

Building Community Legal Capabilities for Post 9-11 Terrorism Preparedness

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Note: Portions of this paper are excerpted from “**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**” by William C. Nicholson, to be published in Volume 9, Issue 2 November, 2002 of the Widener Law Symposium Journal.

A couple of years ago, while serving as General Counsel for the Indiana State Emergency Management Agency (SEMA), I entered our state Emergency Operations Center (EOC) as part of a team discussing the current status of a breaking disaster resulting from flooding of the Ohio River and its tributaries. I laid out several areas of concern from the legal perspective, including: (1) the statutory requirements for a disaster declaration; (2) the Stafford Act’s debris removal requirements; and (3) how to work with the State Department of Health to declare flooded mobile homes unfit for human habitation.

During my presentation, I noticed that the EOC coordinator, (who was organizing the state’s response prior to departing to take charge as Incident Commander (IC)), seemed impatient with my talk. During a quiet moment later that day, I asked him what was bothering him. He responded honestly: “You lawyers never want to let us get on with things. I’m trying to save lives and protect property, and all you want to do is tie us up with legalisms. I don’t have time for the law when lives and property are at stake.”

My colleague, the IC, was quite correct. A disaster response is not the time for learning about the legal parameters that define emergency management. Response to a terrorism event, in particular, requires detailed knowledge of complex legal standards. My friend’s retort points out a significant issue: widespread lack of knowledge of requisite standards. Attorneys as well as emergency managers may generally be characterized as ignorant of the legal aspects of emergency management.

I believe that the current emphasis on terrorism is an excellent opportunity to educate the community about one threat confronted by all hazards emergency management. By seeing terrorism preparedness as a paradigm of risk management, the emergency management community will benefit as knowledge of its contributions becomes more generally appreciated.

Emergency management is a creature of law. On the federal, state and local levels, legal enactments set the parameters for all emergency management activities. Terrorism preparedness from the legal perspective requires knowledge of a variety of legal matters.¹ A brief discussion of the evolving legal requirements applicable to planning for and responding to terrorism events will serve to illustrate the complexity of standards that drive emergency management as a whole.

In general, terrorism response is currently guided on the federal level by Presidential Decision Directive (PDD) 39, Policy on Counterterrorism, (June 21, 1995). PDD 39 specifies that the Federal Bureau of Investigation (FBI) controls the immediate response to this federal crime, which is called “crisis management.” FEMA is responsible for follow up activities, termed “consequence management.” The Federal Response Plan’s (FRP) Terrorism Annex more fully explains the federal role.

President Bush’s June 6, 2002 proposal for a new Department of Homeland Security was billed as consolidating domestic preparedness for terrorism by merging parts of law enforcement entities concerned with this threat. Detailed analysis of this “largest government reorganization since the 1940’s”² is beyond the scope of the current paper. Its establishment would, however, have significant effects embracing and transcending terrorism law that must be briefly touched on here. The Department’s responsibilities would, in fact, go beyond terrorism preparedness to embrace all phases of emergency management. “FEMA would become a central component of the Department of Homeland Security . . .”³ If enacted, the proposal also will replace PDD 39 as the guide for federal response, with its goal “a comprehensive national incident management system for response to terrorist incidents and natural disasters” which “eliminat[es] the artificial distinction between ‘crisis management’ and ‘consequence management.’”⁴ The FRP and other federal response plans will be consolidated by the proposed Department into an all-hazard plan,⁵ an approach that is consistent with established concepts of emergency planning. Some leaders may be concerned at the thought of a single threat driving the agenda for an all-hazards discipline. Added attention and monies, however, will doubtless benefit emergency management as a whole.

In the aftermath of the September 11, 2001 terrorist attacks on the World Trade Center Towers, the scene at “ground zero” – the sixteen-acre site of

¹ See generally William C. Nicholson, *Terrorism: Legal Issues for Emergency Responders*, MERGINET e-magazine at <http://www.merginet.com/>, October 3, 2001.

² David Firestone and Alison Mitchell, *Congress Gets Bill Setting Up New Security Department*, NY TIMES June 18, 2002 at http://story.news.yahoo.com/news?tmpl=story&cid=68&ncid=68&e=5&u=/nyt/20020619/ts_nyt/congress_gets_bill_setting_up_security_dept_.

³ See the White House web site at: <http://www.whitehouse.gov/deptofhomeland/sect1.html>

⁴ See <http://www.whitehouse.gov/deptofhomeland/sect4.html>.

⁵ Id.

destruction - was described by New York University Hospital environmental-medicine specialist Max Costa⁶ as having "the same scope as a Superfund⁷ site." Although EPA monitoring determined that the aftermath was not dangerous from an environmental viewpoint, concern over potential effects of hazardous materials exposure to responders was widespread.⁸ This high profile example illustrates why emergency responders frequently call terrorist attacks "hazardous materials (HAZMAT) incidents with an attitude." The reasoning behind this reference is sound: a terrorist attack will almost always result in the release of hazardous substances, and the terrorist always has a purposeful attitude, or intent in the criminal law⁹ sense of the word.

