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February 7, 1989

TO : Hon. Edward J. Markey
Attention: Cathy Hurwit

FROM : American Law Division

SUBJECT : Whether the Federal Emergency Management Agency May Assume "Command and Control Functions" in the Event of a Nuclear Incident, as Provided for in Executive Order 12657

You have asked, through Ms. Hurwit of your staff, for analysis of the issue captioned above. Executive Order 12657¹, titled "Federal Emergency Management Agency [FEMA] Assistance in Emergency Planning at Commercial Nuclear Power Plants," applies whenever state or local governments fail to (a) prepare emergency preparedness plans for dealing with incidents at commercial nuclear powerplants that meet Nuclear Regulatory Commission licensing requirements, or (b) participate adequately in the exercise or use of such plans. It is widely understood that the Order was promoted by refusals of state and/or local governments to participate in such planning in connection with the Shoreham nuclear plant on Long Island, New York, and the Seabrook nuclear plant in New Hampshire.

Section 5 of the Order, titled "Response to a Radiological Emergency," contains among its provisions subsection (c), as follows:

(c) FEMA shall assume any necessary command-and-control function, or delegate such function to another Federal agency, in the event that no competent State and local authority is available to perform such function.

Though "command and control" is not defined, it has been generally taken to include police-type power to direct movement of persons and traffic and otherwise control evacuations and maintain order, backed by coercive authority. The issue here is whether any federal statute authorizes FEMA personnel to assume such power.

Based on the following, it would appear that the two statutes most likely to vest the requisite authority -- the Federal Civil Defense Act of 1950 and the Disaster Relief and Emergency Assistance Act -- do not do so.

¹ 53 Fed. Reg. 47513 (Nov. 23, 1988) (signed Nov. 18, 1988).

Federal Civil Defense Act of 1950

This statute² originated as a cold-war statute focussed on dealing with nuclear attack. Its purpose was expanded, however, in 1981 to include civil defense necessitated by "natural disasters" as well³ -- "natural disasters" being defined to include "manmade catastrophes."⁴ Hence, there is little doubt that the Act is broad enough to reach civilian nuclear powerplant accidents, and the only issue is whether it grants FEMA command-and-control power to deal with same in the event of state or local recalcitrance.

Despite the existence of sound arguments cutting both ways, the arguments against the Civil Defense Act's granting such authority appear the stronger.

First, the statute itself nowhere states such authority. To be sure, the Act declares that "the responsibility for civil defense shall be vested jointly in the Federal Government and the several States" and further that "[t]he Federal Government shall provide necessary *direction*, coordination, and guidance"⁶ It is improbable, however, that an authority as radical as federal command and control of local activity, an intrusive power affecting the federal-state balance, would have been conveyed by Congress so tersely and obliquely.

Any doubts on this issue are countered by legislative history. The House report from 1950 asserts that the federal role is solely --

coordination and guidance of the civil defense program; the operation of the Federal Civil Defense Administration [FCDA]; and the providing of financial and other assistance.⁶

The lengthy floor debates from 1950 are in accord. Nowhere is any police function noted for personnel of the FCDA, FEMA's predecessor, a fact that argues strongly for the absence of such authority. Noted one Senator --

² 50 U.S.C. App. §§ 2251-2303 (§§ 2291-2297 expired 1974).

³ 50 U.S.C. App. § 2251.

⁴ 50 U.S.C. App. § 2252(b).

⁵ 50 U.S.C. App. § 2251 (emphasis added). See also 50 U.S.C. App. § 2281(a), stating that the Administrator of the Federal Civil Defense Administration shall "prepare national plans ... for civil defense" and "sponsor and *direct*" such plans. (Emphasis added.)

⁶ H.R. Rep. No. 3209, 81st Cong., 2d Sess., reprinted at 1950 U.S. Code Cong. & Ad. News 4328, 4335.

[t]he bill makes no provision for federally organized aid battalions which could move into areas so badly stricken that the State concerned and the neighboring States could not meet the emergency.⁷

Another Senator characterized the "philosophy" of the bill as "simply to make the Government of the United States a *guiding* authority to aid the States in the primary job of civil defense."⁸ "It is the ... city and the State," asserted yet another, "through which the problem [of civil defense] must be handled."⁹

Likewise, when the bill's creation of a United States Civil Defense Corps was debated in the House, care was taken to clarify the minimal federal role. "The Corps," declared one Member's inserted comments, "is designed to be established and operated on a local level under the direction of the State."¹⁰

Significantly, these congressional expressions favoring a dominant state and local role in implementing civil defense plans occurred at a time when the Act contained the "Emergency Authority" of Title III, which provided limited authority for the United States to act at the local level in an emergency. Title III was allowed to expire on June 30, 1974¹¹ and has not been re-enacted since. It would be anomalous, then, if the current Act, lacking emergency provisions, were to be read as authorizing FEMA command and control, while the former Act, containing emergency provisions, seems not to so authorize.

In 1958, amendments to the Federal Civil Defense Act put the allocation of federal and state responsibility under the Act squarely in issue. Though clearly tipping the scales further towards the federal government, the amendments stopped short of conferring command-and-control powers on the FCDA.

