

CHAPTER 16

LEGAL ISSUES IN EMERGENCY MANAGEMENT

Abstract

This chapter provides an overview of the many legal issues involving emergency management. It explains concept of negligence, and explores its specific application to emergency management. The chapter examines relevant sources of federal, state, and local law and immunities. Also discussed are “NFPA 1600 Recommended Practices for Disaster Management” and its evolution toward becoming the legal standard through the Emergency Management Accreditation Program. Legal duties of emergency managers and daily challenges in such areas of law as torts, contracts, ethics, and human resources are also covered. Legal aspects of mutual aid, standard operating procedures, and incident command, including the National Response Plan and National Incident Management System, are considered in some detail. The chapter explores legal issues in working with volunteers, planning responsibilities, and declaring an emergency, as well as response and recovery issues.

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Note: This chapter is not legal advice, and William C. Nicholson is not your attorney. For legal advice, consult your own lawyer.

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Local authorities face many decisions in connection with emergency management activities. Unfortunately, the essential nature of emergencies and disasters is that something is going wrong or is about to go wrong. Whether the event springs from an occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or manmade cause,¹ the choices that must be made by local officials frequently are not easy to make. Indeed, often the options from which a course must be selected are all unpleasant. Sometimes, different plaintiffs will see the same action as wrong for the opposite reasons.

For example, a flood threatens a city and limited resources mean that one of two residential areas may be preserved through sandbagging and diking. One region has many low-income residents and property values that are minimal. The other area is a wealthy enclave with extremely high property values. Assuming all residents can be safely evacuated, the choice that must be made is still not a happy one. Whether the selection is to preserve the higher property values or the greater number of residences, many citizens will be dissatisfied that their neighborhood was not saved. In this case, as with many emergency management decisions, either group may have the basis for a lawsuit. The legal challenge for leaders of local government, as for emergency management as a whole, lies in taking proactive steps to avoid bad choices like the one discussed above. Of course, not every bad choice can be prevented. Still, with close

¹ Indiana Code 10-14-3-1(a) (2004) definition of a disaster.

involvement of legal counsel in all phases of emergency management, the situation may be vastly improved. This approach is known as “litigation mitigation.”²

Litigation mitigation has three goals:

1. reduced exposure to legal claims;
2. improved life safety; and
3. enhanced property protection.

Lawyers are trained to look at the first of these three factors as their main concern. A leader of local government must view all three as of fundamental importance. Actually, reduction of legal exposure naturally results in higher life safety and property protection.

The fact is that the array of laws that regulate the conduct of local government may be bewildering. Emergency managers sometimes disregard legal issues and vociferously declare that they are “too busy saving lives and protecting property to bother with all that legal nonsense.” Such a line of attack is peculiar, given the “all hazards” nature of emergency management. Unfortunately, educational materials are generally deficient when it comes to treatment of legal issues.³ Liability issues have, in fact, been called the “great unplanned for hazard faced by emergency management.”⁴

I. Sources of Emergency Management Law

Emergency management law in the United States is rooted in all three levels of government - federal, state and local. While all three types of legal responsibility may result in liability, the most likely source is state law, specifically the tort concept known

² See William C. Nicholson, “Litigation Mitigation: Proactive Risk Management in the Wake of the West Warwick Club Fire” *Journal of Emergency Management*, Volume 1, No. 2, summer, 2003.

³ William C. Nicholson, *Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response (“HAZWOPER”) Standard, Standard Operating Procedures, Mutual Aid and the Incident Command System*, Widener Symposium Law Journal, Vol. 9, No. 2, 295, 298-300 April 2003.

⁴ See William C. Nicholson, “Litigation Mitigation: Proactive Risk Management in the Wake of the West Warwick Club Fire” *Journal of Emergency Management*, Volume 1, No. 2, summer, 2003.

as negligence. Immunities allow protection for emergency managers under certain circumstances. The National Fire Protection Association and post-9/11 federal law have created new standards that apply to all emergency managers. The availability of federal funds for emergency management results in setting criteria for state and local emergency management performance.

Many other laws affect emergency management's daily activities. Some of these laws spring from duties peculiar to the discipline, such as obligations to plan, train, and exercise. Emergency managers who are government employees have obligations that arise from their service, like complying with government ethics rules and special requirements for procurement. Other important legal considerations arise from general managerial responsibilities, and affect managers in both the private and public sectors. These include issues such as personnel law and contract law.

A. Negligence

Negligence is a common law doctrine that has evolved over the years. Its basic principle is this: every person has a general obligation to act in a reasonable manner at all times, considering the circumstances. When one acts (or fails to act) unreasonably and that act (or failure to act) is the legal cause of an injury to a person or property, liability ensues.

Elements of Negligence

- | | |
|-----------------|---|
| Duty | (Obligation to act in a reasonable manner.) |
| Breach of Duty | (Unreasonable action or failure to act.) |
| Legal Causation | (Frequently referred to as "proximate cause," this simply |

means that the harm happened as a reasonably close result of the act or failure to act.)

Personal injury or property damage

Result is liability.

In the emergency management context, negligence usually arises from the failure to perform (or unreasonably bad performance of) specific governmental duties. The unit of government may incur liability from failure to properly train or supervise emergency management workers. Other frequent sources of liability include failure to perform the duties that are generally accepted as being part of emergency management's responsibilities. (See the discussion below of the NFPA 1600 standard and the Emergency Management Accreditation Program.)

Types of activity that may give rise to negligence liability vary. They include failure to adhere to a plan,⁵ executive level decision making – poor choices, poor planning, bad emergency response, or an Incident Commander's lack of wisdom.

Another frequent cause of liability is the failure to comply with a legal duty, such as OSHA law. Also, a violation of law may be used as proof in a civil suit requesting damages for personal injury or wrongful death. When the elements of the violation are the same as the elements required for civil liability and the burden of proof is the same for both, the only issue in a civil trial may be the measure of damages.⁶

⁵For a detailed discussion of liabilities for failure to plan properly, see Ken Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, 23 URB. LAW. 333, 341-45 (Summer 1991).

⁶See, e.g., *Meridian Ins. Co. v. Zepeda*, 734 N.E. 2d 1126, 1130-31 (Ind. App. 2000). “. . . a criminal conviction may be admitted in evidence in a civil action and may be conclusive proof in a civil trial of the factual issues determined by the criminal judgment.” *Id.*

B. Immunities

Units of government enjoy immunity, or protection from legal liability, for many of their activities. This immunity is not, however, unlimited. During an emergency, the needs of a small group of people (their personal lives, businesses and property) frequently must be considered and balanced against society's greater interest. Disaster response statutes and common law provide customary defenses and immunities for protection of emergency responders who are working in the capacity of a governmental employee.⁷

1. Immunity Under State Law

To protect from litigation, state legislatures incorporate within their laws tort liability immunities for official acts.⁸ Such acts must be within the employee's scope of employment for immunity to apply.⁹ State disaster or emergency statutes¹⁰ often contain more specific immunity provisions to protect government executives engaged in critical decision-making procedures in emergencies. Some states have gone farther, putting into place broad immunities shielding a variety of players (i.e., the state, political subdivisions, or local governmental entities) who act during an emergency response, rather than solely individuals involved in the decision-making process.¹¹ Such provisions are typically contained in a state's emergency management laws.

⁷See generally Lerner at 335.

⁸ See, e.g., IND. CODE § 34-13-3-3 (2004), which includes a long list of actions for which government and its employees are immune.

⁹ See, e.g., IND. CODE § 34-13-3-3 (2004), which requires that actions must be within the scope of employment if they are to be protected.

¹⁰Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487, 490 n.10 (2000) lists citations for emergency management statutes in various jurisdictions.

¹¹See, e.g., IND. CODE § 10-14-3-15(a) (2004). "Any function under this chapter and any other activity relating to emergency management is a governmental function. The state, any political subdivision, any other agencies of the state or political subdivision of the state, or, except in cases of willful misconduct, gross negligence, or bad faith, any emergency management worker complying with or reasonably attempting to comply with this chapter or any order or rule adopted under this chapter, or under any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the

Some states make available particular immunity provisions directed at emergency workers, whether volunteers or employees. Also, immunities exist for people owning or controlling real estate or motorized vehicles who voluntarily authorize the usage of their property during an emergency. “Good Samaritan” statutes may also provide immunity to certain classes of emergency medical responders, although such statutes often do not apply if the responder is operating in an official capacity.

2. Immunities Under Federal Law

General tort immunity may also bar a civil lawsuit springing from an emergency or disaster response. For the Federal government, two tort immunity doctrines may apply: “governmental function” and “discretionary action.”

The “governmental function” analysis guards long-established or inherent governmental activities including measures assigned by constitution or statute and actions like collecting taxes, law enforcement, and legislation. Such actions are usually characterized as being performed solely by a governmental entity, done for the benefit of the public, with no private sector equivalent.¹² The government does make a profit from such acts. Emergency planning and response acquires its immunity from tort liability as a traditional or inherent governmental function.

The Federal Tort Claims Act (FTCA) contains the “discretionary action” exclusion. The “discretionary” immunity centers on a particular governmental act or decision instead of the type of activity undertaken. Its purpose is to protect governmental employees at the policy level from worrying about lawsuits during disaster planning and

state, is not liable for the death of or injury to persons or for damage to property as a result of any such activity.”

¹²57 AM. JUR. 2d *Municipal, County, School and State Tort Liability* § 57 (2001).

response. If, however, the action objected to does not involve a permitted use of policy judgment, the government will not be protected.

The United States Supreme Court in *Berkovitz v. US*¹³ created a two-part test for use of the “discretionary immunity” exemption found in FTCA. The first step requires analyzing the nature of the conduct. If the questioned conduct is not an optional matter but instead is an action mandated by a federal statute or policy, then the discretionary immunity exemption will not apply to the conduct. The employee has no choice but to follow the directives. The Court reasoned that, in the absence of choice—no judgment made, there is no discretion in the conduct to protect. The second step only applies if there is no statutory, regulatory, or procedural policy instruction mandating a course of action. The conduct must involve a quantity of judgment, which then may be determined to be the sort of judgment that the discretionary immunity exemption was designed to guard. The exemption shields only governmental actions and decisions based on public policy (i.e., social, economic, or political policy). If the activity was not founded on public policy, then the suit may continue.

Most states recognize some form of this test within their own statutes. Where state courts have mentioned repetitively that the discretionary immunity exemption provided by their code is essentially the same as the discretionary immunity exemption within the Federal Tort Claims Act, the “discretionary immunity” test applies.¹⁴

In the recent *Commerce and Industry Insurance Company v. Grinnell Corporation*¹⁵ decision, the 5th Circuit Court of Appeals reversed summary judgment by a

¹³Berkovitz v. United States, 486 U.S. 531 (1988).

¹⁴Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act*, 68 Miss. L.J. 703, 774-75 (1999).

¹⁵Commerce and Indus. Ins. Co. v. Grinnell Corp., 280 F.3d 566 (5th Cir. 2002).

lower court, finding that the “discretionary immunity” test was inappropriately employed. The Circuit Court held that specific regulations and distinct fire department policies decreed procedures for firefighters to follow at a warehouse fire, and that the firefighters violated them.¹⁶ The Court stated that the city could not be allowed the immunity exemption provided by La. Rev. Stat. Ann. § 9:2798.1 (West 1997) and remanded the case for further proceedings.

The *Commerce and Industry Insurance Company* decision may indicate the potential future evolution of cases brought against emergency management organizations for improper actions during disasters or emergencies. In an emergency response such as that in the *Commerce and Industry Insurance Company* case, the Courts may hold the organization and its employees responsible for actions that fall outside established regulatory standards (such as the requirement to have a current plan) and standard operating procedures. Emergency management may be hard pressed to rely on discretionary immunity to protect the unit of government and employees from liability.

Courts interpret statutory waivers of government immunity extremely narrowly. They look closely into the facts underlying the alleged waiver.¹⁷ Also, tort immunities may not always apply. They are virtually never to be had if death, injury, or damages

¹⁶Alleged negligent actions and omissions included:

(1) attempting to restore electrical power before an electrical inspection had been conducted, in violation of code and policy; (2) turning off the sprinkler system without posting personnel with two-way radios at the sprinkler valves, in contravention of a specific regulation; (3) opening the large bay doors before the fire was declared out, despite wind velocities of 21 mph; (4) failing to “overhaul” any of the upper level racks even though they had been subjected to intense heat; and (5) departing the scene “under these conditions” within six minutes after declaring the fire out, without leaving adequate personnel and equipment for a fire watch.*Id.* at 569.

¹⁷*Caillouette v. Hercules, Inc.*, 827 P.2d 1306, 1311-13 (N.M. App. 1992). The New Mexico Department of Public Safety was found not to have waived immunity on the facts of the case in a wrongful death action arising from a HAZMAT cleanup incident.

result from conduct other than negligence, including willful conduct, gross negligence, wanton disregard, or bad faith on the part of government employee or entities.¹⁸

B. NFPA 1600:¹⁹ The New Standard for Emergency Management

On April 29, 2004, the American National Standards Institute (ANSI) recommended to the 9-11 Commission that the National Fire Protection Association (NFPA) standard, “NFPA 1600 Recommended Practices for Disaster Management,” be established as the national preparedness standard. ANSI President and CEO Dr. Mark W. Hurwitz made the proposal on behalf of ANSI's Homeland Security Standards Panel. “NFPA is pleased that the Homeland Security Standards Panel of ANSI is making this recommendation to the Commission. We know that 1600 will provide much guidance to businesses and jurisdictions that seek to protect and assist their employees and residents should a disaster occur,” according to James M. Shannon, president and CEO of NFPA.

