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# BEYOND ‘BEYOND THE BORDER’: A PROPOSAL FOR IMPLEMENTATION OF THE ACTION PLAN’S RECOMMENDATION ON CROSS- BORDER CRITICAL INFRASTRUCTURE

*Michael C. McDaniel*

## Abstract

This paper will outline the concurrent development of Emergency Management Assistance Compacts (“EMACs”)<sup>1</sup> and “regional critical infrastructure coalitions” (“RCCCs”),<sup>2</sup> note where they have both been expanded to include cross-border partners, and recommend that the two efforts be melded. Namely, explicit agreements should be incorporated for protection of key nodes of cross-border critical infrastructure networks within the State and Province Emergency Management Assistance Memoranda of Agreement.<sup>3</sup>

## INTRODUCTION

On February 4, 2011, Prime Minister Stephen Harper and President Barack Obama signed a declaration titled “Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness” (“2011 Declaration”).<sup>4</sup> The 2011 Declaration,

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1. Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996).
2. REGIONAL CONSORTIUM COORDINATING COUNCIL, <http://www.r-ccc.org/> (last visited Oct. 10, 2012).
3. State and Province Emergency Management Assistance Memoranda of Agreement, Pub. L. No. 110-171, 121 Stat. 2467 (2007).
4. Joint Declaration by President Barack Obama and Prime Minister Steven Harper of Canada: Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness, 2011 DAILY COMP. PRES. DOC. 70 (Feb. 4, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201100070/pdf/DCPD-201100070.pdf> [hereinafter Beyond the Border Declaration].

however, is in large part an aspirational document, intended to set goals for working groups of designated governmental officials to pursue.<sup>5</sup> For example, the section therein entitled “Integrated Cross-border Law Enforcement” consists of three sentences, all beginning with the words: “We intend to . . .”<sup>6</sup> Similarly, the following section, “Critical Infrastructure and Cybersecurity”, consists of three sentences, the first starting with, “We intend to . . .,” and the third beginning with “Our countries intend to . . .”<sup>7</sup> Both leaders recognized that working groups, including the U.S.-Canada Beyond the Border Working Group,<sup>8</sup> in conjunction with “existing bilateral border-related groups”<sup>9</sup> are necessary to develop the objectives and metrics through a “Joint Plan of Action”<sup>10</sup> to operationalize their declared vision.<sup>11</sup> Thereafter, on December 1, 2011, President Obama and Prime Minister Harper released the *United States-Canada Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness* (“Action Plan”).<sup>12</sup>

Part IV, of the Action Plan, “Critical Infrastructure and Cybersecurity,”<sup>13</sup> is quite short and vague. It contains three goals in the section entitled “Enhance the Resiliency of Our Shared Critical and Cyber Infrastructure,”<sup>14</sup> and three goals in a section entitled “Rapidly Respond to and Recover from Disasters and Emergencies on Either Side of the Border.”<sup>15</sup> The only objective which expressly and exclusively focuses on critical infrastructure states that the two

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5. *See id.*

6. *Id.*

7. *Id.*

8. *See* Press Release, Office of the Press Sec’y, Joint Statement by President Obama and Prime Minister Harper of Can. on Regulatory Cooperation (Feb. 4, 2011) (on file with author), *available at* <http://www.whitehouse.gov/the-press-office/2011/02/04/joint-statement-president-obama-and-prime-minister-harper-canada-regul-0> (explaining that the United States-Canada Regulatory Cooperation Council” was formed contemporaneously).

9. Beyond the Border Declaration, *supra* note 4.

10. *Id.*

11. *Id.*

12. UNITED STATES-CANADA BEYOND THE BORDER: A SHARED VISION FOR PERIMETER SECURITY AND ECONOMIC COMPETITIVENESS ACTION PLAN (Dec. 2011), *available at* <http://www.dhs.gov/xlibrary/assets/wh/us-canada-btb-action-plan.pdf> [hereinafter ACTION PLAN].

13. *Id.* at 23-25.

14. *Id.* at 23-24.

15. *Id.* at 24-25.

countries will “enhance cross-border critical infrastructure protection and resilience” through the following step: “We will implement the *Canada-United States Action Plan for Critical Infrastructure*, including by executing programs and developing joint products to enhance cross-border critical infrastructure protection and resilience.”<sup>16</sup> The *Canada-United States Action Plan for Critical Infrastructure*<sup>17</sup> was drafted in 2010 by Public Safety Canada and the U.S. Department of Homeland Security (“DHS”) to create a “cross-border approach to strengthening the resiliency of critical infrastructure.”<sup>18</sup>

It may seem that the 2011 Declaration and Action Plan give insufficient attention to cross-border infrastructure to assure protection and to establish the needed framework to assure the protection and resilience of cross border critical infrastructure.<sup>19</sup> This paper suggests, however, that the incorporation of the *Canada-United States Action Plan for Critical Infrastructure*, which recognizes the existing regional coalitions and the emergency management assistance compacts, provides both the framework and the opportunity for real movement forward in regional collaboration for the protection of cross-border critical infrastructure. This paper recommends that the collaborative contingency planning inherent in the emergency management compact framework be combined with the public and private sector partnerships which comprise the regional critical infrastructure consortia to create a system of partnerships, focused on the resilience of our shared systems of critical infrastructure across our shared border.

