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Emergency Decisionmaking During the State of Florida's Response to Hurricane Andrew*

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Abstract

This article focuses attention on emergency decisionmaking during the State of Florida's response to Hurricane Andrew, the nation's costliest natural disaster.

KEYWORDS: fiscal, evacuation, shelter

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I. INTRODUCTION

This article focuses attention on emergency decisionmaking during the State of Florida's response to Hurricane Andrew, the nation's costliest natural disaster.¹ I begin in part II with a discussion of some relevant facts about the storm and I review some of the studies of the storm and its aftermath that are just now becoming available. In part III, I address emergency decisionmaking at the state level and argue that certain proposals

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1. Juaquin Avino, *After Andrew Comes Action*, MIAMI HERALD, Nov. 26, 1992, at 35A.

for change in the way the state responds to a disaster may improve emergency decisionmaking in future disasters. In part IV, I deal with selected examples of emergency decisionmaking to make points about the strengths and weaknesses of the process employed by the state when responding to Andrew. I also make some more specific suggestions for improving emergency decisionmaking in the future.

II. THE FACTUAL BACKGROUND

The magnitude of the disaster that befell the state of Florida when Hurricane Andrew struck South Florida on August 24, 1992 is hard to overstate. It was the third most powerful storm to hit the United States in recorded history.² The storm was classified a category four storm. It brought sustained winds of 145 miles per hour, gusts up to 175 miles per hour and a 16.9 foot storm surge in Biscayne Bay to bear on southern Dade County.³

The result was overwhelming devastation.⁴ Ten percent of Dade County's housing stock was rendered useless.⁵ 28,066 homes were destroyed and 107,380 homes were damaged, leaving 180,000 persons homeless.⁶ 82,000 businesses were damaged, and a month after the storm an estimated 86,000 people were out of work and 7,800 businesses were closed at least temporarily.⁷

Significant damage was also done to the region's economy. Homestead Air Force Base was heavily damaged by the storm and it is uncertain whether it will reopen, given the cost of repair and changing defense priorities. Damage to agriculture has been estimated at one billion dollars, with permanent income loss of \$250 million and \$580 million in damage to structures.⁸ Tourism, a \$500 million per year industry, is also likely to be severely impacted in the future.⁹ Estimates of the storm's financial cost

2. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 1 (1992) [hereinafter GOVERNOR'S FINAL REPORT].

3. *Id.*

4. DADE COUNTY GRAND JURY, FINAL REPORT 1 (Spring Term A.D. 1992, Filed Dec. 14, 1992) [hereinafter GRAND JURY REPORT].

5. *Id.*

6. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 2 (1992).

7. *Id.*

8. *Id.*

9. *Id.*

range from twenty billion¹⁰ to thirty billion dollars.¹¹

When a storm of the scale of Hurricane Andrew sweeps across the land, things once hidden become exposed. Those who have seen pictures of some devastated homes in the aftermath of the storm have viewed graphic evidence of poor workmanship that was once buried beneath paint and shingle. Those hidden weaknesses are now exposed for all to see. Much attention in the aftermath of the storm has been paid to failings of this kind. In a Special Report, *The Miami Herald* documented, in pictures, maps and news stories, the role that inappropriate design, weak building materials, poor construction techniques, inadequate inspection and other similar failings played in the destruction of homes and businesses.¹² The Herald Report superimposed a map of the of estimated wind zones over a map of the damage and concluded that "[m]any of the worst-hit neighborhoods were far from the worst winds."¹³ The Herald study also concluded that newer houses did much worse in the storm than older houses.¹⁴ "Houses built since 1980 were sixty-eight percent more likely to be uninhabitable after the hurricane than homes built earlier."¹⁵ The Herald Report supports the conclusion that there were common failings shared by many damaged homes. The report cited an independent engineering study commissioned by a major insurance company. The engineers inspected 121 houses in areas where the sustained winds were estimated below 120 miles per hour and concluded that seventy percent had damage traceable to code violations.¹⁶ The report concluded that "[c]onstruction quality and design largely determined the degree of hurricane damage."¹⁷

A. *The Grand Jury Report*

The Dade County Grand Jury also conducted an investigation of storm related matters. Its report reflected a great frustration with the community's failure to learn from its experience in prior storms and a great fear that, in the rush to rebuild, the same mistakes that had caused great losses during

10. *Id.* at 1.

11. GRAND JURY REPORT, *supra* note 4, at 1.

12. *What went wrong*, THE MIAMI HERALD, Special Report, Dec. 20, 1992.