On July 22, 2004, the 9/11 Commission formally endorsed NFPA 1600, stating that they were encouraged by DHS Secretary Ridge’s praise for it and specifying their preference that its adoption be promoted by DHS. The Commission further urged that compliance with NFPA 1600 be taken into account by the insurance and credit rating industries in assessing a company’s insurance rating and creditworthiness. The 9/11 Commission also believes that “compliance with the standard should define the standard of care owed by a company to its employees and the public for legal purposes.”²⁰

¹⁸See, e.g., IND. CODE § 10-14-3-15(a) (2004). “[E]xcept in cases of willful misconduct, gross negligence, or bad faith, any emergency management worker complying with or reasonably attempting to comply with this chapter or any order or rule adopted under this chapter, or under any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state, is not liable for the death of or injury to persons or for damage to property as a result of any such activity.”

¹⁹ NFPA 1600 (2004 Edition) may be accessed on the web at: <http://www.nasttpo.org/NFPA1600.htm>

²⁰ The 9/11 Commission Report 398 (2004).

NFPA 1600 sets up a shared set of norms for disaster management, emergency management and business continuity programs. It also recognizes ways to exercise plans and makes available a listing of resource organizations within the fields of disaster recovery, emergency management and business continuity planning. One vital aspect of NFPA 1600 is its requirement that all emergency management and business continuity programs must comply with all relevant laws, policies and industry practice.²¹

C. Incorporating NFPA 1600: The Emergency Management Accreditation Program

The National Emergency Management Association (NEMA) has also endorsed NFPA 1600 as an appropriate standard for emergency management. As early as 1998, NEMA passed a resolution signaling its support of NFPA 1600.²² The standard, along with other existing documents like the Capability Assessment for Readiness (CAR), provides the foundation for the Emergency Management Accreditation Program (EMAP).²³ The accreditation process includes application, self-assessment, on-site assessment by an outside review team, committee and commission review of compliance with the EMAP Standard, and re-certification every five years.

EMAP has moved rapidly from a concept first expressed in 1997 through pilot tests and assessments through certification of units of government, the first of which was awarded in 2003.

Emergency Management Accreditation Program Timeline

²¹ NFPA 1600 § 5.2 (2004 Edition).

²² NFPA 1600 Standard Resolution, found on the web at <http://www.nemaweb.org/?335>.

²³ EMAP Recent and Upcoming Activities, found on the web at http://www.emaponline.org/What/Implementation/Description_Full.cfm.

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| April 2002 | EMAP opened for registration and for state applications |
| Summer-Fall 2002 | Local pilot tests |
| 2003 | EMAP conducted 20 state/territorial baseline assessments |
| June 2003 | Two states are conditionally accredited: Arizona and North Dakota |
| September 2003 | First two jurisdictions receive EMAP accreditation: Florida and District of Columbia |
| January 2004 | Continue state/territorial baseline assessments and begin conducting local on-site assessments for programs seeking accreditation |

EMAP is supported by a large number of important players in emergency management, including the National Emergency Management Association, International Association of Emergency Managers, Federal Emergency Management Agency, U.S. Department of Transportation, Association of State Flood Plain Managers, Institute for Business and Home Safety, International Association of Fire Chiefs, National Association of Counties, National Association of Development Organizations, National Conference of State Legislatures, National Governors Association, National League of Cities, and the U.S. Environmental Protection Agency.

Although the program is voluntary, the fact that it is endorsed by such a wide variety of authorities means that EMAP is well on its way to becoming the *de facto* standard for emergency management in the United States. The more programs become accredited under the standard, the more likely a Court will be to hold all emergency management to the norm. Accepted industry practices frequently move from *de facto* to

de jure acceptance through common law adoption in the Courts.²⁴ Clearly, potential liability that could result from not performing to the standards set by EMAP. The wise emergency management program manager will take prompt steps to ensure that his or her program is accredited under EMAP.

D. The Local/State/Federal Interface

Local emergency management organizations' planning, training and exercising responsibilities are contained in the Performance Partnership Agreement (PPA) and the Cooperative Agreement (CA) with the Federal Emergency Management Agency (FEMA). These documents explain the stipulations that must be accomplished before the federal government, through the state emergency management agency, will release emergency management funds to local units of government. The PPA is a strategic plan, and is revised on a five-year timetable. The CA is an accord revised every year that creates goals for emergency management statewide in the federal fiscal year, which runs from October 1 through September 30. The duties of local emergency management are referred to as "Outputs," whose fulfillment the state supervises and reports to FEMA. SEMA co-operates with local emergency management to condense these outputs into detailed assignments, which are called "Compliance Requirements." These standards act as a form of private law, binding states and localities that receive funds to obey federal mandates.

Some counties do not choose to comply with the terms of the PPA and CA, and

²⁴ Indeed, custom and usage within an industry need not be complete or general where improved safety standards, which EMAP provides for emergency management, are involved. See *TJ Hooper*, 60 F 2d 737 (2d Cir. 1932), certiorari denied, *Eastern Transportation Co. v. Northern Barge Corp.*, 287 US 662 (1932), where in 1932, despite the absence of statutes, regulations or even custom as to radio receiving sets, Judge Learned Hand found a vessel unseaworthy for lack of one. Two barges had been lost in a storm and the tugs and their tows might have sought shelter in time had they received weather reports by radio. This case may show which way the wind blows for the future of emergency management certification under EMAP.

hence do not receive federal funding through Emergency Management Performance Grants (EMPGs). The vast majority of counties nationwide comply with the documents. This creates an industry benchmark that compliments NFPA 1600. A court may hold this to be a standard of care, creating potential legal liability for those units of government with non-compliant local emergency management agencies.

II. Legal Duties of Emergency Management Directors

Local and state emergency management directors have many legal duties. The basis for these duties includes both specific emergency management law and other laws of general application, such as Occupational Safety and Health Administration (OSHA) law, contract law, personnel law, and government ethics law.

A. State Emergency Management Law

Every state has some form of emergency management law. Such laws typically include specifications that:

- . set up a state emergency or disaster management agency;
- . specify state and local organization roles in responding to disasters;
- . assign executive authority to declare a state of emergency;
- . explain special executive powers that result from such a declaration; and
- . allow cooperation in the form of mutual aid with neighboring jurisdictions.

These statutes also address many other aspects of disaster preparedness and response. Typically, such laws provide a rather detailed set of responsibilities for emergency managers. For example, in Indiana, the local emergency manager must fulfill a variety of duties during all phases of emergency management. The specifically enumerated duties are limited to preparing and keeping current the emergency plan, preparing and

distributing a list of emergency duties for all officials, and documenting the chain of command for continuity of government purposes.²⁵

Other duties are found elsewhere in the law. The definition section lays out the broad scope of the discipline's responsibilities. " 'Emergency management' means the preparation for and the coordination of all emergency functions, other than functions for which military forces or other federal agencies are primarily responsible, to prevent, minimize, and repair injury and damage resulting from disasters. The functions include the following:

- (1) Firefighting services.
- (2) Police services.
- (3) Medical and health services.
- (4) Rescue.
- (5) Engineering.
- (6) Warning services.
- (7) Communications.
- (8) Radiological, chemical, and other special weapons defense.
- (9) Evacuation of persons from stricken areas.
- (10) Emergency welfare services.
- (11) Emergency transportation.
- (12) Plant protection.
- (13) Temporary restoration of public utility services.
- (14) Other functions related to civilian protection.

²⁵ Indiana Code 10-14-3-17 (h)

(15) All other activities necessary or incidental to the preparation for and coordination of the functions described in subdivisions (1) through (14).”²⁶

As can be easily seen, while the enumerated duties appear to be limited, their scope is all-inclusive. Also, keeping a “current plan” is a specific responsibility, failure to fulfill which may expose the emergency manager and his/her jurisdiction to liability.

B. Local Emergency Management Ordinance

The local emergency manager is obliged to understand and obey all relevant local ordinances, particularly those directed at his or her functions. The emergency management ordinance serves a number of functions. This local law can:

- “fill in the blanks” in state law for local emergency management;
- delineate the local line of succession;
- specify grants of emergency authority to the leaders of the unit of government;
- provide a structure for governmental emergency management activities;
- act as a teaching tool to help all government employees understand their roles during a disaster;
- provide legal support to the emergency operations plan; and
- assure that proper steps are taken at all phases of emergency management to save lives and protect property.

Attached to this chapter as an appendix is a model ordinance²⁷ drafted by the municipal attorney for Grand Forks, North Dakota, in the wake of catastrophic flooding

²⁶ Indiana Code 10-14-3-2(a).

²⁷ Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487 (2000).

that took place in spring 1997. While this is a fine place to start with an ordinance, one must recall the NFPA 1600 and National Incident Management System (NIMS) standards discussed at various points in this chapter, and make sure to be consistent with their requirements.

C. Other Legal Duties

The local emergency manager must bear in mind the mandates of NFPA 1600 and NIMS, as well as numerous other laws that must be complied with to prevent legal blame. These other laws are detailed below.

III. Understanding Contract Law to Prevent Claims

Every emergency manager enters into contracts for purchase of goods and personal services. The basics of contract law are straightforward, consisting of three elements:

1. The offer, typically in the form of “I will sell you these goods or perform these services for this amount of money.”
2. Acceptance, “I accept your offer.” and
3. Consideration, or the fee paid for the services.

Difficulties may arise when the parties do not have a mutual understanding of exactly what is offered or the nature and character of the consideration. To facilitate mutual understanding, frequently referred to as a “meeting of the minds,” contracts are typically written rather than oral. Having the agreement in writing allows both parties to see clearly the subject matter of their bargain.

One key thing to remember is that the party that creates the initial draft of the contract will typically end up with a document that reflects his or her desires more than

those of the other party. This is why emergency managers should strive whenever possible, particularly with expensive purchases, to assure that their attorney drafts the contract. For some, this step is a given, as units of government may have standardized contracts for purchase of goods or services.

Frequently, the contractor will have a standard contract of its own that will be proposed to be the first draft. The contractor may say that they always use this contract, and threaten to walk if it is not used. Unless one company uniquely produces the subject matter, it is not a bad idea to let the contractor walk away in this instance. Remember that the purchaser has the upper hand for the most part in negotiations, because he or she has the money, and the contractor must have work to prosper. Another tack is to take the contractor's document and use pieces of it in crafting one's own contract.

Sometimes, the contract officer will be tempted to use the contractor's document as is, because it will mean less work for that busy individual. One must be extremely careful in reading such texts and always be ready to delete unacceptable language. Their wording commonly will contain indemnification requirements, waivers of inadequate performance, arbitration clauses, and other language that dilutes the obligations of the contractor. Their language also may include requirements that are contrary to existing state or local law.

The emergency manager and his or her attorney or contract officer should carefully scrutinize the contents of standardized contracts when big-ticket items are involved. Modification of standard language is often in order in such situations. Examples of modification to ensure the prompt and proper performance by the contractor are discussed in detail below.

Prompt performance is often a big concern. Three steps are available that can be a big incentive for rapid completion of the work or delivery of the goods. The first is a schedule for performance, with times for completion of different tasks or delivery of a certain amount of goods, and partial payment scheduled to match. One thing to watch out for is that each piece of the job must be carefully inspected for conformance with contract standards before acceptance. The second item, penalties for late delivery or performance, is actually a disincentive for delayed compliance. The third item is extra pay for early performance. The combination of these three elements in a contract can be very helpful when the emergency program needs something yesterday.

One key part of drafting a contract for purchase of goods is performance standards. These are particularly important when the items purchased are being custom built, as is the case with antenna systems, for example. The emergency manager and the subject matter expert need to get together to discuss in fine detail exactly what is desired, and how it is expected to operate when the entire system is installed. They then need to meet with the attorney or contracting officer to make sure that the standards are put together in complete form, leaving nothing out. If this preparatory step is properly taken, one is much more likely to end up with the end product desired.

When purchasing a complex and expensive system, there may be political pressure to award different contracts to various people within the jurisdiction, with the goal of “spreading the wealth.” While this may sound like a good idea, in actuality it could be the cause of unending headaches. When a system, such a communications network, is installed, all of its parts must mesh and work together properly for it to perform as advertised. If multiple contractors have performed the work and there is a

problem, they may all point fingers at one another as the cause of the problem, and refuse to cooperate in fixing things. This can be both inconvenient and politically embarrassing. One good way to avoid this problem is to insist on getting quoted on a “turn key” system with proper guarantees in the contract that it will perform as advertised prior to acceptance by the purchaser. In this situation, it is important when setting up a schedule of partial payments that a significant portion, usually 25 – 33%, be held back until verification tests, possibly by a third party, have been performed to ensure that the entire system works as advertised.

Contract Modifications to Benefit the Emergency Manager

1. Scheduled delivery dates with partial payments upon acceptance of the goods or services.
2. Penalties for late performance.
3. Rewards for early performance.
4. Detailed operation standards for equipment.
5. Try to get a “turn key” system.

Remember that when the actual product differs from the contents of a written contract, the party whose expectations are frustrated will have a number of legal options. First, there may be a cause of action for damages or specific performance. Second, the contract may be repudiated, or cancelled. Third, if part of the contract has been complied with, and some performance is contrary to the contract requirements, there may be payment for partial performance only.

IV. Personnel Law Issues for Emergency Management

All employers face the potential of dealing with workers who act in ways that are contrary to the requirements of the best interests of the organization, whether it be a unit of government, private business, or other entity. Indeed, personnel issues may consume a large percentage of the emergency manager's time. While employment law is a subject with many potential intricacies, understanding the basics will be of great benefit to the emergency manager. Knowing the fundamental outlines of this area of law will assist in planning ahead to avoid personnel disputes, an important aspect of litigation mitigation. This knowledge will also provide insight into the best way to react when problems do occur.