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16. For the accepted definition, see USA PATRIOT Act of 2001, 42 U.S.C. § 5195c(e) (2001) (“In this section, the term “critical infrastructure” means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”); *See also* Homeland Security Presidential Directive 7 (HSPD-7), 39 WEEKLY COMP. PRES. DOC. 1816-1822 (Dec. 17, 2003).
  17. U.S. DEP’T HOMELAND SEC. & PUB. SAFETY CAN., *THE CANADA-UNITED STATES ACTION PLAN FOR CRITICAL INFRASTRUCTURE* (Dec. 2010), *available at* [http://www.dhs.gov/xlibrary/assets/ip\\_canada\\_us\\_action\\_plan.pdf](http://www.dhs.gov/xlibrary/assets/ip_canada_us_action_plan.pdf).
  18. *Id.* at 3.
  19. “CI” and Critical Infrastructure/Key Resources or “CIKR” are often used interchangeably. “CIKR” originated with the DHS Office of Infrastructure Protection as the National Infrastructure Protection Plan separately recognizes the importance of certain stand-alone assets and describes them as “key resources.” The international community refers to “CI”. *See*, DEP’T OF HOMELAND SEC., *NATIONAL INFRASTRUCTURE PROTECTION PLAN* (2009), *available at* [http://www.dhs.gov/xlibrary/assets/NIPP\\_Plan.pdf](http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf) [hereinafter NIPP].

## I. REGIONAL PARTNERSHIPS FOR CRITICAL INFRASTRUCTURE PROTECTION

The use of regional cross-border partnerships to assure the proper balance of trade and security has been recognized as vital by both countries in numerous documents.<sup>20</sup> The use of such partnerships to assure the resilience of cross-border critical infrastructure systems has also been long-recognized. “Resiliency” refers to the ability of an organization, community or people to absorb the impact of a disaster and readily return to a pre-disaster state or to accept a new post-disaster state. Much of the confusion lies in the use of the word to refer to (1) the psychological ability of individuals or community to withstand the social or economic devastation; (2) the ability of emergency planners and managers to be adequately prepared; and (3) the systems of critical infrastructure to withstand the kinetic effects of human or natural violent events.

The 2003 Northeast United States-Ontario blackout emphasized the need to protect critical infrastructure regionally, regardless of geophysical boundaries. The European Union (“EU”) has suffered through emergency events similar to the 2003 blackout, including a large-scale blackout affecting France and Italy as well as parts of Spain, Portugal, the Netherlands, Belgium, and Austria as the result of the shutdown of a high-voltage line in Germany in November 2006.<sup>21</sup> Not surprisingly, the recommended solution included addressing the critical infrastructure networks holistically across the EU, rather than individually by country.<sup>22</sup>

The U.S. *National Infrastructure Protection Plan* (“NIPP”) recognized that there is an intertwined system of partnerships, all focused on critical infrastructure protection.<sup>23</sup> In their entirety, they create a “partnership of partnerships,” an overarching public-private network of Federal departments and agencies, State and local

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20. See POLICY RESEARCH INITIATIVE, GOV. OF CAN., *THE EMERGENCE OF CROSS-BORDER REGIONS BETWEEN CANADA AND THE UNITED STATES* (2006), available at [http://www.thetbwg.org/downloads/The\\_EmergenceofCrossBorderRegions.pdf](http://www.thetbwg.org/downloads/The_EmergenceofCrossBorderRegions.pdf). See also U.S. CHAMBER OF COMM. & CAN. CHAMBER OF COMM., *FINDING THE BALANCE: SHARED BORDER OF THE FUTURE* (2009), available at <http://www.uschamber.com/sites/default/files/reports/0907sharedborder.pdf>.

21. *EU Calls for Full Power Cut Probe*, BBC NEWS (Nov. 6, 2006, 4:17 PM), <http://news.bbc.co.uk/2/hi/business/6120212.stm>.

22. BERNARD HAEMMERLI & ANDREA RENDA, CTR. FOR EUR. POLICY STUDIES, *PROTECTING CRITICAL INFRASTRUCTURE IN THE EU* (2010), available at <http://www.ceps.eu/ceps/download/4061>.

