



Legal Guidelines for Flood Evacuation

**Completed in compliance with the Flood Emergency
Action Team (FEAT): Initiative Number 2**

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System (SEMS) Advisory Board on November 21, 1997**

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Dear Ms. Hindmarsh:

Pursuant to your request, this office has reviewed and found acceptable for release to local government your document entitled, "FLOOD EVACUATION GUIDELINES."

Even so, this office recommends that the advice and assistance of local legal counsel be sought whenever extraordinary actions are contemplated.

Sincerely,

DANIEL E. LUNGREN
Attorney General


ROGER E. VENTURI
Supervising Deputy Attorney General

REV:gmm

10/24/97

LEGAL GUIDELINES FOR FLOOD EVACUATION

based upon a paper prepared by Roger Venturi, S.D.A.G., Office of the Attorney General
Flood Warning Workshops - February 1997 (Revised 6/23/97)

I. BACKGROUND

Purpose The Governor's Office of Emergency Services has prepared the *Flood Evacuation Guidelines* for local government officials and emergency response staff. The guidelines are based upon a paper prepared by Roger Venturi, Supervising Deputy Attorney General, Office of the Attorney General, entitled Flood Warning Workshops - February 1997 (revised 6/23/97).

The guidelines focus on issues local government officials may face when evaluating the potential evacuation of their populations in the event of a flood emergency or disaster. As they face this decision, questions will arise as to a local government's authority to issue an evacuation order and the liabilities associated with such an order. The guidelines provide background to these questions.

Contents The guidelines relate only to evacuations for flood emergencies. For evacuations related to emergencies or disasters other than floods, other legal authorities may apply. This document does not cover these emergencies or legal authorities.

Guidelines This document has been prepared strictly as a guide, and should not be construed as providing legal advice. The guidelines do not address all the legal issues that could arise in a flood emergency, and discuss only those authorities most frequently invoked in evacuations for flood emergencies. Prior to ordering an evacuation or for advice on evacuation issues, local government officials should consult with their city or county legal counsel.

The guidelines are written in a question-and-answer format for ease of use.

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II. DUTIES AND RESPONSIBILITIES

In order to understand the duties and responsibilities that arise during a flood emergency, one must first review the various relationships that apply both prior to and during the flood emergency. For the purposes of these guidelines, the term “governing body” refers to that of a city, county, or city and county.

Q. *WHAT ARE THE LEGAL AUTHORITIES TO ORDER AN EVACUATION?*

A. The primary authorities cited in this document include the following: Government Code, Penal Code, Emergency Services Act, California Constitution, and case law. The legal authorities for specific powers granted to local governments and certain public officials regarding evacuations appear in footnotes for each discussion.

Q. *WHO IS RESPONSIBLE FOR ORDERING AN EVACUATION?*

A. The State, county, city, or city and county entities are responsible for protecting the lives and property of their inhabitants.

Q. *WHO HAS THE AUTHORITY TO ORDER AN EVACUATION?*

A: The Governor, local governing body, and certain statutorily designated law enforcement officers have the authority to order an evacuation.

Four entities that may exercise authority for evacuation in the event of a flood emergency or disaster are discussed below. They include the:

- local governing body of counties, or whomever is authorized to act on their behalf;
- local governing body of cities, or whomever is authorized to act on their behalf;
- statutorily designated law enforcement officers; and
- Governor.

The local governing body, or whomever the local governing body has authorized to issue the evacuation order, is primarily responsible for ordering an evacuation. This authorization can be in the form of an ordinance, resolution, or order that the local governing body has enacted.

A. COUNTIES.

Authorities:

- All the counties of this state are deemed to be legal subdivisions of the state.¹
- Case law establishes that a county exercises only those powers that are granted by the state.²
- Counties are not municipal corporations since counties are not, like municipal corporations, incorporations of the inhabitants of specified regions for purposes of local government.³
- Any county may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with the general laws.⁴
- All counties have the power to promote the public health and general welfare of its citizens.⁵
- Regarding the dissemination of information, any county may disseminate information to the public concerning the rights, duties, properties and activities of the county.⁶

Charter county

In those cases where the county has been granted a charter from the state and that charter has been approved by the state legislature, then those charter counties shall have all the powers that are provided by the state constitution or by statute for the counties.⁷ In contrast, a general law county is created and granted only those powers set forth by statute and the common law.

In charter counties if there is a conflict between state law and a county charter provision, the local law generally prevails except where the intent of a general [state] law is to establish a state policy. In those instances, state law is prevailing.⁸

¹ Cal. Const., Art. II, § 1; Gov. Code, § 2300.2.

² *Marin County v. Superior Court of Marin Co.* (1960) 563 Cal.2d 633.

³ *In re Miller's Estate* (1936) 5 Cal.2d 588; *Dillwood v. Riecks* (1919) 42 Cal.App. 602.

⁴ Cal. Const., Art. II, § 7.

⁵ *Goodall v. Brite* (1936) 11 Cal.App.2d 540.

⁶ Gov. Code, § 25, 207.5.

⁷ Cal. Const., Art. II, § 4 (g) and (h).

⁸ *Shean v. Edmonds* (1948) 89 Cal.App.2d 315.

County Sheriff

The sheriff shall prevent and suppress any affrays, breaches of the peace, riots and insurrections which come to his knowledge, and investigate public offenses which have been committed."⁹

The Sheriff also has the responsibility for closing areas to the public¹⁰ and inferably to order an evacuation (see discussion of Penal Code section 409.5 on page 7).

