

Group H

FOIA/PA NO: 2013-0068

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 Other _____
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 Technique or procedure used for security or prevention of criminal activity
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Other/Comments: _____



DECLASSIFIED

July 23, 2004

SECY-04-0129

TO: Chairman Diaz
Commissioner ~~MCCaffrey~~
Commissioner ~~Merrifield~~
POLICY ISSUE
(Notation Vote)

FROM: Stephen G. Burns
Acting General Counsel

SUBJECT: UPDATE OF PRESIDENTIAL EMERGENCY ACTION DOCUMENTS
(PEADS)

PURPOSE:

[OUO] This paper outlines the combined efforts of OGC and NSIR to review and make recommendations for update of the Presidential Emergency Action Documents (PEADs). There are 48 PEADs, which are currently being reviewed and updated on a government-wide basis. The review and update process is being managed by the Department of Justice (DOJ), the Federal Emergency Management Agency (FEMA), and the National Security Council (NSC).

[OUO] The NRC's input to the PEAD review and update process is due to DOJ and FEMA on July 30, 2004. This paper requests Commission approval to transmit the attached inputs (Attachment 2) to DOJ and FEMA on that date.

DISCUSSION:

I. Background

The PEADs

[OUO] The PEADs are pre-coordinated legal documents designed to implement Presidential decisions during a national emergency. The PEADs consist of proclamations, executive orders, Presidential messages, and draft legislation ready for submission to Congress. Originally designed for use in the event of any major attack against the United States that disrupted the normal functions of the government, PEADs are used to implement extraordinary Presidential authority in response to extraordinary situations.

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DERIVED FROM 1989 document (FEMA)
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- [OUO] The PEADs are useful tools in the case of an emergency because they are flexible, may be quickly executed, and are capable of rapid distribution and implementation. PEADs reduce the normal amount of time required to promulgate and implement such Presidential documents by being prepared in advance of an emergency. They are divided into seven categories according to their subject matter, and designate departments or agencies that would have primary or support responsibility should the PEAD be executed.
- [OUO] Under the PEAD system, primary responsibility is designated to an agency recommending the execution of the PEAD, or one of the main agencies responsible for its implementation. Support responsibility is designated to an agency that has either been assigned direct involvement in carrying out one or more provisions of a PEAD, or an agency that would be directly impacted by the carrying out of a PEAD.

The PEAD Update and Revision Project

- [OUO] The current PEAD portfolio was created in 1989 and contains 48 PEADs. The first meeting to discuss the PEAD update and revision project took place on April 22, 2004. The NRC was not invited to this meeting, nor was the NRC specifically invited to review the PEAD portfolio. According to FEMA, the NRC was not asked to participate in the review because the NRC is not listed as a primary or support agency in any PEAD.
- [OUO] NSIR staff did not learn until June 2004 that the PEAD review was underway. NSIR staff subsequently contacted FEMA and requested copies of the PEADs and guidance on how to participate in the review process. NSIR staff did not receive this information until late June.
- [OUO] The PEAD review and update process calls on all federal departments and agencies to review existing PEADs and develop any new PEADs within their jurisdiction. FEMA serves as the Executive Secretariat to facilitate the review and update process, while DOJ determines the legal sufficiency of any proposed changes or additions to the PEADs. The NSC provides overall policy direction for the effort, and will serve as the final approval authority for any recommended PEAD changes.
- [OUO] There were three main steps to the OGC/NSIR PEAD review and update process. First, OGC and NSIR jointly reviewed existing PEADs to determine their potential impact on the NRC, its licensees, and the energy sector in general. Second, NSIR developed a list of potential NRC security concerns during a national emergency that might be addressed through the PEAD mechanism, and researched whether those concerns are currently being addressed outside the PEAD framework. Finally, OGC researched the legal basis for existing PEADs, as well as recently enacted legislation, to determine whether there is any statutory basis to justify the proposal of a new or amended PEAD to address NSIR's concerns. On the basis of our review, OGC recommends one minor change to the comments on an existing PEAD.

II. Analysis of Existing PEADs

[S] [U] As mentioned above, the PEADs are organized by seven broad categories:

[REDACTED]

[S] [U] Only category D contains PEADs that, if executed, might directly impact the operations of NRC-licensed facilities. These PEADs, D-201 and D-301, are discussed in some detail below. PEADs in categories A, F, and G might indirectly affect NRC licensees—for example,

[REDACTED]

PEADs in categories B and E are not likely to impact NRC operations or NRC-licensed activities and are not discussed here.

[U] We turn now to a discussion of specific PEADs of greatest interest to the NRC.