13. Jeff Leen et al., *Failure of Design and Discipline*, THE MIAMI HERALD, Special Report, Dec. 20, 1992, at 2SR.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1SR.

Andrew would be repeated.¹⁸ The Grand Jury made a number of specific recommendations designed to better prepare South Florida for the next hurricane. For example, the report recommended revision of the South Florida Building Code to increase wind load standards and to extend coastal construction standards twenty miles inland.¹⁹ It also suggested changes to the South Florida Building Code to address the design failures in residential construction identified in the wake of Andrew, including recommending the greater involvement of structural engineers in the design of residential construction.²⁰ The report also urged a series of changes in the South Florida Building Code to strengthen the structure of new construction, including the elimination of wood frame gables atop masonry walls and the use of double hurricane bracing.²¹

The Grand Jury Report also concluded that "[t]he use of building materials with evident design limitations also contributed greatly to the failures of many structures."²² The report urged that the entire products approval process be overhauled.²³ The report was also very critical of both the material used in roofing and the way that it has traditionally been applied. It found that about eighty-five percent of property destruction was related to roofing system and roofing material failures.²⁴ The report recommended the immediate testing of roofing materials to determine their suitability for use in South Florida and recommended greater seriousness in the roofing inspection process.²⁵

Code enforcement in general was a prime target of the Grand Jury's criticism. The report recounted a history of serious problems with code enforcement and urged quick action to increase code enforcement during the rebuilding effort to prevent substandard repairs to homes damaged in the hurricane.²⁶ The report also urged improving both the competence of homebuilding professionals and their knowledge of building codes through testing, through the creation of statutory workmanship standards and through

18. DADE COUNTY GRAND JURY, FINAL REPORT 1-2 (Spring Term A.D. 1992, Filed Dec. 14, 1992).

19. *Id.* at 4.

20. *Id.* at 5.

21. *Id.* at 5-6.

22. *Id.* at 6.

23. DADE COUNTY GRAND JURY, FINAL REPORT 7 (Spring Term A.D. 1992, Filed Dec. 14, 1992).

24. *Id.* at 8.

25. *Id.* at 9-10.

26. *Id.* at 10-13.

mandatory continuing education requirements.²⁷ The report also attempted to introduce accountability into the homebuilding process by recommending that disciplinary action be taken against the license of builders who repeatedly fail inspections and by recommending that each professional involved in building a home be required to conduct an on-site inspection and certify compliance with code.²⁸ These proposals are sound, but it is not clear whether they can weather the political process and become law.

The Grand Jury had harsh words for the Board of Rules and Appeals. It was criticized because it weakened the South Florida Building Code by recommending approval of building materials like particle board, wafer board, masonite sheathing, pneumatically installed roofing staples, lower weight roof felt, wood frame gables, glass windows and doors without storm shutters, wood and metal partitions instead of block partitions, the very "materials that . . . contributed considerably to the destruction caused by Andrew."²⁹ The Bureau of Rules and Appeals was also criticized for being unrepresentative of the community and in clear violation of the board composition requirements set out in the South Florida Building Code, for "pathetic" recordkeeping, and for conflicts of interest and being unduly influenced by the construction industry.³⁰ The Grand Jury report urged the construction industry to play "an active role in maintaining the integrity and quality of construction in our community."³¹ Thus, failures in the construction industry have been a focus of much attention in the post-Andrew analysis that has occurred.

Another weakness that was exposed by the storm was the pre-disaster and post-disaster planning that occurred prior to Andrew. The Grand Jury Report did not focus much attention on this issue, but found that "[d]espite the best of intentions, the State of Florida has failed to develop an effective leadership role on hurricane preparedness issues."³² The Grand Jury recommended that the Department of Community Affairs assume a greater role in pre-disaster and post-disaster planning at the statewide, regional and local level.³³

27. *Id.* at 13-15.

28. DADE COUNTY GRAND JURY, FINAL REPORT 13-15 (Spring Term A.D. 1992, Filed Dec. 14, 1992).

29. *Id.* at 18.

30. *Id.* at 17-20.

31. *Id.* at 21.

32. *Id.* at 27.

