

Public Health Emergency Law

CDC Foundational Course for Front-line Practitioners

Developed by

U.S. Centers for Disease Control and Prevention



Public Health Emergency Law

- Unit 1: Course Introduction and Basic Concepts
- Unit 2: Legal Issues: Detecting and Declaring Emergencies
- Unit 3: Emergency Powers I: Protection of People
- **Unit 4: Emergency Powers II: Management of Property**
- Unit 5: Emergency Powers III: Mobilizing Professional Resources
- Unit 6: Advanced Issues Seminar



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Unit 4

Emergency Powers II: Management of Property



Disclaimer

These course materials are for instructional use only and are not intended as a substitute for professional legal or other advice. While every effort has been made to verify the accuracy of these materials, legal authorities and requirements may vary from jurisdiction to jurisdiction. Always seek the advice of an attorney or other qualified professional with any questions you may have regarding a legal matter.



Unit 4 Objectives

By the end of this unit, participants will be able to:

1. Identify legal options available to manage contaminated private property in emergencies
2. Identify legal options available to use private facilities in emergencies
3. Understand key legal issues regarding control of supplies and equipment



Hypothetical Example (Cont.)

Property Issues . . .

- A building is identified as probable initial source of disease
- Elsewhere, food or drugs found contaminated
- 20,000 patients need hospital care; 1,000 need ventilators – none in stock
- Adequate pharmaceuticals available for confirmed cases; the “worried well” demand access



Objective 4.1

Identify Legal Options Available to Manage Private Property in Emergencies



Perspective

This can be a sensitive topic:

Obtaining consent for managing the use of property is almost always superior to exercise of extraordinary emergency powers over property

Even *discussion* about government's taking of property can be sensitive when there is *no* current emergency



Advantages of Consent: Management of Property

- Principle: *Our nation is built on respect for private management of property*
 - Seizure of property is controversial and reserved for cases of true need
- Management:
 - The more complex the facility or distribution, the more difficult is operation without active cooperation of private managers
- Leverage Social Cohesion:
 - Cooperation is critical in emergencies
 - Volunteers want to help & social cohesion increases



Property Measures: Legal Dichotomy

Access Control vs. Use

- Property management considerations relevant to public health emergencies in two basic ways:
 - **Access Control:** Government may need to close, confiscate, deny access to, evacuate people from, prevent sale or use of real or personal property because unsafe, or for police activity
 - **Use:** Government may need to use private property in order to respond to emergency
- The law treats **access control** measures to protect public health and safety very differently than **use** measures



Property Measures: Legal Tension

- **Access Control:** Government is empowered under police power doctrine to regulate use of private property to protect public from unsafe conditions
- **Use:** Government must pay for the property that it uses for a public purpose

U.S. Constitution, 5th Amendment:

“...nor shall private property be taken for public use, without just compensation”



Reminder: Using National Response Plan

- In major events, coordination of response may be organized by National Response Plan (NRP)
 - Where state and local capabilities need additional Federal support
 - State and Federal government join forces in the Joint Field Office (JFO)
 - Resources available under powers of ANY federal agency are coordinated through the JFO
- Where local, state and federal governments each have powers to take action...
 - Incident commanders in coordinated response can select powers to implement



Management of Property: Closing Facilities

The state or local health department can close a facility or impound contaminated property by:

- Issuing administrative public health orders
 - To close restaurants for unsanitary conditions
- Using general legal powers to control epidemics or determination that there is a public nuisance
 - Same powers used to condemn a property as unsafe after fire, earthquake, storm damage

Until the public health investigation is concluded and the problem or exposure is resolved



Temporary Closure of Facilities: Police Power Doctrine

In addition to “public health” powers, state and local law enforcement can require temporary closure of facilities:

- As unsafe, for as long as the facility may endanger the public
- For purposes of criminal investigation



Temporary Closure of Facilities: Property Rights Under Police Powers

- Compensation is generally **not** provided to close property under police power
- Owner can challenge the closing in court
 - Damages to property owner could be awarded if the closing is shown to be unjustifiable



Management of Private Property: Closing Part of A Facility

Closure or condemnation may be for only part of the business or facility's operations or supplies

- *Public health is required to monitor the facility for safe operations during the public health order*



Reopening a Facility Closed for Public Health Purposes

- Agency that issued the closure order:
 - Determines the facility no longer poses a threat to public health and determines the situation is “safe” or “acceptable”
 - Issues an administrative order rescinding the closure order
- Note: multiple agencies may have role
 - U.S. or State EPA in case of certain contaminants
 - Responsibility for decontamination?