As county director of emergency services

If the county board of supervisors adopts a resolution by unanimous vote, electing that the sheriff hold the office of county director of emergency services, ex officio, the sheriff shall perform the duties prescribed by state law and executive order, the California Disaster and Civil Defense Master Mutual Aid Agreement, mutual aid operational plans adopted pursuant thereto and by county ordinances and resolutions.¹¹

Not all counties have elected to have the sheriff perform the duties of the county director of emergency services. Therefore, you should ascertain who in your county has been given that responsibility.¹²

A. CITIES.

Authorities:

- The state legislature is the entity that prescribes the procedures for city formation and provides for city powers.¹³
- A city charter may provide for that city having the power to make and enforce all ordinances and regulations in respect to municipal affairs, subject only to those restrictions and limitations provided in their charter and in respect to other matters, the city shall be subject to the general laws.¹⁴

⁹ Gov. Code, § 26602

¹⁰ Pen Code §§ 409, 409.5, 409.6.

¹¹ Gov. Code, §§ 22620-22623

¹² Gov. Code, § 26, 624.

¹³ Cal. Const., Art. II, § 2(a)

¹⁴ Cal. Const., Art. II, § 4(a)

- A city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws.¹⁵
- A city may adopt regulations designed to promote the health and welfare of the people.¹⁶
- A [state] statute addressing an area of statewide concern is deemed applicable to charter (and general law) cities.¹⁷

Chief of Police

"For the suppression of riot, public tumult, disturbance of the peace, or resistance against the laws or public authorities in the lawful exercise of their functions, the chief of police has the powers conferred upon sheriffs by general law and in all respects is entitled to the same protection."¹⁸

He shall perform such other services as general law and the city ordinances require.¹⁹

As does the Sheriff, the Chief of Police has the power to close areas to the public and inferably to order an evacuation (refer to discussion of Penal Code section 409.5 on page 7).

Q. WHAT POWERS DOES LAW ENFORCEMENT HAVE WITH RESPECT TO EVACUATIONS?

A. Three Penal Code provisions are of particular import when emergencies arise. They are Penal Code sections 409, 409.5 and 409.6.

409 Pertains to remaining at the place of a riot or unlawful assembly after being given an order to disperse.

409.5 Governs closing an area because of an emergency. Describes power that is granted to certain named law enforcement groups and may be exercised by them either independently of the Emergency Services Act or in conjunction with it (*see list on page 7).

These groups may close the area where the menace exists for the duration thereof by means of ropes, markers, or guards to any and

¹⁵ Cal. Const., Art. II, § 7

¹⁶ *DeAryan v. Butler* (1953) 119 Cal.App.2d 674, cert. den. 74 S.Ct. 863

¹⁷ *DeVita v. County of Napa* (1995) 9 Cal.4th 763.

¹⁸ Gov. Code, § 41601

¹⁹ Gov. Code, § 41611

all persons not authorized by the lifeguard or officer to enter or remain within the enclosed area.

<i>Local health officer</i>	If the calamity creates an immediate menace to the public health, may close the area where the menace exists pursuant to the conditions set forth in this section.
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409.6 Similar to section 409.5, but applies to avalanches, which includes snow or mudslides. Varies from 409.5 in that 409.6 specifically provides for the use of reasonable force to remove a person who has been given notice to leave the closed area.

Q. HOW IS PENAL CODE SECTION 409.5 USED BY LAW ENFORCEMENT IN EVACUATIONS?

A. Since the emphasis of this paper is flood emergencies, section 409.5 is of particular import. However, note that section 409.5 describes a power that is granted to certain named law enforcement groups and may be exercised by them either independently of the Emergency Services Act²⁰ or in conjunction with it.

NOTE: The advantage of Penal Code section 409.5 is that any of the named law enforcement officers may close an area by a verbal order on an immediate and/or selective basis. The disadvantage is that the announcement or orders may vary from officer to officer, thereby increasing the possibility of liability. Close supervision and coordination are essential.

<i>Law enforcement groups</i>	<p>These law enforcement groups are:</p> <ul style="list-style-type: none"> - California Highway Patrol - police department - marshal's office - sheriff's office - any officer or employee of the Department of Forestry and Fire Protection designated a peace officer by subdivision (g) of Section 830.2 - any officer or employee of the Department of Parks and Recreation designated a peace officer by subdivision (f) of Section 830.2
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²⁰ Gov. Code, § 8550, et seq.

- any officer or employee of the Department of Fish and Game designated a peace officer under subdivision (e) of Section 830.2
- any publicly employed full-time lifeguard or publicly employed full-time marine safety officer while acting in a supervisory position in the performance of his or her official duties

Local health officer Further, if the calamity creates an immediate menace to the public health, the local health officer may close the area where the menace exists pursuant to the conditions set forth in this section.

Other sections Sections 409.5(c) and (d) also address issues relevant to flood emergencies. They pertain to an unauthorized person entering a closed area or refusing to leave a closed area, and restricted entry into a closed area for media and residents, respectively.

409.5(c) **Unauthorized person entering a closed area or refusing to leave a closed area. Penal Code Section 409.5:**

"(c) Any unauthorized person who willfully and knowingly enters an area closed pursuant to subdivision (a) or (b) and who willfully remains within the area after receiving notice to evacuate or leave shall be guilty of a misdemeanor.

409.5(d) **Restricted entry into a closed area for media and residents. Penal Code Section 409.5:**

"(d) Nothing in this section shall prevent a duly authorized representative of any news service, newspaper, or radio or television station or network from entering the areas closed pursuant to this section." (See: 67 Ops.Cal.Atty.Gen. 535 (1984): Local law enforcement officers have independent emergency powers to restrict entry of residents and volunteers to area damaged by earthquake while threat exists to public health and safety as reasonably determined on a case-by-case basis.)

Order to evacuate It is unclear under Penal Code section 409.5 whether law enforcement officers can force someone to evacuate an area.

