

CDC Public Health Emergency Law Case Study

Legal Authority During a Public Health Disaster: Hazardous Substance Discharge*

Objectives / Topics for Case Study

1. Explain inter-jurisdictional mutual aid and legal coordination in the *pre-event* phase.
2. Describe the legal role of public health agencies in a declared state of emergency.
3. Describe the legal authorities of public health, law enforcement, and other relevant agencies to implement public health and other services in declared and undeclared emergencies.
4. Describe a public health agency's legal authority and role in a mass evacuation.
5. Describe a public health agency's legal obligations and roles in the provision of public health services to a displaced population.

Background

On February 1, the Governor organizes a summit meeting of state and local officials to review the state's level of preparedness to respond to a mass casualty event caused, intentionally or inadvertently, by a chemical, biological, or radiological agent. The Governor says that by the end of the meeting she wants clarification of (1) her authority to declare an emergency; (2) the extent of state resources available for such a response; (3) the help that can be expected from neighboring states; and (4) the help that can be expected from the federal government.

Question 1: Who can declare an emergency and under what legal authority?

Answers / discussion points: A state declaration of emergency is issued by the Governor. Should the Governor believe that federal assistance is required, the Governor may ask the President to declare an emergency or major disaster under the Stafford Act. The Governor's request must show that the Governor has activated the state's emergency plan but the situation is beyond the capacity of state and local resources. The request must also specify the nature of federal assistance that is requested.

The U. S. Secretary of Health and Human Services is authorized to declare a federal public health emergency. The official authorized to issue state public health emergency declarations may vary by state; it could be the Governor or State

**These exercise contents are for instructional use only and are not intended to provide a legal interpretation or opinion about federal or individual state laws, nor are they intended as a substitute for professional legal or other advice. While every effort has been made to verify the accuracy of these materials, legal authorities and requirements may vary from jurisdiction to*

jurisdiction. Persons who seek legal interpretation or advice on federal, state, or local law should consult a qualified attorney in the relevant jurisdiction(s).

Health Director, and for local declarations, may also include the Local Health Director, or City / County Council or Mayor.

Question 2: What are the criteria and procedures for requesting emergency response assistance from other state and local jurisdictions?

Answers / discussion points: In general, interstate jurisdictions coordinate their responses under a written agreement, such as that authorized by the Emergency Management Assistance Compact (EMAC), and response is voluntary. EMAC is a Congressionally-ratified agreement that provides form and structure to interstate mutual aid. EMAC has been adopted by all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. A governor may request assistance under EMAC only after issuing a state declaration of emergency. If a state does not possess the resources required to deal with the emergency, then the request for assistance may be made to another state or states, and the requesting state pays costs, such as those for labor and materials, to the responding states. (Note that the federal government may reimburse costs paid to the responding state(s) if the President has declared a major disaster or emergency under the Stafford Act *and* the costs are eligible as “emergency measures”).

Mutual aid is also available between local jurisdictions within a state. Most intrastate mutual aid is carried out under arrangements between local jurisdictions themselves, although some states have provided an intrastate mutual aid agreement that local jurisdictions are authorized to utilize. Local jurisdictions have been strongly encouraged to enter into mutual aid agreements with other jurisdictions in their state and may become ineligible for federal preparedness grants if they fail to do so.

October 1, 8:00 a.m.: Train Derailment

Fall rains have caused severe flooding in the Mississippi and Ohio River basins, and numerous levees have been breached. The floods have closed roads and stranded residents in several Midwestern states. On October 1, at 8:00 a.m., high currents on the Mississippi River cause a barge to ram into and damage a railroad trestle bridging the river. Both sides of the trestle are located in high density urban areas, and one side is within a city in the Governor’s state. At 8:30 a.m., the damage on the trestle derails a locomotive and 16 cars. Among the derailed cars are four tank cars containing hazardous chemicals, including a chlorine tank car that ruptures and releases chlorine gas.