Evacuations

- Analogous to closing a facility to prevent public access – ordering that the public evacuate from a facility/area – examples:
 - *Florida Keys as hurricane approaches*
 - *Area around chemical tank car after train crash*
 - *Area around break in chemical plant or pipeline*
 - *Area downstream of dam about to collapse*
- Every state/locality may exercise this fundamental police power to protect public health and safety



Evacuation Example - Kansas

State disaster authorities have specific provisions to order evacuation in “declared” emergencies – Kansas law:

In a (state-) declared emergency, Governor may direct and compel the evacuation of all or part of the population from any area of the state stricken or threatened by disaster if deemed necessary for preservation of life or disaster mitigation, response or recovery



Questions for Evacuation Planning

When ordering an evacuation, the following issues must be considered:

- Will evacuation be mandatory or voluntary?
- If mandatory, how enforced?
- How to protect property in evacuated areas?
- How to precisely identify areas to be evacuated?
- How to ensure mandatory evacuees have priority over voluntary self-evacuees?
- How to provide food, medical care and shelter to the displaced?

Including persons with special needs



Evacuation Issues: Re-entry

If evacuation is based on finding that area was unsafe:

- What standard is required to determine area is safe for return?
 - Condition causing evacuation was safely resolved, or
 - Compliant with all appropriate environmental and health standards?
- Who decides?
 - The authority ordering the evacuation?
 - A different government body?



State Management Contaminated/Infectious/Dangerous Property

Normal, “non-emergency” state and local powers remain available:

- Adulteration of foodstuffs
- Safety of agricultural products
- Drug safety
- Agricultural control
- Chemicals and toxic substances
- Abatement of nuisances at common law



Federal Powers

- Protection of Food Stuffs
 - FDA : Federal Food, Drug and Cosmetic Act
 - USDA: Federal Meat Inspection Act; Animal Health Act
 - EPA: Federal Insecticide, Fungicide, and Rodenticide Act
 - HHS/CDC: Public Health Service Act
 - DHS: Food and Agricultural Coordinating Council
- Environmental Remediation Laws
 - Superfund powers (CERCLA) for clean-up of contaminated sites
 - Anthrax cleanup from Hart Senate Office Building in 2001 is an example



Compensation for Impounded Damaged or Destroyed Facilities

- In most epidemic control operations, condemnation of contaminated property (e.g., food) does not result in compensation
- Cooperation of property owner can frequently be obtained, such as well-publicized cases of recalls of:
 - Tylenol
 - Contaminated ground beef
- Bad publicity associated with non-cooperation is a greater commercial liability than is loss of property through voluntary action



Objective 4.2

Identify Legal Options Available to Use Private Facilities in Emergencies



Emergency Use of Private Facilities: Legal Powers

- Legal authorities empower government to use property in an emergency
 - Permit action where cannot negotiate use of private property
 - Provide leverage in negotiations
- Exercise of these powers should be avoided if possible
 - Litigation rarely the best way to resolve issues of compensation, depreciation, cost allocation, etc.
 - Example: Pipeline right of way acquisition – over 70% by agreement



Emergency Use of Private Facilities: Controlling Vs. Operating Facilities

- Taking over facilities for use rarely meets needs
- Control of a health care facility will not necessarily result in successful operation of the facility -- personnel are also needed
- It is more likely that government will direct patients to cooperating facilities or establish a temporary facility for the specific issue at hand



Emergency Use of Private Facilities: Availability of Temporary Facilities

An alternative to using existing facilities:

- Explore temporary facilities available from NDMS, SNS, contractors or Defense Department
 - E.g., Mobile field hospitals
- Explore temporary facilities with cooperating partners



Emergency Use of Private Facilities State Law Acquisition Power- Kansas

During a state of disaster, every person shall act and manage their affairs and property in any way that will assist and not detract from the ability of the state and the public to successfully respond to the disaster

This includes an obligation for

appropriate personal service

use or restriction of use of property

Compensation shall be paid if excessive and the services or property were not volunteered



Emergency Use of Private Facilities: Government Roles

- In situations of mass trauma, illness or prophylaxis, government role could include:
 - Designating existing facilities for alternative functions
 - Identifying/supplying new, temporary facilities using outside, emergency supplies and staff
 - Identifying and certifying volunteer staff, e.g., nurses and doctors
 - Suspending selected existing regulations
- Could require executive orders by Governor or other emergency powers



Objective 4.3

Understand Key Legal Issues
Regarding Control of Supplies
and Equipment



Management of Private Property

Key Issues: Federal Powers

All subject to 5th Amendment: “nor shall private property be taken for public use, without just compensation”

- General Condemnation— requires filing civil action in Federal Court
 - Condemnation under Stafford Act Title VI:
 - *“Procure by condemnation or otherwise”*
 - *“For emergency preparedness”*
 - *“With right to take immediate possession thereof”*
- Note: This provision is rarely used



