

**INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
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SAN DIEGO, CA
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**When Disaster Strikes:
What Will Your City be
Expected to Do?**



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What qualifies as a disaster or emergency?

- Example: CA Govt. Code Section 8558:
 - Local
 - Declared
 - Disaster or extreme peril to persons and property
 - Examples: air pollution, fire, flood, storm, epidemic, riot, drought, sudden/severe energy shortage, plant/animal infestation/disease, earthquake, volcanic prediction
 - NOT labor controversy
 - Beyond control of services, personnel, equipment, facilities of local agency

What qualifies as a disaster or emergency?

- Non-exclusive list
- Function of ability of local agency to respond
 - Not necessarily widespread or affecting large number of people
- Distinguish public nuisance
 - Entire community or neighborhood
 - Or considerable number of people
 - Interference with rights common to public
 - Balance social utility with gravity of harm
 - Normally caused by third party

What qualifies as a disaster or emergency?







What qualifies as a disaster or emergency?

- Underground utility lines
 - What's there?
 - When were they last checked?
 - How have they been maintained or repaired?
 - Assumption: safe until they blow?
- Public nuisance before it becomes a local emergency



What qualifies as a disaster or emergency?

- Consequences of local emergency
 - No public bidding for repairs
 - FEMA/CalEMA money
 - Use to get injunctive relief in court
 - Media implications
 - Press release/conference
 - Have a plan
 - Anticipate PRA requests
 - Closure when it's over
- Duration: as long as city says; resolution to terminate

First Steps in Responding to an Emergency

- Role of city attorney: the big picture
- Communication
 - Single point of contact: internal and external
 - Talking points: what, when, why, who; one message for all
 - No blame
- Assign others to get the details right
 - Specific staff assignments with external organizations
 - Public safety; staff ID
 - Frequent de-briefs
 - Track all costs on one spreadsheet

First Steps in Responding to an Emergency

- Assess potential liability: city and third parties
 - What was done, what was not done: be creative, the lawyers will be
 - Media doesn't care about your immunities and defenses
 - Insurance/risk pool coverage
 - Complete copy of everything
 - Immediate notice
 - Property: scheduled vs. unscheduled, lost revenue, business interruption; create complete spreadsheet
 - Liability: PR costs, outside counsel

First Steps in Responding to an Emergency

- Corral the documents
 - Litigation hold
 - Implement a consistent response/production policy
 - 10 days, or sooner, or later?
 - Single point of contact for submission and response
 - Track what was produced for whom
 - Decide on exemptions: ongoing investigation, drafts, official information, confidential information (privacy), attorney client and work product
 - Document management system needed?
 - Regulatory agency rules

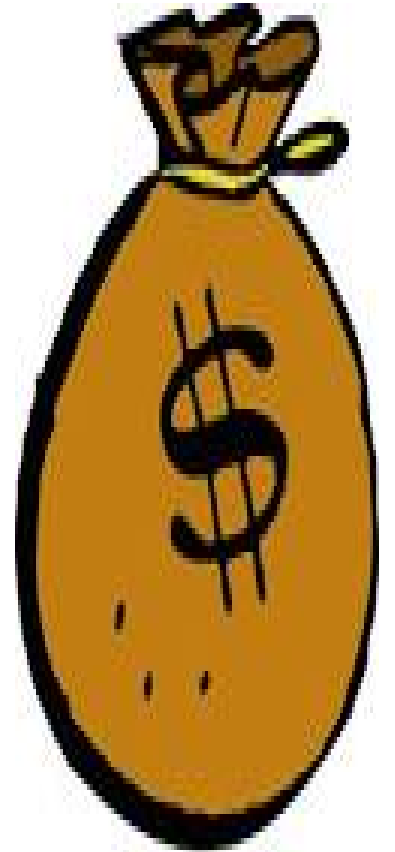


First Steps in Responding to an Emergency

- Mental health: employees and residents
 - For employees: encourage use of EAP
 - For residents: consider city-sponsored program
 - Source of funds
 - Contracts with mental health care providers
 - Used, not abused: immeasurable good will generated

City's needs, residents' expectations: the short term

- What the city needs: money
 - Emergency reserve
 - General fund
 - FEMA/CalEMA: do this first
 - Immediate costs reimbursed relatively quickly
 - Percentage for overhead
 - Retain consultant; claim fees from insurance
- Insurance: wait to make a claim
 - Avoid double-dipping
 - But then claim everything else, regardless of what you think policy says
 - Retain coverage counsel and/or consultant to facilitate submission of claim



City's needs, residents' expectations: the short term

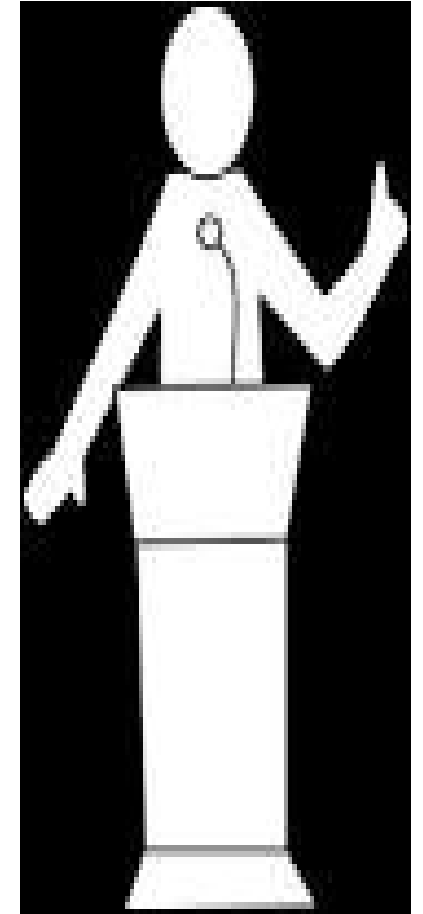
- What the city needs: money
 - If third-party responsible, consider:
 - Asking for unrestricted donation
 - PG&E paid San Bruno \$3M
 - Asking for restricted contribution for repairs and other related expenses
 - If utility, check Public Utilities Code for obligation to pay (Gas: PUC section 6295)
 - San Bruno's solution: irrevocable trust, funded by PG&E, independent trustee, \$70M, expires 2020
 - Advantages for city: avoids insurance claim (thus no subrogation), money always available when city needs it, covers everything
 - Advantages for 3rd party: great PR, avoid subrogation costs, cap compensatory damages

