



Federal Emergency Management Agency

Washington, D.C. 20472

MAR 8 1999

MEMORANDUM FOR: Robert Damus
General Counsel
Office of Management and Budget

Peter Rundlet
Office of White House Counsel

FROM: Ernest B. Abbott
General Counsel
Federal Emergency Management Agency

SUBJECT: Authorities Available To FEMA For A Y2K Disruption
In The United States And Abroad

In your memorandum of February 18, 1999, you asked me to indicate what statutory authorities FEMA could use in responding to a Y2k disruption in the United States and abroad, and whether FEMA sees a need for additional authority to deal with the Y2k problem.

FEMA has broad authority to coordinate and direct Federal Y2k domestic emergency preparedness and response efforts that are necessary or appropriate "to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe." As is the case in all domestic disasters and emergencies, the first emergency response actions caused by Y2K disruptions will be from State and local governments. FEMA's role – and that of the Federal government under FEMA's principal emergency authorities – will be to support, not supplant, state and local emergency response efforts, and will be triggered by Gubernatorial requests to the President for declarations of a state of emergency.¹ FEMA's authorities with respect to Y2k are limited to emergency preparedness and response; FEMA does not have authority to provide disaster relief funds to public or non-profit entities, or to *private* individuals or businesses, to allow them to rebuild computer systems or other infrastructure that might be damaged by a Y2k event. FEMA has virtually no direct authority to prepare for or respond to Y2k disruptions overseas.

¹ 42 U.S.C. § 5192(b).

DOMESTIC AUTHORITIES

I. The Robert T. Stafford Disaster Relief and Emergency Assistance Act.

A. Emergency Provisions.

The Robert C. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) is the principal authority under which FEMA operates in responding to Presidentially declared emergencies² and major disasters.³ Because the Stafford Act excludes from the definition of "major disaster" any non-natural catastrophe other than a "fire, flood, or explosion," the President can declare a "major disaster" arising from Y2k only where the Y2k event in fact triggers a fire, flood, or explosion. An emergency declaration is available, however, regardless of the cause of the threatened catastrophe, and triggers FEMA's emergency response authorities, under which the President may:

1. Give mission assignments to Federal agencies in support of State and local efforts to save lives and protect property;
2. Coordinate disaster relief provided by Federal agencies, private organizations, and State and local governments;
3. Provide technical and advisory assistance to affected State and local governments;
4. Provide emergency assistance through Federal agencies;
5. Remove debris;
6. Provide temporary housing assistance; and
7. Assist State and local governments in the distribution of medicine, food, and other emergency supplies.

² "Emergency" means 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. 42 U.S.C. § 5122 (1).

³ "Major disaster" means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven 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. 42 U.S.C. § 5122 (2)



42 U.S.C. § 5192(a). Additionally, Section 502(b) of the Stafford Act provides, “Whenever the Federal assistance provided under subsection (a) of this section with respect to an emergency is inadequate, the President may also provide assistance with respect to efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.”

All of these emergency authorities are in support of state and local emergency assistance efforts. FEMA perceives the potential consequences of a Y2K disruption to be comparable with other major disasters and emergencies, and particularly those involving the loss of critical infrastructure such as power, communications, and water/sewage service. In these situations, FEMA emergency assistance commences when the President declares an emergency upon finding that the “situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments.” 42 U.S.C. § 5191. Except in one situation that will likely have limited applicability to Y2k disruptions,⁴ the President may declare an emergency under the Stafford Act in a State only where:

- The President is requested to do so by the Governor of a State;
- The Governor certifies that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary;
- The Governor has directed execution of the State’s emergency plan; and
- The Governor furnishes information describing the State and local efforts and resources which have been or will be used to alleviate the emergency, and defines the type and extent of Federal aid required.

FEMA is presently working with all States to define the criteria it will use in recommending to the President that he declare a Stafford Act emergency based upon Y2k disruptions.

A Presidential declaration of emergency triggers availability of reimbursement from the Disaster Relief Fund. For emergencies declared under the Stafford Act, there is a limitation of \$5,000,000 for the response, unless the President reports to the Congress on the nature and extent of emergency assistance requirements and proposes additional legislation if necessary. 42 U.S.C. § 5193(b). This limitation applies to each emergency separately. Therefore, if emergencies are declared in 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam, a potential \$270,000,000 could be expended (subject to the limit of appropriated funds in the Disaster Relief Fund at the time), without any one emergency requiring that a report be submitted to the Congress.

⁴ The President may declare an emergency without a request from a Governor “when the primary responsibility for response rests with the United States 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*.” 42 U.S.C. §5191(b), emphasis added. In the context of the Y2k problem, this section would likely only be applicable to federally owned or leased real estate. Even in this situation, “[i]n determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable.” *Id.*



B. The Federal Response Plan for Implementation of the Stafford Act

If the President were to declare an emergency the Federal Response Plan (FRP) for Implementation of Public Law 93-288, as Amended, provides a method for FEMA to give mission assignments (generally with reimbursement of costs from the Disaster Relief Fund) to other agencies which have adopted the FRP. If no emergency is declared under the Stafford Act, the FRP procedures can still be used to coordinate the response of other Federal agencies (without reimbursement of costs).

