

Emergency Planning and Potential Liabilities for State and Local Governments

William C. Nicholson

FEDERAL, STATE, AND LOCAL officials received considerable criticism in the aftermath of Hurricane Katrina in August 2005. In particular, pre-Katrina emergency plans were deemed to be inadequate (Azulay 2005) or executed improperly (Williams 2005), leading to increased scrutiny of planning efforts at all levels of government (Block 2005; Blumenthal 2006; Zink 2005). Government and media attention focused on the shortcomings of plans, which resulted in death, personal injury, and property damage.

Those responsible for the plans inevitably became the targets of legal claims, including class action suits by those who suffered losses. The defendants include local governments (Parker 2006). The U.S. Federal Emergency Management Agency (FEMA) has been sued for shortcomings in planning its post-Katrina sheltering program (*Washington Post* 2006). Lawsuits have been filed over problems with evacuation—an important aspect of any emergency response plan. An ambulance company and a local unit of government have been sued for their failure to evacuate an elderly woman and her quadriplegic son before Katrina hit.

The two drowned when they were not evacuated even though they were on a special needs list that was activated under the local parish's plan (Davis 2006). The son of a 91-year-old woman who survived the storm but died waiting for evacuation has sued the City of New Orleans and the State of Louisiana (Filosa 2006). The increased potential for lawsuits means that prudent governments at both the state and local levels need to examine closely their emergency planning efforts for legal sufficiency.

Torts and Immunities

To understand the liability claims associated with Hurricane Katrina, one must understand the concept of tort in the context of emergency management. Tort refers to civil (in contrast to criminal) wrongdoing. The purpose of tort law is to provide a way for people who have been injured by others to obtain compensation for the harm. Corporations, which in the law's eyes are artificial people, also can bring a claim and have claims brought against them for tort damages. Likewise, governments that fail to act in a reasonable way may be sued. Often-cited examples of torts include auto accidents, medical malpractice, and defamation. Torts can injure property as

The content of this article does not constitute legal advice. Readers should consult an attorney for legal advice concerning the particular issues they face.

well as people. A hazardous materials spill that renders a neighboring property unusable is an example of a tort against property. A vital issue is the intent of the person who does (or fails to do) the act giving rise to the complaint. Tort involves three varieties of intent: negligence, gross negligence, and intentional wrongdoing. The measure of damages for tortuous behavior is financial: successful plaintiffs are awarded money compensation for losses. Particularly egregious conduct by the wrongdoer may result in punitive damages, which provide restitution beyond the actual losses. Their purpose is twofold: to punish the specific wrongdoer and to deter future similar conduct.

Negligence

The majority of law applicable to daily activities in the United States arises from the creation and evolution of a legal model based on the facts and law of individual cases. A judge's written opinion is frequently alluded to as the law of the case, or precedent. Precedent applies to all future cases in which the same issue arises and is an important means by which new developments may be incorporated into law. Common law is developed through judge-made law and precedent.

The basic theory of the common law principle of negligence is that every person (natural or artificial) has a universal responsibility to act in a reasonable manner at all times given the circumstances. If a person acts in an unreasonable manner and that act is the legal (i.e., proximate) cause of an injury to a person or property, the result is liability. Similarly, failure to act in a reasonable manner may result in liability.

Negligence in the emergency management context typically is the result of failure to perform or adequately perform particular governmental duties. In the planning context, the unit of government may be liable because of failure to develop or revise the plan properly, which effectively constitutes a failure to perform a duty that is generally accepted as being part of emergency management's respon-

sibilities. When the components of a legal violation that is introduced as proof in a civil suit are the same as the elements required for civil liability and the burden of proof is the same (or higher for the proven violation), the only issue in a civil trial may be the amount of damages (*Meridian Ins. Co. v. Zepeda*, 734 N.E. 2d 1126 [Ind. App. 2000]).

Gross Negligence

Negligence is the result of a person failing to act reasonably under the circumstances. Extremely unreasonable actions under the circumstances can result in a court finding a person to be grossly negligent. Gross negligence is a more elevated level of intent than simple negligence, and it may be required for liability to be found. Emergency management law may provide a shield for negligent acts, but gross negligence can result in liability (Indiana Code 10-14-3-15 [2006]). Some states characterize the concept of gross negligence as recklessness.

Intentional Wrongdoing

Intentional wrongdoing is when a person injures another person or the person's property purposely. Battery, the wrongful touching of another person, is an example of an intentional tort. It is also a crime that the government may prosecute, possibly subjecting the wrongdoer to fines and/or imprisonment.

Immunities

A common defense to liability for units of government is sovereign immunity, a doctrine that originated in English law. When applicable, it shields both governments and their employees from liability when they might otherwise be sued for failure to carry out their duties (Lerner 1991). In the context of emergency management, the greatest challenge is to balance the needs of different groups against society's greater interest during emergency situations in which death, injury, or property damage may result. Sovereign immunity provides a liability shield under some circumstances but is not impregnable.

