

fuel to motorists in the event of a radiological emergency at Shoreham. Thus, LILCO sums up its argument as follows:

In a real emergency LERO would get permission from Suffolk County (or as a back-up, from New York State) before removing any obstructions from the roads or giving any gasoline to evacuees. In a fast-breaking accident, LERO would get permission from the County Executive by telephone In a more likely, slower-developing accident, permission would be obtained face-to-face from a County representative at the LERO EOC.

LILCO 4/9 Motion at 1 (emphasis added). LILCO accordingly concludes that its failure to have the "legal authority" to perform the actions at issue in Contentions 4 and 9 would not "harm the public health and safety or lead to lesser 'dose savings' than otherwise," because the "best efforts" of the Suffolk County Executive would necessarily permit LERO personnel to remove road obstructions and provide fuel. Id. at 6. LILCO is wrong, and its argument must fail. Not only are the State and the County prohibited by law from delegating its police powers to LILCO, but as a factual matter the evidentiary record is clear that State and County authorities, including the Governor and the Suffolk County Executive, could not and would not authorize LERO personnel to exercise governmental police powers by removing road obstructions, providing fuel or performing other functions reserved to the Governments under their police powers. See Cuomo Affidavit, ¶¶ 3, 5; Halpin Affidavit, ¶¶ 7, 11. See also Governments' Overview, Section V. Thus, the premise of LILCO's

argument is lacking in both legal and factual basis and LILCO's Motion must be denied.

LILCO's Motion must also be denied for other reasons. First, this Board recently denied LILCO's third attempt for summary disposition of Contentions 4 and 9, finding that certain questions remained outstanding. Included among those unresolved questions were who would remove road obstructions, how they would be removed, how fuel would be dispensed, and whether fuel could actually be dispensed. September 17 Order at 36, 39.^{2/} LILCO's Motion does not address these questions and, accordingly, they remain unresolved. Second, the material "facts" that LILCO claims to be without dispute are in fact disputed. See LILCO's Statement of Material Facts as to Which There Is No Genuine Issue on Contentions 4 and 9 ("LILCO's Statement"), attached to LILCO's Motion as Attachment 1. A Statement of Material Facts as to Which There Exists a Genuine Issue to Be Heard on Matters Raised by LILCO's Motion For Summary Disposition on Contentions 4 and 9 ("Governments' Statement") is attached hereto. In the face of such unresolved factual issues, summary disposition cannot properly be granted.

^{2/} Memorandum and Order (Ruling on Applicant's Motions of March 20, 1987 for Summary Disposition of the Legal Authority Issues and of May 22, 1987 for Leave to File a Reply in Interpreting Rulings Made by the Commission in CLI-86-13 Involving the Remand of the Realism Issue and Its Effect on the Legal Authority Question), Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, _____ NRC _____ (September 17, 1987). ("September 17 Order").

II. BACKGROUND

This is LILCO's fourth attempt for summary disposition of Contentions 4 and 9. Contention 4 concerns LILCO's lack of authority to remove obstructions from the roadways using tow trucks or other means. Contention 9 addresses LILCO's lack of authority to dispense fuel from fuel trucks. As alleged in Contentions 4 and 9, LILCO's inability to remove obstructions or to dispense fuel so that evacuees will not run out of gas renders its evacuation time estimates invalid, and makes it impossible to implement the evacuation procedures contained in the LILCO Plan.

In CLI-86-13, the Commission, while acknowledging that LILCO lacked legal authority to perform, among other things, the functions at issue in Contentions 4 and 9, remanded the matters raised in those contentions to this Board for further proceedings, to determine whether a "best efforts" governmental response would be adequate. CLI-86-13, 24 NRC at 32. Without permitting the Board to conduct the further factual inquiry ordered by the Commission, LILCO, on March 20, 1987, filed its "Second Renewed Motion for Summary Disposition of the 'Legal Authority' Issues (Contentions EP 1-10)." Among the LILCO arguments made at that time were conclusory statements, similar to those in the instant Motion, that the State and County would delegate authority to LILCO to exercise inherently governmental functions.