Issues Because of a variety of issues concerning the implementation of this approach, many jurisdictions decided to warn the person and either have that person sign a waiver form if the person refused to leave, or fully document the giving of the notice to leave and that person's refusal to leave.

Alternative Another alternative would be to have the officer order the evacuation, and should that person refuse to leave the area, the officer would arrest that person under Penal Code section 148.

Evacuation order Rather than relying on Penal Code section 409.5, the local governing body should consider issuing an evacuation order that specifies the following:

- whether the order for voluntary or mandatory evacuation;
 - who is going to enforce the order (police, sheriff, director of emergency services, fire department, etc.);
 - what they are authorized to do (evacuate, use reasonable force to remove someone from an area);
 - the relevant time period; and
 - that the evacuation is issued under provisions of the Emergency Services Act, thereby invoking the penalty provisions of the Act and affording the immunities accorded.
-

Q. IS THERE AN ALTERNATIVE TO ORDERING AN EVACUATION ORDER UNDER PENAL CODE SECTION 409.5?

A. The local governing body may impose voluntary or mandatory evacuation orders pursuant to their police powers. The better practice is to declare a local emergency under provisions of the Emergency Services Act and then issue any evacuation order pursuant to that authority.

Q. WHAT AUTHORITY DOES THE STATE HAVE TO ORDER AN EVACUATION?

A. From the civil defense arena the Legislature adopted the concept that the State and in particular the Governor is in charge of all state agencies, state subdivisions and resources during those conditions known as a "state of war emergency" and as a "state of emergency."²¹

²¹ Gov. Code, §§ 8550, 8558, subds. (a) and (b), 8567, 8570, 8571, 8572, 8574, 8591, 8595, 8596, 8600, 8614, 8620, 8621, 8625, 8627, 8627.5, 8628, 8646, 8653, 8665.

That approach places the Governor and the State at the apex, followed by the counties and lastly by the various cities, even though for mutual aid purposes the local official where the incident has occurred usually is to remain in charge at the scene.²²

More info. For more information, refer to page 12 regarding a “state of emergency.”

County controls Under the provisions of the Emergency Services Act, should a county and a city within that county declare local emergencies seeking to control the same event, and in so doing the two entities issue conflicting, overlapping, emergency ordinances and/or orders, the county emergency ordinances and/or orders are controlling.²³

However, it should be noted that those emergency powers and immunities that are accorded to the state and its political subdivisions under the Emergency Services Act to order an evacuation clearly apply only when a State of War Emergency, a State of Emergency, or a State of Local Emergency are duly proclaimed and meet the definitions for such. Evacuation orders made under a different authority may not qualify for the immunities afforded by the Emergency Services Act.

Requisite conditions Since this paper only concerns flood warnings and evacuation orders, only the State of Emergency and State of Local Emergency proclamations are applicable. The requisite conditions, which are the same for both, must be met. Conditions must exist that are of:

- (1) extreme peril to life and property, and
 - (2) beyond the control of the services, personnel, equipment, and facilities of that subdivision so that outside assistance is required.
-

Q. WHAT ROLE SHOULD STANDBY LOCAL ORDINANCES PLAY IN CLOSING AN AREA OR ORDERING AN EVACUATION?

A. *Expedite response time* In preparation to a flood response, a governing body could adopt by ordinance a standby emergency order regarding evacuation, which will take effect upon the declaration of a local emergency and the meeting of life endangering conditions. The advantage to this is that the appropriate authorities will be empowered to act immediately upon the declaration of a local emergency, thereby expediting response time and allowing for pre-emergency planning.

²² Cal. Const., Art. II, §§ 4 and 7; Gov. Code, §§ 8559, 8560, 8561, 8568, 8600, 8605, 8614, 8616, 8621, 8627, 8627.5, 23002; 62 Ops.Cal.Atty.Gen. 701 (1979).

²³ 62 Ops.Cal.Atty.Gen. 701 (1979).

Example: For example, the local governing body can, by emergency standby order authorize the local director of emergency services to evacuate or close an area or areas under certain conditions. In the emergency standby order, the local governing body would specify who they have designated to act on their behalf, and what that person's authority is.

If the governing body operates under an ordinance when no local emergency has been declared, the ordinance may be deemed by the courts as complementing Penal Code Section 409.5, rather than the Emergency Services Act, and thereby limit the immunities afforded by the Emergency Services Act.

Declare early If a governing body issues a local declaration of emergency, it is preferable to issue the declaration at the earliest possible time since this will authorize the local governing body to issue "orders and regulations necessary to provide for the protection of life and property."²⁴

NOTE: Review the city charter to determine what powers the local government has. The city may already have independent powers to take certain emergency response actions, if these actions do not conflict with state statute.

Ordinances remain in effect Local ordinances remain in effect even though a "State of Emergency" has been proclaimed unless the Governor orders the local ordinance suspended or superseded,²⁵ and in some instances the Governor has permitted the local governing bodies to continue to exercise their emergency powers and to issue orders and regulations even though a "State of Emergency" was declared.

²⁴ Gov. Code, § 8634.

²⁵ Gov. Code, § 8614, subd. (c)

Q. WHAT ARE THE MEANS FOR IMPOSING A MANDATORY EVACUATION?

A. There are three different means for imposing a mandatory evacuation.

Penal Code section 409.5 Penal Code section 409.5 authorizes officers of the highway patrol, police departments, marshal's office or sheriff's office and certain other designated law enforcement officers to close an area whenever there is a menace to public health or safety.

Although that section is often utilized during emergencies, it is unclear whether it may be used to remove persons who were within the area prior to it being ordered closed. Also, only those officers specifically named in that statute may enforce it.

State of local emergency Although a local governing body has inherent policy powers to protect the health and safety of its people, Government Code sections 8558, subdivision (c) and 8630 authorize the local governing body to declare a "state of local emergency" pursuant to the Emergency Services Act.