The city’s business area, the local high school, a small military installation, and some residential areas are near the derailment site. The wind is blowing at approximately 5 miles an hour toward

an adjacent state across the river.

A call placed to 911 reports the wreck and notes that a greenish-yellow cloud is blanketing the surrounding area. The local fire department, emergency medical services (EMS), sheriff's office, public safety, and hazardous material (HAZMAT) teams are called in to respond to the disaster. With the gas plume quickly spreading, other localities are soon involved in the response.

Question 3: When multiple jurisdictions are affected by a disaster such as this, how do the professionals in local, state, federal, and other agencies coordinate their legal authorities?

Answers / discussion points: The response to a disaster has both vertical and horizontal dimensions. The first responders are usually those on the local level. Vertical response efforts, however, may involve, in rapid sequence, local, state, and federal governments. Knowledge of the laws/ordinances of adjoining local and state jurisdictions is crucial to ensure prompt implementation of response efforts. Horizontal response efforts may involve multiple agencies, such as public health, environment, law enforcement, agriculture, food safety, and EMS.

In this situation, local authorities will likely activate mutual aid agreements – particularly those from local governments far enough away that they are not themselves affected. They will also request state assistance. Note that since the Mississippi River is normally a state boundary, the neighboring state may also be affected. Finally, even without a request for federal assistance under the Stafford Act, federal environmental / toxic substances and transportation safety laws will trigger reporting obligations and federal regulatory oversight of this event.

Most incidents involving hazardous materials do not require federal assistance and are handled at the local level, in compliance with federal safety and environmental laws and oversight by federal agencies. Should state officials believe that federal assistance is required, the Governor may ask the President to declare an emergency or major disaster under the Stafford Act. A Stafford Act declaration authorizes the federal government to mobilize and deliver personnel, equipment, supplies, facilities, and managerial, technical and advisory services to state and local governments in a public health emergency. These actions are currently coordinated through the National Response Plan. The National Incident Management System (NIMS) provides a common language and framework for local and state governments to manage disasters, including adoption in all jurisdictions of the Incident Command System (ICS) to manage response operations with resources drawn from multiple agencies.

Question 4: What are some of the key legal concerns regarding volunteer first responders and others who volunteer to assist with response efforts?

Answers / discussion points: Note first that there will be a variety of types of volunteers – untrained vs. trained (with ‘training’ in a wide variety of professional skills, not just medical professions), and spontaneous vs. deployed by or affiliated with non-governmental organizations such as the Red Cross. The scenario describes a dangerous HAZMAT incident, where persons untrained in HAZMAT response may be at severe risk, as would those they attempt to assist. Local authorities should have a volunteer management plan that can be implemented in the early stages of an event and that will create a volunteer center or staging center.

As discussed in the course materials, there are various legal concerns pertaining to volunteers that should be considered and addressed to the extent possible, and the laws dealing with these concerns may vary from state to state. The concerns include: 1) Licensing and credentialing requirements of health care practitioners and other professions; 2) Requirements for ensuring personal protection of volunteers; 3) Potential liability of individual volunteers, as well as the various government agencies, businesses, and non-profit organizations that may either provide volunteers and/or supervise their responder efforts; and 4) The scope and applicability of workers’ compensation coverage to volunteers injured during response activities.

October 1, 9:30am: Health Consequences at Valley High School

At Valley High School, a half mile away from the derailment, a class is participating in a scrimmage soccer match for their P.E. class. Before the students see anything unusual, they smell a strong odor in the air, similar to bleach. Immediately, they begin experiencing itching and burning in their eyes and throats and start coughing. One asthmatic student has extreme difficulty breathing. The students are rushed inside and an urgent call is made to the hospital.