C. Stafford Act Title VI Provisions⁵

The discussion above has focused on the scope of FEMA's authority to coordinate the Federal response to Y2K disruptions. In addition, FEMA has broad authority in Title VI of the Stafford Act to coordinate activities *in preparation for* Y2K disruptions. Under section 601, the Director of FEMA may:

- Prepare Federal response plans and programs for the emergency preparedness of the United States and sponsor and direct such plans and programs;
- Request such reports on State plans and operations for emergency preparedness as may be necessary to keep the President, Congress, and the States advised of the status of emergency preparedness in the United States;
- Delegate to other departments and agencies of the Federal Government appropriate emergency preparedness responsibilities and review and coordinate the emergency preparedness activities of the departments and agencies with each other and with the activities of the States and neighboring countries;
- Make appropriate provision for necessary emergency preparedness communications and for dissemination of warnings to the civilian population of a hazard.

42 U.S.C. § 5196. This authority forms the primary authority for FEMA to encourage and develop an effective preparedness program by States and local governments including development of emergency operations plans, exercises, training, and coordination with Federal authorities. FEMA receives appropriations to implement this authority. A large portion of this appropriation is distributed to States as emergency management assistance grants.⁶

II. Other Legal Authorities

A. The Defense Production Act

Should Y2K disruptions be so severe by themselves or when combined with concurrent domestic or international events that the Federal Response Plan and emergency response

⁵ Formerly the Civil Defense Act of 1950, *as amended*.

⁶ 42 U.S.C. § 5196b.

systems based on voluntary contracting are inadequate, FEMA has authority, under the Defense Production Act⁷ and Executive Order 12919⁸, to provide for priority contracting of essential material and supplies. This authority – which FEMA has never used in its emergency and disaster response efforts – requires that the Director find that a priority contract, “is necessary” for essential civilian needs to promote the “national defense.”⁹

The President has delegated to the Director of FEMA authority to issue determinations with respect to essential civilian needs necessary or appropriate to promote the national defense, including civil defense and continuity of government and directly related activities. The Secretary of Defense has similar authority with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities; the Secretary of Energy makes these determinations with respect to energy production and construction, distribution and use, and directly related activities.

Even if the domestic consequences of Y2k were severe, FEMA does not believe that that priority contracting measures of the Defense Production Act would be appropriate. Y2k preparedness efforts are necessarily decentralized throughout the country, and are based upon numerous individual voluntary contracting efforts of federal, state, local, and private sector entities. Priority contracting procedures under the DPA could well interfere with the preparedness plans and backup contracts upon which our emergency management community will depend.

B. Executive Orders

Section 2-101 of Executive Order No. 12148 of July 20, 1979, “Federal Emergency Management,” 3 C.F.R. Part 3, 1980 Comp., p. 412 provides, “The Director of the Federal Emergency Management Agency shall establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies.” Section 2-104 says “The Director shall represent the President in working with State and local governments and private sector to stimulate vigorous participation in civil emergency preparedness, mitigation, response, and recovery programs.” Section 2-203 defines “civil emergency” as any “accidental, natural, man-caused, or wartime emergency or threat thereof, which causes or may cause substantial injury or harm to the population or substantial damage to or loss of property.” This Executive Order is applicable for preparedness activity only.

Executive Order No. 12656 of November 18, 1988, “Assignment of Emergency Preparedness Responsibilities”, 3 C.F.R. 1988 Comp., p. 585, requires FEMA and other

⁷ 50 U.S.C. App. § 2061 *et seq.*

⁸ Executive Order No. 12919 of June 3, 1994, “National Defense Industrial Resources,” 3 C.F.R., 1994 Comp., p. 901.

⁹ The term “national defense” is specifically defined to include “emergency preparedness activities conducted pursuant to title VI of the Stafford Act, discussed above. *See*, 50 U.S.C. App. § 2152(13).

Federal departments and agencies to prepare for, and respond to "national security emergencies."¹⁰ This Executive Order is also applicable for preparedness activity only.

These Executive Orders, coupled with Title VI of the Stafford Act, provide FEMA with adequate authority for preparedness for responding to emergency consequences of the Y2k problem.

INTERNATIONAL AUTHORITIES

A. Direct Authorities

With certain limited exceptions involving Canada, Mexico¹¹ and NATO countries¹², FEMA does not have direct statutory authorities abroad.

B. Derived Authorities

The Foreign Assistance Act¹³ authorizes the President to "furnish assistance to any foreign country ... on such terms and conditions as he may determine, for international disaster relief and rehabilitation, including assistance relating to *disaster preparedness* (emphasis added). 22 U.S.C. §§ 2292. The Act also grants the President the authority to transfer funds to other agencies. 22 U.S.C. §§ 2392. The President, under the Foreign Assistance Act, could direct FEMA to assist foreign governments in preparing for response due to Y2K emergencies.