When a "state of local emergency" has been declared, the local governing body may issue orders and regulations "necessary to provide for the protection of life and property."²⁶ An order for mandatory evacuation would be authorized under that section. Failure to comply with any such order is a misdemeanor and subject to imprisonment for up to six months and/or a fine of up to \$1,000.²⁷

The advantage of this approach is that local control and coordination are maintained.

State of emergency The Governor may declare a "state of emergency."²⁸ During a "state of emergency" the Governor has complete authority over all state agencies and the right to exercise all police powers vested in the State, including the issuance of such orders and regulations as he deems necessary.²⁹

He also may amend or rescind existing orders and regulations³⁰ and suspend any regulatory statute, any statute prescribing the procedure for conducting state business, or the orders, rules or regulations of any state agency.³¹

²⁶ Gov. Code, § 8634.

²⁷ Gov. Code, § 8665.

²⁸ Gov. Code, §§ 8558, subd. (b), 8625.

²⁹ Gov. Code, §§ 8567, 8627, 8627.5, 8628.

³⁰ Gov. Code, § 8567.

³¹ Gov. Code, § 8571.

Local public officials and employees are required to render all possible assistance to the Governor during a "state of emergency."³² The ordinances, orders, and regulations of a political subdivision continue in effect during a state of emergency unless suspended or superseded by an order issued by the Governor.³³

Thus, the Governor may assume responsibility for the issuance of mandatory evacuation orders or abide by the mandatory evacuation orders issued by the affected political subdivision.

NOTE: If the latter two options, state of local emergency and state of emergency, are utilized, the Emergency Services Act confers increased immunities from liability.³⁴

³² Gov. Code, § 8614.

³³ Gov. Code, § 8614.

³⁴ Gov. Code, §§ 8544 - 8550.

III. EMERGENCY SERVICES ACT

Q. WHAT IS THE ROLE OF THE EMERGENCY SERVICES ACT IN EVACUATIONS?

- A.** Penal Code section 409.5 may be evoked independently or in conjunction with the Emergency Services Act. However, the immunity from liability is much greater if the provisions of the Emergency Services Act apply. In order to understand the differences, the discussion below focuses on the Emergency Services Act commencing with Government Code section 8550.
-

*State
responsibility*

In Section 8550 the Legislature recognizes the state responsibility to mitigate the effects of those emergencies "which result in conditions of disaster or in extreme peril to life, property, and the resources of the state, and generally to protect the health and safety and preserve the lives and property of the people of the state." That section further confers upon the Governor and upon the chief executives and governing bodies of political subdivisions of this state the emergency powers accorded under this act.

*"Political
subdivision"
defined*

Government Code Section 8557, subdivision (c) defines the term "political subdivision" to include "any city, city and county, county, district, or other local governmental agency or public agency authorized by law."

In enacting the Emergency Services Act, the legislature merged three separate ideologies, civil defense, disaster response, and mutual aid, into one operational concept.

Q. HOW DOES MUTUAL AID RELATE TO THE ISSUE OF EVACUATIONS?

- A.** Mutual aid may be rendered under the auspices of the Emergency Services Act even though a local emergency has not been declared, provided that the previously described, specified, conditions have been met -- an emergency affecting life and property of such a magnitude that the local entity is unable to combat it with its available resources so that outside assistance is required. That outside assistance is termed "mutual aid"³⁵ for purposes of the Emergency Services Act.

³⁵ Gov. Code, §§ 8559, 8560, 8561, 8579, subds. (b), (f) and (h), 8589.2, 8600, 8610, 8615, 8617, 8618, 8631, 8633, 8668.

Advantage If a local government renders mutual aid in the absence of a local emergency declaration, it may do so and still be within the auspices of the Emergency Services Act. The advantage of declaring a local emergency is that it establishes that the actions are within the Emergency Services Act, and the local government will be afforded the immunities granted by the Act, such as those immunities from liability for the public entity and its employees.

*Master
Mutual Aid
Agreement*

The Emergency Services Act does not specifically define what constitutes "mutual aid."³⁶ Rather, the Act merely references the Master Mutual Aid Agreement and approved emergency plans as the authority for rendering such aid during a war emergency or state of emergency.³⁷

In periods other than a state of war emergency, state of emergency, or a local emergency, it refers to the Master Mutual Aid Agreement and local ordinances, resolutions, agreements or plans as authority for the exercise of mutual aid powers.³⁸

The Master Mutual Aid Agreement suggests that mutual aid means the interchange of services and facilities on a local, county-wide, regional state-wide and interstate basis to combat the effect of disasters which may result from such calamities as flood, fire, earthquake, pestilence, war, sabotage and riot, and is intended to be available in the event of a disaster of such magnitude that it is, or is likely to be, beyond the control of a single [entity] and requires the combined forces of several or all of the [entities] to combat.

Q. *WHAT ARE THE ADVANTAGES TO A LOCAL GOVERNMENT DECLARING A LOCAL EMERGENCY PRIOR TO ORDERING THE CLOSURE OF AN AREA OR ORDERING AN EVACUATION?*

A. There is an advantage to be covered by the immunities of the "Emergency Services Act" rather than those accorded under the "Tort Claims Act." But in case of a lawsuit, a local government will have to establish that it was acting in accordance with the provisions of the "Emergency Services Act" in order to claim its immunities.³⁹

³⁶ Gov. Code, §§ 8615-8618.

³⁷ Gov. Code, §§ 8560, 8561, 8615, 8616.

³⁸ Gov. Code, §§ 8560, 8561, 8617.

³⁹ *Adkins v. State of California* (1996) 50 Cal.App.4th 1802, 1817-1819; rev. den. 3/12/97 (limits Emergency Services Act immunity).