Over the next few hours, the hospital and 911 receive numerous phone calls and reports of suspected chemical exposure. The list of symptoms and clinical findings (in increasing severity) includes:

- Itching, tingling, and burning of eyes, nose, and throat
- Coughing, shortness of breath, and headaches
- Chest pain, vomiting, and respiratory distress (rapid breathing, wheezing, blue coloring of the skin), leading to fluid buildup in the lungs
- Severe skin burns, lung collapse, and death

Within an hour, the Governors’ office receives a preliminary report on the disaster. Continual updates flood in throughout the morning. Within only five hours, there have been nine deaths in the area and hundreds of people have been affected. In early afternoon, the Governor declares a state of emergency.

Question 5: What are the criteria and procedures for declaring an emergency? Specifically, what constitutes a public health emergency?

Answers / discussion points: An emergency declaration can be triggered by health or non-health related events when jurisdictions need more resources to respond effectively. These events include all hazards: natural disasters, intentional events and acute infections. Typically, state statutes establish procedures through which a state or local public health emergency must be declared. Most often, the Governor declares the emergency with input from health officials. The criteria for a public health emergency may vary from state to state. At the federal level, the Secretary of Health and Human Services can provide a considerable degree of assistance to states through standing authority, including financial and technical assistance, to the states. The HHS Secretary also has broad authority under Section 319 of the Public Health Service Act to determine that a public health emergency exists because of a significant outbreak of infectious disease, a bioterrorist attack, or for any other reason that the Secretary finds warrants such a declaration.

Question 6: How can mutual aid agreements be used both during and absent an emergency declaration?

Answers / discussion points: Optimally, a mutual aid agreement will articulate the steps to be followed in requesting aid and responding to requests [including “incident command” provisions compliant with the National Incident Management System (NIMS)]. Related provisions may include specification of the resources to be provided and the circumstances under which aid may be withheld or withdrawn. Procedural provisions should be drafted with a view to the type of emergency triggering their use. For example, EMAC provides the request and response mechanisms to be used by states during a declared emergency; additional procedural agreements not in conflict with EMAC requirements should be contemplated only if EMAC procedures are considered to be in need of supplementation.

Counties, cities, and neighboring states are likely to have routine non-emergency mutual aid agreements. If an incident involves an immediate need to save lives, resources from the National Guard or U.S. Armed Forces can also be made available.

October 1, 1:00 pm: Further Information

The Governor, through the state’s Emergency Management Agency, establishes an emergency operations center (EOC) and convenes a meeting to summarize available information and

develop a plan for action. The EOC reports the following information:

- Four of the 16 derailed train cars were tank cars: 1 contained chlorine; 2 contained hydrochloric acid; and 1 contained a plasticizer that is an environmentally hazardous substance.
- The plume now has extended to cover parts of two states.
- Hundreds of people are seeking care at local hospitals and clinics, reporting mainly eye, skin, and respiratory tract burning and difficulty breathing.
- Most local residents have been advised via the media, reverse 911 calls, and the Emergency Alert System on the radio to stay inside until further notice.
- There have been some problems with communication because of high demand and out-of-date or unavailable phone numbers (many local residents only have cell phones).
- Significant disruptions in emergency services and health care have occurred due to the overwhelming demand of the injured and the “worried well.”

Given these facts about the unfolding disaster, the Governor requests information on the relative benefits of evacuation and shelter-in-place. Key representatives of public health, fire, law enforcement and emergency services at the EOC give their advice. When the first responders arrived on scene, they reported breathing difficulties and were ordered to stand by and not approach the scene, which proved to be a prudent decision. When the fire chief arrived and was almost overcome by the toxic fumes, he directed a mass evacuation of the immediate area. Although flood conditions will complicate transportation in some of the affected areas, he recommends evacuation of all residents.

Medical personnel from emergency services note that they are concerned about residents who are elderly, ill, or unable to evacuate. A nursing home, Pleasant Place, is located nine miles south of the derailment site and the owner of the nursing home says that it would take at least 24 hours to move the residents. Further, the only available place to evacuate residents is a hospital 20 miles away that is already at full capacity.