33. GRAND JURY REPORT, *supra* note 4, at 28.

The State of Florida's present approach to emergency management is summarized by the Final Report of the Speaker's Task Force on Emergency Preparedness, completed in April of 1990.³⁴

The current system of emergency management is under the direction of the Department of Community Affairs through the Division of Emergency Management. Chapter 252, Florida Statutes, authorizes the Division of Emergency Management to develop a comprehensive emergency management plan and program. This plan is to be integrated into, and coordinated with, the federal and local governments. The state comprehensive plan is comprised of three separate plans. The first plan responds to natural disasters, the second plan responds to a nuclear confrontation between the United States and a hostile adversary, and the third plan responds to a radiological accident (fixed nuclear facility).³⁵

Counties are also required to have plans which specify how they will respond to emergencies and county plans are in turn coordinated with cities.³⁶

B. *The Governor's Committee Report*

A Governor's Disaster Planning and Response Review Committee was appointed to study and report on the effectiveness of the state response to Andrew. The committee held hearings and heard testimony on a wide variety of issues related to the storm. The Governor's Committee Report contained ninety-four recommendations for changes that the committee believed would improve the state response to a future disaster.

The primary weakness of the Governor's Committee Report is that it largely failed to identify where the state response broke down. Instead of determining where the state government succeeded and where it failed in responding to the storm, the report was constructive to a fault. It recommended solutions without explaining the problems that the solutions were designed to address. While the reader might guess at problems that were never quite stated, this Karnac-style³⁷ approach to critique may lead people

34. FLORIDA HOUSE OF REPRESENTATIVES SPEAKER'S TASK FORCE ON EMERGENCY PREPAREDNESS, FINAL REPORT (Apr., 1990).

35. *Id.* at 1-2.

36. *Id.*

37. Karnac the Magnificent, a fictional character made famous by Johnny Carson on the Tonight Show, guesses the question from the answer.

to draw erroneous conclusions concerning what in fact went wrong. While this approach is tactful, it may prove to be less helpful.

Some greater attempt to catalogue the mistakes made in the state's response to Andrew would have been helpful for two reasons. First, it would have given the Governor some guidance on which criticisms of the state response his committee thought were valid and which they thought lacked merit. Second, it would provide better support for the report's many thoughtful and carefully crafted recommendations. Many recommendations call for legislative action and the expenditure of funds. It seems logical that those calls for action would have benefitted from a more complete discussion of the problems that the recommended changes are designed to solve, especially if the changes cost money.

In the committee's defense on this point, the Governor did not expressly ask the committee to develop a report which found facts. Executive Order 92-242, which created the committee stated that:

The purpose of the Committee shall be to evaluate current state and local statutes, plans and programs for natural and man-made disasters, and to make recommendations for improvements to the governor and State Legislature.³⁸

The report identified "four key solutions to the problems uncovered" by the committee: to improve communications at, and among, all levels of government; to strengthen plans for evacuation, shelter, and post-disaster response and recovery; to enhance inter-governmental coordination; and to improve training.³⁹ Many of the report's ninety-four recommendations related to these four proposed solutions.

1. Improve Communications

The Governor's Committee made a series of detailed recommendations

38. Fla. Exec. Order No. 92-242 (Sept. 11, 1992).

39. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 3 (1992). The preliminary draft of the report had a fifth key solution that was dropped in the final report: to increase funding for emergency preparedness and recovery programs. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., PRELIMINARY DRAFT OF FINAL REPORT 5 (1992) [hereinafter PRELIMINARY GOVERNOR'S COMM. REPORT]. Appendix A to the final report contains detailed "Fiscal Notes" which attempt to estimate the cost of each of the committee's recommendations. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 65-79 (1992).

focusing on how communications could be improved both before⁴⁰ and after⁴¹ a disaster. Some ideas were simple yet show promise. For example, it was recommended that each county publish emergency information and instructions to the public in local telephone directories.⁴² If this recommendation is implemented, individuals threatened by a hurricane in the future could look in their phone book and find important emergency telephone numbers, maps of evacuation areas and flood-prone areas, locations of predesigned information centers and other critical disaster response sites, key definitions and terminology, hurricane evacuation routes, guidelines for determining when to evacuate, and other information.⁴³

2. Strengthen Evacuation, Shelter and Post-Disaster Response and Recovery Plans

Concerns about evacuation and shelter seemed to be high on the committee's list. Concerns about the ability of evacuation routes to handle traffic as some future hurricane approaches were driven by the fact that "hurricane experts anticipate an exodus of nearly ninety-five percent of our population when a similar storm threatens this community."⁴⁴ The committee recommended that the Department of Transportation implement a rule for the automatic lifting of tolls when an evacuation order is issued⁴⁵ and further recommended that the Florida Highway Patrol have the authority to request the suspension of tolls prior to that time in the event of severe traffic problems.⁴⁶ Toll was suspended in response to Andrew by an Executive Order signed by the Governor.⁴⁷ The report also addressed traffic concerns by recommending a study of which highways would constrain evacuation,⁴⁸ by recommending the study of a reversible lane system on limited access highways⁴⁹ and by recommending that plans to

40. *Id.* Recommendation 1-8, at 7-11.