In ruling on LILCO's Second Renewed Motion for Summary Disposition, this Board rejected LILCO's attempt to circumvent the fact-finding required by CLI-86-13, holding that "[t]he 'best efforts' assumption is of no assistance to LILCO in the face of sworn Affidavits from Intervenors asserting that they would not and could not delegate their police powers to LILCO."

September 17 Order at 46. Consistent with CLI-86-13's call for further fact-finding, the Board recognized that there were many factual issues in dispute:

Our analysis of the 10 contentions [including Contentions 4 and 9] earlier in this decision reaches the conclusion that there remain factual questions of adequacy of the Governments' response for each of them.

Id. at 45. With respect to Contention 4, this Board specifically noted several outstanding factual issues:

. . . one cannot say from the present record how these obstructions would be removed, who would remove them, or how their removal would be coordinated with such other functions as guiding traffic and selecting alternate evacuation routes. It is not clear who would be in overall charge of a clear and well-planned response.

Id. at 36. Likewise, regarding Contention 9, the Board also recognized that issues of fact remained to be decided, stating that "[i]t is presently unclear how this safety feature

(dispensing fuel) would function, or indeed, whether it would function at all." Id. at 39.

Despite the Commission's instruction for fact-finding and this Board's unequivocal ruling that such an inquiry is required in light of numerous unresolved factual issues, LILCO now, once again, seeks summary disposition. As before, LILCO raises the "best efforts" argument in the face of evidence demonstrating that the Governments would not and could not authorize LILCO to exercise governmental police powers. As before, LILCO's attempt to overcome the need to determine the facts -- a matter which this Board and the Commission have expressly recognized -- with speculation and theory must be denied.

III. DISCUSSION

- A. The Governments Could Not and Would Not Give LILCO Legal Authority to Remove Obstructions or Dispense Fuel
 - 1. The Governments, as a Matter of Law, Cannot Delegate Their Police Powers

LILCO's Motion is filled with conclusory statements that the County would authorize LILCO to perform the tasks at issue in Contentions 4 and 9. However, for the reasons set forth in Section V of the Governments' Overview Memorandum, the State and County cannot lawfully delegate their police powers.

The question of LILCO's legal authority to usurp the police powers of the Governments was first presented to the New York State Courts in Cuomo v. Long Island Lighting Co.^{3/} There, the State Supreme Court held that the functions embraced by LILCO's Plan are inherently governmental, that LILCO has no legal authority to carry out those functions or to implement its Plan as a whole, and that neither the State nor the County can legally authorize LILCO to implement its Plan or perform the functions embraced by Contentions 1-10. Accordingly, the Court entered an order prohibiting LILCO from implementing its Plan -- a decision since affirmed on appeal.

In CLI-86-13, the Commission correctly interpreted Cuomo v. LILCO to hold that LILCO is prohibited by law from performing the governmental functions outlined in Contentions 1-10. 24 NRC at 22. Subsequently, this Board also had the opportunity to address Cuomo v. LILCO, ruling in the September 17 Order that LILCO's realism defense promised upon LILCO gaining permission to perform various acts was in conflict with Cuomo v. LILCO. See September 17 Order at 25. The Board later reaffirmed this decision: "[Cuomo v. LILCO] prohibits the government from delegating its police power." October 29 Order at 13 (emphasis added).^{4/} In short, as everyone but LILCO has recognized, LILCO

^{3/} Consol. Index No. 84-4615 (N.Y. Sup. Ct.), slip op., Feb. 20, 1985, aff'd, 511 N.Y.S. 2d 867 (2d Dept. 1987), appeal pending (hereafter, "Cuomo v. LILCO").

^{4/} Memorandum and Order (Ruling on Applicant's Motion of
(footnote continued)

is a private company to which the Governments' police powers cannot lawfully be delegated. Accordingly, the conclusory statements which form the basis for LILCO's Motion are legally defective. See Governments' Overview, Section V.

2. The Governments Would Not Delegate Their Police Powers to LILCO

Even if the Governments could delegate to LILCO the legal authority to perform the functions at issue in Contentions 4 and 9, they would not do so. First, New York State and Suffolk County officials consider LERO personnel, including those who would be removing roadway obstructions and providing fuel to evacuees, to be inexperienced and lacking in essential training.^{5/} See Cuomo Affidavit, ¶¶ 3, 6; Halpin Affidavit, ¶ 7; Roberts 1988 Affidavit, ¶ 10. Second, as the Affidavits of the Governor and the Suffolk County Executive attest, permission would not be given because LILCO's Plan is "unworkable and

(footnote continued from previous page)
October 5, 1987 for Reconsideration and Other Relief), Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-29, _____ NRC _____ (Oct. 29, 1987) ("October 29 Order").

