well for eleven years." Further, several provisions of this draft bill are likely to adversely affect future disaster preparedness and response efforts.

I. Conflict With Provisions of the Comprehensive Crime Control Act of 1984

The Department has serious concerns regarding this draft bill's coverage of law enforcement emergencies and law enforcement emergency assistance. The Comprehensive Crime Control Act of 1984 (P.L. 98-473, Title II, Secs. 609 M-Q) establishes a mechanism for the chief executive of any state to seek "Federal law enforcement assistance" ("funds, equipment, training, intelligence information, and personnel") by submitting a request to the Attorney General in instances where "such assistance is necessary to provide an adequate response to a law enforcement emergency." "Law enforcement emergency" is defined as "an uncommon situation which requires law enforcement, which is or threatens to become of serious or epidemic proportions, and with respect to which state and local resources are inadequate to protect the lives and property of citizens or to enforce the criminal law ..." Coverage of crowd control planning for general public safety projects and of law enforcement at scheduled public events is expressly excluded.

The draft bill, by virtue of its broader coverage, endangers the desired impact of the Crime Control Act. Situations, such as "scheduled public events, including political conventions and sports events" were intentionally excluded from coverage by the Crime Control Act yet could be reached, at planning and response stages, by the proposed amendments. Similarly, the Crime Control Act imposes restrictions upon the nature of assistance which the Federal Government can provide (such as limiting investigative activities to areas of federal jurisdiction and limiting funding to costs that would not otherwise be available from the state or local governments), which restrictions do not exist in the draft bill. As a result, it is envisioned that this proposed legislation, if enacted, may be used both to avoid existing limitations in covered emergencies and to obtain federal law enforcement assistance in emergencies for which such assistance has been intentionally excluded by the Crime Control Act.

II. Coverage of "Non-Natural Emergencies"

The Disaster Relief Act currently includes a definition of "emergency" ^{1/} and "major disaster." ^{2/} A Presidential

1/ The Act defines an emergency as:

any hurricane, tornado, storm, flood, high water, wind
(Footnote Continued)



declaration of either an emergency or a major disaster triggers a number of substantive authorities under the Act, including the authority of the President to

direct any federal agency, with or without reimbursement, to utilize its available personnel, equipment, supplies, facilities, and other resources . . . in support of State and local disaster assistance efforts.

42 U.S.C. §5142. The Act also specifically authorizes all federal agencies, "on the direction of the President," to provide a wide range of services in major disasters or emergencies. 42 U.S.C. §5146.

FEMA's proposal would make several changes in that statutory scheme. First, the definition of "major disaster" would be specifically limited to naturally caused disasters or fires, explosions, and floods, irrespective of cause. A Presidential declaration of a "major disaster" would trigger authorities of the President and of federal agencies to engage in both emergency and permanent restorative work, for the most part consistent with the existing authorities in the Disaster Relief Act. In Presidentially declared "emergencies," authority would be limited to what FEMA refers to as "emergency" work -- i.e., assistance to save lives and protect property, public health and safety and to lessen or avert the threat of a catastrophe." As far as we can determine, this authority would be provided primarily by §502 of the draft bill, which would authorize the President to

(Footnote Continued)

driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which requires federal emergency assistance to supplement state and local efforts to save lives and protect property, public health and safety or to avert or lessen the threat of a disaster.

2/ A "major disaster" is any of the events listed in the definition of "emergency," supra n.1.,

which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter, above and beyond emergency services by the Federal Government, 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.

42 U.S.C. §5122(2).

- (a) direct any federal agency . . . to utilize its authorities and the resources granted to it under other Acts . . . to save lives and to protect property, public health and safety or to lessen or avert the threat of a catastrophe;
- (b) coordinate all federal agencies and voluntary relief or disaster assistance organizations providing emergency assistance, and coordinate emergency assistance with State and local officials; and
- (c) provide technical and advisory assistance to affected state and local governments

Section 503 of the bill would additionally authorize the President, "in an emergency, when the Federal assistance provided pursuant to Section 502 of this title is inadequate," to "provide assistance to save lives and protect property, public health and safety, or to lessen or avert the threat of a catastrophe."

The transmittal letter and section-by-section analysis provided by FEMA explain that the new definition of "emergency" and "major disaster" are intended to meet concerns expressed by some members of Congress, in the wake of Presidential declarations of the Cuban immigration emergency in 1980 and the Love Canal emergencies of 1978 and 1980, about the correct interpretation of the Act and its applicability to non-natural disasters. FEMA recites that "[s]ome Members of Congress have objected to the use of the variety of disaster assistance authorities, which have been developed over the years primarily to address natural disasters, to respond to non-natural events."