41. *Id.* Recommendation 37-50, at 28-35.

42. *Id.* Recommendation 3, at 9.

43. *Id.*

44. DADE COUNTY GRAND JURY, FINAL REPORT 26 (Spring Term A.D. 1992, Filed Dec. 14, 1992). The Grand Jury also noted that such a panic would result in untold deaths and injuries, and stated "[t]his is a scenario which terrifies us."

45. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 14, at 14 (1992).

46. *Id.* Recommendation 15, at 14.

47. Fla. Exec. Order No. 92-220-E (Aug. 23, 1992).

48. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 18, at 15 (1992).

49. *Id.* Recommendation 16, at 14.

widen US-1 be widened between Key Largo and Florida City should be expedited.⁵⁰

The concern about mass evacuation in response to some future storm also prompted a large number of recommendations designed to improve shelters within threatened areas.⁵¹ The committee's thinking appeared to be that better shelters within the threatened areas would offer an alternative to those who might otherwise evacuate. The committee found a "shelter deficit" which suggested should be addressed by a program designed to eliminate that deficit over five years.⁵² This concern also prompted a recommendation that public information efforts be undertaken to convince people who were not ordered to evacuate to stay either at home or in a shelter near home.⁵³

Post-disaster response and recovery operations were also a focus of much attention.⁵⁴ One excellent suggestion made in this section and in the introduction to the report was that the state and its local governments should use three categories to describe disasters: minor, major and catastrophic.⁵⁵ The report recommends that this new general principle guide emergency preparedness and recovery planning and that the state and local governments adopt different plans for each of these levels of disaster, because the needs of people and demands on government vary with the intensity and scale of disasters.⁵⁶

A number of recommendations in the planning and response area focus on amending Chapter 252, Florida Statutes. One recommendation asks the

50. *Id.* Recommendations 17, at 15.

51. *Id.* Recommendation 22-36, at 17-25.

52. *Id.* at 17.

53. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 1, at 7-8 (1992).

54. *Id.* Recommendation 51-79, at 36-52.

55. *Id.* Recommendation 51, at 36. The report defines a disaster as "a natural, technological, or civil emergency that results in a declaration of a state of emergency by a county, by the Governor, or by the President." *Id.* at 4. Minor disasters are defined as those that "are likely to be within the response capabilities of local government and to result in only a minimal need for state and federal assistance, such as a tropical storm or limited flooding." Major disasters are defined as those "that will likely exceed local capabilities and require a broad range of state and federal assistance, such as a category one to three hurricane." *Id.* Catastrophic disasters are defined as those "that will require massive state and federal assistance, including immediate military involvement, such as a category four or five hurricane that hits a densely populated area." The federal government is also considering using this three tier approach to disaster planning. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 4 (1992).

56. *Id.*

Legislature to require the Department of Community Affairs to adopt a post-disaster response and recovery element to the state comprehensive emergency management plan by June 1, 1993 and that it include regional and interregional planning provisions.⁵⁷ The discussion in connection with this recommendation illustrates the committee's almost total lack of criticism of the state response to the storm. The preliminary draft noted that the department "has been preparing a state recovery plan for several years" and that a "draft document" exists.⁵⁸ The final report states only that the department and the Florida Emergency Preparedness Association "are both in the process of preparing state recovery plans."⁵⁹ What is clear only by implication from this discussion is that, because the department took years to develop a response and recovery element for the state's emergency plan, only a draft of that section of the plan was available to assist in the response to Andrew. The fact that the report calls for the development of such an element within six months suggests that this element need not take years to develop. The fact that the report contains pages of suggestions concerning what the department should include in this element when it finishes developing it suggests that the draft that was available during the storm needed work.⁶⁰ Despite these apparent failings, no criticism of the department was offered on this score. Not all who have critiqued the state response have been so gentle.⁶¹ It should also be noted that the Governor's committee was not nearly as gentle when it came to noting the failings in the federal response.⁶²

57. *Id.* Recommendation 52, at 36-39.

58. PRELIMINARY GOVERNOR'S COMM. REPORT, *supra* note 39, at 49.

59. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 52, at 37 (1992).

60. *Id.* at 36-39.