[S] [U] [REDACTED]

[S] [U] [REDACTED]

[S] [U] SUPPORTING AGENCIES: To be determined at the time of implementation

[S] [U] [REDACTED]

[REDACTED]

[S] [U] One statute that does is the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 *et. seq.* That Act authorizes the President to declare an emergency under certain circumstances, thus bringing federal resources to bear in response to catastrophic events. For example, in the event of a successful terrorist attack on a nuclear power plant or a natural disaster resulting in a radioactive release, the President might choose to execute his Stafford Act authority.²

[S] [U] Federal response to a Presidentially-declared emergency under the Stafford Act would be organized under the National Response Plan (NRP), which is currently being developed by the Department of Homeland Security (DHS) with input from the NRC and other agencies.

[REDACTED]

[S] [U] With the Commission's approval, OGC would recommend that DOJ add clarifying comments [REDACTED] The specific clarifying comments are set forth in the proposed transmittal to DOJ (Attachment 2).

[S] [U] [REDACTED]

[S] [U] [REDACTED]

[S] [U] SUPPORTING AGENCIES: To be determined at time of implementation

[S] [U] [REDACTED]

²[OUO] We refer here to the President's authority to declare an "emergency" under the Stafford Act, not his more familiar power to declare a "major disaster" in response to a state governor's request. The President's authority to declare an "emergency" can be exercised without first receiving a state governor's request for assistance. Compare 42 U.S.C. § 5191(a) with 42 U.S.C. § 5191(b).

³[U] According to the House Report No. 93-707 on the Energy Reorganization Act of 1974, DOE (then the Energy Research and Development Administration) and NRC share authority under AEA section 108. H.R. Rep. No. 93-707 at 27 (Dec. 7, 1973). Under section 201 of the Energy Reorganization Act, NRC exercises "licensing and regulatory" functions under section 108. DOE exercises all other functions. See ERA § 104(c).

[S] [U] [REDACTED]

[S] [U] [REDACTED]

[S] [U] [REDACTED]

[S] [U] [REDACTED]

[S] [U] [REDACTED]

Nevertheless, the attached inputs to DOJ (Attachment 2) reflect this expectation and call for appropriate NRC coordination in the event this PEAD is executed in a manner that impacts NRC-licensed facilities.

[S] [U] [REDACTED]

⁴[U] See 50 U.S.C. App. 2071. Statutory authority in 10 U.S.C. § 2538 and 50 U.S.C. § 82 also forms the legal basis for the President's authority under PEAD D-201.

⁵[U] 10 U.S.C. § 2538 authorizes the President to take such action in the time of war or when war is imminent, while 50 U.S.C. § 82 could only be used in the time of war. This section is particularly applicable to the NRC because it defines "war materials" to include "arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof." Naval reactor fuel manufactured by a fuel facility is likely to fall under this definition.

⁶[U] Executive Order 12,919 delegated to DOE the President's authority under 50
(continued...)

(S) [U] Ultimately, an extraordinary situation may arise where the NRC would have a supporting role
[REDACTED]

(S) [U] [REDACTED]

(S) [U] [REDACTED]

(S) [U] SUPPORTING AGENCIES: To be determined at the time of implementation

(S) [U] [REDACTED]

(S) [U] [REDACTED]

(S) [U] [REDACTED]

⁶(...continued)
U.S.C. App. 2017(c) to require the allocation of materials, equipment, and services to maximize domestic energy supplies with respect to all forms of energy. See 59 Fed. Reg. 29,525 (1994).

⁷[U] See 50 U.S.C. 2071(a) & (b).

⁸[U] See note 6, *supra*.

~~(S)~~ [U]

[REDACTED]

~~(S)~~ [U]

[REDACTED]

~~(S)~~ [U]

After legal review, OGC does not recommend any change to the existing PEAD. As written,

[REDACTED]

2

~~(S)~~ [U]

[REDACTED]

~~(S)~~ [U]

[REDACTED]

~~(S)~~ [U]

SUPPORTING AGENCIES: To be determined at the time of implementation

[U]

Under 10 U.S.C. § 12406, the President may call the National Guard into federal service whenever one of the following three circumstances exist:

- (1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;
- (2) there is a rebellion or danger of rebellion against the authority of the Government of the United States; or
- (3) the President is unable with the regular forces to execute the laws of the United States.

⁹[U] 50 U.S.C. § 2152(12).

¹⁰[U] 50 U.S.C. App. 2071.

(S) [U]

[REDACTED]

(S) [U]

[REDACTED]

(S) [U]

[REDACTED]

Other than this statement of clarity, no revision to this PEAD is necessary.

