

Public Health Emergency Law

CDC Foundational Course
for Front-Line Practitioners
Version 3.0

Developed by the
Public Health Law Program
U.S. Centers for Disease Control and Prevention



Public Health Emergency Law: Course Overview

- Unit 1: Introduction to Emergency Management in the Federal System
- Unit 2: Emergency Powers: Protection of Persons
- Unit 3: Emergency Powers: Property and Volunteers



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Unit 3
Emergency Powers:
Property and Volunteers



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Unit 3 Objectives

By the end of this unit, participants will understand basic legal principles applicable when government:

1. Exercises emergency power over private property
2. Protects the public from dangerous or contaminated private property
3. Takes control of, uses, and allocates privately owned facilities, equipment, materials, and supplies
4. Recruits and manages emergency volunteers, and addresses liability concerns



Objective 3.1

Understand basic legal principles applicable when government exercises emergency power over private property



Property Issues Arise When:

- A building is the probable initial source of disease
- Livestock, food or drugs are (or are suspected to be) diseased or contaminated
- Shortages occur in medical equipment, drugs, vaccines
- Temporary facilities are needed to:
 - Accommodate a “surge” in patients
 - Provide housing for responders



Range of Government Powers Over Property

- In appropriate situations, local, state, and federal agencies can:
 - Close / prohibit access to structures, land, and airspace
 - Confiscate and destroy property, including animals, birds, and crops
 - Commandeer and use facilities, equipment, and supplies
 - Regulate the use of property



Range of Government Powers Over Property (cont.)

BUT:

- What specific *measures* are authorized?
 - For federal officials
 - For state / local officials
- What legal *procedures* must be followed?
 - Due process
 - Special statutory procedures
- When must the government pay *compensation*?



Types of Property Measures

- Access Control: to close, confiscate, deny access to, evacuate people from, or prevent the sale or use of real or personal property because it is dangerous, or because of a police investigation
- Government Use: to take or use private property in order to respond to an emergency

The law treats “access control” and “use” differently



Source of Authority: Controlling Access to Property

- State police power:
 - General authority to take steps necessary to protect the public from unsafe conditions
 - Applies to closing, condemning, destroying, confiscating, and regulating (including licensing)
- Federal regulation:
 - Based on authority over interstate commerce
 - Power to impose conditions on spending for public welfare



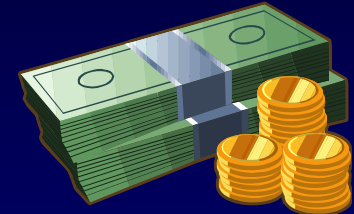
Constitutional Limits on Government Interference with Property Rights

- U.S. Constitution, 5th Amendment
 - Due Process Clause: “nor be deprived of life, liberty, or property, without due process of law”
 - Takings Clause: “...nor shall private property be taken for public use, without just compensation”
 - Made applicable to the States by 14th amendment
- Apply both during and absent a declared emergency



Key Issue:

When Must Government Pay the Property Owner?



General Rule:

- Government need not pay owner when restricting public from access to or use of dangerous property (the property creates a public nuisance)

BUT

- Government must pay owner when using private property for a governmental purpose

Caution: There are exceptions to the general rule!



Objective 3.2

Understand basic legal principles applicable when government protects the public from dangerous or contaminated private property



Closing Facilities and Impounding Property

- A state or local health department can (even in absence of emergency):
 - Issue an administrative public health order to close a facility or impound property
 - e.g., close restaurants for unsanitary conditions
 - Close a facility as a public nuisance
 - Same power is used to condemn a property as unsafe after fire, earthquake, storm damage



Closing Facilities and Impounding Property: by State / Local Public Health

- Procedures for public health orders are specified by state law
- Facility is closed / property impounded
 - Until public health investigation concludes and problem or exposure resolved
 - e.g., Florida building where anthrax was found in 2001 was closed for over 5 years
- NOTE: Public health officials are exercising the state's police power