Question 7a: What legal and operational considerations might influence the decision to call for an evacuation or a shelter-in-place order? What factors should be considered in deciding whether an evacuation or shelter-in-place order be issued in the situation described here?

Answers/discussion points: Legal considerations include balancing of risks and benefits, clarifying the chain of command, and identifying the authority for action. Operational considerations include the degree of hazard, the characteristics of the population at risk (e.g., elderly, special needs), the distance to the derailment site, local capacity to evacuate, evacuation routes, and available transportation. The operational reality that elderly, non-English speaking, special needs, and economically disadvantaged populations cannot evacuate without special assistance, or are at greater risk during an evacuation, will not only affect

the decision of whether to evacuate or shelter-in-place – it will also affect whether there are legal obligations to provide special assistance to certain populations.

The decision to issue an evacuation or shelter-in-place order will depend on the threat/type of emergency and the jurisdiction. (See below for a more thorough discussion.)

Question 7b: How are the requirements of the elderly and other special needs populations addressed through an evacuation or shelter-in-place order?

Answers / discussion points: Pre-event planning is essential to be prepared for evacuation or shelter-in-place of the elderly and other special needs populations. It is crucial to identify the needs of the population (e.g., dialysis, oxygen), decide if they are able to move, and evaluate the risk of moving the individuals. Special transportation will be needed, and patient records must be moved to ensure that health needs are met. Some hospitals may already be at capacity. As the nursing home owner noted, moving nursing home residents is very complicated and takes time, so evacuation should be avoided if possible. However, there are concerns with sheltering-in-place that must be addressed in pre-event planning including access to resources (electricity, water, food), damage to the shelter (flooding, wind damage), and ability to evacuate after the event.

Legal considerations include the following: 1) whether those issuing the evacuation order provide appropriate personal protective equipment (PPE) for use by residents and staff during evacuation; 2) the Americans with Disabilities Act and the Emergency Medical Treatment and Active Labor Act (EMTALA) require consideration of special needs populations during emergencies; and 3) the Post Katrina Emergency Management Reform Act (PKEMRA)* requires the appointment of a Disabilities Coordinator to ensure that the needs of special needs populations are addressed during an emergency.

Question 7c: What factors should be considered in choosing between mandatory or voluntary evacuation orders?

Answers/discussion points: This question should provoke discussion about the difference between voluntary and mandatory evacuation orders – both in terms of the legal impact of the order and information it communicates to individuals and businesses about the nature of the hazard and what action they should take. Even under a mandatory evacuation order, officials do not normally use force to require citizens to leave, but they can limit the services that are provided to those who do not follow the order. A major consideration in deciding whether to issue a mandatory vs. voluntary evacuation order is the effect that the order will have in stimulating the desired response from the populace. Will a higher percentage of

the population evacuate if the order is “mandatory” rather than “voluntary”? Are resources available for evacuation only if it is mandatory? As noted above, operational considerations in making a decision include the degree of hazard, the population at risk, distance to the incident site, capacity to evacuate, evacuation routes and available transportation. In the scenario described here, it is likely that an order to evacuate would be mandatory, but generally, factors such as the severity of the situation and the laws of the city/county/state will determine whether the order will be mandatory or voluntary.

October 1: Review of Legal Authorities for Evacuation

As part of the EOC deliberations, the Governor is asking the Attorney General and legal counsel for key agencies to confirm the legal authority for an evacuation order. One of the questions that arises is the following:

Question 8: Which agencies will make and enforce an evacuation or shelter-in-place order?

Answers / discussion points: Every state/locality has the fundamental police power to protect public health and safety. However, the decision to issue an evacuation or shelter-in-place order may depend on the threat/type of emergency and the jurisdiction. Generally, the governor, mayor/city council, or local public health officer will declare a public health emergency, and every governor has the emergency authority to issue an order to evacuate or shelter-in-place. Whether other state or local officials also have this power or have been delegated this power by the governor will depend on individual state laws. The orders are normally implemented by police, supplemented by National Guard and other resources that are made part of the emergency plan.