Ideally, both the employer and employee should understand that it is to their mutual benefit to cooperate in helping the enterprise to succeed. Unhappy workers mean lower performance and decreased satisfaction for the head of the organization. The boss benefits when the group does well, so it is in his or her best interest to assist in that effort. Actually, however, disputes between people at different levels of authority are a daily part of economic and social life. As such, employment law may be very political.

Employment law includes a lot of governmental regulation, both federal and state. The employer frequently also has extensive standards for employees. This is particularly the case where, as with emergency response and emergency management, the job entails significant potential hazards. Four kinds of legal rules govern the daily life of employees. These include:

1. Statutes, which often authorize administrative agencies to take action.

2. The body of law that comprises the rules, regulations, and rulings of administrative agencies.

3. Common law tort and contract rules.

4. State and federal constitutional specifications that delineate employee rights, mostly regarding government employees.

Statutes that govern the employment relationship are of two types: those that govern collective action (union activity); and those that cover all employees. Collective action is governed by the National Labor Relations Act,²⁸ specific laws regarding federal employment, and other laws not relevant to the limited purposes of this chapter. On the federal side, employees of DHS have extremely limited rights compared to their counterparts in other agencies.²⁹ State regulation of union activities is frequently preempted by the broad federal statutes.

A. Torts

Work-related torts cover an assortment of interests, and are discussed briefly below.

1. Invasion of Privacy

An employee has only a limited expectation of privacy at work. Generally, however, conduct that can be described as “snooping” by the employer goes too far. This does not mean that the employer cannot obtain information on the employee that directly affects workplace performance (like performing reasonable and impartial testing for drugs or alcohol) or may endanger the employer’s reputation or the safety of other employees. Also, one must recall that emergency management is a public safety role,

²⁸ 29 USC §§ 151-169 (2004).

²⁹ This was the subject of vigorous debate during the adoption of the HS Act.

where employees may have access to classified information. As such, a greater degree of intrusion into the employee's affairs may be appropriate. It is very important to consult with legal counsel before taking intrusive action.

2. Defamation

Employers may not do harm to their employees' fame, character, or reputation by means of false or malicious declarations. The declaration may be in the form of gestures or action rather than words. In one case, an employer fired the employee, stood over him while he packed his belongings, and escorted him to the door. This was found to be defamatory activity, because it implied that the employee was dishonest and untrustworthy.³⁰

3. False Imprisonment

False imprisonment means detaining a person without cause and not permitting him or her liberty to leave, when the person knows that he or she may not leave. This was found to exist in a case where a security guard and the owner of the security service kept a grocery clerk in a room and would not let her use the telephone other than to receive one call during a three hour interrogation. The guard put himself between her and the door and told her he would decide if she was going to jail.³¹

4. Intentional Infliction of Emotional Distress

To prove intentional infliction of mental distress: first, the employer must act in an extreme and outrageous way; second, the employer must have intended to cause emotional distress or had a substantial certainty that it would ensue; third, substantial emotional distress must result from the employer's behavior. Courts have differing ideas

³⁰ *Bolton v. Minnesota Dept. of Human Services*, 527 NW 2d 149 (Minn. App. 1985).

³¹ *Buckel v. Rodriguez*, 891 P2d 16 (Or. App. 1995).

about what is outrageous. In one case, the employer ordered the employee to lower his trousers and expose himself to fellow employees. The trial court found for the employee, the appeals court reversed, and the state supreme court reversed again, holding for the employee.³²

5. Fraudulent Misrepresentation

Fraudulent misrepresentation happens when an employer falsely makes a statement of opinion, fact, law, or intention, intending the employee to act based on it. One employer told an employee that if the employee would accept a job in California, the employer would buy his house. After accepting the transfer, the employee tried to get the employer to buy the home, and was fired. The employer's lie changed the way the employee evaluated the job offer, and recovery was permitted.³³

6. Intentional Interference with Contractual Relations

The employer here must act, with knowledge of an existing or possible contract between the employee and a third party, with the intent of interfering with it, and actually cause the harm intended. This tort must be carefully kept in mind by emergency manager supervisors in this time when many contractors are attempting to "cherry pick" the best emergency management employees to work for them. Interfering with this process, despite understandable anger with the employee, may expose the supervisor and employer to liability.

7. Malicious Prosecution

For this action to succeed, one must prove that the antagonist began a legal action, the antagonist lost the case, the antagonist did not have probable cause to begin the case,

³² *Madani v. Kendall Ford, Inc.*, 818 P 2d 930 (Or. 1991).

³³ *Palmer v. Beverly Enterprises*, 823 F 2d 1105 (7th Cir. 1987).

the antagonist began the case with “malice,” and the case caused harm for which damages may be had. Either employer or employee may use this theory, but courts do not like this type of action. When successful, however, large damages may be won.

8. Abuse of Process

Like malicious prosecution, this kind of case springs from misuse of the legal system, and may be used by either employer or employee. One must prove that the adversary used the legal system due to a secret bad motive and that the process was used for a purpose other than that for which it was designed. This can occur, for instance, when one plants evidence to discredit a person and calls the police to arrest the person.

9. Blacklisting

This tort involves preventing or trying to prevent an employee from getting future employment. The employee must establish that the employer did this out of malice. Employers have a limited privilege to talk about matters that concern them both. Giving a bad reference is the classic example of this. If false information is given out, there will be a basis to get damages. If the statements are on overall “suitability,” they may be held to be mere opinion or information.³⁴

B. Constitutional Provisions

The United States Constitution defines the relationships between the federal and state governments, as well as between these government and its citizens. It does not regulate conduct between citizens. It is therefore not relevant in many employment relationships. The Constitution does, however, regulate employment relationships in the public sector, as these are between the government and its citizens. Constitutional provisions control government emergency management programs.

As a general matter, no level of government may exercise its power to take away Constitutionally guaranteed rights of employees. The rights of privacy, free speech, and association are those most often at issue.

1. Right to Privacy

Searching a government employee's desk has been found unconstitutional.³⁵ As mentioned above, however, the fact that emergency management is a public safety entity may create greater opportunities for oversight of employees. Again, the attorney should be consulted prior to any such action.

2. Free Speech and Association

The Supreme Court has ruled that hiring, promotions, transfers, and recalls of a low ranking government employee may not be based on support for a particular political party.³⁶ The employee's first amendment rights of free speech and association are improperly limited by such a requirement, unless party membership can be shown to be a proper prerequisite for effective performance in the job. This would be a difficult matter to prove. The Fourteenth Amendment's equal protection clause stops racial discrimination by government employers.

C. Regulations of Special Interest to Emergency Management

There are many governmental regulatory programs that affect employment, and their full scope is well beyond this chapter. Some must be mentioned if only in passing because of their effect on emergency management activities.

³⁴ *Austin v. Torrington Co.*, 180 F 2d 416 (4th Cir. 1987), *cert. denied*, 484 US 977 (1987).

³⁵ *O'Connor v. Ortega*, 480 US 709 (1987).

1. Health and Safety: OSHA

Occupational Safety and Health Administration (OSHA)³⁷ regulations apply to all workplace activities, including those of government entities. The OSHA statute permits states to have responsibility for workplace safety if their programs meet specific guidelines.³⁸ The state standards must be at least as strict as those of the federal government. The emergency manager should become familiar with the regime in place covering his or her workplace.

OSHA imposes two duties on employers:

1. provision of a hazard-free workplace, and
2. compliance with OSHA standards.³⁹

The OSH Act gives employees several important rights:

1. to question unsafe conditions and request a federal inspection,
2. to assist OSHA inspectors,
3. to bring an action to make the Secretary of Labor seek injunctive relief

where there is imminent danger to employees,

4. to gain access to records about the employee's health an exposure to hazardous substances.⁴⁰

Employers of 11 or more employees must keep records of occupational diseases and injuries.⁴¹ Failure to do so is a very serious matter that may result in huge fines.

³⁶ *Rutan v. Republican Party of Illinois*, 497 US 62 (1990).

³⁷ In 1970, Congress enacted the federal Occupational Safety and Health Act of 1970 ("OSH Act"). 84 Stat. 1590 (codified at 29 U.S.C. 553, 651-678 (2002)). The OSH Act specifically authorized the Secretary of Labor to promulgate national health and safety standards. 29 U.S.C. 655(a).

³⁸ 29 USC § 667.

³⁹ 29 USC § 634(a).

⁴⁰ 29 USC § 657.

2. Health and Safety: Workers Compensation

Government and private sector employees are typically compensated for their on-duty injuries through workers compensation schemes, which vary from state to state. These programs include “exclusive remedy” clauses, which prevent all but a very small number of lawsuits against employers for workplace injuries. The big exception occurs when the employer clearly intends to harm workers. Federal civilian employees are covered by the Federal Employees Compensation Act (FECA).⁴²

D. Progressive Discipline

Many employment contracts utilize a system called “progressive discipline” to deal with employees who perform below par or contrary to the employer’s rules. Such programs typically call for a graduated set of penalties before an employee may be terminated. An example follows:

1. First offense: verbal reprimand.
2. Second offense: written reprimand.
3. Third offense: uncompensated suspension for up to a maximum period, typically two weeks.
4. Fourth offense: termination.

Frequently in such programs, the written reprimand and suspension periods will be accompanied by a plan for correction. This is a sort of “mini contract” in which the manager specifies areas of shortfall, and the employee agrees to correct shortcomings on a schedule. Failure to comply with the plan may result in further discipline.

⁴¹ 29 USC § 657 (c).

⁴² 5 USC §§ 8101-8151.

One challenge with this system is its requirement that managers actually manage. All too often, an underperforming employee may be given one verbal reprimand after another, with no written documentation. Eventually, the sum of failures to perform may be sufficient for termination, but the fact that these events have not been noted in the employee's file may mean that the employee stays on for additional time while a sufficient record for termination is compiled. Such a situation may be the basis for discipline of the manager by his or her superiors. It certainly is frustrating for the attorney who must explain the need for such documentation and fight against the employee's appeal.

Of course, where an employee's actions are illegal or bring the employer into disrepute, like running a gambling ring from one's desk, immediate termination may be appropriate. Similarly, putting oneself or fellow employees at risk through unsafe behavior, like a heavy equipment operator who drinks on the job, may also be grounds for immediate termination. Any possible deviation from the system must, however, be discussed with legal counsel before taking place.

E. Avoiding Ethical Lapses in Emergency Management

Both government and business employees are bound by ethical standards. The difference between the two is that ethical standards for business are largely self-imposed, while those binding government employees may be matters of law or policy. Government ethics guidelines apply to the actions of employees whether they are at work or not. The reason for this intrusion into employees' private lives is that they are seen as representing the government at all times.

Conflict of interest, moonlighting, use of government resources for private purposes,

Public service is a public trust, therefore, government employees must behave in ways that will promote trust by the general public. The following statements are minimum standards of conduct for government employees to follow. (Taken from the Indiana Ethics Commission standards.)

- Employees are to be impartial in the discharge of their duties.
- Decisions and policies must not be made outside the proper channels of government.
- Public office is not to be used for private gain.
- Employees may not make unapproved use of government property, personnel, or facilities.
- Employees may not use government time for other than official duties.
- Employees may not benefit financially from information of a confidential nature gained through government employment.
- Employees may not solicit or accept outside payments for the performance of official duties.
- An employee may not accept a gift, favor, service, entertainment, food or drink which could influence the employee's action.
- Payment for an appearance, speech, or article may not be accepted if the appearance, speech, or article could be considered part of the employee's official duties.
- An employee may not accept payment of expense for travel, conventions, conferences, or similar activities that could influence the employee's action.

- Employees may not have outside employment incompatible with their government employment or against their agency's rules.
- Supervisors may not solicit political contributions from employees they supervise.
- An employee may not solicit political contributions from persons or entities that have a business relationship with the employee's agency.

F. The Hatch Act

The Hatch Act applies to state and local employees of the executive branch. They must be principally employed in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency. Emergency management agencies that operate using the federal funds made available through the Emergency Management Performance Grants as well as employees whose salary is partially paid by programs like the Chemical Stockpile Emergency Preparedness Program (CSEPP) are subject to the Hatch Act. State law and agency regulations also apply to such employees. State and local laws do not affect the Hatch Act's prohibitions.

Covered state and local employees may:

- run for public office in nonpartisan elections
- campaign for and hold office in political clubs and organizations
- actively campaign for candidates for public office in partisan and nonpartisan elections
- contribute money to political organizations and attend political fundraising functions

Covered state and local employees may not:

- be candidates for public office in a partisan election

→ use official authority or influence to interfere with or affect the results of an election or nomination

→ directly or indirectly coerce contributions from subordinates in support of a political party or candidate

Violation of the Hatch Act may result in significant penalties. If the Merit Systems Protection Board finds a violation that calls for discharge from employment, the agency must either remove the employee or surrender a part of the federal assistance equal to two years salary of the employee. If the Board decides the violation does not warrant the employee's firing, there will be no penalty.⁴³

VI. Mutual Aid Agreements

Mutual aid agreements (MAAs) are a key part of emergency management. They are mandated by a number of standards, including NFPA 1600⁴⁴ and NIMS.⁴⁵ Their importance to the EOP is obvious: they allow multiplication of resources. The proper contents for intra-state and inter-state mutual aid agreements are found on the National Emergency Management Association (NEMA) website.⁴⁶

National Incident Management System Suggested Requirements for MAAs⁴⁷

- Definitions of key terms used in the agreement;
- Roles and responsibilities of individual parties;
- Procedures for requesting and providing assistance;
- Procedures, authorities, and rules for payment, reimbursement, and allocation of costs;
- Notification procedures;
- Protocols for interoperable communications;
- Relationships with other agreements among jurisdictions;
- Workers compensation;

⁴³ For further information on the Hatch Act, see <http://www.osc.gov/hatchact.htm>

⁴⁴ NFPA 1600 § 5.6

⁴⁵ NIMS at 39-40.

