Legal Issues in Public Transit Emergency Planning and Operation

DETAILS

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LEGAL ISSUES IN PUBLIC TRANSIT EMERGENCY PLANNING AND OPERATION

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Nicholas Tomizawa, Esq., CEM, URS Corporation, Homeland Security and Emergency Management Group. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

Applications

The goal of this study is to provide a synthesis and assessment of laws, regulations, and guidance from both the transit and homeland security industries to help transit agencies understand their legal responsibilities with respect to emergency planning and operational issues. This study seeks to help transit systems be in or stay in compliance with requirements and guidance by:

- Providing transit managers with guidance to navigate laws, regulations, and guidance from both the transit and homeland security/emergency management fields;
- Summarizing, comparing, and contrasting transit and homeland security laws, regulations, and guidance;
- Assisting transit managers to understand what documents and activities are legally required and which are recommended;
- Providing practical approaches and insight to address emergency planning requirements and guidance, acknowledging concerns over tailoring these programs to all sizes of transit systems and cost constraints; and
- Providing an overview of legal issues pertinent to transit emergency management, including tort liability and immunities, understanding disaster public assistance programs, working with security-sensitive information, and developing memoranda of understanding. *It must be noted that the section entitled "The Role of the Attorney in Emergency Planning" is not just for lawyers, as it provides important planning advice for transit managers to comply with emergency management requirements.*

With such knowledge, transit managers may make informed planning and response decisions to reduce their exposure to claims, protect their property, enhance the safety and security of their employees and the general public, and expand the range of services and capabilities of transit.

As a synthesis, this study is informed by and refers to existing guidance and reports from the Transit Cooperative Research Program and other pertinent organizations.

TRANSPORTATION RESEARCH BOARD
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By Nicholas Tomizawa, Esq., CEM, URS Corporation,
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I. INTRODUCTION

The goal of this study is to provide an assessment of laws, regulations, and guidance from both the transit and homeland security industries. It seeks to help transit agencies understand their legal responsibilities with respect to emergency planning by:

- Providing transit managers with advice on how to navigate laws, regulations and guidance from both the transit and homeland security/emergency management fields.
- Summarizing, comparing, and contrasting transit and homeland security laws, regulations, and guidance.
- Providing practical approaches and insight to address emergency planning mandates and guidance.
- Providing an overview of legal issues pertinent to transit emergency planning.

With such knowledge, transit managers may make informed planning and response decisions to reduce their exposure to claims, protect their property, enhance the safety and security of their employees and the general public, and expand the range of services and capabilities of transit.

"Transit" for the purposes of this study includes:

- Rail transit, transit bus, and demand-response operators (paratransit) funded by the Federal Transit Administration (FTA).
- The 26 commuter railroads funded by FTA, with safety and security oversight by the Federal Railroad Administration (FRA).[1]
- The 18 public passenger ferry systems funded by the Federal Highway Administration (FHWA) and the FTA, with safety and security regulated by the United States Coast Guard (USCG).[2]

Regulatory and legal distinctions between rail transit, commuter rail, transit bus, paratransit, and passenger ferries will be discussed in Section 3.b.

As a result of the creation of the Department of Homeland Security (DHS) and federal directives to develop emergency preparedness capabilities, the majority of foundational materials to be reviewed in this study were developed within the last 10–12 years. While national homeland security priorities and objectives were being developed during that time, transit industry professionals went on a crash course to digest and assimilate this vast and quickly evolving world of homeland security vernacular, principles, and operations.

Section II of this digest seeks to present, clarify, and summarize the essential planning elements from both the transit and homeland security industries. It provides an overarching view of the programs that inform and guide emergency management planning among the U.S. Department of Transportation (USDOT) regulated systems, and lists and describes key transit and homeland security laws and regulations. The section also itemizes DHS guidance and events, and lists and explains key transit policies that impact the development of transit emergency management programs.

Section III describes how homeland security and transit terms have complicated planning issues since September 11, 2001. It provides insight into the multi-layered issue of regulatory compliance for transit and discusses how each mode is impacted by the safety, security, and emergency management programs of various government agencies. Section III clarifies and summarizes the minimum emergency planning requirements for transit. This is purposed to assist transit managers in understanding how homeland security guidance should be viewed in relation to transit requirements, and how transit safety, security, and emergency management programs can be developed that are compliant with homeland security policy. Finally, Section III discusses roles for the attorney in emergency planning.

This study does not focus on planning issues for day-to-day eventualities such as accidents

[1] AMERICAN PUBLIC TRANSPORTATION ASSOCIATION, PUBLIC TRANSPORTATION FACT BOOK 39 (2012), available at http://www.apta.com/resources/statistics/Pages/transitstats.aspx. Accessed July 1, 2013.

[2] *Id.* at 41.

and reroutes. These are more mundane "emergencies" that operators have dealt with since the inception of public transit service. They are understood to be within the scope of transit's traditional daily duties and are not the subject of planning that ties the transit and homeland security worlds to each other.

II. TRANSIT EMERGENCY PLANNING FOUNDATIONS

A. Key Homeland Security Planning Laws, Regulations, and Guidance

Table 1 provides a list of laws, regulations, issues, and events in the fast-developing homeland security industry with relevance to the transit industry. It is presented in chronological order to assist transit professionals in understanding how the industry has evolved since 2001.

KEY HOMELAND SECURITY PLANNING LAWS, REGULATIONS, PROGRAMS, AND EVENTS		
11/1988	Robert T. Stafford Act enacted	Created disaster and hazard mitigation public assistance programs.
9/2001	**Terrorist attacks on United States**	
11/2001	Aviation & Transportation Security Act enacted	Security oversight of USDOT administrations transferred to the Transportation Security Administration (TSA).
11/2002	Homeland Security Act of 2002 enacted	DHS created. TSA, the Federal Emergency Management Agency (FEMA), and other federal agency authority transferred to DHS.
2/2003	Homeland Security Presidential Directive 5 (HSPD-5) Management of Domestic Incidents released	Directs the establishment of a single, comprehensive national incident management system that covers the prevention, preparation, support, response, and recovery from terrorist attacks, major disasters, and other emergencies.
12/2003	Homeland Security Presidential Directive 8 (HSPD-8) National Preparedness released	Tasks the Secretary of Homeland Security with developing National Preparedness Guidelines to build national capabilities, and coordinate preparedness activities, between federal, state, tribal, and local governments; the private sector; and citizens.
3/2004	National Incident Management System (NIMS) released	Structured template/tool that includes the Incident Command System (ICS) to be used nationwide to respond to disasters and/or terrorist attacks. HSPD-5 requires all federal, state, local, and tribal agencies to adopt NIMS.
7/2004	9/11 Commission Report released	Contained 41 homeland security recommendations, including the setting of national preparedness priorities, and mandated the adoption of ICS to guide emergency response.
1/2005	National Response Plan released	The National Response Plan (NRP) provided a framework for a unified national response to all disasters and emergencies. Included the Emergency Support Function structure and based on NIMS.
8/2005	**Hurricane Katrina landfall**	
10/2006	Post-Katrina Emergency Management Reform Act enacted	DHS reorganization restoring FEMA authority. FEMA to lead and support risk-based, comprehensive emergency management system.
1/2008	National Response Framework (NRF) released	Replaces the National Response Plan. Essentially same as NRP, but according to DHS, name change was warranted as the NRP was not a plan *per se*.
3/2011	Presidential Policy Directive 8 (PPD-8) National Preparedness released	Replaces HSPD-8. Capabilities-based planning instead of scenario-based. Mitigation planning along with prevention, protection, response, and recovery activities.

Table 1. Homeland Security Laws, Regulations, Programs, and Events.

1. Robert T. Stafford Disaster Assistance Act

In 1988, Congress passed the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").[3] Administered by FEMA, the Stafford Act is the primary federal disaster relief funding mechanism in the United States today. It provides for legislated cost-sharing requirements for public assistance funding and encourages hazard mitigation planning through grant programs.[4] When local and state resources cannot adequately address a disaster, the governor of a state may request a presidential disaster declaration that legally triggers the mobilization of federal resources to assist in a response.[5] Such resources will be marshaled and directed to state and local response efforts pursuant to activities guided by the NRF (see below).

2. The Aviation and Transportation Security Act

In the aftermath of the attacks on the United States on September 11, 2001, President Bush signed into law the Aviation and Transportation Security Act (ATSA)[6] on November 19, 2001, creating the TSA within the USDOT. While the primary focus of the ATSA was aviation security and the establishment of a federalized workforce of air passenger security screeners, TSA was also authorized to oversee the security of all other modes of transportation under USDOT.[7] This authority includes the ability of TSA to assess threats to transportation[8] and to develop policies, strategies, and plans to address identified threats to transportation security.[9]

3. The Homeland Security Act of 2002

The Homeland Security Act of 2002 (HSA)[10] was passed on November 25, 2002, to restructure various aspects of the federal government following the September 11, 2001, terrorist attacks. Pursuant to the HSA, the DHS was created to consolidate a number of existing agencies with security, intelligence-gathering, and counter-terrorism functions. Working closely with state and local officials, other federal agencies, and the private sector, the DHS mission is to ensure that proper steps are taken to protect high-risk assets in the United States. DHS became responsible for the comprehensive evaluation of vulnerabilities of America's critical infrastructure. This list of critical assets included the nation's transportation networks (air, road, rail, ports, waterways), and as such the functions of TSA were transferred to DHS.[11] Additionally, FEMA was incorporated into DHS due to its mission to respond to disasters in the United States, regardless of their cause. FEMA provides leadership in building a comprehensive national system of emergency preparedness, protection, disaster response, recovery, and mitigation.[12] The Post-Katrina Emergency Management Reform Act (described below) amended the HSA with respect to the organizational structure, authorities, and responsibilities of FEMA and the FEMA Administrator.

4. Homeland Security Presidential Directive-5 (HSPD-5)

HSPD-5 was issued by President Bush on February 28, 2003, to improve the management of domestic incidents by establishing a single, comprehensive national incident management system. Pursuant to the HSA, the Secretary of DHS became responsible for coordinating federal emergency operations within the United States through the incorporation of FEMA into DHS. Federal emergency operations include preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies. Pursuant to HSPD-5, DHS coordinates federal resources when any one of several conditions occurs:[13]

- A federal department or agency requests its assistance.
- The resources of state and local authorities are overwhelmed and they request federal assistance.
- More than one federal department or agency is substantially involved in responding to an incident.

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[3] Pub. L. No. 93-288, 88 Stat. 143 (1988) (codified at 42 U.S.C. §§ 5121 *et seq.*(2013).

[4] 42 U.S.C. § 5131 (2013).

[5] 42 U.S.C. § 5191 (2013).

[6] Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified at 49 U.S.C. §§ 114 *et seq*. (2013)).

[7] *Id.* § 114(d)(2).

[8] *Id.* § 114(f)(2).

[9] *Id.* § 114(f)(3).

[10] Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. §§ 101 *et seq.* 2013).

[11] *Id.* §§ 201–203.

[12] *Id.* §§ 311–321.

[13] HSPD-5, para. 4, available at http://www.fas.org/irp/offdocs/nspd/hspd-5.html. Accessed July 1, 2013.

• The President directs the Secretary to assume responsibility for managing the domestic incident.

HSPD-5 also recognized the roles that state, tribal, and local governments; nongovernmental organizations; and the private sector play in managing incidents. Initial responsibility for managing domestic incidents generally falls on state and local authorities. When their resources are overwhelmed, or when federal property is involved, the federal government provides assistance. In order to provide a consistent, coordinated, nationwide approach for emergency operations across all levels of government, HSPD-5 directed DHS to develop and administer NIMS and a NRP. Together, the NIMS and NRP were intended to provide an approach for federal, state, and local governments to effectively prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity.

5. NIMS

Pursuant to the mandates of HSPD-5, DHS created a structured program to be used nationwide for both governmental and nongovernmental agencies to respond to disasters and terrorist attacks at the federal, state, tribal, and local levels of government. NIMS provides a consistent, flexible, and adjustable national template upon which government and private entities can work together to manage domestic incidents regardless of their cause, size, location, or complexity.

The deliberations of the National Commission on Terrorists Attacks Upon the United States[14] (more commonly known as the "9/11 Commission") had an important impact on the formation of HSPD-5 and the parameters of the program that would become NIMS. In its 2004 final report, the Commission recommended that emergency response agencies nationwide adopt the ICS, a cornerstone of NIMS.[15] ICS, developed to overcome inefficiencies in large-scale responses to wildfires in the early 1970s, addressed multi-jurisdictional coordination and response issues, including:

• A lack of sharing reliable incident information between parties.
• Inadequate and incompatible communications.
• A lack of a structure for coordinated planning between agencies.
• Unclear lines of authority.
• Terminology differences between agencies.

Consequently, ICS would ultimately:

• Become a scalable, flexible coordinating framework and tool to meet the needs of incidents of any kind and size and have the ability to be tailored to the agencies using it.
• Be usable on a day-to-day basis for routine situations as well as for major emergencies.
• Allow personnel from a variety of agencies and diverse geographic locations to rapidly meld into a common management structure.

To avoid confusion, DHS is clear to indicate that NIMS is not a plan. NIMS rather is a dynamic tool that incorporates ICS to assist agencies in planning and coordinating intra- and inter-organizational operations to respond to all types of hazards and threats. Moreover, it sets forth preparedness concepts and principles, describes a means for managing communications and operations, and provides standard resource management procedures. For state and local agencies, NIMS is a guidance tool to enhance existing emergency response and planning operations, marshal personnel and resources within a tailored emergency management structure (for traditional chain-of-command organizations like law enforcement as well as other entities like transit systems), and provide advice on how to work with regional stakeholders when circumstances necessitate.[16]

HSPD-5 required all federal agencies to adopt NIMS and to use it in their individual domestic incident management and emergency prevention, preparedness, response, recovery, and mitigation programs and activities. The directive also required federal departments to make the adoption of NIMS by state, tribal, and local organizations a condition for federal preparedness assistance beginning in fiscal year 2005.

[14] Authorized pursuant to Pub. L. No. 107-306, tit. VI, 116 Stat. 2383 (2002).

[15] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, ch. 12, at 397 (2004), available at http://www.9-11commission.gov/report/911Report.pdf. Accessed July 1, 2013.

[16] *See* Department of Homeland Security, *National Incident Management System*, available at http://www.fema.gov/national-incident-management-system. Accessed July 1, 2013.

6. NRP and NRF

NRP is a specific application of NIMS and is the successor to the Federal Response Plan.[17] HSPD-5 mandated that a NRP plan be developed to integrate "federal government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan."[18] As per HSPD-5, the NRP states that all incidents are initially and primarily handled at the lowest possible organizational and jurisdictional level. Police, fire, public health and medical emergency management, and other personnel such as transit operators are responsible for incident management at the local level.

For those events that rise to the level of an "Incident of National Significance"[19] (as opposed to a snow storm or other subcatastrophic event), DHS would provide the operational and/or resource coordination for federal support to on-scene incident command structures. The NRP includes planning assumptions, roles and responsibilities, concepts of operations, and incident management actions. As part of this structure, the NRP features the Emergency Support Function (ESF) mechanism to coordinate various capabilities and resources and to bundle and funnel them to local, tribal, state, and other responders. There are 15 of these ESFs (*see* Appendix A for full listing and coordinating federal agencies). Local public transportation is supported on the federal level via ESF 1 Transportation with USDOT as the coordinating agency. Resources marshaled by ESF 1 will be directed to local recipients through coordination with state emergency management agencies. Annexes to the NRP provided more detailed information on ESFs, such as administrative requirements. Incident annexes address contingency or hazard situations that required specialized applications of the NRP for Incidents of National Significance (See Figure 1, below).

[17] *See, e.g.*, Department of Homeland Security, National Response Plan (Dec. 2004), available at http://www.au.af.mil/au/awc/awcgate/nrp/. Accessed July 1, 2013.

[18] HSPD-5, para. 16, available at http://www.fas.org/irp/offdocs/nspd/hspd-5.html. Accessed July 1, 2013.

[19] What qualifies as an "Incident of National Significance" and consequently Stafford Act relief funding is discussed in U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-442T, HURRICANE KATRINA: GAO'S PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS, RESPONSE, AND RECOVERY 7 (2006), and clarified in the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1355 (PKEMRA).

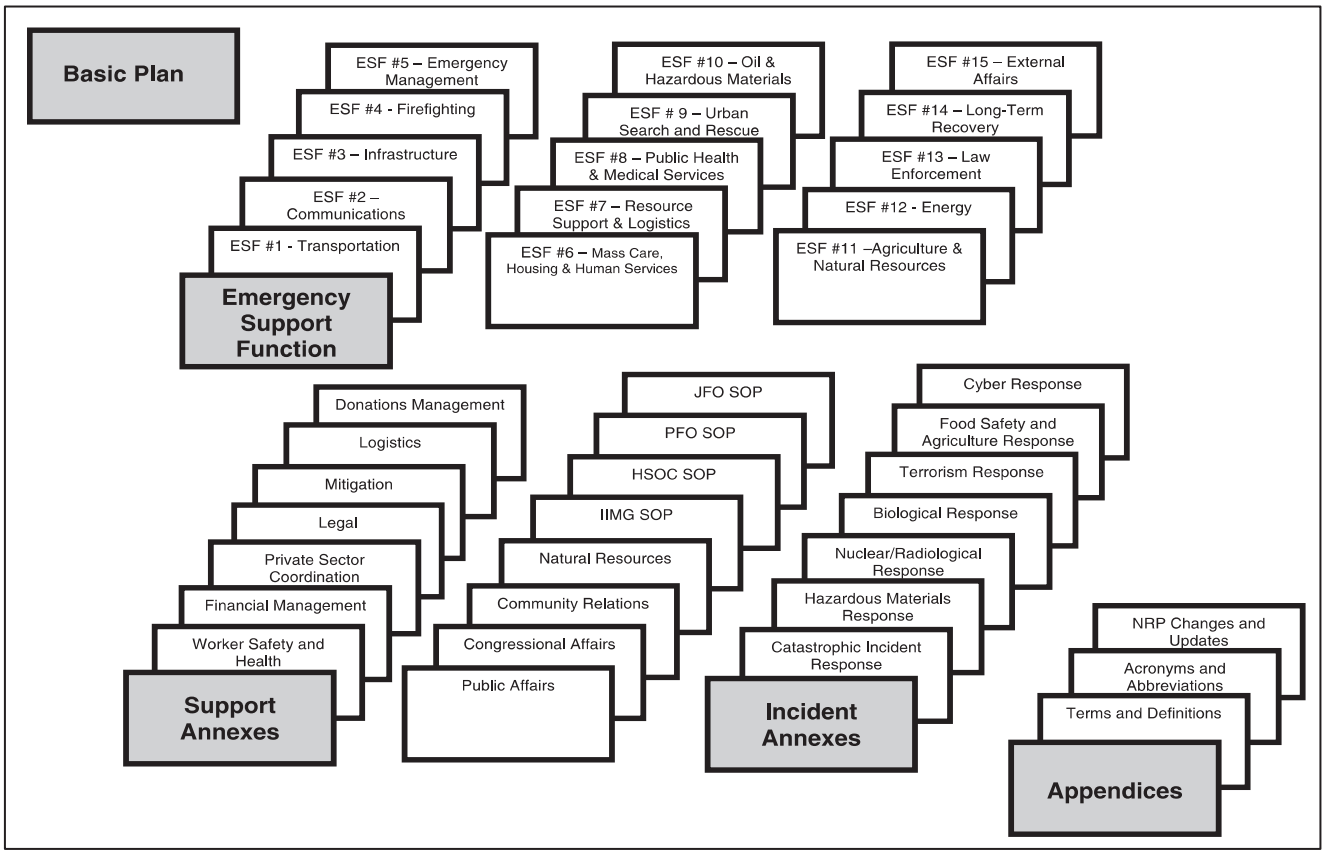

Figure 1. National Response Plan.[20]

NIMS provided the doctrine, concepts, principles, terminology, and organizational processes needed for effective, efficient, and collaborative incident management at all levels. Again, NIMS did not constitute an operational incident management or resource allocation plan but rather a tool to structure, manage, and marshal organizations, their personnel, and resources to handle incident response. The NRP provided the coordinating structure and mechanisms for national-level policy and operational direction for federal support to state, local, and tribal incident managers; federal-to-federal support; and for exercising direct federal authorities and responsibilities as appropriate under the law.[21]

The NRP would ultimately be succeeded by the NRF in 2008.[22] The NRF is based directly on the NRP and retains much of NRP's content. The title was changed based on public comment that indicated that the NRP, like NIMS, was not a plan, but rather a construct to coordinate national incident management.[23] According to FEMA, the document was also modified to improve its usability and to incorporate suggestions from stakeholders, best practices, and lessons learned from exercises and responses to events such as Hurricane Katrina.[24]

[20] Figure 1 borrowed from JOHN N. BALOG, ET AL., 7 PUBLIC TRANSPORTATION SECURITY: PUBLIC TRANSPORTATION EMERGENCY MOBILIZATION AND EMERGENCY OPERATIONS GUIDE (TCRP Report 86, § 2, Transportation Research Board, 2005). This document contains a thorough review of these distinctions and implementation of the NRF in the public transportation context.

[21] HSPD-5, para. 16(a), available at http://www.fas.org/irp/offdocs/nspd/hspd-5.html. Accessed July 1, 2013.

[22] *See* Federal Emergency Management Agency, National Response Framework Web site at http://www.fema.gov/national-response-framework. Accessed July 1, 2013.

[23] Federal Emergency Management Agency, *National Response Framework, Frequently Asked Questions* 3 (2008), available at https://www.fema.gov/pdf/emergency/nrf/NRF_FAQ.pdf.

[24] *Id.*

7. Homeland Security Presidential Directive-8 (HSPD-8)

HSPD-8 was issued in December 2003 as a companion to HSPD-5. Pursuant to HSPD-8, DHS was to coordinate the development of a national domestic all-hazards preparedness goal "to establish measurable readiness priorities and targets that appropriately balance the potential threat and magnitude of terrorist attacks and large scale natural or accidental disasters with the resources required to prevent, respond to, and recover from them."[25] The goal was also to include metrics and standards for assessments to gauge the nation's overall preparedness to respond to major events. To implement the directive, DHS developed the National Preparedness Guidelines using 15 emergency National Planning Scenarios, 12 of which were terrorist-related with the remaining 3 addressing major hurricanes, major earthquakes, and an influenza pandemic. The planning scenarios were intended to exemplify the scope and magnitude of large-scale, catastrophic emergency events for which the nation needed to be prepared and to form the basis for identifying the capabilities needed to respond to a wide range of large-scale emergency events. These comprehensive scenarios focused on the consequences that first responders would have to address.

Using these scenarios, DHS developed a list of over 1,600 discrete tasks, of which 300 were identified as critical. DHS then identified 36 target capabilities to provide guidance to federal, state, and local first responders on the capabilities they need to develop and maintain. That list was subsequently refined, and DHS released a revised draft list of 37 capabilities. With respect to public transportation, numerous tasks were identified to guide localities to ensure that appropriate transportation corridors would be maintained or established to move people, animals, and resources in response to a disaster.[26] These capabilities did not address transit on an operations level but rather on the strategic level.

8. Post-Katrina Emergency Management Reform Act of 2006

The Post-Katrina Emergency Management Reform Act of 2006[27] (PKEMRA) was enacted on October 4, 2006, to address various shortcomings identified in the preparation for and response to Hurricane Katrina. PKEMRA mandated that the President develop a set of national policies to guide preparedness for these hazards with the goal of reducing or preventing potentially devastating consequences. Specifically, improved capabilities were needed to effectively respond to catastrophic disasters, particularly in the areas of situational assessment and awareness, emergency communications, evacuations, search and rescue, logistics, and mass care and sheltering. Moreover, having had much of FEMA's autonomy transferred to DHS leadership through the Homeland Security Act, PKEMRA restored and enhanced FEMA's responsibilities within DHS. PKEMRA mandated that FEMA lead and support the development of a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.

PKEMRA also required FEMA to develop guidelines to accommodate the disabled in public shelters,[28] and take into account persons with limited English proficiency in emergency planning.[29]

9. Presidential Policy Directive-8 (PPD-8) and the National Preparedness Goal

The PKEMRA mandated that the President develop a set of national policies to guide all-hazards preparedness with the goal of reducing or preventing potentially devastating consequences. On March 30, 2011, President Obama issued PPD-8: National Preparedness, initiating the development of national preparedness policies that are intended to fulfill many aspects of the mandate. Consistent with PKEMRA, the purpose of PPD-8 is to "strength[en] the security and resilience of the United States through systemic preparation for the threats that pose the greatest risk to the security of the Nation, including acts of terrorism, cyber attacks, pandemics, and catastrophic natural disasters."[30] Through the devel-

[25] HSPD-8, para. 6, available at https://www.fas.org/irp/offdocs/nspd/hspd-8.html. Accessed July 1, 2013.

[26] DEPARTMENT OF HOMELAND SECURITY, TARGET CAPABILITIES LIST: A COMPANION TO THE NATIONAL PREPAREDNESS GUIDELINES 377–93 (2007), available at http://www.fema.gov/pdf/government/training/tcl.pdf. Accessed July 1, 2013.

[27] Pub. L. No. 109-295, 120 Stat. 1355 (2006).

[28] Pub. L. No. 109-295 § 689(a), 120 Stat. 1355, 1448 (2006).

[29] Pub. L. No. 109-295 § 616, 120 Stat. 1355, 1452.

[30] PPD-8, para. 1, available at http://www.dhs.gov/presidential-policy-directive-8-national-preparedness. Accessed July 1, 2013.

opment of a National Preparedness Goal (NPG), federal, state, and local agencies were directed to focus on the development of core capabilities and resilience, not necessarily based on specific catastrophic scenarios as previously recommended. PPD-8 rescinded HSPD-8.

10. Pets Evacuation and Transportation Standards Act of 2006

During Hurricane Katrina, many Katrina evacuees and disaster victims were forced to leave their pets behind when they evacuated their homes because no government provisions had been made to evacuate pets along with their families.[31] Many pet owners, knowing their animals could not accompany them, chose to stay in their homes with their pets, further complicating human rescue efforts.[32]

Two days after the adoption of PKEMRA, Congress passed the Pets Evacuation and Transportation Standards Act (PETS).[33] PETS amends the Robert T. Stafford Disaster Relief and Emergency Assistance Act and mandates that FEMA's preparedness plans within the NRF "take into account the needs of individuals with pets and service animals prior to, during, and following a major disaster or emergency."[34] PETS:

- Grants FEMA the authority to approve the standards of these plans and assist state and local communities in developing plans.[35]
- States that the FEMA Director may make financial contributions on the basis of programs and projects approved by the Director to state and local authorities for animal emergency preparedness purposes. This includes the procurement, leasing, construction, or renovation of emergency shelter facilities and materials that will accommodate people with pets and service animals.[36]
- Gives FEMA the authority to provide essential assistance to individuals with pets and service animals for the provision of care, rescue, sheltering, and essential needs to such pets and animals.[37]

B. Key Transit Planning Laws, Regulations, and Guidance

Table 2 below provides a list of key transit laws, regulations, and issues with respect to transit emergency planning. The table covers rail transit, commuter rail, transit bus, paratransit, and passenger ferries. Unlike for the prior homeland security summaries, the chronology of these laws, regulations, and issues is less important to this analysis and therefore they are not presented in such order.

[31] Sara Ivry, *An Outpouring for Other Victims, the Four-Legged Kind*, N.Y. TIMES, Nov. 14, 2005, available at http://www.nytimes.com/2005/11/14/giving/14animal.html. Accessed July 1, 2013.

[32] Malcolm Gay, *Beloved Pets, Displaced by Floodwaters, Find Temporary Shelter in Iowa*, N.Y. TIMES, June 30, 2008, available at http://www.nytimes.com/2008/06/30/us/30flood.html?_r=0. Accessed July 1, 2013.

[33] Pub. L. No. 109-308, 120 Stat. 1725 (2006).

[34] 42 U.S.C. § 5196b(2)(b)(3) (2013).

[35] 42 U.S.C. § 5196b(2)(g) (2013).

[36] 42 U.S.C. § 5196(2) (2013).

[37] 42 U.S.C. § 5170b(a)(3)(J)(i) & (ii) (2013).

KEY TRANSIT EMERGENCY PLANNING LAWS, REGULATIONS, AND PROGRAMS	
FTA Fixed Guideway Rail State Safety Oversight	Created State Safety Oversight entities to implement safety and security review programs for rail transit systems.
FTA Project Management Oversight	Mandated the development of a Project Management Plan and a Safety and Security Management Plan for major capital projects.
FTA National Public Transportation Safety Plan	MAP-21 enables FTA to regulate safety and security of all modes.
FTA Key Funding Mechanisms	Various sections of the United States Code for Urban Area, Capital, Elderly and Disabled, Rural, and Crime Prevention and Security investments.
DHS and USDOT Coordination	MAP-21 required DHS to coordinate with USDOT if a proposed DHS rule will affect the safety of public transportation design, construction, or operations.
FTA Charter Bus Rule Exemption	Allows transit buses to operate outside their jurisdictions in times of emergency.
FTA Emergency Procedures for Public Transit	Process to waive FTA regulations in times of emergency.
FRA Passenger Train Emergency Preparedness	Mandates emergency preparedness planning and training.
FRA Emergency Event Waivers	Process to waive FRA regulations in times of emergency.
Vessel and Facility Security Emergency Preparedness and Response Contingency Plans	Mandates the development of maritime security officer positions and emergency response plans, and that operators conduct training and threat assessments.
Americans with Disabilities Act	Mandates the development of reasonable accommodations for persons with disabilities to access and use public facilities.
Executive Order 13347—Individuals with Disabilities and Emergency Preparedness	Calls for a coordinated federal effort to ensure ADA mandates are implemented for emergency situations and response.
Transportation for Individuals With Disabilities: Passenger Vessels	Mandates the development of reasonable accommodations for persons with disabilities to access and use vessels, including response assistance.
USDOT Environmental Justice Order 5610.2(a)	Describes the process for incorporating environmental justice principles into all existing programs, policies, and activities of all modes.
USDOT Policy Guidance Concerning Recipient's Responsibilities to Limited English Proficient	Guidance for all modal agencies to consider service planning and accommodations for Limited English Proficient persons.
Long-Term Capital Planning	Metropolitan Planning Organizations and state transportation planners are encouraged to consider security issues within their capital programming activities.

Table 2. Transit Emergency Planning Laws, Regulations, and Programs.

1. FTA Rail Fixed Guideway State Safety Oversight

In response to public concern regarding the potential for catastrophic accidents and incidents on rail transit systems, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)[38] added Section 28 to the Federal Transit Act.[39] This section required FTA to issue a rule to establish state-managed oversight programs for rail transit safety. On December 27, 1995, FTA published its "Rail Fixed Guideway Systems: State Safety Oversight" regulations, now more commonly referred to as State Safety Oversight or Part 659.[40] Only those states with Rail Fixed Guideway Systems meeting the definition specified in Part 659 must comply with FTA's State Safety Oversight rule, including "as determined by FTA any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that:

- Is not regulated by the Federal Railroad Administration; and
- Is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas[41]; or
- Has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas."[42]

The key provisions of Part 659 include the following requirements:

- The designation by the state of an oversight agency (other than the transit system being regulated) [43] to create safety and security program standards and monitor and assess compliance with these standards by rail transit systems under its jurisdiction.[44]
- The requirement to develop a system safety program plan (SSPP)[45] and a system security plan,[46] also known as a Security and Emergency Preparedness Plan (SEPP). These plan requirements and associated guidance represent the core principles and approaches of FTA with respect to revenue service, safety, security, and emergency management planning.

The SSPP is a key management document and one of the core FTA standards by which FTA grantees describe and detail their safety and emergency management philosophies, programs, and activities. At its essence, an SSPP is a statement of an agency's risk management philosophy and approaches to reduce risk (see additional information on the SSPP and related documents in Section III below). For the most part, the parameters of the SSPP as it is required for rail fixed guideway systems today by the FTA were developed by the American Public Transportation Association (APTA) in the 1980s. APTA developed its program based on Military Standard 882B system safety principles used for the military's transit safety review program. In general, the SSPP requires that a transit system indicate essential programmatic areas that govern system safety, including, among others, management organization, management roles and responsibilities, risk reduction processes, policies and procedures, training and exercises, configuration management, safety certification, and document control and maintenance. The SEPP, Project Management Plan (PMP), and Safety and Security Management Plan (SSMP) (described below) generally follow the same general principles and document organization as the SSPP. They each describe approaches to control risk and promote continuous improvement through periodic analysis. While the FTA SSPP standards as they exist today have expanded upon the APTA template, FTA's program is still basically what APTA built in the 1980s.

2. FTA Project Management Oversight

FTA created the Project Management Oversight (PMO) [47] requirements to encourage efficiency and cost-effectiveness in the capital con-

[38] Pub. L. No. 102-240, 105 Stat. 1914 (1991).

[39] *Id.*

[40] 49 C.F.R. pt. 659, authorized by 49 U.S.C. § 5330.

[41] 49 U.S.C. § 5336 (2013).

[42] *Id.*; 49 C.F.R. § 659.5. Includes systems built entirely with local and state funds, but that will receive formula funding for operations based on their submission of fixed guideway route miles to FTA.

[43] 49 C.F.R. § 659.9.

[44] 49 C.F.R. § 659.15.

[45] 49 C.F.R. § 659.17. Specific requirements at 49 C.F.R. § 659.19.

[46] 49 C.F.R. § 659.21. Specific requirements at 49 C.F.R. § 659.23.

[47] 49 C.F.R. pt. 633, authorized by 49 U.S.C. § 5327.

struction process for major capital projects. Major capital projects are defined as projects that:

- Involve the construction of a new fixed guideway or extension of an existing fixed guideway;
- Involve the rehabilitation or modernization of an existing fixed guideway with a total project cost in excess of $100 million; or
- The FTA Administrator determines it is a major capital project because the project management oversight program will benefit specifically the agency or the recipient.[48]

The PMO requirements allow for the monitoring of budget, schedule, and progress of an agreed-upon project design and such design's construction.[49] The details of a grantee's project approach, design, schedule, budget, project personnel, and project processes and procedures are to be detailed in a PMP for the project to be funded.[50] As part of the PMP, FTA also requires that an SSMP be developed and implemented.[51] The PMP and SSMP can be considered pre-revenue service cousins to the SSPP and the SSEP, respectively (explained more thoroughly in Section III).

3. FTA National Public Transportation Safety Plan

Section 5329[52] of the Moving Ahead for Progress in the 21st Century Act (MAP-21) authorizes the Secretary of Transportation to inspect and audit all public transit systems with respect to safety, to make reports and issue directives, to investigate accidents and incidents, and, among others, to issue regulations to carry out transit safety provisions. The Secretary is mandated to develop safety and security performance criteria for all modes and has the power to request corrective action plans if deficiencies are found and impose penalties for noncompliance with findings. As rail fixed guideway systems, commuter rail, and ferries already have many applicable safety, security, and emergency management regulatory frameworks guiding their operations, the primary modes to be affected by any new rules pursuant to the National Public Transportation Safety Plan (NPTSP) will be transit bus and paratransit systems. To date, no additional safety and security performance criteria for rail have been promulgated.

4. FTA Key Funding Mechanisms

FTA funds are distributed to recipients by formula through specific designations within the MAP-21 authorization law or on a discretionary basis through individual grant programs. FTA works in partnership with states and other grant recipients to administer its programs and provide financial assistance, policy direction, technical expertise, and some oversight. Key funding programs include the following:

- The Urbanized Area Formula Grant Program[53] makes funding available to urbanized areas and to states for public transportation capital projects, planning, and operating assistance for equipment and facilities in urbanized areas and for transportation-related planning. Funds are allocated based on a multi-tiered formula that separates urban areas with populations under 200,000 from those with populations of 200,000 or more. Each fiscal year, recipients will expend at least 1 percent of the amount they receive on security-related projects[54] unless they have decided such expenses are not necessary.[55]
- The New Starts Program[56] provides funds for construction of new fixed guideway systems or extensions to existing fixed guideway systems. These grants are awarded for specific projects by congressional directive based on FTA recommendations. Funds may be provided only to state and local governmental authorities.
- The Rail Fixed Guideway Modernization Program[57] makes federal resources available to modernize or improve existing fixed guideway systems. Funds are first apportioned to urbanized areas according to a seven-tiered formula.
- The Special Needs of Elderly Individuals and Individuals with Disabilities Program[58]

[48] 49 C.F.R. § 633.5.

[49] *Id.*

[50] 49 C.F.R. § 633.21, contents detailed in 49 C.F.R. § 633.25.

[51] SSMP implementation and implementation criteria are detailed in FTA, *FTA Circular 5800.1: Safety and Security Management Guidance for Major Capital Projects (*2007), available at http://www.fta.dot.gov/legislation_law/12349_6930.html. Accessed July 1, 2013.

[52] Pub. L. No. 112-141, § 5329, 126 Stat. 405 (2012).

[53] 49 U.S.C. § 5307 (2013).

[54] 49 U.S.C. § 5307(c)(1)(J)(i) (2013).

[55] 49 U.S.C. § 5307(c)(1)(J)(ii) (2013).

[56] 49 U.S.C. § 5309 (2013).

[57] 49 U.S.C. § 5309 (2013).

[58] 49 U.S.C. § 5310 (2013).

provides funding to states for the purpose of assisting state or local authorities, private non-profit groups, or public transit systems in meeting the transportation needs of elderly individuals and individuals with disabilities. The Secretary may make grants to 1) public transportation projects designed to meet the special needs of seniors and the disabled when current transportation services are unavailable, insufficient, or inappropriate for meeting these needs; 2) public transportation projects that exceed the requirements of the Americans with Disabilities Act (see below); 3) public transportation projects that improve access to fixed route service and decrease reliance by individuals with disabilities on complementary paratransit; and 4) alternatives to public transportation that assist seniors and individuals with disabilities with transportation.[59] Funds are first apportioned to states based on a formula administered by the Secretary of Transportation that considers the number of elderly individuals and individuals with disabilities in each state.

- The Non-Urbanized Area Formula Grant Program[60] provides funding to states and Indian tribes for the purpose of supporting public transportation capital projects and operating costs for equipment and facilities in rural areas with populations of fewer than 50,000. Funds are first apportioned to states and Indian tribes based on a formula provided in MAP-21; then states and Indian tribes may submit applications to FTA. Grant recipients may allocate funds to state or local governmental authorities, or an operator of public transportation or intercity bus service.

In addition to the provisions in the Urbanized Area Formula Grant Program, with respect to the funding of security projects, FTA may make capital grants to public transportation systems for crime prevention and security.[61]

Metropolitan and Statewide Transportation Capital Planning.—The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005[62] established new and revised requirements for statewide and metropolitan transportation plans and programs, as well as the underlying planning processes. For the first time, federal law included security issues as a parameter of metropolitan[63] and statewide planning[64] processes. As such, planners are now encouraged to consider security (and presumably emergency management) issues when making long-term capital planning decisions.

5. DHS and USDOT Coordination

MAP-21 mandated that the Secretary of Homeland Security consult with the Secretary of Transportation before the Secretary of Homeland Security issues a rule or order that the Secretary of Transportation determines affects the safety of public transportation design, construction, or operations.[65]

6. FTA Charter Bus Rule Exemption

FTA allows for its grantees to provide charter service, generally defined as:

- Transportation provided by a recipient at the request of a third party for the exclusive use of a bus or van for a negotiated price but does not include demand response service to individuals;[66]
- Service that is not part of the transit provider's regularly scheduled service, or is offered for a limited period of time;[67]
- Service for which a premium fare is charged that is greater than the usual or customary fixed route fare;[68] and
- Service that is paid for in whole or in part by a third party.[69]

The FTA Charter Bus Rule Exemption allows for a recipient to respond to an emergency declared by the President, governor, or mayor. Under these circumstances, a charter operator may go outside of its geographic service area, defined as "the entire area in which a recipient

[59] 49 U.S.C. §§ 5310(b)(1)(A)-(D) (2013).

[60] 49 U.S.C. § 5311 (2013).

[61] 49 U.S.C. § 5321 (2013).

[62] Pub. L. No. 109-59, 119 Stat. 1144 (2005).

[63] 49 U.S.C. § 5303(h)(1)(c) (2013).

[64] 49 U.S.C. § 5304(d)(1)(c) (2013).

[65] 49 U.S.C. § 5329(i) (2013).

[66] 49 C.F.R. § 604.3(c)(1).

[67] 49 C.F.R. § 604.3(c)(1)(iii).

[68] 49 C.F.R. § 604.3(c)(2)(i).

[69] 49 C.F.R. § 604.3(c)(2)(ii).

is authorized to provide public transportation service under appropriate local, state and federal law."[70] The exemption also allows for waiver of the charter rules for actions taken prior to a formal declaration to respond to an emergency situation. If the emergency lasts more than 45 days, the recipient shall follow the FTA's general rules waiver procedures (see FTA Emergency Procedures for Public Transit below). The Charter Bus Rule Exemption does not apply to a recipient transporting its employees, other transit system employees, transit management officials, transit contractors and bidders, and government officials and their contractors and official guests for emergency preparedness planning and operations.[71]

Recipients of formula grants for special needs of elderly individuals and individuals with disabilities[72] and formula grants for rural or other nonurbanized areas[73] are not subject to the Charter Bus Rule.[74]

7. FTA Emergency Procedures for Public Transit

These procedures apply when the President has declared a national or regional emergency, or when a state governor or the Mayor of the District of Columbia has declared a state of emergency, or in anticipation of such declarations.[75] In the case of a national or regional emergency or disaster, or in anticipation of such a disaster, any FTA grantee or sub-grantee may petition the Administrator for temporary relief from the provisions of any policy statement, circular, guidance document, or rule.[76]

If the Administrator determines that an emergency event has occurred, or in anticipation of such an event, FTA shall place a message on its Web page indicating that the Emergency Relief Docket (ERD) has been opened and include the docket number.[77] The ERD shall be opened within 2 business days of an emergency or disaster declaration in which it appears FTA grantees or sub-grantees are or will be impacted.[78] In cases in which emergencies can be anticipated, such as hurricanes, FTA shall open the ERD and place the message on the FTA Web page in advance of the event.[79] All petitions for relief must be posted to the ERD in order to receive consideration by FTA.[80] If a grantee or sub-grantee needs to request immediate relief and does not have access to electronic means to request that relief, the grantee or sub-grantee may contact any FTA regional office or FTA headquarters and request that FTA staff submit the petition on their behalf.[81]

A petition for relief must include:[82]

- The identity of the grantee or sub-grantee and its geographic location.
- A specific explanation of how an FTA requirement in a policy statement, circular, or agency guidance will limit a grantee's or sub-grantee's ability to respond to an emergency or disaster.
- Identification of the policy statement, circular, guidance document, or rule from which the grantee or sub-grantee seeks relief.
- Specification as to whether the petition for relief is one-time or ongoing, and if ongoing, identification of the time period for which the relief is requested (which may not exceed 3 months, though additional time may be requested through a second petition for relief).

8. FRA Passenger Train Emergency Preparedness Plans

FRA requires minimum safety standards for the development and implementation of emergency preparedness plans[83] for systems operating on the national railroad network,[84] and that employees are appropriately trained on such plans. These plans must be approved by FRA[85] and must address, among other things, communications, notifications, employee training, on-board staff, and coordination with emergency responders.[86] In addition, each railroad must conduct emergency simulation drills once a year.[87]

In 2012, FRA proposed a rule that would require individual commuter and inter-city pas-

[70] 49 C.F.R. § 604.3(j). The charter rules were developed pursuant to 49 U.S.C. § 5323(d) to protect private charter operators from undue competition from FTA recipients.

[71] 49 C.F.R. § 604.2(d).

[72] 49 U.S.C. § 5310 (2013).

[73] 49 U.S.C. § 5311 (2013).

[74] 49 C.F.R. § 604.2(e).

[75] 49 C.F.R. § 601.40.

[76] 49 C.F.R. § 601.41.

[77] 49 C.F.R. § 601.42(c).

[78] 49 C.F.R. § 601.43(a).

[79] 49 C.F.R. § 601.43(b).

[80] 49 C.F.R. § 601.44(a).

[81] 49 C.F.R. § 601.44(c).

[82] 49 C.F.R. §§ 601.45(a)-(d).

[83] 49 C.F.R. § 239.1.

[84] 49 C.F.R. § 239.3.

[85] 49 C.F.R. § 239.101.

[86] *Id.*

[87] 49 C.F.R. § 239.103(b)(1)-(3).

senger rail operators to develop an SSPP.[88] The rule would be established to satisfy the statutory mandate contained in Sections 103 and 109 of the Rail Safety Improvement Act of 2008[89] for passenger rail systems to develop risk reduction programs. Many components of the proposed rule are modeled after elements in APTA's *Manual for the Development of System Safety Program Plans for Commuter Railroads*[90] and thus would be similar to FTA's general standards for SSPPs.

9. FRA Emergency Event Waivers

The FRA Administrator may review petitions for waivers of a safety rule, regulation, or standard that FRA determines are directly related to the occurrence of, or imminent threat of, an emergency event or situation.[91] FRA lists examples of such situations, including natural disasters such as hurricanes, floods, earthquakes, mudslides, forest fires, and snowstorms, or manmade intentional acts, which may include a dangerous radiological, chemical, explosive or biological material, or war-related activity that pose a risk of death, serious illness, severe injury, or substantial property damage.[92]

Each calendar year, FRA creates an ERD and by January 31 of each year, FRA publishes a notice in the *Federal Register* that an ERD has been opened and lists the ERD number for that year.[93] If the Administrator determines that an emergency event or an emergency situation has occurred, or that an imminent threat of it occurring exists, and determines that public safety or recovery efforts require that the provisions of this section be implemented, the Administrator will activate the ERD.[94] In determining whether an emergency exists, the Administrator may consider declarations of emergency made by local, state, or federal officials, and determinations by the federal government that a credible threat of a terrorist attack exists.[95] Petitions submitted to FRA pursuant to this section should:

- Specifically address how the petition is related to the emergency, and to the extent practical, the rule or standard from which the petitioners wish relief;[96] and
- Describe 1) how the petitioner or public is affected by the emergency (including the impact on railroad operations), 2) what FRA regulations are implicated by the emergency, 3) how waiver of the implicated regulations would benefit the petitioner during the emergency, and 4) how long the petitioner expects to be affected by the emergency.[97]

10. Maritime Security and Emergency Plans

Pursuant to the Maritime Transportation Security Act of 2002 (MTSA),[98] vessels on navigable waters must designate a Company Security Officer (CSO)[99] and a Vessel Security Officer (VSO).[100] Both such officers, as well as vessel personnel, must understand the security and emergency management plans and procedures of vessels operations[101] and have received appropriate training in these areas.[102] The CSO must ensure that vessels have a security assessment conducted that includes evaluations of emergency management procedures and equipment relative to potential threats and hazards,[103] and that each vessel has a Vessel Security Plan (VSP) describing security measures.[104] A VSP must include the following areas:

- Security organization of the vessel.
- Personnel training.
- Drills and exercises.
- Records and documentation.
- Response to changes in Maritime Security (MARSEC) Levels (MARSEC Levels advise the maritime community and the public of the level of risk to maritime elements of the national transportation system[105]).
- Procedures for interfacing with facilities and other vessels.
- Declarations of Security.
- Communications.

[88] 77 Fed. Reg. 55375 (Sept. 7, 2012).

[89] Pub. L. No. 110-432, 122 Stat. 4848 (2008).

[90] Manual available at http://www.apta.com/resources/reportsandpublications/Documents/commuter_rail_manual.pdf. Accessed July 1, 2013.

[91] 49 C.F.R. § 211.45(a).

[92] *Id.*

[93] 49 C.F.R. § 211.45(b).

[94] 49 C.F.R. § 211.45(c).

[95] *Id.*

[96] 49 C.F.R. § 211.45(e).

[97] *Id.*

[98] Pub. L. No. 107-295, 116 Stat. 2064 (2002).

[99] 33 C.F.R. § 104.210.

[100] 33 C.F.R. § 104.215.

[101] 33 C.F.R. § 104.220.

[102] 33 C.F.R. § 104.225.

[103] 33 C.F.R. § 104.305.

[104] 33 C.F.R. § 104.400 with all elements at 33 C.F.R. § 104.405.

[105] 33 C.F.R. § 101.200.

- Security systems and equipment maintenance.
- Security measures for access control, including designated passenger access areas and employee access areas.
- Security measures for restricted areas.
- Security measures for handling cargo.
- Security measures for delivery of vessel stores and bunkers.
- Security measures for monitoring.
- Security incident procedures.
- Audits and VSP amendments.
- Vessel Security Assessment Report.

Accordingly, maritime facilities must designate a Facility Security Officer (FSO).[106] The FSO as well as facility personnel must understand the security and emergency management plans and procedures of facility operations and have received appropriate training in these areas.[107] The FSO must ensure that facilities have a security assessment conducted that includes evaluations of emergency management procedures and equipment relative to potential threats and hazards[108] and that each facility has a Facility Security Plan (FSP) describing the security measures for each.[109] The FSP requirements are similar to those of the VSP above.[110]

Furthermore, drills and exercises for vessels and facilities must test the proficiency of vessel and facility personnel in assigned security duties at all MARSEC Levels and the effective implementation of plans to identify security deficiencies. [111] A drill or exercise must be conducted once every 3 months[112] and test individual elements of plans.[113] Exercises must be either full-scale (live), tabletop or seminar, or combined with other appropriate means to test capabilities and training.[114] Each exercise must test communication and notification procedures, and elements of coordination, resource availability, and response.[115]

While the above are USCG requirements, USCG additionally issued regulations pertaining to the development of a Safety Management System (SMS).[116] The SMS is a framework similar to the FTA SSPP to guide an operator's risk management approach. The development of an SMS is voluntary for passenger ferry vessels but is promoted by the Passenger Vessel Association and the USCG. Some large public ferry services like the New York City Department of Transportation's Staten Island Ferry have developed and implemented an SMS.[117]

11. Americans with Disabilities Act and Executive Order 13347

The Americans with Disabilities Act (ADA)[118] prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, and the use of transportation and transportation facilities. To be covered under the ADA, a person must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined, in general, as a person who has a physical or mental impairment that substantially limits one or more major life activities.

Title II of the ADA covers public transit authority operations. Transit systems may not discriminate against people with disabilities in the provision of their services. [119] Transit must comply with requirements for accessibility in newly purchased vehicles, make good faith efforts to purchase or lease accessible used vehicles, remanufacture vehicles in an accessible manner,[120] and, unless it would result in an undue burden,[121] provide paratransit where they operate fixed-route bus or rail systems.[122]

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[106] 33 C.F.R. § 105.205.

[107] 33 C.F.R. §§ 105.210 and 105.215.

[108] 33 C.F.R. § 105.305.

[109] 33 C.F.R. § 105.400 with all elements at 33 C.F.R. § 105.405.

[110] 33 C.F.R. § 105.405.

[111] 33 C.F.R. §§ 104.230(a)(1) and 105.220(a)(1).

[112] 33 C.F.R. §§ 104.230(b)(1) and 105.220(b)(1).

[113] 33 C.F.R. §§ 104.230(b)(2) and 105.220(b)(2).

[114] 33 C.F.R. §§ 104.230(c)(2)(i)-(iii) and 105.220(c)(2)(i)-(iii).

[115] 33 C.F.R. §§ 104.230(c)(4) and 105.220(c)(4).

[116] 33 C.F.R. pt. 96.

[117] In March 2005, as a result of its investigation into the Staten Island (S.I.) Ferry *Andrew J. Barberi* accident, the National Transportation Safety Board (NTSB) recommended that the USCG seek legislative authority to require all U.S.-flagged ferries to implement safety management systems, and that the S.I. Ferry keep to its timetable to implement an SMS. National Transportation Safety Board, *Marine Accident Report: Allision of the Staten Island Ferry Andrew J. Barberi, St. George, Staten Island, New York, October 15, 2003*, NTSB/MAR-05/01 (2005), at 73, available at http://www.ntsb.gov/doclib/reports/2005/MAR0501.pdf. Accessed July 1, 2013.

[118] Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[119] 42 U.S.C. §§ 12161 *et seq.* (2013).

[120] 42 U.S.C. §§ 12142 and 12162 (2013).

[121] 42 U.S.C. § 12145 (2013).

[122] 42 U.S.C. § 12143 (2013).

Recognizing that the ADA did not specifically refer to the development of emergency plans, President Bush issued Executive Order 13347, *Individuals with Disabilities in Emergency Preparedness*,[123] on July 22, 2004. This Executive Order directed the federal government to work together with state, local, and tribal governments, as well as private organizations, to appropriately address the safety and security needs of people with disabilities in emergency situations.

12. Transportation for Individuals with Disabilities: Passenger Vessels

USDOT issued this ADA-related rule[124] to ensure nondiscrimination on the basis of disability by passenger vessel operators and accessibility to landside facilities.[125] This rule incorporates Executive Order 13347 and includes requirements to assist passengers with disabilities disembark a vessel upon request,[126] provide assistance to enable persons with disabilities to participate in safety or emergency evacuation drills,[127] and to maintain evacuation programs, information, and equipment in accessible locations for all passengers.[128] Moreover, information must be conveyed to passengers with vision or hearing impairments.[129]

13. USDOT Environmental Justice Order 5610.2(a)

This USDOT Order[130] updated its prior 1997 Order to Address Environmental Justice in Minority Populations and Low-Income Populations.[131] USDOT's administrations and fund recipients are encouraged to consider the environmental impacts of service and design planning decisions on low-income and minority populations.[132] The USDOT Order strives to ensure nondiscrimination under Title VI of the 1964 Civil Rights Act[133] in federally funded activities. Under Title VI and related statutes, each federal agency is required to ensure that no person is excluded from participation in, denied the benefit of, or subjected to discrimination under any program or activity receiving federal financial assistance on the basis of race, color, national origin, age, sex,[134] and disability.[135] The Civil Rights Restoration Act of 1987[136] clarified the intent of Title VI to include all programs and activities of federal-aid recipients, subrecipients, and contractors,[137] whether those programs and activities are federally funded or not.[138] The USDOT Order also builds upon the foundation of the National Environmental Policy Act of 1969 (NEPA),[139] which stresses the importance of providing for "all Americans safe, healthful, productive, and esthetically pleasing surroundings,"[140] and provided a requirement for recipients to take a "systematic, interdisciplinary approach" to consider environmental and community factors in decision-making.[141]

The USDOT Order urges recipients to 1) avoid, minimize, or mitigate disproportionately high and adverse human health or environmental effects, including social and economic effects, on minority populations and low-income populations,[142] and 2) ensure the full and fair participation by all potentially affected communities in the transportation decision-making process.[143] In implementing these requirements, the following information should be obtained where relevant, appropriate, and practical:[144]

- Population served and/or affected by race, color, or national origin, and income level.
- Proposed steps to guard against disproportionately high and adverse effects on persons on the basis of race, color, or national ori-

[123] 69 Fed. Reg. 44573 (July 26, 2004).

[124] 49 C.F.R. pt. 39.

[125] The Supreme Court upheld that the ADA applies to passenger vessels in *Spector et al. v. Norwegian Cruise Lines*, 545 U.S. 119, 125 S. Ct. 2169, 162 L. Ed. 2d 97 (2005).

[126] 49 C.F.R. § 39.83.

[127] 49 C.F.R. § 39.89.

[128] *Id.*

[129] 49 C.F.R. § 39.85.

[130] 77 Fed. Reg. 27534 (May 10, 2012). Order also available at http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/. Accessed July 1, 2013.

[131] 62 Fed. Reg. 18377 (Apr. 15, 1997).

[132] See DOT/FTA Environmental Justice Circular [Docket FTA-2011-0055], 77 Fed. Reg. 42077, 42081 (July 17, 2012).

[133] Pub. L. No. 88–352, 78 Stat. 241 (1964).

[134] 42 U.S.C. §§ 2000e-2(a)(1)-(2) (2013).

[135] Disability included as part of the ADA described above.

[136] Pub. L. No. 100-259; 102 Stat. 28 (1988).

[137] 42 U.S.C. §§ 2000d-4a(1)(A)-(B) (2013).

[138] 42 U.S.C. § 2000d-4a (2013).

[139] Pub. L. No. 91-190, 83 Stat. 852 (1970).

[140] 42 U.S.C. § 4331(b)(2) (2013).

[141] 42 U.S.C. § 4332(A) (2013).

[142] DOT Order 5610.2(a) § 5(a)(1), 77 Fed. Reg. 27534, 27535 (May 10, 2012).

[143] *Id.*

[144] DOT Order 5610.2(a) § 7(b), 77 Fed. Reg. 27534, 27536 (May 10, 2012).

gin, and income level.

- Present and proposed membership by race, color, or national origin, in any planning or advisory body that is part of the program, policy, or activity.

14. USDOT Policy Guidance Concerning Limited English Proficient Persons

The USDOT Policy Guidance Concerning Recipient's Responsibilities to Limited English Proficient (LEP) Persons[145] implements at the USDOT level the directives of Title VI of the Civil Rights Act of 1964[146] and Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency,"[147] which charged federal agencies with ensuring consistency and cost-effectiveness in assisting individuals with LEP to utilize federal services and programs.[148] This guidance recommends that federal recipients assess the number or proportion of LEP persons served or encountered in their service populations[149] and the frequency with which LEP persons are encountered in the provision of their services.[150] However, the financial resources of the recipient may be a factor in determining the extent of LEP services offered.[151]

III. TRANSIT EMERGENCY PLANNING PRACTICE GUIDE

This Emergency Planning Practice Guide assists transit professionals by:

- Summarizing their emergency planning legal obligations.
- Describing guidance from the transit and homeland security industries and providing practical implementation advice to fulfill their legal obligations.
- Providing two case studies to exemplify how systems implement their planning programs.
- Discussing legal issues such as immunities for planning decisions, disaster recovery assistance programs, dealing with security sensitive information (SSI), and developing mutual aid agreements.

A. Using Terms: Safety, Security, and Emergency Management

After September 11, 2001, both the homeland security and transit industries contemplated how best to understand and adapt to a new set of challenges. In subsequent years, comprehensive new homeland security programs and guidance were developed, though they were not necessarily coordinated within and across industries. Transit was required to quickly grow and evolve in response to the nation's new emphasis on preparedness. For transit, with a long heritage as a common carrier to provide safe transport, adding to its mandate the provision of secure services would be an uncomfortable marriage. Security was generally viewed as the domain of local law enforcement or transit police. In addition, transit had to understand its function in catastrophic planning and how to coordinate into regional incident responses.

Ambiguity in the definitions of key transit terms arose, which impacted the understanding and implementation of safety, security, and emergency management programs since September 11, 2001. For example, in the 1990s, FTA developed and promulgated a substantial regulatory program to oversee transit safety.[152] For rail agencies that did not travel on the national railroad network, this was the most comprehensive set of regulations ever to oversee their safety operations and it set a new codified standard by which all transit systems could assess their management programs. As with FTA's overall programmatic emphasis prior to September 11, 2001, however, there was only a relatively minor State Safety Oversight (SSO) focus on security issues, which up to that point centered primarily on quality-of-life issues, property, and violent crimes.[153] Fire

[145] 70 Fed. Reg. 74087 (Dec. 14, 2005).

[146] 42 U.S.C. §§ 2000d *et seq.* (1964). "[N]o person shall be subjected to discrimination on the basis of race, color, or national origin under any program or activity that receives Federal financial assistance…."

[147] 65 Fed. Reg. 50121 (Aug. 16, 2000).

[148] 70 Fed. Reg. 74087, 74089 (Dec. 14, 2005).

[149] *Id.* at 74092.

[150] *Id.*

[151] *Id.*

[152] Rail Fixed Guideway Systems; State Safety Oversight, 49 C.F.R. pt. 659 (2013).

[153] *See* M. ANNABELLE BOYD & M. PATRICIA BOYD, TRANSIT SECURITY HANDBOOK 25 (1998) (prepared for and sponsored by the FTA), http://www3.cutr.usf.edu/security/documents/FTA/dot-vntsc-fta-98-3.pdf. Congress never specifically stated that SSO was to include a security component and commenters on the proposed SSO rule objected to its inclusion. FTA ultimately interpreted that "safety" encompassed "security," stating that it

> …disagree[s]…with the argument that Congress did not intend section 5330 to include security. Section 5330(c)(1) states that "[a] State meets the requirement of this section if the State—establishes and is carrying out a safety program plan for each

response and facility and vehicle evacuations were considered in the realm of transit safety as part of an agency's overall safety program, along with environmental and occupational health issues. When the SSO program standards were published, the safety and security elements of that program were outlined in this fashion. However, fires and evacuations are issues we now conceptually place within the discipline of emergency management, though there were no explicit delineations between safety and emergency management in the SSO regulations or in the general transit vernacular before September 11, 2001.[154] Moreover, after September 11, 2001, due likely to the influence of the pervasive usage of the term "security" by law enforcement and the military, transit began to discuss the enhancement of its "security" posture, which included consideration for transit's role in emergency management.[155] For example, guidance from FTA in 2003 recommended that agencies detail their emergency response activities in a separate "Security and Emergency Management Plan (SEMP)"[156] or a "Security and Emergency Preparedness Program Plan (SEPP)"[157] rather than as part of an expanded SSPP, which already discussed issues of evacuations and fires. To rail operators who were required to develop an SSPP pursuant to SSO, there seemed to be developing an unclear distinction between traditional SSO "safety" elements and the newly developed criteria for "security."

FTA would eventually attempt to clarify its program elements. In 2006, FTA promulgated revised rules for SSO. As part of an SSPP, a rail transit system must now specifically discuss its emergency management program.[158] While that distinction was made, the revised regulations also mandated that a rail transit system create a separate security plan as well. However, despite these changes, ambiguity lingers. The SSO implementation guidance for the development of an SSO security plan indicates that additional assistance can be found in FTA's 2003 *Public Transportation System Security and Emergency Preparedness Planning Guide*[159] and in the FTA 2006 *Resource Toolkit for State Oversight Agencies Implementing 49 CFR Part 659,*[160] both of which recommend that a system's emergency management program be described as well in a separate SEPP. Nonetheless, after over a decade of experience, the terms safety, security, and emergency management are recognized now as separate disciplines in transit planning.

Much of the verbal interchangeability between the terms safety, security, and emergency management was due to the fact that emergency management is a nexus between the safety and security fields—the three disciplines form a continuum of activities. For example, traditional safety personnel deal with fires and evacuations, but security personnel also have public safety functions in a crisis like crowd control and life safety/rescue. Both safety and security personnel have emergency management duties.

Unfortunately, "security" is still often used as shorthand for "security and emergency management" issues in major DHS and transit programs, as well as to just denote the areas of law enforcement and intelligence work. As such, where necessary and logical, more care to make clear distinctions between safety, secu-

[rail] fixed guideway mass transportation system in the State." According to Webster's Third New International Dictionary, "safety" means "the condition of being safe; freedom from exposure to danger, exemption from hurt, injury, or loss," whereas "security" means "the quality or state of being secure: as (a) freedom from danger: safety." It seems clear, therefore, that the meaning of safety encompasses the meaning of security.

Nonetheless, "security" had, compared with today, a limited scope. 60 Fed. Reg. 67034, 67038 (Dec. 27, 1995).

[154] This is not to say transit professionals did not understand the distinction. Commenters on SSO "contended that emergency planning and response procedures were the same for both safety and security events. Four commenters recommended that FTA include security only when it relates to emergency planning and response…." *Id*.

[155] From 2002–2004, this digest's author was part of one of three consulting teams dispatched nationally as part of the FTA's Top 50 Transit Security and Emergency Management Technical Assistance Program. "Emergency Management" was not initially in the title of the program.

[156] TSA/FTA, *Top 20 Security and Emergency Management Action Items for Transit Agencies* (2003). Updated list available at http://transit-safety.volpe.dot.gov/security/securityinitiatives/ActionItems/default.asp. Accessed July 1, 2013.

[157] FEDERAL TRANSIT ADMINISTRATION, THE PUBLIC TRANSPORTATION SYSTEM SECURITY AND EMERGENCY PREPAREDNESS PLANNING GUIDE 5 (2003), available at http://www.fta.dot.gov/documents/PlanningGuide.pdf. Accessed July 4, 2013.

[158] 49 C.F.R. § 659.17.

[159] FEDERAL TRANSIT ADMINISTRATION, *supra* note 157, at 5.

[160] Federal Transit Administration, Resource Toolkit for State Oversight Agencies Implementing 49 C.F.R. Part 659, at 48 (2006), available at http://www.fta.dot.gov/documents/ResourceToolkit.pdf. Accessed July 4, 2013.

rity, and emergency management should be taken to eliminate the potential for confusion.

B. Modal Administration Jurisdiction and Compliance Issues

Whether and how a particular transit system is or is not required to plan for emergencies is in part determined by which regulatory authority holds sway on a given safety, security, or emergency management issue. The following three sections are provided to help transit managers and legal counsel navigate various legal parameters for rail, bus, paratransit, and ferry systems. A summary of emergency planning legal requirements is included at the end of this section.

1. Rail Transit Compliance Issues

A loose distinction between the systems FTA and FRA regulate is that the former oversees inner-city rapid transit systems and the latter has oversight of commuter rail entities that operate on the national railroad network. However, there are historical, legal, regulatory, financial, and jurisprudential parameters that complicate this picture. For example, commuter railroads receive substantial funding from FTA but are under the safety and security jurisdiction of FRA[161] and not subject to FTA's State Safety Oversight rule.[162] However, pursuant to grant terms and conditions for major capital projects[163] and urbanized area formula funding,[164] FTA works actively with commuter railroads to ensure safety in design, engineering, construction, and operation, and in the procurement of commuter rail vehicles.

Other regulatory issues include:

- As per FTA Rail State Safety Oversight regulations, "rail transit" includes modes outside of those typically thought of as rail operators, including inclined planes.[165]
- TSA, by its authorizing statute[166] and regulations,[167] has security oversight over operations of systems of both administrations.
- Regulatory waivers (e.g. New Jersey Transit's River Line operates on Conrail track pursuant to an FRA waiver).
- Legal precedent (e.g. the Port Authority Trans-Hudson system severed connections with the national railroad network but was still adjudicated to be under FRA jurisdiction).[168]

2. Transit Bus and Paratransit System Compliance Issues

There are distinctions between buses covered by FTA and those that come under the Federal Motor Carrier Safety Administration (FMCSA). While the latter administration oversees a comprehensive set of mandatory Federal Motor Carrier Safety Regulations (FMCSR), buses funded by FTA are not subject to these regulations, except for Commercial Drivers License requirements[169] and in some cases accident report retention requirements.[170] This lack of FMCSA jurisdiction over transit buses is a result of the governmental exception in the FMSCR, which states that "[t]ransportation performed by the federal government, a state, or any political subdivision of a state, or agency established under a compact between states that has been approved by the Congress of the U.S…" is not subject to the FMCSR.[171] While FTA developed a guidance initiative called the *Transit Bus Safety and Security Program* (TBSSP) with industry partners,[172] until 2012, FTA had not been authorized by Congress to wield regulatory authority over transit buses and paratransit operators with respect to safety and security. With such a vacuum, certain states enacted their own

[161] 49 C.F.R. pts. 200–65.

[162] 49 C.F.R. § 659.5.

[163] 49 U.S.C. § 5309 (2013).

[164] 49 U.S.C. § 5307 (2013).

[165] 49 C.F.R. § 659.5.

[166] 49 U.S.C. § 114(d)(2) (2013).

[167] 49 C.F.R. § 1580.201. TSA mandates that any system operating on the national railroad system must appoint a Rail Security Coordinator (RSC). FTA-funded vehicles on the national network via FRA waivers are subject to this regulation. C.F.R. § 1580.201(e) states that the RSC must coordinate with TSA and appropriate law enforcement and emergency response agencies.

[168] For a more thorough discussion of FTA and FRA jurisdictional issues, *see* SELECTED STUDIES IN TRANSPORTATION LAW, *Transit Law, Section 7: Safety* 5 (Transit Cooperative Research Program, Transportation Research Board, 2004).

[169] 49 C.F.R. § 283.23.

[170] 49 C.F.R. § 390.15.

[171] 49 C.F.R. § 390.3(f)(2). All states, along with the rest of the FMCSR, adopted this governmental exception rule. See Federal Transit Administration, Transit Bus Safety Program Task 2—Regulations and Oversight 14 (2001), available at http://transit-safety.volpe.dot.gov/Safety/BusTasks/Task2/PDF/Task2.pdf. Accessed July 4, 2013.

[172] Partners included the American Public Transportation Association (APTA), Community Transportation Association of American (CTAA), and the American Association of State Highway and Transportation Officials (AASHTO).

legislation and programs to oversee transit bus safety and security.[173]

However, on July 17, 2012, MAP-21[174] was enacted mandating the Secretary of Transportation to develop a NPTSP, to include:

- Safety performance criteria for all modes of public transportation.[175]
- A standard for the meaning of "state of good repair" for capital assets.[176]
- Minimum safety performance standards, taking into account NTSB recommendations and best practices.[177]
- A safety certification training program to develop oversight capabilities.[178]
- Within 1 year of the rules for the NPTSP being promulgated, each USDOT recipient shall certify or have certified by the state: 1) a requirement that a Board or equivalent entity approve an agency safety plan and updates thereof, 2) methods of identifying and evaluating safety risks, 3) strategies to minimize risk, 4) a process and timeline for conducting an annual review and update of the safety plan, 5) safety performance targets and state of good repair standards, 6) assignment of an adequately trained safety officer, and 7) a comprehensive staff certification training program for operations personnel with continuing education requirements.[179]

Recipients may use not more than .5 percent of grant funds to pay not more than 80 percent of the cost of a certification training program.[180]

If the Secretary of USDOT does not feel that a recipient is within compliance of the NPTSP, he or she may 1) issue directives, 2) require additional oversight, 3) impose more frequent reporting requirements, or 4) require that federal funds be withheld.[181]

As safety and security programs have already been developed for rail and ferries, transit bus and paratransit are the only modes without similar regulatory oversight, The NPTSP was, in part, developed to fill this vacuum. While NPTSP included major programmatic changes to SSO to ensure independent and efficient oversight of rail transit systems, rules for a bus safety program have yet to be promulgated by USDOT.[182] According to FTA, "…while bus safety is also important, rail is where we will be focusing much of our attention at first."[183] In the meantime, guidance for transit bus and paratransit systems is available through FTA's TBSSP and CTAA's Certified Safety and Security Officer (CSSO) and Community Transportation Safety and Security Accreditation (CTSSA) training programs. Moreover, individual state programs in, for example, Florida and North Carolina (the latter described in Case Study 1 below), also provide safety and security guidance to state transit bus systems.

3. Ferry System Compliance Issues

Public ferry systems are subject to the most rigorous safety, security, and emergency management oversight requirements of all transit modes. Since the enactment of the MTSA,[184] public ferry operators must comply with regular USCG security and emergency management operational, assessment, planning, and training requirements, as well as periodic maintenance checks by the USCG. Ferries are the only transit mode with direct federal oversight.

Public ferry systems receive federal assistance funded through grants and financing from FTA, FHWA, and the Maritime Administration (MARAD).[185] FHWA provides most of the capital construction funds for public ferry systems through its highway and discretionary funds. Additionally, FTA can provide ferry systems assistance through its 5307 Urban Area funds to finance planning and capital design

[173] *See* FLA. STAT. ANN. § 341.061(2)(a), which requires the development of system safety and security program plans for transit bus systems.

[174] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[175] 49 U.S.C. § 5329(b)(2)(A) (2013).

[176] 49 U.S.C. § 5329(b)(2)(B) (2013).

[177] 49 U.S.C. § 5329(b)(2)(C) (2013).

[178] 49 U.S.C. § 5329(c) (2013).

[179] 49 U.S.C. § 5329(d)(1)(A)-(G) (2013).

[180] 49 U.S.C. § 5329(e)(6)(c)(iv) (2013).

[181] 49 U.S.C. § 5329(g)(1)(A)-(D) (2013).

[182] Secretary LaHood put transit safety regulations before Congress in 2009 and formed the Transit Rail Advisory Committee for Safety (TRACS) to recommend revisions to the oversight process to rail fixed guideway systems. *See* Federal Transit Administration, TRACS Web site, at http://www.fta.dot.gov/13099.html. Accessed July 4, 2013. No new safety and security performance standards have been promulgated for rail to date that would impact this analysis.

[183] Federal Transit Administration, *MAP-21 Safety Oversight Questions and Answers*, available at http://www.fta.dot.gov/tso_15038.html. Accessed July 4, 2013.

[184] Pub. L. No. 107-295, 116 Stat. 2064 (2002).

[185] 46 C.F.R. § 53702 authorizes the MARAD to make 100 percent obligation guarantees for passenger vessels.

and construction costs, and to some extent preventive maintenance operating costs. If ferry systems utilize FTA funds, they may be subject to PMP and SSMP requirements pursuant to the FTA's PMO program and statutory and administrative program requirement triennial reviews by FTA.[186]

4. Transit Emergency Planning Requirements

In general, existing laws, policies, and regulations that pertain to transit emergency planning establish broad requirements with few implementation specifics. Applicable laws and regulations primarily mandate the development of overarching system safety, security, and emergency management programs. They seek to ensure that all transit providers consider and deliberate over safety, security, and emergency management issues in a coordinated fashion and mandate that these issues are the responsibility of all transit system employees. In Table 3, Emergency Planning Requirements, below, the primary planning requirements of each transit mode are listed. These requirements broadly mandate the development of:

- Safety, security, and emergency management objectives.
- Safety, security, and emergency management roles and responsibilities.
- Safety, security, and emergency management committees.
- Hazard and threat assessment processes.
- Emergency operations plans based on NIMS and ICS.
- Training programs based on safety, security, and emergency operations plans and procedures.
- Programs that consider the needs of vulnerable populations.
- Coordinative efforts between transit and key external agencies primarily for regional emergency response.

Moreover, the laws, policies, and regulations described above in general do not prescribe the implementation of more specific operational activities. This may be due to the difficulty in addressing:

- The spectrum of transit providers, which vary greatly in agency size, scope, and resources.
- The various environments and circumstances in which transit systems operate.
- The varied circumstances under which emergency operations may occur.
- The fact that in major regional incidents transit systems will not establish incident response priorities and needs. Rather this is the responsibility of local/regional emergency management, public safety, and law enforcement agencies. Incident Commanders will utilize the existing capabilities of transit to respond to an incident and establish incident priorities and operational plans. While transit is recommended to consider the environmental justice impacts of any emergency planning, it must, however, make available to the elderly and disabled any emergency services that it would to the rest of the population. The scope and needs of the latter will be a joint determination between transit and emergency management agencies, including which populations will be addressed in regional plans.[187]

As such, there are no regulations that, for example, prescribe:

- Specific risks a particular agency should consider.
- The specific content of security and emergency management training transit personnel should receive.
- How transit will respond to risks, including public health crises, or how it will evacuate populations.
- How and where transit should establish emergency bus stops and staging areas.
- How transit communicates with the public with respect to emergency planning information.
- With whom transit should enter into mutual aid agreements.
- What standards should be observed to borrow equipment and personnel from other agencies.
- What type of equipment must be on-hand for emergencies.

[186] 49 U.S.C. § 5307(f)(2) (2013).

[187] State and/or local emergency management agencies are required to maintain special-needs population databases. There are no standardized methodologies for the collection of such data, though emergency management will look to transit's enrollments of the disabled in, for example, a system's paratransit services. However, the total special-needs populations addressed in a plan may exceed the enrollment in a transit system's database, e.g., persons identified as disabled elsewhere but in no need of transit assistance on a daily basis. If a plan specifies transit is responsible for these identified groups, then their obligation begins.

Of all the laws and regulations described above, USDOT's rules regarding the treatment of the disabled on passenger vessels are among the most prescriptive. While other ADA-based rules were promulgated by the USDOT to afford reasonable accommodations and prevent discrimination on other modes,[188] USDOT's passenger vessel rules are more narrowly defined and pertain specifically to emergency operations. However, these types of rules are the exception rather than the norm.

In terms of transit employee duties to respond to emergencies, individual state and local emergency management laws and regulations authorize a governor or local executive to marshal the services of government employees to respond to a crisis. One area of tension between labor and management in certain at-risk cities, however, is the level of capability and training employees have to address certain risks. Transit unions have argued for mandatory, industry-wide security awareness training and standards to be established by TSA, but none have been developed to date. Moreover, occupational safety questions regarding whether transit personnel should be pressed into emergency service in the face of pandemics, biochemical threats, etc., with or without proper training and equipment, exist and have been raised across the industry.[189]

[188] 49 C.F.R. pt. 37.

[189] Interview with Frank Goldsmith, Transit Workers Union Local 100, Occupational Health Director (Apr. 2, 2012).

MANDATORY EMERGENCY PLANNNING REQUIREMENTS							
LAW/ REGULATION	**REGULATORY AGENCY**	**DOCUMENT**	**MODE**				
			RAIL TRANSIT	TRANSIT BUS	PARATRANSIT	FERRIES	COMMUTER RAIL
49 C.F.R. § 659.23	FTA	SSPP	Yes	-	-	-	-
U.S.C. § 5329*	FTA	Safety Plan	-	Yes	Yes	-	-
49 C.F.R. Part 633.25**	FTA	PMP/SSMP	Yes	Yes	Yes	Yes***	Yes
33 C.F.R. § 104.405	USCG	VSP	-	-	-	Yes	-
33 C.F.R. § 105.405	USCG	FSP	-	-	-	Yes	-
49 C.F.R .§ 230.101	FRA	EPP	-	-	-	-	Yes

* Regulations for this program have not yet been promulgated.
** For major capital project of $100,000,000 or more.
*** If FTA funding is used and if a major capital project. Ferries are primarily funded by FHWA.

SSPP – System Safety Program PMP – Project Management Plan SSMP – Safety and Security Management Plan	VSP – Vessel Security Plan FSP – Facility Security Plan EPP – Emergency Preparedness Plan

Table 3. Key Emergency Planning Requirements.

C. Understanding Emergency Planning Priorities and Resilience

By the time USDOT develops its regulations, all transit modes will have some type of security and emergency management planning requirements. However, with the constant stream of new programs, recommendations, revisions, and modifications thereto from both DHS and the various USDOT modal administrations, it is understandable that a transit professional still may be at a loss to know what his or her obligations are. The plan requirements listed in Table 3 above constitute great institutional development challenges, and how transit and homeland security programs and policies interact is not easily understood.

In general, the laws, policies, and regulations described in Section 2 establish broad programmatic mandates and do not provide much practical implementation guidance. For example, it is one thing to develop an SSPP, but it is quite another to understand what an SSPP means to an organization and truly implement its policies and operational objectives. In general, there has been confusion:

- Understanding guidance from the transit and homeland security industries and how they integrate into transit operations; and
- Scaling guidance to varying sized operations and across modes.

Documents like the FTA *Public Transportation System Security and Emergency Preparedness Planning Guide* were created to accommodate the largest and most complex rail systems in the country on the assumption that smaller systems could scale down the guidance to fit their circumstances. However, to build a program, a small- to medium-sized agency with 3– 4 key managers would first have to filter through over 100 pages of such guidance. Then, such transit managers would have to consider what it means when they are advised to build plans and capabilities for various specific and probable threat scenarios, and yet somehow still be flexible and prepared enough for the catastrophically unlikely.[190] Given such

[190] Terrorism is a rare occurrence…[a] bus or rail supervisor may experience only one of these events in his or her entire career. Given this lack of frequency, it is difficult to expect competency in these highly charged situations. Yet, the consequences of poor decision-making in response to

commonly heard advice after September 11, 2001, interpreting guidance is at minimum a daunting task and at worst a disincentive to start preparations.

Unfortunately, many have looked upon these homeland security planning issues and requirements narrowly as unfunded mandates or "check-the-box" tasks to fill in templates rather than seeing them for what they truly are: *exercises in risk management*. Contemporary transit planning has its roots in Military Standard system safety[191]—philosophies and coordinated processes by which risks in operations, systems, and equipment can be identified, eliminated, mitigated, or accepted. Across key guidance in both industries, whether it comes from USDOT, DHS, TSA, FEMA, the National Fire Protection Association (NFPA), or APTA, all primary recommendations from these groups are founded upon the principles of continual assessment and improvement. Whether an emergency management planning requirement applies to an agency or not, it nonetheless behooves transit managers to examine their systems from time to time to understand how they organize and function and assess strengths and weaknesses. By deliberately building a program that encourages feedback and training to minimize risk and cost, transit stands to benefit from an enhanced scope and quality of safety, security, and emergency management capability and programs.

To assist transit managers in meeting the mandates of the USDOT modal administrations and complying with guidance and requirements of the homeland security industry, this section will:

1. Delineate transit's and external agency preparedness responsibilities and obligations for large-scale emergencies.
2. Discuss the assessment of transit's resilience for large-scale emergency operations.
3. Assist transit managers in preparing for large-scale emergency operations.

The ultimate goal of this section is to isolate the essential planning elements from both the transit and homeland security industries to instruct transit managers on how to think about building emergency management capability and functions. Where helpful, it will point to specific sections of selected guidance documents for managers to investigate issues more thoroughly and search for ideas and clarifications. At the end of this section, two case studies are presented to provide readers with real-life applications of the elements identified and discussed.

1. Transit's Preparedness Obligations for Large-Scale Emergencies

To understand the roles and obligations of transit to prepare for large-scale events, one must first understand the core principles of the NRF upon which the mechanics of it are built.[192]

The essence of the NRF emanates from a set of principles collectively called "response doctrine." As stated in the NRF, "[r]esponse doctrine is rooted in America's federal system and the Constitution's division of responsibilities between federal and state governments."[193] Response doctrine defines basic roles, responsibilities, and operational concepts for preparedness across all levels of government to save lives and protect property and the environment. Five key principles of operations constitute the national response doctrine:[194]

- *Engaged partnership*—active communication, shared situational awareness, planning and training with key local, state, regional, tribal, and/or federal stakeholders.
- *Tiered response* —incidents begin and end locally, and frontline personnel and organizations are to be supported by successively higher levels of government as resource needs cannot be met at individual levels.
- *Scalable, flexible, and adaptable operational capabilities*—command structures and resource supplies and allocations should surge or wane depending on circumstances.

extraordinary events are grave. Unless adequate preparation is provided, transportation personnel may be unable to mobilize effectively to manage critical incidents on their systems and to support community response when most needed.

Federal Transit Administration, *supra* note 157, at 2.

[191] FTA's State Safety Oversight program was built upon Military Standard 882B (replaced in 2012 with 882E, available at http://www.system-safety.org/Documents/MIL-STD-882E.pdf). *See also* DOT/FTA Rail System Guideway Systems; State Safety Oversight. Accessed July 4, 2013.

[192] For a thorough discussion of the NRF and how transit is integrated into a national response, *see* PUBLIC TRANSPORTATION EMERGENCY MOBILIZATION AND EMERGENCY GUIDE, 7 PUBLIC TRANSPORTATION SECURITY (TCRP Report 86, §§ 2–3, Transportation Research Board, 2005).

[193] *The National Response Framework* 8, available at http://www.fema.gov/national-response-framework. Accessed July 4, 2013.

[194] *Id.* at 9.

• *Unity of effort through unified command*—each level and element of government will have its individual command structure established to marshal its own personnel, equipment, and supplies and have the capability to integrate into larger multi-agency commands.

• *Readiness to act*—having a "forward-leaning posture"[195] built upon strategies, procedures, training, and communications.

The NRF created the overall national structure under which federal, state, and local agencies must operate and coordinate. Being rooted in the Constitution's theory of separation of powers, each state must coordinate its resources and provide strategic guidance needed to prevent, mitigate, prepare for, respond to, and recover from all hazards. States will establish laws and regulations to develop an emergency management structure. As the state coordinates with federal level agencies, local communities will coordinate with the state in a complementary fashion. Accordingly, as FEMA communicates with and marshals federal assets and resources for a state emergency management agency, the state emergency management agency will communicate with and coordinate resource collection and distribution for its local communities through local offices of emergency management.

Therefore, each state has enacted its own set of legislation to create emergency management structures and processes. Each state emergency management agency is charged with a planning function to build disaster readiness capabilities and marshal state and local assets, including public employees. A state emergency statute will mandate that a disaster plan be developed and may identify measures to coordinate resources and personnel during and after major incidents.[196] States mandate that such plans identify risks, recommend disaster prevention and mitigation projects, and indicate revisions for safety and zoning codes.[197] Plans should also describe key operational planning objectives for activities like evacuations, the identification and movement of persons with special needs and pets, and ingress and egress into disaster areas.[198] Moreover, states are mandated to provide assistance to localities to develop their own plans and objectives, assess risk, identify capabilities, and coordinate activities among local government resources and assets in conjunction with state objectives.[199] In turn, localities are encouraged to build their own emergency management structures, plans, and capability.[200] These laws that outline the role in emergency planning for states and localities create an obligation for them to coordinate with local transit systems. Pursuant to state disaster plans, state and local emergency management agencies are charged with working with local transit systems to coordinate objectives to address identified risks. From a transit manager's perspective, though there is no question that transit has a role in regional emergencies like evacuations, these are not planning issues that pertain to their everyday missions. In general, transit agencies will plan for the movement of the disabled, deal with LEP persons, and respond to major transit disruptions such as a loss of a substation, switches, or a yard, among others, to the extent to which their authorizing legislation to run safe and secure service necessitate.[201] However, transit is not mandated to develop the priorities or objectives of regional disaster plans that impact the operations of numerous agencies. Rather, it is legislatively the responsibility of state and local governments to do so while taking into account the existing capabilities of transit. To the extent additional resources, beyond the needs to execute transit's basic mission, are necessary for transit to carry out these emergency management objectives, transit systems may or may not enhance their capabilities to meet those objectives depending on the cost or difficulty. To ensure that the most efficient use of transit's resources are made, or if assistance can be provided to transit to enhance its capabilities, transit should be consulted so that emergency planners may benefit from their opinions, experience, and advice. This last point should not be taken for granted, as it is not at all uncommon for transit systems to be named in state and local plans and never have been consulted with regard to their capabilities or to inform them of local emergency objectives.[202] As response doctrine requires, coordi-

[195] *Id.* at 11.

[196] *See* N.Y. EXEC. LAW art. 2B, § 22b(1) and (2).

[197] *Id.* § 22b(3)(a).

[198] *Id.* § 22b(3)(b).

[199] *Id.* § 22b(3)(a).

[200] *Id.* § 23.

[201] As well as the programs and parameters that activate them from FTA and funding streams, among others. S*ee* § 3b. herein.

[202] A finding in *The Role of Transit in Emergency Evacuation*, TRB Special Report 294, at 70 (2008), was that the "majority of the emergency operations plans for large urbanized areas are only partially

nation with transit by state and local emergency management agencies should occur to assist transit in understanding planning objectives and to determine how transit's capabilities and assets can be utilized to build a stronger regional preparedness program.

Pursuant to state disaster plans, state and local emergency management agencies are charged with working with local transit systems to coordinate objectives to address identified risks. However, transit is not mandated to develop the priorities or objectives of these regional disaster operations. Rather, it is legislatively the responsibility of state and local governments to do so while taking into account the existing capabilities of transit.

2. Assessing Transit's Resilience for Large-Scale Emergencies

Presidential Policy Directive 8: National Preparedness (PPD-8) describes the nation's approach to preparing for threats and hazards. It mandated that an NPG be developed by DHS based on identified risks from specific threats and vulnerabilities. The NPG would identify core capabilities necessary to prepare for such risks and help guide the domestic efforts of all levels of government.[203]

An NPG was developed in 2011. Among the 32 core capabilities listed, "Critical Transportation" is defined as to the ability to "[p]rovide transportation (including infrastructure access and accessible transportation services) for response priority objectives, including the evacuation of people and animals, and the delivery of vital response personnel, equipment, and services into the affected areas."[204] The resiliency of transportation is also part of the NPG as described in the core capability "Infrastructure Systems" task to "[d]ecrease and stabilize immediate infrastructure threats to…evacuation processing centers with a focus on life-sustaining and congregate care services."[205] (Note: PPD-8 and the NPG together constitute another mandate for state and local government to set objectives for disaster transportation operations and coordinate with transit.)

While essentially the same as the directive that PPD-8 superseded, HSPD-8, it differed from its predecessor in that rather than focusing on capability building in relation to various scenarios, preparedness now meant looking at the general resilience of an entity's essential functions.[206] Prior to the release of the NPG, DHS recommended framing risk assessments nationally within 15 National Planning Scenarios (NPS), most of which were catastrophic terrorism events.[207] However, assessing risk in relation to specific threat or hazard scenarios may hamper a risk and capabilities analysis. The *FEMA Comprehensive Preparedness Guide 101* describes the problem:

> Planners must keep in mind that hazard or threat lists pose two problems. The first is exclusion or omission. There is always a potential for new and unexpected risks (part of the reason why maintaining an all-hazards, all-threats capability is important). The second is that such lists involve groupings, which can affect subsequent analysis. A list may give the impression that hazards or threats are independent of one another, when in fact they are often related (e.g., an earthquake might cause dam failure). Lists may group very different causes or sequences of events that require different types of responses under one category. For example, "Flood" might include dam failure, cloudbursts, or heavy rain upstream. Lists also may group a whole range of consequences under the category of a single hazard. "Terrorism," for example, could include use of conventional explosives against people or critical infrastructure; nuclear detonation; or release of lethal chemical, biological, or radiological material.[208]

sufficient in describing in specific and measurable terms how a major evacuation could be conducted successfully, and few focus on the role of transit."

[203] PPD-8, para. 2 (2011), available at http://www.dhs.gov/presidential-policy-directive-8-national-preparedness. Accessed July 5, 2013.

[204] Department of Homeland Security, The National Preparedness Goal, at 12 (2011), available at http://www.dhs.gov/presidential-policy-directive-8-national-preparedness. Accessed July 5, 2013.

[205] *Id.* at 13.

[206] Jared T. Brown, *Presidential Policy Directive 8 and the National Preparedness System: Background and Issues for Congress,* at 4, CRS R-42073 (Oct. 21, 2011), available at http://www.fas.org/sgp/crs/homesec/R42073.pdf. Accessed July 5, 2013.

[207] Department of Homeland Security, National Planning Scenarios (2006). The NPS were developed pursuant to the precursor to the NPG, the National Planning Guidelines, available at https://secure.nccrimecontrol.org/hsb/planning/Planning%20Documents/National%20Planning%20Scenarios%202006.pdf. Accessed July 5, 2013. (Document on Internet marked as "For Official Use Only.")

[208] FEDERAL EMERGENCY MANAGEMENT AGENCY, DEVELOPING AND MAINTAINING EMERGENCY OPERATIONS PLANS: COMPREHENSIVE PREPAREDNESS GUIDE 101, at 4-10 (2010), available at http://www.

This issue can be exemplified in how some rail transit risk assessments are conducted today. Pursuant to FTA's Rail Transit State Safety Oversight program, rail transit engineers and planners must assess the safety impacts of hazards that may debilitate a system or operations in the Preliminary Hazard Assessment (PHA) review process. This is often a separate exercise from the security and emergency management Threat and Vulnerability Assessment (TVA) process. This bifurcation in the full risk assessment process for a rail transit system (a PHA for the SSPP and a TVA for the System Security and Emergency Preparedness Plan) may be a contributing factor as to why some rail engineers and planners defer TVA analyses to "security experts." However, many issues that "safety" engineers and planners assess can be looked at from a security and emergency management perspective for a TVA—from both perspectives, the resulting disruptive outcomes are the same just with different causes. For example:

- A catenary support pole can be toppled by an improvised explosive device meant for nearby passengers as well as by an errant truck.
- Flash floods or tropical storms indicated in a state's Hazard Mitigation Plan can cause track flooding similar to those conditions caused by a sewer or water main break.
- Loss of communications due to a malicious act serves to similarly impact emergency communications and service dispatch as a fallen tree limb might.

This is not to say there are no issues for which advanced security architecture, engineering, and operations knowledge is necessary or helpful. Rather, that enhanced guidance could serve to demystify for transit professionals some of the homeland security domain and offer planning efficiencies. More importantly, in terms of assessing risk and capabilities, it could steer planners to assess core functions, disruptions, and causes in a more holistic fashion.

Thus, if the NPG has designated transit's core functions for state or city emergency plans—transporting people, animals, and equipment—a transit professional must then assess what a system's Mission Essential Functions (MEF) are to be ready to execute its core functions. A transit manager can seek to comply with the resilience objectives espoused by PPD-8 and the NPG by following the recommendations in continuity planning. The Transit Cooperative Research Program's (TCRP) *Continuity of Operations (COOP) Planning Guidelines for Transportation Agencies* explains:

> COOP planning ensures that the transportation agency has a process to manage events that disrupt the agency's internal operations or that deny access to important locations within the agency's service area. Under certain disruptive conditions, the transportation agency cannot perform its normal business activities. Therefore, COOP plans specify the minimum activities that will be performed by the transportation agency—no matter what the emergency or how it affects the agency's service area.
>
> These minimum activities are called *essential functions* because they are the most important activities necessary to restore the internal capabilities of the transportation agency; to support emergency responders and emergency management agencies; and to ensure the safety and protection of the transportation system's users, personnel, contractors, and vendors. In COOP planning, whether the emergency is the result of natural or human-caused events, an all-hazards approach ensures that essential functions will continue.[209]

For transit, in relation to meeting the goals and objectives of PPD-8, the NPG, and state and local emergency plans, the question is, "can transit operations stay up and running at a capacity to meet the objectives of a response and recovery?" Analyzing the MEF of transit operations is the key to answering this question. Following the *Comprehensive Preparedness Guide's* and the TCRP's recommendations, transit systems should focus on:

- Identifying core operational functions, and then
- Identifying potential disruptions and potential sources of such disruptions to these functions.

To accomplish this, planners should first identify those operational factors without which transit would lose the ability to adequately carry on to meet the objectives of a local response or recovery. A transit planner

fema.gov/pdf/about/divisions/npd/CPG_101_V2.pdf. Accessed July 5, 2013.

[209] ANNABELLE BOYD, JIM CATON, ANNE SINGLETON, PETER BROMLEY & CHUCK YORKS, 8 TRANSPORTATION SECURITY, CONTINUITY OF OPERATIONS (COOP) PLANNING GUIDELINES FOR TRANSPORTATION AGENCIES 3 (Transit Cooperative Research Program Report 86/National Cooperative Highway Research Program Report 525, Transportation Research Board, 2005).

could break down operations into parts, and begin assessing strengths, weaknesses, and interdependencies. A sample breakdown is as follows:

Mission Essential Functions

Communications	Transport	Maintenance	Management/ Administration
Cell phones	Vehicles	Facilities	Executives
Radios	Yards	Yards	IT
Repeaters	Track	Equipment	Procurements
Cell towers	Signals	Parts	Admin staff
Internet	Power systems	Fuel	Safety
	Operators	Maintainers	Security
	Supervisors	Cleaners	
	Dispatchers		
	Stations		
	Facilities		
	Bridges		
	Tunnels		
	SCADA systems		
	Fuel		

Table 4. Mission Essential Function Chart Sample.

Charts like these can be extremely helpful assessment tools to open a dialogue among management and operational departments. Once an MEF list is produced, transit managers can determine what causes may disrupt them. A sample set of causes may include:

Causes for Disruption of Services

Naturally Occurring	Human-Caused/Intentional	Human-Caused/Unintentional
Tornadoes	Misuse of resources	IT failures
High winds	Security breaches	Unavailability of personnel
Electrical storms	Theft	Power outages
Ice storms	Fraud or embezzlement	Water outages
Snowstorms	Arson	Fuel outages
Floods	Vandalism	HVAC failures
Earthquakes	Sabotage	SCADA failures
Epidemics	Workplace violence	Damage to equipment
Landslides	Bomb threats and other forms of terrorism	Contamination of equipment
Hurricanes	Labor disputes	Inadequate training
Typhoons	Disruption of supplies	
Tropical storms	Civil disorder	
Tsunamis	War	
Wildfires	Hostage taking	
Droughts	Hijacking	
Dust/wind storms		

Table 5. Causes for Disruption Chart Sample.

Reviewing agency operations and functions to ensure that transit can perform and meet the objectives of a local emergency plan is clearly not a simple matter. It requires a serious and deliberate attempt to critique the utilization of resources and operations. Once this risk assessment has been conducted, transit managers can discuss internally and with local stakeholders the status of their capability and ability to meet the objectives of a local emergency plan. Next, an agency can assess how it wants to address identified risks. It must make a thorough attempt at identifying issues and decide whether to accept risks, or attempt to mitigate or eliminate them.[210] (Lack of thoroughness in this process may raise legal issues.)[211] Depending on how an agency decides to act, these determinations may include decisions to build or enhance physical infrastructure, develop plans and procedures, and/or create training programs, among others, possibly with the assistance from local stakeholders if it helps meet the objectives of a local or state plan. By engaging in this process, transit managers will work towards meeting their obligations to the locality, state, their employees, and the riding public, and to manage risk.

3. Preparing Transit for Large-Scale Emergencies

Another one of the five mandates of the NRF response doctrine speaks to all levels of government being ready to act. The results of a risk assessment process described above will be the transit manager's roadmap for programmatic fortification and resiliency efforts. The common principle linking the core philosophies of the homeland security and transit industries is the commitment to a systems approach to continual improvement and assessment. The FEMA "preparedness cycle" is an important element of its programmatic guidance to bolster national preparedness. It was developed in response to HSPD-5's mandate to develop a framework for preparedness to respond to, recover from, and mitigate against natural disasters, acts of terrorism, and threats and hazards. NIMS defines preparedness as "a continuous cycle of planning, organizing, training, equipping, exercising, evaluating, and taking corrective action in an effort to ensure effective coordination during incident response."[212]

While infrastructure improvements are vital to building resilience, this section will discuss the operational planning issues mandated by the modal administrations and by DHS. The following two sections will discuss the importance of developing 1) plans and procedures, and 2) training and exercise programs.

a) Plans and Procedures.—The FEMA preparedness cycle could easily be used to represent the system safety and security approach promoted by the FTA and APTA as they share the same approach to management. The primary tools of APTA and the FTA to assist transit systems in organizing for continual improvement are the SSPP and SEPP. (See the full set of SSPP parameters in Table 6, below.) The templates for these documents should be viewed as an organization's risk checklist, starting with policies, goals and objectives, and structure of the management organization. The priorities and culture of an organization begin with the ideas and actions of the executive management. If management wants to understand the resiliency of MEF, it will undertake a critical, thorough, and deliberate review of assets and processes of the organization. However, SSPP and SEPP are primarily descriptive documents—transit systems are required to itemize and describe the processes by which safety and security goals and objectives will be met. There is great value in this alone in that transit systems must consider how to implement these programs if they already have not, and how to develop them if they have not yet. To develop these programs, the SSPP and SEPP require transit systems to determine and outline the roles and responsibilities of primary functions of the organization, including who is responsible for each program element and essential activity listed in the SSPP or SEPP.

[210] For a more thorough explanation of the risk assessment process, see FEDERAL EMERGENCY MANAGEMENT AGENCY, RISK MANAGEMENT SERIES, 426: REFERENCE MANUAL TO MITIGATE POTENTIAL TERRORIST ATTACKS AGAINST BUILDINGS (2003), available at http://www.fema.gov/library/viewRecord.do?id=1559. Accessed July 5, 2013.

[211] *See* Bordelon v. Gravity Drainage District No. 4, 74 So. 3d 766, 2011 La. App. LEXIS 1136 (2011).

[212] Federal Emergency Management Agency, National Incident Management System, at 145 (2008), available at http://www.fema.gov/national-incident-management-system. Accessed July 5, 2013.

FTA FIXED GUIDEWAY RAIL STATE SAFETY OVERSIGHT PROGRAM AREAS		
	SSPP ELEMENT	CONTENTS
1	Policy Statement and Authority for SSPP	A policy statement signed by the agency's chief executive that endorses the safety program and describes the authority that establishes the SSPP.
2	Goals and Objectives	A clear definition of the goals and objectives for the rail transit agency safety program and stated management responsibilities to ensure that they are achieved.
3	Overview of Management Structure	An overview of the management structure of the rail transit agency, including (i) an organization chart; (ii) a description of how the safety function is integrated into the rest of the rail transit organization; and (iii) clear identification of the lines of authority used by the rail transit agency to manage safety issues.
4	SSPP Control and Update Procedure	The process used to control changes to the SSPP, including (i) specifying an annual assessment of whether the SSPP should be updated; and (ii) required coordination with the oversight agency, including timeframes for submission, revision, and approval.
5	SSPP Implementation Activities and Responsibilities	A description of specific activities required to implement the system safety program, including (i) tasks to be performed by rail transit agency safety function, by position and management accountability, specified in matrices and/or narrative format; and (ii) safety-related tasks to be performed by other rail transit agency departments, by position and management accountability, specified in matrices and/or narrative format.
6	Hazard Management Process	A description of the process used by the rail transit agency to implement its hazard management program, including activities for (i) hazard identification; (ii) hazard investigation, evaluation, and analysis; (iii) hazard control and elimination; (iv) hazard tracking; and (v) requirements for ongoing reporting to the oversight agency regarding hazard management activities and status.
7	System Modification	A description of the process used by the rail transit agency to ensure that safety concerns are addressed in modifications to existing systems, vehicles, and equipment that do not require formal certification but which may have safety impacts.
8	Safety Certification	A description of the safety certification process required by the rail transit agency to ensure that safety concerns and hazards are adequately addressed prior to the initiation of passenger operations for New Starts and subsequent major projects to extend, rehabilitate, or modify an existing system or to replace vehicles and equipment.
9	Safety Data Collection and Analysis	A description of the process used to collect, maintain, analyze, and distribute safety data, to ensure that the safety function within the rail transit agency receives the information necessary to support implementation of the system safety program.
10	Accident/Incident Investigations	A description of the process used by the agency to perform incident notification, investigation, and reporting, including (i) notification thresholds for internal and external organizations; (ii) investigation process and references to procedures; (iii) the process used to develop, implement, and track corrective actions that address investigation findings; (iv) reporting to internal and external organizations;

FTA FIXED GUIDEWAY RAIL STATE SAFETY OVERSIGHT PROGRAM AREAS		
	SSPP ELEMENT	CONTENTS
		and (v) coordination with the oversight agency.
11	Emergency Management Program	A description of the process used to develop an approved, coordinated schedule for emergency management program activities, which include (i) meetings with external agencies; (ii) emergency planning responsibilities and requirements; (iii) process used to evaluate emergency preparedness, such as annual emergency field exercises; (iv) after action reports and implementation of findings; (v) revision and distribution of emergency response procedures; (vi) familiarization training for public safety organizations; and (vii) employee training.
12	Internal Safety Audits	A description of the process used to ensure that planned and scheduled internal safety audits are performed to evaluate compliance with the SSPP, including (i) identification of departments and functions subject to review; (ii) responsibility for scheduling reviews; (iii) process for conducting reviews, including the development of checklists and procedures and issuing of findings; (iv) review of reporting requirements; (v) tracking the status of implemented recommendations; and (vi) coordination with the oversight agency.
13	Rules Compliance	A description of the process used by the agency to develop, maintain, and ensure compliance with rules and procedures having a safety impact, including (i) identification of operating and maintenance rules and procedures subject to review; (ii) techniques used to assess the implementation of operating and maintenance rules and procedures by employees, such as performance testing; (iii) techniques used to assess the effectiveness of supervision relating to the implementation of operating and maintenance rules; and (iv) the process for documenting results and incorporating them into the hazard management program.
14	Facilities and Equipment Inspections	A description of the process used for facilities and equipment safety inspections, including (i) identification of facilities and equipment subject to regular safety-related inspection and testing; (ii) techniques used to conduct inspections, and testing; (iii) inspection schedules and procedures; and (iv) a description of how results are entered into the hazard management process.
15	Maintenance Audits and Inspections	A description of the maintenance audits and inspections program, including identification of the affected facilities and equipment, maintenance cycles, documentation required, and the process for integrating identified problems into the hazard management process.
16	Training and Certification Program for Employees and Contractors	A description of the training and certification program for employees and contractors, including (i) categories of safety-related work requiring training and certification; (ii) a description of the training and certification program for employees and contractors in safety-related positions; (iii) the process used to maintain and access employee and contractor training records; and (iv) the process used to assess compliance with training and certification requirements.
17	Configuration Management and Control	A description of the configuration management control process: (i) the authority to make configuration changes, (ii) process for making changes, and (iii) assurances necessary for all involved departments to be formally notified.

FTA FIXED GUIDEWAY RAIL STATE SAFETY OVERSIGHT PROGRAM AREAS		
	SSPP ELEMENT	CONTENTS
18	Local, State, and Federal Requirements	A description of the safety program for employees and contractors that incorporates the applicable local, state, and federal requirements, including (i) safety requirements that employees and contractors must follow when working on, or in close proximity to, agency-controlled property; and (ii) the process for ensuring that the employees and contractors know and follow the requirements.
19	Hazardous Materials Program	A description of the hazardous materials program including the process used to ensure knowledge of and compliance with the program requirements.
20	Drug and Alcohol Program	A description of the drug and alcohol program and the process used to ensure knowledge of and compliance with program requirements.
21	Procurement Process	A description of the measures, controls, and assurances in place to ensure that safety principles, requirements, and representatives are included in the rail transit agency procurement process.

Table 6. FTA Rail State Safety Oversight SSPP Program Areas.

The challenge of implementing a program described in a transit SSPP is the same for any organization in any field. The difficulty is in making a utilitarian, holistic, frank, and legitimized process that is led from the top and enforced throughout an organization.

In terms of emergency planning, the SSPP and SEPP are documented representations that a transit system has its house in order to manage itself and its resources under exigent circumstances and that it can coordinate with external agencies.

An Emergency Operations Plan (EOP) is the next level of planning for transit systems (see Appendix D for a sample EOP). If an SSPP and SEPP represent how a transit system organizes and manages itself, then an EOP (which should be listed in an SEPP) identifies and describes an organization and its objectives, and its roles and responsibilities for emergency operations. An EOP should:[213]

- Assign responsibility to departments and individuals to carry out specific actions that exceed routine responsibility at projected times and places during an emergency.
- Set forth lines of authority and organizational relationships and show how all actions will be coordinated.
- Describe how people (including individuals with disabilities, others with access and functional needs, and individuals with limited English proficiency) and property are addressed, handled, and protected.
- Identify personnel, equipment, facilities, supplies, and other resources available internally or externally by agreement or other arrangement.

An EOP must be flexible enough for use in all emergencies. A complete EOP should describe:[214]

- The purpose of the plan.
- The situations, assumptions, and resources for emergency operations.
- Organization and assignment of responsibilities for emergencies, organized in a NIMS-compliant fashion.
- Administration and logistics.
- Plan development and maintenance.
- Authorities and references.
- If possible, specific hazard plans and associated procedures.

As indicated above, any emergency organizational structure should be based on NIMS. While this section will not provide an analysis of NIMS and how it should be applied,[215] it is

[213] FEDERAL EMERGENCY MANAGEMENT AGENCY, *supra* note 208, at 3-1.

[214] *Id.*

[215] *See* Federal Emergency Management Agency, *National Incident Management System* (2008), available at http://www.fema.gov/national-incident-management-system (Accessed July 5, 2013), and JOHN N. BALOG, ANNABELLE BOYD, JIM CATON, PETER N. BROMLEY, JAMIE BETH STRONGIN, DAVID CHIA & KATHLEEN BAGDONIS, PUBLIC TRANS-

important to note that the ICS portion of NIMS is a personnel organizational tool. ICS provides a method to organize a transit system's personnel to manage incidents.

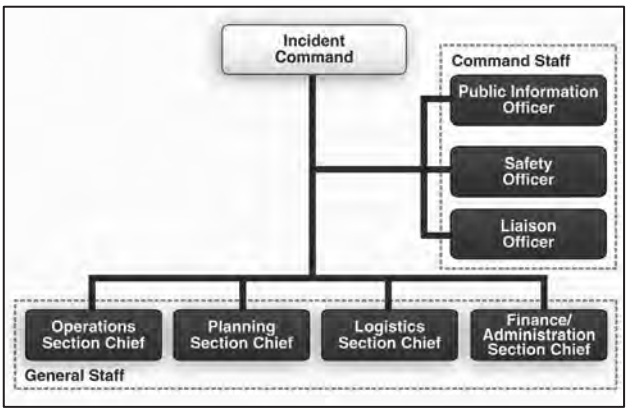

Figure 2. NIMS Incident Command System Template.

An important issue in implementing ICS is that, as an organizational tool, it is more relevant for larger agencies with multiple departments and numerous personnel and in incidents of longer durations and scale. For example, for a transit system that has one to five managers who assume multiple tasks of the operation (as is common among the preponderance of transit systems in the United States), ICS has less value as assistive guidance. However, while there is no exact "tipping point" where it begins to have value, in general as an organization grows in scale, so does the utility of ICS as a tool. In terms of working within an ICS during an emergency response or recovery, though, the key area for efficiency in operations and compliance with NIMS and ICS is that *every transit system must appoint a liaison to interface with external agencies and with an Incident Commander*. Moreover, while FEMA instructs that ICS is a flexible tool, it is not often understood that ICS actually can be molded to fit an organization of any size. Again, in some agencies, one or two people may be responsible for all functions on the ICS chart. In other organizations, during events or periods of responses and recovery, certain functions may be less necessary or functions may be melded or expanded. The basic template in Figure 2 is simply that, a template to be altered and adjusted as necessary to assist organizations and circumstances.[216] For example, a single person may become the planning and operations chief, and someone else may become the logistics/finance chief in a smaller organization.

A final note on plan and procedures development: documents such as these should not only be important tools to instruct and teach upon, but *they should be useful.* It would not be an exaggeration to say that plans and procedures are often shelved and ignored in part due to their excessive length and unwieldiness. The FEMA *Comprehensive Preparedness Guide 101* insightfully states:

> The most common planning pitfall is the development of lengthy, overly detailed plans that those responsible for their execution do not read. A plan that tries to cover every conceivable condition or that attempts to address every detail will only frustrate, constrain, and confuse those charged with its implementation. Successful plans are simple and flexible.[217]

An efficiently and effectively written plan is the same as any other piece of good writing—it requires careful editing and keen attention to audience. Moreover, planners should assess how the document may actually be used outside of training prior to an event. Planners should keep in mind, for example, that personnel may utilize the document to refresh their memories or there may be key sections of the document that are used during an activation. Moreover, personnel from an incident management team from another jurisdiction may have to get up to speed quickly on an EOP's elements. Planners should be mindful to construct these documents so they can be used in various ways.

PORTATION EMERGENCY MOBILIZATION AND EMERGENCY OPERATIONS GUIDE, 7 PUBLIC TRANSPORTATION SECURITY, § 3 (Transit Cooperative Research Program Report 86, Transportation Research Board, 2005), for more information on applying NIMS in EOP.

[216] Correspondence with Michael Docterman, FEMA Program Specialist, PPD-8 Program Executive Office (Apr. 19, 2012).

[217] FEDERAL EMERGENCY MANAGEMENT AGENCY, *supra* note 208, at 1-7.

b) Training and Exercises.—The process of establishing response doctrine forward-readiness is assisted by the establishment and implementation of a training and exercise program, a key tool of a continuous improvement program. Exercises allow personnel—from transit employees and city first responders to senior officials—to validate plans though the application of procedures and experience on various potential emergency scenarios. Exercises are the primary tool for assessing preparedness and identifying areas for improvement, while demonstrating the resolve to prepare for emergency activations. Well-designed and well-executed exercises are the most effective means of:[218]

- Assessing and validating policies, plans, procedures, training, equipment, assumptions, and interagency agreements.
- Clarifying roles and responsibilities.
- Improving interagency coordination and communications.
- Identifying gaps in resources.
- Measuring performance.
- Identifying opportunities for improvement.

A strong training and exercise program will:

- Provide opportunities to test personnel under various circumstances and situations.
- Check personnel understanding of agency protocols and practices.
- Provide personnel with critiques of their performances in drills and exercises (see Appendix C for sample evaluation forms).
- Assist in evaluating plans, procedures, and practices.
- Integrate lessons learned from training, exercises, and actual incidents back into agency procedures and training programs.

Many transit systems struggle with the costs of maintaining a proper training and exercise program. At present, ferry operators are subject to the most rigorous mandates of all transit systems as they are required to run drills or exercises for vessels and facilities every 3 months. However, as Case Study Number 1 below shows, other systems large and small find ways to prioritize, manage, execute, and finance these important activities.[219]

4. Case Studies

The following profiles are presented to assist transit managers to see real-life applications of the resilience guidance above. Whether you operate a rural transit system or the largest of the public transportation providers in the country, these profiles will exemplify that no matter how small or large your agency is, every system can still meet the general obligations for emergency management, just scaled to their realities.

a) Case Study Number 1: Implementing at the Rural Level—SCUSA Transportation[220].—Stanly County Umbrella Services Agency (SCUSA)[221] is a demand-response transportation service provider that serves Stanly County, North Carolina (population approximately 61,000). SCUSA operates 16 vans and buses for 12 hours a day, 5 days a week. Gwen Hinson is the transit service director of SCUSA, a position that directly reports to the Stanly County manager. The director oversees a close-knit operation of approximately 14 operators, a management staff of 2, and an administrative assistant. As with any small operation, management staff has experience with various aspects of operations, including driving vehicles in service.

SCUSA is part of the county's Basic EOP to provide emergency transport services under an incident command. In general, the EOP addresses various hazards for which SCUSA services may be activated, including inclement weather and major accidents. All SCUSA personnel and new job applicants are trained on EOP goals, objectives, and responsibilities and are told as part of their job duties that they may be called in to respond to an incident at any hour of the day. The director is a member

[218] Department of Homeland Security, 1 Homeland Security Exercise Evaluation Program (HSEEP), at 1 (2007), available at https://hseep.dh.gov/pages/1001_HSEEP10.aspx. Accessed July 5, 2013.

[219] For more information on building a training and exercise program, see MCCORMACK TAYLOR, INC., GUIDELINES FOR TRANSPORTATION EMERGENCY TRAINING EXERCISES (9 Transportation Security: Transit Cooperative Research Program Report 86/National Cooperative Highway Research Program Report 525, Transportation Research Board, 2006).

[220] For general information about Stanly County, North Carolina, see http://www.city-data.com/county/Stanly_County-NC.html.

[221] "SCUSA" is an anachronism with roots in a period when transportation services were just one of various services provided by SCUSA. Today, transportation is the only service provided under the "umbrella."

of the county Safety Committee and the Local Emergency Planning Committee.

The foundations upon which SCUSA can operate within an incident command are the basic job skills and experience of its personnel. For over 25 years, SCUSA has been run with a "common sense" philosophy that a focus on the core competencies of personnel will translate into a safer, more secure environment for its employees and its passengers. Policies and personnel job functions are clearly outlined, and job performance evaluation criteria have been specified. Beyond basic skills required of paratransit operators such as lift operations and addressing patrons with various special needs, SCUSA has assessed other more common operational risks, including operator or passenger assaults, hazardous equipment, and environmental conditions, and addressed them within SCUSA procedures. (The director indicates though that some procedures are informal yet understood. For example, one rule of thumb in Stanly County is "when two snowflakes fall, everything shuts down (including transit) and all of the milk and bread disappear off of grocery shelves.") All policies, including emergency protocols, are reviewed for currency by the director every 6 months. Whether or not amendments are made, the policy date is updated to reflect the review.

Several years ago, to enhance the core competencies of her personnel, the director approached the county emergency management director (EMD) about running joint operations for vehicle emergency and evacuation training. The director had been searching for someone to provide this type of training, and after several years investigated the possibility of putting something together with the county. With strong support from the EMD, a drill planning team consisting of Emergency Management Agency, fire, and emergency medical technician (EMT) personnel was formed in 2010. At the outset, the planning team developed three scenarios for the first 3-hour Vehicle Emergency Evacuation training session run in April 2010. To allow for this opportunity, SCUSA will cancel services for 1 day during the year on a date chosen by the planning team 2 to 3 months ahead of time. SCUSA contacts all of its passengers and local agencies to inform them services will not be provided on that date. This information is printed in the local newspaper and put on the county Web site. As an added benefit, the open date allows SCUSA's contracting social service agencies a day to conduct their own training as well.

Having the expertise from multiple local agencies, these Vehicle Emergency Evacuation training sessions are comprehensive and thorough. SCUSA uses several types of vehicles, including one that has met its useful life and is kept specifically for training purposes. Scenarios have called for a vehicle to be turned on its side, put in ditches and gullies, and to add realism to the conditions, smoke machines and moulage have been used. The training helps operators to think through scenarios and responders to become familiar with transit protocols and vehicle equipment, including wheelchair lifts, securements, and hatches. Every operator in SCUSA is tested on each scenario. Exercise participants are all critiqued based on specified expected actions and activities. Results of drills may be translated back into policies if warranted. In addition, one of the most favorable aspects of the Vehicle Emergency Evacuation training program is that the sessions are essentially free. Each agency contributes personnel expertise and time during work hours, and incidentals such as food are low in cost.

The director understands that while she is the head of a transit system, she is in a unique position to be within county management with ties to local emergency services. However, unlike other smaller transit systems, while she has the relationships to assist in this endeavor, the idea to advance her agency's training objectives while advancing those of others was welcomed by her regional partners. As for the cost of training, the director also understands that other agencies do not have the luxury of closing the system on a weekday or that overtime requirements may be necessary. To her, if training is a priority, these types of programs should be built into the operating budget at the beginning of each year as the benefits can be great (or as she puts it, "it is better to pay a few hundred dollars of overtime than to pay a few thousand for an incident that may have been covered in a training session.") To defray costs, the director recommends looking for opportunities for required training sessions to be done at low to no cost. For example, SCUSA works with the EMD for CPR/first aid, bloodborne pathogen, fire extinguisher, oxygen container and securement, and web-cutting training—all at no charge.[222] As a cooperative quid pro quo, SCUSA pays for part of the certification cost for the Emergency Management trainer to teach defensive driving training. "Most people are willing to help," the director

[222] Moreover, fire departments around the United States provide National Incident Management training sessions free of charge, as well as FEMA's Emergency Management Institute's online training site.

recommends. "You just have to go out and find them and form partnerships." To date, 13 other North Carolina transit systems have asked to participate in Stanly County's Vehicle Emergency Evacuation program.

In 2004, the North Carolina Department of Transportation Public Transportation Division (PTD) approved a program implementation modification and began requiring transit systems to establish an SSPP. PTD provided transit systems with an SSPP template to follow based on *FTA Transit Bus Safety and Security Program* guidance. For SCUSA, the SSPP and security plans are useful tools to help organize a transit agency's operations and manage risk, and it supports the PTD's efforts.

b) Case Study Number 2: Implementing at the Metropolitan Area Level—New York City Office of Emergency Management and New York City Transit

On Friday, October 26, 2012, Mayor Michael Bloomberg activated New York City's Coastal Storm Plan (CSP) in anticipation of the arrival of Hurricane Sandy. Activation and implementation of the CSP is a massive undertaking in terms of scope, number of coordinated elements, and cost. The CSP assumes the potential for opening, stocking, and staffing 500 shelters and 65 evacuation centers; moving upwards of 3 million evacuees from all over the city, including from 48 hospitals and 116 nursing homes; and conceptualizing the restoration of services and debris removal in the aftermath of a coastal storm. From a few days prior to the mayor's announcement into months after Sandy's landfall, the city's Office of Emergency Management (OEM) was coordinating with local, state, regional, and private partners to track Hurricane Sandy and consider the potential impacts of what was then being anticipated as a "perfect storm."[223]

As the workhorse for the city's evacuation strategy, OEM coordinated closely with New York City Transit (NYCT) and other area transit systems. In the development phases of the CSP, OEM coordinated planning with NYCT to understand its capabilities to build an evacuation strategy and develop evacuation clearance time estimates, among other tasks, to move people from identified flood zones. NYCT is part of the city's Coastal Storm Steering Committee (CSSC), convened regularly as storms are tracked and the CSP is activated. NYCT liaisons participate in CSSC conference calls to report the status of its subway, bus, and paratransit operations and progress on pre-scripted activities synchronized with other city agency preparedness tasks. The CSP conceives of moving close to 2 million evacuees by transit alone, taking into account people with mobility disabilities, accommodating pets and service animals, and the 10 prominent languages spoken in the 3 potential evacuation zones.[224]

On Sunday, October 28, 2012, the mayor announced that by 9 p.m. that evening, NYCT subways and buses would be closed after they assisted in evacuation operations.[225] The focal point for all CSP activations is "Zero Hour," when sustained tropical storm force winds reach 39 mph and all evacuation operations cease. The subways need at least 8 hours to shutter service and get personnel to safety, and for buses 6 hours are needed, so by closing public access late in the evening Sunday they would meet the National Weather Service's estimate that winds from Hurricane Sandy would achieve 39 mph by morning rush. By 9 p.m. the next evening, the storm surge in the Battery in lower Manhattan exceeded 13 ft and the subway system began to flood. On Tuesday, the city learned of the catastrophic damage to the subway system, including complete flooding of its Whitehall Street/South Ferry Station and seven East River tunnels, with the A Train's North Channel Bridge to the Rockaways submerged in Jamaica Bay.[226] The mayor informed the city that the subways would be closed indefinitely. However, by that Thursday, NYCT initiated bus bridge service into Manhattan and, remarkably, 80 percent of subway service was restored by Saturday.

While the results of efforts to restore NYCT operations were quite surprising to most people in the city, preparedness planning certainly played an important role in NYCT's successes. To prepare for Zero Hour and storm landfall, NYCT is required to carry out various tasks

[223] John Schwartz, *Early Worries that Hurricane Sandy Could Be a "Perfect Storm,"* N.Y. TIMES, Oct. 25, 2012, available at http://www.nytimes.com/2012/10/26/us/early-worries-that-hurricane-sandy-may-be-a-perfect-storm.html?_r=0. Accessed July 5, 2013.

[224] Languages include Spanish, Russian, Chinese, French Creole, Polish, Italian, French, Arabic, Yiddish, and Korean.

[225] NYCT's Access-a-Ride paratransit services closed by 5 p.m. that day. *See* N.Y. Daily News Real Time coverage, available at http://live.nydailynews.com/Event/Tracking_Hurricane_Sandy_2?Page=0. Accessed July 5, 2013.

[226] Robert Kolker, *How Did the MTA Restore Subway Service in Time for Monday's Rush Hour?,* NEW YORK MAGAZINE, Nov. 15, 2012, available at http://nymag.com/daily/intelligencer/2012/11/how-did-the-mta-restore-subway-service.html. Accessed July 5, 2013.

pursuant to the CSP to ensure that services will be available after an event. The primary task is for NYCT to assess the potential impacts of the storm to essential functions and secure the system to the greatest extent possible prior to Zero Hour based on identified threats. NYCT proceeded to implement numerous mitigations to protect vital systems and assets, including:

- Clearing flood-prone stations, yards, and depots.
- Moving buses and trains out of flood areas.
- Clearing pumps and catch basins in tunnels.
- Removing critical components from tunnels to protect them from salt water.
- Covering subway street gratings and subway access ways with plywood and sandbags.
- Dispatching patrol trains to monitor water infiltration, while engineers prepared to shut power to signal systems.
- Removing stop motors from vehicles that interact with automatic brake equipment at track level.
- Checking that pump trains, portable pumps, and emergency response vehicles were operational and would be available to be deployed.[227]
- Stationing a NYCT liaison in the OEM Emergency Operations Center 24/7 well into the recovery from Sandy.

Through an unprecedented unwatering operation conducted by FEMA through the U.S. Army Corps of Engineers, the seven East River tunnels were back up and running in a few weeks. The North Channel Bridge to the Rockaways opened in June 2013.

The president of NYCT, Charles Prendergast, said of the NYCT's work for the storm and reconstruction efforts: "New Yorkers are very resilient; we could not have gotten through it this far without their support…[w]hen I look back, given all that we were able to take care of and get service restored, it was pretty amazing to do all we could do."[228]

D. The Role of the Attorney in Emergency Planning

Legal counsel can be invaluable to guide planning deliberations and in assessing agency compliance with laws and regulations. With the right experience and knowledge, the attorney can provide pivotal risk management advice to a transit system as part of a leadership planning team. This section identifies several key areas where an attorney can be helpful to guide transit executives in emergency management planning, including:

- Tort liability avoidance.
- Understanding disaster assistance programs and processes.
- Evaluating SSI.
- Developing mutual aid agreements.

1. Legal Issues in Emergency Planning

a) Sovereign Immunity and Planning.—As the term implies, a supreme ruler has little fear of legal repercussions if harm comes to one of his or her subjects as the result of imperial negligence. While this thought may be hard to digest now in our society, this was essentially legal doctrine in the United States in the last century, when a government agency had to consent to being sued before an injured person could seek legal redress from a government entity.[229] Over the years, the fortitude of sovereign immunity was tested and eroded by judicial opinion. Ultimately, limitations to the doctrine began to be codified by legislatures.[230] Some government tasks are ministerial requiring little independent thought, with defined parameters and outcomes such as processing a form for a construction permit. However, some government functions require deliberations and judgment such as policymaking and implementing policy. It is a practical reality in the latter case that if government agencies have no such protections for the judgments they make every day they would be debilitated, having to constantly defend their actions. Generally, sovereign immunity provides the assurances that public entities can in fact lead and govern. Applying the doctrine of sovereign immunity is a balancing act that strives to seek an equitable medium between protecting government independence to serve the public and an individual's right to address torts[231] committed by government entities.

[227] *Id.*

[228] *Id.*

[229] LARRY W. THOMAS, STATE LIMITATIONS ON TORT LIABILITY OF PUBLIC TRANSIT OPERATIONS 4, (Transit Cooperative Research Program Legal Research Digest No. 3, Transportation Research Board, 1994).

[230] *Id.*

[231] A tort is "[a] legal wrong committed upon the person or property independent of contract…[or] an infraction of some public duty by which special dam-

With respect to emergency planning, a seminal court case establishing the legal parameters of sovereign immunity is *Dalehite v. United States*.[232] Plaintiffs brought this action under the Federal Torts Claims Act,[233] and argued that a death resulting from an explosion of ammonium nitrate fertilizer on a cargo ship under the control of the United States for export to Europe following World War II was a result of negligence on the part of the government. Plaintiff contended that the explosion was a direct result of improper handling of the fertilizer in the loading process, causing it to become unstable and ignite.[234] The Supreme Court held that "[t]he acts found to have been negligent were…performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department…."[235] The discretionary function of government includes the "determinations made by executives or administrators in establishing plan, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."[236]

In *DFDS Seacruises (Bahamas) v. United States,*[237] the district court examined whether discretion may be used not to engage in emergency planning. The case centers on a fire aboard the cruise ship *Scandinavian Sea* that spread to a number of cabins and decks. Plaintiffs filed a complaint pursuant to the Admiralty Act[238] alleging, *inter alia*, that the USCG was negligent for failing to establish a shipboard firefighting contingency plan.[239] Plaintiffs claimed that had a contingency plan existed, the USCG's firefighting response would have been better coordinated and thus more effective.[240] Moreover, plaintiffs claimed that the USCG failed to comply with a USCG Marine Safety Manual that instructed "district commanders, captains of the port and commanding officers…[to] insure that ports within their jurisdiction have current and effective contingency plans, supported by the port community, to provide adequate response…to fires and other accidents."[241] Relying on *Dalehite*, the District Court held against the plaintiffs as the decision not to develop a contingency plan was within the USCG's discretionary authority to allocate its financial resources as it saw fit.[242] With respect to the Safety Manual, the court found that it was used for "internal guidance only and sets forth numerous desirable goals which Coast Guard personnel are encouraged to achieve…[243] [D]ecisions as to whether, where and when to expend time and resources to develop such plans are entrusted to the Coast Guard's judgment and are not reviewable by this Court."[244]

However, discretionary authority is not limitless, and thorough assessment and deliberation to come to a decision may be a foundation upon which immunity lies. In *Bordelon v. Gravity Drainage District No. 4 of Ward 3 of Calcesieu Parish*,[245] the Louisiana Court of Appeals examined whether immunity applies when no discretionary judgment is actually used for emergency planning. Here, the defendants appealed a jury verdict in favor of the plaintiffs, 24 homeowners whose properties were located within the drainage district that was flooded due to Hurricane Rita in September 2005.[246] Plaintiffs claimed that the planning and delayed measures to address flooding resulted in their losses.[247] The trial court jury found that the defendants did not have a plan in place to deal with the scenario in which personnel might not be able to return to a pumping station for an extended period of time after a disaster, thus rendering them unable to attend to and start pumping operations. For an organization whose primary responsibility "is to provide for drainage…[t]hey are mandated to make adequate provisions for drainage…."[248] The court held that planning for hurricane flooding involved discretion, however a key contingency to the scenario at hand—developing an automated pump system, a pro-

age accrues to the individual…." *Black's Law Dictionary* (9th ed. 2009).

[232] 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).

[233] Pub. L. No. 80-773, 62 Stat. 982 (1948) (codified at 28 U.S.C. § 1346, et al. (2013)).

[234] *Id.* at 46–47.

[235] *Id.* at 39–40.

[236] *Id.* at 35–36.

[237] 676 F. Supp. 1193 (S.D. Fla. 1987).

[238] 46 U.S.C. §§ 741–752 (2013).

[239] 676 F. Supp. at 1196.

[240] *Id.* at 1207.

[241] *Id.*

[242] *Id.* at 1205.

[243] *Id.* at 1201.

[244] *Id.* at 1206.

[245] 74 So. 3d 766, 2011 La. App. LEXIS 1136 (2011).

[246] *Id.*

[247] *Id.* at 768.

[248] *Id.* at 774.

ject which was deemed feasible by the defendants and for which money was available—was never considered by the defendants.[249] The defendants failed "to anticipate the contingency that when no one was available to turn on pumps, flooding would ensue…[therefore] [i]mmunity does not attach."[250]

With respect to emergency operations, many states offer liability protections for emergency service workers through provisions of their state emergency management laws. These liability protections broadly cover all personnel who may serve pursuant to a state's emergency operations plans or local plans. As key components of state transportation ESF, in many states immunity provisions will attach to transit personnel responding to an event pursuant to a local or state emergency declaration.

Under a typical emergency management law liability provision, upon the issuance of a declaration of emergency on either the state or local level, provisions are set into motion regulating the use of disaster emergency response personnel to meet a crisis. A sample from West Virginia of an emergency service worker provision is as follows:

> Immunity and exemption; "duly qualified emergency service worker" defined. All functions hereunder and all other activities relating to emergency services are hereby declared to be governmental functions. Neither the state nor any political subdivision nor any agency of the state or political subdivision nor, except in cases of willful misconduct, any duly qualified emergency service worker complying with or reasonably attempting to comply with this article or any order, rule, regulation or ordinance promulgated pursuant to this article, shall be liable for the death of or injury to any person or for damage to any property as a result of such activity. This section does not affect the right of any person to receive benefits or compensation to which he or she would otherwise be entitled under this article, chapter twenty-three of this code, any Act of Congress or any other law.[251]

Other statutes will not attach immunity "for acts constituting gross negligence or willful or wanton misconduct."[252] Alabama also includes "bad faith" in the exception to immunity.[253] In many cases, emergency management statutes like the West Virginia immunity provision will have broad coverage of emergency service worker activities, including protections for planning functions.

State tort claims acts also may shield emergency service workers using a discretionary function test borrowed from the Federal Torts Claims Act as in South Carolina[254] and Georgia.[255] In *Parsons v. Mississippi State Port Authority at Gulfport*,[256] Appellants argued that the trial court erred in ruling that the Mississippi Tort Claims Act (MTCA)[257] did not supersede the state's Emergency Management law (MEML) and that Appellee is liable for property damage due to Appellee's negligent storm preparations and operations for Hurricane Katrina. The Court of Appeals determined that, while the MTCA was enacted 10 years after the MEML and is the exclusive remedy against the state and its agencies, "claims that are limited or barred by other provisions of law are exempted from liability under the MTCA."[258] As such, the court held that the two laws could be read in conjunction with each other "to provide immunity for the state and its agencies for its activities during times of emergency management while simultaneously being exempt from liability under the MTCA."[259]

However, emergency service worker immunity provisions only become operative upon the issuance of a disaster or emergency declaration. Without such declarations and in the absence of governmental immunity, emergency service workers are subject to local tort law. In *Prince v. Waters,*[260] the court considered the issue of compliance with emergency plans and its elements. Plaintiff alleged that her firefighter husband died while fighting a blaze due to the negligence of the County Fire Coordinator, an employee of the County of Onondaga, and thus the County, pursuant to the *respondeat superior* doctrine, was liable for his death. Additionally, plaintiff contended that defendants were also liable pursuant to General Municipal Law Section 205-a (which allows for additional compensation for injury or death due to "any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and

[249] *Id.* at 772.

[250] *Id.* at 774.

[251] W. VA. CODE § 46-1-101, § 15-5-11(a).

[252] WASH. REV. CODE § 38.52.180(4)(c).

[253] ALA. CODE § 31-9-16(b).

[254] S.C. CODE ANN. § 15-78-60(5).

[255] GA. CODE ANN. § 50-21-24(2).

[256] 996 So. 2d 165 (2008).

[257] MISS. CODE § 11-46-1 (1972, as amended).

[258] *Id*. at 170.

[259] *Id.*

[260] 48 A.D. 3d 1137, 850 N.Y.S.2d 803 (2008).

all their departments, divisions and bureaus….")[261] Defendants moved for summary judgment and the New York Supreme Court dismissed the complaint. On review, the Appellate Division held that the defendants did not comply with a New York State emergency command and control standard, the National Interagency Incident Management System (NIIMS-ICS), adopted by Executive Order. The County Fire Coordinator disputed that he was in command of the incident. However, firefighters reported that he gave orders and that he was wearing the white firefighter hat indicating that he had command responsibilities as per NIIMS-ICS, though the Coordinator disputed the contentions.[262] The court held that these circumstances "may give rise to liability" and that the defendants were not entitled to summary judgment on the Section 205-a claim (plaintiff abandoned its wrongful death action and did not appeal).[263]

b) Civil Rights: ADA, Environmental Justice, and LEP.—Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[264]

In the aftermath of Hurricane Katrina, an additional emphasis was placed not only on emergency preparedness provisions for the disabled and elderly but on other special needs groups such as those with LEP, carless populations, and low-income and minority populations. To address these latter concerns, USDOT issued internal orders and parameters to instruct its modal administrations to consider environmental justice and LEP concerns in operations planning. As Case Study Number 2 above indicates, governments and transit have responded to these requests to consider and accommodate vulnerable populations.

The sections below will examine case law and events to exemplify the issues involved with planning for special needs populations and will indicate sources of guidance and information on ADA, environmental justice, and LEP issues in relation to emergency operations and preparedness. By understanding concerns of these populations, transit can address them appropriately to provide safer, equitable, more comprehensive, and compliant approaches in managing transit risk and service delivery.

i. ADA.—Equity is a key principle upon which USDOT and its modal administrations operate, and nowhere should that be more highlighted than in public transportation. As emergency planning principles pursuant to HSPD-5, NIMS, and the NRP were being developed, President Bush authorized Executive Order 13347, *Individuals with Disabilities in Emergency Preparedness*,[265] which mandated that persons requiring special assistance due to disability be included in emergency planning at all levels of government.

In *Communities Actively Living Independent and Free v. City of Los Angeles*,[266] plaintiffs sued the City of Los Angeles for allegedly violating several laws, including the ADA and the California Disabled Persons Act,[267] by failing to account for the needs of over 800,000 disabled city residents in its emergency preparedness program. Plaintiffs argued that the Los Angeles preparedness plan did not contain provisions to notify individuals with auditory or cognitive impairments regarding an emergency and had no information about evacuation, transportation, or temporary housing for disabled individuals either during or immediately after an emergency.[268] The plaintiffs surveyed a small sample of Los Angeles' estimated 200 emergency shelter sites, and "few, if any" were fully compliant with ADA requirements.[269] In 2008, the Los Angeles Department on Disability reported concerns that disabled city residents were "at-risk for suffering and death in disproportionate numbers" during an emergency unless the city revised its emergency plan to account for their needs.[270] Plaintiffs contended that the defendants failed to act on the concerns raised by the Department of Disability's report and that disabled individuals are at a higher risk than other city residents to be harmed during an emergency.[271] Defendants claimed that, because the City had not taken any affirmative action to actually exclude disabled individuals from any of its programs or services, no illegal discrimination occurred. The court rejected the defendants' argument, as the entire purpose of an emergency prepar-

[261] *Id.*

[262] *Id.* at 1138.

[263] *Id.*

[264] 42 U.S.C. § 2000d (2013).

[265] 69 Fed. Reg. 44573 (July 26, 2004).

[266] No. CV 09-0287 CBM (RZx), U.S. Dist. Ct., Central Dist. of CA (2011).

[267] CAL. CIV. CODE § 54.1, *et seq.* (2013).

[268] *Id.* at 4–5.

[269] *Id.* at 25.

[270] *Id.* at 24.

[271] *Id.*

edness plan is to anticipate the types of needs that will arise during and immediately after an emergency.[272] The district court found that Los Angeles' emergency preparedness program was designed to apply to all city residents, including disabled individuals. Disabled individuals, however, did not have meaningful access to the program and the City had not made reasonable accommodations to meet these needs—thus, disproportionately burdened disabled individuals.[273] The court supported this finding with examples, such as the City's failure to determine whether its emergency shelters were wheelchair accessible or able to accommodate individuals who rely upon service animals.[274]

It was not long before the effects of the *Communities* decision had an impact on other jurisdictions. The U.S. District Court for the Southern District of New York granted class certification on November 7, 2012, in a lawsuit filed in 2011 after Hurricane Irene. The suit alleges that New York City's disaster preparedness plan violates the ADA by failing to accommodate, and thus discriminating against, the estimated 900,000 persons with disabilities in New York.[275] In May 2013, the U.S. Attorney for the Southern District of New York, on behalf of the United States Department of Justice, filed a statement of interest that supported the plaintiffs' position stating that the city's emergency management plans "do not adequately protect the rights of individuals with disabilities…."[276]

ii. Environmental Justice.—USDOT Order 5610.2(a) seeks to achieve environmental justice by integrating the policies of the National Environmental Policy Act and Title VI in the planning of all transportation projects. The USDOT order specifically requires that transportation agencies address "adverse effects" on minority and low-income populations. Adverse effects include the following:

- Bodily impairment, infirmity, illness, or death.
- Air, noise, and water pollution, and soil contamination.
- Destruction or disruption of man-made or natural resources.
- Destruction or diminution of aesthetic values.
- Destruction or disruption of community cohesion or a community's economic vitality.
- Destruction or disruption of the availability of public and private facilities and services.
- Vibration.
- Adverse employment effects.
- Displacement of persons, businesses, farms, or nonprofit organizations.
- Increased traffic congestion, isolation, exclusion, or separation of minority or low-income individuals within a given community or from the broader community.
- The denial of, reduction in, or significant delay in the receipt of benefits of USDOT programs, policies, or activities.

USDOT and other transit authorities must address environmental justice and equity under the USDOT Order. However, matching the aspiration to and achieving the ends of environmental justice and transportation equity is not easily done.

With respect to equity in transit planning, in *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority (MTA)*,[277] minority bus riders of the Los Angeles County MTA filed a class action lawsuit under Title VI and the 14th Amendment alleging that the MTA spent a disproportionate amount of its budget on suburban rail service and buses at the expense of inner city buses, which faced fare increases and service neglect. The plaintiffs presented evidence that while approximately 94 percent of the MTA's clients were bus riders and 80 percent of those riders were persons of color, only 30 percent of the MTA's resources were spent on buses and the remaining 70 percent were spent on the rails, which serviced only 6 percent of the MTA's total ridership.[278] The plaintiffs also presented MTA documents describing overcrowding.[279] In 1996, the two parties entered into a consent decree that required that the MTA purchase 248 additional buses to prevent overcrowding and continue the low monthly and daily fares.[280] However, 14 months after

[272] *Id*. at 26.

[273] *Id*. at 27.

[274] *Id.* at 25.

[275] Brookland Center for Independence of the Disabled v. Bloomberg, No. 11 CV 6690 (U.S. Dist. Ct., So. Dist. of New York, filed Sept. 26, 2011), see http://disabilityrightsgalaxy.com/2012/11/12/nyc-emergency-plan-lawsuit-moves-forward/. Accessed July 5, 2013.

[276] Benjamin Weiser, *Storm Plans for Disabled are Inadequate, U.S. Says*, N.Y. TIMES, May 10, 2013, available at http://www.nytimes.com/2013/05/11/nyregion/storm-plans-for-disabled-inadequate-us-says.html. Accessed July 5, 2013.

[277] 263 F.3d 1041 (9th Cir. 2001).

[278] *Id.*

[279] *Id.* at 1042.

[280] *Id.* at 1047.

signing the consent decree the MTA failed to meet its requirements. Specifically, the MTA had not acted to reduce the over-crowding problems on the buses.[281] The MTA argued that it had insufficient funds to purchase new buses and therefore could not meet its targeted goal.[282] In 2001, the Ninth Circuit affirmed the earlier district court decision and ordered the MTA to comply with the consent decree.

The essence of USDOT's Order regarding applying equity and fairness concerns to planning and programming activities must be an important facet of planning activities, which may serve as another counter-balance to the application of sovereign immunity protection for government. For all to benefit from municipal service equally, transit systems must attempt to avoid disproportionately high and adverse effects in programs, policies, and activities on the disabled, elderly, minority, and low-income populations. In the capital, design, and operational planning processes, procedures should be established or expanded, as necessary, to consider and provide meaningful opportunities for public involvement by members of these communities to mitigate unintended impacts on them.

iii. LEP.—To date, no cases can be located involving persons alleging that a transit system limited access to information for persons with LEP. However, as other cases indicate, failure to provide adequate interpretation of materials can have detrimental impacts.

In New York City, a 2003 law was passed to give city agencies 5 years to phase in comprehensive interpretation services, supplied by phone or in person, and required that city forms be made available in Arabic, Chinese, Haitian, Creole, Korean, Russian, and Spanish. The deadline was February 2009. An advocacy group filed a lawsuit in the State Supreme Court in Manhattan on behalf of six clients who contended, because of language barriers, they lost benefits, their benefits were delayed, or they were unable to appeal benefits determinations effectively.[283]

Today, New York City government agencies provide services in numerous languages, with a core set of English, Spanish, Chinese, and Russian.[284] In addition, the City's 311 system's Web site provides information in over 50 languages, and NYCT's Transit Adjudication Board provides interpretation services for 170 languages.[285]

iv. Resources.—Key sources of helpful information to assist transit in identifying means to address fairness and social justice issues in planning include the following:

- FTA's *Transportation Equity in Emergencies: A Review of the Practices of State Departments of Transportation, Metropolitan Planning Organizations, and Transit Agencies in 20 Metropolitan Areas* (2007). This study focuses on emergency preparedness activities being conducted in 20 metropolitan regions that have recently experienced natural or manmade disasters and also have populations with relatively high overall numbers and proportions of persons of racial and ethnic minorities, persons with low incomes, persons with LEP, and persons living in households without vehicles.
- U.S. Access Board, Resources on Emergency Evacuation and Disaster Preparedness Web site (http://www.access-board.gov/evac.htm) holds a wealth of planning information, including guidance for transportation professionals.
- The FTA Office of Civil Rights' *Implementation of the Department of Transportation's Policy Guidance Concerning Recipient's Responsibilities to Limited English Proficient Persons: A Handbook for Public Transportation Providers* (2007). FTA discusses how grantees may collect and use data and assess operations to comply with the USDOT Order and FTA's Circular 4702.1A.

2. Disaster Recovery Assistance and Resilience Funding

The following sections describe 1) the process by which Stafford Act disaster public assistance becomes available to eligible recipients, 2) eligible activities and costs that are reimbursable pursuant to the Stafford Act, 3) procurement issues related to Stafford Act funding, and 4) common reasons for Stafford Act claims to be rejected.

a) Disaster Declaration Process.—When a disaster occurs and a locality has responded to the best of its ability and is, or will be, overwhelmed by the magnitude of the damage, the

[281] *Id.* at 1048.

[282] *Id.*

[283] Jennifer Lee, *Welfare Agency Is Sued Over Translation Service*, N.Y. TIMES, Aug. 11, 2009, available at http://www.nytimes.com/2009/08/12/nyregion/12translate.html. Accessed July 5, 2013.

[284] Pursuant to City Executive Order 120 (2008), available at http://www.nyc.gov/html/om/pdf/2008/pr282-08_eo_120.pdf. Accessed July 5, 2013.

[285] See N.Y. City Traffic Adjudication Bureau Web site, available at http://www.mta.info/nyct/rules/TransitAdjudicationBureau/LanguageServices.htm. Accessed July 5, 2013.

community turns to the state for help. The governor, after examining the situation, may direct that the state's emergency plan be executed,[286] direct the use of state police or the National Guard, or commit other resources as appropriate to the situation. If it is evident that the situation is or will be beyond the combined capabilities of the local and state resources, the governor may request that the President declare, under the authority of the Stafford Act, that an emergency or major disaster exists in the state.

While this request is being processed, local and state government officials should not delay in taking the necessary response and recovery actions.

The request for a declaration must come from the governor or acting governor. Before sending a formal request letter to the President, the governor should request that FEMA conduct a joint Preliminary Damage Assessment with the state to verify damage and estimate the amount of supplemental assistance that will be needed.[287] After this assessment is complete, if the governor believes that federal assistance is necessary, the governor sends the request letter for either an Emergency Declaration or a Disaster Declaration to the President, directed through the regional director of the appropriate FEMA region.[288] "Emergency" and "Major Disaster" (the presence of which is necessary to order a Disaster Declaration) are defined as follows:

- Emergency: Any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.[289]
- Major Disaster: Any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.[290]

The request is reviewed by the regional director and forwarded with a recommendation to the Director of FEMA who, in turn, makes a recommendation to the President. The President makes the decision whether to declare a major disaster or emergency.[291] When a declaration of a major disaster is made for a state, FEMA will designate those counties of the state that are eligible for assistance.[292]

In a little over a decade, transit systems have faced catastrophic disasters, including the events of September 11, 2001, and Hurricanes Katrina and Sandy. In the wake of an incident, the three primary funding sources to help transit systems recover are insurance, tax revenue, and disaster public assistance if a system is within a declared "major disaster" or "emergency" area. The following sections describe the two primary sources of public disaster assistance: the Stafford Act Public Assistance Program and the complementary FTA Public Transit Emergency Relief Fund (FTA ERF).

b) Stafford Act Public Assistance Program.—

i. Generally.—The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Stafford Act) authorizes the programs and processes by which the federal government provides disaster and emergency assistance to state, tribal, and local governments; eligible private nonprofit organizations; and individuals affected by a declared major disaster or emergency. State government agencies, such as departments of transportation, and local governments, such as a county, city, town, special district or regional authority, village, or borough, are eligible for Stafford Act Public Assistance Program (PAP) funding.[293] Public entities are those organizations that are formed for a public purpose but are not political subdivisions of a state or a local government.[294] Facilities of public entities may be eligible for disaster assistance.[295] To qualify for assistance, disaster assistance work must:

[286] 44 C.F.R. § 206.4. "State[s] shall set forth in [their] emergency plan[s] all responsibilities and actions specified in the Stafford Act and these regulations that are required of [states] and [their] political subdivisions to prepare for and respond to major disasters and emergencies and to facilitate the delivery of Federal disaster assistance…."

[287] 44 C.F.R. § 206.33.

[288] 44 C.F.R. §§ 206.35 and 206.36.

[289] 44 C.F.R. § 206(a)(9).

[290] 44 C.F.R. § 206(a)(17).

[291] 44 C.F.R. § 206.38.

[292] 44 C.F.R. § 206.40.

[293] 44 C.F.R. §§ 206.63 and 206.202.

[294] 44 C.F.R. § 206.221(f)(g).

[295] 44 C.F.R. § 206.223(c).

- Be required as a direct result of the declared disaster.[296]
- Be located within the designated area of a major disaster or emergency declaration (though evacuation activities may be located outside the area).[297]

ii. Eligible Work.—There are three general types of work that may be eligible. Table 7 below describes the various types of projects that may be eligible. See also Figure 3 for a transit-specific aspect of the Stafford PAP.

[296] 44 C.F.R. § 206.223(a)(1).

[297] 44 C.F.R. § 206.223(a)(2).

ELIGIBLE WORK FOR *STAFFORD ACT* PUBLIC ASSISTANCE

Category		Eligible Work	Notes
Debris Removal	A	Trees and woody debris; building wreckage; sand, mud, silt and gravel; vehicles; and other disaster-related material	To be eligible, activities must be necessary to: • Eliminate immediate threats to lives, public health, or safety; • Eliminate immediate threats of significant damage to improved public property or private property; or • Ensure economic recovery of the affected community to the benefit of the community at large.
Emergency Protective Measures	B	Examples include search and rescue; emergency replacement of public transportation facilities and vehicles; emergency medical care; securing perimeters; provision of supplies and resources; temporary facilities; activation of state or local Emergency Operations Centers to direct response; and removal of hazards	Measures taken before, during, or after a disaster to: • Eliminate or reduce an immediate threat to life, public health, or safety. • Eliminate or reduce an immediate hazard that threatens significant damage to improved public property.
Roads and Bridges	C	Disaster-related damage to surfaces, ditches, shoulders, drainage structures, low-water crossings, decking and pavement, piers, girders, abutments, slope protection, and approaches	Must not be duplicative of funding from the Federal Highway Administration's Emergency Relief Fund.
Water Control Facilities	D	Dams and reservoirs; levees; lined and unlined engineered drainage channels; shore protective devices; irrigation facilities; and pumping facilities	The U.S. Army Corps of Engineers and National Resource Conservation Service have primary authority for repair of flood control works and federally funded shore protective devices. Permanent repairs to these facilities are not eligible.
Buildings and Equipment	E	Buildings, furnishings, interior systems, and pre-disaster quantities of consumable supplies and inventory	Insurance policies will be taken into account.
Utilities	F	Water treatment plants and delivery systems; power generation and distribution facilities	Power generation includes generators, substations, and power lines.
Parks, Recreational, and Other	G	Playground equipment, swimming pools, bath houses, tennis courts, boat docks, piers, picnic tables, and golf courses	Other types of facilities, such as roads, mass transit, buildings, and utilities, that are located in parks and recreational areas are also eligible and are subject to the eligibility criteria for Categories C, D, E, and F.

Table 7. Eligible Work for Stafford Act Public Assistance.

STAFFORD ACT TRANSIT EMERGENCY RELIEF WORK

A reimbursable area specific to transit that can be used in conjunction with an agency's FTA Public Transit Emergency Relief Fund application is for Stafford PAP Public Transportation Emergency Work (49 C.F.R. § 206.225[d]). Essential portions of a community's transportation system may be damaged by a disaster (such as a loss of a rail yard or the destruction of vehicles), severely impacting the functioning of a community. FEMA funding is available to provide for temporary supplements to transportation assets to maintain essential transit functions. Such funding will terminate when identified needs have been met.

Figure 3. Stafford Act Transit Emergency Relief Work.

An eligible applicant must be legally responsible for the damaged facility at the time of the disaster.[298] The federal share for assistance provided under this title shall not be less than 75 percent of the eligible costs.[299]

Generally, work to restore eligible facilities is on the basis of the design of a facility as it existed immediately prior to a disaster.[300] When a facility must be repaired, FEMA may pay for upgrades that are necessary to meet specific requirements of current codes and standards.[301] This situation typically occurs when older facilities, particularly buildings, must be repaired in accordance with codes and standards that were adopted after the original construction. In the alternative, FEMA may pay for the replacement costs of a facility, which includes the costs for all work necessary to provide a new facility of the same size or design capacity and function as the damaged facility in accordance with current codes and standards.[302]

If a facility is damaged to the point where the applicant thinks the facility should be replaced rather than repaired, the following calculation, known as the "50 Percent Rule,"[303] should be used to determine whether replacement is eligible:

- IF Repair Cost/Replacement Cost < 50 percent, THEN only the repair cost is eligible.
- IF Repair Cost/Replacement Cost ≥ 50 percent, THEN the replacement cost is eligible.

In addition, FEMA may pay for the cost of relocating a facility to a new location when a facility location is subject to repetitive heavy damage[304] and the relocation is cost-effective[305] as determined by FEMA.

Other costs may also be eligible for reimbursement by FEMA, including ownership and operation costs for use of applicant-owned equipment used to perform eligible work.[306]

iii. Procurements.—All grantees and subgrantees of Stafford Act PAP funds are subject to federal procurement requirements.[307] Grantees and subgrantees will use their own procurement procedures that reflect applicable state and local laws and regulations,[308] but FEMA allows four methods to expedite competitive procurement contracts:

- *Small Purchase Procedures*. For contracts under $100,000, price or rate quotations shall be obtained from an adequate number of qualified sources.[309]
- *Procurement by Sealed Bids*. Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.[310]
- *Procurement by Competitive Proposals.* Proposals are to be solicited to and received from more than one qualified bidder submitting for either a fixed-price or cost-reimbursement basis contract. Generally used

[298] 44 C.F.R. § 206.223(a)(3).
[299] 44 C.F.R. § 206.65.
[300] 44 C.F.R. § 206.226.
[301] 44 C.F.R. § 206.226(f)(2).
[302] 44 C.F.R. § 206.226(f)(2).
[303] 44 C.F.R. § 206.226(f)(1).
[304] 44 C.F.R. § 206.226(g)(1)(i).
[305] 44 C.F.R. § 206.226(g)(1)(iii).
[306] 44 C.F.R. § 206.228(a)(1).
[307] 44 C.F.R. § 13.36(a).
[308] 44 C.F.R. § 13.36 (b)(1).
[309] 44 C.F.R. § 13.36(d)(1).
[310] 44 C.F.R. § 13.36(d)(2).

when conditions are not appropriate for the use of sealed bids.[311]

• *Procurement by Noncompetitive Proposals.* Allowed when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and one of the following circumstances applies: 1) the item is available only from a single source, 2) the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation, 3) the awarding agency authorizes noncompetitive proposals, or 4) after solicitation of a number of sources, competition is determined inadequate.[312]

Cost-plus contracts are expressly ineligible for PAP assistance.[313]

iv. Claims Pitfalls.—First, Section 312 of the Stafford Act establishes that applicants ensure that requests for aid to FEMA are not duplicative of any other benefits or sources of funding.[314] Section 312(a) states:

> President, in consultation with the head of each Federal agency administering any program providing financial assistance to persons, business concerns, or other entities suffering losses as a result of a major disaster or emergency, shall assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source.[315]

Next, the DHS Office of Inspector General (OIG) provides guidance on managing public assistance grants. According to OIG, among the most common causes for findings in an OIG audit and therefore PAP claims to be rejected include:[316]

- Poor contracting practices.
- Unsupported costs.
- Poor project accounting.
- Excessive equipment charges.
- Excessive labor and benefits charges.
- Unrelated project charges.
- Unapplied credits.
- Excessive administrative charges.

As such, OIG recommends grantees and subgrantees be mindful of the following:[317]

- Designate a person to coordinate the accumulation of records.
- Establish a separate and distinct account for recording revenue and expenditures, and a separate account for each distinct FEMA project.
- Ensure that the final claim made for each project is supported by amounts recorded in the accounting system.
- Ensure that each expenditure is recorded in the accounting books and is referenced to supporting source documentation (checks, invoices, etc.) that can be readily retrieved.
- Research insurance coverage and seek reimbursement for the maximum amount. Credit the appropriate FEMA project with that amount.
- Check with your Federal Grant Program Coordinator about the availability of funding under other federal programs (i.e., FHWA, Housing and Urban Development, etc.) and ensure that the final project claim does not include costs that were funded or should be funded by another federal agency.
- Ensure that materials taken from existing inventories for use under FEMA projects are documented by inventory withdrawal and usage records.
- Do not charge the regular time salary of permanent employees or seasonal employees (whose salaries are contained in annual appropriations) to FEMA debris removal and emergency protective services projects.
- Do not claim costs for items or activities for which you did not have a cash outlay.
- Ensure that claims for overtime fringe benefits are based on cost items (i.e., Workers' Compensation insurance, etc.) that accrue as a result of overtime. Items such as health benefits and leave are not eligible as overtime fringe benefits.
- Ensure that expenditures claimed under the FEMA project are reasonable and necessary, are authorized under the scope of work, and directly benefit the project.
- Ensure that you document pertinent actions for contracts awarded under FEMA projects, including the rationale for the method of procurement, the basis for contractor selection, and the basis for the contract price. Remember that federal regulations prohibit cost-plus-percentage-of-cost contracts.

[311] 44 C.F.R. § 13.36(d)(3).

[312] 44 C.F.R. §§ 13.36(d)(4)(i)-(iii).

[313] 44 C.F.R. § 13.36(f)(4).

[314] 42 U.S.C. § 5155.

[315] 42 U.S.C. § 5155(a).

[316] Department of Homeland Security, Office of the Inspector General, *Audit Tips for Managing Disaster-Related Project Costs*, at 3-7 (2012), available at http://www.oig.dhs.gov/assets/Audit_Tips.pdf. Accessed July 5, 2013.

[317] *Id.* at 7.

c) FTA Public Transit Emergency Relief Program.—In 2008, the Government Accountability Office (GAO) reported that since 1998 the Federal Government provided approximately $5 billion through FEMA to assist FTA-funded transit systems after disasters, mostly for costs associated with September 11, 2001, and Hurricane Katrina.[318] However, while FTA is mandated to provide grant funding for the public transportation industry, FTA was limited in its ability to assist these systems with relief aid after emergencies. Moreover, FEMA lacked guidance on the types of relief it could provide transit,[319] and the traditional Stafford Act PAP mechanism proved inefficient to provide quick relief funding for transit.[320] As such, GAO recommended that FEMA and USDOT look to the existing Federal Highway Administration's Emergency Relief Program (FHWA ERP), which distributes Stafford Act funding for prescribed uses, as a model to expedite relief assistance to transit systems and as a source of guidance to build program elements and procedures between FEMA and USDOT.[321]

Four years later, the FTA Public Transit Emergency Relief Program (FTA ERP) was established as part of the MAP-21 legislation. Based on the FHWA ERP, the FTA ERP was created to help states and public transportation systems pay for protecting, repairing, or replacing equipment and facilities that may suffer or have suffered serious damage as a result of an emergency, including natural disasters such as floods, hurricanes, and tornadoes.

Eligible activities under the FTA ERP include:

- Capital projects to protect, repair, reconstruct, or replace equipment and facilities of a public transportation system, including on an Indian reservation, which are in danger of, or have suffered serious damage as a result of an emergency.[322]
- Eligible operating costs of public transportation equipment and facilities in an area directly affected by an emergency,[323] including evacuation services; rescue operations; temporary public transportation service; or reestablishing, expanding, or relocating public transportation route service before, during, or after an emergency.[324]

Recipients will be eligible for operating costs for a 1-year period from the date of an Emergency Declaration.[325] The Secretary may extend that period for an additional year if there is a compelling need.[326] Assistance for capital projects or eligible operating costs will not exceed 80 percent of the net project cost, as determined by the Secretary.[327] However, the Secretary may waive the nonfederal share.[328] These grants cannot be for eligible work and costs outlined in the Stafford Act PAP (listed above).[329]

On February 6, 2013, FTA announced the availability of $2 billion through the FTA Emergency Relief Fund[330] pursuant to the Disaster Relief Appropriations Act of 2013,[331] providing $10.9 billion in transit relief aid primarily for New York and New Jersey. FTA identified three categories of projects for funding:[332]

- Category One: Projects for eligible expenses that affected FTA recipients incurred and disbursed on or before January 29, 2013, in preparation for or response to Hurricane Sandy.
- Category Two: Projects for existing contractual commitments and contracts for which an affected recipient issued requests for proposals or invitations to bid for hurricane response and recovery projects on or before January 29, 2013.
- Category Three: Projects for ongoing force account work for hurricane response and recovery for which the recipient can submit documentation showing the expense was in the recipient's budget on or before January 29, 2013.

The federal share for all eligible capital and operating expenses for these funds was 90 per-

[318] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-243, EMERGENCY TRANSIT ASSISTANCE: FEDERAL FUNDING FOR RECENT DISASTER, AND OPTIONS FOR THE FUTURE 13 (2008).

[319] *Id.* at 22.

[320] *Id.* at 23.

[321] *Id.* at 30.

[322] 49 U.S.C. § 5324(b)(1) (2013).

[323] 49 U.S.C. § 5324(b)(2) (2013).

[324] 49 U.S.C. §§ 5324(a)(1)(A)-(D) (2013).

[325] 49 U.S.C. § 5324(b)(2)(A) (2013).

[326] 49 U.S.C. § 5324(b)(2)(B) (2013).

[327] 49 U.S.C. § 5324(e)(1) (2013).

[328] 49 U.S.C. § 5324(e)(3) (2013).

[329] 49 U.S.C. § 5324(d) (2013).

[330] Federal Transit Administration Notice of Availability of Emergency Relief Funds in Response to Hurricane Sandy, 78 Fed. Reg. 8692 (Feb. 6, 2013).

[331] Pub. L. No. 113-2, 127 Stat. 4 (2013).

[332] 78 Fed. Reg. 8692, 8693.

cent.[333] For disaster areas in Connecticut, New Jersey, and New York, the federal share was 100 percent for eligible recovery operating expenses between October 30 and November 14, 2012.[334] Local match must be provided from an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital. For expenses within all three categories, state planning, Buy America, and Procurement and Contraction Guidelines were waived.[335]

3. SSI

In 2009, FTA published guidance on controlling SSI.[336] FTA developed the document based on the parameters set out in established programs of USDOT[337] and TSA.[338] It instructs:

> For transit, SSI is any information or record whose disclosure may compromise the security of the traveling public, transit employees, or transit infrastructure. SSI may include data, documents, engineering drawings and specifications, and other records whose disclosure could increase the agency's risk of harm. For example, threat and vulnerability assessments are SSI. SSI requires protection from public disclosure as defined under [the Freedom of Information Act (FOIA)]—that is, SSI is not subject to disclosure either under FOIA or state "Sunshine Laws" and, by regulation, it *must not* be disclosed. Failure to categorize or mark information as SSI does not change its protected status.[339]

Of 16 types of records that these USDOT and TSA regulations have determined to be covered as SSI, only 3 apply to public transit, as follows:[340]

- Security programs and contingency plans issued, established, required, received, or approved by USDOT or DHS.
- Vulnerability assessments that are directed, created, held, funded, or approved by USDOT or DHS, or that will be provided to either agency in support of a federal security program.
- Threat information held by the Federal Government concerning transportation, transportation systems, and cyber infrastructure, including sources and methods used to gather or develop the information.

FTA recommends that agency security plans or procedures; records such as training after action reports; and drawings, maps, or designs be reviewed for system vulnerabilities.[341]

The USDOT and TSA regulations also describe people who can access SSI, including persons who: [342]

- Perform official duties, for example, pursuant to a contract or grant.
- Carry out, or supervise or manage persons who are carrying out, DHS- or USDOT-approved, accepted, funded, recommended, or directed transportation security activities, or complete training to carry out such activities.
- Provide technical or legal advice to a "covered" person regarding federal transportation-security legal or regulatory requirements or in connection with a judicial or administrative proceeding regarding these requirements.

FTA recommends that because having a need to know permits an employee, contractor, or vendor to have access to SSI, transit agencies should ensure that their "need to know" requirements do in fact allow all applicable persons to access SSI to perform their work.[343] Additionally, proper marking systems and control processes of SSI should be established.

4. Mutual Aid Agreements

Arrangements that establish the basis for cooperative assistance between government agencies such as a memorandum of understanding (MOU) can be highly beneficial planning tools. MOUs can be intended for everyday purposes as well as disaster-response assistance and are logical extensions of frameworks for coordinated incident response as outlined in NIMS and HSPD-5. Intergovernmental cooperation and coordination through the Emergency Management Assistance Compact (EMAC)[344] was a highlighted success story of the Hurricane Katrina response. EMAC is the

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[333] *Id*. at 8695.

[334] *Id.*

[335] *Id.* at 8696.

[336] Federal Transit Administration, *Sensitive Security Information (SSI): Designation, Markings, and Control* (2009), available at http://www.fta.dot.gov/documents/Final_FTA_SSI_(072009)_revised.pdf. Accessed July 5, 2013.

[337] 49 C.F.R. pt. 15, Protection of Sensitive Security Information.

[338] 49 C.F.R. pt. 1520, Protection of Sensitive Security Information.

[339] Federal Transit Administration, *supra* note 336, at 3.

[340] *Id.* at 5.

[341] *Id.*

[342] 49 C.F.R. § 15.7 and § 1520.7.

[343] Federal Transit Administration, *supra* note 336, at 11.

[344] Pub. L. No. 104-321, 110 Stat. 3877 (1996).

first disaster-relief compact, established in 1996, which offers assistance during governor-declared states of emergency through a system that allows states to send personnel, equipment, and commodities to help disaster-relief efforts in other states. Once EMAC was enabled for Katrina, over 67,000 aid personnel were dispatched to Louisiana and Mississippi through EMAC coordination of 48 states.[345] As a model for cooperative agreements between governments, EMAC "addresses the legal issues of liability, workers compensation, reimbursement, and professional licensure—prior to a disaster or emergency when resource needs and timing are critical."[346]

The APTA Standards Development Program has established guidance for the development of an MOU to provide mutual aid between transit systems.[347] Prior to establishing an MOU between agencies, APTA suggests consideration of a wide range of issues covering assets, personnel, and communications/coordination, including:[348]

- Vehicles and Equipment
  - Develop and maintain a transportation resource list by type, capacity and availability, including mobility device accessible vehicles (i.e., paratransit, taxi, shuttle).
  - Determine whether equipment is compatible with the environment in which it is going to be used. For example, determine vehicle movement limitations (clearances, width, height, turning radius, ramp or lift requirements, track, signal systems, roads, fuel type, and operating range) to ensure that pickup and dropoff locations work with the equipment used. Be sure to consider lift and ramp deployments.
  - Arrange for alternate sources of fuel and other vehicle maintenance supplies (first in line for supplies).
  - Review evacuation route information, including how the transit system fits into the big picture. Follow existing transit service routes if possible.
  - Make arrangements with mutual aid partners to arrange for an alternate site to park and store vehicles if the primary site is damaged.
  - Determine how resources will be managed and deployed.
  - Identify the extent and limitations of liability coverage available.
  - Ensure the availability of an alternate communication system in the event that normal dispatching networks and telephones are not functional.
- Personnel
  - Consider staff requirements and assignments for emergencies, and ensure that employees know where the plan is located.
  - Provide staff training regarding the emergency plan.
  - Staffing plans should include contact and call lists for operators and maintenance personnel and other essential personnel. Review labor contract agreements. Perform a realistic assessment of how many employees will be available and how many employees the transit agency can spare to assist neighboring agencies, municipalities, regions, and community-based organizations.
  - Pre-identify personnel (management, administrative or support staff), including disability transportation providers, who are qualified to operate each type of vehicle. Consider level of training and equipment qualifications. Consider developing an emergency deployment plan, with a contact list and personnel assigned to prearranged locations and tasks.
  - Develop a staffing and mobilization plan for moving vehicles and equipment.
  - Encourage staff members to develop a family emergency plan to provide for the safety and security of their loved ones and personal property (personal planning, food and water, accommodations, arrangements, etc.).
  - Consider time and personnel limitations (geographic proximity, hours of service rules).
  - Develop a plan for food, shelter, and supplies for employees at the agency (emergency packets, MREs (Meal, Ready to Eat), bottled water, blankets and cots, etc.).
- Communications/Coordination
  - Communications capability is vital during emergencies. Communications capabilities between providers and receivers of support may not be compatible.

[345] U.S. House of Representatives Select Bipartisan House Committee to Investigate the Preparation for and Response to Hurricane Katrina, *A Failure of Initiative*, at 144 (2009), available at http://katrina.house.gov/full_katrina_report.htm. Accessed July 5, 2013.

[346] *Id.* at 145.

[347] American Public Transportation Association, *Participating in Mutual Aid*, Security Emergency Management Workgroup, APTA SS-SEM-RP-011-09 (2009), abstract available at http://www.apta.com/resources/standards/Documents/APTA-SS-SEM-RP-011-09.pdf. Accessed July 5, 2013.

[348] *Id.* at 1.

• Means should be taken to ensure adequate communications plans during an emergency.

APTA's suggested template for the development of an MOU covers key areas for operational and legal review, including:[349]

• Assistance commencement and termination.
• Mandated rest time.
• Anticipated length of activations.
• Responsibility for meals, lodgings, materials, and transport.
• Safety rules.
• Timekeeping.
• Resource specifications.
• Wages, benefits, payroll taxes, liability insurance, workmen's compensation, and other contingencies.
• Administrative costs.
• Indemnification.

See the full sample of APTA's MOU template in Appendix B.

IV. CONCLUSION

After September 11, 2001, the transit industry became an integral actor within a new and quickly-evolving homeland security industry. While striving to fulfill its mandate to provide efficient and safe public transport, the transit industry had a steep learning curve to building security and emergency management programs. However, deficiencies in cross-sector coordination and the development of sweeping homeland security programs left transit managers unsure of what was expected of them. For example, transit managers understood they had roles in regional emergency response, but many did not understand their planning roles and how they fit exactly into a regional structure. Moreover, while managers generally understood the benefits of a NIMS, how such systems could be applied in practical fashion to their operations was left unclear. Transit was already struggling with challenges from its own industry, including requirements for rail transit SSO and the process of adapting to such regulatory structures.

In general, existing emergency planning requirements are high-level, systems, risk-management-oriented mandates. The SSPP, SEPP, and the incorporation of ICS into plans are overarching, management-level planning requirements. More prescriptive, operationally oriented requirements are rare. However, sifting through the volumes of guidance documents available to learn how to, for example, develop SSPP and integrate ICS into plans and procedures is no small, uncomplicated, and clear task.

Going forward, how transit is educated on planning requirements will be the challenge. At present, industry organizations are attempting to provide transit systems with advice on how to comply with NIMS, ICS, SSO, PMO, and other key safety, security, and emergency management requirements. However, as indicated by GAO and MAP-21, there is a great need for better coordination between DHS, TSA, FEMA, and USDOT and its modal administrations. Tailoring program guidance to assist transit systems developing EOP, SSPP, SEPP, and other plans that are based on DHS, FEMA, and TSA planning foundations must involve a coordinated program development process. If TSA is charged with the security and emergency management oversight of all USDOT modes, TSA should lead such transit industry education and training efforts in conjunction with USDOT and industry partners. TSA and the transit industry should make a good-faith effort to synthesize existing guidance to provide unified instructive information for the industry. How well TSA coordinates with USDOT and its modal administrations in this process will have important implications on national preparedness and resilience.

[349] *Id.* at 4–5.

Appendix A: NRF Emergency Support Functions and Lead Agencies

NRF EMERGENCY SUPPORT FUNCTIONS		
ESF	**Function**	**Responsible Department**
ESF 1	Transportation	Department of Transportation
ESF 2	Communications	Department of Homeland Security/National Protection and Programs/Cybersecurity and Communications/National Communications System
ESF 3	Public Works and Engineering	Department of Defense/U.S. Army Corps of Engineers
ESF 4	Firefighting	Department of Agriculture/Forest Service
ESF 5	Emergency Management	Department of Homeland Security/Federal Emergency Management Agency
ESF 6	Mass Care, Emergency Assistance, Housing, and Human Services	Department of Homeland Security/Federal Emergency Management Agency
ESF 7	Logistics Management and Resource Support	General Services Administration/ Department of Homeland Security/Federal Emergency Management Agency
ESF 8	Public Health and Medical Services	Department of Health and Human Services
ESF 9	Search and Rescue	Department of Homeland Security/Federal Emergency Management Agency
ESF 10	Oil and Hazardous Materials Response	Environmental Protection Agency
ESF 11	Agriculture and Natural Resources	Department of Agriculture
ESF 12	Energy	Department of Energy
ESF 13	Public Safety and Security	Department of Justice
ESF 14	Public Safety and Security, Long-Term Community Recovery	Department of Homeland Security/Federal Emergency Management Agency
ESF 15	External Affairs	Department of Homeland Security

Appendix B: APTA Sample Public Transit Mutual Aid Assistance Agreement

Public transit systems support processes whereby public transit systems and their geographic operating regions may receive and provide assistance in the form of personnel and equipment, to aid in restoring and/or maintaining public transit or evacuation service when such service may be required due to acts of the elements, equipment malfunctions, accidents, sabotage, or any other occurrence for which emergency assistance is deemed to be necessary or advisable ("Emergency Assistance"). This Mutual Aid Assistance Agreement sets forth the terms and conditions to which the undersigned transit agency ("Participating Agency") agrees to provide assistance, based on the governing principles, on all occasions that it requests and receives ("Requesting Entity") or provides ("Responding Entity") Emergency Assistance from or to another Participating Agency who has also signed the Mutual Aid Assistance Agreement provided; however, that if a Requesting Entity and one or more Responding Entities are parties to another mutual aid assistance agreement at the time of the Emergency Assistance is requested, such other mutual assistance agreement shall govern the Emergency Assistance among those Participating Entities.

In consideration of the foregoing, the Participating Agency hereby agrees as follows:

(1) When providing Emergency Assistance to or receiving Emergency Assistance from another Participating Agency, the Participating Agency will adhere to the written principles accompanying this Agreement to govern Emergency Assistance arrangements.

(2) With respect to each Emergency Assistance event, Requesting Entities agree that they will provide appropriate reimbursement for Responding Entities regarding all costs and expenses incurred by Responding Entities in providing Emergency Assistance as provided under the Principles, unless otherwise agreed to in writing by each Participating Entity provided, however, that Responding Entities must maintain auditable records in a manner consistent with the Principles.

(3) During each Emergency Assistance event, the conduct of the Requesting Entities and the Responding Entities shall be subject to the liability and indemnification provisions set forth in the Principles.

(4) A Participating Agency may request a copy of the signed Mutual Aid Assistance Agreement of another Participating Entity prior to providing or receiving Emergency Assistance.

[Name of Organization]
Name: _____
Signature: _____
Name: _____
Title: _____
Date: _____

Appendix B: Suggested governing principles covering emergency assistance arrangements between emergency response program participants

Transit agencies or other entities may have occasion to call upon other transit agencies or entities for emergency assistance in the form of personnel or equipment to aid in evacuation or maintaining continuity of service, when such service has been disrupted by acts of the elements, equipment malfunctions, accidents, sabotage, or any other occurrences where the

parties deem emergency assistance to be necessary or advisable. While it is acknowledged that a transit entity is not under any obligation to furnish such emergency assistance, experience indicates that companies are willing to furnish such assistance when personnel or equipment is available.

In the absence of a continuing formal contract between a transit agency or other entity requesting emergency assistance ("Requesting Entity") and a transit agency willing to furnish such assistance ("Responding Entity"), the following principles are suggested as the basis for a contract governing emergency assistance to be established at the time such assistance is requested:

(1) The emergency assistance period shall commence when personnel and/or equipment expenses are initially incurred by the Responding Entity in response to the official request of the Requesting Entity. (This would include any request for the Responding Entity to prepare its employees and/or equipment for transport to the Requesting Entity's location but to await further instructions before departing.) The emergency assistance period shall terminate when such employees and/or equipment have returned to the Responding Entity, and shall include any mandated DOT rest time resulting from the assistance provided and reasonable time required to prepare the equipment for return to normal activities (e.g. cleaning off/repair of vehicles, restocking parts, etc.).

(2) To the extent possible, the Requesting Entities and Responding Entities should reach a mutual understanding and agreement in advance on the anticipated length, in general, of the emergency assistance period. For extended assistance periods, there should be agreement on the process for replacing or providing extra rest for the Responding Entity's employees. It is understood and agreed that if in the Responding Entity's judgment such action becomes necessary, the decision to terminate the assistance and recall employees, contractors, and equipment lies solely with the Responding Entity. The Requesting Entity will take the necessary action to return such employees, contractors, and equipment promptly.

(3) Employees of the Responding Entity shall at all times during the emergency assistance period continue to be employees of the Responding Entity and shall not be deemed employees of the Requesting Entity for any purpose. The Responding Entity shall be an independent contractor of the Requesting Entity; and wages, hours, and other terms and conditions of employment of the Responding Entity shall remain applicable to its employees during the emergency assistance period.

(4) The Responding Entity shall make available at least (__) supervisor(s) in addition to operators and maintenance personnel. All instructions for work to be done by Responding Entity's personnel shall be given by Requesting Entity to Responding Entity supervisor(s); or when Responding Entity personnel are to work in widely separate areas, to such of Responding Entity's supervisors as may be designated for the purpose by Responding Entity's management.

(5) Unless otherwise agreed, the Requesting Entity shall be responsible for supplying and/or coordinating support functions such as lodging, meals, materials, etc. when it is reasonably able to do so. As an exception to this, the Responding Entity shall normally be responsible for arranging lodging and meals en route to the Requesting Entity and for the return trip home. The Requesting Entity agrees to seek appropriate reimbursement for expenses incurred by the Requesting Entity.

(6) The Responding Entity's safety rules shall apply to all work done by their employees, unless as mutually agreed otherwise. Any questions or concerns arising about any safety rules and/or procedures should be brought to the proper level of management for prompt resolution between management of the Requesting Entities and Responding Entities.

(7) All timesheets and work records pertaining to the Responding Entity's employees furnishing emergency assistance shall be kept by the Responding Entity.

(8) The Requesting Entity shall indicate to the Responding Entity the types of vehicles and other equipment desired as well as the number of job function employees requested, but the extent to which the Responding Entity makes available such equipment and employees shall be at the Responding Entity's sole discretion.

(9) The Requesting Entity shall reimburse the Responding Entity for all costs and expenses incurred by the Responding Entity as a result of furnishing emergency assistance. The Responding Entity shall furnish documentation of expenses to the Requesting Entity. Such costs and expenses shall include, but not be limited to the following:

- Employees' wages and salaries for paid time spent in Requesting Entity's service area and paid time during travel to and from such service area, plus the Responding Entity's standard payable additives to cover all employee benefits and allowances for vacation, sick leave and holiday, pay, social and retirement benefits, all payroll taxes, workmen's compensation, employer's liability insurance, and other contingencies and benefits imposed by applicable law or regulation.
- Employee travel and living expenses (meals, lodging, and reasonable incidentals).
- Replacement cost of materials and supplies expended or furnished.
- Repair or replacement cost of equipment damaged or lost.
- Charges, at rates internally used by the Responding Entity, for the use of vehicles and other equipment requested.
- Administrative and general costs which are properly allocated to emergency assistance, to the extent such costs are not chargeable pursuant to the foregoing subsections.

(10) The Requesting Entity shall pay all costs and expenses of the Responding Entity within 60 days after receiving an invoice.

(11) The Requesting Entity shall indemnify, hold harmless, and defend the Responding Entity from and against any and all liability for loss, damage, cost, or expense which the Responding Entity may incur by reason of bodily injury, including death, to any person or persons, or by reason of damage to or destruction of any property, including the loss of use thereof, which result from furnishing emergency assistance and whether or not due in whole or in part to any act, omission, or negligence of the Responding Entity, except to the extent that such death or injury to person, or damage to property, is caused by the willful or wanton misconduct and/or gross negligence of the Responding Entity, its employees, officers, contractors, or agents. Where payments are made by the Responding Entity under a workmen's compensation or disability benefits law or any similar law for bodily injury or death resulting from furnishing emergency assistance, the Requesting Entity shall reimburse the Responding Entity for such payments, except to the extent that such bodily injury or death is caused by the willful or wanton misconduct and/or gross negligence of the Responding Entity, its employees, officers, contractors, or agents.

(12) In the event any claim or demand is made, or suit or action is filed against the Responding Entity alleging liability for which the Requesting Entity shall indemnify and hold harmless the Responding Entity under paragraph (11) above, the Responding Entity shall promptly notify the Requesting Entity thereof; and the Requesting Entity, at its sole cost and expense, shall settle, compromise, or defend the same in such manner as it deems necessary or prudent. The Requesting Entity shall consult the Responding Entity on all such litigation and will not compromise any issue or claim without the concurrence of the Responding Entity, which will not be unreasonably withheld. The Responding Entity shall cooperate

with the Requesting Entity's reasonable efforts to investigate, defend, and settle the claim or lawsuit.

Appendix C: Transit Drill and Exercise Evaluation Criteria Sample

Following are sample transit training and exercise evaluation forms. These samples are presented to provide transit managers with ideas to review and critique transit personnel performance in drills and exercises. The samples are excerpts from *Guidelines for Transportation Emergency Training Exercises*, Transportation Security, Vol. 9: *Transit Cooperative Research Program Report 86/National Cooperative Highway Research Program Report 525* (2006). For the full list of sample performance criteria, see Attachment 2 in the Guidelines.

TASK	SUB-TASK	PERFORMED BY	EVALUATION CRITERIA
Emergency Management	1. Mobilize transportation agency emergency operations center staff	Transportation agency emergency operations center	Did the transportation dispatch/management center initiate alert/recall procedures for the transportation agency emergency operations center?
			Was the recall list current?
			Was a determination made whether partial or full transportation agency emergency operations center staffing was necessary?
			Did the appropriate authority authorize partial/full activation of the transportation agency emergency operations center?
			Who authorized the partial/full activation (name and title)?
			Were directions/recommended routes provided to personnel to ensure that the personnel reached the transportation agency emergency operations center as quickly as possibly?
			Was the transportation executive director/general manager or designated alternate notified of the incident in a timely manner?
			How was this notification made?
			Did the appropriate transportation agency personnel respond to the recall?
			Availability and accuracy of contract information used to activate transportation emergency operations center.
			Percentage of personnel in the transportation agency emergency operations center who responded appropriately to the notification call.

TASK	SUB-TASK	PERFORMED BY	EVALUATION CRITERIA
Emergency Management	2. Expand and operate the transportation agency emergency operations center	Transportation agency emergency operations center	Was the facility housing the transportation agency emergency operations center effectively upgraded from current to emergency status?
			Were appropriate procedures followed for removing equipment from storage locations, ensuring that equipment was operating properly, preparing the facility for emergency use, and reviewing plans and procedures appropriate to the incident?
			Was the transportation agency emergency operations center communications system confirmed as operational? Were backup and alternate communications systems also identified and confirmed as operational?
			Were established communications adequate to maintain an uninterrupted capability for the duration of the response?
			Were transportation emergency plans, procedures, contact information, and other materials available at the transportation agency emergency operations center?
			Was a reliable communications link established among the transportation agency emergency operations center, the transportation incident commander in the field, and the transportation representative assigned to the local emergency operations center? Was a reliable communications link established between the transportation agency emergency operations center and the local emergency operations center?

TASK	SUB-TASK	PERFORMED BY	EVALUATION CRITERIA
Emergency Management	2. Expand and operate the transportation agency emergency operations center (cont'd)	Transportation agency emergency operations center	Was an effective communications protocol established between the transportation agency emergency operations center and the transportation dispatch/management center?
			Was there a procedure in place to ensure accountability for personnel once they reach the transportation agency emergency operations center (e.g., sign-in)?
			Was there a procedure in place to ensure that briefing occurred for personnel once they were signed in to the emergency operations center?
			Did the briefings include the status of the incident and current response activities?
			Was there a procedure in place to ensure that follow-up briefings occurred at regular intervals thereafter?
			Was the transportation agency emergency operations center established in a safe and secure area?
			What security measures were used?
			Was a procedure established for record keeping regarding the activities performed by the transportation agency emergency operations center (e.g., event log)?
			Were schedules/staffing plans developed to plan for uninterrupted 24-hour operation to cover all shifts with adequate staff?
			Were other transportation agency personnel notified that the transportation agency emergency operations center had been activated?
			Was the activation and response coordinated and efficient?
			Were arriving staff appropriately briefed upon their arrival?

Appendix D: Emergency Operations Plan Sample

ESF 1 - TRANSPORTATION[350]

TAB A: EMERGENCY BUS MOBILIZATION PLAN

I. Purpose

The purpose of this plan is to coordinate the mobilization of bus resources in support of emergency activities. Activities requiring bus resources may include evacuation, sheltering, and transportation and rehabilitation of emergency workers.

II. Scope

This plan is a tab to *Emergency Support Function 1 – Transportation* of the *YOUR COUNTY Comprehensive Emergency Management Plan*. It also supports evacuation plans for YOUR COUNTY jurisdictions and agencies.

III. Assumptions

A. Both YOUR ORGANIZATION and school districts have a critical function of safely transporting the public and students in an efficient and timely manner. Normally, it will be their first priority to ensure that they can continue to provide these critical functions in an emergency. Upon request, and at their discretion, they can provide bus resources to support emergency operations.

B. YOUR ORGANIZATION and school buses will normally only be available for temporary assignment to an incident. They normally cannot provide long term transportation services.

C. YOUR ORGANIZATION has a central dispatch for all of its buses. It operates daily from 3:30 AM to 10 PM.

D. YOUR ORGANIZATION buses are 25', 29', 30', or 40' in length. The seating capacity of these buses is approximately one person per foot and all are wheel chair lift equipped with capacity for two wheelchairs. They also have 25 paratransit buses that can transport up to four wheelchairs.

E. Most YOUR ORGANIZATION buses have limited ground clearance and are best suited for developed roads.

F. School district bus resources usually cannot be dispatched as quickly as YOUR ORGANIZATION buses. Emergency response may take up to two hours because drivers may not be available. This will be longer in the summer months. Each school district has its own dispatch.

G. School district superintendent approval is required for all emergency bus missions. The procedure below will describe this process.

H. There are more school buses (over [number] in YOUR COUNTY) than YOUR ORGANIZATION buses; they are at several bus transportation centers throughout the county. They have a much higher clearance and they can be used on some less developed roads than YOUR ORGANIZATION buses.

I. Most school buses come in two sizes. Small buses can seat 20. Large buses can seat 66 to 78 children.

J. YOUR ORGANIZATION paratransit operators and all school bus drivers are required to have first aid training. All school and YOUR ORGANIZATION buses come with very simple first aid and bloodborne pathogen kits. Aside from this, bus operators can provide no additional support to passengers. Any passengers should be decontaminated and any necessary support should be provided to them by other personnel.

IV. Concept of Operations

A. General

1. This plan establishes a single point of contact for the mobilization of bus resources. This function is called the 'bus resource coordinator'. YOUR ORGANIZATION is responsible for staffing this function.

2. Initial requests for buses will be made to the YOUR ORGANIZATION dispatch center.

[350] From the FTA Transit Bus Safety and Security Program Resource Library, http://bussafety.fta.dot.gov/show_resource.php?id=4120.

3. When the YOUR Regional EOC is activated and buses are critical resources, the bus resource coordinator will report to the YOUR Regional EOC to provide for close coordination with schools, the logistics section, and other EOC staff.

4. The bus resource coordinator will attempt to provide buses from the following sources, the following order:

- YOUR ORGANIZATION
- School districts
- Other applicable mutual aid bus providers (e.g., YOUR LOCAL TRANSIT AGENCY)

5. In the event that YOUR ORGANIZATION and school bus resources are unavailable or they are exhausted, the bus resource coordinator will forward requests to the logistics section in the YOUR Regional Emergency Operations Center (YOUR Regional EOC).

6. The EOC logistics section will obtain buses through a) contract to local private vendors or b) they will forward the request to the State EOC.

B. EOC Operations – Buses as Critical Resources

1. During an EOC activation involving use of bus resources, the bus resource coordinator will keep the EOC informed of the status of bus resources.

2. Buses will be considered 'critical resources' when they are essential to addressing incident objectives, e.g., in major evacuations.

3. When buses are critical resources, YOUR ORGANIZATION will coordinate bus resources from the YOUR Regional Emergency Operations Center. A school representative may also be present in the EOC to support the provision of school buses.

4. In the event that YOUR ORGANIZATION is canceling or otherwise curtailing bus services, it will coordinate with the YOUR Regional EOC as appropriate to identify possible needs for buses to support emergency operations. Likewise, school bus providers should also coordinate with the bus resource coordinator or the schools representative in the EOC to identify possible future needs for bus resources. If possible needs are identified, bus providers will endeavor to maintain an appropriate level of service to provide those buses if needed.

C. Responsibilities

A. Requesting Agency (fire agencies, law enforcement, etc.)

1. Provide a safe work environment for bus operations.
2. Incorporate bus resources into incident communications plan.
3. Ensure that riders are appropriately evaluated and decontaminated prior to boarding vehicles.
4. Provide fuel for vehicles as needed while they are in service at the incident.
5. Provide any necessary services to riders, including medical care, food and water, sanitation, security, and other special needs.
6. Coordinate the reimbursement of vehicle providers.

B. Bus Providers (YOUR ORGANIZATION, School Districts, or private vendors)

1. Provide appropriately licensed and qualified bus operators with buses.
2. Provide adequately insured vehicles, with fuel, in good working condition, and that are appropriate for the requested mission.
3. Notify the requesting agency of accidents, injuries, or unsafe conditions as soon as possible.
4. In coordination with the requesting agency, provide for repair and maintenance of vehicles to keep them roadworthy.
5. Track all time and costs associated with deployment of vehicles, operators, and other support personnel. Coordinate with requesting agency time and cost tracking units as appropriate.

C. YOUR ORGANIZATION

1. Keep the YOUR Regional EOC informed of the status of agency operations (e.g., disaster impacts,

curtailing of operations, etc.).

2. Staff the 'bus resource coordinator' function. Ensure the continuity of this function.

3. Coordinate provision of public sector bus resources.

4. Keep the YOUR Regional EOC informed of the status of bus resources.

5. In the event that local and mutual aid public sector bus resources are exhausted, forward additional resource requests to the YOUR Regional EOC Logistics Section.

D. YOUR Regional Emergency Operations Center

1. When bus resources are critical to response operations, maintain resource status of bus resources.

2. When bus resources are critical resources, prioritize the deployment of resources as necessary.

3. When requests are forwarded from the bus resource coordinator coordinate the provision of bus resources from private vendors or the State EOC.

VI. Finance and Administration

A. YOUR ORGANIZATION and school district bus providers should carefully track all personnel and equipment costs associated with emergency activities. Emergency work, maintenance, and repair or replacement costs are eligible for reimbursement under federal disaster relief programs.

B. Unless other arrangements or agreements are in effect, the requesting party is responsible for all costs associated with bus operations.

C. In Washington, insurance coverage remains with the vehicle so any bus provided will be insured by the providing agency.

VII. Training, Plan Review, Maintenance

A. YOUR ORGANIZATION and ESD [NUMBER IN YOUR AREA] will endeavor to make bus providers aware of plan provisions, give them access to applicable procedures, and to facilitate training in their responsibilities in bus mobilization.

B. YOUR REGIONAL EMERGENCY SERVICES AGENCY will coordinate the regular review of this plan.

C. At the beginning of each school year, ESD [#] will provide the YOUR ORGANIZATION Director of Operations with an updated contact list of the district transportation managers and any other relevant information about school bus resources that are necessary to ensure readiness.

Appendix A: Mobilization Guidelines

To request bus resources for evacuation, shelter, emergency worker rehabilitation, or any other emergency-related mission:

A. Incident Command

1. Incident command may request bus resources from dispatch.

2. The IC should provide dispatch with specific information about –

a. The number of persons requiring support

b. Staging area location

c. On-scene contact

d. Destination location

e. Route, road closure, and road condition information

f. Special needs or requirements

B. OUR REGIONAL EMERGENCY SERVICES AGENCY 9-1-1/Dispatch. YOUR REGIONAL EMERGENCY SERVICES AGENCY will contact YOUR ORGANIZATION Dispatch and provide them with the detailed information for the bus request.

C. YOUR ORGANIZATION Dispatch

1. YOUR ORGANIZATION dispatch will notify appropriate YOUR ORGANIZATION staff consistent with their incident notification policy. YOUR ORGANIZATION's Executive Director/CEO will be notified

immediately and will provide updates to the YOUR ORGANIZATION Board of Directors as appropriate.

2. YOUR ORGANIZATION will give B. YOUR REGIONAL EMERGENCY SERVICES AGENCY dispatch an ETA as soon as practicable.

3. YOUR ORGANIZATION dispatch will send a bus to the requested location.

4. In the event that no YOUR ORGANIZATION buses are available the bus resource coordinator will arrange for a bus from school district resources.

5. In the event that all publicly owned or managed bus resources are exhausted, the bus coordinator will forward any unfulfilled or additional bus resource requests to the YOUR Regional EOC Logistics Section.

D. YOUR Regional EOC Logistics Section

1. Forward any requests for bus resources to the bus resource coordinator

2. In the event that all public bus resources are exhausted, arrange for bus resources from local private vendors

3. In the event that private bus resources are exhausted, forward requests for buses to the Washington State Emergency Operations Center.

4. Update the bus resource coordinator on the status.

Appendix E: Acronyms

AASHTO	American Association of State Highway and Transportation Officials
ADA	Americans with Disabilities Act of 1990
AMSC	Area Maritime Security Committee
APTA	American Public Transportation Association
ATSA	Airline and Transportation Security Act
CEM	Certified Emergency Manager
CFR	United States Code of Federal Regulations
COOP	Continuity of Operations Plan
CSO	Company Security Officer
CSSC	Coastal Storm Steering Committee
CTAA	Community Transportation Association of America
DHS	Department of Homeland Security
EMAC	Emergency Management Assistance Compact
EOP	Emergency Operations Plan
EMT	Emergency Medical Technician
ERD	Emergency Relief Docket
ESF	Emergency Support Function
FDA	Food and Drug Administration
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
FHWA ERP	FHWA Emergency Relief Program
FMCSA	Federal Motor Carrier Safety Administration
FMCSR	Federal Motor Carrier Safety Regulations
FOIA	Freedom of Information Act
FRA	Federal Railroad Administration
FSO	Facility Security Officer
FSP	Facility Security Plan
FTA	Federal Transit Administration
FTA ERP	FTA Public Transit Emergency Relief Program
FTCA	Federal Torts Claims Act
GAO	U.S. Government Accountability Office
HSA	Homeland Security Act of 2002
HSPD	Homeland Security Presidential Directive
ICS	Incident Command System
ISTEA	Intermodal Surface Transportation Efficiency Act of 1991
LEP	Limited English Proficiency
MAP-21	Moving Ahead for Progress in the 21st Century Act of 2012
MARAD	Maritime Administration
MARSEC	U.S. Coast Guard Maritime Security threat level system
MEF	Mission Essential Functions
MOU	Memorandum of Understanding
MTSA	Maritime Transportation Security Act of 2002
NEPA	National Environmental Policy Act of 1969
NFPA	National Fire Protection Association
NIMS	National Incident Management System
NPG	National Planning Goal
NPS	National Planning Scenarios
NRCS	National Resource Conservation Service
NRF	National Response Framework
NRP	National Response Plan
NPTSP	National Public Transportation Safety Plan
NTSB	National Transportation Safety Board
NYCT	New York City Transit
OEM	NYC Office of Emergency Management
OIG	DHS Office of Inspector General
PAP	Stafford Act Public Assistance Program
PETS	Pet Evacuation and Transportation Standards Act

PKEMRA	Post-Katrina Emergency Management Reform Act of 2006
PMO	Project Management Oversight
PMP	Project Management Plan
PPD	Presidential Policy Directive
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SCUSA	Stanly County Umbrella Services Agency
SDEA	State Defense Emergency Act
SEPP	Security and Emergency Preparedness Plan
SMS	Safety Management System
SOP	Standard Operating Procedure
SSI	Security Sensitive Information
SSO	State Safety Oversight
SSEP	System Security and Emergency Preparedness
SSMP	Safety and Security Management Plan
SSPP	System Safety Program Plan
TCRP	Transit Cooperative Research Program
TRB	Transportation Research Board
TSA	Transportation Security Administration
USACE	U.S. Army Corps of Engineers
USC	United States Code
USDOT	U.S. Department of Transportation
VSO	Vessel Security Officer
VSP	Vessel Security Plan

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