

# 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 MANAGEMENT SYSTEM\*

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In the aftermath of the September 11, 2001 terrorist attacks on the World Trade Center Towers, the scene at “ground zero”—the sixteen-acre site of destruction—was described as the “worst environmental disaster ever inside a major city.”<sup>1</sup> The scene had “the same scope as a Superfund<sup>2</sup> site,” according to New York University Hospital environmental-medicine specialist Max Costa.<sup>3</sup> Although Environmental Protection Agency monitoring determined the aftermath to be safe from an environmental viewpoint, concern over potential effects of hazardous materials exposure to responders was widespread.<sup>4</sup> Given this high profile example, it is not surprising that emergency responders frequently refer to terrorist attacks as “hazardous materials (HAZMAT) incidents with an attitude.”<sup>5</sup> The reasoning behind this nomenclature is sound: a terrorist attack will almost always result in the release of hazardous substances,<sup>6</sup> and the terrorist always has a purposeful attitude, or intent in the criminal law<sup>7</sup> sense of the word.

The legal standards for dealing with a HAZMAT incident are a set of “best practices” that will both promote safety and assist in lowering liability risks during the inherent danger of emergency response.<sup>8</sup> Emergency response organizations utilize standard operating procedures (SOPs) to guide their members

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\* This article was first published as part of *The American Bar Association’s 30<sup>th</sup> National Spring Conference on the Environment - Combating Terrorism in the Environmental Trenches* Widener Symposium Law Journal, Vol. 9, No. 2, 295 (2003).

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<sup>1</sup>David France, *The Cleanup: Ground Zero: An Environmental Disaster*, NEWSWEEK, Oct. 1, 2001, at 8.

<sup>2</sup>The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), requires the ATSDR and the EPA to prepare a list, in order of priority, of substances that are most commonly found at facilities on the National Priorities List (NPL) established by the National Contingency Plan (NCP). 42 U.S.C. § 9604(i)(2)(A) (2002). The NCP provides guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants. *Id.* at § 9604(c)(5)(A). Superfund Amendments and Reauthorization Act of 1986 (SARA or Superfund), 42 U.S.C. §§ 11001- 11050 (2002). This act provided for broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. In addition, the act provides for a tax on the chemical and petroleum industries, which is then deposited into a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites. *Id.*

<sup>3</sup>France, *supra* note 1, at 8.

<sup>4</sup>Robert Lee Hotz & Gary Polakovic, *America Attacked: Environmental Nightmare: Experts Differ On Peril From Smoke*, L.A. TIMES, Sept. 14, 2001, at A5. “Those construction workers, firefighters and cops are being very heavily exposed to dust and asbestos. That [exposure] isn’t going to end tomorrow; they’ll be heavily exposed for weeks and months.” *Id.*

<sup>5</sup>Telephone Interview with Michael B. Bigler, Chief Deputy State Fire Marshal (Oct. 22, 2002). Chief Deputy Bigler serves a coordinator for state agencies for HAZMAT response capabilities for the State of Indiana.

<sup>6</sup>U.S. ENVIRONMENTAL PROTECTION AGENCY, CERCLA HAZARDOUS SUBSTANCES, at <http://www.epa.gov/superfund/programs/er/hazsubs/cerclahazsubs.htm> (last visited Sept. 21, 2002).

CERCLA hazardous substances are defined in terms of those substances either specifically designated as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), otherwise known as the Superfund law, or those substances identified under other laws. In all, the Superfund law includes references to four other laws . . . to designate more than 800 substances as hazardous, and identify many more as potentially hazardous due to their characteristics and the circumstances of their release. *Id.* See also AGENCY FOR TOXIC SUBSTANCE AND DISEASE REGISTRY, 2001 CERCLA PRIORITY LIST OF HAZARDOUS SUBSTANCES, at <http://www.atsdr.cdc.gov/clist.html> (last visited Sept. 21, 2002).

<sup>7</sup>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.” *Id.*

<sup>8</sup>Interview with Michael B. Bigler, *supra* note 5.

during daily operations.<sup>9</sup> When a response requires resources beyond those available to an individual organization, well-written mutual aid agreements (MAAs) tie together the good sops of multiple response organizations on a sizable emergency scene.<sup>10</sup> The incident management system (IMS) roofs over the structure of safety, assuring that on-scene organization reinforces both good sops and well-written MAAs.<sup>11</sup> These tools are designed so that the failure to properly utilize any single element will not result in unsafe conditions. Rather, they provide checks and balances for one another to assure scene safety.

A recent case from Idaho<sup>12</sup> provides important lessons for future users of IMS, SOPs and MAAs. Newly disclosed information about the response to the September 11 attacks on the World Trade Center Towers in New York City illustrates some of the challenges that may accompany a large-scale terrorism event.<sup>13</sup>

### I. HAZMAT TERRORIST INCIDENTS

Unfortunately, terrorists understand the potentially devastating effects of intentionally incorporating hazardous materials into their attacks.<sup>14</sup> They are particularly aware of the potential devastation of the worst types of HAZMAT—weapons of mass destruction (WMD) including chemical, biological and nuclear arms.<sup>15</sup> While the September 11 attackers were of foreign origin, the United States contains significant numbers of supporters of their radical destructive agenda.<sup>16</sup> Recent statements from the Bush administration are aimed at preparing Americans for additional terrorism events.<sup>17</sup> WMD attacks and suicide bombings like those in Israel have been deemed “only an matter of time” and “inevitable” by the Secretary of Defense Donald H. Rumsfeld and Federal Bureau of Investigation (FBI) Director Robert S. Mueller III respectively.<sup>18</sup>

While the events of September 11 have focused attention on the threat of international terrorism, domestic terrorists remain a significant potential source for attacks involving hazardous materials.<sup>19</sup> “Since October 2001 the FBI has responded to over 8,000 reports of use or threatened use of anthrax or other hazardous materials.”<sup>20</sup> The FBI has not found any evidence to link the post 9-11 anthrax attacks to foreign terrorists.<sup>21</sup> An American college student from the Midwest, a domestic terrorist, confessed to being the mailbox pipe bomber.<sup>22</sup> Recent Congressional testimony from the FBI states that a major threat to our nation’s security is the use of weapons of mass destruction within our borders by terrorist groups, both domestic and international.<sup>23</sup> With this background in mind, approaching any terrorism event as a possible HAZMAT

<sup>9</sup>ALAN V. BRUNACINI, *FIRE COMMAND* 16 (1985).

<sup>10</sup>*Id.* at 9.

<sup>11</sup>William C. Nicholson, *Reinventing the On-Scene Relationship Between Paid and Volunteer Fire Service Providers*, Address at the “Reinventing Fire Services” International Conference (Mar. 4, 2000).

<sup>12</sup>*Buttram v. United States*, No. 96-0324-S-BLW Civ., slip op. (D. Idaho, Feb. 19, 1999).

<sup>13</sup>Jim Dwyer et al., *9/11 Exposed Deadly Flaws In Rescue Plan*, N.Y. TIMES, July 7, 2002, at A1.

<sup>14</sup>ROLAND JACQUARD, *IN THE NAME OF OSAMA BIN LADEN* 142 (2002).

<sup>15</sup>*Id.*

<sup>16</sup>*See generally* STEVEN EMERSON, *AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US* (2002).

<sup>17</sup>Philip Shenon & David Stout, *Rumsfeld Says Terrorists Will Use Weapons of Mass Destruction*, N.Y. TIMES, May 21, 2002, at <http://www.nytimes.com>.

<sup>18</sup>*Id.*

<sup>19</sup>*The Terrorist Threat Confronting the United States: Hearing Before the Senate Select Comm. on Intelligence*, 107th Cong., 2d Sess. (Feb. 6, 2002) (statement of Dale L. Watson, Executive Assistant Director, Counterterrorism/Counterintelligence, Federal Bureau of Investigation), at <http://www.fbi.gov/congress/congress02/watson020602.htm> (last visited Sept. 25, 2002).

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>Tom Gorman, *Student Admits to Bombings; Crime: His father alerted FBI about his likely role in rural mailbox incidents. He will face charges in Iowa after Nevada hearing*, L.A. TIMES, May 9, 2002, at A11.

<sup>23</sup>*Combating Terrorism: Protecting the United States - Part II: Hearing Before the Subcomm. on National Security, Veterans' Affairs, and Int'l Relations of the House Comm. on Govt. Reform*, 107th Cong., 2d Sess. (Mar. 21, 2002) (statement of James Caruso, Deputy Assistant Director for Counterterrorism, Federal Bureau of Investigation).

incident is a matter of common sense safety consciousness.

As with any hazardous materials response, the actions of all responders to terrorism events are closely controlled by extensive regulations of both Occupational Safety and Health Administration (OSHA)<sup>24</sup> and the Environmental Protection Agency (EPA).<sup>25</sup> Both public and private entities may be charged with first response to a HAZMAT occurrence.<sup>26</sup> Typically, in-plant response teams will be first at incidents that occur in an industrial setting. Such HAZMAT teams are mandated by OSHA's rule for Process Safety Management of Highly Hazardous Chemicals, whose purpose is preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals.<sup>27</sup> On the public side, for spills or airborne releases occurring on public property such as highways or traveling beyond the boundaries of an industrial facility, the first response organization is typically the fire service.<sup>28</sup> The highly dangerous nature of hazardous materials requires sophisticated technical expertise of responders.<sup>29</sup>

## II. THE ATTORNEY'S ROLE IN TERRORISM EMERGENCY RESPONSE

The attorney without a background in terrorism and emergency law may find him or herself facing significant challenges at an emergency response. Law schools have for the most part provided no training in terrorism and emergency law.<sup>30</sup> Even lawyers employed at the state level by emergency management must, for the most part, learn by doing.<sup>31</sup> Opportunities for legal education in terrorism and emergency law may improve in the future. One authority opines that "law students who understand this area of the law will have a distinct advantage over other candidates for legal positions, particularly in the corporate world."<sup>32</sup> For the average legal counsel at this time, however, events may be unfolding even as the lawyer labors to learn an area of law previously thought of as arcane and generally irrelevant since that sort of thing happens "to someone else, somewhere else."<sup>33</sup>

<sup>24</sup>29 U.S.C. §§ 651-678 (2002).

<sup>25</sup>40 C.F.R. § 372.18 (2001) deals with the Environmental Protection Agency's (EPA) enforcement and compliance guidelines for toxic chemical release reporting and community right-to-know.

<sup>26</sup>See 29 C.F.R. § 1910.119 (2001) for standards for private sector responses in an industrial setting; 29 C.F.R. § 1910.120 (2001) for standards applicable to both private and public entities. NFPA 472 sets particular standards for private sector specialist employees at 472-25.

<sup>27</sup>29 C.F.R. § 1910.119 deals with preventing or minimizing the consequence of catastrophic release of hazardous materials in the industrial setting.

<sup>28</sup>Interview with Michael B. Bigler, *supra* note 5.

<sup>29</sup>See generally FEDERAL EMERGENCY MANAGEMENT AGENCY - UNITED STATES FIRE ADMINISTRATION, HAZARDOUS MATERIALS RESPONSE TECHNOLOGY ASSESSMENT (2000), at <http://www.usta.fema.gov> (last visited Sept. 24, 2002) (discussing various technologies for control and mitigation of HAZMAT incidents, including training required for their utilization).

<sup>30</sup>To the author's knowledge only two law schools in the United States currently offer courses in terrorism law: "Terrorism and Emergency Law" at Widener University School of Law and "Terrorism Law" at the DePaul University Law School. The Widener course was approved in July 2001.

<sup>31</sup>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." The course focussed on the federal side of emergency law. Subsequently, FEMA has worked to educate state level attorneys through the National Emergency Management Association ("NEMA") Legal Counsels Committee during their twice-yearly meetings. Telephone interview with Tamara S. Little, Assistant Attorney General, State of Ohio, NEMA Legal Counsels Committee Chair (March 21, 2002).

<sup>32</sup>FEMA General Counsel Michael D. Brown Shares Inside Story on 9-11: Want a Corporate Attorney Job? Study Emergency Law!, at <http://www.law.widener.edu/LAWNEWS/stories/fema.shtml> (last visited Sept. 27, 2002). "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." *Id.* On January 10, 2003, President Bush nominated Mr. Brown to be Under Secretary for Emergency Preparedness and Response in the Department of Homeland Security. See <http://www.whitehouse.gov/news/nominations/124.html> (last visited Feb. 13, 2003). See also *infra* notes 102-112.

<sup>33</sup>Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487, 487

Response to a terrorism HAZMAT event, in particular, requires detailed knowledge of complex legal standards.<sup>34</sup> Fortunately for the attorney, HAZMAT responders are trained to these standards.<sup>35</sup> Unfortunately for the responders, some attorneys do not react well when their clients know more about the law than do they.<sup>36</sup>

The attorney may find one of emergency law's most difficult aspects to be its requirement for bold thinking. Risk avoidance for the client is the reaction of most lawyers to any situation.<sup>37</sup> In an emergency response, however, this natural tendency must be ruthlessly squelched. The attorney must be able to give rapid advice on matters that would otherwise without doubt be counseled against. Handling an emergency or disaster may include activities such as exercise of eminent domain, putting aside normal contracting requirements and deciding whether to force persons to evacuate their homes.<sup>38</sup> These and many other emergency steps entail a high potential of legal liability.<sup>39</sup>

During the response to emergencies and disasters affecting a unit of government, leaders often keep their legal advisors close at hand.<sup>40</sup> This reaction makes sense, since reaction to any emergency involves multiple decisions with significant legal consequences. For attorneys, the biggest challenge in such circumstances may be ensuring that their advice is a part of emergency response decision process.<sup>41</sup> The reality, however, is that emergency management and response groups often have been working together as a team pursuant to legal authority for a significant period of time.<sup>42</sup> Legal counsel frequently is not thought of as a part of that team.<sup>43</sup> Further, if the attorney has not been involved at the mitigation and preparedness phases of emergency management, it unlikely that he or she will be welcome during response and recovery.<sup>44</sup>

Emergency responders and managers attempting to save lives and protect property must be action-oriented as they deal with fluid, very dangerous situations.<sup>45</sup> Due to the extreme danger posed by hazardous substances that may well be weaponized, terrorism HAZMAT events in particular require prompt, correct action.<sup>46</sup> In such a situation, professionals often perceive the lawyer who gets in the way of timely action as an obstacle to dealing with the event.<sup>47</sup> Attorneys may find themselves literally locked out of emergency operations centers unless they have taken the pains to become a part of the team during the early stages of emergency management.<sup>48</sup>

### III. FEDERAL AND NFPA HAZMAT RESPONSE STANDARDS AND FEDERAL SUPPORT AFTER THE EVENT

#### A. HAZWOPER and NFPA Standards for HAZMAT Responders

In 1986, under Congressional mandate,<sup>49</sup> the United States Secretary of Labor promulgated minimum

(2000).