Disaster response statutes and common law provide customary defenses and immunities for a person working in the capacity of a governmental employee. Sovereign immunity once meant that government could never be sued for wrongdoing. Both federal and state governments have expressly waived sovereign immunity for tort claims in legal enactments, and therefore tort immunities do not always apply (Nicholson 2003a).

The Federal Tort Claims Act (28 U.S.C. §1346b) permits people and corporations injured by the actions of federal employees to bring suit in federal court. The act generally applies to claims (1) for money damages (2) arising from damage to property, personal injury, or death (3) caused by a negligent or wrongful act (4) of a federal government employee (5) acting within the scope of his or her employment, (6) in circumstances in which a private person would be liable under state law. In other words, liability laws for acts of federal agencies directly mirror those of the state in which the act occurred. Thus, immunities for federal and state torts are identical.

Immunities are almost never available if death, injury, or damages result from conduct other than negligence, including willful misconduct, gross negligence, wanton disregard, or bad faith by government employees or entities. Indiana law provides that “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 state, is not liable for the death of or injury to persons or for damage to property as a result of any such activity” (Indiana Code §10-14-3-15 [2006]). Generally, when waivers of sovereign

immunity are considered, the statute will be strictly construed in favor of the sovereign and may not be enlarged beyond the waiver its language expressly requires (*United States v. Nordic Village, Inc.*, 503 U.S. 30 [1992]).

Sovereign immunity normally will apply and protect discretionary decisions made by government employees and agents to address public safety considerations. However, it may not protect the operational activities of employees or agents who are engaged in property control and general services for the health and welfare of the citizens. The Supreme Court opinion in *Berkovitz v. United States*, 486 U.S. 531 (1988) discusses this issue in depth.

Duty to Plan

There is a duty both to plan for emergencies and exercise reasonable care in developing plans. Absent specific legal requirements, the courts will closely examine the facts and circumstances to determine reasonableness in the planning process. Specific requirements for an activity such as planning, however, stipulate a minimum standard of care for plan creation (Binder 2002).

Planning standards for all hazards are extensive and specific and have grown ever more so in the aftermath of the terrorist attacks of September 11, 2005. All states have enacted laws that pertain directly to terrorism. Planning requirements have been updated to include preparedness for terrorist events (*Florida Statute* §§252.34, 395.1056 [2004]). Thus, the planning process is never finalized but rather has as its goal creation of a “living document” (Binder 2002; Nicholson 2006). Emergency managers and advising attorneys must therefore keep current with continually evolving benchmarks (FEMA 2004a; National Fire Protection Association 2004).

Examining plans for legal sufficiency therefore means understanding the applicable benchmarks and assessing plans relative to them. In general, performing to established standards will result in legal safety. Therefore, it is vital for emergency managers and the

attorneys who advise them to understand those standards and the extent to which they apply to specific emergency management activities such as planning (Nicholson 2003a; Binder 2002).

Planning's Place in Emergency Management

Emergency planning is the responsibility of emergency management at the local, state, and federal levels. Planning is just one part of emergency management, which has been viewed as an ongoing, comprehensive cycle that has four phases: mitigation, preparedness, response, and recovery. The National Response Plan (NRP) adds a fifth phase, awareness, which relates specifically to law enforcement responsibilities (FEMA 2004b).

Mitigation consists of actions that eliminate or reduce the chance of occurrence or the effects of a disaster. Planning is a vital part of preparedness, which also includes training and exercising. These activities help to save lives and decrease damage by preparing people to respond effectively before and during an emergency. The third phase of emergency management, response, takes place during and immediately following a disaster. To appropriately respond, a jurisdiction must have a plan for response, trained personnel, and the required resources. Recovery, the final phase, continues until all systems return to normal or near-normal operation. Short-term recovery restores vital life-support assets such as water and sewer systems to minimum operating conditions. Long-term recovery may extend for months or years until the disaster-stricken region returns to its previous condition or is bolstered so that it is less prone to disaster. Recovery thus blends with mitigation, with the goal of improving safety during future disasters.

Planning is at the heart of emergency management at all levels of government. The idea of planning for an emergency may seem to be counterintuitive: after all, emergencies may be spontaneous, unintended occurrences. In reality, preplanning is essential to surviv-

ing and prospering after an event. Well-conceived and executed planning will result in resources and trained personnel being deployed with maximum effect when a disaster occurs.

Plans have standardized content. They customarily incorporate an assessment of possible hazards, analysis of how the hazards translate into the likelihood of particular risks, details of various agencies' and organizations' duties, outlines of command structure (including backup lines of authority), procedures for requesting assistance, and examination of how different groups fit into the overall response to an event. Specific topics may address search and rescue, evacuation, medical assistance, public information, and quarantine. The size and inclusiveness of emergency response plans are specific to a jurisdiction and depend on the drafters' approach to planning. Minimum standards are steadily becoming more stringent.