61. See, e.g., Keith G. Baker & Craig E. Reese, *Lessons of Hurricane Andrew: State and Local Failures and Successes*, IDEAS IN ACTION (Florida Tax Watch, Inc.), Dec., 1992, at 2, make the following assessment:

Unfortunately, when Andrew struck, the Florida Department of Community Affairs (DCA) had not completed the state's post-disaster recovery plan or even developed state guidelines for local post-disaster development planning. The state recovery plan was not available despite three years of recurring complaints by local emergency management directors that a plan was not forthcoming.

62. For example, in support of its Recommendation 75, which asks for changes in the efforts of the Federal Emergency Management Agency, the report supports its recommendation with the kind of material missing when the state government is involved: concrete examples of what went wrong, such as inequities in federal assistance, lack of material assistance, award of contracts to out of state contractors and exclusion of local and state officials from the contracting process. GOVERNOR'S DISASTER PLANNING & RESPONSE

3. Enhance Intergovernmental Cooperation

The Committee heard "substantial testimony" that during the response to Andrew there was inadequate communication between levels of government concerning specific needs, lack of full awareness of supply inventories and agency capabilities, failure to have a single person in charge with a clear chain of command and the inability to cut through bureaucratic red tape.⁶³ Concerns about coordination between the various levels of government responding to a disaster were addressed by a number of committee recommendations. The committee recommended the establishment of a Disaster Field Office (DFO) as soon as possible after a major or catastrophic disaster to house key decisionmakers from all levels of government and the location of a joint information center close to the DFO.⁶⁴ The committee also recommended the establishment of a coordination task force in connection with catastrophic disasters and the location of that task force in the DFO.⁶⁵ That task force would cluster key decisionmakers together and would meet at least daily in the DFO to assure good communication and the chair of the task force would have authority to commit resources and compel action.⁶⁶ The committee found that the Presidential Task Force chaired by Secretary Card in the second week after Andrew demonstrated the potential of such a task force.⁶⁷

The committee also called for more proactive federal involvement in future catastrophic disasters but it recognized that this would require changes in federal law.⁶⁸ This suggestion also raises questions about the proper role of the state and federal government in connection with disasters, and it will likely be the subject of debate in the legislature.

Concerns about coordination between the state and local government were also suggested by the committee's recommendation that Chapter 252 be amended to require all counties to adopt post-disaster response and recovery elements as part of their Peacetime Emergency Plans by June 1, 1995 and that cities' emergency planning efforts to be consistent with the county plan and that the Department of Community Affairs establish

REVIEW COMM., FINAL REPORT 50 (1992).

63. *Id.* at 45.

64. *Id.* Recommendation 62, at 45.

65. *Id.* Recommendation 63, at 45-46.

66. *Id.*

67. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 63, at 76-77 (1992).

68. *Id.* Recommendation 26-77, at 50-51.

minimum criteria for county plans.⁶⁹

4. Improve Training of Facility Managers, Emergency Responders and Volunteers

The report recognized the importance of training to the success of even well designed plans. At various points, the report called for the drafting of manuals to assure that the planning is understandable to those who must act, the training of the people who must carry out those instructions so they understand their role, and the conduct of annual exercises to assure that the plans will work in practice. This level of preparedness probably is necessary to assure success of plans in practice.

5. Fiscal Concerns

The report concluded that Florida devotes insufficient resources to preparedness and recovery programs.⁷⁰ In fiscal year 1992-93, Florida is spending about sixty-eight cents per person on these programs, and the Department of Community Affairs has requested an increase to eighty-seven cents per person in fiscal year 1993-94.⁷¹ The committee found these sums inadequate to fund its many recommendations in this area, and recommended the establishment of an Emergency Management Preparedness and Assistance Trust Fund to be administered by the Department of Community Affairs.⁷² The committee suggested funding the trust fund with surcharges on premiums paid for property and casualty insurance policies, a surcharge on marina and docking fees or other boat fees, a surcharge on building permits, or fees on transactions or specified activities in high risk areas.⁷³ These funds were recommended to be in addition to existing funding.⁷⁴

6. Conclusion

This summary obviously only scratches the surface of Governor's Committee Report, but it gives some insight into the reports strengths and weaknesses as I perceive them. As a whole, it is fair to say that the report

69. *Id.* Recommendation 54, at 39-41.

70. *Id.* at 63.

71. *Id.*

72. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 94, at 64 (1992).

73. *Id.*

74. *Id.*

reflects the committee's careful consideration of much detailed testimony, and there is no doubt that many of its recommendations would improve disaster planning and preparedness. The weakness in the report is its failure to engage in a critical assessment of the state's response.

