

**Joint Legislative Committee on Performance
Evaluation and Expenditure Review (PEER)**

Report to
the Mississippi Legislature



A Legal Analysis of Emergency Powers Given in Mississippi Law Regarding Pandemics and Bioterrorism

Since the terrorist attacks on the United States occurred in 2001, many states have reviewed their public health laws to determine whether they could respond effectively to public health emergencies such as those caused by an act of bioterrorism. The possibility of flu pandemics has also raised concerns about the states' capacity to meet the needs of their citizens.

PEER reviewed Mississippi's laws and determined that some incremental changes should be made regarding emergency public health powers. These potential changes include authorizing the Governor to invoke broad emergency powers in the event of a pandemic, requiring that certain health care professionals (in addition to those currently mandated in law) report diseases to the State Department of Health, empowering the Governor to direct state officials to take control of human remains and contaminated property, and directing health care professionals to serve, if needed, in areas affected by a natural emergency caused by an act of bioterrorism or pandemic.

PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms with one Senator and one Representative appointed from each of the U. S. Congressional Districts. Committee officers are elected by the membership with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

Mississippi's constitution gives the Legislature broad power to conduct examinations and investigations. PEER is authorized by law to review any public entity, including contractors supported in whole or in part by public funds, and to address any issues that may require legislative action. PEER has statutory access to all state and local records and has subpoena power to compel testimony or the production of documents.

PEER provides a variety of services to the Legislature, including program evaluations, economy and efficiency reviews, financial audits, limited scope evaluations, fiscal notes, special investigations, briefings to individual legislators, testimony, and other governmental research and assistance. The Committee identifies inefficiency or ineffectiveness or a failure to accomplish legislative objectives, and makes recommendations for redefinition, redirection, redistribution and/or restructuring of Mississippi government. As directed by and subject to the prior approval of the PEER Committee, the Committee's professional staff executes audit and evaluation projects obtaining information and developing options for consideration by the Committee. The PEER Committee releases reports to the Legislature, Governor, Lieutenant Governor, and the agency examined.

The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

PEER Committee
Post Office Box 1204
Jackson, MS 39215-1204

(Tel.) 601-359-1226
(Fax) 601-359-1420
(Website) <http://www.peer.state.ms.us>

The Mississippi Legislature

Joint Committee on Performance Evaluation and Expenditure Review

PEER Committee

SENATORS
RICHARD WHITE
Chair
MERLE FLOWERS
GARY JACKSON
SAMPSON JACKSON
DEAN KIRBY
EZELL LEE
LYNN POSEY



Post Office Box 1204
Jackson, Mississippi 39215-1204

Max K. Arinder, Ph. D.
Executive Director

www.peer.state.ms.us

REPRESENTATIVES
HARVEY MOSS
Vice Chair
WALTER ROBINSON
Secretary
WILLIE BAILEY
ALYCE CLARKE
DIRK DEDEAUX
JOEY HUDSON
RAY ROGERS

OFFICES:
Woolfolk Building, Suite 301-A
501 North West Street
Jackson, Mississippi 39201

TELEPHONE:
(601) 359-1226

FAX:
(601) 359-1420

October 10, 2006

Honorable Haley Barbour, Governor
Honorable Amy Tuck, Lieutenant Governor
Honorable Billy McCoy, Speaker of the House
Members of the Mississippi State Legislature

On October 10, 2006, the PEER Committee authorized release of the report entitled **A Legal Analysis of Emergency Powers Given in Mississippi Law Regarding Pandemics and Bioterrorism.**

A handwritten signature in black ink, appearing to read "R. White".

Senator Richard White, Chair

This report does not recommend increased funding or additional staff.

Table of Contents

Letter of Transmittal i

Executive Summary v

Introduction 1

 Authority 1

 Scope and Purpose..... 1

 Method 1

 Background 2

Analysis of Mississippi’s Laws Regarding Emergency Powers 3

 Summary of the Model State Emergency Health Powers Act 3

 Criticism of the Model State Emergency Health Powers Act 9

 Comparison of Mississippi’s Laws Addressing Emergency Powers
 to the Model State Emergency Health Powers Act..... 13

 Conclusions Regarding Mississippi’s Laws Granting Emergency Powers 22

Recommendations 26

A Legal Analysis of Emergency Powers Granted in Mississippi Law Regarding Pandemics and Bioterrorism

Executive Summary

PEER prepared this report in response to legislative concerns that have arisen over the state's authority to respond to possible avian flu pandemics or acts of bioterrorism.

In reviewing Mississippi law regarding emergency responses to these occurrences, PEER used the Model State Emergency Health Powers Act as a criterion for evaluating the adequacy of Mississippi's emergency response laws. The model act is a comprehensive model statute that was developed by the Center for Law and Public Health at the Georgetown University Law Center and Johns Hopkins University after the 9/11 terrorist attacks.

The model act provides for emergency planning; the investigation of occurrences of diseases; the declaration of health emergencies; the provision of technical support by state agencies to stricken areas; the securing and, if necessary, taking of property by state entities for the protection of public health; the mandatory medical examination and vaccination of persons suspected of being infected; and the dissemination of information about health emergencies.

Critics of the model act have expressed concern over its broad scope, the allowance for the taking of property, and the possible infringement of privacy rights.

PEER notes that although Mississippi laws are generally sufficient to respond to such emergencies, in some areas incremental change would enable a more effective response to emergencies, such are those that could be posed by a pandemic or act of bioterrorism.