⁴⁶ Found on the web at <http://www.emacweb.org/>

⁴⁷ NIMS at 39-40

- Treatment of liability and immunity;
- Recognition of qualifications and certifications; and
- Sharing agreements, as required.

Authorized officials from each of the participating jurisdictions will collectively approve all mutual-aid agreements.

The Emergency Management Assistance Compact (EMAC) is the benchmark for interstate agreements. Various states have adopted slightly differing versions of EMAC.⁴⁸ One issue that EMAC does not address is the credentialing of visiting emergency responders such as Emergency Medical Technicians and doctors. This was reportedly a matter of such controversy when EMAC was written that the decision was made to allow each state to deal with the issue separately.⁴⁹ It is unfortunate that there is not a uniform national approach to this issue in EMAC.

For those who become federally certified under the authority of NIMS, nationwide credentialing will be a part of the package.⁵⁰ This approach will do a great deal to lessen potential confusion in the aftermath of an emergency or disaster.

⁴⁸ See, e.g., Indiana Code 10-14-6 Interstate Emergency Management and Disaster Compact (2004).

⁴⁹ See, e.g., Indiana Code §§ 10-14-3-3 and 10-14-3-15(b) for one approach. Section 10-14-3-3 defines “emergency management worker” as any full-time or part-time paid, volunteer, or auxiliary employee of:

- (1) the state;
- (2) other:
 - (A) states;
 - (B) territories; or
 - (C) possessions;
- (3) the District of Columbia;
- (4) the federal government;
- (5) any neighboring country;
- (6) any political subdivision of an entity described in subdivisions (1) through (5); or
- (7) any agency or organization;

performing emergency management services at any place in Indiana subject to the order or control of, or under a request of, the state government or any political subdivision of the state.

Sec. 15. (b) Any requirement for a license to practice any professional, mechanical, or other skill does not apply to any authorized emergency management worker who, in the course of performing duties as an emergency management worker, practices a professional, mechanical, or other skill during a disaster emergency.

⁵⁰ NIMS at 46. “Personnel certification entails authoritatively attesting that individuals meet professional standards for the training, experience, and performance required for key incident management functions. Credentialing involves providing documentation that can authenticate and verify the certification and identity of designated incident managers and emergency responders.”

The EMAC web page also contains a model intrastate agreement.⁵¹ Some states already have made provision for an intrastate agreement. For example, Indiana has an intrastate mutual aid program that applies to every political subdivision of the state that do not opt out by adopting an ordinance or resolution stating that it does so.⁵²

Jurisdictions that request mutual aid assistance must be aware of potential legal claims that may arise from doing so. While the model agreements discussed above will cover issues like who is responsible for injuries to members of the assisting unit, case law indicates that the requesting entity may be responsible for their workers compensation claims if they are injured during the response.⁵³

VII. Standard Operating Procedures

Emergency response groups employ standard operating procedures (SOPs) to direct their members during daily operations.⁵⁴ One vital reason for the mutual aid agreement is to guarantee that responding entities, whether public or private, abide by standard operating procedures (SOPs) or standard operating guidelines (SOGs) during mutual aid responses.⁵⁵ When writing SOPs, MAAs should be considered, similarly, when drafting MAAs, SOPs must be assessed.⁵⁶ Many other texts, plans and agreements must be evaluated as well when developing SOPs, including the requirements of the Hazardous Waste Operations and Emergency Response (“HAZWOPER”) Standard.⁵⁷

⁵¹ Found on the web at <http://emacweb.org/docs/Wide%20Release%20Intrastate%20Mutual%20Aid.pdf>

⁵² Indiana Code 10-14-3-10.6.

⁵³ See, e.g., *Thomas v. Lisbon*, 550 A.2d 894 (S.Ct. Conn. 1988).

⁵⁴ ALAN V. BRUNACINI, FIRE COMMAND 16 (1985).

⁵⁵ FEDERAL EMERGENCY MANAGEMENT AGENCY—UNITED STATES FIRE ADMINISTRATION, DEVELOPING EFFECTIVE STANDARD OPERATING PROCEDURES FOR FIRE & EMS DEPARTMENTS 9 (1999) [hereinafter DEVELOPING SOPs] “Mutual or automatic aid agreements . . . help [to] ensure that agreements are enforced and joint operations are coordinated.”

⁵⁶ *Id.*

⁵⁷ *Id.* at 67-75, 92-93.

Like mutual aid agreements, SOPs must be on paper to be successful. They have to be enforced to succeed.⁵⁸

The National Fire Protection Association (NFPA) characterizes an SOP as “ ‘an organizational directive that establishes a standard course of action.’ ”⁵⁹ A comprehensive collection of SOPs specifies in a comprehensive way how an emergency response organization will operate during an event, working as a “game plan” prior to the event.⁶⁰ SOPs must be drafted with intelligent risk management as their main goal to make sure that safety is the norm expected by all involved. Safety-specific SOPs are unqualified mandates that must be abided by, no matter what else is going on.

For individual responders, SOPs provide comprehensible declarations of employer standards and act as a detailed description of expectations. Managers use SOPs for several reasons: examining their operations from a strategic viewpoint, recording needed changes, detailing regulatory compliance, creating intentions, as well as bettering training and measuring performance.⁶¹ They communicate legal and administrative mandates to members of emergency response groups. At a sizeable event with multiple responding agencies involved, SOPs become even more important.⁶²

Fire departments were the first emergency response outfits to utilize SOPs during emergency responses. As departments grew beyond their casual roots, they began to address safety issues through internal controls. These requirements, originally termed “rules of engagement,” protected firefighters during daily fire actions. The more

⁵⁸BRUNACINI at 16-17.

⁵⁹DEVELOPING SOPs at 2.

⁶⁰BRUNACINI at 16.

⁶¹*Id.* at 18. “Standard operating procedures become the basis for much of the use of the regular management process. The standard steps of the system development/training/application/ review/revision are used in the development, application, and ongoing management of SOPs.”

contemporary terminology for these guidelines is standard operating procedures. As fires have become more complicated, SOPs have developed from measures that are “chiseled in stone” to SOGs. SOGs permit increased flexibility in responding to difficult fire scenes, encouraging the full exploitation of firefighters’ knowledge, skills and abilities. Other emergency response groups learned from the fire service’s knowledge, likewise developing ever more highly developed SOPs and SOGs. For HAZMAT responses, employers must encompass SOPs in their written safety and health program.⁶³

Legally, SOPs are a form of “private law,” that is, they are created by an organization and delineate the obligations of its members. For those people, the SOP is a rule of law, and violation can have serious consequences. These results can be internal penalties. Violations can also be the basis for a lawsuit for negligence, since the SOP is, at least, a site-specific industry standard. Indeed, many SOPs reflect generally accepted safe practices, and their violation could well result in liability. Failure to adopt SOPs is not a way to avoid these potential liabilities. The only legal safe harbor is to adopt good SOPs and enforce them.

VIII. The Role of the Incident Command System (ICS)

Concern that the nation required a common method for management of incidents led the Congress, in the Homeland Security Act of 2002,⁶⁴ to require adoption of IMS.⁶⁵

⁶²William C. Nicholson, *Standard Operating Procedures: The Anchor Of On-Scene Safety*, OUR WATCH 2 (Winter 1999).

⁶³29 C.F.R. § 1910.120(b)(1)(ii)(F).

⁶⁴ Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2002) (enacted).

⁶⁵ Id. at § 501 (5) The HS Act requires “[b]uilding a comprehensive incident management system with Federal, state, and local government personnel, agencies, and authorities, to respond to. . . [terrorist] attacks and disasters.”

In response to the Congressional directive, the Department of Homeland Security (DHS) released the National Incident Management System (NIMS) on March 1, 2004.⁶⁶

A bit of confusion over terminology has resulted. Unlike the traditional incident management system, NIMS is a universal approach to emergency management, as opposed to an incident-specific structure. This portion of the chapter deals with the parameters of the traditional incident management system, which will be referred to as “incident command” for purposes of clarity.

The concept of incident command (more recently and commonly referred to as incident management)⁶⁷ originated in the early 1970s, when a group of innovative California fire department and federal agency heads began working on a new system to organize, deploy, and care for the significant resources needed to fight big wildland fires.⁶⁸ In many incidents before adoption of ICS, lack of interagency teamwork resulted in dangerous conditions and unsuitable distribution of resources. The managers noted several specific difficulties.

1. Lack of communication due to incompatible radio codes.
2. No command system was in place. Every organization hinged on the personality of the leader in charge at any particular moment.
3. Lack of common language - even when communication was achievable, errors arose.

⁶⁶ National Incident Management System may be accessed on the web at:

<http://www.dhs.gov/interweb/assetlibrary/NIMS-90-web.pdf>

⁶⁷ Incident Command is a system that uses a “command” model, while incident management uses a “management” model. Paul M. Maniscalco & Hank T. Christen, *Understanding Terrorism and Managing the Consequences* 24 (2001). Experienced responder leaders, however, do not see a difference other than in terminology between the two. Scott Baltic, *ICS For Everyone*, 3 Homeland Preparedness Professional No. 1, 22 (January/February 2004).

4. Resources were not managed centrally - logistics was a result of luck.

5. No clear designation of roles, and how functions related to one another.

The incident command system arose in response to these issues. ICS evolved into the commonly accepted way of integrating response to emergencies.⁶⁹

The accomplishments of the newly created incident command system resulted in its being adopted by many players, including law enforcement, public health, public works, and the private sector.⁷⁰ Emergency management groups also adopted the system,⁷¹ and advocated in 2000 that all levels of government make use of it for response to weapons of mass destruction (WMD) events.⁷² Credentialing bodies have

⁶⁸ National Fire Service Incident Management System, Model Procedures for Structural Firefighting, Second Edition 1 (2000). See generally Scott Baltic, *ICS For Everyone*, 3 Homeland Preparedness Professional No. 1, 20 (January/February 2004).

⁶⁹William C. Nicholson, *The Incident Command System: Legal and Practical Reasons for Incident Management*, OUR WATCH, July – Sept. 1999, at 3, 5. See generally BRUNACINI. Brunacini has been termed “the Godfather of incident command.” His “well-respected” work places him as the “pre-eminent expert in incident command.” Telephone Interview with Tracey Boatwright, Indiana State Fire Marshal (Apr. 24, 2002). Marshal Boatwright served on the Executive Board of the National Association of State Fire Marshals from 1995-2000, and was Secretary/Treasurer from 1999-2000. A long time paid and volunteer firefighter, Boatwright has been State Fire Marshal since 1993.

⁷⁰ Pat West, Senior Editor, *NIMS: The Last Word on Incident Command?* Fire Chief on Line (March 5, 2004) Found at: http://firechief.com/ar/firefighting_nics_last_word/index.htm (Last consulted March 9, 2004). “What we’ve said now with the NIMS document is that it’s not just a fire service issue. We’re expanding (incident management) to include all the agencies involved in response to emergencies – beyond police, EMS and fire -- to include all the government agencies that will respond to a disaster as well as some private organizations.”

⁷¹ “[T]he National Emergency Management Association adopted a position in September 1996 adopting the National Interagency Incident Management System and its Incident Command System (ICS) as the model for all risk/hazard response activities by state and local governments. . . . “ National Emergency Management Association Terrorism Committee, A Resolution Advocating the Incident Command/Management System for all WMD Operations By All Levels Of Government, February 25 - March 1, 2000.

⁷² Id.

unanimously embraced ICS as the pattern for integrating emergency response.⁷³ Despite ICS' established worth, however, not all emergency response groups have adopted it.⁷⁴

A further development, used so far only in California, is the Standardized Emergency Management System (SEMS).⁷⁵ SEMS encompasses ICS, multi- and inter-agency coordination, mutual aid and an operational area concept for flexible response to very large incidents.⁷⁶ SEMS has been predicted to be the standard of the future.

Use of ICS is required by both NFPA 1600⁷⁷ and NIMS.⁷⁸ As mentioned above, the emergency manager is therefore obligated to ensure that it is utilized in emergency responses. HAZWOPER has been in existence for over 20 years. Its mandates for use of ICS are valuable, therefore, for the emergency manager thinking about how best to adopt ICS.

The HAZWOPER model requires all HAZMAT responses to make use of ICS.⁷⁹ A good ICS contains the following attributes: modular organization, integrated communications, common terminology, a unified command structure, consolidated action

⁷³ William C. Nicholson, Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response ("HAZWOPER") Standard, Standard Operating Procedures, Mutual Aid and the Incident Command System, Widener Symposium Law Journal, Volume 9, Number 2, 295, note 116 at 309 (2003).

⁷⁴ "Clearly, ICS is gaining momentum, though there's still a long road before it's a truly universal structure and language for managing incidents." Scott Baltic, *ICS For Everyone*, 3 Homeland Preparedness Professional 1, 26 (January/February 2004).

⁷⁵ ROBERT A. JENSEN, MASS FATALITY AND CASUALTY INCIDENTS, A FIELD GUIDE 4 (1999).