23. NIPP, *supra* note 19.

government agencies, private sector entities, and regional consortia, all dedicated to an expansive focus from protection to resilience.<sup>24</sup> The concept of regional critical infrastructure consortia, as developed by the DHS, is broadly defined and includes “any regional group. . . . [including] multi-state economic development agencies; law enforcement or emergency response networks; or any public-private partnership that crosses jurisdictional, sector, or international boundaries,”<sup>25</sup> with the goal of enhancing the protection, response, recovery, and resilience of the U.S. infrastructure.<sup>26</sup>

Canada developed its *National Strategy for Critical Infrastructure* in 2009,<sup>27</sup> which similarly strives to assure critical infrastructure protection and resiliency, relying on partnerships between the levels of government and the private sector owners and operators.<sup>28</sup> This document, discussed in greater detail below, not only recognizes the need for regional critical infrastructure coalitions, but, like its U.S. counterpart, it too seems to recognize the need for the creation of express cross-border regional critical infrastructure coalitions.<sup>29</sup> Given this broad definition, there are a significant number of DHS recognized regional consortia in the United States.<sup>30</sup> But for the purposes of this paper, the focus is limited to those regional consortia that share the border with Canada. The Pacific Northwest Economic Region (“PNWER”) is the oldest and strongest of the regional coalitions, with a much broader mandate than simply cross-border critical infrastructure resiliency.<sup>31</sup>

PNWER was formed in 1991 by the legislatures of the states of Alaska, Washington, Idaho, Montana, Oregon, and the Canadian provinces of Alberta and British Columbia, with the province of Saskatchewan and the Yukon & Northwest Territories joining thereafter.<sup>32</sup> Ten years later, they created the Regional Disaster Resilience and Homeland Security Program<sup>33</sup> to focus on the region’s

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24. *Id.*

25. REGIONAL CONSORTIUM COORDINATING COUNCIL, *supra* note 2.

26. *Id.*

27. PUB. SAFETY CAN., NATIONAL STRATEGY FOR CRITICAL INFRASTRUCTURE (2009), available at [http://www.publicsafety.gc.ca/prg/ns/ci/\\_fl/ntnl-eng.pdf](http://www.publicsafety.gc.ca/prg/ns/ci/_fl/ntnl-eng.pdf).

28. *Id.*

29. *Id.* at 5.

30. *Id.*

31. See generally PACIFIC NORTHWEST ECON. REGION, <http://www.pnwer.org/> (last updated Jan. 19, 2013).

32. *Id.*

ability to withstand, recover from, and protect critical infrastructure from all hazards.<sup>34</sup>

The Great Lakes Hazards Coalition was established in 2008 by state officials charged with critical infrastructure protection in Michigan, New York, Wisconsin and Ohio, and now includes over twenty-five participating agencies and private sector members from those states as well as Illinois, Indiana, and Pennsylvania.<sup>35</sup> Its primary objectives are to “promote and enhance” regional Critical Infrastructure and Key Resources (“CIKR”) resilience efforts, to provide the “foundation for regional cross-sector collaboration” and to educate the public and private sector on the inherent interdependencies in regional CIKR systems.<sup>36</sup>

The Northern Lights Coalition was started by Infragard Minnesota with Safeguard Iowa and others to focus on the protection of the critical infrastructure of Minnesota, Iowa, North Dakota, South Dakota and Nebraska.<sup>37</sup> This recently established collaboration has three primary goals: (1) better understand the threat and potential impact of terrorism and other threats to critical infrastructure; (2) identify gaps and opportunities in information-sharing and emergency response; and (3) identify and implement long-term opportunities to reduce vulnerability, coordinate response, collaborate on preparedness, and maximize limited resources.<sup>38</sup> Although it is a single-state entity, the Alaska Partnership for Infrastructure Protection (“APIP”)<sup>39</sup> is an existing DHS-recognized public-private sector partnership adjoining Canada with an expressed mission to connect the critical infrastructure owners and operators with the all-hazards emergency preparedness planning process.<sup>40</sup>

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33. CENTER FOR REGIONAL DISASTER RESILIENCE, <http://www.regionalresilience.org/> (last visited Dec. 18, 2012).

34. *Id.* (providing that the FEMA doctrine calls for EM planners to take an “all-hazards approach” which is shorthand for planning for natural and intentional or accidental man-made” events).

35. GREAT LAKES HAZARDS COALITION, <http://www.theglhlc.org/> (last visited Dec. 20, 2012).

36. *Id.*

37. NORTHERN LIGHTS COALITION, <http://northernlightscip.blogspot.com/p/about-us.html> (last visited Dec. 20, 2012).

38. *Id.*

39. ALASKA PARTNERSHIP FOR INFRASTRUCTURE PROTECTION, <http://www.ak-prepared.com> (last visited Oct. 20, 2012).

40. *Id.*

A few observations should be noted. Not all U.S. states that border Canada are participants in the regional partnerships;<sup>41</sup> though, the degree of actual participation by individual states, which are coalition members, is difficult to ascertain from the coalition websites. But based on the information available, there does not seem to be a regional critical infrastructure coalition yet amongst the New England states. Additionally, only the Pacific Northwest regional critical infrastructure coalition seems to include Canadian provinces and territories.<sup>42</sup>