Respecting pandemics, state law at present does not include such in the definition of a natural emergency, thereby creating some concerns that the Governor might not have the legal power to respond to the fullest extent

allowable under current emergency management laws. Another area of weakness is that present law does not require veterinarians and pharmacists to provide information to the State Board of Health on certain diseases.

Further weaknesses include no provisions dealing with the licensure of out-of-state medical professionals who assist in the event of emergencies, no state control over the management or disposal of human remains, and no specific authority over materials and property that might become contaminated.

PEER recommends changes in legislation to correct these minor deficiencies.

For More Information or Clarification, Contact:

PEER Committee
P.O. Box 1204
Jackson, MS 39215-1204
(601) 359-1226
<http://www.peer.state.ms.us>

Senator Richard White, Chair
Terry, MS 601-373-2827

Representative Harvey Moss, Vice Chair
Corinth, MS 662-287-4689

Representative Walter Robinson, Secretary
Bolton, MS 601-866-7973

A Legal Analysis of Emergency Powers Given in Mississippi Law Regarding Pandemics and Bioterrorism

Introduction

Authority

In response to a legislative request, the PEER Committee reviewed state laws concerning the state's capacity to respond to epidemics, pandemics, and bioterrorism. The Committee acted in accordance with MISS. CODE ANN. Section 5-3-51 et seq.

Scope and Purpose

The report examines Mississippi's laws that govern the state's response to epidemics, pandemics, or bioterrorism attacks resulting in health care emergencies. The report's purpose is to inform the Legislature of any critical needs for changes in state law to help ensure an effective, efficient response to such problems should they occur.

Method

In conducting this project, PEER:

- reviewed current state law regarding state responses to epidemics, pandemics, or bioterrorism attacks;
- reviewed the Model State Emergency Health Powers Act and commentaries on the model act;

- reviewed critiques of the model act; and,
- interviewed personnel of the Department of Health regarding the adequacy of the state's current laws addressing these subjects.

Background

Following the terrorist attacks on New York City and the Pentagon on September 11, 2001, many persons in the public health profession began to review and comment on the capacity of states to respond to a potential medical emergency that might be brought about by bioterrorism.

Further, concerns over an outbreak of a particularly virulent form of influenza known as the avian flu have caused many persons to question whether the states have the capacity to ensure that the ill and infected would be properly cared for, and healthy persons inoculated, in an emergency caused by a pandemic. Finally, Mississippi's experiences with Hurricane Katrina provide some background on the need to coordinate more effectively the activities of health responders when addressing a serious natural disaster.

Principally in response to the September 11, 2001 attacks, medical and legal professionals with the Centers for Disease Control and Prevention (CDC) and the Center for Law and Public Health at Georgetown University and Johns Hopkins University proposed a Model State Emergency Health Powers Act. The first draft, offered in October 2001, was extensively revised following comments and criticism. The December 2001 draft has been the subject of continuing criticism.

This report includes a discussion of the model act and how it addresses the problems that might be posed by pandemics or bioterrorism and compares Mississippi's current law dealing with the subjects raised and considered in the model act.

Analysis of Mississippi's Laws Regarding Emergency Powers

While current state law grants the Governor and the Department of Health broad powers to address emergencies and epidemics, the Legislature should revise some provisions of law to address the unique problems that could arise in the event of an epidemic, pandemic, or from bioterrorism.

Summary of the Model State Emergency Health Powers Act

The Model State Emergency Health Powers Act is a comprehensive, yet somewhat controversial, statute designed to provide states with a broad array of powers to respond to an act of bioterrorism or a pandemic.

The Model State Emergency Health Powers Act has eight articles, each addressing a particular area of concern with respect to the state's ability to respond to a pandemic or bioterrorism outbreak. The following sections contain brief discussions of these articles.

Article I: Findings, Purposes, and Definitions

The model act provides definitions of certain biological threats that have not customarily been included in state laws.

This article states general policy concerns about the ability to respond effectively to a public health threat posed by bioterrorism or pandemic and provides definitions of certain biological threats that have not customarily been included in state laws dealing with emergencies or public health quarantines. Of particular concern is the definition of a "public health emergency." This definition states:

A "public health emergency" is an occurrence or imminent threat of an illness or health condition that:

- 1. is believed to be caused by any of the following:*
 - i. bioterrorism;*
 - ii. the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin;*
 - iii. a natural disaster;*

- iv. *a chemical attack or accidental release; or*
 - v. *a nuclear attack or accident; and*
2. *poses a high probability of any of the following harms:*
- i. *a large number of deaths in the affected population;*
 - ii. *a large number of serious or long-term disabilities in the affected population; or*
 - iii. *widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.*

Article II: Planning

The model act provides for a commission appointed by the Governor of each state to adopt a public health emergency plan.

This article provides for a commission appointed by the Governor of each state to adopt a public health emergency plan to establish guidelines governing public health activities in the event of a public health emergency. Matters to be covered include:

- notification of the population regarding the public health risk;
- central coordination of resources;
- the locations, procurement, storage, transportation, maintenance, and distribution of supplies and materials needed for an emergency;
- compliance with legally required reporting provisions of law;
- the continued effective operation of the judicial system;
- methods of evacuating, housing, and feeding affected populations;
- the identification and training of health care providers to diagnose and treat persons with infectious diseases;

- the vaccination of persons in compliance with the provisions of the act;
- the treatment of persons who have been exposed to diseases that are the cause of the health emergency;
- the safe disposal of waste and human remains;
- the safe and effective control of persons isolated, quarantined, vaccinated, tested, or treated during a health emergency;
- tracking the sources and outcomes of infected persons;
- ensuring that local governments identify places where persons may be quarantined or isolated, where supplies may be stored and personnel housed, and routes for evacuation of persons;
- cultural and religious practices and norms that may have a bearing on emergency service provision; and,
- other necessary measures.