^{5/} LILCO misleadingly claims that its accompanying Motion for Summary Disposition of Contentions 5 and 6 explains how "the LERO Director of Local Response would ordinarily receive permission to perform needed functions from the County Executive." LILCO 4/9 Motion at 5. LILCO's Motion for Summary Disposition of Contentions 5 and 6, like LILCO's Motion for Summary Disposition of Contentions 4 and 9, contains nothing more than unsupported assertions that the Suffolk County Executive could and would give permission to LERO to perform governmental functions. These assertions are plainly false. Everything in the evidentiary record demonstrates that the Suffolk County Executive could not and would not give such permission. See, Halpin Affidavit, ¶ 7.

inadequate" (Cuomo Affidavit, ¶¶ 3, 5) and "seriously flawed and unable to protect public safety" (Halpin Affidavit, ¶ 7, 11). Third, the Governments would not rely on LILCO to take actions in response to an emergency based on its past performance. See, e.g., Halpin Affidavit, ¶ 7. Fourth, the Governments would not rely on LILCO for aid and advice on how to respond to a catastrophe that LILCO itself had created. Cuomo Affidavit, ¶ 4; Halpin Affidavit, ¶¶ 7, 9.

The OL-5 Licensing Board agrees with this negative assessment of the LILCO Plan and of the LERO personnel expected to implement that Plan. Thus, that Board recently ruled that fundamental flaws in LILCO's Plan were demonstrated in the areas of communications, training, public information, and mobilization during the February 13, 1986 Exercise of the LILCO Plan. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-2, _____ NRC _____ (Feb. 1, 1988). See also discussion of Exercise Decision in Governments' Overview, Section VI. The OL-5 Board's overall conclusion was that these fundamental flaws, while they remain uncorrected, bar the issuance of an operating license for Shoreham. Id. at 3. Of particular importance to Contention 4, the OL-5 Board found a fundamental flaw in LERO's communications system in that, among other things, it was found to "inherently" hamper LILCO's response to unexpected events, including the removal of road impediments. Id. at 53. The OL-5 Board concluded that because

of this fundamental flaw, LILCO's communications system "should be reviewed and revised." Id.

The OL-5 Board also found that the LERO personnel, who LILCO claims will remove impediments and fuel vehicles in the event of an emergency, are "amateur" emergency workers. Id. at 63. Likewise, it found that it is "questionable whether utility personnel can ever achieve the level of performance that professional emergency workers, such as the police, display." Id. In light of these findings, it is clear that New York State and Suffolk County officials would never permit, or rely on, LERO personnel to remove impediments or provide fuel in the event of a radiological emergency at Shoreham. See Cuomo Affidavit, ¶¶ 3, 5; Halpin Affidavit, ¶¶ 7, 9 and 11. Therefore, even if State and County officials could delegate to LILCO the "legal authority" needed by LILCO to prevail on Contentions 4 and 9, LILCO's assumption that such officials would actually do so is patently false.

3. The Anecdotal Information in LILCO's Affidavits are Irrelevant to the Issue at Hand

LILCO asserts that the Governments would grant permission to LILCO to remove obstructions from the roadways and dispense fuel because the Governments ask LILCO employees for "help of this sort . . . all the time." LILCO 4/9 Motion at 2. In support of this assertion, LILCO references the affidavits of two of its

employees, Messrs. Daverio and Kessler. This LILCO assertion, however, is unavailing because the referenced affidavits are simply not relevant to the matter at hand.

The Daverio Affidavit describes several isolated incidents^{6/} that are clearly not of the same magnitude, and cannot be compared to, removing road obstructions and providing gas to evacuees during a radiological emergency at Shoreham. Halpin Affidavit, ¶ 7, n.3. These incidents, which involve such acts as rendering first aid, covering an injured man with a jacket, turning off a van's ignition, and setting out flares, are not remotely related to the delegation of governmental police powers by the State or Suffolk County, or to the performance of the functions at issue in Contentions 4 and 9. Therefore, the Daverio Affidavit should be ignored.