Legal Requirements for Planning

Various laws require different levels of government to create emergency plans. At the federal level, the most important laws are the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (93 Pub. L. No. 288, 88 Stat. 143) and the Homeland Security Act of 2002 (Pub. Law 107-296, 116 Stat. 2135). The Stafford Act provides for an all-hazards approach to disaster planning and response and stipulates the way in which the federal government provides disaster and emergency support to states, local governments, tribal nations, individuals, and qualified private nonprofit organizations (Bokman 2003). The Homeland Security Act focuses largely on terrorism.

Under Homeland Security Presidential Directive 5, federal agencies must cooperate in developing a NRP and National Incident Management System (NIMS) (White House 2003). States and localities that fail to take part in the national planning effort may lose federal grants and other funding, which make up significant portions of their budgets. Emer-

gency response and management organizations therefore have a compelling incentive to participate.

State laws typically require state and local emergency management agencies to engage in emergency planning activities (many state agencies were renamed homeland security agencies after the September 11, 2001, attacks) (Bea 2004). The role of legal counsel is to examine the federal and state emergency management laws with an eye toward developing local ordinances that ensure that the leaders of a unit of government maximize the emergency powers available to them and address specific local issues outlined in their plans that may need legal regulation. In particular, creation of a legal system for continuity of leadership in the event that those who are normally in power are unavailable or incapacitated is strongly suggested.

Another important industry standard for emergency planning is the voluntary National Fire Protection Association 1600 Standard (NFPA 1600), Recommended Practices for Disaster Management (National Fire Protection Association 2004), the requirements of which complement and amplify those set forth in the NRP and NIMS (Nicholson 2006). All of these standards recognize that a plan must be modified to enable a particular jurisdiction to address the risks it faces and thereby avoid liability (*General Public Utilities Corp. v. United States*, 745 F.2d 239 [3rd Cir. 1984], *cert. denied* 469 U.S. 1228 [1985]). Emergency action plans should be reviewed, revised, and tested periodically (Binder 2002, 833). Many laws contain specific wording that requires that the plan be kept “current” (Indiana Code 10-14-3-17 [2006]).

Specific Planning Standards

The National Fire Protection Association 1600 Standard

Currently, implementation of NFPA 1600 is not compulsory. A wide variety of authoritative organizations endorse it, however. The National Emergency Management Association,

the national group composed of state emergency management directors, has supported NFPA 1600 since 1997 (see www.emaponline.org) and uses it as the basis of the Emergency Management Accreditation Program (EMAP), the association’s benchmark for state and local programs. Many important national organizations endorse NFPA 1600 through their support of EMAP, including the International Association of Emergency Managers, FEMA, 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.

Further, a report by the U.S. Department of Homeland Security (DHS) Office of the Inspector General on FEMA response to Hurricane Katrina urged that DHS develop a system based on the EMAP standard to assess states’ capacities to respond to disasters (U.S. Department of Homeland Security Office of the Inspector General 2006). As of November 2006, 10 states, the District of Columbia, and two local jurisdictions were fully or conditionally accredited by EMAP, demonstrating that EMAP is well on its way to becoming the de facto national emergency management standard. As further emergency management groups are recognized as meeting the standard, it becomes more likely that a court could hold all emergency management groups to a norm (Binder 2002). Customary industry practices may evolve from de facto to de jure recognition either through common law adoption in the courts (Office of Management and Budget 1998) or by way of general public espousal leading to enactment of mandatory standards. An example of this process is the adoption of seat belts. During the 1950s and 1960s, provision and use of seat belts evolved such that the U.S. Department of Transportation began to require that new

cars be equipped with them in 1966 (Automotive Occupant Restraints Council 2006).

According to NFPA 1600 (§§1.7.2.2, 5.7.1, 5.7.3, 5.7.3.1, 5.7.32), plans must address at minimum strategy, emergency operations and response, mitigation, recovery, and continuity. Responsibilities are assigned to organizations and individuals for carrying out specific actions at projected times and places in an emergency or disaster. NFPA 1600 approaches planning as a matter of variations on a common theme to do with the functional roles and responsibilities of internal and external agencies, organizations, departments, and individuals and the lines of authority.

NFPA 1600 also obliges the planner to perform hazard identification, risk assessment, and impact analysis. Jurisdictions that draft plans that do not meet the particular planning objectives specified in NFPA 1600 (and many state and local laws) may be considered negligent and expose themselves to potential liability (National Fire Protection Association 2004). The National Emergency Management Association (state-level group) and the International Association of Emergency Managers (which certifies individual emergency managers as well as state and local programs) assist state and local emergency planners in their ongoing duty to adhere to current laws, policies, and industry practices and meet and monitor benchmarks.