## II. EVOLUTION OF U.S. EMERGENCY MANAGEMENT ASSISTANCE COMPACTS

The concept of mutual aid has been defined as “the provision by a governmental entity of any and all facilities, equipment, supplies, personnel and other resources of a political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom.”<sup>43</sup> Such assistance is assured through entry into mutual aid agreements. The concept has existed within the fire community for decades,<sup>44</sup> but gained expanded consideration after Hurricane Andrew in 1992.<sup>45</sup>

Congress approved the Emergency Management Assistance Compact (“EMAC”) in 1996,<sup>46</sup> although the necessity of a formalized structure of assistance was not fully recognized until the aftermath of Hurricane Katrina.<sup>47</sup> Shortly thereafter, compacts were enacted by all states as well as the District of Columbia, Puerto Rico, and the US Virgin Islands.<sup>48</sup> The EMAC is a mutual aid agreement that gives the

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41. Today, North Dakota is the lone exception. See DEP’T OF HOMELAND SEC., CRITICAL INFRASTRUCTURE PARTNERSHIP ADVISORY COUNCIL ANNUAL REPORT 13 (2011), available at <http://www.dhs.gov/xlibrary/assets/cipac/cipac-annual-2011.pdf>.
  42. PACIFIC NORTHWEST ECON. REGION, *supra* note 31.
  43. N.Y. EXEC. LAW, § 29-h (Consol. 2012), available at <http://www.dhSES.ny.gov/laws-policies/documents/Exec-Law-Art-2-B-2012.pdf> (last visited Oct. 29, 2012).
  44. Arrangement on Mutual Assistance in Fighting Forest Fires, U.S.-Can., May 7, 1982, 34 U.S.T. 1557.
  45. See Elizabeth F. Kent, Note, “Where’s the Cavalry?” *Federal Response to 21st Century Disasters*, 40 SUFFOLK U. L. REV. 181, 182-183 (2006).
  46. Emergency Management Assistance Compact, *supra*, note 1.
  47. Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1394 (2006).
  48. *What Is EMAC?*, EMERGENCY MGMT. ASSISTANCE COMPACT, [http://www.emacweb.org/index.php?option=com\\_content&view=article&id=80&Itemid=256](http://www.emacweb.org/index.php?option=com_content&view=article&id=80&Itemid=256) (last visited Nov. 1, 2012).



governors of impacted states a major legal tool for sharing resources across state boundaries<sup>49</sup> including for example, those resources shared in Hurricane Katrina response and recovery efforts. Hurricane Katrina triggered a flow of personnel, equipment, and supplies into the affected areas from other jurisdictions including police officers, firefighters, national guardsmen, and public health experts assisted in identifying and mitigating public health and safety issues in the storm's aftermath.<sup>50</sup> All told, over 66,000 personnel from the "first responder" disciplines deployed through the EMAC process in response to Hurricanes Katrina and Rita<sup>51</sup> and 12,279 personnel deployed to Texas and Louisiana during Hurricanes Gustav and Ike.<sup>52</sup> The 2009 spring flooding in North Dakota and Minnesota resulted in states deploying equipment, sandbags, 1,029 personnel, 727 National Guard personnel, and 302 civilians to assist North Dakota.<sup>53</sup> In 2011, over 600 personnel were deployed under the EMAC in response to natural disasters in Missouri, North Dakota, Nebraska, South Dakota, Mississippi, Alabama, and Tennessee.<sup>54</sup>

### III. INTERNATIONAL OR CROSS-BORDER ASSISTANCE COMPACTS

The U.S. Constitution explicitly affords to Congress the authority to approve any interstate or cross-border agreements.<sup>55</sup> This provision requires states that seek to enter into mutual aid agreements with each other or with Canadian provinces to obtain congressional approval.<sup>56</sup> As the recognition of the need for regional cooperation has

49. Daniel D. Stier & Richard A. Goodman, *Mutual Aid Agreements: Essential Legal Tools for Public Health Preparedness and Response*, 97 AM. J. PUB. HEALTH S62 (2007).

50. *Id.*

51. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-854, EMERGENCY MANAGEMENT ASSISTANCE COMPACT, ENHANCING EMAC'S COLLABORATIVE AND ADMINISTRATIVE CAPACITY SHOULD IMPROVE NATIONAL DISASTER RESPONSE (2007).

52. *Appropriations for the Department of Homeland Security- Fiscal Year 2013: Hearing before the Subcomm. on Homeland Sec. of the S. Comm. on Appropriations*, 112th Cong. (2012) (statement of Jim Mullen, President, National Emergency Management Association).

53. *Id.*

54. *Id.*

55. U.S. CONST. art. I, § 10, cl. 3 ("No state shall, without the consent of the Congress . . . enter into any agreement or compact with another state, or with a foreign power.").