City's needs, residents' expectations: the short term

- 6-month statute will arrive soon
- Consider tolling agreements: resident claimants, homeowner's insurance carriers, potential third parties
 - Advantages:
 - Allows facts to be investigated and sorted out
 - Tolling time in city's control
 - Media will leave city alone
 - Disadvantages:
 - Potential late involvement in litigation
 - Still subject to discovery

City's needs, residents' expectations: the short term

- Hire a PR consultant
 - Test all messages
- Issue proactive statements
 - No room for error: 100% accuracy is the only option
- Hold informational public meetings
 - Anticipate questions and follow-up questions
 - Prepare chairperson to acknowledge and deflect anger and frustration
- Set up online forum, or monitor those that residents are using
- Consider informal gatherings sponsored by city to remember victims



Desperately seeking normalcy: the medium term

- Rebuilding: private property
 - Transition from temporary housing to rebuilt homes or businesses
 - What can be built?
 - Relaxed zoning for victims?
 - Expedited plan check
 - Waiver of fees
 - If potentially responsible third party:
 - Purchase or repair of private property
 - Some can't decide; conflicts with those who can decide
 - Explore purchase and development of damaged or destroyed properties

Desperately seeking normalcy: the medium term

- Rebuilding: public property
 - Consider retaining construction management firm to coordinate all efforts
 - Timing of private and public repairs
 - Residents will expect city to solve all contractor issues to residents' satisfaction
 - Consider tighter standards and bonus provision for contractors
- City repairs of private property improvements
 - "I've always wanted the city to fix my private drainage swale..."
- What to do with donated money
 - There's no good answer, but keep it simple

Desperately seeking normalcy: the medium term

- City purchase of private property
 - Condemnation?
 - By agreement, for public purpose
 - But not everyone will agree
 - PC: consistency with GP
 - Deals for private benefit: avoid at all costs

Desperately seeking normalcy: the medium term

- City involvement in regulatory agency proceedings
 - Mandatory or optional?
 - Residents may demand participation
 - Retain experts specifically familiar with rules and proceedings
 - Media and litigation minefield
 - Coordinate with PR expert and outside counsel
 - San Bruno required to participate in NTSB proceedings
 - One year of intense work
 - PG&E tried to blame city
 - NTSB found PG&E and CPUC solely responsible



Litigation and the long term

- City not involved
 - Monitor existing case closely
 - Resident expectations will be in part driven by progress of case
 - San Bruno's experience: residents least damaged had highest expectations of city
- City involved
 - Plaintiff, then cross-defendant; or defendant, then cross-complainant
 - Everyone will sue everyone else for everything
 - One tip: read and consider all pleadings from media perspective

Litigation and the long term

- What can the city recover?
 - Check statutory provisions (PUC section 6296)
 - Compensatory damages
 - Lost revenue
 - Diminution in value of property
 - Out-of-pocket expenses proximately related
 - Intangible losses: CB&I case
 - Punitive damages
 - Compensatory X 9
 - No insurance coverage



Litigation and the long term

- San Bruno's experience
 - Already recovered \$3M unrestricted gift and \$70M restricted trust
 - Tolling agreements were still in place
 - Leverage: punitive damages plus media pressure
 - Negotiating team secured \$70M new funds, contributed to city-created non-profit
 - Trust obligation reduced to \$50M
 - Mutual release, plus specific indemnity agreement for any future third-party claims
 - No litigation filed by or against city for \$123M total recovery

Regulatory Agency Action Follows

- City suspected back-door dealings with PG&E in violation of CPUC rules
- City filed Public Records Act case after not receiving records
- Settled for release of 7,000 records
- Floodgates opened: PG&E released over 65,000 additional records
 - Illegal ex parte communications; not just in San Bruno case
 - Judge-shopping
- Result: \$1.6B fine, mostly shareholder-funded; 3,798 violations; mandated safety improvements

The Criminal Trial

- U.S. Attorney led investigation
 - San Bruno detective was lead investigator for prosecution
- Grand Jury indicted company only, not individuals
- Jury found PG&E guilty of six felonies
 - Obstruction of justice: misleading NTSB investigation regarding PG&E's policy of increasing operating pressures above limits set by regulations
 - Five additional counts of violating federal pipeline safety laws

Lessons learned

- Prepared for the expected
 - Check underground and other facilities; demand repairs
 - Check insurance policies
 - Establish emergency reserves
 - Practice emergency drills
- Hire experts, especially for PR and regulatory agency proceedings
- Put together a great interdisciplinary team
- Don't ascribe blame until all the facts are in, and preferably only after an outside agency or a court has done so

Lessons learned

- Work to keep the entire city council and staff on the same message
- Do whatever you can for victims
 - But, expect unreasonable expectations
 - One small miscue can undo a lot of goodwill
- If possible, find creative ways to stay out of litigation



