

SEEKING CONSENSUS ON HOMELAND SECURITY STANDARDS: ADOPTING THE NATIONAL RESPONSE PLAN AND THE NATIONAL INCIDENT MANAGEMENT SYSTEM

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The concept of incident command (more recently and commonly referred to as incident management)¹ dates back to the early 1970s, when a group of forward looking California fire department and federal agency leaders began work on a new system to coordinate, deploy, and maintain the large resources needed to fight major wildland fires.² The success of the newly created incident management system (“IMS”) led to it being adopted by a variety of players, including law enforcement, public health, public works, and the private sector.³ Emergency management groups also embraced the system,⁴

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1. Incident Command is a system that uses a “command” model, while incident management uses a “management” model. PAUL M. MANISCALCO & HANK T. CHRISTEN, UNDERSTANDING TERRORISM AND MANAGING THE CONSEQUENCES 24 (2001). Experienced responder leaders, however, do not see a difference other than in terminology between the two. Scott Baltic, *ICS For Everyone*, HOMELAND PROTECTION PROF., Jan./Feb. 2004, at 1, 22.

2. NATIONAL FIRE SERVICE INCIDENT MANAGEMENT SYSTEM, MODEL PROCEDURES GUIDE FOR STRUCTURAL FIREFIGHTING (2d ed. Int'l Fire Serv. Training Ass'n 2000) (1993). *See generally* Baltic, *supra* note 1, at 20.

3. Pat West, *NIMS: The Last Word on Incident Command?*, FIRE CHIEF, Mar. 5, 2004, available at http://firechief.com/ar/firefighting_nics_last_word/index.html. (“What we've said now with the NIMS document is that it's not just a fire service issue. We're expanding (incident management) to include all the agencies involved in response to emergencies - beyond police, EMS and fire -- to include all the government agencies that will respond to a disaster as well as some private organizations.”).

4. “[T]he National Emergency Management Association adopted a position in September 1996 adopting the National Interagency Incident Management System and its Incident Command System (ICS) as the model for all risk/hazard response activities by state and local governments ...” NAT'L EMERGENCY MGMT. ASS'N, TERRORISM COMM., A RESOLUTION ADVOCATING THE INCIDENT COMMAND/MANAGEMENT SYSTEM FOR ALL WMD

and recommended in 2000 that all levels of government utilize it for response to weapons of mass destruction (“WMD”) events.⁵ Credentialing bodies have universally accepted IMS as the pattern for integrating emergency response.⁶ Despite IMS’ demonstrated value, however, not all emergency response groups have adopted it.⁷ Concern that the nation needed a universal approach to management of incidents led Congress, in the Homeland Security Act of 2002 (“HS Act”),⁸ to require adoption of IMS.⁹ In response to the Congressional mandate, during the summer of 2003, the Department of Homeland Security (“DHS”) released a draft of the National Response Plan and National Incident Management System (“NRP 1” and “NIMS 1”)¹⁰ to emergency response groups as well as to state and local government representatives.¹¹

Concerned stakeholders voiced several criticisms of the NRP 1 and NIMS 1.¹² The language in the documents confused many observers.¹³ The text appeared to create new structures that could have the effect of complicating emergency response and coordination of resources.¹⁴ Some experienced emergency management professionals worried that the focus rested too heavily on terrorism, with a consequent lessening of the “all hazards”¹⁵ approach to

OPERATIONS BY ALL LEVELS OF GOVERNMENT (2000), <http://knxas1.hsdl.nps.navy.mil/homesecc/docs/legis/nps08-112603-18.pdf>.

5. NAT’L EMERGENCY MGMT. ASS’N, TERRORIST COMM., *supra* note 4.

6. William C. Nicholson, *Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response (“HAZWOPER”) Standard, Standard Operating Procedures, Mutual Aid and the Incident Command System*, 9 WIDENER L. SYMP. J. 295, 308-09 & n.116 (2003).

7. “Clearly, ICS is gaining momentum, though there’s still a long road before it’s a truly universal structure and language for managing incidents.” Baltic, *supra* note 1, at 26.

8. Homeland Security Act of 2002, 6 U.S.C. § 101-557 (2002).

9. § 312(5). The HS Act requires “building a comprehensive incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to [terrorist] attacks and disasters.”

10. Note on numbering: NRP 1 and NIMS 1 were actually not the first version of these texts, both of which underwent numerous internal revisions at DHS. They were, however, the first versions released outside the agency, hence the “1” reference.

11. William C. Nicholson, *The New (?) Federal Approach to Emergencies*, HOMELAND PROTECTION PROF., Aug. 2003, at 8.

12. See generally William C. Nicholson, *Integrating Local, State and Federal Responders and Emergency Management: New Packaging and New Controls*, 1 J. EMERGENCY MGMT. 15 (2003).

13. Martin Edwin Andersen, *Local Officials Howl at DHS Emergency Management Plan*, CONG. Q. HOMELAND SECURITY, Aug. 8, 2003.

14. Timothy L. Dunkle, Pennsylvania State Fire Training Administrator and Vice President, North American Fire Training Directors, Comments Submitted to DHS: Comments on the National Incident Management System—July 1, 2003.

15. See WILLIAM C. NICHOLSON, EMERGENCY RESPONSE AND EMERGENCY MANAGEMENT LAW 236-238 (2003) (explaining the “all hazards” approach).

risk management.¹⁶ In particular, they were bothered that natural hazards did not appear to receive sufficient emphasis.¹⁷ The NRP 1 and NIMS 1 incorporated problematic approaches to emergency responder issues.¹⁸ Emergency response organizations, as well as representatives of state and local governments, believed that their input should have been part of the process of creating the documents from their inception.¹⁹ Instead, DHS only asked for their feedback after several drafts had been created and circulated internally at the agency.²⁰ Some affected constituencies worried that this history boded ill for any attempts to try to rectify what many viewed as badly flawed blueprints for national preparedness and response.²¹

DHS solicited input from affected groups, sending out preliminary versions of the National Response Plan (“NRP” or adopted NRP) and National Incident Management System (“NIMS” or adopted NIMS).²² August 1, 2003, was the date set by the agency for receipt of feedback from interested parties.²³ So emphatic and critical was the response, that DHS rapidly put together an NRP/NIMS State and Local Working Group in an attempt to obtain state and local endorsements, without which the effort could not succeed.²⁴ The Group first met to discuss the NRP line by line during the week of August 11, 2003.²⁵ The Initial National Response Plan (“INRP”), issued September 30, 2003, resulted from their efforts.²⁶ In September, the group met again, this time to go over NIMS 1.²⁷ The result of the second meeting was a significantly revised National Incident Management System—Coordination Draft (“NIMS 2”), which was issued for comment on December 3, 2003.²⁸ On March 1, 2004, the first anniversary of the Department of Homeland Security,²⁹ DHS Secretary Tom Ridge announced publication of an adopted version of

16. William L. Waugh, Jr., *The “All-Hazards” Approach Must be Continued*, 2 J. EMERGENCY MGMT. 1, 11 (2003).

17. Timothy L. Dunkle, Pennsylvania State Fire Training Administrator and Vice President, North American Fire Training Directors, Comments Submitted to DHS: Comments on the National Incident Management System—July 1, 2003.

18. Nicholson, *supra* note 12, at 16-17.

19. *Id.* at 20.

20. *Id.*

21. *Id.* at 19.

22. *Id.* at 20.

23. Nicholson, *supra*, note 12, at 21.

24. *Id.* at 20.

25. Telephone Interview with DHS Employee Requesting Anonymity (Aug. 2003).

26. Telephone Interview with Albert Ashwood, Director, Oklahoma Department of Emergency Management (Aug. 22, 2003) (on file with author).

27. *Id.*

28. National Incident Management System—Coordination Draft (NIMS 2), Department of Homeland Security (Dec. 3, 2003).

29. Press Release, White House, President Marks Homeland Security's Accomplishments at Year One (Mar. 2, 2004), <http://www.whitehouse.gov/news/releases/2004/03/20040302-2.html>.

NIMS.³⁰

On February 25, 2004, DHS released to state homeland security advisors and other homeland security partners³¹ a reworked National Response Plan Draft #1 (“NRP Draft #1”).³² Subsequently, DHS put out a number of additional draft versions of the NRP. These included NRP Draft #2, issued April 28, 2004,³³ and the NRP “Final Draft,” issued on June 30, 2004. The document has steadily grown in size as different stakeholders have provided feedback.³⁴ Despite its nomenclature, the NRP “Final Draft” is not the same as the adopted document.³⁵

DHS finally adopted and issued the NRP on November 16, 2004.³⁶ The NRP will be reviewed during its first year of existence and reissued if necessary.³⁷ Following that first year, it will be revised and reissued every four years, or more frequently if the Secretary of DHS deems it advisable.³⁸

30. Press Release, Dep’t of Homeland Security, Department of Homeland Security Secretary Tom Ridge Approves National Incident Management System (NIMS) (Mar. 1, 2004), <http://www.dhs.gov/dhspublic/display?content=3259>. (“NIMS gives all of our Nation’s responders the same framework for incident management and fully puts into practice the concept of, ‘One mission, one team, one fight.’”); DEP’T OF HOMELAND SECURITY, NATIONAL INCIDENT MANAGEMENT SYSTEM 38 (2004), <http://www.dhs.gov/interweb/assetlibrary/NIMS-90-web.pdf> [hereinafter NIMS].

31. DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN DRAFT #1 (2004), <http://www.ops.state.co.us/downloads/referencelibrary/nrpbase1.pdf> [hereinafter NRP Draft #1].

32. *Id.* at Transmittal Letter (“The NRP supercedes [sic] the Federal Response Plan (FRP), United States Government Interagency Domestic Terrorism Concept of Operations Plan (CONPLAN), and the Initial National Response Plan (INRP).”). As this document was neither signed nor generally released, it was not a final document.

33. NRP Draft #2 did not include a transmittal letter, instead stating that it was “To be developed.” DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN DRAFT #2 (2004), <http://www.ops.state.co.us/downloads/referencelibrary/nrpbase2.pdf> [hereinafter NRP Draft #2].

34. NRP1 was 50 pages long. (on file with author). NRP Draft #1 has 82 pages. NRP Draft #1, *supra* note 31, while Draft #2 is 107 pages. NRP Draft #2, *supra* note 33. The NRP “Final Draft,” issued on June 30, 2004, is 121 pages long. (on file with author) [hereinafter NRP Final Draft]. The adopted NRP, issued November 16, 2004, is 430 pages long, including all appendices and annexes. NRP, *infra* note 36.

35. EIIP Virtual Forum Presentation, Statement by Associate Director Barbara Yagerman, Operations and Response Operations Integration Staff, Department of Homeland Security: “The National Response Plan: An Update.” (Sept. 15, 2004), <http://www.emforum.org/vlibrary/toppolicy.htm> (“When the NRP is approved it will be posted on the DHS Web site. ... There are differences in the final approved NRP and the draft that you may have seen...”).

36. DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN 2 (2004), [http://www.rmfd.org/National%20Response%20Plan%20Approved-Unsigned%20\(16%20Nov%2004\).pdf](http://www.rmfd.org/National%20Response%20Plan%20Approved-Unsigned%20(16%20Nov%2004).pdf) [hereinafter NRP].

37. *Id.* at ix (“Within 1 year of its effective date, the Secretary of Homeland Security will conduct an interagency review to assess the effectiveness of the NRP, identify improvements, and provide recommendations regarding plan modifications and reissuance, if required.”).

38. NRP, *supra* note 36, at 59.

This article analyzes both the content of the revisions to the NRP and NIMS and the processes employed to make the changes.

I. WHY THE NRP AND NIMS?

When finalized, the NRP and NIMS will be the end product of a process that began with the passage of the HS Act. Signed into law by President Bush on November 25, 2002, the HS Act considerably alters the national approach to terrorism and all other emergency events.³⁹ The HS Act's most visible effect was the creation of DHS by uniting 180,000 federal workers from twenty-two agencies into a single organization.⁴⁰ As written, the mission of DHS in the HS Act revolves around terrorism.⁴¹ A further challenge posed by the law, therefore, was how to combine the efforts of DHS with those of state and local governments as well as emergency responders into a truly national system reaching beyond terrorism to include "all hazards" emergency preparedness and response.⁴²

Some observers worried that the creation of DHS might be a bureaucratic nightmare.⁴³ The new organization, some feared, might be rife with infighting,

Working toward continuous improvement, DHS is responsible for coordinating full reviews and updates of the NRP every 4 years, or more frequently if the Secretary deems necessary. The review and update will consider lessons learned and best practices identified during exercises and responses to actual events, and incorporate new information technologies. DHS will distribute revised NRP documents to the HSC for the purpose of interagency review and concurrence.

39. Nicholson, *supra* note 12, at 15.

40. Press Release, White House, Fact Sheet: President Highlights a More Secure America on First Anniversary of Department of Homeland Security (Mar. 2, 2004), <http://www.whitehouse.gov/news/releases/2004/03/20040302-4.html>. ("On March 1, 2003, approximately 180,000 personnel from 22 different organizations around the government became part of the Department of Homeland Security -- completing the largest government reorganization since the beginning of the Cold War.")

41. "The primary mission of the Department is to -- (A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; [and] (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States; ..." 6 U.S.C. § 111(b) (1) (2004).

42. Homeland Security Presidential Directive 5 mandates the address of all hazards. Press Release, White House, Homeland Security Directive/HSPD 5, ¶ 16 (Feb. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html> [hereinafter HSPD 5] ("[The NRP] shall integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan."). *Id.* at ¶ 6 ("The Secretary will also provide assistance to State and local governments to develop all-hazards plans and capabilities, including those of greatest importance to the security of the United States, and will ensure that State, local, and Federal plans are compatible.")

43. Jeffrey Manns, *Legislation Comment: Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145, 151 (2002) ("The creation of this superagency may result in little more, however, than forcing a host of agencies to order new letterhead and change their seals. Worse still, the Department of Homeland Security may become a bureaucratic juggernaut, whose unmanageability may magnify the shortcomings of each component agency.")

inflexible, and sluggish in responding to events.⁴⁴ Emergency responders were concerned that DHS would focus on law enforcement needs. Such anxiety seemed reasonable, since acts of terrorism, which are crimes,⁴⁵ were the impetus for the creation of DHS.⁴⁶ NRP 1 and NIMS 1 were viewed as logical outgrowths of an agency insensitive and unresponsive to the needs of the non-law enforcement responders it was tasked with serving.⁴⁷

On February 28, 2003, President Bush put out marching orders for the implementation of the HS Act. On that date, he issued Homeland Security Presidential Directive 5 ("HSPD 5").⁴⁸ HSPD 5 instructed all federal agencies to take specific steps for planning and incident management.⁴⁹ The Directive also mandated setting emergency responder performance standards and established sanctions for responders who fail to conform to those standards.⁵⁰

HSPD 5 directs all federal agencies to collaborate with DHS to establish a NRP and a NIMS.⁵¹ HSPD 5 also sets out a timetable for those actions.⁵² NIMS is the operational part of the NRP.⁵³ In this fashion, authority for creation of the NRP Draft #1 and the adopted NIMS flows from the HS Act through HSPD 5 to DHS.⁵⁴ The way in which DHS utilized this authority is a fascinating glimpse into the formation of policy that directly affects all levels of our federal system.

II. CREATING A NATIONAL RESPONSE PLAN AND NATIONAL INCIDENT MANAGEMENT SYSTEM

44. Elishia L. Krauss, *Building a Bigger Bureaucracy: What the Department of Homeland Security Won't Do; Views You Can Use*, 32 PUBLIC MANAGER 57 (2003). ("Unfortunately, with bureaucracy we only create more layers of inefficiency and bureaucratic red tape, instead of streamlining the processes and focusing resources directly on the mission. Specifically, homeland security requires an organization that is collaborative, quick acting, and efficient. These are not qualities inherent in federal bureaucracies.")

45. Terrorism is a federal crime. See generally Note, *Responding To Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1224 (2002) ("[T]he United States has traditionally treated terrorism as a crime. The U.S. Code contains criminal statutes that define and establish punishments for terrorism.")

46. Nicholson, *supra* note 6, at 305-06.

47. Nicholson, *supra* note 12, at 18-21.

48. See HSPD 5, *supra* note 42.

49. *Id.* at ¶ 3.

50. *Id.* at ¶ 17(b).

51. *Id.* at ¶¶ 15-16.

52. *Id.* at ¶¶ 17-20.

53. HSPD 5, *supra* note 42, at ¶¶ 15-16.

54. Nicholson, *supra* note 12, at 15.

A. Comprehensive Content

HSPD 5 instructs the Secretary of DHS to “integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan,”⁵⁵ the NRP. The NRP must use NIMS to “provide the structure and mechanisms for national level policy and operational direction for Federal support to State and local incident managers and for exercising direct Federal authorities and responsibilities, as appropriate.”⁵⁶ Every federal agency has to embrace and play a part in the NRP and adopt NIMS.⁵⁷

HSPD 5 contains specific requirements for the content of the NRP and NIMS. Included are: protocols for operating under different threat levels; incorporation of existing federal plans such as the National Oil and Hazardous Substances Pollution Contingency Plan—usually referred to as the National Contingency Plan (“NCP”)⁵⁸ (which is the federal approach to hazardous materials response)—and the Federal Radiological Emergency Response Plan (“FREP”);⁵⁹ development of other plans as needed; a consistent approach to information gathering and reporting as well as for providing recommendations to senior federal officials; and “rigorous requirements for continuous improvements from testing, exercising, experience with incidents, and new information and technologies.”⁶⁰ Given this laundry list of new standards, one should not be surprised that NRP 1 and NIMS 1 ended up as comprehensive documents.

B. Challenging Deadlines

HSPD 5 required the Secretary of DHS, by April 1, 2003 (two months after its issuance), to “develop and publish an initial version of the NRP, in consultation with other Federal departments and agencies.”⁶¹ The Presidential Directive does not mention, or apparently even contemplate, involvement by responder groups or state and local government representatives in the NRP development process. In contrast, HSPD 5 directed the Secretary, by June 1, 2003 (four months after its issuance), to consult with State and local governments, as well as other federal departments and agencies, to “develop a national system of standards, guidelines and protocols to implement the NIMS” and establish a mechanism for ongoing management and maintenance of NIMS, including regular consultation with the above-named stakeholders.⁶²

55. HSPD 5, *supra* note 42, at ¶ 16.

56. *Id.* at ¶ 16(a).

57. *Id.* at ¶ 18.

58. 40 C.F.R. pt. 300 (2003).

59. Federal Radiological Emergency Response Plan (FRERP), 50 Fed. Reg. 46,542 (Nov. 8, 1985).

60. HSPD 5, *supra* note 42, at ¶ 16(a-d).

61. *Id.* at ¶ 17(a).

62. HSPD 5, *supra* note 42, at ¶ 17(b).

By September 1, 2003, the Secretary was required to review existing authorities and regulations and recommend revisions to the President that would enable full implementation of the NRP.⁶³ The challenging scope required for the NRP and NIMS, combined with the very short deadlines imposed by President Bush in HSPD 5, led responsible officials at DHS to create an interagency task force to write the documents.⁶⁴ DHS Secretary Ridge selected Admiral James M. Loy, Undersecretary of Transportation, to be the NRP Task Force Director.⁶⁵

C. Challenges for FEMA

The task of organizing the first drafts from the task force was contracted out to the Rand Corporation⁶⁶ through The Transportation Security administration (“TSA”). Doubtless, the time pressure and complexity of the job influenced the decision to bring Rand on board. One truism that applies to all levels of government is that there are never enough hands to promptly accomplish all tasks with which the organization is entrusted.

The decision to bring Rand in to draft the documents worried some people who believed it to be an insult to the experts at Federal Emergency Management Agency (“FEMA”). Indeed, some emergency managers believe that the FEMA structure of cooperation and mutual trust among all levels of government is being dismantled as FEMA is incorporated into DHS.⁶⁷ The situation is perceived as a real and serious problem, leading former FEMA Director James Lee Witt to propose restoring FEMA’s independent agency status.⁶⁸

In contrast, after Florida was hit by multiple hurricanes in the months of August and September 2004, the agency initially received positive reviews of

63. *Id.* at ¶ 17(c).

64. Nicholson, *supra* note 12, at 17.

65. Admiral Loy was later promoted to be Deputy Secretary of DHS. He was sworn in for this position on December 4, 2003. *See* Press Release, Dep’t of Homeland Security, Secretary Ridge Announces the Swearing-In of the New Deputy Secretary of Homeland Security (Dec. 4, 2003), <http://www.dhs.gov/dhspublic/display?Content=3025>.

66. Andersen, *supra* note 13 (“According to sources familiar with the emergency planning process, the draft plan was prepared for the DHS by the Rand Corporation. . .”).