Distribution of the plan is to be made to persons who will play a role in the execution of the plan and to the public. Annual review of the plan is contemplated.

Article III: Detection

This article contains provisions addressing the reporting and investigation of illnesses or diseases that may have been caused by biological agents or pandemic. Specifically, this article contains the following provisions.

- *Physician and Health Services Reporting:* These are requirements that health care providers, coroners, and medical examiners report any illness that might be a cause of a public health emergency. Included are any illnesses identified by the public health agency and those identified by federal law.
- *Pharmacist Reporting:* Pharmacists would be required to report any unusual amounts of antibiotic prescriptions filled for a person or any prescriptions filled for the treatment of uncommon diseases.

- *Reporting:* Reports should be made to the public health agency within twenty-four hours of the occurrence.
- *Reporting of Animal Diseases:* Veterinarians, diagnostic laboratories, and livestock owners are likewise to report cases of any diseases suspected of being potential causes of a public health emergency within twenty-four hours of observation.

The model act requires sharing of information on diseases by local public safety authorities, tribal health officials, and the federal government.

Additionally, the public health agency is required to identify and interview individuals exposed to illnesses or conditions that could give rise to a public health emergency and decontaminate or destroy materials or facilities that threaten the public health.

This article also requires the sharing of information on diseases by local public safety authorities, tribal health officials, and the federal government.

Article IV: Declaration of a Public Health Emergency

Under terms of the model act, the Governor could declare a public health emergency, defining the nature of the threat, as well as the area threatened, and the agency principally responsible for responding to the threat.

Sections 401 through 405 empower the Governor to declare a public health emergency.

Under the terms of the model act, the Governor could declare a public health emergency, defining the nature of the threat, as well as the area threatened, and the agency principally responsible for responding to the threat. The order would also set duration for the emergency.

The effect of such emergency would be activation of the state's agency emergency management plans. The Governor would be empowered to suspend any laws or agency regulations that might impede or delay responding to the emergency. Additionally, the effect of such an order would be to direct the following:

- utilize resources of state and local governments to respond to the emergency;
- transfer personnel resources or functions of state agencies to facilitate response to the emergency;
- mobilize any part of the organized militia to assist in responding to the emergency; or,

- seek aid and assistance from other states and the federal government.

The act also places the responsibility for coordinating the response to the emergency in the state's public health agency.

The act would also require the adoption of special identification of public health personnel working on emergency matters and further require that such personnel wear the identification in plain view.

In the event of a public health emergency, the model act would direct the state's public safety authority to assist the public health agency in carrying out its functions.

Termination of the emergency would occur by executive order, by the passage of a thirty-day period unless renewed by the Governor, or by legislative action.

Article V: Special Powers During a Public Health Emergency

This article addresses the additional powers that the Governor and public health officials would have in the event of a public health emergency. The most significant are as follows:

- *Emergency powers with respect to facilities and materials:* The model act would authorize the public health agency to evacuate, close, or decontaminate any facility if it has a reasonable belief that the facility poses a threat to the public health. Materials that pose a threat to the public health may be destroyed.
- *Use of facilities:* The model act would allow the public health agency by condemnation, lease, contract, or other method the facilities it needs and supplies including, but not limited to, real property, fuels, food, communications devices, and clothing. The public health agency could also require health care facilities to provide necessary services in the event of a public health emergency.

Further, the public health agency would be empowered to control other materials and their distribution such as food, clothing, fuel, and other commodities and arrange for their distribution by rationing or other methods.

Finally, the public health agency would have control over the use of public highways to ensure orderly movement of evacuees and to

control entry into areas stricken with illness or other public health threat.

- *Control over infectious wastes:* Provisions of the model act would also give the public health agency control over the disposal of infectious wastes through the adoption of regulation and control or use of facilities where such wastes could be safely treated or disposed of.
- *Control over and disposal of human remains:* As in the case of infectious wastes, the model act gives the public health authority control over corpses, including their storage and disposition. Use and control over facilities where such can be accomplished is provided for in the model act.
- *Control over health care supplies:* As in the case of facilities, the model act would give the public health agency the authority to control health care supplies and pharmaceuticals need to respond to the emergency.

Finally, several sections of the model act provide for just compensation in cases where a taking of property has occurred and broad language providing for limitations on the destruction of property in emergencies.

Article VI: Protection of Persons During a Public Health Emergency

Under the model act, the public health agency could isolate, quarantine, vaccinate, and treat persons believed to be a public health threat during an emergency.

This article addresses treatment of persons, including vaccination and quarantine of infected persons. Under the authority of the provisions found herein, the public health agency may isolate, quarantine, vaccinate, and treat persons believed to be a public health threat during a public health emergency. The bill also provides for judicial review of any action that would result in mandatory isolation, quarantine, or treatment.

Article VII: Dissemination of Information Regarding a Public Health Emergency

This article addresses the duty of the state's public health agency to make the public aware of the emergency and to provide the necessary information regarding the emergency.

Article VIII: Miscellaneous Provisions

This article addresses such matters as immunity for certain persons and severability.

Success of the Model Act

Although many states have passed provisions of the model act, to PEER's knowledge the efficacy of these provisions has not yet been tested by epidemic, pandemic, or acts of bioterrorism.

Regardless of the concerns raised by critics, the Model State Emergency Health Powers Act has been successful in being passed in the states.