Closing Facilities and Impounding Property: by Law Enforcement

- Law enforcement and building officials also can require temporary closure of facilities:
 - As unsafe, for as long as the facility may endanger the public
 - For purposes of criminal investigation (e.g., criminal investigations & seizures of meth labs)
- NOTE: Law enforcement officials also are exercising the state's police power



Closing, Impounding, Destroying Property: Rights and Procedures

- In general, compensation is not provided to owner
 - Theory: owner is responsible for keeping own property safe; suffers risk of loss if it is not
 - But: there are statutory exceptions requiring compensation in some areas, and recent court decisions may expand compensable “takings”
- Owner can challenge action in court
 - Due process hearing after government takes possession
 - Damages could be awarded to property owner if the closing is shown to be unjustifiable



Management of Private Property

Colorado Example:

“the power. . .[t]o **impound** any vegetables and other edible crops and meat and animal products intended for and unfit for human consumption, and, upon five days' notice and after affording reasonable opportunity for a hearing to the interested parties, to **condemn and destroy** the same if deemed necessary for the protection of the public health.”
(emphasis added)



Reopening a Facility Closed for Public Health Purposes

- Agency that issued the closure order:
 - Determines that facility no longer poses a threat to public health – it is “safe” or “acceptable”
 - Rescinds the closure order
- Other agencies may assert role
 - EPA may assist if threat arises from unsafe levels of toxins
 - Agency for Toxic Substances and Disease Registry
- Issue: Potential liability if reopened facility is unsafe?



Use of Non-Emergency Powers in the Emergency Environment

- “Non-emergency” government powers may provide authority during an emergency to address:
 - Adulteration of foodstuffs
 - Safety of agricultural products
 - Drug safety
 - Agricultural control
 - Chemicals and toxic substances
 - Abatement of nuisances under common law
- Check for availability of emergency / expedited procedures:
 - Who can take action
 - What findings must support action
 - Ability to compress notice and comment periods



Mandating / Seizing vs. “Requesting”

- Rather than seizing products found unsafe, consider asking property owner to recall products
- Negative publicity may be a greater commercial liability than loss of property through voluntary action



Objective 3.3

Understand basic legal principles applicable when government takes control of, uses, and allocates privately owned facilities, equipment, materials, and supplies



Emergency Use of Private Facilities: Legal Powers

- Both state and federal emergency laws empower government to seize and use property in an emergency
 - These powers permit government to act when negotiations for use of private property may not be possible
 - Historical example: army cavalry seizure of wagon train
 - Provide leverage in negotiations even where there IS time to negotiate



Emergency Use of Private Facilities: State Law Acquisition Power

Colorado Example

- For general condemnation:
 - “to build, acquire, construct, or establish any public building or any other public work or public improvement . . . by right of eminent domain such private property as may be required...”
- Power to take control of facility in declared emergencies:
 - “Subject to any applicable requirements for compensation . . . commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency”



Emergency Use of Health Care Facilities

Georgia Example

- Some states have specific provisions covering use of health care facilities in emergencies:
 - Governor may “compel a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary for emergency response.”
 - Use “may include transferring the management and supervision of the health care facility to the Department of Human Resources for a limited or unlimited period of time not extending beyond the termination of the public health emergency.”



Emergency Use of Personal Property

Georgia Example

- Georgia law also covers any materials required during an emergency
 - “The Governor may...(4) Commandeer or utilize any private property if he finds this necessary to cope with the emergency or disaster.”



Emergency Use of Personal Property: Georgia Example

Discussion question:

Under Georgia law –
Would the state need to pay the owner
for use of property commandeered,
or for taking control of medical facilities?



Property Measures: Emergency Seizure for Government Use

- Seizure should be considered a last resort:
 - What justifies “taking” property rather than simply contracting for use?
 - Proper planning for emergencies should identify the property which will need to be acquired
 - Power to “take” and use a facility does not include power to “take” and “direct” employees and management of a facility!



Optimizing Government's Use of Property

- Exercise of powers for seizing / using property should be avoided if possible: procurement by commandeering reflects poor acquisition planning!