IV. Inadequate Authority and Coordination

At this time, FEMA perceives no need for additional authority to respond to Y2K disruptions. Under the auspices of the aforementioned *Federal Response Plan*, FEMA has been engaging in extensive discussions with other Federal departments and agencies on possible Y2K authorities. It is our sense that, aside from their own respective authorities, these departments and agencies will operate under the Stafford Act.

Please feel free to contact me at (202) 646-4105 or Rick Neal of my staff at (202) 646-4538 if you have questions regarding this memorandum.

¹⁰ A national security emergency is any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States. Executive Order 12656, Section 101.

¹¹ Title VI of the Stafford Act authorizes FEMA to conduct planning with "neighboring countries." 42 U.S.C. §§ 5196 and 5196a. This is defined in Title VI as, "Canada and Mexico." 42 U.S.C. § 5195a (a)(8).

¹² Section 1701 of Executive Order 12656 assigns FEMA responsibility to support and coordinate U.S. "civil emergency planning" with NATO countries.

¹³ 22 U.S.C. §§2151 *et seq.*

February 18, 1999

MEMORANDUM TO AGENCY GENERAL COUNSELS

FROM: ROBERT DAMUS
General Counsel, Office of Management and Budget

SUBJECT: Agency Legal Authority to Respond to Y2K Problems
Outside of the Federal Government

Purpose

The purpose of this memorandum is to request information regarding the legal authority available to your agency to respond to disruptions in the United States and abroad that may be caused by the Y2K problem.

Background

As you know, the Federal government is working to minimize the impact of the Year 2000, or Y2K, problem. Federal agencies are working to fix their own critical systems, and are also making inventories of data exchanges with outside business partners -- for example, state and local governments and private contractors that help to operate Federal programs -- to minimize service disruptions. For high-risk areas, agencies are developing contingency plans to ensure that operations will continue even if agency systems fail. The President's Council on Year 2000 Conversion (the "Council"), which consists of representatives from more than 30 major Federal executive and regulatory agencies, is responsible for coordinating Federal agency efforts to promote action on the problem by companies, industry groups, state and local governments, and international entities.

Looking beyond the Federal government, the Council has enlisted agencies to serve as "sector coordinators" to promote action on the Y2K problem and to offer support to public and private sector organizations -- both domestically and internationally -- within these sectors. The Council is also assessing Y2K preparations in key infrastructure areas that Americans depend upon for vital services. Its sector groups on energy, telecommunications, financial institutions, emergency services, and workforce issues are collaborating with industry representatives to assess Year 2000 readiness in these areas and formulate strategies for addressing the problem where there is the greatest risk for significant disruptions. (For additional background information, please refer to the Council's website at: <http://www.y2k.gov>.)



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Action Needed

Given the widespread nature of the Y2K problem, even the best efforts of the Council and others may not prevent all disruptions on or after January 1, 2000. We do not expect the type of catastrophic failures predicted by alarmists; we do, however, need to be prepared for discrete, localized problems and contingencies. **In order for us to prepare properly to respond to all contingencies, and the problems associated with them, we need to assess the current legal authorities available to the Federal government that may assist us in addressing these contingencies adequately and in a timely manner.**

To that end, we request that each agency General Counsel prepare a memorandum outlining the following:

- the legal authorities currently available to your agency that provide for action to prevent, address, or respond to emergencies or other disruptive contingencies outside the Federal government. Please describe not only authorities that permit direct response to the contingency, but also authorities that allow your agency to address problems or issues indirectly created by the contingency (for example, if the ports of countries exporting chemicals for necessary pharmaceuticals close for several months, a system for prioritizing the distribution of those pharmaceuticals may need to be established). Please consider authorities available to respond to both *domestic* and *international* contingencies, including your agency's authority and capability, if any, to provide humanitarian assistance abroad.
- any predicates or "triggering" events that are legally required to invoke your agency's authority or to expend your agency's resources to address such contingencies. If such predicate conditions are required, to what extent, if any, do they limit your agency's ability to undertake *preventative or preparatory* measures to eliminate or mitigate problems before they occur?
- based on any previous experience in addressing contingencies or emergencies, any areas in which your agency has inadequate legal authority to deal with potential problems. Please describe in detail the kinds of contingencies for which your agency's authority has been or may be lacking, and outline specifically what additional authority, in order of priority, may be needed. *(Please note that our objective is not to create a host of new legal authorities and government powers, but rather to identify any gaps in authority or need for clarification. Our strong preference is to rely on existing authority to address any needs flowing from the Y2K problem.)*
- the extent to which your agency coordinates with other agencies to address contingencies that fall within each of your respective domains. To the extent you are aware of them, please describe briefly the authorities of *other* agencies that are available to help address the types of contingencies your agency might face.

Given the urgency of this issue, we need your response as soon as possible, but not later than **March 10, 1999**. In responding to these questions, please refer to any prior occasions in which your agency has responded to emergencies or other contingencies. If you have any questions, please call Peter Rundlet in the White House Counsel's Office, at (202) 456-1984.

Please send your response to Peter Rundlet, Office of the White House Counsel, Old Executive Office Building, Room 148, Washington, DC 20502. You may also fax your responses to (202) 456-5053.

Thank you for your immediate attention.