There is sometimes tension between public health and law enforcement agencies on the issue of enforcement of evacuation or shelter-in-place orders. The tension in part reflects the fact that public health officials’ primary concern is for the health of the public; while law enforcement officials share that concern, they are also responsible for enforcing the law, and as such, public health needs to provide them with clear guidance that includes legal authority.

October 1: Governor Requests Review of Plans for Continuity of Coordination

Anticipating the need for a mass evacuation order, the Governor requests an update on agencies’ plans for continuity of operations. Efforts to ensure continuity of coordination between public health, law enforcement, and the courts are also discussed.

Question 9: How will the continuity of the courts and the justice system be ensured?

Answers / discussion points: As part of continuity planning, the court system should routinely have a judge available by telephone, as well as night and weekend plans that can be implemented in the case of short-term interruption. Key elements of continuity plans for the justice system include: 1) reviewing all agencies' mission to identify and call in only personnel who are necessary; 2) determining the availability of other resources each agency may need (e.g., jail capacity); 3) preparing for staffing reductions by cross training for each position (i.e., following the concept of "three deep" per job to take into account absences) and deciding on the organizational structure that will be used; 4) testing responses and coordination; 5) reviewing the authority granted to law enforcement agencies to take action during a health emergency; 6) developing communication templates; 7) implementing evacuation or shelter-in-place orders; 8) providing resources for families of personnel; and 9) coordinating with public health agencies.

Question 10: What staffing plans are in place for supplying medical services, and for preserving order at medical care facilities?

Answers / discussion points: Staffing plans will vary by facility, but they will need to include the involvement of law enforcement officers to ensure order and to protect needed medical supplies. If this were an infectious disease scenario, another point to consider is how public health and law enforcement officials will protect vaccines or a pharmaceutical point-of-distribution (POD) from a threat of civil unrest. Communications plans should include asking those with less severe health problems to stay at home and not seek medical care. If medical staff have been evacuated, facilities can rely on volunteers for surge capacity or implement mutual aid agreements with other facilities. Patients can be rerouted to other facilities outside the plume area.

October 1: Mass Evacuation Order: Concerns about Displaced Persons

The EOC and the Governor decide to order a mass evacuation. Their plan is to use sheriff's office personnel, assisted by a number of other area law enforcement agencies, to conduct a house-to-house evacuation. Also, a 500-meter buffer zone around the derailment site will be instituted and access will be limited to only those individuals wearing the appropriate personal protective equipment.

A local university and club recreation area will be used to house evacuees.

Question 11: Within your jurisdiction, what are the legal requirements for public health, emergency management, and other agencies to provide food, water, shelter, medical care and other needs to displaced people?

Answers / discussion points: The legal requirement to provide for the needs of displaced persons varies by agency if the displaced persons are not under state custody. In many cases, the Red Cross or other agencies will attempt to provide shelter for displaced people. For persons in the custody of the state, the responsibility of the agency is greater.

Question 12: In your jurisdiction, what agencies may have legal responsibility for ensuring that homes and businesses are safe and clean before allowing people to return home?

Answers / discussion points: Chlorine gas contamination could affect air, water, and food quality and could cause damage to structures and wiring because of its corrosive nature. HAZMAT field teams will complete spot assessments and sampling to ensure that the area is safe for re-entry. Additional questions to consider include: 1) Has the situation originally causing the evacuation been safely resolved? 2) Have any other situations arisen to cause the area to remain unsafe? 3) Who has the legal responsibility for those “trapped” inside a mandatory evacuation because they had to shelter in place?