<sup>34</sup> See *infra* notes 50-112, *supra* note 7, and accompanying material.

<sup>35</sup> 29 C.F.R. § 1910.120 (e) sets legal standards for training HAZMAT responders.

<sup>36</sup> Roger A. Nowadsky, *Lanyering Your Municipality Through a Natural Disaster or Emergency*, 27 URB. LAW. 9, 10-11 (Winter 1995).

<sup>37</sup> Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDIS. L.J. 375, 376 (Summer 1997).

<sup>38</sup> See, e.g., IND. CODE 10-4-1-7(d) (Michie 2000).

<sup>39</sup> See generally Ken Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, 23 URB. LAW. 333 (1991).

<sup>40</sup> Nowadsky, *supra* note 36, at 9.

<sup>41</sup> *Id.* at 9, 10.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.*

<sup>44</sup> "Lawyers . . . will not automatically or initially be consulted when disaster strikes." *Id.*

<sup>45</sup> Al Baker, *Threats and Responses: In Crisis, New York's Emergency Office Was Thwarted by Its Past*, N.Y. TIMES, Sept. 9, 2002, at A15.

<sup>46</sup> Interview with Michael B. Bigler, *supra* note 5.

<sup>47</sup> Nowadsky, *supra* note 36, at 11.

<sup>48</sup> *Id.*

<sup>49</sup> In 1986, Congress ordered the Secretary to "promulgate standards for the health and safety protection of employees engaged in

training requirements for hazardous waste workers.<sup>50</sup> Congress also provided that the states may develop their own occupational safety and health regulations absent an OSHA standard or, in the alternative, preempt OSHA by submitting a plan to the Secretary of Labor.<sup>51</sup>

OSHA's HAZWOPER standard requires all employers to "develop and implement a written safety and health program for their employees involved in hazardous waste operations."<sup>52</sup> The program shall be designed to "identify, evaluate, and control safety and health hazards, and provide for emergency response for hazardous waste operations."<sup>53</sup>

The HAZWOPER standard creates duties for individual responders as well as for the organizations that employ them.<sup>54</sup> Indeed, individual responders are charged with knowledge of their duties whether or not they have actual knowledge thereof.<sup>55</sup> The requirement to use the HAZWOPER standard applies to volunteers as well as to paid responders.<sup>56</sup> Federal employees are also bound by HAZWOPER's requirements.<sup>57</sup>

HAZWOPER requires that an emergency response plan be developed and implemented to handle anticipated emergencies prior to the commencement of emergency response operations.<sup>58</sup> The HAZWOPER requirement is, however, only one of a number of standards mandating plans for emergency response entities.<sup>59</sup> The HAZWOPER plan may be merged with other necessary emergency plans following the National Response Team Integrated Contingency Plan Guidance to avert duplicative efforts.<sup>60</sup>

Employers who will evacuate their employees from the danger area when an emergency occurs, and who do not permit any of their employees to assist in handling the emergency, are exempt from these requirements if they provide an emergency action plan in accord with the rules.<sup>61</sup> In order to achieve an

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hazardous waste operations" pursuant to Section 4 of the OSH Act. 29 U.S.C. § 655.

<sup>50</sup>29 C.F.R. § 1910.120 (1992). The regulations provided that employees in close proximity to hazardous wastes must receive 40 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 24 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).

<sup>51</sup>29 U.S.C. § 667(a) (2002) provided that "[n]othing in this [chapter] shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect. . . ." § 667(a). Further, § 667(b) provides that: "[a]ny State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan . . . [to the Secretary of Labor]."

<sup>52</sup>29 C.F.R. § 1910.120(b).

<sup>53</sup>29 C.F.R. § 1910.120(b).

[Any] [s]afety and health programs developed and implemented to meet other Federal, state, or local regulations are considered acceptable in meeting this requirement if they cover or are modified to cover the topics required in this paragraph. An additional or separate safety and health program is not required by this paragraph. § 1910.120(b).

<sup>54</sup>Wiley Organics, Inc. v. OSHRC, 124 F.3d 201, 1997 WL 476530 (6<sup>th</sup> Cir. 1997).

<sup>55</sup>Ed Taylor Constr. Co. v. OSHRC, 938 F.2d 1265, 1272 (11<sup>th</sup> Cir. 1991). "Whether or not employers are in fact aware of each OSHA regulation and fully understand it, they are charged with this knowledge and are responsible for compliance." *Id.*

<sup>56</sup>40 C.F.R. § 311.2 (1998). "Employee in §311.1 is defined as a compensated or non-compensated worker who is controlled directly by a State or local government, as contrasted to an independent contractor." *Id.*

<sup>57</sup>Continuance of Certain Federal Advisory Committees, 66 Fed. Reg. 50,291 (Oct. 3, 2001) subjected all federal employees to the requirements of OSHA. Executive Order 13225 of September 28, 2001 continues the effect of EO 12196. *Id.*

<sup>58</sup>29 C.F.R. § 1910.120(q)(1) deals with the requirements for developing and implementing an emergency plan. Section 1910.120(q)(1) requires the plan to be "in writing and available for inspection and copying by employees, their representatives and OSHA personnel."

<sup>59</sup>See, e.g., Arnold W. Reitze, Jr. & Randy Lowell, *Control of Hazardous Air Pollution*, 28 B.C. ENVTL. AFF. L. REV. 229, 331-32 (2001).

<sup>60</sup>See The National Response Team's Integrated Contingency Plan Guidance, 61 Fed. Reg. 28,642 (June 5, 1996).

<sup>61</sup>29 C.F.R. § 1910.120(q)(1).

*Emergency response plan.* An emergency response plan shall be developed and implemented to handle anticipated emergencies prior to the commencement of emergency response operations. The plan shall be in writing and available for inspection and copying by the employees, their representatives and OSHA personnel. Employers who will evacuate their employees from the danger area when an

exemption from the full planning requirements, an employer's plan must call for evacuation only.<sup>62</sup> Ambiguity in the plan as to whether employees are required to respond to an uncontrolled HAZMAT release may be interpreted in favor of exemption, but this is a highly fact-specific inquiry.<sup>63</sup> Further, to obtain exemption, an employer must comply with the separate planning requirement of 29 C.F.R. § 1910.38(a).<sup>64</sup> Any involvement by employees in emergency rescue activities will almost always subject the employer to the pre-planning requirements.<sup>65</sup> A narrow exception is made for voluntary employee rescue.<sup>66</sup> Although planning requirements are comprehensive, a court may excuse an incomplete plan under limited circumstances.<sup>67</sup>

National Fire Protection Association (NFPA)<sup>68</sup> 472 "Professional Competence of Responders to Hazardous Materials Incidents" 2002 Edition<sup>69</sup> provides additional valuable detailed standards for HAZMAT response. NFPA 472 requires all occurrences requiring response, including suspected terrorism incidents, to be evaluated by first responders (the lowest level of training) as potential HAZMAT events as part of general situational awareness.<sup>70</sup> NFPA 472 sets out detailed skill sets for all levels of responder training set forth in the HAZWOPER standard.<sup>71</sup>

#### B. SUPPORT BY FEDERAL AGENCIES TO TERRORISM EVENT RESPONSE INCLUDING THE DEPARTMENT OF HOMELAND SECURITY

The local responders whose efforts are the focus of this article will not labor alone in the wake of a

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emergency occurs, and who do not permit any of their employees to assist in handling the emergency, are exempt from the requirements of this paragraph if they provide an emergency action plan. . . . § 1910.120(q)(1).

<sup>62</sup>IBP, Inc. v. Iowa Employment Appeal Bd., 604 N.W. 2d 307, 314 (Iowa 1999).

<sup>63</sup>Secretary of Labor v. Akzo Nobel Chemicals Inc., 1998 OSAHRC LEXIS 98, at \*18-23, 18 OSHC (BNA) 1643, 1998 OSHD (CCH) ¶31,695 (OSHRC Docket No. 96-0062 1998).

<sup>64</sup>*Id.* Pleadings amended to correspond to the evidence and citation affirmed.

<sup>65</sup>604 N.W. 2d at 312-13.

<sup>66</sup>OSHA's interpretive rule regarding "voluntary employee rescue," § 1903.14(f), became effective on December 27, 1994. The statement of policy clarifies that:

It is not OSHA's policy . . . to regulate every decision by a worker to place himself at risk to save another individual. Nor is it OSHA's policy to issue citations to employers whose employees voluntarily undertake acts of heroism to save another individual from imminent harm, . . . [except in specifically stated circumstances].<sup>59</sup> Fed. Reg. 66,612 (Dec. 27, 1994).

<sup>67</sup>Jordan v. Lehigh Constr. Group, Inc., 269 A.D. 2d 743, 744 (S.Ct.N.Y. App. Div. 4<sup>th</sup> Dept. 2000) "decendent was aware of the only means of egress from his office; therefore, any omission of that route from the evacuation plan was not a proximate cause of decendent's death." *Id.*

<sup>68</sup>NFPA ONLINE: *About NFPA: A worldwide leader in providing fire, electrical, and life safety to the public since 1896*, at <http://www.nfpa.org/Home/AboutNFPA/index.asp> (last visited Sept. 19, 2002).

The mission of the international nonprofit NFPA is to reduce the worldwide burden of fire and other hazards on the quality of life by providing and advocating scientifically-based consensus codes and standards, research, training and education. NFPA membership totals more than 75,000 individuals from around the world and more than 80 national trade and professional organizations.*Id.*

<sup>69</sup>NATIONAL FIRE PROTECTION ASSOCIATION 472: STANDARD FOR PROFESSIONAL COMPETENCE OF RESPONDERS TO HAZARDOUS MATERIALS INCIDENTS (2002) [hereinafter NFPA 472]. Like many NFPA benchmarks, this standard has been incorporated by reference into law at the state level. *See, e.g.*, WIS. STAT. § 166.215 (West 2001). A member of a regional emergency response team shall meet the standards for a hazardous materials specialist in 29 C.F.R. § 1910.120 (q)(6)(iv) and national fire protection association standards NFPA 471 and 472. Further, many fire departments have adopted it as part of their standard operating procedures. Telephone interview with Jerry Laughlin, Deputy Director, Alabama Fire College, former staff liaison for NFPA to the Hazardous Materials Emergency Response Technical Committee, which is responsible for NFPA 472. (June 20, 2002).

<sup>70</sup>NFPA 472, *supra* note 69, at 472-9 to 472-11 describes requirements for first responders at the awareness level, which includes all emergency responders. Their duties are summed up at 472-57: "First responders at the awareness level are expected to recognize the presence of hazardous materials, protect themselves, call for trained personnel, and secure the area." 472-11 - 472-15 describes competencies for the first responder at the more intensively trained operational level.

<sup>71</sup>NFPA 472, *supra* note 69, at 472-3.

terrorism HAZMAT incident. The support organization currently in place keys on the National Oil and Hazardous Substances Pollution Contingency Plan, which is commonly referred to as the National Contingency Plan (NCP).<sup>72</sup> The NCP provides a structure for federal support to HAZMAT responses. The plan regulates the cleanup of hazardous waste sites under CERCLA, and is the result of work to coordinate national efforts in support of local and state responders and plans. The NCP provides for a National Response Team (NRT)<sup>73</sup> as well as Regional Response Teams (RRTs).<sup>74</sup> The NCP requires notification of discharges or releases to the National Response Center (NRC) through a toll-free telephone number.<sup>75</sup> The NRC is the national clearinghouse for all pollution incident reporting.<sup>76</sup> The NRP works in conjunction with FEMA's Federal Response Plan (FRP)<sup>77</sup> to assure that the full resources of the federal government are available for response to catastrophic HAZMAT events.<sup>78</sup> The FRP's Terrorism Incident Annex,<sup>79</sup> established pursuant to Presidential Decision Directive (PDD) 39,<sup>80</sup> provides the structure for federal response to all types of terrorism incidents. PDD 39 requires the FBI to be the lead agency during crisis management, or the immediate aftermath of the event, with the emphasis on law enforcement's need to apprehend the perpetrators and prevent future terrorism incidents.<sup>81</sup> Subsequently, FEMA is tasked to lead during consequence management as the response and recovery effort proceeds.<sup>82</sup> The structure discussed in this paragraph will change significantly upon full activation of the Department of Homeland Security.<sup>83</sup>

President Bush established the Office of Homeland Security shortly after the September 11, 2001 attacks with the mission of uniting American terrorism preparedness without creating a new bureaucracy.<sup>84</sup> As time passed, however, barriers to such a cross-agency authority became evident.<sup>85</sup> Creation of a new cabinet-level department was one step strongly pushed by Congress to overcome the challenges faced by the Office. Eventually, on June 6, 2002, President Bush made a comprehensive proposal for a new Department of Homeland Security.<sup>86</sup> As the result of President Bush's November 27, 2002 signing into law of the

<sup>72</sup>National Contingency Plan, 40 C.F.R. § 300 (2002).

<sup>73</sup>40 C.F.R. § 300.110 establishes the role and duties of the NRT in the National Response System.

<sup>74</sup>40 C.F.R. § 300.115 establishes the role and duties of the RRTs in the National Response System.

<sup>75</sup>40 C.F.R. § 300.125(a).

<sup>76</sup>§ 300.125(a).

<sup>77</sup>FEDERAL EMERGENCY MANAGEMENT AGENCY, THE FEDERAL RESPONSE PLAN (1999) [hereinafter FRP]. 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, as amended (42 U.S.C. § 5121), *et seq.* [(2002)]." *Id.*

<sup>78</sup>FRP, *supra* note 77, at 11-12.

<sup>79</sup>FRP TERRORISM INCIDENT ANNEX, available at <http://www.fema.gov/pdf/rrr/frp/frptem.pdf> (last visited Jan. 28, 2003) [hereinafter FRP TERRORISM ANNEX] (1999). "The purpose of this annex is to ensure that the Federal Response Plan (FRP) is adequate to respond to the consequences of terrorism within the United States, including terrorism involving WMD." *Id.* at 1.