Stated the FCDA in a letter to the Speaker of the House:

The question of the appropriate division of responsibility for the Nation's civil defense has been thoroughly studied ... The majority of the recommendations resulting from

⁷ 96 Cong. Rec. 16962 (Dec. 22, 1950) (remarks of Sen. McMahon).

⁸ 96 Cong. Rec. 16970 (Dec. 22, 1950) (remarks of Sen. Cordon) (emphasis added).

⁹ 96 Cong. Rec. 16972 (Dec. 22, 1950) (remarks of Sen. Kefauver).

¹⁰ 96 Cong. Rec. 16829 (Dec. 20, 1950) (inserted by Cong. Durham).

¹¹ Section 307 of the Act, 50 U.S.C. App. § 2297, as amended, provided that Title III terminated on June 30, 1974, or on such earlier date as prescribed by concurrent resolution of the Congress.

such studies urge that civil defense be made primarily a Federal responsibility.

However, the [FCDA] considers State and local efforts of such vital importance ... that the better course is to amend section 2 of the act to declare civil defense to be the joint responsibility of the Federal Government and the States Under such joint responsibility the Federal Government, while exerting positive leadership, can properly exercise its partnership role *by encouraging and requiring the maximum civil-defense effort on the part of the States*¹²

It appears that owing to its planning and preparedness provisions, the Civil Defense Act does authorize FEMA to conduct exercises of radiological emergency plans at nuclear powerplants. Notwithstanding, the foregoing discussion suggests that the Act does not empower FEMA to perform command-and-control functions off-site.¹³

Disaster Relief and Emergency Assistance Act

This Act, amended and renamed in 1988,¹⁴ specifies a broad array of federal assistance for state planning, response, and recovery in connection with an "emergency" or "major disaster," and further authorizes the President to establish a program of disaster preparedness for federal agencies. However, even under the recent amendments, designed to "provide for more effective assistance in responding to major disasters and emergencies," there are several obstacles to invoking the DREAA as authority for FEMA command-and-control.

First, the availability of DREAA relief assistance is contingent on the occurrence of either an "emergency" or a "major disaster."¹⁵ Though both terms were broadened under the 1988 amendments, only "emergency" now

¹² Letter from Mr. Val Peterson (FCDA) to Hon. Sam Rayburn, dated Feb. 8, 1957, appended to Sen. Rep. No. 1831, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. & Ad. News 3311, 3317.

¹³ In reaching this conclusion, we are in agreement with an October 30, 1985 memorandum from the Acting General Counsel for FEMA.

¹⁴ Title I of Public Law 100-707, enacted November 23, 1988, substantially rewrote the Disaster Relief Act of 1974, changing its name in the process to "The Robert T. Stafford Disaster Relief and Emergency Assistance Act."

¹⁵ DREAA §§ 401, 501.

appears to potentially embrace all nuclear powerplant accidents.¹⁶ The new definition of "major disaster" does not seem to cover nuclear powerplant incidents unless a "fire, flood, or explosion" occurs¹⁷ -- which, we understand, is not generally the case. This is a significant obstacle in that if the DREAA contains command-and-control authority at all, it most likely would be found in the statute's more extensive assistance provisions for "major disasters."¹⁸

Secondly, the DREAA comes into play only when the Governor of the affected state requests federal assistance.¹⁹ One might suppose that this precondition undercuts the value of the Act as authority for federal police action under the Order, since the Order applies only when state or local governments are resistant to emergency planning or choose not to participate in the implementation of the adopted plan. On the other hand, there is compelling counter-argument that the state, faced with an actual crisis, might request federal aid notwithstanding its historical opposition to the nuclear plant giving rise to the crisis. And there is the possibility that the Governor of a state might favor federal intervention despite local refusal to participate adequately in plan implementation.

¹⁶ "Emergency," in the amended statute, 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.

DREAA § 102(1). Unlike its forebear, the new definition appears not to be limited to naturally occurring emergencies.

¹⁷ "Major disaster," in the amended statute, 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 Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations

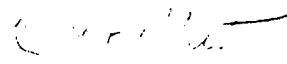
DREAA § 102(2) (emphasis added).

¹⁸ See note 20 infra.

¹⁹ DREAA § 401 (request for major disaster declaration) and § 501 (request for emergency declaration).

Finally, given that the foregoing obstacles are surmounted and the DREAA does apply, the Act's textual support for FEMA command and control is thin. Nowhere does the Act clearly indicate that authority of this nature is being conferred on any federal agency. Both DREAA and its legislative history speak solely in terms of federal aid, federal assistance, federal materiel, and federal services during emergencies and major disasters -- not federal police action. And to reiterate, the broader federal authorities reserved for major disasters²⁰ may not even be applicable here due to definitional constraints noted above.

In sum, the "major disaster" provisions of DREAA may not apply to nuclear powerplant incidents not involving fire, flood, or explosion, and the Act is contingent on request for assistance by a state Governor. To the extent the Act does apply and the Governor requests federal aid, it appears not to confer any command-and-control powers on FEMA.



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²⁰ An example is DREAA § 403(a), providing that --
Federal agencies may on the direction of the
President, provide assistance essential to meeting
immediate threats to life and property resulting
from a major disaster, as follows:

...

(3) Performing on public or private lands or
waters any work or services essential to saving
lives and protecting and preserving property or
public health and safety, including --

...

(I) reduction of immediate threats to life, property,
and public health and safety.