



FEDERAL AUTHORITIES FOR DISASTER RESPONSE

Although initial responsibility for managing domestic incidents generally falls on state and local authorities, the Federal government may render assistance when state and local resources are overwhelmed or when Federal interests are involved. This document summarizes the laws and other authorities that guide and control the Federal government's response to both natural and man-made disasters that occur within the United States.

I. HOMELAND SECURITY ACT

- **General.** The Homeland Security Act of 2002 consolidates the Federal government's emergency response capabilities under the newly created Department of Homeland Security. The Act directs the Secretary of Homeland Security ("Secretary") to oversee the personnel, assets and liabilities of the Federal Emergency Management Agency ("FEMA"), the Office of Emergency Preparedness, the National Disaster Medical System, and the Metropolitan Medical Response System of the Department of Health and Human Services.
- **Secretary of Homeland Security's emergency response authority.** With respect to emergency management and response, the Homeland Security Act directs the Secretary to, among other things:
 - Coordinate the Federal government's response to both natural and man-made disasters, including terrorist attacks, that occur within the United States;
 - Develop and implement a comprehensive national incident management system that enables Federal, state, and local governments to efficiently coordinate the mobilization of resources during emergency response; and
 - Consolidate the existing emergency response plans of individual Federal agencies into a single, comprehensive national response plan.
- **FEMA.** The Homeland Security Act also provides that FEMA shall remain the lead agency in Federal disaster response, including in the development and implementation of the national response plan.

II. FEDERAL STAFFORD ACT

- **General.** The Robert T. Stafford Disaster Relief and Emergency Act ("Stafford Act") sets forth the statutory framework governing Presidential declarations of "emergencies" and "major disasters," and the extent to which Federal resources may be utilized pursuant to such declarations.
- **Declarations based on request from State Governor.** The President may declare a "major disaster" in response to a request for assistance from a State Governor certifying that circumstances within the Governor's state are "of such severity and magnitude that effective response is beyond the capabilities of the state and the affected local governments and that Federal assistance is necessary." The President also may declare an "emergency" in response to such a request, but only if the request is supported by an additional finding that

Federal emergency assistance is required to “save lives and to protect property, public health and safety, or to lessen the treat of a disaster.”

- **Declarations to protect Federal interests.** The President may also declare an “emergency” without a request from a State Governor in circumstances that involve “a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.” Under these circumstances, the Regional Director of FEMA must initiate the request.
- **Organization of Federal assistance subsequent to Presidential declaration.** Immediately following a declaration of a major disaster or emergency, the President must appoint a Federal coordinating officer to the affected area. That officer is required to “make an initial appraisal of the types of relief most urgently needed,” set up a field office, coordinate relief in the region, and assist the local citizens and officials in obtaining Federal assistance. The President must also form emergency support teams of Federal personnel that may be deployed to the affected area to assist the Federal coordinating officer. In each case, the FEMA Associate Director determines the particular types of Federal relief that will be provided to the affected region.
- **President’s authority under the Stafford Act to provide disaster relief.** Once the President properly declares the existence of a major disaster or an emergency, and depending on the type of declaration, he or she may, among other things:
 - Direct any Federal agency to utilize the resources and authorities granted to it by Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) to support state and local relief efforts;
 - Coordinate all disaster relief assistance provided by Federal agencies, private organizations, and state and local governments;
 - Provide technical and advisory assistance for (i) performance of essential community services, (ii) the issuance of warnings of risks and hazards, (iii) dissemination of public health and safety information, (iv) provision of health and safety measures, and (v) management, control, and reduction of immediate threats to health and public safety;
 - Assist in the distribution of medicine, food, and other supplies;
 - Utilize, lend or donate Federal equipment, supplies, facilities, personnel and other resources (only if necessary to meet immediate threats to life and property);
 - Distribute medicine, food, and other consumable supplies (only if necessary to meet immediate threats to life and property); and
 - Perform any work or services essential to saving lives and protecting and preserving property, health and safety, including debris removal; search and rescue; emergency medical care; emergency shelter; clearance of roads; provision of facilities for schools and other community services; demolition of unsafe structures; warning of risks and hazards; provision of technical advice; and reduction of immediate threats to life, property and public health and safety.
- **Use of military to provide “essential assistance.”** In addition to authorizing the President to utilize Federal resources upon the declaration of an emergency or major disaster, the Stafford Act authorizes the President, upon the request of a State Governor, to utilize

Department of Defense (“DOD”) resources to perform emergency work that is essential to the preservation of life and property. Use of DOD resources pursuant to this grant of authority must take place “during the immediate aftermath” of an incident that may ultimately trigger Federal assistance, and may not exceed 10 days.