Terrorists understand the potentially horrific effects of intentionally incorporating hazardous materials into their attacks. They are particularly aware of the potential devastation of the worst types of HAZMAT – weapons of mass destruction (WMD) including chemical, biological and nuclear arms. Osama Bin Laden has been quoted as saying that "If it is true that I have acquired [chemical or nuclear] weapons, I thank God who has made it possible. And if I seek to procure such weapons, it is a duty."¹⁰ Recent statements from the Bush administration are aimed at preparing Americans for additional terrorism events. WMD attacks and suicide bombings like those in Israel have been deemed "only a matter of time" and "inevitable" by the Secretary of Defense Donald H. Rumsfeld and FBI Director Robert S. Mueller III respectively.¹¹

For maximum safety, any terrorism event must be treated as a potential HAZMAT incident. Legal preparedness therefore must include an understanding of HAZMAT law. National Fire Protection Association 472 "Standard for Professional Competence of Responders to Hazardous Materials Incidents" 2002 Edition¹² requires suspected terrorism incidents to be evaluated as potential

⁶ David France, *The Cleanup*, NEWSWEEK, October 1, 2001 at 6.

⁷ The Comprehensive Environmental Response, Compensation, and Liability Act § 104 (i), as amended by the Superfund Amendment and Reauthorization Act of 1986, 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 established by the National Contingency Plan.

⁸ Robert Lee Hotz, Gary Polakovic, *America Attacked; Environmental Nightmare; Experts Differ On Peril From Smoke; Health: EPA Says The Cloud Rising From The Ruins Is Not Toxic, But Others Aren't So Sure. Rescuers Are Most At Risk For Possible Ill Effects*, L.A. TIMES A-5 (September 14, 2001).

⁹ Terrorism is a federal crime. See generally, Note: Responding To Terrorism: Crime, Punishment, And War, 115 HARV. L. REV. 1217, 1224 (2002).

¹⁰ ROLAND JACQUARD, IN THE NAME OF OSAMA BIN LADEN, 142 (2002).

¹¹ Philip Shenon and David Stout, *Rumsfeld Says Terrorists Will Use Weapons of Mass Destruction*, NY TIMES, May 21, 2002 at <http://www.nytimes.com/2002/05/21/politics/21CND-TERROR.html?ntemail1>.

¹² NATIONAL FIRE PROTECTION ASSOCIATION 472: STANDARD FOR PROFESSIONAL COMPETENCE OF RESPONDERS TO HAZARDOUS MATERIALS INCIDENTS (2002). Like many NFPA benchmarks, this standard has been adopted by many fire departments and municipalities, as well as being incorporated by reference into law at the state level. See e.g. Wis. Stat. § 166.215 (2001) (1)(B) A member of a regional emergency response team shall meet the standards for a hazardous

HAZMAT events as part of general situational awareness.¹³ The Hazardous Waste Operations and Emergency Response (HAZWOPER) Standard¹⁴ provides the lawful national guideline for HAZMAT response.

Three invaluable management tools also operate together at any large emergency scene to preserve the safety of responders and the public. Standard operating procedures (SOPs) guide responder organization members during daily operations. SOPs are the sturdy foundation of safety. When a response requires resources beyond those available to an individual organization, well-written mutual aid agreements (MAAs)¹⁵ tie together the good SOPs of multiple response organizations on a sizable emergency scene. The incident command system (ICS) roofs over the structure of safety, assuring that on-scene organization reinforces both good SOPs and well-written MAAs. These tools are designed so that the failure to properly utilize any single element will not result in unsafe conditions. They provide checks and balances for one another to assure scene safety. Their legal underpinnings must be understood to most effectively utilize these tools.¹⁶

Two groups need to learn about the legal basis for terrorism and emergency management - lawyers and emergency managers. They both must learn the law and become partners in public safety.

The Role of Lawyers

The attorney without a background in terrorism and emergency law may find him or herself facing significant challenges at an emergency response. In general law schools provide no training in terrorism and emergency law. Even lawyers employed at the state level by emergency management must, for the most part, learn by doing. The average legal counsel sees events unfolding even as he/she labors to learn an area of law previously thought of as arcane and generally irrelevant since “that sort of thing happens elsewhere.”

Response to a terrorism HAZMAT event, in particular, requires detailed knowledge of complex legal standards. Fortunately for the attorney, HAZMAT responders are trained to these standards. Unfortunately for responders, some attorneys do not react well when their clients know more about the law than do they.

materials specialist in 29 CFR 1910.120 (q) (6) (iv) and National Fire Protection Association Standards NFPA 471 and 472.