As of July 2006, the Center for Law and Public Health Policy at Georgetown and Johns Hopkins reported that the model act, in entirety or in part, has been enacted in thirty-seven states and the District of Columbia. In 2002, the Mississippi Legislature considered H. B. 1348, a bill that contained many provisions of the model act related to reporting of diseases. This legislation was introduced in the House of Representatives but died in committee.

Although many states have passed provisions of the model act, to PEER's knowledge the efficacy of these provisions has not yet been tested by epidemic, pandemic, or acts of bioterrorism.

Criticism of the Model State Emergency Health Powers Act

Several organizations and commentators have raised concerns about both the breadth and substance of the Model State Emergency Health Powers Act.

Promulgated in the months after the September 11, 2001, terrorist attacks, some commentators have suggested that the model act represents an immediate, if not necessarily prudent, response to the attacks.

Groups critical of the original October 2001 draft have been as varied as the American Civil Liberties Union (ACLU) and the American Legislative Exchange Council (ALEC), groups which traditionally have been at opposite ends of the political continuum. The following sections briefly outline the concerns these groups have raised regarding the model act.

Definition of "Public Health Emergency"

Both the ACLU and ALEC have noted that the model act's definition of a "public health emergency" is overly broad. As noted previously in this report, under the most recently

revised versions of the model act, a public health emergency must meet the following criteria.

...occurrence or imminent threat of an illness or health condition that:

1. is believed to be caused by any of the following:

i. bioterrorism;

ii. the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin;

iii. a natural disaster;

iv. a chemical attack or accidental release; or

v. a nuclear attack or accident; and

2. poses a high probability of any of the following harms:

i. a large number of deaths in the affected population;

iv. a large number of serious or long-term disabilities in the affected population; or

v. widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

Groups critical of the model act have asserted that its broad definition of “public health emergency” could trigger imposition of forced immunizations or treatment on persons not desiring such.

Both groups have asserted that this broad definition could embrace something as inconsequential as an outbreak of a flu strain that, while discomforting, might not pose the serious risk to the population at large and could trigger the imposition of forced immunizations or treatment on persons not desiring such.

Threats to Privacy

Both the ACLU and ALEC have raised concerns regarding the broad Article VI powers that would require mandatory treatment and possible quarantine of persons who are

infected with an illness that gives rise to the public health emergency. These commentators note that these powers provide little in the way of exceptions to the exercise of state power and because of the broad definition of what constitutes an emergency, any number of illnesses (e. g., chicken pox, AIDS) could be the triggers to a round-up of persons into quarantine camps.

Groups critical of the model act have noted that because of its broad definition of what constitutes an emergency, any number of illnesses could be the triggers to a round-up of persons into quarantine camps.

The ACLU principally has asserted that some of the provisions in Article III dealing with the reporting of information by pharmacists to public health authorities could result in the distribution of persons' confidential health care information.

On this point, a commentator in the *New England Journal of Medicine* wrote that the model act seems more appropriate to the last century when we did not recognize that persons may have the right to reject examination or treatment. The same commentator also suggests that most persons who are infected would be desirous of treatment and would be likely to be more interested in obtaining any assistance available from public health authorities than in holding out against treatment. In cases in which this does occur, quarantine might be a useful public health tool that would be best exercised by the federal government.

Confiscatory Powers

ALEC raises the concern that the model act gives broad authority to confiscate and ration private property. Many of the provisions in the model act authorize a public health agency to make "quick takes" of property, thereby taking immediate possession prior to making any determination of just compensation for property.

Comments on the Criticism of the Model Act

Laws currently in force and effect in many jurisdictions have for years allowed public health professionals to receive patient information on persons whose illnesses are reportable conditions.

Many of the concerns related to the model act appear to be excessive in light of the fact that laws currently in force and effect in many jurisdictions have for years allowed public health professionals to receive patient information on persons whose illnesses are reportable conditions under state public health regulations. Even under the Health Insurance Portability and Accountability Act (HIPAA), an exception is established for the reporting of such illnesses to public health agencies. It should also be noted that Mississippi law has for years provided for required examinations and immunizations under state laws addressing diseases and quarantines for infectious diseases. These requirements are not novel additions to

state public health laws and have been in force for many years here and in other jurisdictions.

Mississippi law has for years provided for required examinations and immunizations under state laws addressing diseases and quarantines for infectious diseases. Also, state law provides for the Governor to take possession of property if necessary to respond to an emergency.

As to the confiscatory powers objected to by ALEC, PEER notes that Mississippi currently provides for the Governor, in the event of certain emergencies, to take possession of property if necessary to respond to the emergency. PEER notes that provision is made for just compensation and that if it were not, a person could take legal action against the state for compensation for the taking in accordance with the Mississippi and U. S. constitutions.

While the concerns cited above may seem excessive in view of traditional public health laws and practices, some commentators have noted that the law is not necessary and may even create unnecessary conflicts with other emergency preparedness laws passed in the last decade. In a publication prepared in 2003, the Law Center of Louisiana State University (LSU) noted that the principal impetus for the model act was a belief by the drafters that comprehensive reform of public health laws is needed because laws that have been in force and effect for the past eighty to one hundred years in most states are most likely unconstitutional and could not be enforced today.

The commentators from LSU have noted that this position does not bear up to careful research and that the courts in most states have been willing to uphold old state laws so long as the enforcement of these laws is not arbitrary. Thus quarantine laws or immunization laws that have been on the books since the days of smallpox scares and the threat of tuberculosis are most likely still legislative mandates that the courts will enforce.