56. Michael S. Greve, *Compacts, Cartels and Congressional Consent*, 68 MO. L. REV. 285, 296-297 (2003).

evolved, states have collectively asked Congress for the constitutionally-required approval to enter into binding agreements broader than that provided by the EMAC, which would expressly permit states to create mutual assistance agreements with neighboring provinces. Alaska, Idaho, Oregon, and Washington first obtained Congressional approval for the Pacific Northwest Emergency Management Arrangement (“PNEMA”) with British Columbia and the Yukon Territory.<sup>57</sup>

Congress also consented to the International Emergency Management Assistance Memorandum of Understanding (“IEMAC”) between six New England states and the eastern provinces in 2007.<sup>58</sup> The six New England states (Maine, Connecticut, New Hampshire, Vermont, Massachusetts, and Rhode Island) and the five eastern Canadian provinces, (New Brunswick, Nova Scotia, Quebec, Prince Edward Island, and Newfoundland & Labrador) had previously entered into an EMAC-type emergency management agreement in July 2000,<sup>59</sup> known as the International Emergency Management Assistance Memorandum of Understanding (“IEMAC”),<sup>60</sup> and Congress conferred its benison on that pre-existing agreement.<sup>61</sup>

Finally, the central and prairie states of Illinois, Indiana, Ohio, Michigan, Minnesota, Montana, New York, North Dakota, Pennsylvania, and Wisconsin are presently seeking the consent of Congress for a regional compact entitled the *State-Province Emergency Management Assistance Memorandum of Agreement*.<sup>62</sup> The Canadian provinces of Alberta, Manitoba, Ontario and Saskatchewan are envisioned as members as well.<sup>63</sup> This agreement would also permit additional states and provinces to join upon execution or adoption.<sup>64</sup> The state of North Dakota and the province

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57. Joint Resolution Granting the Consent of Congress to the Pacific Northwest Emergency Management Arrangement, S.J. Res. 35, 105th Cong. (1998).

58. State and Province Emergency Management Assistance Memoranda, *supra* note 3, art. 1.

59. Priscilla B. Fox, *Cross-Border Assistance in Emergencies: The New England/Eastern Canadian Model*, 11 NEW ENG. J. INT’L & COMP. L. 75, 77 (2004).

60. *Id.* at 77.

61. State and Province Emergency Management Assistance Memoranda, *supra* note 3, art. 1.

62. A joint resolution granting the consent of Congress to the State and Province Emergency Management Assistance Memorandum of Understanding, S.J. Res. 44, 112th Cong. (2012).

63. *Id.* § 1, art. 1.

64. *Id.*

of Manitoba are the first to have executed the State-Province Emergency Management Assistance Memorandum of Agreement template.<sup>65</sup> When the agreement is executed by the central and prairie states and provinces, then together with the Pacific Northwest Emergency Management Arrangement and the IEMAC, those agreements will complement the Canadian Council of Emergency Management Organizations (“CCEMO”) Memorandum of Understanding Inter-jurisdictional Emergency Management Assistance.<sup>66</sup> These compacts, at the federal and at the state/provincial level, will create a strong and enduring system of mutual cross-border support not just in response to natural disasters, but to plan for mutual response to either man-made or naturally occurring incidents.

#### IV. EXAMPLES OF STATE AND PROVINCIAL COOPERATION

State cooperation and assistance across international borders is supported by ample legal authority, including U.S.–Canada treaty language,<sup>67</sup> the Stafford Act,<sup>68</sup> and the above described State-Province Emergency Management Assistance compacts. The concept of mutual assistance is utilized in the public health field as well, often replicating and bettering the efforts of emergency management officials.<sup>69</sup> Public health officials in both nations quickly recognized the need for cross-border partnerships. The Michigan-Ontario Border Health Initiative, for example, began in early 2004, and was quickly expanded to include Minnesota, New York, and Wisconsin, with the program renamed the Great Lakes Border Health Initiative (“GLBHI”). In February 2009, Ohio, Indiana, and Pennsylvania became the latest regional partners to ratify the necessary agreements to fully participate in all GLBHI activities. The objective of the GLBHI is to formalize and strengthen relationships between local, state and provincial level public health and emergency preparedness agencies responsible for communicable disease tracking, control and

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65. *Canada and U.S. Enact Cross Border Mutual Aid Agreement*, EM ADVOCATE (Feb. 7, 2012), available at <http://wisconsin.apwa.net/news/3593/>.

66. *Id.* At 707.

67. Agreement between the Government of Canada and the Government of the United States of America on Cooperation in Comprehensive Civil Emergency Planning and Management, U.S.-Can., Apr. 28, 1986, T.S. No. 13.

68. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5196 (1988).