<sup>80</sup>Presidential Decision Directive 39, U.S. Policy on Counterterrorism (June 21, 1995) [hereinafter PDD-39]. See *supra* note 6 and *infra* note 107 and accompanying material.

<sup>81</sup>FRP TERRORISM INDEX, *supra* note 79, at 3. PDD-39 reaffirms existing Federal Lead Agency responsibilities for counterterrorism, which are assigned to the Department of Justice (DOJ), as delegated to the FBI, for threats or acts of terrorism within the United States. *Id.* The FBI as the lead for Crisis Management will involve only those Federal agencies required and designated in classified documents. *Id.* The Directive further states that the Federal Emergency Management Agency (FEMA), with the support of all agencies in the Federal Response Plan (FRP), will support the FBI in Washington, DC, and at the event scene until the Attorney General transfers Lead Agency responsibility to FEMA. *Id.* FEMA retains responsibility for Consequence Management throughout the Federal response. *Id.*

<sup>82</sup>*Id.*

<sup>83</sup>See *infra* notes 84-112 and accompanying material.

<sup>84</sup>Eric Planin & Bradley Graham, *Ridge: Goal Isn't to Create Bureaucracy; Head of Homeland Office Says Role Is to Coordinate Agencies, Streamline Security*, WASH. POST, Oct. 4, 2001, at A24.

<sup>85</sup>Elizabeth Becker, *Big Visions for Security Post Shrink Amid Political Drama*, N.Y. TIMES, May 3, 2002, at A1.

<sup>86</sup>Homeland Security Act of 2002, H.R. 5005, 107<sup>th</sup> Cong. (2002) (enacted) [hereinafter H.R. 5005].

Homeland Security Act of 2002, the federal approach to terrorism and all other emergency events will alter dramatically. The Act unifies domestic preparedness for terrorism by joining law enforcement entities concerned with this threat.<sup>87</sup> The law as enacted contains President Bush's goals for the Department of Homeland Security.<sup>88</sup> The Congress intended to have significant impact on the proposed Department, but their efforts were unsuccessful.<sup>89</sup> Some members of Congress desired to preserve the non-law enforcement roles of entities transferred to the new Department.<sup>90</sup> Other worries included the relative lack of congressional control over the agency's budget.<sup>91</sup> Although the final legislation largely embodied President Bush's desires, the last minute insertion of what were termed "special-interest provisions" infuriated some survivors of 9-11 victims.<sup>92</sup>

The creation of the Department of Homeland Security is a huge undertaking, combining 170,000 workers from 22 agencies.<sup>93</sup> Melding these various institutions into one will not be an easy job, nor will it be quickly accomplished.<sup>94</sup> The President acted promptly, however, in filing the reorganization Plan for the Department the day the law was signed.<sup>95</sup> FEMA will be transferred to the Department on March 1, 2003.<sup>96</sup> The legislation originally was to transfer all training functions related to terrorism to the Department, but that plan changed slightly in the law as enacted.<sup>97</sup> The law apparently places lesser emphasis on preparedness and

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<sup>87</sup>PRESIDENT BUSH SIGNS HOMELAND SECURITY ACT: REMARKS BY THE PRESIDENT AT THE SIGNING OF H.R. 5005 THE HOMELAND SECURITY ACT OF 2002, at <http://www.whitehouse.gov/news/releases/2002/11/print/20021125-6.html> (last visited Dec. 9, 2002) [hereinafter REMARKS BY THE PRESIDENT]. The Homeland Security Act of 2002 takes the next critical steps in defending our country. The continuing threat of terrorism, the threat of mass murder on our own soil will be met with a unified, effective response. *Id.*

<sup>88</sup>Richard W. Stevenson, *Signing Homeland Security Bill, Bush Appoints Ridge as Secretary*, N.Y. TIMES, Nov. 26, 2002, at A1.

<sup>89</sup>Stevenson, *supra* note 88.

<sup>90</sup>David Firestone, *Congress to Begin Debating A Domestic Security Agency*, N.Y. TIMES, July 8, 2002, at A1.

Many in Congress are concerned that the changes ahead will represent more than just a different phone number or letterhead for the agencies they oversee. If the Coast Guard, for example, moves from the Transportation Department to the Homeland Security Department, will its basic mission of ensuring maritime safety and mobility shift more toward defense? Several coastal-state representatives are preparing to fight such a move. Members from farm states are similarly worried about moving the Animal and Plant Health Inspection Service out of the Agriculture Department.

*Id.* at A1, A14.

<sup>91</sup>*Id.* "... Congressional appropriations leaders, accustomed to deciding how the government will spend its money, have protested the administration's proposal that the department be able to shift money among its divisions without their approval." *Id.* at A14.

<sup>92</sup>David Firestone, *Domestic Security Bill Riles 9/11 Families*, N.Y. TIMES, Nov. 26, 2002, at A17.

<sup>93</sup>Stevenson, *supra* note 88.

<sup>94</sup>REMARKS BY THE PRESIDENT, *supra* note 87.

The Secretary-designate and his team have an immense task ahead of them. Setting up the Department of Homeland Security will involve the most extensive reorganization of the federal government since Harry Truman signed the National Security Act. To succeed in their mission, leaders of the new department must change the culture of many diverse agencies – directing all of them toward the principal objective of protecting the American people. The effort will take time, and focus, and steady resolve. It will also require full support from both the administration and the Congress. Adjustments will be needed along the way. Yet this is pressing business, and the hard work of building a new department begins today.*Id.*

<sup>95</sup>DEPARTMENT OF HOMELAND SECURITY REORGANIZATION PLAN (Nov. 25, 2002).

<sup>96</sup>*Id.* at 3, 5. March 1, 2003. . . Transfer the Federal Emergency Management Agency ("FEMA"). . . H.R. 5005 at Sec. 503 "In accordance with title XV, there shall be transferred to the Secretary [of Homeland Security] the functions, personnel, assets, and liabilities of the following entities: (1)the Federal Emergency Management Agency, including the functions of the Director of the Federal Emergency Management Agency related thereto."

<sup>97</sup>White House descriptive materials prior to the bill's passage stated that "FEMA would become a central component of the Department of Homeland Security, and the new Department would administer the grant programs for firefighters, police, and emergency personnel currently managed by FEMA, the Department of Justice, and the Department of Health and Human Services." See the White House web site at <http://www.whitehouse.gov/deptofhomeland/sect1.html>. (last visited Jan. 20, 2003). As enacted, however, the law left the terrorism grant programs administered by HHS within that agency. DEPARTMENT OF HOMELAND SECURITY REORGANIZATION PLAN, Nov. 25, 2002, at 13. The training programs will be administered by the ODP and EPR. *Id.* at 13-14.



response to emergencies and disasters other than terrorism.<sup>98</sup>

The Director of the Office of Domestic Preparedness (ODP) will have primary responsibility for preparedness of the country for acts of terrorism.<sup>99</sup> This duty includes coordination of preparedness at the federal level and working closely with other governmental and non-governmental organizations on planning, training and exercising.<sup>100</sup> The ODP will coordinate closely with FEMA, which retains the primary responsibility for preparedness for and mitigation of non-terrorist-related disasters in the United States.<sup>101</sup>

The Undersecretary for Emergency Preparedness and Response (EPR) will help to ensure the effectiveness of response to terrorist attacks, major disasters and other types of emergency.<sup>102</sup> Importantly, EPR is tasked with “Building a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to such attacks and disasters.”<sup>103</sup> This tasking, and its underlying legislation,<sup>104</sup> establishes IMS as the legal benchmark nationwide.

The law also provides authority to replace PDD 39 as the guide for federal response.<sup>105</sup> The FRP, NCP and all other federal plans will be consolidated by the Department into an all-hazard plan.<sup>106</sup> This is a vital mission for EPR.<sup>107</sup> Unified all hazards planning will assist in assuring that all emergency response assets are efficiently utilized.

As President Bush acknowledged when signing the Homeland Security Act, accomplishing these tasks will require time.<sup>108</sup> Other experts have stated that it could be years before the Department could be expected to operate at full effectiveness.<sup>109</sup> Presumably, the current system for emergency planning and response<sup>110</sup> will continue to operate until such time as EPR has built a comprehensive incident management system<sup>111</sup> and created an all-hazard national response plan.<sup>112</sup>

#### IV. THE INCIDENT MANAGEMENT SYSTEM

After a very bad wildfire season during the 1970s, California fire managers decided that a better way was needed to respond to emergencies.<sup>113</sup> In many incidents, lack of interagency cooperation resulted in unsafe

<sup>98</sup>H.R. 5005 § 501. The [responsibilities of the] Secretary, acting through the Under Secretary for Emergency Preparedness and Response, shall include -- (1) helping to ensure the preparedness of emergency response providers for terrorist attacks, major disasters, and other emergencies.

<sup>99</sup>DEPT. OF HOMELAND SECURITY REORGANIZATION PLAN, *supra* note 95, at 13.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 13-14.

<sup>102</sup>*Id.* at 14. *See also supra* note 32.

<sup>103</sup>DEPT OF HOMELAND SECURITY REORGANIZATION PLAN, *supra* note 95, at 15.

<sup>104</sup>H.R. 5005 § 501. Responsibilities: “The Secretary, acting through the Under Secretary for Emergency Preparedness and Response, shall be responsible for . . . (5) [b]uilding a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to such attacks and disasters. . . .”

<sup>105</sup>Prior to the legislation’s enactment, the White House expressed the goal of “a comprehensive national incident management system for response to terrorist incidents and natural disasters” which “eliminat[es] the artificial distinction between ‘crisis management’ and ‘consequence management.’” *See* <http://www.whitehouse.gov/deptofhomeland/sect4.html>. (last visited Aug. 25, 2002).

<sup>106</sup>The all-hazard approach is consistent with existing FEMA guidance and emergency planning practice on the local level. *See, e.g.*, STATE AND LOCAL GUIDE (SLG) 101: GUIDE FOR ALL-HAZARD EMERGENCY OPERATIONS PLANNING (2002).

<sup>107</sup>H.R. 5005 § 501. Responsibilities: “The Secretary, acting through the Under Secretary for Emergency Preparedness and Response, shall be responsible for . . . (6) [c]onsolidating existing Federal Government emergency response plans into a single, coordinated national response plan.” *Id.*

<sup>108</sup>REMARKS BY THE PRESIDENT, *supra* note 87.

<sup>109</sup>*See* Stevenson, *supra* note 88.

<sup>110</sup>*See supra* notes 49-82 and accompanying material.

<sup>111</sup>*See supra* notes 103-104 and accompanying material.

<sup>112</sup>*See supra* notes 105-106 and accompanying material.

<sup>113</sup>PAUL M. MANISCALCO & HANK T. CHRISTEN, UNDERSTANDING TERRORISM AND MANAGING THE CONSEQUENCES 24 (2001).

conditions and improper allocation of resources.<sup>114</sup> The managers noted several specific problems. 1. Lack of communication due to differing radio codes. 2. No command system existed. Every agency depended on the personality of the leader in charge at any given moment. 3. Lack of common terminology—even when communication was possible, misunderstandings arose. 4. No way to effectively assign resources—logistics was a product of luck. 5. No clear definition of functions, and how functions related to one another.<sup>115</sup> The incident command system developed in response to these challenges. ICS evolved into the universally accepted way of integrating response to emergencies.<sup>116</sup>

Incidents continued to grow in size and complexity after ICS was first created.<sup>117</sup> The involvement of multiple response agencies and leaders on these scenes provided the impetus for a further refinement in scene management. The incident management system (IMS) utilizes a management model rather than a command model.<sup>118</sup> IMS emphasizes consensus among leaders, and operates with representatives of involved agencies working together to provide group leadership.<sup>119</sup> A strong indication that IMS will continue to be the standard is the Homeland Security Act of 2002's requirement of “[b]uilding a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to such [terrorist] attacks and disasters.”<sup>120</sup>

A further development, utilized to date only in California, is the Standardized Emergency Management System (SEMS).<sup>121</sup> SEMS incorporates ICS, multi- and inter-agency coordination, mutual aid and an operational area concept for flexible response to extremely large incidents.<sup>122</sup> SEMS has been predicted to be the standard of the future.<sup>123</sup> Currently, IMS is the standard,<sup>124</sup> and the text will refer to IMS and ICS interchangeably hereafter.

The HAZWOPER standard requires all HAZMAT responses to utilize ICS.<sup>125</sup> The following characteristics are part of a good ICS: modular organization, integrated communications, common terminology, a unified command structure, consolidated action plans, a manageable span of control, designated incident facilities, and comprehensive resource management.<sup>126</sup>

HAZWOPER includes important additional and very specific requirements for ICS.<sup>127</sup> It specifies that the

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

<sup>116</sup>William C. Nicholson, *The Incident Command System: Legal and Practical Reasons for Incident Management*, OUR WATCH, July – Sept. 1999, at 3, 5. See generally BRUNACINI, *supra* note 9. Brunacini has been termed “the Godfather of incident command.” His “well-respected” work places him as the “pre-eminent expert in incident command.” Telephone Interview with Tracey Boatwright, Indiana State Fire Marshal (Apr. 24, 2002). Marshal Boatwright served on the Executive Board of the National Association of State Fire Marshals from 1995-2000, and was Secretary/Treasurer from 1999-2000. A long time paid and volunteer firefighter, Boatwright has been State Fire Marshal since 1993.

<sup>117</sup>MANISCALCO & CHRISTEN, *supra* note 113, at 24.

<sup>118</sup>*Id.*

<sup>119</sup>*Id.*

<sup>120</sup>H.R. 5005 § 501(5).

<sup>121</sup>ROBERT A. JENSEN, MASS FATALITY AND CASUALTY INCIDENTS, A FIELD GUIDE 4 (1999).

<sup>122</sup>*Id.* “The goal of SEMS was to organize the response to any incident starting with the lowest level of resources and support required . . . SEMS incorporates . . . [the] Incident Command System. . .” *Id.*

<sup>123</sup>*Id.*

<sup>124</sup>NFPA 472 requires the incident commander to implement IMS as the first step of implementing the preplanned response to a HAZMAT incident. NFPA 472, *supra* note 69, at 472-24. Further, NFPA 1600 “Standard on Disaster/Emergency Management and Business Continuity Programs” 1600-6 (2000) requires that an incident management system shall be utilized.