67. James Lee Witt, President, James Lee Witt Assocs., Former Director of FEMA, Statement before Subcommittee on National Security, Emerging Threats and International Resources and the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs (Mar. 24, 2004), available at <http://www.all-hands.net/Article592.html>.

68. *Id.* “I firmly believe that FEMA should be re-established as an independent agency, reporting directly to the president—but allowing for the secretary of homeland security to task FEMA to coordinate the federal response and perform its historical duty of consequence management following a terrorist or any other kind of disastrous event.”

the quality of its responses.⁶⁹ Some make a case, however, that the major purpose for good service to the people of Florida was political, provoked by the upcoming 2004 election.⁷⁰

Later evaluations have not been as positive.⁷¹ FEMA has been accused of not being open regarding how relief funds were spent in the aftermath of the Florida hurricanes.⁷² A federal audit of FEMA expenses in Miami-Dade documented significant problems resulting from the agency's "pay first and verify later" policy.⁷³ Emergency Preparedness and Response Directorate ("EP&R") head Michael Brown said that changing the policy would result in slower payments.⁷⁴ Ironically, slow payments in the hurricanes' aftermath are one of the main criticisms leveled by Florida lawmakers. One Florida Congressman believes that FEMA has been "submerged" in DHS and no longer works as well as it once did.⁷⁵ He plans to file a bill to separate FEMA from DHS if his beliefs are confirmed.⁷⁶ Former FEMA Director James Lee

69. Jon Elliston, *Disaster In The Making*, THE INDEP. WKLY., Sept. 22, 2004, available at <http://www.indyweek.com/gyrobase/Content?oid=oid%3A22664>

As storms continue to batter the Panhandle, no one would call Florida lucky. But with national elections just around the corner, the hurricanes could scarcely have hit at a better time or place for obtaining federal disaster assistance. 'They're doing a good job,' one former FEMA executive says of the Bush administration's response efforts. 'And the reason why they're doing that job is because it's so close to the election, and they can't f*** it up, otherwise they lose Florida—and if they lose Florida, they might lose the election.'

70. *Id.*

71. Randy Schultz, *Storm Over FEMA Isn't Subsiding*, PALM BEACH POST, Mar. 20, 2005, at 1E ("There is no doubt that Florida won't be cleaned up and paid back from last summer's hurricanes in time for this season. There is no doubt that the main reason is the Federal Emergency Management Agency, which is supposed to help states clean up and get paid back after natural disasters.').

72. *Id.* ("But try to find out where that money went, and FEMA stonewalls.').

73. David Kidwell, *Haste and Waste in Storm Aid*, MIAMI HERALD, Apr. 29, 2005, at 1A. ("The audit's criticism of the Federal Emergency Management Agency centers instead on its long-standing pay-first-verify-later policies—policies agency administrators say are necessary to ensure storm victims get help fast.').

74. *Id.* ("Auditors have the luxury of coming in after the fact without the pressure of seeing people whose lives have been destroyed and without the need my people feel to provide help as quickly as they can,' said FEMA chief Michael Brown, reached late Thursday.').

75. *Id.*

[U.S. Rep. Mark Foley, R-Jupiter] hasn't had anyone confirm it, but his theory is that FEMA doesn't work as well now that it is part of the massive Department of Homeland Security. Reimbursement requests that might have moved swiftly through the old, independent FEMA must pass through a bureaucracy that also deals with bioterror and port security. 'Under (former FEMA directors) James Lee Witt and Joe Allbaugh, things seemed to work fine,' he said. 'This has been a screw-up from start to finish.'

76. *Id.* ("If Rep. Foley confirms his theory, he will file a bill to separate FEMA from Homeland Security.')

Witt again called for FEMA's separation from DHS in March 2005.⁷⁷

Disgruntled Florida lawmakers have introduced legislation⁷⁸ to force FEMA to pay claims more quickly.⁷⁹ One bill would require FEMA to pay fifty percent of local government's eligible claims within sixty days of their filing.⁸⁰ The bill also enlarges the scope of FEMA debris removal, including for the first time, authority to remove debris from private property.⁸¹ A second bill would also authorize removing debris from private property⁸² as well as increasing the time for filing a claim to eighteen months after the event⁸³ and doubling the amounts available for individual and household assistance.⁸⁴ The second bill also would enact a Disaster Expert Grant Program⁸⁵ to create local disaster strike force teams to assist FEMA.⁸⁶ The only eligible entities to receive such grants would be local units of government and Indian tribes.⁸⁷

D. NRP 1 and NIMS 1

Rand reportedly did a good job of creating documents that faithfully reflected the task force's interpretation of HSPD 5's requirements.⁸⁸ From the perspective of DHS, NRP 1 and NIMS 1 were merely "straw men," created as a vehicle to draw comment and very much in draft form.⁸⁹ State and local government representatives and responders, perhaps due to the fact that they were not involved in the documents' creation, worried that NRP 1 and NIMS

77. Bill Kaczor, *Former FEMA Director: Move the Agency Out of Homeland Security*, GAINESVILLE SUN, Mar. 25, 2005. ("The emphasis is not there like it used to be," Witt later told reporters. Putting FEMA under the Department of Homeland Security has minimized their effectiveness in responding, in planning and training, the national hurricane program, everything.").

78. Disaster Recovery Act of 2005, H.R. 1870, 109th Cong. (2005); Responding Equitably, Swiftly, Proportionally, and On-time to Natural Disasters Act of 2005, H.R. 1137, 109th Cong. (2005).

79. Rafael Lorente, *Faster Action Sought On FEMA Claims: Bill Targets Aid for Local Governments*, SUN-SENTINEL, Apr. 28, 2005 at 8A.

80. H.R. 1870, § 2(a)-(b).

81. *Id.* at § 4.

82. H.R. 1137, § (3)(b) (amending § 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5173 (2005)).

83. *Id.* at § 4(a). (amending § 408(a) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5174(a)(2005)).

84. *Id.* at § 4(b) (further amending § 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act).

85. *Id.* at § 7(a) (amending Title VII of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5201, 5203-5205).

86. *Id.*

87. H.R. 1137, § 7(a).

88. Telephone Interview with Bob Stephan, Assistant to Secretary Ridge (Jan.14, 2004) (on file with author).

89. *Id.*

1 would be very close to the final product.⁹⁰ They viewed the products as unhelpful, seeing them as creating a muddle of entities, terms and acronyms and submerging existing, commonly-accepted vocabulary beneath an impenetrable layer of new terminology.⁹¹ NIMS 1 described itself and NRP 1 as “new paradigms” for domestic incident management.⁹² One source within FEMA, however, characterized NRP 1 as “Just the old FRP [Federal Response Plan] with the names changed.”⁹³

Emergency management has historically been described as being composed of four phases—mitigation, preparedness, response, and recovery.⁹⁴ While the four-phase cycle is not perfect, it does offer a global approach to disasters and a common vocabulary for emergency management and government leaders.⁹⁵ NRP 1 changed the accepted four phases in the cycle of emergency management into five domains of incident management activities: awareness, prevention, preparedness, response, and recovery.⁹⁶ The four phases of emergency management under NIMS 1, therefore, were in the future to be referred to as five domains of incident management. This name change could have proven to be somewhat bewildering to emergency responders, who have grown used to the term “incident management” as applying to the more evolved management approach to incident command at the scene of events.⁹⁷

NIMS 1 sought to establish local, state, and Federal Emergency Prevention and Preparedness Councils (“PPCs”). “PPCs integrate awareness, prevention, and preparedness activities into a unified structure that provides an ongoing multi-agency coordinating system (“MACS”) for all potential and impending hazards.”⁹⁸ NIMS 1 included multiple complex charts illustrating how the system was projected to work in the field.⁹⁹ The PPC was projected to be the preparedness compliment to the Emergency Operations Center (“EOC”).¹⁰⁰

90. Nicholson, *supra* note 12, at 21.

91. Andersen, *supra* note 13. (The NRP and NIMS create “. . . a welter of entities, terms and acronyms and that existing, commonly accepted terminology is buried under a confusing layer of bureaucratese.”).

92. Department of Homeland Security, National Incident Management System Draft 1, 4 [hereinafter NIMS 1].

93. Telephone Interview with FEMA Employee Wishing Anonymity (Aug. 14, 2003) (on file with author).

94. FEMA, Unit 3: The Emergency Management Cycle, in PRINCIPLES OF EMERGENCY MANAGEMENT, ON-LINE COURSE NUMBER 230 3.1-3.2, <http://www.training.fema.gov/EMIWeb/downloads/IS230.pdf> (last visited Mar. 11, 2006).

95. Waugh, *supra* note 16, at 11 (“The model of mitigation, preparedness, response and recovery has its problems, but it provides both a unifying approach to dealing with hazards and disasters and a common terminology for emergency managers and public officials.”).

96. NRP Draft # 1, *supra* note 31, at 6.

97. Nicholson, *supra* note 6, at 309.

98. NIMS 1, *supra* note 92, at 5.

99. *Id.* at 4, 8-12, 14-15.

100. *Id.* at 7; FEMA, *supra* note 94, at 3.13

The Emergency Operations Center (EOC) . . . is the central location from which all off-scene activities are coordinated. Senior elected and appointed officials are located at the

MACS was planned to incorporate national and regional EOCs.¹⁰¹ MACS was to provide “standardized mechanisms for managing the flow of financial and physical resources before, during, and after an incident occurs.”¹⁰² Wise resource management has always been one of the primary goals of the incident command system.¹⁰³ The multi-agency coordinating group (“MAC Group”) was conceived as an entity that would:

1. Prioritize among incidents and associated resource allocations;
2. Deal with conflicting agency policies;
3. Give strategic guidance and direction to EOCs;¹⁰⁴ and
4. “[O]perate at all levels, across all domains, for all contingencies.”¹⁰⁵

IV. CREATION OF THE INITIAL NATIONAL RESPONSE PLAN

A. State and Local Governments and Responders Weigh In

In August and September, the NRP/NIMS Working Group met to go over NRP 1 and NIMS 1.¹⁰⁶ Aware of the need for a “buy in” from these partners in preparedness, DHS officials welcomed their feedback on the documents.¹⁰⁷ The agency quickly realized that the texts were seriously flawed in the eyes of the audience that would have to live with them on a daily basis.¹⁰⁸

To their credit, the folks from DHS rolled up their sleeves and went back to the drawing board. Toward the end of August or early September, Bob Stephan, Special Assistant to Secretary Ridge, was appointed to coordinate revision of the documents to respond to the states’ and local governments’ concerns. Stephan and his team decided to go back to basics on the NRP and

EOC, as well as personnel supporting critical functions, such as operations, planning, logistics, and finance and administration. The key function of EOC personnel is to ensure that those who are located at the scene have the resources (i.e., personnel, tools, and equipment) they need for the response.

101. NIMS 1, *supra* note 92, at 30.

102. NIMS 1, *supra* note 92, at 6.

103. FEMA, *Unit 4: Incident Resource Management*, in BASIC INCIDENT COMMAND SYSTEM (ICS) INDEPENDENT STUDY, FEMA ON-LINE COURSE NUMBER 195 4.2, <http://training.fema.gov/EMIWeb/IS/is1951st.asp> (last visited Mar. 4, 2004) (“The effective management of operational resources is a vital consideration in any incident.”).

104. NIMS 1, *supra* note 92, at 22.

105. *Id.* at 7.

106. Nicholson, *supra* note 12, at 20.

107. Telephone Interview with Bob Stephan, *supra* note 88 (“We’ve been able to channel our feedback through the state homeland security advisors to get the formal governmental piece, and they help us reach out further. We’re also using the professional associations in the disciplines and the Homeland Security Advisory Council organization to help extend that outreach for us.”).

108. Nicholson, *supra* note 12, at 20.

produce a new NIMS containing more detail than NIMS 1.¹⁰⁹ Their efforts resulted in the INRP and NIMS 2.

B. The Initial National Response Plan

Following its receipt of the NRP/NIMS Working Group's input, DHS released an INRP on October 10, 2003.¹¹⁰ This "Initial" document is actually at least the eleventh revision of the NRP.¹¹¹

The NRP/NIMS Working Group and its partners at DHS deserve considerable credit for their efforts, as the INRP is a significant improvement of its predecessor.¹¹² The plan's size was reduced from fifty pages to eleven pages. Compared to NRP 1, the INRP is a "bare bones" interim document.¹¹³ The reason for the change was the realization that a document was needed to promptly put into operational terms the Secretary's responsibilities under HSPD 5 as the senior official for domestic emergency response. His goal was to "lock and cock the Secretary's responsibilities."¹¹⁴

One change in the documents is the greater sensitivity demonstrated for state and local government partners—the new text treats them as equals in the pursuit of homeland security.¹¹⁵ The INRP specifies that interaction between newly created federal structures like the Homeland Security Operations Center ("HSOC")—a federal EOC—and analogous State, local, and tribal organizations will be "developed and coordinated collaboratively with other affected entities and published in a separate document."¹¹⁶ The INRP requests state governments to report to the HSOC (again, according to mutually agreed on procedures) the activation of State EOCs, announcements of declarations at the State or local level, and activation of interstate mutual aid agreements.¹¹⁷

Another essential feature of the INRP is its willingness to build on the

109. Telephone Interview with Bob Stephan, *supra* note 88.

110. Keith Bea, Overview of Components of the National Response Plan and Selected Issues, CRS Reports, Washington, DC: Congressional Research Service 4 (Dec. 24, 2003).

111. *See supra* note 10.

112. "[T]he INRP represents a significant first step towards an overall goal of integrating the current family of Federal domestic prevention, preparedness, response, and recovery plans into a single all-discipline, all-hazards plan." Charles E. McQueary, Under Secretary for Science and Technology, Department of Homeland Security, Statement before the House Committee on Science (Feb. 11, 2004), available at http://www.house.gov/science/hearings/full04/feb11/mcqueary_supplement_2-11.htm.

113. Telephone Interview with Bob Stephan, *supra* note 88.

114. *Id.*

115. NRP 1 uses the term "partner" or "partnership" five times, whereas, INRP discusses collaboration with state and local governments and anticipates working out procedures together with them. *See, e.g.*, DEP'T HOMELAND SECURITY, INITIAL NATIONAL RESPONSE PLAN 4 (2003), http://www.dhs.gov/interweb/assetlibrary/Initial_NRP_100903.pdf [hereinafter INRP].

116. INRP, *supra* note 115, at 4.

117. *Id.*

many plans that are already present at the federal level.¹¹⁸ The INRP's purpose was to coordinate these existing frameworks, acting as a "bridging document" between the NRP Draft #1 and documents such as the Federal Response Plan ("FRP"), the U.S. Government Interagency Domestic Terrorism Concept of Operations Plan, and the National Contingency Plan.¹¹⁹ The INRP provided that existing policies and procedures would remain in effect until the final NRP was fully in place.¹²⁰ The DHS Secretary, in cooperation with other federal, state, non-governmental, tribal, and local partners, has developed the NRP Draft #1 as a next step toward a final NRP.¹²¹

The INRP also eliminates almost all of the pointless new jargon to which many observers objected in previous iterations, including the "Preliminary Framework for the NIMS."¹²² As mentioned above, NRP 1 eliminated the well-known four phases of emergency management—mitigation, preparedness, response, and recovery—in favor of five domains of incident management activities: awareness, prevention, preparedness, response, and recovery.¹²³

For many responders, the most troublesome part of NRP 1 was the Secretary's responsibility under Training and Continuous Improvement to "[e]nsure[] rigorous requirements for continuous improvements through a national system to plan, equip, train, exercise, test, and evaluate and to provide standards and credentialing for homeland security."¹²⁴ This requirement of HSPD 5 is addressed in the adopted NIMS.¹²⁵

Post-event activities are more easily comprehended than in NRP 1, including authorizing the DHS Secretary to appoint a Principal Federal

118. *Id.* at 1.

119. "The NRP will replace the Federal Response Plan, U.S. Counterterrorism Concept of Operations Plan, and the National Contingency Plan. Other plans will be developed within the NRP as annexes to the NRP or we will change them to be consistent as appendices to the NRP." Telephone Interview with Bob Stephan, *supra* note 88.

120. INRP, *supra* note 115, at 1. ("The current family of Federal incident management and emergency response plans remains in effect during this interim period, except as specifically modified in this document.")

121. "What we're going to do is [take] a comprehensive look. . . This will be the cornerstone for incident management and response." Telephone Interview with Bob Stephan, *supra* note 88.

122. NRP 1, *supra* note 34, at 37-40.

123. *Id.* at 6 ("The NRP sets forth a new concept of a "response" plan by covering five domains: awareness, prevention, preparedness, response and recovery.")

124. NRP 1, *supra* note 34, at 21.

125. "Under the NIMS, preparedness is based on national standards for the qualification and certification of emergency response personnel. . . Personnel that are certified for employment in support of an incident that transcends interstate jurisdictions through the Emergency Management Assistance Compacts System will be required to meet national qualification and certification standards." NIMS, *supra* note 30, at 38.

Official (“PFO”) for oversight and coordination of federal activities.¹²⁶ The PFO will not be the only federal contact, however, with State, local, and tribal officials.¹²⁷ Requests for, and deployment of, federal assistance will be executed by the FRP, as other existing plans have required in the past.¹²⁸ A Joint Field Office will incorporate the Joint Operations Center, the Disaster Field Office, and other entities into a “one-stop shop” for contact with federal entities.¹²⁹

The INRP encompasses significant improvements on a living document. As Albert Ashwood, the National Association of Emergency Managers representative to the Working Group, summed up: “We have a document that’s in draft form. We’re going to have to be continually looking at it . . . It must be recalled that this is a work in progress.”¹³⁰ The NRP/NIMS Working Group deserves praise for its hard work to rescue an approach that was flawed in many ways. Its assistance has benefited DHS significantly and will continue to do so through the consulting process.

IV. SUBSEQUENT NRP VERSIONS: EVER MORE COMPREHENSIVE PLANS

A. The National Response Plan Draft #1

The NRP Draft #1¹³¹ and later versions of the NRP in some ways hearken back to NRP 1,¹³² but overall analysis reveals that their roots lie much more in the FRP. It is a much longer document than the INRP.¹³³ The documents were created to embody the direction of HSPD 5 to “integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan.”¹³⁴ The evolving NRP Drafts, however, reveal greater sensitivity to the concerns voiced in the aftermath of NRP 1’s release.¹³⁵

NRP 1 made no reference to the National Guard, a shortcoming that the later NRP Drafts address.¹³⁶ The later NRP Drafts task state controlled (not

126. INRP, *supra* note 115, at 6-7.

127. *Id.* at 6.

128. *Id.* at 6-7.

129. *Id.* at 8.

130. Telephone Interview with Albert Ashwood, Director, Oklahoma Department of Emergency Management and NEMA Representative (Aug. 22, 2003).

131. *See supra* note 10.

132. Comparison of the tables of contents reveals coverage of the same topics. NRP 1, *supra* note 34, at v-vi; NRP Draft #1, *supra* note 31, at i-iii.

133. *See supra* note 34.

134. HSPD 5, *supra* note 42, at ¶16.

135. NRP Draft #1, *supra* note 31, at Transmittal Letter. (“This plan was developed through an inclusive interagency, inter-jurisdictional process incorporating the expertise and recommendations of Federal, State, local, tribal, and private sector stakeholders. . . . The successful implementation of this national plan will take the concerted efforts of all stakeholders.”).

136. The National Guard is referenced five times in the NRP Draft #1. NRP Draft #1, *supra* note 31, at 38-39, 69.

federally called up) Army and Air National Guard units with primary duties of supporting their states during civil emergencies.¹³⁷ The NRP Drafts contemplate using the Guard to support federal law enforcement activities when called to federal duty.¹³⁸ They also posit that the National Guard will assist state law enforcement efforts when it has been called to service as a state level resource.¹³⁹ The documents mention the controls placed on military forces by the Posse Comitatus Act,¹⁴⁰ but interpret the Act not to apply to Guard units on state service.¹⁴¹ This interpretation of the Posse Comitatus Act is generally endorsed by legal scholars,¹⁴² who also point out that state law may limit the Guard's use while on state service.¹⁴³

NRP 1 also does not mention emergency medical services ("EMS"). The NRP Draft #1 recognizes EMS as "incident management component[s],"¹⁴⁴ but only mentions EMS once in the entire document. That limitation continues in the adopted NRP.¹⁴⁵ The specifics for EMS are, however, laid out in an attached annex as Emergency Support Function #8,¹⁴⁶ in a manner similar to the FRP.

NRP 1 also discusses the Governor's role, but only very briefly.¹⁴⁷ The

137. NRP Draft #1, *supra* note 31, at 38.

138. *Id.* at 39.

139. *Id.*

140. 18 U.S.C. § 1385 (2003).