The Kessler Affidavit is similarly unsupportive of LILCO's Motion. The Kessler Affidavit discloses that LILCO performs maintenance and repair work near roadways, conducts seminars on

^{6/} The Daverio Affidavit discloses that LILCO vehicles are in a neighborhood watch program and describes how five LILCO employees received neighborhood watch program awards in 1986 for assisting at accidents and medical emergencies. Daverio Affidavit, ¶¶ 18-21 and 23. The Daverio Affidavit further discloses that LILCO employees responded to three incidents in 1987 involving either a downed utility wire or utility pole. Daverio Affidavit, ¶ 24. Finally, the Daverio Affidavit notes that a LILCO wrecker truck was coincidentally in the area of a trailer stuck in mud and it unsuccessfully attempted to tow the trailer out at the request of a Suffolk County sheriff's deputy. Daverio Affidavit, ¶ 26. How these circumstances are comparable to a radiological emergency -- as they obviously are not -- is left unexplained by LILCO.

gas and electric emergencies, and evacuates buildings when the possibility of a gas leak is made known to LILCO. These actions are simply part of LILCO's duties and responsibilities as a utility, and certainly cannot be likened to removing road obstructions and providing fuel during a radiological emergency at Shoreham -- functions which cannot be performed by a private utility absent usurpation of governmental police powers. Thus, the Kessler Affidavit should similarly be disregarded by the Board.

B. LILCO's Motion Does Not Address Issues of Fact Found to Be Left Open by This Board

LILCO's Motion must also be denied because it ignores this Board's finding in its September 17 Order that issues of fact remain outstanding which must be resolved before Contentions 4 and 9 can be decided on their merits. For instance, this Board then ruled that the question of how LILCO would acquire the "legal authority" necessary to implement the actions specified in Contentions 1-10 had not been resolved. September 17 Order at 46. LILCO's Motion ignores this Board's concern, and thus, LILCO does not adequately explain how it will acquire this "legal authority." Rather, LILCO simply makes conclusory statements in its Motion that it would obtain the "legal authority."

As discussed above, however, such statements are totally unsupported by the evidentiary record.^{7/} Not only do they fly directly in the face of the sworn affidavits of the Governor of New York and the Suffolk County Executive, but they leave unanswered the question raised by the Board as to how LILCO would acquire the "legal authority" to implement the actions specified in Contentions 1-10. Thus, LILCO does not analyze or even address who in the Suffolk County government would provide such authority, how long it would take, and how the flaws in LILCO's communications system discovered in the Exercise would affect the grant of such authority.

LILCO's Motion also ignores the specific questions posed by this Board in denying LILCO's previous motion for summary disposition of Contentions 4 and 9. With respect to Contention 4, this Board found that the record was devoid of evidence as to "how these obstructions would be removed, who would remove them, or how their removal would be coordinated with such other functions as guiding traffic and selecting alternate evacuation routes. It is not clear who would be in overall charge of a clear and well-planned response." September 17 Order at 36. Despite the Board's clearly-stated concerns, LILCO's Motion

^{7/} LILCO also includes in its Motion, as Attachment 2, 78 pages of its Plan that, according to LILCO, relates to Contentions 4 and 9. These portions of the Plan, however, were part of the evidentiary record when this Board, in its September 17 Order, found that issues of fact remained outstanding with respect to Contentions 4 and 9. Attachment 2, therefore, does not respond to, and is irrelevant to resolving, the outstanding questions before this Board with respect to Contentions 4 and 9.

contains no new insight or information as to how these outstanding questions can or will be answered.

Likewise, regarding Contention 9, this Board found that "[i]t is presently unclear how this safety feature [dispensing fuel] would function, or, indeed, whether it would function at all." September 17 Order at 39. Again, LILCO's Motion ignores these questions of fact, which remain unanswered.