<sup>125</sup>29 C.F.R. § 1910.120(q)(3)(i) requires that during an emergency response the most senior emergency response official becomes 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.*

<sup>126</sup>See, e.g., JENSEN, *supra* note 121, at 3; William C. Nicholson, *Beating the System to Death: A Case Study in Incident Command and Mutual Aid*, 152 FIRE ENGINEERING at 128, 129-30 (Oct. 1999).

<sup>127</sup>29 C.F.R. § 1910.120(q)(3) requires these characteristics at all HAZMAT response sites.

senior emergency response official responding to an emergency shall become the individual in charge of site-specific ICS (henceforth “incident commander” or IC).<sup>128</sup> The standard recognizes that incidents evolve and that the individual in command may change as additional resources arrive.<sup>129</sup> One tragic aspect of the September 11, 2001 attack in New York was the death of the people comprising the New York Fire Department’s Incident Command structure when the towers collapsed. An important lesson learned from that tragedy is the need to set up back up command structures at terrorism responses.<sup>130</sup> A defined command transfer process must be put in place well before an incident to avoid potential chaos and danger to responders and the public.<sup>131</sup>

Whether leadership is exercised by a single IC or falls on a group under IMS, the characteristics required of the person(s) in charge are the same.<sup>132</sup> The IC must apply command and control efforts to achieve results, rather than for the ego gratification of being in charge.<sup>133</sup> Further, the IC must be suited by disposition to the task. Important personality characteristics for the IC include:

- respect for the task;
- ability to stay cool under pressure;
- knowledge of command;
- an inclination to command, not act;
- the ability to provide a positive example;
- psychological stability;
- being physically fit;

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<sup>128</sup>29 C.F.R. § 1910.120(q)(3)(i). NFPA 472 requires use of IMS and contains detailed competencies for the IC at 472-22 to 472-25.

<sup>129</sup>Note to (q)(3)(i) specifies that the “senior official” at an emergency response is the most senior official on the site who has the responsibility for controlling the operations at the site. That person is the senior officer on the first-due piece of responding emergency apparatus to arrive on the incident scene. *Id.* More senior arriving officers (i.e., battalion chief, fire chief, state law enforcement official, site coordinator, etc.) assume the position, which is passed up the previously established line of authority. *Id.*

<sup>130</sup>Telephone Interview with Rick D. Schlegel, EAI Corporation, Deputy Program Manager, Incident Command Responder Course, Anniston, AL (Apr. 24, 2002).

<sup>131</sup>BRUNACINI, *supra* note 9, at 121-25.

<sup>132</sup>MANISCALO & CHRISTEN, *supra* note 113, at 31.

<sup>133</sup>BRUNACINI, *supra* note 9, at 7.

fairness;  
being straightforward when communicating;  
willingness to take reasonable risks;  
concern for all personnel;  
knowing limitations;  
respect for command;  
being an organized person; and  
being disciplined and consistent.<sup>1</sup>

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<sup>1</sup>BRUNACINI, *supra* note 9, at 10.

The IC must identify, to the extent possible, all hazardous substances or conditions present and address site analysis, use of engineering controls, maximum exposure limits, hazardous substance handling procedures, and use of any new technologies.<sup>1</sup> The IC's duties at this point include both identifying the substance and controlling the hazard, related but not duplicative tasks.<sup>2</sup>

The IC must implement appropriate emergency operations, and assure that the personal protective equipment (PPE) worn is appropriate for the hazards present.<sup>3</sup> There are special requirements for breathing equipment.<sup>4</sup> "Attempting to hold one[s] breath . . . and trying 'not to take too many breaths' . . . [is not] an alternate means of compliance."<sup>5</sup>

"[T]he number of emergency response personnel at the emergency site, in those areas of potential or actual exposure to incident or site hazards . . . , [must be limited] to those who are actively performing emergency operations."<sup>6</sup> The IC, of necessity, has complete control over who is on the HAZMAT scene and what they do.<sup>7</sup> When trained responders come as the organized result of a mutual aid agreement (discussed in detail below), the result can be helpful resources to deal with the incident. Responders will also arrive at the site individually or in mass without being requested, as happened both in New York and at the Pentagon after the September 11, 2001 attacks.<sup>8</sup> For the IC to maintain control of the scene in such a situation requires both organization and tact. One of the first tasks for an IC is establishment of a perimeter, which should be controlled by law enforcement.<sup>9</sup> Persons attempting to enter the perimeter without proper authority must be stopped and sent

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<sup>1</sup>29 C.F.R. § 1910.120(q)(3)(ii).

<sup>2</sup>Secretary of Labor v. Victor Microwave, Inc., No. 94-3024, 1996 OSAHRC LEXIS 57, at \*39-40 (O.S.H.R.C.A.L.J. June 17, 1996). In the aftermath of a release of hazardous gases, the IC failed to identify hazardous gases or to utilize other controls such as ventilating the building.

<sup>3</sup>29 C.F.R. § 1910.120(q)(3)(iii) requires personal protective equipment to "meet, at a minimum, the criteria contained in 29 CFR § 1910.156(e) when worn while performing fire fighting operations beyond the incipient stage for . . . [the] incident."

<sup>4</sup>29 C.F.R. § 1910.120 (q)(3)(iv).

<sup>5</sup>See *Victor Microwave, Inc.*, 1996 OSAHRC LEXIS 57, at \*40-41. Such an approach was found to be a serious violation.

<sup>6</sup>29 C.F.R. § 1910.120(q)(3)(v).

<sup>7</sup>*Id.* at (q)(3)(i).

<sup>8</sup>See, e.g., Dan Barry, *The Search; A Few Moments of Hope In a Mountain of Rubble*, N.Y.

TIMES, Sept. 13, 2001, at A1. "There were volunteers everywhere, arguably more than were needed." *Id.* at A8.

<sup>9</sup>See BRUNACINI, *supra* note 9, at 22.

Police represent the community agency with the authority and ability to directly control the location and activity of the general public at an emergency scene. This capability makes them a unique support agency for the fire command system through their ability to control and manage spectators, traffic and other actions of people. The command system should integrate law enforcement functions into its operations as a matter of routine.*Id.*

to a remote staging area.<sup>10</sup> At that location, their training and abilities can be evaluated, and either be incorporated into the response or politely turned away.

The buddy system in groups of two or more must be utilized.<sup>11</sup> Working within the buddy system requires that one is available to observe and, if necessary, rescue the other.<sup>12</sup> Back-up personnel must be ready to provide assistance or rescue. They may be within hearing range, including presumably radio range, although they need not be in visual contact with the person within the hazardous area.<sup>13</sup> Advance first aid support personnel must also stand by with medical equipment and transportation capability.<sup>14</sup> Perhaps the most important requirement is designation of a safety officer who is knowledgeable in the operations being implemented at the emergency response site.<sup>15</sup> He or she possesses specific responsibility to identify and evaluate hazards and to provide direction with respect to the safety of operations for the emergency at hand.<sup>16</sup> The safety official has the authority to alter, suspend, or terminate those activities.<sup>17</sup> The safety official must immediately inform the IC of any actions needed to be taken to correct these hazards at an emergency scene.<sup>18</sup> Case law makes clear that the safety officer must be an individual distinct from the IC him or herself.<sup>19</sup>

After emergency operations have terminated, the IC is responsible for implementation of appropriate decontamination procedures.<sup>20</sup>

The timing of when emergency response ceases and moves to post-emergency cleanup is an issue that may provoke controversy.<sup>21</sup> During emergency response, scene stabilization and containment of the release are the central concerns.<sup>22</sup> When actions change in character to routine

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<sup>10</sup>See *id.* at 23-24, for an example of standard operating procedures for staging at a fire scene.

<sup>11</sup>29 C.F.R. § 1910.120(q)(3)(v).

<sup>12</sup>See *Victor Microwave, Inc.*, 1996 OSAHRC LEXIS 57, at \*41-43. One member of a pair entering into the hazardous area of release while the other waits out of sight was found to be insufficient. Such an approach was found to be a serious violation.

<sup>13</sup>See *Victor Microwave, Inc.*, 1996 OSAHRC LEXIS 57, at \*43-44.

<sup>14</sup>29 C.F.R. § 1910.120(q)(3)(vi).

<sup>15</sup>29 C.F.R. § 1910.120(q)(3)(vii). “The individual in charge of the ISC shall designate a safety official, who is knowledgeable in the operations being implemented at the emergency response site. . . .” *Id.*

<sup>16</sup>*Id.*

<sup>17</sup>29 C.F.R. § 1910.120(q)(3)(viii).

<sup>18</sup>*Id.*

<sup>19</sup>See *Victor Microwave, Inc.*, 1996 OSAHRC LEXIS 57, at \*44-47. Failure to designate a separate safety officer was found to be a serious violation.

<sup>20</sup>29 C.F.R. § 1910.120(q)(3)(ix).

<sup>21</sup>See generally *Secretary of Labor v. Westinghouse Haztech, Inc.*, No. 88-2458, 1989 OSHARC LEXIS 205, at 7 (O.S.H.R.C.A.L.J. June 7, 1989). (“The question is whether, at the time of the inspection, . . . operations had changed from ‘emergency response’ to ‘post-emergency response’ operations.”)

<sup>22</sup>*Id.* at 4 (defining ‘emergency response operations’).

cleanup activities, the law requires additional protective planning, in the nature of a site control program.<sup>23</sup> Failure to recognize the change of circumstances may lead to a penalty for the violator.<sup>24</sup>

#### V. FEDERAL GUIDELINES FOR INCIDENT MANAGEMENT AT A TERRORISM RESPONSE

In the aftermath of the 1993 attack on the World Trade Center and the bombing of the Murrah Building in Oklahoma City, numerous programs arose to address the need to better prepare for terrorism events.<sup>25</sup>

In the 1998 Appropriations Act<sup>26</sup> and accompanying report, Congress made known its uneasiness over the potentially catastrophic effects of chemical or biological acts of terrorism.<sup>27</sup> The legislature recognized the fact that the federal government's role revolves around preventing and providing supportive response to such threats.<sup>28</sup> In reality, state and local public safety personnel respond first to the scene of these incidents. Congress therefore directed the Attorney General to assist state and local public safety personnel in acquiring the advanced training and equipment needed to safely respond to and manage weapons of mass destruction (WMD) terrorist events.<sup>29</sup> On April 30, 1998, the Attorney General delegated authority to the Office of Justice Programs (OJP) to develop and administer training and equipment assistance programs for state and local emergency response agencies.<sup>30</sup> To execute this mission, the Office of Justice Programs established the Office for Domestic Preparedness (ODP) to create and manage a national Domestic Preparedness Program.<sup>31</sup>

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<sup>23</sup>29 C.F.R. § 1910.120(d)(1) and (2). A site control program for preventing contamination of employees shall be developed during the planning stages of a hazardous waste operation clean-up.

<sup>24</sup>Westinghouse Haztech, Inc., 1989 OSAHRC LEXIS, at \*8-12. Failure to prepare a site map and mark off contaminated areas resulted in a less than serious violation and a fine of \$100.

<sup>25</sup>See, e.g., David Lore, *Federal bucks flow to fight terrorism*, COLUMBUS (OH) DISPATCH, Aug. 7, 2000, at B5.

<sup>26</sup>Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No 105-119, 111 Stat. 2440 (1997).

<sup>27</sup>*Id.*

<sup>28</sup>Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No 105-119, 111 Stat. 2440 (1997).

<sup>29</sup>See <http://www.ojp.usdoj.gov/odp/about/overview.htm>. (last visited Jan. 17, 2003).

<sup>30</sup>*Id.*

<sup>31</sup>This program would become part of the proposed Department of Homeland Security if Congress enacts President Bush's initiative. H.R. 5005 Sec. 502 (2002) provides:

"In accordance with title VIII, there shall be transferred to the Secretary [of Homeland Security] the functions, personnel, assets, and obligations of the following [entities] . . .  
(2) The Office of Emergency Preparedness, the National Disaster Medical System . . ."

As part of its efforts to improve the abilities of emergency responders to deal with terrorism events, the ODP established the Center for Domestic Preparedness (CDP), at the former home of the U.S. Army Chemical School at Fort McClellan in Anniston, Alabama.<sup>32</sup> The CDP trains state and local emergency responders to administer and control WMD incidents.<sup>33</sup> The CDP curriculum includes two training courses of instruction: WMD HAZMAT Technician and WMD Incident Command. The Incident Command course is accompanied by a Guide (henceforth the IC Guide).<sup>34</sup> The IC Guide contains federally suggested guidelines for managing the response to terrorism events.<sup>35</sup>

Many of these guidelines echo those found in NFPA 472 and HAZWOPER.<sup>36</sup> These include scene safety, command, control and communications, patient care, decontamination, and resource management.<sup>37</sup> The IC must beware that terrorists may plant secondary devices, which may be explosives, intended to kill or injure emergency responders.<sup>38</sup> Terrorists use secondary devices to hinder the response, with the goal of frightening the public into believing that the government cannot protect them. Since the terrorism incident is a federal crime scene, the IC Guide suggests preplanning with the local FBI field office to assure preservation of evidence.<sup>39</sup>

## VI. Mutual Aid Agreements

Emergency responses, particularly to large and/or complex HAZMAT incidents, frequently require resources beyond those available to the entity tasked with the first response to an incident.<sup>40</sup> HAZWOPER requires that the emergency response plan include pre-emergency planning and coordination with outside parties.<sup>41</sup> The means for procuring such coordinated assistance is typically a mutual aid

*See also supra* notes 104 and 107, and accompanying material.

<sup>32</sup>ODP Fact Sheet, Center for Domestic Preparedness in Anniston, Alabama, *available at* <http://www.ojp.usdoj.gov/odp/docs/fs-cdp.htm>. (last visited Jan. 17, 2003).

<sup>33</sup>*Id.*

<sup>34</sup>CENTER FOR DOMESTIC PREPAREDNESS, CHEMICAL, ORDINANCE, BIOLOGICAL AND RADIOLOGICAL (COBRA) INCIDENT COMMAND COURSE RESPONDER GUIDE (2002) [hereinafter IC GUIDE].

<sup>35</sup>*Id.* (Specifies the use of an on-scene coordinator during acts and responses to terrorist activities.) *See also* PDD-39, *supra* note 80.

<sup>36</sup>IC GUIDE, *supra* note 168, at RG -7 - 08.

<sup>37</sup>*Id.* at RG -7 - 07. *See also supra* notes 23-30 and accompanying material.

<sup>38</sup>IC GUIDE, *supra* note 168, at RG -7 - 08.