141. NRP Draft #1, *supra* note 31, at 69.

The primary prohibition of the Posse Comitatus Act is against direct involvement by active duty military personnel (to include Reservists on active duty and *National Guard personnel in Federal service*) in traditional law enforcement activities (to include interdiction of vehicle, vessel, aircraft, or other similar activity; a search or seizure; an arrest, apprehension, stop and frisk, or similar activity). (Emphasis added.)

142. See, e.g., Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 964 (1997) ("Additionally, the PCA only applies to forces in federal service, and therefore, the National Guard is not limited by the PCA in its normal status of state service.").

143. *Id.* at 964 n.71.

144. NRP Draft #1, *supra* note 31, at 1-2. ("The NRP incorporates the best practices and procedures from various incident management components—homeland security, emergency management, law enforcement, firefighting, public works, public health, and emergency medical services – and integrates them into a unified structure.").

145. NRP Final Draft, *supra* note 34, at 2.

146. Department of Health & Human Services, Emergency Support Function #8, Public Health and Medical Services Annex, Draft (July 6, 2004).

147. NRP 1, *supra* note 34, at 12.

As a State's chief executive, the Governor is responsible for the public safety and welfare of the people of that State or territory. The Governor:

NRP Draft #1 expands significantly on NRP 1's language regarding the Governor's role.¹⁴⁸ Under NRP 1, the Governor "is responsible . . . to prepare for and to respond to man-made incidents, including terrorism, natural disasters, and other contingencies . . . ," while the NRP Draft #1 requires that he or she "is responsible . . . to prevent, prepare for, to respond and recovery [sic] from incidents involving all hazards including terrorism, natural disasters, accidents, and other contingencies."¹⁴⁹ Adding prevention and recovery to the Governor's responsibilities reflects their nature under state law.¹⁵⁰ The NRP Draft #1 also contains stronger language regarding promotion of mutual aid agreements—moving from "may encourage" in NRP 1 to "encourages" in the NRP Draft #1.¹⁵¹ The NRP Draft #1 includes a detailed reference to federal procedures for Governors to request assistance¹⁵²

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1. Is responsible for coordinating State and local resources to address effectively the full spectrum of actions to prepare for and to respond to man-made incidents, including terrorism, natural disasters, and other contingencies;
 2. Has extraordinary powers during a contingency to suspend authority, to seize property, to direct evacuations, and to authorize emergency funds;
 3. Plays a key role in communicating to the public, in requesting Federal assistance, when State capabilities have been exceeded or exhausted, and in helping people, businesses, and organizations to cope with disasters; and
 4. May also encourage local mutual aid and implement authorities for the State to enter into mutual aid agreements with other States and territories to facilitate resource sharing.

NRP 1, *supra* note 34.

148. NRP Draft #1, *supra* note 31, at 53. "As a State's chief executive, the Governor is responsible for the public safety and welfare of the people of that State or territory. The Governor:

1. Is responsible for coordinating State and local resources to address the full spectrum of actions to prevent, prepare for, to respond and recovery [sic] from incidents involving all hazards including terrorism, natural disasters, accidents, and other contingencies;
2. Has extraordinary powers to suspend authority, to seize property, to direct evacuations, and to authorize emergency funds;
3. Provides leadership and plays a key role in communicating to the public, and in helping people, businesses, and organizations to cope with the consequences of any type of domestic incident within the State;
4. Encourages participation in local mutual aid and implements authorities for the State to enter into mutual aid agreements with other States and territories to facilitate resource sharing; and
5. Requests Federal assistance when State capabilities have been exceeded or exhausted.

Id.

149. *See supra* notes 147-48.

150. *See, e.g.*, IND. CODE § 10-14-3-7(b)(4) (2003), amended by 2006 Ind. Legis. Serv. (West). ("It is also the purpose of this chapter and the policy of the state to . . . clarify and strengthen the roles of the: (A) governor; (B) state agencies; and (C) local governments; in the prevention of, preparation for, response to, and recovery from disasters").

151. *See supra* notes 147-48.

152. NRP Draft #1, *supra* note 31, at 48, 67-68.

under the Stafford Act.¹⁵³

Absent from the NRP Draft #1 are the five “domains” of incident management posited in NRP 1.¹⁵⁴ The language reverts to the “phases”¹⁵⁵ of an incident. Further, the phases include those familiar to emergency management—mitigation, preparedness, response, and recovery—and adds a new phase, prevention.¹⁵⁶ Adding prevention makes sense, as the term refers to the law enforcement piece of DHS’ responsibilities,¹⁵⁷ a duty that was not borne by traditional emergency management.¹⁵⁸

The NRP Draft #1 also addresses other concerns regarding terminology and structure. The MACS,¹⁵⁹ which was conceived of as the heart of incident management,¹⁶⁰ is not present in the NRP Draft #1. MACS is incorporated, however, in the adopted NIMS.¹⁶¹ The local, state, and Federal Emergency

153. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (2003).

154. NRP 1, *supra* note 34, at 6.

155. NRP Draft #1, *supra* note 31, at 14.

156. *Id.* at 15 (“Domestic incident management activities addressed in the NRP span the event including prevention, preparedness, response, recovery, and mitigation.”).

157. *Id.* (“Prevention involves actions to interdict, disrupt, pre-empt or avert a potential incident. This includes homeland security and law enforcement efforts to prevent terrorist attacks.”).

158. “The local Emergency Program Manager has the day-to-day responsibility of overseeing emergency management programs and activities. And most emergencies are handled at the local level without State or Federal assistance. This role entails coordinating all aspects of a jurisdiction’s mitigation, preparedness, response, and recovery capabilities.” FEMA, *supra* note 103, at 4.1.

159. NRP 1 *supra* note 34, at 38-39.

160. *Id.* at 38.

MACS is a combination of committees, facilities, equipment, personnel, procedures, and communications protocols integrated into a common interagency system with responsibility for coordinating and supporting incident operations. MACS establishes policies and priorities; allocates and tracks resources; and coordinates interagency and intergovernmental decisions. The MACS functions principally through Emergency Operations Centers and Emergency Prevention and Preparedness Councils.

161. MACS resurfaces in the adopted NIMS. NIMS, *supra* note 30, at 26.

A multi-agency coordination system is a combination of facilities, equipment, personnel, procedures, and communications integrated into a common system with responsibility for coordinating and supporting domestic incident management activities. The primary functions of multi-agency coordination systems are to support incident management policies and priorities, facilitate logistics support and resource tracking, inform resource allocation decisions using incident management priorities, coordinate incident related information, and coordinate interagency and intergovernmental issues regarding incident management policies, priorities, and strategies. Direct tactical and operational responsibility for conducting incident management activities rests with the Incident Command.

PPCs¹⁶² that were to be the basic underlying structures for MACS¹⁶³ are a thing of the past. The NRP Draft #1 approaches the matter from a functional perspective, concentrating on tasks that must be performed, rather than creating new structures.¹⁶⁴

1. Some concerns regarding terminology remain. The definition of preparedness does not include the terms training and exercising,¹⁶⁵ thus differentiating it from the traditional FEMA concept familiar to emergency managers.¹⁶⁶ Indeed, training and exercising are not found in the definitions of any of the phases of incident management,¹⁶⁷ as delineated in the NRP Draft #1.¹⁶⁸

Unlike NRP 1, the NRP Draft #1 contained an indication in the table of contents that significant reference materials would be added.¹⁶⁹ Of assistance to emergency managers and responders, these materials include Emergency Support Functions Annexes (contained in a separate document distributed with the NRP Draft #1).¹⁷⁰ Other information that was due to be added later

162. NRP 1, *supra* note 34, at 39. (“Emergency Prevention and Preparedness Councils (EPPC). EPPCs are multi-agency, multi-jurisdictional bodies established for pre-event coordination. EPPCs are the principal mechanism through which to maintain and improve the NIMS.”).

163. *Id.* at 38.

164. NRP Draft #1, *supra* note 31, at 15.

Under NIMS, Preparedness encompasses the full range of deliberate, critical tasks and activities necessary to build, sustain and improve the operational capability to prevent, protect against, respond to and recover from domestic incidents. Preparedness, in the context of an actual or potential incident, involves actions to enhance readiness and minimize impacts. This includes hazard mitigation measures to save lives and protect property from the impacts of terrorism, natural disasters and other events.” The adopted NIMS takes the same approach.

NIMS, *supra* note 30, at 34-35.

165. NRP Draft #1, *supra* note 31 at 15-16.

166. Preparedness includes three elements: planning, training, and exercising. GEORGE D. HADDOW & JANE A. BULLOCK, INTRODUCTION TO EMERGENCY MANAGEMENT 115 (2003).

167. Arguably, training and exercising may be inferred from the preparedness definition’s use of the language “the full range of deliberate, critical tasks and activities necessary to build, sustain and improve the operational capability to prevent, protect against, respond to and recover from domestic incidents.” NRP Draft #1, *supra* note 31, at 15. Omitting the terms, however, may indicate a failure to embrace the basics of emergency management. Clearly, training and exercising remain high on the DHS’ list of priorities, as demonstrated by its citation (in NRP Draft #1 at 53) to HSPD 5’s requirement that the Secretary of DHS “coordinate with State and local governments to ensure adequate planning, equipment, training, and exercise activities.” HSPD 5, *supra* note 42, at ¶ 6.

168. NRP Draft #1, *supra* note 31, at 15-16. They do, however, constitute an important aspect of the adopted NIMS. NIMS, *supra* note 30, at 37-38.

169. NRP Draft #1, *supra* note 31, at ii-iii.

170. DEP’T HOMELAND SECURITY, EMERGENCY SUPPORT FUNCTIONS ANNEXES DRAFT #1 (2004), http://ops.state.co.us/downloads/reference_library/nrp Annexes.pdf. This document will be revised, as noted at its beginning:

included Support Annexes¹⁷¹ (including Legal),¹⁷² and Hazard Specific Incident Annexes.¹⁷³ The revival of Emergency Support Functions and Hazard Specific Annexes hearkens back to the FRP.¹⁷⁴ A useful tool for attorneys is the existing portion of the Authorities and References Section,¹⁷⁵ which includes federal authorities for actions under the NRP Draft #1.

B. Adoption of the National Response Plan

The NRP was finally adopted in November 2004 and became effective upon issuance with a phased implementation process throughout the first year.¹⁷⁶ During the first 120 days of this implementation process, the INRP,

Note: These are unedited outlines of the ESF Annexes. The agencies preparing these outlines did not have the draft Basic Plan to use as a reference. It is the intention of the Writing Team that any inconsistencies, gaps and other discrepancies will be corrected between this DRAFT and DRAFT #2 where the outlines will be expanded to full drafts.

171. NRP Draft #1, *supra* note 31, at ii-iii.

172. *Id.* The adopted NRP does not contain a legal annex. NRP, *supra* note 36, at xi-xiii.

173. NRP Draft # 1, *supra* note 31, at ii-iii.

174. FEMA, FEDERAL RESPONSE PLAN (INTERIM) 1 (2003), <http://www.fema.gov/pdf/rrr/frp/frp2003.pdf> (“The Federal Response Plan . . .organizes the types of Federal assistance that a State is most likely to need under 12 Emergency Support Functions (ESFs), each of which has a designated primary agency”).

175. NRP Draft #1, *supra* note 31, at 65-72.

176. NRP, *supra* note 36, at ix. The NRP was implemented as follows:

Phase I—Transitional Period (0 to 60 days): This 60-day timeframe [was] intended to provide a transitional period for departments and agencies and other organizations to modify training, designate staffing of NRP organizational elements, and become familiar with NRP structures, processes, and protocols.

Phase II—Plan Modification (60 to 120 days): This second 60-day timeframe [was] intended to provide departments and agencies the opportunity to modify existing Federal interagency plans to align with the NRP and conduct necessary training.

Phase III—Initial Implementation and Testing (120 days to 1 year): Four months after its issuance, the NRP [was] to be fully implemented, and the INRP, FRP, CONPLAN, and FRERP are superseded. Other existing plans remain[ed] in effect, modified to align with the NRP. During this timeframe, the Department of Homeland Security (DHS) [was to] conduct systematic assessments of NRP coordinating structures, processes, and protocols implemented for actual Incidents of National Significance (defined on page 4 of the NRP), national-level homeland security exercises, and National Special Security Events (NSSEs). These assessments [were to] gauge the plan’s effectiveness in meeting specific objectives outlined in Homeland Security Presidential Directive-5 (HSPD-5). At the end of this period, DHS [was] to conduct a 1-year review to assess the implementation process and make recommendations to the Secretary on necessary NRP revisions. Following this initial review, the NRP [was to] begin a deliberate 4-year review and reissuance cycle.

FRP, U.S. Government Domestic Terrorism Concept of Operations Plan (“CONPLAN”), and Federal Radiological Emergency Response Plan (“FRERP”) remained in effect.¹⁷⁷

The NRP encourages private sector entities, particularly those which represent critical infrastructure or key resources, to develop suitable emergency response and business continuity plans, and information-sharing and incident-reporting protocols. These should be created to address their business’ unique requirements, and be coordinated with regional, State, and local emergency response plans and information-sharing networks. These structures should be in harmony with the NRP Base Plan and supporting annexes.¹⁷⁸

C. Structure of the National Response Plan

The NRP’s structure continued to evolve from its previous versions, becoming in the process more similar to the FRP.¹⁷⁹ DHS had the goal of impacting the existing state and local structure as little as possible in the NRP.¹⁸⁰ In its present form, the NRP can be broken down into the five components: (1) the Base Plan; (2) Appendices; (3) the Emergency Support Function (“ESF”) Annexes; (4) the Support Annexes; and (5) Incident Annexes.¹⁸¹

The Base Plan of the NRP “describes . . . a national approach to domestic incident management designed to incorporate the efforts and resources of Federal, state, local, tribal, private-sector, and nongovernmental organizations.”¹⁸² In addition, the Base Plan comprises “planning assumptions, roles and responsibilities, concept of operations, preparedness guidelines, and plan maintenance instructions.”¹⁸³

The Appendixes are structured as to “provide other relevant, more detailed

NRP, *supra* note 36, at ix.

177. *Id.*

178. *Id.* at x.

179. The FRP establishes a process and structure for the systematic, coordinated, and effective delivery of federal assistance to address the consequences of any major disaster or emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, §§ 5121-5206 (2003). FEMA, THE FEDERAL RESPONSE PLAN iii (1999) [hereinafter FRP].

180. EHP Virtual Forum Presentation, *supra* note 35.

Our goal was too [sic] preserve and mirror the existing structure of state emergency operations plans to the degree that we could. There are only three new ESFs, some modifications to a few of the ESFs. The new structures in the plan—the HSOC, the Joint Field Office, the Interagency Incident Management Group, primarily impact the Federal partners.

181. NRP, *supra* note 36, at xi-xii.

182. *Id.*

183. *Id.* at xi.

supporting information, including terms, definitions, acronyms, authorities, and a compendium of national interagency plans.”¹⁸⁴ They include the following:¹⁸⁵

- Glossary of Key Terms
- List of Acronyms
- Authorities and References
- Compendium of National/International Interagency Plans
- Overview of Initial Federal Involvement Under the Stafford Act
- Overview of Federal-to-Federal Support in Non-Stafford Act Situations

The ESF Annexes specify the missions, policies, structures, and responsibilities of federal agencies for managing resource and program support to states and federal agencies or other entities during Incidents of National Significance.¹⁸⁶ The fifteen ESF Annexes set forth in the NRP are enumerated below by name and scope:¹⁸⁷

ESF	Scope
ESF #1 – Transportation	<ul style="list-style-type: none"> ▪ Federal & civil transportation support ▪ Transportation safety ▪ Restoration/recovery of transportation infrastructure ▪ Movement restrictions ▪ Damage & impact assessment
ESF #2 – Communications	<ul style="list-style-type: none"> ▪ Coordination with telecommunications industry ▪ Restoration/repair of telecommunications infrastructure ▪ Protection, restoration, and sustainment of national cyber & information technology resources
ESF #3 - Public Works & Engineering	<ul style="list-style-type: none"> ▪ Infrastructure protection and emergency repair ▪ Infrastructure restoration

184. *Id.*

185. *Id.* at xii.

186. NRP, *supra* note 36, at xi.

187. NRP, *supra* note 36, at xii *12.

	<ul style="list-style-type: none"> ▪ Engineering services, construction management ▪ Critical infrastructure liaison
ESF #4 - Firefighting	<ul style="list-style-type: none"> ▪ Firefighting activities on Federal lands ▪ Resource support to rural and urban firefighting operations
ESF #5 - Emergency Management	<ul style="list-style-type: none"> ▪ Coordination of incident management efforts ▪ Issuance of mission assignments ▪ Resource and human capital ▪ Incident action planning ▪ Financial management
ESF #6 - Mass Care, Housing, and Human Services	<ul style="list-style-type: none"> ▪ Mass care ▪ Disaster housing ▪ Human services
ESF #7 - Resource Support	<ul style="list-style-type: none"> ▪ Resource support (facility space, office equipment and supplies, contracting services, etc.)
ESF #8 - Public Health and Medical Services	<ul style="list-style-type: none"> ▪ Public health ▪ Medical ▪ Mental health services ▪ Mortuary services
ESF #9 - Urban Search and Rescue	<ul style="list-style-type: none"> ▪ Life-saving assistance ▪ Urban search and rescue
ESF #10 - Oil & Hazardous Materials Response	<ul style="list-style-type: none"> ▪ Oil and hazardous materials (chemical, biological, radiological, etc.) response ▪ Environmental safety and short- and long-term cleanup
ESF #11 - Agriculture and Natural Resources	<ul style="list-style-type: none"> ▪ Nutrition assistance ▪ Animal and plant disease/pest response ▪ Food safety and security ▪ Natural and cultural resources and historic properties protection and restoration
ESF #12 - Energy	<ul style="list-style-type: none"> ▪ Energy infrastructure assessment, repair, and restoration ▪ Energy industry utilities coordination ▪ Energy forecast
ESF #13 - Public Safety & Security	<ul style="list-style-type: none"> ▪ Facility & resource security ▪ Security planning and technical and resource assistance ▪ Public safety/security support ▪ Support to access, traffic, and crowd control
ESF #14 - Long-term Community Recovery & Mitigation	<ul style="list-style-type: none"> ▪ Social and economic community impact assessment ▪ Long-term community recovery assistance to States, local governments, and the private

	sector <ul style="list-style-type: none"> ▪ Mitigation analysis & program implementation
ESF #15 - External Affairs	<ul style="list-style-type: none"> ▪ Emergency public information and protective action guidance ▪ Media and community relations ▪ Congressional and international affairs ▪ Tribal and insular affairs

The Support Annexes provide guidance and describe the methods and administrative obligations needed to assure efficient and effective achievement of NRP incident management objectives.¹⁸⁸ The Support Annexes are described in the NRP as follows:¹⁸⁹

- Financial Management provides guidance for NRP implementation to ensure that incident-related funds are provided expeditiously and that financial management activities are conducted in accordance with established law, policies, regulations, and standards.
- International Coordination provides guidance for carrying out responsibilities regarding international coordination in support of the Federal response to domestic Incidents of National Significance.
- Logistics Management describes the framework within which the overall NRP logistics management function operates. It also outlines logistics management responsibilities and mechanisms for integrating Federal, State, local, and tribal resource providers.
- Private-Sector Coordination outlines processes to ensure effective incident management coordination and integration with the private sector, including representatives of the Nation's Critical Infrastructure/Key Resources ("CI/KR") sectors and other industries.
- Public Affairs describes interagency incident communications procedures designed to enable the coordination and dissemination of timely public information during Incidents of National Significance.

188. NRP, *supra* note 36, at xi.

189. *Id.*

- Science and Technology provides guidance and mechanisms to ensure that all levels of government can leverage the Nation's science and technology resources efficiently and effectively in the management of Incidents of National Significance.
- Tribal Relations describes the policies, responsibilities, and concept of operations for effective coordination and interaction with tribal governments and communities during Incidents of National Significance.
- Volunteer and Donations Management provides guidance on volunteer and donations management functions related to Incidents of National Significance.
- Worker Safety and Health details processes to ensure coordinated, comprehensive efforts to identify responder safety and health risks and implement procedures to minimize or eliminate illness or injuries during incident management and emergency response activities.

The Incident Annexes “address contingency or hazard situations requiring specialized application of the NRP.”¹⁹⁰ Moreover, they “describe the missions, policies, responsibilities, and coordination processes that govern the interaction of public and private entities engaged in incident management and emergency response operations across a spectrum of potential hazards. These annexes are typically augmented by a variety of supporting plans and operational supplements.”¹⁹¹ The Incident Annexes are new to the adopted NRP, and should provide much-needed guidance for state and local responders in their responses to the referenced types of event. The Incident Annexes as described by the NRP are set forth below:¹⁹²

- The Biological Incident Annex describes incident management activities related to a biological terrorism event, pandemic, emerging infectious disease, or novel pathogen outbreak.
- The Catastrophic Incident Annex establishes the strategy for implementing and coordinating an accelerated national response to a catastrophic incident.
- The Cyber Incident Annex establishes procedures for a multidisciplinary, broad-based approach to prepare for, remediate, and recover from catastrophic cyber events impacting critical national processes and the national economy.