The National Incident Management System

Since October 2004, NIMS has established standards for state and local governments that desire to obtain federal funds for emergency management programs, including Emergency Management Performance Grants (FEMA 2004a, 2007; White House 2003). NIMS standards are created and promulgated through the NIMS Integration Center. NIMS and NFPA 1600 not only complement and reinforce one another but also create the benchmark for planning. Kay C. Goss, former associate director in charge of National Preparedness, Training and Exercises at FEMA for eight years, remarked that “synergy is

already building between NFPA 1600, EMAP, and the NIMS Integration Center. It’s just a matter of time before they are incorporated into NIMS [Integration] Center’s requirements” (Nicholson 2006).

Under NIMS, plans are required for emergency operations, corrective action and mitigation, and recovery. It is suggested that emergency operations plans define 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 regarding 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 Incident Commander or Unified Command; facilitate responsive and collaborative incident management; and include preincident and postincident public awareness, education, and communications plans and protocols.

Although uncertainty exists regarding whether these voluntary elements actually constitute requirements, jurisdictions that fail to meet NIMS and NFPA 1600 standards may risk liability and litigation. Parties may dispute the limits of industry practice regarding negligence associated with the security of premises after an emergency or disaster, for example (Barkett 2003; Reynolds 1996). Also, the legal consequence of discontinuing safety measures, whether put in place by government or other entities, is unclear: “Without question, many companies after 9/11 took serious steps, some quite ambitious and costly, to protect their employees and their assets. . . . [However,] plans that were drawn

up were shelved, security machines put in place have been taken out, and computer security remains far from perfect” (Weiser and Deutsch 2004).

The National Plan Review

On June 16, 2006, DHS released the results of the National Plan Review examining existing emergency operations plans for states and urban areas and evaluating their sufficiency for managing a catastrophic event (DHS 2006a, 2006b). Under the NRP, a catastrophic event is defined as any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions. A catastrophic event could result in sustained national impacts over a prolonged period of time; almost immediately exceeds resources normally available to state, local, tribal, and private-sector authorities in the impacted area; and significantly interrupts governmental operations and emergency services to such an extent that national security could be threatened” (FEMA 2004a). A comprehensive study of plans in all 56 states and territories and 75 urban areas was conducted over 6 months, and nearly 2,800 emergency operations plans and related documents were examined. More than 1,000 emergency managers and homeland security officials took part in the effort.

The review concluded that although America’s states and localities are generally well prepared for everyday, garden-variety emergencies, larger catastrophic events are mostly beyond the scope of existing emergency operations plans (Associated Press 2006). Moreover, it recommended that the federal government take action to improve and coordinate planning. The following shortcomings and recommendations for states and urban governments were identified (DHS 2006b ix–x):

1. The majority of the nation’s current emergency operations plans and planning pro-

cesses cannot be characterized as fully adequate, feasible, or acceptable to manage catastrophic events as defined in the NRP.

2. States and urban areas are not conducting adequate collaborative planning as a part of “steady state” preparedness.
3. Assumptions in basic plans do not adequately address catastrophic events.
4. Basic plans do not adequately address continuity of government operations.
5. The most common deficiency among state and urban area direction and control annexes is the absence of a clearly defined command structure.
6. Many states and urban areas need to improve systems and procedures for communications among all operational components.
7. None of the functional annexes adequately address special needs populations.
8. States should designate a specific state agency that is responsible for providing oversight and ensuring accountability in the shelter operations process, including provisions for those with disabilities.
9. Timely warnings requiring emergency actions are not adequately disseminated to custodial institutions, appropriate government officials, and the public.
10. The ability to give the public accurate, timely, and useful information and instructions through the emergency period should be strengthened.
11. Significant weaknesses in evacuation planning are an area of profound concern.
12. Capabilities to manage reception and care for large numbers of evacuees are inadequate.
13. Capabilities to track patients under emergency or disaster conditions and license of out-of-state medical personnel are limited.
14. Resource management is the Achilles’s heel of emergency planning. Resource management annexes do not adequately

describe in detail the means, organization, and process by which states and urban areas will find, obtain, allocate, track, and distribute resources to meet operational needs.

15. Plans should clearly define resource requirements, conduct resource inventories, match available resources to requirements, and identify and resolve shortfalls.

Governments are obliged to examine their existing emergency plans to ensure that any shortcomings they may contain are corrected and that they comply with federal, state, and local standards. From a legal perspective, the National Plan Review's specific criticisms constitute notice of defects. Without notice, an entity might claim a legal excuse that it was unaware of any of its plan's shortcomings, triggering analysis by a court of whether a reasonable entity would have understood the implications of the danger. By virtue of rectifying the problems in its plan, an entity acknowledges that it comprehends the intent of the notice and its own legal responsibility to ameliorate the situation. An entity may be liable when failure to correct the plan results in death, injury, or property damage (Nicholson 2003b).