¹³ Id. Telephone interview with Jerry W. Laughlin, Deputy Director, Alabama Fire College, former staff liaison for NFPA to the Hazardous Materials Emergency Response Technical Committee, which is responsible for NFPA 472. (June 20, 2002)

¹⁴ Occupational Safety and Health Standards 29 CFR §1910.120 (q) (2002).

¹⁵ See William C. Nicholson, *Legally Sound Mutual Aid Agreements*, EMS BEST PRACTICES, Vol. 2, No. 6, p. 46, June 1999.

¹⁶ See William C. Nicholson, *Beating the System to Death: A Case Study in Incident Command and Mutual Aid*, 152 FIRE ENGINEERING, 128 at 129-130 (1999).

The attorney may find one of emergency law's most difficult aspects to be its requirement for bold thinking. Risk avoidance for the client is the reaction of most lawyers to any situation. In an emergency response, however, this natural tendency must be ruthlessly squelched. The attorney must be able to give rapid advice on matters that would otherwise without doubt be counseled against. Handling an emergency or disaster may include activities such as exercise of eminent domain, putting aside normal contracting requirements and deciding whether to force persons to evacuate their homes. These and many other emergency steps entail a high potential of legal liability.

During the response to emergencies and disasters affecting a unit of government, leaders often keep their legal advisors close at hand.¹⁷ This reaction makes sense, since any emergency involves multiple decisions with significant legal consequences. For attorneys, the biggest challenge in such circumstances may be ensuring that their advice is a part of the emergency response decision process. This situation might seem counterintuitive, given the decision of the leader that the attorney shall participate. The reality, however, is that emergency management and response groups have often been working together for a significant period of time as a team pursuant to legal authority. Legal counsel may not be a part of the team. If the attorney has not been involved at the mitigation and preparedness phases of emergency management, it unlikely that he or she will be welcome during response and recovery. Unless the legal advisor is an established member of the mitigation and preparedness team, his or her contributions during response and recovery may not be helpful.

The lawyer unfamiliar with the legal bases for emergency management and response may, through caution and ignorance, attempt to slow events as he or she strives to learn the law in real time. Emergency responders and managers attempting to save lives and protect property must be action-oriented as they deal with fluid, very dangerous situations. Due to the extreme danger posed by hazardous substances that may well be weaponized, terrorism HAZMAT events in particular require prompt, correct action. In such a situation, professionals often perceive the lawyer who gets in the way of timely action as an obstacle to dealing with the event. Attorneys may find themselves literally locked out of emergency operations centers unless they have taken the pains to become a part of the team during the early stages of emergency management.

The Role of Emergency Managers

While students of emergency management are taught to think and plan for all hazards, there is currently no structure in the educational system to provide them with guidance on the many legal hazards that may arise in the course of

¹⁷ See generally Howard D. Swanson, THE DELICATE ART OF PRACTICING MUNICIPAL LAW UNDER CONDITIONS OF HELL AND HIGH WATER, 76 N.D. L. Rev. 487, 497 (2000) This article details the difficulties faced by attorneys in the aftermath of major floods.

their work.

Many laws affect the professional emergency manager's daily activities. He or she must comprehend both enactments specific to emergency management and areas of law to be faced incidental to being part of government or private sector organizations. Preparedness for terrorism events requires that these daily "housekeeping" legal matters be under control. I do not propose that emergency managers should become attorneys. They need to understand the law sufficiently so as to be able to spot potential issues and obtain legal assistance in resolving them. Teaching emergency managers to be "legal generalists" is the goal.

For example, knowing and understanding human resources law issues will lead to planning ahead to avoid personnel disputes and handling them properly when they occur. Unresolved staff conflicts could lead to unnecessary tension during a terrorism response. OSHA law applies to government employees in many states. HAZWOPER applies in ALL states. Other legal matters that need to be considered include: zoning and land use law; government and business ethics; the local emergency management ordinance; utilization of volunteers; legal underpinnings of planning, training and exercising; declaring an emergency; line of succession; interface between ICS and the EOC; evacuation; animal issues; ending the emergency; and legal basis for mitigation steps.

Conclusion

Almost all lawyers are woefully ignorant of terrorism and emergency law. They need more opportunities to learn the law before the fact rather than in the middle of a response. Similarly, students of emergency management require guidance regarding the many legal hazards that may arise in the course of their work. Incorporating all-legal-hazards knowledge and skills will fill a significant gap in their education. Application of that legal knowledge on a daily basis will result in legal counsel and professional emergency managers with the ability to apply a team approach to identifying and pro-actively dealing with legal issues, working together for "litigation mitigation." The end result will be communities that are better prepared for terrorism response as well as all other hazards.