- **Funding for Stafford Act assistance.** Congress makes an annual appropriation to the Federal Disaster Relief Fund (“DRF”) to support disaster relief efforts by states, localities and certain non-profit organizations. Financing for Federal disaster relief conducted pursuant to the Stafford Act comes primarily from the DRF, although many relief activities fall within the statutory mandate of one or more responsible agencies and are not reimbursed. Funds appropriated to the DRF remain available until expended. When particularly catastrophic events exhaust DRF funding, Congress may authorize supplemental appropriations.

III. **HOMELAND SECURITY PRESIDENTIAL DIRECTIVE No. 5**

- **General.** Following enactment of the Homeland Security Act, President Bush issued Homeland Security Presidential Directive No. 5 (“HSPD-5”) in February 2003 to establish “a single, comprehensive national incident management system.” Among other things, HSPD-5 commands the Secretary to develop and administer a National Incident Management System (“NIMS”) and a National Response Plan (“NRP”).
- **National Incident Management System.** Pursuant to HSPD-5, the Secretary developed the NIMS to provide “a consistent, nationwide approach to domestic incident management that is applicable to all jurisdictional levels across functional disciplines in an all-hazards context.” To a large extent, the NIMS speaks in generalities about organizational structure, a systematic method of operations, resource management and communications. HSPD-5 requires that Federal agencies “make adoption of the NIMS a requirement, to the extent permitted by law, for providing Federal preparedness assistance through grants, contracts, or other activities.” By FY 2007, Federal preparedness assistance will be conditioned on full compliance with the NIMS.
- **National Response Plan.** As directed by the President through HSPD-5, the Secretary developed the National Response Plan (NRP) to establish “a comprehensive, national, all-hazards approach to domestic incident management across a spectrum of activities including prevention, preparedness, response, and recovery.” The NRP, which is based on the NIMS, sets forth mechanisms for providing Federal support to state and local incident managers, and establishes a framework for exercising direct Federal authorities and responsibilities. To this end, the NRP prescribes various protocols for operating under different threats or threat levels, and mandates a consistent approach for reporting incidents, providing assessments, and making recommendations to the President, the Secretary of Homeland Security, and the Homeland Security Council.

The NRP outlines fifteen emergency support functions, and identifies the Federal department or agency that is primarily responsible for coordinating the function during an emergency response situation. Those support functions, and the corresponding departments/agencies, are listed below:



Emergency Support Function	Responsible Department/Agency
Transportation	Dep't of Transportation
Communications	Dep't of Homeland Security
Public Works and Engineering	Dep't of Defense/U.S. Army Corps of Engineers
Firefighting	Dep't of Agriculture/Forest Service
Emergency Management	Dep't of Homeland Security/Emergency Preparedness and Response/FEMA
Mass Care, Housing, and Human Services	Dep't of Homeland Security/Emergency Preparedness and Response/FEMA
Resource Support	General Services Administration
Public Health and Medical Services	Dep't of Health and Human Services
Urban Search and Rescue	Dep't of Homeland Security/Emergency Preparedness and Response/FEMA
Oil and Hazardous Materials Response	Environmental Protection Agency
Agriculture and Natural Resources	Dep't of Agriculture
Energy	Dep't of Energy
Public Safety and Security	Dep't of Homeland Security/Dep't of Justice
Long-term Community Recovery and Mitigation	Dep't of Homeland Security/Emergency Preparedness and Response/FEMA
External Affairs	Dep't of Homeland Security

The NRP implements the framework set forth in HSPD-5 for identifying emergency situations that warrant centralized Federal organization and control. Specifically, the Secretary of Homeland Security may declare any threat or hazard an “Incident of National Significance” and thereby assume command for Federal emergency response if:

1. A Federal department or agency acting under its own authority has requested the assistance of the Secretary;
2. The resources of state and local authorities are overwhelmed, and Federal assistance has been requested by the appropriate state and local authorities (as provided by the Stafford Act);
3. More than one Federal department or agency has become substantially involved in responding to the incident; or
4. The President has directed the Secretary to assume responsibility for managing the domestic incident.

For Incidents of National Significance that are Presidentially declared disasters or emergencies, Federal support to states is delivered in accordance with relevant provisions of the Stafford Act. (All Presidentially declared disasters and emergencies are considered Incidents of National Significance, but not vice-versa.)