Emergency Use of Private Facilities: Impact on Public-Private Cooperation

- Public / private cooperation is critical in disasters since most essential infrastructure is in private hands
- Public / private partnerships are optimized through pre-event planning and cooperation with private sector (i.e., not through threat of seizure)
- Disaster law places strong emphasis on pre-disaster contingency contracting with businesses for supplies
- Proper planning for emergencies should identify the property which will need to be acquired



Limitations on Seized Facilities: Personnel and Efficiency

- Skilled personnel are essential to successful operation a facility
- Power to “take” and use a facility does not include power to “take” and “direct” employees and management of a facility!
- Facility will operate best through cooperation: Owner / manager of facility understands design and operation of facility
 - Planning, training, and pre-disaster preparedness require cooperation of owner



Emergency Use of Private Facilities: Alternatives to Using Existing Facilities

- Explore temporary facilities available from NDMS, SNS, contractors or DoD
 - E.g., mobile field hospitals



- Explore temporary facilities with cooperating partners
 - From other states through mutual aid
 - Private-sector emergency contractors



Emergency Use of Private Facilities: Government Roles

- In situations of mass trauma, illness, or prophylaxis, government could:
 - Designate existing facilities for alternative functions
 - Identify and supply new, temporary facilities with government supplies and staff
 - Identify and certify volunteer staff (e.g., nurses, doctors)
 - Suspend selected existing regulations
- Actions may require executive orders by Governor or using other emergency powers



Emergency Reallocation of Resources: State Powers

- All states have powers to reallocate resources in emergencies.
- Key state-specific differences involve:
 - Is an emergency declaration needed?
 - Are executive orders by the governor required?
 - Point in distribution chain affected by order: manufacturer vs. distributor vs. inventories of care providers
 - Systems for identifying the location of such supplies?

Note: care required when order impacts interstate commerce!



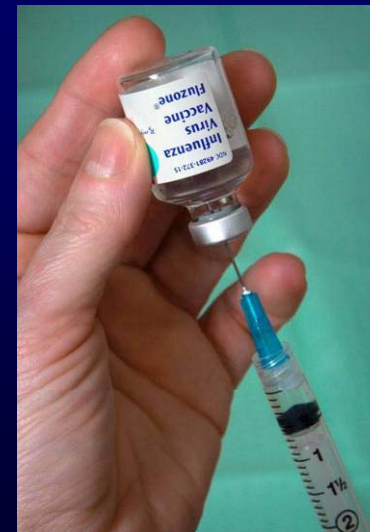
Management of Private Property: Key Issues for Federal Powers

- Federal government also can take property in emergencies - subject to “due process” and “just compensation” [RARELY USED POWERS]
- Condemnation under Stafford Act Title VI:
 - Power to condemn; with right to take immediate possession
 - For purposes of preparedness, response, recovery
- Defense Production Act: “priority contracting”
 - Can apply to preparedness, response, recovery
 - Federal priority can be accorded to state or local acquisition contracts



Emergency Reallocation of Resources: Federal Powers

- As a matter of policy, HHS frequently requests voluntary reallocation of private resources (vaccines, medications, ventilators) to protect public health
 - Voluntary re-routing of influenza vaccine in fall 2004
- HHS also can reallocate government-owned supplies:
 - Vaccines
 - Strategic National Stockpile



Use of Un-Licensed Pharmaceuticals: Federal Powers

- Federal government has the power to authorize emergency uses of pharmaceuticals
 - FDA may approve a pharmaceutical for use as an “Emergency Use Investigational New Drug” (IND)
 - May be domestic drug awaiting approval
 - May be an imported pharmaceutical similar to a domestic pharmaceutical
 - Use requires informed, written consent of patient



Federal Authorization for Emergency Use of Drugs

Bioshield Act of 2004



- Used with emergencies involving biological / chemical / radiological agents
- HHS Secretary can authorize “emergency use” of unapproved drugs, devices, or biological products
 - After consultation with CDC and NIH
 - Requires determination of effectiveness and balancing of benefits and risks “to the extent feasible and appropriate given the circumstances”
 - Secretary can impose conditions on emergency use, including labeling and communication



