



The Center for Law & the Public's Health at Georgetown & Johns Hopkins Universities

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MEMORANDUM

Hurricane Katrina Response

Federal Utilization of State Emergency Management Resources

In response to the current and impending use of volunteer health professionals (VHPs) in the Gulf Coast region impacted most significantly by Hurricane Katrina, the *Center for Law and the Public's Health (Center)* has drafted a brief analysis of avenues by which the federal government may utilize state resources for purposes of emergency management.

Disclaimer - *This information does not represent the official legal positions of the federal, state, or local governments nor is it meant to provide specific legal guidance or advice.*

Federal Participation in EMAC

The Emergency Management Assistance Compact (EMAC) provides for mutual assistance between member states during emergency or disaster situations. EMAC dictates the procedures for sharing assets between states to provide mutual assistance, outlines protections for these assets, and provides for reimbursement for the use of persons and other assets during a response. The full text of the Model EMAC legislation can be found on the web at <http://www.emacweb.org/?13>.

EMAC is an agreement between the states and territories of the United States, but not the federal government. The model legislation defines states as “. . . the several states, the Commonwealth of Puerto Rico, the District of Columbia, and all U.S. territorial possessions.” *See* EMAC, Art. 1. Furthermore, the purpose of the compact is to provide mutual assistance between states for the management of emergencies or disasters declared by party states. *See id.* Currently, EMAC has been executed by forty-eight states (excepting CA and HI), the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

Though it is not a party to EMAC, the federal government has consented to its provisions. *See* P.L. 104-321 (1996). The federal government cannot invoke the protections of EMAC. As a result, if the federal government seeks to take advantage of state resources as a part of the federal response to an emergency, it typically executes a separate memorandum of understanding to govern the terms of use.

The federal government does enjoy certain rights under the agreement, which include consultation with states regarding their emergency management responsibilities. *See* EMAC, Art. III.C. Additionally, party states are required to deposit copies of the signed compact with the Federal Emergency Management Agency (FEMA) and any other appropriate federal agencies. *See* EMAC, Art. XI.C.

For a detailed discussion of the incorporation of local assets into state responses under EMAC, including sample agreements, please see the *Center's* memo titled "Hurricane Katrina Response: Incorporation of Local Assets into a State Emergency Management Assistance Compact (EMAC) Response," which can be found on the web at <http://www.publichealthlaw.net/Research/PDF/Katrina%20-%20Local%20Assets%20and%20EMAC.pdf>.

Federal Disaster Relief Laws

The participation of the federal government in disaster relief efforts is governed by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, PL 93-288. Although the Stafford Act permits the federal government to contract with local entities to carry out disaster relief activities, it does not directly equip the federal government with the power to take state resources to carry out emergency management activities. *See* 42 U.S.C.A. § 5150. The Stafford Act does, however, permit the federal government to "accept and utilize" the services of any state or local government in carrying out its disaster relief activities with the consent of the state or local government providing the resources. *See* 42 U.S.C. § 5159(a).

The federal government's inability to appropriate state resources or personnel in response to emergencies (or otherwise) without state consent is a significant issue of constitutional law. Pursuant to the Supremacy Clause in the U.S. Constitution, federal law is the supreme law of the land. State law is subordinate when the federal government is acting pursuant to its constitutionally delegated powers. However, principles of federalism suggest that the federal government's power over states is limited. For example, the federal government is not permitted to commandeer state legislatures and compel them to enact and enforce a federal regulatory program. *See New York v. U.S.*, 505 U.S. 144, 161 (1992). To do so would infringe upon the sovereignty of states granted by the 10th Amendment of the Constitution. In *New York v. U.S.*, the Supreme Court invalidated a "take-title" provision of the Low-Level Radioactive Waste Policy Act, which required the state to accept ownership of waste or regulate according to the instructions of Congress. The Court determined that this provision was impermissibly coercive and amounted to commandeering the state into the service of federal regulatory purposes. *See id.* at 175.

For the federal government to require the assistance of state resources, like public health laboratories or personnel, without the consent of the state to respond to Hurricane Katrina would infringe state sovereignty. The taking of the resources would be analogous to compelling the state to enforce a federal administrative policy regarding disaster relief through the use of its own resources. Although the federal government may not be constitutionally permitted to take state resources for its own use, states may, of course, consent to such uses. As mentioned above, memoranda of understanding regarding the use of the resources and associated reimbursement for the resources are commonly used to obviate these issues and would be in compliance with the requirements of 42 U.S.C. § 5159(a)..

We hope that these brief comments are helpful. Please let us know if you have any questions.

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