For Incidents of National Significance that are not encompassed by the Stafford Act, the President may instruct a Federal agency to utilize the authorities and resources granted to it by Congress, subject to any statutory limitations. For example, Federal agencies must adhere to Federal appropriations law -- they may not engage in activities beyond their statutory mandates, and any Federal-to-Federal assistance must comply with the Economy Act.

While the NRP applies to all Federal departments and agencies that may be requested to provide Federal assistance or to conduct operations in the context of actual or potential Incidents of National Significance, the NRP does not confer new authority upon the Secretary or any other Federal official.

IV. DEPARTMENT OF DEFENSE / NATIONAL GUARD

- **Stafford Act.** As discussed above, the Stafford Act expressly authorizes the President to utilize DOD resources in the “immediate aftermath” of a disaster that may ultimately qualify for Federal aid. This “essential assistance” authority authorizes “any emergency work which is made necessary by the [disaster] and which is essential for the preservation of life and property.” Accordingly, subsequent to a Presidential declaration of emergency or major disaster, the President may order active duty military personnel or the National Guard to render aid through services such as debris removal and road clearance; search and rescue; emergency medical care and shelter; provision of food, water and medicine; and dissemination of public health and safety information.
- **Posse Comitatus Act.** The Posse Comitatus Act limits the extent to which the Federal government may use the military or the National Guard (while in Federal status) in emergency response situations. In general terms, that Act forbids military personnel from participating in civilian law enforcement activities unless expressly authorized to do so by the U.S. Constitution or a Federal statute.

The Stafford Act does not provide an exception to the Posse Comitatus Act. Consequently, Federal troops deployed pursuant to the Stafford Act may not engage in activities that directly benefit civilian law enforcement, such as preventing looting or other criminal activities commonly encountered by relief workers. Likewise, military personnel may not engage in traffic control or provide security to facilities used in relief efforts.

Congress and the Federal courts have carved out a number of exceptions to the Posse Comitatus Act that may be relevant in disaster relief efforts. For example:

- The Posse Comitatus Act does not apply to the Coast Guard during peacetime.
- The President may call upon the military or National Guard (1) to quell an insurrection at the request of a state government, (2) to enforce Federal law when “unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws . . . by the ordinary course of judicial proceedings,” and (3) to protect civil rights when states and localities are unable to do so.
- The military may provide information, facilities and equipment to civilian law enforcement agencies.
- The military may assist the Department of Justice in enforcing various laws relating to weapons of mass destruction.
- The military may perform military duties that incidentally benefit civilian law enforcement.

- **U.S. Government’s inherent emergency power.** DOD regulations recognize the military’s emergency power to (1) “protect Federal property and Federal governmental functions” when local authorities fail to provide adequate protection, and (2) “prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations.”

The DOD finds authority for this emergency power under the U.S. Government’s inherent constitutional right “to insure the preservation of public order and the carrying out of governmental operations within its territorial limits.” Because the power is based upon a constitutional right, DOD maintains that it may utilize the power (1) regardless of whether the President has made a Stafford Act declaration, and (2) irrespective of the limitations imposed by the Posse Comitatus Act.

- **DOD Immediate Response Authority.** DOD directives set forth a similar, although separate, non-statutory right to render aid in the immediate wake of extraordinary disasters. Specifically, the directives provide that military personnel may render assistance to civil authorities when a civil emergency or attack overwhelms the capabilities of local authorities and necessitates immediate response to “save lives, prevent human suffering, or mitigate great property damage.” Such assistance may be provided only at the request of civil authorities, and may include, among other things (i) rescue, evacuation, and emergency medical treatment; (ii) emergency restoration of essential public services (including fire-fighting, water, communications, transportation, power and fuel); (iii) debris removal; (iv) monitoring and controlling contaminated areas; (v) safeguarding, collecting and distributing food and essential supplies; and (vi) facilitating and reestablishing civil government functions.

DOD may act pursuant to this “immediate response authority” regardless of whether the President has made a Stafford Act declaration. In addition, it appears that DOD bases its immediate response authority solely on the U.S. Government’s inherent constitutional rights, which renders the Posse Comitatus Act inapplicable.

- **Non-Federalized National Guard.** Members of the National Guard serve a dual role as members of their individual state militias and as Reserve members of the U.S. armed forces. Until called into Federal service, each National Guard unit is a state entity, and its members are civilians who are subject to state military control. While under state control, Guard personnel operate under the command of their State Governor and his Adjutant General, and state laws generally provide that the Governor may activate its National Guard when necessary for the welfare of safety of the state. State Governors routinely activate their National Guard in the wake of natural disasters or civil disturbances that overwhelm local law enforcement. Until called into Federal service, Guard personnel are not subject to the Posse Comitatus Act.