<sup>39</sup>*Id.* at RG -7 - 25. *See also supra* notes 6 and 56-66 and accompanying materials.

<sup>40</sup>William C. Nicholson, *Legally Sound Mutual Aid Agreements*, 2 EMS BEST PRACT. 41, 46 (1999).

<sup>41</sup>29 C.F.R. § 1910.120(q)(2)(i) requires that the emergency response plan include planning and coordination with outside parties.



agreement, although sometimes the emergency planning and coordination happens at the site before committing responders to enter the hazardous area.<sup>42</sup>

The fire, emergency medical services and emergency management communities are encouraged, both by law<sup>43</sup> and by common sense, to enter into mutual aid agreements. The reasoning behind mutual aid is sound: in this era when emergency services providers are being told to do more with less, combining forces to battle a common foe preserves resources and allows more efficient response to crisis situations.<sup>44</sup> There is a definite national trend towards greater reliance on mutual aid agreements, as well as better planning for such agreements.<sup>45</sup> Many smaller municipalities have reached MAAs with neighboring larger cities, although such agreements may be forced on one entity or the other by circumstances.<sup>46</sup> A variety of players, including state and local governments, the private sector, and federal agencies and departments, enter into MAAs with one another.<sup>47</sup> Mutual aid, joint powers and intergovernmental assistance agreements have been characterized as “expected and the norm” among municipalities.<sup>48</sup> In the aftermath of a catastrophic terrorism event, the role of the military will be very significant.<sup>49</sup> A preexisting MAA will greatly facilitate use of that assistance.

MAAs may be either verbal “handshake” understandings or written documents. Verbal MAAs may prove to be dangerous invitations to

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<sup>42</sup>Interview with Michael B. Bigler, *supra* note 5.

<sup>43</sup>*See, e.g.*, Indiana Comprehensive Emergency Management Plan III.C (2002), which requires mutual aid be requested prior to state assistance being approved.

<sup>44</sup>Nicholson, *supra* note 174, at 46.

<sup>45</sup>Granting the Consent of Congress to the Emergency Management Assistance Compact, Pub. L. No. 104-312, 110 Stat. 3877 (1996); EMAC: Current EMAC News, at <http://www.nemaweb.org/emac/index.cfm> (last visited Sept. 19, 2002).

<sup>46</sup>Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 HASTINGS CONST. L.Q. 621, 651 (1999) (citing Frank P. Sherwood, *Some Major Problems of Metropolitan Areas*, in GOVERNOR’S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA 95 (Ernest A. Engelbert ed., 1961)). As an example, Sherwood explained that the City of Los Angeles, out of self-interest, had to help the City of Vernon protect its factories from fire, but that the Vernon Fire Department was all but useless to the City of Los Angeles.

<sup>47</sup>*See, e.g.*, Francis A. Delzompo, *Warriors on the Fire Line: The Deployment of Service Members to Fight Fire in The United States*, ARMY LAW. 51, 55 (April 1995). Mutual aid agreements for use of firefighting assets between military installations and local units of government are common.

<sup>48</sup>Swanson, *supra* note 33, at 497.

<sup>49</sup>Barry Kellman, *Catastrophic Terrorism—Thinking Fearfully, Acting Legally*, 20 MICH. J. INT’L L. 537, 546-47 (1999). For information on military assistance after the Oklahoma City bombing, see Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW. 3 (July 1997).

potential liability.<sup>50</sup> Written mutual aid agreements are preferable for several reasons. First, a written agreement provides a guideline for response during a crisis.<sup>51</sup> Second, a written agreement clearly defines who is responsible for various expenses during and after the response.<sup>52</sup> Third and most important, written mutual aid agreements avoid conflict between agencies that need to be mutually supportive in future responses.<sup>53</sup>

“During a response, many important issues must be addressed immediately. Who is in overall command? Who is in command of responding units from the assisting jurisdiction? Who is responsible for the actions of responding agencies’ employees?”<sup>54</sup> “After the response, other issues arise. Who pays for the costs of response? Who is accountable for equipment damaged in the response? Who pays for medical expenses of injured responders? Who is responsible for workman’s compensation for injured responders?”<sup>55</sup> State law may also address some of these matters. Some state laws, however, allow the parties to an agreement to vary the duties otherwise imposed by state law. For example, in Indiana, unless otherwise provided for by agreement, a requesting unit of government is responsible for the costs of a party responding to a request for mutual aid.<sup>56</sup>

As mentioned above, the lack of clear definition of response functions, and how functions related to one another numbered among the emergency response problem that IMS was devised to address.<sup>57</sup> Traditionally, MAAs involve entities addressing the same functions, such as fire suppression.<sup>58</sup> The more advanced view is to look at MAAs in light of how they will support IMS at a response scene.<sup>59</sup> From this perspective, it is advisable to address other functions reasonably anticipated to be needed at the scene. Such MAAs might involve multiple response entities, including the fire service for the fire suppression function, Emergency Medical Services (EMS) for the mass care function, the Red Cross for the sheltering function, amateur radio

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<sup>50</sup>Nicholson, *supra* note 174, at 46.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>Nicholson, *supra* note 174, at 46.

<sup>56</sup>IND. CODE § 36-1-7-7(b) (Michie 1999) requires, in the absence of a written agreement, fire service and law enforcement entities that request mutual aid to pay for the travel expenses of the responding units. The responding units are also under the supervision of the requesting unit.

<sup>57</sup>*See supra* notes 113-115 and accompanying text.

<sup>58</sup>Telephone Interview with Rick D. Schlegel, EAI Corporation, Deputy Program Manager, Incident Command Responder Course, Anniston, AL (Apr. 24, 2002).

<sup>59</sup>*Id.*

for the support of the communications function, law enforcement or volunteer emergency management for the traffic control function, and so on.<sup>60</sup>

## VII. STANDARD OPERATING PROCEDURES

One key purpose of the MAA is to assure that responding entities, whether public or private, adhere to standard operating procedures (SOPs) or standard operating guidelines (SOGs) during mutual aid responses.<sup>61</sup> When drafting SOPs, MAAs should be considered, similarly, when drafting MAAs, SOPs must be evaluated.<sup>62</sup> Many other documents, plans and agreements need to be considered as well when developing SOPs, including the requirements of HAZWOPER.<sup>63</sup> Like MAAs, SOPs must be written to be effective.<sup>64</sup> They must also be enforced to work properly.<sup>65</sup>

The National Fire Protection Association (NFPA) defines an SOP as “‘an organizational directive that establishes a standard course of action.’”<sup>66</sup> A complete set of SOPs sets out in a detailed manner how an emergency response organization will function during an event, functioning as a “game plan” before the event.<sup>67</sup> SOPs must be written with intelligent management of risks as their primary goal to ensure that safety becomes the standard expected by all involved.<sup>68</sup> Safety-specific SOPs are absolute mandates that must be followed, no matter what other circumstances may obtain.<sup>69</sup>

For individual responders, SOPs provide understandable statements of employer requirements and give a detailed explanation of expectations.<sup>70</sup> Managers use SOPs for a number of purposes: examining their operations from a strategic perspective, noting needed changes, documenting regulatory compliance, establishing intentions, and improving training and measuring performance.<sup>71</sup> They provide a way to

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<sup>60</sup>*Id.*

<sup>61</sup>FEDERAL EMERGENCY MANAGEMENT AGENCY—UNITED STATES FIRE ADMINISTRATION, DEVELOPING EFFECTIVE STANDARD OPERATING PROCEDURES FOR FIRE & EMS DEPARTMENTS 9 (1999) [hereinafter DEVELOPING SOPs] “Mutual or automatic aid agreements . . . help [to] ensure that agreements are enforced and joint operations are coordinated.” *Id.*

<sup>62</sup>DEVELOPING SOPs, *supra* note 195, at 9.

<sup>63</sup>*Id.* at 67-75, 92-93.

<sup>64</sup>BRUNACINI, *supra* note 9, at 16-17.

<sup>65</sup>*Id.* at 17.

<sup>66</sup>DEVELOPING SOPs, *supra* 195 note 1, at 2.

<sup>67</sup>BRUNACINI, *supra* note 9, at 16.

<sup>68</sup>*Id.* at 222.

<sup>69</sup>*Id.* at 228.

<sup>70</sup>*Id.* at 16.

<sup>71</sup>*Id.* at 18. “Standard operating procedures become the basis for much of the use of the

communicate legal and administrative requirements to members of emergency response organizations.<sup>72</sup> At a large scene with many responding agencies involved, SOPs become even more important.<sup>73</sup>

Fire departments were the first emergency response organizations to develop and use SOPs during emergency responses.<sup>74</sup> As departments grew beyond their informal roots, they began to address safety considerations through internal controls.<sup>75</sup> These tenets, originally termed “rules of engagement,” protected firefighters during daily fire operations. The more modern terminology for these guidelines is standard operating procedures.<sup>76</sup> As fires have become more complex, SOPs have evolved from procedures that are “chiseled in stone” to SOGs.<sup>77</sup> “SOGs allow increased flexibility in responding to complex fire scenes, encouraging the full utilization of firefighters’ knowledge, skills and abilities.”<sup>78</sup> Other emergency response organizations have learned from the experience of the fire service, similarly developing ever more sophisticated SOPs and SOGs.<sup>79</sup> For HAZMAT responses, employers must incorporate SOPs in their written safety and health program.<sup>80</sup>

#### VIII. LEGAL RISKS IN FAILURE TO INTEGRATE IMS, MAAs AND SOPs

Failure to understand the interrelation of IMS, MAAs and SOPs may result in death or injury to responders and ruinous legal liability.<sup>81</sup> An unreported slip opinion out of Idaho, *Buttram v. United States*<sup>82</sup> illustrates the fatal danger to emergency responders resulting from the failure to integrate IMS, MAAs and SOPs. Of course, as an unpublished slip opinion, the *Buttram* matter is of extremely limited precedential value. The opinion is worthy of consideration, however, because it is the only detailed examination by a federal court to date of the interactions between these tools. Additional insight flows from analysis of the fact

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regular management process. The standard steps of the system development/training/application/ review/revision are used in the development, application, and ongoing management of SOPs.” BRUNACINI, *supra* note 9, at 18.

<sup>72</sup>DEVELOPING SOPs, *supra* note 195, at 2.

<sup>73</sup>William C. Nicholson, *Standard Operating Procedures: The Anchor Of On-Scene Safety*, OUR WATCH 2 (Winter 1999).

<sup>74</sup>One example of an early SOP is the requirement that not all firefighters enter a burning building at the same time. *Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 2.

<sup>77</sup>*Id.*

<sup>78</sup>Nicholson, *supra* note 207.

<sup>79</sup>DEVELOPING SOPs, *supra* note 195, at 5.

<sup>80</sup>29 C.F.R. § 1910.120(b)(1)(ii)(F).

<sup>81</sup>William C. Nicholson, *Beating the System to Death: A Case Study in Incident Command and Mutual Aid*, 152 FIRE ENGINEERING 128 (1999).

<sup>82</sup>*Buttram v. United States*, No. 96-0324-S-BLW Civ., slip op. (D. Idaho, Feb. 19, 1999).

pattern as if it were a terrorism event subject to the HAZWOPER standard.

A. *THE FACTS*

*Buttram* involved a brush fire, designated the Point Fire, on United States Bureau of Land Management (BLM) land near Boise, Idaho.<sup>83</sup> The first responding BLM crew chief was designated as Incident Commander (IC), and his control of the responding units was guided by the BLM's fire suppression policies.<sup>84</sup> These policies dictated aggressive fire suppression efforts, due to the proximity of a National Conservation Area.<sup>85</sup> Conditions were very dry and hot, with a heavy fuel load and winds up to 55 m.p.h.<sup>86</sup> The BLM deployed response resources greater than called for in their fire suppression policies, including 5 engines, a bulldozer, a tender and a detection helicopter.<sup>87</sup> The record does not reveal any section or sector commanders in addition to the overall IC.

Subsequently, the Kuna Rural Fire District (RFD) verbally contacted the IC and offered assistance.<sup>88</sup>

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<sup>83</sup>*Id.* at 1.

<sup>84</sup>*Id.* at 2.

<sup>85</sup>*Id.* at 2.

<sup>86</sup>*Id.* at 2-4.

<sup>87</sup>*Buttram*, No. 96-0324-S-BLW, at 4.

<sup>88</sup>*Id.*

The IC requested one brush truck and a water tender.<sup>1</sup> Kuna RFD dispatched two brush trucks and a water tender.<sup>2</sup> RFD policies stated that a firefighter was qualified to drive a vehicle as soon as s/he had learned to operate the vehicle.<sup>3</sup> The Kuna RFD Captain briefed the brush truck crews to obey the BLM IC, stay in safe zones, get into burned-out areas if trouble developed and maintain radio contact with BLM.<sup>4</sup> In the first brush truck, Unit 620, both the driver, Bill Buttram, and his crew, Josh Oliver, were rookies experiencing their first wildfire season. In the second brush truck, Unit 622, were two experienced firefighters.<sup>5</sup>

Evidence suggests that either Unit 620's radio was not working properly or it was not operated properly.<sup>6</sup> About 45 minutes after the units arrived at the fire, the BLM dispatch office issued a "Red Flag Warning," indicating an approaching thunderstorm with winds in excess of 50 m.p.h.<sup>7</sup> Unit 620 may have "stepped on" the Red Flag transmission, meaning that they were transmitting at the time the warning was issued, resulting in the warning not being heard.<sup>8</sup> As the Red Flag Warning was being transmitted, Unit 620 radioed that they were "basically doing mop-up. Is it okay for Josh to get some drive time just doing mop-up."<sup>9</sup> The RFD responded by denying the request, but did not ask if Unit 620 had heard or understood the Red Flag broadcast. The Court held that this conversation meant that either the two volunteer firefighters did not hear the Red Flag Warning or they did not understand its serious nature.<sup>10</sup>

The IC did not inquire as to whether Unit 620 had gotten the warning.<sup>11</sup> Instead, he told them to refill in an area where winds were likely to drive the fire.<sup>12</sup> The volunteers never arrived at the refill location. Their truck was spotted in a burned black area. As the wind speed increased, Buttram and Oliver tried to travel to a fence break, moving in zero visibility due to the wind kicking up debris and ash.<sup>13</sup> Unit 620 overshot the fence break, driving into unburned brush. The wind fed the flames, and the young volunteers found themselves trying

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<sup>1</sup>*Id.*

<sup>2</sup>*Id.*

<sup>3</sup>*Buttram*, No. 96-0324-S-BLW, at 5.