The LSU commentators also note that the old laws leave room for administrative flexibility in creating procedures for carrying out public health mandates that the model act does not have. The commentators note that this in itself is not beneficial to the public interest.

Finally, the model act can conflict with other provisions that states have enacted to address both natural emergencies and health-related problems that have been in force and effect for years. In general, the LSU commentators have expressed a preference for an incremental approach to the enactment of public health reform, taking provisions that can be woven into the fabric of a state's laws rather than a blanket approach to addressing public health emergencies.

While PEER has not reviewed exhaustively the jurisprudence from other states over the past forty years since the beginning of the due process revolution of the 1960s, it does note the following:

- *In applying old statutes providing for quarantine or other remedies for addressing persons with infectious diseases, courts will ensure that the states or local authorities have not acted arbitrarily or beyond their grant of legislative authority.* In *City of Newark v. J.S.* infra, the Superior Court of Essex County upheld a commitment of a person with tuberculosis under a 1912 statute, but noted that the state had to prove that the person against whom commitment was sought posed a threat to himself or others. The court also required a hearing prior to commitment, even though the New Jersey statute was passed long before hearings were necessitated for such actions. See *Newark*, 652 A.2d. 265 (NJ Super. L, 1993). See also *City of New York v. Antoinette R.* 630 NYS 2d. 1008 (sup, 1995), Application of *Halko*, 54 Cal Reprtr. 61 (CA 2, 1966) denying a writ of habeas corpus for a person quarantined for infectious tuberculosis.
- *Mississippi courts have traditionally protected citizens against arbitrary exercise of quarantine powers.* In *Wilson v. Alabama G. S. and R.*, 77 Miss. 714, 28 So. 567 (1900) and *Kosciusko v. Slomberg*, 68 Miss. 469, 9 So 297 (1891), the Mississippi Supreme Court struck down certain quarantine orders and in doing so clearly stated that it is within the duties of the judiciary to review such orders for reasonableness. It appears that under these authorities, the courts have always had and have exercised the authority to protect citizens from the arbitrary exercise of state power executed in the name of protecting citizens from disease.

Comparison of Mississippi's Laws Addressing Emergency Powers to the Model State Emergency Health Powers Act

While Mississippi has not adopted the Model State Emergency Health Powers Act, state law addresses most subjects contained in the model act through either emergency management laws or through longstanding public health provisions of the MISSISSIPPI CODE.

Mississippi's laws dealing with the problems posed by health threats have been adopted piece by piece over time. The following sections discuss the way Mississippi law addresses each of the categories set out in the model act.

Statements of Policy and Definitions

Mississippi's Emergency Management Law contains no definition of a "public health emergency." It does, however, contain a very broad definition of an emergency. MISS. CODE ANN. Section 33-15-5 (1972), paragraph f through paragraph k, establishes definitions of emergencies in Mississippi:

The following words, whenever used in this article shall, unless a different meaning clearly appears from the context, have the following meanings: . . .

(g) "Local emergency" means the duly proclaimed existence of conditions of disaster or extreme peril to the safety of persons and property within the territorial limits of a county and/or municipality caused by such conditions as air or water pollution, fire, flood, storm, epidemic, earthquake, hurricane, resource shortages or other natural or man-made conditions, which conditions are or are likely to be beyond the control of the services, personnel, equipment and facilities of the political subdivision and require the combined forces of other subdivisions or of the state to combat.

(h) "Emergency" means any occurrence, or threat thereof, whether natural, technological, or man-made, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.

(i) "Man-made emergency" means an emergency caused by an action against persons or society, including, but not limited to, emergency attack, sabotage, terrorism, civil unrest or other action impairing the orderly administration of government.

(j) "Natural emergency" means an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought or an earthquake.

(k) "Technological emergency" means an emergency caused by a technological failure or accident, including, but not limited to, an explosion, transportation accident, radiological accident, or chemical or other hazardous material incident.

It would appear that Mississippi's emergency management statutes would allow the invoking of an emergency if in a local area disease or an act of terrorism created conditions that were beyond the control of a local government to manage.

PEER notes that the definitions, while not as broad as those in the model act, include terms such as “epidemic” and “terrorism,” which appear to be the major concerns of those proponents of the model act. Consequently, it would appear that Mississippi’s emergency management statutes would allow the invoking of an emergency if in a local area disease or an act of terrorism created conditions that were beyond the control of a local government to manage. It should be noted that in the definition of natural emergency, the terms epidemic or pandemic do not appear. This weakness could impair the state’s emergency response in the event of such occurrences.

Planning

MISS. CODE ANN. Section 33-15-11 (b) (2) (1972) contains emergency planning mandates for the state. By virtue of these provisions, the Governor and the Mississippi Emergency Management Agency (MEMA) are to engage in planning activity. Specifically, subsections 2 and 3 provide:

(b) In performing his duties under this article, the Governor is further authorized and empowered: . . .

(2) To work with the Mississippi Emergency Management Agency in preparing a comprehensive plan and program for the emergency management of this state, such plan and program to be integrated into and coordinated with the emergency management plans of the federal government and of other states to the fullest possible extent, and to coordinate the preparation of plans and programs for emergency management by the political subdivisions of this state, such local plans to be integrated into and coordinated with the emergency management plan and program of this state to the fullest possible extent.

The above-cited language would allow the Governor and MEMA to consider health emergencies in their planning and consolidate them into the state comprehensive plan.

Detection

Provisions of Mississippi law have long contained disease detection and investigation mandates. MISS. CODE ANN.