⁷⁶ *Id.* "The goal of SEMS was to organize the response to any incident starting with the lowest level of resources and support required . . . SEMS incorporates . . . [the] Incident Command System. . . ." *Id.*

⁷⁷ NFPA 1600 § 5.8.

⁷⁸ NIMS at 1-2.

⁷⁹ 29 C.F.R. § 1910.120(q)(3)(i) requires that during an emergency response the most senior emergency response official becomes the individual in charge of a site-specific Incident Command System (ICS). All emergency responders and their communications shall be coordinated and controlled through the individual in charge of the ICS assisted by the senior official present for each employer. *Id.*

plans, a manageable span of control, designated incident facilities, and comprehensive resource management.⁸⁰

HAZWOPER includes essential supplementary and very particular requirements for ICS.⁸¹ It obliges the senior emergency response official responding to an emergency to become the individual in charge of site-specific ICS (henceforth “incident commander” or IC).⁸² The standard acknowledges that incidents change and that the person in charge may change as added assets arrive.⁸³ One unfortunate feature of the September 11, 2001 attack in New York was the death of the New York Fire Department’s Incident Command structure when the towers fell. A significant lesson learned from that calamity is the requisite to put in place back up command structures at terrorism responses. A defined command transfer process must be established well before an incident to avoid possible chaos and hazard to responders and the public.

The IC must categorize, to the extent possible, all hazardous substances or conditions at hand and address site analysis, use of engineering controls, maximum exposure limits, hazardous substance handling procedures, and use of any new technologies.⁸⁴ The IC’s duties at this point consist of identifying the substance and controlling the hazard.

⁸⁰See, e.g., William C. Nicholson, *Beating the System to Death: A Case Study in Incident Command and Mutual Aid*, 152 FIRE ENGINEERING at 128, 129-30 (Oct. 1999).

⁸¹29 C.F.R. § 1910.120(q)(3) requires these characteristics at all HAZMAT response sites.

⁸²29 C.F.R. § 1910.120(q)(3)(i). NFPA 472 requires use of IMS and contains detailed competencies for the IC at 472-22 to 472-25.

⁸³Note to (q)(3)(i) specifies that the “senior official” at an emergency response is the most senior official on the site who has the responsibility for controlling the operations at the site. That person is the senior officer on the first-due piece of responding emergency apparatus to arrive on the incident scene. *Id.* More senior arriving officers (i.e., battalion chief, fire chief, state law enforcement official, site coordinator, etc.) assume the position, which is passed up the previously established line of authority. *Id.*

⁸⁴29 C.F.R. § 1910.120(q)(3)(ii).

The IC must put into practice suitable emergency operations, and ensure that the personal protective equipment (PPE) worn is appropriate for the hazards present.⁸⁵ There are particular requirements for breathing equipment.⁸⁶ “[T]he number of emergency response personnel at the emergency site, in those areas of potential or actual exposure to incident or site hazards . . . , [must be limited] to those who are actively performing emergency operations.”⁸⁷

The “buddy system” in twos or more must be used.⁸⁸ This necessitates that one is available to observe and, if required, save the other. Back-up workers must be prepared to provide support or rescue. Advance emergency medical personnel must also be present with medical equipment and transportation.⁸⁹

Perhaps the most imperative obligation is naming a safety officer who is well-informed about operations at the emergency response location.⁹⁰ He or she has the specific responsibility of identifying and evaluating hazards and providing direction respecting safety of operations. The safety official has the power to alter, suspend, or terminate those activities.⁹¹ The safety official must immediately inform the IC of any action required to rectify hazards at an emergency scene. Case law demonstrates that the safety officer must be an individual other than the IC him or herself.⁹²

⁸⁵29 C.F.R. § 1910.120(q)(3)(iii) requires personal protective equipment to “meet, at a minimum, the criteria contained in 29 CFR § 1910.156(e) when worn while performing fire fighting operations beyond the incipient stage for . . . [the] incident.”

⁸⁶29 C.F.R. § 1910.120 (q)(3)(iv).

⁸⁷29 C.F.R. § 1910.120(q)(3)(v).

⁸⁸29 C.F.R. § 1910.120(q)(3)(v).

⁸⁹29 C.F.R. § 1910.120(q)(3)(vi).

⁹⁰29 C.F.R. § 1910.120(q)(3)(vii). “The individual in charge of the ISC shall designate a safety official, who is knowledgeable in the operations being implemented at the emergency response site. . . .”

⁹¹29 C.F.R. § 1910.120(q)(3)(viii).

⁹²See *Victor Microwave, Inc.*, 1996 OSAHRC LEXIS 57, at *44-47. Failure to designate a separate safety officer was found to be a serious violation.

The lessons learned over the past 20 plus years from use of ICS at HAZMAT scenes will be invaluable for implementation of the standard in the wake NFPA 1600's and NIMS' requirements to do so.

IX. Incorporating Volunteer Resources

Volunteers are a vital resource for emergency management. Properly managed, they can prove to be a key element in the successful response to an emergent situation. Their contributions are particularly important when funding for many types of preparedness and response activities are shrinking, as terrorism becomes the obsession of our national leadership. A number of legal issues may arise in connection with the utilization of volunteer resources.

A. Who Is a Volunteer?

The first question that must be addressed is the definitional issue – who is a volunteer? The answer is more complex than it might seem. One does not become a volunteer by simply showing up at the scene of an event. Rather, a person must be a member of an accredited organization or an integrated member of the emergency response team.

B. Incorporating Volunteers

The most important step that can be taken to prevent liability with regard to volunteers is properly integrating them into the emergency management team. This may be done in a couple of ways. The best approach is to establish ongoing relationships with the major volunteer groups prior to a crisis. Like other emergency response groups, volunteer organizations need to be included in planning, training, and exercising. Their roles should be spelled out in the plan. Typically, the parent organization takes care of

assuring that the individual volunteers are properly trained and provides them with documentation so that they are identified as appropriately on the scene during an event. This removes a significant administrative burden from the incident commander at the scene of an event.

C. Emergent Volunteers

One of the incident commander's biggest headaches may be the crowd of well-meaning emergent volunteers that often congregates at the scene. These folks are frequently not affiliated with the groups with which the unit of government has existing mutual aid agreements. They may or may not be trained responders. One of the incident commander's major duties is scene control. The IC controls the personnel on the scene and their actions. When trained responders arrive as the prearranged outcome of a mutual aid agreement, the result can be useful resources. Unfortunately, emergent responders will turn up at the location individually or as a group, despite not being asked for or even being actively discouraged. This happened both in New York and at the Pentagon after the 9-11 strikes.⁹³ The IC must show decision and tact to maintain control of the site. One of the first responsibilities for an IC is organization of a perimeter, which should be controlled by law enforcement.⁹⁴ People trying to come into the perimeter without proper permission must be prevented from doing so and moved to a distant staging area.⁹⁵ There, training and capabilities can be assessed, and their proper role, if

⁹³See, e.g., Dan Barry, *The Search; A Few Moments of Hope In a Mountain of Rubble*, N.Y. TIMES, Sept. 13, 2001, at A1. "There were volunteers everywhere, arguably more than were needed." *Id.* at A8.

⁹⁴See BRUNACINI at 22.

Police represent the community agency with the authority and ability to directly control the location and activity of the general public at an emergency scene. This capability makes them a unique support agency for the fire command system through their ability to control and manage spectators, traffic and other actions of people. The command system should integrate law enforcement functions into its operations as a matter of routine.*Id.*

⁹⁵See *id.* at 23-24, for an example of standard operating procedures for staging at a fire scene.

any, can be assigned. In the event that they are found to be trained responders with needed skills, a record of the assessment must be made. They can then be officially rostered as approved responders. Taking these steps will protect the emergency management and emergency response entities from liability, as it shows that they are taking reasonable steps to find out the competencies of the volunteers. Of course, there is an accompanying duty to assign the volunteers to duties for which they are qualified.⁹⁶

D. The Volunteer Protection Act of 1997

Many members of Congress believe that the possibility of litigation may lessen the likelihood of people to volunteer for public service. In response, they enacted the Volunteer Protection Act of 1997 (VPA) to make available statutory immunity to increase the labor pool for voluntary entities.⁹⁷ The VPA pre-empts state laws providing higher levels of liability for volunteers than gross negligence. States may opt out of the VPA. In addition to shelter from negligence lawsuits, punitive damages may not be awarded against a volunteer acting within the scope of his/her responsibilities to a non-profit organization, even when that volunteer is negligent or grossly negligent. The immunity does not attach to the volunteer's organization.

Notably, the Act does not exempt volunteers from liability for any harm caused

⁹⁶ See generally, William C. Nicholson, *Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response ("HAZWOPER") Standard, Standard Operating Procedures, Mutual Aid and the Incident Management System*, Widener Symposium Law Journal, Vol. 9, No. 2, 295, 321-322 (2003).

⁹⁷ Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. §§ 14501-14505 (West Supp. III 2002)). As is the case with any type of tort reform, the VPA has come in for significant criticism. See, e.g., Andrew F. Popper, *A One-Term Tort Reform Tale: Victimized The Vulnerable*, 35 HARV. J. ON LEGIS. 123, 130-137 (Winter 1998). "An underlying principle of tort law is that the threat of personal liability creates individual accountability and thereby enhances the quality of goods and services. Accordingly, the common law imposes a minimum level of due care on people who choose to volunteer. The Volunteer Protection Act changes that standard, and in so doing, reduces the incentive to provide quality services." *Id.* at 134-35 (citations omitted).

while driving a motor vehicle. This exclusion is important, since research indicates that half the claims involving emergency response organizations arise from vehicle accidents. While the Volunteer Protection Act alters the basis for a lawsuit, it probably does not affect administrative actions taken on a negligence basis. Laws that name negligent conduct endangering persons as the basis for administrative penalties therefore continue to be valid.

X. The Planning Process

The first step in emergency management at all levels of government is planning. While "planning" for an emergency may appear incongruous – since emergencies are by definition unplanned events - actually pre-planning has substantial worth. Correct planning signifies that resources, proper procedures, and trained personnel are organized when a disaster occurs. Plans typically include an evaluation of possible hazards, explanations of various agencies' and organizations' responsibilities, command structure, protocols for asking for support, and analysis of various distinct roles within the total response effort. These may include, for example, public information, evacuation, medical assistance, and quarantine. Emergency response plans may vary widely in size and comprehensiveness, depending on the nature of the jurisdiction they serve and the planning philosophy of the drafters.

A. Pro-Active Preparation for Federal Assistance

One matter that can make a tremendous difference in the amount and quality of assistance that a jurisdiction receives from the federal government is the legal enactments it has in place regarding infrastructure replacement. Building and fire codes should be up

to date, and require that all new or rebuilt structures must comply therewith. Standards for replacement of infrastructure, such as bridges and highways, must specify that new construction or repairs shall conform to currently accepted best practices. The reason for these legal steps is that federal aid will pay for reconstruction or repair only to the extent that the unit of government imposes the same requirements on itself or private parties.

Good financial controls will also make a tremendous difference when the time comes to request federal reimbursement. The federal government will only pay for items for which properly documented receipts exist.

Although these matters may seem beyond the scope of traditional emergency management planning, having them in place is an excellent example of how proper planning on the legal side can result in significant financial benefits.

B. Potential Liabilities Arising from the Duty to Plan

As described above, the common custom is to create and take care of an emergency response plan. If possessing such a plan improves response, the next query must be whether lack of a plan would be the basis for a lawsuit. Violation of a "specific and mandatory" statutory or other mandate to establish a plan would not be discretionary under *Berkovitz v. United States*, discussed above. All states have statutory requirements to prepare an emergency response plan. Further, environmental law requires preparation of a response plan for releases of extremely hazardous substances.⁹⁸

⁹⁸ The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 104 (i), as amended by SARA, requires ATSDR and the EPA to prepare a list, in order of priority, of substances that are most commonly found at facilities on the National Priorities List (NPL) established by the National Contingency Plan (NCP). The NCP provides guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants. Superfund Amendment and Reauthorization Act of 1986 (SARA or Superfund), 42 USC §§ 11001 et seq. This act provided for broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.

Failing to prepare a mandated plan will result in liability. In a case involving failure by the Nuclear Regulatory Commission to prepare a plan mandated by its own rules, the court found that the "choice" made by the agency's employee was a failure or refusal to follow safety standards, resulting in a lack of immunity. Where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees.⁹⁹

Another situation that may result in liability is where a plan exists, but may have been negligently drafted. Interestingly, on the federal level, planning is considered inherently discretionary, while operational activities are not. This means that cases brought under the Federal Tort Claims Act for bad plans (as opposed to the previous discussion where a mandatory plan was not created) will typically not succeed.¹⁰⁰

The adoption of the NFPA 1600 emergency management standard discussed above, however, will most probably result in liability for negligently drafted plans. This is because the planning portion of NFPA 1600 details particular tasks. Several plans are mandated:

5.7.1* The program shall include, but shall not be limited to, a strategic plan, an emergency operations/response plan, a mitigation plan, a recovery plan, and a continuity plan.¹⁰¹

The content of these plans is laid out with some particularity. The emergency response plan is described as follows:

⁹⁹ *Roberts v. United States*, 724 F.Supp. 778, 791 (D.DC 1989).

¹⁰⁰ See, e.g., *In Re: Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988).

¹⁰¹ NFPA 1600 § 5.7.1 (2004 Edition).

5.7.2.2 The emergency operations/response plan shall assign responsibilities to organizations and individuals for carrying out specific actions at projected times and places in an emergency or disaster.¹⁰²

All of the plans required by NFPA 1600 have several shared components:

5.7.3 Common Plan Elements.

5.7.3.1 The functional roles and responsibilities of internal and external agencies, organizations, departments, and individuals shall be identified.