[U] Other Energy-Related PEADs

(S) [U]

[REDACTED]

~~[S]~~ [U]

III. Analysis of Recently Enacted Legislation and Consideration of New PEADs

- [OUO] As stated above, NSIR provided OGC with a list of potential areas of NRC concern during a national emergency that might be remedied by creation of a new PEAD (Attachment 1). In addition to analyzing existing PEADs to determine whether they could be used to address NSIR's concerns, OGC analyzed recently enacted legislation to determine whether any new Presidential emergency powers have been established that might be incorporated into the PEADs. Specifically, OGC examined the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002 to determine whether Congress has provided the President with any emergency powers that might support new PEADs germane to the NRC's mission and/or responsive to NSIR's concerns.
- [OUO] The Homeland Security Act, though sweeping in its reorganization of federal agencies, did not significantly expand the emergency powers of the President. Most, if not all, Presidential powers established by the Act relate to appointments, transfers and designations of officials responsible for executing the Act. The Act does establish some substantive Presidential authority—for example, the President is directed to prescribe government-wide policies and procedures for sharing and protecting homeland security information. But this authority is apparently exercised through normal policymaking channels on a continuing basis and would not require a PEAD for emergency implementation.
- [OUO] The USA PATRIOT Act includes a wide range of provisions aimed at improving investigative tools in the fight against terrorism. These provisions largely apply to the day-to-day functions of law-enforcement agencies. The Act also expands the President's authority to confiscate property of foreign entities that engage in armed hostilities against the United States. Although seizure of property would disrupt terrorist organization over time, it would not likely address pressing social, economic, military, or political issues during or after a national emergency. Therefore, there appears to be no need for this Presidential authority to be implemented through the PEAD mechanism. It is also unclear how a PEAD related to the President's powers under the USA PATRIOT Act would relate to NRC's mission.
- [OUO] Ultimately, OGC discovered no new statutory authority that might be used to support development of new PEADs germane to NRC's mission or that would address the areas of concern identified by NSIR (Attachment 1).

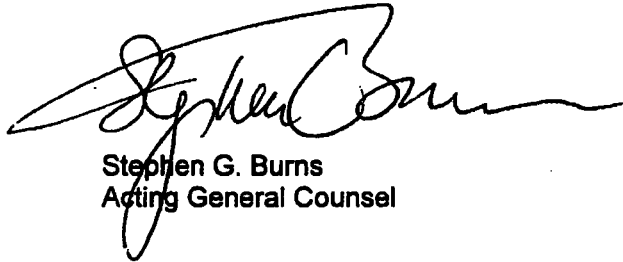
COORDINATION

[U] This paper has been coordinated with the Office of the Executive Director for Operations and the Office of Nuclear Security and Incident Response.

RECOMMENDATION

[U] That the Commission approve transmittal of the proposed comment letter to FEMA and DOJ (Attachment 2).

[U] Note: In order to meet the July 30 deadline, prompt Commission action is requested.



Stephen G. Burns
Acting General Counsel

Attachments:

1. NSIR Areas of Potential Concern
2. Proposed Comment Letter

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB Wednesday, July 28, 2004.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT July 27, 2004, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:

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**ATTACHMENT 1
NSIR AREAS OF POTENTIAL CONCERN DURING NATIONAL EMERGENCIES**

[OUO] As part of the PEAD review and update process, NSIR staff posed a number of scenarios that might arise during a national emergency and asked whether any PEADs should be changed or added to address those scenarios. NSIR (in consultation with other offices) also considered whether existing authorities outside the PEAD framework could be used to address its concerns. OGC then analyzed existing PEADs and recent legislation to determine whether any of NSIR's concerns should be addressed through PEAD changes. Ultimately, OGC recommends no substantive changes to the PEADs because NSIR's concerns can either be addressed using existing PEADs, or are better addressed through other decisionmaking processes.

NSIR Concerns Addressed by Existing PEADs

[OUO] 1. In the event of a national emergency, the President should not have to wait for a state governor to request assistance under the Stafford Act or to engage the National Response Plan. Should a PEAD be developed that would allow the President to act accordingly?

[OUO] • Under 42 U.S.C. § 5191(b), the President may engage the Stafford Act without a request from a state governor by declaring that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. The National Response Plan would be used to implement the Stafford Act in these circumstances.

[OUO] • [REDACTED] OGC will recommend to DOJ that the background comments [REDACTED] make this explicit.

[OUO] 2. Situations may arise where security at critical nuclear facilities needs to be supplemented with armed forces. Should the President be able to direct the use of National Guard units or military reserves for this purpose using a PEAD?

[S] [U]

• [REDACTED]

[S] [U]

• [REDACTED]

[S] [U]

3. Situations may arise where specific goods or services are needed to respond to a nuclear incident. For example, priority diagnosis and treatment for essential nuclear power plant personnel exposed to a range of chem-bio-rad hazards may be needed. [REDACTED]

[REDACTED]

[S] [U]

[REDACTED]

[S] [U]

In OGC's view, [REDACTED] In the scenario posed by NSIR, the Department of Health and Human Services, which has been delegated authority to act under the DPA by Executive Order 12,919, would be empowered [REDACTED]

Other NSIR Concerns for Which No PEAD Changes are Needed

[OUO]

1. Situations may arise where a need for power requires continued nuclear power plant operation in violation of federal environmental laws or under degraded safety conditions. Would a PEAD authorizing such operation be useful?