190. NRP, *supra* note 36, at xiii.

191. *Id.* at xiii.

192. *Id.* at xiii.

- The Food and Agriculture Incident Annex describes incident management activities related to a terrorist attack, major disaster, or other emergency involving the Nation's agriculture and food systems. (To be published in a subsequent version of the NRP.)
- The Nuclear/Radiological Incident Annex describes incident management activities related to nuclear/radiological incidents.
- The Oil and Hazardous Materials Incident Annex describes incident management activities related to certain nationally significant oil and hazardous materials pollution incidents.
- The Terrorism Incident Law Enforcement and Investigation Annex describes law enforcement and criminal investigation coordinating structures and processes in response to a terrorist event.

In keeping with its status as a “national” plan, the NRP requires incident management and emergency response plans to incorporate its approach to their subject matter. Specifically, they must include, to the extent authorized by law:

- Principles and terminology of the NIMS;
- Reporting requirements of the NRP;
- Linkages to key NRP organizational elements (such as the Interagency Incident Management Group (“IIMG”), National Response Coordination Center (“NRCC”), Regional Response Coordination Center (“RRCC”), Joint Field Office (“JFO”), etc.; and
- Procedures for transitioning from localized incidents to Incidents of National Significance.¹⁹³

Although a Legal Support Annex was to have been issued in the NRP, as indicated by its inclusion in the table of contents for the NRP Draft #1,¹⁹⁴ this element does not appear in the document, nor did it appear in the contents of NRP Final Draft or the final NRP. Such guidance would have been particularly welcome to attorneys at all levels of government, who for the most part have been flying blind when the time came to advise clients on legal issues

193. NRP, *supra* note 36, at 60.

194. NRP Draft #1, *supra* note 31, at ii-iii.

during incidents.¹⁹⁵ Both government attorneys and their business counterparts need all the information they can get regarding incident management, an issue that will likely become ever more prominent in their legal practices.¹⁹⁶

V. NIMS 2 AND THE ADOPTED NIMS: MORE DETAIL FOR RESPONDERS AND EMERGENCY MANAGERS

The NRP/NIMS Working Group meeting that resulted in the INRP was the first of an ongoing series of conferences.¹⁹⁷ A subsequent conference addressed NIMS 1, and the working group produced yet another document responsive to concerns of state and local representatives.¹⁹⁸ NIMS 2—totaling ninety-two pages in length¹⁹⁹—is a much more detailed document than is the INRP—comprised of eleven pages.²⁰⁰ Accordingly, the adopted NIMS is very close in content to NIMS 2, in contrast to differences between the INRP, the NRP Draft #1, and the adopted NRP.²⁰¹

A. Preparedness Issues

Perhaps the most interesting and significant parts of the adopted NIMS

195. See generally Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487 (2000); Roger A. Nowadsky, *Lawyering Your Municipality Through a Natural Disaster or Emergency*, 27 URB. LAW. 9 (1995).

196. Michael D. Brown, Acting Deputy Director, Chief Operating Officer and General Counsel, FEMA, Address at Widener Univ. Sch. of Law: FEMA's Role in the Aftermath of 9-11 and Homeland Security (Mar. 14, 2002), *quotation available at* http://www.law.widener.edu/news/articles/2002/de_030102.shtml ("This subject is not going away. The events of 9-11 are, unfortunately, likely to be the shape of things to come. All attorneys advising businesses [as well as emergency management government attorneys] are going to have to know how terrorism and emergency law works."). Brown was nominated in January 2003 by President Bush to be Under Secretary for Emergency Preparedness and Response at DHS. Press Release, FEMA, Michael D. Brown Nominated for Key Homeland Security Position (Jan. 10, 2003), <http://www.fema.gov/news/newsrelease.fema?id=2116>.

197. Telephone Interview with Albert Ashwood, *supra* note 26.

198. Telephone Interview with Bob Stephan, *supra* note 88.

199. Dep't Homeland Security, National Incident Management System Draft 2 (web site for NIMS 2) [hereinafter NIMS 2].

200. INRP, *supra* note 115.

201. NIMS 2 is ninety-two pages long, while adopted NIMS is 139 pages long. Their contents have the same labels. See NIMS 2, *supra* note 199; NIMS, *supra* note 30, at v-vii. The difference in overall length is due to the adopted NIMS containing three additional tabs in Appendix A: The Incident Command System. NIMS, *supra* note 30, at vi-vii. Those tabs are:

- Tab 7 – Predesignated Facilities and Areas
- Tab 8 – The Planning Process
- Tab 9 – Examples of ICS Forms

Id. Together, these tabs account for twenty-six of the additional forty-seven pages. The remaining twenty-one pages are spread through the document. See NIMS 2, *supra*, note 199; NIMS, *supra* note 30.

deal with preparedness.²⁰² Adopted NIMS' Chapter III—Preparedness—lays out a “preparedness cycle” that includes planning, training, equipping, exercising, evaluating, and taking action to correct or mitigate.²⁰³

Emergency managers can take heart from changes between NIMS 1, NIMS 2, and the adopted NIMS. While the former attempted to create a completely new structure,²⁰⁴ the latter two documents recognize the importance of FEMA's established “all-hazards” approach to preparedness.²⁰⁵ Despite the funding issues mentioned above regarding the primacy of terrorism, the adopted NIMS clearly anticipates that it will apply to all hazards.²⁰⁶ The adopted NIMS recognizes the fact that different jurisdictions have evolved different preparedness organizations.²⁰⁷ It specifies, however, that when preparedness must take place across jurisdictions, organizations should be multi-jurisdictional in nature.²⁰⁸ This pronouncement dovetails with the adopted NIMS heavy emphasis on mutual aid agreements, discussed in more detail below.²⁰⁹

The roles of preparedness organizations and the nature of preparedness programs set forth in the NIMS are laid out in some detail.²¹⁰ Plans need to address the elements of the preparedness cycle enumerated above.²¹¹ Planning must include emergency operations plans, procedures for implementing the plans, preparedness plans (including training and exercising), mitigation plans, and recovery plans.²¹² Training and exercises (to federal standards) must be run to ensure continual improvement in all-hazards incident management

202. See NIMS, *supra* note 30, at 33-43.

203. *Id.* at 35. (“Individual jurisdictions establish programs that address the requirements for each step of the preparedness cycle (planning, training, equipping, exercising, evaluating, and taking action to correct and mitigate). These programs should adopt relevant NIMS standards, guidelines, processes, and protocols.”)

204. “Deep-sixing the current system [as done by NRP 1 and NIMS 1], the critics charge, amounts to ‘reinventing the wheel,’ in the words of one specialist.” Andersen, *supra* note 13.

205. NIMS, *supra* note 30, at 3. (“The NIMS integrates existing best practices into a consistent, nationwide approach to domestic incident management that is applicable at all jurisdictional levels and across functional disciplines in an all-hazards context.”)

206. *Id.* at 1. (“For purposes of this document, incidents can include acts of terrorism, wildland and urban fires, floods, hazardous materials spills, nuclear accidents, aircraft accidents, earthquakes, hurricanes, tornadoes, typhoons, war-related disasters, etc.”)

207. “The needs of the jurisdictions involved will dictate how frequently such [preparedness] organizations must conduct their business, as well as how they are structured.” *Id.* at 34.

208. “When preparedness activities routinely need to be accomplished across jurisdictions, preparedness organizations should be multijurisdictional.” NIMS, *supra* note 30, at 35-36.

209. *Id.* at 39.

210. *Id.* at 33-42.

211. *Id.* at 35.

212. *Id.* at 35-38.

nationwide.²¹³ Personnel qualifications²¹⁴ and equipment²¹⁵ must be standardized to enable integration of different entities. Finally, for all aspects of preparedness, publications management is a key element, as it provides consistent standards and promotes interoperability.²¹⁶

B. The NIMS Integration Center and Responder Certification Issues

As mentioned above, HSPD 5 requires federal regulation of homeland security responders.²¹⁷ These standards will be enforced through funding cuts for non-compliant entities.²¹⁸ Although such cuts could have begun in fiscal year 2005,²¹⁹ DHS issued guidance for compliance in fiscal year 2005 that puts off such steps.²²⁰

The adopted NIMS requires “guidelines, protocols, and standards for planning, training and exercises, personnel qualification and certification, equipment certification, and publication management.”²²¹ National level preparedness standards will be “maintained and managed” through a multi-jurisdictional, multidisciplinary center, using a collaborative process.²²² To accomplish this goal, the adopted NIMS sets up a NIMS Integration Center

213. Incident management organizations and personnel at all levels of government, and within the private sector and non-governmental organizations, must be appropriately trained to improve all-hazards incident management capability nationwide. Incident management organizations and personnel must also participate in realistic exercises—including multidisciplinary and multi-jurisdictional events and private sector and nongovernmental organization interaction—to improve integration and interoperability.

NIMS, *supra* note 30, at 37.

214. “Under the NIMS, preparedness is based on national standards for the qualification and certification of emergency response personnel.” *Id.* at 38.

215. “A critical component of operational preparedness is the acquisition of equipment that will perform to certain standards, including the capability to be interoperable with similar equipment in other jurisdictions.” *Id.* at 39.

216. “Publication management for the NIMS includes development of naming and numbering conventions; review and certification of publications; methods for publications control; identification of sources and suppliers for publications and related services; and management of publication distribution.” *Id.* at 40.

217. HSPD 5, *supra* note 42, at ¶ 16.

218. *Id.* at ¶ 20.

219. *Id.*

220. *See infra* Appendix 1.

221. NIMS, *supra* note 30, at 33.

222. The process for managing and maintaining the NIMS ensures that all users and stakeholders—including various levels of government, functional disciplines, and private entities—are given the opportunity to participate in NIMS Integration Center activities. To accomplish this goal, the NIMS Integration Center will be multi-jurisdictional and multi-disciplinary and will maintain appropriate liaison with private organizations.

Id. at 59.

("NIMS Center"),²²³ which was referred to as the Management and Maintenance Center under NIMS 2.²²⁴

The NIMS Center's nature is outlined in very general terms in the adopted NIMS.²²⁵ Stephan expressed concern that the NIMS needed to be produced and useful as quickly as possible.²²⁶ The discussions between stakeholders on how to put together the NIMS Center were able, therefore, to progress in parallel with the NIMS revision.²²⁷ The result has been a more rapid deployment of two mature documents, rather than prolonged consideration of a single text.²²⁸ In early 2004, a cross department working group with outreach to other interested parties began to flesh out the Integration Center.²²⁹ They came up with a detailed concept of operations and staffing requirements for the NIMS Center.²³⁰ One aspect of specialized support for the Integration Center is legal staff on detached duty from the DHS Office of General Counsel.²³¹

When the NIMS Center first debuted the detailed NIMS concept nationwide, some emergency response groups expressed concerns regarding its concept and background.²³² Law enforcement initially viewed it as something from the fire service with little application to their work.²³³ As they learned more about NIMS, however, law enforcement agencies adopted it warmly.²³⁴ NIMS awareness training is included in many different police academies at the state and local levels. Law enforcement understands that NIMS will bring order to an on-scene event where chaos could well exist.²³⁵

223. *Id.* at 59-62.

224. NIMS 2, *supra* note 199, at 21.

225. NIMS, *supra* note 30, at 59-64.

226. Telephone Interview with Bob Stephan, *supra* note 88.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Telephone Interview with Bob Stephan, *supra* note 88.

232. Interview with Gil Jamieson, Acting Director, NIMS Integration Center, Washington, D.C. (June 3, 2005) (on file with author).

233. *Id.*

234. *Id.*

We just recently completed a series of roll outs across the nation in seven cities, and law enforcement was part of the panel that discussed NIMS. I was directing that panel. At the same time, I certainly wasn't trying to script what individuals had to say, and I will tell you that in all those venues, I was heartened by the law enforcement representatives, how well they were acquainted with the idea, and astonished in some instances, in terms of how far they had progressed in terms of implementing it at the state and local level.

Id.

235. *Id.*

On April 7, 2004, Secretary Ridge signed a memorandum prepared by Bob Stephan approving a Management Directive establishing the NIMS Integration Center.²³⁶ Attached to the memorandum were a detailed Concept of Operations and Staffing Plan for the NIMS Center as well as a Proposed Budget for fiscal year 2004. Interestingly, the NIMS Center is to be housed in the EP&R,²³⁷ which was originally tasked in the HS Act with drafting the NRP,²³⁸ of which NIMS is the operational section. Putting the NIMS Center under EP&R may signal that DHS is returning to the stated intent of the HS Act, as well as signal that the diminution of FEMA's role may lessen somewhat.

The goal for the NIMS Integration Center is not to be a federal "big brother" creating impassible barriers to entry for responders. As stated by Stephan,

This NIMS Center is not going to be a bunch of guys pushing it out to the field. It's going to be participatory development. And in many cases, the NIMS Center may not even be the organization that actually develops the standards—it may be a professional association, but then the NIMS Center can take that and put a stamp of approval on it . . . and help promulgate it.²³⁹

Changes in NIMS standards and other corrective actions may be proposed by a variety of entities, including local, state, tribal, federal, private sector, and professional organizations.²⁴⁰ Yet, ultimate authority for alteration in NIMS standards rests with the Secretary of DHS.²⁴¹ Thus, while other interested groups may propose modifications, their input is advisory only.

As suggested by Stephan, some responder organizations have already begun the process of putting together proposed standards for federal homeland security responders. In keeping with a Congressional mandate, the U.S. Fire Academy ("USFA") and DHS held a series of meetings to develop national fire service credentialing standards for federally declared disasters, with the

You're going to have potential criminal activity, you're going to have a host of different first responders, not only from your own community but from the state, and from other states, and they recognize that NIMS is the way that they can organize and attack the problem from a competent perspective. . . at the macro level, there is an understanding that this concept has relevance to them and can benefit them in the work they do.

Id.

236. Memorandum for Secretary Tom Ridge from Bob Stephan (endorsed by Secretary Ridge), NIMS Integration Center (NIC), Department of Homeland Security (Apr. 7, 2004) (on file with author).

237. Memorandum for Secretary Tom Ridge, *supra* note 236.

238. 6 U.S.C. § 312(6) (2004).

239. Telephone Interview with Bob Stephan, *supra* note 88.

240. NIMS, *supra* note 30, at 59.

241. HSPD 5, *supra* note 42, at ¶ 15.

goal of improving multi-agency coordination and response effectiveness.²⁴² One guideline that the group emphasized was the need to operate within the framework of existing state credentialing systems, rather than imposing a new layer of bureaucracy.²⁴³ This would be a voluntary system.²⁴⁴ The last meeting of the USFA group took place on December 11, 2003— about a week after the release of NIMS 2.²⁴⁵

The USFA's proposal that the federal standards be voluntary would appear to conflict with the clear mandate for standard setting contained in the adopted NIMS,²⁴⁶ but their voluntary nature may well reflect a pilot approach to requirements that may be applied down the road. The adopted NIMS anticipates that jurisdictions may continue to credential personnel for operation within their boundaries, but states that “[p]ersonnel that are certified for employment in support of an incident that transcends interstate jurisdictions through the Emergency Management Assistance Compacts System will be required to meet national qualification and certification standards.”²⁴⁷ In common with other advocates for the incident management system, Stephan particularly emphasizes the need for common standards and vocabulary when responding to incidents involving weapons of mass destruction or other particularly dangerous substances.²⁴⁸

Putting a national credentialing system into place will not be an easy task, nor will it be achieved as promptly as some would like.²⁴⁹ The continual renewal of the ranks of emergency responders means that training for NIMS credentialing must be an ongoing effort, as with all types of responder

242. *National Fire Service Credentialing System*, U.S. FIRE ADMIN. NEWSL. (U.S. Fire Admin., Emmitsburg, M.D.), Dec. 2003, available at <http://www.usfa.fema.gov/downloads/txt/newsletter12-03.txt>.

243. *Id.* The USFA also outlined the following as the elements of the credentialing process:

- Identifying the standards that would be used as the basis for the credentials issued
- Certifying the individuals against these standards
- Reviewing the certifying bodies to ensure that their processes are valid
- Maintaining a record system that allows for identification of the individual and verification of the information contained on that identification.

244. *National Fire Service Credentialing System*, *supra* note 242.

245. *Id.*

246. “The NIMS Integration Center will be further responsible for . . . facilitating the development and publication of national standards, guidelines, and protocols for the qualification and certification of emergency responder and incident management personnel, as appropriate.” NIMS, *supra* note 30, at 61.

247. *Id.* at 38.

248. Telephone Interview with Bob Stephan, *supra* note 88.

249. Interview with Gil Jamieson, *supra* note 232 (“I think we’ll be lucky if we have the standards developed by the end of FY 2006 for the disciplines. I think this is a long term project.”)

training.²⁵⁰ NIMS Certification will be required for all types of emergency responders defined by the HS Act,²⁵¹ but this will not be a requirement for the states and local units of government for fiscal year 2006.²⁵²

The NIMS Center's Jamieson has taken the first step toward creating a federal certification structure by beginning on the federal level to bring all departments into compliance with their responsibilities under the NRP.²⁵³ They are working to identify positions, training requirements, and experience requirements that will serve as a standard for federal positions with NRP responsibilities.²⁵⁴ Jamieson's goal is to create a cadre of competent people who can step into a variety of positions based on their knowledge, skills, and abilities, rather than being pigeon-holed by previous experience.²⁵⁵

One potential effect of the multi-tiered (federal and other jurisdictions)

250. *Id.*

Just when you think you have it solved, we're going to have the whole turnover issue of new people coming into the system who need to meet these standards, training, experience, what have you. So this is clearly a long term project, with a lot of operations and maintenance associated with it.

251. 6 U.S.C. § 101 (2002) ("The term 'emergency response providers' includes Federal, State, and local emergency public safety, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies, and authorities.").

252. Interview with Gil Jamieson, *supra* note 232. ("We are not looking to have that be a requirement that needs to be satisfied at the state and local level, certainly not in FY 2006.").

253. *Id.*

254. *Id.*

I am encouraging all federal departments and agencies to now identify the positions and skill categories that are needed in order to execute their responsibilities under the NRP, and, as a result of that, a new field operations guide for each of those new positions that is established, and then finally, a training package that equips them within their job jar to perform all the functions that they are assigned to consistent with the field operations guide. So, as a result of that, I think that there are going to be positions identified, training requirements identified, experience requirements identified, that will serve as a standard of sorts for what it's going to take to do each one of those jobs. Now, I don't see that happening next week, but I think that's where we are going to long term. The measure of that will be, for any one of those positions, here's a guy to do it, and here's what the career path is to perform that career function.

255. *Id.*

This individual or this group was responsible for logistics [for example] in the last disaster and they did a good job, so let's ask them to do it again . . . I think we need to get out of that familiarity system, for lack of a better word, and have it be much more disciplined. Here's a cadre of folks who have completed the training that's needed in order to serve as logistics branch chief, and in relationship to that position of logistics branch chief, there will be experience requirements and training requirements, and we will be able to access a cadre data base at the federal level of individuals who could in fact perform that particular function.

credentialing system could be uneven levels of protection for different parts of the nation due to authorization of federal, state, tribal, and local training authorities.²⁵⁶ Those with federal credentials will receive federal grant funds for equipment and training, while responders with other levels of certification will be denied those funds, as required by HSPD 5.²⁵⁷ Further, Homeland Security Undersecretary Michael Brown has stated that DHS will make contributions to first-responder salaries in partnership with state and local governments.²⁵⁸

Under a strict reading of HSPD 5, less affluent and rural jurisdictions that do not have federally certified responders could be forced to pay their expenses solely from local funds.²⁵⁹ The NIMS Center does not desire this as the outcome for the most needy of groups.²⁶⁰ Local agencies with different levels of training and equipment will be viewed differently under the rubric of resource typing.²⁶¹ States will determine “as a whole” whether different regions within the state are NIMS compliant and report this information to DHS.²⁶²

Some within the region, like a very small rural volunteer fire company with few personnel, little money, and minimal equipment, could be determined to be NIMS compliant as part of the regional evaluation. This might be the case despite such a small local entity not being, when viewed in isolation, NIMS compliant.²⁶³ On the other hand, some groups possessing the personnel and other resources to become NIMS compliant may choose not to do so. States will be strongly encouraged by the NIMS Center not to fund the latter entities.²⁶⁴

A lack of federal funding could compound challenges that currently face small local entities.²⁶⁵ As documented in the recent Council of Foreign

256. NIMS, *supra* note 30, at 38. (“Federal, State, local, and tribal certifying agencies; professional organizations; and private organizations should credential personnel for their respective jurisdictions.”). Federalism considerations would seem to mandate such an approach.