<sup>4</sup>*Id.* at 7.

<sup>5</sup>*Id.* at 4-6.

<sup>6</sup>*Id.* at 8.

<sup>7</sup>*Id.* at 10.

<sup>8</sup>*Buttram*, No. 96-0324-S-BLW, at 11.

<sup>9</sup>*Id.* at 10.

<sup>10</sup>*Id.* at 10-12.

<sup>11</sup>*Id.* at 10.

<sup>12</sup>*Id.* at 12.

<sup>13</sup>*Buttram*, No. 96-0324-S-BLW, at 13.

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to outrun the fire.<sup>14</sup>

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<sup>14</sup>*Id.* at 13-14.

The brush truck stalled in unburned brush, with the fire close behind. Buttram radioed “we got fire coming hard, this thing has died . . . it’s not going to let us out of here.”<sup>1</sup> The Kuna RFD asked Buttram to identify the truck’s problem, and he responded “We’re surrounded by fire . . . The truck has been overtaken by fire.”<sup>2</sup> This was the last anyone heard from Bill Buttram and Josh Oliver. The two rookie volunteers were found dead in Unit 620’s front seats. Oliver’s parents survived him. Buttram left a wife and one-year old son.<sup>3</sup>

*B. Duties Owed to the Volunteer Firefighters*

Applying Idaho law, the Court stated that an employer “has the duty to exercise reasonable care commensurate with the nature of its business in order to protect employees from hazards incident to the employment and to provide him with safe tools, appliances, machinery, and working places.”<sup>4</sup> This requirement is similar to the general duty clause found in OSHA law.<sup>5</sup> The Court held that BLM had a duty to protect Buttram and Oliver from the foreseeable hazards incident to fighting the fire.<sup>6</sup>

The IC, in particular, had the duty to ensure that the firefighters were assigned duties commensurate with their ability and the qualifications of the Kuna RFD.<sup>7</sup> The IC had supervisory control and information about the fire superior to the knowledge of a rural RFD.<sup>8</sup> As the emergent nature of the fire may cause the IC to make quick decisions, he may rely on indicators of qualifications. As the firefighters were operating a brush truck, he reasonably assumed that they were qualified by Kuna RFD standards. When the IC operates under assumptions about responders’ qualifications, however, he has a higher duty to provide for their safety.<sup>9</sup>

The IC also has the duty to fully instruct rural fire district volunteers in a safety briefing before they are committed about the fire’s nature, fuel conditions, weather, safety factors, command structure and radio use.<sup>10</sup> The

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<sup>1</sup>*Id.* at 14.

<sup>2</sup>*Buttram*, No. 96-0324-S-BLW, at 14.

<sup>3</sup>*Id.* at 14-15.

<sup>4</sup>*Id.* at 16 (citing *West v. Sonka*, 968 P.2d 228, 237 (Idaho 1998)).

<sup>5</sup>29 U.S.C. § 654 (2002). Duties of employers and employees

(a) Each employer--

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.*Id.*

<sup>6</sup>*See Buttram*, No. 96-0324-S-BLW, at 20-21.

<sup>7</sup>*Id.* at 22.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 21-22.

<sup>10</sup>*Id.* at 23.



IC must ensure that firefighters understand and obey warnings such as the Red Flag Warning.<sup>11</sup> In this case, the IC (or a designated safety officer) did not hold a safety briefing or communicate the Red Flag Warning or its significance.<sup>12</sup> The IC ordered Unit 620 into a position of danger, where he should have known that the wind would drive the fire at them.<sup>13</sup> The BLM, through its IC, breached these duties,<sup>14</sup> and those breaches were the proximate cause of the firefighters' deaths.<sup>15</sup>

The RFD also had the duty to send only qualified firefighters and to pair them in a manner to provide for their safety, particularly since in this instance the RFD had sufficient resources to do so.<sup>16</sup> The Kuna RFD had the duty to get a weather report and to assure that the BLM IC gave the firefighters a safety briefing or to provide such a briefing themselves.<sup>17</sup> The Kuna RFD also had the duty to train its personnel to fight wildland fires in a safe and effective manner.<sup>18</sup> The Kuna RFD breached these duties,<sup>19</sup> and those breaches were the proximate cause of the firefighters' deaths.<sup>20</sup>

Buttram and Oliver had the duty to exercise reasonable care to provide for their own safety while fighting the fire.<sup>21</sup> They complied with this duty at all times, trusting and obeying the instructions of higher authorities.<sup>22</sup>

### C. IMPROPER USE OF THE INCIDENT MANAGEMENT SYSTEM

As mentioned above, the following characteristics are part of good IMS: modular organization, integrated communications, common terminology, a unified command structure, consolidated action plans, a manageable span of control, designated incident facilities, and comprehensive resource management. The *Buttram* case exemplifies many failures to understand and correctly use ICS.

Modular organization was not utilized: all units reported to the IC rather than to sector or section leaders. Planning, logistics and finance/administration were not present.

The command structure was fragmented. The IC and the RFD leadership had sporadic contact at best. Plans were made on the spur of the moment, rather than in a consolidated manner. The IC controlled too many units, and

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<sup>11</sup> *Buttram*, No. 96-0324-S-BLW, at 24.

<sup>12</sup> *Buttram*, No. 96-0324-S-BLW, at 24.

<sup>13</sup> *Id.* at 23-24.

<sup>14</sup> *Id.* at 25-35.

<sup>15</sup> *Id.* at 32.

<sup>16</sup> *Id.* at 28.

<sup>17</sup> *Buttram*, No. 96-0324-S-BLW, at 28.

<sup>18</sup> *Id.* at 27-29.

<sup>19</sup> *Id.* at 29-31.

<sup>20</sup> *Id.* at 32.

<sup>21</sup> *Id.* at 31.

<sup>22</sup> *Buttram*, No. 96-0324-S-BLW, at 31-32.

did not have sector commanders, despite the availability of Kuna RFD officers to act in this capacity. The court's decision shows no indication of any designated incident facilities. Rather than comprehensive resource management, assets were apparently dispatched without having designated tasks to perform. The prime principle of establishing tasks before committing resources was not followed.<sup>23</sup>

*D. Potential Liabilities and Protections for Individual Responders and Response Organizations*

In the *Buttram* matter, the federal government's liability was premised on application of the Federal Tort Claims Act.<sup>24</sup> The IC was an employee of the BLM, a federal entity operating on federal property.<sup>25</sup> The typical terrorism HAZMAT response, in contrast, will most likely occur on private property, as with the attacks on the World Trade Center on September 11, 2001. The relevant law in such instances will be the law of the state in which the incident occurs. The potential liabilities of individuals and organizations will, therefore, flow from state law as well as from federal or state analogue OSHA rules.<sup>26</sup>

1. FEDERAL TORT CLAIMS ACT

The *Buttram* court had jurisdiction over the case as a result of its being filed under the Federal Tort Claims Act (FTCA),<sup>27</sup> which requires that the federal government be subjected to liability "in the same manner and to the same extent as a private individual under like circumstances. . . ."<sup>28</sup> In assessing damages, the *Buttram* court applied Idaho law,<sup>29</sup> which required assessment of the parties' comparative responsibilities.<sup>30</sup>

The Court totaled damages at approximately \$2.5 million.<sup>31</sup> In apportioning liability, the Court determined that the BLM was responsible for 35% and the Kuna RFD was responsible for 65%.<sup>32</sup> Such a sum is beyond the resources of a RFD. Fortunately for the Kuna RFD, it was not a named defendant in the case. Normally, a RFD provides protection through an agreement with the

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<sup>23</sup> See generally *Buttram*, No. 96-0324-S-BLW.

<sup>24</sup> *Id.* at 1.

<sup>25</sup> *Id.*

<sup>26</sup> See notes regarding OSHA in part IV; Judith A. Harris, *Recognizing Legal Tropes: Metonymy As Manipulative Mode*, 34 AM. U. L. REV. 1215, 1222 (1985). "The set of choice-of-law rules that are regarded as 'traditional' prescribes that, in a tort case, a court should apply the law of the jurisdiction where the tort occurred. . . ." *Id.*

<sup>27</sup> *Buttram*, No. 96-0324-S-BLW, at 1.

<sup>28</sup> Federal Tort Claims Act, 28 U.S.C. § 2674 (2002).

<sup>29</sup> 28 U.S.C. § 2674. The law of the place where the act or omission occurred must be applied to determine whether a private individual would be liable under the circumstances.

<sup>30</sup> See *Buttram*, No. 96-0324-S-BLW, at 32-34. See also IDAHO CODE § 6-801 (Michie 2002).

<sup>31</sup> *Buttram*, No. 96-0324-S-BLW, at 34.

<sup>32</sup> *Id.* at 33-34.

local unit of government, which is responsible for a judgment against the RFD.<sup>33</sup> Had the Kuna RFD been a named defendant, the local unit of government might well have been required to raise taxes to cover the unfunded liability of such a verdict.<sup>34</sup>

## 2. OSHA VIOLATION LIABILITY

As indicated above, OSHA law closely regulates the actions of emergency responders to a HAZMAT incident. In the event that a violation is found to have taken place, significant penalties may ensue. Penalties and fines range as follows:

De Minimis Notice	\$0 <sup>35</sup>
Nonserious	\$0-\$7,000 <sup>36</sup>
Serious	\$1-\$7,000 <sup>37</sup>
Repeated	\$0-\$70,000 <sup>38</sup>
Willful	\$5,000-\$70,000 <sup>39</sup>
Failure to Abate Notice	\$0-\$7,000 per day <sup>40</sup>

Even multiple serious and willful violations may not result in an aggregate monetary penalty that approaches the maximum for a single willful violation.<sup>41</sup> Violations of serious or greater gravity will, nonetheless, have significant consequences for the offending employer. Above and beyond the penalties listed above, employers may find themselves losing insurance coverage that may be required to conduct business.<sup>42</sup> Further, a violation of law may be

<sup>33</sup>See, e.g., IND. CODE 36-8-13-3(a)(4), (5).

<sup>34</sup>Ayres v. Indiana Heights Vol. Fire Dept., 493 N.E.2d 1229, 1235 (Ind. 1986). “When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and are subject to the laws and statutes affecting governmental agencies and corporations. Firefighting is a service that is uniquely governmental.” *Id.* (citation omitted).

<sup>35</sup>29 U.S.C. § 568 discusses the procedure of issuing a citation to an employer who is in violation of a requirement of Section 5 of OSH Act or Section 6 of the Act.

<sup>36</sup>29 U.S.C. § 666. A civil penalty assessed on an employer for violation of either an employer’s requirements and duties under Section 5 of the OSH Act or any violations of the Occupational Safety and Health Standards under Section 6 of the Act.

<sup>37</sup>29 U.S.C. § 666 describes a serious violation as existing in a place of employment if there is a substantial probability that death or serious physical harm could result from an existing condition, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use.

<sup>38</sup>29 U.S.C. § 666.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Victor Microwave, Inc.*, 1996 OSAHRC at \*97-98. Total penalties for 30 violations equal \$34,400.

<sup>42</sup>See, e.g., *Fisher Indust. Serv., Inc. v. Alabama Dept. of Env’tl. Mgmt.*, 1989 AL ENV LEXIS, at \*3, 2 “... insurance is required prior to commitment of hazardous waste storage operations. . . .

used as proof in a civil trial for damages for personal injury or wrongful death. When the elements of the violation are congruent to the elements required for civil liability and the burden of proof is the same for both, the only issue in a civil trial may be the measure of damages.<sup>43</sup>

As noted previously, both the RFD and the federal BLM through its IC, shared responsibility for the deaths of Buttram and Oliver.<sup>44</sup> Under OSHA law, the firefighters could be viewed as having employment relations with both the RFD and the federal government.<sup>45</sup> OSHA determines employer liability based on which employer controls, supervises, or directs a loaned employee.<sup>46</sup> The *Buttram* court found that both entities had control over their actions.<sup>47</sup> For the RFD to avoid liability under OSHA, it would have had to show adequate safety training and instruction.<sup>48</sup> The BLM had overall control of the scene and was responsible for the safety of its employees and the safety of the volunteer firefighters.<sup>49</sup>

No other cases could be found directly concerning an IC's liability for supervising or directing loaned emergency responders during a common undertaking. However, an examination of the Second and Seventh Circuit decisions involving main contractor liability in construction cases involving subcontractor employee injuries illustrates a standard that could be construed to apply in a case involving emergency response. The Second Circuit decision found that it was only necessary to show that "a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking."<sup>50</sup> The Second and Seventh Circuit expanded on this rule by holding that "an employer does control such an area, he will be held in violation of OSHA [regulations], regardless of whether his own employees are exposed to any

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Petitioner was denied insurance because it was uninsurable. . . ." See also 40 C.F.R. § 264.147 (2002) (liability insurance required of owner of hazardous waste treatment, storage, or disposal facility).

<sup>43</sup>See, e.g., *Meridian Ins. Co. v. Zepeda*, 734 N.E. 2d 1126, 1130-31 (Ind. App. 2000). "... a criminal conviction may be admitted in evidence in a civil action and may be conclusive proof in a civil trial of the factual issues determined by the criminal judgement." *Id.*

<sup>44</sup>*Buttram*, No. 96-0324-S-BLW, at 1.

<sup>45</sup>Note, *Administrative Law—Occupational Safety & Health Act—On Multiemployer Jobsite, When Employees of Any Employer Are Affected By Noncompliance With A Safety Standard, Employer in Control Of Work Area Violates Act; Employer Not In Control Of The Area Does Not Violate Act, Even If His Own Employees Are Affected, Provided that the Hazard is "Nonserious,"* 89 HARV. L. REV. 793, 796 (1976).

<sup>46</sup>*Id.*

<sup>47</sup>*Buttram*, No. 96-0324-S-BLW, at 21, 27.

<sup>48</sup>*A & W Drill Rentals, Inc.*, 2 OSHC 1394, 1396 (1974).

<sup>49</sup>*Buttram*, No. 96-0324-S-BLW, at 21-24.