Therefore, FEMA seeks to limit assistance available for "major disasters" to naturally occurring catastrophes, plus fire, explosions, and floods. Non-natural catastrophes (with the exception of fires, explosions, and floods) would qualify for more limited assistance. FEMA states that "[t]he combined effect of the changes to the definition of 'major disaster' and 'emergency,' and the addition of the new Title V, Federal Emergency Assistance Programs, would be to establish separate authority for providing supplemental federal assistance in two distinct types of situations."

The Department feels that the policy implications of limiting the authorities available in most non-natural catastrophes to emergency and technical assistance and of limiting the availability of more expansive authorities primarily to natural disasters have not been adequately explored. Further, the means which FEMA proposes to achieve that result raise serious concerns.



We do not believe it is advisable to modify the definition of "emergency" contained in the Disaster Relief Act. FEMA has suggested that the new definition would allow FEMA "to respond to a much broader range of catastrophes where Federal emergency supplemental assistance is required," and has cited Congressional concern over the "interpretation" of the definition as it applies to non-natural emergencies. In the past the Department has reviewed the definition of emergency in the Disaster Relief Act at some length, and has concluded that it covers emergencies arising from both man-made and natural disasters determined by the President to require federal emergency assistance within the terms of the Act. See Memorandum for Rudolph Giuliani, Associate Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, "Use of Disaster Relief Act of 1974, 42 U.S.C. §5122 et seq." (Nov. 19, 1982). This interpretation is consistent with the legislative history of the Act and its amendments, and with FEMA's consistent administrative practice, in which Congress has largely acquiesced. Therefore, we do not believe any amendment of the definition of "emergency" is necessary to establish or to clarify that the authorities available in cases of emergencies are available in man-made, as well as natural, emergencies. Moreover, there is a risk in proposing legislation on that basis. If Congress rejects an amendment proposed on that basis, the argument could subsequently be made that Congress thereby made clear a more limited interpretation of the Act. Although such subsequent Congressional actions or statements are not necessarily definitive or persuasive, they would unnecessarily cloud the availability of the current authority. We, therefore, oppose the proposed modification in the definition of "emergency."

We are also concerned that the authorities available to federal agencies to act in the event of a Presidentially declared emergency would be severely, and perhaps unintentionally, limited by FEMA's proposal. As noted above, §502 of FEMA's proposal would authorize the President to "direct any Federal agency . . . to utilize its authorities and the resources granted to it under other acts . . ." The phrase "granted to it under other acts" is not included in the current authority available to the President under 42 U.S.C. §5142, and its inclusion in this draft raises the question whether it would limit the authority of federal agencies, in Presidentially declared emergencies, to whatever authority is already available to that agency under its existing statutes. We believe this could be a significant limitation. For example, we have advised the Veterans Administration, which is authorized by Title 38 to provide medical care to veterans, that it may participate in the National Disaster Medical System by planning to provide service to non-veterans, even though it would not have such authority under its own statutes. See Memorandum for Harry N. Walters, Administrator, Veterans Administration, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, "Authority of the Veterans Administration to Participate in the National Disaster Medical System" (July 6, 1984). Our conclusion



was based on the authority provided the President under the Disaster Relief Act in 42 U.S.C. §5142, the authority in §5146 of that act for agencies to provide aid in times of emergencies and major disasters and separate authority in the Federal Civil Defense Act of 1950. We are concerned that the language of proposed §502 could undercut any such conclusion if it were to be enacted, particularly as the proposed bill contains no section parallel to 42 U.S.C. §5146, which specifically authorizes federal agencies to act in times of emergencies (or major disasters) and thereby removes any doubt as to their authority.

III. Lack of Adherence to the Principle of "Several" Substantive Agency Responsibility for Emergency Preparedness

We are also disturbed about the proposed creation of FEMA law enforcement planning, operational, or oversight authority in the draft bill. In a letter dated August 2, 1984, to Robert C. McFarlane, Assistant to the President for National Security Affairs, former Attorney General William French Smith objected to a FEMA-authored draft Executive Order assigning FEMA a role which he suggested "exceeds its proper function as a coordinating agency for emergency preparedness." In particular, he opposed the "expansion of the definition of severe emergencies to encompass 'routine' domestic law enforcement emergencies." The instant draft legislation exhibits the same flaws. An expansion of FEMA's delegated authority will result from an expanded definition of "emergencies," which definition could encompass numerous "routine" law enforcement emergencies.