Emergency Waiver of Regulatory Restriction on Use of Property

- Compliance with federal regulations governing health care facilities may be impossible in emergency
 - Health care officials and facility operators should be aware of these restrictions
 - Health care facility operators can request waivers or suspension of requirements in emergency



Emergency Waiver of Regulatory Restriction on Use of Property: EMTALA

- Emergency Medical Treatment and Active Labor Act (EMTALA) imposes two principal obligations on hospitals participating in Medicare – hospitals must:
 - Screen all individuals in ER to determine condition
 - Stabilize individuals before transferring or discharging
- Secretary of HHS can waive this requirement after declaring Public Health Emergency



Objective 3.4

Understand basic legal principles applicable when government recruits and manages emergency volunteers, and addresses liability concerns



Accessing Emergency Volunteers

- Types of Volunteers
 - Professional
 - Traditional affiliated (e.g. Red Cross)
 - Spontaneous from within affected area
 - Spontaneous from outside affected area



Accessing Emergency Personnel: Volunteers

- Challenges and issues
 - Logistics and coordination (e.g., transportation, support, food, shelter)
 - Many of these challenges exist also for donated material
 - Credentials and licensing
 - Liability
 - Workers' Compensation



Accessing Emergency Personnel: Volunteer Systems

- Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP)
- Federal volunteers
 - Citizen Corps
 - Medical Reserve Corps
- Non-governmental organizations
 - e.g., Red Cross, Salvation Army



Accessing Emergency Personnel: Planning for Volunteers

- NRP / NRF & most state Emergency Operations Plans have a Volunteer Management Annex covering:
 - Requests for volunteers through standard channels
 - Interface with non-governmental volunteer organizations
 - Establishment of staging area / volunteer center
 - Media and Web communications about needs for volunteers
 - Identify and supply logistical requirements of volunteers
 - Verification of skills, licensing, privileges and credentials, particularly for volunteers from out of state



Liability Issues During Emergencies

- Medical care and resources during emergencies will be provided to the best extent capable, but...

ERRORS WILL OCCUR

MALPRACTICE WILL BE ALLEGED

- State and federal laws provide protection from liability for acting in good faith during emergencies
- However, gaps remain in the liability protection offered to responders during emergencies



Liability Issues during Emergencies: Government Employees

- Government agencies are liable for actions of employees acting within the scope their employment
 - May be protected by sovereign immunity or mutual aid indemnification agreements
- Government employees have no personal liability for actions within the scope of their employment
 - Gross negligence, or reckless, wanton, or intentional acts usually are considered outside scope



Minimizing Liability: EMAC, Licensing & Liability Issues

These provisions only apply to “officers and employees” of state!

- Licensing of professionals
 - A “person” licensed in the responding state “shall be deemed” licensed in the requesting state UNLESS requesting governor orders otherwise
- Liability and compensation provisions
 - Responding state’s “officers and employees” are “agents” of requesting state for liability and immunity purposes – responding state and its officers or employees not liable for actions in good faith
 - Responding state retains responsibility to pay compensation and death benefits for its officers and employees even if injury occurs during EMAC deployment to another state



Standard of Care in Emergencies: “It depends....”

- “Standard of care” owed by health professional to patient depends on circumstances
 - Example: “Reasonable” care in an emergency could be different when there is no electric power or running water
- Liability concerns remain real
 - Hurricane Katrina: patient abandonment cases against health providers heightened concern
 - Negligence-based liability before emergency: failure to plan and prepare for emergency
 - Some organizations are developing “altered care” protocols



Minimizing Liability: Federal Volunteer Protection Act of 1997

- No liability for volunteer from any non-governmental organization (NGO) or government if:
 - Work performed within volunteer's scope of duties
 - Volunteer is properly licensed
 - Volunteer had no criminal or willful misconduct
- NGOs and governments can still remain independently liable for their own acts and actions of their volunteers