III. EMERGENCY DECISIONMAKING

Despite the disaster planning that preceded the storm, the state was not well prepared to deal with a catastrophe of the magnitude of Andrew. Not only was the post-disaster planning incomplete in a formal sense, because despite years of work the Department of Community Affairs has not yet completed a final post-disaster response and recovery element to the state comprehensive emergency management plan, it was incomplete in a conceptual sense as well. It was as if the planners had failed to comprehend the extent to which the things we take for granted each day of our lives would be unavailable in the aftermath of the storm and how much the realities of a disaster area themselves hamper relief efforts. One must only read the headlines of the Miami Herald during the relevant period to get a feel for the situation at this time. "We Need Help,"⁷⁵ "Hope Amid Chaos,"⁷⁶ "A Deepening Crisis,"⁷⁷ "The War Zone,"⁷⁸ and "Why Help Took So Long."⁷⁹

Perhaps one must live through a disaster of this magnitude to truly appreciate the difficulties it can cause. I understand that the relief crews who had worked on the recovery efforts in connection with Hurricane Hugo showed up in South Dade carrying several days of c-rations while others who showed up to help, but had no such experience, were less prepared for the realities they found. Today we are better able to do disaster planning because of the mistakes we made.

The state government was forced, by weaknesses in preparation, to make up its response as it went along to a greater degree than is desirable. The Governor issued more than two dozen executive orders to address post-disaster response and recovery.⁸⁰ State agencies promulgated dozens of emergency rules. Much of the material in these emergency pronounce-

75. MIAMI HERALD, Fri., Aug. 28, 1992, at 1.

76. MIAMI HERALD, Sat., Aug. 29, 1992, at 1.

77. MIAMI HERALD, Sun., Aug. 30, 1992, at 1.

78. MIAMI HERALD, Tues., Sept. 1, 1992, at 1.

79. MIAMI HERALD, Sun., Sept. 6, 1992, at 1.

80. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 65, at 46 (1992).

ments could not be the subject of much careful thought and could not be put out for public comment or discussion because of the need for quick action. Mistakes were made.

This need for quick response, though understandable under the circumstances, could have been avoided, at least in part, had better planning been done. The demands that would likely be placed on state government in an emergency and the government's options in responding to them could and should have been discussed in the disaster planning process. Better planning leads to better emergency decisionmaking because better planning allows issues to be considered in advance where there is time for study, thought and input.

One important contribution that the Governor's Committee Report makes is to address this problem in two ways. First, it zeros in on some of the areas where we learned planning can help emergency decisionmaking and it makes good recommendations for improving planning to avoid spur of the moment decisions. For example, the committee recommends that the Department of Community Affairs evaluate the executive orders issued by the Governor after Hurricane Andrew and prepare draft executive orders by May 1, 1993 to be used when declaring a state of emergency in response to major and catastrophic disasters.⁸¹ This will hopefully lead to an examination of the demands made on the Governor, an analysis of how he responded and the use of some form of process to permit participation by the public in the preparation of the draft executive orders.⁸² The existence of two sets of draft executive orders, tailored to the severity of the disaster, will improve emergency decisionmaking in the future because the substance of many emergency decisions will have been made under non-emergency conditions.

Some things that were done by executive orders will now be done without need for an executive order. One example, mentioned earlier, is that the committee recommended that the Department of Transportation implement a rule for the automatic lifting of tolls when an evacuation order is issued⁸³ and further recommended that the Florida Highway Patrol have the authority to suspend tolls prior to that time in the event of severe traffic

81. *Id.* at 46-47.

82. It is not clear whether, or how, this activity by the Department of Community Affairs (DCA) is governed by the Florida Administrative Procedure Act. The Governor is not bound by the Administrative Procedure Act (APA) in preparing executive orders, but DCA is bound by the APA in its activities. Is the preparation of these draft executive orders rulemaking? If so, rulemaking procedure must be followed.

83. See *supra* text accompanying note 45.

problems.⁸⁴ Tolls were suspended in response to Andrew by an Executive Order signed by the Governor.⁸⁵ The recommendation to move decision-making from the Governor's office into the rulemaking process improves emergency decisionmaking because it improves input into the process.

Second, the Governor's Committee Report offers a new paradigm for emergency decisionmaking. By suggesting that different emergency plans be developed for different levels of disaster, the report advocates planning that, ideally, would alert decisionmakers, with some level of specificity, to the types of problems they are actually likely to face in that type of disaster, before those problems appear. Also ideally, such planning would provide emergency decisionmakers with a list of possible solutions to likely problems from which the decisionmakers might choose.