257. HSPD 5, *supra* note 42, at ¶ 20.

258. Ted Leventhal, *Lawmakers Voice Concerns About Emergency Preparations*, NAT’L J. TECH. DAILY, Mar. 3, 2004, available at <http://www.govexec.com/dailyfed/0304/030304tdpm2.htm>. (“[Brown] said Homeland Security will contribute to first-responder salaries in partnership with state and local governments.”) Given the requirement for federal certification for federal funds as of fiscal 2005, this promise clearly will apply to only federally certified first responders.

259. HSPD 5, *supra* note 42, at ¶ 20.

260. Interview with Gil Jamieson, *supra* note 232.

261. *Id.* (“It will not be necessary for every community to have every type of capability.”).

262. *Id.*

263. *Id.*

264. *Id.*

265. Press Release, Int’l Assoc. of Fire Fighters, Fire Fighters Give Bush Failing Grade on Anniversary of Creation of Dept. of Homeland Security (Mar. 4, 2004),

Relations report on responder resources entitled *Emergency Responders: Drastically Underfunded, Dangerously Unprepared*, current unfunded requirements total \$98.4 billion.²⁶⁶ Under the multi-tiered system,²⁶⁷ local responders who are not a part of the federal certification system would suffer from increasingly inadequate funding. Absent the flexible approach to the most needy groups discussed above,²⁶⁸ the outcome might have been continuing deterioration of emergency response capabilities in those jurisdictions least able to afford the cost of preparedness.

An ongoing worry that is independent of pressures imposed by the adoption of the NIMS concerns volunteer services that have difficulty in recruiting members under current conditions.²⁶⁹ These groups frequently report that any additional required training results in fewer new members and attrition of current members.²⁷⁰ New federal standards requiring additional training, unless flexibly enforced, could be enough additional pressure on some local organizations to force them to disband, leaving portions of the country bereft of emergency responders.²⁷¹

Stephan does not agree.

The creation of the Department of Homeland Security was a step in the right direction. But one year after its creation, our nation's fire fighters and emergency medical personnel are still operating with too few staff, outdated equipment and the need for training to appropriately and safely respond to all of the emergencies, disasters and possible acts of terrorism we need to be prepared for today. The result is that our communities are more vulnerable because of Bush's failure in Homeland Security.

266. Warren B. Rudman et al., Council Foreign Rel., *Emergency Responders: Drastically Underfunded, Dangerously Unprepared* (2003), http://www.cfr.org/content/publications/attachments/Responders_TF.pdf.

267. NIMS, *supra* note 30, at 38.

268. Interview with Gil Jamieson, *supra* note 232.

269. See generally Franklin Woodrow Wilson II, *Recruitment and Retention of the Volunteer: The Missing Piece of the Fire Service*, Aug. 15, 2002, http://www.nvfc.org/pdf/retention_and_recruitment.pdf.

The fire service recognizes the pressures placed on volunteers, but must find ways to make volunteer opportunities more doable. A fundamental change in the nature of some of its volunteer jobs is likely necessary in order to attract new, energetic professionals to volunteer in the fire service.

270. Reade Bush, *Special Presentation: Recruitment and Retention in the Volunteer Fire Service*, in REPORT ON THE NATIONAL VOLUNTEER FIRE SUMMIT (1998), available at <http://www.nvfc.org/firesummit.html>. ("Several factors underlie today's retention and recruitment problem in the volunteer fire service. It is a complex and multi-faceted problem . . . [S]tringent training standards, leadership problems, and time constraints caused by increased family responsibilities—particularly in two-career families and single parent households—seem to be the most common roots.").

271. *Id.* ("Many fire departments across the nation today are experiencing more difficulty with recruiting and retaining members than ever before. This is demonstrated by the decline in the number of active volunteer firefighters nationally, which is estimated to have dropped from 884,600 in 1983 to 815,500 in 1996, and by reports from fire departments in every region of the country.").

What we're looking for is not to force people to spend a whole lot of money . . . We think we are building enough flexibility into the system . . . [I]f you are a small podunk jurisdiction and can't afford a big computer system, you are going to have to update your manuals . . . The key is we are building for a very broad system of users.²⁷²

Stephan's vision of how NIMS should be put in place is in the process of being phased out by subsequent events in the NIMS Center. Acting NIMS Center Director Jamieson is focused on moving beyond compliance issues and affiliated concerns about losing federal grant funds. He wants to concentrate on making NIMS an effective emergency response tool.

What we're working on now is, because the Presidential Directive [HSPD5] tied compliance very much to the grant funding, there is some anxiousness out there about what needs to be done, when it needs to be done. I am anxious to turn the conversation from one of compliance to what do we need to do to make ourselves more effective, to focus on the metrics of how has the implementation of NIMS made us more efficient in what we do, how has it perhaps economized on budgets at the municipal level . . . I think over time, we can continue to work on it, and not from a compliance and grant making perspective, but from the "this is a better way to do business" perspective.²⁷³

The variety of circumstances faced by emergency response groups across the nation makes setting national standards a challenge. For example, firefighters in the industrialized northeast frequently confront fires or spills involving hazardous materials. West of the Mississippi River, in contrast, wildfires are a major concern.²⁷⁴ Clearly, while both groups of firefighters have common aspects to their work for which common standards may be promulgated, there is no need to require everyone to know everything.²⁷⁵ It is likely that a national "basic firefighter" qualification with endorsements for further national standards such as HAZMAT or wildfire expertise will be the approach to certification.²⁷⁶ The NIMS Center's Jamieson appreciates the inadvisability of unilaterally imposing standards on emergency responders. He believes that all involved should understand that compromises for the common goal will be required.²⁷⁷

While delayed compliance or waivers for organizations with demonstrable

272. Telephone Interview with Bob Stephan, *supra* note 88.

273. Interview with Gil Jamieson, *supra* note 232.

274. *See* National Interagency Coordination Center, 2003 Statistics and Summary, US Large Fires January 1–December 31, 2003, http://www.nifc.gov/news/2003_statssumm/intro_summary.pdf.

275. Interview with Gil Jamieson, *supra* note 232.

276. *Id.*

277. *Id.* ("The feds unilaterally establishing standards would fail right out of the chute. Compromise will be required from many people.")

undue hardships could provide limited safe harbors within the new regulatory framework, the NIMS Center does not wish to approach the standard's enactment with the goal that it be less than universal.²⁷⁸ Although additional federal bureaucracy might be needed to enforce HSPD 5's funding penalties for non-compliant organizations and personnel, the planned approach centers on utilizing existing mechanisms for oversight of fund distribution and spending.²⁷⁹

If the system as enacted has the flexibility envisioned by Stephan and Jamieson, the result is likely to be a workable national model that is achievable by all.

C. DHS Structural Issues Create Responder Training Challenges

One reality with which DHS must deal is the belief by many local responders and emergency managers that funding and power are flowing inexorably toward terrorism and away from all other hazards.²⁸⁰ While terrorism is different from other types of hazards, the issue is whether that difference is so great as to render the "all hazards" approach ineffective.²⁸¹ The "all hazards" approach makes sense—it encourages a broader perspective as well as allowing a focus on the most likely threats to life and property.²⁸² "It's a competing balance inside the Department [of Homeland Security]," DHS Undersecretary and FEMA head Michael Brown says.²⁸³ "The department has two missions. One is to prevent terrorism. The other is to prepare the country for all hazards. My job is to convince and show and lead by example that the all-hazard approach fits into their terrorism prevention."²⁸⁴ Clearly, the current focus at DHS is how all hazards are to be "fit into" a single hazard—terrorism prevention. Former FEMA Director

278. *Id.* ("I don't want to go into this process with the idea of making exceptions.")

279. *Id.*

280. Witt, *supra* note 67.

281. William L. Waugh, Jr., *Terrorism and the "All-Hazards" Model*, J. EMERGENCY MGMT., Mar./Apr. 2005, at 8.

282. *Id.*

283. Robert Block, *Identity Crisis - Hurricane Tests Emergency Agency At Time of Ferment: Now Under Homeland Security, FEMA Has Lost Clout, Managers on Ground Say: Terrorist With 145 MPH Winds*, WALL ST. J., Aug. 16, 2004.

284. *Id.*

According to [DHS Under Secretary Michael] Brown and other insiders, a quiet battle is under way within the Homeland Security Department. On one side are former law-enforcement officials, advocating secrecy, tight security and intelligence as the key to minimizing the trauma of any terrorist attack. On the other are firefighters and emergency managers who emphasize collaboration, information sharing, public awareness and mitigation efforts to reduce the impact of disasters.

James Lee Witt has a less positive view regarding the future than does Brown: “[FEMA] has been buried beneath a massive bureaucracy whose main and seemingly only focus is fighting terrorism and while that is absolutely critical, it should not be at the expense of preparing for and responding to natural disasters.”²⁸⁵

The HS Act divided the responsibility for training emergency responders, giving duties to two groups. The Office of Domestic Preparedness (“ODP”), located in the Directorate of Border and Transportation Security,²⁸⁶ received the mission of preparing responders for terrorism events.²⁸⁷ Training for all other hazards remained with the Undersecretary for EP&R.²⁸⁸ Among the agencies that were brought into EP&R is FEMA.²⁸⁹ The transfer into DHS preserved FEMA’s “all hazards” protection role.²⁹⁰ ODP was tasked to work closely with FEMA given their complimentary training responsibilities.²⁹¹

285. Witt, *supra* note 67.

286. 6 U.S.C. § 238(a) (2004) (“The Office for Domestic Preparedness shall be within the Directorate of Border and Transportation Security.”).

287. 6 U.S.C. § 238(c)(1)

The Office for Domestic Preparedness shall have the primary responsibility within the executive branch of Government for the preparedness of the United States for acts of terrorism, including, coordinating preparedness efforts at the Federal level, and working with all State, local, tribal, parish, and private sector emergency response providers on all matters pertaining to combating terrorism, including training, exercises, and equipment support.

288. 6 U.S.C. § 312(1) (2004) (“The Secretary, acting through the Under Secretary for Emergency Preparedness and Response, shall include helping to ensure the effectiveness of emergency response providers to terrorist attacks, major disasters, and other emergencies.”).

289. 6 U.S.C. § 313(1) (2004) (“In accordance with title subchapter XII, there shall be transferred to the Secretary the functions, personnel, asset, and liabilities of the following entities: The Federal Emergency Management Agency, including the functions of the Director of the Federal Emergency Management Agency relating thereto.”).

290. 6 U.S.C. § 317(a) (2004)

The functions of the Federal Emergency Management Agency include the following: (1) All functions and authorities prescribed by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.); (2) Carrying out its mission to reduce the loss of life and property and protect the Nation from all hazards by leading and supporting the Nation in a comprehensive, risk-based emergency management program...

291. 6 U.S.C. § 238(c)(6) (2004)

The Office for Domestic Preparedness shall have the primary responsibility within the executive branch of Government for the preparedness of the United States for acts of terrorism, including, as the lead executive branch agency for preparedness of the United States for acts of terrorism, cooperating closely with the Federal Emergency Management Agency, which shall have the primary responsibility within the executive branch to prepare for and mitigate the effects of nonterrorist-related disasters in the United States.

The Bush Administration's funding choices demonstrate where its priorities lie. President Bush's 2005 budget proposal would have transferred, reduced, or eliminated grants aimed at supporting local and state "all-hazards" efforts, focused on floods, wildfires, and blizzards, into programs focused solely on terrorism. Emergency managers in state and local governments question funding decisions that manifest a "myopic focus on terrorism."²⁹² The Bush Administration tried to slash funding for Emergency Management Performance Grants ("EMPGs"),²⁹³ as well as limiting the portion of the money that could be spent on personnel. The Administration proposed a fiscal year 2006 EMPG budget cut from \$180 million to \$170 million.²⁹⁴ In response, the International Association of Emergency Managers ("IAEM"),²⁹⁵ at its mid year meeting on February 27, 2005, adopted a resolution to increase EMPG funding from \$180 million to \$280 million and keep it as a separate account rather than commingling it with antiterrorism funds.²⁹⁶

Many federal grants finance state and local emergency management activity, but only the EMPG focuses on the salary costs of the personnel-intensive activity.²⁹⁷ The personnel limitation would have endangered the future of emergency management, with former FEMA Director James Lee Witt estimating that over half the nation's 4,000 emergency management jobs might

292. Shaun Waterman, *Analysis: Fear of Being Eclipsed by Terror*, UNITED PRESS INT'L, Mar. 19, 2004, <http://www.upi.com/inc/view.php?StoryID=20040319-020617-1820r> ("[E]mergency managers over the country . . . working in state and local governments to plan and prepare their communities for the worst, feel their budgets and in some cases their very existence being squeezed by what some say is a myopic focus on terrorism.").

293. Karin Fischer, *Anti-Terrorism Focus Could Hurt State Cuts Would Affect Ability to Respond to Natural Disasters*, CHARLESTON DAILY MAIL, Feb. 27, 2004, at 1C. ("State officials, however, are alarmed at reductions in grants that help pay for the salaries of emergency services staff. The appropriation for the Emergency Management Performance Grants would decrease by nine million dollars, and states would face limitations on the share that would go to pay personnel.").

294. INT'L ASS'N EMERGENCY MANAGERS, EMERGENCY MANAGEMENT PERFORMANCE GRANT (EMPG) FUNDING, <http://www.iaem.com/resources/ADVOCACY/documents/IAEM2005positions.doc> [hereinafter IAEM].

295. See <http://www.iaem.com> for more information on IAEM.

296. IAEM, *supra* note 294.

297. Waterman, *supra* note 292.

Of the plethora of federal grants that fund state and local emergency management activities, only one—the Emergency Management Performance Grant—has historically covered the wage costs of this personnel-intensive business. The Bush administration's proposed 2005 budget cuts the allocation for that program by 5 percent, but—far more damagingly, say critics—caps the amount that can be spent on salaries at one-quarter of any grant. "The fact is, if no source of funding is available for these posts, the temptation will always be to save money (by cutting them) and make those (emergency management) duties someone else's responsibility—give it to the fire department, or the police."

have been lost.²⁹⁸ A lack of funding for these positions could well tempt local governments to preserve funds by eliminating them and shifting emergency management duties to another body, like law enforcement or the fire department.²⁹⁹ The result of such change could be recreation of inter-service rivalries largely eliminated by emergency management, which is often seen as an honest broker.

Historically, FEMA has been an important provider of training for emergency responders. FEMA's National Fire Academy ("NFA") offers highly regarded training for our nation's firefighters.³⁰⁰ Similarly, the Emergency Management Institute ("EMI") trains emergency managers.³⁰¹ The FEMA Emergency Management Higher Education Project ("FEMA Higher Ed Project") was created to encourage development of college and university programs for emergency management.³⁰² These resident, outreach, and distance learning programs all originate from the National Emergency Training Center ("NETC") facility in Emmitsburg, Maryland.³⁰³

The FEMA Higher Ed Project commenced in 1995. At that time, there were four collegiate level emergency management curricula.³⁰⁴ As of 2004, 110 institutions of higher learning incorporated such programs.³⁰⁵ An additional ninety-six emergency management teaching programs are now being developed or investigated. These consist of thirty-one at the associate level, thirty-five at the bachelor level, and thirty at the graduate level.³⁰⁶ The Higher Ed Project creates emergency management training courses for national distribution. Even well before the attacks of September 11, 2001, the Project's courses included training for terrorism as well as more probable natural and man-made hazards.³⁰⁷

The FEMA Higher Ed Project has achieved a record for a nominal outlay of funds.³⁰⁸ Despite this record of success, DHS has steadily decreased the Project's funding for the last two fiscal years. The Project's funding from

298. Witt, *supra* note 67 ("[M]any critical programs have been cut or dramatically altered. The cuts in Emergency Management could result in more than half of the country's 4,000-plus emergency managers losing their jobs.").

299. *See supra* note 297.

300. *See* FEMA, Emergency Management Institute, Training and Education, <http://training.fema.gov> (last visited Mar. 12, 2006).

301. *Id.*

302. FEMA, FEMA's EMI Higher Education Project, <http://www.training.fema.gov/emweb/edu/> (last visited Mar. 12, 2006).

303. *See* U.S. Fire Administration, National Emergency Training (NETC) Center Campus Information, <http://www.usfa.fema.gov/training/netc> (last visited Mar. 12, 2006).

304. *See* B. WAYNE BLANCARD, FEMA HIGHER EDUCATION PROJECT (Dec. 1, 2005), http://www.training.fema.gov/emweb/downloads/highedbrief_course2.ppt.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

fiscal year 2000 through fiscal year 2003 remained constant at \$184,900.³⁰⁹ In fiscal year 2004, the budget was slashed by seventy-five percent to \$59,000,³¹⁰ and in fiscal year 2005, it was further cut by thirty-three percent to only \$39,000.³¹¹ In response, the Education and Training Committee of the IAEM,³¹² at its mid year meeting on February 27, 2005, adopted a resolution calling for increased funding for EMI and an additional one million dollar appropriation for the Higher Ed Project.³¹³

Many firefighters believe that terrorism dollars are the result of redirecting money that would otherwise be spent on fire programs.³¹⁴ Fire service leaders have worried that “in the Washington bureaucracy, budgets and table of organizations mean power, or lack thereof. The fire service is not a power player within DHS. Its voice is weak, buried under layers of bureaucracy.”³¹⁵ These concerns grew when the USFA’s 2003 budget decreased by \$10 million, although this proved to be a one time aberration.³¹⁶ One funding choice said to support this analysis is the Bush Administration’s decision to transfer to the ODP,³¹⁷ which is in charge of terrorism preparedness,³¹⁸ the Assistance for

309. Communication from B. Wayne Blanchard, head of the FEMA Higher Education Project (Jan. 10, 2005) (on file with author).

310. *Id.*

311. *Id.*

312. See FEMA, *supra* note 302.

313. Telephone Interview with Kay Goss, CEM Chair Training and Education Committee of the IAEM (May 9, 2005) (on file with author).

314. Harvey Eisner, *Editor’s Editorial*, FIRE CHIEF, Feb. 1, 2004, available at http://firechief.com/ar/firefighting_editors_editorial/index.htm.

DHS has not responded urgently to congressional testimony from fire chiefs from around the country painting a bleak picture of response capabilities. Nor does it seem to have paid much attention to reports from organizations such as The Council of Foreign Relations, a New York-based nonpartisan research group. In its preparedness report, *Emergency Responders: Drastically Underfunded, Dangerously Unprepared*, the council stated that ‘the U.S. remains dangerously ill-prepared to handle a catastrophic attack on American soil.’

315. Eisner, *supra* note 314.

316. Pat West, *Financial Check Up*, FIRE CHIEF, Apr. 1, 2005, available at http://firechief.com/mag/firefighting_financial_checkup/index.html.

[US Fire Administrator] Paulison said the steep \$10 million decline in 2003 was due primarily to a one-time \$5 million “pass-through” appropriation from the Centers for Disease Control and Prevention for a fire safety awareness campaign and the transfer of \$4.9 million to DHS for state grant programs under the Office for Domestic Preparedness that the USFA previously had distributed.

317. 6 U.S.C. § 313(3) (2004) (“In accordance with subchapter XII of this chapter, there shall be transferred to the Secretary the functions, personnel, assets, and liabilities of the following entities: the National Domestic Preparedness Office of the Federal Bureau of Investigation, including the functions of the Attorney General relating thereto.”).

318. Press Release, Dep’t Homeland Security, Department of Homeland Security Announces Opening of Assistance to Firefighters Grant Program Application Period (Mar. 2, 2004), <http://www.dhs.gov/dhspublic/display?content=3271>.

Firefighters Grant Program ("FIRE Grant Program").³¹⁹ "This is a politically calculated move, the only goal of which is to repurpose existing appropriations for basic fire department needs into the Homeland Security Department's WMD bureaucracy . . ." ³²⁰ The City of Fresno Fire Department Chief and Immediate Past President of the International Association of Fire Chiefs, Randy Bruegman, cautioned that transferring it to ODP would mean "the end of the FIRE Grant program as we know it."³²¹ Another serious concern was the decision of the Bush Administration, with Congressional backing, to eliminate the position of U.S. Fire Administrator, a step later reversed through further Congressional action.³²²

The USFA responded to some of these concerns, many of which were expressed via email.³²³ U.S. Fire Administrator David R. Paulison informed a gathering of fire chiefs in late February 2005 that the proposed USFA budget for fiscal year 2006 reflected an increase of \$1.3 million over fiscal year 2005³²⁴ and also included continuing responsibility and additional funding from the NIMS Integration Center for NIMS/NRP training.³²⁵ Fire service leaders

ODP [is] the principal Federal agency responsible for the preparedness of the United States for acts of terrorism, including coordinating preparedness efforts at the Federal level, and working with all State, local, tribal, parish, and private sector emergency response providers on all matters pertaining to combating terrorism, including training, exercises, and equipment support.