Liabilities for Activities Related to Planning

For agencies, the criteria contained in the NRP, NIMS, and state and local laws create positive duties to perform to certain standards. Meeting these standards may preclude liability issues if it is found that the legal cause of death, personal injury, or property damage resulted from the failure of a plan. It is the consensus that planning benchmarks should be viewed as industry standards that compel compliance independent of any statutory requirement. In fact, legal precedent exists for safety standards to be binding within an industry, even if they are not completely or generally adopted (*T. J. Hooper*, 60 F.2d 737 [2d Cir. 1932], *cert. denied*; *Eastern Transportation Co. v. Northern Barge Corp.*, 287 U.S. 662 [1932]). In general, as technology advances,

the legally required standard of care becomes more refined (Binder 2002). Because emergency planning norms pertain to safety for the entire affected population, compliance is paramount.

Although every state has established a legal obligation to develop and maintain an emergency response plan, it is unclear whether the lack of a plan would be the basis for a lawsuit. Not creating a plan when there is a "specific and mandatory" legislative or other directive to do so would not be protected as a discretionary act. Further, negligently drafted plans would not be justifiable, nor would those that do not meet the requisite standards when there is a violation of safety.

As a matter of law, planning historically has been thought of as intrinsically discretionary at the federal level, but operational activities have not. Therefore, cases arising under the Federal Tort Claims Act for "bad" (i.e., negligently drafted) plans usually have been unsuccessful (*In Re: Ohio River Disaster Litigation*, 862 F.2d 1237 [6th Cir. 1988]). In the presence of the legal mandate of the Homeland Security Act of 2002 for all federal agencies to conform to the NRP and NIMS standards, specifically Homeland Security Presidential Directive 5, the discretionary defense for planning activities under the Federal Tort Claims Act may be eroded significantly in future tests.

Failure to Follow the Plan

Even if a plan consistent with applicable standards exists, it may not be adhered to during the response to an emergency. In this instance, the emergency manager may be liable. In the aftermath of Hurricane Katrina, New Orleans mayor Ray Nagin and Louisiana governor Kathleen Blanco were accused of failing to follow emergency plans, and some critics contended that these officials were personally responsible (Williams 2005). Other potentially culpable parties cite improper actions by the mayor and governor as reasons why they failed in their own legal duties in the aftermath of Katrina (Binder 2002).

Whether a plan is interpreted as a statute, regulation, or policy that creates a specific and mandatory responsibility is the purview of the courts. Violation of an internal policy—especially if the content of a plan is strictly regulated—may produce conditions for a lawsuit if the policy “leaves no room for implementing officials to exercise independent policy judgment” (*Berkovitz v. United States*, 486 U.S. 531 [1988]).

Determining whether officials’ choices are specifically defined or only their discretion to exercise judgment is limited requires detailed examination of the content of a plan. When the law creates a general duty for protecting the public (as it often does for county commissioners, for example), use of discretion is plainly called for in making decisions about how to best fulfill the responsibility. Alternatively, if a plan incorporates in-depth inventories of measures to be taken and does not allow variance, as is typically the case, no option exists except for compliance.

Plans frequently contain compulsory, pre-programmed protective measures such as evacuation. To illustrate, major industrial facilities that use extremely hazardous chemicals may classify emergencies by level. The plans of surrounding jurisdictions may specify that routines such as sounding alert sirens or evacuating a predetermined radius around the plant be followed when certain alert levels are reached, even though a chemical release might not have occurred. Should the unit of government fail to take these steps, tort liability may ensue.

Planning for Particular Risks

In addition to containing specific content, many plans are required by law to cover particular emergencies. Some laws affect all plans; others apply only to specific kinds of hazards, such as waste generated by a nearby nuclear power plant. Examples of other risks include terrorism and school violence. Each jurisdiction must examine the particular hazards to which it is vulnerable and the relevant laws to determine which measures must be incorpo-

rated into its plan. In any case, an all-hazards emergency operations plan must exist.

Hazardous Materials Releases

Environmental law independently creates an obligation for states and localities to formulate a response plan for extremely hazardous substance releases (Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. 9601 §104i; Superfund Amendment and Reauthorization Act of 1986 42 U.S.C. §§11001 et seq.). Both the Occupational Safety and Health Administration and the Environmental Protection Agency extensively regulate all emergency responses, especially those relating to hazardous materials, which are commonly referred to as HAZMAT releases (Occupational Safety and Health Standards 29 C.F.R. §1910.120q; Environmental Protection Agency 40 C.F.R. §372.18). FEMA has become closely involved with the responses to major HAZMAT events (Cumming and Sylves 2005). Weapons of mass destruction attacks are defined as HAZMAT events guided by criminal intent (Nicholson 2003a). The extremely dangerous nature of hazardous materials compels responders to have sophisticated technical proficiency (IOCAD Engineering Services, Inc. 2000). Under the all-hazards approach, emergency management must clarify safety rules and ensure that responders understand that the laws apply to their actions. The Emergency Planning and Community Right to Know Act (42 U.S.C. §§11001–11050) creates a separate structure for planning for emergencies involving the release of extremely hazardous substances.