5.7.3.2 Lines of authority for those agencies, organizations, departments, and individuals shall be established or identified.¹⁰³

NFPA 1600 also requires other steps be taken that are a normal part of planning, such as hazard identification, risk assessment, and impact analysis.¹⁰⁴ As mentioned previously, NFPA 1600 also imposes a duty to adhere to current laws, policies, and industry practices.¹⁰⁵ This means that the requirements of NFPA 1600 are a moving target. Avoidance of liability for bad planning will therefore require constant attention to evolving standards.

In addition to the NFPA 1600 standard, the National Incident Management System (NIMS)¹⁰⁶ sets mandatory standards for emergency management programs that wish to receive federal funds, including Emergency Management Performance Grants (EMPGs),¹⁰⁷ after October 2004.¹⁰⁸ (This may be a hollow threat, at least as far as the EMPGs are concerned, due to planned budget cuts in the program.¹⁰⁹) NIMS requires

¹⁰² NFPA 1600 § 5.7.2.2 (2004 Edition).

¹⁰³ NFPA 1600 § 5.7.3 (2004 Edition).

¹⁰⁴ NFPA 1600 § 5.3 (2004 Edition).

¹⁰⁵ NFPA 1600 § 5.2 (2004 Edition).

¹⁰⁶ National Incident Management System may be accessed on the web at:

<http://www.dhs.gov/interweb/assetlibrary/NIMS-90-web.pdf>

¹⁰⁷ EMPG description on the web at: <http://www.fema.gov/preparedness/empg.shtm>

¹⁰⁸ Homeland Security Presidential Directive 5, § 20 Subject: Management of Domestic Incidents, The White House, February 28, 2003. <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html>

¹⁰⁹ Shaun Waterman, *Analysis: Fear of Being Eclipsed by Terror*, UPI (March 19, 2004). "Of the plethora of federal grants that fund state and local emergency management activities, only one -- the Emergency Management Performance Grant -- has historically covered the wage costs of this personnel-intensive business. The Bush administration's proposed 2005 budget cuts the allocation for that program by 5

emergency operations plans (EOPs), corrective action and mitigation plans, and recovery plans.¹¹⁰ NIMS' requirements for EOPs are rather extensive.

National Incident Management System Suggested Requirements for EOPs¹¹¹

- √ Defines the scope of preparedness and incident management activities necessary for the jurisdiction.
- √ Describe organizational structures, roles and responsibilities, policies, and protocols for providing emergency support.
- √ Facilitate response and short-term recovery activities
- √ Drive decisions long-term prevention and mitigation efforts or risk-based preparedness measures directed at specific hazards.
- √ Be flexible enough for use in all emergencies.
- √ Describe the purpose of the plan, situation and assumptions, concept of operations, organization and assignment of responsibilities, administration and logistics, plan development and maintenance, and authorities and references.
- √ Contain functional annexes, hazard-specific appendices, and a glossary.
- √ Predesignate jurisdictional and/or functional area representatives to the IC or UC to facilitate responsive and collaborative incident management.
- √ Include preincident and postincident public awareness, education, and communications plans and protocols.

NIMS establishes a national industry standard. NIMS frames its mandates as suggestions, using the term "should" rather than "must." The requirement of NFPA 1600 that plans incorporate industry standards, however, renders these voluntary elements

percent, but -- far more damagingly, say critics -- caps the amount that can be spent on salaries at one-quarter of any grant.

"The fact is, if no source of funding is available for these posts, the temptation will always be to save money (by cutting them) and make those (emergency management) duties someone else's responsibility -- give it to the fire department, or the police."

¹¹⁰ NIMS at 36-37.

¹¹¹ NIMS at 36-37.

mandatory. NIMS compliments NFPA 1600, and sets the benchmark for planning. Failure to plan to its requirements may well result in liability.

Since 9/11, states have expanded their statutory schemes to include specific enactments addressing terrorism. In particular, states that list planning requirements frequently have added planning for terrorist events to their laws.¹¹² This is an example of the evolving nature of planning requirements. As experienced emergency managers say, the plan is never final, but rather a “living document.”

C. Failure to Follow the Plan

Assuming that a good plan is in place, failure to follow it in the wake of an emergency may subject the emergency manager to liability. In federal court the response hinges on whether the plan is interpreted as setting down a compulsory course of action. A disaster plan could be construed as a "specific and mandatory" obligation, although it is an internal document with no direct legal consequences for the public. That result may be gotten from *Berkovitz*, which refers to “statute, regulation or policy.”¹¹³ Violating an internal policy, therefore, may give a basis to sue if the policy “leaves no room for implementing official s to exercise independent policy judgment”¹¹⁴

Determining whether a document limits an official's choice or only informs his or her discretionary judgment requires close scrutiny. Disaster plans generally contain a range of substance varying from general to specific. A general tasking for protecting the public (e.g., to the county commissioners) clearly envisages the use of discretion. Conversely, where the plan contains detailed lists of actions, there may be no opportunity

¹¹² See, e.g., Fla. Stat. § 252.34 (2004) emergency management responsibilities, Fla. Stat. § 395.1056 (2004) requiring hospitals to plan for terrorism events.

¹¹³ *Berkovitz* at 536.

¹¹⁴ *Berkovitz* at 547.

to do other than required by the list, except if the plan permits deviation. Some plans have mandatory, automatic protective measures – like evacuating the public. For instance, nuclear power plants classify emergencies employing four-levels. Neighboring areas may include language in their plans that particular measures, like setting off warning sirens or evacuating a given radius in the region of the plant, must automatically occur when the plant gets to the third or fourth level, whether or not any radioactivity been released. Failing negligently to do these things could expose the emergency manager to tort liability.

XI Planning for Special Risks

A. Hazardous Materials Releases

The acts of all responders to emergencies, particularly those involving hazardous materials (HAZMAT) – like a weapons of mass destruction (WMD) event, are closely regulated by both OSHA¹¹⁵ and the Environmental Protection Agency (EPA).¹¹⁶ Emergency management should take steps to ensure that responders understand the applicability of these rules to their activities, and work to make sure that safety mandates are followed. Specific planning requirements apply to these substances.

Both public and private groups have responsibility for first response to a HAZMAT occurrence. Usually, in-plant response teams will be first at industrial incidents. OSHA's rule for Process Safety Management of Highly Hazardous Chemicals

¹¹⁵ Occupational Safety and Health Standards 29 CFR §1910.120 (q) (1998) covers employees who are engaged in emergency response to hazardous substance releases no matter where it occurs except that it does not cover employees engaged in operations specified in paragraphs (a)(1)(i) through (a)(1)(iv) of this section. Nor does it cover those emergency response organizations that have developed and implemented programs equivalent to this paragraph for handling releases of hazardous substances pursuant to section 303 of the Superfund Amendments and Reauthorization Act of 1986 shall be deemed to have met the requirements of this paragraph.

¹¹⁶ Environmental Protection Agency (EPA) 40 CFR § 372.18 (1995) deals with the enforcement and compliance guidelines for toxic chemical release reporting and community right-to-know

mandates these teams. This rule's purpose is preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals.¹¹⁷ On the public side, for spills or airborne releases occurring on public property like highways or exceeding the boundaries of an industrial facility, the first response organization is normally the fire service. The highly dangerous nature of hazardous materials requires sophisticated technical expertise of responders.¹¹⁸

1. Planning Structure for Extremely Hazardous Substances

The requirements of the Emergency Planning and Right to Know Act (EPCRA) mandate a separate structure for planning for extremely hazardous substances (EHS) releases. EPCRA is part of Title III of the Superfund Amendment and Reauthorization Act of 1986 (SARA Title III).¹¹⁹ States frequently enact EPCRA's requirements into their own laws to provide a supporting state structure for the program.¹²⁰

EPCRA creates a structure consisting of Local Emergency Planning Committees (LEPCs), which report to, and are lesser parts of, State Emergency Response Commissions (SERCs). The LEPC also has specific roles that are directed by law, some of which coincide with the local emergency management agency's (EMA) duties.

2. State Emergency Response Commission and Local Emergency Planning Committee Duties

The SERC has four responsibilities. First, the SERC promotes emergency planning and provides information about potential chemical hazards statewide. Second,

¹¹⁷ 29 CFR § 1910.119 deals with preventing or minimizing the consequence of catastrophic release of hazardous materials in the industrial setting.

¹¹⁸ See generally FEDERAL EMERGENCY MANAGEMENT AGENCY - UNITED STATES FIRE ADMINISTRATION, HAZARDOUS MATERIALS RESPONSE TECHNOLOGY ASSESSMENT (2000), which discusses various technologies for control and mitigation of HAZMAT incidents, including training required for their utilization.

¹¹⁹ 42 United States Code §§ 11001-11050 (2004).

the SERC helps the state to obey the obligations imposed by SARA. Third, the SERC sets up and oversees the operation of state emergency planning districts. Fourth, the SERC collects and issues information needed for successful emergency response planning.

Sara requires the LEPC to do the following:

1. Prepare an EHS release plan.
2. Revise the plan yearly.
3. Evaluate resources needed to develop, implement and exercise the plan.
4. Make recommendations for additional needed resources.
5. Submit the plan to the SERC.¹²¹

3. LEPC and Local EMA Interface

In contrast to the LEPC, local emergency management agencies are clearly part of local government. As mentioned, the LEPC's planning requirement under EPCRA is expressly limited to SARA Title III chemical discharges. The LEPC's plan cannot, however, stand alone, for LEPCs are not the only bodies charged by law with planning for emergencies. NFPA 1600 and state laws require local emergency management to prepare and keep current a local disaster emergency plan for its area.

Under the all hazards approach, emergency management must consider possible emergencies concerning HAZMAT. The emergency operations plan (EOP) must include a current appendix for response to HAZMAT events. Possible HAZMAT emergencies incorporate the extremely hazardous materials covered by SARA Title III, as well as an assortment of other substances. Required planning Compliance Requirements for local

¹²⁰ See, e.g., Indiana Code 13-25-2 (2004).

¹²¹ 42 USC § 11003.

emergency management will typically include submitting the local EOP, in its entirety, including the SARA Title III plan as a hazard-specific appendix.

The overlapping planning responsibilities of LEPCs and emergency management may occasionally result in some doubling of effort, and even disputes as to the proper approaches to the nine planning elements required of LEPCs. In order to join together the planning responsibilities of local emergency management and those of LEPCs, it makes sense for the SARA Title III plan should be a hazard-specific appendix to the EOP. The SARA Title III plan continues to be the LEPC's responsibility. As an appendix, the SARA Title III plan should make use of the rest of the EOP. Subjects required to be part of the LEPC plan like community notification, evacuation, training, and exercising should be referred to the proper portions of the EOP, rather than duplicated in the LEPC's plan.

The shared goals of saving lives and protecting property unite local emergency management and LEPCs, just as they link SEMA and the ERC. All involved must, however, work with both mutual deference and awareness of the legal limits on local emergency management and LEPCs. Working carefully together, local emergency management and LEPCs can come together to make certain that the best feasible steps have been taken to plan for potential SARA Title III Extra Hazardous Substances releases.

B. Terrorism

Terrorism is an unfortunate danger of modern life. Some emergency managers believe, in fact, that terrorism has become the single hazard tail that wags the all hazards dog of their professional life. Requirements for terrorism planning, however, are not

new. Indeed, they pre-date the September 11, 2001 attacks by a number of years. In 1995, President Clinton issued Presidential Decision Directives 39,¹²² which detailed ways of dealing with aspects terrorism, including planning. FEMA promulgated the Federal Response Plan Terrorism Incident Annex¹²³ in 1999 to make sure that the FRP would provide a structure to fully respond to terrorism events.

Congress, in the Homeland Security Act of 2002, Public Law 107-296 (HS Act),¹²⁴ requires the Department of Homeland Security to build a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to terrorist attacks and disasters; and consolidate existing Federal Government emergency response plans into a single, coordinated national response plan.¹²⁵ On February 28, 2003 President Bush issued Homeland Security Presidential Directive 5 (HSPD 5).¹²⁶ HSPD 5's policy states that

to prevent, prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies, the United States Government shall establish a single, comprehensive approach to domestic incident management. The objective of the United States Government is to ensure that all levels of government across the Nation have the capability to work efficiently and effectively together, using a national approach to domestic incident management.¹²⁷

¹²² Presidential Decision Directive 39, U.S. Policy on Counterterrorism (June 21, 1995)

¹²³ FEDERAL RESPONSE PLAN TERRORISM INCIDENT ANNEX, *available at* <http://www.fema.gov/pdf/rrr/frp/frptem.pdf> (1999). "The purpose of this annex is to ensure that the Federal Response Plan (FRP) is adequate to respond to the consequences of terrorism within the United States, including terrorism involving WMD." *Id.* at 1.

¹²⁴ Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2002) (enacted) [hereinafter HS Act].

¹²⁵ HS Act §§ 501(5) and (6).

¹²⁶ Homeland Security Presidential Directive 5, Subject: Management of Domestic Incidents, The White House, February 28, 2003. <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html>

¹²⁷ HSPD 5 § 3.

To accomplish the preparedness goals of that policy, DHS directs in the NIMS that planning be performed for all types of incidents, including acts of terrorism.¹²⁸ The consequences of failing to plan as directed by the HS Act are discussed above.