It is not difficult to see how this approach to planning would improve emergency decisionmaking, because it would make it less likely that emergency decisionmakers would be blindsided by problems and less likely that they would fail to fully consider their options when devising solutions. This recommended approach improves decisionmaking by preserving thought and input, and moving them to a more convenient time: the time the emergency plan is developed.

IV. SELECTED ISSUES

It is important to review at least some of the problem areas in emergency decisionmaking that occurred during Andrew. The purpose of this discussion is not to criticize people who did the best they could under difficult circumstances. Rather, it is to help us learn from our mistakes so the same mistakes are not repeated. Three types of emergency decisionmaking will be briefly reviewed: Emergency orders, executive orders and emergency rulemaking.

A. Emergency Orders

One way that state agencies responded to the devastation of Hurricane Andrew was to issue emergency orders. Emergency orders are authorized by the Florida Administrative Procedure Act, but the act requires agencies that use emergency orders to find an immediate danger to the public health, safety or welfare and the facts that underlie that finding must be recited with

84. See *supra* text accompanying note 46.

85. See *supra* text accompanying note 47.

particularity in the order, because no opportunity for hearing is provided before issuance.⁸⁶

Emergency orders are perhaps most familiar in the context of emergency license suspension or revocation. In response to Andrew, emergency orders were used in a much different way, they were used to issue emergency general permits in the environmental area. Emergency action was necessary because damage from the storm had created a threat to public health, safety and welfare that required "quick action by Florida's citizens and government to repair, replace and restore structures, equipment, and operations damaged by the hurricane in the Emergency Area."⁸⁷ The state's Department of Environmental Regulation found that "an emergency general permit" was required to address the need for such quick action "because many property owners will require authorization from the department to repair and replace structures, equipment, or fill or take other remedial measures to restore essential services, protect the public health, safety and welfare and otherwise respond to the environmental and other damage wrought by the storm."⁸⁸ The use of an emergency general permit was designed to avoid a flood of permit requests to authorize needed actions and the delays that processing those requests would create.

The department's decision to respond by issuing an emergency general permit raises issues that can be considered with more detachment now that the emergency has passed. The order was clearly a swift and decisive response to an immediate danger. The discussion of it here is not intended as a criticism of the action taken, because some immediate action was required. The question to be considered now is whether some other form of response might have been preferable to the form chosen.

An emergency general permit is different from a regular permit in several ways. A regular permit is issued to an applicant. It is issued after consideration of individual circumstances. An emergency general permit is issued to the world without consideration of individual circumstances. In fact, there is only one party in the proceeding in which the emergency general permit is issued: the agency issuing it. Others, in essence, join as parties to the permit by using it. The permit may, by its terms, require some or all of those who use it to notify the department. Some may do the things specified in the permit and not even know of the emergency general

86. FLA. STAT. § 120.59(3) (1991).

87. *In re: Emergency Authorization For Repairs, Replacement, Restoration, and Certain Other Measures made Necessary By Hurricane Andrew*, No. 92-1476, at 2 (Emergency Final Order, Florida Department of Environmental Regulation 1992).

88. *Id.* at 3.

permit's existence at the time of their actions, but might later still be able to claim the permit as a defense if their actions are ever called into question.

What other alternatives did the department have to issuing an emergency general permit? One possible option was the issuance of an emergency rule. In some ways, an emergency general permit has more in common with an emergency rule than it does with an administrative order. Like an emergency rule, an emergency general permit has no parties when it is issued. Like an emergency rule, it contains statements of general applicability that implement, interpret or prescribe law or policy, the operative language in the Florida Administrative Procedure Act's definition of a rule.⁸⁹ In fact, the argument could be made that an emergency general permit is an unpromulgated emergency rule.

What are the positives and negatives of issuing an emergency general permit? On the positive side, an emergency general permit is easier to issue than an emergency rule is to adopt and can perhaps be adopted more quickly.⁹⁰ No rulemaking documents must be prepared. Also, perhaps the use of the permit form, rather than the rule form, has some substantive value, if some form of permitting, rather than mere rule authorization, is required by statute. If that is true, however, a good argument can be made that a general permit that does not involve the investigation of an applicant's individual circumstances prior to issuance would be no more or less faithful to such a statutory scheme than an emergency rule that created an exception to permitting requirements during an emergency.