Terrorism

Terrorism—as most dramatically illustrated by the events of September 11, 2001, and the 1995 Oklahoma City bombing—is considered to be a hazard that is likely to occur. The Homeland Security Act of 2002 requires DHS to provide a role in the NRP and NIMS for federal, state, and local government personnel, agencies, and authorities to respond to terrorist attacks and disasters. The policy

of Homeland Security Presidential Directive 5 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 (White House 2003).” To accomplish the preparedness policy, DHS dictates in NIMS that planning include all types of emergencies and disasters, including acts of terrorism (FEMA 2004b).

School Violence

The federal government enacted the Safe and Drug-Free Schools and Communities Act of 1994 after events such as the Columbine High School massacre in Colorado. The act requires that school safety plans be drafted to address containment of student-on-student violence. Designed to prevent violence and drug abuse in schools, the federal grant program established by the act funnels monies through states to local educational agencies and community organizations as well as private, nonprofit organizations and colleges and universities that develop antiviolence and antidrug initiatives. Because schools are considered to be “soft targets,” school administrators must ensure that their plans address terrorist attacks.

Requirement to Train and Exercise According to the Plan

As a living document, a plan is tested and improved through training and staging drills when there is not an actual emergency or disaster. FEMA grant programs for emergency management often establish goals such as developing and delivering training for individuals and groups who have important emergency management duties and focusing on a jurisdiction’s capability to respond to identified risks. This training must be done at all levels of government and in the private sector. On-the-job training for emergency managers from areas that are unaffected during actual emergencies allows these officials to contribute to the response as well as readies them for when they must take the lead.

Training specifications for federal grant funds frequently include objectives such as the following: continue to instruct a state’s “quick-reaction team,” provide assistance to state agencies in creating standard operating procedures, educate state and local officials with regard to specific hazards such as earthquakes and hurricanes, deliver training through the state emergency management or homeland security agency, originate new training, support a public awareness program, and complete the Superfund Amendments and Reauthorization Act Title III training mandated by law.

Federal grant standards typically require a plan to be exercised at least once annually. Exercises include “tabletop” demonstrations, functional practices, and simulations of full-scale events. Sometimes a state’s standards allow an actual event to substitute for an exercise. Objectives may include setting up a comprehensive exercise program to test and measure all aspects of the state’s emergency management system, including federal programs applicable to terrorism, earthquakes, radiological and chemical stockpile emergencies, and hazardous materials; performing statewide tabletop exercises that encompass federal, state, and local response forces; and emphasizing assessment and correction of identified deficiencies (Nicholson 2003a).

Requirement to Revise the Plan

The goal of exercises is to improve the plan through realistic testing. One of the most important federal grant requirements is creation of a system to spot and rectify plan weaknesses exposed in the exercise. In what is termed a “hot-wash” debriefing, lessons learned are documented and reviewed immediately after an exercise to guide future efforts in order to avoid repeating past errors. A full analysis of the exercise at a later time allows more complete and detailed scrutiny of the plan’s successes and failures. Plans also must be improved in the aftermath of real events. Uncorrected deficiencies that bring about property damage or personal injury during a subsequent event may result in liability.

The Hurricane Katrina experience illustrates how exercising a plan has the potential to improve it and how failure to properly incorporate lessons learned may result in liability. A year before Hurricane Katrina struck the Gulf Coast, a federally funded exercise was conducted based on the scenario of New Orleans being struck by a fictional Category 3 hurricane dubbed Hurricane Pam (Katrina was eventually recognized to be a strong Category 3 storm). The Hurricane Pam exercise predicted that thousands of people would be displaced, injured, or killed; billions of dollars worth of buildings and infrastructure would be destroyed; evacuations and shelters would be inadequate; roads would be impassable; the metropolitan area's sewage system would be inoperable; and much of Southeast Louisiana would be uninhabitable (U.S. Congress. House of Representatives. Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina 2006; Beriwal 2005).

Many of the lessons learned were not applied, as evidenced by the outcome of Hurricane Katrina. A major reason why they were not completely incorporated into the New Orleans plan is that the federal government abruptly terminated funding for follow-up corrective actions to amend the plan, reportedly because the Hurricane Pam exercise did not involve a terrorist event. Moreover, at the highest levels, DHS apparently did not even know that the Pam exercise had taken place (CNN 2005).

As of mid-2006, Louisiana and New Orleans still had not adequately revised their plans. The National Plan Review found Louisiana's plans to be "insufficient" as the state continues to struggle with damage from Hurricanes Katrina and Rita. New Orleans's plan was given the lowest ranking possible; it was found that only 4 percent of preparedness measures met federal standards (DHS 2006b). There is an urgent need to revise the plans because failure to do so could result in liability.

The responsibility for failures to correct a plan based on lessons learned may be shared

among different levels of government if the failure is attributable to loss of funding. In such a case, all levels of government could be named as defendants in any subsequent lawsuits. Regardless, state and local governments continue to have a clear responsibility independent of any direct involvement by the federal government to update and correct their plans after an exercise.