Local Declaration The easiest situation to prove is **where a state of local emergency has been declared by the local governing body.**

In-county resources By doing so, there is a finding that an emergency exists and that mutual aid is needed to assist that entity. Then, where just in-county resources are utilized, the Master Mutual Aid Agreement and any local agreements to provide mutual aid should be sufficient to establish that the Emergency Services Act applies.⁴⁰

Out-of-county resources However, if out-of-county assistance is needed, then requests for mutual aid should follow the procedures set forth by the Office of Emergency Services including the obtaining of mission numbers from O.E.S. for the responding agencies. This becomes particularly important for purposes of possible reimbursement of extraordinary costs should a "State of Emergency" and/or a presidential declaration of disaster be issued and state or federal disaster relief funds be made available.

Issue orders and regulations The other advantage to proclaiming a local emergency is that the local governing body is authorized to issue "orders and regulations necessary to provide for the protection of life and property."⁴¹

That provision takes on particular import when talking about closing an area or ordering evacuations. If the local entity orders such:

- it may expand the category of persons who are authorized to announce and enforce the orders;
- the failure to obey the order is a misdemeanor subject to fine and/or imprisonment;⁴²
- use of an order avoids the previously discussed legal ambiguities inherent in Penal Code section 409.5.

⁴⁰ Gov. Code, §§ 8615-8617, 8631.

⁴¹ Gov. Code, § 8634.

⁴² Gov. Code, § 8665.

Declare early Regarding the possibility of declaring a "local emergency," in a number of respects it is best to declare it at the earliest possible time. By doing so it provides for the following:

- alerting and activating the mutual aid system;
- invoking and disseminating emergency orders at the earliest possible time; and
- meeting the requisites for seeking the Governor's proclamation of a "State of Emergency."⁴³

Q. WHAT IS THE BETTER APPROACH FOR A PUBLIC ENTITY TO FOLLOW WHEN CONTEMPLATING ISSUING AN ORDER OF EVACUATION AND WHY?

No Local Declaration

The following addresses the situation where an emergency has arisen, mutual aid is requested, but the local governing body has not proclaimed a local flood emergency.

1. First, the primary power to close and/or evacuate an area would be Penal Code section 409.5, with all its previously discussed problems.
2. Second, in order to come within the "Emergency Services Act," the parties would have to establish that mutual aid was provided in accordance with that act, meaning the response was accomplished in accordance with the State Emergency Plan, the Master Mutual Aid Agreement, or local mutual aid agreements or plans.⁴⁴

Act under ESA

But should an entity be sued, it would have to establish it was acting under the provisions of the Emergency Services Act, rather than a general contract or a joint powers agreement, in order to invoke the immunities conferred by the Emergency Services Act.

How to invoke ESA immunities

The best way to insure such, would be to establish a local plan, have it reviewed by O.E.S. and the California Emergency Council and have it be adopted by the Governor as part of the State Emergency Plan.⁴⁵

The next best way is to establish that the mutual aid was provided in accordance with the Emergency Services Act, the Master Mutual Aid Agreement, and the procedures set forth by the Office of Emergency Services.

⁴³ Gov. Code, § 8625, subds. (a) and (b).

⁴⁴ Gov. Code, §§ 8560, 8561, 8568, 8569, 8616, 8617, 8632.

⁴⁵ Gov. Code, §§ 8560, 8569, 8579, subd. (f).

Mutual aid outside OES procedures However, there may be instances where the assistance is rendered according to a local agreement or just a request for assistance, say from one city to another within the same county, without resorting to the formalized OES mutual aid procedures. This often arises within an "operational area" which is defined as "an intermediate level of the state emergency services organization, consisting of a county and all political subdivisions within the county area."⁴⁶

Suggestion Where the local government intends to render mutual aid outside of the normal state OES procedures, i.e., adjoining cities, it is suggested that it either cover such as part of the State Emergency Plan, or specifically reference those parts of the Emergency Services Act authorizing the use of mutual aid. Without such, the entities run the danger of their actions being deemed a joint powers agreement and subject only to the provisions of the "Tort Claims Act."

Private Entities May a governmental entity enter into mutual aid agreements with private entities? Yes, the Emergency Services Act anticipates the use of such agreements.⁴⁷ If the private parties are sworn in as disaster service workers, or impressed, they could qualify as volunteers or impressed persons within the meaning of Government Code section 8657, and thus be accorded immunity under the Act.

Advantages government There would be advantages to both parties. Local government would be afforded the services, supplies, and expertise of the particular private entities. In certain situations, such agreements may be subject to normal public contracting requirements.

Reference ESA If a formal agreement is drafted, or an ordinance or regulation enacted requiring mutual aid to combat an emergency, it is recommended that a reference to the mutual aid provisions of the Emergency Services Act⁴⁸ be incorporated into those documents. (See Health & Saf. Code, § 13863 [private fire department public entity mutual aid].) Those approaches may not resolve the question of whether the Emergency Services Act applies, but it at least is an arguable position.

⁴⁶ Gov. Code, § 8559, subd. (b).

⁴⁷ Gov. Code, §§ 8616-8619, 8565-8574.

⁴⁸ Gov. Code, §§ 8610, 8617.

IV. POTENTIAL LIABILITY AND IMMUNITIES

Q. WHAT ARE THE POTENTIAL LIABILITIES AND IMMUNITIES FOR A LOCAL GOVERNMENT WHEN ORDERING AN EVACUATION?

A. The guidelines discuss two laws that address liability and immunities for public entities and public employees. They are the Emergency Services Act and the Tort Claims Act. The discussion below relates to flood emergencies and an order of evacuation.