Section 41-23-1 (1) (1972), the antecedent of which dates back to the 1906 CODE, provides:

(1) The State Board of Health shall adopt rules and regulations (a) defining and classifying communicable diseases and other diseases that are a danger to health based upon the characteristics of the disease; and (b) establishing reporting, monitoring and preventive procedures for those diseases.

This same section goes on to provide, in subsections 4 and 5, the following:

4) Every practicing or licensed physician, or person in charge of a hospital, health care facility, insurance company which causes to be performed blood tests for underwriting purposes or laboratory, shall report immediately to the Executive Officer of the State Board of Health or to other authorities as required by the State Board of Health every case of such diseases as shall be required to be reported by the State Board of Health. Such reporting shall be according to procedures, and shall include such information about the case, as shall be required by the State Board of Health. Insurance companies having such blood test results shall report immediately to the Executive Officer of the State Board of Health or to other authorities as required by the State Board of Health every case of such diseases as shall be required to be reported by the State Board of Health. The insurance company shall notify the individual on whom the blood test was performed in writing by certified mail of an adverse underwriting decision based upon the results of such individual's blood test but shall not disclose the specific results of such blood tests to the individual. The insurance company shall also inform the individual on whom the blood test was performed that the results of the blood test will be sent to the physician designated by the individual at the time of application and that such physician should be contacted for information regarding the blood test results. If a physician was not designated at the time of application, the insurance company shall request that the individual name a physician to whom a copy of the blood test can be sent.

(5) Any practicing or licensed physician, or person in charge of a hospital or health care facility, who knows that a patient has a medical condition specified by the Department of Health as requiring special precautions by health care providers, shall report this fact and the need for appropriate precautions to any other institution or provider of health care services to whom such patient is transferred or referred, according to regulations established by the State Board of Health.

Current law addresses reporting by physicians and health care facilities, but does not address reporting from pharmacists or veterinarians.

PEER believes that current law addresses reporting by physicians and health care facilities, but does not address reporting diseases to the Board of Health from pharmacists or veterinarians. Consequently, there is a considerable weakness in current law addressing reporting by health care professionals.

Declaration of Emergency

MISS. CODE ANN. Section 33-15-11 (17) (1972) empowers the Governor to declare a state of emergency in certain areas of the state under the conditions provided for in law. Specifically, this subsection states:

(17) To proclaim a state of emergency in an area affected or likely to be affected thereby when he finds that the conditions described in [Section 33-15-5 \(g\)](#) exist, or when he is requested to do so by the mayor of a municipality or by the president of the board of supervisors of a county, or when he finds that a local authority is unable to cope with the emergency. Such proclamation shall be in writing and shall take effect immediately upon its execution by the Governor. As soon thereafter as possible, such proclamation shall be filed with the Secretary of State and be given widespread notice and publicity. The Governor, upon advice of the director, shall review the need for continuing the state of emergency at least every thirty (30) days until the emergency is terminated and shall proclaim a reduction of area or the termination of the state of emergency at the earliest possible date that conditions warrant.

This provision would allow the Governor to declare an emergency in local areas affected by an emergency.

It appears that state law gives the Governor sufficient authority to declare an emergency based solely upon the health effects of an epidemic or an act of terrorism.

Because it specifically refers to the definition as set out in MISS. CODE ANN. Section 33-15-5 (g) (1972), which includes both epidemic and man-made disasters (the latter including terrorism), it appears that this provision would give the Governor sufficient authority to declare an emergency based solely upon the health effects of an epidemic or an act of terrorism.

Special Powers During a Public Health Emergency

MISS. CODE ANN. Section 33-15-11 (c) (1972) grants extensive powers to the Governor that may be exercised in the occurrence of a state of emergency. This provision states:

(c) In addition to the powers conferred upon the Governor in this section, the Legislature hereby expressly delegates to the Governor the following powers and duties in the event of an impending enemy attack, an enemy attack, or a man-made, technological or natural disaster where such disaster is beyond local control:

(1) To suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with a disaster or emergency.

(2) To transfer the direction, personnel or functions of state agencies, boards, commissions or units thereof for the purpose of performing or facilitating disaster or emergency services.

(3) To commandeer or utilize any private property if necessary to cope with a disaster or emergency, provided that such private property so commandeered or utilized shall be paid for under terms and conditions agreed upon by the participating parties. The owner of said property shall immediately be given a receipt for the said private property and said receipt shall serve as a valid claim against the Treasury of the State of Mississippi for the agreed upon market value of said property.

(4) To perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency.

This would grant the Governor the authority to take control of any property in the event of a bioterrorism attack, as such acts of terrorism would fall within the definition of a man-made disaster. PEER notes that the term “natural emergency” does not include epidemics or pandemics. Consequently, a serious epidemic would not trigger the provisions of this section.

Issues regarding the control over human remains and disposal of dangerous wastes are not specifically addressed in this provision or any other provision, thus leaving such matters to either local government or to state agencies generally empowered to set standards governing the disposal of medical or other dangerous wastes.

Procurement of Drugs

With respect to the Governor’s emergency powers, MISS. CODE ANN. Section 33-15-11 (b) (3) (1972) provides:

(3) In accordance with such plan and program for emergency management of this state, to ascertain the requirements of the state or the political subdivisions thereof for food or clothing or other necessities of life in the event of attack or natural or man-made or technological disasters and to plan for and procure supplies, medicines, materials and equipment, and to use and employ from time to time any of the property, services and resources within the state, for the purposes set forth in this article; to make surveys of the industries, resources and facilities within the state as are necessary to carry out the purposes of this article; to institute training programs and public information programs, and to take all other preparatory steps, including the partial or full mobilization of emergency management organizations in advance of actual disaster, to insure the furnishing of adequately trained and equipped forces of emergency management personnel in time of need.