319. *Id.*

320. Eisner, *supra* note 314. See also *FIRE Grants Moved to ODP, Funded at \$750 Million*, FIRE CHIEF, Sept. 2003, available at http://firechief.com/ar/firefighting_fire_grants_moved_2/index.htm ("[T]he IAFC and many other fire service organizations have fought the transfer of the FIRE Grants to ODP, saying the program that has become critical to equipping fire departments might be lost in other first responder grant programs. . ."); Eisner, *supra* note 314 ("As a weak USFA minimizes the fire service, so is it minimized by moving administration of the FIRE Act into the Office of Domestic Preparedness, which resides within the DHS Borders and Transportation Directorate and has no connections with the fire service.").

321. *FIRE Grants Moved to ODP, Funded at \$750 Million*, *supra* note 320.

322. Eisner, *supra* note 314 ("The USFA is the only agency within the federal bureaucracy that speaks for the fire service. It's telling that both the Bush administration and Congress failed to include the position of the U.S. Fire Administrator in the DHS reorganization. It took another act of Congress to restore the position.").

323. Janet Wilmoth, *Forward This*, FIRE CHIEF, Mar. 2005, available at http://firechief.com/mag/firefighting_forward030105/index.html.

In response to a plethora of forwards, the International Association of Fire Chiefs organized a Fire Service Leadership Summit in Washington, D.C., held during the last week of February. Eighteen fire service associations, organizations and media outlets participated in what was designed to be a factual presentation of the financial status of the USFA and the NFA with the Department of Homeland Security.

324. West, *supra* note 316. ("According to Paulison's financial report, the USFA's budget was: \$67.3 million in 2002; \$54.7 million in 2003; \$57.4 million in 2004 (actual spending); and estimated at \$55.9 million for FY 2005, as funding is provided quarterly.").

325. *Id.*

were reassured,³²⁶ despite the fact that the budget for USFA was significantly underfunded, with resulting limits on USFA programs.³²⁷

Still, the FIRE Grant program remains at the ODP.³²⁸ It would appear that ODP has won the turf battle over funding and power within DHS, at FEMA's expense. Ironically, some local responders may be more poorly financed than before the advent of DHS and the enormous increases in funding since September 11, 2001.

While money for homeland security has grown, regular state and federal funding for police and fire operations continues to be cut as both state legislatures and the Bush Administration try to control growing budget deficits. In order to get the homeland-security money, states and localities must frame their needs in terms of terrorism.³²⁹

D. NFPA 1600:³³⁰ Another Important Standard for Emergency Management

On April 29, 2004, the American National Standards Institute ("ANSI")³³¹ proposed to the 9-11 Commission that the National Fire Protection Association 1600 Standard on Disaster/Emergency Management and Business Continuity Programs, 2004 Edition ("NFPA 1600") be recognized as the national preparedness standard.³³²

Subsequently, the 9-11 Commission formally endorsed NFPA 1600,³³³ stating that Commission members were encouraged by DHS Secretary Ridge's praise for it³³⁴ and specifying their preference that its adoption be promoted by DHS.³³⁵ The Commission suggested that compliance with NFPA 1600 should be taken into account by the insurance and credit rating industries in calculating a company's insurance rating and creditworthiness.³³⁶ The 9-11 Commission also supported the concept that "compliance with the standard

326. Wilmoth, *supra* note 323. ("What's the bottom line? The fire service is not as bad off as the grapevine would have it, at least with respect to the funding of the USFA.")

327. President Bush Releases FY 2006 Budget, NATIONAL VOLUNTEER FIRE COUNCIL, <http://www.nvfc.org/news/2005-fy2006-budget.html> (last visited Mar. 12, 2006).

328. *See supra* note 320 and accompanying text.

329. Amanda Ripley, *How We Got Homeland Security Wrong*, TIME, Mar. 29, 2004, at 32.

330. NFPA 1600 Standard on Disaster/Emergency Management and Business Continuity Programs (2004), <http://www.nastpo.org/NFPA1600.htm> [hereinafter NFPA 1600].

331. For information on ANSI, *see* <http://www.ansi.org> (last visited Mar. 12, 2006).

332. 9-11 Commission Presented with Recommendation on Emergency Preparedness, ANSI (2004), [http://public.ansi.org/ansionline/Documents/Standards%20Activities/Homeland%20Security%20Standards%20Panel/ANSIHSSP%20News%20Items%20\(2004\)/news_story_April29.pdf](http://public.ansi.org/ansionline/Documents/Standards%20Activities/Homeland%20Security%20Standards%20Panel/ANSIHSSP%20News%20Items%20(2004)/news_story_April29.pdf).

333. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 398 (2004), <http://www.gpoaccess.gov/911/> [hereinafter 9/11 COMMISSION REPORT].

334. *Id.*

335. *Id.*

336. *Id.*

should define the standard of care owed by a company to its employees and the public for legal purposes.”³³⁷

Following up on the 9-11 Commission’s endorsement, DHS announced a new program entitled Ready Business,³³⁸ which incorporates the NFPA 1600 as its basis.³³⁹ The program featured a new brochure that laid down business preparedness planning standards based on the NFPA 1600.³⁴⁰

President Bush signed the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTP Act”)³⁴¹ on December 17, 2004.³⁴² The Act is another step in the incorporation of the NFPA 1600 as a national standard, for it recognizes NFPA 1600 as a “voluntary” national preparedness standard.³⁴³ The Act states, as the sense of the Congress, that the Secretary of Homeland Security should promote voluntary adoption of standards such as NFPA 1600.³⁴⁴

The federal government apparently wishes to create a system where costs of doing business will produce voluntary compliance with the NFPA 1600 standard. The IRTP Act’s endorsement of NFPA 1600 will join with the standard setting power of the DHS under NIMS.³⁴⁵ The result will be broad acceptance of the standard among the business and government community in the United States.

NFPA 1600 establishes a common set of standards for disaster management, emergency management, and business continuity programs.³⁴⁶ Important aspects of it include procedures for exercising plans and a listing of resource organizations in the fields of disaster recovery, emergency management, and business continuity planning.³⁴⁷

NFPA 1600 requires that “[t]he program shall include, but shall not be limited to, a strategic plan, an emergency operations/response plan, a mitigation plan, a recovery plan, and a continuity plan”³⁴⁸ Furthermore, NFPA 1600 ensures that its guidance will continue to evolve through a

337. *Id.*

338. *DHS Launches Ready Business and Incorporates Recommendations from American National Standard NFPA 1600*, ANSI (2004), [http://public.ansi.org/ansionline/Documents/Standards%20Activities/Homeland%20Security%20Standards%20Panel/ANSI-HSSP%20News%20Items%20\(2004\)/ReadyBusiness.pdf](http://public.ansi.org/ansionline/Documents/Standards%20Activities/Homeland%20Security%20Standards%20Panel/ANSI-HSSP%20News%20Items%20(2004)/ReadyBusiness.pdf).

339. *Id.*

340. *Id.*

341. Intelligence Reform and Terrorism Prevention Act, S. 2845, 108th Cong.

342. Press Release, Office of the Press Secretary, President Signs Intelligence Reform and Terrorism Prevention Act (Dec. 17, 2004), <http://www.whitehouse.gov/news/releases/2004/12/20041217-1.html>.

343. S. 2845, § 7305(b).

344. *Id.*

345. Interview with Gil Jamieson, *supra* note 232.

346. NFPA 1600, *supra* note 330, at § 1.1.

347. *Id.* at § 1.2.

348. *Id.* at § 5.7.1.

mandate that all emergency management and business continuity programs comply with all relevant laws, policies, and industry practice.³⁴⁹ Such an open-ended requirement may result in a significant amount of litigation³⁵⁰ as parties disagree in the aftermath of an emergency or disaster regarding the extent of, for example, industry practice regarding negligent security aspects of premises liability.³⁵¹

1. NFPA 1600 for Emergency Management: The Emergency Management Accreditation Program

The National Emergency Management Association (“NEMA”) supports NFPA 1600, believing it to be a suitable benchmark for emergency management. In 1998, NEMA resolved to support NFPA 1600.³⁵² NFPA 1600 forms the basis of the Emergency Management Accreditation Program (“EMAP”).³⁵³ Included in the accreditation process are application, self-assessment, on-site assessment by an outside review team, committee and commission review of compliance with the EMAP Standard, and re-certification every five years.³⁵⁴

EMAP began as a concept in 1997, then moved through pilot tests and assessments via certification of units of government, the first of which was awarded in 2003.³⁵⁵ EMAP is supported by many key emergency management groups and partners, including the NEMA, IAEM, FEMA, U.S. Department of Transportation, Association of State Flood Plain Managers, Institute for Business and Home Safety, International Association of Fire Chiefs, National Association of Counties, National Association of Development Organizations,

349. *Id.* at § 5.2.

350. See John M. Barkett, *If Terror Reigns, Will Torts Follow?*, 9 WIDENER L. SYMP. J. 485 (2003).

351. See Melinda L. Reynolds, *Landowner Liability For Terrorist Acts*, 47 CASE W. RES. L. REV. 155 (1996). Another issue is the effect of discontinuing safety measures. See Benjamin Weiser & Claudia H. Deutsch, *Offices Hold the Line on Security Spending*, N.Y. TIMES, Aug. 16, 2004, at B1.

Without question, many companies after 9/11 took serious steps, some quite ambitious and costly, to protect their employees and their assets. Gregg A. Popkin, senior managing director of CB Richard Ellis Inc., which manages about 115 commercial buildings in the metropolitan area, says landlords in those buildings have spent a combined \$50 million on scanners, turnstiles and other measures in the past three years. . . . But there is much that has not changed all that dramatically. Plans that were drawn up were shelved, security machines put in place have been taken out, and computer security remains far from perfect.

352. NFPA 1600 Standard Resol., NEMA, <http://www.nemaweb.org/?335> (last visited Mar. 12, 2006).

353. Emergency Management Accreditation Program (EMAP), EMAP Basics, <http://www.emaponline.org/?113> (last visited Mar. 12, 2006).

354. *Id.*

355. EMAP Recent and Upcoming Activities, http://emaponline.org/What/Implementation/Description_Full.cfm (last visited Mar. 12, 2006).

National Conference of State Legislatures, National Governors Association, National League of Cities, and the U.S. Environmental Protection Agency.³⁵⁶

As mentioned above, adoption of NFPA 1600 is not mandatory at this time. Given that such a wide variety of authoritative organizations endorse it, however, it might fairly be said that EMAP may become the United States' de facto standard for emergency management. As additional emergency management programs are accredited under the standard, it becomes more probable that a court would hold all emergency management groups to the standards set forth in the NFPA 1600.³⁵⁷ Accepted industry practices may progress from de facto to de jure acceptance either by way of common law adoption in the courts³⁵⁸ or through general public support leading to enactment of mandatory standards.³⁵⁹

One nationally known expert stated "synergy is already building between NFPA 1600, EMAP and the NIMS Integration Center. It's just a matter of time before they are incorporated into NIMS Center's requirements."³⁶⁰ This view has proven to be prescient, as mandatory adoption of NFPA 1600 into NIMS is seen as an important part of standards to be set by the NIMS Integration Center.³⁶¹

2. NFPA 1600 and the Incident Command System

Both NFPA 1600 and NIMS require use of the incident command system ("ICS").³⁶² Therefore, emergency managers have the obligation to use it

356. Emergency Management Accreditation Program, Emergency Management Accreditation: An Overview, <http://www.emaponline.org/?16> (last visited Mar. 12, 2006).

357. Indeed, custom and usage within an industry need not be complete or general where improved safety standards, which EMAP provides for emergency management, are involved. See *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), *cert. denied*, *E. Transp. Co. v. N. Barge Corp.*, 287 U.S. 662 (1932), where in 1932, despite the absence of statutes, regulations or even custom as to radio receiving sets, Judge Learned Hand found a vessel unseaworthy for lack of one. Two barges had been lost in a storm and the tugs and their tows might have sought shelter in time had they received weather reports by radio. *Id.* at 740. This case may show which way the wind blows for the future of emergency management certification under EMAP.

358. See, e.g., Office of Management and Budget, Circular No. A-119: Federal Participation in the Development and Use of Voluntary Standards, 47 Fed. Reg. 49,496 (Nov. 1, 1982) (requiring that federal government rely on voluntary standards where possible).

359. The adoption of seat belts is a case in point. Seat belts became ever more broadly accepted in the 1950's and 1960's until their being required by the U.S. Department of Transportation in 1966. See Automotive Occupant Restraints Council, About Us, <http://www.aorc.org/aboutusnew.html> (last visited Mar. 12, 2006).

360. Telephone Interview with Kay C. Goss, *supra* note 313.

361. Interview with Gil Jamieson, *supra* note 232. ("I see the prospects of their being part of NIMS for emergency management. I have met with both the NFPA 1600 committee and the EMAP people, and I endorse the process, but it needs to evolve and be more inclusive of NIMS.")

362. NFPA 1600, *supra* note 330, at § 5.8; NIMS, *supra* note 30, at 65.

during emergency responses. First mandated in 1986,³⁶³ the Hazardous Waste Operations and Emergency Response (“HAZWOPER”) Standard³⁶⁴ requires the use of the ICS at hazardous materials releases.³⁶⁵ The HAZWOPER’s mandates for the use of the ICS are valuable, therefore, for the emergency manager thinking about how best to adopt ICS. The lessons learned over the past twenty plus years from use of the ICS at HAZMAT scenes will be invaluable for implementation of the standard in the wake the NFPA 1600’s and NIMS’ requirements to do so.³⁶⁶ These standards build on the experience gained through use of the HAZWOPER.

3. NIMS and NFPA 1600 Planning Standards

Adopting the NFPA 1600 emergency management standard discussed above might result in liability for negligently drafted plans.³⁶⁷ The reason that liability might arise is that the planning portion of the NFPA 1600 details particular planning tasks as outlined below. Failure to perform to the standard of a reasonably competent emergency planner could be determined negligent.³⁶⁸ Several plans are mandated: “[t]he program shall include, but shall not be limited to, a strategic plan, an emergency operations/response plan, a mitigation plan, a recovery plan, and a continuity plan.”³⁶⁹

The content of these plans is laid out with some particularity. For example, the emergency response plan is described as follows: “[t]he emergency operations/response plan shall assign responsibilities to organizations and individuals for carrying out specific actions at projected times and places in an emergency or disaster.”³⁷⁰

All of the NFPA 1600’s mandatory plans possess the following shared

363. In 1986, Congress ordered the Secretary to “promulgate standards for the health and safety protection of employees engaged in hazardous waste operations” pursuant to § 4 of the OSH Act. 29 U.S.C. § 655.

364. 29 C.F.R. § 1910.120 (2004). The regulations provide that employees in close proximity to hazardous wastes must receive forty hours of off-site training and have three days of on-site field experience. 29 C.F.R. § 1910.120(e)(3)(i). Employees occasionally on-site must receive twenty-four hours of off-site training and have one day of on-site field experience. 29 C.F.R. § 1910.120(e)(3)(ii) & (iii). Supervisors must complete an additional eight hours of training on subjects such as employee safety and spill containment. 29 C.F.R. § 1910.120(e)(4).

365. 29 C.F.R. § 1910.120(q)(3)(i) requires that during an emergency response the most senior emergency response official to become “the individual in charge of a site-specific Incident Command System (ICS). All emergency responders and their communications shall be coordinated and controlled through the individual in charge of the ICS assisted by the senior official present for each employer.” *Id.*

366. For an extensive discussion of ICS and its relation to terrorism and the HAZWOPER standard, see Nicholson, *supra* note 6, at 315-17.

367. See Denis Binder, *Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan Is Planning to Fail”*, 63 U. PITT. L. REV. 791, 793 (2002).

368. *Id.* “[B]asic principles of negligence law readily apply to the analysis of emergency action plans.”

369. NFPA 1600, *supra* note 330, at § 5.7.1.

370. *Id.* at § 5.7.2.2.

elements: “[t]he functional roles and responsibilities of internal and external agencies, organizations, departments, and individuals shall be identified,”³⁷¹ and “[l]ines of authority for those agencies, organizations, departments, and individuals shall be established or identified.”³⁷²

The NFPA 1600 requires additional actions to take place that are standard elements of planning, including hazard identification, risk assessment, and impact analysis.³⁷³ As discussed above, the NFPA 1600 also imposes a duty to comply with current laws, policies, and industry practices.³⁷⁴ The NFPA 1600’s requirements are, therefore, always evolving and preventing liability for bad planning will be a difficult and uncertain task, as no defined “zone of legal safety” can be found in such circumstances.³⁷⁵

The NIMS establishes compulsory criteria for emergency management programs wishing to obtain federal funds, including EMPGs, after October 2004.³⁷⁶ The NIMS obliges preparation of emergency operations plans (“EOPs”), corrective action and mitigation plans, and recovery plans.³⁷⁷ The NIMS’ requirements for EOPs are rather extensive. EOPs should:

[D]efine[] the scope of preparedness and incident management activities necessary for the jurisdiction

[D]escribe organizational structures, roles and responsibilities, policies, and protocols for providing emergency support

[F]acilitate response and short-term recovery activities;

[D]rive decisions long-term prevention and mitigation efforts or risk-based preparedness measures directed at specific hazards;

[B]e flexible enough for use in all emergencies;

[D]escribe the purpose of the plan, situation and assumptions, concept of operations, organization and assignment of responsibilities, administration and logistics, plan development and maintenance, and authorities and references;

371. *Id.* at § 5.7.3.1

372. *Id.* at § 5.7.3.2.

373. *Id.* at § 5.3.

374. *Id.* at § 5.2.

375. *Cf.* Reynolds, *supra* note 351. Reynolds discusses the difficulties of preventing liability where there are no hard and fast standards to create zones of safety.

376. HSPD 5, *supra* note 42, at ¶ 20. This could have been a somewhat pointless threat regarding EMPGs, since the Bush administration proposed significant budget cuts in the program. *See supra* note 293. Congressional action resulted in defeat of the Bush budget cut proposal. *See supra* note 296.

377. NIMS, *supra* note 30, at 35-37.

[C]ontain functional annexes, hazard-specific appendices, and a glossary;

[P]redesignate jurisdictional and/or functional area representatives to the IC or UC to facilitate responsive and collaborative incident management; [and]

[I]nclude preincident and postincident public awareness, education, and communications plans and protocols.³⁷⁸

In both detail and the prospective widespread nature of its use, the NIMS creates a national industry standard. NIMS uses the term “should” rather than “must”³⁷⁹ in discussing its requirements. The NFPA 1600’s statement that plans must incorporate industry standards, however, changes the nature of these elements, making mandatory what was voluntary.³⁸⁰ The NIMS and the NFPA 1600 compliment one another, and together set the planning benchmark.

Both NFPA 1600 and state laws require local emergency management to prepare and keep current a local disaster emergency plan for its area.³⁸¹ In the aftermath of the September 11, 2001 attacks, states’ statutory schemes have grown to incorporate laws aimed at particular aspects of terrorism.³⁸² States that catalog planning requirements often have inserted planning for terrorist events in their laws.³⁸³ This reaction to a specific series of events, the September 11, 2001 attacks, is an example of the ever-developing nature of planning requirements. Experienced emergency managers often say that the plan is never final, but rather is a “living document” that must constantly be revised to reflect the evolving nature of hazards.³⁸⁴

D. Mutual Aid Concerns

Mutual aid agreements (“MAAs”)³⁸⁵ are a vital ingredient in easing the

378. NIMS, *supra* note 30, at 35-36.

379. *Id.*

380. *See supra* note 349 and accompanying text.

381. NFPA 1600, *supra* note 330, at § 5.7.1; *see also, e.g.*, IND. CODE §10-14-3-17(h) (2005) (“Each local or inter-jurisdictional agency shall: (1) prepare; and (2) keep current; a local or inter-jurisdictional disaster emergency plan for its area.”).

382. HOMELAND SECURITY LAW AND POLICY 365-73 (William C. Nicholson ed., 2005).

383. *See, e.g.*, FLA. STAT. § 252.34(4), (6) (2004) (emergency management responsibilities include reduction of vulnerability from terrorism); FLA. STAT. § 395.1056 (2004) (requiring hospitals to plan for terrorism events.)