Aside from the questions raised by the Board, other questions remain outstanding. Included are: whether, assuming an ad hoc "best efforts" governmental response, the provisions in LILCO's Plan for removing road obstructions will be implemented; whether, assuming a "best efforts" governmental response, obstructions caused by vehicles running out of gas can be prevented or removed; whether, assuming a "best efforts" governmental response, there can be a finding of compliance with NUREG 0654; whether a "best efforts" governmental response would be the same as, or consistent with, the LILCO Plan and procedures referenced in Contentions 4 and 9; whether the Governments are familiar with LILCO's Plan; under a "best efforts" governmental response, how would a decision to develop and implement a plan to remove road obstructions and provide fuel be implemented and how long would it take; under a "best efforts" governmental response, how long would it take to mobilize and dispatch personnel into the field to remove road obstructions and provide fuel; under a

"best efforts" governmental response, would a sufficient number of qualified personnel be available, willing and able to implement a plan to remove road obstructions and provide fuel; and would a "best efforts" governmental response be adequate, coordinated, integrated and otherwise sufficient to protect the public health and safety and comply with regulatory requirements. These outstanding questions become even more significant in light of the fundamental flaws found by the OL-5 Licensing Board in LERO's ability to remove road impediments and to train emergency workers. With so many questions remaining unresolved, summary disposition at this point -- if ever -- is inappropriate. LILCO's Motion must be denied. See also Governments' Overview, Section III, discussing why the amended NRC rule does not alter the September 17 Order.

C. There Are Genuine Issues to Be Heard on LILCO's Statement of "Material Facts" as to Which LILCO Claims There Are No Genuine Issues

Attached to LILCO's Motion are five "material facts" as to which LILCO claims there are no genuine issues to be heard. See LILCO's Statement, attached as Attachment 1 to LILCO's Motion. However, as shown below, these "facts" are either unsupported by the record, false or immaterial.

Alleged Fact 1 - LILCO claims that all LERO road crews, including those who are to provide gasoline to motorists in an

evacuation, have two-way radio communication with the LERO EOC. This alleged "fact," however, is immaterial to LILCO's Motion. The capabilities of the LERO road crews are not dispositive of whether summary disposition should be granted in LILCO's favor. This Board has recognized that certain questions remain outstanding, including how obstructions would be removed, who would remove them, and how would the practice of dispensing fuel actually work. September 17 Order at 36, 39. Whether the LERO road crews have two-way radio communication with the LERO EOC is immaterial, and does not respond, to these questions.

Moreover, this alleged "fact" becomes even more immaterial in light of the OL-5 Licensing Board's Exercise Decision. In its Decision, the OL-5 Board found a fundamental flaw in LERO's communications system relating to, among other things, the removal of road impediments. The Board also found a fundamental flaw in the Plan concerning, among others, the area of communications. Exercise Decision at 251-52; see Governments' Overview, Section VI. Therefore, even if LERO road crews have the equipment to be in communication with the LERO EOC, it would be immaterial to their performance. Simply put, as the OL-5 Licensing Board has found, LERO's communications system and the LERO workers' ability to use it are fundamentally flawed.

Alleged Fact 2 - LILCO next claims that the Suffolk County authorities may lawfully ask (or direct) utility company

employees to remove disabled vehicles from the road in an emergency. Alleged "Fact 2" is both false and unsupported by the record, for the reasons discussed in detail above and briefly summarized below. First, Suffolk County authorities are legally prohibited from delegating police powers to LILCO or to any other private citizen. Second, there is nothing in the record that gives even the slightest suggestion that Suffolk County authorities would either ask or direct LILCO to remove disabled vehicles from the road in an emergency. Third, even if Suffolk County authorities did have the legal authority to do so, they would not rely on LERO's personnel to perform such a vital and necessary function as removing roadway impediments, given the OL-5 Licensing Board's finding (Exercise Decision at 63) that LERO personnel are "amateur" emergency workers. See Halpin Affidavit, ¶¶ 7, 9, 11. Therefore, LILCO's alleged "Fact 2" is without basis.

Alleged Fact 3 - LILCO further claims that the Suffolk County authorities may lawfully ask or direct LILCO employees to provide fuel to motorists in an emergency. However, for the identical reasons that alleged "Fact 2" should be given no weight, alleged "Fact 3" should be disregarded.