Maximizing Federal Assistance

A plan should take into account the legal requirements for disaster response and recovery. The legal enactments of a jurisdiction regarding infrastructure replacement can make a vast difference in the amount of federal assistance available after a disaster. Specifically, planners should examine, with the assistance of the jurisdiction's attorney, the building and fire codes that are in place. They should be current with the latest enactments of the jurisdiction's building authority. Regardless of what type of legal structure is in place (i.e., state law, a combination of state and local law, or local enactments), it is vital that the law require that all new or rebuilt structures comply with codified best practices.

With regard to publicly owned infrastructure such as bridges and highways, all new construction or repairs to existing structures must conform to the definitions in the codes. Federal aid can be used to pay for reconstruction or repair only to the extent that the unit of government imposes the same standards on itself or private parties. Further, a jurisdiction will not receive federal aid if it enforces established standards only in situations in which federal dollars will pay for the improvements. Financial controls including documented receipts, time sheets, and records of mutual aid costs are essential if federal reimbursement is requested. Anticipating legalities might seem to be outside the purview of traditional emergency management planning. However, proactively working with legal counsel may reap considerable economic benefits for a jurisdiction and enable it to avoid the economic ram-

ifications of lawsuits. In fact, a program of general improvement may actually benefit a jurisdiction by making it a more attractive location for new businesses and increasing public safety through highway improvements, for example (Nicholson 2003b).

Conclusion

State and local governments have explicit legal responsibilities for emergency planning. Following the attacks of September 11, 2001, and the creation of the Department of Homeland Security, the number and specificity of planning standards have increased significantly. Because failure to adhere to these standards might result in liability, emergency management professionals and legal counsel must work together to ensure that plans conform to established benchmarks. Plans must constantly be revised in light of lessons learned from exercises and real world events.

Similarly, legal analysis must be on an ongoing effort. Ideally, attorneys should view themselves as part of the emergency planning team and provide support services on a continual basis. Through a proactive legal approach, an attorney will understand more fully the variety of complex and unique laws that apply to emergencies and disasters and be better able to advise the leadership on choosing wisely among legal options.

Emergencies and disasters will continue to occur. Proper planning by state and local governments is perhaps the most important step to lessen their effects and facilitate rapid recovery. Comprehending the possible legal pitfalls and constantly working for plan improvement will both decrease the likelihood of liability and help ensure public safety in the aftermath of emergencies and disasters.

William C. Nicholson is an assistant professor in the Department of Criminal Justice at North Carolina Central University, where he also works with the Institute for Homeland Security and Workforce Development. Previously, he was em-

ployed as general counsel to the Indiana State Emergency Management Agency. He is the author of *Homeland Security Law and Policy (2005)* and *Emergency Response and Emergency Management Law (2003)*, both published by Charles C. Thomas, Publisher.

References

- Associated Press. 2000. Homeland security: U.S. not ready for disaster. June 15. www.msnbc.msn.com/id/13351916/. Accessed January 2, 2007.
- Automotive Occupant Restraints Council. 2006. *About us*. www.aorc.org/aboutus.asp. Accessed November 10.
- Azulay, Jessica. 2005. FEMA planned to leave New Orleans poor behind. *The New Standard*, September 4. newstandardnews.net/content/index.cfm/items/2322. Accessed January 11, 2007.
- Barkett, John M. 2003. If terror reigns, will torts follow? *Widener Symposium Law Journal* 9:485–521.
- Bea, Keith. 2004. *Emergency management and homeland security statutory authorities in the states, District of Columbia, and insular areas: A summary*. Order code RL32287. Washington, DC: Library of Congress, Congressional Research Service.
- Beriwal, Madhu. 2005. Hurricanes Pam and Katrina: A lesson in disaster planning. *Natural Hazards Observer* 30:10–11. www.colorado.edu/hazards/o/archives/2005/nov05/nov05d2.html#pam. Accessed January 8, 2007.
- Binder, Denis. 2002. Emergency action plans: A legal and practical blueprint—failing to plan is planning to fail. *University of Pittsburgh Law Review* 63:791–833.
- Block, Robert. 2005. U.S. had plan for crisis like Katrina. *Wall Street Journal*, September 19, A-3. www.democraticunderground.com/discuss/duboard.php?az=view_all&address=104x4816218. Accessed January 10, 2007.
- Blumenthal, Les. 2006. Disaster plan fails state, say officials—feds blasted for using cookie-cutter approach. *The News Tribune* (Tacoma, WA), July 23. www.thenewstribune.com/news/local/v-printer/story/5974061p-5252815c.html. Accessed January 6, 2007.
- Bokman, Lloyd. 2003. All-hazards planning—what does it mean? *Natural Hazards Observer* 17:10–11. www.colorado.edu/hazards/o/archives/2003/mar03/mar03f.html. Accessed December 20, 2006.
- CNN. 2005. Chertoff: Katrina scenario did not exist—however, experts for years had warned of threat to New Orleans. September 5. www.cnn.com/2005/US/09/03/katrina.chertoff/index.html. Accessed January 9, 2007.
- Cumming, William R., and Richard T. Sylves. 2005. FEMA's place in policy, law, and management: A hazardous materials perspective 1979–2003. In *Home-*