Minimizing Liability: State Good Samaritan Laws

North Carolina example

- A person is not liable for civil damages arising out of care or treatment of a person who is unconscious, ill, or injured **IF**
 - Circumstances reasonably require prompt decisions **AND**
 - Necessity of immediate health care reasonably apparent and delay would further endanger the life of the person
- And so long as the treatment is:
 - “Gratuitous”
 - Done in good faith



Minimizing Liability: State Emergency Management

Virginia example

- When engaged in emergency services activities, the following are not liable for death or any injury to persons or property as a result of such services:
 - Commonwealth, or any political subdivision
 - Federal agencies
 - Other public or private agencies
- ***Except in cases of willful misconduct**
- Private persons with professional licenses have protection only if services are “gratuitous”



Minimizing Liability: Recent Developments

- National Conference of Commissioners on Uniform State Laws has approved the “Uniform Emergency Volunteer Health Practitioners Act”
 - Adopted in several states to cover licensing and credentialing requirements
 - Includes liability “options” in two versions, with and without expanded liability protection
 - Tennessee enacted its version in June 2007 with liability protection and workers compensation coverage for emergency health care workers



Minimizing Liability: Recent Developments

- Efforts also are underway to expand emergency volunteer liability protections beyond health care practitioners:
 - Since September 2001: 18 states have extended liability protection to architects & engineers assisting in emergency response and recovery efforts
 - In May 2007: Iowa enacted “entity liability protection” for businesses and non-profit organizations that provide good faith assistance under state direction during a public health disaster



Minimizing Liability: Summary of Current Status

- Liability provisions and exposure vary by state
- Businesses and non-profit entities may face liability exposure, depending upon state law
- Liability exposure is low for volunteers acting in good faith and for government employees
- Risk of liability exists for persons (who are not government employees) receiving compensation
- These and related issues are under active consideration in many legislatures



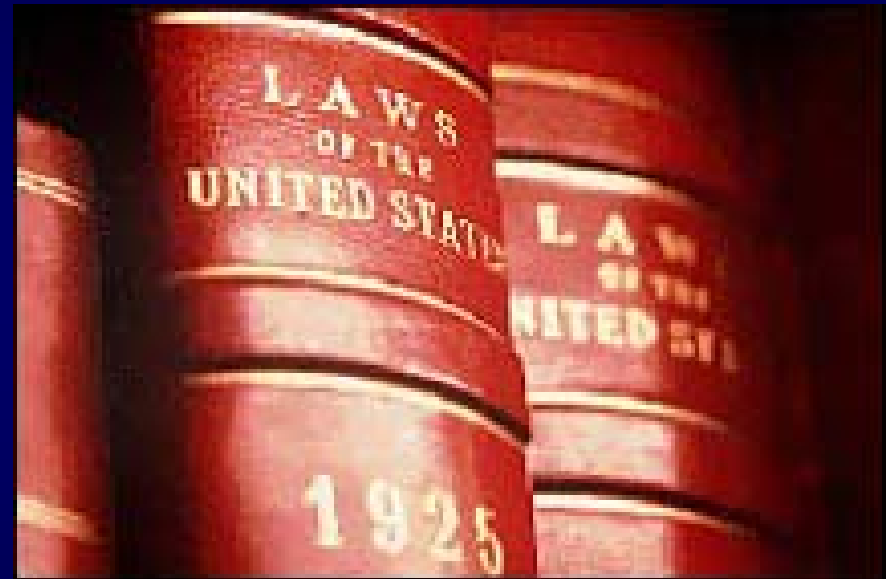
Unit 3 Summary and Key Take-Aways

1. Each level of government has general powers to deny access to or take control of virtually any facility or property if necessary to protect the public's health
2. Government actions affecting private property are subject to “due process” procedural rights and, if government takes property for public use, to payment of compensation
3. Exercising statutory authorities over property in emergency requires pre-emergency planning, training, and advance contracting
4. Volunteers are a critical response resource, but advance planning is required to address logistics, licensing, credentialing, and liability concerns



End: Unit 3

For additional information on public health law and legal preparedness visit the *CDC Public Health Law Program*



www.cdc.gov/phlp