C. School Violence

In the wake of events like the Columbine High School massacre in Colorado, the federal government enacted the Safe and Drug-Free Schools and Communities Act of 1994 (Safe Schools Act).¹²⁹ The Safe School Act requires schools to develop appropriate school safety plans that will help control student-on-student violence. The Safe Schools Act is a federal grant program that focuses on preventing violence and drug abuse in schools. These goals are achieved through federal aid to states so that they can make grants to local educational agencies and community organizations. Federal money also goes to support private, non-profit organizations and colleges and universities that develop anti-violence and anti-drug initiatives.

Unfortunately, as frequently happens when funds become available to fulfill a mandate, some unscrupulous contractors came on the scene touting questionable school safety plans. Comparing these “plans” often revealed them to be “one size fits all” documents. A form plan that does not take into account the particular characteristics of a school is an inadequate plan. The potential liabilities that flow from embracing an inadequate plan are discussed above.

XII. Training and Exercising to the Plan

Typically, training and exercising are matters for which LEPCs may legitimately

¹²⁸ NIMS at 1, 35-37 (planning elements).

¹²⁹ Safe and Drug-Free Schools and Communities Act of 1994 (Safe Schools Act) 20 USC §§ 7101 *et. seq* (2004).

expend funds. States often require LEPCs to include training¹³⁰ under and exercising¹³¹ in their plans.

A. Training Responsibilities

The PPA often sets objectives for training such as: develop and deliver training to individuals and groups with important emergency management duties, focusing on deficit in ability related to identified risks. Such training is often required to be accomplished at all levels of government as well as the private sector, and to include "on the job" training for EMA managers from unaffected areas during genuine emergencies.

For every year, the CA contains specific requisites that help the state, and its local units of government, get closer to the objectives specified in the PPA. The training specifications of the CA often set training objectives like these: continue to train a state's quick reaction team, provide support to state agencies in creation of standard operating procedures, conduct training for state and local agencies in specific hazards such as earthquakes or hurricanes, deliver training through SEMA, develop new training, provide a robust public awareness program, and accomplish SARA Title III training. Required training Compliance Requirements for local emergency management organizations may include: one SEMA training course annually for each staff member for whom the federal government provides salary reimbursement.

B. Exercising Responsibilities

EPCRA requires that the LEPC's plan must be exercised at least once annually. A state's ERC may create a policy permitting the exercise may be a tabletop, functional or full-scale exercise. The ERC may require a 30-day advance notification and brief

¹³⁰ See, e.g., Indiana Code 13-25-2-5(c)(8) (2004).

¹³¹ See, e.g., Indiana Code 13-25-2-5(c)(9) (2004).

description of the exercise to be conducted. Sometimes, an ERC will permit an actual event to be used to substitute for an exercise.

For local emergency management, the PPA may set exercise objectives such as these: (1) establish a comprehensive exercise program to test and assess all aspects of the state's emergency management system, including federal programs, such as the Radiological Emergency Planning (REP), Chemical Stockpile Emergency Preparedness (CSEP), Earthquake (EQ), HAZMAT, Terrorism, etc.; (2) conduct statewide tabletop exercises that incorporate federal, state and local response forces; and (3) stress assessment and correction of identified shortcomings.

A CA may require exercises during a given federal fiscal year like these: participate in federally created exercises that evaluate federal response planning concepts, observe all exercises and create a procedure to correct shortcomings, and require that all participants in the federal reimbursement program meet the exercise standards set by FEMA including rectification of deficiencies. Required exercise Compliance Requirements for local emergency management may include: one "real world" event or one full scale exercise or one functional exercise or two table top exercises. All events or exercises must meet set criteria. Working together, local emergency management and LEPCs should be able to combine their requirements in a mutual exercise that will satisfy both the ERC and SEMA.

C. Revising the Plan

Exercises exist to test the plan and help improve it. As indicated above, one of FEMA's most consistent requirements is a methodology to identify and correct shortcomings revealed by the exercise. To that end, immediately following exercises a

“hot wash” debriefing typically takes place. The hot wash allows lessons learned that are immediately in mind to be recorded. Later analysis of the exercise will allow for a more complete and detailed examination of where the plan worked correctly and where it needs improvement. The failure to apply lessons learned from exercises in the form of revision to the plan and added training for those people with deficiencies may result in liability if the uncorrected deficiencies result in property damage or personal injury in a subsequent actual event.

XIII. Declaring an Emergency

Many types of events are characterized as emergencies, from a one-car accident with minor injuries and property injury to a hurricane or terrorist attack. Clearly, the resources necessary to respond to an event vary considerably depending on its type, nature, and extent. Happily, the vast majority of incidents are closer to the one-car accident end of the spectrum than to a major disaster. In most instances, therefore, assistance from beyond a jurisdiction’s borders is not required.

The emergency manager knows the extent of resources locally available to him or her. In compliance with NFPA 1600 and NIMS, there will also be in place mutual aid agreements to obtain help from neighboring jurisdictions, which will be most able to respond rapidly. When the large event occurs, however, the emergency manager knows how long readily obtainable resources will last. There is not a requirement that every available resource be exhausted before help from higher levels of government may be obtained. As a general matter, local capabilities must be in either actual or imminent danger of being overwhelmed before a successful request for aid may be made.

One need not wait for an event to occur to ask for help. The timing of a request for assistance from the next higher level of government revolves around whether the unit

of government any part thereof is suffering from or is in imminent danger of suffering a natural or manmade emergency or disaster. (See Appendix A for a model municipal declaration procedure.)

The procedure for asking for help from the next higher level of government is similar, whether the requestor is at the local or state level. The requirements for both include writing a declaration, which must contain several elements.

1. A statement that a disaster is current or imminent.
2. Description of the disaster event.
3. A statement that resources are or soon will be exhausted.
4. The extent of damage.
5. The types of assistance requested.
6. A request for assistance.

The request must be made through the proper channels. Local government may request help from the state. The state must be the entity that asks the federal government for assistance.

A. Federal Support to States

FEMA processes a Governor's request for Presidential disaster or emergency declarations under the Stafford Act. Governors submit these requests to FEMA indicating the extent of damage and the types of Federal assistance required. FEMA then forwards the Governor's request to the White House, simultaneously notifying the Secretary of Homeland Security, along with a recommended course of action. Concurrent with a Presidential declaration of a major disaster or emergency and official appointment of an FCO, FEMA designates the types of assistance to be made available and the counties

eligible to receive assistance. In large-scale or catastrophic events, the declaration process can be expedited. In some cases, the Stafford Act authorizes declarations without a Governor's request.¹³²

B. Effect of Declaring an Emergency

Declaring an emergency activates the disaster response and recovery aspects of the disaster emergency plans applicable to the affected political subdivision or area. Additionally it typically will activate specific powers for the head of government to take a variety of actions for the duration of the declaration. These may include any of the following:

1. Deployment and use of any forces to which the plan or plans apply,
2. Use or distribution of any supplies, equipment, materials, and facilities assembled, stockpiled, or arranged to be made available under any law relating to disaster emergencies,
3. During the continuance of any state of disaster emergency at the state level, the governor is commander-in-chief of the organized and unorganized militia and of all other forces available for emergency duty,
4. Suspend the provisions of any regulatory statute prescribing the procedures for conduct of government business, or the orders, rules, or regulations of any agency if strict compliance with any of these provisions would in any way prevent, hinder, or delay necessary action in coping with the emergency.
5. Use all available resources of the unit of government reasonably necessary to cope with the disaster emergency.

¹³² This information is from the National Response Plan, Draft #2 at 61 (April 28, 2004).

6. Transfer the direction, personnel, or functions of departments and agencies or units for performing or facilitating emergency services.
7. Subject to any applicable requirements for compensation, commandeer or use any private property if the governor finds this action necessary to cope with the disaster emergency.
8. Assist in the evacuation of all or part of the population from any stricken or threatened area in the jurisdiction if the head of the unit of government considers this action necessary for the preservation of life or other disaster mitigation, response, or recovery.
9. Prescribe routes, modes of transportation, and destinations in connection with evacuation.
10. Control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises in the area.
11. Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles.
12. Make provision for the availability and use of temporary emergency housing.
13. At the state level, allow persons who hold a license to practice medicine, dentistry, pharmacy, nursing, engineering, and similar other professions as may be specified by the governor to practice their respective profession in the state during the period of the state of emergency if the state in which a person's license was issued has a mutual aid compact for emergency management with the state.

14. Give specific authority to allocate drugs, foodstuffs, and other essential materials and services.¹³³

C. When to Declare

Generally, an emergency should be declared when doing so will benefit the jurisdiction. In most states, the head of the unit of government makes the declaration, with advice from the emergency manager. An unnecessary declaration may be the source of liability. This would be most likely if the declaration were clearly unneeded and the special powers that accrue to the head of the unit of government, such as ignoring normal contracting requirements or taking private property, were used in an objectionable way. This is an unlikely scenario, for to succeed, a suit would need to prove that the declarer acted in a grossly negligent or malicious manner. A delayed declaration could result in hindering prompt assistance from higher jurisdictions that possess manpower and equipment that could prevent a bad situation from further deteriorating. If the delay resulted in property damage, personal injury, or death, liability might result.

As discussed above, different states approach the matter of emergency management immunities in their own ways. In some states, a delay in declaring will be accompanied by a postponement of immunities for the emergency management team. In other states, in contrast, all activities connected with emergency management, whatever phase may be involved, are protected by immunity statutes.

XIV. Legal Issues in Evacuation

One of the most challenging aspects of emergency response is the fact that often a decision must be made between options that are universally unattractive. Sometimes,

¹³³ This list is adapted from Indiana Code 10-14-3-12 (2004).

different plaintiffs will see the same action as wrong for the opposite reasons. Evacuation is a good example of this phenomenon.

Legal authorities for declaring an evacuation are found in state and local emergency management acts and ordinances. Such laws often grant the head of government the authority to force people to evacuate their homes and businesses. Often, evacuation may be the best protective step that can be taken. Unfortunately, evacuation is a very expensive and troublesome step for people and businesses. Further, it incorporates possible safety risks. Evacuation illustrates the fundamental challenge to the person making choices during responses: reacting successfully to the situation, while steering clear of needless disturbance to daily existence. Public policy decisions like deciding whether and how broadly to evacuate are the sort of action that should typically be covered by discretionary function immunity.

Sometimes, people refuse to evacuate. Options at that point are not attractive. Does one spend vital time trying to convince the recalcitrant resident to evacuate when there are others to be saved? Does one spend limited resources on arresting and confining the person (risking a potential suit for false arrest)? One effective approach has been to require those refusing to evacuate to fill in a “next of kin” form so that the government may inform their survivors after they die (the implication is that failing to leave will render death inevitable). The form also should contain waiver of liability language so that the government will not be responsible for the person’s death.

One reason that people may not wish to leave is that their companion animals may not accompany them to Red Cross shelters. Many jurisdictions are addressing this issue by making advance agreements for assistance with veterinarians to care for such animals.

Sometimes, it is necessary to reenter the scene for vital tasks during the emergency. At this point, this nature and criticality of the task must be evaluated to ascertain whether it is worthwhile to risk lives and legal liability to permit such action. To be on the safe side from a legal perspective, only when the danger has passed should reentry be allowed.

XV. Legal Issues in the Recovery Phase of Emergency Management

The legal requirements for ending a state of emergency may be found in emergency management laws and ordinances. Typically, the event is terminated by action of law after a certain period of time. Renewal of the state of emergency may be possible by a simple declaration by the head of government, or it might take ratification by the legislative body.

There are three varieties of federal major disaster recovery assistance:

1. Mitigation,
2. Individual Assistance, which applies to individuals and households, and
3. Public Assistance, which applies to infrastructure.

If a Small Business Administration emergency has been declared, low interest loans may be available to businesses.

The interested reader should refer to additional very lengthy federal publications covering this issue. The answers to basic questions and referral to more extensive materials may be found on the FEMA web site at:

<http://www.fema.gov/rrr/qanda.shtm>

XVI. Transitioning from Recovery to Mitigation

Emergency management has a legal obligation to ensure that lessons learned from an event are incorporated into mitigation.

NIMS requires Corrective Action and Mitigation, as well as Recovery Plans, new developments that go beyond the traditional emergency operations plan.

Corrective action plans are intended to put into practice measures based on lessons learned from actual incidents or training and exercises. Mitigation plans explain actions that can be taken prior to, during, or after an event to reduce or eliminate risks to persons or property or to lessen the actual or possible effects or consequences of an incident.

Recovery plans explain measures beyond quick damage assessment and any that may be needed to supply urgent life support for victims. Long-term recovery planning entails identifying strategic priorities for restoration, improvement, and growth. This includes rebuilding to withstand future calamities. The discussion above of legal steps that may be taken in the planning stage is relevant at this point as well.

XVII. Conclusion

Emergency managers must comply with a wide variety of legal responsibilities. They spring from federal and state statutes, local ordinances, case law, and policies. Some of these apply specifically to emergency management, having been drafted specifically for the discipline. Further obligations apply to all government managers, and still other standards pertain to all management personnel.

Avoidance of liability requires creating a pro-active partnership with legal advisors that runs through all phases of emergency management. In mitigation, updating

fire and building codes to address local hazards can mean a less severe effect from a disaster. During preparedness, attorneys can help draft plans, evaluate training standards, and monitor exercises for potential legal issues, as well as assuring that plan revisions from lessons learned are sufficient from a legal standpoint. In a response, the attorney may advise the leader of the unit of government and emergency manager on potential legal effects of various options. In recovery, the lawyer can help to make sure that expenses are properly documented and that the transition into mitigation is properly performed. Only when emergency managers and the attorneys who advise them understand one another's responsibilities and contributions can they team up together to diminish the potential for litigation.

Appendix A: Model Local Emergency Management Ordinance

Note: This ordinance is found in: Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487 (2000).