<sup>50</sup>*Brennan v. Occupational Safety and Health Review Commission*. 513 F.2d 1032, 1038 (2d Cir. 1975).

potential danger.”<sup>51</sup> Furthermore, when an employer does not have control of the area, the employer will not be held in violation of the OSHA regulation, even if his own employees are exposed, unless the exposure is to a hazard presenting a likelihood of death or serious harm.<sup>52</sup>

Clearly, like subcontractor employees or the firefighters in *Buttram*, when emergency responders to a terrorist HAZMAT event are engaged in a common undertaking there exists a specific duty to them on the part of all entities with supervisory authority, regardless of who employs them.<sup>53</sup> During a common undertaking, this specific duty of adequate training and instruction is over and above the general duty owed to an IC’s own emergency responders.

### 3. IMMUNITIES FOR GOVERNMENT ACTION

As discussed above, potential liability may arise as a result of OSHA violations after an emergency response. In addition, civil liability against a state or the federal government may also develop as a result of failure to follow a plan,<sup>54</sup> executive level decision making – poor decisions,<sup>55</sup> street-level operations – operational error,<sup>56</sup> poor planning, emergency response, or an IC’s exercise of judgment. During an emergency competing interests of a few (i.e., personal lives, businesses and property) are often weighed and balanced against the greater interest of society. Standard defenses and immunities have developed under disaster response statutes and common law to provide protection to emergency responders who are working in the capacity of a governmental employee.<sup>57</sup>

#### A. STATE IMMUNITY PROVISIONS

To avoid litigation, many state legislatures have incorporated within their state disaster or emergency statutes<sup>58</sup> immunity provisions to protect an IC during the crucial decision-making process of an emergency. Several states have taken additional measures and have adopted broad immunities providing protection to anyone (i.e., the state, political subdivisions, or local governmental entities) involved in an emergency response, not just individuals

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<sup>51</sup>Note, *supra* note 281, at 796.

<sup>52</sup>*See id.* at 796. *See generally* *Underhill Constr. Corp. v. Secretary of Labor and OSHRC*, 526 F.2d 53 (2d Cir. 1975). *See generally* *Anning-Johnson Co. v. United States OSHRC*, 516 F.2d 1081 (7th Cir. 1975).

<sup>53</sup>*See supra* notes 280-288 and accompanying text.

<sup>54</sup>For a detailed discussion of liabilities for failure to plan properly, see Ken Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, 23 URB. LAW. 333, 341-45 (Summer 1991).

<sup>55</sup>*Id.* at 345-48.

<sup>56</sup>*Id.* at 347-51.

<sup>57</sup>*See generally id.* at 335.

<sup>58</sup>Swanson, *supra* note 33, at 490 n.10, lists citations for emergency management statutes in various jurisdictions.

involved in the decision-making process.<sup>59</sup> Such provisions can be found directly within a state's emergency management act.<sup>60</sup>

Other states provide specific immunity provisions targeting emergency workers, whether volunteers or employees. In addition, specific immunities exist for individuals, owning or controlling real estate or motorized vehicles, which voluntarily permit the use of their property during an emergency.<sup>61</sup> Good Samaritan statutes may also provide immunity to certain classes of emergency medical responders,<sup>62</sup> although such statutes frequently do not apply if the responder is operating in an official capacity.<sup>63</sup>

#### B. FEDERAL TORT IMMUNITY

A civil lawsuit resulting from an emergency or disaster response may also be barred under the general tort immunity. The two tort immunity doctrines available to the Federal government are the "governmental function" and "discretionary action."<sup>64</sup>

The "governmental function" test protects traditional or inherent governmental activities ranging from actions that are delegated by constitution or statute to activities such as collecting taxes, law enforcement, and legislation.<sup>65</sup> Such activities are usually characterized as being performed only by a governmental entity, conducted for the benefit of the public, with no private sector counterpart.<sup>66</sup> These activities do not result in a profit for the government. Disaster planning and response obtains its immunity from tort liability as a traditional or inherent governmental function.

The "discretionary action" exemption can be found in the Federal Tort Claims Act.<sup>67</sup> The "discretionary" immunity focuses on a particular act or governmental decision rather than the type of activity.<sup>68</sup> Its purpose is to create immunity around acts of discretion by governmental employees to protect them from the fear of lawsuits during disaster planning and response. However, the government will not be insulated if the activity challenged does not involve a permissible exercise of policy judgment.

The United States Supreme Court in *Berkovitz v. US*<sup>69</sup> established a two-part test for the applicability of the "discretionary immunity" exemption found

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<sup>59</sup> See, e.g., IND. CODE § 10-4-1-8 (2000).

<sup>60</sup> See Lerner, *supra* note 290, at 336.

<sup>61</sup> ARK. CODE ANN. § 12-75-125 (Michie 2001). For a more comprehensive list of state statutes that provide immunity for owners or controllers of real estate used as shelter during emergencies, see Swanson, *supra* note 33, at 500.

<sup>62</sup> Swanson, *supra* note 33, at 500.

<sup>63</sup> See, e.g., IND. CODE § 34-30-12-1 (2002).

<sup>64</sup> Lerner, *supra* note 290, at 338 n.30.

<sup>65</sup> *Id.* at 338-39.

<sup>66</sup> 57 AM. JUR. 2d *Municipal, County, School and State Tort Liability* § 57 (2001).

<sup>67</sup> See *supra* notes 153-155 and accompanying material.

<sup>68</sup> Lerner, *supra* note 290, at 339.

<sup>69</sup> *Berkovitz v. United States*, 486 U.S. 531 (1988).

in FTCA.<sup>70</sup> The first step involves the analysis of the nature of the conduct.<sup>71</sup> If the challenged conduct is not a matter of choice but is an action proscribed by a federal statute or policy, then the discretionary immunity exemption will not apply to the conduct.<sup>72</sup> In this event, the employee has no choice but to follow the directives.<sup>73</sup> The Court held that since there is no choice—no judgment, then there is no discretion in the conduct to protect.<sup>74</sup> The second step is only applicable if there is no statutory, regulatory, or procedural policy directive dictating a course of action.<sup>75</sup> The challenged conduct must involve an element of judgment, which then may be determined to be the kind of judgment that the discretionary immunity exemption was designed to shield.<sup>76</sup> The exemption protects only governmental actions and decisions based on public policy (i.e., social, economic, or political policy).<sup>77</sup> If the action was not grounded in public policy, the suit may proceed.

Most states have recognized some version of this test within their own statutes.<sup>78</sup> When state courts have noted repeatedly that the discretionary immunity exemption provided by their code is essentially the same as the discretionary immunity exemption within the Federal Tort Claims Act, the “discretionary immunity” test is applicable.<sup>79</sup> In a recent decision, *Commerce and Industry Insurance Company v. Grinnell Corporation*,<sup>80</sup> the 5<sup>th</sup> Circuit Court of Appeals reversed summary judgment of a lower court stating that the “discretionary immunity” test was improperly applied.<sup>81</sup> The Circuit Court held that particular regulations and discrete fire department policies dictated procedures for firefighters to follow at a warehouse fire, and that the firefighters violated them.<sup>82</sup> The Court stated that the city could not be

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<sup>70</sup>*See generally id.*

<sup>71</sup>*Id.* at 536.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Berkovitz*, 486 U.S. at 536.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 536-37.

<sup>77</sup>*Id.* at 537.

<sup>78</sup>Lerner, *supra* note 290, at 339-40.

<sup>79</sup>Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act*, 68 Miss. L.J. 703, 774-75 (1999).

<sup>80</sup>*Commerce and Indus. Ins. Co. v. Grinnell Corp.*, 280 F.3d 566 (5<sup>th</sup> Cir. 2002).

<sup>81</sup>*Id.* at 567.

<sup>82</sup>Alleged negligent actions and omissions included:

(1) attempting to restore electrical power before an electrical inspection had been conducted, in violation of code and policy; (2) turning off the sprinkler system without posting personnel with two-way radios at the sprinkler valves, in contravention of a specific regulation; (3) opening the large bay doors before the fire was declared out, despite wind velocities of 21 mph; (4) failing to “overhaul” any of the upper level racks even though they had been subjected to intense heat; and (5) departing the scene “under these conditions” within six minutes after declaring the fire out, without leaving adequate personnel and equipment for a fire watch.*Id.* at 569.

afforded the immunity exemption provided by La. Rev. Stat. Ann. § 9:2798.1 (West 1997) and remanded the case for further proceedings.<sup>83</sup>

The *Commerce and Industry Insurance Company* decision points the way for evaluation of future claims against response organizations for improper actions during terrorism HAZMAT events. As demonstrated above, HAZWOPER sets a higher regulatory standard for such activities than obtains for a typical fire response such as that in the *Commerce and Industry Insurance Company* case.<sup>84</sup> Responders to a terrorism HAZMAT event will be hard pressed to rely on discretionary immunity to insulate them from liability.

Courts interpret statutory waivers of government immunity very narrowly, inquiring closely into the facts underlying the alleged waiver.<sup>85</sup> In addition, tort immunities are not always applicable. They are almost never available if death, injury, or damages are the result of conduct other than negligence, including willful conduct, gross negligence, wanton disregard, or bad faith on the part of government employee or entity.

### C. VOLUNTEER PROTECTION ACT OF 1997

The Congress enacted the Volunteer Protection Act of 1997 (VPA)<sup>86</sup> to provide statutory immunity for persons desiring to assist in good works. The Congress found that citizens' willingness to volunteer was deterred by the

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<sup>83</sup>*Id.* at 567.

<sup>84</sup>*See supra* notes 49-71 and accompanying text.

<sup>85</sup>*Caillouette v. Hercules, Inc.*, 827 P.2d 1306, 1311-13 (N.M. App. 1992). The New Mexico Department of Public Safety was found not to have waived immunity on the facts of the case in a wrongful death action arising from a HAZMAT cleanup incident.

<sup>86</sup>Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. §§ 14501-14505 (West Supp. III 2002)). As is the case with any type of tort reform, the VPA has come in for significant criticism. *See, e.g.*, Andrew F. Popper, *A One-Term Tort Reform Tale: Victimized The Vulnerable*, 35 HARV. J. ON LEGIS. 123, 130-137 (Winter 1998).

An underlying principle of tort law is that the threat of personal liability creates individual accountability and thereby enhances the quality of goods and services. Accordingly, the common law imposes a minimum level of due care on people who choose to volunteer. The Volunteer Protection Act changes that standard, and in so doing, reduces the incentive to provide quality services.*Id.* at 134-35 (citations omitted).



possibility of litigation arising from their volunteer activities.<sup>87</sup> This law pre-empts state laws providing higher levels of liability for volunteers<sup>88</sup> than gross negligence,<sup>89</sup> although states may opt out.<sup>90</sup> In addition to protection from negligence lawsuits, punitive damages may not be awarded against a volunteer acting within the scope of his/her responsibilities to a non-profit organization, even when that volunteer is negligent or grossly negligent.<sup>91</sup> The immunity does not attach to the organization with which the volunteer is associated.<sup>92</sup>

Significantly, the Act does not exempt volunteers from liability for any harm caused while driving a motor vehicle.<sup>93</sup> This exclusion is significant, since, by some counts, half the claims involving emergency response organizations involve vehicle accidents.<sup>94</sup> While the Volunteer Protection Act

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<sup>87</sup>42 U.S.C.S § 14501 Findings and purpose:

(a) Findings. The Congress finds and declares that--

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;*Id.*

<sup>88</sup>“Volunteer” is defined as an individual (including a director or officer) performing services for a “nonprofit organization” or a governmental entity who does not receive compensation (other than reasonable expenses) in excess of \$ 500 per year. § 14505(6).

<sup>89</sup>§ 14503(a)(3).

<sup>90</sup>The opt-out authorization would only apply where all of the parties in a case are residents of the state in question. § 14502(b).

<sup>91</sup>The VPA’s limits on punitive damages liability and joint and several liability for non-economic damages are not limited to matters where the volunteer acted with a required license or was not caused by a motor vehicle. The prohibition on ordinary negligence actions and limits on punitive damages against volunteers do not apply to civil cases brought by a nonprofit or governmental entity against affiliated volunteers. The limitation is not contained in the provisions limiting non-economic damages in joint and several liability cases. *See* 42 U.S.C. § 14503 (a), (c), (e) & 14504.

<sup>92</sup>The Volunteer Protection Act does not provide any direct liability protections to the nonprofit organizations or government agencies. § 14503(c).

<sup>93</sup>§ 14503(a)(1), (2) & (3). The Act also excludes from liability protection any specific misconduct constituting a crime of violence or international terrorism, hate crime, sexual offense, civil rights violation, or which is caused by the influence of alcohol or drugs in violation of state law as well as volunteers performing services for groups responsible for federal hate crimes (e.g., crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity). §§ 14503(f) & 14505(4). (Federal hate crimes are defined at 28 U.S.C. 534).

<sup>94</sup>*See, e.g.,* Joseph M. Soler et al., *The Ten Year Malpractice Experience of a Large Urban EMS System*, 14 ANNALS OF EMERGENCY MED. at 982, 985 (Oct. 1985); Richard J. Goldberg, et al., *A Review*

changes the basis for a lawsuit, it probably does not affect administrative actions taken on a negligence basis. Therefore, laws specifying negligent conduct endangering persons as a basis for administrative penalties,<sup>95</sup> continue to be valid.

#### F. LESSONS LEARNED AND APPLICATION TO TERRORISM RESPONSE

The *Buttram* case marks the sad intersection between an improperly functioning incident command system and the failure to have a written mutual aid agreement and underlying standard operating procedures.<sup>96</sup> Working together, these command tools could have assured that two rookie volunteer firefighters were not put into harm's way without proper equipment, training or supervision. Sadly, these two firefighters' deaths were very avoidable. Recent information on lessons learned in the aftermath of the September 11 attack on the World Trade Center provides additional cautions for future responses.

The most important priorities in all emergency responses are safety and preservation of life, and the *Buttram* case illustrates how easily these priorities may be misplaced. The Court found that volunteer firefighters Buttram and Oliver were not at fault in their untimely deaths.<sup>97</sup> The firefighters were the victims of an improperly used ICS, the lack of a written MAA and inadequate SOPs.<sup>98</sup> As the *Buttram* court concluded, those in responsible positions had the duty to use these powerful management tools correctly.<sup>99</sup> The following sections discuss the differences between the detailed requirements of HAZWOPER and the way IMS, the MAA and SOPs were used at the Point Fire.

