To: Jim Tierney, Nicholas Gess

From: David Flanagan

Re: Initial outline of issues 4 Sept 06

The following memo is intended to identify some of the generic issues that a State Attorney General may expect to encounter in the course of natural or man-made catastrophes, without elaborating as to the specific ways they might be implicated in a particular scenario:

I. STATE/FEDERAL RELATIONS.

   A. Constitutional allocation of power.
      1. The police power.
      2. State requests and federal initiative.
      4. The problems of shared jurisdiction.
      5. The current controversy over when the federal government can take over management of a disaster without a State request.
   B. Federalization of the National Guard.
   C. Jurisdiction and use of federal law enforcement personnel.
   D. Stafford Act responsibilities of the States and applications for federal assistance.

II. PREPARATION FOR DISASTER RESPONSE.

   A. AG involvement in the development of a State disaster response plan consistent with the NRP.
   B. Understanding NIMS, the National Incident Management System.
   C. The leadership role and responsibilities of an AG in managing a disaster
      1. Coordination with other State agencies.
      2. Relationship with the US Department of Justice
      3. Prerequisites for involvement; EOC participation; adequate communications; participation in planning and exercises.
   D. Anticipating the legal needs of the Emergency Support Function (ESF) units under the State Plan.

III. PUBLIC SECURITY.

   A. Participation in developing declarations of emergency and Executive Orders.
   B. Providing guidance re policies concerning:
      1. civil rights,
      2. identity checks and requirements,
      3. treatment of undocumented aliens,
4. weapons restrictions,
5. Use of force by State agents and private security personnel,
6. and other sensitive issues.
C. Defining the State role in the use of public resources to protect public and private infrastructure.
Note: Other security issues will be addressed in the Public Health and Criminal Justice sections of this outline.

IV. CRIMINAL JUSTICE.

A. Invoking the appropriate statutes to trigger federal assistance.
B. Invoking the interstate emergency assistance compact (EMAC).
   1. Challenges of utilizing out of state law enforcement personnel,
   2. Command and control of units and “self-deployed” individual officers,
   3. Issues re qualifications, credentialing and deputizing,
   4. Issues re private security personnel.
C. State plans for continuity:
   1. Jails and prisons-transfer of inmates; establishment of temporary detention facilities,
   2. Trials; preservation of evidence and records.
D. Policy guidance re: police operations in an emergency, including:
   1. Use of force,
   2. Stop and frisk,
   3. Search and seizure,
   4. Arrest and detention,
E. The role of military forces in law enforcement:
   1. The capabilities and authority of National Guard troops under Title 10, U.S.C.
   2. The same under Title 30,
   3. The capabilities and authority of the standing armed forces and the Posse Comitatus Act.

V. PUBLIC HEALTH.

A. Quarantine powers.
B. Search and confiscation authority.
C. Privacy rights.
D. Police protection for health supplies and workers.
E. Qualifications and credentialing for health workers.
F. Reviewing the adequacy of state statutes to deal with present day emergency scenarios.
VI. PROCUREMENT.

A. Developing and standardizing pre-incident contingent contracts for commodities, transportation and personnel.
B. Coordination with the federal government, NGOs and the private sector.
C. Confiscation or commandeering of private or local government resources.

VII. CONSUMER PROTECTION.

A. Insurance coverage and claims management.
B. Disability Act rights.
C. Workers’ rights.
D. Profiteering issues:
   1. Enforcing statutes limiting price increases,
   2. Dealing with black markets,
   3. Rationing issues.

VIII. ENVIRONMENTAL LAW.

A. Liability for pollution during and as a result of disasters.
B. Development and enforcement of land use and building codes which can mitigate the vulnerability and extent of damage to people and property as a result of either natural or man-made disasters.
C. Circumstances during an emergency when modification of environmental requirements may be considered.
D. Special problems of debris removal.

IX. FRAUD.

A. Against the government by contractors and vendors.
B. Against the government by assistance recipients.
C. Against the public by phony charities.
D. State and federal jurisdiction.

X. RECOVERY.

A. State role in restoration of services.
B. State role in taking property for redevelopment.
C. State role in restoration of infrastructure.
D. Sovereign immunity defense for failures in planning, enforcement, and management related to the disaster.
E. State role in planning and carrying out recovery activities under the Stafford Act and federal special purpose legislation.