Who decides when it is safe to allow people to return home? Should it be the authority who issued the evacuation order or another authority with oversight over the issuing authority? To illustrate, in the setting of a potential federal crime scene, a state environmental agency or the EPA may have independent authority to keep an area closed even though a federal law enforcement agency (e.g., the FBI) issued the order for the original closure because the site was a federal crime scene.

Remember: In general, it may be easier to manage the re-opening of a facility or area if the criteria for re-opening are thought through before the decision is made to close the facility or area.

Conclusion

By midnight on October 1, still winds had prevented the further spread of the cloud. A light rain that evening also provided some relief, washing the toxic contaminants from the air, but causing them to enter the water supply. Some fish and wildlife were killed by the water contamination, but a major crisis was averted by the environmental teams that worked quickly to prevent further damage. By October 9, when residents began returning to their homes and businesses, the source(s) for reimbursement to evacuees for their expenses remained unclear.

Quick action and effective coordination by local, state, regional, and federal officials helped prevent deaths and limit damage, but the incident highlighted the risks posed by similar events across the country.

Notes:

* Relevant provisions of PKEMRA (FY2007 DHS Appropriations Act, P.L. 109-295):

Sec. 689(a), (c) Individuals with Disabilities – PKEMRA acknowledges the need to meet special needs of individuals with disabilities during emergency evacuation and response. First, Sec. 689(a) requires the FEMA Administrator to “develop guidelines to accommodate individuals with disabilities... guidelines include ‘the accessibility of, and communications and programs in, shelters, recovery centers, and other facilities; and devices used in connection with disaster operations, including first aid stations, mass feeding areas, portable payphone stations, portable toilets, and temporary housing.’ This provision is not codified in the Stafford Act. Second, Section 689(c) amends the Stafford Act’s Federal Assistance to Individuals and Households program (§408) to recognize that damage can render a home inaccessible to disabled persons, and thus, uninhabitable to them. Accordingly, temporary housing assistance can be provided to individuals with disabilities whose residence is rendered “inaccessible” as a result of a major disaster. Further, in locating readily fabricated dwellings, FEMA must now seek whenever practicable, sites that – “[meet] the physical accessibility requirements for individuals with disabilities.” The term ‘Individual with a Disability’ is defined by reference to section 3(2) of the Americans with Disabilities Act of 1990.

Sec. 689a. Nondiscrimination in Disaster Assistance – Section 308(a) of the Stafford Act has long required that “the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished... without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.” This section has now been amended also to prohibit discrimination on the basis of “disability and English proficiency.” This amendment, coupled with the two previous amendments **Sec. 689 Individuals with Disabilities**, and **Sec. 689e. Disaster Related Information Services** (listed above), may make FEMA’s decisions in providing assistance to individuals with disabilities or with limited English proficiency judicially reviewable. While FEMA’s decisions to grant or withhold disaster assistance are generally protected from judicial review by sovereign immunity, courts have held that they can review FEMA compliance with its statutory prohibition against discrimination; this amendment opens the possibility for judicial review.

References:

1. Agency for Toxic Substances and Disease Registry. ToxFAQs for Chlorine. Available at <http://www.atsdr.cdc.gov/tfacts172.html>. Accessed September 4, 2007.
2. National Transportation Safety Board. Collision of Norfolk Southern Freight Train 192 with Standing Norfolk Southern Local Train P22 with Subsequent Hazardous Materials Release at Graniteville, South Carolina, January 6, 2005. Washington, DC: 2005; NTSB/RAR-05/04. Available at <http://www.nts.gov/publictn/2005/RAR0504.pdf>. Accessed September 9, 2007.
3. National Transportation Safety Board. CSX Train Derailment and Subsequent Fire in the Howard Street Tunnel, Baltimore, Maryland, July 18, 2001, Railroad Accident Brief. Washington, DC: 2004; NTSB/RAB-04/08. Available at <http://www.nts.gov/publictn/2004/RAB0408.pdf>. Accessed September 9, 2007