By this authority, the Governor could procure drugs and medical supplies in the event of a war or an emergency, whether natural, man-made, or technological. Since

epidemics or pandemics are not included in the definition of “natural emergency,” the Governor’s powers to respond to these problems would be limited.

Compensation and Destruction of Property

Provisions noted above provide for the Governor to acquire property if necessary, with just compensation to be provided. As to destruction of property, the state would have to make arrangements to pay for such before destroying the property. Dangerous agents used in a bioterrorism act could reasonably be seized and dealt with in the same way as other illegal articles. It seems doubtful that this could be accomplished without first empowering an agency of the state to take responsibility for the safe destruction or decontamination of such property.

Protection of Persons During a Public Health Emergency

Several provisions of state law that have been in effect for years establish standards for the isolation of persons with communicable diseases and the quarantine of persons with diseases. Specifically, MISS. CODE ANN. Section 41-23-5 (1972) provides:

The State Department of Health shall have the authority to investigate and control the causes of epidemic, infectious and other disease affecting the public health, including the authority to establish, maintain and enforce isolation and quarantine, and in pursuance thereof, to exercise such physical control over property and individuals as the department may find necessary for the protection of the public health.

Additionally, MISS. CODE ANN. Section 41-3-15 (4) (c) (1972) provides:

(4) The State Board of Health shall have authority: . . .

(c) To direct and control sanitary and quarantine measures for dealing with all diseases within the state possible to suppress same and prevent their spread.

Taken together, these provisions authorize the Board of Health to adopt policies regarding quarantine and for the department to carry out quarantine and isolation if necessary.

It appears to PEER that the provisions in state law dealing with quarantine and isolation are sufficient to address the concerns of pandemic or bioterrorism.

PEER believes that the provisions in state law dealing with quarantine and isolation are sufficient to address the concerns of pandemic or bioterrorism.

Respecting the forced treatment for communicable illness, PEER notes that the CODE at present does not contain provisions on this subject except in cases in which a person is known to have an infectious sexually transmitted disease (see CODE Section 41-23-27).

While provisions of law do not contain any avenues for judicial review, PEER would suggest that an arbitrary and capricious action, whether or not it be directing an isolation or quarantine, could be challenged in chancery court on constitutional grounds. Generally, *habeas corpus* is the writ one would seek for release from such confinement if it were imposed without reasonable basis. (See Am Jur 2nd. Ed Health, Section 38 et seq.)

Access to and Disclosure of Protected Health Information

At present, Mississippi law requires that physicians and certain other health facility owners report information about infectious diseases to the Department of Health. As for disclosure to others, state law is silent. Regulations of the Department of Health provide that the information will be kept confidential. The model act has provisions on confidentiality that ensure that information will be kept confidential except in cases in which the health agency is investigating cases.

Licensing of Health Professionals

State law does not contain provisions on emergency licensing or certification for visiting professionals and paraprofessionals who must be licensed to practice in the state.

Following a disaster, it is not unusual for large numbers of health professionals to volunteer in disaster-stricken areas. This could also happen in an area stricken by bioterrorism attack, pandemic, or other natural disaster.

Mississippi law does not contain provisions on emergency licensing or certification for visiting professionals and paraprofessionals who must be licensed to practice their profession of occupation in the state. As noted above, the model act has provisions that address such matters.

Dissemination of Information

Mississippi's emergency management laws are silent on the subject of communications regarding conditions during an emergency, although they are broad enough to

allow for such. PEER notes that the customary practice during an emergency is for MEMA to make frequent announcements to the public about the emergency and the proper conduct of citizens during the emergency.

Conclusions Regarding Mississippi's Laws Granting Emergency Powers

While Mississippi law provides extensive authority to the Governor to respond to a major disaster such as a pandemic or an act of bioterrorism, the Legislature should take corrective measures to ensure that the state's response is effective in the event of such an occurrence.

While some controversy exists regarding the necessity, prudence, and constitutionality of certain portions of the Model State Emergency Health Powers Act, the Legislature could take some actions that would not be controversial and that would enable Mississippi to respond more effectively to a pandemic or act of bioterrorism.

The Legislature should address the following weaknesses in Mississippi law to help ensure an effective response to a pandemic or an act of bioterrorism.

- Pandemics are not included in the definition of “natural emergency.”
- No provision is made for the emergency licensing of medical professionals in the wake of disasters.
- State law does not provide for a state agency to take control of the disposal and management of human remains in cases wherein the local governments could not bear the burden of management and disposal.
- State law does not address the authority to dispose of dangerous substances in the event of a disaster.
- State law on the reporting of illnesses and diseases, while quite comprehensive for physicians and certain other health care professionals, does not include veterinarians and pharmacists.

The following sections include discussions of these weaknesses in existing laws.

Definition of Natural Emergency

State law does not include pandemics within the definition of “natural emergency.”

Including pandemics in the definition of “natural emergency” could be critical if a pandemic occurred and the Governor had to exercise powers granted under state law to take possession of property needed to house or possibly quarantine persons.

While the avian flu threat that has caused many to discuss public health capability to respond to disaster has fortunately not materialized, PEER notes that the terms “pandemic” and “epidemic” are not included in the definition of a natural emergency in CODE Section 33-15-5. This could be critical if a pandemic occurred and the Governor had to exercise the powers granted under MISS. CODE ANN. Section 33-15-11 (1972) to take possession of property needed to house or possibly quarantine persons who suffer from pandemic disease.