69. For an excellent work on this subject, see Stier & Goodman, *supra* note 49.

response.<sup>70</sup> The program is funded by the U.S. Department of Health and Human Services and managed through the U.S. Centers for Disease Control and Prevention's Early Warning Infectious Disease Surveillance ("EWIDS") project.<sup>71</sup> There is also a Pacific North West Border Health Alliance ("PNWBHA") comprised of Alaska, Idaho, Montana, Oregon and Washington as well as British Columbia, Saskatchewan, and the Yukon Territory.<sup>72</sup> Significantly, the public health partnerships have combined with the eastern and "non-aligned states" to form the Canada-United States Pan Border Public Health Preparedness Council,<sup>73</sup> a "partnership of partnerships" which spans the shared border.<sup>74</sup> The public health partnerships are not codified through a compact between the nations, however.

Natural resources officials from Michigan, Minnesota, Ontario, and Wisconsin signed the Great Lakes Forest Fire Protection Agreement in 1989.<sup>75</sup> Thereafter, Congress approved the Northwest Wildland Fire Protection Agreement on November 12, 1998.<sup>76</sup> The agreement binds the states on matters similar to those found in EMAC agreements including liability, compensation, and reimbursement. There also exist numerous informal cross-border "handshake" agreements particularly at the local government level.<sup>77</sup>

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70. *Overview of the Great Lakes Border Health Initiative*, MICHIGAN.GOV, [http://www.michigan.gov/mdch/0,4612,7-132-54783\\_54875-170665--,00.html](http://www.michigan.gov/mdch/0,4612,7-132-54783_54875-170665--,00.html) (last visited Nov. 1, 2012).

71. *Id.*

72. PACIFIC NORTHWEST BORDER HEALTH ALLIANCE, <http://www.pnw bha.org/> (last visited Nov. 1, 2012).

73. *Who We Are*, CAN.-U.S. PAN BORDER PUBLIC HEALTH PREPAREDNESS COUNCIL, [http://www.pbphpc.org/?page\\_id=5](http://www.pbphpc.org/?page_id=5) (last visited Nov. 1, 2012).

74. *Id.*

75. *Compact History*, GREAT LAKES FOREST FIRE COMPACT, <http://www.glffc.com/information/compact-history/> (last visited Nov. 17, 2012).

76. The Northwest Wildland Fire Protection Agreement, Pub. L. No. 105-377, 112 Stat. 3391.

77. Based on conversations by the author while Michigan Homeland Security Advisor with local officials from Port Huron and Detroit, Michigan and from Sarnia and Windsor, Ontario, between 2002 and 2009.

## V. APPLICATION OF THE CROSS-BORDER ASSISTANCE COMPACTS TO CROSS-BORDER CRITICAL INFRASTRUCTURE COALITIONS

Earlier discussions between the Great Lakes states and Ontario expressly noted the importance of the assurance of critical infrastructure resilience within the four corners of the agreement itself. The Central Region Emergency Management Advisory Council<sup>78</sup> drafted a Memorandum of Agreement for Interjurisdictional Emergency Management Assistance, which noted the importance of critical infrastructure.<sup>79</sup> That draft Memorandum of Agreement expressed four goals: (1) save lives, prevent and limit personal injury and property damage, and reduce suffering; (2) mitigate the impact on infrastructure, economy and the environment; (3) respond to surge capacity demands on resources efficiently and cost-effectively; and (4) assess current capabilities and explore future responsibilities in mitigation, prevention preparedness, and response and recovery.<sup>80</sup>

The currently proposed compact for the central states and provinces, the State-Province Emergency Management Assistance Memorandum of Agreement, however, does not expressly reference the objective of protection and resiliency of cross-border critical infrastructure.<sup>81</sup>

The Canadian *National Strategy for Critical Infrastructure* (“*National Strategy*”) contains a number of important points that should be directly incorporated into the bilateral efforts to build resilient cross-border critical infrastructure.<sup>82</sup> Most importantly, the *National Strategy* recognizes and relies on the pre-existing emergency management framework much more explicitly than does the NIPP.<sup>83</sup>

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78. *See supra* text accompanying note 77.

79. *Id.*

80. Note: This is a draft document in the possession of the author; its reference herein is intended solely to emphasize that the central region states and Emergency Management Ontario expressly intended, and correctly in the author’s view, to include steps to assure the resilience of the regional critical infrastructure within the central North American compact template.

81. *See generally* S.J. Res. 44, 112th Cong. (2012) (including nothing expressly referencing the objective of protection and resiliency of cross-border critical infrastructure)

82. *See generally* PUB. SAFETY CAN., NATIONAL STRATEGY FOR CRITICAL INFRASTRUCTURE (2009).