The Department, in an April 7, 1983, letter from Robert A. McConnell, former Assistant Attorney General of the Office of Legislative Affairs, to OMB regarding an earlier version of this draft bill, suggested that the "great discretion" accorded to the Director of FEMA "conceivably could conflict with the Department's law enforcement authority." Our experience since April, 1983, with FEMA coordination initiatives for federal law enforcement resources suggests an even greater need for the clarification "to ensure that existing law enforcement authority of the

3/ Section 503 may have been intended by FEMA as a catch-all provision, in that it authorizes the President to "provide assistance" if federal assistance provided pursuant to §502 is inadequate. FEMA has not provided any explanation of this section in its explanatory materials, and we are, therefore, unclear as to its intended effect. In any event, we would not read this section as authorizing the President to direct federal agencies to provide assistance that is not otherwise within the statutory authority of those agencies, but rather only as authorizing the President to use resources he may have available, whatever those may be.



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Department remains unchanged" that Mr. McConnell requested in that April, 1983, letter.

The proposal that E.O. 12148 be revised following the enactment of the draft bill is also a matter of concern. E.O. 12148 mandates: "Assignments of civil emergency functions shall, whenever possible, be based on extensions (under emergency conditions) of the regular missions of the Executive agencies." It requires policies which are "founded on the use of existing organizations, resources, and systems to the maximum extent practicable." It was that Order which former Attorney General Smith relied upon in criticizing a series of FEMA actions and proposed authorities which involved FEMA control of the "several agencies' substantive functions. As a result of that objection, the FEMA-authored draft revisions of E.O. 11490 have never been sent to the President. Accordingly, it seems unwise to submit legislation to the Congress, which legislation will create an immediate need for revision of a related Executive Order when it is apparent that interagency conflicts will delay that Executive Order revision process. In the absence of a revised version of E.O. 12148, the existing version will be relied upon, thus delegating to FEMA virtually all of the President's powers in this vastly expanded draft emergency legislation.

IV. Adverse Intergovernmental Relations and Fiscal Impact

The expanded coverage of the proposed legislation will create a basis for an increased volume of requests for "emergency" (using the new definition) federal assistance. While the broader coverage may permit desirable assistance in some situations, it will certainly result in numerous additional instances in which the President must refuse assistance (due to the scarcity of federal resources). It is not clear that the benefit of a few additional instances of approved assistance will offset the damage to intergovernmental relations caused by a significantly increased volume of refused requests. Further, there remains a risk that various factors will result in the approval of a greater volume of aid (as FEMA has suggested will occur) and thus adversely affect the Administration's goal of reducing federal subsidies to state and local governments. Finally, the administrative processing burden upon the Federal Government will certainly increase.

V. Absence of a Precise Standard for Civil Recovery Actions

Proposed Section 317 would create a civil recovery action under which the United States could recover from third parties who cause disasters the amount of federal assistance provided under the Act:

The Attorney General of the United States is authorized to institute actions . . . against

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any party whose acts or omissions may in any way have caused or contributed to the damage or hardship for which federal assistance is provided pursuant to this Act. Upon the showing that an emergency or major disaster or the associated damage or hardship was caused in whole or in part by an act or omission of such party, then such party shall be liable to the United States for the full amount of federal expenditures made to alleviate the suffering or damage attributable to such act or omission.

There can be little doubt that an express recovery provision such as proposed Section 317 would be a useful tool for enforcing the terms of the disaster relief program. The Department's recent experience with enforcing the National Flood Insurance Act, which lacks such a recovery provision, has made us acutely aware of the government's need to be able to sue directly under a United States statute. See United States v. Parish of St. Bernard, 756 F.2d 1116 (5th Cir. 1985). However, we are concerned that Section 317 is drafted so as to extend unnecessarily the scope of the third party liability to the United States, and we believe that the provision proposed by FEMA could be drafted with greater precision. Specifically, we recommend that the Administration decide whether to propose to Congress a standard of liability based upon negligence or upon strict liability, and that Section 317 be redrafted to impose that standard clearly.