Management of Private Facilities

Key Issues: Other Federal Powers:

Defense Production Act (DPA):

- Government can require private companies to execute “priority” contracts for materials, services & facilities
- May redirect/reallocate medical supplies, equipment and pharmaceuticals held in private sector
 - Even where subject to existing contractual commitments
- Requires findings that the contract is “necessary for the national defense, including ‘emergency preparedness’”

Rarely used historically, other than DoD contracting



Emergency Re-allocation of Resources

Federal Powers

- CDC traditionally **requests** re-allocation of resources such as vaccines, medications, ventilators to protect public health across the country
 - Voluntary re-routing of flu vaccine in Fall 2004
- HHS also can reallocate *government-owned* supplies such as:
 - Vaccines
 - Strategic National Stockpile (SNS)



Emergency Reallocation of Resources

State Powers

All states have powers to reallocate resources in emergencies. Key differences involve:

- Is an emergency declaration needed?
- Are executive orders by the Governor required?
- Are provisions required for alternate, new supplies from the manufacturer or suppliers?
- How does the government identify the location of such supplies?



Ability to Use Non-Licensed Pharmaceuticals

Federal Powers

Federal government has power to obtain emergency resources not normally available

- FDA may approve pharmaceutical for use as an *Emergency Use Investigational New Drug (IND)*
- IND may be domestic drugs awaiting approval
- IND may be an imported pharmaceutical similar to a domestic pharmaceutical
- Use of IND requires informed, written consent of patient



New Drug Licensing Option: Federal Waiver

Bioshield Act of 2004

- In emergencies involving bio/chem/ radiological agents (military, domestic, and/or public health)
- HHS Secretary can authorize “emergency use” of otherwise unapproved drug, device, or biological product
 - After consultation with CDC and NIH
 - Determination of effectiveness/balancing benefits and risks
 - Secretary can impose conditions on emergency use
 - Provisions for labeling/communication



Key Takeaways - Summary

- Each level of government has general powers to deny access to or take control of virtually any facility or property if such action is necessary to protect the public health
- Cooperation of and agreement with property owners is far superior to exercising emergency powers



Hypothetical Example (Cont.)

Still Need Personnel

Up until now:

- Arrangements were made to establish several medical treatment facilities and drug distribution centers – in armories, schools, and a tent city
- Equipment and drugs have been requisitioned and are being delivered

BUT

- Most local public health and medical personnel are already either:
 - Treating patients in pre-existing hospitals & clinics, or
 - Sick themselves and unable to report



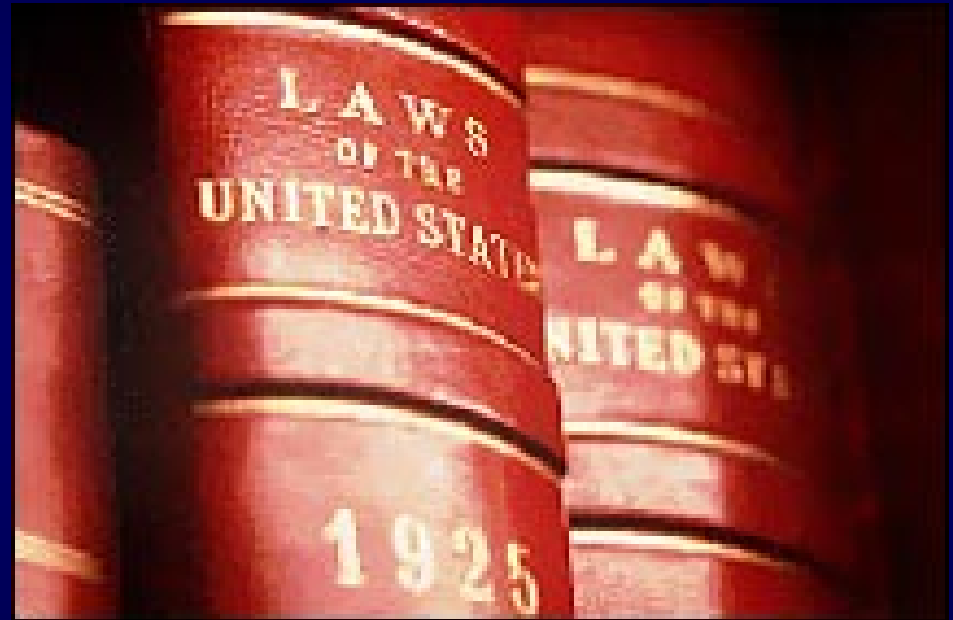
Next Segment

What are the legal considerations regarding the identification of and access to professional resources during public health emergencies?



End: Unit 4

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



www.cdc.gov/phlp