LOCAL DISASTER OR EMERGENCY ORDINANCE

Section 1-0101. Intent.

It is the intent of this article to provide the necessary organization, powers, and authority to enable the timely and effective use of all available City resources to prepare for, respond to and recover from emergencies and/or disasters, whether natural or man made, likely to affect the health, security, safety, or property of the inhabitants of the City. It is intended to grant as broad of power as permitted.

Section 1-0102. Definitions.

(1) Civil emergency: Conditions of unrest including, but not limited to riot, civil disturbance, unlawful assembly, hostile military or paramilitary action, war, terrorism, or sabotage.

(2) Disaster: The occurrence of widespread or severe damage, injury, or loss of life or property resulting from any natural or manmade cause including but not limited to flood, fire, cyclone, tornado, earthquake, severe high or low temperatures, blizzard, landslide, mudslide, hurricane, building or structural collapse, high water table, water pollution, air pollution, epidemic, riot, drought, utility emergency, sudden and severe energy shortages, volcano, earthquake, snow, ice, windstorm, waves, hazardous substance spills, chemical or petroleum spills, biological material release or spill, radiological release or spill, structural failure, public health emergency or accidents.

(3) Emergency: Any occurrence or threat of natural or man made disaster of a major proportion in which the safety and welfare of the inhabitants of the City or their property are jeopardized or placed at extreme peril that timely action may avert or minimize.

(4) Utility emergency: Any condition which endangers or threatens to endanger the safety, potability, availability, transmission, distribution, treatment, or storage of water, natural gas, fuel or electricity through their respective systems.

Section 1-0103. Authorization to issue declaration of emergency or disaster.

The Mayor is authorized to declare a local emergency or disaster if the Mayor finds that the City or any part thereof is suffering from or is in imminent danger of suffering a natural or manmade emergency or disaster.

Section 1-0104. Filing of declaration.

Any declaration of an emergency or disaster by the mayor shall be promptly filed with the City Auditor and the public shall be notified through general publicity of said declaration.

Section 1-0105. Term of declaration.

The declaration of a local emergency or disaster shall be in effect as determined by the Mayor for a period of up to thirty (30) days. This period may be extended only upon the approval of the City Council.

Section 1-0106. Succession of Authority.

If the Mayor is unavailable, the President of the City Council shall have the same authority as is granted to the Mayor hereunder, followed by the Vice President of the City Council, the Chair of the Public Safety Committee, the Chair of the Public Service

Committee, the Chair of the Finance Committee, the Chair of the Urban Development Committee, and then followed by the next most senior member of the City Council.

Section 1-0107. Powers.

Upon the issuance of an emergency or disaster declaration, the Mayor may exercise the following powers, including, but not limited to:

(1) an order establishing a curfew during such hours of the days or nights and affecting such categories of persons as may be designated.

(2) an order to direct and compel the evacuation of all or a part of the population from any stricken or threatened areas within the City if the Mayor deems this action is necessary for the preservation of life, property or other disaster or emergency mitigation, response or recovery activities and to prescribe routes, modes of transportation and destination in connection with an evacuation.

(3) an order controlling, restricting, allocating or regulating the use, sale, production or distribution of food, water, fuel, clothing, and other commodities, materials, goods, services and resources.

(4) an order requiring the closing of businesses deemed nonessential by the Mayor.

(5) an order suspending or limiting the sale, distribution, dispensing, or transportation of alcoholic beverages, firearms, explosives and/or combustible products and requiring the closing of those businesses or parts of businesses insofar as the sale, distribution, dispensing or transportation of these items are concerned.

(6) an order prohibiting the sale or distribution within the City of any products which, the mayor determines, could be employed in a manner that would constitute a danger to public health or safety.

(7) an order closing any streets, alleys, sidewalks, public parks, public ways or other public places.

(8) an order closing the access to any buildings, streets, alleys, sidewalks or other public or private places.

(9) establish and control routes of transportation ingress or egress.

(10) control ingress and egress from a disaster or emergency area.

(11) subject to requirements for compensation, commandeer or utilize private property if necessary to cope with emergency or disaster conditions.

(12) appropriate and expend funds, exclude contracts, authorize the obtaining and acquisition of property, equipment, services, supplies and materials without the strict compliance with procurement regulations or procedures.

(13) transfer the direction, personnel or functions of City departments and agencies for the purposes of performing or facilitating emergency or disaster services.

(14) utilize all available resources of the City as may be reasonably necessary to cope with the emergency or disaster whether in preparation for, response to or recovery from an emergency or disaster.

(15) suspend or modify the provisions of any ordinance if strict compliance thereof would in any way prevent, hinder or delay necessary action in coping with any emergency or disaster.

(16) accept services, gifts, grants and loans, equipment, supplies and materials whether from private, nonprofit or governmental sources.

(17) temporarily suspend, limit, cancel, postpone, convene, schedule, or continue all meetings of the City Council, and any City committee, commission, board, authority or other City body as deemed appropriate by the Mayor.

(18) suspend or limit the use of the City's water resources.

(19) suspend or limit the burning of any items of property within the City limits and up to two (2) miles outside the corporate City limits.

(20) requiring emergency services of any City officer or employee. If regular City forces are determined to be inadequate, then to acquire the services of such other personnel as are available, including citizen volunteers. All duly authorized persons rendering emergency services shall be entitled to the privileges and immunities as provided by state or local law.

(21) hire or contract for construction, engineering, architectural, building, electrical, plumbing, and/or other professional or construction services essential to continue the activities of the City without the advertising of bids or compliance with procurement requirements.

(22) make application for local, state or federal assistance.

(23) terminate or suspend any process, operation, machine, device or event that is or may negatively impact the health, safety and welfare of persons or property within the City of Grand Forks.

(24) delegate authority to such City officials as the Mayor determines reasonably necessary or expedient.

(25) requiring the continuation, termination, disconnection or suspension of natural gas, electric power, water, sewer or other public utilities.

(26) close or cancel the use of any municipally owned or operated building or other public facility.

(27) prescribe routes, modes of transportation and destination in connection with any evacuation.

(28) exercise such powers and functions in light of the exigencies of emergency or disaster including the waiving of compliance with any time consuming procedures and formalities, including notices, as maybe prescribed by law pertaining thereto.

(29) issue any and all such other orders or undertake such other functions and activities as the Mayor reasonably believes is required to protect the health, safety, welfare of persons or property within the City of Grand Forks or to otherwise preserve the public peace or abate, clean up, or mitigate the effects of any emergency or disaster.

Section 1-0108. Enforcement of Orders.

A. The members of the police department and such other law enforcement and peace officers as may be authorized by the Mayor are further authorized and directed to enforce the orders, rules and regulations made or issued pursuant to this chapter.

B. During the period of a declared emergency or disaster, a person shall not:

(1) enter or remain upon the premises of any establishment not open for business to the general public, unless such person is the owner or authorized agent of the establishment.

(2) violate any of the orders duly issued by the Mayor or authorized personnel.

(3) willfully obstruct, hinder, or delay any duly authorized City officer, employee or volunteer in the enforcement or exercise of the provisions of this chapter, or of the undertaking of any activity pursuant to this chapter.

Section 1-0109. Authority to enter a property.

During the period of a declared emergency or disaster, a City employee or authorized agent may enter onto or upon private property if the employee or authorized agent has reasonable grounds to believe that there is a true emergency and an immediate need for assistance for the protection of life or property, and that entering onto the private land will allow the person to take such steps to alleviate or minimize the emergency or disaster or to prevent or minimize danger to lives or property from the declared emergency or disaster.

Section 1-0110. Location of governing body meetings and departments.

(1) Whenever an emergency or disaster makes it imprudent or impossible to conduct the affairs of the City at its regular locations, the governing body may meet at any place, inside or outside the city limits. Any temporary disaster meeting location for the governing body shall continue until a new location is established or until the emergency or disaster is terminated and the governing body is able to return to its normal location.

(2) Whenever a disaster makes it imprudent or impossible to conduct the affairs of any department of the City at its regular location, such department may conduct its business at any place, inside or outside the city limits and may remain at the temporary location until the emergency or disaster is declared ended or until the department is able to return to its normal location.

(3) Any official act or meeting required to be performed at any regular location of the governing body or of its departments is valid when performed at any temporary location under this section.

(4) The provisions of this section shall apply to all executive, legislative and judicial branches, powers and functions conferred upon the city and its offices, employees, and authorized agents.

Section 1-0111. Mutual aid agreements.

(1) The Mayor may, on behalf of the City, enter into such reciprocal aid, mutual aid, joint powers agreements, intergovernmental assistance agreements or other compacts or plans with other governmental entities for the protection of life and property. Such agreements may include the furnishing or exchange of supplies, equipment, facilities, personnel and/or services.

(2) The governing body or any of its committees, commissions or authorities may exercise such powers and functions in light of the exigencies of the emergency or disaster and may waive compliance with time consuming procedures and formalities prescribed by law pertaining thereto.

(3) The foregoing shall apply to all executive, legislative and judicial powers and functions conferred upon the City and its officers, employees and authorized agents.

Section 1-0112. Severability.

The provisions of this chapter are declared to be severable, and if any section, sentence, clause or phrase of this chapter shall for any reason be held to be invalid or unconstitutional or if the application of this chapter to any person or circumstance is held to be invalid or unconstitutional, such holding shall not affect the validity of the remaining sections, sentences, clauses and/or phrases of this ordinance.

Appendix B: List of Acronyms

| | |
|----------|---|
| ANSI | American National Standards Institute |
| CA | Cooperative Agreement |
| CAR | Capability Assessment for Readiness |
| CSEP | Chemical Stockpile Emergency Preparedness |
| DHS | Department of Homeland Security |
| EHS | extremely hazardous substances |
| EMAP | Emergency Management Accreditation Program |
| EMA | emergency management agency |
| EMAC | Emergency Management Assistance Compact |
| EMPG | Emergency Management Performance Grants |
| EOP | emergency operations plan |
| EPA | Environmental Protection Agency |
| EQ | earthquake |
| FECA | Federal Employees Compensation Act |
| FEMA | Federal Emergency Management Agency |
| FTCA | Federal Tort Claims Act |
| HAZMAT | hazardous materials |
| HAZWOPER | Hazardous Waste Operations and Emergency Response |
| HS Act | Homeland Security Act of 2002 |
| HSPD 5 | Homeland Security Presidential Directive 5 |
| IC | incident commander |
| ICS | Incident Command System |
| LEPC | Local Emergency Planning Committee |
| MAA | mutual aid agreement |
| NEMA | National Emergency Management Association |
| NIMS | National Incident Management System |
| NFPA | National Fire Protection Association |
| OSHA | Occupational Safety and Health Administration |
| PPA | Performance Partnership Agreement |

| | |
|----------------|---|
| PPE | personal protective equipment |
| REP | Radiological Emergency Planning |
| SARA Title III | Superfund Amendment and Reauthorization Act of 1986 Title III |
| SOG | standard operating guideline |
| SOP | standard operating procedure |
| SEMS | Standardized Emergency Management System |
| SERC | State Emergency Response Commission |
| VPA | Volunteer Protection Act of 1997 |
| WMD | weapons of mass destruction |

Appendix C: Additional Recommended Reading

Baltic, Scott *ICS For Everyone*, 3 Homeland Preparedness Professional No. 1 (January/February 2004)

Bea, Keith *Emergency Management and Homeland Security Statutory Authorities in the States, District of Columbia, and Insular Areas: A Summary*, Congressional Research Service, Library of Congress, Order Code RL32287 (March 17, 2004)

Bea, Keith *Emergency Management Preparedness Standards: Overview and Options for Congress*, Congressional Research Service, Library of Congress, Order Code RL32520 (August 12, 2004)

Comfort, Louise K. (ed.) *Managing Disasters: Strategies and Policy Perspectives*. Durham, NC: Duke University Press (1988)

Haddow and Bullock *Introduction to Emergency Management*, Butterworth-Heinemann (2003)

Nicholson, William C. *Emergency Response and Emergency Management Law: Cases and Materials*, Charles C. Thomas Publisher, Ltd. (2003)

Nicholson, William C. *Homeland Security Law and Policy*, Charles C. Thomas Publisher, Ltd. (2004 in press)

Nicholson, William C. "Integrating Local, State and Federal Responders and Emergency Management: New Packaging and New Controls," *Journal of Emergency Management*, Vol.1, No. 4 fall, 2003

Nicholson, William C. "Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response ("HAZWOPER") Standard, Standard Operating Procedures, Mutual Aid and the Incident Management System," part of *The American Bar Association's 30th National Spring Conference on the Environment - Combating Terrorism in the Environmental Trenches* Widener Symposium Law Journal, Vol. 9, No. 2, 295 (2003)

Nicholson, William C. "National Incident Management System (NIMS) Basics: What Managers Need to Know," *Best Practices in Emergency Services*, Vol. 7, No. 7, 76 (July 2004)

Platt, Rutherford H. *Disasters and Democracy*, Island Press (1999)

Rubin, Claire B., Cumming, William, and Renda-Tanali, Irmak. *Report: Terrorism Time Line: Major Focusing Events and Their U.S. Outcomes (1993-2003); Chart: Terrorism Time Line, version 2.*, (June 2003) URL: www.disaster-timeline.com.

Sylves, Richard T. and William L. Waugh, Jr. (Eds.) *Disaster Management in the U.S. and Canada*, Charles C. Thomas (1996)

The 9/11 Commission Report, W.W. Norton (2004)

Waugh, William L. Jr. *The "All-Hazards" Approach Must be Continued*, 2 J. of Emergency Management No. 1 (Fall 2003)