Q. WHAT ADDITIONAL PROTECTIONS DOES THE EMERGENCY SERVICES ACT OFFER TO PUBLIC ENTITIES?

A. Most of the previous discussion touches upon actions taken under the provisions of the Emergency Services Act.⁴⁹ The first question usually asked is why should we, at the local level, even bother with the Emergency Services Act? The most cogent answer is that it provides greater immunity from liability than does the "Tort Claims Act."

Government Code section 8655 states:

"The state or its political subdivisions shall not be liable for any claims based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of this chapter."

*Disaster
service
workers*

Government Code section 8657 extends those immunities to enrolled volunteers (disaster service workers) and persons duly impressed into service during a state of war emergency, a state of emergency or a local emergency.

In other words, the Emergency Services Act grants immunity for both discretionary and ministerial duties, while the "Tort Claims Act" typically only grants discretionary immunity.⁵⁰

⁴⁹ Gov. Code, §§ 8550, et seq.

⁵⁰ *Macias v. State of California* (1995) 10 Cal.4th 844, 848, 854; *Adkins v. State of California, supra*; *Farmers Ins. Exchange v. State of California, supra*; *LaBadie v. State of California* (1989) 208 Cal.App.3d 1366, 1369; *Teresi v. State of California, supra*.

Tort Claims Act In 1961, the California Supreme Court abrogated the doctrine of governmental tort immunity.⁵¹ In response to that ruling, the California legislature enacted in 1963, the "Tort Claims Act."⁵²

Defines liability and immunities It is the primary, although not the exclusive, source for defining liability and immunities of public entities and public employees. This paper will touch upon some of the general principles of the "Tort Claims Act."

"Public agency" defined For purposes of the Tort Claims Act, a "public agency" is defined as the state, the Regents of the University of California, a county, a city, a district, public authority, public agency and any other political subdivision or public corporation in the state.⁵³

"Employee" defined The term "employee" includes an officer, a judicial officer, an employee, or a servant, whether compensated or not, but does not include an independent contractor.⁵⁴

Tort liability Even though Government Code section 815 appears to establish immunity of public entities as the rule and liability as the exception, the courts generally have taken the opposite approach.⁵⁵ For example, statutes which impose tort liability in general terms have been found to be applicable to public entities even though public entities were not named.⁵⁶ Nor is liability based upon contractual arrangements affected.⁵⁷

However, Government Code section 815, subdivision (b), indicates that liabilities established under the "Tort Claims Act" are subject to any statutory immunities, including immunities created by statutes other than the "Tort Claims Act," such as those, which will be addressed later, in the Emergency Services Act.

⁵¹ *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, 216-217.

⁵² Gov. Code, §§ 810, et seq.

⁵³ Gov. Code, § 811.2.

⁵⁴ Gov. Code, § 810.2.

⁵⁵ *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692.

⁵⁶ *Levine v. City of Los Angeles* (1977) 68 Cal.App.3d 481, 487.

⁵⁷ *Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 969, fn. 5.

Q. WHAT PROTECTIONS DOES THE TORT CLAIMS ACT OFFER TO PUBLIC ENTITIES WHEN AN ORDER OF EVACUATION IS NOT ACCOMPLISHED WITHIN THE PURVIEW OF THE EMERGENCY SERVICES ACT?

A. Even though the "Tort Claims Act" is a statutory creature, the courts have looked to the common law and general negligence principles. That approach most often arises when determining an employee's liability and the possible vicarious immunity accorded the public entity employer.⁵⁸

Circumstances for liability

And, even though the "Tort Claims Act" states that except as otherwise provided by statute, a public entity is not liable for an injury, whether the injury arises out of an act or omission of the public entity, a public employee, or any other person, the exceptions to immunity are numerous. Essentially, a public entity may be liable under the following circumstances:

Act or omission

Where there is a duty of care owed the injured party, a reasonable reliance upon the performance of that duty and the public employee's act or omission would be the proximate cause of injury so that such act or omission would make that employee personally liable. When viewed under general negligence principles, then the public entity may be found vicariously liable for the act for its employee.⁵⁹

This has often arisen in the context of the employee promising to do an act such as warn a particular person of some danger, the person reasonably relies upon that promise, the employee fails to carry out the promise and the failure to give the warning resulted in an injury to the promisee. In essence, the employee created a duty to a person with a special relationship, and then performed negligently, causing the injury.

Flood warning

This concept has been applied to flood alert warnings (rising water) situations and would likely also apply to actions or omissions in regard to evacuation warnings or orders issued by a public entity or its employees.⁶⁰

⁵⁸ *State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 861-862.

⁵⁹ *State of California v. Superior Court, supra*, at pp. 861-862.

⁶⁰ *Garcia v. Superior Court* (1990) 50 Cal.3d 728, 735-737; *Johnson v. State of California* (1968) 69 Cal.2d 782, 799; *Connelly v. State of California* (1970) 3 Cal.App.3d 744.

Example It likely could arise under the provisions of Penal Code section 409.5, should a peace officer promise to notify a party in a flood zone of any future need to evacuate, then fail to do so and the promisee who reasonably relies on the officer's promise is inundated by flood waters.

*Avoid
"created
duties"*

A public entity and its employees should pay particular attention to the phrasing of flood warnings and voluntary evacuation orders in order to avoid "created" duties. Generally policy decisions are accorded immunity, while ministerial acts are not.⁶¹

*Failure to
discharge
duty
perform*

Liability may be incurred for an injury proximately caused by a public entity's failure to discharge a mandatory duty imposed by statute or regulation.⁶² Where a public entity fails to perform a mandatory duty, it has the burden of establishing that it exercised reasonable diligence to assure that the duty was performed.⁶³

*Dangerous
conditions
public
property*

Liability is imposed under specific provisions of the "Tort Claims Act," such as those sections imposing liability for dangerous conditions of public property.⁶⁴

*Statute or
constitutional
provisions*

Liability is imposed by statute or constitutional provisions other than those set forth by the "Tort Claims Act." For instance, the constitutional provision governing a taking of property for public use, i.e., inverse condemnation,⁶⁵ negligent or wrongful act or omission in the operation of any motor vehicle⁶⁶ or maintaining a nuisance⁶⁷ are examples of such.