83. *Id.* Other areas where the National Strategy for Critical Infrastructure nicely emphasizes the relationship between Critical infrastructure and emergency management include (1) the recognition of the need for a single system of risk management across the enterprise, (2) the observation that distant natural or man-made events can adversely

Just as the NIPP is nestled within the National Strategy for National Security,<sup>84</sup> the *National Strategy* falls within the Emergency Management Framework for Canada, but directly notes that reason for the relationship.<sup>85</sup> The *National Strategy* observes that achieving resiliency of critical infrastructure requires “emergency management planning to ensure adequate response procedures are in place to deal with unforeseen disruptions and natural disasters,”<sup>86</sup> and calls for the provision of necessary security measures to address intentional and accidental incidents and the promotion of business continuity practices.

Secondly, the *National Strategy* pledges the federal government, and encourages the provincial and territorial governments, to work with their cross-border counterparts:

Canada will work with the United States and other international governments and organizations to promote a collaborative approach to strengthening the resiliency of critical infrastructure. The Strategy also recognizes that at the regional level, provinces, territories and neighboring American states have cooperative emergency management arrangements in place. Together, federal, provincial and territorial governments and critical infrastructure sectors will identify and address international dependencies and risks.<sup>87</sup>

This paragraph suggests a clear path forward by recognizing: (1) the cross-border character of many of our critical infrastructure systems and the cross-border impact of many others (“the international dependencies and risks”); (2) the existing cross-border relationships between states and provinces and territories to promote emergency management assistance and cross-border critical infrastructure resilience; and (3) the need to use the cross-border emergency management assistance to promote or to expand bilateral

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impact the nation’s critical infrastructure, and (3) express mention of the interconnectivity of Canada and US critical infrastructure.

84. See HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY 25 (2007) (explaining that NIPP is part of the National Strategy for Homeland Security).

85. See MINISTERS RESPONSIBLE FOR EMERGENCY MANAGEMENT, AN EMERGENCY MANAGEMENT FRAMEWORK FOR CANADA 12 (2d ed. 2011) (explaining the reason why the National Strategy for Critical Infrastructure falls under the Emergency Management Framework. The Canadian National Strategy expressly acknowledges the link between critical infrastructure resiliency and emergency management planning).

86. PUBLIC SAFETY CANADA, *supra* note 82, at 2.

87. *Id.* at 5.

efforts in cross-border critical infrastructure protection and resiliency.<sup>88</sup>

The *Beyond the Border Action Plan*<sup>89</sup> incorporates and adopts the 2010 *Canada-United States Action Plan for Critical Infrastructure*<sup>90</sup> as a vital part of its action items. The *Action Plan* recognized the need for a process to harmonize the NIPP and the *National Strategy* to assure a consistent and holistic approach to the protection of North American critical infrastructure systems.<sup>91</sup> The *Action Plan* notes that the “complexity and interconnectedness of Canada-U.S. critical infrastructure requires that the Canada-U.S. Action Plan be implemented using organizational structures and partnerships committed to sharing and protecting information and managing risks.”<sup>92</sup> The *Action Plan* then references two “organizational structures and partnerships” that should be utilized by the Emergency Management Consultative Group (EMCG), created under the Canada-U.S. Agreement on Emergency Management Cooperation and the DHS recognized coordinating councils.<sup>93</sup> The EMCG, however, is a working group at the federal government level, which only provides for consultation “as appropriate” with state, provincial, and local authorities.<sup>94</sup> There is no procedure contained in the *Agreement Between The Government of the United States of America and the Government of Canada On Emergency Management Cooperation* that details how or when consultation with the states and provinces shall occur, much less a process for harmonizing pre-existing emergency management compacts and agreements.<sup>95</sup> The sector coordinating councils which comprise the U.S. partnership model for the coordination of critical infrastructure protection and resilience efforts, expressly includes the Regional Coordinating Councils described above.<sup>96</sup> These consortia are not specifically

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88. *Id.*

89. *See generally* DEP’T OF HOMELAND SEC., UNITED STATES-CANADA BEYOND THE BORDER: A SHARED VISION FOR PERIMETER SECURITY AND ECONOMIC COMPETITIVENESS—ACTION PLAN (2011).

90. *See generally* DEP’T OF HOMELAND SEC. & PUB. SAFETY CAN., CANADA-UNITED STATES ACTION PLAN FOR CRITICAL INFRASTRUCTURE (2010).

91. *See* DEP’T OF HOMELAND SEC., *supra* note 89, at iv (acknowledging the greater efficiency and effectiveness in using a collaborative approach).

92. DEP’T OF HOMELAND SEC. & PUB. SAFETY CAN., *supra* note 90, at 5.

93. *Id.* at 6.

94. *See* Agreement on Emergency Management Cooperation, U.S.-Can., Dec. 12, 2008, T.I.A.S. No. 09707.

95. *Id.*

96. *See* DEP’T OF HOMELAND SEC. & PUB. SAFETY CAN., *supra* note 90, at 6.

referenced in the *Action Plan*, but are presumably intended to be included.