[OUO]

• OGC does not recommend the development of a PEAD that could be used to order operation of nuclear power plants under degraded safety conditions. Enforcement discretion could be exercised by federal authorities (including the NRC) to allow continued operation even though not all safety and environmental requirements are being met. Specific decisions should be made by the agencies expert in the relevant field. PEADs are not used to make these detailed, technical judgments.

[OUO]

2. Terrorist attacks may cause radioactive material shipments to be rerouted through states that object. Is a PEAD necessary to resolve those objections?

[OUO]

• The Department of Transportation currently has the authority to route shipments over a state's objection, so a PEAD is not needed. DOT regulations adopted under the Hazardous Materials Transportation Act of 1975, as amended, would preempt state efforts to block emergency rerouting of radioactive material shipments. See 49 U.S.C. §§ 5101-5127; 49 C.F.R. § 397.101.

[OUO]

3. The NRC may need to take control of certain radioactive materials because of increased threats, weakened security, or other reasons that increase the risk to the public. Is a PEAD necessary for this purpose?

- [OUO] • Under AEA sections 108 and 186.c, the Commission has authority to order the recapture of special nuclear material if a license is revoked or if Congress declares a national emergency.
- [OUO] • The Commission also has broad authority under the AEA to take actions to protect public health and safety and promote the common defense and security. This authority can be invoked to ensure protection of material by mandating protective measures or transfer of material to an authorized recipient. The NRC also has a standing agreement with DOE to take radioactive materials when necessary to protect the public.
- [OUO] 4. It may become critical and urgent that the NRC participate more directly in assessing a threat or in sharing threat information than is normally allowed. Should a PEAD ordering enhanced information sharing be written to meet the NRC's needs?
- [OUO] • Information sharing and intelligence coordination continues to be a high priority in the daily operations of the federal government. In a national emergency, OGC expects that those efforts would be further enhanced as observed in the response to the attacks of September 11, 2001. Improvements to information and intelligence sharing should continue to be pursued through the Department of Homeland Security and existing intelligence groups with which NRC has working contacts.
- [OUO] 5. Nuclear power plant workers may refuse to work due to terrorist threats against the plant or a spreading outbreak of communicable disease or virus. Should a PEAD be developed to address this possibility?
- [OUO] • If a nuclear plant does not have enough willing workers to operate safely, it would have to be shut down. There is no legal authority that could be used to force nuclear power plant employees to work.

**ATTACHMENT 2
PROPOSED COMMENT LETTER TO DOJ**

Dear Sir or Madam:

[OUO] This letter provides the Nuclear Regulatory Commission's (NRC) input to the Presidential Emergency Action Documents (PEADs) update and review process. Although the NRC was not invited to participate in this review, the NRC learned of the project through contacts with FEMA and requested the opportunity to comment. The NRC did not receive the PEADs or review guidance until late June.

[OUO] The NRC recommends one minor change to the comments on an existing PEAD, offers clarifying comments setting forth its understanding of another PEAD, and sets forth its expected role as a support agency in the event certain PEADs are executed.

[REDACTED]

[S] [U] [REDACTED]

[S] [U] [REDACTED] to implement the NRP or the Stafford Act in every situation. In typical scenarios, the President implements those authorities by declaring a "major disaster" in response to a state governor's request—this model remains valid and should continue to be followed [REDACTED]. But extraordinary circumstances may arise that require the President to engage the Stafford Act and the NRP even before a state requests federal assistance. In such circumstances, the President may wish to exercise his authority under 42 U.S.C. § 5191(b) to declare an "emergency" so that federal resources are quickly brought to bear.

[S] [U] [REDACTED] But currently, it is not clear [REDACTED] can trigger application of the NRP. NRC proposes that DOJ consider adding the following comment to the legal basis discussion [REDACTED]

[S] [U] [REDACTED]

Alternatively, the President could issue a subsequent, stand-alone executive order implementing his emergency powers under the Stafford Act.

[REDACTED]

(S) [U]

[REDACTED]

Clarification of NRC Supporting Agency Role

(S) [U]

The NRC notes that a number of PEADs, if executed in a particular manner, could impact

[REDACTED]

If you have any questions about our comments, please contact our staff attorney Darani Reddick at (301) 415-3841 or Jared Heck at (301) 415-1623. I can be reached at (301) 415-1740. Thank you for the opportunity to provide input to the PEAD review and update process.

Sincerely,

Stephen G. Burns
Acting General Counsel