Alleged Fact 4 - In alleged "Fact 4," LILCO claims that in an emergency requiring the evacuation of the public from around the Shoreham plant, if an obstruction occurred on the roads that

would hinder evacuating motorists, Suffolk County would permit LERO personnel to remove the obstruction unless there were a better way to remove it. Alleged "Fact 4" is plainly false. Even assuming, arguendo, that Suffolk County officials could permit LILCO personnel to remove roadway impediments, they would not authorize LILCO personnel to do so. See Halpin Affidavit, ¶ 11. This is especially true in light of the fundamental flaws relating to the removal of road impediments that were found and discussed in detail by the OL-5 Licensing Board in the Exercise Decision.

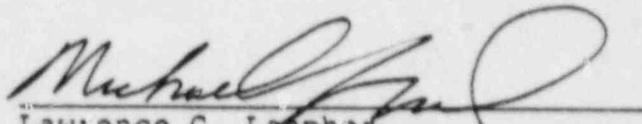
Alleged Fact 5 - This so-called "fact" alleges that in an emergency requiring the evacuation of the public from around Shoreham, Suffolk County would permit LERO to give fuel to members of the public who needed it to evacuate. However, for the same reasons asserted with respect to alleged "Fact 4," Suffolk County officials, as stated above, would not permit LERO personnel to perform governmental emergency services, such as providing fuel, in the event of a radiological emergency at Shoreham. See Halpin Affidavit, ¶ 11.

IV. CONCLUSION

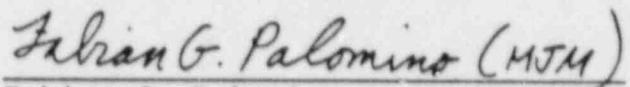
For the reasons set forth above, LILCO's Motion for Summary Disposition of Contentions 4 and 9 must be denied in its entirety.

Respectfully submitted,

E. Thomas Boyle
Suffolk County Attorney
Building 158 North County Complex
Veteran Memorial Highway
Hauppauge, New York 11788



Lawrence C. Lanpher
Michael S. Miller
Christopher M. McMurray
Michael J. Missal
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - Ninth Floor
Washington, D.C. 20036-5891



Fabian G. Palomino
Richard J. Zahnleuter
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Stephen B. Latham (HJM)

Stephen B. Latham
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

Attorney for the Town of
Southampton

STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE EXISTS A GENUINE ISSUE TO BE HEARD
ON MATTERS RAISED BY LILCO'S MOTION FOR
SUMMARY DISPOSITION OF CONTENTIONS 4 AND 9

1. How would road obstructions be removed and who would remove them?

2. How would the removal of road obstructions be coordinated with such other functions as guiding traffic and selecting alternate evacuation routes?

3. Who would be in overall charge of an effort to remove road obstructions?

4. Whether, assuming an ad hoc "best efforts" governmental response to a Shoreham emergency, the provisions for removing obstacles from public roadways, as described in the LILCO Plan and particularly in OPIP 3.6.3, would be implemented.

5. Whether, assuming a "best efforts" governmental response to a Shoreham emergency, obstructions and blockages on roadways caused by vehicles running out of gas could be effectively prevented or removed.

6. How would the procedure for dispensing fuel actually function in a Shoreham emergency? Would it function at all?

7. Whether, assuming a "best efforts" governmental response to a Shoreham emergency, there can be a finding of compliance with NUREG 0654, § II.J.10.

8. Would a "best efforts" governmental response be the same as, or consistent with, the LILCO Plan and procedures referenced in Contentions 4 and 9?

9. Are pertinent government officials, including the SCPD, sufficiently familiar with LILCO's Plan, including the provisions relating to removing obstructions from the roads and providing fuel, to be able to implement all or a portion of the Plan, with or without LILCO's assistance?

10. Under a "best efforts" governmental response, how would a decision to develop and implement a plan to remove road obstructions and provide fuel be implemented and how long would it take?

11. Under a "best efforts" governmental response, how long would it take to mobilize and dispatch personnel into the field to remove road obstructions and provide fuel?

12. Under a "best efforts" governmental response, would a sufficient number of qualified personnel be available, willing and able to implement a plan to remove road obstructions and provide fuel?

13. Would a "best efforts" governmental response be adequate, coordinated, integrated, and otherwise sufficient to protect the public health and safety, and would it comply with regulatory requirements?