The following U.S. border states are members of DHS-recognized regional critical infrastructure consortia: Alaska, Washington, Idaho, Montana, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio and New York. The U.S. border states which are signatories to an international EM compact include: Alaska, Idaho, Oregon, Washington, North Dakota, Maine, Connecticut, New Hampshire, Vermont, Massachusetts, and Rhode Island.

Neither the IEMAC, covering the New England states and the eastern Canadian provinces, nor the PNEMA for the northwest states, the province of British Columbia and the Yukon Territory, expressly reference critical infrastructure, nor do they provide for the assurance of its protection and resilience as an objective. As mentioned, the current draft agreement between the central states and provinces does not do so either. These agreements, however, could act as the vehicle to provide the legal authority to create cross-border regional critical infrastructure coalitions consistent with the vision of the Beyond the Border Action Plan. In short, the existing compacts and memoranda of agreements could be amended, as needed, to expressly encompass the assurance of the protection and resilience of cross-border critical infrastructure systems.

Both the IEMAC and the PNEMA provide a broad intent to assure mutually supporting systems of emergency preparedness, including “preparedness, response and recovery measures with that of contiguous jurisdictions for those emergencies, disasters, or hostilities affecting or potentially affecting any one or more of the Signatories.”<sup>97</sup> Both agreements expressly reference the need for mutual cross-border planning for contingencies.<sup>98</sup> This language is arguably of sufficient breadth to support the creation of cross-border critical infrastructure coalitions.<sup>99</sup> Understanding, however, the constitutional need for the consent of Congress, the congressional resolutions grant the signatories the power to amend the documents if consistent with authority provided. Having not yet obtained the consent of Congress, the central and prairie states could consider amending the State-Province Emergency Management Assistance Memorandum of Agreement to expressly recognize cross-border critical infrastructure protection and resilience.

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97. See Pacific Northwest Emergency Management Arrangement, Pub. L. No. 105-381, 112 Stat. 3402, 3402 (1998).

98. See *id.* at 3402; see Agreement on Emergency Management Cooperation, *supra* note 94.

99. *Id.*



## VI. RECOMMENDATIONS

1. The creation of cross-border regional CIKR consortia.<sup>100</sup> As discussed above, the DHS recognizes a number of regional consortia which abut the border with Canada. Only PNWER can be said to share that border through regional planning, including for the resilience of trans-border critical infrastructure systems and networks. To assure sustainable mechanisms and processes for engagement of regional CIKR stakeholders, local and regional public-private partnerships similar to PNWER must be created. A concerted effort should be made to develop similar sustainable frameworks to build trust and relationships. These partnerships should then be combined, akin to the Canada-United States Pan Border Public Health Preparedness Council, to provide opportunities for information sharing and lessons learned.

2. The express inclusion of the goal of assurance of CIKR protection and resilience within the cross-border emergency assistance compacts for the Pacific, Prairie, Central, and New England/Maritime regions. Inclusion of this goal would assure that the state and provincial emergency management officials, in conjunction with their county and local partners, would develop jurisdictionally-specific and precise plans for the protection of cross-border critical infrastructure under their aegis, pursuant to guidelines set by the Emergency Management Consultative Group or another working group for the federal governments. Assuring that the regional critical infrastructure consortia wholly match up with the EM officials will ensure that all vital partners including the private sector owner-operators are fully engaged and, as such, that the most comprehensive planning and information-sharing processes are in place.

3. The creation of a two county, cross-border International planning zone pilot program. Many critical infrastructure systems that span the border have critical nodes located in adjoining counties. Those counties bear the brunt of EM response expectations, particularly response to transportation and energy systems. County-level emergency response planning must be consistent with the province and state planning.

4. A necessary corollary of province-to-state and county-to-county cross border agreements for critical infrastructure protection and resilience is the development of standardized cross-border risk assessment. The first step would be to craft a standardized cross-

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100. See DEP'T OF HOMELAND SEC. & PUB. SAFETY CAN., *supra* note 90, at 5.

border risk assessment pilot program. As one emergency manager phrased the issue, “We need to know that apples are apples.”<sup>101</sup>

5. The need for real-time information sharing between communities across the international border. Steps to consider would include the implementation of a cross-border alert and warning network at the county, state and provincial levels, and a system of direct communication between provincial and state “centers of gravity” for threat and intelligence information sharing. For example, the Michigan State Information Operations Center contains a critical infrastructure section, which collects, analyzes, verifies, and distributes critical infrastructure information to a validated subscriber list of critical infrastructure owners and operators, as well as government officials.<sup>102</sup>

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101. Interview with Mr. Jeff Friedland, Emergency Manager, St Clair County, Mich. (Feb. 10, 2012).

102. *See Frequently Asked Questions*, MICHIGAN INTELLIGENCE OPERATIONS CENTER, <http://www.michigan.gov/mioc/0,1607,7-241-44636---,00.html> (last visited Nov. 5, 2012) (describing “fusion centers” that collect and analyze information).