On the negative side, the issuance of an emergency general permit might be less desirable in some ways than the adoption of an emergency rule that created an exception to normal permitting requirements during an emergency. Assuming someone is aggrieved by an emergency general permit, the remedy is to appeal to the District Court of Appeal without a record.⁹¹ Emergency rulemaking gives those who are unhappy with the emergency policies a better remedy, the emergency rule challenge authorized by section 120.56(3), Florida Statutes. It also would permit review of the emergency rule by the Joint Administrative Procedures Committee of the Legislature. Also, the issuance of a permit, rather than the creation of an

89. FLA. STAT. § 120.52 (1991).

90. The emergency general permit was adopted on August 26, 1992, the second day after the storm. The first emergency rules related to the storm appeared in the September 11, 1992 issue of the *Florida Administrative Weekly*.

91. *In re: Emergency Authorization For Repairs, Replacement, Restoration, and Certain Other Measures made Necessary By Hurricane Andrew*, No. 92-1476, at 12 (Emergency Final Order, Florida Department of Environmental Regulation 1992).

exception to existing requirements, might give the impression of the creation of some form of vested rights in the person taking action pursuant to the permit. Since actions taken were never actually approved by the agency, and may merely be the permittee's impression of what was permitted under guidelines set out in the emergency general permit, the concept of vested rights in such a circumstance could prove troublesome. For all these reasons, perhaps the practice of emergency general permitting should be reconsidered.

B. *Executive Orders*

As was noted earlier, over two dozen emergency orders were issued in connection with the hurricane. One problem with this extensive use of the executive order process is the fact that executive orders are not usually used to develop policy of this broad importance and the procedure for issuing executive orders and the dissemination of the orders issued is not well suited for the development of policy.

Executive orders have traditionally not been subject to any of the procedural requirements of the Florida Administrative Procedure Act. They are developed by the Governor's legal staff, signed by the Governor and filed with the Secretary of State. They expire, unless renewed, in sixty-days. No notice or hearing is required before they are issued and they are not published. During the storm, many important decisions with wide ranging impact were made by executive order, but those orders were not generally available. For example, Executive Order 92-225 declared that "[a]ll state agencies are temporarily relieved, for a period of thirty days, from procedural and notice requirements of Chapter 120, Florida statutes, to the extent such requirements cannot be complied with due to the emergency" ⁹² No notice of that significant order was ever published. If executive orders are used in this very substantive manner in the future, I suggest that important orders be published two places. First, they should be published immediately upon issuance in a major newspaper covering the disaster and available to victims of the disaster. Second, they should be published in the Florida Administrative Weekly which is available to subscribers and law libraries throughout the state. I also suggest that the Governor continue the practice, used in the issuance of some executive orders during the storm, of seeking input on important questions before issuing executive orders on those points.

92. Fla. Exec. Ord. No. 92-225 (1992).

C. Emergency Rulemaking

Hurricane Andrew unleashed a flood of emergency rules as agencies tried to respond quickly to emergency conditions.⁹³ Some actions proved controversial. For example, Insurance Commissioner Gallagher was criticized for his decision to implement price guidelines on home repairs by emergency rule.⁹⁴ A controversy arose concerning whether the guidelines were designed to help consumers, by holding down prices, or the insurance industry, by holding down insurance reimbursements to a reimbursement level too low to pay for the actual cost of repair. One area of dispute in connection with this rulemaking was the degree to which the Department of Insurance sought input from affected groups before adopting the rule.

This emergency rule demonstrates some of the dangers of tackling controversial problems through emergency rulemaking. Because the opportunities for careful consideration and public participation are more limited in emergency rulemaking, it is more likely that mistakes will be made and public reaction will be miscalculated in that process. Agencies using emergency rulemaking can protect themselves, to some degree, from these miscalculations by better disaster planning and with outreach for public input at the time the emergency rule is adopted. Just as the Governor's executive orders should be reviewed as part of future disaster planning, the emergency rules and emergency orders filed in connection with the hurricane should be reviewed as part of each agency's preparation for the future. To the extent that options can be drawn from those documents and adopted through the normal rulemaking process, that should be considered.

V. CONCLUSION

It is true in disaster planning, as in life, that there is no substitute for experience. Now that we have had that experience, we can choose to learn from it or to miss that opportunity. Many of the recommendations that have come from those who have studied the storm and its aftermath show great promise. The true test of whether we learn from our experience is whether those recommendations are put into practice.

93. According to my unofficial count, 59 of 102 emergency rules noticed in the Florida Administrative Weekly between September 11, 1992 and December 18, 1992, were related to Hurricane Andrew. Expressed another way, this represents more than a 100% increase in emergency rulemaking as a result of the storm.

94. David Poppe, *Whose Side Is He On?*, MIAMI REV., Sept. 25, 1992.



FLORIDA'S PATH OF DESTRUCTION—HURRICANE ANDREW (Historic Publications, Aug. 1992).