384. Telephone Interview with David Barrabee, State Planner, Indiana Department of Homeland Security (Apr. 7, 2005).

Mutual-aid agreements are the means for one jurisdiction to provide resources, facilities, services, and other required support to another jurisdiction during an incident. Each jurisdiction should be party to a mutual-aid agreement (such as the Emergency

difficulties resulting from organizations working together.³⁸⁶ A number of standards, including the NFPA 1600 and the NIMS, require or strongly suggest them.³⁸⁷ Their role in the aftermath of a disaster or emergency is vital, as they facilitate rapid deployment of additional resources when time is of the essence.³⁸⁸

In contrast to the vast majority of standards in the adopted NIMS,³⁸⁹ the quality and contents of mutual aid agreements are termed as strong suggestions.³⁹⁰ This situation results from the fact that the HSPD 5 provides for federal standards for such matters as responder qualification and certification,³⁹¹ but not for MAAs. These agreements, therefore, preserve the existing situation regarding MAAs, under which their contents are subject to negotiation by the different units of government involved.³⁹² This situation will change in fiscal year 2006, when adopting mutual aid agreements will become mandatory under the NIMS.³⁹³ As explained by Jamieson,

We have developed a phased approach towards that notion of full compliance. Mutual aid was not a requirement in fiscal year 2005. It will be a requirement in fiscal year 2006. So states will be required to participate in interstate mutual aid agreements. We are also putting a premium on intrastate mutual aid agreements and ensuring that there are agreements in place between the disciplines in each state. I think it's critical to a successful incident management system.³⁹⁴

The Emergency Management Assistance Compact ("EMAC") sets the

Management Assistance Compact) with appropriate jurisdictions from which they expect to receive or to which they expect to provide assistance during an incident. This would normally include all neighboring or nearby jurisdictions, as well as relevant private-sector and nongovernmental organizations.

NIMS, *supra* note 30, at 39.

386. Nicholson, *supra* note 6, at 315-317.

387. NFPA 1600, *supra* note 330, at § 5.6; NIMS, *supra* note 30, at 39-40.

388. *See* Emergency Management Assistance Compact, <http://www.emacweb.org> for suggested contents for both intra-state and inter-state mutual aid agreements.

389. *See, e.g.*, NIMS, *supra* note 30, at 38-39 (certification and equipment standards).

390. *Id.* at 39 ("Each jurisdiction should be party to a mutual-aid agreement . . . At a minimum, mutual-aid agreements should include the following elements or provisions . . .") (emphasis added).

391. HSPD 5, *supra* note 43, at ¶ 15 ("The Secretary shall develop, submit for review to the Homeland Security Council, and administer a National Incident Management System (NIMS). . . To provide for interoperability and compatibility among Federal, State, and local capabilities, the NIMS will include . . . qualifications and certification. . .").

392. The adopted NIMS recognizes this reality of the federal system when it specifies that "[a]uthorized officials from each of the participating jurisdictions will collectively approve all mutual-aid agreements." NIMS, *supra* note 30, at 40. Absent such ratification, the units of government are not bound to an agreement.

393. Interview with Gil Jamieson, *supra* note 232.

394. *Id.*

standard for interstate agreements.³⁹⁵ States have adopted slightly inconsistent versions of the EMAC.³⁹⁶ Perhaps the major issue not tackled by the EMAC is the credentialing of visiting emergency responders, such as Emergency Medical Technicians and doctors. This issue caused a great deal of disagreement while the EMAC was being drawn up,³⁹⁷ with the result being that states were left to handle the matter individually.³⁹⁸ The NIMS Integration Center endorses the EMAC and supports it nationwide,³⁹⁹ although they recognize the difficult compensation and liability issues that must be ironed out.⁴⁰⁰ With the NIMS Center's support, the fire service is developing specific pilot intrastate mutual aid agreements.⁴⁰¹

The EMAC's lack of a uniform national approach to interstate certification and licensing was recognized and addressed in the Model State Emergency

395. *See infra* note 406.

396. *See, e.g.*, IND. CODE § 10-14-6-1 (2004).

397. William C. Nicholson, *Chapter Twelve: Preparedness for Public Health Emergencies*, in LEGAL ISSUES IN HOMELAND SECURITY AND EMERGENCY MANAGEMENT: A PRIMER FOR STATE AND LOCAL GOVERNMENT (2005). (“Unfortunately, EMAC does not speak to the credentialing of visiting emergency responders like Emergency Medical Technicians and doctors. Reportedly, this subject caused such controversy during EMAC’s drafting that the decision was made to permit each state to address the issue separately.”).

398. *See, e.g.*, IND. CODE §§ 10-14-3-3, 10-14-3-15(b) for one approach. Section 10-14-3-3 defines “emergency management worker” to include:

any full-time or part-time paid, volunteer, or auxiliary employee of: (1) the state; (2) other: (A) states; (B) territories; or (C) possession; (3) the District of Columbia; (4) the federal government; (5) any neighboring country; any political subdivision of any entity described in subdivisions (1) through (5); or any agency or organization; performing emergency management services at any place in Indiana subject to the order or control of, or under a request of, the state government or any political subdivision of the state.” *Id.* at § 10-14-3-3. Section 10-14-3-15(b) provides that “[a]ny requirement for a license to practice any professional, mechanical, or other skill does not apply to any authorized emergency management worker who, in the course of performing duties as an emergency management worker, practices a professional, mechanical, or other skill during a disaster emergency.

Id. at § 10-14-3-15(b).

399. Interview with Gil Jamieson, *supra* note 232.

We got some supplemental funding from Congress in 2002. We took a big part of that money as a matter of fact and invested it in EMAC. We like what they’re doing there. We support what they’re doing there. It’s a critical piece and we support what they are doing there. On the interstate piece, we are supportive of what they are doing there.

400. *Id.* (“There are a number of very difficult issues concerning compensation and liability with those interstate mutual aid agreements. There is some language that Congress provided us in the Intelligence Reform Act that we think is going to help a lot.”).

401. *Id.* (“We’re also putting into place an agreement with the fire service to pilot some discipline specific interstate mutual aid agreements. So, we’re covering that area on a lot of different fronts.”).

Health Powers Act (“MSEHPA”).⁴⁰² MSHEPA authorizes the public health authority “[t]o appoint and prescribe the duties of [. . .] out-of-state emergency health care providers as may be reasonable and necessary to respond to [a] public health emergency.”⁴⁰³ Included in this authority is the power to set aside all licensure requirements, permits, and fees for health care providers from other jurisdictions that would otherwise be required to practice within the state.⁴⁰⁴ The nationwide federal certification available under the NIMS incorporates nationwide credentialing.⁴⁰⁵ A national scope of practice will decrease possible confusion regarding authority of practitioners even as it potentially creates administrative hardships.

Also found on the EMAC web page is a model intrastate agreement.⁴⁰⁶ In some states, an intrastate agreement is a part of law. The Indiana legislature, for example, created an intrastate mutual aid program that applies to every political subdivision of the state that does not opt out by adopting an ordinance or resolution to that effect.⁴⁰⁷

Jurisdictions requesting mutual aid assistance need to understand the potential legal claims that may result. Although the model agreements previously covered will address issues like responsibility for injuries to members of the assisting unit, case law in some states holds the requesting party responsible for helpers’ workers compensation claims if they are injured during the response.⁴⁰⁸

Interestingly, the only place in the NIMS document that speaks of legal issues is the MAA contents list.⁴⁰⁹ Workers compensation, treatment of liability and immunity, and recognition of qualifications and certifications are listed as appropriate contents for an MAA.⁴¹⁰ While these are very important legal issues, a shortcoming in virtually all emergency operations plans is the failure to have an overall approach to liability issues as a separate hazard.⁴¹¹

402. The Center for Law and the Public’s Health at Georgetown & Johns Hopkins Universities, The Model State Health Emergency Powers Act (2001), <http://www.publichealthlaw.net/Resources/Modellaws.htm>.

403. *Id.* at § 608(b).

404. *Id.* at § 608(b)(2).

405. NIMS, *supra* note 30, at 46. (“Personnel certification entails authoritatively attesting that individuals meet professional standards for the training, experience, and performance required for key incident management functions. Credentialing involves providing documentation that can authenticate and verify the certification and identity of designated incident managers and emergency responders.”).

406. Emergency Management Assistance Compact, Model Intrastate Legislative Language, <http://www.emacweb.org/?150> (last visited Mar. 12, 2006).

407. IND. CODE § 10-14-3-10.6 (2005).

408. *See, e.g.*, Thomas v. Town of Lisbon, 550 A.2d 894 (Conn. 1988).

409. NIMS, *supra* note 30, at 39-40.

410. *Id.*

411. William C. Nicholson, *Litigation Mitigation: Proactive Risk Management in the Wake of the West Warwick Club Fire*, 1 J. EMERGENCY MGMT. 14, 17-18 (Summer 2003).

The proposed Legal Support Annex to the NRP Draft #1 might have addressed this shortcoming.⁴¹² Past legal education offerings from the federal government have focused on federal issues, without being of much help to state and local attorneys.⁴¹³

The adopted NIMS requires that responders to interstate requests for assistance be federally certified.⁴¹⁴ As mentioned above, in the EMAC, the issue of certifying visiting responders has to date been left to the individual states.⁴¹⁵ The challenges posed by the multi-tiered certification system include important legal issues that must be considered in the context of mutual aid.⁴¹⁶ First of all, an interstate agreement may not validly be reached if one of its members is not federally certified pursuant to NIMS.⁴¹⁷ As a practical matter, however, emergency responders help those who need them, and respond to requests for assistance from their neighbors, regardless of legal consequences.⁴¹⁸

Stephan recognizes this reality:

If you've got a mass casualty situation, you're going to try to get everyone in there you can [whether they are federally certified or not]. On a local type of scene, probably not. That's going to have to be situationally dependent. Liability issues come up. If you are nationally certified, you're going to be able to fit in all the different scenarios—that's the best option.⁴¹⁹

FEMA currently imposes requirements for formal MAAs in order to receive reimbursement for mutual aid expenses,⁴²⁰ yet many groups do not enter into such pacts. While this background indicates that increases in MAAs

412. *See supra* notes 172 & 176 and accompanying text.

413. FEMA, through the Emergency Management Institute, taught a class to state and FEMA attorneys September 9-10, 1998 entitled "Course E709: Expediting Disaster Response and Recovery Pursuant to the Stafford Act." Telephone Interview with Tamara S. Little, Assistant Attorney General, State of Ohio, NEMA Legal Counsels Committee Chair (Mar. 21, 2002). The course focused on the federal side of emergency law. *Id.* Subsequently, FEMA has worked to educate state level attorneys through the National Emergency Management Association (NEMA) Legal Counsels Committee during their twice-yearly meetings. *Id.*

414. NIMS, *supra* note 30, at 38 ("Personnel that are certified for employment in support of an incident that transcends interstate jurisdictions through the Emergency Management Assistance Compacts System will be required to meet national qualification and certification standards.").

415. Emergency Management Assistance Compact, Pub. L. No. 104-321, art. v, 110 Stat. 3877, 3880 (1996).

416. Nicholson, *supra* note 6, at 315-317.

417. Since interstate responders under NIMS must be Federally certified, it follows that both parties must be federally certified in order to reach a valid interstate mutual aid agreement under NIMS. *See* NIMS, *supra* note 30, at 38.

418. *See* NICHOLSON, *supra* note 15, at 109 n.50.

419. Telephone interview with Bob Stephan, *supra* note 88.

420. Federal Emergency Management Agency, 9523.6 Mutual Aid Agreements for Public Assistance ¶ 7(G) (2004), http://www.fema.gov/rrr/pa/9523_6.shtm.

use will continue to slowly grow,⁴²¹ the mandate of the adopted NIMS will ensure more rapid growth.⁴²² Greater understanding of potential liabilities, including possible nullification of existing agreements and loss of federal grant funds, may increase the use of MAAs.⁴²³

F. Implementing the NIMS

On September 8, 2004, the NIMS Integration Center issued a letter to all State Governors, with copies to State Administrative Agencies, State Emergency Management Directors, State Homeland Security Advisors, DHS Directorates and Offices, and the Homeland Security Advisory Council.⁴²⁴ The letter outlines the background of the NIMS, including the issuance of HSPD 5, creation of the NIMS in obedience to HSPD 5, adoption of the NIMS by the federal government, and creation of the NIMS Integration Center.⁴²⁵ The document's bulk contained the steps required for state, territorial, tribal, and local entities to become compliant with NIMS.⁴²⁶ The letter takes a phased approach to compliance, with entities "ramping up" their capabilities under NIMS.⁴²⁷

In keeping with NIMS' status as a "national" system, the letter states that, while some NIMS requirements are specific to local jurisdictions, the leadership role of the states is critical for full NIMS implementation. The states, in fact, have a critical role under NIMS in regionalizing their response capabilities.⁴²⁸ The correspondence further specified that fiscal 2005 would a "start up year" and that full NIMS compliance would not immediately be required in order to receive grant funds.⁴²⁹ The NIMS Center is currently

421. Baltic, *supra* note 2, at 26.

422. *See supra* note 412 and accompanying text.

423. NICHOLSON, *supra* note 15, at 246-254.

424. *See supra* Appendix 1 herein.

425. *Id.*

426. *Id.*

427. Interview with Gil Jamieson, *supra* note 232:

The NIMS document itself is not really a mandate as much as it is a document that describes the National Incident Management System. What we're attempting to do is say that in order to comply with the spirit and intent of NIMS that state and local governments and federal departments and agencies need to take certain actions. We have developed a phased approach towards that notion of full compliance.

428. *Id.*

429. *Id.* To meet the minimum NIMS requirements for fiscal year 2005, State and territory level efforts to implement the NIMS must include the following:

- Incorporating NIMS into existing training programs and exercises;
- Ensuring that Federal preparedness funding (including DHS Homeland Security Grant Program, Urban Area Security Initiative (UASI) funds) support NIMS

working to identify all preparedness grant programs, whose continuance depends on NIMS compliance.⁴³⁰

In some jurisdictions, significant changes to the law, including legislation, executive orders, ordinances, resolutions, or regulations, may be needed to comply with NIMS. The NIMS Center will provide models for these enactments. This process will accelerate the devolution of power over responders and their sponsoring organizations from the state and local levels of the government to the federal sphere.

States are encouraged to achieve full NIMS compliance in FFY 2005.⁴³¹ Those that do not do so will be required to “leverage” federal assistance funds to completely adopt NIMS during FFY 2006.⁴³² Those that have not become fully NIMS compliant will not receive federal preparedness funds during FFY 2007.⁴³³ This time frame will be less onerous than the denial of federal preparedness funds to non-compliant entities in FFY 2005 authorized by HSPD 5.⁴³⁴ Units of government nonetheless continue to face a firm, albeit delayed, deadline for losing federal funds if they do not “voluntarily” comply with the NIMS. Of course, the heart of the NIMS is adoption of the Incident Command System (“ICS”), which the letter specifies must be consistent with the concepts and principles taught by DHS.⁴³⁵

Even after the stakeholder input described above, support for the NIMS is

implementation at the State and local levels (in accordance with the eligibility and allowable uses of the grants);

- Incorporating NIMS into Emergency Operations Plans (EOP);
- Promotion of intrastate mutual aid agreements;
- Coordinating and providing technical assistance to local entities regarding NIMS; [and]
- Institutionalizing the use of the Incident Command System (ICS).

See supra Appendix 1 herein. In addition, at the State, territorial, tribal, and local levels, jurisdictions should support NIMS implementation by:

- Completing the NIMS Awareness Course: “National Incident Management System (NIMS), An Introduction” IS 700;
- Formally recognizing the NIMS and adopting the NIMS principles and policies;
- Establish a NIMS baseline by determining which NIMS requirements you already meet;
- Establishing a timeframe and developing a strategy for full NIMS implementation; [and]
- Institutionalizing the use of the Incident Command System (ICS).

Interview With Gil Jamieson, *supra* note 232.

430. *See supra* Appendix 1 herein.

431. *Id.*

432. Joe Fiorill, *Emergency Responders Rap Federal Incident Management System*, GOVEXEC.com (2004), http://www.govexec.com/story_page.cfm?articleid=29606&printerfriendlyVers=1&

433. *Id.*

434. HSPD 5, *supra* note 42, at ¶ 20.

435. Fiorill, *supra* note 432.

not universal.⁴³⁶ Some responders reacted critically to the letter's rapid promulgation of the NIMS, saying that the NIMS lacks clarity and fails to provide sufficient training and funding for personnel.⁴³⁷

"The start of fiscal year 2006 is too soon to begin to tie the receipt of federal terrorism-response grant funding to NIMS implementation," Los Angeles County Fire Chief Michael Freeman told the [House of Representatives] subcommittee. "The NIMS has 518 measurable requirements. It is unclear to us whether DHS will require implementation of all 518 or whether a percentage will be required or whether there will be a top 10," Freeman said. "Implementing all 518 requirements within the next year will be a Herculean and perhaps unreasonable task."⁴³⁸

Deputy Associate Director David Kaufman of the DHS ODP recently stated that the NIMS Integration Center's "determination of 'what implementation and compliance means and all the rest' will take time." As a result, Kaufman said, "We can't exactly require that compliance this month."⁴³⁹

On September 29, 2003, at a hearing before the Select Committee on Homeland Security's Emergency Preparedness and Response Subcommittee, Democrat Bennie Thompson of Mississippi said,

I am concerned that DHS is not providing additional grant funds to achieve these goals and that they are unfunded mandates. For example, I am not aware of any additional funding for state and local governments to train personnel on the NIMS, nor am I aware of any funding to revise and publish new emergency operations plans that are consistent with NIMS . . . "It appears," Thompson said, "that DHS expects the states to leverage their general ODP grant funds for this purpose and choose between implementing NIMS and other equally

436. *Id.*

The decision to establish a National Incident Management System must be applauded,' [George Washington University professor Joseph] Barbera, [co-director of the university's Institute for Crisis, Disaster and Risk Management] said. 'The development process used in creating the NIMS document, however, was not as open to professional input as many of us would have preferred. It is particularly unclear whether the NIMS development process provided a full hearing for the concerns and issues of acute-care medical and hospital professionals.

437. *Id.*

438. *Id.* Freeman was referring to the NIMS Compliance Assurance Support Tool (NIMSCAST) when he listed the mentioned the 518 requirements. See Federal Emergency Management Agency, Welcome to NIMCAST; <http://www.fema.gov/nimcast/index.jsp> (last visited Apr. 13, 2006).

439. *Id.*

pressing needs like specialized equipment, training, terrorism exercises and enhanced security at critical infrastructure sites.”⁴⁴⁰

VII. NRP AND NIMS AS RULEMAKING

The Administrative Procedure Act (“APA”)⁴⁴¹ establishes standards and procedures for Federal rulemaking. The APA defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” or establish rules of practice.⁴⁴² Section 3502(1) of Title 44 of the United States Code defines “agency” as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . .”⁴⁴³

DHS is an Executive Department. While typically plans are not rules,⁴⁴⁴ the comprehensive character of the NRP and NIMS,⁴⁴⁵ their universal applicability to all emergency preparedness and response activities,⁴⁴⁶ and their future effect⁴⁴⁷ are aspects that resemble rules. Especially convincing is the

440. Fiorill, *supra* note 432.

441. 5 U.S.C. §§ 551-706 (2005).

442. § 551(4). *See also* Exec. Order No. 12,291, Federal Regulation, 46 Fed. Reg. 13,193 § 1(a) (Feb. 17, 1981); Exec. Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 § 3(d) (Sept. 30, 1993); 44 C.F.R. §1.2(a) (2005). Exec. Order No. 12,291 was revoked by Exec. Order No. 12,866 (Sept. 30, 1993). Exec. Order No. 12,866 was amended by Exec. Order 13250, Providing an Order of Succession Within the Department of Health and Human Services, 67 Fed. Reg. 1,597 (Feb. 26, 2002).

443. 44 U.S.C. § 3502(1) (2005).

444. The Federal Response Plan, for example, is not a rule. The National Contingency Plan, 40 C.F.R. pt. 300 (2004), in contrast, was adopted as a rule. While it might seem simplistic to argue that the word “national” in the title of a plan should tilt the balance toward its being a rule, the fact is that any plan that is national in scope, affecting all levels of government and all Americans, would benefit from the input of the U.S.-wide stakeholder group and the public that will be affected by it, as contemplated by the APA.

445. HSPD 5 ¶1 states that its purpose, as implemented through the NRP and NIMS, is “[t]o enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system.” HSPD 5, *supra* note 42, at ¶ 1. *See also* NRP Draft #1, *supra* note 31, at Transmittal Letter (“The incident management structures and processes outlined herein call for maximum integration and coordination at all levels of government and between the government and private entities.”).

446. HSPD 5, *supra* note 42; NRP Draft #1, *supra* note 31.

447. NRP Draft #1, *supra* note 31, at 1

Given the complex 21st Century threat environment, the nation can no longer rely on a patchwork quilt approach to incident management. These threats demand a tightly woven tapestry, with a clearly defined framework and processes that eliminate artificial distinctions and barriers. The National Response Plan (NRP) and the National Incident Management System (NIMS) provide the framework and processes that weave all of the capabilities and resources of all of the jurisdictions, disciplines, and levels of government and the private sector into a cohesive, unified, coordinated, and seamless national approach to domestic incident management.

truth that at the NRP's and NIMS's heart is the all-encompassing implementation and direction of all-hazards homeland security rules for all levels of government.⁴⁴⁸ The NRP, through the adopted NIMS, its operational section, institutes in minute detail emergency preparedness and response rules of practice for all levels of government.