Emergency Licensing of Health Care Professionals

State law does not specifically provide for the licensing of medical professionals from other jurisdictions as part of the emergency powers of state agencies or provide for requiring local professionals to assist during an emergency.

As noted above, it is not uncommon for health care professionals from other jurisdictions to offer their services in a disaster-stricken area. While no state should turn away persons who offer assistance of such critical value and importance, the law should include assurances to protect the public interest.

At present, state law does not include a mechanism to grant emergency licenses to professionals who wish to practice for a limited amount of time in Mississippi. Further, while generally local professionals are willing to assist in times of emergency, it is conceivable that in a major disaster, local medical professionals would have to be directed to perform services in parts of the state most impacted by a pandemic or other disaster. At present, state law does not provide for such broad powers to be vested in any officer or agency of the state.

Disposal of Human Remains

Presently, local jurisdictions are responsible for the oversight of human remains in the event of a large-scale disaster.

Regardless of the conditions in a local jurisdiction, currently that jurisdiction is responsible for dealing with the problem of human remains in the event of a large-scale disaster. In the event of a pandemic or biological terror

attack, a local coroner could be faced with dealing with hundreds or thousands of bodies. In such instances, the need for resources for storage and management of these remains could extend beyond the capacity of the local government and the locally based funeral homes.

In the event of a large-scale disaster, the need for resources for storage and management of human remains could extend beyond the capacity of local governments.

While the state could mobilize more resources to address these problems, at present it would not be able to take responsibility for human remains in a major disaster. PEER notes that MISS. CODE ANN. Section 41-39-5 (1972) makes unclaimed bodies the responsibility of the boards of supervisors. It would be expected that in the event of a pandemic, an act of bioterrorism, or major natural disaster, there could be large numbers of unclaimed bodies.

Disposal of Dangerous Substances

State law does not address disposal of dangerous materials in the event of a pandemic.

At present, state law does not specifically provide for the state to take possession of, decontaminate, or destroy facilities or dangerous materials that might have been the cause of a pandemic or act of bioterrorism or could contribute to the continuation of a dangerous condition.

While PEER recognizes that these matters have traditionally been the responsibility of local governments, instances could arise wherein the safety of persons in an affected local area, or the state at large, could be jeopardized if the state could not use its considerable resources to act quickly to address an immediate public health problem. PEER suggests that Mississippi's constitutional system recognizes that the state must act in the public good when the local governments cannot do the same.

At present, state law recognizes that in some cases, the state will have to step in and perform traditionally local functions in the midst of a crisis. The above-cited emergency powers provisions are examples of such.

Failure to provide for such could frustrate the state's ability to ensure that its residents are properly cared for in the wake of a disaster.

Reporting of Related Illnesses and Diseases

State law does not provide that pharmacists or veterinarians must report certain diseases or pharmaceutical acquisitions to the State Board of Health.

As noted above, state law places a considerable responsibility on physicians and other health care professionals to report illnesses to the State Board of Health. The model act notes that other professionals, such as pharmacists and veterinarians, can also play an important role in ensuring that diseases, particularly those caused by acts of bioterrorism, be reported and monitored (e.g., anthrax). The failure of state law to include these professionals leaves a gap in what is otherwise extensive reporting coverage provided for under Mississippi law.

Approach to Correcting Weaknesses in the Law

PEER believes that the Legislature should make incremental changes to existing emergency management laws and laws governing the operations of the Department of Health, rather than adopting the model act in its entirety.

PEER notes that other provisions of the model act might actually conflict with existing emergency management provisions of law and, in some cases, are controversial. Because it appears that Mississippi could address the problems addressed in the model act with incremental changes to existing emergency management laws and laws governing the operations of the Department of Health, PEER questions the need to consider adopting the model act in its entirety.

Recommendations

1. The Legislature should amend MISS. CODE ANN. Section 33-15-5 (1972) to include within the definition of “natural emergency” the terms “epidemic” and “pandemic” to ensure that the Governor could invoke his broadest emergency powers in the event of such occurrences.
2. The Legislature should amend MISS. CODE ANN. Section 41-23-1 (1972) to require that pharmacists and veterinarians report certain diseases or pharmaceutical purchasing practices to the State Board of Health.
3. The Legislature should also enact laws to accomplish the following:
 - empower the Governor to direct, in certain instances, that local health care professionals be used to provide medical assistance in areas impacted by natural, man-made, or technological disasters and address the licensure of out-of-state volunteer providers who come to Mississippi to assist in the wake of disaster;
 - provide that the Department of Health may, in certain emergencies, take responsibility for human remains in local jurisdictions; and,
 - allow the Governor to direct the Department of Health to take possession of and either decontaminate or destroy dangerous materials or facilities that have been contaminated or that could contribute to further contamination or danger.

PEER Committee Staff

Max Arinder, Executive Director
James Barber, Deputy Director
Ted Booth, General Counsel

Evaluation

David Pray, Division Manager
Linda Triplett, Division Manager
Larry Whiting, Division Manager
Chad Allen
Antwyn Brown
Pamela O. Carter
Kim Cummins
Lonnie Edgar
Yohhana Goode
Barbara Hamilton
Matthew Holmes
Kelly Kuyrkendall
Karen Land
John Pearce
Brad Rowland
Jennifer Sebren

Editing and Records

Ava Welborn, Editor and Records Coordinator
Tracy Bobo
Sandra Haller

Administration

Mary McNeill, Accounting and Office Manager
Rosana Slawson
Gale Taylor

Data Processing

Larry Landrum, Systems Analyst

Corrections Audit

Louwill Davis, Corrections Auditor