⁶¹ *Johnson v. State of California, supra*; See *Adkins v. State of California* (1996) 50 Cal.App.4th 1802, 1817-1819; rev. den. 3/12/97.

⁶² *State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 854.

⁶³ *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 696.

⁶⁴ Gov. Code, §§ 830-840.6.

⁶⁵ Cal. Const., Art. I, § 19.

⁶⁶ Veh. Code, §§ 17001, 17004.

⁶⁷ *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 931-937.

Qualifying principles applicable

Although most of the discussion has centered on areas of potential liability, two qualifying principles may be in flood warning, evacuation or flooding situations.

Doctrine of imminent peril

The first, variously has been called the doctrine of imminent peril, the sudden peril rule, or the emergency doctrine. Where one, who without negligence on his or her part, is suddenly confronted with apparent or actual imminent danger, that person is not required to use the same judgment and prudence as would be required under ordinary circumstances.

The two basic and indispensable elements of the doctrine are:

1. the sudden and unexpected appearance of danger, and
2. the necessity of making an immediate choice between two or more alternative sources of action.

If both of those conditions are met, the person is not necessarily negligent if that person makes a choice that ultimately proves to have been the wrong one, provided that person chose one of the courses of action that a person of ordinary prudence would have chosen under the circumstances. If such is the case, that person will not be liable even if an alternative course of action would have avoided the action.⁶⁸

State's police power

The other governing principle is that the State may take property by virtue of its police powers when there is an urgency sufficiently important to override the policy of compensation.⁶⁹

⁶⁸ *Leo v. Dunham* (1953) 41 Cal.2d 712, 714-715; *Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912-913.

⁶⁹ *Teresi v. State of California* (1986) 180 Cal.App.3d 239; see: *Adkins v. State of California, supra*; *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 305; *Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494, 501-502; *Freeman v. Contra Costa County Water District* (1971) 18 Cal.App.3d 404, 408.

Example

For instance, where a house was blown up to stop the spread of a fire which had not yet reached that point, the court denied any recovery because, "The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government This is not a taking of public property for public use, within the meaning of the Constitution."⁷⁰

⁷⁰ *Surocco v. Geary* (1853) 3 Cal. 69, 73.

EXECUTIVE EVACUATION CHECKLIST

- ❑ **1: Situation Assessment**
 - Determine type, size, and location of emergency
 - Determine number of people affected
 - Determine emergency assistance required, especially for vulnerable populations

- ❑ **2: Infrastructure Assessment**
 - Conduct infrastructure assessment (public and high-risk buildings)
 - transportation
 - communications
 - utilities

- ❑ **3: Evacuation**
 - Identify areas to be evacuated
 - Identify transportation / roadways to be used
 - Alert local law enforcement, California Highway Patrol, and CalTrans
 - Identify vulnerable populations, including people from unique institutions to be evacuated

- ❑ **4: Alert and Warning / Notification**
 - Determine if thresholds for alert and warning have been reached
 - Consider announcing precautionary warnings for vulnerable populations (hospitals, nursing homes/care facilities, schools, special event facilities, etc.)
 - Identify whether the emergency affects life and property
 - Activate public warning system: Emergency Alert System, including emergency digital information system (EDIS)
 - Issue public advisory / notification
 - Advise Operational Area (if city) / REOC (if county) of situation
 - Advise affected jurisdictions, agencies, facilities of public evacuation

- ❑ **5: Initial Response**
 - Announce a precautionary warning for vulnerable populations
 - Declare local emergency
 - Issue local emergency orders/evacuation order
 - Close affected areas

- ❑ **6: Public Information**
 - Issue precautionary warnings and instructions for vulnerable populations
 - Issue evacuation instructions
 - Issue news releases
 - Issue press advisories

- ❑ **7: Mass Care and Shelter**
 - Identify sheltering needs and capabilities
 - activate/establish multi-jurisdictional agreements for care and shelter
 - activate existing agreements with American Red Cross, Salvation Army, community based organizations.
 - designate shelter areas
 - medical
 - standard

EVACUATION CHECKLIST

The checklist is based upon information in the Federal Emergency Management Agency's *Guide for All-Hazard Emergency Operations Planning, September 1996*, the State and Federal Local Guide (SLG) 101.

The information below covers the broad range of issues to consider when contemplating ordering an evacuation.

1: SITUATION ASSESSMENT

Identify the following to determine the response and recovery measures to be implemented. This information will help determine the number of people to be evacuated, time available in which to effect the evacuation, and the time and distance of travel necessary to ensure safety.

- Location of emergency
- Size of involved area, actual and potential
- Emergency conditions that could occur and that would require evacuation
- Characteristics of the hazard or threat
 - magnitude
 - intensity
 - speed of onset
 - duration, and
 - impact on local community
- Weather conditions and any expected changes
- Particular areas or facilities which will not require evacuation because of their location or similar circumstances
- Areas potentially subject to evacuation
- Type of area (business, residential, hillside, etc.)

- Population groups requiring assistance during evacuation, including the identification of medical / health issues
 - develop a plan for evacuating the medically fragile, including those in care facilities that should receive a precautionary warning prior to general evacuation announcements
- Number of affected residents
- Number and type of casualties/injuries
- Direction of movement of evacuees
- Ingress/egress routes for emergency vehicles
- Location of staging area
- Emergency assistance required (ambulance, fire, public utility, heavy equipment)

2: INFRASTRUCTURE ASSESSMENT

Identify facilities presenting high risk or providing public services.