The argument that the NRP and NIMS have the effect of a rule or regulation, and should therefore be issued as such, is quite convincing. It would be additionally classified as a "significant regulatory action" if the NRP (which may be viewed as including NIMS—described as its "operational" aspect) would be likely to result in a yearly economic effect of \$100 million or more or adversely affect public health or safety.⁴⁴⁹ To make the financial impact determination would necessitate a cost analysis, but given that homeland security annual expenditures are currently \$30.5 billion, the NRP's economic effect will most likely be well in excess of \$100 million.⁴⁵⁰ As the previous discussion of potential deleterious effects of the two-tiered system of emergency responders illustrates, an adverse effect on some segments of public safety is also a likely outcome of issuing the NRP.

As a significant regulatory action, Executive Order No. 12866 would require centralized regulatory review⁴⁵¹ of the NRP to determine, among other things, quantified potential costs and benefits from the rule, who is likely to reap the benefits or bear the costs, and less costly alternatives that might achieve the same goals.⁴⁵² Although the NRP might be classified as an "emergency rule" and exempted from the timing of performing regulatory analysis,⁴⁵³ this task must still be performed.⁴⁵⁴

The APA contains different types of rulemaking methods. The most common procedure, usually referred to as "informal" or "notice and

448. NRP Draft #1, *supra* note 32, at 1.

449. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 § 3(f)(1)

Significant regulatory action' means any regulatory action that is likely to result in a rule that may: (1) [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

A similar definition, referred to as a "major rule," was promulgated in Exec. Order. No. 12,291, 46 Fed. Reg. 13,193 § 1(b)(1).

450. Press Release. The White House, Office of the Press Secretary, Remarks by the President on the One-Year Anniversary of the U.S. Department of Homeland Security (Mar. 2, 2004), <http://www.dhs.gov/dhspublic/display?content=3280>. ("[We] have tripled federal funding for homeland security since 2001, to some \$30.5 billion.")

451. Exec. Order No. 12866, 58 Fed. Reg. 51735 § 6.

452. *Id.* at § 6(3)(C).

453. *Id.* at § 6(3)(D).

454. *Id.* at § 6(3)(D).

comment” rulemaking, appears at 5 U.S.C. §553. Under this procedure the APA requires the issuance of a final rule along with “a concise and general statement of . . . [the rule’s] basis and purpose.”⁴⁵⁵

DHS has specifically been granted rulemaking authority.⁴⁵⁶ FEMA, as a constituent agency of DHS, has such authority independently.⁴⁵⁷ An interested party might petition DHS to issue the NRP as a rule under either grant of rulemaking authority.⁴⁵⁸ Even if the agency were to decide not to promulgate the documents as a rule, it would be required to issue a statement of the reasoning behind such a decision.⁴⁵⁹ The agency’s decision not to issue a rule might then be appealed in court.⁴⁶⁰ Such public participation in agency decision making is looked upon favorably by the courts.⁴⁶¹ Other interested persons might intervene in an appeal as well.⁴⁶²

One must note that the agency reportedly consulted extensively with attorneys during the adoption process.⁴⁶³ Unlike the rest of the documents, however, where DHS consulted rather extensively with non-federal government stakeholders, there is no indication whatsoever that attorneys outside DHS and the White House were consulted at any stage during the

455. 5 U.S.C. § 553(c) (2006).

456. Homeland Security act of 2002, 6 U.S.C. § 112(e)(2002) (providing that the issuance of regulations by the DHS Secretary are governed by the APA, except as otherwise provided within the HS Act).

457. FEMA policies and procedures require, among other things, “adequate information concerning the need for and consequences of proposed government action,” cost benefit analysis, choice of the alternative involving the least net cost to society, and choice of the option that maximizes the aggregate net benefits to society with regard to the rulemaking process. 44 C.F.R. § 1.4(a). Further, FEMA policy requires public participation in rulemaking. *Id.* at § 1.4(b).

458. 5 U.S.C. § 553(e) provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” *Id.*

459. 5 U.S.C. § 553(e) does not give the public a right to compel an agency to perform a rulemaking proceeding. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 813 (D.C. Cir. 1981); S. REP. NO. 79-752, at 15 (1945). However, the APA mandates that an agency denying a rulemaking request must give notice of the denial accompanied by a statement of the grounds for denial. *See* 5 U.S.C. § 555(e) (2004) (“Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.”).

460. 5 U.S.C. § 704 (2005).

461. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 190 n.96 (1997) (citing *National Resources Defense Council v. SEC*, 606 F.2d 1031, 1046 n.18 (D.C. Cir. 1979)).

462. Rule 24(a)(2) of the Federal Rules of Civil Procedure confers a right of intervention upon a person who “claims an interest relating to” the subject matter of the suit in which the person wants to intervene, provided that the disposition of the suit might “impair or impede” the person’s ability to protect that interest and the interest is not “adequately represented” by the parties to the suit. FED. R. CIV. P. 24(a)(2).

463. EIIIP Virtual Forum Presentation, *supra* note 35 (“We worked closely with DHS and White House attorneys throughout the process, and we adhered to all requirements that they stipulated were appropriate.”).

process of drafting and revision.⁴⁶⁴ Knowledgeable outside attorneys who could have provided valuable input on the adoption process include members of the National Emergency Management Association Legal Counsels Committee, state and local emergency management attorneys, as well as law school academics and lawyers in private practice whose areas of expertise include emergency response and emergency management.

Requesting that the rule be issued pursuant to DHS' or FEMA's authority appears to make sense, given the HS Act's requirement that the Undersecretary for Emergency Preparedness and Response put together the NRP.⁴⁶⁵ FEMA is a part of the EP&R,⁴⁶⁶ while the TSA, which is responsible for the NRP and NIMS,⁴⁶⁷ is part of the Border and Transportation Security Directorate ("BTSD").⁴⁶⁸ Whether issued as a rule or not, DHS has violated the clear mandate of the HS Act by using the BTSD rather than EP&R as the vehicle for consolidating existing federal government emergency response plans into a single, coordinated national response plan.⁴⁶⁹

If DHS were to issue this material as a rule using the notice and comment rulemaking structure, the current approach would be flawed for several reasons. First, the NRP and NIMS were not published in the customary way as a Notice of Proposed Rule in the Federal Register. Rather, they were sent directly to a select number of interested parties.⁴⁷⁰ Second, the "public comment" period does not contemplate the involvement of the general public, as illustrated by the limited release of the material.⁴⁷¹ Third, DHS' intent is to establish a final version of the NRP, as they did with the Adopted NIMS, after internal federal executive agency analysis and some input from selected stakeholders. Regulatory analysis does not appear to be part of DHS' adoption plan.

When asked what lessons the NRP/NIMS adoption process holds for federal agencies that are often assumed to be inflexible and unresponsive, Bob Stephan stated,

464. *Id.*

465. Homeland Security Act of 2002, 6 U.S.C. § 312(6) (2002) ("In assisting the Secretary with the responsibilities specified in section 101(b)(2)(D), the primary responsibilities of the Under Secretary for Emergency Preparedness and Response shall include consolidating existing Federal Government emergency response plans into a single, coordinated national response plan.").

466. § 312(1).

467. Andersen, *supra* note 13.

468. § 203(2).

469. § 312(6).

470. NRP Base Plan DRAFT #1, All Hands Community Newsletter No. 23 for Thursday, Mar. 11, 2004.

471. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 §6(A)(1) requires public participation. "Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process." *Id.*

The only lesson [here] is that you have to seek the comments and you have to understand that they are important. The lion's share of what we're responsible for and what we are concerned about resides on the state and local jurisdictions. They have to be part of the solution, and they have to be part of the acceptance of whatever you're coming up with. In this whole security world, that is the constituency that you're concerned about. You have to find out how to reach out and touch the right partners from the political, governmental, and [emergency response and emergency management] discipline sides of the house.⁴⁷²

Although DHS is to be commended for opening the process to the extent it has, more access could well benefit the end product. Scrutiny of the NRP and NIMS using the rulemaking process would cast refreshing illumination on what has otherwise been an internal matter between DHS, other federal agencies, and a limited group of stakeholders. The documents would surely gain from receiving supplementary contributions from all interested parties, including the general public.

VIII. CONCLUSION

Many emergency managers and responders were extremely concerned that the NRP and NIMS adoption process began without consideration of their views.⁴⁷³ For a considerable time, it appeared that DHS was headed down the wrong track in creating and imposing standards for front line troops in "all-hazards" preparedness.⁴⁷⁴

To the surprise of many observers, DHS has proven to be fairly flexible and open to suggestions by the communities that the agency regulates pursuant to federal law.⁴⁷⁵ The contributions of state, local, and tribal governments, as well as emergency response groups, have helped the agency to understand that cooperation and buy-in are essential for success in its mission.⁴⁷⁶ The adopted NIMS provides a formalized structure for their ongoing feedback on regulatory and other issues of interest in the form of the NIMS Integration Center.⁴⁷⁷ Still, the process has been significantly less inclusive than it might

472. Telephone Interview with Bob Stephan, *supra* note 88.

473. West, *supra* note 3:

When this document was first written, it was written as if the federal government was going to respond to an automobile accident and take care of it, when the fact is, all emergencies are local. They start with local people and they end with local people. You may invite a whole lot of other people in the middle, but they start and end locally. But what we were able to do is we were able to take a document that was written from the federal perspective and influence it into what I believe is now a national perspective.

474. Nicholson, *supra* note 12, at 20.

475. *Id.* at 21.

476. William C. Nicholson, *The New Federalism in Homeland Security*, HOMELAND PREPAREDNESS PROF., Nov./Dec. 2003, at 8-10.

477. NIMS, *supra* note 30, at 60.

have been, with no avenue for involvement of the general public. Incorporating the requirements of the NFPA 1600 will be yet another challenge, but it is one that the NIMS Center embraces. Perhaps, the greatest difficulty will lie in finding the financial resources needed to ensure compliance with the unfunded, and likely very expensive, mandates embodied in the NRP and NIMS. The enlightened approach to implementation taken by the NIMS Center will likely result in the process being as painless as possible.

One must recall that the final word on federal regulation of state and local responders and emergency managers comes from the DHS Secretary.⁴⁷⁸ Further, the administration apparently possesses contradictory views of preparedness, paying lip service to “all-hazards” readiness while diverting funding away from emergency responders and emergency managers. While Secretary Ridge showed himself to be sensitive to the concerns of the regulated communities, his successor, Secretary Chertoff, and other future holders of the office, must demonstrate their respect for these stakeholders’ views on an ongoing basis.

The HS Act could be amended to give the concerned communities a formalized portion of control over the regulatory scheme with which they must abide. Such a change in the law would ensure that DHS continues to consider their perspectives and modify its practices to take them into account. A simpler approach that would afford a voice for all concerned would have been utilization of notice and comment rulemaking to enact the NRP and NIMS.

Making law is commonly compared with making sausage—a process that, once observed, decreases one’s appetite for the end product. The creation of the NRP and NIMS illustrates that this comparison applies equally to establishment of “voluntary” standards. Appetite aside, however, the importance of this effort cannot be overstated. Creating a uniform national approach to incident response and management will surely result in significantly increased safety for emergency responders and greater efficiency in resource management. In an era when disasters and emergencies appear to constantly increase in size and complexity, and multiple agencies must work together ever more frequently, seeking and achieving common standards is a most worthy goal.

478. *Id.* (“The Secretary has ultimate authority and responsibility for publishing revisions and modifications to NIMS-related documents, including supplementary standards, procedures, and other materials, in coordination with other Federal, State, local, tribal, and private entities with incident management and emergency responder responsibilities, expertise, and experience.”) (emphasis added).

APPENDIX 1

DEPARTMENT OF HOMELAND SECURITY
Washington, DC 20528

September 8, 2004

Dear Governor:

In Homeland Security Presidential Directive (HSPD)-5, *Management of Domestic Incidents*, the President directed me to develop and administer the National Incident Management System (NIMS). The NIMS provides a consistent nationwide approach for Federal, State,⁴⁷⁹ territorial, tribal, and local⁴⁸⁰ governments to work effectively and efficiently together to prepare for, prevent, respond to, and recover from domestic incidents, regardless of cause, size, or complexity. On March 1, 2004, the Department of Homeland Security (DHS) issued the NIMS to provide a comprehensive national approach to incident management, applicable at all jurisdictional levels and across functional disciplines. HSPD-5 also required DHS to establish a mechanism for ongoing coordination to provide strategic direction for, and oversight of, the NIMS. To this end, the NIMS Integration Center (NIC) was established to support both routine maintenance and the continuous refinement of the NIMS.

All Federal departments and agencies are required to adopt the NIMS and use it in their individual domestic incident management and emergency prevention, preparedness, response, recovery, and mitigation activities, as well as in support of all actions taken to assist State or local entities. The NIC is working with Federal departments and agencies to ensure that they develop a plan to adopt NIMS and that all fiscal year (FY) 2005 Federal preparedness assistance program documents begin the process of addressing State, territorial, tribal, and local NIMS implementation.

This letter outlines the important steps that State, territorial, tribal, and local entities should take during FY 2005 (October 1, 2004- September 30, 2005) to become compliant with the NIMS.

The NIMS provides the framework for locals, tribes, territories, States, and the Federal Government to work together to respond to any domestic incident. Many of

479. As defined in the Homeland Security Act of 2002, the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any possession of the United States." § 6 U.S.C. 101 (14).

480. As defined in the Homeland Security Act of 2002, Section (10): the term "local government" means:

(A) county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments... regional or interstate government entity, or agency or instrumentality of a local government; an Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation; and a rural community, unincorporated town or village, or other public entity."

6 U.S.C. § 101(10).

the NIMS requirements are specific to local jurisdictions. In order for NIMS to be implemented successfully across the nation, it is critical that States provide support and leadership to tribal and local entities to ensure full NIMS implementation. We are looking to you and your State Administrative Agency (SAA) to coordinate with the State agencies, tribal governments, and local jurisdictions to ensure NIMS implementation. Given the importance and urgency of this effort, Federal, State, territorial, tribal, and local entities should begin efforts to implement the NIMS, if such efforts are not already underway.

Implementation of and compliance with the NIMS is critical to ensuring full and robust preparedness across our nation. HSPD-5 established ambitious deadlines for NIMS adoption and implementation. FY 2005 is a start up year for NIMS implementation and full compliance with the NIMS is not required for you to receive FY 2005 grant funds. Since FY 2005 is a critical year for initial NIMS adoption, you should start now by prioritizing your FY 2005 preparedness assistance (in accordance with the eligibility and allowable uses of the grant) to facilitate its implementation. The NIC is working with the Federal departments and agencies to identify all of preparedness assistance programs. The NIC will then provide this information to the States, territories, tribes, and local governments.

To the maximum extent possible, States, territories, tribes, and local entities are encouraged to achieve full NIMS implementation and institutionalization across the entire response system during FY 2005. This memorandum highlights the important features of NIMS implementation that should receive special emphasis in FY 2005, but does not represent all of the actions necessary to fully implement the NIMS.

The NIMS is the nation's first-ever standardized approach to incident management and response. The NIMS unifies Federal, State, territorial, tribal, and local lines of government into one coordinated effort. This integrated system makes America safer by establishing a uniform set of processes, protocols, and procedures that all emergency responders, at every level of government, will use to conduct response actions. This system ensures that those involved in emergency response operations understand what their roles are and have the tools they need to be effective.

This system encompasses much more than the Incident Command System (ICS), although ICS is a critical component of the NIMS. It also provides a common foundation for training and other preparedness efforts, communicating and sharing information with other responders and with the public, ordering resources to assist with a response effort, and for integrating new technologies and standards to support incident management. For the first time, all of the nation's emergency responders will use a common language, and a common set of procedures when working individually and together to keep America safe. The NIMS ensures that they will have the same preparation, the same goals and expectations, and most importantly, they will be speaking the same language.

Minimum FY 2005 NIMS Compliance Requirements:

State and territory level efforts to implement the NIMS must include the following:

- ① ■ Incorporating NIMS into existing training programs and exercises
- ① ■ Ensuring that Federal preparedness funding (including DHS Homeland

Security Grant Program, Urban Area Security Initiative (UASI) funds) support NIMS implementation at the State and local levels (in accordance with the eligibility and allowable uses of the grants)

- ④ ■ Incorporating NIMS into Emergency Operations Plans (EOP)
- ④ ■ Promotion of intrastate mutual aid agreements
- ④ ■ Coordinating and providing technical assistance to local entities regarding NIMS
- ④ ■ Institutionalizing the use of the Incident Command System (ICS)

At the State, territorial, tribal, and local levels, jurisdictions should support NIMS implementation by:

Completing the NIMS Awareness Course: “National Incident Management System (NIMS), An Introduction” IS 700

This independent study course developed by the Emergency Management Institute (EMI) explains the purpose, principles, key components and benefits of NIMS. The course also contains "Planning Activity" screens, allowing participants an opportunity to complete some planning tasks during the course. The planning activity screens are printable so that they can be used after the course is complete. The course is available on-line and will take between forty-five minutes to three hours to complete. The course is available on the EMI web page at: <http://training.fema.gov/EMIWeb/IS/is700.asp>.

- Formally recognizing the NIMS and adopting the NIMS principles and policies States, territories, tribes, and local entities should establish legislation, executive orders, resolutions, or ordinances to formally adopt the NIMS. The NIC will provide sample language and templates to assist you in formally adopting the NIMS through legislative and/or executive/administrative means.
- Establish a NIMS baseline by determining which NIMS requirements you already meet

We recognize that State, territorial, tribal, and local entities have already implemented many of the concepts and protocols identified in the NIMS. The 2004 DHS Homeland Security Grant Program encouraged grantees to begin utilizing the NIMS concepts, principles, terminology, and technologies. The NIC is developing the NIMS Capability Assessment Support Tool (NIMCAST). The NIMCAST is a web-based self-assessment system that States, territories, tribes, and local governments can use to evaluate their incident response and management capabilities. This useful tool identifies the requirements established within the NIMS and can assist you in determining the extent to which you are already compliant, as well as identify the NIMS requirements that you are not currently meeting. As gaps in compliance with the NIMS are identified, States, territories, tribes, and local entities should use existing initiatives, such as the Office for Domestic Preparedness (ODP) Homeland Security grant programs, to develop strategies for addressing those gaps. The NIC will formally pilot the NIMCAST with a limited number of States in September. Upon completion of the pilot, the NIC will provide all potential future users with voluntary

access to the system. Additional information about the NIMCAST tool will be provided later this year.

④ ■ Establishing a timeframe and developing a strategy for full NIMS implementation

States, territories, tribes, and local entities are encouraged to achieve full NIMS implementation during FY 2005. To the extent that full implementation is not possible during FY 2005, Federal preparedness assistance must be leveraged to complete NIMS implementation by FY 2006. By FY 2007, Federal preparedness assistance will be conditioned by full compliance with the NIMS. Again, in order for NIMS to be implemented successfully across the nation, it is critical that States provide support and leadership to tribal and local entities to ensure full NIMS implementation. States should work with the tribal and local governments to develop a strategy for statewide compliance with the NIMS.

④ ■ Institutionalizing the use of the Incident Command System (ICS)

If State, territorial, tribal, and local entities are not already using ICS, you must institutionalize the use of ICS (consistent with the concepts and principles taught by DHS) across the entire response system. The 9/11 Commission Report recommended national adoption of the Incident Command System (ICS) to enhance command, control, and communications capabilities. All Federal, State, territory, tribal, and local jurisdictions will be required to adopt ICS in order to be compliant with the NIMS. Additional information about adopting ICS will be provided to you by the NIC.

FY 2006 and FY 2007 Requirements:

In order to receive FY 2006 preparedness funding, the minimum FY 2005 compliance requirements described above must be met. Applicants will be required to certify as part of their FY 2006 grant applications that they have met the FY 2005 NIMS requirements. Additional information about NIMS compliance and resources for achieving compliance will be forthcoming from the NIC. In addition, FY 2005 Federal preparedness assistance program documents will address State and local NIMS compliance. The NIC web page, www.fema.gov/nims, will be updated regularly with information about the NIMS and guidance for implementation. The NIC may be contacted at the following:

Gil Jamieson, Acting Director
NIMS Integration Center
500 C Street, SW
Washington, DC 20472
(202) 646-3850
NIMS-Integration-Center@dhs.gov
web page: www.fema.gov/nims

Thank you for your support in implementing the NIMS. I look forward to continuing our collective efforts to better secure the homeland and protect our citizens and appreciate all of your hard work in this important endeavor.

Sincerely,

Tom Ridge

cc: State Administrative Agency
State Emergency Management Director
State Homeland Security Advisor
DHS Directorates and Offices
Homeland Security Advisory Council