##### 1. PRE-PLANNING

Pre-planning to the HAZWOPER standard would have revealed the shortcomings in Kuna RFD's SOPs and training.<sup>100</sup> Pre-planning would have included evaluation of the MAA between the BLM and Kuna RFD.<sup>101</sup> If an unwritten agreement existed, pre-planning would have revealed the fact and allowed timely drafting of a mutually acceptable MAA. A quality MAA could

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*of Prehospital Care Litigation in a Large Metropolitan EMS System*, 19 ANNALS OF EMERGENCY MED. at 557, 558 (May 1990).

<sup>95</sup>See, e.g., IND. ADMIN. CODE tit. 836 § 4-4-1(c)(4), specifying negligent conduct endangering patients as a basis for imposing administrative penalties on emergency medical services personnel.

<sup>96</sup>*Buttram*, No. 96-0324-S-BLW, at 16.

<sup>97</sup>*Buttram*, No. 96-0324-S-BLW, at 31-32.

<sup>98</sup>See generally *id.*

<sup>99</sup>*Id.* at 33-35.

<sup>100</sup>See *supra* note 58 and accompanying text.

<sup>101</sup>29 C.F.R. § 1910.120(q)(2)(i) requires the emergency response plan to include "Pre-emergency planning and coordination with outside parties."

have operated to protect their lives. Of course, a properly drafted MAA would include following properly drafted SOPs.<sup>102</sup> Pre-planning would have revealed the insufficiency of the RFD's SOP allowing two rookie firefighters to team up in the response.<sup>103</sup>

Pre-planning would provide a guideline for response during a crisis. The lines of authority, including the use of ICS, would have been defined.<sup>104</sup> The communication failures between the IC and Kuna RFD would not have occurred.<sup>105</sup> The RFD's responsibility to provide tactical control under the IC would be outlined. The fact of tactical control would again underline to the RFD the need for reliable communication with its firefighters, as well as the requirement for proper training and experience.<sup>106</sup>

The magnitude of the September 11 attacks was not anticipated by New York response agencies.<sup>107</sup> In New York, exercises rarely involved more than 100 firefighters, but the 9/11 response included nearly 1,000.<sup>108</sup> "On that day, Sept. 11, all the plans, all the scenarios that we had developed, everything, everything was blown up," said James Ellison, former deputy in the New York City Office of Emergency Management.<sup>109</sup> Warnings about imminent collapse of the second Trade Tower were broadcast 21 minutes before its demise on the police band.<sup>110</sup> Police heard the warning and many escaped. Firefighters, in contrast, did not hear that warning or others issued earlier, since their radios were not linked to the police system. The firefighters' communications system failed frequently that day. Even worse, the problems of 9/11 were a repeat of the same trouble from the 1993 bombings of the World Trade Center. "Communications were a serious problem from the outset" of the 1993 event according to the then-chief of the Department, Anthony L. Fusco.<sup>111</sup> Similar difficulties plagued the September 11 response. "Throughout, of course, there were communications problems. All we had to rely on was handy talkie communications," said Deputy Chief Peter Hayden of the First Division in an interview.<sup>112</sup> No other agency lost communications to the same degree or with

<sup>102</sup> See *supra* notes 195-196 and accompanying text.

<sup>103</sup> See *supra* notes 201-203 and accompanying text.

<sup>104</sup> 29 C.F.R. § 1910.120(q)(2)(ii) requires an emergency response plan to address lines of authority. See also *supra* notes 125-131, 140-141, and accompanying text.

<sup>105</sup> The coordination required under 29 C.F.R. § 1910.120(q)(2)(i) must include communications; as coordination requires communication. 29 C.F.R. § 1910.120(q)(2)(ix) requires emergency alerting and response procedures. 29 C.F.R. § 1910.120(q)(2)(ii) requires planning for "personnel roles, lines of authority, training and communication."

<sup>106</sup> § 1910.120(q)(2)(ii).

<sup>107</sup> Dwyer et al., *supra* note 13, at A1.

<sup>108</sup> *Id.* at A13.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at A12-A13.

<sup>111</sup> *Id.* at A12.

<sup>112</sup> Transcript, Deputy Chief Peter Hayden of the First Division, N.Y. TIMES on the Web, at <http://www.nytimes.com>.

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such fatal effect during the 9/11 response.<sup>113</sup>

## 2. USE OF IMS AND ROLE OF THE INCIDENT COMMANDER

The IC under the NFPA 472 and HAZWOPER standards has broad and well-delineated responsibilities, the first of which is controlling responders and communications.<sup>114</sup> This charge would have provided an important opportunity to identify the problems with communications and lines of authority. HAZWOPER requires that all emergency responders be coordinated and controlled through the IC assisted by the senior official present for each employer.<sup>115</sup> In the *Buttram* matter, in contrast, the IC and RFD officers had minimal contact with one another. Communications problems only exacerbated the disinclination of leaders to consult with one another.<sup>116</sup>

The IC must identify, to the extent possible, all hazardous substances or conditions present and address site analysis, use of engineering controls, maximum exposure limits, hazardous substance handling procedures, and use of any new technologies.<sup>117</sup> The IC must be intimately familiar with the site and methods used to stabilize and control the incident. The IC must implement appropriate emergency operations, and assure that personal protective equipment worn, including breathing apparatus, is appropriate for the hazards present.<sup>118</sup> The HAZWOPER IC will know the training of responders to be that required by known and specific standards. Back-up personnel would have been ready to provide assistance or rescue. Advance first aid support personnel would also have been standing by with medical equipment and transportation capability.<sup>119</sup>

No consolidated action plan was evident: the IC was reacting to developments rather than planning ahead. The IC had too many units for a proper span of control, 8 BLM units and 3 Kuna RFD units. The IC was also apparently acting as safety officer:<sup>120</sup> he was likely suffering from an

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<sup>113</sup>Dwyer et al., *supra* note 13, at A13. See also <http://www.whitehouse.gov/deptofhomeland/sect4.html> (last visited Sept. 19, 2002).

In the aftermath of any major terrorist attack, emergency response efforts would likely involve hundreds of offices from across the government and the country. It is crucial for response personnel to have and use equipment and systems that allow them to communicate with one another. The current system has not yet supplied the emergency response community with the technology that it needs for this mission. The new Department of Homeland Security would make this a top priority.*Id.*

<sup>114</sup>See *supra* note 340 and accompanying text.

<sup>115</sup>29 C.F.R. § 1910.120(q)(3)

<sup>116</sup>*Buttram*, No. 96-0324-S-BLW, at 33. "The BLM knew a great deal about the fire but nothing about the experience and knowledge of Buttram and Oliver." *Id.*

<sup>117</sup>See *supra* notes 135-136 and accompanying text.

<sup>118</sup>See *supra* notes 137-139 and accompanying text.

<sup>119</sup>See *supra* notes 145-148 and accompanying text.

<sup>120</sup>Such a dual role would be a violation of the HAZWOPER standard. See *supra* note 95 and

information overload that put him in a reactive, rather than proactive, mode. The record does not reveal any designated incident facilities.<sup>121</sup>

There was uneven and superficial management of resources: the IC apparently did not appreciate the danger in the position to which he directed Unit 620 for refilling, and the importance of the Red Flag Warning and its existence were not communicated.<sup>122</sup> Further, evidently no safety officer was appointed and no safety briefing was given to the firefighters. Failure to appoint a safety officer means that the IC himself assumed those duties in addition to his other burdens.<sup>123</sup>

Unfortunately, failure to properly utilize IMS is not merely the province of under funded rural emergency response entities. In the aftermath of the September 11 attacks in New York, IMS was reportedly not used correctly, despite all the authorities mandating its utilization.<sup>124</sup> After many years of argument, the New York police and fire departments did not quarrel on Sept. 11. They did not communicate on any established basis at all. “There was not a link,” Police Commissioner Raymond W. Kelly later stated.<sup>125</sup> Police emergency responders did not check in with fire officers in charge of rescue. “They report to nobody and they go and do whatever they want[.]” according to retired Deputy Assistant Fire Chief Albert J. Turi, former senior safety officer of the FDNY.<sup>126</sup>

### 3. Training Requirements

HAZWOPER requires extensive training for responders prior to entering a site.<sup>127</sup> The IC must know the responders’ level of training in order to identify hazards to them.<sup>128</sup> Of course, in a large response, the IC is unlikely to know every responder’s level of training. Failure to be properly trained as a hazardous material technician when attempting to terminate a release is a

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accompanying material.

<sup>121</sup> See *supra* note 144 and accompanying material regarding staging facilities.

<sup>122</sup> *Buttram*, No. 96-0324-S-BLW, at 23-24.

<sup>123</sup> *Id.* at 24-25.

<sup>124</sup> Dwyer et al., *supra* note 13, at A13. Nearly every state, including New York, and the federal government have adopted a structure for managing crises known as the incident command system, in which agencies agree in advance who will be in charge. New York City has not. The Police and Fire Departments did not work together that day, and they rarely did before. *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> 29 C.F.R. § 1910.120(q)(6).

Training shall be based on the duties and function to be performed by each responder of an emergency response organization. The skill and knowledge levels required for all new responders, those hired after the effective date of this standard, shall be conveyed to them through training before they are permitted to take part in actual emergency operations on an incident. *Id.*

<sup>128</sup> See *supra* note 341 and accompanying text.

serious violation.<sup>129</sup>

Under HAZWOPER as well as in the case at hand, the responder's home organization is responsible for his or her training and certification as to level of training.<sup>130</sup> The *Buttram* Court stated that the IC could assume that the firefighters were trained to the standards of the RFD, but the IC at the Point Fire had no way of ascertaining exactly what those standards entailed.<sup>131</sup> Training to the mutually known and understood HAZWOPER standard rather than to the self-regulated RFD standard would have resulted in knowledgeable responders who could enter the site with confidence. Such training would also have given the IC confidence in their abilities.

#### 4. SAFETY OFFICER AND COMMUNICATIONS

The requirement that a safety officer be designated means that safety will always be the first priority. He or she has responsibility for identification and evaluation of hazards and to provide direction with respect to the safety of operations.<sup>132</sup> The safety official has the authority to alter, suspend, or terminate operations.<sup>133</sup> The safety official must immediately inform the IC of any actions needed to be taken to correct hazards at an emergency scene.<sup>134</sup>

Had a HAZWOPER qualified safety officer been present at the Point Fire, he or she could have stopped operations at any of a number of times that bad decisions were made that together resulted in the firefighters' deaths.<sup>135</sup> Before the Kuna RFD ever entered the scene, he or she would have noted the problems with pre-planning if the RFD had been subjected previously to that process. Even if the RFD were an agency assisting in the response from a geographically remote point, near-site pre-planning before the RFD entered the scene would have revealed problems with communications, training and SOPs. The safety officer would have pinpointed the communications problems for the IC in the event that the IC somehow failed to be aware of them, despite HAZWOPER's requirements to the contrary.<sup>136</sup> The safety officer would have constantly monitored the weather, including wind speed and direction. He or she would have had the power to stop Unit 620 from being directed downwind to reload.<sup>137</sup> The safety officer would have assured

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<sup>129</sup>*Victor Microwave, Inc.*, 1996 OSAHRC LEXIS 57, at \*49. Failure to monitor exposure and use of garbage bags as a responder's sole PPE are prima facie showing that responders were not trained as hazardous materials technicians as required by 29 C.F.R. 1910.120(q)(6)(iii). Violation determined to be serious. *Victor Microwave, Inc.*, 1996 OSAHRC LEXIS 57, at \*49.

<sup>130</sup>*Id.*

<sup>131</sup>*See Buttram*, No. 96-0324-S-BLW, at 21.

<sup>132</sup>29 C.F.R. § 1910.120(q)(3)(vii).

<sup>133</sup>§ 1910.120(q)(3)(viii).

<sup>134</sup>*Id.*

<sup>135</sup>*See supra* notes 149-152 and accompanying text.

<sup>136</sup>29 C.F.R. § 1910.120(q)(3).

<sup>137</sup>*See* notes 149-152 and accompanying text.

that the IC had assistance in monitoring communications, so that receipt of the Red Flag Warning by all units would have been verified.

As mentioned above, communication failures on September 11<sup>th</sup> prevented the NYFD from receiving critical information.<sup>138</sup> Despite critical warnings being broadcast on police bands, the information was never relayed to the fire department. “A six-month examination by the [New York] Times found that the rescuers’ ability to save themselves and others was hobbled by technical difficulties . . . that have been part of the emergency response culture in New York City and other regions for years.”<sup>139</sup>

## IX. CONCLUSION

The *Buttram* case stands for important principles applicable beyond the fire protection experience. The lessons learned through the deaths of Buttram and Oliver must be applied to terrorism events, as well as to other types of emergency. The more recent lessons from the September 11 response must also be examined and taken to heart.

Common sense recommends treating any terrorism event as a HAZMAT scene until proven otherwise. Safety demands this cautious approach. Applicable standards also mandate such a view towards these events. Competent use of IMS, MAAs and SOPs must take place at any terrorism event response, whether it involves HAZMAT or not. An important key to advance integration of these elements into a system of safety is the written mutual aid agreement.

The New York City emergency response agencies reported failure to fully utilize IMS apparently resulted in more responder fatalities on September 11, 2001 than would have otherwise occurred. As the New York and *Buttram* experiences illustrate, pre-planning, as required by HAZWOPER, helps to assure proper utilization of these tools. The written MAA is the best vehicle to implement HAZWOPER-required pre-emergency planning and coordination with outside parties.

All emergency response groups owe a duty to emergency responders to exercise reasonable care in order to protect responders from hazards incident to their employment and to provide them with safe tools, appliances, machinery and working places. Of course, terrorism events, fires and other emergency response locations are often dangerous sites, but proper use of IMS, quality written MAAs and good SOPs will ensure that the maximum effort is made to protect responders from foreseeable hazards.

To help assure the highest possible levels of safety for responders as well as to pro-actively avoid potential litigation, all organizations should mandate a documented safety briefing prior to sending personnel to terrorism sites. The safety briefing for terrorism events must include warning of secondary devices, which may be set with the intent of injuring or killing responders. In

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<sup>138</sup>Dwyer et al., *supra* note 13, at A1.

<sup>139</sup>*Id.*

responding to emergencies, whether caused by terrorism, other man made activities, or natural hazards, avoiding liability and ensuring safety frequently require the same actions. Using IMS, MAAs and SOPs as specified in the HAZWOPER standard will serve the goals of both attorneys and responders. For the attorney, the safety-oriented approach will assist in liability avoidance. For the emergency response organization and its members, complying with both legal standards and best practices will assure the highest possible level of safety for emergency responders to the criminal events that comprise acts of terrorism.