As it now stands, Section 317 can be read to impose a very broad form of strict liability on those who cause disasters requiring the expenditure of federal funds. For example, an individual whose removal of a levee causes extensive flood damage might be liable for millions of dollars in federal disaster expenditures despite the fact that he consulted engineers or local flood control authorities, or even obtained the permission of FEMA itself. This would represent a distinct departure from most federal recovery statutes, which in general impose a negligence standard of liability on third party tortfeasors. Compare 38 U.S.C. §629, 42 U.S.C. §2651 (United States subrogated to claims of recipients of veterans' benefits and medical care).

Whether a negligence or strict liability standard is appropriate is a policy question as to which we defer to other agencies; nevertheless, we believe that in either case the statute could benefit from more precise drafting, especially given the potentially broad expansion of third party liability. We can discern no advantage in deferring to the courts on a policy decision that could easily be made now by the responsible executive agencies. Moreover, the absence of a precise standard in the legislation would inevitably generate more litigation for interpretation of the liability provision, resulting in a drain on litigative resources.



VI. Miscellaneous

The draft bill changes many separate provisions of law. Examination of the bill would be greatly facilitated if the standard analysis were prepared indicating which language would be inserted, which deleted, and how the Act would read if the bill were passed. We requested from FEMA a copy of the Act with the proposed amendments inserted and were told that no such document exists. We believe that legislation of this importance merits such an analysis, for the use of both the drafting agency and all commenting agencies.

The following typographical errors are also noted in the draft bill: at page 5, line 4, the word "emergency" is misspelled; and at page 7, line 7, the reference to 41 U.S.C. should be 42 U.S.C.

In conclusion, the Department of Justice recommends against submission of this legislation to the Congress unless the following actions are taken:

- 1) The draft bill is revised to expressly indicate that the provisions of the Comprehensive Crime Control Act of 1984 relating to "emergency federal law enforcement assistance" and other emergency assistance authorities remain the appropriate mechanisms for requesting and receiving federal law enforcement assistance and that this draft legislation may not be used to provide "federal law enforcement assistance" (as that term is defined in the Comprehensive Crime Control Act of 1984).
- 2) The draft bill is revised to recognize the Attorney General's substantive law enforcement management role and to provide the President with a means of diverting disaster relief funding required for law enforcement assistance in declared emergencies to the existing Department of Justice structure established by the Crime Control Act. Consideration should also be given to similar provisions recognizing the substantive roles of other agencies.
- 3) The transmittal expressly acknowledges that revisions in the definitions of "emergency" and "major disaster" are not necessitated by legal considerations. If FEMA and other concerned agencies believe that programmatic and policy considerations justify the proposed revision of those definitions, we defer to that judgment. However, it should be made clear, both within the Administration and to the Congress, that the revisions are being proposed because of those programmatic and policy concerns, and not because of any legal question about the scope of the current definitions. Further, FEMA's proposed §502 should be revised to delete the phrase "granted to it under other acts." We would prefer, for the sake of consistency and interpretation, that the same language be used as is now used in §5142, and that an additional section, modelled on §5146, be added to clarify the

scope of authority available to federal agencies in times of emergencies.

4) Proposed revisions of E.O. 12148 are approved by affected Executive Branch agencies for submission to the President before the draft legislation is submitted to the Congress, to ensure that the President will be given the opportunity to sign the amended Executive Order when the amended Act is signed.

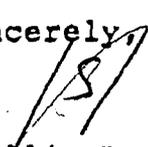
5) The liability standard provision of the draft bill is more precisely drafted, to avoid unnecessary litigation regarding the interpretation of the liability provisions.

6) The two typographical errors cited above are corrected and a "line in, line out" version of the proposed Act is prepared and provided for comment to all affected agencies.

7) The proposed report and other transmittal documents are revised to reflect the "agency neutral" nature of the draft bill. The exercise of the right of the President to delegate powers should not be prejudged.

The Department of Justice objects to the submission of this legislation unless amended as suggested. If the actions described above are taken, the Department of Justice defers to the Department of the Treasury, National Security Council staff, Office of Management and Budget and other appropriate agencies regarding issues of public policy raised by the draft bill. In particular, the wisdom of distinguishing between natural and "non-natural" emergencies, the reduction of Presidential authority, the potential impact upon intergovernmental relations, consistency with existing Presidential "several" agency delegations of responsibility, and the impact upon the Administration's fiscal program regarding federal assistance to state and local governments should be subject to additional review.

Sincerely,


Phillip D. Brady, Acting
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs