

DIVISION OF EMERGENCY MANAGEMENT

# DIGEST



**WILLIAM P. CLEMENTS, JR.**  
Governor

**JOE E. MILNER**  
Director

**ROBERT A. LANSFORD**  
State Coordinator

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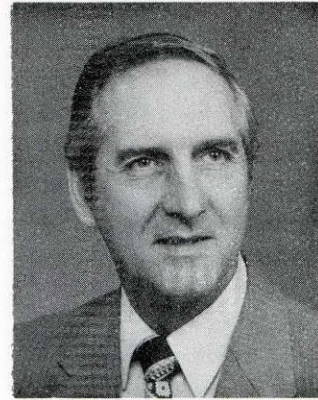


*Sandbags were used to help prevent flooding in the City of Liberty in Liberty County during spring floods. Story, page 2.*

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# DEM UPDATE



**by Robert A. Lansford**  
**State Coordinator**

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It has been a very, very busy spring and early summer. It all started about April 15 with storms and flooding in North Texas. It was downhill from then on. As of this writing, there are now 68 counties declared major disaster areas for individual assistance; 44 of those counties are also approved for public assistance. There are still a few pending determination by FEMA for public assistance. This has almost been a repeat of last year's flooding and storm damage, with many of the same counties involved. Most of this year's damage is in north and east Texas, especially along the Trinity River.

The Division was still heavily involved in the storm situation when the Mega Borg incident occurred. The Mega Borg situation demanded actions that were somewhat unusual for us—response was primarily via the U.S. Coast Guard—but nevertheless are a part of our emergency coordinating activities. We were fortunate in having had our first multi-agency oil spill drill in April; the training provided by the exercise went a long way in developing a working relationship between state, local and federal agencies.

With hurricane season just beginning to come into full force, we have a long road ahead of us through the rest of the year. I cannot over-emphasize the need for local governments to know in advance the steps for effective disaster recovery. Many of you have participated in our disaster recovery course and the procedures you learned in that course are most important for timely declaration actions. Many times, both this year and last, problems developed because the

**Continued on page 4**

Because of staff time dedicated to disaster response and recovery this spring, this is a combined—four month—Digest.

## 2 Disaster Declarations Keep Response, Recovery Workers Busy

With the year less than half over, Texas has already experienced two major disasters that resulted in Presidential disaster declarations.

On January 9 President George Bush approved Governor Bill Clements' January 2 request for a disaster declaration for parts of the Rio Grande Valley because of freezing weather that occurred December 21-24, 1989. Initially, Cameron, Hidalgo, Starr and Willacy counties were approved for programs such as Disaster Unemployment Assistance, Farmers Home Administration agriculture loans, and Small Business Administration loans for real estate, personal property and business losses. On January 18 Dimmit, Kenney, Maverick, Uvalde and Zavala counties were added to the declaration, and on January 25 Frio County was added.

Nearly \$4 million in DUA funds was issued to persons out of work because of the freeze. The Texas

Department of Commerce provided Job Training Partnership Act funds, the Texas Department of Community Affairs provided funds for basic necessities to affected Valley residents and the Department of Human Services assisted local government officials in supplying meal services at several Valley area locations.

Storms and flooding that began April 15 and continued through June 4 resulted in 68 counties, mainly in north central, northeast and southeast Texas, being approved for a major disaster declaration. The original declaration, for Brown, Comanche, Erath and Parker counties, was approved by the President May 2 at the request of Governor Clements. More than 6,000 applications for various aid programs were taken over the toll-free application phone lines. To date, more than \$7 million from the Individual and Family Grant and Temporary Housing programs has been paid to disaster victims.

## First Of Its Kind: Oil Spill Exercise Helps Agencies Prepare

Once again the Division was able to experience the direct relationship between disaster training and a real-world situation. Oil Spill '90, the first oil spill exercise developed jointly by three levels of government and private industry in Texas, took place April 25 after nearly 10 months of planning. That planning paid off in June, when the tanker Mega Borg caught fire in the Gulf of Mexico.

The exercise scenario, which included a release (simulated) of oil from a storage facility in Corpus Christi Bay, was developed by 16 different entities that would be called on to deal with such a spill and related concerns—from the containment of the oil to diverting land and water traffic.

The Governor's Oil Spill Advisory Committee's Status Report, issued in October of 1989, recommended the inclusion of annual exercises "to develop coordinated interactions among all players in the response to and recovery from oil spills."

The exercise, which began on April 25 at 4 a.m., included the establishment and staffing of a command post at the American Petrofina Pipeline Company storage facility and a joint information center in Aransas Pass. A tabletop exercise April 26 examined post-response issues such as environmental and economic impact as well as cleanup and disposal of the oil.

In addition to DEM and American Petrofina, the General Land Office, Water Commission, Railroad Commission, Department of Parks and Wildlife, Department of Public Safety, Department of Highways and Public Transportation, Department of Health, U.S. Coast Guard, U.S. Environmental Protection Agency, Corpus Christi Oil Spill Control Association, San Patricio County, and the cities of Corpus Christi, Aransas Pass and Port Aransas took part in the exercise.

The Mega Borg incident took place in the Gulf of Mexico and was handled under the auspices of the U.S. Coast Guard in accordance with federal law. State and local officials prepared to respond; fortunately, little of the light crude oil made landfall. Much of the oil was burned up by the fire; skimmers, bioremediation and dispersants were also used to control the oil.

"The intent of an exercise is to test emergency management plans and resources and determine what works and what doesn't, as well as to give the various entities involved an opportunity to work together," Division of Emergency Management State Coordinator Robert Lansford said. The exercise allowed all those who would work together in an oil spill situation to better understand each other's roles and capabilities, he said.

# 3 29th Annual State Conference Provides EM Information

Some 640 attendees at the 29th annual State Emergency Management Conference had the opportunity to listen to a variety of experts in emergency management fields discuss matters of interest to all emergency managers. Hazardous material transportation, local disaster recovery, CAER, Hurricane Hugo recovery, the National Hurricane Center, FEMA, range fires, the Exxon Valdez oil spill and media relations were some of the highlights. Next year's conference

will be February 26-28 at the Austin Doubletree Hotel.

Following requests from a number of attendees, the Digest will reprint in this and subsequent issues the presentation entitled "Legal Liability Issues" by Susan Kantor Bank, associate general counsel of FEMA. Ms. Bank's remarks begin on page 5.

## Jennings Named FEMA Deputy

Jerry D. Jennings, appointed by President Bush to be the deputy director of the Federal Emergency Management Agency (FEMA), was confirmed for that post May 25 by the U.S. Senate.

Jennings, 49, formerly deputy director of the U.S. Selective Service System, replaced Robert H. Morris. Morris became deputy director of FEMA in 1983 and served as acting director from June 1989 until his retirement May 19.

As the agency's deputy director, Jennings assists in overseeing all agency operations, including the programs of its three directorates, two administrations and national training center.

Before his appointment, Jennings was deputy director of the U.S. Selective Service System since 1986. In that capacity, he assisted in directing programs for ensuring the Armed Forces manpower capability in the event of a national emergency.

From 1982 to 1986, Jennings served as executive

director of the White House Office of Science and Technology Policy where he was responsible for managing the agency and directing the activities of the White House Science Council.

Prior to that he saw nine years of White House service as an advisor to the President's assistant for National Security Affairs under four Administrations, beginning in 1973.

Jennings was with the Federal Bureau of Investigation from 1968 to 1973 as a field agent and later as a special assistant to the Dept. of Justice director of the Office of National Narcotics Intelligence. From 1965 to 1968, he served as an intelligence officer for the Central Intelligence Agency in the Far East.

A former infantry captain with the U.S. Marine Corps, Jennings is a native of Flint, Mich., and holds a Bachelor of Science degree from Eastern Michigan University. He has studied public and government administration at the City University of New York and Harvard University.

## DEM Personnel

**Russell P. Lecklider** has joined DEM in the Population Protection Planning Division. Russ, a planner at PPP, holds a B.A. in International Studies and an M.A. in Political Science from Ohio State University, as well as an M.S. in Systems Management from the University of Southern California. A native of Florida, Russ previously served in the U.S. Air Force as an Intelligence Operations Manager. **Michael Howard** is the new Engineer Assistant at PPP. Mike has a Bachelor of Science degree in Architectural Engineering from the University of Texas and previously worked in engineering and construction businesses. **Jim Roby** has retired after 16 years with DEM.

**Rebecca Mullen**, formerly the secretary in the DEM Information Office, was promoted to Administrative Secretary in the Energy Resources Management section, replacing **Debbie Bartz**, who now works for the University of Texas System Office. **Donna Englert**, formerly with the Disaster Recovery unit, is the new Information Office secretary. **Lee Janecka** took Donna's place in Disaster Recovery. Lee, a Missouri native, has an associate degree from Southwest Baptist University and previously worked at DPS and as a real estate office manager.

# 'Polly' Tests Emergency Communications

With landline communications cut off by high winds and surge tides that pounded the Texas coast, state and local emergency managers got a chance to test and evaluate alternate communications systems, courtesy of Hurricane Polly '90. Four separate exercise dates in May and June allowed the Category 4 storm to cause problems along the entire Texas coast after devastating several Caribbean islands.

Disaster District offices at Corpus Christi, San Antonio, Harlingen, Houston, Pierce and Beaumont activated for the storm, as did 31 local governments and the State EOC in Austin.

Local governments were provided sealed exercise

packages that included hurricane advisories issued by the National Hurricane Center as well as local Weather Service advisories. The realistic messages were written by National Weather Service staff. DEM provided ESTED (Estimated Safe Time remaining before Evacuation Decision) messages to assist local governments in making evacuation decisions for their jurisdictions.

In all, 1,087 local officials and 193 state officials participated in the exercises. At the state level, radio communication support was provided by the Texas Department of Highways and Public Transportation, the Texas Forest Service and the Texas National Guard.

## NEMA Announces 1991 E. Erie Jones Award For Excellence in Emergency Management

Research Alternatives, Inc., has announced that nominations are now being accepted for the National Emergency Management Association's (NEMA) E. Erie Jones Award for Comprehensive Emergency Management. This third annual competition marks the adoption of the award by NEMA, the leading national association for state-level emergency management organizations.

Two years ago, RAI created the award to reward outstanding programs or projects in the field of emergency management.

To enter, nominations must be in the form of a project description submitted by the project director. Eligible projects may include those from all levels of government and private sector organizations. Nominating papers should be submitted to Research Alternatives, Inc., by **November 1, 1990**.

Papers nominating emergency management projects must follow the following format:

1. Title page: Nominating staff, organization, address, and telephone
2. Table of Contents

3. Project Overview and Accomplishments (not to exceed three typed, double-spaced pages)
4. Project Description
  - a. Objectives
  - b. Major Functions/Operations
  - c. Involvement of Government and Private Sectors
  - d. Costs and Funding Innovations
  - e. Public Safety Achievements
5. Transferring/Communicating the Experience to Others
  - a. Pitfalls to avoid
  - b. Recommended Actions for Improvement
6. References who can be contacted for their informal observations about the project.
7. Summary and Conclusions

The winner of NEMA's E. Erie Jones Award for Comprehensive Emergency Management will be announced in January, 1991. That agency receives a complimentary copy of the Emergency Information System (EIS). The value of the award is more than \$3,000.00. Please send nominations to K.C. Chartrand, Director of Publications at Research Alternatives, Inc., 966 Hungerford Dr., Suite 1, Rockville, MD 20850.

## DEM UPDATE continued from page 1

persons who attended the recovery courses failed to exercise their knowledge in the process of obtaining disaster assistance. It is unfortunate that at times we spend a great amount of time and energy trying to untangle problems that occurred because misinformed persons are handling the recovery request while those who attend the courses stay in the

background. Effective emergency management involves not only the response phase dealing with rescue and emergency actions, but also the knowledge and leadership needed to initiate and coordinate the recovery phase: something that local governments as a whole are not doing very well.

# Legal Liability Issues

by  
**Susan Kantor Bank,**  
**Associate General Counsel**  
**for Insurance and Litigation, FEMA**

*Following are the remarks by Ms. Bank at the 29th Annual State Emergency Management Conference, February, 1990.*

We live in an increasingly litigious society — **more** people are **more** likely to sue, and communities have to have legal concerns relative to allowing development to be sited in hazard areas.

These include: constructing, planning or approving bridges, roads, sewers and other facilities, and residential commercial structures.

Local governments might subject themselves to potential liability under certain circumstances. Communities should be aware of potential liability if damage from a NATURAL HAZARD (flood, mudslide, earthquake) results when the facility is improperly planned, built, operated or maintained.

On the other hand, local governments that seek to **restrict** development in hazardous areas are generally on solid legal ground. If properly implemented, land-use **restrictions** for flood-hazard areas can be successfully defended in court.

Under what circumstances does liability arise? While liability suits may arise in numerous contexts, I'd like to go over with you some of those areas of emergency management and hazard mitigation that have in the past been susceptible to such suits:

1. **Emergency Plans:** Suits have arisen over the adequacy of emergency plans alleging that plans are poorly written or contain inadequately defined chains of command. Also, even for comprehensive, well-thought out plans, suits have arisen over **failure to follow** plans of record. A disaster response plan is in essence, the standard of care, and should be followed. I read somewhere that only 1 of some 50 municipalities in South Carolina had an emergency plan in place to deal with Hurricane Hugo—that resulted in needless confusion and delay in getting vital services back on line.

2. **Training:** Suits have arisen over lack of adequate training of emergency personnel and failure to adequately instruct the public in the event of an emergency.

3. **If a government** knew or should have known that area is subject to a natural hazard. Legal Notice may be by:

- past experience
- identification of hazard by public/private

organization (e.g., an FIS)

- designations on maps (FEMA's floodplain maps)

For example, **Ducey v. United States**, 830 F.2d 1071 (9th Cir. 1987):

Spouses of users of floodplain on federal land who were killed in a flash flood brought suit against United States for damages caused by breach of duty of National Park Service and employees of concessionaire to warn of or guard against flood. Cases were consolidated. The district court found in favor of United States, and plaintiffs appealed. After several procedural rulings, the Court of Appeals for the Ninth Circuit held that : (1) United States WAS UNDER A DUTY TO WARN recreational users of floodplain of hazards of major 100-year flood and to take same precautionary measures that private landowner would have taken, (2) finding that fact that flood was seven times greater than 100-year flood was a superseding cause making warnings ineffective was clearly erroneous.

It is important to note that the government was aware that a life-threatening, 100-year flood was long overdue. From the awareness, the Court held that it followed that the government foresaw the danger of a 100-year flood, and was therefore under a duty to warn decedents of the hazards of a major 100-year flood, and to take the same precautionary measures that a reasonable private landowner would have taken under those circumstances. Moreover, despite the fact that the flood was extraordinary (7 times greater than the 100-year flood), the Court found that the government was still liable because it foresaw the occurrence of a 100-year flood, and failed to warn plaintiffs of it.

4. **If a government** built a structure/facility without accounting for hazard (e.g., if built in San Francisco without properly stabilizing and reinforcing structure against earthquake damage, or if built a bridge where floodwater would back up).

5. **If this failure** to account for hazard **proximately** resulted in damage to third party. Damaged party would have to show:

- a duty to the plaintiff
- a standard of care
- violation of that standard of care
- foreseeability of injury/damage/destruction.

Remember, a Disaster Response Plan is a standard of care. Once established, a community must take care to follow it and not violate it, or liability may result.

6. **If a government** tries to protect against hazard—if negligent in the planning, construction, operation or maintenance of a levee or culvert, it can be held liable when levee/culvert fails due to negligence.

However, even without negligence, in some jurisdictions, communities can be liable even if (through no

fault of their own), they took action which resulted in damage.

This is based on the legal theory of **INVERSE CONDEMNATION**:—Under **INVERSE CONDEMNATION**, if a public improvement causes damage, government is considered to have, in effect, **condemned** the property. It must pay for the damage. To recover under **INVERSE CONDEMNATION**, a party need only show that the community took a deliberate action, (such as construction of a public works project), and that such action resulted in damage.

**DOESN'T MATTER THAT** construction was not negligent  
**DOESN'T MATTER THAT** design was well-conceived  
**DOESN'T MATTER THAT** damage was not foreseeable

Remember, **INVERSE CONDEMNATION** does **NOT** require fault in order to impose liability. I don't want to spend more time discussing, but you should be aware if **INVERSE CONDEMNATION** is a valid cause of action in your state.

**7. If a government fails to warn** citizens—once a community undertakes to provide hurricane, flood or earthquake warnings, it **can** be sued for failure to adequately provide these warnings.

For example, **Brown v. United States** 790 F.2d 199 (1st Cir. 1986)

Personal representatives of estates of three deceased fishermen brought action against United States for negligence of National Oceanic and Atmospheric Administration in maintaining weather observation buoy. The district court of Massachusetts entered judgment for plaintiffs, and the government appealed. The Court of Appeals held that the government **WAS NOT LIABLE** for the death of fishermen who had drowned in a storm which the National Weather Service had failed to predict.

**FACTS:** Lobster fishermen listened to weather forecast on their radio receivers. National Weather Service (NWS) predicted a storm, but it was in fact much worse than they predicted; this was a storm known, because of its sudden and explosive development, as a "bomb." The boat sank, three of the crew were lost. After holding trial, the district court awarded damages to the families of the deceased fishermen, based on the finding of negligence in not earlier predicting the storm's true path. The U.S. appealed, denying liability as a matter of law and fact. Plaintiffs' claims were based upon the government's failure to have repaired or replaced a sporadically malfunctioning weather-reporting buoy on Georges Bank. The government contended that it owed no actionable duty, but if it did, that it had acted reasonably, and that causation was lacking, that is, the district court's findings with respect to the buoy's contribution to the failure to predict were clearly erroneous.

The First Circuit reversed the district court's imposition of liability against the government, holding that "...the Weather Service is a particularly unfortunate area in which to establish a duty of judicially reviewable due care. A weather forecast is a classic example of prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources. Weather predictions fail on frequent occasions." The Court thus found the **GOVERNMENT NOT LIABLE** on grounds of its discretionary regulatory function.

That rulings stands, because the U.S. Supreme Court declined to hear any further appeal by the plaintiffs.

**8. Communities can** be held liable for actions of others!

In one 1985 case which was reversed on appeal, Los Angeles County was found liable for \$2.3 million because it substantially participated in the planning and approval of a development using seepage pits and horizontal drains. That development contributed to a rise in groundwater which was a substantial cause of landslide damage.

The \$2.3 million verdict may have been the **GOOD NEWS** for the County; the **BAD NEWS** is that there were about 240 other homeowners in the same area who suffered the same type of damage from the same causes.

The California Superior Court (for L.A. County) cited a 1970 case (**Holtz**) and adopted its analysis: "...the governmental entity with its superior resources is in a better position to evaluate the nature and extent of the risks of public improvement than are potentially affected property owners, and ordinarily is the more capable focus of responsibility for striking the best bargain between efficiency and cost in the planning of such improvements."

So, the Court found the County was in the best position to assess the risk of residential development of Big Rock Mesa with a system of seepage pits and horizontal drains that it had approved, so, under the philosophy articulated in **Holtz**, it must bear the loss when damage occurs. **UPDATE:** This individual case was reversed on appeal in 1988, but 240 neighboring homeowners had joined the original suit. It was settled in February 1989: **CALTRANS** to pay \$40 million, L.A. County to pay \$35 million, and numerous insurers (homeowners' policies) to pay \$21.8 million—total \$96.8 million!

So, clearly, local governments should use caution in approving private projects, in incorporating such projects into their systems and in what they accept from developers or builders.

Some of you may be wondering, what is FEMA's role in all of this?

*To be continued in the next Digest.*

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