- land security law and policy*, ed. William C. Nicholson. Springfield, IL: Charles C. Thomas, Publisher.
- Davis, Sandy. 2006. Family sues Acadian, parish in canceled Katrina evacuation. *The Advocate* (Baton Rouge, LA), August 30. www.emsresponder.com/article/article.jsp?id=3993&siteSection=1. Accessed January 15, 2007.
- Filosa, Gwen. 2006. Son sues in death of mother—she died in wheelchair days after Katrina. *New Orleans Times-Picayune*, August 18. www.nola.com/news/t-p/new-orleans/index.ssf?/base/news-6/115588331577510.xml&coll=1. Accessed January 11, 2007.
- IOCAD Engineering Services, Inc. 2000. *Hazardous materials response technology assessment*. Washington, DC: Federal Emergency Management Agency, U.S. Fire Administration. www.usfa.dhs.gov/downloads/pdf/publications/fa-199.pdf. Accessed December 21, 2006.
- Lerner, Ken. 1991. Government negligence liability exposure in disaster management. *The Urban Lawyer* 23:333–351.
- National Fire Protection Association. 2004. *NFPA 1600 Standard on disaster/emergency management and business continuity programs*. www.nfpa.org/assets/files/pdf/nfpa1600.pdf. Accessed January 8, 2007.
- Nicholson, William C. 2003a. 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* 9:295–337.
- . 2003b. Litigation mitigation: Proactive risk management in the wake of the West Warwick club fire. *Journal of Emergency Management* 1:14–18.
- . 2006. Seeking consensus on homeland security standards: Adopting the National Response Plan and the National Incident Management System. *Widener Law Review* 12:491–559.
- Office of Management and Budget. 1998. *Federal participation in the development and use of voluntary standards*, 47 Fed. Reg. 49,496, 49,498. Circular no. A-119. www.whitehouse.gov/omb/circulars/a119/a119.html. Accessed December 21, 2006.
- Parker, Laura. 2006. After Katrina, courts flooded by lawsuits. *USA Today*, January 15, A-1. www.usatoday.com/news/nation/2006-01-15-katrina-suits_x.htm?csp=14. Accessed January 17, 2007.
- Reynolds, Melinda L. 1996. NOTE: Landowner liability for terrorist acts. *Case Western Reserve Law Review* 47:155–206.
- U.S. Congress. House of Representatives. Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina. 2006. *A failure of initiative: The final report of the select bipartisan committee to investigate the preparation for and response to Hurricane Katrina*. 109th Cong., 1st sess. katrina.house.gov/. Accessed January 8, 2007.
- U.S. Department of Homeland Security. 2006a. *DHS releases review of nationwide catastrophic event preparedness*. www.dhs.gov/xnews/releases/press_release_0930.shtm. Accessed January 23, 2007.
- . 2006b. *National Plan Review*. www.dhs.gov/xlibrary/assets/Prep_NationwidePlanReview.pdf. Accessed December 28.
- U.S. Department of Homeland Security Office of the Inspector General. 2006. *A performance review of FEMA’s disaster management activities in response to Hurricane Katrina*. www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-32_Mar06.pdf. Accessed January 30, 2007.
- U.S. Federal Emergency Management Agency. 2004a. *National Incident Management System*. www.fema.gov/pdf/emergency/nims/nims_doc_full.pdf. Accessed December 27, 2006.
- . 2004b. *National Response Plan*. www.dhs.gov/xlibrary/assets/NRP_FullText.pdf. Accessed December 28, 2006.
- . 2007. *Grants information*. www.fema.gov/emergency/nims/compliance/grants.shtm. Accessed January 2.
- Washington Post*. 2006. “Obfuscation” by FEMA hurt Katrina victims. June 22, A-27. www.washingtonpost.com/wp-dyn/content/article/2006/06/21/AR2006062101793.html?nav=rss_politics. Accessed December 21.
- Weiser, Benjamin, and Claudia H. Deutsch. 2004. Stringent measures gather dust, experts say. *New York Times*, August 16, B-1. select.nytimes.com/gst/abstract.html?res=F7081FFF385B0C758DDDA10894DC404482. Accessed January 16, 2007.
- White House. 2003. *Homeland security presidential directive 5, subject: Management of domestic incidents*. www.whitehouse.gov/news/releases/2003/02/20030228-9.html. Accessed January 16, 2007.
- Williams, Bob. 2005. After the storm: Blame amid the tragedy—Governor Blanco and Mayor Nagin failed their constituents. *Wall Street Journal*, September 7. www.opinionjournal.com/forms/printThis.html?id=110007219. Accessed December 27, 2006.
- Zink, Janet. 2005. Hurricane readiness rekindles tensions. *St. Petersburg Times*, September 15. www.sptimes.com/2005/09/15/Hillsborough/Hurricane_readiness_r.shtml. Accessed December 29, 2006.