- Damage to structures, roads, critical emergency facilities
- Hospitals and other emergency response facilities
- Airports, docks and other transportation centers
- Roadways, elevated freeways, over and under passes
- Dams, reservoirs, aqueducts, and water storage tanks
- Schools and other locations of high population density
- Hillside for landslide damage
- Telephone facilities, electrical relay stations, and high-voltage power lines
- Refineries, radioactive storage areas
- High-rise buildings, brick buildings, and large-scale apartment structures

3: EVACUATION

- Identify areas to be evacuated.
- Identify sheltering needs and capabilities.
- Ensure that vulnerable populations receive a precautionary warning prior to a general evacuation announcement.
- Contact American Red Cross or similar agency to establish shelters.
- Establish command post to coordinate evacuation.
- Alert local law enforcement, California Highway Patrol, and CalTrans regarding evacuation.
- Continue to assess evacuation areas.
- Identify destination of evacuees.
- Develop evacuation movement control procedures.
 - Develop approach for controlling the flow of evacuees from threatened area.
 - Specify travel routes.
 - Close roads, airports, other pathways.
- Identify means to transport evacuees.
- Identify evacuation options.
- Identify modes of transportation to be used to move evacuees.
- Identify assembly areas for picking up people that do not have their own transportation.
- Identify methods for the movement of people without their own transportation.
- Develop procedures for the perimeter and interior security of the area, including such things as passes, identification requirements, and anti-looting patrols.

- Identify and develop procedures for the evacuation and care of vulnerable populations.
 - children in school
 - medically fragile individuals in home-care settings
 - children in day care centers
 - nursing home residents (long-term)
 - those persons with disabilities (hearing-impaired, sight-impaired, mentally impaired, and mobility-impaired)
 - non-English speaking people
 - institutionalized individuals (hospitals, mental health facilities, nursing homes (short-term), incarcerated residents (jails, juvenile facilities, drug treatment centers)
 - transient populations (street people, motel and hotel guests, seasonal workers)
 - people without transportation

4: ALERT AND WARNING / NOTIFICATION

- Determine if thresholds for alert and warning have been reached.
- Identify whether the emergency affects life and property.
- Identify communication contacts.
- Ensure that vulnerable populations have received a precautionary warning.
- Identify means to be used to keep evacuees and general public informed on evacuation activities and specific actions they should take.
- Activate public warning systems to include Emergency Alert System (EAS).
- Issue evacuation advisement / order
 - use EAS
 - use Emergency Digital Information System (EDIS)
- Institute procedures to warn those persons with disabilities, the deafness community, the medically fragile, and non-English speaking groups.
- Advise Operational Area of situation.
- Advise Mutual Aid Coordinators of situation.
- Advise OES Region of situation.
- Notify affected jurisdictions, agencies, and facilities of public evacuation.
 - American Red Cross of need to establish shelters
 - neighboring counties if local shelter facilities will be overwhelmed
 - hospitals of potential influx of patients

5: INITIAL RESPONSE

- Declare local emergency (by law enforcement or local governing body).
- Issue local emergency orders to include the following:
 - who will enforce order
 - what areas order applies to
 - relevant time period
 - place of evacuation
- Issue statement on jurisdiction's policy for people that do not comply with evacuation instructions.
- Close affected area(s).
- Assist animal care and control agency's efforts to evacuate animals at risk during catastrophic emergency.
 - identify facilities that may be used to house evacuated animals.

6: PUBLIC INFORMATION

- Coordinate outreach/awareness activities with media.
- Disseminate instructional materials and information to evacuees:
 - specific areas to be evacuated
 - list of items that evacuees should take with them
 - departure times
 - pick-up points for people requiring transportation assistance
 - evacuation routes
 - location of mass care facilities outside of the evacuation area
 - information on appropriate actions to protect and care for companion and farm animals that are to be evacuated or left behind
 - phone numbers for American Red Cross shelters (disaster registry)
 - phone numbers for Telesensory Device for the Deaf (TTD) and teletypewriter (TTY) phones for the hearing impaired to obtain evacuation information
- Establish media center for the public to obtain additional information (e.g. hotline)
- Coordinate with appropriate officials (mass care, health and medical) to obtain necessary information
- Schedule news conferences, interviews, and media access
- Coordinate rumor control activity

7: MASS CARE AND SHELTER

- Determine need for shelters and whether shelter in-place is appropriate.
- Identify any multi-jurisdictional agreements regarding care and shelter.
- Review existing agreements with American Red Cross (ARC) and Salvation Army re care and shelter.
- Review existing agreements with community organizations that provide care and shelter services in an emergency such as Volunteers Assisting in Disasters (VOADS) and community based organizations (CBOs).
- Enter into agreement with adjacent jurisdictions to arrange for mass care services for evacuees that cannot be taken care of in the home jurisdiction or to provide similar services to other jurisdictions when their evacuees cannot be cared for in their home jurisdiction.
- Identify potential shelters that are accessible to persons with disabilities.
 - shelters that can be modified to be accessible for those with disabilities.
- Activate shelter plan for those with medical needs.
- Activate plan to shelter pets for those going to mass shelters.
- Establish evacuation centers and direct people to them.
- Coordinate transportation access to shelters.
- Ensure shelters are open and staffed.
- Ensure shelters have utilities, water, hygiene, and food facilities.
- Open communications line to shelter.
- Assess if more shelters need to be opened.
- Assess if shelters need to be closed.
- Develop a plan for residents to return to their homes short-term to retrieve goods.
- Develop procedures for the lifting of the evacuation and reentry of the area.